Central and Eastern Europe Moot Competition
25-27 April 2025

Organised by:

JURIS ANGLIAE SCIENTIA
British Law Centres

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Competitors may find it helpful to look at the following documents concerning the CJEU's rules and procedures:
CJEU Rules of procedure: http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf
CJEU Statute: http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/statut_2008-09-25_17-29-58_783.pdf
Notes for the guidance of Counsel in written and oral proceedings before the CJEU:
http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt9_2008-09-25_17-37-52_275.pdf

PART A. PRELIMINARIA

Chief Public Prosecutor of the Federal Republic of Gléck (appellant)

v.

Mx Theo Von Boles (respondent)

and

Chief Public Prosecutor of the Federal Republic of Gléck (appellant)

v.

Mrs Yania Deformis (respondent)

Mx Theo Von Boles

1. Mx Theo Von Boles is a 45-year-old citizen of the Kingdom of Fortis (a Member State of the European Union). He identifies as they/their and he is Adhucian. The Adhuc are indigenous people of Flaat Islands - an autonomous territory of Fortis. Since 2015 he has been residing in the Federal Republic of Gléck (a Member State of the European Union) where, from the date of arrival, he has been in full time employment as an art curator at the National Museum of Gléck. He is a world known and very respected art critic and curator.

2. In February 2025 a European Arrest Warrant was issued by a Municipal Court in Pealinn, the capital of Fortis. It requests the surrender of Mx Von Boles from Gléck to Fortis for the purposes of prosecution and sentencing for several criminal offences committed on the territory of Fortis.

3. According to the information provided by the requesting court, Mx Von Boles is the leader of "Taide Jengi" - an organised crime syndicate specialising in art robbery as well as making and selling forged works of art. On two consecutive nights (1-2 November 2024), Mx Von Boles, together with two other members of "Taide Jengi", stole six masterpieces from the National Museum of Fortis. During the second robbery he fatally wounded two security guards, who died as a result of receiving gunshots. On the same night he departed from Pealinn on a private jet owned by one of the regular clients of "Taide Jengi", a war lord and well-known drug dealer. As per the European Arrest Warrant issued by the requesting court, Mx Von Boles is being prosecuted in Fortis for participation in the organised crime, money laundering, drug trafficking, and a murder. If surrendered, he may face a custodial sentence of maximum twenty five years of imprisonment.

Mrs Yania Deformis

4. Mrs Yania Deformis is a citizen of the Republic of Trots. The Republic of Trots is a former Member State of the European Union, which formally exited on 3 January 2022. Its relations with the European Union are regulated by the EU-Trots Withdrawal Agreement (EU-Trots WA) and the EU-Trots Trade

and Cooperation Agreement (EU-Trots TCA). The former regulates intertemporal issues connected with the withdrawal from the European Union, while the latter deals with the post-withdrawal relations. The legal basis for the EU-Trots TCA was Article 217 TFEU, therefore it is an association agreement.

5. Mrs Yania Deformis is 36 years old and has been residing for twelve years in the Federal Republic of Gléck. In accordance with Article 16 of Directive 2004/38 on citizens' rights, she benefits from the permanent right to reside in the Federal Republic of Gléck. Mrs Deformis is half deaf and has never been able to achieve fluency in Gléck, the official language of the Federal Republic of Gléck. In May 2024 she gave birth to a baby boy Xela, whose father is Mx Theo Von Boles. The couple married on 15 June 2024.

6. Mrs Yania Deformis is a qualified schoolteacher with almost ten years of experience in teaching sign language at schools in Gléck as well as other EU Member States. She is also a pastor and a proactive member of the Temple of Pudicita, an unaffiliated primitive church established and operating in Trots. For the past two years, the Temple has been under a strict surveillance of state authorities, and, following an in-depth investigation, it is now considered a hate group engaging is protests against LGBT+ community, non-married and divorced people, as well as Christian denominations. The authorities of Trost are yet to delegalise the Temple of Pudicita. Until the Ministry of Education of Trots issued a ban in August 2024, the Temple of Pudicita had organised numerous summer and winter camps for young children. During the investigation, the Trots police obtained evidence from the disgruntled former employee of the Temple of Pudicita, implicating that Pastor Deformis is a notorious shoplifter and illegally possesses guns. The authorities of Trots evaluated the evidence and found it trustworthy enough to issue an indictment.

7. On 14 January 2025, the City Court in Strot, the capital of Trots, has issued an arrest warrant pursuant to Article 599(1) of the EU-Trots TCA. The arrest warrant requests the surrender of Pastor Deformis for the purposes of prosecution and sentencing for multiple thefts, illegal possession of weapons, and one instance of hate crime. If surrendered, she may face a custodial sentence of maximum seven years of imprisonment.

Decisions on the execution of arrest warrants

8. Both arrest warrants were received by the Municipal Court of Empuzjon, the capital of Gléck. It is a designated executing judicial authority within the meaning of Article 9 of the Framework Decision 2002/584/JHA on the European Arrest Warrant (EAW FD) and Article 598(b) of the EU-Trots TCA. Hearings in both cases took place on 12 February 2025.

9. A number of arguments was raised by the defence lawyers of Mx Von Boles and Pastor Deformis as to why the Municipal Court of Empuzjon should refuse to surrender their clients to Fortis and Trots, respectively.

10. As for EAW requesting surrender of Mx Von Boles, it was submitted that following the change of government in 2017, the Kingdom of Fortis has been undergoing radical reforms of judiciary and prosecution services. Several of them, including the procedures for making judicial and prosecutorial appointments, have been under the scrutiny of the European Union institutions, leading up to judgments of the Court of Justice finding them to be in breach of Article 19 TEU (interpreted in the light of Article 2 TEU). Furthermore, the executive has instigated a widespread smear campaign aiming at individual judges who join public demonstrations against the reforms and who openly question their legality. The Government of Fortis has recently proposed a bill which, if adopted by the national Parliament of Fortis, will create a fast-track disciplinary procedure aiming at judges and prosecutors who refuse to follow instructions received from the chief public prosecutor who, as of 2017, is *ex lege* also the Minister of Justice. All these reforms received negative evaluations from the Venice Commission of the Council of

Europe. Furthermore, the Government through the megaphones of the state-owned media has been tacitly supporting hate campaigns targeting ethnic minorities, in particular citizens of Adhucian origin, as well as LGBT+ community.

11. With the above in mind, the lawyers representing Mx Von Boles argued in front of the Municipal Court of Empuzjon, that surrender of Mx Von Boles to the Kingdom of Fortis would be in breach of Article 1(3) EAW FD. Based on the evidence presented to the Court, the defence lawyers argued that Mx Von Boles's life would be potentially in danger, furthermore, he would, if surrendered, unlikely undergo a fair trial.

12. In its decision of 14 February 2025, the Municipal Court of Empuzjon decided to refuse to surrender Mx Von Boles to the Kingdom of Fortis. The decision was based on Article 466 of the Criminal Procedure Code of the Federal Republic of Gléck (CPC), which lists the mandatory and optional grounds for refusal to surrender. While Article 466 CPC does not envisage risks to respect for human rights as one of the grounds for refusal, the sitting judge applied the judgment of CJEU in the case *Pupino* and interpreted Article 466 CPC in the light of Article 1(3) EAW FD. It proceeded without a reference for preliminary ruling under Article 267 TFEU. Furthermore, the sitting judge relied on the fact that, to her knowledge, the courts of the United States of Opir (another Member State of the European Union), already - as a matter of principle - refuse to surrender requested persons to the Kingdom of Fortis. Thus, there was no need to follow the two-step procedure envisaged by the CJEU in the *Aranyosi and Căldăraru* ruling.

13. In the case of Pastor Deformis, it was submitted that after its withdrawal from the European Union, the Republic of Trots has pursued large-scale deregulation, cutting ties with international institutions, and openly challenging multilateral human rights conventions. It particularly targeted the Council of Europe, including the European Court of Human Rights for its decisions finding the Republic of Trots to be in breach of the ECHR by imposing a blanket ban on voting rights of prisoners as well as finding that the detention conditions did not meet the required human rights standards. Furthermore, the Committee for Prevention of Torture of the Council of Europe (CPT) in several recent reports found that inmates in prisons all around the Republic of Trots were subject to inhumane treatment and conditions were not satisfactory, in particular, for disabled persons. On 24 September 2024, the government of Trots has tabled a Freedom from International Human Rights Bill, which – if adopted by the Parliament of the Republic of Trots – will give it the constitutionally required permission to withdraw from the European Convention of Human Rights and the European Court of Human Rights in Strasbourg. Bearing in mind that the 'Trots Sovereignty Party', which forms the government of Trots, has a large majority in the Parliament, the adoption of the bill is considered as *fait accompli.* According to the election manifesto of the 'Trots Sovereignty Party', after withdrawal from the Council of Europe, a Bill of Rights for the Republic of Trots would be tabled in the Parliament.

14. The defence team of Pastor Deformis made several submissions before the Municipal Court of Empuzjon. Firstly, it was argued that the prospect of withdrawal from the Council of Europe and the European Convention of Human Rights would undermine the right to fair trial. Secondly, pursuant to Article 692 EU-Trots TCA, the European Union as a consequence of the withdrawal, will terminate Part Four of the EU-Trots TCA. Thus, it is likely that by the time the trial of Pastor Deformis would commence, the surrender mechanism under the EU-Trots TCA may no longer exist. Thirdly, since Pastor Deformis's command of the Gléck language was not satisfactory enough to follow the legal proceedings, interpretation into Trotsy language was requested. This request, however, was not entertained by the sitting judge who, having assessed the language skills of Pastor Deformis, concluded that her case did not merit translation and interpretation within the meaning of Directive 2010/64/EU on the right to translation and interpretation in criminal proceedings (Directive 2010/64). Fourthly, doubts were raised as to the quality of evidence which had been obtained by the Police, and subsequently used by the

prosecution service, to issue an indictment, and - in turn – by the issuing authority – to issue the arrest warrant.

15. On 14 February 2025 the Municipal Court of Empuzjon decided to refuse the surrender of Pastor Deformis to the Republic of Trots. The sitting judge based her decision on the likely withdrawal of Trots from the Council of Europe and the European Convention for Human Rights. In her words, 'it would seriously undermine the rule of law standards in the Republic of Trots and could negatively impact the fairness of trial that the requested person would face upon surrender'. Furthermore, the uncertain future of EU relations with the Republic of Trots, including the possible termination of Part Four of the EU-Trots TCA, made the future of the arrest warrant *modus operandi* questionable. The sitting judge also ruled that there was no need to proceed with a reference for preliminary ruling to the CJEU (Article 267 TFEU).

Appeals to the Federal Court of Appeal of Gléck

16. Decisions of the Municipal Court of Empuzjon to refuse the surrender of Mx Theo Von Boles to the Kingdom of Fortis and Pastor Deformis to the Republic of Trots, have been appealed by the Chief Public Prosecutor of the Federal Republic of Gléck. In accordance with the CPC, they are heard in the second and final instance by the Federal Court of Appeal.

Case of Mx Theo Von Boles

17. In case of Mx Theo Von Boles, the Chief Public Prosecutor submitted that the Municipal Court of Empuzjon by refusing to surrender erred in law on the following grounds:

A. The fast-track extradition system established by the EAW FD is based on the mutual recognition and mutual trust between the Member States. With this in mind, the grounds for mandatory and optional non-execution of the European Arrest Warrant listed in Articles 3 and 4 EAW FD should be interpreted strictly and in accordance with case law of the Court of Justice. Furthermore, their interpretation and application to the facts of the case, should preclude impunity from prosecution and imposition of sanctions for committed crimes. Since all criminal offences that Mx Theo Von Boles is accused of had been allegedly committed solely on the territory of the Kingdom of Fortis, the law of the Federal Republic of Gléck precludes prosecution of these crimes in front of Gléck courts. Consequently, the refusal to execute the EAW, would result in impunity of Mx Theo Von Boles.

B. The way the Municipal Court applied the doctrine of indirect effect to Article 466 CPC and interpreted the provision in question in the light of Article 1(3) EAW FD, went beyond the parameters of the interpretative tool established by the CJEU in *von Colson*, *Marleasing*, and *Pupino*. The appealed decision amounted to setting aside domestic law within the meaning of the *Simmenthal II* judgment, and the application of the doctrine of direct effect to Article 1(3) EAW FD. This is contrary to the former Article 34 TEU (which precluded direct effect of framework decisions), and its interpretation by the CJEU in *Poplawski II*.

C. In the alternative, if the Municipal Court stayed within the limits of indirect effect as per *Pupino*, it should have applied, before taking a decision on the execution of the EAW, the two-tier test established by the CJEU in the joined cases *Aranyosi and Căldăraru*. The fact that the courts of the United States of Opir, already - as a matter of principle - refuse to surrender requested persons to the Kingdom of Fortis is irrelevant and should not be a point of reference for the Municipal Court. The latter should seek assurances that the right of fair trial would be respected and that the rights of the Adhucian minority would be accepted, too.

18. The defence team of Mx Theo Von Boles submitted that the appeal brought by the Chief Public Prosecutor should be dismissed as ungrounded for the following reasons:

A. It is well established in the case law of the CJEU, that the executing authorities may rely on Article 1(3) EAW FD to decide on non-execution of European Arrest Warrants on the human rights grounds, even though Articles 3-4 EAW FD do not include such grounds on the lists of mandatory and optional grounds for refusal. The distinction between the direct effect and the indirect effect of framework decisions is irrelevant in this case.
B. In case of very strong evidence available to the executing authority about non-compliance of the requesting state with the values of the European Union listed in Article 2 TEU, in particular with the rule of law principles, and consequential major risks to the respect for the fundamental rights of the requested person, the executing authority may conduct the two stage test laid down in the joined cases *Aranyosi and Căldăraru* fully by itself, that is without contacting the issuing authority. Even if it did fully apply the *Aranyosi and Căldăraru* test and received further information from the issuing judicial authority, it should refuse to surrender Mx Theo Von Boles.

Case of Pastor Deformis

19. In case of Pastor Deformis, the Chief Public Prosecutor submitted that the Municipal Court of Empuzjon by refusing to surrender erred in law on the following grounds:

A. The arrest warrant system established by the EU-Trots TCA is still in place, as neither the Parliament of the Republic of Trots has adopted the bill authorising the withdrawal from the Council of Europe (and the European Convention on Human Rights), nor the European Union has formally terminated (or even discussed the termination) of Part Four of the EU-Trots TCA. Thus, for the time being, the existing rules apply. With this in mind, there are no grounds to believe that the right of Pastor Deformis to have a fair trial would be in danger in the foreseeable future.

B. Since all criminal offences that Pastor Deformis is accused of, had been allegedly committed solely on the territory of the Republic of Trots, the law of the Federal Republic of Gléck precludes prosecution of these crimes in front of Gléck courts. Consequently, the refusal to execute the EAW, would result in impunity of Pastor Deformis.

C. In order to assess whether the detention facilities in which Pastor Deformis would be potentially held after her surrender to the Republic of Trots, the executing authority may not rely solely on the generally available information. In the light of the case-law of the CJEU, it should apply, *mutatis mutandis*, the two-stage test established in the case *Aranyosi and Căldăraru* even though it had been developed in relation to the EAW FD, not the EU-Trots TCA. The decision in *Aranyosi and Căldăraru* should be read together with Article 604(c) EU-Trots TCA, which provides that: 'if there are substantial grounds for believing that there is a real risk to the protection of the fundamental rights of the requested person, the executing judicial authority may require, as appropriate, additional guarantees as to the treatment of the requested person after the person's surrender before it decides whether to execute the arrest warrant.'

20. The defence team of Pastor Deformis submitted that the appeal should be dismissed on the following grounds:

A. The mere risk of withdrawal of the Republic of Trots from the Council of Europe and the European Convention on Human Rights is a sufficient ground for refusal to execute the arrest warrant. Provisions of the Part Four of the EU-Trots TCA which deal with the arrest warrant, despite their similarities to the EAW FD, provide for an extradition mechanism which is neither

based on mutual recognition, nor on mutual trust. Therefore, the principles established in relation to the EAW FD should not be automatically applicable *mutatis mutandis* to arrest warrants issued under the EU-Trots TCA. In the light of available evidence, the risk of rule of law backsliding is considerable and it is very probable that Pastor Deformis would be deprived of the right to fair trial.

B. CPT reports indicate that the detention conditions in the Republic of Trots do not meet the ECHR standards, or, for that matter, the standards outlined in the Recommendation of the European Commission for the Member States on detention conditions.

C. Relevant provisions of the EU-Trots TCA should be interpreted in the light of the Charter of Fundamental Rights, including Article 7 of the Charter which provides for the right to family life and the rights of children.

D. Bearing in mind that the EU-Trots TCA entered into force in 2022, and so far, has generated very little case law of the CJEU, the interpretation of relevant provisions of the EU-Trots TCA is far from being *acte clair*. Thus, the Federal Court of Appeal of Gléck should consider sending a reference for preliminary ruling as per Article 267 TFEU.

21. During the hearing at the Federal Court of Appeal of Gléck, the defence team of Pastor Deformis requested the interpretation of proceedings into the Trotsy language as well as into the sign language. According to the defence team, the Municipal Court erred in law by concluding that neither the lack of proficiency in Gléck nor the disability merited involvement of interpreters. The request for interpretation was entertained by the Federal Court of Appeal of Gléck.

22. Directive 2010/64 on the right to interpretation and translation in criminal proceedings provides in Article 2(8) that 'interpretation provided under this Article shall be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence.' While the majority of provisions contained in Directive 2010/64 have been transposed into the CPC of the Federal Republic of Gléck, Articles 2(5) and 2(8) were not reflected in the domestic law. According to the European Commission, the Federal Republic of Gléck has failed to transpose fully the Directive in question and therefore it opened infringement proceedings under Article 258 TFEU. In the reasoned opinion published on 31 January 2025, the European Commission gave the Federal Republic of Gléck, 2 months to adopt necessary changes to CPC. Since they did not materialise, the European Commission submitted on 15 April 2025 the infringement action to the CJEU. The case is pending.

23. The interpretation into Trotsy language as well as into the sign language has been provided during proceedings at the Federal Court of Appeal of Gléck. However, the defence team of Pastor Deformis has challenged the quality of the interpretation by relying directly on Articles 2(5) and 2(8).

24. The Federal Court of Appeal of Gléck decided to suspend the proceedings in both cases and to send the references for a preliminary ruling to the CJEU.

In the case of **Mx Theo Von Boles** the questions to the CJEU are as follows:

1. In the absence of direct transposition of Article 1(3) EAW FD to national law, can the executing judicial authority refuse to surrender on human rights grounds if they are not envisaged in the mandatory or the optional grounds for surrender listed in national law?
2. If the answer to question 1 is in the affirmative, in case of persistent breaches of Article 19 TEU and Article 47 of the Charter of Fundamental Rights by the issuing Member State, can the

executing judicial authority apply the *Aranyosi and Căldăraru* test without engaging with the authorities that issued the European Arrest Warrant, particularly if it is beyond a reasonable doubt that they were appointed in the breach of rule of law standards and the issuing judicial authority is known for either refusing to furnish the explanations as per the *Aranyosi and Căldăraru* test or for providing information that is not reliable and does not reflect the state of affairs (for instance, in relation to detention conditions)?

In the case of **Pastor Deformis**, the questions to the CJEU are as follows:

1. Do Articles 2(5) and 2(8) of Directive 2010/64 apply to the surrender procedure established under the EU-Trots TCA, especially bearing in mind that the EU-Trots TCA is an association agreement?
2. If the answer to question 1 is in the affirmative, do Articles 2(5) and 2(8) of Directive 2010/64 lay down directly effective rights that can be relied on by individuals in national courts?
3. Would the threat of withdrawal from the Council of Europe and the European Convention of Human Rights, and possible termination of Part Four of the EU-Trots TCA, serve as sufficient grounds to assume the imminent lowering of the rule of law standards, justifying the non-execution of arrest warrants issued under the EU-Trots TCA?
4. Should Part Four of the EU-Trots TCA, in particular Article 524(2) thereof, be read in the light of the Charter of Fundamental Rights and thus preclude the surrender of a mother of small child, whose father may be surrendered pursuant to the EAW FD to another Member State of the European Union?
5. Would the decision to surrender Pastor Deformis be compatible with the principle of proportionality as per Article 597 EU-Trots TCA?

NOTE FROM THE CEEMC ORGANISERS:

1. For the purposes of the *written pleadings*, each team must prepare one set of pleadings for the applicant[s] and a separate set of pleadings for the respondent[s]. All of the questions above must be dealt with in each set of written pleadings.

2. For the purposes of the *oral rounds*, each team will act, in separate moots, on behalf of both the applicant[s] and the respondent[s]. *Not all* of the questions above will be mooted on Day 1, so only those 8 teams which are selected to moot on Day 2 will moot all of the above questions during the oral stages.

3. The questions which will be dealt with on each day of the CEEMC 2025 are as follows:

Day 1	**Mx Theo Von Boles:** Question 1 **Pastor Deformis:** Questions 1 and 2
Day 2 (apart from final)	**Mx Theo Von Boles:** Question 2 **Pastor Deformis:** Questions 3, 4 and 5
Final (on day 2)	At lunch-time on Day 2 (when announcing the finalists), the judges will announce which questions they wish to be mooted in the final. This may include any/all of the questions mooted on Day 1 or 2.

Annex 1
(Fictional) Trade and Cooperation between the European Union and the Republic of Trots (extract)

PREAMBLE

1. REAFFIRMING their commitment to democratic principles, to the rule of law, to human rights, to countering proliferation of weapons of mass destruction and to the fight against climate change, which constitute essential elements of this and supplementing agreements,

2. RECOGNISING the importance of global cooperation to address issues of shared interest,

3. RECOGNISING the importance of transparency in international trade and investment to the benefit of all stakeholders,

4. SEEKING to establish clear and mutually advantageous rules governing trade and investment between the Parties,

5. CONSIDERING that in order to guarantee the efficient management and correct interpretation and application of this Agreement and any supplementing agreement, as well as compliance with the obligations under those agreements, it is essential to establish provisions ensuring overall governance, in particular dispute settlement and enforcement rules that fully respect the autonomy of the respective legal orders of the Union and of the Republic of Trots, as well as the Republic of Trot's status as a country outside the European Union,

6. BUILDING upon their respective rights and obligations under the Marrakesh Agreement Establishing the World Trade Organization, done on 15 April 1994, and other multilateral and bilateral instruments of cooperation,

7. RECOGNISING the Parties' respective autonomy and rights to regulate within their territories in order to achieve legitimate public policy objectives such as the protection and promotion of public health, social services, public education, safety, the environment including climate change, public morals, social or consumer protection, animal welfare, privacy and data protection and the promotion and protection of cultural diversity, while striving to improve their respective high levels of protection,

8. BELIEVING in the benefits of a predictable commercial environment that fosters trade and investment between the Parties and prevents the distortion of trade and unfair competitive advantages, in a manner conducive to sustainable development in its economic, social and environmental dimensions,

9. RECOGNISING the need for an ambitious, wide-ranging and balanced economic partnership to be underpinned by a level playing field for open and fair competition and sustainable development, through effective and robust frameworks for subsidies and competition and a commitment to uphold their respective high levels of protection in the areas of labour and social standards, environment, the fight against climate change, and taxation,

10. RECOGNISING the need to ensure an open and secure market for businesses, including small and medium-sized enterprises, and their goods and services through addressing unjustified barriers to trade and investment,

11. NOTING the importance of facilitating new opportunities for businesses and consumers through digital trade, and addressing unjustified barriers to data flows and trade enabled by electronic means, whilst respecting the Parties' personal data protection rules,

12. DESIRING that this Agreement contribute to consumer welfare through policies ensuring a high level of consumer protection and economic well-being, as well as encouraging cooperation between relevant authorities,

13. CONSIDERING the importance of cross-border connectivity by air, by road and by sea, for passengers and for goods, and the need to ensure high standards in the provision of transportation services between the Parties,

14. RECOGNISING the benefits of trade and investment in energy and raw materials and the importance of supporting the delivery of cost efficient, clean and secure energy supplies to the Union and the Republic of Trots,

15. NOTING the interest of the Parties in establishing a framework to facilitate technical cooperation and to develop new trading arrangements for interconnectors which deliver robust and efficient outcomes for all timeframes,

16. NOTING that cooperation and trade between the Parties in these areas should be based on fair competition in energy markets and non-discriminatory access to networks,

17. RECOGNISING the benefits of sustainable energy, renewable energy, in particular offshore generation in the North Sea, and energy efficiency,

18. DESIRING to promote the peaceful use of the waters adjacent to their coasts and the optimum and equitable utilisation of the marine living resources in those waters including the continued sustainable management of shared stocks,

19. NOTING that the Republic of Trots withdrew from the European Union and that with effect from 1 January 2021, the Republic of Trots is an independent coastal State with corresponding rights and obligations under international law,

20. AFFIRMING that the sovereign rights of the coastal States exercised by the Parties for the purpose of exploring, exploiting, conserving and managing the living resources in their waters should be conducted pursuant to and in accordance with the principles of international law, including the United Nations Convention on the Law of the Sea, done at Montego Bay on 10 December 1982 (United Nations Convention on the Law of the Sea),

21. RECOGNISING the importance of the coordination of social security rights enjoyed by persons moving between the Parties to work, to stay or to reside, as well as the rights enjoyed by their family members and survivors,

22. CONSIDERING that cooperation in areas of shared interest, such as science, research and innovation, nuclear research and space, in the form of the participation of the Republic of Trots in the corresponding Union programmes under fair and appropriate conditions will benefit both Parties,

23. CONSIDERING that cooperation between the Republic of Trots and the Union relating to the prevention, investigation, detection or prosecution of criminal offences and to the execution of criminal penalties, including the safeguarding against and prevention of threats to public security, will enable the security of the Republic of Trots and the Union to be strengthened,

24. DESIRING that an agreement is concluded between the Republic of Trots and the Union to provide a legal base for such cooperation,

25. ACKNOWLEDGING that the Parties may supplement this Agreement with other agreements forming an integral part of their overall bilateral relations as governed by this Agreement and that the Agreement on Security Procedures for Exchanging and Protecting Classified Information is concluded as such a supplementing agreement and enables the exchange of classified information between the Parties under this Agreement or any other supplementing agreement,

HAVE AGREED AS FOLLOWS:

PART ONE

General Provisions

Article 2

Private rights

1. Nothing in this Agreement or any supplementing agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement or any supplementing agreement to be directly invoked in the domestic legal systems of the Parties.

[...]

PART FOUR

Law Enforcement and Judicial Cooperation in Criminal Matters

Article 524

1. The cooperation provided for in this Part is based on the Parties' and Member States' long-standing respect for democracy, the rule of law and the protection of fundamental rights and freedoms of individuals, including as set out in the Universal Declaration of Human Rights and in the European Convention on Human Rights, and on the importance of giving effect to the rights and freedoms in that Convention domestically.

2. Nothing in this Part modifies the obligation to respect fundamental rights and legal principles as reflected, in particular, in the European Convention on Human Rights and, in the case of the Union and its Member States, in the Charter of Fundamental Rights of the European Union.

[...]

Article 596

Objective

The objective of this Title is to ensure that the extradition system between the Member States, on the one side, and the Republic of Trots, on the other side, is based on a mechanism of surrender pursuant to an arrest warrant in accordance with the terms of this Title.

Article 597

Principle of proportionality

Cooperation through the arrest warrant shall be necessary and proportionate, taking into account the rights of the requested person and the interests of the victims, and having regard to the seriousness of the act, the likely penalty that would be imposed and the possibility of a State taking measures less

coercive than the surrender of the requested person particularly with a view to avoiding unnecessarily long periods of pre-trial detention.

Article 598

Definitions

For the purposes of this Title, the following definitions apply:

(a) "arrest warrant" means a judicial decision issued by a State with a view to the arrest and surrender by another State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order;

(b) "judicial authority" means an authority that is, under domestic law, a judge, a court or a public prosecutor. A public prosecutor is considered a judicial authority only to the extent that domestic law so provides;

(c) "executing judicial authority" means the judicial authority of the executing State which is competent to execute the arrest warrant by virtue of the domestic law of that State;

(d) "issuing judicial authority" means the judicial authority of the issuing State which is competent to issue an arrest warrant by virtue of the domestic law of that State.

Article 599

Scope

1. An arrest warrant may be issued for acts punishable by the law of the issuing State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences or detention orders of at least four months.

2. Without prejudice to paragraphs 3 and 4, surrender is subject to the condition that the acts for which the arrest warrant has been issued constitute an offence under the law of the executing State, whatever the constituent elements or however it is described.

3. Subject to Article 600, points (b) to (h) of Article 601(1), and Articles 602, 603 and 604, a State shall not refuse to execute an arrest warrant issued in relation to the following behaviour where such behaviour is punishable by deprivation of liberty or a detention order of a maximum period of at least 12 months:

(a) the behaviour of any person who contributes to the commission by a group of persons acting with a common purpose of one or more offences in the field of terrorism referred to in Articles 1 and 2 of the European Convention on the Suppression of Terrorism, done at Strasbourg on 27 January 1977, or in relation to illicit trafficking in narcotic drugs and psychotropic substances, or murder, grievous bodily injury, kidnapping, illegal restraint, hostage-taking or rape, even where that person does not take part in the actual execution of the offence or offences concerned; such contribution must be intentional and made with the knowledge that the participation will contribute to the achievement of the group's criminal activities; or

(b) terrorism as defined in Annex 45.

4. The Republic of Trots and the Union, acting on behalf of any of its Member States, may each notify the Specialised Committee on Law Enforcement and Judicial Cooperation that, on the basis of reciprocity, the condition of double criminality referred to in paragraph 2 will not be applied, provided that the offence on which the warrant is based is:

(a) one of the offences listed in paragraph 5, as defined by the law of the issuing State; and

(b) punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years.

5. The offences referred to in paragraph 4 are:

— participation in a criminal organisation;

— terrorism as defined in Annex 45;

— trafficking in human beings;

— sexual exploitation of children and child pornography;

— illicit trafficking in narcotic drugs and psychotropic substances;

— illicit trafficking in weapons, munitions and explosives;

— corruption, including bribery;

— fraud, including that affecting the financial interests of the Republic of Trots, a Member State or the Union;

— laundering of the proceeds of crime;

— counterfeiting currency;

— computer-related crime;

— environmental crime, including illicit trafficking in endangered animal species and endangered plant species and varieties;

— facilitation of unauthorised entry and residence;

— murder;

— grievous bodily injury;

— illicit trade in human organs and tissue;

— kidnapping, illegal restraint and hostage-taking;

— racism and xenophobia;

— organised or armed robbery;

— illicit trafficking in cultural goods, including antiques and works of art;

— swindling;

— racketeering and extortion;

— counterfeiting and piracy of products;

— forgery of administrative documents and trafficking therein;

— forgery of means of payment;

— illicit trafficking in hormonal substances and other growth promoters;

— illicit trafficking in nuclear or radioactive materials;

— trafficking in stolen vehicles;

— rape;

— arson;

— crimes within the jurisdiction of the International Criminal Court;

— unlawful seizure of aircraft, ships or spacecraft; and

— sabotage.

Article 600

Grounds for mandatory non-execution of the arrest warrant

The execution of the arrest warrant shall be refused:

(a) if the offence on which the arrest warrant is based is covered by an amnesty in the executing State, where that State had jurisdiction to prosecute the offence under its own criminal law;

(b) if the executing judicial authority is informed that the requested person has been finally judged by a State in respect of the same acts, provided that, if a penalty has been imposed, it has been enforced, is in the process of being enforced or can no longer be enforced under the law of the sentencing State; or

(c) if the person who is the subject of the arrest warrant may not, owing to the person's age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State.

Article 601

Other grounds for non-execution of the arrest warrant

1. The execution of the arrest warrant may be refused:

(a) if, in one of the cases referred to in Article 599(2), the act on which the arrest warrant is based does not constitute an offence under the law of the executing State; however, in relation to taxes or duties, customs and exchange, the execution of the arrest warrant shall not be refused on the grounds that the law of the executing State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes or duties, customs and exchange regulations as the law of the issuing State;

(b) if the person who is the subject of the arrest warrant is being prosecuted in the executing State for the same act as that on which the arrest warrant is based;

(c) if the judicial authorities of the executing State have decided either not to prosecute for the offence on which the arrest warrant is based or to halt proceedings, or if a final judgment which prevents further proceedings has been passed upon the requested person in a State in respect of the same acts;

(d) if the criminal prosecution or punishment of the requested person is statute-barred under the law of the executing State and the acts fall within the jurisdiction of that State under its own criminal law;

(e) if the executing judicial authority is informed that the requested person has been finally judged by a third country in respect of the same acts provided that, if a penalty has been imposed, it has been enforced, is in the process of being enforced or can no longer be enforced under the law of the sentencing country;

(f) if the arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order and the requested person is staying in, or is a national or a resident of the executing State and that State undertakes to execute the sentence or detention order in accordance with its domestic law; if consent of the requested person to the transfer of the sentence or detention order to the executing State is required, the executing State may refuse to execute the arrest warrant only after the requested person consents to the transfer of the sentence or detention order;

(g) if the arrest warrant relates to offences which:

(i) are regarded by the law of the executing State as having been committed in whole or in part in the territory of the executing State or in a place treated as such; or

(ii) have been committed outside the territory of the issuing State, and the law of the executing State does not allow prosecution for the same offences if committed outside its territory;

(h) if there are reasons to believe on the basis of objective elements that the arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of the person's sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of those reasons;

(i) if the arrest warrant has been issued for the purpose of executing a custodial sentence or a detention order and the requested person did not appear in person at the trial resulting in the decision, unless the arrest warrant states that the person, in accordance with further procedural requirements defined in the domestic law of the issuing State:

(i) in due time:

(A) either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that the person was aware of the date and place of the scheduled trial;

and

(B) was informed that a decision may be handed down if that person did not appear for the trial;

or

(ii) being aware of the date and place of the scheduled trial, had given a mandate to a lawyer, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that lawyer at the trial;

or

(iii) after being served with the decision and being expressly informed about the right to a retrial or appeal in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed:

(A) expressly stated that the person did not contest the decision;

or

(B) did not request a retrial or appeal within the applicable time frame;

or

(iv) was not personally served with the decision but:

(A) will be personally served with it without delay after the surrender and will be expressly informed of the right to a retrial or appeal in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed;

and

(B) will be informed of the time frame within which the person has to request such a retrial or appeal, as mentioned in the relevant arrest warrant.

2. Where the arrest warrant is issued for the purpose of executing a custodial sentence or detention order under the conditions in point (i) (iv) of paragraph 1 and the person concerned has not previously received any official information about the existence of the criminal proceedings against him or her, that person may, when being informed about the content of the arrest warrant, request to receive a copy of the judgment before being surrendered. Immediately after having been informed about the request, the issuing authority shall provide the copy of the judgment via the executing authority to the person concerned. The request of the person concerned shall neither delay the surrender procedure nor delay the decision to execute the arrest warrant. The provision of the judgment to the person concerned shall

be for information purposes only; it shall not be regarded as a formal service of the judgment nor actuate any time limits applicable for requesting a retrial or appeal.

3. Where a person is surrendered under the conditions in point (i) (iv) of paragraph 1 and that person has requested a retrial or appeal, until those proceedings are finalised the detention of that person awaiting such retrial or appeal shall be reviewed in accordance with the domestic law of the issuing State, either on a regular basis or upon request of the person concerned. Such a review shall in particular include the possibility of suspension or interruption of the detention. The retrial or appeal shall begin within due time after the surrender.

Article 604

Guarantees to be given by the issuing State in particular cases

The execution of the arrest warrant by the executing judicial authority may be subject to the following guarantees:

(a) if the offence on which the arrest warrant is based is punishable by a custodial life sentence or a lifetime detention order in the issuing State, the executing State may make the execution of the arrest warrant subject to the condition that the issuing State gives a guarantee deemed sufficient by the executing State that the issuing State will review the penalty or measure imposed, on request or at the latest after 20 years, or will encourage the application of measures of clemency for which the person is entitled to apply under the law or practice of the issuing State, aiming at the non-execution of such penalty or measure;

(b) if a person who is the subject of an arrest warrant for the purposes of prosecution is a national or resident of the executing State, the surrender of that person may be subject to the condition that the person, after being heard, is returned to the executing State in order to serve there the custodial sentence or detention order passed against him or her in the issuing State; if the consent of the requested person to the transfer of the sentence or detention order to the executing State is required, the guarantee that the person be returned to the executing State to serve the person's sentence is subject to the condition that the requested person, after being heard, consents to be returned to the executing State;

(c) if there are substantial grounds for believing that there is a real risk to the protection of the fundamental rights of the requested person, the executing judicial authority may require, as appropriate, additional guarantees as to the treatment of the requested person after the person's surrender before it decides whether to execute the arrest warrant.

[...]

Article 609

Rights of a requested person

1. If a requested person is arrested for the purpose of the execution of an arrest warrant, the executing judicial authority, in accordance with its domestic law, shall inform that person of the arrest warrant and of its contents, and also of the possibility of consenting to surrender to the issuing State.

2. A requested person who is arrested for the purpose of the execution of an arrest warrant and who does not speak or understand the language of the arrest warrant proceedings shall have the right to be assisted by an interpreter and to be provided with a written translation in the native language of the requested person or in any other language which that person speaks or understands.

3. A requested person shall have the right to be assisted by a lawyer in accordance with the domestic law of the executing State upon arrest.

4. The requested person shall be informed of the person's right to appoint a lawyer in the issuing State for the purpose of assisting the lawyer in the executing State in the arrest warrant proceedings.

5. A requested person who is arrested shall have the right to have the consular authorities of that person's State of nationality, or if that person is stateless, the consular authorities of the State where that person usually resides, informed of the arrest without undue delay and to communicate with those authorities, if that person so wishes.

Article 610

Keeping the person in detention

When a person is arrested on the basis of an arrest warrant, the executing judicial authority shall take a decision on whether the requested person should remain in detention, in accordance with the law of the executing State. The person may be released provisionally at any time in accordance with the domestic law of the executing State, provided that the competent authority of that State takes all the measures it deems necessary to prevent the person from absconding.

Article 612

Hearing of the requested person

Where the arrested person does not consent to surrender as referred to in Article 611, that person shall be entitled to be heard by the executing judicial authority, in accordance with the law of the executing State.

Article 613

Surrender decision

1. The executing judicial authority shall decide whether the person is to be surrendered within the time limits and in accordance with the conditions defined in this Title, in particular the principle of proportionality as set out in Article 597.

2. If the executing judicial authority finds the information communicated by the issuing State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to Article 597, Articles 600 to 602, Article 604 and Article 606, 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 provided for in Article 615.

3. The issuing judicial authority may forward any additional useful information to the executing judicial authority at any time.

Article 615

Time limits and procedures for the decision to execute the arrest warrant

1. An arrest warrant shall be dealt with and executed as a matter of urgency.

2. In cases where the requested person consents to surrender, the final decision on the execution of the arrest warrant shall be taken within ten days after the consent was given.

3. In other cases, the final decision on the execution of the arrest warrant shall be taken within 60 days after the arrest of the requested person.

4. Where in specific cases the arrest warrant cannot be executed within the time limits laid down in paragraph 2 or 3, the executing judicial authority shall immediately inform the issuing judicial authority of that fact, giving the reasons for the delay. In such cases, the time limits may be extended by a further 30 days.

5. As long as the executing judicial authority has not taken a final decision on the arrest warrant, it shall ensure that the material conditions necessary for the effective surrender of the person remain fulfilled.

6. Reasons must be given for any refusal to execute an arrest warrant.

Article 617

Hearing the person pending the decision

1. The requested person shall be heard by a judicial authority. To that end, the requested person shall be assisted by a lawyer designated in accordance with the law of the issuing State.

2. The requested person shall be heard in accordance with the law of the executing State and with the conditions determined by mutual agreement between the issuing and executing judicial authorities.

3. The competent executing judicial authority may assign another judicial authority of its State to take part in the hearing of the requested person in order to ensure the proper application of this Article.

[...]

Article 692

Termination of Part Four of the Agreement

1. Without prejudice to Article 779, each Party may at any moment terminate this Part by written notification through diplomatic channels. In that event, this Part shall cease to be in force on the first day of the ninth month following the date of notification.

2. However, if this Part is terminated on account of the Republic of Trots or a Member State having denounced the European Convention on Human Rights or Protocols 1, 6 or 13 thereto, this Part shall cease to be in force as of the date that such denunciation becomes effective or, if the notification of its termination is made after that date, on the fifteenth day following such notification.

3. If either Party gives notice of termination under this Article, the Specialised Committee on Law Enforcement and Judicial Cooperation shall meet to decide what measures are needed to ensure that any cooperation initiated under this Part is concluded in an appropriate manner. In any event, with regard to all personal data obtained through cooperation under this Part before it ceases to be in force, the Parties shall ensure that the level of protection under which the personal data were transferred is maintained after the termination takes effect.

Article 693

Suspension of Part Four of the Agreement

1. In the event of serious and systemic deficiencies within one Party as regards the protection of fundamental rights or the principle of the rule of law, the other Party may suspend this Part or Titles thereof, by written notification through diplomatic channels. Such notification shall specify the serious and systemic deficiencies on which the suspension is based.

[...]

6. If one Party notifies the suspension of one or several Titles of this Part pursuant to paragraph 1 or 2, the other Party may suspend all of the remaining Titles, by written notification through diplomatic channels, with three months' notice.

[...]

9. The suspended Titles shall be reinstated on the first day of the month following the day on which the Party having notified the suspension pursuant to paragraph 1 or 2 has given written notification to the other Party, through diplomatic channels, of its intention to reinstate the suspended Titles. The Party having notified the suspension pursuant to paragraph 1 or 2 shall do so immediately after the serious and systemic deficiencies on the part of the other Party on which the suspension was based have ceased to exist.

Annex 2
(Fictional) Criminal Procedure Code of Federal Republic of Gléck
(extract)

Article 466
Grounds for non-execution of the European arrest warrant

A. The executing judicial authority shall refuse to execute the European arrest warrant in the following cases:

1. if the offence on which the arrest warrant is based is covered by amnesty in Gléck, where it had jurisdiction to prosecute the offence under its own criminal law;

2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;

3. if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of Gléck.

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

1. if, in one of the cases referred to in Article 465, the act on which the European arrest warrant is based does not constitute an offence under the law of Gléck; however, in relation to taxes or duties, customs and exchange, execution of the European arrest warrant shall not be refused on the ground that the law of the Gléck does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the issuing Member State;

2. where the person who is the subject of the European arrest warrant is being prosecuted in Gléck for the same act as that on which the European arrest warrant is based;

3. where the judicial authorities of Gléck have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings;

4. where the criminal prosecution or punishment of the requested person is statute-barred according to the law of Gléck and the acts fall within the jurisdiction of Gléck under criminal law;

5. if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country;

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 Gléck and that Gléck undertakes to execute the sentence or detention order in accordance with its domestic law;

7. where the European arrest warrant relates to offences which:

(a) are regarded by the law of Gléck as having been committed in whole or in part in the territory of Gléck or in a place treated as such; or

(b) have been committed outside the territory of the issuing Member State and the law of Gléck does not allow prosecution for the same offences when committed outside its territory.

Central & Eastern European Moot Competition

2025 COMPETITION RULES

Contents

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1. Competition and important dates:

This 30th edition of the CEEMC takes place in Warsaw. It is co-hosted and co-organised by the University of Warsaw (Faculty of Law & Administration) and the Supreme Administrative Court in Poland.

The CEEMC competition began in 1995. It is supported by the University of Cambridge and the Court of Justice of the European Union, both of which host prizes awarded to the best speakers/team. The CEEMC enjoys extremely close links with many of the judges, Advocates General and referendaires of the Court of Justice of the European Union (CJEU), some of whom are regular members of the CEEMC's judicial panel.

The CEEMC participating teams and mooters come from all across the CEE region, including *inter alia* from: Armenia, Belarus, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Lithuania, Latvia, Kazakhstan, Hungary, Malta, Moldova, Poland, Romania, Russia, Slovak Republic, Slovenia, Turkey and Ukraine.

Each year, the CEEMC is held in a different city (for details see: https://ceemc.co.uk/past-competitions/). We celebrated the 25th anniversary of the CEEMC at the Court of Justice in Luxembourg in May 2019. After being forced to cancel the moot in 2020 event and holding it online in 2021 (both due to the covid-19 pandemic), we were delighted to return to face-to-face mooting in Budapest in 2022, Dubrovnik in 2023, Prague in 2024 and now in Warsaw…

The CEEMC question, which is prepared by a committee of organisers and external experts (including from the CJEU itself) aims to reproduce, as closely as possible, the discussion and argument of a genuine preliminary referral to the CJEU. The bundle of supporting materials and authorities which is provided alongside the CEEMC

question includes all of the authorities to which teams are permitted to refer to during the competition. In other words, a team's written or oral pleadings cannot refer to any legal sources other than those contained in the bundle.

IMPORTANT DATES:

Date for registering a competing team: 31st January 2025
Teams must register online at the CEEMC website. The organising committee may, at its absolute discretion, consider applications from teams who have not registered by this date. To enquire about this possibility, or to ask any other questions about registration, please email us at: organisers@ceemc.co.uk.

Fee Payment deadline: 21st February 2025
See section 5 below for details of the organisers' bank details. If you have difficulty in meeting this deadline, please email us at: organisers@ceemc.co.uk

Deadline for submitting written pleadings: 7th April 2024
In order to ensure fairness between all teams, we cannot extend the deadline for submitting written pleadings.

2. Participating Teams

The CEEMC is open to teams comprising 3 or 4 members (mooters). Each team member must also:

- be enrolled as a full-time student on a university course (inc. Erasmus students) at a university in an EU candidate country, an Eastern Partnership Country or a Member State that acceded to the EU after 2004; and:
- be 30 years old or younger; and
- *not* be a qualified and practising lawyer; and
- *not* have previously participated in the CEEMC

A participating university may register more than one moot team, provided that each team submits a separate set of written pleadings and pays a separate registration fee. Teams should notify us if they are aware that their University intends to submit two teams.

A CEEMC team may include participants from various Universities (i.e. a mixed team), but any team wishing to register as a mixed team must clearly inform us of this when registering.

3. The Stages of the CEEMC

The CEEMC question is based on an area of European Union substantive and/or procedural law, involving a preliminary reference to the Court of Justice of the EU under Article 267 TFEU. Each competing team must submit written pleadings (by the date indicates above) and participate in the oral pleadings at the CEEMC location.

Each team must submit written pleadings on behalf of *both* the applicant and the respondent. Likewise, during the oral rounds, each team will (in different rounds) act as both applicant and the respondent

The team with the highest overall score wins the CEEMC competition. A team's score is calculated as the aggregate of its scores granted for four separate stages, described below.

The CEEMC's official language is English. It is the only language used in each of the stages described below.

STAGE 1: Submitting written pleadings

Each team must prepare written pleadings on the following basis:

- Each team prepares one set of written pleadings (dealing with *all* of the referred questions) for the applicant and a separate set of written pleadings for the respondent;
- The maximum permissible length of each set of pleadings is 10 pages (Times New Roman font, size 11), excluding the accompanying bibliography of legal authorities relied upon in the pleadings;
- Pleadings should contain clear headings/sub-headings and each paragraph of the pleadings should be consecutively numbered;
- Arguments contained in the pleadings should be supported, insofar as is possible, by reference to existing legal authorities (i.e. cases/legislation);
- Any legal authorities referred to in written/oral pleadings must be contained or referred to in the moot bundle;
- When referring to legal authorities, ensure that you reference the paragraph of the case (or number of the Article in legislation) and to refer to the page of the CEEMC bundle on which it can be found;
- The written pleadings must be sent by email to us at: organisers@ceemc.co.uk
- The written pleadings must be sent by the end of the day indicated in section 1 above (**Competition and important dates)**
- The organisers will confirm the receipt of your team's pleadings within 3 days of submission.
- A maximum of 20 points are awarded for each team's written pleadings
- A prize is awarded for the best written pleadings, sponsored by Clifford Chance law firm.

STAGE 2: Day 1 of Oral Pleadings

At the moot venue, each team participates in oral pleadings *twice* on the first day (Saturday) – i.e. in one moot as the applicant, and in the other moot as the respondent. In each of the two moots on Day 1, your team will most probably moot against different opponents. You will be informed about the timings of your moots (and in which of those moots you will act for the applicant or respondent) and the identity of your opponents in the mooting timetable. This will be provided at the opening ceremony on the Friday preceding Day 1 of the oral pleadings).

During Day 1 of the oral pleadings, all team members must actively submit pleadings (i.e. speak). However, it is *not* necessary for all team members to speak in *each* of the two separate moots on Day 1 (e.g. a team with 4 people may decide that 2 team members shall plead for the applicants in moot 1, while the other 2 shall plead for the respondent in moot 2). The crucial thing is that, by the end of Day 1, all team members must have delivered oral pleadings.

Timings:
The following timings apply to all moots except the final.

Pleadings for applicant: Max 20 minutes (for dealing with all questions that will be mooted on that day)
Pleadings for respondent: Max 20 minutes (for dealing with all questions that will be mooted on that day)
Reply for applicant: Max 5 minutes (limited to commenting on matters raised in the respondent's pleadings)
Rejoinder for respondent: Max 5 minutes (limited to commenting on matters raised in the applicant's reply)

If these time limits are exceeding, it is entirely at the discretion of the court whether a team will be granted extra time (normally not exceeding 5 extra minutes) in order to continue their pleadings.

NB. The clock *stops* 'running' when a judge asks a question or makes a comment, but continues to 'run' again when the judge finishes.

NB. The timings for the final are explained below.

Scoring Criteria:

The following scoring criteria are applied by the judges to each individual moot during the CEEMC's oral-pleading stages (i.e. to all moots on Day 1 and Day 2, including the final):

Criteria	**Maximum Points Awarded**
Style and quality of presentation in oral arguments	30
Effective and accurate use of provided materials	30
Team-work	10
Ability to respond effectively to judges' questions.	10
Effectiveness of reply/rejoinder	20
TOTAL	*100*

STAGE 3: Day 2 of Oral Pleadings (8 selected teams only)

Eight teams are selected from the Day 1 of oral pleadings to progress to Day 2 (Sunday). During Day 2, the qualifying teams moot different questions to those mooted on Day 1. Details of which questions will be mooted on Day 1 and Day 2 are indicated at the end of the moot question.

After Day 1 has finished, the CEEMC judges may decide that they also wish one/more of the Day 1 questions to be mooted again during Day 2. If this is the case, information will be provided to the 8 teams which progress to Day 2.

Each of the 8 teams competing in Day 2 will again have two moots (mooting once as applicant, once as respondent). However, a key difference from Day 1 is that, on Day 2, *each and every team member must speak (plead) during BOTH of the team's two moots* (i.e. if a team has 4 members, all 4 must speak when the team acts on behalf of the applicant and all 4 must speak when the team acts on behalf of the respondent).

At lunchtime on Day 2, after each of the 8 remaining teams has mooted twice, the judges will announce the two teams which will compete in the final.

STAGE 4: Final (2 selected teams only)

At lunchtime on Day 2 (Sunday), two teams are chosen (from the 8 teams which mooted on Day 2) to face each other in the final. The role to be played by each finalist (applicant or respondent) is chosen by lot. The judges will announce which questions they wish to be mooted during the final. These may be a mixture of any of the questions mooted during Day 1 and Day 2.

Each and every member of the team must speak (plead) in the final. It is permitted for a particular team member's speaking role to be limited to only a small fraction of the team's overall speaking time (e.g. by dealing only with a sub-part of one question, or saying very little during the reply/rejoinder), but this may lead to the judges to draw adverse inferences regarding the team's overall quality and team-work.

The scoring criteria that apply to the final are identical to the other rounds (as described above) but the timings are adapted as below:

Pleadings for applicant:	Max 45 minutes (for dealing with all questions to be mooted on that day)
Pleadings for respondent:	Max 45 minutes (for dealing with all questions to be mooted on that day)
Reply for applicant:	Max 10 minutes (limited to commenting on the respondent's pleadings)
Rejoinder for respondent:	Max 10 minutes (limited to commenting on the applicant's reply)

No time extensions will be granted in the final.

Post-final: awards ceremony

Following the CEEMC final, the awards ceremony will be held. During this ceremony, each team member will received a participation certificate signed by the CEEMC President. Special prizes will also be awarded to:

- the winning team
- the person chosen as best speaker (this can be a person who mooted at *any stage* on Day 2, not necessarily someone who appeared in the final)
- other individual speakers whom the judges feel deserve special recognition
- best written pleadings

4. Fees

The CEEMC fee for 2025 is **EUR 1,600** per team*. This includes the fee for accommodation**, sustenance and participation in the competition***.

* Each team may include 3 or 4 mooting team members and one accompanying coach. An extra fee of EUR 320 per person applies to any team wishing to send an extra coach or observer. Please inform us as soon as possible if this applies to your team, and in any case by no later than **31st January 2025**.

** Each team will be allocated a number of beds in the 2-person or 3-person rooms available at the CEEMC accommodation venue, corresponding to the number of people in the team (inc. coach[es]). If any team member or coach wishes to have a single room, an additional fee of €40 per night will be payable. Please inform us as soon as possible if this applies to your team, and in any case by no later than **31st January 2025**.

It may be that our hotel reservation requires us to confirm/cancel the exact number of rooms even before the date indicated above, so please let us know *as soon as possible* if you need any extra room[s] or single room[s]. If the number of rooms we have reserved is fewer than the number of additional/single rooms the participants request, we will allocate rooms on a *first-come-first-served* basis.

*** Each team is individually responsible for other costs, including travel to/from/at the competition and any administrative or visa charges to the CEEMC location (please contact us if you need additional support when applying for a visa).

The competition fee must be paid by bank transfer and received by no later than the date specified in Section 1 above **Competition and important dates).**

If your university prefers to pay by credit card, please contact us at: organisers@ceemc.co.uk **An additional cost will be added to the team's fees to cover the costs we are required to pay by Stripe for any online card payments. Details of Stripe's fees are available at: https://stripe.com/en-pl/pricing**

When registering your team on the website, please contact us if you wish to receive an official invitation, which may be useful to apply for university funding or a visa (where necessary).

5. Organiser's Bank details

Recipient name:	Juris Angliae Scientia Ltd
Recipient address:	Faculty of Law, University of Cambridge, 10 West Road, Cambridge United Kingdom, CB3 9BZ
Account no: (this is a Euro account)	PL90 1750 0009 0000 0000 4001 2915
BIC/SWIFT code:	PPABPLPK
Bank name:	BNP Paribas

NB. Please ensure that we receive all payments in full (net) in EUR currency.

6. The organiser: Juris Angliae Scientia

The CEEMC is organised by the British Law Centres of the English charity *Juris Angliae Scientia* (JAS). In addition to the CEEMC, JAS also organises a Diploma in English Law & Legal Skills ("DELLS"), which can be studied at a range of locations or 100% online. We also organise a Commercial Law Diploma ("CLD") as a follow-on from DELLS.

If you think your University may be interested in British Law Centre visiting to teach our courses, please contact us at: s.terrett@britishlawcentre.co.uk.

For details of how to apply for the DELLS courese, which begins each academic year in October, please visit: https://www.britishlawcentre.co.uk/apply/

PRELIMINARY INFORMATION ON THE CJEU

The following is a short introductory guide to the role of the Court of Justice to the European Union (formerly – and still commonly – known as the European Court of Justice or ECJ) and its relationship with the national courts of the Member States.

- The CJEU's function is to rule upon the interpretation and application of the Treaties and on the interpretation, application and validity of secondary EU law. It is effectively the supreme court on such issues, with no appeal to any higher judicial body.

- Cases may be brought directly before the CJEU on behalf of an EU institution (i.e. Commission, Council, European Parliament), by a Member State or by a national of a Member State.

- The Commission's power to bring actions against a Member State it suspects to be in breach of Community law stems from Article 258. The power of one Member State to bring an action against another Member State comes from Article 259 but such cases are rare. Institutions or Member States may also challenge secondary legislation adopted by institutions of the TFEU on the basis that it exceeds the competences granted under the treaties or fails to comply with procedural requirements thereof.

- Where an individual wishes the CJEU to rule upon a certain issue of European Union law, it is most common for such a case to begin in that person's national courts and for the national court to make an Article 267 reference to the CJEU asking for guidance on the interpretation, application or validity of an EU measure. (NB. Remember that the Treaty article which describes the preliminary ruling procedure has been renumbered over the years and moved from the EEC Treaty to the EC Treaty to TFEU, so some (earlier) cases may refer to the earlier numbering of Article 177 or Article 234).

- The CJEU is assisted by Advocate-Generals, who produce reasoned opinions on a case before the CJEU rules on it. These opinions will discuss the applicable law and will recommend how the court should decide the case. Often these opinions are more detailed than the eventual judgment of the court. They are not binding on the CJEU but they are very influential and are often followed in practice.

- The CJEU is not bound by its own jurisprudence (case-law) and may depart from an earlier decision if it wishes. Although any court attempts to follow its earlier jurisprudence wherever possible, the CJEU has already been seen to have reversed its own jurisprudence on a number of occasions.

- National courts are bound to follow the CJEU's rulings on Union law but it is for the national court to apply that Union law to the facts of the case in front of it.

***NB. A final version of the timetable will be provided at the competition itself**

FRIDAY 25th April 2025

16.00-18.00 Registration of teams
18.00 Welcome Reception (inc. informal meeting with judges)

SATURDAY 26th April 2025

09.00 Official opening words by CEEMC Organisers and Judges

Round 1 of Competition

09.30 - 11.00 Group 1
11.15 - 12.45 Group 2

13.00 - 14.00 LUNCH

14.15 - 15.45 Group 3
16.00 - 17.30 Group 4

20.00 DINNER (Announcement of semi-finalists)

SUNDAY 27th April 2025

Round 2 of Competition

09.00 - 11.00 First semi-finals
11.15 - 13.15 Second semi-finals

13.30 LUNCH BREAK (Announcement of finalists)

Round 3 of Competition

15.00 FINAL (followed immediately by presentation of moot-participation certificates and prize ceremony)

20.00 Celebration dinner, party and singing competition.

MONDAY 28th April 2025

Departure of teams.

PART B. EU LEGISLATIVE MATERIALS

Official Journal C 321 E , 29/12/2006 P. 0005 - 0036
Official Journal C 325 , 24/12/2002 P. 0005 - Consolidated version
Official Journal C 340 , 10/11/1997 P. 0145 - Consolidated version

TITLE VI

PROVISIONS ON POLICE AND JUDICIAL COOPERATION IN CRIMINAL MATTERS

[…]

Article 34

1. In the areas referred to in this title, Member States shall inform and consult one another within the Council with a view to coordinating their action. To that end, they shall establish collaboration between the relevant departments of their administrations.

2. The Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may:

(a) adopt common positions defining the approach of the Union to a particular matter;

(b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect;

(c) adopt decisions for any other purpose consistent with the objectives of this title, excluding any approximation of the laws and regulations of the Member States. These decisions shall be binding and shall not entail direct effect; the Council, acting by a qualified majority, shall adopt measures necessary to implement those decisions at the level of the Union;

(d) establish conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements. Member States shall begin the procedures applicable within a time limit to be set by the Council.

Unless they provide otherwise, conventions shall, once adopted by at least half of the Member States, enter into force for those Member States. Measures implementing conventions shall be adopted within the Council by a majority of two thirds of the Contracting Parties.

3. Where the Council is required to act by a qualified majority, the votes of its members shall be weighted as laid down in Article 205(2) of the Treaty establishing the European Community, and for their adoption acts of the Council shall require at least 232 votes in favour, cast by at least two thirds of the members. When a decision is to be adopted by the Council by a qualified majority, a member of the Council may request verification that the Member States constituting the qualified majority represent at least 62% of the total population of the Union. If that condition is shown not to have been met, the decision in question shall not be adopted.

4. For procedural questions, the Council shall act by a majority of its members.

HIS MAJESTY THE KING OF THE BELGIANS, HER MAJESTY THE QUEEN OF DENMARK, THE PRESIDENT OF THE FEDERAL REPUBLIC OF GERMANY, THE PRESIDENT OF IRELAND, THE PRESIDENT OF THE HELLENIC REPUBLIC, HIS MAJESTY THE KING OF SPAIN, THE PRESIDENT OF THE FRENCH REPUBLIC, THE PRESIDENT OF THE ITALIAN REPUBLIC, HIS ROYAL HIGHNESS THE GRAND DUKE OF LUXEMBOURG, HER MAJESTY THE QUEEN OF THE NETHERLANDS, THE PRESIDENT OF THE PORTUGUESE REPUBLIC, HER MAJESTY THE QUEEN OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND,

PREAMBLE

RESOLVED to mark a new stage in the process of European integration undertaken with the establishment of the European Communities,

DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law,

RECALLING the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe,

CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law,

CONFIRMING their attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers,

DESIRING to deepen the solidarity between their peoples while respecting their history, their culture and their traditions,

DESIRING to enhance further the democratic and efficient functioning of the institutions so as to enable them better to carry out, within a single institutional framework, the tasks entrusted to them,

RESOLVED to achieve the strengthening and the convergence of their economies and to establish an economic and monetary union including, in accordance with the provisions of this Treaty and of the Treaty on the Functioning of the European Union, a single and stable currency,

DETERMINED to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields,

RESOLVED to establish a citizenship common to nationals of their countries,

RESOLVED to implement a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence in accordance with the provisions of Article 42, thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world,

RESOLVED to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by establishing an area of freedom, security and justice, in accordance with the provisions of this Treaty and of the Treaty on the Functioning of the European Union,

RESOLVED to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity,

IN VIEW of further steps to be taken in order to advance European integration,

(List of plenipotentiaries not reproduced)

TITLE I: COMMON PROVISIONS

Article 1

(ex Article 1 TEU)

By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, hereinafter called 'the Union', on which the Member States confer competences to attain objectives they have in common.

This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties'). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community.

Article 2

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 3

(ex Article 2 TEU)

1. The Union's aim is to promote peace, its values and the well-being of its peoples.

2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

4. The Union shall establish an economic and monetary union whose currency is the euro.

5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.

Article 4

1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.

2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

Article 5

(ex Article 5 TEC)

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

Article 6

(ex Article 6 TEU)

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Article 7

(ex Article 7 TEU)

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.

Article 8

1. The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.

2. For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.

TITLE II: PROVISIONS ON DEMOCRATIC PRINCIPLES

Article 9

In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

Article 10

1. The functioning of the Union shall be founded on representative democracy.

2. Citizens are directly represented at Union level in the European Parliament.

Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.

3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.

4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.

Article 11

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.

2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.

3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.

4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.

The procedures and conditions required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union.

Article 12

National Parliaments contribute actively to the good functioning of the Union:

(a) through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union;

(b) by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality;

(c) by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 70 of the Treaty on the Functioning of the European Union, and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles 88 and 85 of that Treaty;

(d) by taking part in the revision procedures of the Treaties, in accordance with Article 48 of this Treaty;

(e) by being notified of applications for accession to the Union, in accordance with Article 49 of this Treaty;

(f) by taking part in the inter-parliamentary cooperation between national Parliaments and with the European Parliament, in accordance with the Protocol on the role of national Parliaments in the European Union.

TITLE III: PROVISIONS ON THE INSTITUTIONS

Article 13

1. The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions.

The Union's institutions shall be:

— the European Parliament,

— the European Council,

— the Council,

— the European Commission (hereinafter referred to as ‘the Commission’),

— the Court of Justice of the European Union,

— the European Central Bank,

— the Court of Auditors.

2. Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.

3. The provisions relating to the European Central Bank and the Court of Auditors and detailed provisions on the other institutions are set out in the Treaty on the Functioning of the European Union.

4. The European Parliament, the Council and the Commission shall be assisted by an Economic and Social Committee and a Committee of the Regions acting in an advisory capacity.

Article 14

1. The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties. It shall elect the President of the Commission.

2. The European Parliament shall be composed of representatives of the Union's citizens. They shall not exceed seven hundred and fifty in number, plus the President. Representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats.

The European Council shall adopt by unanimity, on the initiative of the European Parliament and with its consent, a decision establishing the composition of the European Parliament, respecting the principles referred to in the first subparagraph.

3. The members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot.

4. The European Parliament shall elect its President and its officers from among its members.

Article 15

1. The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions.

2. The European Council shall consist of the Heads of State or Government of the Member States, together with its President and the President of the Commission. The High Representative of the Union for Foreign Affairs and Security Policy shall take part in its work.

3. The European Council shall meet twice every six months, convened by its President. When the agenda so requires, the members of the European Council may decide each to be assisted by a minister and, in the case of the President of the Commission, by a member of the Commission. When the situation so requires, the President shall convene a special meeting of the European Council.

4. Except where the Treaties provide otherwise, decisions of the European Council shall be taken by consensus.

5. The European Council shall elect its President, by a qualified majority, for a term of two and a half years, renewable once. In the event of an impediment or serious misconduct, the European Council can end the President's term of office in accordance with the same procedure.

6. The President of the European Council:

(a) shall chair it and drive forward its work;

(b) shall ensure the preparation and continuity of the work of the European Council in cooperation with the President of the Commission, and on the basis of the work of the General Affairs Council;

(c) shall endeavour to facilitate cohesion and consensus within the European Council;

(d) shall present a report to the European Parliament after each of the meetings of the European Council.

The President of the European Council shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy.

The President of the European Council shall not hold a national office.

Article 16

1. The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Treaties.

2. The Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote.

3. The Council shall act by a qualified majority except where the Treaties provide otherwise.

4. As from 1 November 2014, a qualified majority shall be defined as at least 55 % of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union.

A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained.

The other arrangements governing the qualified majority are laid down in Article 238(2) of the Treaty on the Functioning of the European Union.

5. The transitional provisions relating to the definition of the qualified majority which shall be applicable until 31 October 2014 and those which shall be applicable from 1 November 2014 to 31 March 2017 are laid down in the Protocol on transitional provisions.

6. The Council shall meet in different configurations, the list of which shall be adopted in accordance with Article 236 of the Treaty on the Functioning of the European Union.

The General Affairs Council shall ensure consistency in the work of the different Council configurations. It shall prepare and ensure the follow-up to meetings of the European Council, in liaison with the President of the European Council and the Commission.

The Foreign Affairs Council shall elaborate the Union's external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union's action is consistent.

7. A Committee of Permanent Representatives of the Governments of the Member States shall be responsible for preparing the work of the Council.

8. The Council shall meet in public when it deliberates and votes on a draft legislative act. To this end, each Council meeting shall be divided into two parts, dealing respectively with deliberations on Union legislative acts and non-legislative activities.

9. The Presidency of Council configurations, other than that of Foreign Affairs, shall be held by Member State representatives in the Council on the basis of equal rotation, in accordance with the conditions established in accordance with Article 236 of the Treaty on the Functioning of the European Union.

Article 17

1. The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements.

2. Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide.

3. The Commission's term of office shall be five years.

The members of the Commission shall be chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt.

In carrying out its responsibilities, the Commission shall be completely independent. Without prejudice to Article 18(2), the members of the Commission shall neither seek nor take instructions from any Government or other institution, body, office or entity. They shall refrain from any action incompatible with their duties or the performance of their tasks.

4. The Commission appointed between the date of entry into force of the Treaty of Lisbon and 31 October 2014, shall consist of one national of each Member State, including its President and the High Representative of the Union for Foreign Affairs and Security Policy who shall be one of its Vice-Presidents.

5. As from 1 November 2014, the Commission shall consist of a number of members, including its President and the High Representative of the Union for Foreign Affairs and Security Policy, corresponding to two thirds of the number of Member States, unless the European Council, acting unanimously, decides to alter this number.

The members of the Commission shall be chosen from among the nationals of the Member States on the basis of a system of strictly equal rotation between the Member States, reflecting the demographic and geographical range of all the Member States. This system shall be established unanimously by the European Council in accordance with Article 244 of the Treaty on the Functioning of the European Union.

6. The President of the Commission shall:

(a) lay down guidelines within which the Commission is to work;

(b) decide on the internal organisation of the Commission, ensuring that it acts consistently, efficiently and as a collegiate body;

(c) appoint Vice-Presidents, other than the High Representative of the Union for Foreign Affairs and Security Policy, from among the members of the Commission.

A member of the Commission shall resign if the President so requests. The High Representative of the Union for Foreign Affairs and Security Policy shall resign, in accordance with the procedure set out in Article 18(1), if the President so requests.

7. Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members. If he does not obtain the required majority, the European Council, acting by a qualified majority, shall within one month propose a new candidate who shall be elected by the European Parliament following the same procedure.

The Council, by common accord with the President-elect, shall adopt the list of the other persons whom it proposes for appointment as members of the Commission. They shall be selected, on the basis of the suggestions made by Member States, in accordance with the criteria set out in paragraph 3, second subparagraph, and paragraph 5, second subparagraph.

The President, the High Representative of the Union for Foreign Affairs and Security Policy and the other members of the Commission shall be subject as a body to a vote of consent by the European Parliament. On the basis of this consent the Commission shall be appointed by the European Council, acting by a qualified majority.

8. The Commission, as a body, shall be responsible to the European Parliament. In accordance with Article 234 of the Treaty on the Functioning of the European Union, the European Parliament may vote on a motion of censure of the Commission. If such a motion is carried, the members of the Commission shall resign as a body and the High Representative of the Union for Foreign Affairs and Security Policy shall resign from the duties that he carries out in the Commission.

Article 18

1. The European Council, acting by a qualified majority, with the agreement of the President of the Commission, shall appoint the High Representative of the Union for Foreign Affairs and Security Policy. The European Council may end his term of office by the same procedure.

2. The High Representative shall conduct the Union's common foreign and security policy. He shall contribute by his proposals to the development of that policy, which he shall carry out as mandated by the Council. The same shall apply to the common security and defence policy.

3. The High Representative shall preside over the Foreign Affairs Council.

4. The High Representative shall be one of the Vice-Presidents of the Commission. He shall ensure the consistency of the Union's external action. He shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action. In exercising these responsibilities within the Commission, and only for these responsibilities, the High Representative shall be bound by Commission procedures to the extent that this is consistent with paragraphs 2 and 3.

Article 19

1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

2. The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General.

The General Court shall include at least one judge per Member State.

The Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles 253 and 254 of the Treaty on the Functioning of the European Union. They shall be appointed by common accord of the governments of the Member States for six years. Retiring Judges and Advocates-General may be reappointed.

3. The Court of Justice of the European Union shall, in accordance with the Treaties:

(a) rule on actions brought by a Member State, an institution or a natural or legal person;

(b)give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;

(c) rule in other cases provided for in the Treaties.

EXTRACTED ARTICLES FROM THE CONSOLIDATED VERSION OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (TFEU)

PREAMBLE

HIS MAJESTY THE KING OF THE BELGIANS, THE PRESIDENT OF THE FEDERAL REPUBLIC OF GERMANY, THE PRESIDENT OF THE FRENCH REPUBLIC, THE PRESIDENT OF THE ITALIAN REPUBLIC, HER ROYAL HIGHNESS THE GRAND DUCHESS OF LUXEMBOURG, HER MAJESTY THE QUEEN OF THE NETHERLANDS, [1]

DETERMINED to lay the foundations of an ever closer union among the peoples of Europe,

RESOLVED to ensure the economic and social progress of their States by common action to eliminate the barriers which divide Europe,

AFFIRMING as the essential objective of their efforts the constant improvements of the living and working conditions of their peoples,

RECOGNISING that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition,

ANXIOUS to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions,

DESIRING to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade,

INTENDING to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations,

RESOLVED by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts,

DETERMINED to promote the development of the highest possible level of knowledge for their peoples through a wide access to education and through its continuous updating,

(List of plenipotentiaries not reproduced)

PART ONE

PRINCIPLES

Article 1

1. This Treaty organises the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences.

2. This Treaty and the Treaty on European Union constitute the Treaties on which the Union is founded. These two Treaties, which have the same legal value, shall be referred to as ‘the Treaties’.

TITLE I

CATEGORIES AND AREAS OF UNION COMPETENCE

Article 2

1. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.

2. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

3. The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide.

4. The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.

5. In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas.

Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations.

6. The scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area.

Article 3

1. The Union shall have exclusive competence in the following areas:

(a) customs union;

(b) the establishing of the competition rules necessary for the functioning of the internal market;

(c) monetary policy for the Member States whose currency is the euro;

(d) the conservation of marine biological resources under the common fisheries policy;

(e) common commercial policy.

2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

Article 4

1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.

2. Shared competence between the Union and the Member States applies in the following principal areas:

(a) internal market;

(b) social policy, for the aspects defined in this Treaty;

(c) economic, social and territorial cohesion;

(d) agriculture and fisheries, excluding the conservation of marine biological resources;

(e) environment;

(f) consumer protection;

(g) transport;

(h) trans-European networks;

(i) energy;

(j) area of freedom, security and justice;

(k) common safety concerns in public health matters, for the aspects defined in this Treaty.

3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

Article 5

1. The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies.

Specific provisions shall apply to those Member States whose currency is the euro.

2. The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies.

3. The Union may take initiatives to ensure coordination of Member States' social policies.

Article 6

The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be:

(a) protection and improvement of human health;

(b) industry;

(c) culture;

(d) tourism;

(e) education, vocational training, youth and sport;

(f) civil protection;

(g) administrative cooperation.

TITLE II

PROVISIONS HAVING GENERAL APPLICATION

Article 7

The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.

Article 8

(ex Article 3(2) TEC) [(2)]

In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.

Article 9

In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

Article 10

In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Article 11

(ex Article 6 TEC)

Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.

Article 12

(ex Article 153(2) TEC)

Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities.

Article 13

In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.

Article 14

(ex Article 16 TEC)

Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.

Article 15

(ex Article 255 TEC)

1. In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible.

2. The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.

3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.

General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.

Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph.

The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks.

The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures under the terms laid down by the regulations referred to in the second subparagraph.

Article 16

(ex Article 286 TEC)

1. Everyone has the right to the protection of personal data concerning them.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.

The rules adopted on the basis of this Article shall be without prejudice to the specific rules laid down in Article 39 of the Treaty on European Union.

Article 17

1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.

2. The Union equally respects the status under national law of philosophical and non-confessional organisations.

3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations.

PART TWO

NON-DISCRIMINATION AND CITIZENSHIP OF THE UNION

Article 18

(ex Article 12 TEC)

Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.

Article 19

(ex Article 13 TEC)

1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.

Article 20

(ex Article 17 TEC)

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

(a) the right to move and reside freely within the territory of the Member States;

(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;

(c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;

(d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

Article 21

(ex Article 18 TEC)

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.

3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.

Article 22

(ex Article 19 TEC)

1. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

2. Without prejudice to Article 223(1) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

Article 23

(ex Article 20 TEC)

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall adopt the necessary provisions and start the international negotiations required to secure this protection.

The Council, acting in accordance with a special legislative procedure and after consulting the European Parliament, may adopt directives establishing the coordination and cooperation measures necessary to facilitate such protection.

Article 24

(ex Article 21 TEC)

The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the provisions for the procedures and conditions required for a citizens' initiative within the meaning of Article 11 of the Treaty on European Union, including the minimum number of Member States from which such citizens must come.

Every citizen of the Union shall have the right to petition the European Parliament in accordance with Article 227.

Every citizen of the Union may apply to the Ombudsman established in accordance with Article 228.

Every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 13 of the Treaty on European Union in one of the languages mentioned in Article 55(1) of the Treaty on European Union and have an answer in the same language.

Article 25

(ex Article 22 TEC)

The Commission shall report to the European Parliament, to the Council and to the Economic and Social Committee every three years on the application of the provisions of this Part. This report shall take account of the development of the Union.

On this basis, and without prejudice to the other provisions of the Treaties, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may adopt provisions to strengthen or to add to the rights listed in Article 20(2). These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements.

[…]

TITLE V

INTERNATIONAL AGREEMENTS

Article 216

1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.

Article 217

(ex Article 310 TEC)

The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.

Article 218

(ex Article 300 TEC)

1. Without prejudice to the specific provisions laid down in Article 207, agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance with the following procedure.

2. The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them.

3. The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.

4. The Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted.

5. The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.

6. The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.

Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:

(a) after obtaining the consent of the European Parliament in the following cases:

  (i) association agreements;

  (ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;

  (iii) agreements establishing a specific institutional framework by organising cooperation procedures;

  (iv) agreements with important budgetary implications for the Union;

  (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

  The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent.

(b) after consulting the European Parliament in other cases. The European Parliament shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act.

7. When concluding an agreement, the Council may, by way of derogation from paragraphs 5, 6 and 9, authorise the negotiator to approve on the Union's behalf modifications to the agreement where it provides for them to be adopted by a simplified procedure or by a body set up by the agreement. The Council may attach specific conditions to such authorisation.

8. The Council shall act by a qualified majority throughout the procedure.

However, it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article 212 with the States which are candidates for accession. The Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements.

9. The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions

to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.

10. The European Parliament shall be immediately and fully informed at all stages of the procedure.

11. A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

Article 219

(ex Article 111(1) to (3) and (5) TEC)

1. By way of derogation from Article 218, the Council, either on a recommendation from the European Central Bank or on a recommendation from the Commission and after consulting the European Central Bank, in an endeavour to reach a consensus consistent with the objective of price stability, may conclude formal agreements on an exchange-rate system for the euro in relation to the currencies of third States. The Council shall act unanimously after consulting the European Parliament and in accordance with the procedure provided for in paragraph 3.

The Council may, either on a recommendation from the European Central Bank or on a recommendation from the Commission, and after consulting the European Central Bank, in an endeavour to reach a consensus consistent with the objective of price stability, adopt, adjust or abandon the central rates of the euro within the exchange-rate system. The President of the Council shall inform the European Parliament of the adoption, adjustment or abandonment of the euro central rates.

2. In the absence of an exchange-rate system in relation to one or more currencies of third States as referred to in paragraph 1, the Council, either on a recommendation from the Commission and after consulting the European Central Bank or on a recommendation from the European Central Bank, may formulate general orientations for exchange-rate policy in relation to these currencies. These general orientations shall be without prejudice to the primary objective of the ESCB to maintain price stability.

3. By way of derogation from Article 218, where agreements concerning monetary or foreign exchange regime matters need to be negotiated by the Union with one or more third States or international organisations, the Council, on a recommendation from the Commission and after consulting the European Central Bank, shall decide the arrangements for the negotiation and for the conclusion of such agreements. These arrangements shall ensure that the Union expresses a single position. The Commission shall be fully associated with the negotiations.

4. Without prejudice to Union competence and Union agreements as regards economic and monetary union, Member States may negotiate in international bodies and conclude international agreements.

PART SIX

INSTITUTIONAL AND FINANCIAL PROVISIONS

TITLE I

INSTITUTIONAL PROVISIONS

CHAPTER 1

THE INSTITUTIONS

[…]

SECTION 5

THE COURT OF JUSTICE OF THE EUROPEAN UNION

Article 251

(ex Article 221 TEC)

The Court of Justice shall sit in chambers or in a Grand Chamber, in accordance with the rules laid down for that purpose in the Statute of the Court of Justice of the European Union.

When provided for in the Statute, the Court of Justice may also sit as a full Court.

Article 252

(ex Article 222 TEC)

The Court of Justice shall be assisted by eight Advocates-General. Should the Court of Justice so request, the Council, acting unanimously, may increase the number of Advocates-General.

It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement.

Article 253

(ex Article 223 TEC)

The Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence; they shall be appointed by common accord of the governments of the Member States for a term of six years, after consultation of the panel provided for in Article 255.

Every three years there shall be a partial replacement of the Judges and Advocates-General, in accordance with the conditions laid down in the Statute of the Court of Justice of the European Union.

The Judges shall elect the President of the Court of Justice from among their number for a term of three years. He may be re-elected.

Retiring Judges and Advocates-General may be reappointed.

The Court of Justice shall appoint its Registrar and lay down the rules governing his service.

The Court of Justice shall establish its Rules of Procedure. Those Rules shall require the approval of the Council.

Article 254

(ex Article 224 TEC)

The number of Judges of the General Court shall be determined by the Statute of the Court of Justice of the European Union. The Statute may provide for the General Court to be assisted by Advocates-General.

The members of the General Court shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to high judicial office. They shall be appointed by common accord of the governments of the Member States for a term of six years, after consultation of the panel provided for in Article 255. The membership shall be partially renewed every three years. Retiring members shall be eligible for reappointment.

The Judges shall elect the President of the General Court from among their number for a term of three years. He may be re-elected.

The General Court shall appoint its Registrar and lay down the rules governing his service.

The General Court shall establish its Rules of Procedure in agreement with the Court of Justice. Those Rules shall require the approval of the Council.

Unless the Statute of the Court of Justice of the European Union provides otherwise, the provisions of the Treaties relating to the Court of Justice shall apply to the General Court.

Article 255

A panel shall be set up in order to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the governments of the Member States make the appointments referred to in Articles 253 and 254.

The panel shall comprise seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament. The Council shall adopt a decision establishing the panel's operating rules and a decision appointing its members. It shall act on the initiative of the President of the Court of Justice.

Article 256

(ex Article 225 TEC)

1. The General Court shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 263, 265, 268, 270 and 272, with the exception of those assigned to a specialised court set up under Article 257 and those reserved in the Statute for the Court of Justice. The Statute may provide for the General Court to have jurisdiction for other classes of action or proceeding.

Decisions given by the General Court under this paragraph may be subject to a right of appeal to the Court of Justice on points of law only, under the conditions and within the limits laid down by the Statute.

2. The General Court shall have jurisdiction to hear and determine actions or proceedings brought against decisions of the specialised courts.

Decisions given by the General Court under this paragraph may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Union law being affected.

3. The General Court shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267, in specific areas laid down by the Statute.

Where the General Court considers that the case requires a decision of principle likely to affect the unity or consistency of Union law, it may refer the case to the Court of Justice for a ruling.

Decisions given by the General Court on questions referred for a preliminary ruling may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Union law being affected.

Article 257

(ex Article 225a TEC)

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish specialised courts attached to the General Court to hear and determine at first instance certain classes of action or proceeding brought in specific areas. The European Parliament and the Council shall act by means of regulations either on a proposal from the Commission after consultation of the Court of Justice or at the request of the Court of Justice after consultation of the Commission.

The regulation establishing a specialised court shall lay down the rules on the organisation of the court and the extent of the jurisdiction conferred upon it.

Decisions given by specialised courts may be subject to a right of appeal on points of law only or, when provided for in the regulation establishing the specialised court, a right of appeal also on matters of fact, before the General Court.

The members of the specialised courts shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office. They shall be appointed by the Council, acting unanimously.

The specialised courts shall establish their Rules of Procedure in agreement with the Court of Justice. Those Rules shall require the approval of the Council.

Unless the regulation establishing the specialised court provides otherwise, the provisions of the Treaties relating to the Court of Justice of the European Union and the provisions of the Statute of the Court of Justice of the

European Union shall apply to the specialised courts. Title I of the Statute and Article 64 thereof shall in any case apply to the specialised courts.

Article 258

(ex Article 226 TEC)

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

Article 259

(ex Article 227 TEC)

A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.

Article 260

(ex Article 228 TEC)

1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.

2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

This procedure shall be without prejudice to Article 259.

3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.

Article 261

(ex Article 229 TEC)

Regulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of the Treaties, may give the Court of Justice of the European Union unlimited jurisdiction with regard to the penalties provided for in such regulations.

Article 262

(ex Article 229a TEC)

Without prejudice to the other provisions of the Treaties, the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, may adopt provisions to confer jurisdiction, to the extent that it shall determine, on the Court of Justice of the European Union in disputes relating to the application of acts adopted on the basis of the Treaties which create European intellectual property rights. These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements.

Article 263

(ex Article 230 TEC)

The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects *vis-à-vis* third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

Article 264

(ex Article 231 TEC)

If the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void.

However, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive.

Article 265

(ex Article 232 TEC)

Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may

bring an action before the Court of Justice of the European Union to have the infringement established. This Article shall apply, under the same conditions, to bodies, offices and agencies of the Union which fail to act.

The action shall be admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion.

Article 266

(ex Article 233 TEC)

The institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.

This obligation shall not affect any obligation which may result from the application of the second paragraph of Article 340.

Article 267

(ex Article 234 TEC)

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

Article 268

(ex Article 235 TEC)

The Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340.

Article 269

The Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article.

Such a request must be made within one month from the date of such determination. The Court shall rule within one month from the date of the request.

Article 270

(ex Article 236 TEC)

The Court of Justice of the European Union shall have jurisdiction in any dispute between the Union and its servants within the limits and under the conditions laid down in the Staff Regulations of Officials and the Conditions of Employment of other servants of the Union.

Article 271

(ex Article 237 TEC)

The Court of Justice of the European Union shall, within the limits hereinafter laid down, have jurisdiction in disputes concerning:

(a) the fulfilment by Member States of obligations under the Statute of the European Investment Bank. In this connection, the Board of Directors of the Bank shall enjoy the powers conferred upon the Commission by Article 258;

(b) measures adopted by the Board of Governors of the European Investment Bank. In this connection, any Member State, the Commission or the Board of Directors of the Bank may institute proceedings under the conditions laid down in Article 263;

(c) measures adopted by the Board of Directors of the European Investment Bank. Proceedings against such measures may be instituted only by Member States or by the Commission, under the conditions laid down in Article 263, and solely on the grounds of non-compliance with the procedure provided for in Article 19(2), (5), (6) and (7) of the Statute of the Bank;

(d) the fulfilment by national central banks of obligations under the Treaties and the Statute of the ESCB and of the ECB. In this connection the powers of the Governing Council of the European Central Bank in respect of national central banks shall be the same as those conferred upon the Commission in respect of Member States by Article 258. If the Court finds that a national central bank has failed to fulfil an obligation under the Treaties, that bank shall be required to take the necessary measures to comply with the judgment of the Court.

Article 272

(ex Article 238 TEC)

The Court of Justice of the European Union shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law.

Article 273

(ex Article 239 TEC)

The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties.

Article 274

(ex Article 240 TEC)

Save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States.

Article 275

The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.

However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of

Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.

Article 276

In exercising its powers regarding the provisions of Chapters 4 and 5 of Title V of Part Three relating to the area of freedom, security and justice, the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

Article 277

(ex Article 241 TEC)

Notwithstanding the expiry of the period laid down in Article 263, sixth paragraph, any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in Article 263, second paragraph, in order to invoke before the Court of Justice of the European Union the inapplicability of that act.

Article 278

(ex Article 242 TEC)

Actions brought before the Court of Justice of the European Union shall not have suspensory effect. The Court may, however, if it considers that circumstances so require, order that application of the contested act be suspended.

Article 279

(ex Article 243 TEC)

The Court of Justice of the European Union may in any cases before it prescribe any necessary interim measures.

Article 280

(ex Article 244 TEC)

The judgments of the Court of Justice of the European Union shall be enforceable under the conditions laid down in Article 299.

Article 281

(ex Article 245 TEC)

The Statute of the Court of Justice of the European Union shall be laid down in a separate Protocol.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may amend the provisions of the Statute, with the exception of Title I and Article 64. The European Parliament and the Council shall act either at the request of the Court of Justice and after consultation of the Commission, or on a proposal from the Commission and after consultation of the Court of Justice.

[…]

CHAPTER 2

LEGAL ACTS OF THE UNION, ADOPTION PROCEDURES AND OTHER PROVISIONS

SECTION 1

THE LEGAL ACTS OF THE UNION

Article 288

(ex Article 249 TEC)

To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force.

Article 289

1. The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. This procedure is defined in Article 294.

2. In the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a special legislative procedure.

3. Legal acts adopted by legislative procedure shall constitute legislative acts.

4. In the specific cases provided for by the Treaties, legislative acts may be adopted on the initiative of a group of Member States or of the European Parliament, on a recommendation from the European Central Bank or at the request of the Court of Justice or the European Investment Bank.

Article 290

1. A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.

The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.

2. Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:

(a) the European Parliament or the Council may decide to revoke the delegation;

(b)the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.

For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority.

3. The adjective ‘delegated’ shall be inserted in the title of delegated acts.

Article 291

1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts.

2. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.

3. For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

4. The word ‘implementing’ shall be inserted in the title of implementing acts.

Article 292

The Council shall adopt recommendations. It shall act on a proposal from the Commission in all cases where the Treaties provide that it shall adopt acts on a proposal from the Commission. It shall act unanimously in those areas in which unanimity is required for the adoption of a Union act. The Commission, and the European Central Bank in the specific cases provided for in the Treaties, shall adopt recommendations.

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

The European Parliament, the Council and the Commission solemnly proclaim the following text as the Charter of Fundamental Rights of the European Union.

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, services, goods and capital, and the freedom of establishment.

To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.

This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights. In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.

Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.

The Union therefore recognises the rights, freedoms and principles set out hereafter.

TITLE I: DIGNITY

Article 1

Human dignity

Human dignity is inviolable. It must be respected and protected.

Article 2

Right to life

1. Everyone has the right to life.
2. No one shall be condemned to the death penalty, or executed.

Article 3

Right to the integrity of the person

1. Everyone has the right to respect for his or her physical and mental integrity.
2. In the fields of medicine and biology, the following must be respected in particular:

(a) the free and informed consent of the person concerned, according to the procedures laid down by law;

(b) the prohibition of eugenic practices, in particular those aiming at the selection of persons;

(c) the prohibition on making the human body and its parts as such a source of financial gain;

(d) the prohibition of the reproductive cloning of human beings.

Article 4

Prohibition of torture and inhuman or degrading treatment or punishment

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 5

Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. Trafficking in human beings is prohibited.

TITLE II: FREEDOMS

Article 6

Right to liberty and security

Everyone has the right to liberty and security of person.

Article 7

Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 8

Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority.

Article 9

Right to marry and right to found a family

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

Article 10

Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.

2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

Article 11

Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected.

Article 12

Freedom of assembly and of association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.

Article 13

Freedom of the arts and sciences

The arts and scientific research shall be free of constraint. Academic freedom shall be respected.

Article 14

Right to education

1. Everyone has the right to education and to have access to vocational and continuing training.

2. This right includes the possibility to receive free compulsory education.

3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

Article 15

Freedom to choose an occupation and right to engage in work

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.

2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.

3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

Article 16

Freedom to conduct a business

The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.

Article 17

Right to property

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

2. Intellectual property shall be protected.

Article 18

Right to asylum

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties').

Article 19

Protection in the event of removal, expulsion or extradition

1. Collective expulsions are prohibited.

2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

TITLE III: EQUALITY

Article 20

Equality before the law

Everyone is equal before the law.

Article 21

Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

Article 22

Cultural, religious and linguistic diversity

The Union shall respect cultural, religious and linguistic diversity.

Article 23

Equality between women and men

Equality between women and men must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

Article 24

The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Article 25

The rights of the elderly

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

Article 26

Integration of persons with disabilities

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

TITLE IV: SOLIDARITY

Article 27

Workers' right to information and consultation within the undertaking

Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices.

Article 28

Right of collective bargaining and action

Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

Article 29

Right of access to placement services

Everyone has the right of access to a free placement service.

Article 30

Protection in the event of unjustified dismissal

Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices.

Article 31

Fair and just working conditions

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.

2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

Article 32

Prohibition of child labour and protection of young people at work

The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations.

Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.

Article 33

Family and professional life

1. The family shall enjoy legal, economic and social protection.

2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

Article 34

Social security and social assistance

1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.

2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices.

3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.

Article 35

Health care

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities.

Article 36

Access to services of general economic interest

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union.

Article 37

Environmental protection

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

Article 38

Consumer protection

Union policies shall ensure a high level of consumer protection.

TITLE V: CITIZENS' RIGHTS

Article 39

Right to vote and to stand as a candidate at elections to the European Parliament

1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.

2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

Article 40

Right to vote and to stand as a candidate at municipal elections

Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.

Article 41

Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

2. This right includes:

(a)the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

(b)the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

(c) the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

Article 42

Right of access to documents

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.

Article 43

European Ombudsman

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the European Ombudsman cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union, with the exception of the Court of Justice of the European Union acting in its judicial role.

Article 44

Right to petition

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament.

Article 45

Freedom of movement and of residence

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.

2. Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.

Article 46

Diplomatic and consular protection

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State.

TITLE VI: JUSTICE

Article 47

Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Article 48

Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

Article 49

Principles of legality and proportionality of criminal offences and penalties

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.

3. The severity of penalties must not be disproportionate to the criminal offence.

Article 50

Right not to be tried or punished twice in criminal proceedings for the same criminal offence

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

TITLE VII: GENERAL PROVISIONS GOVERNING THE INTERPRETATION AND APPLICATION OF THE CHARTER

Article 51

Field of application

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

Article 52

Scope and interpretation of rights and principles

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if 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.

2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

6. Full account shall be taken of national laws and practices as specified in this Charter.

7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.

Article 53

Level of protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

Article 54

Prohibition of abuse of rights

Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.

(2007/C 303/02)

These explanations were originally prepared under the authority of the Praesidium of the Convention which drafted the Charter of Fundamental Rights of the European Union. They have been updated under the responsibility of the Praesidium of the European Convention, in the light of the drafting adjustments made to the text of the Charter by that Convention (notably to Articles 51 and 52) and of further developments of Union law. Although they do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter.

TITLE I — DIGNITY

Explanation on Article 1 — Human dignity

The dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights. The 1948 Universal Declaration of Human Rights enshrined human dignity in its preamble: 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.' In its judgment of 9 October 2001 in Case C-377/98 *Netherlands v European Parliament and Council* [2001] ECR I-7079, at grounds 70 — 77, the Court of Justice confirmed that a fundamental right to human dignity is part of Union law.

It results that none of the rights laid down in this Charter may be used to harm the dignity of another person, and that the dignity of the human person is part of the substance of the rights laid down in this Charter. It must therefore be respected, even where a right is restricted.

Explanation on Article 2 — Right to life

1. Paragraph 1 of this Article is based on the first sentence of Article 2(1) of the ECHR, which reads as follows:

   '1. Everyone's right to life shall be protected by law …'.

2. The second sentence of the provision, which referred to the death penalty, was superseded by the entry into force of Article 1 of Protocol No 6 to the ECHR, which reads as follows:

   'The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.'

   Article 2(2) of the Charter is based on that provision.

3. The provisions of Article 2 of the Charter correspond to those of the above Articles of the ECHR and its Protocol. They have the same meaning and the same scope, in accordance with Article 52(3) of the Charter. Therefore, the 'negative' definitions appearing in the ECHR must be regarded as also forming part of the Charter:

   (a) Article 2(2) of the ECHR:

   'Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

   (a) in defence of any person from unlawful violence;

   (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

   (c) in action lawfully taken for the purpose of quelling a riot or insurrection.'

   (b) Article 2 of Protocol No 6 to the ECHR:

   'A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions…'.

Explanation on Article 3 — Right to the integrity of the person

1. In its judgment of 9 October 2001 in Case C-377/98 *Netherlands v European Parliament and Council* [2001] ECR-I 7079, at grounds 70, 78 to 80, the Court of Justice confirmed that a fundamental right to human integrity is part of Union law and encompasses, in the context of medicine and biology, the free and informed consent of the donor and recipient.

2. The principles of Article 3 of the Charter are already included in the Convention on Human Rights and Biomedicine, adopted by the Council of Europe (ETS 164 and additional protocol ETS 168). The Charter does not set out to depart from those principles, and therefore prohibits only reproductive cloning. It neither authorises nor prohibits other forms of cloning. Thus it does not in any way prevent the legislature from prohibiting other forms of cloning.

3. The reference to eugenic practices, in particular those aiming at the selection of persons, relates to possible situations in which selection programmes are organised and implemented, involving campaigns for sterilisation, forced pregnancy, compulsory ethnic marriage among others, all acts deemed to be international crimes in the Statute of the International Criminal Court adopted in Rome on 17 July 1998 (see its Article 7(1)(g)).

Explanation on Article 4 — Prohibition of torture and inhuman or degrading treatment or punishment

The right in Article 4 is the right guaranteed by Article 3 of the ECHR, which has the same wording: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. By virtue of Article 52(3) of the Charter, it therefore has the same meaning and the same scope as the ECHR Article.

Explanation on Article 5 — Prohibition of slavery and forced labour

1. The right in Article 5(1) and (2) corresponds to Article 4(1) and (2) of the ECHR, which has the same wording. It therefore has the same meaning and scope as the ECHR Article, by virtue of Article 52(3) of the Charter. Consequently:

   — no limitation may legitimately affect the right provided for in paragraph 1,

   — in paragraph 2, 'forced or compulsory labour' must be understood in the light of the 'negative' definitions contained in Article 4(3) of the ECHR:

   'For the purpose of this article the term "forced or compulsory labour" shall not include:

   (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

   (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

   (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

   (d) any work or service which forms part of normal civic obligations.'.

2. Paragraph 3 stems directly from human dignity and takes account of recent developments in organised crime, such as the organisation of lucrative illegal immigration or sexual exploitation networks. The Annex to the Europol Convention contains the following definition which refers to trafficking for the purpose of sexual exploitation: 'traffic in human beings: means subjection of a person to the real and illegal sway of other persons by using violence or menaces or by abuse of authority or intrigue with a view to the exploitation of prostitution, forms of sexual exploitation and assault of minors or trade in abandoned children'. Chapter VI of the Convention implementing the Schengen Agreement, which has been integrated into the Union's *acquis*, in which the United Kingdom and Ireland participate, contains the following wording in Article 27(1) which refers to illegal immigration networks: 'The Contracting Parties undertake to impose appropriate penalties on any person who, for financial gain, assists or tries to assist an alien to enter or reside within the territory of one of the Contracting Parties in breach of that Contracting Party's laws on the entry and residence of aliens.' On 19 July 2002, the Council adopted a framework decision on combating trafficking in human beings (OJ L 203, 1.8.2002, p. 1) whose Article 1 defines in detail the offences concerning trafficking in human beings for the purposes of labour

exploitation or sexual exploitation, which the Member States must make punishable by virtue of that framework decision.

TITLE II — FREEDOMS

Explanation on Article 6 — Right to liberty and security

The rights in Article 6 are the rights guaranteed by Article 5 of the ECHR, and in accordance with Article 52(3) of the Charter, they have the same meaning and scope. Consequently, the limitations which may legitimately be imposed on them may not exceed those permitted by the ECHR, in the wording of Article 5:

'1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.'

The rights enshrined in Article 6 must be respected particularly when the European Parliament and the Council adopt legislative acts in the area of judicial cooperation in criminal matters, on the basis of Articles 82, 83 and 85 of the Treaty on the Functioning of the European Union, notably to define common minimum provisions as regards the categorisation of offences and punishments and certain aspects of procedural law.

Explanation on Article 7 — Respect for private and family life

The rights guaranteed in Article 7 correspond to those guaranteed by Article 8 of the ECHR. To take account of developments in technology the word 'correspondence' has been replaced by 'communications'.

In accordance with Article 52(3), the meaning and scope of this right are the same as those of the corresponding article of the ECHR. Consequently, the limitations which may legitimately be imposed on this right are the same as those allowed by Article 8 of the ECHR:

'1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public

safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

Explanation on Article 8 — Protection of personal data

This Article has been based on Article 286 of the Treaty establishing the European Community and Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31) as well as on Article 8 of the ECHR and on the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, which has been ratified by all the Member States. Article 286 of the EC Treaty is now replaced by Article 16 of the Treaty on the Functioning of the European Union and Article 39 of the Treaty on European Union. Reference is also made to Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1). The above-mentioned Directive and Regulation contain conditions and limitations for the exercise of the right to the protection of personal data.

Explanation on Article 9 — Right to marry and right to found a family

This Article is based on Article 12 of the ECHR, which reads as follows: 'Men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercising of this right.' The wording of the Article has been modernised to cover cases in which national legislation recognises arrangements other than marriage for founding a family. This Article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. This right is thus similar to that afforded by the ECHR, but its scope may be wider when national legislation so provides.

Explanation on Article 10 — Freedom of thought, conscience and religion

The right guaranteed in paragraph 1 corresponds to the right guaranteed in Article 9 of the ECHR and, in accordance with Article 52(3) of the Charter, has the same meaning and scope. Limitations must therefore respect Article 9(2) of the Convention, which reads as follows: 'Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.'

The right guaranteed in paragraph 2 corresponds to national constitutional traditions and to the development of national legislation on this issue.

Explanation on Article 11 — Freedom of expression and information

1. Article 11 corresponds to Article 10 of the European Convention on Human Rights, which reads as follows:

   '1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

   2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

   Pursuant to Article 52(3) of the Charter, the meaning and scope of this right are the same as those guaranteed by the ECHR. The limitations which may be imposed on it may therefore not exceed those provided for in Article 10(2) of the Convention, without prejudice to any restrictions which the competition law of the Union may impose on Member States' right to introduce the licensing arrangements referred to in the third sentence of Article 10(1) of the ECHR.

2. Paragraph 2 of this Article spells out the consequences of paragraph 1 regarding freedom of the media. It is based in particular on Court of Justice case-law regarding television, particularly in Case C-288/89 (judgment of 25 July 1991, *Stichting Collectieve Antennevoorziening Gouda and others* [1991] ECR I-4007), and on the Protocol on the system of public broadcasting in the Member States annexed to the EC Treaty and now to the Treaties, and on Council Directive 89/552/EC (particularly its seventeenth recital).

Explanation on Article 12 — Freedom of assembly and of association

1. Paragraph 1 of this Article corresponds to Article 11 of the ECHR, which reads as follows:

   '1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

   2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.'

   The meaning of the provisions of paragraph 1 of this Article 12 is the same as that of the ECHR, but their scope is wider since they apply at all levels including European level. In accordance with Article 52(3) of the Charter, limitations on that right may not exceed those considered legitimate by virtue of Article 11(2) of the ECHR.

2. This right is also based on Article 11 of the Community Charter of the Fundamental Social Rights of Workers.

3. Paragraph 2 of this Article corresponds to Article 10(4) of the Treaty on European Union.

Explanation on Article 13 — Freedom of the arts and sciences

This right is deduced primarily from the right to freedom of thought and expression. It is to be exercised having regard to Article 1 and may be subject to the limitations authorised by Article 10 of the ECHR.

Explanation on Article 14 — Right to education

1. This Article is based on the common constitutional traditions of Member States and on Article 2 of the Protocol to the ECHR, which reads as follows:

   'No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.'

   It was considered useful to extend this Article to access to vocational and continuing training (see point 15 of the Community Charter of the Fundamental Social Rights of Workers and Article 10 of the Social Charter) and to add the principle of free compulsory education. As it is worded, the latter principle merely implies that as regards compulsory education, each child has the possibility of attending an establishment which offers free education. It does not require all establishments which provide education or vocational and continuing training, in particular private ones, to be free of charge. Nor does it exclude certain specific forms of education having to be paid for, if the State takes measures to grant financial compensation. In so far as the Charter applies to the Union, this means that in its training policies the Union must respect free compulsory education, but this does not, of course, create new powers. Regarding the right of parents, it must be interpreted in conjunction with the provisions of Article 24.

2. Freedom to found public or private educational establishments is guaranteed as one of the aspects of freedom to conduct a business but it is limited by respect for democratic principles and is exercised in accordance with the arrangements defined by national legislation.

Explanation on Article 15 — Freedom to choose an occupation and right to engage in work

Freedom to choose an occupation, as enshrined in Article 15(1), is recognised in Court of Justice case-law (see *inter alia* judgment of 14 May 1974, Case 4/73 *Nold* [1974] ECR 491, paragraphs 12 to 14 of the grounds; judgment of 13 December 1979, Case 44/79 *Hauer* [1979] ECR 3727; judgment of 8 October 1986, Case 234/85 *Keller* [1986] ECR 2897, paragraph 8 of the grounds).

This paragraph also draws upon Article 1(2) of the European Social Charter, which was signed on 18 October 1961 and has been ratified by all the Member States, and on point 4 of the Community Charter of the Fundamental Social Rights of Workers of 9 December 1989. The expression 'working conditions' is to be understood in the sense of Article 156 of the Treaty on the Functioning of the European Union.

Paragraph 2 deals with the three freedoms guaranteed by Articles 26, 45, 49 and 56 of the Treaty on the Functioning of the European Union, namely freedom of movement for workers, freedom of establishment and freedom to provide services.

Paragraph 3 has been based on Article 153(1)(g) of the Treaty on the Functioning of the European Union, and on Article 19(4) of the European Social Charter signed on 18 October 1961 and ratified by all the Member States. Article 52(2) of the Charter is therefore applicable. The question of recruitment of seamen having the nationality of third States for the crews of vessels flying the flag of a Member State of the Union is governed by Union law and national legislation and practice.

Explanation on Article 16 — Freedom to conduct a business

This Article is based on Court of Justice case-law which has recognised freedom to exercise an economic or commercial activity (see judgments of 14 May 1974, Case 4/73 *Nold* [1974] ECR 491, paragraph 14 of the grounds, and of 27 September 1979, Case 230-78 *SpA Eridiana and others* [1979] ECR 2749, paragraphs 20 and 31 of the grounds) and freedom of contract (see *inter alia Sukkerfabriken Nykøbing* judgment, Case 151/78 [1979] ECR 1, paragraph 19 of the grounds, and judgment of 5 October 1999, C-240/97 *Spain v Commission* [1999] ECR I-6571, paragraph 99 of the grounds) and Article 119(1) and (3) of the Treaty on the Functioning of the European Union, which recognises free competition. Of course, this right is to be exercised with respect for Union law and national legislation. It may be subject to the limitations provided for in Article 52(1) of the Charter.

Explanation on Article 17 — Right to property

This Article is based on Article 1 of the Protocol to the ECHR:

'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

This is a fundamental right common to all national constitutions. It has been recognised on numerous occasions by the case-law of the Court of Justice, initially in the *Hauer* judgment (13 December 1979, [1979] ECR 3727). The wording has been updated but, in accordance with Article 52(3), the meaning and scope of the right are the same as those of the right guaranteed by the ECHR and the limitations may not exceed those provided for there.

Protection of intellectual property, one aspect of the right of property, is explicitly mentioned in paragraph 2 because of its growing importance and Community secondary legislation. Intellectual property covers not only literary and artistic property but also *inter alia* patent and trademark rights and associated rights. The guarantees laid down in paragraph 1 shall apply as appropriate to intellectual property.

Explanation on Article 18 — Right to asylum

The text of the Article has been based on TEC Article 63, now replaced by Article 78 of the Treaty on the Functioning of the European Union, which requires the Union to respect the Geneva Convention on refugees. Reference should be made to the Protocols relating to the United Kingdom and Ireland, annexed to the Treaties, and to Denmark, to determine the extent to which those Member States implement Union law in this area and the extent to which this Article is applicable to them. This Article is in line with the Protocol on Asylum annexed to the Treaties.

Explanation on Article 19 — Protection in the event of removal, expulsion or extradition

Paragraph 1 of this Article has the same meaning and scope as Article 4 of Protocol No 4 to the ECHR concerning collective expulsion. Its purpose is to guarantee that every decision is based on a specific examination and that no single measure can be taken to expel all persons having the nationality of a particular State (see also Article 13 of the Covenant on Civil and Political Rights).

Paragraph 2 incorporates the relevant case-law from the European Court of Human Rights regarding Article 3 of the ECHR (see Ahmed v. Austria, judgment of 17 December 1996, 1996-VI, p. 2206, and Soering, judgment of 7 July 1989).

TITLE III — EQUALITY

Explanation on Article 20 — Equality before the law

This Article corresponds to a general principle of law which is included in all European constitutions and has also been recognised by the Court of Justice as a basic principle of Community law (judgment of 13 November 1984, Case 283/83 *Racke* [1984] ECR 3791, judgment of 17 April 1997, Case C-15/95 *EARL* [1997] ECR I–1961, and judgment of 13 April 2000, Case C-292/97 *Karlsson* [2000] ECR 2737).

Explanation on Article 21 — Non-discrimination

Paragraph 1 draws on Article 13 of the EC Treaty, now replaced by Article 19 of the Treaty on the Functioning of the European Union, Article 14 of the ECHR and Article 11 of the Convention on Human Rights and Biomedicine as regards genetic heritage. In so far as this corresponds to Article 14 of the ECHR, it applies in compliance with it.

There is no contradiction or incompatibility between paragraph 1 and Article 19 of the Treaty on the Functioning of the European Union which has a different scope and purpose: Article 19 confers power on the Union to adopt legislative acts, including harmonisation of the Member States' laws and regulations, to combat certain forms of discrimination, listed exhaustively in that Article. Such legislation may cover action of Member State authorities (as well as relations between private individuals) in any area within the limits of the Union's powers. In contrast, the provision in Article 21(1) does not create any power to enact anti-discrimination laws in these areas of Member State or private action, nor does it lay down a sweeping ban of discrimination in such wide-ranging areas. Instead, it only addresses discriminations by the institutions and bodies of the Union themselves, when exercising powers conferred under the Treaties, and by Member States only when they are implementing Union law. Paragraph 1 therefore does not alter the extent of powers granted under Article 19 nor the interpretation given to that Article.

Paragraph 2 corresponds to the first paragraph of Article 18 of the Treaty on the Functioning of the European Union and must be applied in compliance with that Article.

Explanation on Article 22 — Cultural, religious and linguistic diversity

This Article has been based on Article 6 of the Treaty on European Union and on Article 151(1) and (4) of the EC Treaty, now replaced by Article 167(1) and (4) of the Treaty on the Functioning of the European Union, concerning culture. Respect for cultural and linguistic diversity is now also laid down in Article 3(3) of the Treaty on European Union. The Article is also inspired by Declaration No 11 to the Final Act of the Amsterdam Treaty on the status of churches and non-confessional organisations, now taken over in Article 17 of the Treaty on the Functioning of the European Union.

Explanation on Article 23 — Equality between women and men

The first paragraph has been based on Articles 2 and 3(2) of the EC Treaty, now replaced by Article 3 of the Treaty on European Union and Article 8 of the Treaty on the Functioning of the European Union which impose the objective of promoting equality between men and women on the Union, and on Article 157(1) of the Treaty on the Functioning of the European Union. It draws on Article 20 of the revised European Social Charter of 3 May 1996 and on point 16 of the Community Charter on the rights of workers.

It is also based on Article 157(3) of the Treaty on the Functioning of the European Union and Article 2(4) of Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

The second paragraph takes over in shorter form Article 157(4) of the Treaty on the Functioning of the European Union which provides that the principle of equal treatment does not prevent the maintenance or adoption of measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers. In accordance with Article 52(2), the present paragraph does not amend Article 157(4).

Explanation on Article 24 — The rights of the child

This Article is based on the New York Convention on the Rights of the Child signed on 20 November 1989 and ratified by all the Member States, particularly Articles 3, 9, 12 and 13 thereof.

Paragraph 3 takes account of the fact that, as part of the establishment of an area of freedom, security and justice, the legislation of the Union on civil matters having cross-border implications, for which Article 81 of the Treaty on the Functioning of the European Union confers power, may include notably visiting rights ensuring that children can maintain on a regular basis a personal and direct contact with both of their parents.

Explanation on Article 25 — The rights of the elderly

This Article draws on Article 23 of the revised European Social Charter and Articles 24 and 25 of the Community Charter of the Fundamental Social Rights of Workers. Of course, participation in social and cultural life also covers participation in political life.

Explanation on Article 26 — Integration of persons with disabilities

The principle set out in this Article is based on Article 15 of the European Social Charter and also draws on point 26 of the Community Charter of the Fundamental Social Rights of Workers.

TITLE IV — SOLIDARITY

Explanation on Article 27 — Workers' right to information and consultation within the undertaking

This Article appears in the revised European Social Charter (Article 21) and in the Community Charter on the rights of workers (points 17 and 18). It applies under the conditions laid down by Union law and by national laws. The reference to appropriate levels refers to the levels laid down by Union law or by national laws and practices, which might include the European level when Union legislation so provides. There is a considerable Union *acquis* in this field: Articles 154 and 155 of the Treaty on the Functioning of the European Union, and Directives 2002/14/EC (general framework for informing and consulting employees in the European Community), 98/59/EC (collective redundancies), 2001/23/EC (transfers of undertakings) and 94/45/EC (European works councils).

Explanation on Article 28 — Right of collective bargaining and action

This Article is based on Article 6 of the European Social Charter and on the Community Charter of the Fundamental Social Rights of Workers (points 12 to 14). The right of collective action was recognised by the European Court of Human Rights as one of the elements of trade union rights laid down by Article 11 of the ECHR. As regards the appropriate levels at which collective negotiation might take place, see the explanation given for the above Article. The modalities and limits for the exercise of collective action, including strike action, come under national laws and practices, including the question of whether it may be carried out in parallel in several Member States.

Explanation on Article 29 — Right of access to placement services

This Article is based on Article 1(3) of the European Social Charter and point 13 of the Community Charter of the Fundamental Social Rights of Workers.

Explanation on Article 30 — Protection in the event of unjustified dismissal

This Article draws on Article 24 of the revised Social Charter. See also Directive 2001/23/EC on the safeguarding of employees' rights in the event of transfers of undertakings, and Directive 80/987/EEC on the protection of employees in the event of the insolvency of their employer, as amended by Directive 2002/74/EC.

Explanation on Article 31 — Fair and just working conditions

1. Paragraph 1 of this Article is based on Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work. It also draws on Article 3 of the Social Charter and point 19 of the Community Charter on the rights of workers, and, as regards dignity at work, on Article 26 of the revised Social Charter. The expression 'working conditions' is to be understood in the sense of Article 156 of the Treaty on the Functioning of the European Union.

2. Paragraph 2 is based on Directive 93/104/EC concerning certain aspects of the organisation of working time, Article 2 of the European Social Charter and point 8 of the Community Charter on the rights of workers.

Explanation on Article 32 — Prohibition of child labour and protection of young people at work

This Article is based on Directive 94/33/EC on the protection of young people at work, Article 7 of the European Social Charter and points 20 to 23 of the Community Charter of the Fundamental Social Rights of Workers.

Explanation on Article 33 — Family and professional life

Article 33(1) is based on Article 16 of the European Social Charter.

Paragraph 2 draws on Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding and Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC. It is also based on Article 8 (protection of maternity) of the European Social Charter and draws on Article 27 (right of workers with family responsibilities to equal opportunities and equal treatment) of the revised Social Charter. 'Maternity' covers the period from conception to weaning.

Explanation on Article 34 — Social security and social assistance

The principle set out in Article 34(1) is based on Articles 153 and 156 of the Treaty on the Functioning of the European Union, Article 12 of the European Social Charter and point 10 of the Community Charter on the rights of workers. The Union must respect it when exercising the powers conferred on it by Articles 153 and 156 of the Treaty on the Functioning of the European Union. The reference to social services relates to cases in which such services have been introduced to provide certain advantages but does not imply that such services must be created where they do not exist. 'Maternity' must be understood in the same sense as in the preceding Article.

Paragraph 2 is based on Articles 12(4) and 13(4) of the European Social Charter and point 2 of the Community Charter of the Fundamental Social Rights of Workers and reflects the rules arising from Regulation (EEC) No 1408/71 and Regulation (EEC) No 1612/68.

Paragraph 3 draws on Article 13 of the European Social Charter and Articles 30 and 31 of the revised Social Charter and point 10 of the Community Charter. The Union must respect it in the context of policies based on Article 153 of the Treaty on the Functioning of the European Union.

Explanation on Article 35 — Health care

The principles set out in this Article are based on Article 152 of the EC Treaty, now replaced by Article 168 of the Treaty on the Functioning of the European Union, and on Articles 11 and 13 of the European Social Charter. The second sentence of the Article takes over Article 168(1).

Explanation on Article 36 — Access to services of general economic interest

This Article is fully in line with Article 14 of the Treaty on the Functioning of the European Union and does not create any new right. It merely sets out the principle of respect by the Union for the access to services of general economic interest as provided for by national provisions, when those provisions are compatible with Union law.

Explanation on Article 37 — Environmental protection

The principles set out in this Article have been based on Articles 2, 6 and 174 of the EC Treaty, which have now been replaced by Article 3(3) of the Treaty on European Union and Articles 11 and 191 of the Treaty on the Functioning of the European Union.

It also draws on the provisions of some national constitutions.

Explanation on Article 38 — Consumer protection

The principles set out in this Article have been based on Article 169 of the Treaty on the Functioning of the European Union.

TITLE V — CITIZENS' RIGHTS

Explanation on Article 39 — Right to vote and to stand as a candidate at elections to the European Parliament

Article 39 applies under the conditions laid down in the Treaties, in accordance with Article 52(2) of the Charter. Article 39(1) corresponds to the right guaranteed in Article 20(2) of the Treaty on the Functioning of the European Union (cf. also the legal base in Article 22 of the Treaty on the Functioning of the European Union for the adoption of detailed arrangements for the exercise of that right) and Article 39(2) corresponds to Article 14(3) of the Treaty on European Union. Article 39(2) takes over the basic principles of the electoral system in a democratic State.

Explanation on Article 40 — Right to vote and to stand as a candidate at municipal elections

This Article corresponds to the right guaranteed by Article 20(2) of the Treaty on the Functioning of the European Union (cf. also the legal base in Article 22 of the Treaty on the Functioning of the European Union for the adoption of detailed arrangements for the exercise of that right). In accordance with Article 52(2) of the Charter, it applies under the conditions defined in these Articles in the Treaties.

Explanation on Article 41 — Right to good administration

Article 41 is based on the existence of the Union as subject to the rule of law whose characteristics were developed in the case-law which enshrined *inter alia* good administration as a general principle of law (see *inter alia* Court of Justice judgment of 31 March 1992 in Case C-255/90 P *Burban* [1992] ECR I-2253, and Court of First Instance judgments of 18 September 1995 in Case T-167/94 *Nölle* [1995] ECR II-2589, and 9 July 1999 in Case T-231/97 *New Europe Consulting and others* [1999] ECR II-2403). The wording for that right in the first two paragraphs results from the case-law (Court of Justice judgment of 15 October 1987 in Case 222/86 *Heylens* [1987] ECR 4097, paragraph 15 of the grounds, judgment of 18 October 1989 in Case 374/87 *Orkem* [1989] ECR 3283, judgment of 21 November 1991 in Case C-269/90 *TU München* [1991] ECR I-5469, and Court of First Instance judgments of 6 December 1994 in Case T-450/93 *Lisrestal* [1994] ECR II-1177, 18 September 1995 in Case T-167/94 *Nölle* [1995] ECR II-2589) and the wording regarding the obligation to give reasons comes from Article 296 of the Treaty on the Functioning of the European Union (cf. also the legal base in Article 298 of the Treaty on the Functioning of the European Union for the adoption of legislation in the interest of an open, efficient and independent European administration).

Paragraph 3 reproduces the right now guaranteed by Article 340 of the Treaty on the Functioning of the European Union. Paragraph 4 reproduces the right now guaranteed by Article 20(2)(d) and Article 25 of the Treaty on the Functioning of the European Union. In accordance with Article 52(2) of the Charter, those rights are to be applied under the conditions and within the limits defined by the Treaties.

The right to an effective remedy, which is an important aspect of this question, is guaranteed in Article 47 of this Charter.

Explanation on Article 42 — Right of access to documents

The right guaranteed in this Article has been taken over from Article 255 of the EC Treaty, on the basis of which Regulation (EC) No 1049/2001 has subsequently been adopted. The European Convention has extended this right to documents of institutions, bodies and agencies generally, regardless of their form (see Article 15(3) of the Treaty on the Functioning of the European Union). In accordance with Article 52(2) of the Charter, the right of access to documents is exercised under the conditions and within the limits for which provision is made in Article 15(3) of the Treaty on the Functioning of the European Union.

Explanation on Article 43 — European Ombudsman

The right guaranteed in this Article is the right guaranteed by Articles 20 and 228 of the Treaty on the Functioning of the European Union. In accordance with Article 52(2) of the Charter, it applies under the conditions defined in these two Articles.

Explanation on Article 44 — Right to petition

The right guaranteed in this Article is the right guaranteed by Articles 20 and 227 of the Treaty on the Functioning of the European Union. In accordance with Article 52(2) of the Charter, it applies under the conditions defined in these two Articles.

Explanation on Article 45 — Freedom of movement and of residence

The right guaranteed by paragraph 1 is the right guaranteed by Article 20(2)(a) of the Treaty on the Functioning of the European Union (cf. also the legal base in Article 21; and the judgment of the Court of Justice of 17 September 2002, Case C-413/99 *Baumbast* [2002] ECR I-7091). In accordance with Article 52(2) of the Charter, those rights are to be applied under the conditions and within the limits defined by the Treaties.

Paragraph 2 refers to the power granted to the Union by Articles 77, 78 and 79 of the Treaty on the Functioning of the European Union. Consequently, the granting of this right depends on the institutions exercising that power.

Explanation on Article 46 — Diplomatic and consular protection

The right guaranteed in this Article is the right guaranteed by Article 20 of the Treaty on the Functioning of the European Union (cf. also the legal base in Article 23). In accordance with Article 52(2) of the Charter, it applies under the conditions defined in these two Articles.

TITLE VI — JUSTICE

Explanation on Article 47 — Right to an effective remedy and to a fair trial

The first paragraph is based on Article 13 of the ECHR:

'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

However, in Union law the protection is more extensive since it guarantees the right to an effective remedy before a court. The Court of Justice enshrined that right in its judgment of 15 May 1986 as a general principle of Union law (Case 222/84 *Johnston* [1986] ECR 1651; see also judgment of 15 October 1987, Case 222/86 *Heylens* [1987] ECR 4097 and judgment of 3 December 1992, Case C-97/91 *Borelli* [1992] ECR I-6313). According to the Court, that general principle of Union law also applies to the Member States when they are implementing Union law. The inclusion of this precedent in the Charter has not been intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to admissibility for direct actions before the Court of Justice of the European Union. The European Convention has considered the Union's system of judicial review including the rules on admissibility, and confirmed them while amending them as to certain aspects, as reflected in Articles 251 to 281 of the Treaty on the Functioning of the European Union, and in particular in the fourth paragraph of Article 263. Article 47 applies to the institutions of the Union and of Member States when they are implementing Union law and does so for all rights guaranteed by Union law.

The second paragraph corresponds to Article 6(1) of the ECHR which reads as follows:

'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

In Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. That is one of the consequences of the fact that the Union is a community based on the rule of law as stated by the Court in Case 294/83, *'Les Verts' v European Parliament* (judgment of 23 April 1986, [1986] ECR 1339). Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union.

With regard to the third paragraph, it should be noted that in accordance with the case-law of the European Court of Human Rights, provision should be made for legal aid where the absence of such aid would make it impossible

to ensure an effective remedy (ECHR judgment of 9 October 1979, Airey, Series A, Volume 32, p. 11). There is also a system of legal assistance for cases before the Court of Justice of the European Union.

Explanation on Article 48 — Presumption of innocence and right of defence

Article 48 is the same as Article 6(2) and (3) of the ECHR, which reads as follows:

'2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a)to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c)to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d)to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e)to have the free assistance of an interpreter if he cannot understand or speak the language used in court.'

In accordance with Article 52(3), this right has the same meaning and scope as the right guaranteed by the ECHR.

Explanation on Article 49 — Principles of legality and proportionality of criminal offences and penalties

This Article follows the traditional rule of the non-retroactivity of laws and criminal sanctions. There has been added the rule of the retroactivity of a more lenient penal law, which exists in a number of Member States and which features in Article 15 of the Covenant on Civil and Political Rights.

Article 7 of the ECHR is worded as follows:

'1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.'

In paragraph 2, the reference to 'civilised' nations has been deleted; this does not change the meaning of this paragraph, which refers to crimes against humanity in particular. In accordance with Article 52(3), the right guaranteed here therefore has the same meaning and scope as the right guaranteed by the ECHR.

Paragraph 3 states the general principle of proportionality between penalties and criminal offences which is enshrined in the common constitutional traditions of the Member States and in the case-law of the Court of Justice of the Communities.

Explanation on Article 50 — Right not to be tried or punished twice in criminal proceedings for the same criminal offence

Article 4 of Protocol No 7 to the ECHR reads as follows:

'1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and the penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention.'

The '*non bis in idem*' rule applies in Union law (see, among the many precedents, the judgment of 5 May 1966, Joined Cases 18/65 and 35/65 *Gutmann v Commission* [1966] ECR 149 and a recent case, the decision of the Court of First Instance of 20 April 1999, Joined Cases T-305/94 and others *Limburgse Vinyl Maatschappij NV v Commission* [1999] ECR II-931). The rule prohibiting cumulation refers to cumulation of two penalties of the same kind, that is to say criminal-law penalties.

In accordance with Article 50, the '*non bis in idem*' rule applies not only within the jurisdiction of one State but also between the jurisdictions of several Member States. That corresponds to the *acquis* in Union law; see Articles 54 to 58 of the Schengen Convention and the judgment of the Court of Justice of 11 February 2003, C-187/01 *Gözütok* [2003] ECR I-1345, Article 7 of the Convention on the Protection of the European Communities' Financial Interests and Article 10 of the Convention on the fight against corruption. The very limited exceptions in those Conventions permitting the Member States to derogate from the '*non bis in idem*' rule are covered by the horizontal clause in Article 52(1) of the Charter concerning limitations. As regards the situations referred to by Article 4 of Protocol No 7, namely the application of the principle within the same Member State, the guaranteed right has the same meaning and the same scope as the corresponding right in the ECHR.

TITLE VII — GENERAL PROVISIONS GOVERNING THE INTERPRETATION AND APPLICATION OF THE CHARTER

Explanation on Article 51 — Field of application

The aim of Article 51 is to determine the scope of the Charter. It seeks to establish clearly that the Charter applies primarily to the institutions and bodies of the Union, in compliance with the principle of subsidiarity. This provision was drafted in keeping with Article 6(2) of the Treaty on European Union, which required the Union to respect fundamental rights, and with the mandate issued by the Cologne European Council. The term 'institutions' is enshrined in the Treaties. The expression 'bodies, offices and agencies' is commonly used in the Treaties to refer to all the authorities set up by the Treaties or by secondary legislation (see, e.g., Articles 15 or 16 of the Treaty on the Functioning of the European Union).

As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law (judgment of 13 July 1989, Case 5/88 *Wachauf* [1989] ECR 2609; judgment of 18 June 1991, Case C-260/89 *ERT* [1991] ECR I-2925; judgment of 18 December 1997, Case C-309/96 *Annibaldi* [1997] ECR I-7493). The Court of Justice confirmed this case-law in the following terms: 'In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules ...' (judgment of 13 April 2000, Case C-292/97 [2000] ECR I-2737, paragraph 37 of the grounds). Of course this rule, as enshrined in this Charter, applies to the central authorities as well as to regional or local bodies, and to public organisations, when they are implementing Union law.

Paragraph 2, together with the second sentence of paragraph 1, confirms that the Charter may not have the effect of extending the competences and tasks which the Treaties confer on the Union. Explicit mention is made here of the logical consequences of the principle of subsidiarity and of the fact that the Union only has those powers which have been conferred upon it. The fundamental rights as guaranteed in the Union do not have any effect other than in the context of the powers determined by the Treaties. Consequently, an obligation, pursuant to the second sentence of paragraph 1, for the Union's institutions to promote principles laid down in the Charter may arise only within the limits of these same powers.

Paragraph 2 also confirms that the Charter may not have the effect of extending the field of application of Union law beyond the powers of the Union as established in the Treaties. The Court of Justice has already established this rule with respect to the fundamental rights recognised as part of Union law (judgment of 17 February 1998, C-249/96 *Grant* [1998] ECR I-621, paragraph 45 of the grounds). In accordance with this rule, it goes without saying that the reference to the Charter in Article 6 of the Treaty on European Union cannot be understood as extending by itself the range of Member State action considered to be 'implementation of Union law' (within the meaning of paragraph 1 and the above-mentioned case-law).

Explanation on Article 52 — Scope and interpretation of rights and principles

The purpose of Article 52 is to set the scope of the rights and principles of the Charter, and to lay down rules for their interpretation. Paragraph 1 deals with the arrangements for the limitation of rights. The wording is based on

the case-law of the Court of Justice: '... it is well established in the case-law of the Court that restrictions may be imposed on the exercise of fundamental rights, in particular in the context of a common organisation of the market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights' (judgment of 13 April 2000, Case C-292/97, paragraph 45 of the grounds). The reference to general interests recognised by the Union covers both the objectives mentioned in Article 3 of the Treaty on European Union and other interests protected by specific provisions of the Treaties such as Article 4(1) of the Treaty on European Union and Articles 35(3), 36 and 346 of the Treaty on the Functioning of the European Union.

Paragraph 2 refers to rights which were already expressly guaranteed in the Treaty establishing the European Community and have been recognised in the Charter, and which are now found in the Treaties (notably the rights derived from Union citizenship). It clarifies that such rights remain subject to the conditions and limits applicable to the Union law on which they are based, and for which provision is made in the Treaties. The Charter does not alter the system of rights conferred by the EC Treaty and taken over by the Treaties.

Paragraph 3 is intended to ensure the necessary consistency between the Charter and the ECHR by establishing the rule that, in so far as the rights in the present Charter also correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the ECHR. This means in particular that the legislator, in laying down limitations to those rights, must comply with the same standards as are fixed by the detailed limitation arrangements laid down in the ECHR, which are thus made applicable for the rights covered by this paragraph, without thereby adversely affecting the autonomy of Union law and of that of the Court of Justice of the European Union.

The reference to the ECHR covers both the Convention and the Protocols to it. The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights and by the Court of Justice of the European Union. The last sentence of the paragraph is designed to allow the Union to guarantee more extensive protection. In any event, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR.

The Charter does not affect the possibilities of Member States to avail themselves of Article 15 ECHR, allowing derogations from ECHR rights in the event of war or of other public dangers threatening the life of the nation, when they take action in the areas of national defence in the event of war and of the maintenance of law and order, in accordance with their responsibilities recognised in Article 4(1) of the Treaty on European Union and in Articles 72 and 347 of the Treaty on the Functioning of the European Union.

The list of rights which may at the present stage, without precluding developments in the law, legislation and the Treaties, be regarded as corresponding to rights in the ECHR within the meaning of the present paragraph is given hereafter. It does not include rights additional to those in the ECHR.

1.Articles of the Charter where both the meaning and the scope are the same as the corresponding Articles of the ECHR:

— Article 2 corresponds to Article 2 of the ECHR,

— Article 4 corresponds to Article 3 of the ECHR,

— Article 5(1) and (2) corresponds to Article 4 of the ECHR,

— Article 6 corresponds to Article 5 of the ECHR,

— Article 7 corresponds to Article 8 of the ECHR,

— Article 10(1) corresponds to Article 9 of the ECHR,

—Article 11 corresponds to Article 10 of the ECHR without prejudice to any restrictions which Union law may impose on Member States' right to introduce the licensing arrangements referred to in the third sentence of Article 10(1) of the ECHR,

— Article 17 corresponds to Article 1 of the Protocol to the ECHR,

— Article 19(1) corresponds to Article 4 of Protocol No 4,

—Article 19(2) corresponds to Article 3 of the ECHR as interpreted by the European Court of Human Rights,

— Article 48 corresponds to Article 6(2) and(3) of the ECHR,

—Article 49(1) (with the exception of the last sentence) and (2) correspond to Article 7 of the ECHR.

2.Articles where the meaning is the same as the corresponding Articles of the ECHR, but where the scope is wider:

—Article 9 covers the same field as Article 12 of the ECHR, but its scope may be extended to other forms of marriage if these are established by national legislation,

—Article 12(1) corresponds to Article 11 of the ECHR, but its scope is extended to European Union level,

—Article 14(1) corresponds to Article 2 of the Protocol to the ECHR, but its scope is extended to cover access to vocational and continuing training,

—Article 14(3) corresponds to Article 2 of the Protocol to the ECHR as regards the rights of parents,

—Article 47(2) and (3) corresponds to Article 6(1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards Union law and its implementation,

—Article 50 corresponds to Article 4 of Protocol No 7 to the ECHR, but its scope is extended to European Union level between the Courts of the Member States,

—Finally, citizens of the European Union may not be considered as aliens in the scope of the application of Union law, because of the prohibition of any discrimination on grounds of nationality. The limitations provided for by Article 16 of the ECHR as regards the rights of aliens therefore do not apply to them in this context.

The rule of interpretation contained in paragraph 4 has been based on the wording of Article 6(3) of the Treaty on European Union and takes due account of the approach to common constitutional traditions followed by the Court of Justice (e.g., judgment of 13 December 1979, Case 44/79 *Hauer* [1979] ECR 3727; judgment of 18 May 1982, Case 155/79 *AM&S* [1982] ECR 1575). Under that rule, rather than following a rigid approach of 'a lowest common denominator', the Charter rights concerned should be interpreted in a way offering a high standard of protection which is adequate for the law of the Union and in harmony with the common constitutional traditions.

Paragraph 5 clarifies the distinction between 'rights' and 'principles' set out in the Charter. According to that distinction, subjective rights shall be respected, whereas principles shall be observed (Article 51(1)). Principles may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers, and by the Member States only when they implement Union law); accordingly, they become significant for the Courts only when such acts are interpreted or reviewed. They do not however give rise to direct claims for positive action by the Union's institutions or Member States authorities. This is consistent both with case-law of the Court of Justice (cf. notably case-law on the 'precautionary principle' in Article 191(2) of the Treaty on the Functioning of the European Union: judgment of the CFI of 11 September 2002, Case T-13/99 *Pfizer v Council*, with numerous references to earlier case-law; and a series of judgments on Article 33 (ex-39) on the principles of agricultural law, e.g. judgment of the Court of Justice in Case 265/85 *Van den Berg* [1987] ECR 1155: scrutiny of the principle of market stabilisation and of reasonable expectations) and with the approach of the Member States' constitutional systems to 'principles', particularly in the field of social law. For illustration, examples for principles, recognised in the Charter include e.g. Articles 25, 26 and 37. In some cases, an Article of the Charter may contain both elements of a right and of a principle, e.g. Articles 23, 33 and 34.

Paragraph 6 refers to the various Articles in the Charter which, in the spirit of subsidiarity, make reference to national laws and practices.

Explanation on Article 53 — Level of protection

This provision is intended to maintain the level of protection currently afforded within their respective scope by Union law, national law and international law. Owing to its importance, mention is made of the ECHR.

Explanation on Article 54 — Prohibition of abuse of rights

This Article corresponds to Article 17 of the ECHR:

‘Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.’.

(1) Editor's note: References to article numbers in the Treaties have been updated and some minor technical errors have been corrected.

TITLE III
REFERENCES FOR A PRELIMINARY RULING

Chapter 1
GENERAL PROVISIONS

Article 93

Scope

The procedure shall be governed by the provisions of this Title:

(a) in the cases covered by Article 23 of the Statute,

(b) as regards references for interpretation which may be provided for by agreements to which the European Union or the Member States are parties.

Article 94

Content of the request for a preliminary ruling

In addition to the text of the questions referred to the Court for a preliminary ruling, the request for a preliminary ruling shall contain:

(a) a summary of the subject-matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based;

(b) the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law;

(c) a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

Article 95

Anonymity

1. Where anonymity has been granted by the referring court or tribunal, the Court shall respect that anonymity in the proceedings pending before it.

2. At the request of the referring court or tribunal, at the duly reasoned request of a party to the main proceedings or of its own motion, the Court may also, if it considers it necessary, render anonymous one or more persons or entities concerned by the case.

Article 96

Participation in preliminary ruling proceedings

1. Pursuant to Article 23 of the Statute, the following shall be authorised to submit observations to the Court:

(a) the parties to the main proceedings,

(b) the Member States,

(c) the European Commission,

(d) the institution which adopted the act the validity or interpretation of which is in dispute,

(e) the States, other than the Member States, which are parties to the EEA Agreement, and also the EFTA Surveillance Authority, where a question concerning one of the fields of application of that Agreement is referred to the Court for a preliminary ruling,

(f) non-Member States which are parties to an agreement relating to a specific subject-matter, concluded with the Council, where the agreement so provides and where a court or tribunal of a Member State refers to the Court of Justice for a preliminary ruling a question falling within the scope of that agreement.

2. Non-participation in the written part of the procedure does not preclude participation in the oral part of the procedure.

Article 97

Parties to the main proceedings

1. The parties to the main proceedings are those who are determined as such by the referring court or tribunal in accordance with national rules of procedure.

2. Where the referring court or tribunal informs the Court that a new party has been admitted to the main proceedings, when the proceedings before the Court are already pending, that party must accept the case as he finds it at the time when the Court was so informed. That party shall receive a copy of every procedural document already served on the interested persons referred to in Article 23 of the Statute.

3. As regards the representation and attendance of the parties to the main proceedings, the Court shall take account of the rules of procedure in force before the court or tribunal which made the reference. In the event of any doubt as to whether a person may under national law represent a party to the main proceedings, the Court may obtain information from the referring court or tribunal on the rules of procedure applicable.

TITLE III
PROCEDURE BEFORE THE COURT OF JUSTICE

Article 19

The Member States and the institutions of the Union shall be represented before the Court of Justice by an agent appointed for each case; the agent may be assisted by an adviser or by a lawyer.

The States, other than the Member States, which are parties to the Agreement on the European Economic Area and also the EFTA Surveillance Authority referred to in that Agreement shall be represented in same manner.

Other parties must be represented by a lawyer.

Only a lawyer authorised to practise before a court of a Member State or of another State which is a party to the Agreement on the European Economic Area may represent or assist a party before the Court.

Such agents, advisers and lawyers shall, when they appear before the Court, enjoy the rights and immunities necessary to the independent exercise of their duties, under conditions laid down in the Rules of Procedure.

As regards such advisers and lawyers who appear before it, the Court shall have the powers normally accorded to courts of law, under conditions laid down in the Rules of Procedure.

University teachers being nationals of a Member State whose law accords them a right of audience shall have the same rights before the Court as are accorded by this Article to lawyers.

Article 20

The procedure before the Court of Justice shall consist of two parts: written and oral.

The written procedure shall consist of the communication to the parties and to the institutions of the Union whose decisions are in dispute, of applications, statements of case, defences and observations, and of replies, if any, as well as of all papers and documents in support or of certified copies of them.

Communications shall be made by the Registrar in the order and within the time laid down in the Rules of Procedure.

The oral procedure shall consist of the hearing by the Court of agents, advisers and lawyers and of the submissions of the Advocate-General, as well as the hearing, if any, of witnesses and experts.

Where it considers that the case raises no new point of law, the Court may decide, after hearing the Advocate-General, that the case shall be determined without a submission from the Advocate-General.

Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision (2002/584/JHA):

Council Framework Decision

of 13 June 2002

on the European arrest warrant and the surrender procedures between Member States

(2002/584/JHA)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 31(a) and (b) and Article 34(2)(b) thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Whereas:

(1) According to the Conclusions of the Tampere European Council of 15 and 16 October 1999, and in particular point 35 thereof, the formal extradition procedure should be abolished among the Member States in respect of persons who are fleeing from justice after having been finally sentenced and extradition procedures should be speeded up in respect of persons suspected of having committed an offence.

(2) The programme of measures to implement the principle of mutual recognition of criminal decisions envisaged in point 37 of the Tampere European Council Conclusions and adopted by the Council on 30 November 2000(3), addresses the matter of mutual enforcement of arrest warrants.

(3) All or some Member States are parties to a number of conventions in the field of extradition, including the European Convention on extradition of 13 December 1957 and the European Convention on the suppression of terrorism of 27 January 1977. The Nordic States have extradition laws with identical wording.

(4) In addition, the following three Conventions dealing in whole or in part with extradition have been agreed upon among Member States and form part of the Union acquis: the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at their common borders(4) (regarding relations between the Member States which are parties to that Convention), the Convention of 10 March 1995 on simplified extradition procedure between the Member States of the European Union(5) and the Convention of 27 September 1996 relating to extradition between the Member States of the European Union(6).

(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 of the Treaty on European Union and Article 5 of the Treaty establishing the European Community. 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 means 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.

(9) The role of central authorities in the execution of a European arrest warrant must be limited to practical and administrative assistance.

(10) The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.

(11) In relations between Member States, the European arrest warrant should replace all the previous instruments concerning extradition, including the provisions of Title III of the Convention implementing the Schengen Agreement which concern extradition.

(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union(7), in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.

This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.

(13) No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

(14) Since all Member States have ratified the Council of Europe Convention of 28 January 1981 for the protection of individuals with regard to automatic processing of personal data, the personal data processed in the context of the implementation of this Framework Decision should be protected in accordance with the principles of the said Convention,

HAS ADOPTED THIS FRAMEWORK DECISION:

CHAPTER 1

GENERAL PRINCIPLES

Article 1

Definition of the European arrest warrant and obligation to execute it

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 modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

Article 2

Scope of the European arrest warrant

1. A European arrest warrant may be issued 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 or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.

2. The following offences, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant:

- participation in a criminal organisation,

- terrorism,

- trafficking in human beings,

- sexual exploitation of children and child pornography,

- illicit trafficking in narcotic drugs and psychotropic substances,

- illicit trafficking in weapons, munitions and explosives,

- corruption,

- fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests,

- laundering of the proceeds of crime,

- counterfeiting currency, including of the euro,

- computer-related crime,

- environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,

- facilitation of unauthorised entry and residence,

- murder, grievous bodily injury,

- illicit trade in human organs and tissue,

- kidnapping, illegal restraint and hostage-taking,

- racism and xenophobia,

- organised or armed robbery,

- illicit trafficking in cultural goods, including antiques and works of art,

- swindling,

- racketeering and extortion,

- counterfeiting and piracy of products,

- forgery of administrative documents and trafficking therein,

- forgery of means of payment,

- illicit trafficking in hormonal substances and other growth promoters,

- illicit trafficking in nuclear or radioactive materials,

- trafficking in stolen vehicles,

- rape,

- arson,

- crimes within the jurisdiction of the International Criminal Court,

- unlawful seizure of aircraft/ships,

- sabotage.

3. The Council may decide at any time, acting unanimously after consultation of the European Parliament under the conditions laid down in Article 39(1) of the Treaty on European Union (TEU), to add other categories of offence to the list contained in paragraph 2. The Council shall examine, in the light of the report submitted by the Commission pursuant to Article 34(3), whether the list should be extended or amended.

4. 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.

Article 3

Grounds for mandatory non-execution of the European arrest warrant

The judicial authority of the Member State of execution (hereinafter "executing judicial authority") shall refuse to execute the European arrest warrant in the following cases:

1. if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law;

2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;

3. if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State.

Article 4

Grounds for optional non-execution of the European arrest warrant

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

1. if, in one of the cases referred to in Article 2(4), the act on which the European arrest warrant is based does not constitute an offence under the law of the executing Member State; however, in relation to taxes or duties, customs and exchange, execution of the European arrest warrant shall not be refused on the ground that the law of the executing Member State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the issuing Member State;

2. where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based;

3. where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings;

4. where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law;

5. if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country;

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;

7. where the European arrest warrant relates to offences which:

(a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or

(b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.

Article 5

Guarantees to be given by the issuing Member State in particular cases

The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions:

1. where the European arrest warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered in absentia and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment;

2. if the offence on the basis of which the European arrest warrant has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure;

3. where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.

Article 6

Determination of the competent judicial authorities

1. The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State.

2. The executing judicial authority shall be the judicial authority of the executing Member State which is competent to execute the European arrest warrant by virtue of the law of that State.

3. Each Member State shall inform the General Secretariat of the Council of the competent judicial authority under its law.

Article 7

Recourse to the central authority

1. Each Member State may designate a central authority or, when its legal system so provides, more than one central authority to assist the competent judicial authorities.

2. A Member State may, if it is necessary as a result of the organisation of its internal judicial system, make its central authority(ies) responsible for the administrative transmission and reception of European arrest warrants as well as for all other official correspondence relating thereto.

Member State wishing to make use of the possibilities referred to in this Article shall communicate to the General Secretariat of the Council information relating to the designated central authority or central authorities. These indications shall be binding upon all the authorities of the issuing Member State.

Article 8

Content and form of the European arrest warrant

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

(a) the identity and nationality of the requested person;

(b) the name, address, telephone and fax numbers and e-mail address of the issuing judicial authority;

(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;

(d) the nature and legal classification of the offence, particularly in respect of Article 2;

(e) a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person;

(f) the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State;

(g) if possible, other consequences of the offence.

2. The European arrest warrant must be translated into the official language or one of the official languages of the executing Member State. Any Member State may, when this Framework Decision is adopted or at a later date, state in a declaration deposited with the General Secretariat of the Council that it will accept a translation in one or more other official languages of the Institutions of the European Communities.

CHAPTER 2

SURRENDER PROCEDURE

Article 9

Transmission of a European arrest warrant

1. When the location of the requested person is known, the issuing judicial authority may transmit the European arrest warrant directly to the executing judicial authority.

2. The issuing judicial authority may, in any event, decide to issue an alert for the requested person in the Schengen Information System (SIS).

3. Such an alert shall be effected in accordance with the provisions of Article 95 of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of controls at common borders. An alert in the Schengen Information System shall be equivalent to a European arrest warrant accompanied by the information set out in Article 8(1).

For a transitional period, until the SIS is capable of transmitting all the information described in Article 8, the alert shall be equivalent to a European arrest warrant pending the receipt of the original in due and proper form by the executing judicial authority.

Article 10

Detailed procedures for transmitting a European arrest warrant

1. If the issuing judicial authority does not know the competent executing judicial authority, it shall make the requisite enquiries, including through the contact points of the European Judicial Network(8), in order to obtain that information from the executing Member State.

2. If the issuing judicial authority so wishes, transmission may be effected via the secure telecommunications system of the European Judicial Network.

3. If it is not possible to call on the services of the SIS, the issuing judicial authority may call on Interpol to transmit a European arrest warrant.

4. The issuing judicial authority may forward the European arrest warrant by any secure means capable of producing written records under conditions allowing the executing Member State to establish its authenticity.

5. All difficulties concerning the transmission or the authenticity of any document needed for the execution of the European arrest warrant shall be dealt with by direct contacts between the judicial authorities involved, or, where appropriate, with the involvement of the central authorities of the Member States.

6. If the authority which receives a European arrest warrant is not competent to act upon it, it shall automatically forward the European arrest warrant to the competent authority in its Member State and shall inform the issuing judicial authority accordingly.

Article 11

Rights of a requested person

1. When a requested person is arrested, the executing competent judicial authority shall, in accordance with its national law, inform that person of the European arrest warrant and of its contents, and also of the possibility of consenting to surrender to the issuing judicial authority.

2. A requested person who is arrested for the purpose of the execution of a European arrest warrant shall have a right to be assisted by a legal counsel and by an interpreter in accordance with the national law of the executing Member State.

Article 12

Keeping the person in detention

When a person is arrested on the basis of a European arrest warrant, the executing judicial authority shall take a decision on whether the requested person should remain in detention, in accordance with the law of the executing Member State. The person may be released provisionally at any time in conformity with the domestic law of the executing Member State, provided that the competent authority of the said Member State takes all the measures it deems necessary to prevent the person absconding.

Article 13

Consent to surrender

1. If the arrested person indicates that he or she consents to surrender, that consent and, if appropriate, express renunciation of entitlement to the "speciality rule", referred to in Article 27(2), shall be given before the executing judicial authority, in accordance with the domestic law of the executing Member State.

2. Each Member State shall adopt the measures necessary to ensure that consent and, where appropriate, renunciation, as referred to in paragraph 1, are established in such a way as to show that the person concerned has expressed them voluntarily and in full awareness of the consequences. To that end, the requested person shall have the right to legal counsel.

3. The consent and, where appropriate, renunciation, as referred to in paragraph 1, shall be formally recorded in accordance with the procedure laid down by the domestic law of the executing Member State.

4. In principle, consent may not be revoked. Each Member State may provide that consent and, if appropriate, renunciation may be revoked, in accordance with the rules applicable under its domestic law. In this case, the period between the date of consent and that of its revocation shall not be taken into consideration in establishing the time limits laid down in Article 17. A Member State which wishes to have recourse to this possibility shall inform the General Secretariat of the Council accordingly when this Framework Decision is adopted and shall specify the procedures whereby revocation of consent shall be possible and any amendment to them.

Article 14

Hearing of the requested person

Where the arrested person does not consent to his or her surrender as referred to in Article 13, he or she shall be entitled to be heard by the executing judicial authority, in accordance with the law of the executing Member State.

Article 15

Surrender decision

1. The executing judicial authority shall decide, within the time-limits and under the conditions defined in this Framework Decision, whether the person is to be surrendered.

2. 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.

3. The issuing judicial authority may at any time forward any additional useful information to the executing judicial authority.

Article 16

Decision in the event of multiple requests

1. If two or more Member States have issued European arrest warrants for the same person, the decision on which of the European arrest warrants shall be executed shall be taken by the executing judicial authority with due consideration of all the circumstances and especially the relative seriousness and place of the offences, the respective dates of the European arrest warrants and whether the warrant has been issued for the purposes of prosecution or for execution of a custodial sentence or detention order.

2. The executing judicial authority may seek the advice of Eurojust(9) when making the choice referred to in paragraph 1.

3. In the event of a conflict between a European arrest warrant and a request for extradition presented by a third country, the decision on whether the European arrest warrant or the extradition request takes precedence shall be taken by the competent authority of the executing Member State with due consideration of all the circumstances, in particular those referred to in paragraph 1 and those mentioned in the applicable convention.

4. This Article shall be without prejudice to Member States' obligations under the Statute of the International Criminal Court.

Article 17

Time limits and procedures for the decision to execute the European arrest warrant

1. A European arrest warrant shall be dealt with and executed as a matter of urgency.

2. In cases where the requested person consents to his surrender, the final decision on the execution of the European arrest warrant should be taken within a period of 10 days after consent has been given.

3. In other cases, the final decision on the execution of the European arrest warrant should be taken within a period of 60 days after the arrest of the requested person.

4. Where in specific cases the European arrest warrant cannot be executed within the time limits laid down in paragraphs 2 or 3, the executing judicial authority shall immediately inform the issuing judicial authority thereof, giving the reasons for the delay. In such case, the time limits may be extended by a further 30 days.

5. As long as the executing judicial authority has not taken a final decision on the European arrest warrant, it shall ensure that the material conditions necessary for effective surrender of the person remain fulfilled.

6. Reasons must be given for any refusal to execute a European arrest warrant.

7. Where in exceptional circumstances a Member State cannot observe the time limits provided for in this Article, it shall inform Eurojust, giving the reasons for the delay. In addition, a Member State which has experienced repeated delays on the part of another Member State in the execution of European arrest warrants shall inform the Council with a view to evaluating the implementation of this Framework Decision at Member State level.

Article 18

Situation pending the decision

1. Where the European arrest warrant has been issued for the purpose of conducting a criminal prosecution, the executing judicial authority must:

(a) either agree that the requested person should be heard according to Article 19;

(b) or agree to the temporary transfer of the requested person.

2. The conditions and the duration of the temporary transfer shall be determined by mutual agreement between the issuing and executing judicial authorities.

3. In the case of temporary transfer, the person must be able to return to the executing Member State to attend hearings concerning him or her as part of the surrender procedure.

Article 19

Hearing the person pending the decision

1. The requested person shall be heard by a judicial authority, assisted by another person designated in accordance with the law of the Member State of the requesting court.

2. The requested person shall be heard in accordance with the law of the executing Member State and with the conditions determined by mutual agreement between the issuing and executing judicial authorities.

3. The competent executing judicial authority may assign another judicial authority of its Member State to take part in the hearing of the requested person in order to ensure the proper application of this Article and of the conditions laid down.

Article 20

Privileges and immunities

1. Where the requested person enjoys a privilege or immunity regarding jurisdiction or execution in the executing Member State, the time limits referred to in Article 17 shall not start running unless, and counting from the day when, the executing judicial authority is informed of the fact that the privilege or immunity has been waived.

The executing Member State shall ensure that the material conditions necessary for effective surrender are fulfilled when the person no longer enjoys such privilege or immunity.

2. Where power to waive the privilege or immunity lies with an authority of the executing Member State, the executing judicial authority shall request it to exercise that power forthwith. Where power to waive the privilege or immunity lies with an authority of another State or international organisation, it shall be for the issuing judicial authority to request it to exercise that power.

Article 21

Competing international obligations

This Framework Decision shall not prejudice the obligations of the executing Member State where the requested person has been extradited to that Member State from a third State and where that person is protected by provisions of the arrangement under which he or she was extradited concerning speciality. The executing Member State shall take all necessary measures for requesting forthwith the consent of the State from which the requested person was extradited so that he or she can be surrendered to the Member State which issued the European arrest warrant. The time limits referred to in Article 17 shall not start running until the day on which these speciality rules cease to apply. Pending the decision of the State from which the requested person was extradited, the executing Member State will ensure that the material conditions necessary for effective surrender remain fulfilled.

Article 22

Notification of the decision

The executing judicial authority shall notify the issuing judicial authority immediately of the decision on the action to be taken on the European arrest warrant.

Article 23

Time limits for surrender of the person

1. The person requested shall be surrendered as soon as possible on a date agreed between the authorities concerned.

2. He or she shall be surrendered no later than 10 days after the final decision on the execution of the European arrest warrant.

3. If the surrender of the requested person within the period laid down in paragraph 2 is prevented by circumstances beyond the control of any of the Member States, the executing and issuing judicial authorities shall immediately contact each other and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.

4. The surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health. The execution of the European arrest warrant shall take place as soon as these grounds have ceased to exist. The executing judicial authority shall immediately inform the issuing judicial authority and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.

5. Upon expiry of the time limits referred to in paragraphs 2 to 4, if the person is still being held in custody he shall be released.

Article 24

Postponed or conditional surrender

1. The executing judicial authority may, after deciding to execute the European arrest warrant, postpone the surrender of the requested person so that he or she may be prosecuted in the executing Member State or, if he or she has already been sentenced, so that he or she may serve, in its territory, a sentence passed for an act other than that referred to in the European arrest warrant.

2. Instead of postponing the surrender, the executing judicial authority may temporarily surrender the requested person to the issuing Member State under conditions to be determined by mutual agreement between the executing and the issuing judicial authorities. The agreement shall be made in writing and the conditions shall be binding on all the authorities in the issuing Member State.

Article 25

Transit

1. Each Member State shall, except when it avails itself of the possibility of refusal when the transit of a national or a resident is requested for the purpose of the execution of a custodial sentence or detention order, permit the transit through its territory of a requested person who is being surrendered provided that it has been given information on:

(a) the identity and nationality of the person subject to the European arrest warrant;

(b) the existence of a European arrest warrant;

(c) the nature and legal classification of the offence;

(d) the description of the circumstances of the offence, including the date and place.

Where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the Member State of transit, transit may be subject to the condition that the person, after being heard, is returned to the transit Member State to serve the custodial sentence or detention order passed against him in the issuing Member State.

2. Each Member State shall designate an authority responsible for receiving transit requests and the necessary documents, as well as any other official correspondence relating to transit requests. Member States shall communicate this designation to the General Secretariat of the Council.

3. The transit request and the information set out in paragraph 1 may be addressed to the authority designated pursuant to paragraph 2 by any means capable of producing a written record. The Member State of transit shall notify its decision by the same procedure.

4. This Framework Decision does not apply in the case of transport by air without a scheduled stopover. However, if an unscheduled landing occurs, the issuing Member State shall provide the authority designated pursuant to paragraph 2 with the information provided for in paragraph 1.

5. Where a transit concerns a person who is to be extradited from a third State to a Member State this Article will apply mutatis mutandis. In particular the expression "European arrest warrant" shall be deemed to be replaced by "extradition request".

CHAPTER 3

EFFECTS OF THE SURRENDER

Article 26

Deduction of the period of detention served in the executing Member State

1. The issuing Member State shall deduct all periods of detention arising from the execution of a European arrest warrant from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed.

2. To that end, all information concerning the duration of the detention of the requested person on the basis of the European arrest warrant shall be transmitted by the executing judicial authority or the central authority designated under Article 7 to the issuing judicial authority at the time of the surrender.

Article 27

Possible prosecution for other offences

1. Each Member State may notify the General Secretariat of the Council that, in its relations with other Member States that have given the same notification, consent is presumed to have been given for the prosecution, sentencing or detention with a view to the carrying out of a custodial sentence or detention order for an offence committed prior to his or her surrender, other than that for which he or she was surrendered, unless in a particular case the executing judicial authority states otherwise in its decision on surrender.

2. Except in the cases referred to in paragraphs 1 and 3, a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered.

3. Paragraph 2 does not apply in the following cases:

(a) when the person having had an opportunity to leave the territory of the Member State to which he or she has been surrendered has not done so within 45 days of his or her final discharge, or has returned to that territory after leaving it;

(b) the offence is not punishable by a custodial sentence or detention order;

(c) the criminal proceedings do not give rise to the application of a measure restricting personal liberty;

(d) when the person could be liable to a penalty or a measure not involving the deprivation of liberty, in particular a financial penalty or a measure in lieu thereof, even if the penalty or measure may give rise to a restriction of his or her personal liberty;

(e) when the person consented to be surrendered, where appropriate at the same time as he or she renounced the speciality rule, in accordance with Article 13;

(f) when the person, after his/her surrender, has expressly renounced entitlement to the speciality rule with regard to specific offences preceding his/her surrender. Renunciation shall be given before the competent judicial authorities of the issuing Member State and shall be recorded in accordance with that State's domestic law. The renunciation shall be drawn up in such a way as to make clear that the person has given it voluntarily and in full awareness of the consequences. To that end, the person shall have the right to legal counsel;

(g) where the executing judicial authority which surrendered the person gives its consent in accordance with paragraph 4.

4. A request for consent shall be submitted to the executing judicial authority, accompanied by the information mentioned in Article 8(1) and a translation as referred to in Article 8(2). Consent shall be given when the offence for which it is requested is itself subject to surrender in accordance with the provisions of this Framework Decision. Consent shall be refused on the grounds referred to in Article 3 and otherwise may be refused only on the grounds referred to in Article 4. The decision shall be taken no later than 30 days after receipt of the request.

For the situations mentioned in Article 5 the issuing Member State must give the guarantees provided for therein.

Article 28

Surrender or subsequent extradition

1. Each Member State may notify the General Secretariat of the Council that, in its relations with other Member States which have given the same notification, the consent for the surrender of a person to a Member State other than the executing Member State pursuant to a European arrest warrant issued for an offence committed prior to his or her surrender is presumed to have been given, unless in a particular case the executing judicial authority states otherwise in its decision on surrender.

2. In any case, a person who has been surrendered to the issuing Member State pursuant to a European arrest warrant may, without the consent of the executing Member State, be surrendered to a Member State other than the executing Member State pursuant to a European arrest warrant issued for any offence committed prior to his or her surrender in the following cases:

(a) where the requested person, having had an opportunity to leave the territory of the Member State to which he or she has been surrendered, has not done so within 45 days of his final discharge, or has returned to that territory after leaving it;

(b) where the requested person consents to be surrendered to a Member State other than the executing Member State pursuant to a European arrest warrant. Consent shall be given before the competent judicial authorities of the issuing Member State and shall be recorded in accordance with that State's national law. It shall be drawn up in such a way as to make clear that the person concerned has given it voluntarily and in full awareness of the consequences. To that end, the requested person shall have the right to legal counsel;

(c) where the requested person is not subject to the speciality rule, in accordance with Article 27(3)(a), (e), (f) and (g).

3. The executing judicial authority consents to the surrender to another Member State according to the following rules:

(a) the request for consent shall be submitted in accordance with Article 9, accompanied by the information mentioned in Article 8(1) and a translation as stated in Article 8(2);

(b) consent shall be given when the offence for which it is requested is itself subject to surrender in accordance with the provisions of this Framework Decision;

(c) the decision shall be taken no later than 30 days after receipt of the request;

(d) consent shall be refused on the grounds referred to in Article 3 and otherwise may be refused only on the grounds referred to in Article 4.

For the situations referred to in Article 5, the issuing Member State must give the guarantees provided for therein.

4. Notwithstanding paragraph 1, a person who has been surrendered pursuant to a European arrest warrant shall not be extradited to a third State without the consent of the competent authority of the Member State which surrendered the person. Such consent shall be given in accordance with the Conventions by which that Member State is bound, as well as with its domestic law.

Article 29

Handing over of property

1. At the request of the issuing judicial authority or on its own initiative, the executing judicial authority shall, in accordance with its national law, seize and hand over property which:

(a) may be required as evidence, or

(b) has been acquired by the requested person as a result of the offence.

2. The property referred to in paragraph 1 shall be handed over even if the European arrest warrant cannot be carried out owing to the death or escape of the requested person.

3. If the property referred to in paragraph 1 is liable to seizure or confiscation in the territory of the executing Member State, the latter may, if the property is needed in connection with pending criminal proceedings, temporarily retain it or hand it over to the issuing Member State, on condition that it is returned.

4. Any rights which the executing Member State or third parties may have acquired in the property referred to in paragraph 1 shall be preserved. Where such rights exist, the issuing Member State shall return the property without charge to the executing Member State as soon as the criminal proceedings have been terminated.

Article 30

Expenses

1. Expenses incurred in the territory of the executing Member State for the execution of a European arrest warrant shall be borne by that Member State.

2. All other expenses shall be borne by the issuing Member State.

CHAPTER 4

GENERAL AND FINAL PROVISIONS

Article 31

Relation to other legal instruments

1. Without prejudice to their application in relations between Member States and third States, this Framework Decision shall, from 1 January 2004, replace the corresponding provisions of the following conventions applicable in the field of extradition in relations between the Member States:

(a) the European Convention on Extradition of 13 December 1957, its additional protocol of 15 October 1975, its second additional protocol of 17 March 1978, and the European Convention on the suppression of terrorism of 27 January 1977 as far as extradition is concerned;

(b) the Agreement between the 12 Member States of the European Communities on the simplification and modernisation of methods of transmitting extradition requests of 26 May 1989;

(c) the Convention of 10 March 1995 on simplified extradition procedure between the Member States of the European Union;

(d) the Convention of 27 September 1996 relating to extradition between the Member States of the European Union;

(e) Title III, Chapter 4 of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders.

2. Member States may continue to apply bilateral or multilateral agreements or arrangements in force when this Framework Decision is adopted in so far as such agreements or arrangements allow the objectives of this Framework Decision to be extended or enlarged and help to simplify or facilitate further the procedures for surrender of persons who are the subject of European arrest warrants.

Member States may conclude bilateral or multilateral agreements or arrangements after this Framework Decision has come into force in so far as such agreements or arrangements allow the prescriptions of this Framework Decision to be extended or enlarged and help to simplify or facilitate further the procedures for surrender of persons who are the subject of European arrest warrants, in particular by fixing time limits shorter than those fixed in Article 17, by extending the list of offences laid down in Article 2(2), by further limiting the grounds for refusal set out in Articles 3 and 4, or by lowering the threshold provided for in Article 2(1) or (2).

The agreements and arrangements referred to in the second subparagraph may in no case affect relations with Member States which are not parties to them.

Member States shall, within three months from the entry into force of this Framework Decision, notify the Council and the Commission of the existing agreements and arrangements referred to in the first subparagraph which they wish to continue applying.

Member States shall also notify the Council and the Commission of any new agreement or arrangement as referred to in the second subparagraph, within three months of signing it.

3. Where the conventions or agreements referred to in paragraph 1 apply to the territories of Member States or to territories for whose external relations a Member State is responsible to which this Framework Decision does not apply, these instruments shall continue to govern the relations existing between those territories and the other Members States.

Article 32

Transitional provision

1. Extradition requests received before 1 January 2004 will continue to be governed by existing instruments relating to extradition. Requests received after that date will be governed by the rules adopted by Member States pursuant to this Framework Decision. However, any Member State may, at the time of the adoption of this Framework Decision by the Council, make a statement indicating that as executing Member State it will continue to deal with requests relating to acts committed before a date which it specifies in accordance with the extradition system applicable before 1 January 2004. The date in question may not be later than 7 August 2002. The said statement will be published in the Official Journal of the European Communities. It may be withdrawn at any time.

Article 33

Provisions concerning Austria and Gibraltar

1. As long as Austria has not modified Article 12(1) of the "Auslieferungs- und Rechtshilfegesetz" and, at the latest, until 31 December 2008, it may allow its executing judicial authorities to refuse the enforcement of a European arrest warrant if the requested person is an Austrian citizen and if the act for which the European arrest warrant has been issued is not punishable under Austrian law.

2. This Framework Decision shall apply to Gibraltar.

Article 34

Implementation

1. Member States shall take the necessary measures to comply with the provisions of this Framework Decision by 31 December 2003.

2. Member States shall transmit to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision. When doing so, each Member State may indicate that it will apply immediately this Framework Decision in its relations with those Member States which have given the same notification.

The General Secretariat of the Council shall communicate to the Member States and to the Commission the information received pursuant to Article 7(2), Article 8(2), Article 13(4) and Article 25(2). It shall also have the information published in the Official Journal of the European Communities.

3. On the basis of the information communicated by the General Secretariat of the Council, the Commission shall, by 31 December 2004 at the latest, submit a report to the European Parliament and to the Council on the operation of this Framework Decision, accompanied, where necessary, by legislative proposals.

4. The Council shall in the second half of 2003 conduct a review, in particular of the practical application, of the provisions of this Framework Decision by the Member States as well as the functioning of the Schengen Information System.

Article 35

Entry into force

This Framework Decision shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Communities.

Done at Luxembourg, 13 June 2002.

For the Council

The President

M. Rajoy Brey

(1) OJ C 332 E, 27.11.2001, p. 305.

(2) Opinion delivered on 9 January 2002 (not yet published in the Official Journal).

(3) OJ C 12 E, 15.1.2001, p. 10.

(4) OJ L 239, 22.9.2000, p. 19.

(5) OJ C 78, 30.3.1995, p. 2.

(6) OJ C 313, 13.10.1996, p. 12.

(7) OJ C 364, 18.12.2000, p. 1.

(8) Council Joint Action 98/428/JHA of 29 June 1998 on the creation of a European Judicial Network (OJ L 191, 7.7.1998, p. 4).

(9) Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (OJ L 63, 6.3.2002, p. 1).

ANNEX

EUROPEAN ARREST WARRANT(1)

This warrant has been issued by a competent judicial authority. I request that the person mentioned below be arrested and surrendered for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

(1) This warrant must be written in, or translated into, one of the official languages of the executing Member State, when that State is known, or any other language accepted by that State.

Statements made by certain Member States on the adoption of the Framework Decision

Statements provided for in Article 32

Statement by France:

Pursuant to Article 32 of the framework decision on the European arrest warrant and the surrender procedures between Member States, France states that as executing Member State it will continue to deal with requests relating to acts committed before 1 November 1993, the date of entry into force of the Treaty on European Union signed in Maastricht on 7 February 1992, in accordance with the extradition system applicable before 1 January 2004.

Statement by Italy:

Italy will continue to deal in accordance with the extradition rules in force with all requests relating to acts committed before the date of entry into force of the framework decision on the European arrest warrant, as provided for in Article 32 thereof.

Statement by Austria:

Pursuant to Article 32 of the framework decision on the European arrest warrant and the surrender procedures between Member States, Austria states that as executing Member State it will continue to deal with requests relating to punishable acts committed before the date of entry into force of the framework decision in accordance with the extradition system applicable before that date.

Statements provided for in Article 13(4)

Statement by Belgium:

The consent of the person concerned to his or her surrender may be revoked until the time of surrender.

Statement by Denmark:

Consent to surrender and express renunciation of entitlement to the speciality rule may be revoked in accordance with the relevant rules applicable at any time under Danish law.

Statement by Ireland:

In Ireland, consent to surrender and, where appropriate, express renunciation of the entitlement to the "specialty" rule referred to in Article 27(2) may be revoked. Consent may be revoked in accordance with domestic law until surrender has been executed.

Statement by Finland:

In Finland, consent to surrender and, where appropriate, express renunciation of entitlement to the "speciality rule" referred to in Article 27(2) may be revoked. Consent may be revoked in accordance with domestic law until surrender has been executed.

Statement by Sweden:

Consent or renunciation within the meaning of Article 13(1) may be revoked by the party whose surrender has been requested. Revocation must take place before the decision on surrender is executed.

DIRECTIVE 2010/64/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 20 October 2010

on the right to interpretation and translation in criminal proceedings

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular point (b) of the second subparagraph of Article 82(2) thereof,

Having regard to the initiative of the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand-Duchy of Luxembourg, the Republic of Hungary, the Republic of Austria, the Portuguese Republic, Romania, the Republic of Finland and the Kingdom of Sweden [1],

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure [2],

Whereas:

(1) The Union has set itself the objective of maintaining and developing an area of freedom, security and justice. According to the Presidency Conclusions of the European Council in Tampere of 15 and 16 October 1999, and in particular point 33 thereof, the principle of mutual recognition of judgments and other decisions of judicial authorities should become the cornerstone of judicial cooperation in civil and criminal matters within the Union because enhanced mutual recognition and the necessary approximation of legislation would facilitate cooperation between competent authorities and the judicial protection of individual rights.

(2) On 29 November 2000, the Council, in accordance with the Tampere Conclusions, adopted a programme of measures to implement the principle of mutual recognition of decisions in criminal matters [3]. The introduction to the programme states that mutual recognition is 'designed to strengthen cooperation between Member States but also to enhance the protection of individual rights'.

(3) The implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States have trust in each other's criminal justice systems. The extent of mutual recognition is very much dependent on a number of parameters, which include mechanisms for safeguarding the rights of suspected or accused persons and common minimum standards necessary to facilitate the application of the principle of mutual recognition.

(4) Mutual recognition of decisions in criminal matters can operate effectively only in a spirit of trust in which not only judicial authorities but all actors in the criminal process consider decisions of the judicial authorities of other Member States as equivalent to their own, implying not only trust in the adequacy of other Member States' rules, but also trust that those rules are correctly applied.

(5) Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the ECHR) and Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter the Charter) enshrine the right to a fair trial. Article 48(2) of the Charter guarantees respect for the right of defence. This Directive respects those rights and should be implemented accordingly.

(6) Although all the Member States are party to the ECHR, experience has shown that that alone does not always provide a sufficient degree of trust in the criminal justice systems of other Member States.

(7) Strengthening mutual trust requires a more consistent implementation of the rights and guarantees set out in Article 6 of the ECHR. It also requires, by means of this Directive and other measures, further development within the Union of the minimum standards set out in the ECHR and the Charter.

(8) Article 82(2) of the Treaty on the Functioning of the European Union provides for the establishment of minimum rules applicable in the Member States so as to facilitate mutual recognition of judgments and

judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. Point (b) of the second subparagraph of Article 82(2) refers to 'the rights of individuals in criminal procedure' as one of the areas in which minimum rules may be established.

(9) Common minimum rules should lead to increased confidence in the criminal justice systems of all Member States, which, in turn, should lead to more efficient judicial cooperation in a climate of mutual trust. Such common minimum rules should be established in the fields of interpretation and translation in criminal proceedings.

(10) On 30 November 2009, the Council adopted a resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [4]. Taking a step-by-step approach, the Roadmap called for the adoption of measures regarding the right to translation and interpretation (measure A), the right to information on rights and information about the charges (measure B), the right to legal advice and legal aid (measure C), the right to communication with relatives, employers and consular authorities (measure D), and special safeguards for suspected or accused persons who are vulnerable (measure E).

(11) In the Stockholm programme, adopted on 10 December 2009, the European Council welcomed the Roadmap and made it part of the Stockholm programme (point 2.4). The European Council underlined the non-exhaustive character of the Roadmap, by inviting the Commission to examine further elements of minimum procedural rights for suspected and accused persons, and to assess whether other issues, for instance the presumption of innocence, need to be addressed, in order to promote better cooperation in that area.

(12) This Directive relates to measure A of the Roadmap. It lays down common minimum rules to be applied in the fields of interpretation and translation in criminal proceedings with a view to enhancing mutual trust among Member States.

(13) This Directive draws on the Commission proposal for a Council Framework Decision on the right to interpretation and to translation in criminal proceedings of 8 July 2009, and on the Commission proposal for a Directive of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings of 9 March 2010.

(14) The right to interpretation and translation for those who do not speak or understand the language of the proceedings is enshrined in Article 6 of the ECHR, as interpreted in the case-law of the European Court of Human Rights. This Directive facilitates the application of that right in practice. To that end, the aim of this Directive is to ensure the right of suspected or accused persons to interpretation and translation in criminal proceedings with a view to ensuring their right to a fair trial.

(15) The rights provided for in this Directive should also apply, as necessary accompanying measures, to the execution of a European arrest warrant [5] within the limits provided for by this Directive. Executing Members States should provide, and bear the costs of, interpretation and translation for the benefit of the requested persons who do not speak or understand the language of the proceedings.

(16) In some Member States an authority other than a court having jurisdiction in criminal matters has competence for imposing sanctions in relation to relatively minor offences. That may be the case, for example, in relation to traffic offences which are committed on a large scale and which might be established following a traffic control. In such situations, it would be unreasonable to require that the competent authority ensure all the rights under this Directive. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by such an authority and there is a right of appeal to a court having jurisdiction in criminal matters, this Directive should therefore apply only to the proceedings before that court following such an appeal.

(17) This Directive should ensure that there is free and adequate linguistic assistance, allowing suspected or accused persons who do not speak or understand the language of the criminal proceedings fully to exercise their right of defence and safeguarding the fairness of the proceedings.

(18) Interpretation for the benefit of the suspected or accused persons should be provided without delay. However, where a certain period of time elapses before interpretation is provided, that should not constitute an infringement of the requirement that interpretation be provided without delay, as long as that period of time is reasonable in the circumstances.

(19) Communication between suspected or accused persons and their legal counsel should be interpreted in accordance with this Directive. Suspected or accused persons should be able, inter alia, to explain their version of the events to their legal counsel, point out any statements with which they disagree and make their legal counsel aware of any facts that should be put forward in their defence.

(20) For the purposes of the preparation of the defence, communication between suspected or accused persons and their legal counsel in direct connection with any questioning or hearing during the proceedings, or with the lodging of an appeal or other procedural applications, such as an application for bail, should be interpreted where necessary in order to safeguard the fairness of the proceedings.

(21) Member States should ensure that there is a procedure or mechanism in place to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter. Such procedure or mechanism implies that competent authorities verify in any appropriate manner, including by consulting the suspected or accused persons concerned, whether they speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter.

(22) Interpretation and translation under this Directive should be provided in the native language of the suspected or accused persons or in any other language that they speak or understand in order to allow them fully to exercise their right of defence, and in order to safeguard the fairness of the proceedings.

(23) The respect for the right to interpretation and translation contained in this Directive should not compromise any other procedural right provided under national law.

(24) Member States should ensure that control can be exercised over the adequacy of the interpretation and translation provided when the competent authorities have been put on notice in a given case.

(25) The suspected or accused persons or the persons subject to proceedings for the execution of a European arrest warrant should have the right to challenge the finding that there is no need for interpretation, in accordance with procedures in national law. That right does not entail the obligation for Member States to provide for a separate mechanism or complaint procedure in which such finding may be challenged and should not prejudice the time limits applicable to the execution of a European arrest warrant.

(26) When the quality of the interpretation is considered insufficient to ensure the right to a fair trial, the competent authorities should be able to replace the appointed interpreter.

(27) The duty of care towards suspected or accused persons who are in a potentially weak position, in particular because of any physical impairments which affect their ability to communicate effectively, underpins a fair administration of justice. The prosecution, law enforcement and judicial authorities should therefore ensure that such persons are able to exercise effectively the rights provided for in this Directive, for example by taking into account any potential vulnerability that affects their ability to follow the proceedings and to make themselves understood, and by taking appropriate steps to ensure those rights are guaranteed.

(28) When using videoconferencing for the purpose of remote interpretation, the competent authorities should be able to rely on the tools that are being developed in the context of European e-Justice (e.g. information on courts with videoconferencing equipment or manuals).

(29) This Directive should be evaluated in the light of the practical experience gained. If appropriate, it should be amended so as to improve the safeguards which it lays down.

(30) Safeguarding the fairness of the proceedings requires that essential documents, or at least the relevant passages of such documents, be translated for the benefit of suspected or accused persons in accordance with this Directive. Certain documents should always be considered essential for that purpose and should therefore be translated, such as any decision depriving a person of his liberty, any charge or indictment, and any judgment. It is for the competent authorities of the Member States to decide, on their own motion or upon a request of suspected or accused persons or of their legal counsel, which other documents are essential to safeguard the fairness of the proceedings and should therefore be translated as well.

(31) Member States should facilitate access to national databases of legal translators and interpreters where such databases exist. In that context, particular attention should be paid to the aim of providing access to existing databases through the e-Justice portal, as planned in the multiannual European e-Justice action plan 2009-2013 of 27 November 2008 [6].

(32) This Directive should set minimum rules. Member States should be able to extend the rights set out in this Directive in order to provide a higher level of protection also in situations not explicitly dealt with in this Directive. The level of protection should never fall below the standards provided by the ECHR or the Charter as interpreted in the case-law of the European Court of Human Rights or the Court of Justice of the European Union.

(33) The provisions of this Directive that correspond to rights guaranteed by the ECHR or the Charter should be interpreted and implemented consistently with those rights, as interpreted in the relevant case-law of the European Court of Human Rights and the Court of Justice of the European Union.

(34) Since the objective of this Directive, namely establishing common minimum rules, cannot be sufficiently achieved by the Member States and can therefore, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

(35) In accordance with Article 3 of the Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, those Member States have notified their wish to take part in the adoption and application of this Directive.

(36) In accordance with Articles 1 and 2 of the Protocol (No 22) on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Subject matter and scope

1. This Directive lays down rules concerning the right to interpretation and translation in criminal proceedings and proceedings for the execution of a European arrest warrant.

2. The right referred to in paragraph 1 shall apply to persons from the time that they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether they have committed the offence, including, where applicable, sentencing and the resolution of any appeal.

3. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed to such a court, this Directive shall apply only to the proceedings before that court following such an appeal.

4. This Directive does not affect national law concerning the presence of legal counsel during any stage of the criminal proceedings, nor does it affect national law concerning the right of access of a suspected or accused person to documents in criminal proceedings.

Article 2

Right to interpretation

1. Member States shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during

criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings.

2. Member States shall ensure that, where necessary for the purpose of safeguarding the fairness of the proceedings, interpretation is available for communication between suspected or accused persons and their legal counsel in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications.

3. The right to interpretation under paragraphs 1 and 2 includes appropriate assistance for persons with hearing or speech impediments.

4. Member States shall ensure that a procedure or mechanism is in place to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter.

5. Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for interpretation and, when interpretation has been provided, the possibility to complain that the quality of the interpretation is not sufficient to safeguard the fairness of the proceedings.

6. Where appropriate, communication technology such as videoconferencing, telephone or the Internet may be used, unless the physical presence of the interpreter is required in order to safeguard the fairness of the proceedings.

7. In proceedings for the execution of a European arrest warrant, the executing Member State shall ensure that its competent authorities provide persons subject to such proceedings who do not speak or understand the language of the proceedings with interpretation in accordance with this Article.

8. Interpretation provided under this Article shall be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence.

Article 3

Right to translation of essential documents

1. Member States shall ensure that suspected or accused persons who do not understand the language of the criminal proceedings concerned are, within a reasonable period of time, provided with a written translation of all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings.

2. Essential documents shall include any decision depriving a person of his liberty, any charge or indictment, and any judgment.

3. The competent authorities shall, in any given case, decide whether any other document is essential. Suspected or accused persons or their legal counsel may submit a reasoned request to that effect.

4. There shall be no requirement to translate passages of essential documents which are not relevant for the purposes of enabling suspected or accused persons to have knowledge of the case against them.

5. Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for the translation of documents or passages thereof and, when a translation has been provided, the possibility to complain that the quality of the translation is not sufficient to safeguard the fairness of the proceedings.

6. In proceedings for the execution of a European arrest warrant, the executing Member State shall ensure that its competent authorities provide any person subject to such proceedings who does not understand the language in which the European arrest warrant is drawn up, or into which it has been translated by the issuing Member State, with a written translation of that document.

7. As an exception to the general rules established in paragraphs 1, 2, 3 and 6, an oral translation or oral summary of essential documents may be provided instead of a written translation on condition that such oral translation or oral summary does not prejudice the fairness of the proceedings.

8. Any waiver of the right to translation of documents referred to in this Article shall be subject to the requirements that suspected or accused persons have received prior legal advice or have otherwise obtained full knowledge of the consequences of such a waiver, and that the waiver was unequivocal and given voluntarily.

9. Translation provided under this Article shall be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence.

Article 4

Costs of interpretation and translation

Member States shall meet the costs of interpretation and translation resulting from the application of Articles 2 and 3, irrespective of the outcome of the proceedings.

Article 5

Quality of the interpretation and translation

1. Member States shall take concrete measures to ensure that the interpretation and translation provided meets the quality required under Article 2(8) and Article 3(9).

2. In order to promote the adequacy of interpretation and translation and efficient access thereto, Member States shall endeavour to establish a register or registers of independent translators and interpreters who are appropriately qualified. Once established, such register or registers shall, where appropriate, be made available to legal counsel and relevant authorities.

3. Member States shall ensure that interpreters and translators be required to observe confidentiality regarding interpretation and translation provided under this Directive.

Article 6

Training

Without prejudice to judicial independence and differences in the organisation of the judiciary across the Union, Member States shall request those responsible for the training of judges, prosecutors and judicial staff involved in criminal proceedings to pay special attention to the particularities of communicating with the assistance of an interpreter so as to ensure efficient and effective communication.

Article 7

Record-keeping

Member States shall ensure that when a suspected or accused person has been subject to questioning or hearings by an investigative or judicial authority with the assistance of an interpreter pursuant to Article 2, when an oral translation or oral summary of essential documents has been provided in the presence of such an authority pursuant to Article 3(7), or when a person has waived the right to translation pursuant to Article 3(8), it will be noted that these events have occurred, using the recording procedure in accordance with the law of the Member State concerned.

Article 8

Non-regression

Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union, other relevant provisions of international law or the law of any Member State which provides a higher level of protection.

Article 9

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 27 October 2013.

2. Member States shall transmit the text of those measures to the Commission.

3. When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

Article 10

Report

The Commission shall, by 27 October 2014, submit a report to the European Parliament and to the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive, accompanied, if necessary, by legislative proposals.

Article 11

Entry into force

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Article 12

Addressees

This Directive is addressed to the Member States in accordance with the Treaties.

Done at Strasbourg, 20 October 2010.

For the European Parliament
The President
J. BUZEK
For the Council
The President
O. CHASTEL

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[1] OJ C 69, 18.3.2010, p. 1.

[2] Position of the European Parliament of 16 June 2010 (not yet published in the Official Journal) and decision of the Council of 7 October 2010.

[3] OJ C 12, 15.1.2001, p. 10.

[4] OJ C 295, 4.12.2009, p. 1.

[5] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002, p. 1).

[6] OJ C 75, 31.3.2009, p. 1.

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

DIRECTIVE 2004/38/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 29 April 2004

on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 12, 18, 40, 44 and 52 thereof,

Having regard to the proposal from the Commission [1],

Having regard to the Opinion of the European Economic and Social Committee [2],

Having regard to the Opinion of the Committee of the Regions [3],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [4],

Whereas:

(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.

(2) The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the Treaty.

(3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.

(4) With a view to remedying this sector-by-sector, piecemeal approach to the right of free movement and residence and facilitating the exercise of this right, there needs to be a single legislative act to amend Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community [5] and to repeal the following acts: Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families [6], Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services [7], Council Directive 90/364/EEC of 28 June 1990 on the right of residence [8], Council Directive 90/365/EEC of 28 June 1990 on the right of residence for

employees and self-employed persons who have ceased their occupational activity [9] and Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students [10].

(5) The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of "family member" should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.

(6) In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.

(7) The formalities connected with the free movement of Union citizens within the territory of Member States should be clearly defined, without prejudice to the provisions applicable to national border controls.

(8) With a view to facilitating the free movement of family members who are not nationals of a Member State, those who have already obtained a residence card should be exempted from the requirement to obtain an entry visa within the meaning of Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [11] or, where appropriate, of the applicable national legislation.

(9) Union citizens should have the right of residence in the host Member State for a period not exceeding three months without being subject to any conditions or any formalities other than the requirement to hold a valid identity card or passport, without prejudice to a more favourable treatment applicable to job-seekers as recognised by the case-law of the Court of Justice.

(10) Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions.

(11) The fundamental and personal right of residence in another Member State is conferred directly on Union citizens by the Treaty and is not dependent upon their having fulfilled administrative procedures.

(12) For periods of residence of longer than three months, Member States should have the possibility to require Union citizens to register with the competent authorities in the place of residence, attested by a registration certificate issued to that effect.

(13) The residence card requirement should be restricted to family members of Union citizens who are not nationals of a Member State for periods of residence of longer than three months.

(14) The supporting documents required by the competent authorities for the issuing of a registration certificate or of a residence card should be comprehensively specified in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise of the right of residence by Union citizens and their family members.

(15) Family members should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership. With due regard

for family life and human dignity, and in certain conditions to guard against abuse, measures should therefore be taken to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis.

(16) As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers as defined by the Court of Justice save on grounds of public policy or public security.

(17) Enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host Member State would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union. A right of permanent residence should therefore be laid down for all Union citizens and their family members who have resided in the host Member State in compliance with the conditions laid down in this Directive during a continuous period of five years without becoming subject to an expulsion measure.

(18) In order to be a genuine vehicle for integration into the society of the host Member State in which the Union citizen resides, the right of permanent residence, once obtained, should not be subject to any conditions.

(19) Certain advantages specific to Union citizens who are workers or self-employed persons and to their family members, which may allow these persons to acquire a right of permanent residence before they have resided five years in the host Member State, should be maintained, as these constitute acquired rights, conferred by Commission Regulation (EEC) No 1251/70 of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State [12] and Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity [13].

(20) In accordance with the prohibition of discrimination on grounds of nationality, all Union citizens and their family members residing in a Member State on the basis of this Directive should enjoy, in that Member State, equal treatment with nationals in areas covered by the Treaty, subject to such specific provisions as are expressly provided for in the Treaty and secondary law.

(21) However, it should be left to the host Member State to decide whether it will grant social assistance during the first three months of residence, or for a longer period in the case of job-seekers, to Union citizens other than those who are workers or self-employed persons or who retain that status or their family members, or maintenance assistance for studies, including vocational training, prior to acquisition of the right of permanent residence, to these same persons.

(22) The Treaty allows restrictions to be placed on the right of free movement and residence on grounds of public policy, public security or public health. In order to ensure a tighter definition of the circumstances and procedural safeguards subject to which Union citizens and their family members may be denied leave to enter or may be expelled, this Directive should replace Council Directive 64/221/EEC of 25 February 1964 on the coordination of special

measures concerning the movement and residence of foreign nationals, which are justified on grounds of public policy, public security or public health [14].

(23) Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin.

(24) Accordingly, the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be. Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life. In addition, such exceptional circumstances should also apply to an expulsion measure taken against minors, in order to protect their links with their family, in accordance with the United Nations Convention on the Rights of the Child, of 20 November 1989.

(25) Procedural safeguards should also be specified in detail in order to ensure a high level of protection of the rights of Union citizens and their family members in the event of their being denied leave to enter or reside in another Member State, as well as to uphold the principle that any action taken by the authorities must be properly justified.

(26) In all events, judicial redress procedures should be available to Union citizens and their family members who have been refused leave to enter or reside in another Member State.

(27) In line with the case-law of the Court of Justice prohibiting Member States from issuing orders excluding for life persons covered by this Directive from their territory, the right of Union citizens and their family members who have been excluded from the territory of a Member State to submit a fresh application after a reasonable period, and in any event after a three year period from enforcement of the final exclusion order, should be confirmed.

(28) To guard against abuse of rights or fraud, notably marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence, Member States should have the possibility to adopt the necessary measures.

(29) This Directive should not affect more favourable national provisions.

(30) With a view to examining how further to facilitate the exercise of the right of free movement and residence, a report should be prepared by the Commission in order to evaluate the opportunity to present any necessary proposals to this effect, notably on the extension of the period of residence with no conditions.

(31) This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In accordance with the prohibition of discrimination contained in the Charter, Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinion, membership of an ethnic minority, property, birth, disability, age or sexual orientation,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

General provisions

Article 1

Subject

This Directive lays down:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;

(b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;

(c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health.

Article 2

Definitions

For the purposes of this Directive:

1) "Union citizen" means any person having the nationality of a Member State;

2) "Family member" means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

3) "Host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.

Article 3

Beneficiaries

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

CHAPTER II

Right of exit and entry

Article 4

Right of exit

1. Without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport and their family members who are not nationals of a Member State and who hold a valid passport shall have the right to leave the territory of a Member State to travel to another Member State.

2. No exit visa or equivalent formality may be imposed on the persons to whom paragraph 1 applies.

3. Member States shall, acting in accordance with their laws, issue to their own nationals, and renew, an identity card or passport stating their nationality.

4. The passport shall be valid at least for all Member States and for countries through which the holder must pass when travelling between Member States. Where the law of a Member State does not provide for identity cards to be issued, the period of validity of any passport on being issued or renewed shall be not less than five years.

Article 5

Right of entry

1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport.

No entry visa or equivalent formality may be imposed on Union citizens.

2. Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement.

Member States shall grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.

3. The host Member State shall not place an entry or exit stamp in the passport of family members who are not nationals of a Member State provided that they present the residence card provided for in Article 10.

4. Where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence.

5. The Member State may require the person concerned to report his/her presence within its territory within a reasonable and non-discriminatory period of time. Failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions.

CHAPTER III

Right of residence

Article 6

Right of residence for up to three months

1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.

Article 7

Right of residence for more than three months

1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) —are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

—have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph l(a), (b) or (c).

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

(a) he/she is temporarily unable to work as the result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed

during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

4. By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner.

Article 8

Administrative formalities for Union citizens

1. Without prejudice to Article 5(5), for periods of residence longer than three months, the host Member State may require Union citizens to register with the relevant authorities.

2. The deadline for registration may not be less than three months from the date of arrival. A registration certificate shall be issued immediately, stating the name and address of the person registering and the date of the registration. Failure to comply with the registration requirement may render the person concerned liable to proportionate and non-discriminatory sanctions.

3. For the registration certificate to be issued, Member States may only require that

— Union citizens to whom point (a) of Article 7(1) applies present a valid identity card or passport, a confirmation of engagement from the employer or a certificate of employment, or proof that they are self-employed persons;

— Union citizens to whom point (b) of Article 7(1) applies present a valid identity card or passport and provide proof that they satisfy the conditions laid down therein;

— Union citizens to whom point (c) of Article 7(1) applies present a valid identity card or passport, provide proof of enrolment at an accredited establishment and of comprehensive sickness insurance cover and the declaration or equivalent means referred to in point (c) of Article 7(1). Member States may not require this declaration to refer to any specific amount of resources.

4. Member States may not lay down a fixed amount which they regard as "sufficient resources" but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State.

5. For the registration certificate to be issued to family members of Union citizens, who are themselves Union citizens, Member States may require the following documents to be presented:

(a) a valid identity card or passport;

(b) a document attesting to the existence of a family relationship or of a registered partnership;

(c) where appropriate, the registration certificate of the Union citizen whom they are accompanying or joining;

(d) in cases falling under points (c) and (d) of Article 2(2), documentary evidence that the conditions laid down therein are met;

(e) in cases falling under Article 3(2)(a), a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen;

(f) in cases falling under Article 3(2)(b), proof of the existence of a durable relationship with the Union citizen.

Article 9

Administrative formalities for family members who are not nationals of a Member State

1. Member States shall issue a residence card to family members of a Union citizen who are not nationals of a Member State, where the planned period of residence is for more than three months.

2. The deadline for submitting the residence card application may not be less than three months from the date of arrival.

3. Failure to comply with the requirement to apply for a residence card may make the person concerned liable to proportionate and non-discriminatory sanctions.

Article 10

Issue of residence cards

1. The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called "Residence card of a family member of a Union citizen" no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately.

2. For the residence card to be issued, Member States shall require presentation of the following documents:

(a) a valid passport;

(b) a document attesting to the existence of a family relationship or of a registered partnership;

(c) the registration certificate or, in the absence of a registration system, any other proof of residence in the host Member State of the Union citizen whom they are accompanying or joining;

(d) in cases falling under points (c) and (d) of Article 2(2), documentary evidence that the conditions laid down therein are met;

(e) in cases falling under Article 3(2)(a), a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen;

(f) in cases falling under Article 3(2)(b), proof of the existence of a durable relationship with the Union citizen.

Article 11

Validity of the residence card

1. The residence card provided for by Article 10(1) shall be valid for five years from the date of issue or for the envisaged period of residence of the Union citizen, if this period is less than five years.

2. The validity of the residence card shall not be affected by temporary absences not exceeding six months a year, or by absences of a longer duration for compulsory military service or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.

Article 12

Retention of the right of residence by family members in the event of death or departure of the Union citizen

1. Without prejudice to the second subparagraph, the Union citizen's death or departure from the host Member State shall not affect the right of residence of his/her family members who are nationals of a Member State.

Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).

2. Without prejudice to the second subparagraph, the Union citizen's death shall not entail loss of the right of residence of his/her family members who are not nationals of a Member State and who have been residing in the host Member State as family members for at least one year before the Union citizen's death.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4).

Such family members shall retain their right of residence exclusively on a personal basis.

3. The Union citizen's departure from the host Member State or his/her death shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies.

Article 13

Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership

1. Without prejudice to the second subparagraph, divorce, annulment of the Union citizen's marriage or termination of his/her registered partnership, as referred to in point 2(b) of Article 2 shall not affect the right of residence of his/her family members who are nationals of a Member State.

Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).

2. Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:

(a) prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or

(b) by agreement between the spouses or the partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has custody of the Union citizen's children; or

(c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or

(d) by agreement between the spouses or partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4).

Such family members shall retain their right of residence exclusively on personal basis.

Article 14

Retention of the right of residence

1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.

2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.

In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7,12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.

3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.

4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:

(a) the Union citizens are workers or self-employed persons, or

(b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.

Article 15

Procedural safeguards

1. The procedures provided for by Articles 30 and 31 shall apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health.

2. Expiry of the identity card or passport on the basis of which the person concerned entered the host Member State and was issued with a registration certificate or residence card shall not constitute a ground for expulsion from the host Member State.

3. The host Member State may not impose a ban on entry in the context of an expulsion decision to which paragraph 1 applies.

CHAPTER IV

Right of permanent residence

Section I

Eligibility

Article 16

General rule for Union citizens and their family members

1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.

3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.

4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.

Article 17

Exemptions for persons no longer working in the host Member State and their family members

1. By way of derogation from Article 16, the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by:

(a) workers or self-employed persons who, at the time they stop working, have reached the age laid down by the law of that Member State for entitlement to an old age pension or workers who cease paid employment to take early retirement, provided that they have been working in that Member State for at least the preceding twelve months and have resided there continuously for more than three years.

If the law of the host Member State does not grant the right to an old age pension to certain categories of self-employed persons, the age condition shall be deemed to have been met once the person concerned has reached the age of 60;

(b) workers or self-employed persons who have resided continuously in the host Member State for more than two years and stop working there as a result of permanent incapacity to work.

If such incapacity is the result of an accident at work or an occupational disease entitling the person concerned to a benefit payable in full or in part by an institution in the host Member State, no condition shall be imposed as to length of residence;

(c) workers or self-employed persons who, after three years of continuous employment and residence in the host Member State, work in an employed or self-employed capacity in another Member State, while retaining their place of residence in the host Member State, to which they return, as a rule, each day or at least once a week.

For the purposes of entitlement to the rights referred to in points (a) and (b), periods of employment spent in the Member State in which the person concerned is working shall be regarded as having been spent in the host Member State.

Periods of involuntary unemployment duly recorded by the relevant employment office, periods not worked for reasons not of the person's own making and absences from work or cessation of work due to illness or accident shall be regarded as periods of employment.

2. The conditions as to length of residence and employment laid down in point (a) of paragraph 1 and the condition as to length of residence laid down in point (b) of paragraph 1 shall not apply if the worker's or the self-employed person's spouse or partner as referred to in point 2(b) of Article 2 is a national of the host Member State or has lost the nationality of that Member State by marriage to that worker or self-employed person.

3. Irrespective of nationality, the family members of a worker or a self-employed person who are residing with him in the territory of the host Member State shall have the right of permanent residence in that Member State, if the worker or self-employed person has acquired himself the right of permanent residence in that Member State on the basis of paragraph 1.

4. If, however, the worker or self-employed person dies while still working but before acquiring permanent residence status in the host Member State on the basis of paragraph 1, his family members who are residing with him in the host Member State shall acquire the right of permanent residence there, on condition that:

(a) the worker or self-employed person had, at the time of death, resided continuously on the territory of that Member State for two years; or

(b) the death resulted from an accident at work or an occupational disease; or

(c) the surviving spouse lost the nationality of that Member State following marriage to the worker or self-employed person.

Article 18

Acquisition of the right of permanent residence by certain family members who are not nationals of a Member State

Without prejudice to Article 17, the family members of a Union citizen to whom Articles 12(2) and 13(2) apply, who satisfy the conditions laid down therein, shall acquire the right of permanent residence after residing legally for a period of five consecutive years in the host Member State.

Section II

Administrative formalities

Article 19

Document certifying permanent residence for Union citizens

1. Upon application Member States shall issue Union citizens entitled to permanent residence, after having verified duration of residence, with a document certifying permanent residence.

2. The document certifying permanent residence shall be issued as soon as possible.

Article 20

Permanent residence card for family members who are not nationals of a Member State

1. Member States shall issue family members who are not nationals of a Member State entitled to permanent residence with a permanent residence card within six months of the submission of the application. The permanent residence card shall be renewable automatically every ten years.

2. The application for a permanent residence card shall be submitted before the residence card expires. Failure to comply with the requirement to apply for a permanent residence card may render the person concerned liable to proportionate and non-discriminatory sanctions.

3. Interruption in residence not exceeding two consecutive years shall not affect the validity of the permanent residence card.

Article 21

Continuity of residence

For the purposes of this Directive, continuity of residence may be attested by any means of proof in use in the host Member State. Continuity of residence is broken by any expulsion decision duly enforced against the person concerned.

CHAPTER V

Provisions common to the right of residence and the right of permanent residence

Article 22

Territorial scope

The right of residence and the right of permanent residence shall cover the whole territory of the host Member State. Member States may impose territorial restrictions on the right of residence and the right of permanent residence only where the same restrictions apply to their-own nationals.

Article 23

Related rights

Irrespective of nationality, the family members of a Union citizen who have the right of residence or the right of permanent residence in a Member State shall be entitled to take up employment or self-employment there.

Article 24

Equal treatment

1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

Article 25

General provisions concerning residence documents

1. Possession of a registration certificate as referred to in Article 8, of a document certifying permanent residence, of a certificate attesting submission of an application for a family member residence card, of a residence card or of a permanent residence card, may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof.

2. All documents mentioned in paragraph 1 shall be issued free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents.

Article 26

Checks

Member States may carry out checks on compliance with any requirement deriving from their national legislation for non-nationals always to carry their registration certificate or residence card, provided that the same requirement applies to their own nationals as regards their identity card. In the event of failure to comply with this requirement, Member States may impose the same sanctions as those imposed on their own nationals for failure to carry their identity card.

CHAPTER VI

Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health

Article 27

General principles

1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

3. In order to ascertain whether the person concerned represents a danger for public policy or public security, when issuing the registration certificate or, in the absence of a registration system, not later than three months from the date of arrival of the person concerned on its territory or from the date of reporting his/her presence within the territory, as provided for in Article 5(5), or when issuing the residence card, the host Member State may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have. Such enquiries shall not be made as a matter of routine. The Member State consulted shall give its reply within two months.

4. The Member State which issued the passport or identity card shall allow the holder of the document who has been expelled on grounds of public policy, public security, or public health from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute.

Article 28

Protection against expulsion

1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous ten years; or

(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.

Article 29

Public health

1. The only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State.

2. Diseases occurring after a three-month period from the date of arrival shall not constitute grounds for expulsion from the territory.

3. Where there are serious indications that it is necessary, Member States may, within three months of the date of arrival, require persons entitled to the right of residence to undergo, free of charge, a medical examination to certify that they are not suffering from any of the conditions referred to in paragraph 1. Such medical examinations may not be required as a matter of routine.

Article 30

Notification of decisions

1. The persons concerned shall be notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them.

2. The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security.

3. The notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification.

Article 31

Procedural safeguards

1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.

2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:

— where the expulsion decision is based on a previous judicial decision; or

— where the persons concerned have had previous access to judicial review; or

—where the expulsion decision is based on imperative grounds of public security under Article 28(3).

3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.

4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.

Article 32

Duration of exclusion orders

1. Persons excluded on grounds of public policy or public security may submit an application for lifting of the exclusion order after a reasonable period, depending on the circumstances, and in any event after three years from enforcement of the final exclusion order which has been validly adopted in accordance with Community law, by putting forward arguments to establish that there has been a material change in the circumstances which justified the decision ordering their exclusion.

The Member State concerned shall reach a decision on this application within six months of its submission.

2. The persons referred to in paragraph 1 shall have no right of entry to the territory of the Member State concerned while their application is being considered.

Article 33

Expulsion as a penalty or legal consequence

1. Expulsion orders may not be issued by the host Member State as a penalty or legal consequence of a custodial penalty, unless they conform to the requirements of Articles 27, 28 and 29.

2. If an expulsion order, as provided for in paragraph 1, is enforced more than two years after it was issued, the Member State shall check that the individual concerned is currently and genuinely a threat to public policy or public security and shall assess whether there has been any material change in the circumstances since the expulsion order was issued.

CHAPTER VII
Final provisions

Article 34

Publicity

Member States shall disseminate information concerning the rights and obligations of Union citizens and their family members on the subjects covered by this Directive, particularly by means of awareness-raising campaigns conducted through national and local media and other means of communication.

Article 35

Abuse of rights

Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.

Article 36

Sanctions

Member States shall lay down provisions on the sanctions applicable to breaches of national rules adopted for the implementation of this Directive and shall take the measures required for their application. The sanctions laid down shall be effective and proportionate. Member States shall notify the Commission of these provisions not later than [15] and as promptly as possible in the case of any subsequent changes.

Article 37

More favourable national provisions

The provisions of this Directive shall not affect any laws, regulations or administrative provisions laid down by a Member State which would be more favourable to the persons covered by this Directive.

Article 38

Repeals

1. Articles 10 and 11 of Regulation (EEC) No 1612/68 shall be repealed with effect from ... [15].

2. Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC shall be repealed with effect from [15].

3. References made to the repealed provisions and Directives shall be construed as being made to this Directive.

Article 39

Report

No later than [16] the Commission shall submit a report on the application of this Directive to the European Parliament and the Council, together with any necessary proposals, notably on the opportunity to extend the period of time during which Union citizens and their family members may reside in the territory of the host Member State without any conditions. The Member States shall provide the Commission with the information needed to produce the report.

Article 40

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [17].

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive together with a table showing how the provisions of this Directive correspond to the national provisions adopted.

Article 41

Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Union.

Article 42

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 29 April 2004.

For the European Parliament

The President

P.COX

For the Council

The President

M. McDOWELL

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[1] OJ C 270 E, 25.9.2001, p. 150.

[2] OJ C 149,21.6.2002, p. 46.

[3] OJ C 192, 12.8.2002, p. 17.

[4] Opinion of the European Parliament of 11 February 2003 (OJ C 43 E, 19.2.2004, p. 42), Council Common Position of 5 December 2003 (OJ C 54 E, 2.3.2004, p. 12) and Position of the European Parliament of 10 March 2004 (not yet published in the Official Journal).

[5] OJ L 257, 19.10.1968, p. 2. Regulation as last amended by Regulation (EEC) No 2434/92 (OJ L 245, 26.8.1992, p. 1).

[6] OJ L 257,19.10.1968, p. 13. Directive as last amended by the 2003 Act of Accession.

[7] OJ L 172, 28.6.1973, p. 14.

[8] OJ L 180,13.7.1990, p. 26.

[9] OJ L 180, 13.7.1990, p. 28.

[10] OJ L 317, 18.12.1993, p. 59.

[11] OJ L 81, 21.3.2001, p. 1. Regulation as last amended by Regulation (EC) No 453/2003 (OJ L 69, 13.3.2003, p. 10).

[12] OJ L 142, 30.6.1970, p. 24.

[13] OJ L 14, 20.1.1975, p. 10.

[14] OJ 56, 4.4.1964, p. 850. Directive as last amended by Directive 75/35/EEC (OJ 14, 20.1.1975, p. 14).

[15] Two years from the date of entry into force of this Directive.

[16] Four years from the date of entry into force of this Directive.

[17] Two years from the date of entry into force of this Directive.

COMMISSION RECOMMENDATION (EU) 2023/681

of 8 December 2022

on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof,

Whereas:

(1) In accordance with Article 2 of the Treaty on European Union, the European Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. Articles 1, 4 and 6 of the Charter of Fundamental Rights of the European Union (the Charter) provide that human dignity is inviolable and must be respected and protected, that no one shall be subjected to torture or to inhuman or degrading treatment or punishment and that everyone has the right to liberty and security. Articles 7 and 24 of the Charter enshrine the right to family life and the rights of the child. Article 21 of the Charter provides that no one shall be subject to discrimination. Articles 47 and 48 of the Charter recognise the right to an effective remedy and to a fair trial as well as the presumption of innocence and the right of defence. Article 52 of the Charter provides that any limitation to the exercise of fundamental rights recognised therein must be provided for by law and must respect the essence of those rights and freedoms as well as the principles of necessity and proportionality.

(2) The Member States are already legally bound by existing Council of Europe instruments on human rights and the prohibition of torture and inhuman or degrading treatment, in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the protocols to that Convention, the case law of the European Court of Human Rights and the 1987 European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment. All Member States are furthermore parties to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).

(3) A number of non-legally binding instruments that deal more specifically with the rights of persons who have been deprived of their liberty have also to be taken into account, in particular: at United Nations level, the United Nations standard minimum rules on the treatment of prisoners (Nelson Mandela Rules); the United Nations standard minimum rules for non-custodial measures (Tokyo Rules); as well as, at the Council of Europe level, Recommendation Rec(2006)2-Rev on the European Prison Rules; the Recommendation Rec(2006)13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse; Recommendation CM/Rec(2017)3 on the European Rules on community sanctions and measures; Recommendation CM/Rec(2014)4 on electronic monitoring; Recommendation CM/Rec(2010)1 on the Council of Europe Probation Rules; and the White Paper on Prison Overcrowding.

(4) In addition other instruments exist that target specific groups of persons deprived of liberty, in particular: at the United Nations level, the United Nations Rules for the protection of juveniles deprived of their liberty and the United Nations Rules for the treatment of women prisoners and non-custodial measures for women offenders (Bangkok Rules); the United National Convention on the Rights of the Child (UNCRC); as well as, at the Council of Europe level, Recommendation CM/Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures; and the Recommendation CM/Rec(2018)5 concerning children with imprisoned parents; Recommendation CM/Rec (2012)12 concerning foreign prisoners; as well as, at an international non-governmental level, the Principles on the application of international human rights law in relation to sexual orientation and gender identity (Yogyakarta Principles), developed by the International Commission of Jurists and the International Service for Human Rights.

(5) The Court of Justice of the European Union has acknowledged, in the *Aranyosi/Căldăraru* and follow-up judgments [1], the importance of detention conditions in the context of mutual recognition and the operation of

Council Framework Decision 2002/584/JHA ([2]) on the European arrest warrant. The European Court of Human Rights has also ruled on the impact of poor detention conditions on the operation of the European arrest warrant ([3]).

(6) In the December 2018 Council conclusions on promoting mutual recognition by enhancing mutual trust, Member States were encouraged to make use of alternative measures to detention in order to reduce the population in their detention facilities, thereby furthering the aim of social rehabilitation and also addressing the fact that mutual trust is often hampered by poor detention conditions and the problem of overcrowded detention facilities ([4]).

(7) In the December 2019 Council conclusions on alternatives to detention, Member States committed to taking several actions in the field of detention at national level, such as to adopt alternative measures to detention ([5]).

(8) In the June 2019 Council conclusions on preventing and combating radicalisation in prisons and on dealing with terrorist and violent extremist offenders after release, Member States committed urgently to take effective measures in this area ([6]).

(9) For several years, the European Parliament has urged the Commission to take action to address the issue of material prison conditions and to ensure that pre-trial detention remains an exceptional measure, to be used in compliance with the presumption of innocence. This request was repeated in the European Parliament report on the European arrest warrant ([7]).

(10) At the request of, and funded by, the Commission, the Fundamental Rights Agency has developed a database on detention conditions, which was launched in December 2019 and which is publicly accessible ([8]). The Agency's Criminal Detention Database collates information on detention conditions in all Member States. Drawing on national, Union and international standards, case law and monitoring reports, it informs about selected core aspects of detention conditions, including cell space, sanitary conditions, access to healthcare and protection against violence.

(11) Available statistics on the European arrest warrant demonstrate that, since 2016, Member States have refused or delayed execution on grounds related to a real risk of breach of fundamental rights in close to 300 cases, including on the basis of inadequate material conditions of detention ([9]).

(12) National judicial authorities have requested more concrete guidance on how to deal with such cases. The problems identified by practitioners concerns the lack of harmonisation, dispersion and lack of clarity of detention standards across the Union as a challenge for judicial cooperation in criminal matters ([10]).

(13) Half of the Member States that provided to the Commission statistics on their detention populations indicated that they have a problem of overcrowding in their detention facilities with an occupancy rate of more than 100 per cent. The excessive or unnecessary use and length of pre-trial detention also contributes to the phenomenon of overcrowding in detention facilities, which seriously undermines improvements in conditions of detention.

(14) Substantial divergences exist among Member States in relation to important aspects of pre-trial detention, such as the use of pre-trial detention as a last resort and the review of pre-trial detention decisions ([11]). The maximum time limit for pre-trial detention also differs from one Member State to another, ranging from less than 1 year to more than 5 years ([12]). In 2020, the average length of pre-trial detention in the different Member States varied from 2 months to 13 months ([13]). The number of pre-trial detainees as a proportion of the total prison population also varies significantly from one Member State to another, ranging from less than 10 % to more than 40 % ([14]). Such vast divergences appear unjustified in a common EU area of freedom, security and justice.

(15) Recent reports of the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment draw attention to the persistence of certain serious problems in some Member States, such as ill-treatment, the unsuitability of detention facilities as well as a lack of meaningful activities and of appropriate provision of healthcare.

(16) In addition, the European Court of Human Rights still continues to find Member States in violation of Article 3 or 5 of the ECHR in the context of detention.

(17) Given the vast number of recommendations developed by international organisations in the area of criminal detention, these may not always be easily accessible for individual judges and prosecutors in the Member

States who have to assess detention conditions before taking their decisions, either in the context of a European arrest warrant or at national level.

(18) In the Union and, in particular, within the area of freedom, security and justice, Union specific minimum standards, applicable to all Member States' detention systems alike, are required in order to strengthen mutual trust between Member States and facilitate mutual recognition of judgments and judicial decisions.

(19) To strengthen the trust of Member States in each other's criminal justice systems and thus to improve mutual recognition of decisions in criminal matters, notably six measures on procedural rights in criminal proceedings, namely Directives 2010/64/EU ([15]), 2012/13/EU ([16]), 2013/48/EU ([17]), (EU) 2016/343 ([18]), (EU) 2016/800 ([19]) and (EU) 2016/1919 ([20]) of the European Parliament and of the Council, as well as Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings ([21]), have already been adopted. These measures aim to ensure that the procedural rights of suspects and accused persons in criminal proceedings are respected, including where pre-trial detention is imposed. For this purpose, these Directives contain specific procedural safeguards for suspects and accused persons who are deprived of liberty. Directive (EU) 2016/800 contains specific provisions on conditions of pre-trial detention for children; these aim to safeguard their well-being where subject to such a coercive measure. It is necessary to complement the procedural rights standards established in these Directives and the 2013 Recommendation, as well as, in the case of Directive (EU) 2016/800, relevant standards on material detention conditions for children who are subject to pre-trial detention.

(20) The Commission aims to consolidate and build on those minimum standards established within the framework of the Council of Europe as well as the case law of the Court of Justice and of the European Court of Human Rights. To this end, it is necessary to provide an overview of selected minimum standards for procedural rights of suspects and accused persons subject to pre-trial detention and material conditions of detention in key priority areas for judicial cooperation in criminal matters between Member States.

(21) With respect to procedural rights of suspects and accused persons subject to pre-trial detention, the guidance in this Recommendation should cover key standards on the use of pre-trial detention as a measure of last resort and alternatives to detention, grounds for pre-trial detention, requirements for decision-making by judicial authorities, periodic review of pre-trial detention, the hearing of suspect or accused persons for decisions on pre-trial detention, effective remedies and the right to appeal, the length of pre-trial detention and the recognition of time spent in pre-trial detention in terms of a deduction from the final sentence.

(22) With respect to material conditions of detention, guidance should be given on key standards in the areas of accommodation, the allocation of detainees, hygiene and sanitation, nutrition, detention regimes with regard to out-of-cell exercise and activities, work and education, healthcare, prevention of violence and ill-treatment, contact with the outside world, access to legal assistance, request and complaint procedures, and inspections and monitoring. Furthermore guidance should be provided on safeguarding the rights of persons for whom deprivation of liberty constitutes a situation of particular vulnerability, such as women, children, persons with disabilities or serious health conditions, LGBTIQ and foreign nationals, as well as the prevention of radicalisation in prisons.

(23) Pre-trial detention should always be used as a measure of last resort based on a case-by-case assessment. The widest possible range of less restrictive measures alternative to detention (alternative measures) should be made available and applied wherever possible. Member States should also ensure that pre-trial detention decisions are not discriminatory and are not automatically imposed on suspects and accused persons based on certain characteristics, such as foreign nationality.

(24) Adequate material conditions of detention are fundamental for safeguarding the rights and dignity of persons deprived of liberty and to prevent violations of the prohibition of torture and inhuman or degrading treatment or punishment (ill-treatment).

(25) To ensure appropriate detention standards, Member States should provide each detainee with a minimum amount of personal living space in accordance with the recommendations of the European Committee for Prevention of Torture (CPT) and the case law of the European Court of Human Rights.

(26) Where persons are deprived of liberty, they are rendered particularly vulnerable to violence and ill-treatment as well as social isolation. To ensure their safety and to support their social reintegration, the allocation and

separation of detainees should take into account differences in detention regimes as well as the need to protect detainees in situations of particular vulnerability from abuse.

(27)Detention regimes should not unduly limit detainees' freedom of movement inside the detention facility and their access to exercise, outdoor spaces, and meaningful activities and social interaction, to allow them to maintain their physical and mental health and to promote their social reintegration.

(28)Victims of crime committed in detention often have limited access to justice notwithstanding the obligation of States to provide for effective remedies in cases where their rights have been violated. In line with the objectives of the EU Strategy on victims' rights (2020-2025), it is recommended that Member States ensure effective remedies for violations of detainees' rights as well as protection and support measures. Legal assistance, and mechanisms for submitting requests and complaints, should be easily accessible, confidential and effective.

(29)Member States should take into account the special needs of particular groups of detainees, including women, children, elderly persons, persons with disabilities or serious health conditions, LGBTIQ, persons with a minority racial or ethnic background and foreign nationals, in all decisions relating to their detention. In particular, where children are detained, the child's best interest must always be a primary consideration.

(30)With respect to terrorist and violent extremist offenders, Member States should take effective measures to prevent radicalisation in prisons, and to implement rehabilitation and reintegration strategies given the risk posed by terrorist and violent extremist offenders or offenders radicalised while serving time in prison, and the fact that a number of these offenders will be released within a short period of time.

(31)Only an overview of selected standards is provided in this Recommendation and it should be considered in light of, and without prejudice to, the more detailed guidance provided in the Council of Europe standards and of the case law of the Court of Justice and of the European Court of Human Rights. It is without prejudice to existing Union law and its future development. It is also without prejudice to the authoritative interpretation of Union law, which may be given by the Court of Justice of the European Union.

(32)This Recommendation should also facilitate the execution of European arrest warrants under Framework Decision 2002/584/JHA, as well as the recognition of judgments and the enforcement of sentences under Council Framework Decision 2008/909/JHA ([22]) on the application of the principle of mutual recognition to judgments imposing custodial sentences or measures involving deprivation of liberty.

(33)This Recommendation respects and promotes fundamental rights recognised by the Charter of Fundamental Rights of the European Union. In particular, this Recommendation seeks to promote respect for human dignity, the right to liberty, the right to family life, the rights of the child, the right to an effective remedy and to a fair trial as well as the presumption of innocence and the right of defence.

(34)References in this Recommendation to appropriate measures to ensure effective access to justice for persons with disabilities should be understood in light of the rights and obligations under the United Nations Convention on the Rights of Persons with Disabilities to which the European Union and all its Member States are parties. In addition, it should be ensured that if persons with disabilities are deprived of their liberty in criminal proceedings, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the United Nations Convention on the Rights of Persons with Disabilities, including by providing reasonable accommodation for special needs and by ensuring accessibility,

HAS ADOPTED THIS RECOMMENDATION:

PURPOSE OF THE RECOMMENDATION

(1)This Recommendation sets out guidance for Member States to take effective, appropriate and proportionate measures to strengthen the rights of all suspects and accused persons in criminal proceedings who are deprived of their liberty, in relation both to the procedural rights of persons subject to pre-trial detention and to material detention conditions, in order to ensure that persons subject to deprivation of liberty are treated with dignity, that their fundamental rights are upheld and that they are deprived of their liberty only as a measure of last resort.

(2)This Recommendation consolidates standards established under existing policies at national, Union and international level on the rights of persons deprived of their liberty as a result of proceedings in criminal

matters, which are of key relevance in the context of judicial cooperation in criminal matters between Member States.

(3)Member States may extend the guidance set out in this Recommendation in order to provide a higher level of protection. Such higher levels of protection should not constitute an obstacle to the mutual recognition of judicial decisions that this guidance is designed to facilitate. The level of protection should never fall below the standards provided by the Charter or by the ECHR, as interpreted by the case law of the Court of Justice and of the European Court of Human Rights.

DEFINITIONS

(4)Under this Recommendation, 'pre-trial detention' should be understood as any period of detention of a suspect or accused person in criminal proceedings ordered by a judicial authority and prior to conviction. It should not include the initial deprivation of liberty by a police or law enforcement officer (or by anyone else so authorised to act) for the purposes of questioning or securing the suspect or accused person until a decision on pre-trial detention has been made.

(5)Under this Recommendation, 'alternative measures' should be understood as less restrictive measures as an alternative to detention.

(6)Under this Recommendation, 'detainee' should be understood to cover persons deprived of liberty in pre-trial detention and convicted persons serving a sentence of imprisonment. 'Detention facility' should be understood as any prison or other facility for the holding of detainees as defined in this Recommendation.

(7) Under this Recommendation, 'child' should be understood as a person below the age of 18.

(8)Under this Recommendation, 'young adult' should be understood as a person above the age of 18 and below the age of 21.

(9)Under this Recommendation, 'persons with disabilities' should be understood in accordance with Article 1 of the United Nations Convention on the Rights of persons with Disabilities to include those persons who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

GENERAL PRINCIPLES

(10)Member States should use pre-trial detention only as a measure of last resort. Alternative measures to detention should be preferred, in particular where the offence is punishable only by a short sentence of imprisonment or where the offender is a child.

(11)Member States should ensure that detainees are treated with respect and dignity and in line with their respective human rights obligations, including the prohibition of torture and inhuman or degrading treatment or punishment as laid down in Article 3 of the European Convention on Human Rights and Article 4 of the Charter of Fundamental Rights of the European Union.

(12)Member States are encouraged to manage detention in such a way as to facilitate the social reintegration of detainees, with a view to preventing recidivism.

(13)Member States should apply this Recommendation without distinction of any kind, such as racial or ethnic origin, colour, sex, age, disability, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or any other status.

MIMINUM STANDARDS FOR PROCEDURAL RIGHTS OF SUSPECTS AND ACCUSED PERSONS SUBJECT TO PRE-TRIAL DETENTION

Pre-trial detention as a measure of last resort and alternatives to detention

(14)Member States should impose pre-trial detention only where strictly necessary and as a measure of last resort, taking due account of the specific circumstances of each individual case. To this end, Member States should apply alternative measures where possible.

(15)Member States should adopt a presumption in favour of release. Member States should require the competent national authorities to bear the burden of proof for demonstrating the necessity of imposing pre-

trial detention.

(16)To avoid inappropriate use of pre-trial detention, Member States should make available the widest possible range of alternative measures, such as the alternative measures mentioned in Council Framework Decision 2009/829/JHA [(23)] on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.

(17)Such measures could include: (a) undertakings to appear before a judicial authority as and when required, not to interfere with the course of justice and not to engage in particular conduct, including that involved in a profession or particular employment; (b) requirements to report on a daily or periodic basis to a judicial authority, the police or other authority; (c) requirements to accept supervision by an agency appointed by the judicial authority; (d) requirements to submit to electronic monitoring; (e) requirements to reside at a specified address, with or without conditions as to the hours to be spent there; (f) requirements not to leave or enter specified places or districts without authorisation; (g) requirements not to meet specified persons without authorisation; (h) requirements to surrender passports or other identification papers; and (i) requirements to provide or secure financial or other forms of guarantees as to conduct pending trial.

(18)Member States should furthermore require that, where a financial surety is fixed as a condition for release, the amount is proportionate to the suspect's or accused person's means.

Reasonable suspicion and grounds for pre-trial detention

(19)Member States should impose pre-trial detention only on the basis of a reasonable suspicion, established through a careful case-by-case assessment, that the suspect has committed the offence in question, and should limit the legal grounds for pre-trial detention to: (a) risk of absconding; (b) risk of re-offending; (c) risk of the suspect or accused person interfering with the course of justice; or (d) risk of a threat to public order.

(20)Member States should ensure that the determination of any risk is based on the individual circumstances of the case, but that particular consideration be given to: (a) the nature and seriousness of the alleged offence; (b) the penalty likely to be incurred in the event of conviction; (c) the age, health, character, previous convictions and personal and social circumstances of the suspect, and in particular their community ties; and (d) the conduct of the suspect, especially how they have fulfilled any obligations that may have been imposed on them in the course of previous criminal proceedings. The fact that the suspect is not a national of, or has no other links with, the state where the offence is assumed to have been committed is not in itself sufficient to conclude that there is a risk of flight.

(21)Member States are encouraged to impose pre-trial detention only for offences that carry a minimum custodial sentence of 1 year.

Reasoning of pre-trial detention decisions

(22)Member States should ensure that every decision by a judicial authority to impose pre-trial detention, to prolong such pre-trial detention, or to impose alternative measures is duly reasoned and justified and refers to the specific circumstances of the suspect or accused person justifying their detention. The person affected should be provided with a copy of the decision, which should also include reasons why alternatives to pre-trial detention are not considered appropriate.

Periodic review of pre-trial detention

(23)Member States should ensure that the continued validity of the grounds on which a suspect or accused person is held in pre-trial detention is periodically reviewed by a judicial authority. As soon as the grounds for detaining the person cease to exist, Member States should ensure that the suspect or accused person is released without undue delay.

(24)Member States should permit the periodic review of pre-trial detention decisions to be initiated upon request by the defendant or, *ex officio*, by a judicial authority.

(25)Member States should, in principle, limit the interval between reviews to a maximum of 1 month, except in cases where the suspect or accused person has the right to submit, at any time, an application for release and to receive a decision on this application without undue delay.

Hearing of the suspect or accused person

(26)Member States should ensure that a suspect or accused person is heard in person or through a legal representative by way of an adversarial oral hearing before the competent judicial authority making a decision on pre-trial detention. Member States should ensure that decisions on pre-trial detention are made without undue delay.

(27)Member States should uphold the suspect or accused person's right to a trial within a reasonable time. In particular, Member States should ensure that cases in which pre-trial detention has been imposed are treated as a matter of urgency and with due diligence.

Effective remedies and the right to appeal

(28)Member States should guarantee that suspects or accused persons who are deprived of their liberty have recourse to proceedings before a court, which is competent to review the lawfulness of their detention and, where appropriate, to order their release.

(29)Member States should grant suspects or accused persons subject to a decision on pre-trial detention the right of appeal against such a decision and inform them of this right when the decision is made.

Length of pre-trial detention

(30)Member States should ensure that the length of pre-trial detention does not exceed, and is not disproportionate to, the penalty that may be imposed for the offence concerned.

(31)Member States should ensure that the length of pre-trial detention imposed does not conflict with the right of a detained person to be tried within a reasonable time.

(32) Member States should consider as a priority cases involving a person subject to pre-trial detention.

Deduction of time spent in pre-trial detention from the final sentence

(33)Member States should deduct any period of pre-trial detention prior to conviction, including where enforced through alternative measures, from the length of any sentence of imprisonment subsequently imposed.

MINIMUM STANDARDS FOR MATERIAL DETENTION CONDITIONS

Accommodation

(34)Member States should assign each detainee a minimum amount of surface area of at least 6 m^2 in single occupancy cells and 4 m^2 in multi-occupancy cells. Member States should guarantee that the absolute minimum personal space available to each detainee, including in a multi-occupancy cell, amounts to the equivalent of at least 3 m^2 surface area per detainee. Where the personal space available to a detainee is below 3 m^2, a strong presumption of a violation of Article 3 of the ECHR arises. The calculation of the available space should include the area occupied by furniture but not that occupied by sanitary facilities.

(35)Member States should ensure that any exceptional reduction of the absolute minimum surface area per detainee of 3 m^2 is short, occasional, minor and accompanied by sufficient freedom of movement outside the cell and appropriate out-of-cell activities. Furthermore, Member States should ensure that, in such cases, the general conditions of detention at the facility are appropriate and that there are no other aggravating factors in the conditions of the concerned person's detention, such as other shortcomings in minimum structural requirements for cells or sanitary facilities.

(36) Member States should guarantee that detainees have access to natural light and fresh air in their cells.

Allocation

(37)Member States are encouraged, and in the case of children, should make sure, to allocate detainees, as far as possible, to detention facilities close to their homes or other places suitable for the purpose of their social rehabilitation.

(38)Member States should ensure that pre-trial detainees are held separately from convicted detainees. Women should be held separately from men. Children should not be detained with adults, unless it is considered to be in the child's best interests to do so.

(39)When a detained child reaches the age of 18 and, where appropriate, for young adults under the age of 21, Member States should provide for the possibility to continue to hold that person separately from other detained adults where warranted, taking into account the circumstances of the person concerned and provided that this is compatible with the best interests of children who are detained with that person.

Hygiene and sanitary conditions

(40)Member States should ensure that sanitary facilities are accessible at all times and that they offer sufficient privacy to detainees, including effective structural separation from living spaces in multi-occupancy cells.

(41)Member States should establish effective measures to maintain good hygienic standards through disinfection and fumigation. Member States should furthermore ensure that basic sanitary products, including hygienic towels, are provided to detainees and that warm and running water is available in cells.

(42)Member States should provide detainees with appropriate clean clothing and bedding, and with the means to keep such items clean.

Nutrition

(43)Member States should ensure that food is provided in sufficient quantity and quality to meet the detainee's nutritional needs and that food is prepared and served under hygienic conditions. Furthermore, Member States should guarantee that clean drinking water is available to detainees at all times.

(44)Member States should provide detainees with a nutritious diet that takes into account their age, disability, health, physical condition, religion, culture and the nature of their work.

Time spent outside the cell and outdoors

(45)Member States should allow detainees to exercise in the open air for at least 1 hour per day and should provide spacious and appropriate facilities and equipment for this purpose.

(46)Member States should allow detainees to spend a reasonable amount of time outside their cells to engage in work, education, and recreational activities as are necessary for an appropriate level of human and social interaction. To prevent a violation of the prohibition of torture and inhuman or degrading treatment or punishment, Member States should ensure that any exceptions to this rule in the context of special security regimes and measures, including solitary confinement, are necessary and proportionate.

Work and education of detainees to promote their social reintegration

(47)Member States should invest in the social rehabilitation of detainees, taking into account their individual needs. To that effect, Member States should strive to provide remunerated work of a useful nature. With a view to promoting the detainee's successful reintegration into society and the labour market, Member States should give preference to work that involves vocational training.

(48)To help detainees prepare for their release and to facilitate their reintegration into society, Member States should ensure that all detainees have access to safe, inclusive and accessible educational programmes (including distance learning) that meet their individual needs while taking into account their aspirations.

Healthcare

(49)Member States should guarantee that detainees have access in a timely manner to the medical, including psychological, assistance they require to maintain their physical and mental health. To this end, Member States should ensure that healthcare in detention facilities meets the same standards as that provided by the national public health system, including with regard to psychiatric treatment.

(50)Member States should provide regular medical supervision and should encourage vaccination and health screening programmes including communicable (HIV, viral hepatitis B and C, tuberculosis and sexually transmitted diseases) and non-communicable diseases (especially cancer screening), followed up by diagnosis and initiation of treatment where required. Health education programmes can contribute to improving screening rates and health literacy. In particular, Member States should ensure that special attention is paid to treatment for detainees with drug addiction, infectious diseases prevention and care, mental health and suicide prevention.

(51)Member States should require that a medical examination is carried out without undue delay at the beginning of any period of deprivation of liberty and subsequent to any transfer.

Prevention of violence and ill-treatment

(52)Member States should take all reasonable measures to ensure the safety of detainees and to prevent any form of torture or ill-treatment. In particular, Member States should take all reasonable measures to ensure that detainees are not subject to violence or ill-treatment by staff in the detention facility and that they are treated with respect for their dignity. Member States should also require staff in the detention facility and all competent authorities to protect detainees from violence or ill-treatment by other detainees.

(53)Member States should ensure that the fulfilment of this duty of care and any use of force by staff in the detention facility are subject to supervision.

Contact with the outside world

(54)Member States should allow detainees to receive visits from their families and other persons, such as legal representatives, social workers and medical practitioners. Member States should also allow detainees to correspond freely with such persons by letter and, as often as possible, by telephone or other forms of communication including alternative means of communication for persons with disabilities.

(55)Member States should provide suitable facilities to accommodate family visits under child-friendly conditions, compatible with the demands of security but less traumatic for children. Such family visits should ensure the maintenance of regular and meaningful contact between family members.

(56)Member States should consider enabling communication via digital means, such as video calls, in order to, inter alia, enable detainees to maintain contact with their families, to apply for jobs, to take training courses or to look for accommodation in preparation for release.

(57)Member States should ensure that, where detainees are exceptionally prohibited from communicating with the outside world, such a restrictive measure is strictly necessary and proportionate and is not applied for a prolonged period of time.

Legal assistance

(58) Member States should ensure that detainees have effective access to a lawyer.

(59)Member States should respect the confidentiality of meetings and other forms of communication, including legal correspondence, between detainees and their legal advisers.

(60)Member States should grant detainees access to, or allow them to keep in their possession, documents relating to their legal proceedings.

Requests and complaints

(61)Member States should ensure that all detainees are clearly informed of the rules applicable in their specific detention facility.

(62)Member States should facilitate effective access to a procedure enabling detainees to officially challenge aspects of their life in detention. In particular, Member States should ensure that detainees can freely submit confidential requests and complaints about their treatment, through both internal and external complaint mechanisms.

(63)Member States should ensure that detainee complaints are handled promptly and diligently by an independent authority or tribunal empowered to order measures of relief, in particular measures to terminate any violation of the right not to be subjected to torture or inhuman or degrading treatment.

Special measures for women and girls

(64)Member States should take into account women’s and girls’ specific physical, vocational, social and psychological needs, as well as sanitary and healthcare requirements, when making decisions that affect any aspect of their detention.

(65)Member States should allow detainees to give birth in a hospital outside of the detention facility. Where a

child is nevertheless born in the detention facility, Member States should arrange all necessary support and facilities to protect the bond between mother and child and to safeguard their physical and mental well-being, including appropriate pre-natal and post-natal health care.

(66)Member States should allow detainees who have infant children to keep such children with them in the detention facility to the extent that this is compatible with the best interests of the child. Member States should provide special accommodation and take all reasonable child-friendly measures to ensure the health and welfare of affected children throughout the execution of the sentence.

Special measures for foreign nationals

(67)Member States should ensure that foreign nationals and other detainees with particular linguistic needs deprived of liberty have reasonable access to professional interpretation services and translations of written materials in a language that they understand.

(68)Member States should ensure that foreign nationals are informed, without undue delay, of their right to request contact, and be allowed reasonable facilities to communicate, with the diplomatic or consular service of their country of nationality.

(69) Member States should ensure that information about legal assistance is provided.

(70)Member States should ensure that foreign nationals are informed of the possibility to request that the execution of their sentence or pre-trial supervision measures be transferred to their country of nationality or permanent residence, such as under Framework Decision 2008/909/JHA and Framework Decision 2009/829/JHA.

Special measures for children and young adults

(71)Member States should ensure that the child's best interests are a primary consideration in all matters relating to their detention, and that their specific rights and needs are taken into account when making decisions that affect any aspect of their detention.

(72)For children, Member States should establish an appropriate and multidisciplinary detention regime, that ensures and preserves their health and their physical, mental and emotional development, their right to education and training, the effective and regular exercise of their right to family life, and their access to programmes that foster their reintegration into society.

(73)Any use of disciplinary measures, including solitary confinement, use of restraints or use of force should be subject to strict necessity and proportionality considerations.

(74)Where appropriate, Member States are encouraged to apply the juvenile detention regime to young offenders under the age of 21.

Special measures for persons with disabilities or serious medical conditions

(75)Member States should ensure that persons with disabilities or other persons with serious medical conditions receive appropriate care comparable to that provided by the national public health system which meets their specific needs. In particular, Member States should ensure that persons who are diagnosed with mental health related medical conditions receive specialised professional care, where needed in specialised institutions or dedicated sections of the detention facility under medical supervision, and that continuity of healthcare is provided for detainees in preparation of release, where necessary.

(76)Member States should take special care to meet the needs of and ensure accessibility for detainees with disabilities or serious medical conditions with regards to material detention conditions and detention regimes. This should including the provision of appropriate activities for such detainees.

Special measures to protect other detainees with special needs or vulnerabilities

(77)Member States should ensure that placement in detention does not further aggravate the marginalisation of persons because of their sexual orientation, racial or ethnic origin or religious beliefs or on the basis of any other ground.

(78)Member States should take all reasonable measures to prevent any violence or other ill-treatment, such as

physical, mental or sexual abuse, against persons because of their sexual orientation, racial or ethnic origin, religious beliefs or on the basis of any other ground by staff in the detention facility or other detainees. Member States should ensure that special protection measures are applied where there is a risk of such violence or ill-treatment.

Inspections and monitoring

(79)Member States should facilitate regular inspections by an independent authority to assess whether detention facilities are administered in accordance with the requirements of national and international law. In particular, Member States should grant unhindered access to the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and to the National Preventive Mechanisms network.

(80)Member States should grant access to detention facilities to national parliamentarians and are encouraged to grant similar access to members of the European Parliament.

(81)Member States should also consider organising regular visits to detention facilities and other detention centres for judges, prosecutors and defence lawyers as part of their judicial training.

Specific measures to address radicalisation in prisons

(82)Member States are encouraged to carry out an initial risk assessment to determine the appropriate detention regime applicable to detainees suspected or convicted of terrorist and violent extremist offences.

(83)Based on this risk assessment, these detainees may be placed together in a separate terrorist wing or may be dispersed among the general prison population. In the latter case, Member States should prevent such individuals from having direct contact with detainees in situations of particular vulnerability in detention.

(84)Member States should ensure that further risk assessments are carried out on a regular basis by the prison administration (at the beginning of detention, during detention and prior to release of detainees suspected or convicted of terrorist and violent extremist offences).

(85)Member States are encouraged to provide general awareness training to all staff, and training to specialised staff, to recognise signs of radicalisation at an early stage. Member States should also consider providing an appropriate number of well-trained prison chaplains representing a variety of religions.

(86)Member States should implement measures providing for rehabilitation, deradicalisation and disengagement programmes in prison, in preparation of release, and programmes after release to promote reintegration of detainees convicted of terrorist and violent extremist offences.

MONITORING

(87)Member States should inform the Commission on their follow-up to this Recommendation within 18 months of its adoption. Based on this information, the Commission should monitor and assess the measures taken by Member States and submit a report to the European Parliament and to the Council within 24 months of its adoption.

Done at Brussels, 8 December 2022.

For the Commission

Didier REYNDERS

Member of the Commission

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[1] Judgment of the Court of Justice of 5 April 2016, *Aranyosi and Căldăraru,* C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198. Judgment of the Court of Justice of 25 July 2018, *Generalstaatsanwaltschaft,* C-220/18 PPU, ECLI:EU:C:2018:589 and Judgment of the Court of Justice of 15 October 2019, *Dimitru-Tudor Dorobantu*, C-128/18, ECLI:EU:C:2019:857.

[2] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002, p. 1).

[3] *Bivolaru and Moldovan v France*, Judgment of 25 March 2021, 40324/16 and 12623/17.

[4] https://data.consilium.europa.eu/doc/document/ST-14540-2018-INIT/en/pdf

[5] https://data.consilium.europa.eu/doc/document/ST-14075-2019-INIT/en/pdf

[6] https://data.consilium.europa.eu/doc/document/ST-9727-2019-INIT/en/pdf

[7] (2019/2207(INI)) as adopted on 20 January 2021.

[8] Visit https://fra.europa.eu/en/databases/criminal-detention

[9] Period covered 2016-2019. For further reference see: https://ec.europa.eu/info/publications/replies-questionnaire-quantitative-information-practical-operation-european-arrest-warrant_en

[10] The 9th round of mutual evaluations and conclusions of the High-Level Conference on the European arrest warrant, organised by the German Presidency of the Council of the European Union in September 2020.

[11] See Directorate-General for Justice and Consumers, *Rights of suspects and accused persons who are in pre-trial detention (exploratory study): final report*, Publications Office of the European Union, 2022, https://data.europa.eu/doi/10.2838/293366; Directorate-General for Justice and Consumers, *Rights of suspects and accused persons who are in pre-trial detention (exploratory study). Annex 2, Country fiches*, Publications Office of the European Union, 2022, https://data.europa.eu/doi/10.2838/184080

[12] Less than 1 year in Austria, Germany, Denmark, Estonia, Latvia, Sweden and Slovakia; Between 1 year and 2 years in Bulgaria, Greece, Lithuania, Malta, Poland and Portugal; Between 2 and 5 years in the Czechia, France, Spain, Croatia and Hungary; More than 5 years in Italy and Romania; No time limit in Belgium, Cyprus, Finland, Ireland, Luxembourg, Netherlands.

[13] In 2020, from just under 2 and a half months in Malta to nearly 13 months in Slovenia. Average per Member State: Austria – 2,9 months; Bulgaria – 6,5 months; Czechia – 5,1 months; Estonia – 4,7 months; Finland – 3,7 months; Greece – 11,5 months; Hungary – 12,3 months; Ireland – 2,5 months; Italy – 6,5 months; Lithuania – 2,8 months; Luxembourg – 5,2 months; Malta 2,4 months; Netherlands – 3,7 months; Portugal – 11 months; Romania – 5,3 months; Slovakia – 3,9 months; Slovenia – 12,9 months; Spain – 5,9 months. No data was available for the year 2020 for Belgium, Denmark, France, Latvia, Poland, Germany, Croatia, Cyprus and Sweden.

[14] Less than 10 % in Bulgaria, Czechia and Romania and more than 45 % in Luxembourg in 2019.

[15] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ L 280, 26.10.2010, p. 1).

[16] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ L 142, 1.6.2012, p. 1).

[17] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294, 6.11.2013, p. 1).

[18] Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ L 65, 11.3.2016, p. 1).

[19] Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (OJ L 132, 21.5.2016, p. 1).

[20] Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (OJ L 297, 4.11.2016, p. 1).

[21] OJ C 378, 24.12.2013, p. 8.

[22] Council Framework Decision 2008/909/JHA 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 L 327, 5.12.2008, p. 27).

[23] Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (OJ L 294, 11.11.2009, p. 20).

Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings

(2019/C 380/01)

These recommendations have been drawn up for the attention of the courts and tribunals of the Member States of the European Union and echo the provisions of Title III of the Rules of Procedure of the Court of Justice [1]. They serve as a reminder of the essential characteristics of the preliminary ruling procedure and the matters to be taken into account by the national courts and tribunals before a reference for a preliminary ruling is made to the Court of Justice, while providing practical guidance as to the form and content of requests for a preliminary ruling. Since such requests will be served, after having been translated, on all the interested persons referred to in Article 23 of the Protocol on the Statute of the Court of Justice of the European Union and the decisions of the Court closing the proceedings will in principle be published in all the official languages of the European Union, close attention must be paid to the presentation of requests for a preliminary ruling and, in particular, to the protection of the personal data which they contain.

INTRODUCTION

1. The reference for a preliminary ruling, provided for in Article 19(3)(b) of the Treaty on European Union ('TEU') and Article 267 of the Treaty on the Functioning of the European Union ('TFEU'), is a fundamental mechanism of EU law. It is designed to ensure the uniform interpretation and application of EU law within the European Union, by offering the courts and tribunals of the Member States a means of bringing before the Court of Justice of the European Union ('the Court') for a preliminary ruling questions concerning the interpretation of EU law or the validity of acts adopted by the institutions, bodies, offices or agencies of the Union.

2. The preliminary ruling procedure is based on close cooperation between the Court and the courts and tribunals of the Member States. In order to ensure that that procedure is fully effective, it is necessary to recall its essential characteristics and to provide further information to clarify the provisions of the rules of procedure relating, in particular, to the originator, subject matter and scope of a request for a preliminary ruling, as well as to the form and content of such a request. That information — which applies to all requests for a preliminary ruling (I) — is supplemented by provisions concerning requests for a preliminary ruling requiring particularly expeditious handling (II) and by an annex which summarises, by way of a reminder, all the elements that must be included in a request for a preliminary ruling.

I. PROVISIONS WHICH APPLY TO ALL REQUESTS FOR A PRELIMINARY RULING

The originator of the request for a preliminary ruling

3. The jurisdiction of the Court to give a preliminary ruling on the interpretation or validity of EU law is exercised exclusively on the initiative of the national courts and tribunals, whether or not the parties to the main proceedings have expressed the wish that a question be referred to the Court. In so far as it is called upon to assume responsibility for the subsequent judicial decision, it is for the national court or tribunal before which a dispute has been brought — and for that court or tribunal alone — to determine, in the light of the particular circumstances of each case, both the need for a request for a preliminary ruling in order to enable it to deliver its decision and the relevance of the questions which it submits to the Court.

4. Status as a court or tribunal is interpreted by the Court as an autonomous concept of EU law. The Court takes account of a number of factors such as whether the body making the reference is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.

5. The courts and tribunals of the Member States may refer a question to the Court on the interpretation or validity of EU law where they consider that a decision of the Court on the question is necessary to enable them to give judgment (see second paragraph of Article 267 TFEU). A reference for a preliminary ruling may, inter alia, prove particularly useful when a question of interpretation is raised before the national court or tribunal that is new and of general interest for the uniform application of EU law, or where the existing case-law does not appear to provide the necessary guidance in a new legal context or set of facts.

6. Where a question is raised in the context of a case that is pending before a court or tribunal against whose decisions there is no judicial remedy under national law, that court or tribunal is nonetheless required to bring a request for a preliminary ruling before the Court (see third paragraph of Article 267 TFEU), unless there is already well-established case-law on the point or unless the correct interpretation of the rule of law in question admits of no reasonable doubt.

7. It follows, moreover, from settled case-law that although national courts and tribunals may reject pleas raised before them challenging the validity of acts of an institution, body, office or agency of the Union, the Court has exclusive jurisdiction to declare such acts invalid. When it has doubts about the validity of such an act, a court or tribunal of a Member State must therefore refer the matter to the Court, stating the reasons why it has such doubts.

The subject matter and scope of the request for a preliminary ruling

8. A request for a preliminary ruling must concern the interpretation or validity of EU law, not the interpretation of rules of national law or issues of fact raised in the main proceedings.

9. *The Court can give a preliminary ruling only if EU law applies to the case in the main proceedings*. It is essential, in that respect, that the referring court or tribunal set out all the relevant matters of fact and of law that have prompted it to consider that any provisions of EU law may be applicable in the case.

10. With regard to references for a preliminary ruling concerning the interpretation of the Charter of Fundamental Rights of the European Union, it must be noted that, under Article 51(1) of the Charter, the provisions of the Charter are addressed to the Member States only when they are implementing EU law. While the circumstances of such implementation can vary, it must nevertheless be clearly and unequivocally apparent from the request for a preliminary ruling that a rule of EU law other than the Charter is applicable to the case in the main proceedings. Since the Court has no jurisdiction to give a preliminary ruling where a legal situation does not come within the scope of EU law, any *provisions of the Charter* that may be relied upon by the referring court or tribunal *cannot, of themselves, form the basis for such jurisdiction*.

11. Lastly, although, in order to deliver its decision, the Court necessarily takes into account the legal and factual context of the dispute in the main proceedings, as defined by the referring court or tribunal in its request for a preliminary ruling, it does not itself apply EU law to that dispute. When ruling on the interpretation or validity of EU law, the Court makes every effort to give a reply which will be of assistance in resolving the dispute in the main proceedings, but it is for the referring court or tribunal to draw case-specific conclusions, if necessary by disapplying the rule of national law that has been held to be incompatible with EU law.

The appropriate stage at which to make a reference for a preliminary ruling

12. A national court or tribunal may submit a request for a preliminary ruling to the Court as soon as it finds that a ruling on the interpretation or validity of EU law is necessary to enable it to give judgment. It is that court or tribunal which is in fact in the best position to decide at what stage of the national proceedings such a request should be made.

13. Since, however, that request will serve as the basis of the proceedings before the Court and the Court must therefore have available to it all the information that will enable it both to assess whether it has jurisdiction to give a reply to the questions raised and, if so, to give a useful reply to those questions, it is necessary that a decision to make a reference for a preliminary ruling be taken when the national proceedings have reached a stage at which the referring court or tribunal is able to *define, in sufficient detail, the legal and factual context of the case in the main proceedings, and the legal issues which it*

raises. In the interests of the proper administration of justice, it may also be appropriate for the reference to be made only after both sides have been heard.

The form and content of the request for a preliminary ruling

14. The request for a preliminary ruling may be in any form allowed by national law, but it should be borne in mind that that request serves as the basis of the proceedings before the Court and is served on all the interested persons referred to in Article 23 of the Protocol on the Statute of the Court of Justice of the European Union ('the Statute') and, in particular, on all the Member States, with a view to obtaining any observations they may wish to make. Owing to the consequential need to translate it into all the official languages of the European Union, the request for a preliminary ruling should therefore be drafted simply, clearly and precisely by the referring court or tribunal, avoiding superfluous detail. As experience has shown, about 10 pages are often sufficient to set out adequately the legal and factual context of a request for a preliminary ruling and the grounds for making the reference to the Court.

15. The content of any request for a preliminary ruling is prescribed by Article 94 of the Rules of Procedure of the Court and is summarised, by way of a reminder, in the annex hereto. In addition to the text of the questions referred to the Court for a preliminary ruling, *the request for a preliminary ruling must contain*:

—a summary of the subject matter of the dispute in the main proceedings and the relevant findings of fact as determined by the referring court or tribunal, or, at the very least, an account of the facts on which the questions referred are based,

—the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law, and

—a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

In the absence of one or more of the above, the Court may find it necessary, notably on the basis of Article 53(2) of the Rules of Procedure, to decline jurisdiction to give a preliminary ruling on the questions referred or dismiss the request for a preliminary ruling as inadmissible.

16. In its request for a preliminary ruling, the referring court or tribunal must provide the *precise references for the national provisions applicable to the facts of the dispute in the main proceedings and for the provisions of EU law* whose interpretation is sought or whose validity is challenged. Those references must, as far as possible, include both the exact title and date of adoption of the acts containing the provisions concerned and the publication references for those acts. When referring to case-law, the referring court or tribunal is also requested to mention the European Case Law Identifier (ECLI) of the decision concerned.

17. If it considers it necessary for the purpose of understanding the case, the referring court or tribunal may briefly set out the *main arguments of the parties to the main proceedings*. It should be borne in mind in that context that only the request for a preliminary ruling will be translated, not any annexes to that request.

18. The referring court or tribunal may also briefly state *its view on the answer to be given to the questions referred for a preliminary ruling*. That information may be useful to the Court, particularly where it is called upon to give a preliminary ruling in an expedited or urgent procedure.

19. Lastly, *the questions referred* to the Court for a preliminary ruling must appear *in a separate and clearly identified section of the order for reference*, preferably at the beginning or the end. It must be possible to understand them on their own terms, without it being necessary to refer to the statement of the grounds for the request.

20. In order to make the request for a preliminary ruling easier to read, it is essential that the Court receive it in typewritten form and that the pages and paragraphs of the order for reference be

numbered. Handwritten requests for a preliminary ruling will not be processed by the Court.

Protection of personal data and anonymisation of the request for a preliminary ruling

21. In order to ensure optimal protection of personal data in the Court's handling of the case, service of the request for a preliminary ruling on the interested persons referred to in Article 23 of the Statute and the subsequent dissemination, in all official languages of the European Union, of the decision closing the proceedings, *the referring court or tribunal* — which alone has full knowledge of the file submitted to the Court — *is invited to anonymise the case by replacing, for example using initials or a combination of letters, the names of individuals* referred to in the request *and by redacting information that might enable them to be identified*. Given the increasing use of new information technologies and, in particular, the use of search engines, any anonymisation effected after the request for a preliminary ruling has been served on the interested persons referred to in Article 23 of the Statute and publication of the notice relating to the case in the *Official Journal of the European Union* is likely to be less effective.

22. If the referring court or tribunal has a nominative version of the request for a preliminary ruling, containing the full names and contact details of the parties to the main proceedings, and an anonymised version of that request, it is requested to send both versions to the Court to facilitate the Court's handling of the case.

Transmission to the Court of the request for a preliminary ruling and of the case file in the national proceedings

23. The request for a preliminary ruling must be dated and signed, then sent to the Court Registry electronically or by post (Registry of the Court of Justice, Rue du Fort Niedergrünewald, L-2925 Luxembourg). For reasons connected, in particular, with the need to ensure expeditious handling of the case and optimal communication with the referring court or tribunal, the Court recommends that national courts and tribunals use the e-Curia application. The rules on access to that application, which enables procedural documents to be lodged and served electronically, and the conditions of use of e-Curia may be viewed on the institution's website (https://curia.europa.eu/jcms/jcms/P_78957/en/). In order to facilitate the Court's processing of requests for a preliminary ruling and, in particular, their translation into all the official languages of the European Union, national courts and tribunals are requested, in addition to sending the original version of the request for a preliminary ruling via e-Curia, to send an editable version (word processing software such as 'Word', 'OpenOffice' or 'LibreOffice') of that request to the following address: DDP-GreffeCour@curia.europa.eu.

24. The request for a preliminary ruling must reach the Registry together with all the relevant documents and documents useful for the Court's handling of the case and, in particular, the precise contact details for the parties to the main proceedings and their representatives, if any, as well as the file of the case in the main proceedings or a copy of it. The file (or copy file) — which may be sent electronically or by post — will be retained at the Registry throughout the proceedings before the Court where, unless otherwise indicated by the referring court or tribunal, it may be consulted by the interested persons referred to in Article 23 of the Statute.

Interaction between the reference for a preliminary ruling and the national proceedings

25. Although the referring court or tribunal may still order protective measures, particularly in connection with a reference on determination of validity, the lodging of a request for a preliminary ruling nevertheless calls for the national proceedings to be stayed until the Court has given its ruling.

26. While the Court, in principle, remains seised of a request for a preliminary ruling for so long as that request is not withdrawn by the referring court or tribunal, it must nevertheless be borne in mind that the Court's role in the preliminary ruling procedure is to contribute to the effective administration of justice in the Member States, and not to give opinions on general or hypothetical questions. Since the preliminary ruling procedure is predicated on there being proceedings actually pending before the referring court or tribunal, it is incumbent on that court or tribunal to inform the Court of any procedural step that may affect the referral and, in particular, of any discontinuance or withdrawal or of any amicable settlement of the dispute in the main proceedings, and of any other event leading to

the termination of the proceedings. The referring court or tribunal must also inform the Court of any decision delivered in the context of an appeal against the order for reference and of the consequences of that decision for the request for a preliminary ruling. In the interests of the proper conduct of the preliminary ruling proceedings before the Court and, in particular, to ensure that the Court does not devote time and resources to a case that is likely to be withdrawn or become devoid of purpose, it is important that such information is communicated to the Court with the minimum of delay.

27. National courts and tribunals should also note that the withdrawal of a request for a preliminary ruling may have an impact on the management of similar cases by the referring court or tribunal. Where the outcome of a number of cases pending before the referring court or tribunal depends on the reply to be given by the Court to the questions submitted by that court or tribunal, it is appropriate for that court or tribunal to join those cases before submitting to the Court its request for a preliminary ruling in order to enable the Court to reply to the questions referred notwithstanding any withdrawal of one or more cases.

Costs and legal aid

28. Preliminary ruling proceedings before the Court are free of charge and the Court does not rule on the costs of the parties to the proceedings pending before the referring court or tribunal. It is for the referring court or tribunal to rule on those costs.

29. If a party to the main proceedings has insufficient means, the Court may grant that party legal aid to cover the costs, particularly those in respect of its representation, which it incurs before the Court. That aid can, however, be granted only if the party in question is not already in receipt of aid under national rules or to the extent to which that aid does not cover, or covers only partly, costs incurred before the Court. That party is requested in any event to send to the Court all information and supporting documents that will enable his or her true financial situation to be assessed.

Conduct of the proceedings before the Court and the action taken by the referring court or tribunal upon the Court's decision

30. The Court Registry will remain in contact with the referring court or tribunal throughout the proceedings, and will send it copies of all procedural documents and any requests for information or clarification deemed necessary in order for a useful reply to be given to the questions referred by that court or tribunal.

31. At the end of the proceedings which, as a rule, comprise a written part and an oral part, the Court gives its ruling in the form of a judgment on the questions put by the referring court or tribunal. In some cases, however, the Court may find it necessary to rule on those questions without an oral part of the procedure, or even without seeking the written observations of the interested persons referred to in Article 23 of the Statute. That is the case, in particular, when the question referred for a preliminary ruling is identical to a question on which the Court has already ruled, or where the answer to such a question may be clearly deduced from existing case-law or admits of no reasonable doubt. In such cases, the Court will, on the basis of Article 99 of its Rules of Procedure, rule expeditiously on the question put, by a reasoned order which has the same scope and the same binding force as a judgment.

32. After the judgment has been delivered or the order closing the proceedings has been signed, the Registry will send the Court's decision to the referring court or tribunal, which is requested to inform the Court of the action taken upon that decision in the case in the main proceedings. The final decision of the referring court or tribunal must be sent, with an express reference to the case number of the case before the Court, to the following address: Follow-up-DDP@curia.europa.eu.

II. PROVISIONS APPLICABLE TO REQUESTS FOR A PRELIMINARY RULING REQUIRING PARTICULARLY EXPEDITIOUS HANDLING

33. As provided in Article 23a of the Statute and Articles 105 to 114 of the Rules of Procedure, a reference for a preliminary ruling may, in certain circumstances, be determined pursuant to an expedited procedure or an urgent procedure. The Court will decide whether these procedures are to be applied, either on submission by the referring court or tribunal of a separate, duly reasoned, request setting out the matters of fact or of law which justify the application of such procedure(s), or, exceptionally, of

its own motion, where that appears to be required by the nature or the particular circumstances of the case.

Conditions for the application of the expedited procedure and the urgent procedure

34. Article 105 of the Rules of Procedure provides that a reference for a preliminary ruling may thus be determined pursuant to *an expedited procedure*, derogating from the provisions of those rules, where the nature of the case requires that it be dealt with within a short time. Since that procedure imposes significant constraints on all those involved in it, and, in particular, on all the Member States called upon to lodge observations, whether written or oral, within much shorter time limits than would ordinarily apply, its application must be sought only when particular circumstances create an emergency that warrants the Court ruling quickly on the questions referred. That may be the case, inter alia, if there is a serious and immediate danger to public health or to the environment which a prompt decision by the Court might help to avert, or if particular circumstances require uncertainties concerning fundamental issues of national constitutional law and of EU law to be resolved within a very short time. According to settled case-law, the large number of persons or legal situations potentially affected by the decision that the referring court or tribunal has to deliver after bringing the matter before the Court for a preliminary ruling, the fact that there may be important economic issues at stake or that the referring court or tribunal is obliged to rule expeditiously do not, however, in themselves constitute exceptional circumstances that would justify the use of the expedited procedure.

35. The same applies *a fortiori* to *the urgent preliminary ruling procedure*, provided for in Article 107 of the Rules of Procedure. That procedure, which applies only in the areas covered by Title V of Part Three of the TFEU, relating to the area of freedom, security and justice, imposes even greater constraints on those concerned, since it limits the number of parties authorised to lodge written observations and, in cases of extreme urgency, allows the written part of the procedure before the Court to be omitted altogether. The application of the urgent procedure must therefore be requested only where it is absolutely necessary for the Court to give its ruling very quickly on the questions submitted by the referring court or tribunal.

36. Although it is not possible to provide an exhaustive list of such circumstances, particularly because of the varied and evolving nature of the rules of EU law governing the area of freedom, security and justice, a national court or tribunal may, for example, consider submitting a request for the urgent preliminary ruling procedure to be applied in the case, referred to in the fourth paragraph of Article 267 TFEU, of a person in custody or deprived of his or her liberty, where the answer to the question raised is decisive as to the assessment of that person's legal situation, or in proceedings concerning parental authority or custody of young children, in so far, in particular, as the outcome of the dispute in the main proceedings depends on the answer to the question referred for a preliminary ruling and the use of the ordinary procedure could cause serious, and perhaps irreparable, harm to the relationship between a child and (one of) that child's parents or to the child's development and integration into his or her family and social environment. By contrast, mere economic interests, however substantial and legitimate they may be, the legal uncertainty affecting the parties to the main proceedings or other parties to similar disputes, the large number of persons or legal situations potentially affected by the decision that a referring court has to deliver after bringing a matter before the Court for a preliminary ruling, or the large number of cases that may be affected by the decision of the Court do not constitute, as such, circumstances that would justify the application of the urgent preliminary ruling procedure.

The request for application of the expedited procedure or the urgent procedure

37. To enable the Court to decide quickly whether the expedited procedure or the urgent preliminary ruling procedure should be applied, the request must *set out precisely the matters of fact and law which establish the urgency* and, in particular, the risks involved in following the ordinary procedure. In so far as it is possible to do so, the referring court or tribunal must also briefly state its view on the answer to be given to the questions referred. Such a statement makes it easier for the parties to the main proceedings and the other interested persons participating in the procedure to define their positions, and therefore contributes to the rapidity of the procedure.

38. The request for the application of the expedited procedure or the urgent procedure must in any event be submitted in an unambiguous form that enables the Registry to establish immediately that the file has to be dealt with in a particular way. Accordingly, the referring court or tribunal is requested to specify which of the two procedures is required in the particular case, and to mention in its request the relevant article of the Rules of Procedure (Article 105 for the expedited procedure or Article 107 for the urgent procedure). That mention must be included in a clearly identifiable place in its order for reference or in a separate letter from the referring court or tribunal.

39. As regards the order for reference itself, it is particularly important that it should be concise where the matter is urgent, as this will help to ensure the rapidity of the procedure.

Communication between the Court, the referring court or tribunal and the parties to the main proceedings

40. A court or tribunal submitting a request for the expedited procedure or the urgent procedure to be applied is requested to send that request and the order for reference itself — together with the text of the latter in an editable format (word processing software such as 'Word', 'Open Office' or 'LibreOffice') — by means of the e-Curia application or by email (DDP-GreffeCour@curia.europa.eu).

41. In order to facilitate subsequent communication by the Court with the referring court or tribunal and with the parties to the main proceedings, the referring court or tribunal is also requested to state its email address and any fax number which may be used by the Court, together with the email addresses and any fax numbers of the representatives of the parties to the main proceedings.

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[1] OJ L 265, 29.9.2012, p. 1.

ANNEX

The essential elements of a request for a preliminary ruling

This annex summarises, by way of a reminder, the main elements that must be included in a request for a preliminary ruling. These are followed by an indication of the paragraphs in the present recommendations in which those elements are discussed in more detail.

Whether transmitted electronically or by post, all requests for a preliminary ruling must mention:

1. the identity of the court or tribunal making the reference and, where appropriate, the chamber or formation of the court or tribunal having jurisdiction (see, in that respect, paragraphs 3 to 7);

2. the precise identity of the parties to the main proceedings and of anyone representing them before the referring court or tribunal (with regard to the parties to the main proceedings, see, however, paragraphs 21 and 22 of the present recommendations, in relation to the protection of personal data);

3. the subject matter of the dispute in the main proceedings and the relevant facts (see paragraph 15);

4. the relevant provisions of national law and of EU law (see paragraphs 15 and 16);

5. the reasons that prompted the referring court or tribunal to inquire about the interpretation or validity of EU law (see paragraphs 8 to 11 and 15 to 18);

6. the questions referred for a preliminary ruling (see paragraph 19) and, if applicable,

7. the possible need for specific treatment of the request, related, for example, to the need to preserve the anonymity of individuals concerned by the dispute or to the particularly expeditious way in which the request should be dealt with by the Court (see paragraph 33 et seq.).

As regards form, requests for a preliminary ruling must be typewritten, dated and signed and must be received at the Court Registry, preferably electronically, together with all the documents that are relevant and useful for the handling of the case (see, in that respect, paragraphs 20 to 24 of the present

recommendations and, with regard to requests requiring particularly expeditious treatment, paragraphs 40 and 41).

Transmission channels recommended by the Court

In order to ensure the best possible communication with courts and tribunals that have referred questions to the Court for a preliminary ruling, the Court recommends the use of the following transmission channels:

(1) Lodging of the request for a preliminary ruling (or of other relevant documents linked to that request):

— Signed original of the request for a preliminary ruling (or of the other documents linked to that request): to be sent via the e-Curia application. The rules on access to that application, which is free of charge and secure, and the conditions of use of e-Curia, are available here: https://curia.europa.eu/jcms/jcms/P_78957/en/

— Editable version of the request for a preliminary ruling (or of the other documents linked to it): DDP-GreffeCour@curia.europa.eu

(2) Transmission of the final decision of the referring court or tribunal (anonymised, if necessary, including for the purposes of being placed online), following the Court's decision on the request for a preliminary ruling: Follow-up-DDP@curia.europa.eu

PART C. CJEU JURISPRUDENCE

Parties

IN CASE 106/77

REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE PRETORE DI SUSA (ITALY) FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

AMMINISTRAZIONE DELLE FINANZE DELLO STATO (ITALIAN FINANCE ADMINISTRATION)

AND

SIMMENTHAL S.P.A ., HAVING ITS REGISTERED OFFICE AT MONZA ,

Subject of the case

ON THE INTERPRETATION OF ARTICLE 189 OF THE EEC TREATY AND , IN PARTICULAR , ON THE EFFECTS OF THE DIRECT APPLICABILITY OF COMMUNITY LAW IF IT IS INCONSISTENT WITH ANY PROVISIONS OF NATIONAL LAW WHICH MAY CONFLICT WITH IT .

Grounds

1BY AN ORDER OF 28 JULY 1977 , RECEIVED AT THE COURT ON 29 AUGUST 1977 , THE PRETORE DI SUSA REFERRED TO THE COURT FOR A RULING PURSUANT TO ARTICLE 177 OF THE EEC TREATY , TWO QUESTIONS RELATING TO THE PRINCIPLE OF THE DIRECT APPLICABILITY OF COMMUNITY LAW AS SET OUT IN ARTICLE 189 OF THE TREATY FOR THE PURPOSE OF DETERMINING THE EFFECTS OF THAT PRINCIPLE WHEN A RULE OF COMMUNITY LAW CONFLICTS WITH A SUBSEQUENT PROVISION OF NATIONAL LAW .

2IT IS APPROPRIATE TO DRAW ATTENTION TO THE FACT THAT AT A PREVIOUS STAGE OF THE PROCEEDINGS THE PRETORE REFERRED TO THE COURT FOR A PRELIMINARY RULING QUESTIONS DESIGNED TO ENABLE HIM TO DETERMINE WHETHER VETERINARY AND PUBLIC HEALTH FEES LEVIED ON IMPORTS OF BEEF AND VEAL UNDER THE CONSOLIDATED TEXT OF THE ITALIEN VETERINARY AND PUBLIC HEALTH LAWS , THE RATE OF WHICH WAS LAST FIXED BY THE SCALE ANNEXED TO LAW NO 1239 OF 30 DECEMBER 1970 (GAZZETA UFFICIALE NO 26 OF 1 FEBRUARY 1971), WERE COMPATIBLE WITH THE TREATY AND WITH CERTAIN REGULATIONS - IN PARTICULAR REGULATION (EEC) NO 805/68 OF THE COUNCIL OF 27 JUNE 1968 ON THE COMMON ORGANIZATION OF THE MARKET IN BEEF AND VEAL (OFFICIAL JOURNAL , ENGLISH SPECIAL EDITION 1968 (I), P . 187).

3HAVING REGARD TO THE ANSWERS GIVEN BY THE COURT IN ITS JUDGMENT OF 15 DECEMBER 1976 IN CASE 35/76 (SIMMENTHAL S.P.A . V ITALIAN MINISTER FOR FINANCE (1976) ECR 1871) THE PRETORE HELD THAT THE LEVYING OF THE FEES IN QUESTION WAS INCOMPATIBLE WITH THE PROVISIONS OF COMMUNITY LAW AND ORDERED THE AMMINISTRAZIONE DELLE FINANZE DELLO STATO (ITALIAN FINANCE ADMINISTRATION) TO REPAY THE FEES UNLAWFULLY CHARGED , TOGETHER WITH INTEREST .

4THE AMMINISTRAZIONE APPEALED AGAINST THAT ORDER .

5THE PRETORE , TAKING INTO ACCOUNT THE ARGUMENTS PUT FORWARD BY THE PARTIES DURING THE PROCEEDINGS ARISING OUT OF THIS APPEAL , HELD THAT THE ISSUE BEFORE HIM INVOLVED A CONFLICT BETWEEN CERTAIN RULES OF COMMUNITY LAW AND A SUBSEQUENT NATIONAL LAW , NAMELY THE SAID LAW NO 1239/70 .

6HE POINTED OUT THAT TO RESOLVE AN ISSUE OF THIS KIND , ACCORDING TO RECENTLY DECIDED CASES OF THE ITALIAN CONSTITUTIONAL COURT (JUDGMENTS NO 232/75 AND NO 205/76 AND ORDER NO 206/76), THE QUESTION WHETHER THE LAW IN QUESTION WAS UNCONSTITUTIONAL UNDER ARTICLE 11 OF THE CONSTITUTION MUST BE REFERRED TO THE CONSTITUTIONAL COURT ITSELF .

7THE PRETORE , HAVING REGARD , ON THE ONE HAND , TO THE WELL-ESTABLISHED CASE-LAW OF THE COURT OF JUSTICE RELATING TO THE APPLICABILITY OF COMMUNITY LAW IN THE LEGAL SYSTEMS OF THE MEMBER STATES AND , ON THE OTHER HAND , TO THE DISADVANTAGES WHICH MIGHT ARISE IF THE NATIONAL COURT , INSTEAD OF DECLARING OF ITS OWN MOTION THAT A LAW IMPEDING THE FULL FORCE AND EFFECT OF COMMUNITY LAW WAS INAPPLICABLE , WERE REQUIRED TO RAISE THE ISSUE OF CONSTITUTIONALITY , REFERRED TO THE COURT TWO QUESTIONS FRAMED AS FOLLOWS :

(A) SINCE , IN ACCORDANCE WITH ARTICLE 189 OF THE EEC TREATY AND THE ESTABLISHED CASE-LAW OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES , DIRECTLY APPLICABLE COMMUNITY PROVISIONS MUST , NOTWITHSTANDING ANY INTERNAL RULE OR PRACTICE WHATSOEVER OF THE MEMBER STATES , HAVE FULL , COMPLETE AND UNIFORM EFFECT IN THEIR LEGAL SYSTEMS IN ORDER TO PROTECT SUBJECTIVE LEGAL RIGHTS CREATED IN FAVOUR OF INDIVIDUALS , IS THE SCOPE OF THE SAID PROVISIONS TO BE INTERPRETED TO THE EFFECT THAT ANY SUBSEQUENT NATIONAL MEASURES WHICH CONFLICT WITH THOSE PROVISIONS MUST BE FORTHWITH DISREGARDED WITHOUT WAITING UNTIL THOSE MEASURES HAVE BEEN ELIMINATED BY ACTION ON THE PART OF THE NATIONAL LEGISLATURE CONCERNED (REPEAL) OR OF OTHER CONSTITUTIONAL AUTHORITIES (DECLARATION THAT THEY ARE UNCONSTITUTIONAL) ESPECIALLY , IN THE CASE OF THE LATTER ALTERNATIVE , WHERE , SINCE THE NATIONAL LAW CONTINUES TO BE FULLY EFFECTIVE PENDING SUCH DECLARATION , IT IS IMPOSSIBLE TO APPLY THE COMMUNITY PROVISIONS AND , IN CONSEQUENCE , TO ENSURE THAT THEY ARE FULLY , COMPLETELY AND UNIFORMLY APPLIED AND TO PROTECT THE LEGAL RIGHTS CREATED IN FAVOUR OF INDIVIDUALS?

(B) ARISING OUT OF THE PREVIOUS QUESTION , IN CIRCUMSTANCES WHERE COMMUNITY LAW RECOGNIZES THAT THE PROTECTION OF SUBJECTIVE LEGAL RIGHTS CREATED AS A RESULT OF '' DIRECTLY APPLICABLE '' COMMUNITY PROVISIONS MAY BE SUSPENDED UNTIL ANY CONFLICTING NATIONAL MEASURES ARE ACTUALLY REPEALED BY THE COMPETENT NATIONAL AUTHORITIES , IS SUCH REPEAL IN ALL CASES TO HAVE A WHOLLY RETROACTIVE EFFECT SO AS TO AVOID ANY ADVERSE EFFECTS ON THOSE SUBJECTIVE LEGAL RIGHTS?

THE REFERENCE TO THE COURT

8THE AGENT OF THE ITALIAN GOVERNMENT IN HIS ORAL OBSERVATIONS DREW THE ATTENTION OF THE COURT TO A JUDGMENT OF THE ITALIAN CONSTITUTIONAL COURT NO 163/77 OF 22 DECEMBER 1977 DELIVERED IN ANSWER TO QUESTIONS OF CONSTITUTIONALITY RAISED BY THE COURTS OF MILAN UND ROME , WHICH DECLARED THAT CERTAIN OF THE PROVISIONS OF LAW NO 1239 OF 30 DECEMBER 1970 INCLUDING THOSE AT ISSUE IN THE ACTION PENDING BEFORE THE PRETORE DI SUSA , WERE UNCONSTITUTIONAL .

9IT WAS SUGGESTED THAT SINCE THE DISPUTED PROVISIONS HAVE BEEN SET ASIDE BY THE DECLARATION THAT THEY ARE UNCONSTITUTIONAL , THE QUESTIONS RAISED BY THE PRETORE NO LONGER HAVE RELEVANCE SO THAT IT IS NO LONGER NECESSARY TO ANSWER THEM .

10ON THIS ISSUE IT SHOULD BE BORNE IN MIND THAT IN ACCORDANCE WITH ITS UNVARYING PRACTICE THE COURT OF JUSTICE CONSIDERS A REFERENCE FOR A PRELIMINARY RULING , PURSUANT TO ARTICLE 177 OF THE TREATY , AS HAVING BEEN VALIDLY BROUGHT BEFORE IT SO LONG AS THE REFERENCE HAS NOT BEEN WITHDRAWN BY THE COURT FROM WHICH IT EMANATES OR HAS NOT BEEN QUASHED ON APPEAL BY A SUPERIOR COURT .

11THE JUDGMENT REFERRED TO , WHICH WAS DELIVERED IN PROCEEDINGS IN NO WAY CONNECTED WITH THE ACTION GIVING RISE TO THE REFERENCE TO THIS COURT , CANNOT HAVE SUCH A RESULT AND THE COURT CANNOT DETERMINE ITS EFFECT ON THIRD PARTIES .

12THE PRELIMINARY OBJECTION RAISED BY THE ITALIAN GOVERNMENT MUST THEREFORE BE OVERRULED .

THE SUBSTANCE OF THE CASE

13THE MAIN PURPOSE OF THE FIRST QUESTION IS TO ASCERTAIN WHAT CONSEQUENCES FLOW FROM THE DIRECT APPLICABILITY OF A PROVISION OF COMMUNITY LAW IN THE EVENT OF INCOMPATIBILITY WITH A SUBSEQUENT LEGISLATIVE PROVISION OF A MEMBER STATE .

14DIRECT APPLICABILITY IN SUCH CIRCUMSTANCES MEANS THAT RULES OF COMMUNITY LAW MUST BE FULLY AND UNIFORMLY APPLIED IN ALL THE MEMBER STATES FROM THE DATE OF THEIR ENTRY INTO FORCE AND FOR SO LONG AS THEY CONTINUE IN FORCE .

15THESE PROVISIONS ARE THEREFORE A DIRECT SOURCE OF RIGHTS AND DUTIES FOR ALL THOSE AFFECTED THEREBY , WHETHER MEMBER STATES OR INDIVIDUALS , WHO ARE PARTIES TO LEGAL RELATIONSHIPS UNDER COMMUNITY LAW .

16THIS CONSEQUENCE ALSO CONCERNS ANY NATIONAL COURT WHOSE TASK IT IS AS AN ORGAN OF A MEMBER STATE TO PROTECT , IN A CASE WITHIN ITS JURISDICTION , THE RIGHTS CONFERRED UPON INDIVIDUALS BY COMMUNITY LAW .

17FURTHERMORE , IN ACCORDANCE WITH THE PRINCIPLE OF THE PRECEDENCE OF COMMUNITY LAW , THE RELATIONSHIP BETWEEN PROVISIONS OF THE TREATY AND DIRECTLY APPLICABLE MEASURES OF THE INSTITUTIONS ON THE ONE HAND AND THE NATIONAL LAW OF THE MEMBER STATES ON THE OTHER IS SUCH THAT THOSE PROVISIONS AND MEASURES NOT ONLY BY THEIR ENTRY INTO FORCE RENDER AUTOMATICALLY INAPPLICABLE ANY CONFLICTING PROVISION OF CURRENT NATIONAL LAW BUT - IN SO FAR AS THEY ARE AN INTEGRAL PART OF , AND TAKE PRECEDENCE IN , THE LEGAL ORDER APPLICABLE IN THE TERRITORY OF EACH OF THE MEMBER STATES - ALSO PRECLUDE THE VALID ADOPTION OF NEW NATIONAL LEGISLATIVE MEASURES TO THE EXTENT TO WHICH THEY WOULD BE INCOMPATIBLE WITH COMMUNITY PROVISIONS .

18INDEED ANY RECOGNITION THAT NATIONAL LEGISLATIVE MEASURES WHICH ENCROACH UPON THE FIELD WITHIN WHICH THE COMMUNITY EXERCISES ITS LEGISLATIVE POWER OR WHICH ARE OTHERWISE INCOMPATIBLE WITH THE PROVISIONS OF COMMUNITY LAW HAD ANY LEGAL EFFECT WOULD AMOUNT TO A CORRESPONDING DENIAL OF THE EFFECTIVENESS OF OBLIGATIONS UNDERTAKEN UNCONDITIONALLY AND IRREVOCABLY BY MEMBER STATES PURSUANT TO THE TREATY AND WOULD THUS IMPERIL THE VERY FOUNDATIONS OF THE COMMUNITY .

19THE SAME CONCLUSION EMERGES FROM THE STRUCTURE OF ARTICLE 177 OF THE TREATY WHICH PROVIDES THAT ANY COURT OR TRIBUNAL OF A MEMBER STATE IS ENTITLED TO MAKE A REFERENCE TO THE COURT WHENEVER IT CONSIDERS THAT A PRELIMINARY RULING ON A QUESTION OF INTERPRETATION OR VALIDITY RELATING TO COMMUNITY LAW IS NECESSARY TO ENABLE IT TO GIVE JUDGMENT .

20THE EFFECTIVENESS OF THAT PROVISION WOULD BE IMPAIRED IF THE NATIONAL COURT WERE PREVENTED FROM FORTHWITH APPLYING COMMUNITY LAW IN ACCORDANCE WITH THE DECISION OR THE CASE-LAW OF THE COURT .

21IT FOLLOWS FROM THE FOREGOING THAT EVERY NATIONAL COURT MUST , IN A CASE WITHIN ITS JURISDICTION , APPLY COMMUNITY LAW IN ITS ENTIRETY AND PROTECT RIGHTS WHICH THE LATTER CONFERS ON INDIVIDUALS AND MUST ACCORDINGLY SET ASIDE ANY PROVISION OF NATIONAL LAW WHICH MAY CONFLICT WITH IT , WHETHER PRIOR OR SUBSEQUENT TO THE COMMUNITY RULE .

22ACCORDINGLY ANY PROVISION OF A NATIONAL LEGAL SYSTEM AND ANY LEGISLATIVE , ADMINISTRATIVE OR JUDICIAL PRACTICE WHICH MIGHT IMPAIR THE EFFECTIVENESS OF COMMUNITY LAW BY WITHHOLDING FROM THE NATIONAL COURT HAVING JURISDICTION TO APPLY SUCH LAW THE POWER TO DO EVERYTHING NECESSARY AT THE MOMENT OF ITS APPLICATION TO SET ASIDE NATIONAL LEGISLATIVE PROVISIONS WHICH MIGHT PREVENT COMMUNITY RULES FROM HAVING FULL FORCE AND EFFECT ARE INCOMPATIBLE WITH THOSE REQUIREMENTS WHICH ARE THE VERY ESSENCE OF COMMUNITY LAW .

23THIS WOULD BE THE CASE IN THE EVENT OF A CONFLICT BETWEEN A PROVISION OF COMMUNITY LAW AND A SUBSEQUENT NATIONAL LAW IF THE SOLUTION OF THE CONFLICT WERE TO BE RESERVED FOR AN AUTHORITY WITH A DISCRETION OF ITS OWN , OTHER THAN THE COURT CALLED UPON TO APPLY COMMUNITY LAW , EVEN IF SUCH AN IMPEDIMENT TO THE FULL EFFECTIVENESS OF COMMUNITY LAW WERE ONLY TEMPORARY .

24THE FIRST QUESTION SHOULD THEREFORE BE ANSWERED TO THE EFFECT THAT A NATIONAL COURT WHICH IS CALLED UPON , WITHIN THE LIMITS OF ITS JURISDICTION , TO APPLY PROVISIONS OF COMMUNITY LAW IS UNDER A DUTY TO GIVE FULL EFFECT TO THOSE PROVISIONS , IF NECESSARY REFUSING OF ITS OWN MOTION TO APPLY ANY CONFLICTING PROVISION OF NATIONAL LEGISLATION , EVEN IF ADOPTED SUBSEQUENTLY , AND IT IS NOT NECESSARY FOR THE COURT TO REQUEST OR AWAIT THE PRIOR SETTING ASIDE OF SUCH PROVISION BY LEGISLATIVE OR OTHER CONSTITUTIONAL MEANS .

25THE ESSENTIAL POINT OF THE SECOND QUESTION IS WHETHER - ASSUMING IT TO BE ACCEPTED THAT THE PROTECTION OF RIGHTS CONFERRED BY PROVISIONS OF COMMUNITY LAW CAN BE SUSPENDED UNTIL ANY NATIONAL PROVISIONS WHICH MIGHT CONFLICT WITH THEM HAVE BEEN IN FACT SET ASIDE BY THE COMPETENT NATIONAL AUTHORITIES - SUCH SETTING ASIDE MUST IN EVERY CASE HAVE UNRESTRICTED RETROACTIVE EFFECT SO AS TO PREVENT THE RIGHTS IN QUESTION FROM BEING IN ANY WAY ADVERSELY AFFECTED .

26IT FOLLOWS FROM THE ANSWER TO THE FIRST QUESTION THAT NATIONAL COURTS MUST PROTECT RIGHTS CONFERRED BY PROVISIONS OF THE COMMUNITY LEGAL ORDER AND THAT IT IS NOT NECESSARY FOR SUCH COURTS TO REQUEST OR AWAIT THE ACTUAL SETTING ASIDE BY THE NATIONAL AUTHORITIES EMPOWERED SO TO ACT OF ANY NATIONAL MEASURES WHICH MIGHT IMPEDE THE DIRECT AND IMMEDIATE APPLICATION OF COMMUNITY RULES .

27THE SECOND QUESTION THEREFORE APPEARS TO HAVE NO PURPOSE .

Operative part

ON THOSE GROUNDS

THE COURT ,

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE PRETORE DI SUSA BY ORDER OF 28 JULY 1977 , HEREBY RULES :

A NATIONAL COURT WHICH IS CALLED UPON , WITHIN THE LIMITS OF ITS JURISDICTION , TO APPLY PROVISIONS OF COMMUNITY LAW IS UNDER A DUTY TO GIVE FULL EFFECT TO THOSE PROVISIONS , IF NECESSARY REFUSING OF ITS OWN MOTION TO APPLY ANY CONFLICTING PROVISION OF NATIONAL

LEGISLATION , EVEN IF ADOPTED SUBSEQUENTLY , AND IT IS NOT NECESSARY FOR THE COURT TO REQUEST OR AWAIT THE PRIOR SETTING ASIDE OF SUCH PROVISIONS BY LEGISLATIVE OR OTHER CONSTITUTIONAL MEANS .

Judgment in Case 270/80 Polydor Limited and RSO Records Inc. v Harlequin Records Shops Limited and Simons Records Limited

Keywords

1 . INTERNATIONAL AGREEMENTS - AGREEMENT BETWEEN THE EEC AND THE PORTUGUESE REPUBLIC - DIFFERENT PURPOSE FROM THAT OF THE EEC TREATY - PROVISIONS OF THE TREATY GOVERNING THE RELATIONSHIP BETWEEN INDUSTRIAL AND COMMERCIAL PROPERTY RIGHTS AND THE FREE MOVEMENT OF GOODS - INTERPRETATION GIVEN BY THE COURT - TRANSPOSITION TO THE PROVISIONS OF THE AGREEMENT - NOT POSSIBLE

(EEC TREATY , ARTS 30 AND 36 ; AGREEMENT BETWEEN THE EEC AND PORTUGAL OF 22 JULY 1972 , ARTS 14 (2) AND 23)

2 . INTERNATIONAL AGREEMENTS - AGREEMENT BETWEEN THE EEC AND THE PORTUGUESE REPUBLIC - RESTRICTIONS ON TRADE JUSTIFIED ON THE GROUND OF THE PROTECTION OF INDUSTRIAL AND COMMERCIAL PROPERTY - COPYRIGHT - ATTEMPT BY THE COPYRIGHT OWNER TO RESTRAIN THE IMPORTATION INTO A MEMBER STATE OF PROTECTED PRODUCTS PLACED ON THE MARKET IN PORTUGAL BY THE OWNER ' S LICENSEE - PERMISSIBLE

(AGREEMENT BETWEEN THE EEC AND PORTUGAL OF 22 JULY 1972 , ARTS 14 (2) AND 23)

Summary

1 . THE SIMILARITY BETWEEN THE TERMS USED IN ARTICLES 30 AND 36 OF THE EEC TREATY , ON THE ONE HAND , AND ARTICLES 14 (2) AND 23 OF THE AGREEMENT BETWEEN THE EEC AND THE PORTUGUESE REPUBLIC , ON THE OTHER , IS NOT A SUFFICIENT REASON FOR TRANSPOSING TO THE PROVISIONS OF THE AGREEMENT THE CASE-LAW OF THE COURT WHICH DETERMINES IN THE CONTEXT OF THE COMMUNITY THE RELATIONSHIP BETWEEN THE PROTECTION OF INDUSTRIAL AND COMMERCIAL PROPERTY RIGHTS AND THE RULES ON THE FREE MOVEMENT OF GOODS .

ALTHOUGH IT MAKES PROVISION FOR THE UNCONDITIONAL ABOLITION OF CERTAIN RESTRICTIONS ON TRADE BETWEEN THE COMMUNITY AND PORTUGAL , SUCH AS QUANTITATIVE RESTRICTIONS AND MEASURES HAVING EQUIVALENT EFFECT , THE AGREEMENT DOES NOT HAVE THE SAME PURPOSE AS THE EEC TREATY , INASMUCH AS THE LATTER SEEKS TO UNITE NATIONAL MARKETS INTO A SINGLE MARKET REPRODUCING AS CLOSELY AS POSSIBLE THE CONDITIONS OF A DOMESTIC MARKET . IT FOLLOWS THAT IN THE CONTEXT OF THE AGREEMENT RESTRICTIONS ON TRADE IN GOODS MAY BE CONSIDERED TO BE JUSTIFIED ON THE GROUND OF THE PROTECTION OF INDUSTRIAL AND COMMERCIAL PROPERTY IN A SITUATION IN WHICH THEIR JUSTIFICATION WOULD NOT BE POSSIBLE WITHIN THE COMMUNITY .

2 . THE ENFORCEMENT BY THE PROPRIETOR OR BY PERSONS ENTITLED UNDER HIM OF COPYRIGHTS PROTECTED BY THE LAW OF A MEMBER STATE AGAINST THE IMPORTATION AND MARKETING OF GRAMOPHONE RECORDS LAWFULLY MANUFACTURED AND PLACED ON THE MARKET IN THE PORTUGUESE REPUBLIC BY LICENSEES OF THE PROPRIETOR IS JUSTIFIED ON THE GROUND OF THE PROTECTION OF INDUSTRIAL AND COMMERCIAL PROPERTY WITHIN THE MEANING OF ARTICLE 23 OF THE AGREEMENT BETWEEN THE EEC AND THE PORTUGUESE REPUBLIC AND THEREFORE DOES NOT CONSTITUTE A RESTRICTION ON TRADE SUCH AS IS PROHIBITED BY ARTICLE 14 (2) OF THE AGREEMENT . SUCH ENFORCEMENT DOES NOT CONSTITUTE A MEANS OF ARBITRARY DISCRIMINATION OR A DISGUISED RESTRICTION ON TRADE BETWEEN THE COMMUNITY AND PORTUGAL WITHIN THE MEANING OF THE SAID ARTICLE 23 .

Subject of the case

ON THE INTERPRETATION OF ARTICLES 14 AND 23 OF THE AGREEMENT CONCLUDED ON 22 JULY 1972 BETWEEN THE EUROPEAN ECONOMIC COMMUNITY AND THE PORTUGUESE REPUBLIC (OFFICIAL JOURNAL , ENGLISH SPECIAL EDITION 1972 (31 DECEMBER) (L 301), P . 167),

Grounds

1 BY ORDER OF 15 MAY 1980 , WHICH WAS RECEIVED AT THE COURT ON 8 DECEMBER 1980 , THE COURT OF APPEAL OF ENGLAND AND WALES REFERRED TO THE COURT FOR A PRELIMINARY RULING UNDER ARTICLE 177 OF THE EEC TREATY FOUR QUESTIONS ON THE INTERPRETATION OF ARTICLES 14 (2) AND 23 OF THE AGREEMENT BETWEEN THE EUROPEAN ECONOMIC COMMUNITY AND THE PORTUGUESE REPUBLIC , WHICH WAS SIGNED IN BRUSSELS ON 22 JULY 1972 AND WAS CONCLUDED AND ADOPTED ON BEHALF OF THE COMMUNITY BY REGULATION (EEC) NO 2844/72 OF THE COUNCIL OF 19 DECEMBER 1972 (OFFICIAL JOURNAL , ENGLISH SPECIAL EDITION (31 DECEMBER) (L 301), P . 166).

2 THE MAIN PROCEEDINGS CONCERN AN ACTION FOR INFRINGEMENT OF COPYRIGHT BROUGHT AGAINST TWO BRITISH UNDERTAKINGS , HARLEQUIN RECORD SHOPS LIMITED AND SIMONS RECORDS LIMITED (HEREINAFTER REFERRED TO AS ''HARLEQUIN ''AND ''SIMONS ''RESPECTIVELY), SPECIALIZING IN THE IMPORTATION AND SALE OF GRAMOPHONE RECORDS , WHICH IMPORTED FROM PORTUGAL AND PUT ON SALE IN THE UNITED KINGDOM RECORDS FEATURING THE POPULAR MUSIC OF THE GROUP KNOWN AS ''THE BEE GEES '', WITHOUT OBTAINING THE CONSENT OF THE PROPRIETOR OF THE COPYRIGHTS OR OF HIS EXCLUSIVE LICENSEE IN THE UNITED KINGDOM .

3 THE PROPRIETOR OF THE COPYRIGHTS IN THE SOUND RECORDINGS IN QUESTION , RSO RECORDS INC . (HEREINAFTER REFERRED TO AS ''RSO ''), GRANTED TO AN AFFILIATED COMPANY , POLYDOR LIMITED (HEREINAFTER REFERRED TO AS ''POLYDOR ''), AN EXCLUSIVE LICENCE TO MANUFACTURE AND DISTRIBUTE GRAMOPHONE RECORDS AND CASSETTES REPRODUCING THOSE RECORDINGS IN THE UNITED KINGDOM . RECORDS AND CASSETTES REPRODUCING THE SAME RECORDINGS WERE MANUFACTURED AND MARKETED IN PORTUGAL BY TWO COMPANIES INCORPORATED UNDER PORTUGUESE LAW , WHICH WERE LICENSEES OF RSO IN PORTUGAL . SIMONS PURCHASED RECORDS CONTAINING THOSE RECORDINGS IN PORTUGAL IN ORDER TO IMPORT THEM INTO THE UNITED KINGDOM WITH A VIEW TO THEIR SALE . HARLEQUIN PURCHASED A NUMBER OF THOSE RECORDS FROM SIMONS FOR THE PURPOSE OF RETAIL SALE .

4 THE COURT OF APPEAL ESTABLISHED THAT UNDER ENGLISH LAW HARLEQUIN AND SIMONS HAD THEREBY INFRINGED SECTION 16 (2) OF THE COPYRIGHT ACT , 1956 . THAT PROVISION PROVIDES THAT A COPYRIGHT IS INFRINGED BY ANY PERSON WHO , WITHOUT THE LICENCE OF THE OWNER OF THE COPYRIGHT , IMPORTS AN ARTICLE INTO THE UNITED KINGDOM , IF TO HIS KNOWLEDGE THE MAKING OF THAT ARTICLE CONSTITUTED AN INFRINGEMENT OF THAT COPYRIGHT , OR WOULD HAVE CONSTITUTED SUCH AN INFRINGEMENT IF THE ARTICLE HAD BEEN MADE IN THE PLACE INTO WHICH IT IS SO IMPORTED .

5 HARLEQUIN AND SIMONS MAINTAINED , HOWEVER , THAT THE PROPRIETOR OF A COPYRIGHT MIGHT NOT RELY UPON THAT RIGHT IN ORDER TO RESTRAIN THE IMPORTATION OF A PRODUCT INTO A MEMBER STATE OF THE COMMUNITY , IF THAT PRODUCT HAD BEEN LAWFULLY PLACED ON THE MARKET IN PORTUGAL BY HIM OR WITH HIS CONSENT . IN SUPPORT OF THAT SUBMISSION THE COMPANIES RELIED UPON ARTICLES 14 (2) AND 23 OF THE AGREEMENT BETWEEN THE EUROPEAN ECONOMIC COMMUNITY AND THE PORTUGUESE REPUBLIC OF 1972 (HEREINAFTER REFERRED TO AS '' THE AGREEMENT ''), CLAIMING THAT THOSE PROVISIONS WERE BASED ON THE SAME PRINCIPLES AS ARTICLES 30 AND 36 OF THE EEC TREATY AND ACCORDINGLY HAD TO BE INTERPRETED IN A SIMILAR MANNER .

6 IN ORDER TO ENABLE IT TO ASSESS THAT SUBMISSION ON THE PART OF THE DEFENCE , THE COURT OF APPEAL REFERRED TO THE COURT OF JUSTICE FOR A PRELIMINARY RULING THE FOLLOWING QUESTIONS :

''1 . IS THE ENFORCEMENT BY COMPANY A OF THEIR UNITED KINGDOM COPYRIGHTS AGAINST A GRAMOPHONE RECORD LAWFULLY MADE AND SOLD IN THE STATE OF PORTUGAL BY LICENSEES UNDER THE EQUIVALENT PORTUGUESE COPYRIGHTS A MEASURE HAVING EQUIVALENT EFFECT TO QUANTITATIVE RESTRICTIONS ON IMPORTS WITHIN THE MEANING OF ARTICLE 14 (2) OF THE SAID AGREEMENT DATED 22 JULY 1972 MADE BETWEEN THE EUROPEAN ECONOMIC COMMUNITY AND THE STATE OF PORTUGAL?

2.IF THE ANSWER TO THE FIRST QUESTION IS AFFIRMATIVE :

(A) IS SUCH ENFORCEMENT BY COMPANY A JUSTIFIED WITHIN THE MEANING OF ARTICLE 23 OF THE SAID AGREEMENT DATED 22 JULY 1980 FOR THE PROTECTION OF THE SAID UNITED KINGDOM COPYRIGHTS?

(B)DOES SUCH ENFORCEMENT BY COMPANY A CONSTITUTE A MEANS OF ARBITRARY DISCRIMINATION OR A DISGUISED RESTRICTION ON TRADE BETWEEN THE STATE OF PORTUGAL AND THE EUROPEAN ECONOMIC COMMUNITY?

3.IS ARTICLE 14 (2) OF THE SAID AGREEMENT DATED 22 JULY 1980 DIRECTLY ENFORCEABLE BY INDIVIDUALS WITHIN THE EUROPEAN ECONOMIC COMMUNITY HAVING REGARD IN PARTICULAR TO THE SAID EUROPEAN ECONOMIC COMMUNITY COUNCIL REGULATION DATED 19 DECEMBER 1972 GIVING EFFECT TO THE SAID AGREEMENT?

4.CAN AN IMPORTER INTO THE UNITED KINGDOM OF THE GRAMOPHONE RECORDS REFERRED TO IN QUESTION 1 RELY ON ARTICLE 14 (2) OF THE SAID AGREEMENT DATED 22 JULY 1972 AS A DEFENCE WHEN SUED BY COMPANY A FOR INFRINGEMENT OF THEIR SAID COPYRIGHTS IN THE UNITED KINGDOM?

''

7 ACCORDING TO THE WELL-ESTABLISHED CASE-LAW OF THE COURT , THE EXERCISE OF AN INDUSTRIAL AND COMMERCIAL PROPERTY RIGHT BY THE PROPRIETOR THEREOF , INCLUDING THE COMMERCIAL EXPLOITATION OF A COPYRIGHT , IN ORDER TO PREVENT THE IMPORTATION INTO A MEMBER STATE OF A PRODUCT FROM ANOTHER MEMBER STATE , IN WHICH THAT PRODUCT HAS LAWFULLY BEEN PLACED ON THE MARKET BY THE PROPRIETOR OR WITH HIS CONSENT , CONSTITUTES A MEASURE HAVING AN EFFECT EQUIVALENT TO A QUANTITATIVE RESTRICTION FOR THE PURPOSES OF ARTICLE 30 OF THE TREATY , WHICH IS NOT JUSTIFIED ON THE GROUND OF THE PROTECTION OF INDUSTRIAL AND COMMERCIAL PROPERTY WITHIN THE MEANING OF ARTICLE 36 OF THE TREATY .

8 THE FIRST TWO QUESTIONS , WHICH MAY BE CONSIDERED TOGETHER , SEEK IN SUBSTANCE TO DETERMINE WHETHER THE SAME INTERPRETATION MUST BE PLACED ON ARTICLES 14 (2) AND 23 OF THE AGREEMENT . IN ORDER TO REPLY TO THOSE QUESTIONS IT IS NECESSARY TO ANALYSE THE PROVISIONS IN THE LIGHT OF BOTH THE OBJECT AND PURPOSE OF THE AGREEMENT AND OF ITS WORDING .

9 BY VIRTUE OF ARTICLE 228 OF THE TREATY THE EFFECT OF THE AGREEMENT IS TO BIND EQUALLY THE COMMUNITY AND ITS MEMBER STATES . THE RELEVANT PROVISIONS OF THE AGREEMENT READ AS FOLLOWS :

ARTICLE 14 (2). '' QUANTITATIVE RESTRICTIONS ON IMPORTS SHALL BE ABOLISHED ON 1 JANUARY 1973 AND ANY MEASURES HAVING AN EFFECT EQUIVALENT TO QUANTITATIVE RESTRICTIONS ON IMPORTS SHALL BE ABOLISHED NOT LATER THAN 1 JANUARY 1975 . ''

ARTICLE 23 . '' THE AGREEMENT SHALL NOT PRECLUDE PROHIBITIONS OR RESTRICTIONS ON IMPORTS . . . JUSTIFIED ON GROUNDS OF . . . THE PROTECTION OF INDUSTRIAL AND COMMERCIAL PROPERTY . . . SUCH PROHIBITIONS OR RESTRICTIONS MUST NOT , HOWEVER , CONSTITUTE A MEANS OF ARBITRARY DISCRIMINATION OR A DISGUISED RESTRICTION ON TRADE BETWEEN THE CONTRACTING PARTIES . ''

10 ACCORDING TO ITS PREAMBLE , THE PURPOSE OF THE AGREEMENT IS TO CONSOLIDATE AND TO EXTEND THE ECONOMIC RELATIONS EXISTING BETWEEN THE COMMUNITY AND PORTUGAL AND TO ENSURE , WITH DUE REGARD FOR FAIR CONDITIONS OF COMPETITION , THE HARMONIOUS DEVELOPMENT OF THEIR COMMERCE FOR THE PURPOSE OF CONTRIBUTING TO THE WORK OF CONSTRUCTING EUROPE . TO THAT END THE CONTRACTING PARTIES DECIDED TO ELIMINATE PROGRESSIVELY THE OBSTACLES TO SUBSTANTIALLY ALL THEIR TRADE , IN ACCORDANCE WITH THE PROVISIONS OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE (HEREINAFTER REFERRED TO AS THE '' GENERAL AGREEMENT '') CONCERNING THE ESTABLISHMENT OF FREE-TRADE AREAS .

11 UNDER ARTICLE XXIV (8) OF THE GENERAL AGREEMENT A FREE-TRADE AREA IS TO BE UNDERSTOOD TO MEAN '' A GROUP OF TWO OR MORE CUSTOMS TERRITORIES IN WHICH THE DUTIES AND OTHER RESTRICTIVE REGULATIONS OF COMMERCE . . . ARE ELIMINATED ON SUBSTANTIALLY ALL THE TRADE BETWEEN THE CONSTITUENT TERRITORIES IN PRODUCTS ORIGINATING IN SUCH TERRITORIES . ''

12 IN PURSUANCE OF THE ABOVE-MENTIONED OBJECTIVE THE AGREEMENT SEEKS TO LIBERALIZE TRADE IN GOODS BETWEEN THE COMMUNITY AND PORTUGAL . ACCORDING TO ARTICLE 2 THE AGREEMENT IS TO APPLY , SUBJECT TO SPECIAL ARRANGEMENTS PROVIDED FOR IN RESPECT OF CERTAIN PRODUCTS , TO PRODUCTS ORIGINATING IN THE COMMUNITY OR IN PORTUGAL WHICH FALL WITHIN CHAPTERS 25 TO 99 OF THE BRUSSELS NOMENCLATURE .

13 IN THAT CONNECTION ARTICLES 3 TO 7 OF THE AGREEMENT PROVIDE FOR THE ABOLITION OF CUSTOMS DUTIES AND OF CHARGES HAVING EQUIVALENT EFFECT IN TRADE BETWEEN THE COMMUNITY AND PORTUGAL . THE SAME PRINCIPLE IS APPLIED BY ARTICLE 14 TO QUANTITATIVE RESTRICTIONS AND MEASURES HAVING EQUIVALENT EFFECT . THOSE PROVISIONS ARE SUPPLEMENTED IN ARTICLE 21 BY THE PROHIBITION OF FISCAL MEASURES OR PRACTICES OF A DISCRIMINATORY NATURE AND IN ARTICLE 22 BY THE ABOLITION OF ALL RESTRICTIONS ON PAYMENTS RELATING TO TRADE IN GOODS . MOREOVER , IN ARTICLES 26 AND 28 THE AGREEMENT CONTAINS CERTAIN RULES ON COMPETITION , PUBLIC AID AND DUMPING . BY VIRTUE OF ARTICLE 32 A JOINT COMMITTEE IS ESTABLISHED WHICH IS TO BE RESPONSIBLE FOR THE ADMINISTRATION OF THE AGREEMENT AND TO ENSURE ITS PROPER IMPLEMENTATION .

14 THE PROVISIONS OF THE AGREEMENT ON THE ELIMINATION OF RESTRICTIONS ON TRADE BETWEEN THE COMMUNITY AND PORTUGAL ARE EXPRESSED IN TERMS WHICH IN SEVERAL RESPECTS ARE SIMILAR TO THOSE OF THE EEC TREATY ON THE ABOLITION OF RESTRICTIONS ON INTRA-COMMUNITY TRADE . HARLEQUIN AND SIMONS POINTED OUT IN PARTICULAR THE SIMILARITY BETWEEN THE TERMS OF ARTICLES 14 (2) AND 23 OF THE AGREEMENT ON THE ONE HAND AND THOSE OF ARTICLES 30 AND 36 OF THE EEC TREATY ON THE OTHER .

15 HOWEVER , SUCH SIMILARITY OF TERMS IS NOT A SUFFICIENT REASON FOR TRANSPOSING TO THE PROVISIONS OF THE AGREEMENT THE ABOVE-MENTIONED CASE-LAW , WHICH DETERMINES IN THE CONTEXT OF THE COMMUNITY THE RELATIONSHIP BETWEEN THE PROTECTION OF INDUSTRIAL AND COMMERCIAL PROPERTY RIGHTS AND THE RULES ON THE FREE MOVEMENT OF GOODS .

16 THE SCOPE OF THAT CASE-LAW MUST INDEED BE DETERMINED IN THE LIGHT OF THE COMMUNITY ' S OBJECTIVES AND ACTIVITIES AS DEFINED BY ARTICLES 2 AND 3 OF THE EEC TREATY . AS THE COURT HAS

HAD OCCASION TO EMPHASIZE IN VARIOUS CONTEXTS , THE TREATY , BY ESTABLISHING A COMMON MARKET AND PROGRESSIVELY APPROXIMATING THE ECONOMIC POLICIES OF THE MEMBER STATES , SEEKS TO UNITE NATIONAL MARKETS INTO A SINGLE MARKET HAVING THE CHARACTERISTICS OF A DOMESTIC MARKET .

17 HAVING REGARD TO THOSE OBJECTIVES , THE COURT , INTER ALIA , IN ITS JUDGMENT OF 22 JUNE 1976 IN CASE 119/75 TERRAPIN (OVERSEAS) LTD . V TERRANOVA INDUSTRIE C . A . KAPFERER & CO . (1976) ECR 1039 , INTERPRETED ARTICLES 30 AND 36 OF THE TREATY AS MEANING THAT THE TERRITORIAL PROTECTION AFFORDED BY NATIONAL LAWS TO INDUSTRIAL AND COMMERCIAL PROPERTY MAY NOT HAVE THE EFFECT OF LEGITIMIZING THE INSULATION OF NATIONAL MARKETS AND OF LEADING TO AN ARTIFICIAL PARTITIONING OF THE MARKETS AND THAT CONSEQUENTLY THE PROPRIETOR OF AN INDUSTRIAL OR COMMERCIAL PROPERTY RIGHT PROTECTED BY THE LAW OF A MEMBER STATE CANNOT RELY ON THAT LAW TO PREVENT THE IMPORTATION OF A PRODUCT WHICH HAS LAWFULLY BEEN MARKETED IN ANOTHER MEMBER STATE BY THE PROPRIETOR HIMSELF OR WITH HIS CONSENT .

18 THE CONSIDERATIONS WHICH LED TO THAT INTERPRETATION OF ARTICLES 30 AND 36 OF THE TREATY DO NOT APPLY IN THE CONTEXT OF THE RELATIONS BETWEEN THE COMMUNITY AND PORTUGAL AS DEFINED BY THE AGREEMENT . IT IS APPARENT FROM AN EXAMINATION OF THE AGREEMENT THAT ALTHOUGH IT MAKES PROVISION FOR THE UNCONDITIONAL ABOLITION OF CERTAIN RESTRICTIONS ON TRADE BETWEEN THE COMMUNITY AND PORTUGAL , SUCH AS QUANTITATIVE RESTRICTIONS AND MEASURES HAVING EQUIVALENT EFFECT , IT DOES NOT HAVE THE SAME PURPOSE AS THE EEC TREATY , INASMUCH AS THE LATTER , AS HAS BEEN STATED ABOVE , SEEKS TO CREATE A SINGLE MARKET REPRODUCING AS CLOSELY AS POSSIBLE THE CONDITIONS OF A DOMESTIC MARKET .

19 IT FOLLOWS THAT IN THE CONTEXT OF THE AGREEMENT RESTRICTIONS ON TRADE IN GOODS MAY BE CONSIDERED TO BE JUSTIFIED ON THE GROUND OF THE PROTECTION OF INDUSTRIAL AND COMMERCIAL PROPERTY IN A SITUATION IN WHICH THEIR JUSTIFICATION WOULD NOT BE POSSIBLE WITHIN THE COMMUNITY .

20 IN THE PRESENT CASE SUCH A DISTINCTION IS ALL THE MORE NECESSARY INASMUCH AS THE INSTRUMENTS WHICH THE COMMUNITY HAS AT ITS DISPOSAL IN ORDER TO ACHIEVE THE UNIFORM APPLICATION OF COMMUNITY LAW AND THE PROGRESSIVE ABOLITION OF LEGISLATIVE DISPARITIES WITHIN THE COMMON MARKET HAVE NO EQUIVALENT IN THE CONTEXT OF THE RELATIONS BETWEEN THE COMMUNITY AND PORTUGAL .

21 IT FOLLOWS FROM THE FOREGOING THAT A PROHIBITION ON THE IMPORTATION INTO THE COMMUNITY OF A PRODUCT ORIGINATING IN PORTUGAL BASED ON THE PROTECTION OF COPYRIGHT IS JUSTIFIED IN THE FRAMEWORK OF THE FREE-TRADE ARRANGEMENTS ESTABLISHED BY THE AGREEMENT BY VIRTUE OF THE FIRST SENTENCE OF ARTICLE 23 . THE FINDINGS OF THE NATIONAL COURT DO NOT DISCLOSE ANY FACTOR WHICH WOULD PERMIT THE CONCLUSION THAT THE ENFORCEMENT OF COPYRIGHT IN A CASE SUCH AS THE PRESENT CONSTITUTES A MEANS OF ARBITRARY DISCRIMINATION OR A DISGUISED RESTRICTION ON TRADE WITHIN THE MEANING OF THE SECOND SENTENCE OF THAT ARTICLE .

22 FOR ALL THOSE REASONS THE REPLY WHICH MUST BE GIVEN TO THE FIRST TWO QUESTIONS IS THAT THE ENFORCEMENT BY THE PROPRIETOR OR BY PERSONS ENTITLED UNDER HIM OF COPYRIGHTS PROTECTED BY THE LAW OF A MEMBER STATE AGAINST THE IMPORTATION AND MARKETING OF GRAMOPHONE RECORDS LAWFULLY MANUFACTURED AND PLACED ON THE MARKET IN THE PORTUGUESE REPUBLIC BY LICENSEES OF THE PROPRIETOR IS JUSTIFIED ON THE GROUND OF THE PROTECTION OF INDUSTRIAL AND COMMERCIAL PROPERTY WITHIN THE MEANING OF ARTICLE 23 OF THE AGREEMENT AND THEREFORE DOES NOT CONSTITUTE A RESTRICTION ON TRADE BETWEEN THE COMMUNITY AND PORTUGAL SUCH AS IS PROHIBITED BY ARTICLE 14 (2) OF THE AGREEMENT . SUCH ENFORCEMENT DOES NOT CONSTITUTE A MEANS OF ARBITRARY DISCRIMINATION OR A DISGUISED RESTRICTION ON TRADE BETWEEN THE COMMUNITY AND PORTUGAL .

23 IN VIEW OF THE REPLIES GIVEN TO THE FIRST TWO QUESTIONS , IT IS UNNECESSARY TO REPLY TO THE THIRD AND FOURTH QUESTIONS .

Operative part

ON THOSE GROUNDS ,

THE COURT ,

IN ANSWER TO THE QUESTIONS SUBMITTED TO IT BY THE COURT OF APPEAL BY ORDER OF 15 MAY 1980 , HEREBY RULES :

THE ENFORCEMENT BY THE PROPRIETOR OR BY PERSONS ENTITLED UNDER HIM OF COPYRIGHTS PROTECTED BY THE LAW OF A MEMBER STATE AGAINST THE IMPORTATION AND MARKETING OF GRAMOPHONE RECORDS

LAWFULLY MANUFACTURED AND PLACED ON THE MARKET IN THE PORTUGUESE REPUBLIC BY LICENSEES OF THE PROPRIETOR IS JUSTIFIED ON THE GROUND OF THE PROTECTION OF INDUSTRIAL AND COMMERCIAL PROPERTY WITHIN THE MEANING OF ARTICLE 23 OF THE AGREEMENT BETWEEN THE EUROPEAN ECONOMIC COMMUNITY AND THE PORTUGUESE REPUBLIC OF 22 JULY 1972 (OFFICIAL JOURNAL , ENGLISH SPECIAL EDITION 1972 (31 DECEMBER) (L 301), P . 167) AND THEREFORE DOES NOT CONSTITUTE A RESTRICTION ON TRADE SUCH AS IS PROHIBITED BY ARTICLE 14 (2) OF THAT AGREEMENT . SUCH ENFORCEMENT DOES NOT CONSTITUTE A MEANS OF ARBITRARY DISCRIMINATION OR A DISGUISED RESTRICTION ON TRADE BETWEEN THE COMMUNITY AND PORTUGAL WITHIN THE MEANING OF THE SAID ARTICLE 23 .

Keywords

1 . MEASURES ADOPTED BY THE INSTITUTIONS - DIRECTIVES - IMPLEMENTATION BY THE MEMBER STATES - NEED TO ENSURE THAT DIRECTIVES ARE EFFECTIVE - OBLIGATIONS OF NATIONAL COURTS

(EEC TREATY , ARTS 5 AND 189 , THIRD PARA .)

2 . SOCIAL POLICY - MALE AND FEMALE WORKERS - ACCESS TO EMPLOYMENT AND WORKING CONDITIONS - EQUAL TREATMENT - DIRECTIVE NO 76/207/EEC - DISCRIMINATION IN ACCESS TO EMPLOYMENT - NO SANCTIONS PROVIDED FOR IN THE DIRECTIVE - EFFECT - CHOICE OF SANCTIONS BY THE MEMBER STATES - AWARD OF COMPENSATION - NEED FOR ADEQUATE COMPENSATION - OBLIGATIONS OF NATIONAL COURTS

(COUNCIL DIRECTIVE NO 76/207/EEC)

Summary

1 . ALTHOUGH THE THIRD PARAGRAPH OF ARTICLE 189 OF THE TREATY LEAVES MEMBER STATES FREE TO CHOOSE THE WAYS AND MEANS OF ENSURING THAT THE DIRECTIVE IS IMPLEMENTED , THAT FREEDOM DOES NOT AFFECT THE OBLIGATION , IMPOSED ON ALL THE MEMBER STATES TO WHICH THE DIRECTIVE IS ADDRESSED , TO ADOPT , WITHIN THE FRAMEWORK OF THEIR NATIONAL LEGAL SYSTEMS , ALL THE MEASURES NECESSARY TO ENSURE THAT THE DIRECTIVE IS FULLY EFFECTIVE , IN ACCORDANCE WITH THE OBJECTIVE WHICH IT PURSUES .

THE MEMBER STATES ' OBLIGATION ARISING FROM A DIRECTIVE TO ACHIEVE THE RESULT ENVISAGED BY THE DIRECTIVE AND THEIR DUTY UNDER ARTICLE 5 OF THE TREATY TO TAKE ALL APPROPRIATE MEASURES , WHETHER GENERAL OR PARTICULAR , TO ENSURE THE FULFILMENT OF THAT OBLIGATION , IS BINDING ON ALL THE AUTHORITIES OF MEMBER STATES INCLUDING , FOR MATTERS WITHIN THEIR JURISDICTION , THE COURTS . IT FOLLOWS THAT , IN APPLYING NATIONAL LAW AND IN PARTICULAR THE PROVISIONS OF A NATIONAL LAW SPECIFICALLY INTRODUCED IN ORDER TO IMPLEMENT A DIRECTIVE , THE NATIONAL COURT IS REQUIRED TO INTERPRET ITS NATIONAL LAW IN THE LIGHT OF THE WORDING AND THE PURPOSE OF THE DIRECTIVE IN ORDER TO ACHIEVE THE RESULT REFERRED TO IN THE THIRD PARAGRAPH OF ARTICLE 189 .

2 . DIRECTIVE NO 76/207/EEC DOES NOT REQUIRE DISCRIMINATION ON GROUNDS OF SEX REGARDING ACCESS TO EMPLOYMENT TO BE MADE THE SUBJECT OF A SANCTION BY WAY OF AN OBLIGATION IMPOSED ON THE EMPLOYER WHO IS THE AUTHOR OF THE DISCRIMINATION TO CONCLUDE A CONTRACT OF EMPLOYMENT WITH THE CANDIDATE DISCRIMINATED AGAINST .

AS REGARDS SANCTIONS FOR ANY DISCRIMINATION WHICH MAY OCCUR , THE DIRECTIVE DOES NOT INCLUDE ANY UNCONDITIONAL AND SUFFICIENTLY PRECISE OBLIGATION WHICH , IN THE ABSENCE OF IMPLEMENTING MEASURES ADOPTED WITHIN THE PRESCRIBED TIME-LIMITS , MAY BE RELIED ON BY AN INDIVIDUAL IN ORDER TO OBTAIN SPECIFIC COMPENSATION UNDER THE DIRECTIVE , WHERE THAT IS NOT PROVIDED FOR OR PERMITTED UNDER NATIONAL LAW .

ALTHOUGH DIRECTIVE NO 76/207/EEC , FOR THE PURPOSE OF IMPOSING A SANCTION FOR THE BREACH OF THE PROHIBITION OF DISCRIMINATION , LEAVES THE MEMBER STATES FREE TO CHOOSE BETWEEN THE DIFFERENT SOLUTIONS SUITABLE FOR ACHIEVING ITS OBJECTIVE , IT NEVERTHELESS REQUIRES THAT IF A MEMBER STATE CHOOSES TO PENALIZE BREACHES OF THAT PROHIBITION BY THE AWARD OF COMPENSATION , THEN IN ORDER TO ENSURE THAT IT IS EFFECTIVE AND THAT IT HAS A DETERRENT EFFECT , THAT COMPENSATION MUST IN ANY EVENT BE ADEQUATE IN RELATION TO THE DAMAGE SUSTAINED AND MUST THEREFORE AMOUNT TO MORE THAN PURELY NOMINAL COMPENSATION SUCH AS , FOR EXAMPLE , THE REIMBURSEMENT ONLY OF THE EXPENSES INCURRED IN CONNEXION WITH THE APPLICATION . IT IS FOR THE NATIONAL COURT TO INTERPRET AND APPLY THE LEGISLATION ADOPTED FOR THE IMPLEMENTATION OF THE DIRECTIVE IN CONFORMITY WITH THE REQUIREMENTS OF COMMUNITY LAW , IN SO FAR AS IT IS GIVEN DISCRETION TO DO SO UNDER NATIONAL LAW .

Subject of the case

ON THE INTERPRETATION OF COUNCIL DIRECTIVE NO 76/207/EEC OF 9 FEBRUARY 1976 ON THE IMPLEMENTATION OF THE PRINCIPLE OF EQUAL TREATMENT FOR MEN AND WOMEN AS REGARD ACCESS TO EMPLOYMENT , VOCATIONAL TRAINING AND PROMOTION , AND WORKING CONDITIONS (OFFICIAL JOURNAL 1976 , L 39 , P . 40).

Grounds

1 BY ORDER OF 6 DECEMBER 1982 , WHICH WAS RECEIVED AT THE COURT ON 24 JANUARY 1983 , THE ARBEITSGERICHT (LABOUR COURT) HAMM REFERRED TO THE COURT FOR A PRELIMINARY RULING PURSUANT TO ARTICLE 177 OF THE EEC TREATY SEVERAL QUESTIONS ON THE INTERPRETATION OF COUNCIL DIRECTIVE NO 76/207/EEC OF 9 FEBRUARY 1976 ON THE IMPLEMENTATION OF THE PRINCIPLE OF EQUAL TREATMENT FOR MEN AND WOMEN AS REGARDS ACCESS TO EMPLOYMENT , VOCATIONAL TRAINING AND PROMOTION , AND WORKING CONDITIONS (OFFICIAL JOURNAL 1976 , L 39 , P . 40).

2 THOSE QUESTIONS WERE RAISED IN THE COURSE OF PROCEEDINGS BETWEEN TWO QUALIFIED SOCIAL WORKERS , SABINE VON COLSON AND ELISABETH KAMANN , AND THE LAND NORDRHEIN-WESTFALEN . IT APPEARS FROM THE GROUNDS OF THE ORDER FOR REFERENCE THAT WERL PRISON , WHICH CATERS EXCLUSIVELY FOR MALE PRISONERS AND WHICH IS ADMINISTERED BY THE LAND NORDRHEIN-WESTFALEN , REFUSED TO ENGAGE THE PLAINTIFFS IN THE MAIN PROCEEDINGS FOR REASONS RELATING TO THEIR SEX . THE OFFICIALS RESPONSIBLE FOR RECRUITMENT JUSTIFIED THEIR REFUSAL TO ENGAGE THE PLAINTIFFS BY CITING THE PROBLEMS AND RISKS CONNECTED WITH THE APPOINTEMENT OF FEMALE CANDIDATES AND FOR THOSE REASONS APPOINTED INSTEAD MALE CANDIDATES WHO WERE HOWEVER LESS WELL-QUALIFIED .

3 THE ARBEITSGERICHT HAMM HELD THAT THERE HAD BEEN DISCRIMINATION AND TOOK THE VIEW THAT UNDER GERMAN LAW THE ONLY SANCTION FOR DISCRIMINATION IN RECRUITMENT IS COMPENSATION FOR '' VERTRAUENSSCHADEN '', NAMELY THE LOSS INCURRED BY CANDIDATES WHO ARE VICTIMS OF DISCRIMINATION AS A RESULT OF THEIR BELIEF THAT THEIR WOULD BE NO DISCRIMINATION IN THE ESTABLISHMENT OF THE EMPLOYMENT RELATIONSHIP . SUCH COMPENSATION IS PROVIDED FOR UNDER PARAGRAPH 611A (2) OF THE BURGERLICHES GESETZBUCH .

4 UNDER THAT PROVISION , IN THE EVENT OF DISCRIMINATION REGARDING ACCESS TO EMPLOYMENT , THE EMPLOYER IS LIABLE FOR '' DAMAGES IN RESPECT OF THE LOSS INCURRED BY THE WORKER AS A RESULT OF HIS RELIANCE ON THE EXPECTATION THAT THE ESTABLISHMENT OF THE EMPLOYMENT RELATIONSHIP WOULD NOT BE PRECLUDED BY SUCH A BREACH (OF THE PRINCIPLE OF EQUAL TREATMENT) ''. THAT PROVISION PURPORTS TO IMPLEMENT COUNCIL DIRECTIVE NO 76/207 .

5 CONSEQUENTLY THE ARBEITSGERICHT FOUND THAT , UNDER GERMAN LAW , IT COULD ORDER THE REIMBURSEMENT ONLY OF THE TRAVEL EXPENSES INCURRED BY THE PLAINTIFF VON COLSON IN PURSUING HER APPLICATION FOR THE POST (DM 7.20) AND THAT IT COULD NOT ALLOW THE PLAINTIFFS ' OTHER CLAIMS .

6 HOWEVER , IN ORDER TO DETERMINE THE RULES OF COMMUNITY LAW APPLICABLE IN THE EVENT OF DISCRIMINATION REGARDING ACCESS TO EMPLOYMENT , THE ARBEITSGERICHT REFERRED THE FOLLOWING QUESTIONS TO THE COURT OF JUSTICE :

'' 1 . DOES COUNCIL DIRECTIVE NO 76/207/EEC OF 9 FEBRUARY 1976 ON THE IMPLEMENTATION OF THE PRINCIPLE OF EQUAL TREATMENT FOR MEN AND WOMEN AS REGARDS ACCESS TO EMPLOYMENT , VOCATIONAL TRAINING AND PROMOTION , AND WORKING CONDITIONS IMPLY THAT DISCRIMINATION ON GROUNDS OF SEX IN RELATION TO ACCESS TO EMPLOYMENT (FAILURE TO CONCLUDE A CONTRACT OF EMPLOYMENT ON ACCOUNT OF THE CANDIDATE ' S SEX ; PREFERENCE GIVEN TO ANOTHER CANDIDATE ON ACCOUNT OF HIS SEX) MUST BE SANCTIONED BY REQUIRING THE EMPLOYER IN QUESTION TO CONCLUDE A CONTRACT OF EMPLOYMENT WITH THE CANDIDATE WHO WAS DISCRIMINATED AGAINST?

2.IF QUESTION 1 IS ANSWERED IN THE AFFIRMATIVE , IN PRINCIPLE :

(A) IS THE EMPLOYER REQUIRED TO CONCLUDE A CONTRACT OF EMPLOYMENT ONLY IF , IN ADDITION TO THE FINDING THAT HE MADE A SUBJECTIVE DECISION ON THE BASIS OF CRITERIA RELATING TO SEX , IT CAN BE ESTABLISHED THAT THE CANDIDATE DISCRIMINATED AGAINST IS OBJECTIVELY - ACCORDING TO ACCEPTABLE SELECTION CRITERIA - BETTER QUALIFIED FOR THE POST THAN THE CANDIDATE WITH WHOM A CONTRACT OF EMPLOYMENT WAS CONCLUDED?

(B)OR , IS THE EMPLOYER ALSO REQUIRED TO ENGAGE THE CANDIDATE DISCRIMINATED AGAINST IF , ALTHOUGH IT CAN BE ESTABLISHED THAT THE EMPLOYER MADE A SUBJECTIVE DECISION ON THE BASIS OF CRITERIA RELATING TO SEX , THE CANDIDATE DISCRIMINATED AGAINST AND THE SUCCESSFUL CANDIDATE ARE OBJECTIVELY EQUALLY WELL QUALIFIED?

(C)FINALLY , DOES THE CANDIDATE DISCRIMINATED AGAINST HAVE THE RIGHT TO BE ENGAGED EVEN IF OBJECTIVELY HE IS LESS WELL QUALIFIED THAN THE SUCCESSFUL CANDIDATE , BUT IT IS ESTABLISHED THAT FROM THE OUTSET THE EMPLOYER , ON ACCOUNT OF THE SEX OF THE CANDIDATE DISCRIMINATED AGAINST , DISREGARDED THAT CANDIDATE IN MAKING HIS DECISION ON THE BASIS OF ACCEPTABLE CRITERIA?

'' 3.IF THE ESSENTIAL ISSUE IS THE OBJECTIVE ASSESSMENT OF THE CANDIDATE ' S QUALIFICATIONS WITHIN THE MEANING OF QUESTIONS 2 (A), (B) AND (C):

IS THAT ISSUE TO BE DECIDED WHOLLY BY THE COURT AND WHAT CRITERIA AND PROCEDURAL RULES RELATING TO EVIDENCE AND BURDEN OF PROOF ARE APPLICABLE IN THAT REGARD?

'' 4.IF QUESTION 1 IS ANSWERED IN THE AFFIRMATIVE , IN PRINCIPLE :

WHERE THERE ARE MORE THAN TWO CANDIDATES FOR A POST AND FROM THE OUTSET MORE THAN ONE PERSON IS ON THE GROUND OF SEX DISREGARDED FOR THE PURPOSES OF THE DECISION MADE ON THE BASIS OF ACCEPTABLE CRITERIA , IS EACH OF THOSE PERSONS ENTITLED TO BE OFFERED A CONTRACT OF EMPLOYMENT?

IS THE COURT IN SUCH A CASE OBLIGED TO MAKE ITS OWN CHOICE BETWEEN THE CANDIDATES DISCRIMINATED AGAINST?

IF THE QUESTION CONTAINED IN THE FIRST PARAGRAPH IS ANSWERED IN THE NEGATIVE , WHAT OTHER SANCTION OF SUBSTANTIVE LAW IS AVAILABLE?

'' 5.IF QUESTION 1 IS ANSWERED IN THE NEGATIVE , IN PRINCIPLE :

UNDER THE PROVISIONS OF DIRECTIVE NO 76/207/EEC WHAT SANCTION APPLIES WHERE THERE IS AN ESTABLISHED CASE OF DISCRIMINATION IN RELATION TO ACCESS TO EMPLOYMENT?

IN THAT REGARD MUST A DISTINCTION BE DRAWN BETWEEN THE SITUATIONS DESCRIBED IN QUESTION 2 (A), (B) AND (C)?

'' 6.DOES DIRECTIVE NO 76/207/EEC AS INTERPRETED BY THE COURT OF JUSTICE IN ITS ANSWERS TO THE QUESTIONS SET OUT ABOVE CONSTITUTE DIRECTLY APPLICABLE LAW IN THE FEDERAL REPUBLIC OF GERMANY?

''

7 THOSE QUESTIONS ARE INTENDED PRIMARILY TO ESTABLISH WHETHER DIRECTIVE NO 76/207 REQUIRES MEMBER STATES TO LAY DOWN LEGAL CONSEQUENCES OR SPECIFIC SANCTIONS IN THE EVENT OF DISCRIMINATION REGARDING ACCESS TO EMPLOYMENT (QUESTIONS 1 TO 5) AND WHETHER INDIVIDUALS MAY , WHERE APPROPRIATE , RELY ON THE PROVISIONS OF THE DIRECTIVE BEFORE THE NATIONAL COURTS WHERE THE DIRECTIVE HAS NOT BEEN TRANSPOSED INTO THE NATIONAL LEGAL ORDER WITHIN THE PERIODS PRESCRIBED (QUESTION 6).

(A) QUESTION 1

8 IN ITS FIRST QUESTION THE ARBEITSGERICHT ASKS ESSENTIALLY WHETHER DIRECTIVE NO 76/207 REQUIRES DISCRIMINATION ON GROUNDS OF SEX IN THE MATTER OF ACCESS TO EMPLOYMENT TO BE PENALIZED BY AN OBLIGATION , IMPOSED ON AN EMPLOYER WHO IS GUILTY OF DISCRIMINATION TO CONCLUDE A CONTRACT OF EMPLOYMENT WITH THE CANDIDATE WHO WAS THE VICTIM OF DISCRIMINATION .

9 ACCORDING TO THE ARBEITSGERICHT , IT IS CLEAR FROM THE RECITALS IN THE PREAMBLE TO AND FROM THE ACTUAL PROVISIONS OF THE DIRECTIVE THAT THE DIRECTIVE REQUIRES MEMBER STATES TO ADOPT LEGAL PROVISIONS WHICH PROVIDE EFFECTIVE SANCTIONS . IN ITS VIEW ONLY COMPENSATION IN KIND , ENTAILING THE APPOINTMENT OF THE PERSONS WHO WERE THE VICTIMS OF DISCRIMINATION , IS EFFECTIVE .

10 ACCORDING TO THE PLAINTIFFS IN THE MAIN ACTION , BY RESTRICTING THE RIGHT TO COMPENSATION SOLELY TO '' VERTRAUENSSCHADEN '', PARAGRAPH 611A (2) OF THE BURGERLICHES GESETZBUCH EXCLUDED THE POSSIBILITIES OF COMPENSATION AFFORDED BY THE GENERAL RULES OF LAW . DIRECTIVE NO 76/207 REQUIRES MEMBER STATES TO INTRODUCE APPROPRIATE MEASURES WITH A VIEW TO AVOIDING DISCRIMINATION IN THE FUTURE . IT SHOULD , THEREFORE , BE ACCEPTED THAT PARAGRAPH 611A (2) MUST BE LEFT OUT OF ACCOUNT . THE RESULT OF THAT WOULD BE THAT THE EMPLOYER WOULD BE REQUIRED TO CONCLUDE A CONTRACT OF EMPLOYMENT WITH THE CANDIDATE DISCRIMINATED AGAINST .

11 THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY IS AWARE OF THE NEED FOR AN EFFECTIVE TRANSPOSITION OF THE DIRECTIVE BUT STRESSES THE FACT THAT , UNDER THE THIRD PARAGRAPH OF ARTICLE 189 OF THE EEC TREATY , EACH MEMBER STATE HAS A MARGIN OF DISCRETION AS REGARDS THE LEGAL CONSEQUENCES WHICH MUST RESULT FROM A BREACH OF THE PRINCIPLE OF EQUAL TREATMENT . THE GERMAN GOVERNMENT SUBMITS , MOREOVER , THAT IT IS POSSIBLE FOR THE GERMAN COURTS TO WORK OUT , ON THE BASIS OF PRIVATE NATIONAL LAW AND IN CONFORMITY WITH THE SUBSTANCE OF THE DIRECTIVE , ADEQUATE SOLUTIONS WHICH SATISFY BOTH THE PRINCIPLE OF EQUAL TREATMENT AND THE INTERESTS OF ALL THE PARTIES . FINALLY AN APPRECIABLE LEGAL CONSEQUENCE IS IN ITS VIEW SUFFICIENT TO ENSURE COMPLIANCE WITH THE PRINCIPLE OF EQUAL TREATMENT AND THAT CONSEQUENCE SHOULD FOLLOW ONLY IF THE VICTIM OF DISCRIMINATION WAS BETTER QUALIFIED FOR THE POST THAN THE OTHER CANDIDATES ; IT SHOULD NOT APPLY WHERE THE CANDIDATES ' QUALIFICATIONS WERE EQUAL .

12 THE DANISH GOVERNMENT CONSIDERS THAT THE DIRECTIVE DELIBERATELY LEFT TO MEMBER STATES THE CHOICE OF SANCTIONS , IN ACCORDANCE WITH THEIR NATIONAL CIRCUMSTANCES AND LEGAL SYSTEMS . MEMBER STATES SHOULD PENALIZE BREACHES OF THE PRINCIPLE OF EQUAL TREATMENT IN THE SAME WAY AS THEY PENALIZE SIMILAR BREACHES OF NATIONAL RULES IN RELATED AREAS NOT GOVERNED BY COMMUNITY LAW .

13 THE UNITED KINGDOM IS ALSO OF THE OPINION THAT IT IS FOR MEMBER STATES TO CHOOSE THE MEASURES WHICH THEY CONSIDER APPROPRIATE TO ENSURE THE FULFILMENT OF THEIR OBLIGATIONS UNDER THE DIRECTIVE . THE DIRECTIVE GIVES NO INDICATION AS TO THE MEASURES WHICH MEMBER STATES SHOULD ADOPT AND THE QUESTIONS REFERRED TO THE COURT THEMSELVES CLEARLY ILLUSTRATE THE DIFFICULTIES ENCOUNTERED IN LAYING DOWN APPROPRIATE MEASURES .

14 THE COMMISSION CONSIDERS THAT ALTHOUGH THE DIRECTIVE IS INTENDED TO LEAVE TO MEMBER STATES THE CHOICE AND THE DETERMINATION OF THE SANCTIONS , THE TRANSPOSITION OF THE DIRECTIVE MUST NEVERTHELESS PRODUCE EFFECTIVE RESULTS . THE PRINCIPLE OF THE EFFECTIVE TRANSPOSITION OF THE DIRECTIVE REQUIRES THAT THE SANCTIONS MUST BE OF SUCH A NATURE AS TO CONSTITUTE APPROPRIATE COMPENSATION FOR THE CANDIDATE DISCRIMINATED AGAINST AND FOR THE EMPLOYER A MEANS OF PRESSURE WHICH IT WOULD BE UNWISE TO DISREGARD AND WHICH WOULD PROMPT HIM TO RESPECT THE PRINCIPLE OF EQUAL TREATMENT . A NATIONAL MEASURE WHICH PROVIDES FOR COMPENSATION ONLY FOR LOSSES ACTUALLY INCURRED THROUGH RELIANCE ON A EXPECTATION ('' VERTRAUENSSCHADEN '') IS NOT SUFFICIENT TO ENSURE COMPLIANCE WITH THAT PRINCIPLE .

15 ACCORDING TO THE THIRD PARAGRAPH OF ARTICLE 189 : '' A DIRECTIVE SHALL BE BINDING , AS TO THE RESULT TO BE ACHIEVED , UPON EACH MEMBER STATE TO WHICH IT IS ADDRESSED , BUT SHALL LEAVE TO THE NATIONAL AUTHORITIES THE CHOICE OF FORM AND METHODS '' . ALTHOUGH THAT PROVISION LEAVES MEMBER STATES TO CHOOSE THE WAYS AND MEANS OF ENSURING THAT THE DIRECTIVE IS IMPLEMENTED , THAT FREEDOM DOES NOT AFFECT THE OBLIGATION IMPOSED ON ALL THE MEMBER STATES TO WHICH THE DIRECTIVE IS ADDRESSED , TO ADOPT , IN THEIR NATIONAL LEGAL SYSTEMS , ALL THE MEASURES NECESSARY TO ENSURE THAT THE DIRECTIVE IS FULLY EFFECTIVE , IN ACCORDANCE WITH THE OBJECTIVE WHICH IT PURSUES .

16 IT IS THEREFORE NECESSARY TO EXAMINE DIRECTIVE NO 76/207 IN ORDER TO DETERMINE WHETHER IT REQUIRES MEMBER STATES TO PROVIDE FOR SPECIFIC LEGAL CONSEQUENCES OR SANCTIONS IN RESPECT OF A BREACH OF THE PRINCIPLE OF EQUAL TREATMENT REGARDING ACCESS TO EMPLOYMENT .

17 THE OBJECT OF THAT DIRECTIVE IS TO IMPLEMENT IN THE MEMBER STATES THE PRINCIPLE OF EQUAL TREATMENT FOR MEN AND WOMEN , IN PARTICULAR BY GIVING MALE AND FEMALE REAL EQUALITY OF OPPORTUNITY AS REGARDS ACCESS TO EMPLOYMENT . WITH THAT END IN VIEW , ARTICLE 2 DEFINES THE PRINCIPLE OF EQUAL TREATMENT AND ITS LIMITS , WHILE ARTICLE 3 (1) SETS OUT THE SCOPE OF THE PRINCIPLE SPECIFICALLY AS REGARDS ACCESS TO EMPLOYMENT . ARTICLE 3 (2) (A) PROVIDES THAT MEMBER STATES ARE TO TAKE THE MEASURES NECESSARY TO ENSURE THAT ANY LAWS , REGULATIONS AND ADMINISTRATIVE PROVISIONS CONTRARY TO THE PRINCIPLE OF EQUAL TREATMENT ARE ABOLISHED .

18 ARTICLE 6 REQUIRES MEMBER STATES TO INTRODUCE INTO THEIR NATIONAL LEGAL SYSTEMS SUCH MEASURES AS ARE NECESSARY TO ENABLE ALL PERSONS WHO CONSIDER THEMSELVES WRONGED BY DISCRIMINATION '' TO PURSUE THEIR CLAIMS BY JUDICIAL PROCESS '' . IT FOLLOWS FROM THE PROVISION THAT MEMBER STATES ARE REQUIRED TO ADOPT MEASURES WHICH ARE SUFFICIENTLY EFFECTIVE TO ACHIEVE THE OBJECTIVE OF THE DIRECTIVE AND TO ENSURE THAT THOSE MEASURES MAY IN FACT BE RELIED ON BEFORE THE NATIONAL COURTS BY THE PERSONS CONCERNED . SUCH MEASURES MAY INCLUDE , FOR EXAMPLE , PROVISIONS REQUIRING THE EMPLOYER TO OFFER A POST TO THE CANDIDATE DISCRIMINATED AGAINST OR GIVING THE CANDIDATE ADEQUATE FINANCIAL COMPENSATION , BACKED UP WHERE NECESSARY BY A SYSTEM OF FINES . HOWEVER THE DIRECTIVE DOES NOT PRESCRIBE A SPECIFIC SANCTION ; IT LEAVES MEMBER STATES FREE TO CHOOSE BETWEEN THE DIFFERENT SOLUTIONS SUITABLE FOR ACHIEVING ITS OBJECTIVE .

19 THE REPLY TO THE FIRST QUESTION SHOULD THEREFORE BE THAT DIRECTIVE NO 76/207 DOES NOT REQUIRE DISCRIMINATION ON GROUNDS OF SEX REGARDING ACCESS TO EMPLOYMENT TO BE MADE THE SUBJECT OF A SANCTION BY WAY OF AN OBLIGATION IMPOSED UPON THE EMPLOYER WHO IS THE AUTHOR OF THE DISCRIMINATION TO CONCLUDE A CONTRACT OF EMPLOYMENT WITH THE CANDIDATE DISCRIMINATED AGAINST . (B) QUESTIONS 2 , 3 AND 4

20 IT IS NOT NECESSARY TO ANSWER THE SECOND , THIRD AND FOURTH QUESTIONS SINCE THEY ARE PUT ONLY ON THE SUPPOSITION THAT AN EMPLOYER IS REQUIRED TO OFFER A POST TO THE CANDIDATE DISCRIMINATED AGAINST .

(C) QUESTIONS 5 AND 61

21 IN ITS FIFTH QUESTION THE ARBEITSGERICHT ESSENTIALLY ASKS WHETHER IT IS POSSIBLE TO INFER FROM THE DIRECTIVE ANY SANCTION IN THE EVENT OF DISCRIMINATION OTHER THAN THE RIGHT TO THE

CONCLUSION OF A CONTRACT OF EMPLOYMENT . QUESTION 6 ASKS WHETHER THE DIRECTIVE , AS PROPERLY INTERPRETED , MAY BE RELIED ON BEFORE NATIONAL COURTS BY PERSONS WHO HAVE SUFFERED INJURY .

22 IT IS IMPOSSIBLE TO ESTABLISH REAL EQUALITY OF OPPORTUNITY WITHOUT AN APPROPRIATE SYSTEM OF SANCTIONS . THAT FOLLOWS NOT ONLY FROM THE ACTUAL PURPOSE OF THE DIRECTIVE BUT MORE SPECIFICALLY FROM ARTICLE 6 THEREOF WHICH , BY GRANTING APPLICANTS FOR A POST WHO HAVE BEEN DISCRIMINATED AGAINST RECOURSE TO THE COURTS , ACKNOWLEDGES THAT THOSE CANDIDATES HAVE RIGHTS OF WHICH THEY MAY AVAIL THEMSELVES BEFORE THE COURTS .

23 ALTHOUGH , AS HAS BEEN STATED IN THE REPLY TO QUESTION 1 , FULL IMPLEMENTATION OF THE DIRECTIVE DOES NOT REQUIRE ANY SPECIFIC FORM OF SANCTION FOR UNLAWFUL DISCRIMINATION , IT DOES ENTAIL THAT THAT SANCTION BE SUCH AS TO GUARANTEE REAL AND EFFECTIVE JUDICIAL PROTECTION . MOREOVER IT MUST ALSO HAVE A REAL DETERRENT EFFECT ON THE EMPLOYER . IT FOLLOWS THAT WHERE A MEMBER STATE CHOOSES TO PENALIZE THE BREACH OF THE PROHIBITION OF DISCRIMINATION BY THE AWARD OF COMPENSATION , THAT COMPENSATION MUST IN ANY EVENT BE ADEQUATE IN RELATION TO THE DAMAGE SUSTAINED .

24 IN CONSEQUENCE IT APPEARS THAT NATIONAL PROVISIONS LIMITING THE RIGHT TO COMPENSATION OF PERSONS WHO HAVE BEEN DISCRIMINATED AGAINST AS REGARDS ACCESS TO EMPLOYMENT TO A PURELY NOMINAL AMOUNT , SUCH AS , FOR EXAMPLE , THE REIMBURSEMENT OF EXPENSES INCURRED BY THEM IN SUBMITTING THEIR APPLICATION , WOULD NOT SATISFY THE REQUIREMENTS OF AN EFFECTIVE TRANSPOSITION OF THE DIRECTIVE .

25 THE NATURE OF THE SANCTIONS PROVIDED FOR IN THE FEDERAL REPUBLIC OF GERMANY IN RESPECT OF DISCRIMINATION REGARDING ACCESS TO EMPLOYMENT AND IN PARTICULAR THE QUESTION WHETHER THE RULE IN PARAGRAPH 611A (2) OF THE BURGERLICHES GESETZBUCH EXCLUDES THE POSSIBILITY OF COMPENSATION ON THE BASIS OF THE GENERAL RULES OF LAW WERE THE SUBJECT OF LENGTHY DISCUSSION BEFORE THE COURT . THE GERMAN GOVERNMENT MAINTAINED IN THE ORAL PROCEDURE THAT THAT PROVISION DID NOT NECESSARILY EXCLUDE THE APPLICATION OF THE GENERAL RULES OF LAW REGARDING COMPENSATION . IT IS FOR THE NATIONAL COURT ALONE TO RULE ON THAT QUESTION CONCERNING THE INTERPRETATION OF ITS NATIONAL LAW .

26 HOWEVER , THE MEMBER STATES ' OBLIGATION ARISING FROM A DIRECTIVE TO ACHIEVE THE RESULT ENVISAGED BY THE DIRECTIVE AND THEIR DUTY UNDER ARTICLE 5 OF THE TREATY TO TAKE ALL APPROPRIATE MEASURES , WHETHER GENERAL OR PARTICULAR , TO ENSURE THE FULFILMENT OF THAT OBLIGATION , IS BINDING ON ALL THE AUTHORITIES OF MEMBER STATES INCLUDING , FOR MATTERS WITHIN THEIR JURISDICTION , THE COURTS . IT FOLLOWS THAT , IN APPLYING THE NATIONAL LAW AND IN PARTICULAR THE PROVISIONS OF A NATIONAL LAW SPECIFICALLY INTRODUCED IN ORDER TO IMPLEMENT DIRECTIVE NO 76/207 , NATIONAL COURTS ARE REQUIRED TO INTERPRET THEIR NATIONAL LAW IN THE LIGHT OF THE WORDING AND THE PURPOSE OF THE DIRECTIVE IN ORDER TO ACHIEVE THE RESULT REFERRED TO IN THE THIRD PARAGRAPH OF ARTICLE 189 .

27 ON THE OTHER HAND , AS THE ABOVE CONSIDERATIONS SHOW , THE DIRECTIVE DOES NOT INCLUDE ANY UNCONDITIONAL AND SUFFICIENTLY PRECISE OBLIGATION AS REGARDS SANCTIONS FOR DISCRIMINATION WHICH , IN THE ABSENCE OF IMPLEMENTING MEASURES ADOPTED IN GOOD TIME MAY BE RELIED ON BY INDIVIDUALS IN ORDER TO OBTAIN SPECIFIC COMPENSATION UNDER THE DIRECTIVE , WHERE THAT IS NOT PROVIDED FOR OR PERMITTED UNDER NATIONAL LAW .

28 IT SHOULD , HOWEVER , BE POINTED OUT TO THE NATIONAL COURT THAT ALTHOUGH DIRECTIVE NO 75/207/EEC , FOR THE PURPOSE OF IMPOSING A SANCTION FOR THE BREACH OF THE PROHIBITION OF DISCRIMINATION , LEAVES THE MEMBER STATES FREE TO CHOOSE BETWEEN THE DIFFERENT SOLUTIONS SUITABLE FOR ACHIEVING ITS OBJECTIVE , IT NEVERTHELESS REQUIRES THAT IF A MEMBER STATES CHOOSES TO PENALIZE BREACHES OF THAT PROHIBITION BY THE AWARD OF COMPENSATION , THEN IN ORDER TO ENSURE THAT IT IS EFFECTIVE AND THAT IT HAS A DETERRENT EFFECT , THAT COMPENSATION MUST IN ANY EVENT BE ADEQUATE IN RELATION TO THE DAMAGE SUSTAINED AND MUST THEREFORE AMOUNT TO MORE THAN PURELY NOMINAL COMPENSATION SUCH AS , FOR EXAMPLE , THE REIMBURSEMENT ONLY OF THE EXPENSES INCURRED IN CONNECTION WITH THE APPLICATION . IT IS FOR THE NATIONAL COURT TO INTERPRET AND APPLY THE LEGISLATION ADOPTED FOR THE IMPLEMENTATION OF THE DIRECTIVE IN CONFORMITY WITH THE REQUIREMENTS OF COMMUNITY LAW , IN SO FAR AS IT IS GIVEN DISCRETION TO DO SO UNDER NATIONAL LAW .

Operative part

ON THOSE GROUNDS ,

THE COURT

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE ARBEITSGERICHT HAMM BY ORDER OF 6 DECEMBER 1982 , HEREBY RULES :

1 . DIRECTIVE NO 76/207/EEC DOES NOT REQUIRE DISCRIMINATION ON GROUNDS OF SEX REGARDING ACCESS TO EMPLOYMENT TO BE MADE THE SUBJECT OF A SANCTION BY WAY OF AN OBLIGATION IMPOSED ON THE EMPLOYER WHO IS THE AUTHOR OF THE DISCRIMINATION TO CONCLUDE A CONTRACT OF EMPLOYMENT WITH THE CANDIDATE DISCRIMINATED AGAINST .

2 . AS REGARDS SANCTIONS FOR ANY DISCRIMINATION WHICH MAY OCCUR , THE DIRECTIVE DOES NOT INCLUDE ANY UNCONDITIONAL AND SUFFICIENTLY PRECISE OBLIGATION WHICH , IN THE ABSENCE OF IMPLEMENTING MEASURES ADOPTED WITHIN THE PRESCRIBED TIME-LIMITS , MAY BE RELIED ON BY AN INDIVIDUAL IN ORDER TO OBTAIN SPECIFIC COMPENSATION UNDER THE DIRECTIVE , WHERE THAT IS NOT PROVIDED FOR OR PERMITTED UNDER NATIONAL LAW .

3 . ALTHOUGH DIRECTIVE NO 76/207/EEC , FOR THE PURPOSE OF IMPOSING A SANCTION FOR THE BREACH OF THE PROHIBITION OF DISCRIMINATION , LEAVES THE MEMBER STATES FREE TO CHOOSE BETWEEN THE DIFFERENT SOLUTIONS SUITABLE FOR ACHIEVING ITS OBJECTIVE , IT NEVERTHELESS REQUIRES THAT IF A MEMBER STATE CHOOSES TO PENALIZE BREACHES OF THAT PROHIBITION BY THE AWARD OF COMPENSATION , THEN IN ORDER TO ENSURE THAT IT IS EFFECTIVE AND THAT IT HAS A DETERRENT EFFECT , THAT COMPENSATION MUST IN ANY EVENT BE ADEQUATE IN RELATION TO THE DAMAGE SUSTAINED AND MUST THEREFORE AMOUNT TO MORE THAN PURELY NOMINAL COMPENSATION SUCH AS , FOR EXAMPLE , THE REIMBURSEMENT ONLY OF THE EXPENSES INCURRED IN CONNECTION WITH THE APPLICATION . IT IS FOR THE NATIONAL COURT TO INTERPRET AND APPLY THE LEGISLATION ADOPTED FOR THE IMPLEMENTATION OF THE DIRECTIVE IN CONFORMITY WITH THE REQUIREMENTS OF COMMUNITY LAW , IN SO FAR AS IT IS GIVEN DISCRETION TO DO SO UNDER NATIONAL LAW .

Keywords

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1 . PRELIMINARY RULINGS - JURISDICTION OF THE COURT - ACTS OF THE INSTITUTIONS - AGREEMENTS ENTERED INTO BY THE COMMUNITY - ASSOCIATION AGREEMENT - PROVISIONS ON FREEDOM OF MOVEMENT FOR WORKERS

(EEC TREATY, ART . 48 ET SEQ ., ART . 177 (1) (B), AND ARTS 228 AND 238)

2 . INTERNATIONAL AGREEMENTS - AGREEMENTS ENTERED INTO BY THE COMMUNITY - DIRECT EFFECT - CONDITIONS - ARTICLE 12 OF THE ASSOCIATION AGREEMENT BETWEEN THE EEC AND TURKEY AND ARTICLE 36 OF THE ADDITIONAL PROTOCOL

(ASSOCIATION AGREEMENT BETWEEN THE EEC AND TURKEY, ARTS 7 AND 12; ADDITIONAL PROTOCOL, ART . 36)

3 . COMMUNITY LAW - PRINCIPLES - FUNDAMENTAL RIGHTS - OBSERVANCE ENSURED BY THE COURT - COMPATIBILITY OF NATIONAL LEGISLATION WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS - APPRAISAL - OUTSIDE JURISDICTION OF THE COURT

Summary

1 . AN AGREEMENT CONCLUDED BY THE COUNCIL UNDER ARTICLES 228 AND 238 OF THE EEC TREATY IS, AS FAR AS THE COMMUNITY IS CONCERNED, AN ACT OF ONE OF THE INSTITUTIONS OF THE COMMUNITY WITHIN THE MEANING OF ARTICLE 177 (1) (B), AND, AS FROM ITS ENTRY INTO FORCE, THE PROVISIONS OF SUCH AN AGREEMENT FORM AN INTEGRAL PART OF THE COMMUNITY LEGAL SYSTEM; WITHIN THE FRAMEWORK OF THAT SYSTEM THE COURT HAS JURISDICTION TO GIVE PRELIMINARY RULINGS CONCERNING THE INTERPRETATION OF SUCH AN AGREEMENT .

IN THE CASE OF PROVISIONS IN AN ASSOCIATION AGREEMENT CONCERNING THE FREE MOVEMENT OF WORKERS, DOUBT CANNOT BE CAST ON THAT JURISDICTION OF THE COURT BY THE ARGUMENT THAT, IN THE CASE OF A "MIXED" AGREEMENT, ITS POWERS DO NOT EXTEND TO PROVISIONS WHEREBY THE MEMBER STATES HAVE ENTERED INTO COMMITMENTS IN THE EXERCISE OF THEIR OWN POWERS . SINCE FREEDOM OF MOVEMENT FOR WORKERS IS, BY VIRTUE OF ARTICLE 48 ET SEQ . OF THE EEC TREATY, ONE OF THE FIELDS COVERED BY THAT TREATY, COMMITMENTS REGARDING FREEDOM OF MOVEMENT FALL WITHIN THE POWERS CONFERRED ON THE COMMUNITY BY ARTICLE 238 .

NOR CAN THE JURISDICTION OF THE COURT BE CALLED IN QUESTION BY VIRTUE OF THE FACT THAT IN THE FIELD OF FREEDOM OF MOVEMENT FOR WORKERS, AS COMMUNITY LAW NOW STANDS, IT IS FOR THE MEMBER STATES TO LAY DOWN THE RULES WHICH ARE NECESSARY TO GIVE EFFECT IN THEIR TERRITORY TO THE PROVISIONS OF THE AGREEMENT OR THE DECISIONS TO BE ADOPTED BY THE ASSOCIATION COUNCIL . IN ENSURING RESPECT FOR COMMITMENTS ARISING FROM AN AGREEMENT CONCLUDED BY THE COMMUNITY INSTITUTIONS THE MEMBER STATES FULFIL, WITHIN THE COMMUNITY SYSTEM, AN OBLIGATION IN RELATION TO THE COMMUNITY, WHICH HAS ASSUMED RESPONSIBILITY FOR THE DUE PERFORMANCE OF THE AGREEMENT .

2 . A PROVISION IN AN AGREEMENT CONCLUDED BY THE COMMUNITY WITH NON-MEMBER COUNTRIES MUST BE REGARDED AS BEING DIRECTLY APPLICABLE WHEN, REGARD BEING HAD TO ITS WORDING AND THE PURPOSE AND NATURE OF THE AGREEMENT ITSELF, THE PROVISION CONTAINS A CLEAR AND PRECISE OBLIGATION WHICH IS NOT SUBJECT, IN ITS IMPLEMENTATION OR EFFECTS, TO THE ADOPTION OF ANY SUBSEQUENT MEASURE .

THAT IS NOT THE CASE WITH ARTICLE 12 OF THE AGREEMENT ESTABLISHING AN ASSOCIATION BETWEEN THE EEC AND TURKEY AND ARTICLE 36 OF THE ADDITIONAL PROTOCOL, READ IN CONJUNCTION WITH ARTICLE 7 OF THE AGREEMENT . THE AFORESAID ARTICLE 12 AND ARTICLE 36 ESSENTIALLY SERVE TO SET OUT A PROGRAMME, WHILST ARTICLE 7, WHICH DOES NO MORE THAN IMPOSE ON THE CONTRACTING PARTIES A GENERAL OBLIGATION TO COOPERATE IN ORDER TO ACHIEVE THE AIMS OF THE AGREEMENT, CANNOT DIRECTLY CONFER ON INDIVIDUALS RIGHTS WHICH ARE NOT ALREADY VESTED IN THEM BY OTHER PROVISIONS OF THE AGREEMENT .

3 . ALTHOUGH IT IS THE DUTY OF THE COURT TO ENSURE OBSERVANCE OF FUNDAMENTAL RIGHTS IN THE FIELD OF COMMUNITY LAW, IT HAS NO POWER TO EXAMINE THE COMPATIBILITY WITH THE EUROPEAN

CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF NATIONAL LEGISLATION LYING OUTSIDE THE SCOPE OF COMMUNITY LAW .

Parties

IN CASE 12/86

REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE VERWALTUNGSGERICHT (ADMINISTRATIVE COURT) STUTTGART FOR A PRELIMINARY RULING IN THE PROCEEDINGS PENDING BEFORE THAT COURT BETWEEN

MERYEM DEMIREL, RESIDING AT SCHWAEBISCH GMUEND,

AND

STADT SCHWAEBISCH GMUEND (CITY OF SCHWAEBISCH GMUEND),

ON THE INTERPRETATION OF ARTICLES 7 AND 12 OF THE ASSOCIATION AGREEMENT BETWEEN THE EUROPEAN ECONOMIC COMMUNITY AND TURKEY, AND ARTICLE 36 OF THE ADDITIONAL PROTOCOL THERETO,

THE COURT

COMPOSED OF : LORD MACKENZIE STUART, PRESIDENT, Y . GALMOT, T . F . O' HIGGINS AND F . SCHOCKWEILER (PRESIDENTS OF CHAMBERS), G . BOSCO, T . KOOPMANS, U . EVERLING, K . BAHLMANN, R . JOLIET, J . C . MOITINHO DE ALMEIDA AND G . C . RODRIGUEZ IGLESIAS, JUDGES,

ADVOCATE GENERAL : M . DARMON

REGISTRAR : H . A . RUEHL, PRINCIPAL ADMINISTRATOR

AFTER CONSIDERING THE OBSERVATIONS SUBMITTED ON BEHALF OF

STADT SCHWAEBISCH GMUEND, THE DEFENDANT IN THE MAIN PROCEEDINGS, BY DIETER SCHAEDEL, OF THE CITY' S LEGAL DEPARTMENT, IN THE WRITTEN PROCEDURE,

THE VERTRETER DES OEFFENTLICHEN INTERESSES (REPRESENTATIVE OF THE PUBLIC INTEREST), WHO INTERVENED IN THE MAIN PROCEEDINGS IN SUPPORT OF THE CONCLUSIONS OF THE CITY OF SCHWAEBISCH GMUEND, BY PROFESSOR HARALD FLIEGAUF, LEITENDER OBERLANDESANWALT (SENIOR REGIONAL PROSECUTOR), IN THE WRITTEN AND THE ORAL PROCEDURE,

THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY, BY MARTIN SEIDEL, MINISTERIALRAT AT THE FEDERAL MINISTRY OF ECONOMICS, AND JOCHIM SEDEMUND, OF THE COLOGNE BAR, IN THE WRITTEN PROCEDURE AND BY MARTIN SEIDEL IN THE ORAL PROCEDURE,

THE GOVERNMENT OF THE FRENCH REPUBLIC, BY GILBERT GUILLAUME, DIRECTEUR DES AFFAIRES JURIDIQUES AT THE MINISTRY OF FOREIGN AFFAIRS, IN THE WRITTEN PROCEDURE, AND BY PHILIPPE POUZOULET, SECRETAIRE DES AFFAIRES ETRANGERES AT THE LEGAL DEPARTMENT OF THE MINISTRY OF FOREIGN AFFAIRS, IN THE ORAL PROCEDURE,

THE GOVERNMENT OF THE HELLENIC REPUBLIC, BY IANNOS KRANIDIOTIS, SECRETARY AT THE MINISTRY OF FOREIGN AFFAIRS, ASSISTED BY STELIOS PERRAKIS, LEGAL ADVISER IN THE EUROPEAN COMMUNITIES SECTION OF THE MINISTRY OF FOREIGN AFFAIRS, IN THE WRITTEN PROCEDURE, AND BY STELIOS PERRAKIS, IN THE ORAL PROCEDURE,

THE UNITED KINGDOM, BY B . E . MCHENRY OF THE TREASURY SOLICITOR' S DEPARTMENT, IN THE WRITTEN PROCEDURE, AND BY PROFESSOR DAVID EDWARD, OF THE SCOTTISH BAR, IN THE ORAL PROCEDURE,

THE COMMISSION OF THE EUROPEAN COMMUNITIES, BY ITS LEGAL ADVISER, PETER GILSDORF, IN THE WRITTEN AND THE ORAL PROCEDURE,

HAVING REGARD TO THE REPORT FOR THE HEARING, AS SUPPLEMENTED FURTHER TO THE HEARING ON 10 FEBRUARY 1987,

AFTER HEARING THE OPINION OF THE ADVOCATE GENERAL DELIVERED AT THE SITTING ON 19 MAY 1987,

GIVES THE FOLLOWING

JUDGMENT

Grounds

*1 BY AN ORDER OF 11 DECEMBER 1985, LODGED AT THE COURT REGISTRY ON 17 JANUARY 1986, THE VERWALTUNGSGERICHT (ADMINISTRATIVE COURT) STUTTGART REFERRED TO THE COURT FOR A PRELIMINARY RULING UNDER ARTICLE 177 OF THE EEC TREATY TWO QUESTIONS CONCERNING THE INTERPRETATION OF ARTICLES 7 AND 12 OF THE AGREEMENT ESTABLISHING AN ASSOCIATION BETWEEN THE EUROPEAN ECONOMIC COMMUNITY AND TURKEY (HEREINAFTER REFERRED TO AS "THE AGREEMENT "), SIGNED AT ANKARA ON 12 SEPTEMBER 1963 AND CONCLUDED ON BEHALF OF THE COMMUNITY BY A DECISION OF THE COUNCIL OF 23 DECEMBER 1963 (OFFICIAL JOURNAL 1973, C*113, P.*2), AND OF ARTICLE 36 OF THE ADDITIONAL PROTOCOL (HEREINAFTER REFERRED TO AS "THE PROTOCOL "), SIGNED AT BRUSSELS ON 23 NOVEMBER 1970 AND CONCLUDED ON BEHALF OF THE COMMUNITY BY COUNCIL REGULATION NO 2760/72 OF 19 DECEMBER 1972 (OFFICIAL JOURNAL 1973, C*113, P . 18).*

2 THE QUESTIONS AROSE IN THE COURSE OF AN ACTION FOR THE ANNULMENT OF AN ORDER TO LEAVE THE COUNTRY, ACCOMPANIED BY THE THREAT OF EXPULSION, WHICH THE CITY OF SCHWAEBISCH GMUEND HAD ISSUED AGAINST MRS MERYEM DEMIREL, A TURKISH NATIONAL, ON THE EXPIRY OF HER VISA . MRS DEMIREL IS THE WIFE OF A TURKISH NATIONAL WHO HAD BEEN LIVING AND WORKING IN THE FEDERAL REPUBLIC OF GERMANY SINCE ENTERING THAT COUNTRY IN 1979 FOR THE PURPOSE OF REJOINING HIS FAMILY . SHE HAD COME TO REJOIN HER HUSBAND HOLDING A VISA WHICH WAS VALID ONLY FOR THE PURPOSES OF A VISIT AND WAS NOT ISSUED FOR FAMILY REUNIFICATION .

3 IT APPEARS FROM THE ORDER OF THE VERWALTUNGSGERICHT THAT THE CONDITIONS FOR FAMILY REUNIFICATION IN THE CASE OF NATIONALS OF NON-MEMBER COUNTRIES WHO HAVE THEMSELVES ENTERED THE FEDERAL REPUBLIC OF GERMANY FOR THE PURPOSES OF FAMILY REUNIFICATION WERE TIGHTENED IN 1982 AND 1984 BY AMENDMENTS TO A CIRCULAR ISSUED FOR THE LAND OF BADEN-WUERTTEMBERG BY THE MINISTER FOR THE INTERIOR OF THAT LAND PURSUANT TO THE AUSLAENDERGESETZ (ALIENS LAW); THOSE AMENDMENTS RAISED FROM THREE TO EIGHT YEARS THE PERIOD DURING WHICH THE FOREIGN NATIONAL WAS REQUIRED TO HAVE RESIDED CONTINUOUSLY AND LAWFULLY ON GERMAN TERRITORY . MRS DEMIREL' S HUSBAND DID NOT FULFIL THAT CONDITION AT THE TIME OF THE EVENTS WHICH LED TO THE MAIN PROCEEDINGS .

4 THE VERWALTUNGSGERICHT STUTTGART, TO WHICH APPLICATION WAS MADE FOR ANNULMENT OF THE ORDER THAT MRS DEMIREL LEAVE THE COUNTRY, REFERRED THE FOLLOWING QUESTIONS TO THE COURT OF JUSTICE :

(1) DO ARTICLE 12 OF THE ASSOCIATION AGREEMENT BETWEEN THE EUROPEAN ECONOMIC COMMUNITY AND TURKEY AND ARTICLE 36 OF THE ADDITIONAL PROTOCOL THERETO, IN CONJUNCTION WITH ARTICLE 7 OF THE ASSOCIATION AGREEMENT, ALREADY LAY DOWN A PROHIBITION THAT UNDER COMMUNITY LAW IS DIRECTLY APPLICABLE IN THE MEMBER STATES ON THE INTRODUCTION OF FURTHER RESTRICTIONS ON FREEDOM OF MOVEMENT APPLICABLE TO TURKISH WORKERS LAWFULLY RESIDING IN A MEMBER STATE IN THE FORM OF A MODIFICATION OF AN EXISTING ADMINISTRATIVE PRACTICE?

(2) IS THE EXPRESSION "FREEDOM OF MOVEMENT" IN THE ASSOCIATION AGREEMENT TO BE UNDERSTOOD AS GIVING TURKISH WORKERS RESIDING IN A MEMBER STATE THE RIGHT TO BRING CHILDREN UNDER THE AGE OF MAJORITY AND SPOUSES TO LIVE WITH THEM?

5 REFERENCE IS MADE TO THE REPORT FOR THE HEARING FOR A FULLER ACCOUNT OF THE FACTS IN THE MAIN PROCEEDINGS, THE PROVISIONS OF GERMAN LEGISLATION, THE AGREEMENT AND THE PROTOCOL THERETO, THE COURSE OF THE PROCEDURE AND THE OBSERVATIONS SUBMITTED UNDER ARTICLE 20 OF THE PROTOCOL ON THE STATUTE OF THE COURT OF JUSTICE OF THE EEC, WHICH ARE MENTIONED OR DISCUSSED HEREINAFTER ONLY IN SO FAR AS IS NECESSARY FOR THE REASONING OF THE COURT .

JURISDICTION OF THE COURT

6 SINCE, IN THEIR WRITTEN OBSERVATIONS, THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY AND THE UNITED KINGDOM CALL IN QUESTION THE JURISDICTION OF THE COURT TO INTERPRET THE PROVISIONS OF THE AGREEMENT AND THE PROTOCOL REGARDING THE FREEDOM OF MOVEMENT FOR WORKERS, IT IS APPROPRIATE TO CONSIDER THE ISSUE OF THE COURT' S JURISDICTION BEFORE RULING ON THE QUESTIONS SUBMITTED BY THE NATIONAL COURT .

7 IT SHOULD FIRST BE POINTED OUT THAT, AS THE COURT HELD IN ITS JUDGMENT OF 30 APRIL 1974 IN CASE 181/73 HAEGEMAN V BELGIUM ((1974)) ECR 449, AN AGREEMENT CONCLUDED BY THE COUNCIL UNDER ARTICLES 228 AND 238 OF THE TREATY IS, AS FAR AS THE COMMUNITY IS CONCERNED, AN ACT OF ONE OF THE INSTITUTIONS OF THE COMMUNITY WITHIN THE MEANING OF ARTICLE 177 (1) (B), AND, AS FROM ITS ENTRY INTO FORCE, THE PROVISIONS OF SUCH AN AGREEMENT FORM AN INTEGRAL PART OF THE COMMUNITY LEGAL SYSTEM; WITHIN THE FRAMEWORK OF THAT SYSTEM THE COURT HAS JURISDICTION TO GIVE PRELIMINARY RULINGS CONCERNING THE INTERPRETATION OF SUCH AN AGREEMENT .

8 HOWEVER, THE GERMAN GOVERNMENT AND THE UNITED KINGDOM TAKE THE VIEW THAT, IN THE CASE OF "MIXED" AGREEMENTS SUCH AS THE AGREEMENT AND THE PROTOCOL AT ISSUE HERE, THE COURT' S

INTERPRETATIVE JURISDICTION DOES NOT EXTEND TO PROVISIONS WHEREBY MEMBER STATES HAVE ENTERED INTO COMMITMENTS WITH REGARD TO TURKEY IN THE EXERCISE OF THEIR OWN POWERS WHICH IS THE CASE OF THE PROVISIONS ON FREEDOM OF MOVEMENT FOR WORKERS .

9 IN THAT CONNECTION IT IS SUFFICIENT TO STATE THAT THAT IS PRECISELY NOT THE CASE IN THIS INSTANCE . SINCE THE AGREEMENT IN QUESTION IS AN ASSOCIATION AGREEMENT CREATING SPECIAL, PRIVILEGED LINKS WITH A NON-MEMBER COUNTRY WHICH MUST, AT LEAST TO A CERTAIN EXTENT, TAKE PART IN THE COMMUNITY SYSTEM, ARTICLE 238 MUST NECESSARILY EMPOWER THE COMMUNITY TO GUARANTEE COMMITMENTS TOWARDS NON-MEMBER COUNTRIES IN ALL THE FIELDS COVERED BY THE TREATY . SINCE FREEDOM OF MOVEMENT FOR WORKERS IS, BY VIRTUE OF ARTICLE 48 ET SEQ . OF THE EEC TREATY, ONE OF THE FIELDS COVERED BY THAT TREATY, IT FOLLOWS THAT COMMITMENTS REGARDING FREEDOM OF MOVEMENT FALL WITHIN THE POWERS CONFERRED ON THE COMMUNITY BY ARTICLE 238 . THUS THE QUESTION WHETHER THE COURT HAS JURISDICTION TO RULE ON THE INTERPRETATION OF A PROVISION IN A MIXED AGREEMENT CONTAINING A COMMITMENT WHICH ONLY THE MEMBER STATES COULD ENTER INTO IN THE SPHERE OF THEIR OWN POWERS DOES NOT ARISE .

10 FURTHERMORE, THE JURISDICTION OF THE COURT CANNOT BE CALLED IN QUESTION BY VIRTUE OF THE FACT THAT IN THE FIELD OF FREEDOM OF MOVEMENT FOR WORKERS, AS COMMUNITY LAW NOW STANDS, IT IS FOR THE MEMBER STATES TO LAY DOWN THE RULES WHICH ARE NECESSARY TO GIVE EFFECT IN THEIR TERRITORY TO THE PROVISIONS OF THE AGREEMENT OR THE DECISIONS TO BE ADOPTED BY THE ASSOCIATION COUNCIL .

11 AS THE COURT HELD IN ITS JUDGMENT OF 26 OCTOBER 1982 IN CASE 104/81 HAUPTZOLLAMT MAINZ V KUPFERBERG ((1982)) ECR 3641, IN ENSURING RESPECT FOR COMMITMENTS ARISING FROM AN AGREEMENT CONCLUDED BY THE COMMUNITY INSTITUTIONS THE MEMBER STATES FULFIL, WITHIN THE COMMUNITY SYSTEM, AN OBLIGATION IN RELATION TO THE COMMUNITY, WHICH HAS ASSUMED RESPONSIBILITY FOR THE DUE PERFORMANCE OF THE AGREEMENT .

12 CONSEQUENTLY, THE COURT DOES HAVE JURISDICTION TO INTERPRET THE PROVISIONS ON FREEDOM OF MOVEMENT FOR WORKERS CONTAINED IN THE AGREEMENT AND THE PROTOCOL .

THE QUESTIONS REFERRED TO THE COURT

13 THE VERWALTUNGSGERICHT' S FIRST QUESTION SEEKS ESSENTIALLY TO ESTABLISH WHETHER ARTICLE 12 OF THE AGREEMENT AND ARTICLE 36 OF THE PROTOCOL, READ IN CONJUNCTION WITH ARTICLE 7 OF THE AGREEMENT, CONSTITUTE RULES OF COMMUNITY LAW WHICH ARE DIRECTLY APPLICABLE IN THE INTERNAL LEGAL ORDER OF THE MEMBER STATES .

14 A PROVISION IN AN AGREEMENT CONCLUDED BY THE COMMUNITY WITH NON-MEMBER COUNTRIES MUST BE REGARDED AS BEING DIRECTLY APPLICABLE WHEN, REGARD BEING HAD TO ITS WORDING AND THE PURPOSE AND NATURE OF THE AGREEMENT ITSELF, THE PROVISION CONTAINS A CLEAR AND PRECISE OBLIGATION WHICH IS NOT SUBJECT, IN ITS IMPLEMENTATION OR EFFECTS, TO THE ADOPTION OF ANY SUBSEQUENT MEASURE .

15 ACCORDING TO ARTICLES 2 TO 5 THEREOF, THE AGREEMENT PROVIDES FOR A PREPARATORY STAGE TO ENABLE TURKEY TO STRENGTHEN ITS ECONOMY WITH AID FROM THE COMMUNITY, A TRANSITIONAL STAGE FOR THE PROGRESSIVE ESTABLISHMENT OF A CUSTOMS UNION AND FOR THE ALIGNMENT OF ECONOMIC POLICIES, AND A FINAL STAGE BASED ON THE CUSTOMS UNION AND ENTAILING CLOSER COORDINATION OF ECONOMIC POLICIES .

16 IN STRUCTURE AND CONTENT, THE AGREEMENT IS CHARACTERIZED BY THE FACT THAT, IN GENERAL, IT SETS OUT THE AIMS OF THE ASSOCIATION AND LAYS DOWN GUIDELINES FOR THE ATTAINMENT OF THOSE AIMS WITHOUT ITSELF ESTABLISHING THE DETAILED RULES FOR DOING SO . ONLY IN RESPECT OF CERTAIN SPECIFIC MATTERS ARE DETAILED RULES LAID DOWN BY THE PROTOCOLS ANNEXED TO THE AGREEMENT, LATER REPLACED BY THE ADDITIONAL PROTOCOL .

17 IN ORDER TO ACHIEVE THE AIMS SET OUT IN THE AGREEMENT, ARTICLE 22 CONFERS DECISION-MAKING POWERS ON THE COUNCIL OF ASSOCIATION WHICH CONSISTS OF MEMBERS OF THE GOVERNMENTS OF THE MEMBER STATES AND MEMBERS OF THE COUNCIL AND COMMISSION, ON THE ONE HAND, AND MEMBERS OF THE TURKISH GOVERNMENT, ON THE OTHER .

18 TITLE II OF THE AGREEMENT, WHICH DEALS WITH THE IMPLEMENTATION OF THE TRANSITIONAL STAGE, INCLUDES TWO CHAPTERS ON THE CUSTOMS UNION AND AGRICULTURE, TOGETHER WITH A THIRD CHAPTER CONTAINING OTHER ECONOMIC PROVISIONS, OF WHICH ARTICLE 12 ON THE FREEDOM OF MOVEMENT FOR WORKERS FORMS PART .

19 ARTICLE 12 OF THE AGREEMENT PROVIDES THAT THE CONTRACTING PARTIES AGREE TO BE GUIDED BY ARTICLES 48, 49 AND 50 OF THE TREATY ESTABLISHING THE COMMUNITY FOR THE PURPOSE OF PROGRESSIVELY SECURING FREEDOM OF MOVEMENT FOR WORKERS BETWEEN THEM .

20 ARTICLE 36 OF THE PROTOCOL PROVIDES THAT FREEDOM OF MOVEMENT SHALL BE SECURED BY PROGRESSIVE STAGES IN ACCORDANCE WITH THE PRINCIPLES SET OUT IN ARTICLE 12 OF THE AGREEMENT BETWEEN THE END OF THE 12TH AND THE 22ND YEAR AFTER THE ENTRY INTO FORCE OF THAT AGREEMENT, AND THAT THE COUNCIL OF ASSOCIATION IS TO DECIDE ON THE RULES NECESSARY TO THAT END .

21 ARTICLE 36 OF THE PROTOCOL GIVES THE COUNCIL OF ASSOCIATION EXCLUSIVE POWERS TO LAY DOWN DETAILED RULES FOR THE PROGRESSIVE ATTAINMENT OF FREEDOM OF MOVEMENT FOR WORKERS IN ACCORDANCE WITH POLITICAL AND ECONOMIC CONSIDERATIONS ARISING IN PARTICULAR OUT OF THE PROGRESSIVE ESTABLISHMENT OF THE CUSTOMS UNION AND THE ALIGNMENT OF ECONOMIC POLICIES, PURSUANT TO SUCH ARRANGEMENTS AS THE COUNCIL OF ASSOCIATION MAY DEEM NECESSARY .

22 THE ONLY DECISION WHICH THE COUNCIL OF ASSOCIATION ADOPTED ON THE MATTER WAS DECISION NO 1/80 OF 19 SEPTEMBER 1980 WHICH, WITH REGARD TO TURKISH WORKERS WHO ARE ALREADY DULY INTEGRATED IN THE LABOUR FORCE OF A MEMBER STATE, PROHIBITS ANY FURTHER RESTRICTIONS ON THE CONDITIONS GOVERNING ACCESS TO EMPLOYMENT . IN THE SPHERE OF FAMILY REUNIFICATION, ON THE OTHER HAND, NO DECISION OF THAT KIND WAS ADOPTED .

23 EXAMINATION OF ARTICLE 12 OF THE AGREEMENT AND ARTICLE 36 OF THE PROTOCOL THEREFORE REVEALS THAT THEY ESSENTIALLY SERVE TO SET OUT A PROGRAMME AND ARE NOT SUFFICIENTLY PRECISE AND UNCONDITIONAL TO BE CAPABLE OF GOVERNING DIRECTLY THE MOVEMENT OF WORKERS .

24 ACCORDINGLY, IT IS NOT POSSIBLE TO INFER FROM ARTICLE 7 OF THE AGREEMENT A PROHIBITION ON THE INTRODUCTION OF FURTHER RESTRICTIONS ON FAMILY REUNIFICATION . ARTICLE 7, WHICH FORMS PART OF TITLE I OF THE AGREEMENT DEALING WITH THE PRINCIPLES OF THE ASSOCIATION, PROVIDES IN VERY GENERAL TERMS THAT THE CONTRACTING PARTIES ARE TO TAKE ALL APPROPRIATE MEASURES, WHETHER GENERAL OR PARTICULAR, TO ENSURE FULFILMENT OF THE OBLIGATIONS ARISING FROM THE AGREEMENT AND THAT THEY ARE TO REFRAIN FROM ANY MEASURES LIABLE TO JEOPARDIZE THE ATTAINMENT OF THE OBJECTIVES OF THE AGREEMENT . THAT PROVISION DOES NO MORE THAN IMPOSE ON THE CONTRACTING PARTIES A GENERAL OBLIGATION TO COOPERATE IN ORDER TO ACHIEVE THE AIMS OF THE AGREEMENT AND IT CANNOT DIRECTLY CONFER ON INDIVIDUALS RIGHTS WHICH ARE NOT ALREADY VESTED IN THEM BY OTHER PROVISIONS OF THE AGREEMENT .

25 CONSEQUENTLY, THE ANSWER TO BE GIVEN TO THE FIRST QUESTION IS THAT ARTICLE 12 OF THE AGREEMENT AND ARTICLE 36 OF THE PROTOCOL, READ IN CONJUNCTION WITH ARTICLE 7 OF THE AGREEMENT, DO NOT CONSTITUTE RULES OF COMMUNITY LAW WHICH ARE DIRECTLY APPLICABLE IN THE INTERNAL LEGAL ORDER OF THE MEMBER STATES .

26 BY ITS SECOND QUESTION THE NATIONAL COURT WISHES TO ESTABLISH WHETHER THE CONDITIONS SUBJECT TO WHICH THE SPOUSE AND MINOR CHILDREN OF A TURKISH WORKER ESTABLISHED WITHIN THE COMMUNITY MAY JOIN HIM ARE COVERED BY THE CONCEPT OF "FREEDOM OF MOVEMENT" WITHIN THE MEANING OF THE AGREEMENT .

27 IN THE LIGHT OF THE ANSWER TO THE FIRST QUESTION, THE SECOND QUESTION DOES NOT CALL FOR AN ANSWER .

28 AS TO THE POINT WHETHER ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS HAS ANY BEARING ON THE ANSWER TO THAT QUESTION, IT MUST BE OBSERVED THAT, AS THE COURT RULED IN ITS JUDGMENT OF 11 JULY 1985 IN JOINED CASES 60 AND 61/84 CINETHEQUE V FEDERATION NATIONALE DES CINEMAS FRANCAIS ((1985)) ECR 2605, AT P . 2618, ALTHOUGH IT IS THE DUTY OF THE COURT TO ENSURE OBSERVANCE OF FUNDAMENTAL RIGHTS IN THE FIELD OF COMMUNITY LAW, IT HAS NO POWER TO EXAMINE THE COMPATIBILITY WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS OF NATIONAL LEGISLATION LYING OUTSIDE THE SCOPE OF COMMUNITY LAW . IN THIS CASE, HOWEVER, AS IS APPARENT FROM THE ANSWER TO THE FIRST QUESTION, THERE IS AT PRESENT NO PROVISION OF COMMUNITY LAW DEFINING THE CONDITIONS IN WHICH MEMBER STATES MUST PERMIT THE FAMILY REUNIFICATION OF TURKISH WORKERS LAWFULLY SETTLED IN THE COMMUNITY . IT FOLLOWS THAT THE NATIONAL RULES AT ISSUE IN THE MAIN PROCEEDINGS DID NOT HAVE TO IMPLEMENT A PROVISION OF COMMUNITY LAW . IN THOSE CIRCUMSTANCES, THE COURT DOES NOT HAVE JURISDICTION TO DETERMINE WHETHER NATIONAL RULES SUCH AS THOSE AT ISSUE ARE COMPATIBLE WITH THE PRINCIPLES ENSHRINED IN ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS .

Operative part

On those grounds,

THE COURT,

in answer to the questions referred to it by the Verwaltungsgericht Stuttgart by an order of 11 December 1985, hereby rules :

Article 12 of the Agreement establishing an association between the European Economic Community and Turkey, signed in Ankara on 12 September 1963 and concluded on behalf of the Community by a Council Decision of 23 December 1963, and Article 36 of the Additional Protocol, signed at Brussels on 23 November 1970 and concluded on behalf of the Community by Council Regulation No 2760/72 of 19 December 1972, read in conjunction with Article 7 of the Agreement, do not constitute rules of Community law which are directly applicable in the internal legal order of the Member States .

Keywords

1 . MEASURES ADOPTED BY THE INSTITUTIONS - DIRECTIVES - DIRECT EFFECT - CONDITIONS - LIMITS - POSSIBILITY OF RELYING UPON A DIRECTIVE AGAINST AN INDIVIDUAL - NONE

(EEC TREATY, ART . 189(3)*)*

2 . MEASURES ADOPTED BY THE INSTITUTIONS - DIRECTIVES - IMPLEMENTATION BY THE MEMBER STATES - NEED TO ENSURE THAT DIRECTIVES ARE EFFECTIVE - OBLIGATIONS OF THE NATIONAL COURTS - LIMITS - PRINCIPLES OF LEGAL CERTAINTY AND NON-RETROACTIVITY

(EEC TREATY, ART . 189(3)*)*

Summary

1 . WHEREVER THE PROVISIONS OF A DIRECTIVE APPEAR, AS FAR AS THEIR SUBJECT-MATTER IS CONCERNED, TO BE UNCONDITIONAL AND SUFFICIENTLY PRECISE, THOSE PROVISIONS MAY BE RELIED UPON BY AN INDIVIDUAL AGAINST THE STATE WHERE THAT STATE FAILS TO IMPLEMENT THE DIRECTIVE IN NATIONAL LAW BY THE END OF THE PERIOD PRESCRIBED OR WHERE IT FAILS TO IMPLEMENT THE DIRECTIVE CORRECTLY .

HOWEVER, ACCORDING TO ARTICLE 189 OF THE EEC TREATY THE BINDING NATURE OF A DIRECTIVE, WHICH CONSTITUTES THE BASIS FOR THE POSSIBILITY OF RELYING ON THE DIRECTIVE BEFORE A NATIONAL COURT, EXISTS ONLY IN RELATION TO "EACH MEMBER STATE TO WHICH IT IS ADDRESSED ". IT FOLLOWS THAT A DIRECTIVE MAY NOT OF ITSELF IMPOSE OBLIGATIONS ON AN INDIVIDUAL AND THAT A PROVISION OF A DIRECTIVE MAY NOT BE RELIED UPON AS SUCH AGAINST SUCH A PERSON BEFORE A NATIONAL COURT .

2 . IN APPLYING NATIONAL LAW AND IN PARTICULAR THE PROVISIONS OF A NATIONAL LAW SPECIFICALLY INTRODUCED IN ORDER TO IMPLEMENT THE DIRECTIVE, NATIONAL COURTS ARE REQUIRED TO INTERPRET THEIR NATIONAL LAW IN THE LIGHT OF THE WORDING AND THE PURPOSES OF THE DIRECTIVE IN ORDER TO ACHIEVE THE RESULT REFERRED TO IN THE THIRD PARAGRAPH OF ARTICLE 189 OF THE TREATY .

HOWEVER, THAT OBLIGATION IS LIMITED BY THE GENERAL PRINCIPLES OF LAW WHICH FORM PART OF COMMUNITY LAW AND IN PARTICULAR THE PRINCIPLES OF LEGAL CERTAINTY AND NON-RETROACTIVITY . THEREFORE A DIRECTIVE CANNOT, OF ITSELF AND INDEPENDENTLY OF A NATIONAL LAW ADOPED BY A MEMBER STATE FOR ITS IMPLEMENTATION, HAVE THE EFFECT OF DETERMINING OR AGGRAVATING THE LIABILITY IN CRIMINAL LAW OF PERSONS WHO ACT IN CONTRAVENTION OF THE PROVISIONS OF THAT DIRECTIVE .

Parties

IN CASE 80/86

REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE ARRONDISSEMENTSRECHTBANK (DISTRICT COURT), ARNHEM, FOR A PRELIMINARY RULING IN THE CRIMINAL PROCEEDINGS PENDING BEFORE THAT COURT AGAINST

KOLPINGHUIS NIJMEGEN BV, NIJMEGEN,

*ON THE INTERPRETATION OF COUNCIL DIRECTIVE 80/777/EEC OF 15 JULY 1980 ON THE APPROXIMATION OF THE LAWS OF THE MEMBER STATES RELATING TO THE EXPLOITATION AND MARKETING OF NATURAL MINERAL WATERS (OFFICIAL JOURNAL 1980, L*229, P.*1), IN PARTICULAR AS REGARDS THE EFFECTS OF THAT DIRECTIVE BEFORE IT HAS BEEN IMPLEMENTED IN NATIONAL LAW,*

THE COURT (SIXTH CHAMBER)

COMPOSED OF : O . DUE, PRESIDENT OF CHAMBER, G . C . RODRIGUEZ IGLESIAS, T . KOOPMANS, K . BAHLMANN AND C . KAKOURIS, JUDGES,

ADVOCATE GENERAL : J . MISCHO

REGISTRAR : D . LOUTERMAN, ADMINISTRATOR

AFTER CONSIDERING THE OBSERVATIONS SUBMITTED ON BEHALF OF

THE NETHERLANDS GOVERNMENT, IN THE WRITTEN PROCEDURE BY I . VERKADE, SECRETARY-GENERAL, AND AT THE HEARING BY ITS AGENT, G . M . BORCHARDT,

THE UNITED KINGDOM, IN THE WRITTEN PROCEDURE BY ITS AGENT, S . J . HAY, AND AT THE HEARING BY H . L . PURSE, ASSISTANT SOLICITOR,

THE ITALIAN GOVERNMENT, BY LUIGI FERRARI BRAVO, HEAD OF THE DEPARTMENT FOR CONTENTIOUS DIPLOMATIC AFFAIRS, ACTING AS AGENT, ASSISTED BY M . CONTI, AVVOCATO DELLO STATO,

THE COMMISSION OF THE EUROPEAN COMMUNITIES, IN THE WRITTEN PROCEDURE BY AUKE HAAGSMA, A MEMBER OF ITS LEGAL DEPARTMENT, ACTING AS AGENT, REPLACED AT THE HEARING BY R . C . FISCHER, LEGAL ADVISER, ACTING AS AGENT,

HAVING REGARD TO THE REPORT FOR THE HEARING AND FURTHER TO THE HEARING ON 3 FEBRUARY 1987,

AFTER HEARING THE OPINION OF THE ADVOCATE GENERAL DELIVERED AT THE SITTING ON 17 MARCH 1987,

GIVES THE FOLLOWING

JUDGMENT

Grounds

1 BY AN ORDER OF 3 FEBRUARY 1986, WHICH WAS RECEIVED AT THE COURT ON 14 MARCH 1986, THE ARRONDISSEMENTSRECHTBANK, ARNHEM, SUBMITTED TO THE COURT FOR A PRELIMINARY RULING UNDER ARTICLE 177 OF THE EEC TREATY FOUR QUESTIONS ON THE INTERPRETATION OF COMMUNITY LAW WITH REGARD TO THE EFFECT OF A DIRECTIVE UNDER THE NATIONAL LAW OF A MEMBER STATE WHICH HAS NOT YET ADOPTED THE MEASURES NEEDED TO IMPLEMENT THAT DIRECTIVE .

2 THOSE QUESTIONS AROSE IN CRIMINAL PROCEEDINGS BROUGHT AGAINST AN UNDERTAKING RUNNING A CAFE FOR STOCKING FOR SALE AND DELIVERY A BEVERAGE WHICH IT CALLED "MINERAL WATER" BUT WHICH CONSISTED OF TAP-WATER AND CARBON DIOXIDE . THE UNDERTAKING IS CHARGED WITH INFRINGING ARTICLE 2 OF THE KEURINGSVERORDENING (INSPECTION REGULATION) OF THE MUNICIPALITY OF NIJMEGEN WHICH PROHIBITS THE STOCKING FOR SALE AND DELIVERY OF GOODS INTENDED FOR TRADE AND HUMAN CONSUMPTION WHICH ARE OF UNSOUND COMPOSITION .

*3 BEFORE THE POLITIERECHTER (MAGISTRATE DEALING WITH COMMERCIAL OFFENCES), THE OFFICIER VAN JUSTITIE (PUBLIC PROSECUTOR) RELIED INTER ALIA UPON COUNCIL DIRECTIVE 80/777/EEC OF 15 JULY 1980 ON THE APPROXIMATION OF THE LAWS OF THE MEMBER STATES RELATING TO THE EXPLOITATION AND MARKETING OF NATURAL MINERAL WATERS (OFFICIAL JOURNAL 1980, L*229, P.*1). THE DIRECTIVE PROVIDES IN PARTICULAR THAT THE MEMBER STATES ARE TO TAKE THE MEASURES NECESSARY TO ENSURE THAT ONLY WATERS EXTRACTED FROM THE GROUND OF A MEMBER STATE AND RECOGNIZED BY THE RESPONSIBLE AUTHORITY OF THAT MEMBER STATE AS NATURAL MINERAL WATERS SATISFYING THE PROVISIONS OF ANNEX I, SECTION I, OF THE DIRECTIVE MAY BE MARKETED AS NATURAL MINERAL WATERS . THAT PROVISION OF THE DIRECTIVE OUGHT TO HAVE BEEN IMPLEMENTED WITHIN FOUR YEARS AFTER THE DIRECTIVE WAS NOTIFIED, THAT IS TO SAY BY 17 JULY 1984, BUT THE NETHERLANDS LEGISLATION WAS AMENDED ONLY WITH EFFECT FROM 8 AUGUST 1985, WHEREAS THE OFFENCES WITH WHICH THE ACCUSED IN THE MAIN PROCEEDINGS IS CHARGED TOOK PLACE ON 7 AUGUST 1984 .*

4 UNDER THOSE CIRCUMSTANCES THE ARRONDISSEMENTSRECHTBANK SUBMITTED TO THE COURT THE FOLLOWING QUESTIONS :

"(1) CAN AN AUTHORITY OF A MEMBER STATE (IN THIS CASE THE PROSECUTING BODY) RELY AS AGAINST NATIONALS OF THAT MEMBER STATE ON A PROVISION OF A DIRECTIVE IN A CASE WHICH IS NOT COVERED BY THE STATE' S OWN LEGISLATION OR IMPLEMENTING PROVISIONS?

(2) IS A NATIONAL COURT OBLIGED, WHERE A DIRECTIVE HAS NOT BEEN IMPLEMENTED, TO GIVE DIRECT EFFECT TO PROVISIONS OF THE DIRECTIVE WHICH LEND THEMSELVES TO SUCH TREATMENT EVEN WHERE THE INDIVIDUAL CONCERNED DOES NOT SEEK TO DERIVE ANY RIGHT FROM THOSE PROVISIONS?

(3) WHERE A NATIONAL COURT IS REQUIRED TO INTERPRET A NATIONAL RULE, SHOULD OR MAY THAT COURT BE GUIDED IN ITS INTERPRETATION BY THE PROVISIONS OF AN APPLICABLE DIRECTIVE?

(4) DOES IT MAKE A DIFFERENCE TO THE ANSWERS TO QUESTIONS 1, 2 AND 3 IF ON THE MATERIAL DATE (IN THIS CASE 7 AUGUST 1984) THE PERIOD WHICH THE MEMBER STATE HAD IN WHICH TO ADAPT NATIONAL LAW HAD NOT YET EXPIRED?"

5 REFERENCE IS MADE TO THE REPORT FOR THE HEARING FOR A FULLER ACCOUNT OF THE FACTS OF THE MAIN PROCEEDINGS, THE RELEVANT COMMUNITY AND NATIONAL RULES AND THE OBSERVATIONS SUBMITTED

TO THE COURT, WHICH ARE MENTIONED OR DISCUSSED HEREINAFTER ONLY IN SO FAR AS IS NECESSARY FOR THE REASONING OF THE COURT .

THE FIRST TWO QUESTIONS

6 THE FIRST TWO QUESTIONS CONCERN THE POSSIBILITY WHETHER THE PROVISIONS OF A DIRECTIVE WHICH HAS NOT YET BEEN IMPLEMENTED IN NATIONAL LAW IN THE MEMBER STATE IN QUESTION MAY BE APPLIED AS SUCH .

7 IN THIS REGARD IT SHOULD BE RECALLED THAT, ACCORDING TO THE ESTABLISHED CASE-LAW OF THE COURT (IN PARTICULAR ITS JUDGMENT OF 19 JANUARY 1982 IN CASE 8/81 BECKER V FINANZAMT MUENSTER-INNENSTADT ((1982)) ECR 53), WHEREVER THE PROVISIONS OF A DIRECTIVE APPEAR, AS FAR AS THEIR SUBJECT-MATTER IS CONCERNED, TO BE UNCONDITIONAL AND SUFFICIENTLY PRECISE, THOSE PROVISIONS MAY BE RELIED UPON BY AN INDIVIDUAL AGAINST THE STATE WHERE THAT STATE FAILS TO IMPLEMENT THE DIRECTIVE IN NATIONAL LAW BY THE END OF THE PERIOD PRESCRIBED OR WHERE IT FAILS TO IMPLEMENT THE DIRECTIVE CORRECTLY .

8 THAT VIEW IS BASED ON THE CONSIDERATION THAT IT WOULD BE INCOMPATIBLE WITH THE BINDING NATURE WHICH ARTICLE 189 CONFERS ON THE DIRECTIVE TO HOLD AS A MATTER OF PRINCIPLE THAT THE OBLIGATION IMPOSED THEREBY CANNOT BE RELIED ON BY THOSE CONCERNED . FROM THAT THE COURT DEDUCED THAT A MEMBER STATE WHICH HAS NOT ADOPTED THE IMPLEMENTING MEASURES REQUIRED BY THE DIRECTIVE WITHIN THE PRESCRIBED PERIOD MAY NOT PLEAD, AS AGAINST INDIVIDUALS, ITS OWN FAILURE TO PERFORM THE OBLIGATIONS WHICH THE DIRECTIVE ENTAILS .

9 IN ITS JUDGMENT OF 26 FEBRUARY 1986 IN CASE 152/84 MARSHALL V SOUTH-WEST HAMPSHIRE AREA HEALTH AUTHORITY ((1986)) ECR 723, THE COURT EMPHASIZED, HOWEVER, THAT ACCORDING TO ARTICLE 189 OF THE EEC TREATY THE BINDING NATURE OF A DIRECTIVE, WHICH CONSTITUTES THE BASIS FOR THE POSSIBILITY OF RELYING ON THE DIRECTIVE BEFORE A NATIONAL COURT, EXISTS ONLY IN RELATION TO "EACH MEMBER STATE TO WHICH IT IS ADDRESSED ". IT FOLLOWS THAT A DIRECTIVE MAY NOT OF ITSELF IMPOSE OBLIGATIONS ON AN INDIVIDUAL AND THAT A PROVISION OF A DIRECTIVE MAY NOT BE RELIED UPON AS SUCH AGAINST SUCH A PERSON BEFORE A NATIONAL COURT .

10 THE ANSWER TO THE FIRST TWO QUESTIONS SHOULD THEREFORE BE THAT A NATIONAL AUTHORITY MAY NOT RELY, AS AGAINST AN INDIVIDUAL, UPON A PROVISION OF A DIRECTIVE WHOSE NECESSARY IMPLEMENTATION IN NATIONAL LAW HAS NOT YET TAKEN PLACE .

THE THIRD QUESTION

11 THE THIRD QUESTION IS DESIGNED TO ASCERTAIN HOW FAR THE NATIONAL COURT MAY OR MUST TAKE ACCOUNT OF A DIRECTIVE AS AN AID TO THE INTERPRETATION OF A RULE OF NATIONAL LAW .

12 AS THE COURT STATED IN ITS JUDGMENT OF 10 APRIL 1984 IN CASE 14/83 VON COLSON AND KAMANN V LAND NORDRHEIN-WESTFALEN ((1984)) ECR 1891, THE MEMBER STATES' OBLIGATION ARISING FROM A DIRECTIVE TO ACHIEVE THE RESULT ENVISAGED BY THE DIRECTIVE AND THEIR DUTY UNDER ARTICLE 5 OF THE TREATY TO TAKE ALL APPROPRIATE MEASURES, WHETHER GENERAL OR PARTICULAR, TO ENSURE THE FULFILMENT OF THAT OBLIGATION, IS BINDING ON ALL THE AUTHORITIES OF MEMBER STATES INCLUDING, FOR MATTERS WITHIN THEIR JURISDICTION, THE COURTS . IT FOLLOWS THAT, IN APPLYING THE NATIONAL LAW AND IN PARTICULAR THE PROVISIONS OF A NATIONAL LAW SPECIFICALLY INTRODUCED IN ORDER TO IMPLEMENT THE DIRECTIVE, NATIONAL COURTS ARE REQUIRED TO INTERPRET THEIR NATIONAL LAW IN THE LIGHT OF THE WORDING AND THE PURPOSE OF THE DIRECTIVE IN ORDER TO ACHIEVE THE RESULT REFERRED TO IN THE THIRD PARAGRAPH OF ARTICLE 189 OF THE TREATY .

13 HOWEVER, THAT OBLIGATION ON THE NATIONAL COURT TO REFER TO THE CONTENT OF THE DIRECTIVE WHEN INTERPRETING THE RELEVANT RULES OF ITS NATIONAL LAW IS LIMITED BY THE GENERAL PRINCIPLES OF LAW WHICH FORM PART OF COMMUNITY LAW AND IN PARTICULAR THE PRINCIPLES OF LEGAL CERTAINTY AND NON-RETROACTIVITY . THUS THE COURT RULED IN ITS JUDGMENT OF 11 JUNE 1987 IN CASE 14/86 PRETORE DE SALO V X ((1987)) ECR ... THAT A DIRECTIVE CANNOT, OF ITSELF AND INDEPENDENTLY OF A NATIONAL LAW ADOPTED BY A MEMBER STATE FOR ITS IMPLEMENTATION, HAVE THE EFFECT OF DETERMINING OR AGGRAVATING THE LIABILITY IN CRIMINAL LAW OF PERSONS WHO ACT IN CONTRAVENTION OF THE PROVISIONS OF THAT DIRECTIVE .

14 THE ANSWER TO THE THIRD QUESTION SHOULD THEREFORE BE THAT IN APPLYING ITS NATIONAL LEGISLATION A COURT OF A MEMBER STATE IS REQUIRED TO INTERPRET THAT LEGISLATION IN THE LIGHT OF THE WORDING AND THE PURPOSE OF THE DIRECTIVE IN ORDER TO ACHIEVE THE RESULT REFERRED TO IN THE THIRD PARAGRAPH OF ARTICLE 189 OF THE TREATY, BUT A DIRECTIVE CANNOT, OF ITSELF AND INDEPENDENTLY OF A LAW ADOPTED FOR ITS IMPLEMENTATION, HAVE THE EFFECT OF DETERMINING OR AGGRAVATING THE LIABILITY IN CRIMINAL LAW OF PERSONS WHO ACT IN CONTRAVENTION OF THE PROVISIONS OF THAT DIRECTIVE .

THE FOURTH QUESTION

15 THE QUESTION WHETHER THE PROVISIONS OF A DIRECTIVE MAY BE RELIED UPON AS SUCH BEFORE A NATIONAL COURT ARISES ONLY IF THE MEMBER STATE CONCERNED HAS NOT IMPLEMENTED THE DIRECTIVE IN NATIONAL LAW WITHIN THE PRESCRIBED PERIOD OR HAS IMPLEMENTED THE DIRECTIVE INCORRECTLY . THE FIRST TWO QUESTIONS WERE ANSWERED IN THE NEGATIVE . HOWEVER, IT MAKES NO DIFFERENCE TO THOSE ANSWERS IF ON THE MATERIAL DATE THE PERIOD WHICH THE MEMBER STATE HAD IN WHICH TO ADAPT NATIONAL LAW HAD NOT YET EXPIRED . AS REGARDS THE THIRD QUESTION CONCERNING THE LIMITS WHICH COMMUNITY LAW MIGHT IMPOSE ON THE OBLIGATION OR POWER OF THE NATIONAL COURT TO INTERPRET THE RULES OF ITS NATIONAL LAW IN THE LIGHT OF THE DIRECTIVE, IT MAKES NO DIFFERENCE WHETHER OR NOT THE PERIOD PRESCRIBED FOR IMPLEMENTATION HAS EXPIRED .

16 THE ANSWER TO THE FOURTH QUESTION MUST THEREFORE BE THAT IT MAKES NO DIFFERENCE TO THE ANSWERS SET OUT ABOVE IF ON THE MATERIAL DATE THE PERIOD WHICH THE MEMBER STATE HAD IN WHICH TO ADAPT NATIONAL LAW HAD NOT YET EXPIRED .

Operative part

ON THOSE GROUNDS,

THE COURT (SIXTH CHAMBER)

HEREBY RULES :

(1) A NATIONAL AUTHORITY MAY NOT RELY, AS AGAINST AN INDIVIDUAL, UPON A PROVISION OF A DIRECTIVE WHOSE NECESSARY IMPLEMENTATION IN NATIONAL LAW HAS NOT YET TAKEN PLACE .

(2) IN APPLYING ITS NATIONAL LEGISLATION, A COURT OF A MEMBER STATE IS REQUIRED TO INTERPRET THAT LEGISLATION IN THE LIGHT OF THE WORDING AND THE PURPOSE OF THE DIRECTIVE IN ORDER TO ACHIEVE THE RESULT REFERRED TO IN THE THIRD PARAGRAPH OF ARTICLE 189 OF THE TREATY, BUT A DIRECTIVE CANNOT, OF ITSELF AND INDEPENDENTLY OF A LAW ADOPTED FOR ITS IMPLEMENTATION, HAVE THE EFFECT OF DETERMINING OR AGGRAVATING THE LIABILITY IN CRIMINAL LAW OF PERSONS WHO ACT IN CONTRAVENTION OF THE PROVISIONS OF THAT DIRECTIVE .

(3) IT MAKES NO DIFFERENCE TO THE ANSWERS SET OUT ABOVE IF ON THE MATERIAL DATE THE PERIOD WHICH THE MEMBER STATE HAD IN WHICH TO ADAPT NATIONAL LAW HAD NOT YET EXPIRED .

Keywords

1 . Measures adopted by the Community institutions - Directives - Implementation by Member States - Need to ensure the effectiveness of directives - Obligations of the national courts

(EEC Treaty, Art . 5 and Art . 189, third paragraph)

2 . Freedom of movement for persons - Freedom of establishment - Companies - Directive 68/151 - Rules on nullity - Exhaustive list of cases in which nullity can arise - Obligation on the part of the national court not to allow nullity in other cases - Nullity on account of the illegality of a company' s objects - Concept of the objects of a company

(Council Directive 68/151, Art . 11)

Summary

1 . The Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts . It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by it and thereby comply with the third paragraph of Article 189 of the Treaty .

2 . A national court hearing a case which falls within the scope of Directive 68/151 on the coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, is required to interpret its national law in the light of the purpose and the wording of that directive in order to preclude a declaration of nullity of a public limited company on a ground other than those listed in Article 11 of the directive . Those grounds must themselves be strictly interpreted, in the light of that purpose, so as to ensure that nullity on the ground that the objects of the company are unlawful or contrary to public policy must be understood as referring exclusively to the objects of the company as described in the instrument of incorporation or the articles of association .

Parties

In Case C-106/89,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Juzgado de Primera Instancia e Instrucción (Court of First Instance and Examining Magistrates' Court) No 1, Oviedo, Spain, for a preliminary ruling in the proceedings pending before that court between

Marleasing SA

and

La Comercial Internacional de Alimentación SA

on the interpretation of Article 11 of the First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (Official Journal, English Special Edition 1968 (I), p . 41),

THE COURT (Sixth Chamber),

composed of : G . F . Mancini, President of Chamber, T . F . O' Higgins, M . Díez de Velasco, C . N . Kakouris and P . J . G . Kapteyn, Judges,

Advocate General : W . van Gerven

Registrar : H . A . RUEhl, Principal Administrator,

after considering the written observations submitted on behalf of

Marleasing SA, by José Ramón Buzón Ferrero, of the Oviedo Bar,

the Commission of the European Communities, by its Legal Adviser Antonio Caeiro and by Daniel Calleja, a member of its Legal Department, acting as Agents,

having regard to the Report for the Hearing and further to the hearing on 6 June 1990,

after hearing the Opinion of the Advocate General delivered at the sitting on 12 July 1990,

gives the following

Judgment

Grounds

1 By order of 13 March 1989, which was received at the Court on 3 April 1989, the Juzgado de Primera Instancia e Instrucción No 1, Oviedo, referred a question to the Court pursuant to Article 177 of the EEC Treaty for a preliminary ruling on the interpretation of Article 11 of Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community .

2 Those questions arose in a dispute between Marleasing SA, the plaintiff in the main proceedings, and a number of defendants including La Comercial Internacional de Alimentación SA (hereinafter referred to as "La Comercial "). The latter was established in the form of a public limited company by three persons, including Barviesa SA, which contributed its own assets .

3 It is apparent from the grounds set out in the order for reference that Marleasing' s primary claim, based on Articles 1261 and 1275 of the Spanish Civil Code, according to which contracts without cause or whose cause is unlawful have no legal effect, is for a declaration that the founders' contract establishing La Comercial is void on the ground that the establishment of the company lacked cause, was a sham transaction and was carried out in order to defraud the creditors of Barviesa SA, a co-founder of the defendant company . La Comercial contended that the action should be dismissed in its entirety on the ground, in particular, that Article 11 of Directive 68/151, which lists exhaustively the cases in which the nullity of a company may be ordered, does not include lack of cause amongst them .

4 The national court observed that in accordance with Article 395 of the Act concerning the Conditions of Accession of Spain and the Portuguese Republic to the European Communities (Official Journal 1985 L 302, p . 23) the Kingdom of Spain was under an obligation to bring the directive into effect as from the date of accession, but that that had still not been done at the date of the order for reference . Taking the view, therefore, that the dispute raised a problem concerning the interpretation of Community law, the national court referred the following question to the Court :

"Is Article 11 of Council Directive 68/151/EEC of 9 March 1968, which has not been implemented in national law, directly applicable so as to preclude a declaration of nullity of a public limited company on a ground other than those set out in the said article?"

5 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court .

6 With regard to the question whether an individual may rely on the directive against a national law, it should be observed that, as the Court has consistently held, a directive may not of itself impose obligations on an individual and, consequently, a provision of a directive may not be relied upon as such against such a person (judgment in Case 152/84 Marshall v Southampton and South-West Hampshire Area Health Authority [1986] ECR 723).

7 However, it is apparent from the documents before the Court that the national court seeks in substance to ascertain whether a national court hearing a case which falls within the scope of Directive 68/151 is required to interpret its national law in the light of the wording and the purpose of that directive in order to preclude a declaration of nullity of a public limited company on a ground other than those listed in Article 11 of the directive .

8 In order to reply to that question, it should be observed that, as the Court pointed out in its judgment in Case 14/83 Von Colson and Kamann v Land Nordrhein-Westfalen [1984] ECR 1891, paragraph 26, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts . It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the

wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty .

9 It follows that the requirement that national law must be interpreted in conformity with Article 11 of Directive 68/151 precludes the interpretation of provisions of national law relating to public limited companies in such a manner that the nullity of a public limited company may be ordered on grounds other than those exhaustively listed in Article 11 of the directive in question .

10 With regard to the interpretation to be given to Article 11 of the directive, in particular Article 11(2)(b), it should be observed that that provision prohibits the laws of the Member States from providing for a judicial declaration of nullity on grounds other than those exhaustively listed in the directive, amongst which is the ground that the objects of the company are unlawful or contrary to public policy .

11 According to the Commission, the expression "objects of the company" must be interpreted as referring exclusively to the objects of the company as described in the instrument of incorporation or the articles of association . It follows, in the Commission' s view, that a declaration of nullity of a company cannot be made on the basis of the activity actually pursued by it, for instance defrauding the founders' creditors .

12 That argument must be upheld . As is clear from the preamble to Directive 68/151, its purpose was to limit the cases in which nullity can arise and the retroactive effect of a declaration of nullity in order to ensure "certainty in the law as regards relations between the company and third parties, and also between members" (sixth recital). Furthermore, the protection of third parties "must be ensured by provisions which restrict to the greatest possible extent the grounds on which obligations entered into in the name of the company are not valid ". It follows, therefore, that each ground of nullity provided for in Article 11 of the directive must be interpreted strictly . In those circumstances the words "objects of the company" must be understood as referring to the objects of the company as described in the instrument of incorporation or the articles of association .

13 The answer to the question submitted must therefore be that a national court hearing a case which falls within the scope of Directive 68/151 is required to interpret its national law in the light of the wording and the purpose of that directive in order to preclude a declaration of nullity of a public limited company on a ground other than those listed in Article 11 of the directive .

Operative part

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Juzgado de Primera Instancia e Instrucción No 1, Oviedo, by order of 13 March 1989, hereby rules :

A national court hearing a case which falls within the scope of Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, is required to interpret its national law in the light of the wording and the purpose of that directive in order to preclude a declaration of nullity of a public limited company on a ground other than those listed in Article 11 of the directive .

Keywords

1. Preliminary rulings ° Jurisdiction of the Court ° Limits ° General or hypothetical questions ° Determination by the Court of its own jurisdiction

(EEC Treaty, Art. 177)

2. Preliminary rulings ° Reference to the Court ° Stage of the proceedings at which reference should be made

(EEC Treaty, Art. 177)

3. Preliminary rulings ° Jurisdiction of the Court ° Hypothetical question submitted in circumstances in which a useful answer is precluded ° Lack of jurisdiction of the Court

(EEC Treaty, Art. 177)

Summary

1. In the framework of the procedure for cooperation between the Court of Justice and the national courts provided for by Article 177 of the Treaty, the national court, which alone has direct knowledge of the facts of the case, is in the best position to assess having regard to the particular features of the case, whether a preliminary ruling is necessary to enable it to give judgment. Consequently, where the questions submitted by the national court concern the interpretation of a provision of Community law, the Court is, in principle, bound to give a ruling.

Nevertheless, it is a matter for the Court of Justice, in order to determine whether it has jurisdiction, to examine the conditions in which the case has been referred to it. The spirit of cooperation which must prevail in the preliminary ruling procedure requires the national court to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions.

2. The need to provide an interpretation of Community law which will be of use to the national court makes it essential to define the legal context in which the interpretation requested should be placed. Accordingly, it may be convenient, in certain circumstances, for the facts of the case to be established and for questions of purely national law to be settled at the time the reference is made to the Court of Justice, so as to enable the latter to take cognizance of all the features of fact and of law which may be relevant to the interpretation of Community law which it is called upon to give.

3. The Court would be exceeding the limits of the function entrusted to it if it decided to give a ruling on a hypothetical problem without having before it the matters of fact or law necessary to give a useful answer to the questions submitted to it.

Parties

In Case C-83/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Landgericht Hannover for a preliminary ruling in the proceedings pending before that court between

Wienand Meilicke

and

ADV/ORGA AG

on the interpretation of the Second Council Directive, Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ 1977 L 26, p. 1),

THE COURT,

composed of: F.A. Schockweiler, President of Chamber, acting for the President, P.J.G. Kapteyn (Presidents of Chambers), G.F. Mancini, C.N. Kakouris, J.C. Moitinho de Almeida, M. Diez de Velasco and M. Zuleeg, Judges,

Advocate General: G. Tesauro,

Registrar: H.A. Ruehl, Principal Administrator,

after considering the written observations submitted on behalf of:

° Wienand Meilicke, Rechtsanwalt of Bonn, by himself,

° ADV/ORGA AG, by H. Dingler, Rechtsanwalt of Frankfurt am Main,

° the German Government, by Dr H. Teske, Ministerialrat in the Federal Ministry of Justice, Dr K.F. Deutler, Ministerialrat in the same ministry, and C.D. Quassowski, Regierungsdirektor in the Federal Ministry of the Economy, acting as Agents,

° the Commission of the European Communities, by H. Etienne, Principal Legal Adviser, and A. Caeiro, Legal Adviser, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of W. Meilicke, ADV/ORGA AG, the German Government, represented by Dr J. Ganske, Ministerialrat in the Federal Ministry of Justice, and the Commission at the hearing on 19 February 1992,

after hearing the Opinion of the Advocate General at the sitting on 8 April 1992,

gives the following

Judgment

Grounds

1 By order of 15 January 1991, received at the Court Registry on 1 March 1991, the Landgericht Hannover (Regional Court, Hanover) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions on the interpretation of the Second Council Directive, Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ 1977 L 26, p. 1 ° "the Second Directive").

2 The questions were raised in proceedings brought by Wienand Meilicke against the company ADV/ORGA AG ("ADV/ORGA"), of which he is a shareholder and whose management refused to disclose certain information to him at the general meeting of shareholders of 16 February 1990.

3 The dispute relates to matters governed by the Aktiengesetz, the German Law on public limited companies, as interpreted by the Bundesgerichtshof.

4 It should be observed that, with respect to increases in capital, the Aktiengesetz makes non-cash contributions (hereinafter referred to as "contributions in kind") subject to more severe conditions as to publication and verification than those applicable to contributions in cash.

5 The German case-law, however, treats certain cash contributions as "disguised contributions in kind". That applies in particular to a cash contribution preceded or followed by a transaction whereby the company in question pays to the subscriber a sum which enables it to discharge a debt it owed to the latter. According to the case-law of the Bundesgerichtshof, such a contribution cannot be regarded as a cash contribution and must therefore be subject to the special rules applicable to contributions in kind, pursuant to Paragraph 27 of the Aktiengesetz and Article 10 of the Second Directive. If those rules are not complied with, the disguised contribution in kind does not discharge the debt (see in particular the judgment of the Bundesgerichtshof of 15 January 1990, II ZR 164/88, DB 1990 p. 311; BGHZ 110, p. 47).

6 That case-law has been criticized on a number of occasions by Mr Meilicke, the plaintiff in the main proceedings, in particular in his book Die "verschleierte" Sacheinlage; eine deutsche Fehlentwicklung (Schaeffer Verlag, Stuttgart 1989), a copy of which is annexed to the observations submitted to the Court by Mr Meilicke in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC. He considers that the case-law in question is contrary to the Second Directive, in particular Article 11 thereof, which lays down exhaustive provisions for preventing circumvention of the rules concerning contributions in kind.

7 Mr Meilicke holds one share in ADV/ORGA. The company faced financial difficulties and on 28 April 1989 resolved to increase its capital by DM 5 million. The new shares issued for that purpose were issued at 300% of face value and were underwritten by Commerzbank; they ultimately became the property of that bank.

8 At ADV/ORGA' s general meeting of 16 February 1990, Mr Meilicke put several questions to the management concerning the 1989 increase of capital and the use made of the funds thereby raised. His questions were directed essentially to establishing whether the funds had been used to reduce the company' s debts to Commerzbank.

9 Mr Meilicke' s request was made under the first sentence of Paragraph 131(1) of the Aktiengesetz, which states that the management must provide each shareholder who requests it at a general meeting with information concerning the business of the company to the extent to which such information enables him to express a fully informed opinion on any item on the agenda. Paragraph 131(3) defines the circumstances in which the management may withhold such information from a shareholder.

10 Mr Meilicke considered that the answers given to the questions asked at the general meeting of 16 February 1990 were unsatisfactory and that as a result he had not obtained the information to which he was entitled under Paragraph 131 of the Aktiengesetz. He therefore commenced proceedings against ADV/ORGA before the Landgericht Hannover under the procedure laid down in Paragraph 132 of the Aktiengesetz.

11 Paragraph 132 of the Aktiengesetz lays down a special procedure for shareholders to enforce their right to obtain information. The first sentence of Paragraph 132(1) provides that the question whether the management is required to disclose the requested information is to be settled by the Landgericht (Regional Court) for the district where the company has its registered office.

12 During the written procedure before the Landgericht Hannover, Mr Meilicke contended that the answers to the questions put to ADV/ORGA were necessary in order to verify the correctness of the annual balance sheet. He stated that those answers should enable him to establish whether the increase of the capital of the company in 1989 constituted a disguised contribution in kind and whether the requirements of the German legislation and case-law concerning contributions of that kind had been complied with.

13 In the course of the written procedure before the national court, ADV/ORGA maintained that the information requested by Mr Meilicke was not relevant to consideration of the correctness of the balance sheet and that the conditions for the application of Paragraph 131 of the Aktiengesetz were not satisfied. It also denied that Mr Meilicke had any interest in bringing proceedings, in view of the criticisms which he himself had, in several works written by him, levelled against the German case-law. ADV/ORGA also considered that the conditions for the application of that case-law were not satisfied.

14 At the hearing before the national court, the parties commented in particular on the judgment of the Bundesgerichtshof of 15 January 1990, cited above, and the appropriateness of a request for a preliminary ruling. The Landgericht Hannover asked them to make more detailed submissions concerning the latter point.

15 ADV/ORGA first repeated that the conditions for the application of the case-law of the Bundesgerichtshof concerning disguised contributions in kind were not satisfied and that there were consequently no grounds for referring the matter to the Court of Justice. It then contended, in the alternative, that if the Landgericht considered that a disguised contribution in kind could be presumed to have been made and that only the amount of that contribution was unknown, it was necessary to verify whether the management had acted illegally. In support of that argument, ADV/ORGA contended that the conduct of the management could not be regarded as unlawful if the German case-law was contrary to the Second Directive. In that context, ADV/ORGA stated, in agreement with Mr Meilicke, that that question of compatibility should be referred to the Court of Justice under Article 177.

16 Mr Meilicke, for his part, claimed that the facts of the case might in fact disclose a disguised contribution in kind, within the meaning of the German case-law, and that the information asked for was necessary to decide the matter. However, he agreed with ADV/ORGA that the question of the compatibility of the German case-law with the Second Directive should be the subject of a request for a preliminary ruling and for that purpose submitted seven draft preliminary questions to the Landgericht Hannover.

17 In its order for reference, the Landgericht expressed the view that the conditions laid down by Paragraph 131 of the Aktiengesetz were satisfied in that, by virtue of the doctrine of disguised contributions in kind, developed in Germany by the courts and academic legal writers, Mr Meilicke' s request for information was justified. The Landgericht observed that it was in fact possible that the repayment of the defendant' s borrowings, which antedated the increase of capital, by means of cash contributions from the lender might be void as a result of circumvention of the company-law provisions concerning capital contributions in kind.

18 However, the Landgericht considers that it is not able to give judgment on Mr Meilicke' s claim since doubts exist as to whether its object is lawful. If it was found that the doctrine of disguised contributions in kind was incompatible with Community law, in particular the Second Directive, Mr Meilicke' s action would be otiose. It is apparent from the order for reference that ADV/ORGA shares those doubts and that Mr Meilicke contends that that doctrine is clearly incompatible with Community law and that, by virtue of Community law, his request should be rejected.

19 The Landgericht therefore considers that, in the interests of legal certainty, the following questions should be referred to the Court of Justice for a preliminary ruling under Article 177:

"1. Is it compatible with European Community law in principle to apply the rules concerning safeguards in relation to non-cash subscriptions of capital to the extinguishment of a public limited company' s liabilities incurred prior to an increase in its capital by the use of cash subscribed by the creditor?

In particular:

2. Is the Second Council Directive on the coordination of company law (OJ 1977 L 26, p. 1) directly applicable, in the sense that individuals may rely upon it before national courts and national courts must take into account the wording and aims of the directive in interpreting national implementing laws (in this case the German Law of 13 December 1978 on the implementation of the Second Directive of the Council of the European Communities on the coordination of company law, Bundesgesetzblatt 1 1978, p. 1959)?

3. Do the provisions of the Second Council Directive, in particular Articles 10, 11 and 27(2) thereof, merely lay down minimum requirements so that Member States are permitted to enact or apply stricter national law designed to prevent the rules in Articles 10 and 27(2) on examination of value and publication from being circumvented by means of business transactions which have a substantive and temporal link with a contribution in cash; or

Does Article 11 of the Directive contain an exhaustive set of provisions for preventing circumvention of the rules in Articles 10 and 27(2) of the directive on non-cash consideration and preclude stricter or less strict national law which departs from those provisions; or

In addition to Article 11, does it follow from the aims of Articles 10 and 27(2) of the directive that there is an obligation on all the Member States to prevent circumvention of the rules on non-cash consideration?

3.1 If Articles 10, 11 and 27(2) of the directive merely lay down minimum requirements,

(a) is there a standstill rule which permits stricter national law only if it already existed when the directive was adopted? If so,

(aa) do the scope of the stricter national law which is still permissible and that of the stricter national law which was adopted after the relevant date and is therefore no longer permissible fall to be determined by the national courts or does this question form part of the interpretation of European law for which the Court of Justice is responsible?

(bb) if it is for the Court of Justice to determine the scope of the national law which is contrary to the standstill rule as a matter of interpretation of European law, is there an infringement of the standstill rule where the extinguishment of the company' s liabilities towards a person subscribing cash for an increase of capital is treated as an unlawful circumvention of the provisions on non-cash consideration?

(cc) if the scope of national law which is contrary to the standstill rule falls to be determined by the national courts, what is the reference date for determining whether or not the stricter national law retained on the basis of the standstill rule may continue to exist (for example, the commencement of consultations concerning the directive, examination by the European Parliament or adoption by the Council of Ministers), and

(dd) is the stricter national law permitted by the standstill rule limited to formal legal provisions (Laws, Regulations) or does it extend to case-law and academic opinion as it stands at the reference date referred to in (cc) above?

(b) If Articles 10, 11 and 27(2) of the Second Council Directive lay down minimum requirements (with or without a standstill rule), may stricter national law only be laid down by formal national legal rules or, despite the harmonised wording of the national implementing laws, may it also be laid down by way of interpretation or analogy by the national courts?

(c) If Articles 10, 11 and 27(2) of the Second Directive lay down minimum requirements, with reference to what category of interested persons must it be determined whether such national rules constitute permissible, stricter law or impermissible, less strict law? Do the interests protected by the minimum requirements include the interest of the company and third parties in legal certainty in relation to legal transactions which take place between the subscriber and the company and which have a substantive and temporal connection with a contribution in cash (in this case, the extinguishment of the subscriber' s claim against the company)?

3.2. If Article 11 constitutes an exhaustive set of anti-avoidance rules, does that mean that Member States are not entitled to treat as unlawful and apply civil or criminal sanctions to a contribution in cash increasing a company' s capital or a business transaction, on the sole ground that the company, in substantive and temporal connection with the contribution in cash, has extinguished a debt towards the subscriber, without complying with the provisions in Article 10 of the directive on publication and examination of value? Does that mean, in particular, that Member States are not entitled to demand publication or an examination of value pursuant to Articles 10 and 27(2) of the directive if the transaction (in this case the repayment of debts) is in the normal course of the company' s business within the meaning of Article 11(2) of the directive and takes place after expiry of the period laid down by national law pursuant to Article 11(1)?

3.3. If Articles 10, 11 and 27(2) do not lay down minimum requirements which may be supplemented by stricter national law, but equally Article 11 does not constitute an exhaustive set of anti-avoidance rules and it follows from the aims of the directive that all Member States are under a duty to prevent the examination and publication requirements for non-cash consideration from being circumvented by dividing the operation into a contribution in cash and a business transaction, do the legal principles concerning measures taken against such circumvention derive directly and uniformly from European law, in particular from the aims of the directive, or do they derive from the national law of the individual Member State concerned?

4. Does an increase in a company' s capital by means of the extinguishment of the subscriber' s claim against the company

(a) necessarily constitute an increase in capital by contribution in cash?

(b) necessarily constitute an increase in capital by a subscription other than in cash within the meaning of Article 27(1) of the Second Directive?

(c) or is there a choice as to whether such a subscription should be treated as a cash contribution or a contribution in kind? Is that choice a matter for the general meeting of shareholders under Article 25(1), first sentence, of the Second Directive or for the Member States?

(d) or do the Member States have the power to distinguish, at their discretion, between cash consideration for a share issue and consideration other than cash?

5. With regard to Article 7, first sentence, of the Second Directive:

5.1. Is Article 7, first sentence, of the Second Directive to be interpreted to the effect that a subscription in the form of the relinquishment of a claim against the company where the company is in financial difficulty is wholly or partly impermissible, or does that provision permit subscription at the nominal value regardless of the financial soundness of the company?

5.2. If Article 7, first sentence, of the Second Directive permits subscription in the form of the relinquishment of a claim against the company at the nominal value without any examination of the financial soundness of the company,

(a) is the permissibility of a subscription in the form of the relinquishment of a claim a question pertaining to the application of the Community directive, whose interpretation is a matter for the Court of Justice,

(b) or does Article 7, first sentence, lay down minimum requirements and allow Member States to apply stricter national law imposing additional requirements concerning the permissibility of such a subscription,

(c) or does Article 7, first sentence, deal exhaustively with the question of what constitutes permissible consideration?

5.3. In so far as Article 7, first sentence, of the Second Directive does not deal exhaustively with the permissibility of a subscription in the form of the relinquishment of a claim against the company (5.2 (b) above) but constitutes a provision containing minimum requirements which allows additional requirements to be imposed by stricter national law, the Court of Justice is also asked to consider

(a) whether and under what conditions a standstill rule exists and whether the introduction of an examination of financial soundness in cases where the consideration takes the form of the relinquishment of a claim against the company constitutes an infringement of the standstill rule (see question 3.1 (a) (aa) to (dd) above);

(b) whether stricter national law implies an express formal legal provision or whether it may take the form of a stricter interpretation of the implementing law (in this case Paragraph 27(2), first sentence, of the Aktiengesetz); and

(c) with reference to what category of interested persons must it be determined whether additional requirements concerning such consideration constitute permissible, stricter law or impermissible, less strict law?

5.4. If Article 7, first sentence, contains exhaustive rules on the permissibility of such consideration (5.2. (c) above), is the economic assessment of a claim against the company to be made:

(a) from the viewpoint of the company and hence without regard to the financial soundness of the company; or

(b) from the viewpoint of the creditor and hence taking account of reductions in value resulting from the company' s lack of financial soundness?

6. If Articles 7, 10, 11 and 27(2) of the directive are to be interpreted as establishing a uniform set of Community anti-avoidance rules which prohibit the repayment of the subscriber' s claim against the company where there is a substantive and temporal link to a contribution in cash unless the rules in Article 10 on publication and examination of value are complied with, the Court of Justice is asked to consider whether the following constitute unlawful circumvention of the provisions on non-cash consideration:

(a) Must the amount of the cash consideration be identical to the repaid debt or does the fact that they are only partly identical give rise to illegality?

(b) Must there be a subjective link between the contribution in cash and the business transaction (in this case the extinguishment of the debt) or is it sufficient that there should be a substantive and temporal connection? If a subjective link is necessary, does a temporal connection raise a presumption of a subjective link? How close must the temporal connection be?

(c) If only a subjective link constitutes unlawful circumvention, does the subjective link presuppose that there should be an intention to circumvent the provisions on non-cash consideration, or is it sufficient that it be known that the provisions on non-cash consideration could be applied, or is knowledge of the provisions on publication and examination of value unnecessary if it is known that there is a subjective link between the contribution in cash and extinguishment of the debt? Is a subjective link only damaging if one transaction constitutes a condition for the other or is it sufficient that the conclusion of one transaction is a reason for the conclusion of the other? Must such reasons be reciprocal or is it sufficient that for one of the parties one transaction is the reason for the conclusion of the other?

(d) Is there also unlawful circumvention where a lending institution for the purposes of Paragraph 186(5) of the Aktiengesetz takes the new shares issued as part of a capital increase by contribution in cash subject to an obligation to offer them for subscription by existing shareholders, and is the lawfulness of the circumvention of the provisions on non-cash consideration affected by whether and to what extent the lending institution subscribing to the issue is itself an existing shareholder and whether at the time of the subscription by the lending institution rapid placement on the capital market does not appear to be a problem or whether the lending institution has guaranteed the placement?

(e) Does it affect the lawfulness of the circumvention of the provisions on non-cash consideration that the bank, despite the repayment of its claims out of the cash which it subscribes, leaves its lines of credit open? Does it depend on whether and when those credit lines are later actually used or on whether and when it could be anticipated, at the time of the increase in capital, that the lines of credit would be used?

7. Is it compatible with the power conferred by the first sentence of Article 25(1) of the Second Directive on the general meeting to decide upon increases in capital for a contribution in cash to a capital issue which is decided upon by the general meeting and is in isolation properly paid to be regarded or treated as invalid or unlawful because the directors and the subscriber have agreed, in substantive and temporal connection with the capital increase, upon a normal business transaction (in this case the extinguishment of a loan) which results in the cash subscribed being returned wholly or partly to the subscriber? Does the existence of unlawful circumvention depend on whether the general meeting was aware, at the time when it decided upon the increase in capital, of the existence of such an agreement between the directors and the subscriber or must it have been aware of such an agreement?

8. If it is unlawful to circumvent the rules in Article 10 on examination of value and publication by dividing the operation into a contribution in cash and a normal business transaction, and if Article 7, first sentence, of the Second Directive is to be interpreted to the effect that subscription in the form of the relinquishment of a claim against the company in circumstances in which the company is in financial difficulties is unlawful (5.1. above), does it follow from the fact that such a subscription is not permissible that the extinguishment of the debt by the company experiencing financial difficulties is lawful notwithstanding the substantive and temporal connection with the contribution in cash or is the extinguishment of the debt, since it cannot be regarded as a lawful contribution in kind duly examined in accordance with registration law, all the more unlawful in the absence thereof?"

20 Reference is made to the Report for the Hearing for a fuller account of the relevant Community legislation, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

21 In view of the circumstances in which the Landgericht submitted its questions, it is necessary to rehearse and clarify a number of principles concerning the jurisdiction of the Court under Article 177 of the Treaty.

22 It has consistently been held (see, in the first place, Case 16/65 Schwarze v Einfuhr- und Vorratsstelle fuer Getreide und Futtermittel [1965] ECR 877 and, most recently, Case C-147/91 Criminal proceedings against Ferrer Laderer [1992] ECR I-4097, paragraph 6) that the procedure provided for by Article 177 is an instrument for cooperation between the Court of Justice and the national courts.

23 It is also settled law (see, in the first place, Case 83/78 Pigs Marketing Board v Redmond [1978] ECR 2347, paragraph 25, and, most recently, Case C-186/90 Durighello v INPS [1991] ECR I-5773, paragraph 8), that, in the context of such cooperation, the national court, which alone has direct knowledge of the facts of the case, is in the best position to assess, having regard to the particular features of the case, whether a preliminary ruling is necessary to enable it to give judgment.

24 Consequently, since the questions submitted by the national court concern the interpretation of a provision of Community law, the Court is, in principle, bound to give a ruling (see Case C-231/89 Gmurzynska-Bscher v Oberfinanzdirektion Koeln [1990] ECR I-4003, paragraph 20).

25 Nevertheless, in Case 244/80 Foglia v Novello [1981] ECR 3045, paragraph 21, the Court considered that, in order to determine whether it has jurisdiction, it is a matter for the Court of Justice to examine the conditions in which the case has been referred to it by the national court. The spirit of cooperation which must prevail in the preliminary-ruling procedure requires the national court to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions (Foglia v Novello, cited above, paragraphs 18 and 20, and Case 149/82 Robards v Insurance Officer [1983] ECR 171, paragraph 19).

26 The Court has already made it clear that the need to provide an interpretation of Community law which will be of use to the national court makes it essential to define the legal context in which the interpretation requested should be placed and that, in that respect, it may be convenient, in certain circumstances, for the facts of the case to be established and for questions of purely national law to be settled at the time the reference is made to the Court, so as to enable the latter to take cognizance of all the features of fact and of law which may be relevant to the interpretation of Community law which it is called upon to give (Joined Cases 36 and 71/80 Irish Creamery Milk Suppliers Association v Ireland [1981] ECR 735, paragraph 6). Without such information, the Court may find it impossible to give a useful interpretation (see Case 52/76 Benedetti v Munari [1977] ECR 163, paragraphs 20, 21 and 22, and Joined Cases 205 to 215/82 Deutsche Milchkontor v Germany [1983] ECR 2633, paragraph 36).

27 In the light of those considerations, it must first be observed that the specific context of the dispute which gave rise to the reference for a preliminary ruling is defined by Paragraphs 131 and 132 of the Aktiengesetz. Those articles concern the right of shareholders to receive information from the management.

28 The questions submitted do not relate directly to that right but essentially raise the problem of the compatibility with the Second Directive of the doctrine of disguised contributions in kind, as embodied in particular in the judgment of the Bundesgerichtshof of 15 January 1990, cited above. The national court considers that an answer to those questions is needed in order to enable it to adjudicate on the request for information made by Mr Meilicke. It states that the request would have to be rejected if it was found that the doctrine of disguised contributions in kind, as set out in the German case-law, was incompatible with the Second Directive.

29 However, it is apparent from the documents before the Court that it has not been established that the conditions for the application of that doctrine have been satisfied in the main proceedings. Both in the proceedings before the national court and in its written observations to the Court of Justice, ADV/ORGA has rejected the view that the German case-law applies to the transactions entered into between it and Commerzbank. The national court' s own reference to the issue is inconclusive, in that it states that Commerzbank' s contribution may be contrary to the case-law in question.

30 It follows that the problem of the compatibility of the doctrine of contributions in kind with the Second Directive is a hypothetical one.

31 Moreover, the hypothetical nature of the problem on which the Court is requested to give a ruling is confirmed by the fact that the documents forwarded by the national court do not identify the matters of fact and of law which might make it possible to define the context in which ADV/ORGA' s increase of capital took place and to establish the links between the contribution made by Commerzbank and the doctrine of disguised contributions in kind as set out in the German case-law. The preliminary questions are specifically concerned with the compatibility of that doctrine with the Second Directive and therefore raise numerous problems, the answers to which largely depend on the circumstances in which the capital was increased.

32 The Court is thus being asked to give a ruling on a hypothetical problem, without having before it the matters of fact or law necessary to give a useful answer to the questions submitted to it.

33 Accordingly, the Court would be exceeding the limits of the function entrusted to it if it decided to answer the questions submitted to it.

34 It follows that it is not appropriate to answer the questions submitted by the Landgericht Hannover.

Operative part

On those grounds,

THE COURT,

in reply to the questions referred to it by the Landgericht Hannover, by order of 15 January 1991, hereby rules:

It is not appropriate to answer the questions submitted by the Landgericht Hannover.

Judgment in Case C-105/03 Criminal proceedings against Maria Pupino

JUDGMENT OF THE COURT (Grand Chamber)

16 June 2005 (*)

(Police and judicial cooperation in criminal matters – Articles 34 EU and 35 EU – Framework Decision 2001/220/JHA – Standing of victims in criminal proceedings – Protection of vulnerable persons – Hearing of minors as witnesses – Effects of a framework decision)

In Case C-105/03,

REFERENCE for a preliminary ruling under Article 35 EU by the judge in charge of preliminary enquiries at the Tribunale di Firenze (Italy), made by decision of 3 February 2003, received at the Court on 5 March 2003, in criminal proceedings against

Maria Pupino

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, R. Silva de Lapuerta and A. Borg Barthet, Presidents of Chambers, N. Colneric, S. von Bahr, J.N. Cunha Rodrigues (Rapporteur), P. Kūris, E. Juhász, G. Arestis and M. Ilešič, Judges

Advocate General: J. Kokott,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 26 October 2004,

after considering the observations submitted on behalf of:

– Mrs Pupino, represented by M. Guagliani and D. Tanzarella, avvocati,

– the Italian Government, represented by I.M. Braguglia, acting as Agent, assisted by P. Gentili, avvocato dello Stato,

– the Greek Government, represented by A. Samoni-Rantou and K. Boskovits, acting as Agents,

– the French Government, represented by R. Abraham, G. de Bergues and C. Isidoro, acting as Agents,

– the Netherlands Government, represented by H.G. Sevenster and C. Wissels, acting as Agents,

– the Portuguese Government, represented by L. Fernandes, acting as Agent,

– the Swedish Government, represented by A. Kruse and K. Wistrand, acting as Agents,

– the United Kingdom Government, represented by R. Caudwell and E. O'Neill, acting as Agents, assisted by M. Hoskins, Barrister,

– the Commission of the European Communities, represented by M. Condou-Durande and L. Visaggio, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 November 2004,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 2, 3 and 8 of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (OJ 2001 L 82, p. 1; 'the Framework Decision').

2 The reference has been made in the context of criminal proceedings against Mrs Pupino, a nursery school teacher charged with inflicting injuries on pupils aged less than five years at the time of the facts.

Legal background

European Union Law

The Treaty on European Union

3 Under Article 34(2) EU, in the version resulting from the Treaty of Amsterdam, which forms part of Title VI of the Treaty on European Union, headed 'Provisions on police and judicial cooperation in criminal matters':

'The Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this Title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may:

…

b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect;

…'

4 Article 35 EU provides:

'1. The Court of Justice shall have jurisdiction, subject to the conditions laid down in this Article, to give preliminary rulings on the validity and interpretation of framework decisions, and decisions on the interpretation of conventions established under this Title and on the validity and interpretation of the measures implementing them.

2. By a declaration made at the time of signature of the Treaty of Amsterdam or at any time thereafter, any Member State shall be able to accept the jurisdiction of the Court of Justice to give preliminary rulings as specified in paragraph 1.

3. A Member State making a declaration pursuant to paragraph 2 shall specify that either:

a) any court or tribunal of that State against whose decisions there is no judicial remedy under national law may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment; or

b) any court or tribunal of that State may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment.

...'

5 The information published in the *Official Journal of the European Communities* of 1 May 1999 (OJ 1999 L 114, p. 56) on the date of entry into force of the Treaty of Amsterdam shows that the Italian Republic has made a declaration under Article 35(2) EU, whereby it has accepted the jurisdiction of the Court of Justice to rule in accordance with the arrangements under Article 35(3)(b) EU.

The Framework Decision

6 Under Article 2 of the Framework Decision, headed 'Respect and recognition':

'1. Each Member State shall ensure that victims have a real and appropriate role in its criminal legal system. It shall continue to make every effort to ensure that victims are treated with due respect for the dignity of the individual during proceedings and shall recognise the rights and legitimate interests of victims with particular reference to criminal proceedings.

2. Each Member State shall ensure that victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances.'

7 Article 3 of the Framework Decision, headed 'Hearings and provision of evidence' provides:

'Each Member State shall safeguard the possibility for victims to be heard during proceedings and to supply evidence.

Each Member State shall take appropriate measures to ensure that its authorities question victims only insofar as necessary for the purpose of criminal proceedings.'

8 Article 8 of the Framework Decision, headed 'Right to protection', provides in paragraph 4:

'Each Member State shall ensure that, where there is a need to protect victims – particularly those most vulnerable – from the effects of giving evidence in open court, victims may, by decision taken by the court, be entitled to testify in a manner which will enable this objective to be achieved, by any appropriate means compatible with its basic legal principles.'

9 Under Article 17 of the Framework Decision, each Member State is required to bring into force the laws, regulations and administrative provisions necessary to comply with the Framework Decision 'not later than 22 March 2002'.

National legislation

10 Article 392 of the Codice di procedura penale (Italian Code of Criminal Procedure; 'the CPP'), which appears in Book V, Part II, Title VII, headed 'Preliminary enquiries and preliminary hearing', provides:

‘1. During the preliminary enquiry, the Public Prosecutor’s Office and the person being examined may ask the judge to take evidence under special arrangements:

a) where there are reasonable grounds for believing that the witness cannot be heard in open court by reason of illness or serious impediment;

b) where, on the basis of specific facts, there are reasonable grounds for believing that the witness is vulnerable to violence, threats, offers or promises of money or other benefits, to induce him or her not to testify or to give false testimony.

…

1a. In proceedings for offences under Articles 600a, 600b, 600d, 609a, 609c, 609d, and 609g of the criminal code [concerning sexual offences or offences with a sexual background], the Public Prosecutor’s Office and the person being examined may ask for persons aged under 16 years to be heard in accordance with special arrangements even outside the cases referred to in paragraph 1.

…’

11 Under Article 398(5a) of the CPP:

‘In enquiries concerning offences under Articles 600a, 600b, 600d, 609a, 609c, 609d, and 609g of the criminal code, where the evidence involves minors under 16, the judge shall determine by order the place, time and particular circumstances for hearing evidence where a minor’s situation makes it appropriate and necessary. In such cases, the hearing can be held in a place other than the court, in special facilities or, failing that, at the minor’s home. The witness statements must be fully documented by the use of sound and audiovisual recording equipment. Where recording equipment or technical personnel are not available, the judge shall use the expert report or technical advice procedures. The interview shall also be minuted. The recordings shall be transcribed only at the request of the parties.’

Factual background and the question referred

12 The order for reference shows that, in the criminal proceedings against Mrs Pupino, it is alleged that, in January and February 2001, she committed several offences of ‘misuse of disciplinary measures’ within the meaning of Article 571 of the Italian Criminal Code (‘the CP’) against a number of her pupils aged less than five years at the time, by such acts as regularly striking them, threatening to give them tranquillisers and to put sticking plasters over their mouths, and forbidding them from going to the toilet. She is further charged that, in February 2001, she inflicted ‘serious injuries’, as referred to in Articles 582, 585 and 576 of the CP, in conjunction with Article 61(2) and (11) thereof, by hitting a pupil in such a way as to cause a slight swelling of the forehead. The proceedings before the Tribunale di Firenze are at the preliminary enquiry stage.

13 The referring court states in that respect that, under Italian law, criminal procedure comprises two distinct stages. During the first stage, namely that of the preliminary enquiry, the Public Prosecutor’s Office makes enquiries and, under the supervision of the judge in charge of preliminary enquiries, gathers the evidence on the basis of which it will assess whether the prosecution should be abandoned or the matter should proceed to trial. The final decision on whether to allow the prosecution to proceed or to dismiss the matter is taken by the judge in charge of preliminary enquiries at the conclusion of an informal hearing.

14 A decision to send the examined person for trial opens the second stage of the proceedings, namely the adversarial stage, in which the judge in charge of preliminary enquiries does not take part. The proceedings proper begin with this stage. It is only at that stage that, as a rule, evidence must be taken at the initiative of the parties and in compliance with the adversarial principle. The

referring court states that it is during the trial that the parties' submissions may be accepted as evidence within the technical sense of the term. In those circumstances, the evidence gathered by the Public Prosecutor's Office during the preliminary enquiry stage, in order to enable the Office to decide whether to institute criminal proceedings by proposing committal for trial or to ask for the matter to be closed, must be subjected to cross-examination during the trial proper in order to acquire the value of 'evidence' in the full sense.

15 The national court states, however, that there are exceptions to that rule, laid down by Article 392 of the CPP, which allow evidence to be established early, during the preliminary enquiry period, on a decision of the judge in charge of preliminary enquiries and in compliance with the adversarial principle, by means of the Special Inquiry procedure. Evidence gathered in that way has the same probative value as that gathered during the second stage of the proceedings. Article 392(1a) of the CPP has introduced the possibility of using that special procedure when taking evidence from victims of certain restrictively listed offences (sexual offences or offences with a sexual background) aged less than 16 years, even outside the cases envisaged in paragraph 1 of that article. Article 398(5a) of the CPP also allows the same judge to order evidence to be taken, in the case of enquiries concerning offences referred to in Article 392(1a) of the CPP, under special arrangements allowing the protection of the minors concerned. According to the national court, those additional derogations are designed to protect, first, the dignity, modesty and character of a minor witness, and, secondly, the authenticity of the evidence.

16 In this case, the Public Prosecutor's Office asked the judge in charge of preliminary enquiries in August 2001 to take the testimony of eight children, witnesses and victims of the offences for which Mrs Pupino is being examined, by the special procedure for taking evidence early, pursuant to Article 392(1a) of the CPP, on the ground that such evidence could not be deferred until the trial on account of the witnesses' extreme youth, inevitable alterations in their psychological state, and a possible process of repression. The Public Prosecutor's Office also requested that evidence be gathered under the special arrangements referred to in Article 398(5a) of the CPP, whereby the hearing should take place in specially designed facilities, with arrangements to protect the dignity, privacy and tranquillity of the minors concerned, possibly involving an expert in child psychology by reason of the delicate and serious nature of the facts and the difficulties caused by the victims' young age. Mrs Pupino opposed that application, arguing that it did not fall within any of the cases envisaged by Article 392(1) and (1a) of the CPP.

17 The referring court states that, under the national provisions in question, the application of the Public Prosecutor's Office would have to be dismissed. Those provisions do not provide for the use of the Special Inquiry procedure, or for the use of special arrangements for gathering evidence, where the facts are such as those alleged against the defendant, even if there is no reason to preclude those provisions also covering cases other than those referred to in Article 392(1) of the CPP in which the victim is a minor. A number of offences excluded from the scope of Article 392(1) of the CPP might well prove more serious for the victim than those referred to in that provision. That, in the view of the national court, is the case here, where, according to the Public Prosecutor's Office, Mrs Pupino maltreated several children aged less than five years, causing them psychological trauma.

18 Considering that, 'apart from the question of the existence or otherwise of a direct effect of Community law', the national court must 'interpret its national law in the light of the letter and the spirit of Community provisions', and having doubts as to the compatibility of Articles 392(1a) and 398(5a) of the CPP with Articles 2, 3 and 8 of the Framework Decision, inasmuch as the provisions of that code limit the ability of the judge in charge of preliminary enquiries to apply the Special Inquiry procedure for the early gathering of evidence, and the special arrangements for its gathering, to sexual offences or offences with a sexual background, the judge in charge of preliminary enquires at the Tribunale di Firenze has decided to stay the proceedings and ask the Court of Justice to rule on the scope of Articles 2, 3 and 8 of the Framework Decision.

19 Under Article 46(b) EU, the provisions of the EC, EAEC and ECSC Treaties concerning the powers of the Court of Justice and the exercise of those powers, including the provisions of Article 234 EC, apply to the provisions of Title VI of the Treaty on European Union under the conditions laid down by Article 35 EU. It follows that the system under Article 234 EC is capable of being applied to the Court's jurisdiction to give preliminary rulings by virtue of Article 35 EU, subject to the conditions laid down by that provision.

20 As stated in paragraph 5 of this judgment, the Italian Republic indicated by a declaration which took effect on 1 May 1999, the date on which the Treaty of Amsterdam came into force, that it accepted the jurisdiction of the Court of Justice to rule on the validity and interpretation of the acts referred to in Article 35 EU in accordance with the rules laid down in paragraph 3(b) of that article.

21 Concerning the acts referred to in Article 35(1) EU, Article 35(3)(b) provides, in terms identical to those of the first and second paragraphs of Article 234 EC, that 'any court or tribunal' of a Member State may 'request the Court of Justice to give a preliminary ruling' on a question raised in a case pending before it and concerning the 'validity or interpretation' of such acts, 'if it considers that a decision on the question is necessary to enable it to give judgment'.

22 It is undisputed, first, that the judge in charge of preliminary enquiries in criminal proceedings, such as those instituted in this case, acts in a judicial capacity, so that he must be regarded as a 'court or tribunal of a Member State' within the meaning of Article 35 EU (see to that effect, in relation to Article 234 EC, Joined Cases C-54/94 and C-74/94 *Cacchiarelli and Stanghellini* [1995] ECR I-391, and Joined Cases C-74/95 and C-129/95 *X* [1996] ECR I-6609) and, secondly, that the Framework Decision, based on Articles 31 EU and 34 EU, is one of the acts referred to in Article 35(1) EU, in respect of which the Court may give a preliminary ruling.

23 Whilst in principle, therefore, the Court of Justice has jurisdiction to reply to the question raised, the French and Italian Governments have nevertheless raised an objection of inadmissibility against the application that has been made, arguing that the Court's answer would not be useful in resolving the dispute in the main proceedings.

24 The French Government argues that the national court is seeking to apply certain provisions of the Framework Decision in place of national legislation, whereas, in accordance with the very wording of Article 34(2)(b) EU, Framework Decisions cannot have such a direct effect. It further points out that, as the national court itself acknowledges, an interpretation of national law in accordance with the Framework Decision is impossible. In accordance with the case-law of the Court of Justice, the principle that national law must be given a conforming interpretation cannot lead to an interpretation that is *contra legem*, or to a worsening of the position of an individual in criminal proceedings, on the basis of the Framework Decision alone, which is precisely what would happen in the main proceedings.

25 The Italian Government argues as its main argument that framework decisions and Community directives are completely different and separate sources of law, and that a framework decision cannot therefore place a national court under an obligation to interpret national law in conformity, such as the obligation which the Court of Justice has found in its case-law concerning Community directives.

26 Without expressly querying the admissibility of the reference, the Swedish and United Kingdom Governments generally argue in the same way as the Italian Government, insisting in particular on the inter-governmental nature of cooperation between Member States in the context of Title VI of the Treaty on European Union.

27 Finally, the Netherlands Government stresses the limits imposed on the obligation of conforming interpretation and poses the question whether, assuming that obligation applies to framework decisions, it can apply in the case in the main proceedings, have regard precisely to those limits.

28 As stated in paragraph 19 of this judgment, the system under Article 234 EC is capable of being applied to Article 35 EU, subject to the conditions laid down in Article 35.

29 Like Article 234 EC, Article 35 EU makes reference to the Court of Justice for a preliminary ruling subject to the condition that the national court 'considers that a decision on the question is necessary in order to enable it to give judgment', so that the case-law of the Court of Justice on the admissibility of references under Article 234 EC is, in principle, transposable to references for a preliminary ruling submitted to the Court of Justice under Article 35 EU.

30 It follows that the presumption of relevance attaching to questions referred by national courts for a preliminary ruling may be rebutted only in exceptional cases, where it is quite obvious that the interpretation of Community law sought bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical and the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted. Save for such cases, the Court is, in principle, required to give a ruling on questions concerning the interpretation of the acts referred to in Article 35(1) EU (see for example, in relation to Article 234 CE, Case C-355/97 *Beck and Bergdorf* [1999] ECR I-4977, paragraph 22, and Case C-17/03 *VEMW and Others* [2005] ECR I-0000, paragraph 34).

31 Having regard to the arguments of the French, Italian, Swedish, Netherlands and United Kingdom Governments, it has to be examined whether, as the national court presupposes and as the French, Greek and Portuguese Governments and the Commission maintain, the obligation on the national authorities to interpret their national law as far as possible in the light of the wording and purpose of Community directives applies with the same effects and within the same limits where the act concerned is a framework decision taken on the basis of Title VI of the Treaty on European Union.

32 If so, it has to be determined whether, as the French, Italian, Swedish and United Kingdom Governments have observed, it is obvious that a reply to the question referred cannot have a concrete impact on the solution of the dispute in the main proceedings, given the inherent limits on the obligation of conforming interpretation.

33 It should be noted at the outset that the wording of Article 34(2)(b) EU is very closely inspired by that of the third paragraph of Article 249 EC. Article 34(2)(b) EU confers a binding character on framework decisions in the sense that they 'bind' the Member States 'as to the result to be achieved but shall leave to the national authorities the choice of form and methods'.

34 The binding character of framework decisions, formulated in terms identical to those of the third paragraph of Article 249 EC, places on national authorities, and particularly national courts, an obligation to interpret national law in conformity.

35 The fact that, by virtue of Article 35 EU, the jurisdiction of the Court of Justice is less extensive under Title VI of the Treaty on European Union than it is under the EC Treaty, and the fact that there is no complete system of actions and procedures designed to ensure the legality of the acts of the institutions in the context of Title VI, does nothing to invalidate that conclusion.

36 Irrespective of the degree of integration envisaged by the Treaty of Amsterdam in the process of creating an ever closer union among the peoples of Europe within the meaning of the second paragraph of Article 1 EU, it is perfectly comprehensible that the authors of the Treaty on European Union should have considered it useful to make provision, in the context of Title VI of that treaty, for recourse to legal instruments with effects similar to those provided for by the EC Treaty, in order to contribute effectively to the pursuit of the Union's objectives.

37 The importance of the Court's jurisdiction to give preliminary rulings under Article 35 EU is confirmed by the fact that, under Article 35(4), any Member State, whether or not it has made a

declaration pursuant to Article 35(2), is entitled to submit statements of case or written observations to the Court in cases which arise under Article 35(1).

38 That jurisdiction would be deprived of most of its useful effect if individuals were not entitled to invoke framework decisions in order to obtain a conforming interpretation of national law before the courts of the Member States.

39 In support of their position, the Italian and United Kingdom Governments argue that, unlike the EC Treaty, the Treaty on European Union contains no obligation similar to that laid down in Article 10 EC, on which the case-law of the Court of Justice partially relied in order to justify the obligation to interpret national law in conformity with Community law.

40 That argument must be rejected.

41 The second and third paragraphs of Article 1 of the Treaty on European Union provide that that treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe and that the task of the Union, which is founded on the European Communities, supplemented by the policies and forms of cooperation established by that treaty, shall be to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples.

42 It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions, as the Advocate General has rightly pointed out in paragraph 26 of her Opinion.

43 In the light of all the above considerations, the Court concludes that the principle of conforming interpretation is binding in relation to framework decisions adopted in the context of Title VI of the Treaty on European Union. When applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 34(2)(b) EU.

44 It should be noted, however, that the obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law is limited by general principles of law, particularly those of legal certainty and non-retroactivity.

45 In particular, those principles prevent that obligation from leading to the criminal liability of persons who contravene the provisions of a framework decision from being determined or aggravated on the basis of such a decision alone, independently of an implementing law (see for example, in relation to Community directives, Joined Cases C-74/95 and C-129/95 *X* [1996] ECR I-6609, paragraph 24, and Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-0000, paragraph 74).

46 However, the provisions which form the subject-matter of this reference for a preliminary ruling do not concern the extent of the criminal liability of the person concerned but the conduct of the proceedings and the means of taking evidence.

47 The obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law ceases when the latter cannot receive an application which would lead to a result compatible with that envisaged by that framework decision. In other words, the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*. That principle does, however, require that, where necessary, the national court consider the whole of national law in order to assess how far it can

be applied in such a way as not to produce a result contrary to that envisaged by the framework decision.

48 In this case, as the Advocate General has pointed out in paragraph 40 of her Opinion, it is not obvious that an interpretation of national law in conformity with the framework decision is impossible. It is for the national court to determine whether, in this case, a conforming interpretation of national law is possible.

49 Subject to that reservation, the Court will answer the question referred.

The question referred for a preliminary ruling

50 By its question, the national court essentially asks whether, on a proper interpretation of Articles 2, 3 and 8(4) of the Framework Decision, a national court must be able to authorise young children, who, as in this case, claim to have been victims of maltreatment, to give their testimony in accordance with arrangements ensuring them an appropriate level of protection, outside the public trial and before it is held.

51 Article 3 of the Framework Decision requires each Member State to safeguard the possibility for victims to be heard during proceedings and to supply evidence, and to take appropriate measures to ensure that its authorities question victims only insofar as necessary for the purpose of criminal proceedings.

52 Articles 2 and 8(4) of the Framework Decision require each Member State to make every effort to ensure that victims are treated with due respect for their personal dignity during proceedings, to ensure that particularly vulnerable victims benefit from specific treatment best suited to their circumstances, and to ensure that where there is a need to protect victims, particularly those most vulnerable, from the effects of giving evidence in open court, victims may, by decision taken by the court, be entitled to testify in a manner enabling that objective to be achieved, by any appropriate means compatible with its basic legal principles.

53 The Framework Decision does not define the concept of a victim's vulnerability for the purposes of Articles 2(2) and 8(4). However, independently of whether a victim's minority is as a general rule sufficient to classify such a victim as particularly vulnerable within the meaning of the Framework Decision, it cannot be denied that where, as in this case, young children claim to have been maltreated, and maltreated, moreover, by a teacher, those children are suitable for such classification having regard in particular to their age and to the nature and consequences of the offences of which they consider themselves to have been victims, with a view to benefiting from the specific protection required by the provisions of the Framework Decision referred to above.

54 None of the three provisions of the Framework Decision referred to by the national court lays down detailed rules for implementing the objectives which they state, and which consist, in particular, in ensuring that particularly vulnerable victims receive 'specific treatment best suited to their circumstances', and the benefit of special hearing arrangements that are capable of guaranteeing to all victims treatment which pays due respect to their individual dignity and gives them the opportunity to be heard and to supply evidence, and in ensuring that those victims are questioned 'only insofar as necessary for the purpose of criminal proceedings'.

55 Under the legislation at issue in the main proceedings, testimony given during the preliminary enquiries must generally be repeated at the trial in order to acquire full evidential value. It is, however, permissible in certain cases to give that testimony only once, during the preliminary enquiries, with the same probative value, but under different arrangements from those which apply at the trial.

56 In those circumstances, achievement of the aims pursued by the abovementioned provisions of the framework decision require that a national court should be able, in respect of particularly vulnerable victims, to use a special procedure, such as the Special Inquiry for early gathering of evidence provided for in the law of a Member State, and the special arrangements for hearing testimony for which provision is also made, if that procedure best corresponds to the situation of those victims and is necessary in order to prevent the loss of evidence, to reduce the repetition of questioning to a minimum, and to prevent the damaging consequences, for those victims, of their giving testimony at the trial

57 It should be noted in that respect that, according to Article 8(4) of the Framework Decision, the conditions for giving testimony that are adopted must in any event be compatible with the basic legal principles of the Member State concerned.

58 Moreover, in accordance with Article 6(2) EU, the Union must respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 ('the Convention'), and as they result from the constitutional traditions common to the Member States, as general principles of law.

59 The Framework Decision must thus be interpreted in such a way that fundamental rights, including in particular the right to a fair trial as set out in Article 6 of the Convention and interpreted by the European Court of Human Rights, are respected.

60 It is for the national court to ensure that – assuming use of the Special Inquiry and of the special arrangements for the hearing of testimony under Italian law is possible in this case, bearing in mind the obligation to give national law a conforming interpretation – the application of those measures is not likely to make the criminal proceedings against Mrs Pupino, considered as a whole, unfair within the meaning of Article 6 of the Convention, as interpreted by the European Court of Human Rights (see, for example, ECHR judgments of 20 December 2001, *P.S.* v *Germany*, of 2 July 2002, *S.N.* v *Sweden*, *Reports of judgments and decisions* 2002-V, of 13 February 2004, *Rachdad* v *France*, and the decision of 20 January 2005, *Accardi and Others* v *Italy*, App. 30598/02).

61 In the light of all the above considerations, the answer to the question must be that Articles 2, 3 and 8(4) of the Framework Decision must be interpreted as meaning that the national court must be able to authorise young children, who, as in this case, claim to have been victims of maltreatment, to give their testimony in accordance with arrangements allowing those children to be guaranteed an appropriate level of protection, for example outside the trial and before it takes place. The national court is required to take into consideration all the rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Framework Decision.

Costs

62 Since these proceedings are, for the parties to the main proceedings, a step in the proceedings before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than by those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Articles 2, 3 and 8(4) of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings must be interpreted as meaning that the national court must be able to authorise young children, who, as in this case, claim to have been victims of maltreatment, to give their testimony in accordance with arrangements allowing those children to be guaranteed an appropriate level of protection, for example outside the trial and before it takes place.

The national court is required to take into consideration all the rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Framework Decision.

[Signatures]

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* Language of the case: Italian.

JUDGMENT OF THE COURT (First Chamber)

15 October 2015 (*)

‘Reference for a preliminary ruling — Judicial cooperation in criminal matters — Directive 2010/64/EU — Right to interpretation and translation in criminal proceedings — Language of the proceedings — Penalty order imposing a fine — Possibility of lodging an objection in a language other than the language of the proceedings — Directive 2012/13/EU — Right to information in criminal proceedings — Right to be informed of the charge — Service of a penalty order — Procedures — Mandatory appointment by the accused person of person authorised to accept service — Period for lodging an objection running from service on the person authorised to accept service’

In Case C-216/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Amtsgericht Laufen (Local Court, Laufen, Germany), made by decision of 22 April 2014, received at the Court on 30 April 2014, in the criminal proceedings against

Gavril Covaci,

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), Vice-President, acting President of the First Chamber, F. Biltgen, A. Borg Barthet, M. Berger and S. Rodin, Judges,

Advocate General: Y. Bot,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 19 March 2015,

after considering the observations submitted on behalf of:

— Mr Covaci, by U. Krause and S. Ryfisch, Rechtsanwälte,

— the German Government, by T. Henze and J. Kemper, acting as Agents,

— the Greek Government, by K. Georgiadis and S. Lekkou, acting as Agents,

— the French Government, by D. Colas and F.-X. Bréchot, acting as Agents,

— the Italian Government, by G. Palmieri, acting as Agent, and by M. Salvatorelli, avvocato dello Stato,

— the Austrian Government, by G. Eberhard, acting as Agent,

— the European Commission, by W. Bogensberger and R. Troosters, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 May 2015,

gives the following

Judgment

[1]This request for a preliminary ruling concerns the interpretation of Articles 1(2) and 2(1) and (8) of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ 2010 L 280, p. 1), and of Articles 2, 3(1)(c) and 6(1) and (3) of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ 2012 L 142, p. 1).

[2]The request has been made in criminal proceedings brought against Mr Covaci for road traffic offences committed by the person concerned.

Legal context

EU law

Directive 2010/64

[3]Recitals 12, 17 and 27 in the preamble to Directive 2010/64 state:

‘(12)This Directive ... lays down common minimum rules to be applied in the fields of interpretation and translation in criminal proceedings with a view to enhancing mutual trust among Member States.

...

(17)This Directive should ensure that there is free and adequate linguistic assistance, allowing suspected or accused persons who do not speak or understand the language of the criminal proceedings fully to exercise their right of defence and safeguarding the fairness of the proceedings.

...

(27)The duty of care towards suspected or accused persons who are in a potentially weak position, in particular because of any physical impairments which affect their ability to communicate effectively, underpins a fair administration of justice. The prosecution, law enforcement and judicial authorities should therefore ensure that such persons are able to exercise effectively the rights provided for in this Directive, for example by taking into account any potential vulnerability that affects their ability to follow the proceedings and to make themselves understood, and by taking appropriate steps to ensure those rights are guaranteed.’

[4]Article 1(1) and (2) of that directive, under the heading ‘Subject matter and scope’, provides:

‘1. This Directive lays down rules concerning the right to interpretation and translation in criminal proceedings ...

2. The right referred to in paragraph 1 shall apply to persons from the time that they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether they have committed the offence, including, where applicable, sentencing and the resolution of any appeal.’

[5]Article 2 of that directive, headed ‘Right to interpretation’, provides:

‘1. Member States shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings.

2. Member States shall ensure that, where necessary for the purpose of safeguarding the fairness of the proceedings, interpretation is available for communication between suspected or accused persons and their legal counsel in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications.

3. The right to interpretation under paragraphs 1 and 2 includes appropriate assistance for persons with hearing or speech impediments.

...

8. Interpretation provided under this Article shall be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence.'

[6]Article 3 of the same directive, headed 'Right to translation of essential documents', is worded as follows:

'1. Member States shall ensure that suspected or accused persons who do not understand the language of the criminal proceedings concerned are, within a reasonable period of time, provided with a written translation of all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings.

2. Essential documents shall include any decision depriving a person of his liberty, any charge or indictment, and any judgment.

3. The competent authorities shall, in any given case, decide whether any other document is essential ...

...'

Directive 2012/13

[7]Recital 27 in the preamble to Directive 2012/13 states:

'Persons accused of having committed a criminal offence should be given all the information on the accusation necessary to enable them to prepare their defence and to safeguard the fairness of the proceedings.'

[8]Article 1 of that directive, which is headed 'Subject matter', provides:

'This Directive lays down rules concerning the right to information of suspects or accused persons, relating to their rights in criminal proceedings and to the accusation against them ...'

[9]Article 2(1) of that directive defines the scope of the directive as follows:

'This Directive applies from the time persons are made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the criminal offence, including, where applicable, sentencing and the resolution of any appeal.'

[10]Article 3 of the same directive, headed 'Right to information about rights', provides in paragraph 1:

'Member States shall ensure that suspects or accused persons are provided promptly with information concerning at least the following procedural rights, as they apply under national law, in order to allow for those rights to be exercised effectively:

...

(c) the right to be informed of the accusation, in accordance with Article 6;

...'

[11]Article 6 of Directive 2012/13, headed 'Right to information about the accusation', provides:

'1. Member States shall ensure that suspects or accused persons are provided with information about the criminal act they are suspected or accused of having committed. That information shall be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence.

2. Member States shall ensure that suspects or accused persons who are arrested or detained are informed of the reasons for their arrest or detention, including the criminal act they are suspected or accused of having committed.

3. Member States shall ensure that, at the latest on submission of the merits of the accusation to a court, detailed information is provided on the accusation, including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person.

4. Member States shall ensure that suspects or accused persons are informed promptly of any changes in the information given in accordance with this Article where this is necessary to safeguard the fairness of the proceedings.'

German law

[12]Paragraph 184 of the Law on the judicial system (Gerichtsverfassungsgesetz; 'the Law on the judicial system') states:

'The language of the courts is German ...'

[13]Paragraph 187 of the Law on the judicial system, as amended as a result of the transposition of Directives 2010/64 and 2012/13, states:

'1. The court shall provide an accused or convicted person who does not have a command of German or who is hearing impaired or speech impaired with an interpreter or a translator in so far as that is necessary for the exercise of his rights in criminal proceedings. The court shall inform the accused person in a language which he understands that he may, to that end, request the free assistance of an interpreter or a translator for the entire duration of the criminal proceedings.

2. For the exercise of the procedural rights of an accused person who does not have a command of German, as a general rule, a written translation of orders depriving a person of his liberty, charges and indictments, penalty orders and judgments which are not final shall be required ...'

[14]Paragraph 132 of the Code of Criminal Procedure (Strafprozessordnung), which concerns the provision of security and the appointment of persons authorised to accept service, provides in subparagraph 1:

'If an accused person who is strongly suspected of having committed a criminal offence has no fixed domicile or residence within the territorial jurisdiction of this law but the requirements for issuing an arrest warrant are not satisfied, it may be ordered, in order to ensure that the course of justice is not impeded, that the accused person

1. provides appropriate security for the anticipated fine and the costs of the proceedings, and

2. authorises a person residing within the jurisdiction of the competent court to accept service.'

[15]Paragraph 410 of the Code of Criminal Procedure, which concerns objections to a penalty order and the force of *res judicata*, provides:

'1. The accused person may lodge an objection to a penalty order at the court which made the penalty order within two weeks of service, in writing or by making a statement recorded by the registry ...

2. The objection may be limited to certain points of complaint.

3. Where no objection has been lodged against a penalty order in due time, that order shall be equivalent to a judgment having the force of *res judicata*.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

[16]At a police check conducted on 25 January 2014, it was determined, first, that Mr Covaci, a Romanian citizen, was driving, in Germany, a vehicle for which no valid mandatory motor vehicle civil liability insurance had been taken out and, secondly, that the proof of insurance, the so-called green card, submitted to the German authorities by the person concerned, was a forgery.

[17]Mr Covaci, who was questioned on those matters by the police, received the assistance of an interpreter.

[18]In addition, Mr Covaci, who had no fixed domicile or residence within the jurisdiction of German law, issued an irrevocable written authorisation for three officials of the Amtsgericht Laufen to accept service of court documents addressed to him. According to the actual wording of that authorisation, the periods for bringing appeals against any judicial decision begin to run from service on the authorised persons appointed.

[19]On 18 March 2014, at the end of the investigation, the Traunstein Public Prosecutor's Office (Staatsanwaltschaft Traunstein) made an application to the Amtsgericht Laufen for it to issue a penalty order imposing a fine on Mr Covaci.

[20]The procedure laid down in respect of the issuing of such a penalty order is simplified and does not require a hearing or a trial *inter partes*. Issued by the court upon application by the Public Prosecutor's Office in the case of minor offences, that order is a provisional decision. In accordance with Paragraph 410 of the Code of Criminal Procedure, a penalty order acquires the force of *res judicata* upon expiry of a period of two weeks from its service, where appropriate, on the persons authorised to accept service for the person being sentenced. The latter may secure a trial *inter partes* only by lodging an objection against that order, before the expiry of that period. The objection, which may be lodged in writing or by making a statement recorded by the registry, results in a court hearing being held.

[21]In the present case, the Traunstein Public Prosecutor's Office requested that the penalty order be served on Mr Covaci through the persons authorised to accept service and, moreover, that any written observations of the person concerned, including an objection lodged against that order, should be in German.

[22]First, the Amtsgericht Laufen (Local Court, Laufen), before which the application for the penalty order concerned in the main proceedings was made, is uncertain whether the obligation, arising from Paragraph 184 of the Law on the judicial system, to use German for the drafting of an objection lodged against such an order is consistent with the provisions of Directive 2010/64, under which free linguistic assistance is to be provided to accused persons in criminal proceedings.

[23]Secondly, the referring court has doubts as to the compatibility of the procedures for service of that penalty order with Directive 2012/13, and in particular with Article 6 thereof, which requires each Member State to ensure that, at the latest on submission of the merits of the accusation to a court, detailed information is provided on the accusation.

[24]In those circumstances the Amtsgericht Laufen decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1)Are Articles 1(2) and 2(1) and (8) of Directive 2010/64 to be interpreted as precluding a court order that requires, under Paragraph 184 of the Law on the judicial system, accused persons to bring an appeal only in the language of the court, here in German, in order for it to be effective?

(2)Are Articles 2, 3(1)(c) and 6(1) and (3) of Directive 2012/13 to be interpreted as precluding the accused from being required to appoint a person authorised to accept service, where the period for bringing an appeal begins to run upon service on the person authorised and ultimately it is irrelevant whether the accused is at all aware of the offence of which he is accused?'

Consideration of the questions referred

The first question

[25]By its first question, the referring court asks, in essence, whether Articles 1 to 3 of Directive 2010/64 must be interpreted as precluding national legislation such as that at issue in the main proceedings which, in criminal proceedings, does not permit the individual against whom a penalty order has been made to lodge an objection in writing against that order in a language other than that of the proceedings, even though that individual does not have a command of the language of the proceedings.

[26]In order to reply to that question, it is necessary to observe that Article 1(1) of Directive 2010/64 provides for the right to interpretation and translation in, inter alia, criminal proceedings. Furthermore, Article 1(2) of that directive states that that right is to apply to persons from the time that they are made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether they have committed the offence, including, where applicable, sentencing and the resolution of any appeal.

[27]Consequently, the situation of a person such as Mr Covaci, who wishes to lodge an objection against a penalty order which has not yet acquired the force of *res judicata* and of which he is the addressee, clearly falls within the scope of that directive, with the result that that person must be able to exercise the right to interpretation and translation guaranteed by that directive.

[28]As regards the question whether a person in a situation such as that of Mr Covaci may rely on that right in order to lodge an objection against such an order in a language other than that of the procedure applicable before the competent national court, it is necessary to refer to the content of Articles 2 and 3 of Directive 2010/64. Those two articles respectively govern the right to interpretation and the right to translation of certain essential documents, that is to say the two aspects of the right provided for in Article 1 of that directive and referred to in the actual title of the directive.

[29]For those purposes, it should be noted that the Court has consistently held that, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgment in Rosselle, C-65/14, EU:C:2015:339, paragraph 43 and the case-law cited).

[30]As regards Article 2 of Directive 2010/64, which governs the right to interpretation, it follows from the actual wording of that article that, unlike Article 3 of that directive, which concerns the written translation of certain essential documents, Article 2 of the directive refers to the oral interpretation of oral statements.

[31]Thus, in accordance with Article 2(1) and (3) of that directive, only suspected or accused persons who are unable to express themselves in the language of the proceedings, whether that be due to the fact that they do not speak or understand that language or the fact that they have hearing or speech impediments, are able to exercise the right to interpretation.

[32]Indeed, that is why, by listing the circumstances in which interpretation must be provided to suspected or accused persons, Article 2(1) and (2) of Directive 2010/64 refer — albeit in a non-exhaustive way — only to situations giving rise to oral communications, such as police questioning, all court hearings and any necessary interim hearings, and communication with legal counsel in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications.

[33]In other words, in order to safeguard the fairness of the proceedings and ensure that the person concerned is able to exercise his right of defence, that provision ensures that, when he is called upon to make oral statements himself within the context, inter alia, of criminal proceedings, either directly before the competent judicial authorities or to his legal counsel, that person is entitled to do so in his own language.

[34] Such an interpretation is borne out by the objectives pursued by Directive 2010/64.

[35]In that regard, it should be observed that that directive was adopted on the basis of point (b) of the second subparagraph of Article 82(2) TFEU, pursuant to which, to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council of the European Union may establish minimum rules concerning the rights of individuals in criminal procedure.

[36]Thus, in accordance with recital 12 in the preamble to Directive 2010/64, it is with a view to enhancing mutual trust among Member States that that directive lays down common minimum rules to be applied in the fields of interpretation and translation in criminal proceedings.

[37]In accordance with recital 17 in the preamble to that directive, such rules should ensure that there is free and adequate linguistic assistance, allowing suspected or accused persons who do not speak or understand the language of the criminal proceedings fully to exercise their rights of defence and safeguarding the fairness of the proceedings.

[38]However, to require Member States, as suggested inter alia by Mr Covaci and the German Government, not only to enable the persons concerned to be informed, fully and in their language, of the facts alleged against them and to provide their own version of those facts, but also to take responsibility, as a matter of course, for the translation of every appeal brought by the persons concerned against a judicial decision which is addressed to them would go beyond the objectives pursued by Directive 2010/64 itself.

[39]As is also apparent from the case-law of the European Court of Human Rights, compliance with the requirements relating to a fair trial merely ensures that the accused person knows what is being alleged against him and can defend himself, and does not necessitate a written translation of all items of written evidence or official documents in the procedure (European Court of Human Rights, *Kamasinski v. Austria*, 19 December 1989, § 74, Series A no. 168).

[40]Consequently, the right to interpretation provided for in Article 2 of Directive 2010/64 concerns the translation by an interpreter of the oral communications between suspected or accused persons and the investigative and judicial authorities or, where relevant, legal counsel, to the exclusion of the written translation of any written document produced by those suspected or accused persons.

[41]With respect to the situation at issue in the main proceedings, it is apparent from the documents before the Court that the penalty order provided for under German law is adopted on the basis of a *sui generis* procedure. That procedure provides that the only possibility the accused person has of obtaining a trial *inter partes*, in which he can fully exercise his right to be heard, is to lodge an objection against that order. That objection, which can be submitted in writing or, where it is lodged orally, directly at the registry of the competent court, is not subject to the obligation to state reasons, must be lodged within a particularly short period of two weeks from service of that order and does not require the mandatory involvement of a lawyer, since the accused person can submit it himself.

[42]Accordingly, Article 2 of Directive 2010/64 ensures that a person in a situation such as that of Mr Covaci can obtain the free assistance of an interpreter, if that person himself orally lodges an objection against the penalty order of which he is the subject at the registry of the competent national court, so that that registry records that objection, or, if that person lodges an objection in writing, can obtain the assistance of legal counsel, who will take responsibility for the drafting of the appropriate document, in the language of the proceedings.

[43]As regards the question whether Article 3 of Directive 2010/64, which governs the right to translation of certain essential documents, confers the benefit of assistance with regard to translation on a person in a situation such as that of Mr Covaci, who wishes to lodge an objection in writing against a penalty order without the assistance of legal counsel, it should be observed that it follows from the very wording of that provision that that right is designed to ensure that the persons concerned are able to exercise their right of defence and to safeguard the fairness of the proceedings.

[44]It follows that, as the Advocate General observed at point 57 of his Opinion, Article 3 of Directive 2010/64 concerns, in principle, only the written translation into the language understood by the person concerned of certain documents drawn up in the language of the proceedings by the competent authorities.

[45]Moreover, that interpretation is confirmed, first, by the list of documents which Article 3(2) of Directive 2010/64 considers to be essential and for which a translation is therefore necessary. That list, though not exhaustive, includes any decision depriving a person of his liberty, any charge or indictment, and any judgment.

[46]Secondly, that interpretation is also justified by the fact that the purpose of the right to translation provided for in Article 3 of that directive, as is apparent from paragraph 4 of that article, is to '[enable] suspected or accused persons to have knowledge of the case against them'.

[47]It follows that the right to translation provided for in Article 3(1) and (2) of Directive 2010/64 does not include, in principle, the written translation into the language of the proceedings of a document such as an objection lodged against a penalty order, drawn up by the person concerned in a language of which he has a command, but which is not the language of the proceedings.

[48]However, Directive 2010/64 lays down only minimum rules, leaving the Member States free, as recital 32 in the preamble to that directive states, to extend the rights set out in that directive in order to provide a higher level of protection also in situations not explicitly dealt with in that directive.

[49]In addition, it is important to note that Article 3(3) of Directive 2010/64 expressly allows the competent authorities to decide, in any given case, whether any document other than those provided for in Article 3(1) and (2) of that directive is essential within the meaning of that provision.

[50]It is therefore for the referring court, taking into account in particular the characteristics of the procedure applicable to the penalty order concerned in the main proceedings, which were noted in paragraph 41 of this judgment, and of the case brought before it, to establish whether the objection lodged in writing against a penalty order should be considered to be an essential document, the translation of which is necessary.

[51]It follows from all the foregoing that the answer to the first question is that Articles 1 to 3 of Directive 2010/64 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which, in criminal proceedings, does not permit the individual against whom a penalty order has been made to lodge an objection in writing against that order in a language other than that of the proceedings, even though that individual does not have a command of the language of the proceedings, provided that the competent authorities do not consider, in accordance with Article 3(3) of that directive, that, in the light of the proceedings concerned and the circumstances of the case, such an objection constitutes an essential document.

The second question

[52]By its second question the referring court asks, in essence, whether Articles 2, 3(1)(c) and 6(1) and (3) of Directive 2012/13 must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which, in criminal proceedings, makes it mandatory for an accused person not residing in that Member State to appoint a person authorised to accept service of a penalty order concerning him, with the period for lodging an objection against that order running from the service of that order on that authorised person.

[53]In order to answer that question, it is necessary to observe that Article 1 of Directive 2012/13 provides for the right to information of suspects or accused persons, relating to their rights in criminal proceedings and to the accusation against them.

[54]As is apparent from a reading of Article 3 in conjunction with Article 6 of that directive, the right mentioned in Article 1 of the directive concerns at least two separate rights.

[55]First, in accordance with Article 3 of Directive 2012/13, suspects or accused persons must be informed, at least, of certain procedural rights, which are listed in that provision, including the right of access to a lawyer, any entitlement to free legal advice and the conditions for obtaining such advice, the right to be informed of the accusation, the right to interpretation and translation and the right to remain silent.

[56]Secondly, that directive establishes, in Article 6 thereof, rules concerning the right to information about the accusation.

[57]Since the question asked by the referring court concerns in particular the scope of the latter right, it is necessary to determine whether Article 6 of Directive 2012/13, which establishes that right, is applicable in the context of a particular procedure, such as that at issue in the main proceedings, resulting in the adoption of a penalty order.

[58]In that regard, it should be noted that, according to the actual wording of Article 2 of Directive 2012/13, that directive applies from the time persons are made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the criminal offence, including, where applicable, sentencing and the resolution of any appeal.

[59]Given that, as was found in paragraph 27 of this judgment, the penalty order which the referring court was asked to make against Mr Covaci will not acquire the force of *res judicata* before the expiry of the prescribed period for lodging an objection against it, the situation of a person such as Mr Covaci clearly falls within the scope of Directive 2012/13, with the result that the person concerned must be able to exercise the right, throughout the proceedings, to be informed of the accusation.

[60]While it is true that, because of the summary and simplified nature of the proceedings at issue, the service of a penalty order such as that at issue in the main proceedings is effected only after the court has ruled on the merits of the accusation, the fact remains that, in that order, the court rules only provisionally and that the service of that order represents the first opportunity for the accused person to be informed of the accusation against him. That is confirmed, moreover, by the fact that that person is entitled to bring not an appeal against that order before another court, but an objection making him eligible, before the same court, for the ordinary *inter partes* procedure, in which he can fully exercise his rights of defence, before that court rules again on the merits of the accusation against him.

[61]Consequently, in accordance with Article 6 of Directive 2012/13, the service of a penalty order must be considered to be a form of communication of the accusation against the person concerned, with the result that it must comply with the requirements set out in that article.

[62]It is true that, as the Advocate General observed at point 105 of his Opinion, Directive 2012/13 does not regulate the procedures whereby information about the accusation, provided for in Article 6 of that directive, must be provided to that person.

[63]However, those procedures cannot undermine the objective referred to inter alia in Article 6 of Directive 2012/13, which, as is also apparent from recital 27 in the preamble to that directive, consists in enabling suspects or persons accused of having committed a criminal offence to prepare their defence and in safeguarding the fairness of the proceedings.

[64]It is apparent from the order for reference that the national legislation at issue in the main proceedings provides that the penalty order is to be served on the person authorised by the accused person and that the latter has a period of two weeks to lodge an objection against that order, with that period running from the service of that order on that authorised person. Upon expiry of that period, the order is to acquire the force of *res judicata*.

[65]Though it is not relevant, in order to answer the question asked by the referring court, to rule on the appropriateness of such a limitation period of two weeks, it is important to observe that both the objective of enabling the accused person to prepare his defence and the need to avoid any kind of discrimination between (i) accused persons with a residence within the jurisdiction of the national law

concerned and (ii) accused persons whose residence does not fall within that jurisdiction, who alone are required to appoint a person authorised to accept service of judicial decisions, require the whole of that period to be available to the accused person.

66 If the period of two weeks at issue in the main proceedings began to run from the time when the accused person actually became aware of the penalty order, that order providing information on the accusation within the meaning of Article 6 of Directive 2012/13, it would be certain that the whole of that period is available to that person.

67 By contrast, if, as in the present case, that period begins to run from the service of the penalty order on the person authorised by the accused person, the latter can effectively exercise his right of defence and the trial is fair only if he has the benefit of that period in its entirety, that is to say without the duration of that period being reduced by the time needed by the authorised person to transmit the penalty order to its addressee.

68 In the light of the foregoing considerations, the answer to the second question is that Articles 2, 3(1)(c) and 6(1) and (3) of Directive 2012/13 must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, which, in criminal proceedings, makes it mandatory for an accused person not residing in that Member State to appoint a person authorised to accept service of a penalty order concerning him, provided that that accused person does in fact have the benefit of the whole of the prescribed period for lodging an objection against that order.

Costs

69 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **Articles 1 to 3 of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings must be interpreted as not precluding national legislation such as that at issue in the main proceedings which, in criminal proceedings, does not permit the individual against whom a penalty order has been made to lodge an objection in writing against that order in a language other than that of the proceedings, even though that individual does not have a command of the language of the proceedings, provided that the competent authorities do not consider, in accordance with Article 3(3) of that directive, that, in the light of the proceedings concerned and the circumstances of the case, such an objection constitutes an essential document.**

2. **Articles 2, 3(1)(c) and 6(1) and (3) of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, which, in criminal proceedings, makes it mandatory for an accused person not residing in that Member State to appoint a person authorised to accept service of a penalty order concerning him, provided that that accused person does in fact have the benefit of the whole of the prescribed period for lodging an objection against that order.**

[Signatures]

(*) Language of the case: German.

Opinion of AG Bot in Joined Cases C-404/15 and C-659/15 PPU Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen

OPINION OF ADVOCATE GENERAL

BOT

delivered on 3 March 2016 (1)

Cases C-404/15 and C-659/15 PPU

Pál Aranyosi (C-404/15)

and

Robert Căldăraru (C-659/15 PPU)

(Requests for a preliminary ruling
from the Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court, Bremen, Germany))

(Reference for a preliminary ruling — Police and judicial cooperation in criminal matters — Framework Decision 2002/584/JHA — European arrest warrants issued for the purposes of prosecution or the execution of a custodial sentence or detention order — Surrender of persons requested to the issuing judicial authorities — Article 1(3) — Fundamental rights — Detention conditions in the issuing Member State — Risk of inhuman or degrading treatment — Need for a review of proportionality when European arrest warrants are issued)

I – **Introduction**

1. The execution of a European arrest warrant leads to the detention of the requested person. Does the possibility or probability of degrading detention conditions, resulting from a systemic deficiency of the prisons of the issuing Member State, permit the executing judicial authorities to refuse to surrender the person concerned?

2. It is stated in Article 1(3) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, (2) that '[the decision] shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [EU]'.

3. The underlying question is whether the force of the principle of mutual recognition is limited if there is a breakdown in the confidence which the Member States should have in each other, owing to a potential infringement of the fundamental rights which they are presumed to respect.

4. Mutual recognition, of which the European arrest warrant is itself the implementation, is, according to the standard expression, the 'cornerstone' (3) of the area of freedom, security and justice which the European Union has set as its objective, as is recorded in the treaties.

5. It is therefore necessary for the Court, in this case, to weigh respect for the fundamental rights of the person surrendered against the absolute necessity to achieve that common area by, inter alia, protecting the rights and freedoms of others. The Court will therefore have to ask itself whether the principles which it has identified in other

areas of EU law, such as those contained in the judgment in *N. S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, concerning the Common European Asylum System, can be transposed to the specific mechanism of the European arrest warrant at the risk of blocking that mechanism, letting an offence go unpunished and generating extremely serious consequences for the executing judicial authorities.

6. In fact, I believe that the solution is to be found in the very balance of the system established by the European arrest warrant, from which the appropriate conclusions can be drawn. Although the warrant retains the force conferred on it by the principle of mutual recognition, it is in the implicit or express reference made by the Framework Decision to certain basic principles, and in particular to the principle of proportionality, a general principle of Union law, that the solution lies.

7. I shall explain why, where the issuing judicial authorities are faced with generalised prison overcrowding with the consequence that the physical conditions of detention are contrary to fundamental rights, those authorities are required to conduct a review of proportionality in order to adjust the need to issue a European arrest warrant in the light of both the nature of the offence and the specific procedures for enforcement of the penalty.

8. Since the European arrest warrant is an instrument created and regulated by Union law, inter alia as regards the conditions for its issue, judicial authorities wishing to issue such a warrant must make sure not only that it satisfies the conditions as to substance and form in the Framework Decision, but also that it is issued in accordance with the principle of proportionality. That review, in so far as it facilitates control over the conditions and, in particular, the consequences of the surrender of the requested person, is to be understood, more broadly, as forming part of the obligations imposed on the issuing Member State to ensure respect for the fundamental rights of the person requested under a European arrest warrant and, consequently, as security for the confidence which the executing judicial authorities must have, downstream of that review, in the issuing Member State.

9. Finally, I shall state that that review must not elide the responsibilities of the issuing Member State as regards respect for the fundamental rights of individuals held in custody, in accordance not only with Article 6 TEU, but also with the principle of the primacy of Union law and its duty of sincere cooperation, and the action which the Council of the European Union and the European Commission must necessarily undertake in order to increase the effectiveness of the system.

II – **Legal framework**

10. Before analysing the problems raised by the questions referred to the Court, it is necessary, first, to recall the fundamental principles on which my analysis will be based. They are found in the treaties.

A – *The Treaties*

11. As provided in Article 3(2) TEU and Article 67(1) TFEU, the Union's objective is to continue and develop as an area of freedom, security and justice in which the free movement of persons is ensured, in compliance with the fundamental rights of all, by the adoption of appropriate measures with respect to the prevention and combating of crime.

12. To that end, the first subparagraph of Article 6(1) TEU provides that 'the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union' ('the Charter').

13. It is also apparent from Article 6(3) TEU that 'fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms [, signed in Rome on 4 November 1950, "the ECHR")] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'.

14. Under Title V of Part Three of the Treaty on the Functioning of the European Union, entitled 'Area of freedom, security and justice', Article 82 TFEU provides that 'judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition'. That principle, as I have said, constitutes the 'cornerstone' of judicial cooperation in criminal matters between the Member States.

B – *The Framework Decision*

15. The European arrest warrant established by the Framework Decision was designed to replace the traditional extradition mechanism, which involves a decision of the executive authority, with an instrument of cooperation between the national judicial authorities based on the principles of mutual recognition of judgments and judicial decisions and mutual confidence between the Member States. (4)

16. The Framework Decision establishes a new simplified and more effective system for the surrender of persons convicted or suspected of having infringed criminal law (5) by strictly limiting the grounds for non-execution and setting time limits for the adoption of decisions relating to the European arrest warrant. (6)

17. By establishing a procedure designed to be more effective and efficient than the previous procedure, the mechanism of the European arrest warrant constitutes, first and foremost, an essential contribution to the prosecution and punishment of criminal conduct within the Union. Inasmuch as it ensures the prosecution, trial and conviction of the perpetrators of a criminal offence committed in one of the Member States, it is today a safeguard which is fundamental to the abolition of the internal borders within the Union and is also designed to increase protection for the victims of criminal offences by ensuring that their perpetrators are tried and convicted for the offences committed and that they are brought before the courts more quickly and effectively.

18. Recitals 10 to 13 of the Framework Decision are worded as follows:

‘(10) The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) [EU], determined by the Council pursuant to Article 7(1) [EU] with the consequences set out in Article 7(2) thereof. (7)

(11) In relations between Member States, the European arrest warrant should replace all the previous instruments concerning extradition, including the provisions of Title III of the Convention implementing the Schengen Agreement which concern extradition.

(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 [EU] and reflected in the [Charter], in particular Chapter VI thereof. …

(13) No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.’

19. Article 1 of the Framework Decision, headed ‘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 modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [EU].’

20. Articles 3 to 4a of the Framework Decision are devoted to the grounds for mandatory non-execution and the grounds for optional non-execution of the European arrest warrant.

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

21. These references for a preliminary ruling are made in the context of the examination, by the Generalstaatsanwaltschaft Bremen (Public Prosecutor’s Office, Bremen), of the permissibility of the surrender of Mr Aranyosi and Mr Căldăraru to the judicial authorities of their Member State of origin. (8)

22. In the case of Mr Aranyosi (C-404/15), the German judicial authorities are seised of a request for the surrender of the person concerned under two European arrest warrants, issued on 4 November and 31 December 2014 respectively, by the Miskolc járásbíróság (District Court, Miskolc, Hungary) for the purpose of conducting a criminal prosecution. Mr Aranyosi is a Hungarian national, currently living in Bremerhaven (Germany) with his mother, and he has a girlfriend and small child.

23. He is accused of having stolen, after breaking into a house in Sajohidveg (Hungary), EUR 2 500 and HUF 100 000 (Hungarian florints) (approximately EUR 313) in cash and various items of value and also of entering a school in Sajohidveg, damaging equipment and stealing technical devices and cash of an estimated total value of HUF 244 000 (approximately EUR 760).

24. In the case of Mr Căldăraru (C-659/15 PPU), the German judicial authorities are, this time, seised of a request for the surrender of the person concerned under a European arrest warrant issued on 29 October 2015 by the Judecatoria Fagaras (District Court, Fagaras, Romania), for the purpose of execution of a custodial sentence of one year and eight months imposed by a final judgment. Mr Căldăraru is a Romanian national.

25. Although there had been imposed on Mr Căldăraru, on 17 December 2013, a suspended prison sentence for the offence of driving without a licence, he reoffended on 5 August 2014 in order to go to his father's home.

26. Mr Căldăraru was arrested in Bremen (Germany) on 8 November 2015 and placed in detention pending extradition.

27. At their hearings, Mr Aranyosi and Mr Căldăraru both objected to being surrendered to the issuing judicial authorities, and accordingly declared that they did not consent to the simplified surrender procedure.

28. In each of these two cases, the Public Prosecutor's Office of Bremen asked the issuing judicial authorities to state the name of the establishment in which the persons concerned would be imprisoned in the event of surrender, this being in reference to detention conditions which do not satisfy minimum European standards. Neither of those authorities could commit itself on that point and the Public Prosecutor's Office of Bremen therefore wonders, in the light of Article 1(3) of the Framework Decision and the provisions laid down in Article 73 IRG, (9) whether such surrenders are permissible.

29. These references for a preliminary ruling are therefore set in a very specific context, characterised by the finding made not by the European Council in accordance with the sanction mechanism provided for in Article 7 TEU and expressly referred to in recital 10 of the Framework Decision, but by the European Court of Human Rights.

30. In its judgment in *Iavoc Stanciu* v *Romania* (10) and in its pilot-judgment (11) in *Varga and Others* v *Hungary,* (12) that Court found that there was a general malfunctioning of the Romanian and Hungarian penitentiary systems resulting, inter alia, in generalised prison overcrowding as a consequence of which imprisoned individuals are or risk being exposed to inhuman or degrading treatment during their detention, contrary to Articles 2, 3 and 5 ECHR.

31. Where it is established that, in Romania, 10 detainees may be confined in an area of 9 m², and therefore have a living space of less than 2 m², and where it is true that the European Court of Human Rights is seised, in that regard, of several hundred individual cases, we cannot but wonder as to the legality of the execution of a European arrest warrant, whether it is issued for the purposes of a prosecution or of execution of a custodial sentence, having regard to the protection of the fundamental rights of the person surrendered.

32. That finding was previously made by the European Court of Human Rights in three pilot-judgements concerning the Italian Republic, the Republic of Bulgaria and Hungary respectively. (13)

33. Nevertheless, its case-law reveals the existence of recurrent problems in the penitentiary systems of the 47 Member States of the Council of Europe, including Member States of the Union.

34. In cases involving the Republic of Lithuania, the Republic of Poland and the Republic of Slovenia, (14) the European Court of Human Rights has held that prison overcrowding had reached such a level that that factor alone was sufficient basis for pleading an infringement of Article 3 ECHR. Moreover, although it has not given rise to delivery

of a pilot-judgment, that Court has found that problems stemming from prison overcrowding in Belgium were systemic, going beyond the specific situation of the applicant in the case. (15)

35. In 2011 the European Parliament and the Commission expressed their concern regarding the way in which detention conditions in the Member States may affect mutual confidence and the proper functioning of the instruments of mutual recognition in the area of freedom, security and justice. (16)

36. Five years after that declaration, the Court is now seised of the matter by these requests for a preliminary ruling.

37. Considering it necessary to ask the Court for an interpretation of Article 1(3) of the Framework Decision, the Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court, Bremen) decided to stay the proceedings and refer the following questions for a preliminary ruling:

'1. Is Article 1(3) of the Framework Decision to be interpreted as meaning that surrender for the purposes of criminal prosecution [(Case C-404/15) or surrender for the purposes of the execution of criminal penalties (Case C-659/15 PPU)] is impermissible where there are strong indications that detention conditions in the issuing Member State infringe the fundamental rights of the person concerned and the fundamental legal principles as enshrined in Article 6 TEU or is it to be interpreted as meaning that, in such circumstances, the executing Member State can or must make the decision on the permissibility of surrender conditional upon an assurance that detention conditions are compliant? To that end, can or must the executing Member State lay down specific minimum requirements applicable to the detention conditions in respect of which an assurance is sought?

2. Are Articles 5 and 6(1) of the Framework Decision to be interpreted as meaning that the issuing judicial authority is also entitled to give assurances that detention conditions are compliant, or do assurances in this regard remain subject to the domestic rules of competence in the issuing Member State?'

38. Although the questions raised in connection with Case C-404/15 concern the execution of a European arrest warrant issued for the purposes of criminal prosecution and those raised in connection with Case C-659/15 PPU concern, in contrast, the execution of a European arrest warrant issued for the purposes of execution of a custodial sentence, these questions lend themselves to joint examination because the issues are identical. Furthermore, I shall examine together the two questions raised since they are complementary and consequently related.

IV – **Preliminary observations relating to the difficulties raised by a transposition of the principles identified in the judgment in *N. S. and Others***

39. Several Member States propose transposing the principle identified by the Court in its judgment in *N. S. and Others*, C-411/10 and C-493/10, EU:C:2011:865. (17) It is true that the idea comes quite spontaneously to mind owing to a factual comparability which, as in the context of the saying that you cannot see the wood for the trees, focuses attention and reasoning.

40. That comparability relates to the fact that, in the case giving rise to that judgment, as in the main proceedings, there was a systemic deficiency in the Member State in which the asylum seeker was to be detained in the event of his removal, a deficiency identified by the European Court of Human Rights following individual cases which had been brought before it.

41. In the judgment in *N.S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, the Court held that the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware, owing to the instruments available to them, that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State are likely to expose the asylum seeker to inhuman or degrading treatment within the meaning of Article 4 of the Charter. (18)

42. The reasoning followed in that judgment amounts to requiring the Member State in whose territory the asylum seeker is to be present to examine itself the asylum claim, if the Member State 'responsible' within the meaning of Regulation No 343/2003 does not provide adequate assurances regarding detention conditions.

43. However tempting it may be, particularly owing to its simplicity, that case-law does not seem to me to be applicable by analogy to the interpretation of the provisions of the Framework Decision.

44. Several reasons preclude it.

45. In the first place, the principle which the Court identified in its judgment in *N. S. and Others.*, C-411/10 and C-493/10, EU:C:2011:865, is a transposition, at Union level, of the fundamental principle governing the rules for removal and expulsion in connection with the right to asylum. That principle, according to which no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment, is enshrined in Article 19(2) of the Charter and in Article 3 ECHR.

46. However, it must be stated that, in connection with the mechanism of the European arrest warrant, transposition of that principle is carefully precluded by the Union legislature, owing to the wording used in recital 13 of the Framework Decision.

47. That recital states that 'no person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'.

48. No mention is made of the 'surrendered' person. However, since that term designates the fundamental mechanism newly created by the European arrest warrant, it is unlikely that the Union legislature would have omitted to include it if it had intended to submit the procedure for surrendering a person to whom a European arrest warrant applies to the principles stated in that recital. In so acting, the Union legislature clearly distinguished the rules governing the European arrest warrant from those regulating the Common European Asylum System. It also clearly announced its intention to break with the traditional rules governing extradition, which is perfectly justified where the intention is to replace it with judicial cooperation based on mutual recognition and mutual confidence. (19)

49. In the second place, the Common European Asylum System and the European arrest warrant mechanism, although they both form part of the creation of the area of freedom, security and justice, fulfil different objectives and have particular characteristics, structured around specific rules and principles.

50. First, the Common European Asylum System is based on a comprehensive body of rules harmonised at Union level. Criminal law, substantive and procedural, has not been harmonised throughout the Union and remains, in spite of everything, governed by the territoriality of the criminal law.

51. Second, the Common European Asylum System is intended to provide an area of protection and solidarity for individuals who are fleeing from persecution or serious physical injury and seek international protection. The European arrest warrant is intended, for its part, to ensure the prosecution and punishment of criminal conduct in the Union by enabling the prosecution, trial and conviction of the perpetrators of criminal offences.

52. Third, the Common European Asylum System is based on a purely administrative examination procedure, where the issue is to ascertain whether or not the person concerned is entitled to refugee status and, if not, to remove him from the territory of the Union. The European arrest warrant is part of a purely internal Union mechanism and is based, furthermore, on an exclusively judicial procedure. It is not a Member State, but rather a national court which seeks an individual's imprisonment and the Framework Decision requires, under certain conditions, that is to say with certain reservations, the other Member States to accede to that request.

53. Fourth, in the Common European Asylum System, the detention order constitutes, for the Member State responsible, the measure of last resort, wholly in the alternative, linked to the need to ensure enforced removal. The detention which the European arrest warrant involves is the rule and is the result of a court decision convicting the perpetrator of a criminal offence or requiring him, by means of enforcement, to appear before a court to be tried.

54. Last, we must take into consideration what is at issue in, and the very specific consequences of, applying the case-law in *N. S. and Others,* C-411/10 and C-493/10, EU:C:2011:865) to the European arrest warrant mechanism and the limits of that application in view of the role and competencies of the Member State in the execution of a European arrest warrant.

55. In the case which gave rise to the judgment in *N. S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, what was at issue was to ascertain which of the Member States was responsible for examining an asylum claim within the meaning of Regulation No 343/2003. Very specifically, the solution adopted by the Court had no consequences other than to require the competent United Kingdom and Irish authorities to either identify, in accordance with the criteria laid down by that regulation, another 'Member State responsible' or to handle the asylum application themselves, if appropriate, by requiring the persons concerned to be removed from their territory. It was therefore a question of making an exception to a rule of territorial jurisdiction, laid down in order to spread the burden of administrative procedures subject to substantive criteria common to all the Member States.

56. In the main proceedings, the issue is entirely different because it is a question of ensuring public order and public security by enabling a criminal prosecution to be brought against Mr Aranyosi and ensuring the execution of a custodial sentence against Mr Căldăraru.

57. The practical consequences are also of a very different scale since, on the basis of the principles affirmed by the Court in its judgment in *N. S. and Others,* C-411/10 and C-493/10, EU:C:2011:865, the executing judicial authorities are obliged to refuse to surrender the requested person.

58. Contrary to the Common European Asylum System, which is, as I have said, broadly harmonised, criminal law, substantive and procedural, has not been harmonised throughout the Union and remains, in spite of everything, governed by the territoriality of the criminal law.

59. This means that, in the context of the execution of a European arrest warrant issued for the purpose of conducting a criminal prosecution, the transposition of the principle identified by the Court in its judgment in *N. S. and Others,* C-411/10 and C-493/10, EU:C:2011:865, leads to the situation in which the executing judicial authorities can no longer surrender the requested person for the purposes of prosecution and also no longer has, as a general rule, jurisdiction to prosecute him in place of the issuing judicial authorities. As is apparent from the order for reference in Case C-404/15 and particularly from the comments made by the District Prosecutor's Office of Miskolc, establishing the offence and choosing the penalties to be applied fall within the exclusive jurisdiction of the Hungarian judicial authorities.

60. There is therefore a clear and obvious risk that the offence would remain unpunished and that its perpetrator would reoffend, thus infringing the rights and freedoms of the other citizens of the Union.

61. In connection with the execution of a European arrest warrant issued for purposes of the execution of a custodial sentence, the problem may appear less sensitive in so far as, if the requested individual resides on the territory of the executing Member State, the judicial authorities of that State might possibly undertake to execute that sentence, on the basis of the provisions of Article 4(6) of the Framework Decision. The issuing judicial authorities might also, for their part, invoke the provisions of Council Framework Decision 2008/909/JHA 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, (20) in order that that individual may serve his sentence on the territory of the executing Member State.

62. While such a solution is conceivable, the fact remains that, by applying the principle identified by the Court in its judgment in *N. S. and Others,* C-411/10 and C-493/10, EU:C:2011:865 to the European arrest warrant mechanism, we end up with a difference in treatment and, therefore, a breach of the principle of equal treatment, depending on whether the requested person is accused of an offence or has already been convicted.

63. Moreover, we cannot preclude the possibility that such a solution may eventually encourage persons requested for the purposes of criminal prosecution or the execution of a custodial sentence to go to other Member States in order to escape those prosecutions or to be able to serve their sentence there. Those States would therefore become States of refuge, as, indeed, the Public Prosecutor's Office of Bremen expressly stated during the hearing held before the Court. How can it be ensured that those latter States will not in their turn experience problems and become deficient? They will doubtless avoid this by not executing sentences in respect of which they have refused to execute the European arrest warrant. Such consequences must be seriously considered.

64. Further, judging by the number of Member States which, according to the findings of the European Court of Human Rights or the Commission, are to be considered as deficient with regard to detention conditions, those seem to be suitable places of refuge. Already overburdened, there is little likelihood that they will further increase the

occupation rate of their prisons by accommodating individuals convicted by the judicial authorities of other Member States.

65. In the light of all these considerations, it must be stated that a transposition of the principle identified by the Court in its judgment in *N. S. and Others,* C-411/10 and C-493/10, EU:C:2011:865, would meet major obstacles relating to the nature and objectives of the European arrest warrant and would involve, furthermore, not only a paralysis of the mechanism introduced by the Framework Decision, but also extremely onerous and harmful consequences for the executing judicial authorities, points to which I shall return.

V – **My analysis**

66. By its questions, the referring court asks the Court whether, in the light of the provisions of Article 1(3) of the Framework Decision, the judicial authority executing a European arrest warrant is required to surrender the person requested for the purposes of criminal prosecution or the execution of a custodial sentence where that person is likely to be detained, in the issuing Member State, in physical conditions which infringe his fundamental rights and, if so, on what terms and in accordance with what procedural requirements.

67. The problem raised by the national court does not concern an irregularity affecting the intrinsic validity of the European arrest warrant or an irregularity in the investigation procedure, the trial or legal remedies applicable in the issuing Member State. The irregularity concerns the detention conditions in that State, that is to say a stage subsequent to the execution of the European arrest warrant. That irregularity involves a risk, that of submitting the requested person to physical detention conditions which are contrary to the safeguards provided for in Article 4 of the Charter.

68. The problem raised by the referring court therefore concerns the classic difficulty of weighing different fundamental objectives, whether it is necessary to attain those objectives, and whether it is possible to do so without nullifying or even merely weakening the safeguards which make the Union an area of justice and freedom.

69. First of all, I shall carry out a traditional analysis of the wording in which Article 1(3) of the Framework Decision is couched, of the structure of that decision and of the guiding principles on which it is based. At the end of that examination, I shall conclude that Article 1(3) of the Framework Decision cannot be interpreted as constituting a ground for non-execution of the European arrest warrant.

70. However, I shall not argue for an absolute obligation to surrender where execution of the European arrest warrant risks having results such as those described by the referring court.

71. Secondly, I shall explain the reasons why a review of proportionality is required when a judicial authority decides, in spite of the lack of space in the State's prisons and the numerous times that State has been censured owing to physical detention conditions which infringe the fundamental rights, to issue a European arrest warrant for minor offences.

A – *The wording of Article (3) of the Framework Decision*

72. Article 1 of the Framework Decision is headed 'Definition of the European arrest warrant and obligation to execute it.'

73. The Union legislature therefore defines, in Article 1(1), the subject matter of the European arrest warrant and states, in Article 1(2), the principle that the Member States must execute it in accordance with the principle of mutual recognition.

74. When it states, in Article 1(3), that the 'Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [EU]', the Union legislature is merely reminding each of the Member States that they are required, under the latter provision, to respect fundamental rights.

75. That obligation constitutes, as we shall see, an expression of the principal of mutual confidence between the Member States as reiterated by the Court in its Opinion 2/13 (EU:C:2014:2454).

76. The Union legislature therefore states, in Article 1(2) and (3) of the Framework Decision, the principles on which the execution of the European arrest warrant is based, namely, the principle of mutual recognition of judicial decisions and the principle of mutual confidence between the Member States, respectively.

77. Those paragraphs 2 and 3 complement each other, since the two principles which they lay down are inseparably linked in so far as the principle of mutual recognition is based on the confidence held by the Member States that each of them respects Union law, and in particular fundamental rights.

78. In the light of these considerations, Article 1(3) of the Framework Decision can therefore not be interpreted as aiming to introduce an exception to the general rule of execution of the European arrest warrant.

B – *The structure of the system*

79. If Article 1(3) of the Framework Decision were to be interpreted as a provision allowing the executing judicial authority to refuse to execute the European arrest warrant on the ground that the requested person is likely to be exposed to physical detention conditions which infringe his fundamental rights, such an interpretation would, furthermore, be clearly contrary to the structure of the system.

80. It would have the effect of introducing a ground for non-execution which was clearly not provided for by the Union legislature.

81. It would therefore go against not only the Union legislature's clearly stated intention of stipulating exhaustively, for reasons of legal certainty, the cases in which the European arrest warrant may not be executed, but also against the case-law of the Court which applies a very strict interpretation of the Framework Decision, and particularly of the grounds for non-execution provided for in Article 3 to Article 4a thereof.

82. That interpretation would also have the effect of introducing a ground for the systematic non-execution of the European arrest warrants issued by Member States beset by major problems in the functioning of their prisons, other than the ground expressly mentioned in recital 10 of the Framework Decision.

83. In that recital, the Union legislature expressly provides for the possibility of suspending the European arrest warrant mechanism in respect of a Member State in the event that that Member State commits a serious and persistent breach of the principles set out in Article 6(1) EU.

84. 'Persistent' breach is defined by the Commission as referring to the 'systematic repetition of individual breaches', (21) the Commission taking care to observe that the fact that 'a Member State has repeatedly been condemned for the same type of breach over a period of time by an international court such as the European Court of Human Rights …, and has not demonstrated any intention of taking practical remedial action' (22) is a factor that could be taken into account.

85. There is no doubt, in my view, that this is the situation here.

86. In recital 10 of the Framework Decision, the Union legislature advocates the ultimate intervention of political leaders to suspend the European arrest warrant mechanism, since only the European Council, in accordance with the procedure referred to in Article 7(2) EU, may initiate the procedure to suspend the rights of the Member State in question. However, the procedure is onerous and complex, since the European Council acts by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, and clearly needs strong political will.

87. By allowing only the European Council to suspend the mechanism of the European arrest warrant by means of the sanction mechanism provided for in Article 7(2) EU, the Union legislature wished to regulate that situation very strictly and clearly did not intend to allow the executing judicial authorities to refuse to execute a European arrest warrant in such circumstances.

88. Furthermore, if it had wished to afford that possibility, there were many opportunities for doing so.

89. First of all, the Union legislature could have stated it in recital 10 of the Framework Decision.

90. It could then have applied by analogy the fundamental principle which governs the rules for removal, expulsion and extradition, set out in recital 13 of the Framework Decision and according to which, I reiterate, 'no person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'.

91. The wording of that recital was carefully chosen because no reference is made to the person 'surrendered' under a European arrest warrant. I believe that there was a clear intention to distinguish the rules governing the European arrest warrant from those regulating the Common European Asylum System and also an intention to break away from the traditional rules governing extradition, which is perfectly justified when the intention was to replace it with judicial cooperation based on mutual recognition and mutual confidence.

92. Finally, the Union legislature could have expressly included that ground in the grounds for non-execution, mandatory or optional, provided for in Article 3 to Article 4a of the Framework Decision, but it did not do so.

93. In the light of these considerations, I can only say that, by laying down the principle stated in Article 1(3) of the Framework Decision, the Union legislature did not intend to allow the executing judicial authorities to refuse to surrender the requested person in circumstances such as those at issue in the present cases.

C – *The guiding principles of the Framework Decision*

94. The Framework Decision is based, as we know, on the principles of mutual recognition and mutual confidence, which require the executing judicial authorities to consider that, in the implementation of the European arrest warrant, the issuing judicial authorities will ensure respect for the fundamental rights of the surrendered person.

1. The principle of mutual recognition of judicial decisions

95. The use of the mutual recognition principle became necessary in order to achieve the area of freedom, security and justice, the aim which the Union set itself under Article 3(2) TEU and Article 82 TFEU.

96. By laying down that principle as the 'cornerstone' of that area, it is clear that the Member States wished to achieve it without necessarily having first harmonised national criminal law. Past experience had adequately shown that that step, although logically required, was ultimately the surest means of reaching an impasse. The Member States therefore wished to break through that impasse, while retaining the idea that harmonisation may still be necessary, but will henceforth have an ancillary role.

97. That assertion, far from being an opinion of academic lawyers, can be clearly inferred from the wording of Article 82(1) and (2) TFEU.

98. That reasoning was fully integrated by the Court, even before the drafting of the Treaty of Lisbon, when it defined the principle of mutual recognition, in connection with an application of the *ne bis in idem* rule, in its judgment in *Gözütok and Brügge*. (23) The latter principle can apply in a cross-border context only if the judicial decisions of the various Member States are not disregarded as a matter of principle and are recognised in the circumstances and with the effects laid down by the Court. Accordingly, mutual recognition necessarily implies, regardless of the way in which a penalty is imposed, that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States, even when the outcome would be different if its own national law were applied. (24)

99. As a result, in the 'mutual recognition/mutual confidence' relationship, the former imposes the latter on the Member States. From the moment the principle of mutual recognition applies and constitutes the 'essential rule' on which judicial cooperation is based, (25) the Member States must have mutual confidence in each other.

100. There is no doubt, in my view, that the terms of Article 82 TFEU constitute an implicit confirmation of the case-law of the Court, which it would have been so easy to reverse when the Treaty of Lisbon was drafted. We should note that Article 82(2) presents a legal basis for harmonisation of national legislation in order to facilitate mutual recognition.

101. Questions referred for a preliminary ruling in connection with the implementation of the European arrest warrant allowed the Court to establish the rules leading to the creation and maintenance of the European criminal judicial area and to give full force and meaning to the principle of mutual recognition.

102. Since its judgment in *Gözütok and Brügge*, (26) the Court has always applied a very strict interpretation of that principle, particularly with regard to the automatic nature of the surrender of the requested person where no objection to that surrender can be pleaded, on the basis of an extremely rigorous application of the principles of mutual recognition and mutual confidence and of the promotion of the efficient and expeditious functioning of the surrender procedure laid down by the Framework Decision.

103. It follows that, where the judicial authority of a Member State requests the surrender of a person either by reason of a final conviction or because that person is the subject of a criminal prosecution, its decision must be automatically recognised by the executing Member State, which is obliged, under Article 1(2) of the Framework Decision, to implement that warrant without any possible ground for non-execution other than those listed exhaustively in Article 3 to Article 4a of the decision. (27) Furthermore, the executing judicial authority may make the execution of that warrant subject only to the conditions set out in Article 5 of the Framework Decision.

104. Therefore, according to standard wording, it is to '[facilitate] the surrender of requested persons, in accordance with the principle of mutual recognition' (28) and to '[reinforce] the system of surrender established by the Framework Decision for the good of the area of freedom, security and justice', (29) that the Court, in its judgment in *Wolzenburg*, C-123/08, EU:C:2009:616, encouraged the Member States to limit, as far as possible, the situations in which they may refuse to execute a European arrest warrant, inviting them not necessarily to take advantage of the opportunities granted to them by Article 4 of the Framework Decision relating to the grounds for optional non-execution, however important the objectives referred to in that article are. (30) The Court has thus acknowledged that, in spite of the importance of the objective of reintegrating the requested person into society, (31) referred to in Article 4(6) of the Framework Decision, (32) the Member States must be able to limit, in accordance with the principle of mutual recognition, the situations in which it ought to be possible to refuse to surrender that person.

105. In its judgment in *West,* C-192/12 PPU, EU:C:2012:404, once again, it is to facilitate surrender and to reinforce the European arrest warrant system that the Court, in the context of successive surrenders of the same person, limited the concept of 'executing Member State' to the Member State which carried out the last surrender so as to limit the situations in which the national judicial authorities may refuse to consent to the execution of a European arrest warrant. (33)

2. The principle of mutual confidence between the Member States

106. The principle of mutual confidence between the Member States is today among the fundamental principles of Union law, of comparable status to the principles of primacy and direct effect.

107. In its Opinion 2/13 (EU:C:2014:2454), the Court (Full Court) reaffirmed 'the fundamental importance' of that principle 'which Union law imposes … between [the] Member States' in that it 'allows an area without internal borders to be created and maintained' and observance of which is essential to the 'underlying balance of the EU'. (34)

108. As regards the area of freedom, security and justice, the Court defined that principle as requiring each of the Member States to consider, save in exceptional circumstances, that all the other States are complying with Union law, and particularly with the fundamental rights recognised by that law. (35)

109. According to the Court, the principle of mutual confidence therefore precludes a Member State checking whether another Member State has actually complied, in a specific case, with the fundamental rights safeguarded by the Union, because that '[would upset] the underlying balance of the EU'. (36)

110. Mutual confidence between the Member States is based on several factors.

111. First, the confidence that each Member State must have in the respective criminal justice systems of the other Member States appears to be the logical and absolutely inevitable result of the disappearance of internal borders and the creation of a single area of freedom, security and justice.

112. Secondly, as the Court points out in its Opinion 2/13, EU:C:2014:2454, that confidence is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the Union is founded, such as respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, as stated in Article 2 TEU. (37) Accordingly, all the Member States showed, when they created the European Communities or acceded to them, that they were States governed by the rule of law which respected fundamental rights.

113. Thirdly, that confidence is based on the fact that each of the Member States is obliged to respect the fundamental rights as enshrined in the ECHR or in the Charter or laid down by their national law, even in connection with criminal law, substantive or procedural, which does not fall within the scope of the Framework Decision and Union law. (38)

114. In spite of the absence, to date, of extensive harmonisation of substantive and procedural criminal law within the Union, the Member States have therefore been able to be convinced that the conditions in which requested persons are prosecuted, tried and, depending on the circumstances, detained in the other Member States respect the rights of those persons and will allow them properly to defend themselves.

115. It is that obligation imposed on each of the Member States to respect fundamental rights that, according to the Court, must enable the Member States to have confidence 'that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at EU level, particularly in the Charter'. (39)

116. Thus, in accordance with those principles, the Court held, in its judgment in *F.*, C-168/13 PPU, EU:C:2013:358, (40) that 'it is therefore within the legal system of the issuing Member State that persons who are the subject of a European arrest warrant can avail themselves of any remedies which allow the lawfulness of the criminal proceedings or the enforcement of the custodial sentence or detention order, or indeed the substantive criminal proceedings which led to that sentence or order, to be contested'. (41)

117. Again, in accordance with those principles the Court held, in its judgment in *Melloni*, C-399/11, EU:C:2013:107, (42) that surrender must be automatic even if the executing Member State develops as part of its constitution a more demanding concept of the right to a fair trial.

118. Therefore, from the moment the executing judicial authority is unable to rely on one of the grounds for non-execution exhaustively listed in Article 3 to Article 4a of the Framework Decision, it is obliged to surrender the requested person to the issuing judicial authorities even if the provisions of its national law, including constitutional provisions, would provide a higher level of protection of fundamental rights than that deriving from the provisions of the Framework Decision.

119. In the case which gave rise to that judgment, the Court therefore held that allowing a Member State to avail itself of a higher standard of protection for fundamental rights in its constitution to make the surrender of a person convicted *in absentia* subject to conditions would therefore undermine the principles of mutual recognition and confidence on which the Framework Decision is based and, accordingly, compromise the effectiveness of that decision.

120. It is that obligation relating to respect for fundamental rights which, in the end, according to the Court, explains the wording of recital 10 of the Framework Decision, according to which the implementation of the European arrest warrant may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) EU, determined by the Council pursuant to Article 7(2) EU with the consequences set out in Article 7(3) EU. (43)

121. It is therefore that obligation which, again according to the Court, strengthens the principle of mutual recognition, which is the basis for the European arrest warrant mechanism in accordance with Article 1(2) of the Framework Decision.

122. It is clear, at the end of this analysis, that a ground for non-execution based on the risk of infringement, in the issuing Member State, of the fundamental rights of the surrendered person would substantially undermine the relationship of trust which is deemed to form the basis of the cooperation of one court with another which the Framework Decision requires, therefore nullifying the principle of mutual recognition of judicial decisions.

123. In view of the number of Member States faced with a malfunctioning prison system, and in particular a problem of generalised prison overcrowding, that interpretation would have the effect, as we have seen, of introducing a systematic exception to the execution of European arrest warrants issued by those States, which would lead to the paralysis of the European arrest warrant mechanism.

124. It is a fact, furthermore, that the executing judicial authorities would no longer be able to surrender the person requested for the purposes of criminal prosecution or the execution of a custodial sentence.

125. If the Framework Decision mechanism were paralysed, it would in fact be one of the aims of the area of freedom, security and justice which would be undermined, namely the aim of ensuring the prosecution and punishment of criminal conduct not only in the common interest of all the Member States but also in the interest of victims because, if the European arrest warrant were issued for the purposes of criminal prosecution, the executing judicial authorities would not have, in principle, any jurisdiction to try the party concerned in place of the issuing judicial authorities, having regard to the principle of territoriality of criminal law. If, on the other hand, they did have jurisdiction, as seems to be the situation in the present case, the Public Prosecutor's Office of Bremen has pointed out the difficulties and disproportionate resources which that would involve.

126. It is not the responsibility of the executing Member State, even under its duty of solidarity as stated in Article 4(3) TEU, to execute, owing to the malfunctioning of the prison system of the issuing Member State, the sentence of the requested person with the cost which that involves, unless, of course, it is required to assume that responsibility for the purpose of reintegrating that person into society, a possibility offered by the provisions of the Framework Decision. Other than in those cases, to reduce prison overcrowding in one Member State only to increase it in another is not a solution.

127. We must also not forget that the issue here is to prevent a risk, not to find and penalise an infringement. Although the existence of a systemic deficiency constitutes legitimate grounds for questioning the detention conditions of surrendered persons, that finding made at one given moment does permit *a priori* suspicion of infringement of the fundamental rights of surrendered persons and the blocking of mutual recognition by the introduction of a 'systematic' ground for non-execution.

128. Finally, as one last point, if the Court were to consider that the existence of a systemic deficiency of detention conditions constitutes a ground for non-execution of the European arrest warrant, that would also constitute grounds for non-transfer under Framework Decision 2008/909.

129. Having regard to the issues involved in and deriving from the principle of mutual recognition, the executing judicial authorities can therefore rely only on the grounds for mandatory or optional non-execution set out in Article 3 to Article 4a of the Framework Decision and, if none of those grounds can be relied upon, they must surrender the requested persons in accordance with the mutual confidence which they must have in the issuing judicial authorities.

130. From this perspective, the logic of the system therefore means that the answer to the referring court is that it is, as a general rule, obliged to execute the European arrest warrants which it is responsible for examining.

131. Is it, however, possible to conclude, without more, that there is an obligation to execute European arrest warrants the execution of which would lead to disproportionate results such as those described in the orders for reference?

132. I would say that there is not.

133. In exceptional circumstances, (44) such as those at issue in the main proceedings, characterised by a systemic deficiency in the detention conditions in the issuing Member State, established by the European Court of Human Rights, it is legitimate for the executing judicial authority to ask itself whether the surrendered person actually 'risks' being detained in the conditions indicated by that Court.

134. It is therefore through an exchange of information based on the cooperation of one court with another that the executing judicial authority must assess whether, in the light of the information provided by the issuing judicial authority, the surrendered person will actually be detained in conditions which are not disproportionate.

D – *Application of the principle of proportionality to the issue of European arrest warrants*

135. It is clear that, in circumstances such as those at issue in the main proceedings, it is necessary to weigh up the rights of the surrendered person against the requirements of the protection of the rights and freedoms of others. As the Court pointed out in its judgment in *N.*, C-601/15 PPU, EU:C:2016:84, Article 6 of the Charter states that everyone has the right not only to liberty but also to security of person. (45) That right, as the right guaranteed in Article 4 of the Charter is an absolute and non-derogable right. Where the person with respect to whom the European arrest warrant is issued is sought for acts of terrorism or rape of a child, it is clear that non-execution of that warrant raises the question of the need to safeguard national security and public order.

136. That weighing is therefore essential and falls fully within the role of the judge of a court of law, the guardian of individual freedoms, who in this situation is genuinely constrained to choose, and it is, in my view, through the application of the principle of proportionality that this weighing may be effected.

1. Scope of the principal of proportionality

137. The principle of proportionality has a particularly significant application in the judicial sphere as the 'individualisation' of the penalty.

138. The individualisation of the penalty has two dimensions: at the stage of the imposition of the penalty and the stage of its execution.

139. At the stage of the imposition of the penalty, the principle of the individualisation of the penalty precludes the rule of an automatic and entirely fixed penalty. The court will decide on the penalty according to the specific characteristics of the offender, as they emerge from inter alia the nature of the offence committed, the circumstances of its commission, the social enquiry report, victim and witness statements, psychological and psychiatric reports and the possibilities of reintegration offered by the specific characteristics of that individual.

140. Where the court imposes a custodial sentence, it must take into account, for the purpose of fixing its length, the conditions of the execution of that sentence, and in particular their possible harshness. The aim is to ensure that the detention of the surrendered person does not have consequences for him that are disproportionate.

141. In that connection, it is clearly necessary to take into account the capacity of the prisons and the possible inability of the system to ensure proper detention conditions owing to a problem of prison overcrowding.

142. That principle of individualisation also applies, and with the same force, to the stage of execution of the penalty. One speaks of enforcement of sentences. Consideration of the physical detention conditions is relevant here, for two main reasons, irrespective of the aspects relating to human dignity.

143. First of all, modern criminology is unanimous in drawing attention to the unwanted effects of excessive overcrowding, because such a factor is morally debilitating. The sense of injustice which is the result of suffering degrading treatment only reinforces the detainee's detachment from society and therefore only increases exponentially the risk of reoffending. The aim of the penalty, which is to ensure, ultimately, the rehabilitation and reintegration of the convicted person into society is therefore clearly compromised.

144. Secondly, the penalty cannot become a humiliation. Excessively harsh detention conditions lend to the penalty an extra degree of severity which is not intended by the court and which reinforces the sense of injustice described above.

145. The same proportionality must be observed when issuing a European arrest warrant for the purposes of criminal prosecution.

146. In that situation, the presumption of innocence enjoyed by the prosecuted person is already sufficient ground, in itself, to encourage moderation. Moreover, detention which is the result of execution of the European arrest warrant is, in fact, similar to provisional pre-trial detention, since the duration of that detention will be deducted from the sentence to be imposed at the end of the proceedings. It is therefore reasonable to issue the European arrest warrant only in cases in which it is likely that a sentence will be imposed, owing to the objective nature of the acts committed.

147. It is true that no provision in the Framework Decision expressly requires a review of proportionality to be carried out. However, since the principle of proportionality is a general principle of Union law, it can, as such, be relied on to oppose an action of the Member States where they are implementing Union law, which includes the Framework Decision.

148. Moreover, the discretion allowed to the executing judicial authorities by Articles 4 and 5 of the Framework Decision is nothing other than an application of the principle of proportionality. The aim of that discretion conferred on the court called upon to execute the European arrest warrant is, in fact, to enable enforcement measures to be adjusted, whether criminal prosecution or the execution of a custodial sentence is concerned, in order to avoid a situation where an automatic and indiscriminate execution results in the detachment from society of the person concerned.

149. In the light of these considerations, a review of proportionality must, in my view, be carried out.

150. Others appear to share this opinion, even if they base it on grounds which are different, such as those relating, inter alia, to freedom of movement, but which are, in fact, complementary.

151. The European handbook on how to issue a European arrest warrant (46) thus quite clearly invites the issuing judicial authorities to carry out that review. Taking account of the serious consequences of the execution of such a warrant as regards the restrictions placed on the freedom of movement of the requested person, that manual emphasises that the European arrest warrant must be used, 'in an efficient, effective and proportionate manner' to further the prosecution of 'more serious or more damaging' offences.

152. In its Resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant, (47) the Parliament also recommended that, when issuing such a warrant, the judicial 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'. (48)

153. In a significant number of Member States, the issuing judicial authorities have already integrated that review prior to the issue of a European arrest warrant, (49) either in the measure transposing the Framework Decision (50) or in their own practice. (51)

154. I share the view of the Parliament, the Council and the Commission in so far as they state that it is when the European arrest warrant is issued that the review of proportionality must be carried out.

155. The very spirit of the system requires that it is the issuing judicial authority that should carry out that review, since the European arrest warrant must satisfy that condition even before it leaves the borders of the national territory.

156. However, that is not always so, for various reasons.

157. Some national legislation prohibits, in particular, such a review under the principle of mandatory prosecution. That is the case in Hungary and Romania (52) which were required to apply that principle strictly when they acceded to the Union.

158. That principle prohibits any assessment of proportionality at the stage of the decision to prosecute or of the execution of a judicial decision in order to ensure the full independence of the judicial authority. Its aim, which is very laudable, and which is also imposed on judicial authorities which are not courts of law, is to ensure by the automatic nature of the procedure that no outside influence, particularly political influence, interferes with the course of justice.

159. The result is an automatic response which may lead to genuine lack of humanity in the implementation of decisions, to the extent that mechanisms such as that of the European arrest warrant are discredited. It culminates in a systematic and sometimes unjustified issue of the European arrest warrant for the surrender of persons requested for offences which are often minor, (53) such as the theft of 2 m^2 of tiling or of a bicycle wheel, a practice which the Commission itself criticised in its report mentioned in footnote 16 of this opinion.

160. For these reasons, I think it is legitimate that the question of the proportionality of the European arrest warrant may be raised before the executing judicial authority.

161. Admittedly, there is no question of my challenging the principle of procedural autonomy.

162. However, when the decision of the issuing judicial authority leaves the national territory where it alone is enforceable to be applied in the area of freedom, security and justice, it must comply with the general rules and principles which govern that single judicial area and enable the uniform application of the principle of mutual recognition.

163. The obligation of the executing Member State to give the 'foreign' decision the same force as if it were its own decision, even if its national law would have led to a different solution, cannot require it to execute a European arrest warrant which does not satisfy the conditions required expressly and implicitly by the Framework Decision which governs a particular aspect of mutual recognition.

164. In my view, that situation must be distinguished from that in which the executing judicial authority tries to assess the legality of the European arrest warrant in the light of its own standard of protection of fundamental rights, a situation regulated inter alia by the judgment in *Melloni*, C-399/11, EU:C:2013:107. It is a question of determining whether, in the specific sphere of the criminal law and within the framework of the 'horizontal' dialogue between the sovereign courts of law, it is necessary to raise the question of proportionality.

165. Let me say, first of all, that, to my mind, since the principle of proportionality is a general principle of Union law, it is for the Court and for the Court alone to define its scope and parameters if necessary. It will therefore be for the executing judicial authority, where appropriate, to refer the matter to the Court by means of a reference for a preliminary ruling.

166. The specific procedures for assessing that principle remain to be determined.

2. The specific procedures for applying the principle of proportionality to the issue of the European arrest warrant

167. Where, on the basis of reliable factual information, the executing judicial authority establishes the existence of a systemic deficiency in detention conditions in the issuing Member State, it must be able to assess, in the light of the specific circumstances of each case, whether surrender of the requested person is likely to expose him to detention conditions that are disproportionate.

168. To that end, the executing judicial authority must be able to ask the issuing judicial authority for any information it considers necessary. Owing to the principle of separation of powers, the executing judicial authority ought, in my view, to approach its competent national authority in order that it may make direct contact with the competent national authority in the issuing Member State and the replies should be communicated to it through the same channels.

169. As regards a European arrest warrant issued for the purposes of the execution of a custodial sentence, this must, in my view, be considered proportionate where the conditions of execution do not lead to adverse consequences out of all proportion to those which would result from the sentence imposed if it were executed under normal circumstances.

170. As regards a European arrest warrant issued for the purposes of criminal prosecution, it is proportionate if its conditions of execution are compatible with the sole necessity of ensuring that the requested person does not evade the course of justice. In its judgment in *Ladent v. Poland*, (54) the European Court of Human Rights held, furthermore, that the issue of a European arrest warrant for the commission of an offence for which provisional detention is normally considered inappropriate may have disproportionate consequences for the freedom of the requested person which may be addressed from the perspective of the guarantees referred to in Article 5 ECHR. (55)

171. Finally, it is clear that the possibilities offered by Articles 4 and 5 of the Framework Decision must be examined systematically.

172. If, in connection with a review of proportionality, the executing judicial authority were to be faced with a specific problem of assessment, it would then be required to refer the matter to the Court, which alone has jurisdiction to settle that matter of EU law.

173. In any event, we must not lose sight of the fact that it is for the issuing judicial authority to carry out a review of proportionality in the first place. Since this is a matter of implementation of Union law, it is its responsibility to do so, even if, in order to do so, it must disapply its national legislation imposing the principle of mandatory prosecution, because it is necessary here to give a ruling in accordance with EU law, the primacy of which also applies in respect of the provisions of the Framework Decision.

174. Indeed, if that review were carried out, questions such as those raised in the present references would undoubtedly be a rare occurrence.

175. I am aware that the position which I suggest the Court should adopt amounts, in part, to asking it to behave as a human rights court would behave. In the sphere of criminal law, I think that that approach will need to be addressed at some point.

176. However, I cannot ignore the fact that the current situation is also the consequence of a damaging failure to act, on the part both of the Member States and of the Union institutions.

177. It should be unnecessary to point out that each of the Member States is required to ensure respect for fundamental rights under Article 6 TEU. That obligation is imposed, as we have seen, by virtue not only of mutual confidence but also of the principle of sincere cooperation. (56) The two go together. Let us remember, moreover, that in its judgment in *Pupino*, C-105/03, EU:C:2005:386, the Court expressly stated that 'it would be difficult for the Union to carry out its task effectively if the principle of [sincere] cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under … Union law, were not also binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions'. (57)

178. If we insist that the executing judicial authorities must surrender the requested person, in circumstances such as those at issue in the main proceedings, the principle of mutual confidence means, in turn, that the issuing judicial authorities in which that confidence is placed, and in particular the Member State to which the requested person will be surrendered, should take all necessary measures, including necessary reforms of criminal policy, to ensure that that person serves his sentence in conditions which respect his fundamental rights and is able to avail himself of all legal remedies available to defend his individual freedoms.

179. In that regard, I can only welcome the commitments made in that respect by Hungary and Romania.

180. I also note, in view of the very large number of individual applications brought before the European Court of Human Rights, that the legal remedies provided for in Hungary and Romania enable individuals exposed to physical conditions of detention which are contrary to the safeguards laid down in Article 3 ECHR to obtain the protection of their fundamental rights.

181. Finally, I see no solution other than to reinforce the mechanism of the European arrest warrant through the action of the Union institutions. Although the Commission, in 2011, painted a disheartening picture of the detention conditions in certain Member States and the consequences for the implementation of the Framework Decision, I note that neither the Council nor the Commission has undertaken action to ensure that the Member States meet all their obligations or, at least, take the necessary measures.

182. However, Article 82 TFEU provides them with a legal basis for doing so.

VI – **Conclusion**

183. In the light of the foregoing, I propose that the Court reply to the questions raised by the Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court, Bremen) as follows:

Article 1(3) 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 meaning that it does not constitute a ground for non-execution of the European arrest warrant issued for the purposes of criminal prosecution or the execution of a custodial sentence, based on the risk of an infringement, in the issuing Member State, of the fundamental rights of the surrendered person.

It is for the issuing judicial authorities to carry out a review of proportionality in order to adjust the need to issue a European arrest warrant in the light of the nature of the offence and the specific procedures for executing the sentence.

In circumstances such as those at issue in the main proceedings, characterised by a systemic deficiency of detention conditions in the issuing Member State, the executing judicial authority may legitimately ask the issuing judicial authority, through the competent national authorities where appropriate, for any information necessary to enable it to assess, in the light of the specific circumstances of each case, whether surrender of the requested person is likely to expose him to detention conditions that are disproportionate.

It is also for the issuing Member State, in accordance with the obligations deriving from Article 6 TEU and its duties in respect of the principles of mutual confidence and sincere cooperation, to take all necessary measures, including necessary reforms of criminal policy, to ensure that that person serves his sentence in conditions which respect his fundamental rights and is able to avail himself of all legal remedies available to defend his individual freedoms.

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1 Original language: French.

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2 OJ 2002 L 190, p. 1. Framework Decision as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24) ('the Framework Decision').

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3 According to the expression used in recital 6 of the Framework Decision.

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4 First subparagraph of Article 82(1) TFEU and recitals 5, 6, 10 and 11 of the Framework Decision.

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5 Judgments in *Radu*, C-396/11, EU:C:2013:39, paragraph 34, and *Melloni,* C-399/11, EU:C:2013:107, paragraph 37.

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6 Judgment in *F.*, C-168/13 PPU, EU:C:2013:358, paragraphs 57 and 58.

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7 Although recital 10 refers to Article 7(1) EU and Article 7(2) EU, it seems to me that the Union legislature intended to refer to Article 7(2) EU and Article 7(3) EU.

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8 Under Article 29(1) of the Law on international mutual assistance in criminal matters (Gesetz über die internationale Rechtshilfe in Strafsachen) of 23 December 1982, as amended by the Law on the European Arrest Warrant (Europäisches Haftbefehlsgesetz) of 20 July 2006 (BGBl. 2006 I, p. 1721, 'IRG'), the Oberlandesgericht (Higher Regional Court, Germany) rules, at the request of the Public Prosecutor's Office, on the permissibility of extradition when the offender has not consented to extradition. The decision is given by an order, in accordance with Article 32 of the IRG.

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9 Paragraph 73 IRG states that, 'Mutual legal assistance and transmission of data, if not requested, are unlawful if they would conflict with basic principles of the German legal system. If a request is made under Parts Eight, Nine and Ten, mutual legal assistance is unlawful if it would infringe the principles laid down in Article 6 [TEU].'

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10 No 35972/05, 24 July 2012. In that judgment, the European Court of Human Rights holds that, in spite of the efforts of the Romanian authorities to improve the situation, there is a structural problem in that area.

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11 The pilot-judgment procedure enables the European Court of Human Rights to find an infringement of the ECHR owing to systematic, recurrent and persistent problems concerning detention conditions which affect or are likely to affect a large number of persons.

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12 Nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13. In that judgment, the European Court of Human Rights emphasises the general malfunctioning of the Hungarian penitential system, which has already led to

multiple judgments against Hungary under Article 3 ECHR and given rise to the 450 applications currently pending against that State (see, in particular, paragraphs 99 and 100).

13 See, respectively, ECtHR, *Torregiani and Others v Italy,* Nos 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, 8 January 2013, *Neshkov and Others v Bulgaria,* Nos 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015, and *Varga and Others v Hungary,* cited above.

14 See, respectively, ECtHR, *Karalevičius v Lithuania,* No 53254/99, 7 April 2005; *Norbert Sikorski* v *Poland,* No 17599/05, 22 October 2009, and *Mandic and Jovic v Slovenia,* Nos 5774/10 and 5985/10, 20 October 2011.

15 See ECtHR, *Vasilescu* v *Belgium,* No 64682/12, 25 November 2014.

16 See the Resolution of the European Parliament of 15 December 2011 on detention conditions in the Union (OJ 2013 C 168 E, p. 82) and paragraph 4 of the 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].

17 In the case which gave rise to that judgment, asylum seekers from Afghanistan, Iran and Algeria objected to being transferred from the United Kingdom and Ireland to Greece, the Member State competent to hear their application under Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1), since they risked being subjected, in Greece, to inhuman and degrading treatment within the meaning of Article 4 of the Charter owing to the conditions of their detention.

18 See, inter alia, paragraphs 86, 94 and 106 of that judgment.

19 Recital 13 of the Framework Decision must be read in the light of the provisions laid down in Article 28 thereof, since the principle which it establishes applies where, once the European arrest warrant has been executed, the question of removal, expulsion or extradition is raised in the issuing Member State.

20 OJ 2008 L 327, p. 27.

21 See paragraph 1.4.4 of the Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union — Respect for and promotion of the values on which the Union is based [COM(2003) 606 final].

22 Idem.

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

24 Paragraph 33 of that judgment.

25 Judgment in *West*, C-192/12 PPU, EU:C:2012:404, paragraph 62 and the case-law cited.

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

27 See the judgments in *Leymann and Pustovarov*, C-388/08 PPU, EU:C:2008:669, paragraph 51; *Wolzenburg,* C-123/08, EU:C:2009:616, paragraph 57; *Radu,* C-396/11, EU:C:2013:39, paragraphs 35 and 36; and *Melloni,* C-399/11, EU:C:2013:107, paragraph 38.

28 Judgments in *Wolzenburg*, C-123/08, EU:C:2009:616, paragraph 59, and *West*, C-192/12 PPU, EU:C:2012:404, paragraph 62.

29 Judgment in *Wolzenburg,* C-123/08, EU:C:2009:616, paragraph 58.

30 Judgment in *Wolzenburg,* C-123/08, EU:C:2009:616, paragraph 62 and the case-law cited.

31 See the judgment in *Kozłowski* , C-66/08, EU:C:2008:437, paragraph 45.

32 Under that provision, 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'.

33 Paragraph 62 of that judgment.

34 Paragraphs 191 and 194 of that opinion.

35 Paragraph 191 of the opinion.

36 Opinion 2/13, EU:C:2014:2454, paragraph 194.

37 Paragraph 168.

38 Judgment in *F.*, C-168/13 PPU, EU:C:2013:358, paragraph 48.

39 Judgment in *F.*, C-168/13 PPU, EU:C:2013:358, paragraph 50.

40 That judgment concerns the possibility of bringing an appeal suspending execution of the decision of the executing judicial authority.

41 Paragraph 50.

42 In that judgment, Court ruled on the scope of Article 4a(1) of the Framework Decision which provides grounds for the optional non-execution of a European arrest warrant issued for the purposes of executing a custodial sentence or detention order, if the person concerned has not appeared in person in the proceedings leading to his conviction.

43 Judgment in *F.*, C-168/13 PPU, EU:C:2013:358, paragraph 49.

44 I am referring here to the exceptional circumstances referred to by the Court in paragraph 191 of its Opinion 2/13, EU:C:2014:2454.

45 Paragraph 53 and the case-law cited.

46 Document 17195/1/10 REV 1 — COPEN 275 EJN 72 Eurojust 139.

47 Document T7-0174/2014.

48 See the annex to that resolution. It is interesting to note that the requirement of proportionality is already enshrined within the framework of the establishment, operation and use of the second generation Schengen Information System (SIS II) established by Council Decision 2007/533/JHA of 12 June 2007 (OJ L 205, p. 63). Article 21 of that decision provides that, before issuing an alert, the issuing Member State shall determine whether the case is 'adequate, relevant and important enough to warrant entry of the alert in SIS'.

49 See, inter alia, the 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 by the Council on 4 and 5 June 2009 (document 8302/4/09 REV 4 — Crimorg 55 COPEN 68 EJN 24 Eurojust 20), which assesses the implementation of the European arrest warrant in each Member State.

50 Inter alia in the Czech Republic, Latvia, Lithuania and Slovakia.

51 Inter alia in Belgium, Denmark, Germany, Estonia, Ireland (by the police forces and the Public Prosecutor), Spain, France, Cyprus, Luxembourg, the Netherlands, Portugal, Slovenia, Finland, Sweden (by the Public Prosecutor) and also the United Kingdom.

52 That is expressly stated in the replies given by those Member States in connection with the Commission's report referred to in footnote 16 of this opinion.

53 This has been extensively noted by the latest institutional documents relating to the application of the Framework Decision. See, inter alia, paragraph 4 of the Commission's report mentioned in footnote 16 of this opinion.

54 No 11036/03, 18 March 2008.

55 Paragraphs 55 and 56.

56 That duty of sincere cooperation derives from Article 4(3) TEU, it being understood that, under that provision, the obligation is equally applicable to relations between Member States and the Union (see Opinion 2/13, EU:C:2014:2454, paragraph 202).

57 Paragraph 42.

Judgment in Joined Cases C-404/15 and C-659/15 PPU Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen

UDGMENT OF THE COURT (Grand Chamber)

5 April 2016 (*)

(Reference for a preliminary ruling — Police and judicial cooperation in criminal matters — Framework Decision 2002/584/JHA — European arrest warrant — Grounds for refusal to execute — Charter of Fundamental Rights of the European Union — Article 4 — Prohibition of inhuman or degrading treatment — Conditions of detention in the issuing Member State)

In Joined Cases C-404/15 and C-659/15 PPU,

REQUESTS for a preliminary ruling under Article 267 TFEU made by the Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court of Bremen, Germany), made by decisions of 23 July and 8 December 2015, received at the Court on 24 July and 9 December 2015 respectively, in proceedings relating to the execution of European arrest warrants issued in respect of

Pál Aranyosi (C-404/15)

Robert Căldăraru (C-659/15 PPU),

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, L. Bay Larsen, T. von Danwitz and D. Šváby, Presidents of Chambers, A. Rosas, E. Juhász, A. Borg Barthet, J. Malenovský, M. Safjan (Rapporteur), M. Berger, A. Prechal, E. Jarašiūnas, M. Vilaras and E. Regan, Judges,

Advocate General: Y. Bot,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 15 February 2016,

after considering the observations submitted on behalf of:

– Mr Aranyosi, by R. Chekerov, Rechtsanwältin,

– Mr Căldăraru, by J. van Lengerich, Rechtsanwalt,

– the Generalstaatsanwaltschaft Bremen, by M. Glasbrenner, Oberstaatsanwalt,

– the German Government, by T. Henze, M. Hellmann and J. Kemper, acting as Agents,

– the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

– Ireland, by E. Creedon, L. Williams, G. Mullan and A. Joyce, acting as Agents,

– the Spanish Government, by A. Sampol Pucurull, acting as Agent,

– the French Government, by F.-X. Bréchot, D. Colas and G. de Bergues, acting as Agents,

– the Lithuanian Government, by D. Kriaučiūnas and J. Nasutavičienė, acting as Agents,

– the Hungarian Government, by M. Fehér, G. Koós and M. Bóra, acting as Agents,

– the Netherlands Government, by M. Bulterman and J. Langer, acting as Agents,

– the Austrian Government, by G. Eberhard, acting as Agent,

– the Romanian Government, by R. Radu and M. Bejenar, acting as Agents,

– the United Kingdom Government, by V. Kaye, acting as Agent, and by J. Holmes, Barrister,

– the European Commission, by W. Bogensberger and R. Troosters, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 March 2016,

gives the following

Judgment

1 The requests for a preliminary ruling concern the interpretation of Article 1(3), Article 5 and Article 6(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24; 'the Framework Decision').

2 These requests have been made in the context of the execution, in Germany, of two European arrest warrants issued in respect of Mr Aranyosi on 4 November and 31 December 2014 respectively by the examining magistrate at the Miskolci járásbíróság (District Court of Miskolc, Hungary), and of a European arrest warrant issued in respect of Mr Căldăraru on 29 October 2015 by the Judecătoria Făgăraş (Court of first instance of Fagaras, Romania).

Legal context

ECHR

3 Under the heading 'Prohibition of torture', Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), signed in Rome on 4 November 1950, provides:

'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

4 Article 15 ECHR, headed 'Derogation in time of emergency', provides:

'1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from … or from Articles 3 … shall be made under this provision.

…'

5 Article 46(2) ECHR, that article being headed 'Binding force and execution of judgments', provides:

'The final judgment of the [European Court of Human Rights; 'EctHR'] shall be transmitted to the Committee of Ministers, which shall supervise its execution.'

EU law

The Charter

6 Article 1 of the Charter of Fundamental Rights of the European Union ('the Charter'), headed 'Human dignity', states:

'Human dignity is inviolable. It must be respected and protected.'

7 Article 4 of the Charter, headed 'Prohibition of torture and inhuman or degrading treatment or punishment', states:

'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

8 The Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17; 'the Explanations relating to the Charter') state that '[t]he right in Article 4 [of the Charter] is the right guaranteed by Article 3 of the ECHR which has the same wording ... By virtue of Article 52(3) of the Charter, it therefore has the same meaning and the same scope as the ECHR Article'.

9 Article 6 of the Charter, headed 'Right to liberty and security', provides:

'Everyone has the right to liberty and security of person.'

10 Article 48(1) of the Charter, that article being headed 'Presumption of innocence and rights of defence', provides:

'Everyone who has been charged shall be presumed innocent until proved guilty according to law.'

11 Article 51(1) of the Charter, that article being headed 'Field of application', provides:

'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. ...'

12 Article 52(1) of the Charter, that article being headed 'Scope and interpretation of rights and principles', provides:

'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if 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.'

The Framework Decision

13 Recitals 5 to 8, 10 and 12 in the preamble of the Framework Decision are worded as follows:

'(5) ... 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. ...

(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 means 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. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) [EU, now after amendment, Article 2 TEU], determined by the Council pursuant to Article 7(1) [EU, now after amendment, Article 7(2) TEU] with the consequences set out in Article [7(2) EU].

...

(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 [EU] and reflected by the Charter ..., in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.

...'

14 Article 1 of the Framework Decision, headed '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 modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [EU].'

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

16 Article 5 of the Framework Decision, headed 'Guarantees to be given by the issuing Member State in particular cases', provides:

'The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions:

...

(2) if the offence on the basis of which the European arrest warrant has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure;

(3) where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.'

17 Article 6 of the Framework Decision, headed 'Determination of the competent judicial authorities', provides:

'1. The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State.

2. The executing judicial authority shall be the judicial authority of the executing Member State which is competent to execute the European arrest warrant by virtue of the law of that State.

3. Each Member State shall inform the General Secretariat of the Council of the competent judicial authority under its law.'

18 Article 7 of the Framework Decision, headed 'Recourse to the central authority', reads as follows:

'1. Each Member State may designate a central authority or, when its legal system so provides, more than one central authority to assist the competent judicial authorities.

2. A Member State may, if it is necessary as a result of the organisation of its internal judicial system, make its central authority(ies) responsible for the administrative transmission and reception of European arrest warrants as well as for all other official correspondence relating thereto.

Member State[s] wishing to make use of the possibilities referred to in this Article shall communicate to the General Secretariat of the Council information relating to the designated central authority or central authorities. These indications shall be binding upon all the authorities of the issuing Member State.'

19 Article 12 of the Framework Decision, headed 'Keeping the person in detention', states:

'When a person is arrested on the basis of a European arrest warrant, the executing judicial authority shall take a decision on whether the requested person should remain in detention, in accordance with the law of the executing Member State. The person may be released provisionally at any time in conformity with the domestic law of the executing Member State, provided that the competent authority of the said Member State takes all the measures it deems necessary to prevent the person absconding.'

20 Article 15 of the Framework Decision, headed 'Surrender decision', provides:

'1. The executing judicial authority shall decide, within the time-limits and under the conditions defined in this Framework Decision, whether the person is to be surrendered.

2. 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.

3. The issuing judicial authority may at any time forward any additional useful information to the executing judicial authority.'

21 Article 17 of the Framework Decision, headed 'Time limits and procedures for the decision to execute the European arrest warrant', provides:

'1. A European arrest warrant shall be dealt with and executed as a matter of urgency.

2. In cases where the requested person consents to his surrender, the final decision on the execution of the European arrest warrant should be taken within a period of 10 days after consent has been given.

3. In other cases, the final decision on the execution of the European arrest warrant should be taken within a period of 60 days after the arrest of the requested person.

4. Where in specific cases the European arrest warrant cannot be executed within the time limits laid down in paragraphs 2 or 3, the executing judicial authority shall immediately inform the issuing judicial authority thereof, giving the reasons for the delay. In such case, the time limits may be extended by a further 30 days.

5. As long as the executing judicial authority has not taken a final decision on the European arrest warrant, it shall ensure that the material conditions necessary for effective surrender of the person remain fulfilled.

…

7. Where in exceptional circumstances a Member State cannot observe the time limits provided for in this Article, it shall inform Eurojust, giving the reasons for the delay. In addition, a Member State which has experienced repeated delays on the part of another Member State in the execution of European arrest warrants shall inform the Council with a view to evaluating the implementation of this Framework Decision at Member State level.'

22 Article 23 of the Framework Decision, headed 'Time limits for surrender of the person', provides:

'1. The person requested shall be surrendered as soon as possible on a date agreed between the authorities concerned.

2. He or she shall be surrendered no later than 10 days after the final decision on the execution of the European arrest warrant.

…

4. The surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health. The execution of the European arrest warrant shall take place as soon as these grounds have ceased to exist. The executing judicial authority shall immediately inform the issuing judicial authority and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.

5. Upon expiry of the time limits referred to in paragraphs 2 to 4, if the person is still being held in custody he shall be released.'

German law

23 The Framework Decision was transposed into the German legal system by Paragraphs 78 to 83k of the Law on international mutual legal assistance in criminal matters (Gesetz über die internationale Rechtshilfe in Strafsachen) of 23 December 1982, as amended by the Law on the European arrest warrant (Europäisches Haftbefehlsgesetz) of 20 July 2006 (BGBl. 2006 I, p. 1721; 'the IRG').

24 Under Paragraph 15 of the IRG, headed 'Detention pending extradition':

'1. On receipt of the request for extradition, an order may made for the individual sought to be detained pending extradition, where

(1) there is a risk that the individual will not cooperate with the extradition procedure or the enforcement of the extradition, or

(2) there is specific evidence to support a strong suspicion that the individual sought will hinder the determination of the facts in the foreign proceedings or in the extradition procedure.

2. Subparagraph (1) shall not apply where the extradition appears to be prima facie unlawful.'

25 Paragraph 24 of the IRG, headed 'Suspension of execution of the arrest warrant issued for the purposes of extradition', provides:

'1. An arrest warrant issued for the purposes of extradition must be suspended forthwith when the conditions for provisional detention pending extradition are no longer met or the extradition has been declared to be unlawful.

2. An arrest warrant issued for the purposes of extradition must also be suspended at the request of the Public Prosecutor at the Higher Regional Court. When that request is made, the Public Prosecutor shall order the release of the individual sought.'

26 Under Paragraph 29(1) of the IRG, the Higher Regional Court is to give a ruling, at the request of the Public Prosecutor, on the legality of the extradition where the individual sought has not consented to extradition. The decision is to be made by order, in accordance with Paragraph 32 of the IRG.

27 Paragraph 73 of the IRG states:

'In the absence of a request to that effect, mutual legal assistance and the transmission of information shall be unlawful if contrary to the essential principles of the German legal system. In the event of a request under Parts VIII, IX and X, mutual legal assistance shall be unlawful if contrary to the principles stated in Article 6 TEU.'

The main proceedings and the questions referred for a preliminary ruling

Case C-404/15

28 Mr Aranyosi is a Hungarian national born on 14 July 1996 in Szikszó (Hungary).

29 The examining magistrate at the Miskolci járásbíróság (Court of first instance, Miskolc) issued two European arrest warrants, on 4 November and 31 December 2014 respectively, with respect to Mr Aranyosi, seeking his surrender to the Hungarian judicial authorities for the purposes of prosecution.

30 According to the European arrest warrant of 4 November 2014, on 3 August 2014 Mr Aranyosi forced entry to a dwelling house in Sajohidveg (Hungary). Having done so, he stole, inter alia, EUR 2 500 and HUF 100 000 (Hungarian forints; approximately EUR 313) in cash, and various objects of value.

31 Further, according to the European arrest warrant of 31 December 2014, Mr Aranyosi was accused of entering by a window, on 19 January 2014, a school in Sajohidveg, and forcing open a number of doors within the building and stealing technical equipment and cash. The stated value of the theft was HUF 244 000 (approximately EUR 760) and the value of material damage was HUF 55 000 (approximately EUR 170).

32 Mr Aranyosi was temporarily arrested on 14 January 2015 in Bremen (Germany) as a result of an alert having been entered in the Schengen Information System. He was heard on the same day by the investigating magistrate of the Amtsgericht Bremen (District Court of Bremen, Germany).

33 Mr Aranyosi stated that he was a Hungarian national, that he lived in Bremerhaven (Germany) with his mother, that he was unmarried, that he had a girlfriend and an eight-month-old child. He denied the offences of which he was accused and declined to consent to the simplified surrender procedure.

34 The representative of the Public Prosecutor of Bremen ordered that Mr Aranyosi be released from custody because there was no apparent risk that he would not cooperate with the surrender procedure. On 14 January 2015 the Generalstaatsanwaltschaft Bremen (Office of the Public Prosecutor of Bremen), referring to detention conditions in a number of Hungarian prisons that did not satisfy minimum European standards, asked the Miskolci járásbíróság (District Court of Miskolc) to state in which prison Mr Aranyosi would be held in the event that he was surrendered.

35 By letter of 20 February 2015, received by fax on 15 April 2015 via the Hungarian Minister of Justice, the Public Prosecutor of the district of Miskolc stated that, in this case, it was not inevitable that there would be an enforcement measure of preventive detention in criminal proceedings and that a custodial sentence would be requested.

36 The Public Prosecutor stated that, under Hungarian criminal law, there are a number of enforcement measures that are less onerous than detention and that a number of penalties other than a custodial sentence come into consideration. What form of enforcement measure would be requested prior to the decision to indict and what

penalty would be requested in that decision are exclusively within the discretion of the Public Prosecutor, who is independent.

37 Further, the Public Prosecutor of the district of Miskolc said that the determination of the offence and the choice of penalties to be imposed fall within the competence of the Hungarian judicial authorities. In that regard, Hungarian legislation provides, in criminal proceedings, equivalent safeguards based on European values.

38 On 21 April 2015 the Public Prosecutor of Bremen requested that the surrender of Mr Aranyosi to the issuing judicial authority for the purposes of criminal prosecution should be declared to be lawful. He stated, inter alia, that, while the Public Prosecutor of the district of Miskolc had not stated in which prison Mr Aranyosi would be held in the event of his being surrendered to Hungary, there was however no specific evidence that, if he were surrendered, Mr Aranyosi might be the victim of torture or other cruel, inhuman or degrading treatment.

39 Mr Aranyosi's lawyer claimed that the request of the Public Prosecutor of Bremen should be rejected on the ground that the Public Prosecutor of the district of Miskolc had not stated in which prison Mr Aranyosi would be held. It was therefore impossible to ascertain the conditions of detention.

40 The Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court of Bremen) states that the request submitted by Hungary satisfies the conditions to which requests for surrender are subject under the IRG.

41 In particular, what Mr Aranyosi is accused of constitutes a criminal offence both under Article 370(1) of the Hungarian Criminal Code and Paragraphs 242, 243(1) point 1, and 244(1) point 3, of the German Criminal Code. There is criminality in both Member States concerned and the penalty that can be imposed is a minimum of one year's imprisonment under Hungarian and German law.

42 Nonetheless, in the opinion of the Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court of Bremen), it would be necessary to declare the surrender to be unlawful if there were an impediment to surrender under Paragraph 73 of the IRG. Having regard to the information currently available, the referring court is satisfied that there is probative evidence that, in the event of surrender to the Hungarian judicial authority, Mr Aranyosi might be subject to conditions of detention that are in breach of Article 3 ECHR and the fundamental rights and general principles of law enshrined in Article 6 TEU.

43 The ECtHR has found Hungary to be in violation by reason of the overcrowding in its prisons (ECtHR, *Varga and Others v. Hungary*, Nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, of 10 March 2015). The ECtHR held that it was established that Hungary was in violation of Article 3 ECHR by imprisoning the applicants in cells that were too small and that were overcrowded. The ECtHR treated those proceedings as a pilot case after 450 similar cases against Hungary were brought before it with respect to inhuman conditions of detention.

44 The Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court of Bremen) states that specific evidence that the conditions of detention to which Mr Aranyosi would be subject, if he were surrendered to the Hungarian authorities, do not satisfy the minimum standards required by international law is also to be found in a report issued by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The findings in that report refer in particular to the significant prison overcrowding identified in the course of visits made between 2009 and 2013.

45 On the basis of that information, the referring court considers that it is not in a position to give a ruling on the lawfulness of the surrender of Mr Aranyosi to the Hungarian authorities, having regard to the restrictions imposed in Paragraph 73 of the IRG and Article 1(3) of the Framework Decision. The decision of the referring court will depend essentially on whether or not the impediment to surrender can still be overcome, in accordance with the Framework Decision, by means of assurances given by the issuing Member State. If that impediment cannot be removed by such assurances, the surrender would then be unlawful.

46 In those circumstances, the Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court of Bremen) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is Article 1(3) of the Framework Decision to be interpreted as meaning that a request for surrender for the purposes of prosecution is inadmissible where there are strong indications that detention conditions in

the issuing Member State infringe the fundamental rights of the person concerned and the fundamental legal principles as enshrined in Article 6 TEU, or is it to be interpreted as meaning that, in such circumstances, the executing Member State can or must make the decision on the admissibility of the request for surrender conditional upon assurances that detention conditions are compliant? To that end, can or must the executing Member State lay down specific minimum requirements applicable to the detention conditions in respect of which an assurance is sought?

2. Are Articles 5 and 6(1) of the Framework Decision to be interpreted as meaning that the issuing judicial authority is also entitled to give assurances that detention conditions are compliant, or do assurances in this regard remain subject to the domestic rules of competence in the issuing Member State?'

Case C-659/15 PPU

47 Mr Căldăraru is a Romanian national born on 7 December 1985 in Brașov (Romania).

48 By judgment of the Judecătoria Făgăraş (Court of First Instance of Făgăraş, Romania) of 16 April 2015, Mr Căldăraru was convicted and sentenced to an overall period of imprisonment of one year and eight months, for the offence of driving without a driving licence.

49 According to the grounds of that judgment, as set out by the referring court in its request for a preliminary ruling, that sentence included a period of imprisonment of one year, for the offence of driving without a driving licence, execution of which was suspended on 17 December 2013 by the Judecătoria Făgăraş (Court of First Instance of Făgăraş).

50 That conviction and sentence became final following a judgment of the Curtea de Apel Brașov (Court of Appeal of Brașov) of 15 October 2015.

51 On 29 October 2015 the Judecătoria Făgăraş (Court of First Instance of Fagaras) issued a European arrest warrant in respect of Mr Căldăraru and entered in the Schengen Information System an alert concerning him.

52 Mr Căldăraru was arrested in Bremen on 8 November 2015.

53 On the same date the Amtsgericht Bremen (District Court of Bremen) issued an arrest warrant with respect to Mr Căldăraru. At his hearing before that court, Mr Căldăraru stated that he would not consent to the simplified surrender procedure.

54 On 9 November 2015 the Public Prosecutor of Bremen applied to the court for Mr Căldăraru to be detained pending extradition.

55 By decision of 11 November 2015 the Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court of Bremen) granted that application. That court held that the fact of Mr Căldăraru being detained pending extradition did not appear to be 'prima face unlawful' under Paragraph 15(2) of the IRG, and found that there was a risk that Mr Căldăraru would not cooperate with the procedure of surrender to the Romanian authorities, and that his being detained pending extradition, in accordance with Paragraph 15(1) of the IRG, was therefore justified.

56 On 20 November 2015 the Public Prosecutor of Bremen applied to the court for Mr Căldăraru's surrender to the Romanian authorities to be declared to be lawful. In addition, that authority stated that the Judecătoria Făgăraş (Court of First Instance of Fagaras) was unable to provide information as to the prison in which Mr Căldăraru would be held in Romania.

57 The Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court of Bremen) states that the application presented by Romania complies with the conditions in the IRG governing requests for surrender.

58 In particular, what Mr Căldăraru was convicted of constitutes a criminal offence under both Article 86 of the Romanian Law No 195 of 2002 and Paragraph 21 of the German Road Traffic law (Straßenverkehrsgesetz). There

is criminality in both Member States concerned, the attached penalty being not less than four months imprisonment.

59 Nonetheless, in the opinion of the Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court of Bremen), it would be necessary to declare the surrender to be unlawful if there were an impediment to surrender under Paragraph 73 of the IRG. Having regard to the information currently available, the referring court states that there is probative evidence that, in the event of surrender to the Romanian judicial authority, Mr Căldăraru might be subject to conditions of detention that are in breach of Article 3 ECHR and the fundamental rights and general principles of law enshrined in Article 6 TEU.

60 In a number of judgments issued on 10 June 2014, the ECtHR found Romania to be in violation by reason of the overcrowding in its prisons (ECtHR, *Voicu v. Romania*, No 22015/10; *Bujorean v. Romania*, No 13054/12; *Mihai Laurenţiu Marin v. Romania*, No 79857/12, and *Constantin Aurelian Burlacu v. Romania*, No 51318/12). The ECtHR held it to be established that Romania was in violation of Article 3 ECHR by imprisoning the applicants in cells that were too small and overcrowded, that lacked adequate heating, that were dirty and lacking in hot water for showers.

61 The Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court of Bremen) states that specific evidence that the conditions of detention to which Mr Căldăraru would be subject, if he were to be surrendered to the Romanian authorities, do not satisfy the minimum standards required by international law is also to be found in a report issued by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The findings in that report refer in particular to the significant prison overcrowding identified in visits made between 5 and 17 June 2014.

62 On the basis of that information, the referring court considers that it is not in a position to give a ruling on the lawfulness of the surrender of Mr Căldăraru to the Romanian authorities, having regard to the restrictions imposed in Paragraph 73 of the IRG and Article 1(3) of the Framework Decision. The decision of the referring court will depend essentially on whether or not the impediment to surrender can still be overcome, in accordance with the Framework Decision, by means of assurances given by the issuing Member State. If that impediment cannot be removed by such assurances, the surrender would then be unlawful.

63 In those circumstances, the Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court of Bremen) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Is Article 1(3) of the Framework Decision to be interpreted as meaning that surrender for the purposes of execution of a criminal sentence is impermissible where there are strong indications that detention conditions in the issuing Member State infringe the fundamental rights of the person concerned and the fundamental legal principles as enshrined in Article 6 TEU, or is it to be interpreted as meaning that, in such circumstances, the executing Member State can or must make the decision on the permissibility of surrender conditional upon assurances that detention conditions are compliant? To that end, can or must the executing Member State lay down specific minimum requirements applicable to the detention conditions in respect of which an assurance is sought?

2. Are Articles 5 and 6(1) of the Framework Decision to be interpreted as meaning that the issuing judicial authorities are also entitled to give assurances that detention conditions are compliant, or do assurances in this regard remain subject to the domestic rules of competence in the issuing Member State?’

Procedure before the Court

Case C-404/15

64 The referring court requested that this request for a preliminary ruling be dealt with under the urgent procedure provided for in Article 107 of the Court’s Rules of Procedure.

65 In support of its request, the referring court stated that Mr Aranyosi had been temporarily arrested on the basis of a European arrest warrant issued by the Hungarian authorities, but that he was not currently in custody, since

the Public Prosecutor in Bremen had ordered that he be released, on the ground that there was at that time no risk that the accused would abscond, given his social ties.

66 On 31 July 2015 the Fourth Chamber of the Court, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decided not to grant the request of the referring court that Case C-404/15 be dealt with under the urgent preliminary ruling procedure.

67 By decision of 4 August 2015, the President of the Court ordered that Case C-404/15 should be given priority over others.

Case C-659/15 PPU

68 The referring court requested that this request for a preliminary ruling be dealt with under the urgent procedure provided for in Article 107 of the Court's Rules of Procedure.

69 In support of its request, the referring court stated that Mr Căldăraru had been temporarily arrested on the basis of a European arrest warrant issued by the Romanian authorities and that he was currently held in custody on the basis of that arrest warrant for the purposes of his surrender to those authorities. The referring court added that whether Mr Căldăraru's detention was well founded depended on the answer of the Court to the questions referred by it for a preliminary ruling.

70 In that respect, it must be observed that the reference for a preliminary ruling in Case C-659/15 PPU concerns the interpretation of the Framework Decision, which is within the field covered by Part Three, Title V, of the FEU Treaty, relating to the area of freedom, security and justice. It may therefore be dealt with under the urgent preliminary ruling procedure. Further, Mr Căldăraru is currently held in custody and whether his detention should continue depends on the answer of the Court to the questions referred to it by the national court.

71 In those circumstances, on 16 December 2015 the Third Chamber of the Court decided, on the Judge-Rapporteur's proposal and after hearing the Advocate General, to grant the referring court's request that the reference for a preliminary ruling in Case C-659/15 PPU be dealt with under the urgent procedure.

72 It was also decided that Case C-659/15 PPU, and, because of the connection between the cases, Case C-404/15, should be referred to the Court for assignment to the Grand Chamber.

73 Given that connection, confirmed at the hearing of oral argument, the two cases C-404/15 and C-659/15 PPU are to be joined for the purposes of judgment.

Consideration of the questions referred for a preliminary ruling

74 By its questions, which can be examined together, the referring court seeks, in essence, to ascertain whether Article 1(3) of the Framework Decision must be interpreted as meaning that, where there is solid evidence that detention conditions in the issuing Member State are incompatible with fundamental rights, in particular with Article 4 of the Charter, the executing judicial authority may or must refuse to execute a European arrest warrant issued in respect of a person for the purposes of conducting a criminal prosecution or executing a custodial sentence, or whether it may or must make the surrender of that person conditional on there being obtained from the issuing Member State information enabling it to be satisfied that those detention conditions are compatible with fundamental rights. Further, the referring court seeks to ascertain whether Articles 5 and 6(1) of the Framework Decision must be interpreted as meaning that such information may be supplied by the judicial authority of the issuing Member State or whether the supply of that information is governed by the domestic rules of competence in that Member State.

75 It should be recalled, as a preliminary point, that the purpose of the Framework Decision, as is apparent in particular from Article 1(1) and (2) thereof and recitals 5 and 7 in the preamble thereto, is to replace the multilateral system of extradition based on the European Convention on Extradition of 13 December 1957 with a system of surrender between judicial authorities of convicted or suspected persons for the purpose of enforcing judgments or of conducting prosecutions, that system of surrender being based on the principle of mutual recognition (see judgments in *West*, C-192/12 PPU, EU:C:2012:404, paragraph 54; *Melloni*, C-399/11,

EU:C:2013:107, paragraph 36; *F.*, C-168/13 PPU, EU:C:2013:358, paragraph 34; and *Lanigan*, C-237/15 PPU, EU:C:2015:474, paragraph 27).

76 The Framework Decision thus seeks, by the establishment of a new simplified and more effective system for the surrender of persons convicted or suspected of having infringed criminal law, 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 (see judgments in *Melloni*, C-399/11, EU:C:2013:107, paragraph 37; *F.*, C-168/13 PPU, EU:C:2013:358, paragraph 35; and *Lanigan*, C-237/15 PPU, EU:C:2015:474, paragraph 28).

77 The principle of mutual recognition on which the European arrest warrant system is based is itself founded on the mutual confidence between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at EU level, particularly in the Charter (see, to that effect, judgment in *F.*, C-168/13 PPU, EU:C:2013:358, paragraph 50, and, by analogy, with respect to judicial cooperation in civil matters, the judgment in *Aguirre Zarraga*, C-491/10 PPU, EU:C:2010:828, paragraph 70).

78 Both the principle of mutual trust between the Member States and the principle of mutual recognition are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (see, to that effect, Opinion 2/13, EU:C:2014:2454, paragraph 191).

79 In the area governed by the Framework Decision, the principle of mutual recognition, which constitutes, as is stated notably in recital (6) of that Framework Decision, the 'cornerstone' of judicial cooperation in criminal matters, is given effect in Article 1(2) of the Framework Decision, pursuant to which Member States are in principle obliged to give effect to a European arrest warrant (see, to that effect, judgment in *Lanigan*, C-237/15 PPU, EU:C:2015:474, paragraph 36 and the case-law cited).

80 It follows that the executing judicial authority may refuse to execute such a warrant only in the cases, exhaustively listed, of obligatory non-execution, laid down in Article 3 of the Framework Decision, or of optional non-execution, laid down in Articles 4 and 4a of the Framework Decision. Moreover, the execution of the European arrest warrant may be made subject only to one of the conditions exhaustively laid down in Article 5 of that Framework Decision (see, to that effect, judgment in *Lanigan*, C-237/15 PPU, EU:C:2015:474, paragraph 36 and the case-law cited).

81 It must, in that context, be noted that recital 10 of the Framework Decision states that the implementation of the mechanism of the European arrest warrant as such may be suspended only in the event of serious and persistent breach by one of the Member States of the principles referred to in Article 2 TEU, and in accordance with the procedure provided for in Article 7 TEU.

82 However, first, the Court has recognised that limitations of the principles of mutual recognition and mutual trust between Member States can be made 'in exceptional circumstances' (see, to that effect, Opinion 2/13, EU:C:2014:2454, paragraph 191).

83 Second, as is stated in Article 1(3) thereof, the Framework Decision is not to have the effect of modifying the obligation to respect fundamental rights as enshrined in, inter alia, the Charter.

84 In that regard, it must be stated that compliance with Article 4 of the Charter, concerning the prohibition of inhuman or degrading treatment or punishment, is binding, as is stated in Article 51(1) of the Charter, on the Member States and, consequently, on their courts, where they are implementing EU law, which is the case when the issuing judicial authority and the executing judicial authority are applying the provisions of national law adopted to transpose the Framework Decision (see, by analogy, judgments in *Dereci and Others*, C-256/11, EU:C:2011:734, paragraph 72, and *Peftiev and Others*, C-314/13, EU:C:2014:1645, paragraph 24).

85 As regards the prohibition of inhuman or degrading treatment or punishment, laid down in Article 4 of the Charter, that prohibition is absolute in that it is closely linked to respect for human dignity, the subject of Article 1 of the Charter (see, to that effect, judgment in *Schmidberger*, C-112/00, EU:C:2003:333, paragraph 80).

86 That the right guaranteed by Article 4 of the Charter is absolute is confirmed by Article 3 ECHR, to which Article 4 of the Charter corresponds. As is stated in Article 15(2) ECHR, no derogation is possible from Article 3 ECHR.

87 Articles 1 and 4 of the Charter and Article 3 ECHR enshrine one of the fundamental values of the Union and its Member States. That is why, in any circumstances, including those of the fight against terrorism and organised crime, the ECHR prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned (see judgment of the ECtHR in *Bouyid v. Belgium*, No 23380/09 of 28 September 2015, § 81 and the case-law cited).

88 It follows that, where the judicial authority of the executing Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State, having regard to the standard of protection of fundamental rights guaranteed by EU law and, in particular, by Article 4 of the Charter (see, to that effect, judgment in *Melloni*, C-399/11, EU:C:2013:107, paragraphs 59 and 63, and Opinion 2/13, EU:C:2014:2454, paragraph 192), that judicial authority is bound to assess the existence of that risk when it is called upon to decide on the surrender to the authorities of the issuing Member State of the individual sought by a European arrest warrant. The consequence of the execution of such a warrant must not be that that individual suffers inhuman or degrading treatment.

89 To that end, the executing judicial authority must, initially, rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention. That information may be obtained from, inter alia, judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN.

90 In that regard, it follows from the case-law of the ECtHR that Article 3 ECHR imposes, on the authorities of the State on whose territory an individual is detained, a positive obligation to ensure that any prisoner is detained in conditions which guarantee respect for human dignity, that the way in which detention is enforced does not cause the individual concerned distress or hardship of an intensity exceeding the unavoidable level of suffering that is inherent in detention and that, having regard to the practical requirements of imprisonment, the health and well-being of the prisoner are adequately protected (see judgment of the ECtHR in *Torreggiani and Others v. Italy*, Nos 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10, and 37818/10, of 8 January 2013, § 65).

91 Nonetheless, a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of detention in the issuing Member State cannot lead, in itself, to the refusal to execute a European arrest warrant.

92 Whenever the existence of such a risk is identified, it is then necessary that the executing judicial authority make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State.

93 The mere existence of evidence that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, with respect to detention conditions in the issuing Member State does not necessarily imply that, in a specific case, the individual concerned will be subject to inhuman or degrading treatment in the event that he is surrendered to the authorities of that Member State.

94 Consequently, in order to ensure respect for Article 4 of the Charter in the individual circumstances of the person who is the subject of the European arrest warrant, the executing judicial authority, when faced with evidence of the existence of such deficiencies that is objective, reliable, specific and properly updated, is bound to determine whether, in the particular circumstances of the case, there are substantial grounds to believe that, following the surrender of that person to the issuing Member State, he will run a real risk of being subject in that Member State to inhuman or degrading treatment, within the meaning of Article 4.

95 To that end, that authority must, pursuant to Article 15(2) of the Framework Decision, request of the judicial authority of the issuing Member State that there be provided as a matter of urgency all necessary supplementary

information on the conditions in which it is envisaged that the individual concerned will be detained in that Member State.

96 That request may also relate to the existence, in the issuing Member State, of any national or international procedures and mechanisms for monitoring detention conditions, linked, for example, to visits to prisons, which make it possible to assess the current state of detention conditions in those prisons.

97 In accordance with Article 15(2) of the Framework Decision, the executing judicial authority may fix a time limit for the receipt of the supplementary information requested from the issuing judicial authority. That time limit must be adjusted to the particular case, so as to allow to that authority the time required to collect the information, if necessary by seeking assistance to that end from the central authority or one of the central authorities of the issuing Member State, under Article 7 of the Framework Decision. Under Article 15(2) of the Framework Decision, that time limit must however take into account the need to observe the time limits set in Article 17 of that Framework Decision. The issuing judicial authority is obliged to provide that information to the executing judicial authority.

98 If, in the light of the information provided pursuant to Article 15(2) of the Framework Decision, and of any other information that may be available to the executing judicial authority, that authority finds that there exists, for the individual who is the subject of the European arrest warrant, a real risk of inhuman or degrading treatment, as referred to in paragraph 94 of this judgment, the execution of that warrant must be postponed but it cannot be abandoned (see, by analogy, judgment in *Lanigan*, C-237/15 PPU, EU:C:2015:474, paragraph 38).

99 Where the executing authority decides on such a postponement, the executing Member State is to inform Eurojust, in accordance with Article 17(7) of the Framework Decision, giving the reasons for the delay. In addition, pursuant to that provision, a Member State which has experienced repeated delays on the part of another Member State in the execution of European arrest warrants for the reasons referred to in the preceding paragraph, is to inform the Council with a view to an evaluation, at Member State level, of the implementation of the Framework Decision.

100 Further, in accordance with Article 6 of the Charter, the executing judicial authority may decide to hold the person concerned in custody only in so far as the procedure for the execution of the European arrest warrant has been carried out in a sufficiently diligent manner and in so far as, consequently, the duration of the detention is not excessive (see, to that effect, judgment in *Lanigan*, C-237/15 PPU, EU:C:2015:474, paragraphs 58 to 60). The executing judicial authority must give due regard, with respect to individuals who are the subject of a European arrest warrant for the purposes of prosecution, to the principle of the presumption of innocence guaranteed by Article 48 of the Charter.

101 In that regard, the executing judicial authority must respect the requirement of proportionality, laid down in Article 52(1) of the Charter, with respect to the limitation of any right or freedom recognised by the Charter. The issue of a European arrest warrant cannot justify the individual concerned remaining in custody without any limit in time.

102 In any event, if the executing judicial authority concludes, following the review referred to in paragraphs 100 and 101 of this judgment, that it is required to bring the requested person's detention to an end, it is then required, pursuant to Articles 12 and 17(5) of the Framework Decision, to attach to the provisional release of that person any measures it deems necessary so as to prevent him from absconding and to ensure that the material conditions necessary for his effective surrender remain fulfilled for as long as no final decision on the execution of the European arrest warrant has been taken (see judgment in *Lanigan*, C-237/15 PPU, EU:C:2015:474, paragraph 61).

103 In the event that the information received by the executing judicial authority from the issuing judicial authority is such as to permit it to discount the existence of a real risk that the individual concerned will be subject to inhuman and degrading treatment in the issuing Member State, the executing judicial authority must adopt, within the time limits prescribed by the Framework Decision, its decision on the execution of the European arrest warrant, without prejudice to the opportunity of the individual concerned, after surrender, to have recourse, within the legal system of the issuing Member State, to legal remedies that may enable him to challenge, where appropriate, the lawfulness of the conditions of his detention in a prison of that Member State (see, to that effect, judgment in *F.*, C-168/13 PPU, EU:C:2013:358, paragraph 50).

104 It follows from all the foregoing that the answer to the questions referred is that Article 1(3), Article 5 and Article 6(1) of the Framework Decision must be interpreted as meaning that where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of his surrender to that Member State. To that end, the executing judicial authority must request that supplementary information be provided by the issuing judicial authority, which, after seeking, if necessary, the assistance of the central authority or one of the central authorities of the issuing Member State, under Article 7 of the Framework Decision, must send that information within the time limit specified in the request. The executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end.

Costs

105 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 1(3), Article 5 and Article 6(1) 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, must be interpreted as meaning that, where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of his surrender to that Member State. To that end, the executing judicial authority must request that supplementary information be provided by the issuing judicial authority, which, after seeking, if necessary, the assistance of the central authority or one of the central authorities of the issuing Member State, under Article 7 of the Framework Decision, must send that information within the time limit specified in the request. The executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end.

[Signatures]

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* Language of the case: German.

JUDGMENT OF THE COURT (Fifth Chamber)

29 June 2017 (*)

(Reference for a preliminary ruling — Police and judicial cooperation in criminal matters — Framework Decision 2002/584/JHA — European arrest warrant and surrender procedures between Member States — Grounds for optional non-execution — Article 4(6) — Member State's undertaking to enforce the sentence in accordance with its domestic law — Implementation — Obligation of conforming interpretation)

In Case C-579/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the rechtbank Amsterdam (District Court, Amsterdam, Netherlands), made by decision of 30 October 2015, received at the Court on 6 November 2015, in the proceedings relating to the execution of the European arrest warrant issued against

Daniel Adam Popławski,

intervener

Openbaar Ministerie,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, A. Tizzano, Vice-President of the Court, acting as Judge of the Fifth Chamber, M. Berger (Rapporteur), A. Borg Barthet and F. Biltgen, Judges,

Advocate General: Y. Bot,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 28 September 2016,

after considering the observations submitted on behalf of:

– Mr Popławski, by P.J. Verbeek, advocaat,

– the Openbaar Ministerie, by K. van der Schaft and J. Asbroek,

– the Netherlands Government, by M.K. Bulterman, B. Koopman and J. Langer, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by R. Troosters and S. Grünheid, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 February 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of 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 (OJ 2002 L 190, p. 1).

2 The request has been made in connection with the execution in the Netherlands of a European arrest warrant ('EAW') issued by the Sąd Rejonowy w Poznaniu (District Court, Poznań, Poland) against Mr Daniel Adam Popławski with a view to enforcing a custodial sentence in Poland.

Legal context

EU law

Framework Decision 2002/584

3 Recitals 6 and 11 of Framework Decision 2002/584 are worded as follows:

'(6) The [EAW] 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.

...

(11) In relations between Member States, the [EAW] should replace all the previous instruments concerning extradition, including the provisions of Title III of the Convention implementing the Schengen Agreement [of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed in Schengen (Luxembourg) on 19 June 1990 and entered into force on 26 March 1995 (OJ 2000 L 239, p. 19] which concern extradition.'

4 Article 1(2) of that framework decision provides:

'Member States shall execute any [EAW] on the basis of the principle of mutual recognition and in accordance with the provisions of this framework decision.'

5 Article 4 of that framework decision, entitled 'Grounds for optional non-execution of the [EAW]', provides:

'The executing judicial authority may refuse to execute the [EAW]:

...

(6) if the [EAW] 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.

...'

Framework Decision 2008/909/JHA

6 Article 28 of Council Framework Decision 2008/909/JHA 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), entitled 'Transitional provision', is worded as follows:

'1. Requests received before 5 December 2011 shall continue to be governed in accordance with the existing legal instruments on the transfer of sentenced persons. Requests received after that date shall be governed by the rules adopted by Member States pursuant to this framework decision.

2. However, any Member State may, on the adoption of this framework decision, make a declaration indicating that, in cases where the final judgment has been issued before the date it specifies, it will as an issuing and an executing State, continue to apply the existing legal instruments on the transfer of sentenced persons applicable before 5 December 2011. If such a declaration is made, those instruments shall apply in such cases in relation to all other Member States irrespective of whether or not they have made the same declaration. The date in question may not be later than 5 December 2011. The said declaration shall be published in the *Official Journal of the European Union*. It may be withdrawn at any time.'

Netherlands law

7 Article 6 of the Overleveringswet (Law on surrender) of 29 April 2004 (Stb. 2004, No 195) transposing into Netherlands law Framework Decision 2002/584, in the version applicable prior to the entry into force of the Netherlands provisions implementing Framework Decision 2008/909 ('the OLW') provided:

'1. The surrender of a Netherlands national may be permitted provided that the surrender is requested for the purposes of a criminal investigation against that national and that, in the view of the executing judicial authority, it is guaranteed that, if he is sentenced to an unconditional custodial sentence in the issuing Member State on the basis of acts for which surrender may be permitted, he may serve that sentence in the Netherlands.

2. The surrender of a Netherlands national shall not be permitted if that surrender is sought for the purposes of execution of a custodial sentence imposed on him by a final judicial decision.

3. Where surrender is refused solely on the basis of Article 6(2) …, the public prosecutor shall notify the issuing judicial authority that it is willing to execute the judgment in accordance with the procedure laid down in Article 11 of the Convention on the Transfer of Sentenced Persons [signed in Strasbourg on 21 March 1983] or on the basis of another applicable convention.

4. The Public Prosecutor shall immediately notify our Minister of … any refusal to surrender under the terms of the declaration, referred to in paragraph 3, that the Netherlands is willing to execute the foreign judgment.

5. Paragraphs 1 to 4 shall also apply to a foreign national in possession of a residence permit of indefinite duration, in so far as he may be prosecuted in the Netherlands for the offences on which the EAW is based and in so far as he can be expected not to forfeit his right of residence in the Netherlands as a result of any sentence or measure which may be imposed on him after surrender.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

8 By judgment of 5 February 2007, which became final on 13 July 2007, the Sąd Rejonowy w Poznaniu (District Court, Poznań) gave Mr Popławski, a Polish national, a one-year suspended prison sentence. By decision of 15 April 2010, that court ordered the enforcement of that custodial sentence.

9 On 7 October 2013, that court issued an EAW against Mr Popławski with a view to enforcement of that sentence.

10 In the main proceedings relating to the execution of that EAW, the rechtbank Amsterdam (District Court, Amsterdam, the Netherlands) asks whether it must apply Article 6(2) and (5) of the OLW which provides an optional ground for non-execution of an EAW in favour of, inter alia, persons residing in the Netherlands, as is the case with Mr Popławski.

11 The referring court observes that, under Article 6(3) of the OLW, where the Netherlands refuses to execute an EAW, it must state that it is 'willing' to take over the execution of the sentence on the basis of a convention in force between it and the issuing Member State. It states that taking over that execution in the main proceedings requires Poland to make a request to that end. However, Polish legislation precludes such a request in a situation where the person concerned is a Polish national.

12 The referring court makes it clear that, in such a situation, a refusal to surrender could lead to the impunity of the person to whom the EAW applies. After pronouncement of the judgment refusing the surrender, it may prove impossible to take over execution of the sentence, in particular because there has been no request to that end

from the issuing Member State, and that fact would have no bearing on the judgment refusing to surrender the requested person.

13 In those circumstances, given its doubts as to whether Article 6(2) to (4) of the OLW is compatible with Article 4(6) of Framework Decision 2002/584 which permits a refusal to surrender only if the executing Member State 'undertakes' to execute the sentence in accordance with its domestic law, the rechtbank Amsterdam (District Court, Amsterdam) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) May a Member State transpose Article 4(6) of Framework Decision 2002/584 in its national law in such a way that:

– its executing judicial authority is, without more, obliged to refuse surrender, for purposes of executing a sentence, of a national or resident of the executing Member State,

– by operation of law, that refusal gives rise to the willingness to take over the execution of the custodial sentence imposed on the national or resident,

– but the decision to take over execution of the sentence is taken only after refusal of surrender for purposes of executing the sentence, and a positive decision is dependent on (1) a basis for the decision in a treaty or convention which is in force between the issuing Member State and the executing Member State, (2) the conditions set by that treaty or convention, and (3) the cooperation of the issuing Member State by, for example, making a request to that effect,

with the result that there is a risk that, following refusal of surrender for purposes of executing the sentence, the executing Member State cannot take over execution of that sentence, while that risk does not affect the obligation to refuse surrender for purposes of executing the sentence?

(2) If Question 1 is answered in the negative:

(a) can the national courts apply the provisions of Framework Decision 2002/584 directly even though, under Article 9 of Protocol (No 36) on transitional provisions [(OJ 2012 C 326, p. 322)], the legal effects of that framework decision are preserved after the entry into force of the Treaty of Lisbon until that framework decision is repealed, annulled or amended?

(b) if so, is Article 4(6) of Framework Decision 2002/584 sufficiently precise and unconditional to be applied by the national courts?

(3) If the answers to Questions 1 and 2(b) are in the negative, may a Member State, whose national law requires that the taking-over of the execution of the foreign custodial sentence must be based on an appropriate treaty or convention, transpose Article 4(6) of that framework decision in its national law in such a way that that provision itself provides the required conventional basis, in order to avoid the risk of impunity associated with the national requirement of a conventional basis?

(4) If the answers to Questions 1 and 2(b) are in the negative, may a Member State transpose Article 4(6) of that framework decision in its national law in such a way that, for refusal of surrender for purposes of executing a sentence in respect of a resident of the executing Member State who is a national of another Member State, it sets the condition that the executing Member State must have jurisdiction in respect of the offences cited in the EAW and that there must be no actual obstacles in the way of a criminal prosecution in the executing Member State of that resident in respect of those offences, such as the refusal by the issuing Member State to hand over the case-file to the executing Member State, whereas it does not set such a condition for refusal of surrender for purposes of executing a sentence in respect of a national of the executing Member State?'

Consideration of the questions referred

Preliminary remark

14 The questions referred for a preliminary ruling concern the compatibility with Framework Decision 2002/584 of national legislation which is no longer in force as a result of being repealed and replaced by national measures aimed at implementing Framework Decision 2008/909.

15 The referring court considers that that national legislation is still applicable in the main proceedings, in particular given the fact that the Kingdom of the Netherlands, on the basis of Article 28 of Framework Decision 2008/909, made a declaration indicating, in essence, that it will continue to apply to judgments which became final before 5 December 2011, such as the one made against Mr Popławski, legal instruments, prior to that framework decision, concerning the transfer of sentenced persons. However, the European Commission contests the validity of that declaration and a similar declaration made by the Republic of Poland, and submits that the situation at issue in the main proceedings, contrary to what the referring court believes, is governed by the national provisions implementing Framework Decision 2008/909.

16 In that regard, the Court has already held that it must in principle confine its examination to the matters which the referring court has decided to submit to it in its request for a preliminary ruling. Thus, as regards the application of the relevant national legislation, the Court must proceed on the basis of the situation which the referring court considers to be established (judgment of 8 June 2016, *Hünnebeck*, C-479/14, EU:C:2016:412, paragraph 36 and the case-law cited). It is clear from the settled case-law of the Court that questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance (judgment of 8 December 2016, *Eurosaneamientos and Others*, C-532/15 and C-538/15, EU:C:2016:932, paragraph 28 and the case-law cited).

17 In those circumstances, it is necessary to reply to the questions referred by the national court on the basis of the legislative and factual framework defined by that court.

The first question

18 By its first question, the referring court asks, in essence, whether Article 4(6) of Framework Decision 2002/584 must be interpreted to the effect that it precludes legislation of a Member State implementing that provision which, in a situation where the surrender of a foreign national in possession of a residence permit of indefinite duration in the territory of that Member State is sought by another Member State in order to execute a custodial sentence imposed on that national by a decision which has become final, first, does not authorise such a surrender, and secondly, merely lays down the obligation for the judicial authorities of the first Member State to inform the judicial authorities of the second Member State that they are willing to take over the enforcement of the judgment, where, on the date of the refusal to surrender, the execution has not in fact been taken over and where, furthermore, in the event that taking over that execution subsequently proves to be impossible, such a refusal may not be challenged.

19 In that regard, it is apparent, first of all, from Article 1(2) of framework decision 2002/584 that that decision lays down the principle that Member States must execute any EAW on the basis of the principle of mutual recognition and in accordance with the provisions of that framework decision. Save in exceptional circumstances, the executing judicial authorities, as the Court has already held, may refuse to execute such a warrant only in the cases of non-execution, exhaustively listed and laid down by the framework decision, and the execution of the EAW may be made subject only to one of the conditions exhaustively laid down by that framework decision (see, to that effect, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 80 and 82 and the case-law cited). Accordingly, while the execution of the EAW constitutes the rule, the refusal to execute is intended to be an exception which must be interpreted strictly.

20 Next, it must be recalled that Article 4(6) of Framework Decision 2002/584 sets out a ground for optional non-execution of the EAW under which the executing judicial authority 'may' refuse to execute an EAW for the purposes of enforcing a custodial sentence where, in particular, the requested person is a resident of the executing Member State, as is the case in the main proceedings, and that State 'undertakes' to enforce that sentence in accordance with its domestic law.

21 It is clear from the actual wording of Article 4(6) of Framework Decision 2002/584, as the Advocate General stated in point 30 of his Opinion, that, where a Member State chose to transpose that provision into domestic law, the executing judicial authority must, nevertheless, have a margin of discretion as to whether or not it is appropriate

to refuse to execute the EAW. In that regard, that authority must take into consideration the objective of the ground for optional non-execution set out in that provision, which, according to the Court's settled case-law, means enabling the executing judicial authority to give particular weight to the possibility of increasing the requested person's chances of reintegrating into society when the sentence imposed on him expires (see, to that effect, judgment of 5 September 2012, *Lopes Da Silva Jorge*, C-42/11, EU:C:2012:517, paragraph 32 and the case-law cited).

22 It also follows from the wording of Article 4(6) of Framework Decision 2002/584, as the Advocate General stated in point 45 of his Opinion, that any refusal to execute an EAW presupposes an actual undertaking on the part of the executing Member State to execute the custodial sentence imposed on the requested person, even though, in any event, the mere fact that that Member State declares itself 'willing' to execute the sentence could not be regarded as justifying such a refusal. This indicates that any refusal to execute an EAW must be preceded by the executing judicial authority's examination of whether it is actually possible to execute the sentence in accordance with its domestic law. In the event that the executing Member State finds that it is in fact impossible to undertake to execute the sentence, it falls to the executing judicial authority to execute the EAW and, therefore, to surrender the requested person to the issuing Member State.

23 Accordingly, legislation of a Member State which implements Article 4(6) of Framework Decision 2002/584 by providing that its judicial authorities are, in any event, obliged to refuse to execute an EAW in the event that the requested person resides in that Member State, without those authorities having any margin of discretion, and without that Member State actually undertaking to execute the custodial sentence pronounced against that requested person, thereby creating a risk of impunity of that requested person, cannot be regarded as compatible with that framework decision.

24 Therefore the answer to the first question is that Article 4(6) of Framework Decision 2002/584 must be interpreted to the effect that it precludes legislation of a Member State implementing that provision which, in a situation where the surrender of a foreign national in possession of a residence permit of indefinite duration in the territory of that Member State is sought by another Member State in order to execute a custodial sentence imposed on that national by a decision which has become final, first, does not authorise such a surrender, and secondly, merely lays down the obligation for the judicial authorities of the first Member State to inform the judicial authorities of the second Member State that they are willing to take over the enforcement of the judgment, where, on the date of the refusal to surrender, the execution has not in fact been taken over and where, furthermore, in the event that taking over that execution subsequently proves to be impossible, such a refusal may not be challenged.

Concerning the second and third questions

25 By its second and third questions, which must be examined together, the referring court asks, in essence, whether the provisions of Framework Decision 2002/584 have direct effect, and if not, whether Netherlands law may be interpreted in a manner consistent with EU law, so that, where a Member State makes the act of taking over execution of the custodial sentence conditional upon there being a legal basis in an international convention, Article 4(6) of that framework decision itself constitutes the formal basis required under domestic law.

26 In that regard, it must be pointed out that Framework Decision 2002/584 does not have direct effect. That is because that framework decision was adopted on the basis of the former third pillar of the European Union, in particular, under Article 34(2)(b) EU (in the version prior to the Lisbon Treaty). That provision stated that framework decisions are not to entail direct effect (see, by analogy, judgment of 8 November 2016, *Ognyanov*, C-554/14, EU:C:2016:835, paragraph 56).

27 It must be added that, under Article 9 of the Protocol (No 36) on transitional provisions, the legal effects of the acts of the institutions, bodies, offices and agencies of the European Union adopted on the basis of the EU Treaty before the entry into force of the Treaty of Lisbon are to be preserved only until those acts are repealed, annulled or amended in implementation of the Treaties. As the Advocate General stated in point 67 of his Opinion, Framework Decision 2002/584 was not repealed, annulled or amended after the Treaty of Lisbon entered into force.

28 Although the provisions of Framework Decision 2002/584 may not, therefore, entail direct effect, in accordance with Article 34(2)(b) EU, that framework decision is still binding on the Member States as to the result to be

achieved, but leaves to the national authorities the choice of form and methods (see, by analogy, judgment of 8 November 2016, *Ognyanov*, C-554/14, EU:C:2016:835, paragraph 56).

29 In the present case, as is apparent from paragraphs 19 to 24 above, where the conditions laid down in Article 4(6) of Framework Decision 2002/584 have not been satisfied, Article 1(2) of that framework decision requires Member States to execute any EAW on the basis of the principle of mutual recognition.

30 In that context, it must be recalled that, in accordance with the Court's settled case-law, Member States must take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under a framework decision (see, to that effect, by analogy, judgment of 16 June 2005, *Pupino*, C-105/03, EU:C:2005:386, paragraph 42).

31 In particular, it is clear from the Court's settled case-law, that the binding character of a framework decision places on national authorities, including national courts, an obligation to interpret national law in conformity with EU law. When those courts apply domestic law, they are therefore bound to interpret it, so far as possible, in the light of the wording and the purpose of the framework decision concerned in order to achieve the result sought by it. This obligation to interpret national law in conformity with EU law is inherent in the system of the FEU Treaty, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of EU law when they rule on the disputes before them (judgment of 8 November 2016, *Ognyanov*, C-554/14, EU:C:2016:835, paragraphs 58 and 59 and the case-law cited).

32 It is true that the principle of interpreting national law in conformity with EU law has certain limitations. Thus, the obligation on the national court to refer to the content of a framework decision when interpreting and applying the relevant rules of its national law is limited by general principles of law, particularly those of legal certainty and non-retroactivity. In particular, those principles preclude that obligation from leading to the criminal liability of individuals being determined or aggravated, on the basis of a framework decision alone, absent any legislation implementing its provisions, where they are in breach of those provisions (judgment of 8 November 2016, *Ognyanov*, C-554/14, EU:C:2016:835, paragraphs 62 to 64 and the case-law cited).

33 Moreover, the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem* (judgment of 28 July 2016, *JZ*, C-294/16 PPU, EU:C:2016:610, paragraph 33 and the case-law cited).

34 However, the fact remains that the principle that national law must be interpreted in conformity with EU law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, with a view to ensuring that the framework decision in question is fully effective and to achieving an outcome consistent with the objective pursued by it (judgment of 5 September 2012, *Lopes Da Silva Jorge*, C-42/11, EU:C:2012:517, paragraph 56 and the case-law cited).

35 In that connection, the Court has already held that the obligation to interpret domestic law in conformity with EU law requires national courts to change established case-law, where necessary, if it is based on an interpretation of domestic law that is incompatible with the objectives of a framework decision (judgment of 8 November 2016, *Ognyanov*, C-554/14, EU:C:2016:835, paragraph 67 and the case-law cited).

36 The Court has also held that, in a situation where a national court claims that it is impossible for it to interpret a provision of domestic law in a manner that is compatible with a framework decision, on the ground that it is bound by the interpretation given to that national provision by the national Supreme Court in an interpretative judgment, it is for that national court to ensure that the framework decision is given full effect, and if necessary to disapply, on its own authority, the interpretation adopted by the national Supreme Court, since that interpretation is not compatible with EU law (see, to that effect, judgment of 8 November 2016, *Ognyanov*, C-554/14, EU:C:2016:835, paragraphs 69 and 70).

37 Having made those preliminary points, it must be made clear that, in the present case, although the national court's obligation to ensure the complete effectiveness of Framework Decision 2002/584 brings with it the obligation for the Netherlands State to execute the EAW in question or, in the event of a refusal, the obligation to ensure that the sentence pronounced in Poland is actually executed, it has no bearing on the determination of Mr Popławski's criminal liability which stems from the judgment pronounced against him on 5 February 2007

by the Sąd Rejonowy w Poznaniu (District Court, Poznań) and, a fortiori, cannot be regarded as aggravating that liability.

38 It should also be noted that the referring court considers that, contrary to what the Openbaar Ministerie (Public Prosecutor, Netherlands) suggested at the hearing, the declaration in which the latter informed the issuing judicial authority that, pursuant to Article 6(3) of the OLW, it is willing to take over the execution of the sentence on the basis of the EAW concerned cannot be interpreted as constituting an actual undertaking on the part of the Netherlands State to execute that sentence, unless Article 4(6) of Framework Decision 2002/584 constitutes a formal legal basis, for the purposes of Article 6(3) of the OLW, for the actual execution of such a sentence in the Netherlands.

39 In that regard, it must be recalled that the Court has consistently held that it does not have jurisdiction to interpret the domestic law of a Member State (judgment of 16 February 2017, *Agro Foreign Trade & Agency*, C-507/15, EU:C:2017:129, paragraph 23 and the case-law cited). It is therefore for the referring court alone to assess whether Netherlands law may be interpreted to the effect that it puts Framework Decision 2002/584 on the same footing as that formal legal basis, for the purposes of Article 6(3) of the OLW.

40 However, the Court, which is called on to provide answers that are of use to the national court in context of a reference for a preliminary ruling, may provide guidance, based on the file in the main proceedings and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment (see, to that effect, judgment of 17 July 2014, *Leone*, C-173/13, EU:C:2014:2090, paragraph 56).

41 With that in mind, it must be stated, first, that, in accordance with recital 11 of Framework Decision 2002/584, in relations between Member States, the EAW must replace all the previous instruments concerning extradition, including the provisions of Title III of the Convention implementing the Schengen Agreement, referred to in paragraph 3 above, relating to extradition. Given that the framework decision has thus replaced all conventions which existed between Member States and that it coexists, whilst having its own legal arrangements defined by EU law, with the extradition conventions in force between the various Member States and third States, it is not inconceivable that that framework decision could be placed on the same footing as such a convention.

42 Secondly, Framework Decision 2002/584 does not contain any provision which leads to the conclusion that it precludes the term 'another applicable convention', in Article 6(3) of the OLW, from being interpreted to the effect that it also covers Article 4(6) of that framework decision, provided that such an interpretation would ensure that the discretionary power of the executing judicial authority to refuse to execute the EAW is exercised only on condition that the sentence pronounced against Mr Popławski is in fact executed in the Netherlands and a solution that is compatible with the purpose of that framework decision is thus achieved.

43 In those circumstances, the answer to the second and third questions is that the provisions of Framework Decision 2002/584 do not have direct effect. However, the competent national court, by taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, is obliged to interpret the provisions of national law at issue in the main proceeding, so far as is possible, in the light of the wording and the purpose of that framework decision, which in the present case means that, in the event of a refusal to execute an EAW issued with a view to the surrender of a person who has been finally judged in the issuing Member State and given a custodial sentence, the judicial authorities of the executing Member State are themselves required to ensure that the sentence pronounced against that person is actually executed.

The fourth question

44 By its fourth question, the referring court, asks, in essence, whether Article 4(6) of Framework Decision 2002/584 must be interpreted to the effect that it authorises a Member State to refuse to execute an EAW issued with a view to the surrender of a person who is a national of another Member State and who has been finally judged and given a custodial sentence, on the sole ground that the first Member State intends to prosecute that person in relation to the same acts as those for which that judgment was pronounced, whereas that Member State, as a matter of course, refuses to surrender its own nationals for the purposes of executing judgments which impose custodial sentences on them.

45 In that regard it must be stated that there is nothing in Article 4(6) of Framework Decision 2002/584 that makes it possible to interpret that provision as authorising the judicial authority of a Member State to refuse to execute

an EAW in the event that a fresh prosecution, for the same acts as those which form the subject matter of the final criminal judgment pronounced against the requested person, may be brought against that person on his own territory.

46 Apart from the fact that Article 4(6) of Framework Decision 2002/584 makes no mention whatsoever of that possibility, it must be pointed out that such an interpretation would be inconsistent with Article 50 of the Charter of Fundamental Rights of the European Union, which provides, inter alia, that no one may be liable to be tried again in criminal proceedings for an offence for which he has already been finally acquitted or convicted within the Union in accordance with the law.

47 In those circumstances, since that interpretation is not, in any event, compatible with EU law, there is no need to take a view on the question whether it would lead to possible discrimination between nationals of the Netherlands and nationals of other Member States, which is also incompatible with EU law.

48 In the light of the foregoing, the answer to the fourth question is that Article 4(6) of Framework Decision 2002/584 must be interpreted to the effect that it does not authorise a Member State to refuse to execute an EAW issued with a view to the surrender of a person who has been finally judged and given a custodial sentence, on the sole ground that that Member State intends to prosecute that person in relation to the same acts as those for which that judgment was pronounced.

On those grounds, the Court (Fifth Chamber) hereby rules:

1. **Article 4(6) of Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States must be interpreted to the effect that it precludes legislation of a Member State implementing that provision which, in a situation where the surrender of a foreign national in possession of a residence permit of indefinite duration in the territory of that Member State is sought by another Member State in order to execute a custodial sentence imposed on that national by a decision which has become final, first, does not authorise such a surrender, and secondly, merely lays down the obligation for the judicial authorities of the first Member State to inform the judicial authorities of the second Member State that they are willing to take over the enforcement of the judgment, where, on the date of the refusal to surrender, the execution has not in fact been taken over and where, furthermore, in the event that taking over that execution subsequently proves to be impossible, such a refusal may not be challenged.**

2. **The provisions of Framework Decision 2002/584 do not have direct effect. However, the competent national court, by taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, is obliged to interpret the provisions of national law at issue in the main proceeding, so far as is possible, in the light of the wording and the purpose of that framework decision, which in the present case means that, in the event of a refusal to execute a European arrest warrant issued with a view to the surrender of a person who has been finally judged in the issuing Member State and given a custodial sentence, the judicial authorities of the executing Member State are themselves required to ensure that the sentence pronounced against that person is actually executed.**

3. **Article 4(6) of Framework Decision 2002/584 must be interpreted to the effect that it does not authorise a Member State to refuse to execute a European arrest warrant issued with a view to the surrender of a person who has been finally judged and given a custodial sentence, on the sole ground that that Member State intends to prosecute that person in relation to the same acts as those for which that judgment was pronounced.**

[Signatures]

OPINION OF ADVOCATE GENERAL

SÁNCHEZ-BORDONA

delivered on 27 November 2018 (1)

Case C-573/17

Openbaar Ministerie

v

Daniel Adam Popławski

(Request for a preliminary ruling from the rechtbank Amsterdam (District Court, Amsterdam, Netherlands)

(Reference for a preliminary ruling — Judicial cooperation in criminal matters — European arrest warrant — Framework Decision 2002/584/JHA — 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 — Framework Decision 2008/909/JHA — Declaration by a Member State allowing it to continue to apply earlier legal instruments — Withdrawal of the declaration by the executing State — Late declaration by the issuing State — Lack of direct effect of framework decisions — Primacy of EU law — Consequences)

1. This request for a preliminary ruling was made in the context of the execution in the Netherlands of a European arrest warrant ('EAW') issued by the Sąd Rejonowy w Poznaniu (District Court, Poznań, Poland) against Daniel Adam Popławski for the purposes of executing a one-year custodial sentence in Poland.

2. The request follows from the *Popławski* (2)judgment of 29 June 2017, in which the Court of Justice held, essentially, that the Netherlands legislation was incompatible with 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, (3) which establishes a ground for optional non-execution of an EAW in order to facilitate the social reinsertion of the sentenced person. In the same judgment, the Court of Justice called to mind the obligation on national courts to interpret domestic law, so far as possible, in accordance with that framework decision.

3. The rechtbank Amsterdam (District Court, Amsterdam, Netherlands) now enquires whether, in the event that it is unable to fulfil that obligation to interpret domestic law in compliance with EU law, it would be bound, under the principle of the primacy of EU law, to disapply the provisions of its domestic law that conflict with the framework decision at issue.

4. This case will therefore enable the Court of Justice to clarify the relationship between Framework Decision 2002/584 and Council Framework Decision 2008/909/JHA 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. (4) It is also an opportunity for the Court to clarify the effects that EU measures of that kind can have on national law.

I. Legal context

A. EU law

1. Framework Decision 2002/584

5. Article 4 of Framework Decision 2002/584 provides that:

'The executing judicial authority may refuse to execute the [EAW]:

...

(6) if the [EAW] 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;

...'.

2. Framework Decision 2008/909

6. Article 25 of Framework Decision 2008/909 provides that:

'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, or where, acting under Article 5(3) of that Framework Decision, it has imposed the condition that the person has to be returned to serve the sentence in the Member State concerned, so as to avoid impunity of the person concerned.'

7. According to Article 26(1) of Framework Decision 2008/909:

'1. Without prejudice to their application between Member States and third States and their transitional application according to Article 28, this Framework Decision shall, from 5 December 2011, replace the corresponding provisions of the following conventions applicable in relations between the Member States:

– The European Convention on the transfer of sentenced persons of 21 March 1983 and the Additional Protocol thereto of 18 December 1997;

– The European Convention on the International Validity of Criminal Judgments of 28 May 1970;

– Title III, Chapter 5, of the Convention of 19 June 1990 implementing the Schengen Convention of 14 June 1985 on the gradual abolition of checks at common borders;

– The Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences of 13 November 1991.'

8. Article 28 of that Framework Decision states:

'1. Requests received before 5 December 2011 shall continue to be governed in accordance with the existing legal instruments on the transfer of sentenced persons. Requests received after that date shall be governed by the rules adopted by Member States pursuant to this Framework Decision.

2. However, any Member State may, on the adoption of this Framework Decision, make a declaration indicating that, in cases where the final judgment has been issued before the date it specifies, it will as an issuing and an executing State, continue to apply the existing legal instruments on the transfer of sentenced persons applicable before 5 December 2011. If such a declaration is made, those instruments shall apply in such cases in relation to all other Member States irrespective of whether or not they have made the same declaration. The

date in question may not be later than 5 December 2011. The said declaration shall be published in the *Official Journal of the European Union*. It may be withdrawn at any time.'

B. Netherlands law

9. Article 6 of the Overleveringswet (Law on the surrender of sentenced persons) (5) of 29 April 2004, which transposes Framework Decision 2002/584 into Netherlands law, in the version applicable until the Netherlands provisions implementing Framework Decision 2008/909 came into force, provided that:

> '1. The surrender of a Netherlands national may be permitted provided that he is sought for the purposes of a criminal investigation against him and that, in the view of the executing judicial authority, it is guaranteed that, if he receives an unconditional custodial sentence in the issuing Member State in relation to acts for which surrender may be permitted, he may serve that sentence in the Netherlands.
>
> 2. The surrender of a Netherlands national shall not be permitted if that surrender is sought for the purposes of execution of a custodial sentence imposed on him by final judicial decision.
>
> 3. Where surrender is refused solely on the ground of Article 6(2) …, the public prosecutor shall notify the issuing judicial authority that it is willing to assume responsibility for executing the judgment in accordance with the procedure laid down in Article 11 of the Convention on the Transfer of Sentenced Persons or on the basis of another applicable convention.
>
> 4. The public prosecutor shall immediately inform our minister of … any refusal to surrender communicated with the declaration, referred to in paragraph 3, to the effect that the Netherlands is willing to assume responsibility for executing the foreign judgment.
>
> 5. Paragraphs 1 to 4 shall also apply to a foreign national in possession of a residence permit of indefinite duration, in so far as he may be prosecuted in the Netherlands for the offences on which the [EAW] is based and in so far as he can be expected not to forfeit his right of residence in the Netherlands as a result of any sentence or measure which may be imposed on him after surrender.'

10. Since the entry into force of the Wet wederzijdse erkenning en tenuitvoerlegging vrijheidsbenemende en voorwaardelijke sancties (Law on the mutual recognition and enforcement of custodial and suspended sentences) (6) of 12 July 2012, transposing Framework Decision 2008/909, Article 6(3) of the OLW has read as follows:

> 'Where surrender is refused solely on the ground of Article 6(2) …, the public prosecutor shall notify the issuing judicial authority that it is willing to assume responsibility for executing the judgment.'

11. Article 5:2 of the WETS provides:

> '1. The [WETS] replaces the Wet overdracht tenuitvoerlegging strafvonnissen [(Law on transfer of enforcement of criminal sentences) of 10 September 1986] (7) in relations with the Member States of the European Union.
>
> …
>
> 3. The [WETS] does not apply to judicial decisions … that became final before 5 December 2011.
>
> …'

II. The dispute in the main proceedings and the questions referred for a preliminary ruling

12. By a judgment of 5 February 2007, which became final on 13 July 2007, the Sąd Rejonowy w Poznaniu (District Court, Poznań) imposed a one-year suspended custodial sentence on Mr Popławski, a Polish national. By a decision of 15 April 2010, that court ordered execution of the sentence.

13. On 7 October 2013, that court issued an EAW against Mr Popławski for the purposes of executing the sentence concerned.

14. In the course of the main proceedings relating to execution of that EAW, the Rechtbank Amsterdam (District Court, Amsterdam) asked itself whether it should apply Article 6(2), (3) and (5) of the OLW, which establishes a ground for non-execution of an EAW that benefits, in particular, persons who reside in the Netherlands, as Mr Popławski does. (8)

15. By a decision of 30 October 2015, the referring court made a first request for a preliminary ruling to the Court of Justice, in the context of which it observed that, under Article 6(3) of the OLW, where the Kingdom of the Netherlands refuses to execute an EAW, it must state that it is 'willing' to take over the execution of the sentence on the basis of a convention in force between it and the issuing Member State. The referring court stated that, in the case in the main proceedings, taking over that execution in the main proceedings requires the Republic of Poland to make a request to that end and that the Polish legislation, in its view, precluded such a request being made against a Polish national.

16. The referring court noted that, in such a situation, a refusal to surrender could lead to the impunity of the person to whom the EAW applies. After pronouncement of the judgment refusing the surrender, it may prove impossible to take over execution of the sentence, in particular because there has been no request to that end from the issuing Member State, and that fact would have no bearing on the judgment refusing to surrender the requested person.

17. The referring court also expressed doubts as to whether Article 6(2) to (4) of the OLW is compatible with Article 4(6) of Framework Decision 2002/584 which permits a refusal to surrender only if the executing Member State 'undertakes' to execute the sentence in accordance with its domestic law.

18. In the *Popławski* judgment, the Court of Justice held that 'Article 4(6) of Framework Decision 2002/584 must be interpreted to the effect that it precludes legislation of a Member State implementing that provision which, in a situation where the surrender of a foreign national in possession of a residence permit of indefinite duration in the territory of that Member State is sought by another Member State in order to execute a custodial sentence imposed on that national by a decision which has become final, first, does not authorise such a surrender, and secondly, merely lays down the obligation for the judicial authorities of the first Member State to inform the judicial authorities of the second Member State that they are willing to take over the enforcement of the judgment, where, on the date of the refusal to surrender, the execution has not in fact been taken over and where, furthermore, in the event that taking over that execution subsequently proves to be impossible, such a refusal may not be challenged.' (9)

19. In the same judgment, the Court of Justice also held that 'the provisions of Framework Decision 2002/584 do not have direct effect.' (10) It nevertheless found that 'the competent national court, by taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, is obliged to interpret the provisions of national law at issue in the main proceeding, so far as is possible, in the light of the wording and the purpose of that framework decision, which in the present case means that, in the event of a refusal to execute an EAW issued with a view to the surrender of a person who has been finally judged in the issuing Member State and given a custodial sentence, the judicial authorities of the executing Member State are themselves required to ensure that the sentence pronounced against that person is actually executed.' (11)

A. Request for a preliminary ruling

20. In its request for a preliminary ruling, the referring court states that it is apparent from the *Popławski* judgment that Article 6(2), (3) and (5) of the OLW is contrary to Article 4(6) of Framework Decision 2002/584.

21. It is also of the view that an interpretation of Article 6(2), (3) and (5) of the OLW fully in conformity with that framework decision — in the sense that the referring court, on the one hand, has a margin of discretion over whether or not to apply the ground for refusal to surrender under that article and, on the other hand, may refuse to surrender only if it is assured that the Kingdom of the Netherlands will in fact take over enforcement of the sentence — is impossible, as such an interpretation would be *contra legem*.

22. The referring court nevertheless calls to mind that, in its first order for reference in the present case, it had referred preliminary questions in relation to three solutions that could nevertheless, in its view, lead to an outcome in conformity with Framework Decision 2002/584.

23. According to the referring court, it is apparent from the first preliminary ruling in this case that only one of those three solutions is permissible under EU law, that is to say, the interpretation whereby Article 4(6) of Framework

Decision 2002/584 provides the legal basis in convention required by the former Article 6(3) of the OLW for taking over enforcement of the sentence. However, the Minister van Justitie en Veiligheid (Netherlands Minister of Justice and Security), the competent body for the taking over of enforcement of the sentence, took the view that Framework Decision 2002/584 was not a convention either for the purposes of Article 6(3) of the OLW or for the purposes of Article 2 of the Law on transfer of enforcement of criminal sentences.

24. The referring court infers from the foregoing that the interpretation referred to does not ensure that the sentence pronounced against Mr Popławski will in fact be executed in the Netherlands and therefore does not achieve a solution that is compatible with the purpose of Framework Decision 2002/584, as the Court of Justice requires in the *Popławski* judgment. (12)

25. That being so, the referring court submits that it is faced with conflicting obligations. Indeed, were it to surrender the requested person, it would be acting in accordance with Article 4(6) of Framework Decision 2002/584 but contrary to Article 6(2), (3) and (5) of the OLW, which provisions cannot be interpreted as meaning that their application will lead to an outcome in conformity with the framework decision. Conversely, were the referring court to refuse to surrender the requested person, it would then be acting in accordance with Article 6(2), (3) and (5) of the OLW, but contrary to Article 4(6) of Framework Decision 2002/584.

26. The referring court therefore asks itself whether, pursuant to the principle of the primacy of EU law, it can refrain from applying the provisions of its domestic law that are incompatible with the provisions of Framework Decision 2002/584, even if those latter provisions are not directly effective. It observes that, if it refrained from applying Article 6(2), (3) and (5) of the OLW, there would no longer be any ground for refusing to surrender Mr Popławski to the Polish authorities. The interest of Mr Popławski of being reintegrated in Netherlands society would then give way to the interest of him not escaping his sentence.

27. Lastly, the referring court sets out a further possible approach, alluding to the Opinion of Advocate General Bot in *van Vemde.* (13) That potential solution involves applying the national legislation implementing Framework Decision 2008/909 to the recognition and enforcement of the sentence.

28. In that case, Advocate General Bot took the view that the declaration made by the Kingdom of the Netherlands under Framework Decision 2008/909 had no legal effect because it was made late. (14)

29. According to the referring court, that assertion, on which the Court of Justice did not rule in its judgment of 25 January 2017, *van Vemde*, (15) is relevant to the decision it must make in this case.

30. According to the referring court, if that declaration were found to be invalid, the national rules transposing Framework Decision 2008/909 would apply, in accordance with Article 25 of that framework decision, in order to satisfy the obligation to execute the sentence, as Article 4(6) of Framework Decision 2002/584 requires, so as to avoid the impunity of the person concerned. In that case the referring court would have to examine, first, whether the national transitional law, that is to say, Article 5:2(3) of the WETS, in so far as it provides that the national legislation in question does not apply to judicial decisions which became final before 5 December 2011, can be interpreted in accordance with Framework Decision 2008/909 and, secondly, whether, where there is a refusal to surrender on the basis of Article 6(2), (3) and (5) of the OLW, effective execution of the sentence in the Netherlands will indeed be ensured.

31. Were the referring court to answer both those questions in the affirmative, it could refuse to surrender Mr Popławski and the sentence could be executed in the Netherlands, in accordance with Article 6(2), (3) and (5) of the OLW and with Article 4(6) of Framework Decision 2002/584, which would be consistent with the objective of reintegrating Mr Popławski.

32. The referring court also states, still on the assumption that the Kingdom of the Netherlands' declaration has no legal effect, that, should an interpretation of Article 5:2(3) of the WETS in conformity with Framework Decision 2008/909 ultimately prove not to be possible, the question arises whether it must, in accordance with the principle of the primacy of EU law, disapply that article to the extent that it is incompatible with Framework Decision 2008/909.

33. In the light of those considerations the rechtbank Amsterdam (District Court, Amsterdam) stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) If the executing judicial authority cannot interpret the national provisions implementing a framework decision in such a way that their application leads to an outcome in conformity with the framework decision, must it then, in accordance with the principle of primacy, disapply those national provisions not in conformity with that framework decision?

(2) Does a declaration of a Member State within the meaning of Article 28(2) of Framework Decision 2008/909, that it did not make "on the adoption of this Framework Decision", but at a later date, have legal effect?'

B. The referring court's clarifications in its decision of 10 July 2018

34. Subsequently to the request for a preliminary ruling, the Kingdom of the Netherlands decided to withdraw the declaration it had made under Article 28(2) of Framework Decision 2008/909. The Kingdom of the Netherlands accordingly withdrew that declaration with effect from 1 June 2018 and the withdrawal decision was published in the Official Journal on 28 June 2018. (16)

35. On 10 July 2018, with the agreement of the parties, the referring court held a hearing with a different formation and allowed the parties to give their views on the consequences of that declaration being withdrawn. By an order of the same date, the referring court maintained the two questions it had referred for a preliminary ruling.

36. The referring court has stated that, following withdrawal of the Kingdom of the Netherlands' declaration, the regime under Framework Decision 2008/909 applies to the situation at issue in the main proceedings. However, the referring court notes that Article 5:2(3) of the WETS, which is intended to implement Framework Decision 2008/909, nevertheless provides that the WETS does not apply to judgments that became final before 5 December 2011, as Mr Popławski's sentence did.

37. The referring court observes that it is not certain that it can interpret that article in conformity with Framework Decision 2008/909, and that, in its view, the first question therefore remains relevant to the decision to be made in the main proceedings.

38. According to the referring court, the second question, likewise, remains relevant to the decision to be made in the main proceedings. Indeed, the referring court indicates that the issuing Member State, that is to say, the Republic of Poland, also made a declaration within the meaning of Article 28(2) of Framework Decision 2008/909. It refers on that point to the Opinion of Advocate General Bot in *Popławski*, (17) in which he drew attention to the fact that the Republic of Poland's declaration was late. (18)

39. As regards the relationship between the two questions, the referring court submits that the second question remains relevant irrespective of the reply to the first question, and vice versa. On that point, the referring court supplements its order for reference with the following considerations.

40. According to that court, if the declaration made by the Republic of Poland did not have legal effect, both Member States would be bound to apply the regime under Framework Decision 2008/909. In relation to the Kingdom of the Netherlands, the referring court would then have to examine, in the first place, whether it could interpret Article 5:2(3) of the WETS in conformity with that framework decision. If that article could not be interpreted in conformity with Framework Decision 2008/909, the WETS would not apply and effective enforcement of the sentence by the Kingdom of the Netherlands would not be ensured. In those circumstances, the reply to the first question would remain relevant. If, in contrast, Article 5:2(3) of the WETS could be interpreted in conformity with Framework Decision 2008/909, the referring court states that it would have to examine whether, under the WETS, execution of the sentence is effectively ensured.

III. Assessment

41. By its first question, the referring court asks the Court of Justice to rule on whether a national court that is unable to interpret national provisions adopted to implement a framework decision in a way that leads to an outcome in conformity with that framework decision must, in accordance with the principle of the primacy of EU law, disapply those national provisions not in conformity with that framework decision.

42. By its second question, the referring court asks the Court of Justice to rule on whether a declaration of a Member State within the meaning of Article 28(2) of Framework Decision 2008/909 is capable of having legal effects if it was not submitted on adoption of that framework decision, but at a later date.

43. I will begin my analysis by examining that second question, in so far as it could determine the legal context that applies to execution in the Netherlands of the sentence issued in Poland against Mr Popławski.

A. The second question

1. General analysis

44. It is worth recalling that, although Article 28(1) of Framework Decision 2008/909 provides that requests for the recognition and enforcement of sentences received after 5 December 2011 are to be governed by the rules adopted by the Member States pursuant to that framework decision, Article 28(2) of that framework decision nonetheless authorises any Member State to make a declaration having the effect of delaying the application of that framework decision.

45. The difficulty arises from the fact that, in accordance with the wording of Article 28(2) of Framework Decision 2008/909, the declaration must be made 'on the adoption of [the] Framework Decision'.

46. I am of the view, in common with Advocate General Bot, (19) that the declaration under Article 28(2) of Framework Decision 2008/909 must be made, by any means, when the framework decision is adopted and must specifically indicate the choice of the Member State concerned as to the date of delivery of final judgments before which the framework decision will not apply. Article 28(2) of that framework decision gives Member States a certain margin of discretion in setting that date, provided that it is no later than 5 December 2011.

47. I would also note that in situations in which Framework Decision 2008/909 authorises the Member States to make a declaration not only on adoption of the framework decision but also at a later date, are set out very clearly in that framework decision. I refer in particular to Articles 4(7) and 7(4) of that framework decision.

48. It follows from the foregoing that, where a Member State's declaration relating to Article 28 of Framework Decision 2008/909 was made after that framework decision was adopted, contrary to the requirements of Article 28(2) of that framework decision, it is not capable of having legal effects.

2. Application in the context of the present case

49. Since, as the referring court informed the Court of Justice, the declaration that the Kingdom of the Netherlands made under Article 28(2) of Framework Decision 2008/909 was withdrawn with effect from 1 June 2018, the second question no longer relates to that declaration but, now, to the declaration made by the Republic of Poland under the same article.

50. It appears that the Republic of Poland's decision was received by the Council of the European Union on 23 February 2011, before being published in the Official Journal on 1 June 2011. (20)

51. In the absence of any official version of the precise declaration made by the Republic of Poland earlier than the document received by the Council on 23 February 2011, I therefore take the view that the declaration of the Republic of Poland is not capable of producing legal effects because it was submitted out of time. (21)

52. Since there is no declaration complying with the conditions laid down in Article 28(2) of Framework Decision 2008/909, it is Article 28(1) thereof which determines the scope *ratione temporis* of the rules contained in that framework decision, namely those for requests received after 5 December 2011.

53. In the event of a request for the sentence made against Mr Popławski to be executed in the Netherlands it is indeed therefore the rules adopted by that Member State as well as those adopted by the Republic of Poland implementing Framework Decision 2008/909 that must govern that request.

54. The referring court's first question must therefore be approached from the perspective of execution in the Netherlands of the sentence handed down against Mr Popławski where that execution is governed by the regime under Framework Decision 2008/909.

B. The first question

55. As I stated above, the referring court invites the Court of Justice to rule on whether a national court that is unable to interpret national provisions adopted to implement a framework decision in a way that leads to an outcome in conformity with that framework decision must, in accordance with the principle of the primacy of EU law, disapply those provisions not in conformity with that framework decision.

56. This question relates to two categories of provision of Netherlands law that, if the answer to that question is in the affirmative, the referring court must disapply because they are incompatible with Framework Decision 2002/584 or Framework Decision 2008/909, as the case may be.

57. The first category consists of Article 6(2), (3) and (5) of the OLW, which implements Article 4(6) of Framework Decision 2002/584.

58. The second category consists of Article 5:2(3) of the WETS, which provides that rules adopted by the Kingdom of the Netherlands to implement Framework Decision 2008/909 do not apply to judicial decisions that became final before 5 December 2011. That article therefore reflects in domestic law the declaration that the Kingdom of the Netherlands made under Article 28(2) of that framework decision, which that Member State withdrew with effect from 1 June 2018.

59. Before expressing a view on the matter of principle concerning the effects that a framework decision is capable of producing on national law, I need to define the context in which that question has been raised. I will therefore begin by summarising the two points in respect of which the Court of Justice, in the *Popławski* judgment, found the Netherlands legislation to be incompatible with Article 4(6) of Framework Decision 2002/584.

1. The Popławski judgment

60. First of all, the Court of Justice noted that Article 4(6) of Framework Decision 2002/584 sets out a ground for optional non-execution of EAWs whereby the executing judicial authority 'may' refuse to execute an EAW which has been issued for the purposes of executing a custodial sentence, where, in particular, the requested person is a resident of the executing Member State, as occurs in the case in the main proceedings, and that State 'undertakes' to ensure that that sentence is executed in accordance with its domestic law. (22) According to the Court, 'it is clear from the actual wording of Article 4(6) of Framework Decision 2002/584, … that, where a Member State chose to transpose that provision into domestic law, the executing judicial authority must, nevertheless, have a margin of discretion as to whether or not it is appropriate to refuse to execute the EAW. In that regard, that authority must take into consideration the objective of the ground for optional non-execution set out in that provision, which, according to the Court's settled case-law, means enabling the executing judicial authority to give particular weight to the possibility of increasing the requested person's chances of reintegrating into society when the sentence imposed on him expires'. (23)

61. The Court of Justice thereby hinted at a first ground on which Netherlands law is incompatible with Article 4(6) of Framework Decision 2002/584, in so far as, under that law, the executing judicial authority must refuse to execute an EAW where the person requested resides in the Member State to which that authority belongs and it is therefore deprived of any margin of discretion as to how to proceed with the EAW. (24)

62. Secondly, the Court of Justice stated that 'it also follows from the wording of Article 4(6) of Framework Decision 2002/584 … that any refusal to execute an EAW presupposes an actual undertaking on the part of the executing Member State to execute the custodial sentence imposed on the requested person, even though, in any event, the mere fact that that Member State declares itself "willing" to execute the sentence could not be regarded as justifying such a refusal. This indicates that any refusal to execute an EAW must be preceded by the executing judicial authority's examination of whether it is actually possible to execute the sentence in accordance with its domestic law. In the event that the executing Member State finds that it is in fact impossible to undertake to execute the sentence, it falls to the executing judicial authority to execute the EAW and, therefore, to surrender the requested person to the issuing Member State.' (25)

63. The Court thereby highlighted a second ground on which Netherlands law is incompatible with Article 4(6) of Framework Decision 2002/584 in so far as, under that law, a refusal to execute an EAW is not subject to a requirement that the executing Member State 'actually undertak[es] to execute the custodial sentence pronounced against [the] requested person, thereby creating a risk of impunity of that requested person'. (26) From that perspective, the Netherlands legislation does therefore conflict with Article 4(6) of Framework Decision 2002/584 in so far as it 'merely lays down the obligation for the judicial authorities of the [executing] Member State to inform the judicial authorities of the [issuing] Member State that they are willing to take over the enforcement of [a custodial sentence] where, on the date of the refusal to surrender, the execution has not in fact been taken over and where, furthermore, in the event that taking over that execution subsequently proves to be impossible, such a refusal may not be challenged.' (27)

64. In the light of that finding that Netherlands law is incompatible, the Court of Justice invited the referring court to seek so far as possible an interpretation of Netherlands law in conformity with Article 4(6) of Framework Decision 2002/584.

2. The principle that national law must be interpreted in conformity with EU law

65. It is worth calling to mind that 'it is clear from the Court's settled case-law, that the binding character of a framework decision places on national authorities, including national courts, an obligation to interpret national law in conformity with EU law. When those courts apply domestic law, they are therefore bound to interpret it, so far as possible, in the light of the wording and the purpose of the framework decision concerned in order to achieve the result sought by it. This obligation to interpret national law in conformity with EU law is inherent in the system of the FEU Treaty, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of EU law when they rule on the disputes before them'. (28)

66. Admittedly, as the Court of Justice has acknowledged, 'the principle of interpreting national law in conformity with EU law has certain limitations. Thus, the obligation on the national court to refer to the content of a framework decision when interpreting and applying the relevant rules of its national law is limited by general principles of law, particularly those of legal certainty and non-retroactivity. In particular, those principles preclude that obligation from leading to the criminal liability of individuals being determined or aggravated, on the basis of a framework decision alone, absent any legislation implementing its provisions, where they are in breach of those provisions'. (29)

67. Nor may the obligation to interpret national law in conformity with EU law 'serve as the basis for interpreting national law *contra legem*'. (30)

68. Nevertheless, according to the Court of Justice, 'the principle that national law must be interpreted in conformity with EU law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, with a view to ensuring that the framework decision in question is fully effective and to achieving an outcome consistent with the objective pursued by it'. (31)

69. In that connection, the Court has already held that 'the obligation to interpret domestic law in conformity with EU law requires national courts to change established case-law, where necessary, if it is based on an interpretation of domestic law that is incompatible with the objectives of a framework decision'. (32)

70. The Court has also held that, 'in a situation where a national court claims that it is impossible for it to interpret a provision of domestic law in a manner that is compatible with a framework decision, on the ground that it is bound by the interpretation given to that national provision by the national Supreme Court in an interpretative judgment, it is for that national court to ensure that the framework decision is given full effect, and if necessary to disapply, on its own authority, the interpretation adopted by the national Supreme Court, since that interpretation is not compatible with EU law'. (33)

71. In light of the foregoing summary of the extent and limitations of the obligation to interpret domestic law in conformity with EU law, the referring court should be invited once again to endeavour by all interpretative means available to it to implement Article 6(2), (3) and (5) of the OLW in a manner consistent with the objective of Article 4(6) of Framework Decision 2002/584. It must strive equally in relation to Article 5:2(3) of the WETS, in order to achieve an interpretation consistent with Framework Decision 2008/909. Indeed, the primacy of framework decisions over

national law must give rise first and foremost to an obligation on national courts to interpret their domestic law in conformity with those framework decisions.

72. Before providing the referring court with guidance in that regard, it is necessary to clarify how Framework Decision 2002/584 and Framework Decision 2008/909 should interrelate.

3. The relationship between Framework Decision 2002/584 and Framework Decision 2008/909

73. Article 25 of Framework Decision 2008/909, 'Enforcement of sentences following an [EAW]', describes how Framework Decision 2002/584 and Framework Decision 2008/909 interrelate, establishing that '*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 [Framework Decision 2002/584] or where, acting under Article 5(3) of that Framework Decision, it has imposed the condition that the person has to be returned to serve the sentence in the Member State concerned, so as to avoid impunity of the person concerned.' (34)

74. That article must, for its part, be read in the light of recital 12 of Framework Decision 2008/909, from which it is apparent that applying that framework decision, *mutatis mutandis*, to the enforcement of sentences in the situations under Article 4(6) of Framework Decision 2002/584 'means, inter alia, that, without prejudice to that Framework Decision, the executing State could verify the existence of grounds for non-recognition and non-enforcement as provided in Article 9 of this Framework Decision, including the checking of double criminality to the extent that the executing State makes a declaration under Article 7(4) of this Framework Decision, as a condition for recognising and enforcing the judgment with a view to considering whether to surrender the person or to enforce the sentence in cases pursuant to Article 4(6) of Framework Decision [2002/584].'

75. We can infer from those provisions that, provided the regime under Framework Decision 2008/909 applies to the enforcement of a sentence, where the executing Member State does not intend to rely on a ground for non-recognition and non-enforcement under Article 9 of that framework decision and where, furthermore, the executing judicial authority believes that executing the sentence in that Member State would facilitate the social reinsertion of the sentenced person, there is nothing to prevent that Member State from giving a firm and final undertaking to execute that sentence. The requirements for the executing judicial authority to be entitled to refuse surrender are accordingly satisfied. The interest in the sentenced person being reinserted in society thereby converges with the interest in ensuring that a custodial sentence does not remain unexecuted. The need to reconcile those two interests makes it all the more compelling for the referring court to seek an interpretation of its domestic law that gives full effect to Article 4(6) of Framework Decision 2002/584.

4. An interpretation of domestic law in conformity with Framework Decision 2002/584 and Framework Decision 2008/909

76. As the Court of Justice noted in the *Popławski* judgment, it does not have jurisdiction to interpret the domestic law of a Member State. (35) It is therefore for the referring court alone to assess whether Netherlands law can be interpreted in conformity with Article 4(6) of Framework Decision 2002/584 and with Article 28 of Framework Decision 2008/909.

77. However, the Court of Justice, when 'called on to provide answers that are of use to the national court in context of a reference for a preliminary ruling, may provide guidance, based on the file in the main proceedings and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment'. (36)

78. In the present case, applying Article 6(2), (3) and (5) of the OLW in the main proceedings in conformity with Article 4(6) of Framework Decision 2002/584 presupposes, in my view, that the domestic provision in question can be interpreted as follows.

79. First, it must be possible to interpret Article 6(2), (3) and (5) of the OLW as meaning that it establishes a ground for optional refusal to execute an EAW in respect of a requested person, in such a way that the judicial authority of the executing Member State has a margin of discretion to execute or refuse to execute that EAW.

80. In its request for a preliminary ruling the referring court seems to doubt whether any such interpretation of domestic law is possible, even though it is at the same time apparent from the other considerations it expresses that this is not, to its mind, the most significant obstacle to achieving an outcome in conformity with Article 4(6) of Framework Decision 2002/584.

81. Secondly, going to the nub of the referring court's questions, if Article 6(2), (3) and (5) of the OLW is to satisfy the requirements of Article 4(6) of Framework Decision 2002/584, it must be possible to interpret it as meaning that the executing judicial authority's power to refuse to execute the EAW can only be exercised on condition that it ensures that the sentence imposed on Mr Popławski will effectively be executed in the Netherlands.

82. In that regard, any discussion of whether, where a Member State makes taking over execution of a custodial sentence subject to there being a legal basis in an international convention, Article 4(6) of Framework Decision 2002/584 can itself be the formal basis required by domestic law, has become redundant.

83. As I stated above, the Kingdom of the Netherlands has in fact withdrawn the declaration it made under Article 28(2) of Framework Decision 2008/909, with effect from 1 June 2018. The effect of withdrawing that declaration is that the provisions of that framework decision must to my mind apply, *ratione temporis*, to a request for execution of a sentence in a case where a Member State undertakes to execute that sentence in accordance with Article 4(6) of Framework Decision 2002/584.

84. I would call to mind, in that regard, that Framework Decision 2008/909 was implemented in Netherlands law by the WETS. Since that legislation came into force, Article 6(3) of the OLW has no longer mentioned the need for a basis in convention in order to execute a sentence where surrender has been refused. That redrafting makes sense in so far as, as Article 26(1) of Framework Decision 2008/909 states, that framework decision has, from 5 December 2011, replaced the corresponding provisions of several European conventions applicable in relations between the Member States.

85. The referring court is therefore entitled to take the view that application of the national rules adopted to implement Framework Decision 2008/909 is capable of ensuring that the sentence imposed on Mr Popławski can effectively be executed in the Netherlands.

86. Nevertheless, applying those national rules in the present case encounters an obstacle in Article 5:2(3) of the WETS, in so far as that article, as stated above, provides that those rules do not apply to judicial decisions that became final before 5 December 2011.

87. Since there is no declaration made by the Kingdom of the Netherlands under Article 28(2) of Framework Decision 2008/909, that provision must be found to be incompatible with Article 28(1) of that framework decision that, likewise as I stated above, provides that requests received after 5 December 2011 are governed by the rules adopted by the Member States to implement that framework decision, and the date on which the judgment in question became final is completely irrelevant for that purpose.

88. Enlisting all its domestic law and the interpretative methods available to it, the referring court is, to my mind, in a position to find that, because the Kingdom of the Netherlands chose to withdraw the declaration it had made under Article 28(2) of Framework Decision 2008/909, the national provision intended to implement that declaration in domestic law is consequently deprived of any legal basis. In so far as the Kingdom of the Netherlands expressed its intention unambiguously, it must in my view be easy to reduce the scope of Article 5:2(3) of the WETS on the basis of domestic law alone without the referring court coming up against any *contra legem* interpretation.

89. Having in that way clarified how the referring court can arrive at an interpretation of its domestic law in conformity with Framework Decision 2002/584 and Framework Decision 2008/909, I need to set out specifically how the national rules implementing both those framework decisions fit together in a situation such as that in the main proceedings.

90. The starting point here should be that, since the regime derived from Framework Decision 2008/909 applies to a request for the sentence delivered in Poland against Mr Popławski to be executed in the Netherlands and since any uncertainty arising earlier from application of the regime derived from the relevant European conventions has been dispelled, the executing Member State is in a position to give a firm and final undertaking to execute that sentence, as Article 4(6) of Framework Decision 2002/584 requires.

91. I am also of the view that, once the requirements of Article 4(6) are satisfied, a refusal by the Member State that issued the EAW to forward the judgment together with the certificate under Annex I of Framework Decision 2008/909 cannot be allowed to prevent execution of the sentence in the executing Member State.

92. I do not share the Republic of Poland's view that unless it requests or agrees to execution of the sentence imposed on Mr Popławski in the Netherlands, that execution cannot take place. Indeed, that position would ultimately render ineffective the ground for optional non-execution under Article 4(6) of Framework Decision 2002/584, which the executing Member State chose to implement in its domestic law. The Republic of Poland's position, which effectively precludes any firm and final undertaking by the executing Member State to execute the sentence, also runs counter to the objective of enhancing the possibility of social rehabilitation of the sentenced person, pursued not only by Framework Decision 2002/584 but also by Framework Decision 2008/909, as Article 3(1) of that decision expressly states. (37) It needs emphasising, in that respect, that the Court of Justice has already held that 'the social rehabilitation of the Union citizen in the State in which he has become genuinely integrated is not only in his interest but also in that of the … Union in general'. (38)

93. Contrary to the Republic of Poland's assertions, the issuing Member State cannot rely on Article 4(5) of Framework Decision 2008/909 to object to forwarding the judgment together with the certificate in Annex I of that framework decision.

94. Article 4(5) does admittedly provide that 'the executing State may, on its own initiative, request the issuing State to forward the judgment together with the certificate' and that 'requests made under this paragraph shall not create an obligation of the issuing State to forward the judgment together with the certificate.'

95. However, as I stated above, it is Article 25 of Framework Decision 2008/909 that governs the execution of sentences following an EAW, as the heading of that article furthermore makes expressly apparent. That article therefore constitutes a *lex specialis* as opposed to the general regime governing the execution of sentences contained in that framework decision.

96. I would repeat here that, according to Article 25, the provisions of Framework Decision 2008/909 apply to the execution of judgments in the context of Article 4(6) of Framework Decision 2002/584 'without prejudice' to Framework Decision 2002/584 and only 'to the extent they are compatible' with the provisions of that framework decision. In short, this means that application of Framework Decision 2008/909 cannot adversely affect the ability to rely on the ground for optional non-execution in Article 4(6) of Framework Decision 2002/584 provided, in accordance with Article 4(6), the executing Member State undertakes to execute the sentence in question. It would indeed be paradoxical and, to be honest, inconsistent to believe that the EU legislature intended to allow the issuing Member State to invoke the rules contained in Framework Decision 2008/909, which seeks, I would repeat, to facilitate the social reinsertion of the sentenced person, in order to impede the application of rules adopted by the executing Member State in order to implement Article 4(6) of Framework Decision 2002/584, which pursues exactly the same aim. (39)

97. In practical terms, I infer from the foregoing that, where the executing Member State undertakes to execute a sentence, in accordance with the requirements of Article 4(6) of Framework Decision 2002/584, the issuing Member State is bound to grant the executing State's request to forward it the judgment together with the certificate in Annex I of Framework Decision 2008/909.

98. That interpretation of the scheme of Framework Decision 2008/909 and of how it relates to Framework Decision 2002/584 is therefore completely consistent with the objective of facilitating the social reinsertion of the sentenced person and, at the same time, ensures effective execution of the sentence.

99. It also needs noting, in support of the approach I am advocating that, 'as provided for in Article 26 thereof, Framework Decision 2008/909 replaces, as regards relations between Member States, a number of instruments of international law in order to *further develop* cooperation, as stated in recital 5 of the decision, in the enforcement of criminal judgments.' (40)

100. Unlike those instruments of international law, Framework Decision 2008/909 is based, above all, on the principle of mutual recognition, which, according to recital 1 of that framework decision, read in conjunction with Article 82(1) TFEU, is the 'cornerstone' of judicial cooperation in criminal matters within the European Union, which in turn, according to recital 5, is based on the Member States' special mutual confidence in their respective legal systems. (41)

Cooperation by the issuing Member State in order to enable a sentence to be executed in the executing Member State in the situation under Article 4(6) of Framework Decision 2002/584 is the concrete expression of that mutual confidence.

101. As emerges from the foregoing, processing the EAW issued against Mr Popławski, in accordance with the procedure I have just described, nevertheless presupposes that the referring court must be able to interpret its domestic law in conformity with Framework Decision 2002/584 and Framework Decision 2008/909.

102. Indeed, because framework decisions do not have direct effect, the national courts cannot apply them directly without the intermediary of domestic law.

103. I therefore have to envisage a situation in which the referring court finds itself unable to interpret its domestic law in conformity with Framework Decision 2002/584 and Framework Decision 2008/909 even though, in the light of what I have said above, that court can in my view reach an interpretation of that law in conformity with those framework decisions. I also note that the arguments in the request for a preliminary ruling and in the referring court's order of 10 July 2008 bear out the referring court's intention so far as possible to seek an interpretation of its domestic law in conformity with those framework decisions, in order to reconcile the aims of preventing impunity and of facilitating the social reinsertion of the sentenced person once the sentence has been served.

5. Disapplication of conflicting domestic law pursuant to the principle of the primacy of EU law

104. In general terms, I believe that, whilst framework decisions undeniably do not have direct effect, their effect on national law cannot however be reduced merely to an obligation on national authorities to interpret domestic law in conformity with EU law.

105. Indeed, it is important to understand that if a national provision intended to implement a framework decision cannot, despite the efforts of the competent national court, be interpreted so that it is in conformity with that framework decision, this means that the framework decision remains incompatible with domestic law, even though framework decisions are binding. This is fundamentally at odds with the principle of the primacy of EU law. From that perspective, the only way to resolve the contradiction in question is to require the competent national court to refrain from applying the national provision that conflicts with a framework decision.

106. Therefore if, ultimately, the exercise of interpreting Netherlands law in conformity with Framework Decision 2002/584 and Framework Decision 2008/909, which I invite the referring court to undertake, proves impossible, in particular because the interpretation reached would be *contra legem*, the obligation on national courts to ensure the complete effectiveness of those framework decisions (42) in my view requires the referring court to refrain from applying the national provisions that are contrary to them.

107. In his Opinions in *Popławski* (43) and in *Lada*, (44) Advocate General Bot set out the reasons why, according to him, even though framework decisions are not directly effective, it should be possible to rely on them in order to preclude application of national provisions that conflict with them. I agree with the reasoning set out in those opinions, to which I refer. (45)

108. I would add that the Court of Justice itself, in the *Popławski* judgment, seems not to have ruled out the possibility that a framework decision can give rise to an obligation on national courts to refrain from applying national provisions that are contrary to that framework decision.

109. Indeed, in that judgment the Court noted that 'in accordance with [its] settled case-law, Member States must take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under a framework decision'. (46)

110. The Court of Justice then stated that 'in particular, it is clear from [its] settled case-law, that the binding character of a framework decision places on national authorities, including national courts, an obligation to interpret national law in conformity with EU law.' (47)

111. Although the Court in that way emphasised the obligation on national courts to interpret national law in conformity with EU law, in line with the precedence that it, in my view correctly, gives to the ability to rely on EU law in

that way, the reminder that framework decisions are binding and mention of the fact that the binding effect of framework decisions results 'in particular' in an obligation on national courts to interpret national law in conformity with EU law, seems to me to leave the way open, where those courts cannot arrive at an interpretation of their domestic law in conformity with a framework decision, to their being bound to disapply domestic law.

112. Nor do I believe that accepting that a provision of a framework decision can be relied upon by or before a national court with a view to the disapplication of national law that conflicts with that framework decision means that the provision in question must satisfy the requirements in order to be capable of having direct effect, that is to say, that it must be sufficiently clear, precise and unconditional.

113. The present case also clearly illustrates the fact that such a requirement would undermine the binding nature of framework decisions, and the fact that, contrary to the Commission's contention, there is indeed a genuine difference between direct effect and the fact that a framework decision can be relied upon with a view to the disapplication of national law that conflicts with it.

114. To my mind, Article 4(6) of Framework Decision 2002/584 does not in fact satisfy the requirements in order to have direct effect. I note, in that respect, that Article 4(6) sets out a ground for optional non-execution of the EAW, which implies, on the one hand, as is apparent from the case-law of the Court of Justice, that the Member States can choose whether or not to transpose that provision into domestic law (48) and, on the other, that the executing judicial authority must have a margin of discretion as to whether or not it is appropriate to refuse to execute the EAW. (49)

115. Accordingly, even if framework decisions were capable of having direct effect, in my view Article 4(6) of Framework Decision 2002/584 does not in any event have direct effect. In other words, a national court cannot under any circumstances apply that article directly irrespective of or instead of the national rule that implements it. This means that, if a national rule does not correctly implement Article 4(6) of Framework Decision 2002/584 and it proves impossible to interpret that national rule in a manner in conformity with Article 4(6), the national court must — only — refrain from applying that national rule, and its doing so will under no circumstances have the effect of applying Article 4(6) of Framework Decision 2002/584 instead of that rule.

116. Under those circumstances and since nothing here calls into question the prohibition on the direct effect of framework decisions that the drafters of the Treaties intended, I believe that denying that Article 4(6) of Framework Decision 2002/584 can have the effect of ousting conflicting national law amounts purely and simply to allowing the Member States to implement incorrectly a ground for non-execution of the EAW and to undermining the requirement that framework decisions be applied uniformly within the European Union, and the principles of mutual trust and recognition. (50) To my mind, an area of freedom, security and justice can only be constructed if the incorrect application of EU law can be effectively neutralised by the national courts which, it should be recalled, play a primordial role in that regard.

117. I would emphasise, furthermore, that the Court of Justice's most recent case-law on the effects that directives have on national law corroborates the thesis that direct effect must be distinguished from the ousting effect of directives, which is a consequence of the principle of the primacy of EU law. Accordingly, in its judgment of 4 October 2018, *Link Logistik N&N*, (51) the Court found, initially, that a provision of a directive did not satisfy the requirements in order to have direct effect, (52) but that fact did not prevent it, subsequently, from holding, in relation to the same provision, that 'if … an interpretation [in conformity with EU law] is not possible the national court must fully apply EU law and protect the rights which EU law confers on individuals, disapplying if necessary any [national] provision in so far as its application would, in the circumstances of the case, lead to a result contrary to EU law'. (53)

118. I will now indicate what the consequences would be of refraining from applying Article 6(2), (3) and (5) of the OLW, to the extent that it conflicts with Article 4(6) of Framework Decision 2002/584.

119. If the referring court refrains from applying Article 6(2), (3) and (5) of the OLW the effect will be, in the absence in national law of any ground for optional non-execution corresponding to Article 4(6) of Framework Decision 2002/584, that the EAW issued on 7 October 2013 against Mr Popławski by the Sąd Rejonowy w Poznaniu (Poznań Regional Court) for execution of the sentence imposed by that court must be executed. At the hearing, the public prosecutor, in particular, confirmed that there is indeed a basis in Netherlands legislation for surrendering Mr Popławski.

120. I would emphasise in that respect that, in the *Popławski* judgment, the Court of Justice stated very clearly that 'where the conditions laid down in Article 4(6) of Framework Decision 2002/584 have not been satisfied, Article 1(2) of

that framework decision requires Member States to execute any EAW on the basis of the principle of mutual recognition.' (54) That statement would be meaningless if national legislation incorrectly transposing Article 4(6) of Framework Decision 2002/584 and that cannot be interpreted in a manner in conformity with that article could present an immovable obstacle to execution of an EAW. In other words, in such a situation, I can see no way of complying with the rule that the EAW must, in principle, be executed other than by the executing judicial authority disapplying such national legislation.

121. I note in that regard that, as the Court of Justice has also recently stated, 'the principle of mutual recognition is applied in Article 1(2) of [Framework Decision 2002/584], which lays down the rule that Member States are required to execute any [EAW] on the basis of the principle of mutual recognition and in accordance with the provisions of [that] Framework Decision. Executing judicial authorities may therefore, in principle, refuse to execute such a warrant only on the grounds for non-execution exhaustively listed in [that] Framework Decision. Accordingly, while execution of the [EAW] constitutes the rule, refusal to execute is intended to be an exception which must be interpreted strictly'. (55)

122. The solution proposed by the Kingdom of the Netherlands, that of waiting until the national legislation is amended, is therefore unacceptable. Nor, moreover, have I discovered any reason concerning legal certainty that could prevent the referring court from ensuring the complete effectiveness of Framework Decision 2002/584. I would add that the Commission's argument that Article 6(2), (3) and (5) of the OLW cannot be disapplied in so far as doing so would be to the detriment of the person concerned is, to my mind, irrelevant. Indeed, in the light of the case-law I have just set out, such a consideration cannot prevent execution of an EAW where the national court cannot rely on a ground for optional non-execution in conformity with Framework Decision 2002/584.

123. Furthermore, I would note that, as this Court held in the *Popławski* judgment, 'the national court's obligation to ensure the complete effectiveness of [that Framework Decision] … has no bearing on the determination of Mr Popławski's criminal liability which stems from the judgment pronounced against him on 5 February 2007 by the Sąd Rejonowy w Poznaniu (District Court, Poznań) and, a fortiori, cannot be regarded as aggravating that liability'. (56)

124. The only consequence of refraining from applying Article 5:2(3) of the WETS, in the event that it proved impossible to interpret the Netherlands legislation in accordance with Framework Decision 2008/909, would be to remove a limitation on the application *ratione temporis* of the national rules adopted to implement that framework decision. I would emphasise here that a solution consisting of denying that the referring court is authorised to remove such a time limit would amount to prolonging the effects of the declaration that the Kingdom of the Netherlands made under Article 28(2) of Framework Decision 2008/909, whereas that declaration has been withdrawn and, in any event, probably had no legal effects. (57)

125. In the light of the foregoing, I therefore propose in answer to the first question that a national court that is unable to interpret national provisions adopted to implement a framework decision in a manner that leads to an outcome in conformity with that framework decision must, in accordance with the principle of the primacy of EU law, disapply those provisions not in conformity with that framework decision.

IV. Conclusion

126. In the light of all the foregoing, I suggest that the Court of Justice should reply as follows to the questions referred by the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands) for a preliminary ruling:

(1) Where a Member State's declaration concerning Article 28 of Council Framework Decision 2008/909/JHA 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 was made after that framework decision was adopted, contrary to the requirement in Article 28(2) of that framework decision, that declaration is not capable of having legal effects.

(2) A national court with jurisdiction to rule on execution of a European arrest warrant that intends to rely on the ground for optional non-execution under 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 must, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, interpret the national provisions adopted to implement that framework decision and

Framework Decision 2008/909, to the fullest extent possible, in a manner such as to reconcile the aims of combating impunity and of facilitating the social reinsertion of sentenced persons.

(3) A national court that is unable to interpret national provisions adopted to implement a framework decision in a way that leads to an outcome in conformity with that framework decision must, in accordance with the principle of the primacy of EU law, disapply those provisions not in conformity with that framework decision.

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1 Original language: French.

2 C-579/15, EU:C:2017:503, 'the *Popławski* judgment'.

3 OJ 2002 L 190, p. 1.

4 OJ 2008 L 327, p. 27.

5 Stb. 2004, No 195, 'the OLW'.

6 Stb. 2012, No 333, 'the WETS'.

7 Stb. 1986, No 593.

8 It is common ground that Mr Popławski has proven that he has resided legally and uninterruptedly in the Netherlands for at least five years.

9 Paragraph 24 of that judgment.

10 Paragraph 43 of that judgment.

11 Paragraph 43 of that judgment.

12 See paragraph 42 of that judgment.

13 C-582/15, EU:C:2016:766.

14 See points 21 to 29 of that Opinion.

15 C-582/15, EU:C:2017:37.

16 OJ 2018 L 163, p. 19.

17 C-579/15, EU:C:2017:116.

18 See points 54 and 55 of his Opinion.

19 See, by analogy, on the validity of the declaration made by the Kingdom of the Netherlands, Opinion of Advocate General Bot in *van Vemde* (C-582/15, EU:C:2016:766, points 21 to 29).

20 OJ 2011 L 146, p. 21. See, in that regard, the Commission's observations in *Popławski* (C-579/15) (footnote 7, p. 12).

21 I would have to make the same finding in relation to the declaration by the Kingdom of the Netherlands had it not been withdrawn.

22 See the *Popławski* judgment (paragraph 20).

23 See the *Popławski* judgment (paragraph 21 and the case-law cited).

24 See the *Popławski* judgment (paragraph 23).

25 See the *Popławski* judgment (paragraph 22).

26 See the *Popławski* judgment (paragraph 23).

27 See the *Popławski* judgment (paragraph 24).

28 See, amongst others, the *Popławski* judgment (paragraph 31 and the case-law cited).

29 See, amongst others, the *Popławski* judgment (paragraph 32 and the case-law cited).

30 See, amongst others, the *Popławski* judgment (paragraph 33 and the case-law cited).

31 See, amongst others, the *Popławski* judgment (paragraph 34 and the case-law cited).

32 See, amongst others, the *Popławski* judgment (paragraph 35 and the case-law cited).

33 See, amongst others, the *Popławski* judgment (paragraph 36 and the case-law cited).

34 My italics.

35 See, amongst others, the *Popławski* judgment (paragraph 39 and the case-law cited).

36 See, amongst others, the *Popławski* judgment (paragraph 40 and the case-law cited).

37 See, amongst others, the *Popławski* judgment (paragraph 21).

38 See, amongst others, 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).

39 See, in the same vein, the Opinion of Advocate General Bot in *Sut* (C-514/17, EU:C:2018:672), in which he states that Article 25 of Framework Decision 2008/909 attests the EU legislature's intention that Framework Decision 2008/909 should not have the effect of 'diminishing the spirit and force of the [EAW] mechanism established by Framework Decision 2002/584' (point 36, see, also, point 81).

40 See judgment of 11 January 2017, *Grundza* (C-289/15, EU:C:2017:4, paragraph 40). My italics.

41 See, amongst others, judgment of 11 January 2017, *Grundza* (C-289/15, EU:C:2017:4, paragraph 41 and the case-law cited).

42 See the *Popławski* judgment (paragraph 37).

43 C-579/15, EU:C:2017:116.

44 C-390/16, EU:C:2018:65.

45 See Opinion of Advocate General Bot in *Popławski* (C-579/15, EU:C:2017:116, points 76 to 91) and in *Lada* (C-390/16, EU:C:2018:65, points 106 to 118).

46 See the *Popławski* judgment (paragraph 30 and the case-law cited).

47 See the *Popławski* judgment (paragraph 31 and the case-law cited).

48 See, in that respect, judgment of 5 September 2012, *Lopes Da Silva Jorge* (C-42/11, EU:C:2012:517, paragraph 35), and the *Popławski* judgment (paragraph 21).

49 See the *Popławski* judgment (paragraphs 21 and 23).

50 I would observe, in that respect, that the Court of Justice, in its judgment of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107), held that 'allowing a Member State … to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State, a possibility not provided for under [Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (OJ 2009 L 81, p. 24)], … would undermine the principles of mutual trust and recognition which

that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision' (paragraph 63).

51 C-384/17, EU:C:2018:810.

52 See paragraph 56 of that judgment.

53 See paragraph 61 of that judgment. Paragraph 62 of the same judgment shows very clearly the distinction between direct effect, on the one hand, and an interpretation in conformity with EU law and the ousting effect, on the other.

54 See the *Popławski* judgment (paragraph 29).

55 See judgment of 19 September 2018, *R O* (C-327/18 PPU, EU:C:2018:733, paragraph 37 and the case-law cited). See also the *Popławski* judgment (paragraph 19).

56 See the *Popławski* judgment (paragraph 37).

57 I refer, on that point, to the Opinion of Advocate General Bot in *van Vemde* (C-582/15, EU:C:2016:766, points 21 to 29).

Judgment in Case C-573/17 Poplawski II

JUDGMENT OF THE COURT (Grand Chamber)

24 June 2019 (*)

(Reference for a preliminary ruling — Judicial cooperation in criminal matters — European arrest warrant — Framework Decisions — No direct effect — Primacy of EU law — Consequences — Framework Decision 2002/584/JHA — Article 4(6) — Framework Decision 2008/909/JHA — Article 28(2) — Declaration by a Member State allowing it to continue to apply existing legal instruments on the transfer of sentenced persons applicable before 5 December 2011 — Late declaration — Consequences)

In Case C-573/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the rechtbank Amsterdam (District Court, Amsterdam, Netherlands), made by decision of 28 September 2017, received at the Court on 28 September 2017, in the proceedings relating to the execution of the European arrest warrant issued against

Daniel Adam Popławski,

other parties:

Openbaar Ministerie

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Arabadjiev, M. Vilaras and C. Lycourgos (Rapporteur), Presidents of Chambers, M. Ilešič, J. Malenovský, L. Bay Larsen, C.G. Fernlund and S. Rodin, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 1 October 2018,

after considering the observations submitted on behalf of:

– Openbaar Ministerie, by K. van der Schaft and U.E.A. Weitzel, acting as Agents,

– Mr Popławski, by P.J. Verbeek and T.O.M. Dieben, advocaten,

– the Netherlands Government, by M.K. Bulterman and J. Langer, acting as Agents,

– the Spanish Government, by M. J. García-Valdecasas Dorrego, acting as Agent,

– the Austrian Government, by C. Pesendorfer, acting as Agent,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by R. Troosters, H. Krämer and S. Grünheid, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 November 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the principle of the primacy of EU law and of Article 28(2) of Council Framework Decision 2008/909/JHA 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).

2 The request has been made in connection with the execution in the Netherlands of a European arrest warrant ('EAW') issued by the Sąd Rejonowy w Poznaniu (District Court, Poznań, Poland) against Mr Daniel Adam Popławski with a view to enforcing a custodial sentence in Poland.

Legal context

EU law

Framework Decision 2002/584/JHA

3 Recitals 5, 7 and 11 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1) state:

'(5) The objective set for the [European] 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.

...

(7) Since the aim of replacing the system of multilateral extradition built upon the European Convention on Extradition[, signed in Paris on 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 [of the European Union] may adopt measures in accordance with the principle of subsidiarity as referred to in Article 2 [TEU] and Article 5 [EC Treaty]. 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.

...

(11) In relations between Member States, the European arrest warrant should replace all the previous instruments concerning extradition, including the provisions of Title III of the Convention implementing the Schengen Agreement [of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed in Schengen on 19 June 1990 and entered into force on 26 March 1995 (OJ 2000 L 239, p. 19] which concern extradition.'

4 Article 1 of that Framework Decision 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.

...'

5 Article 4 of that Framework Decision provides:

'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.

...'

Framework Decision 2008/909

6 Article 3(1) of Framework Decision 2008/909 reads as follows:

'The purpose of this Framework Decision is to establish the rules under which a Member State, with a view to facilitating the social rehabilitation of the sentenced person, is to recognise a judgment and enforce the sentence.'

7 Article 4(5) and (7) of that framework decision states:

'5. The executing State may, on its own initiative, request the issuing State to forward the judgment together with the certificate. The sentenced person may also request the competent authorities of the issuing State or of the executing State to initiate a procedure for forwarding the judgment and the certificate under this Framework Decision. Requests made under this paragraph shall not create an obligation of the issuing State to forward the judgment together with the certificate.

...

7. Each Member State may, either on adoption of this Framework Decision or later, notify the General Secretariat of the Council that, in its relations with other Member States that have given the same notification, its prior consent under paragraph 1(c) is not required for the forwarding of the judgment and the certificate:

(a) if the sentenced person lives in and has been legally residing continuously for at least five years in the executing State and will retain a permanent right of residence in that State, and/or

(b) if the sentenced person is a national of the executing State in cases other than those provided for in paragraph 1(a) and (b).

...'

8 Article 7(4) of that framework decision provides:

'Each Member State may, on adoption of this Framework Decision or later, by a declaration notified to the General Secretariat of the Council declare that it will not apply paragraph 1. Any such declaration may be withdrawn at any time. Such declarations or withdrawals of declarations shall be published in the *Official Journal of the European Union*.'

9 Article 25 of that framework decision 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, or where, acting under Article 5(3) of that Framework Decision, it has imposed the condition that the person has to be returned to serve the sentence in the Member State concerned, so as to avoid impunity of the person concerned.'

10 Under Article 26(1) of Framework Decision 2008/909:

'Without prejudice to their application between Member States and third States and their transitional application according to Article 28, this Framework Decision shall, from 5 December 2011, replace the corresponding provisions of the following conventions applicable in relations between the Member States:

– The European Convention on the transfer of sentenced persons of 21 March 1983 and the Additional Protocol thereto of 18 December 1997;

– The European Convention on the International Validity of Criminal Judgments of 28 May 1970;

– Title III, Chapter 5, of the Convention of 19 June 1990 implementing the Schengen Convention of 14 June 1985 on the gradual abolition of checks at common borders;

– The Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences of 13 November 1991.'

11 Article 28 of that framework decision provides:

'1. Requests received before 5 December 2011 shall continue to be governed in accordance with the existing legal instruments on the transfer of sentenced persons. Requests received after that date shall be governed by the rules adopted by Member States pursuant to this Framework Decision.

2. However, any Member State may, on the adoption of this Framework Decision, make a declaration indicating that, in cases where the final judgment has been issued before the date it specifies, it will as an issuing and an executing State, continue to apply the existing legal instruments on the transfer of sentenced persons applicable before 5 December 2011. If such a declaration is made, those instruments shall apply in such cases in relation to all other Member States irrespective of whether or not they have made the same declaration. The date in question may not be later than 5 December 2011. The said declaration shall be published in the *Official Journal of the European Union*. It may be withdrawn at any time.'

Netherlands law

12 The Overleveringswet (Law on surrender) of 29 April 2004 (Stb. 2004, No 195, 'the OLW'), which transposes into Netherlands law Framework Decision 2002/584, provides in Article 6:

'1. The surrender of a Netherlands national may be permitted provided that he is sought for the purposes of a criminal investigation against him and that, in the view of the executing judicial authority, it is guaranteed that, if he receives an unconditional custodial sentence in the issuing Member State in relation to acts for which surrender may be permitted, he may serve that sentence in the Netherlands.

2. The surrender of a Netherlands national shall not be permitted if that surrender is sought for the purposes of execution of a custodial sentence imposed on him by final judicial decision.

...

4. The public prosecutor shall immediately inform our minister of ... any refusal to surrender communicated with the declaration, referred to in paragraph 3, to the effect that the Kingdom of the Netherlands is willing to assume responsibility for executing the foreign judgment.

5. Paragraphs 1 to 4 shall also apply to a foreign national in possession of a residence permit of indefinite duration, in so far as he may be prosecuted in the Netherlands for the offences on which the EAW is based and in so far as he can be expected not to forfeit his right of residence in the Netherlands as a result of any sentence or measure which may be imposed on him after surrender.'

13 Article 6(3) of the OLW, in the version applicable until the entry into force of the Wet wederzijdse erkenning en tenuitvoerlegging vrijheidsbenemende en voorwaardelijke sancties (Law on the mutual recognition and enforcement of custodial and suspended sentences) of 12 July 2012 (Stb. 2012, No 333, 'the WETS'), which implements Framework Decision 2008/909, provided:

'Where surrender is refused solely on the basis of Article 6(2) ..., the public prosecutor shall notify the issuing judicial authority that it is willing to execute the judgment in accordance with the procedure laid down in Article 11 of the Convention on the Transfer of Sentenced Persons, signed in Strasbourg on 21 March 1983, or on the basis of another applicable convention.'

14 Since the WETS came into force, Article 6(3) of the OLW is worded as follows:

'Where surrender is refused solely on the ground of Article 6(2) ..., the public prosecutor shall notify the issuing judicial authority that it is willing to assume responsibility for executing the judgment.'

15 Article 5:2 of the WETS provides:

'1. [The WETS] replaces the [Wet overdracht tenuitvoerlegging strafvonnissen (Law on the transfer of enforcement of judgments in criminal matters)] in relations with the Member States of the European Union.

...

3. [The WETS] shall not apply to judicial decisions which became final before 5 December 2011.

...'

The dispute in the main proceedings and the questions referred for a preliminary ruling

16 By a judgment of 5 February 2007, which became final on 13 July 2007, the Sąd Rejonowy w Poznaniu (District Court, Poznań) imposed a one-year suspended custodial sentence on Mr Popławski, who is a Polish national. By decision of 15 April 2010, that court ordered the execution of that sentence.

17 On 7 October 2013, that court issued an EAW against Mr Popławski for the purposes of executing that sentence.

18 In the main proceedings relating to the execution of that EAW, the rechtbank Amsterdam (District Court, Amsterdam, the Netherlands) asked whether it had to apply Article 6(2) and (5) of the OLW which provides an automatic ground for non-execution of an EAW in favour of, inter alia, persons residing in the Netherlands, as is the case with Mr Popławski.

19 By a decision of 30 October 2015, the referring court made a first request for a preliminary ruling to the Court of Justice, in the context of which it observed that, under Article 6(3) of the OLW, in the version applicable until the entry into force of the WETS, where the Kingdom of the Netherlands refuses, pursuant to Article 6(2) and (5) of the OLW, to execute an EAW, it must state that it is 'willing' to take over the execution of the sentence on the basis of a convention in force between it and the issuing Member State. It stipulated that, in accordance with the provisions of the convention applicable to relations between the Republic of Poland and the Kingdom of the Netherlands, enforcement of the sentence in the Netherlands had to be preceded by a request to that effect made by the Republic of Poland and that Polish legislation precluded such a request being made in respect of Polish nationals.

20 In that decision, the referring court observed that, in such a situation, a refusal to surrender could lead to the impunity of the person to whom the EAW applies. After pronouncement of the judgment refusing the surrender,

it may prove impossible to take over execution of the sentence, because there has been no request to that end from the Polish authorities.

21 The referring court also expressed doubts as to whether Article 6(2) to (4) of the OLW is compatible with Article 4(6) of Framework Decision 2002/584 which permits a refusal to surrender only if the executing Member State 'undertakes' to execute the sentence in accordance with its domestic law.

22 By its judgment of 29 June 2017, *Popławski* (C-579/15, EU:C:2017:503), the Court of Justice held that Article 4(6) of Framework Decision 2002/584 must be interpreted as meaning that it precludes legislation of a Member State implementing that provision which, in a situation where the surrender of a foreign national in possession of a residence permit of indefinite duration in the territory of that Member State is sought by another Member State in order to execute a custodial sentence imposed on that national by a decision which has become final, first, does not authorise such a surrender, and secondly, merely lays down the obligation for the judicial authorities of the first Member State to inform the judicial authorities of the second Member State that they are willing to take over the enforcement of the judgment, where, on the date of the refusal to surrender, the execution has not in fact been taken over and where, furthermore, in the event that taking over that execution subsequently proves to be impossible, such a refusal may not be challenged.

23 In the same judgment, the Court held that the provisions of Framework Decision 2002/584 do not have direct effect. However, it observed that the competent national court, by taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, is obliged to interpret the provisions of national law concerned, so far as is possible, in the light of the wording and the purpose of that framework decision, which in the present case means that, in the event of a refusal to execute an EAW issued with a view to the surrender of a person who has been finally judged in the issuing Member State and given a custodial sentence, the judicial authorities of the executing Member State are themselves required to ensure that the sentence pronounced against that person is actually executed (judgment of 29 June 2017, *Popławski*, C-579/15, EU:C:2017:503).

24 In the order for reference, the referring court states that it is apparent from that judgment that Article 6(2), (3) and (5) of the OLW is contrary to Article 4(6) of Framework Decision 2002/584.

25 According to the referring court, it also follows from the judgment of 29 June 2017, *Popławski* (C-579/15, EU:C:2017:503), that EU law does not preclude an interpretation of Article 6(3) of the OLW, in the version applicable until the entry into force of the WETS, according to which Article 4(6) of Framework Decision 2002/584 provides the legal basis required by that national provision for enforcement of the sentence, bearing in mind that Article 4(6), unlike international conventions applicable to relations with the Republic of Poland, does not require a request for enforcement from the authorities which issued the EAW, in the present case the Polish authorities, and that therefore such an interpretation of Article 6(3) of the OLW would make it possible to ensure that the custodial sentence is actually enforced in the Netherlands.

26 However, the Minister van Veiligheid en Justitie (Minister of Security and Justice, Netherlands) ('the Minister'), who is the competent organ of State under Netherlands law for enforcement of the sentence, considered that Framework Decision 2002/584 was not a convention for the purposes of Article 6(3) of the OLW in the version applicable until the entry into force of the WETS.

27 The referring court considers that, irrespective of whether the Minister's interpretation is correct, it cannot, in those circumstances, conclude that that interpretation will ensure that the sentence pronounced against Mr Popławski will actually be enforced in the Netherlands.

28 The referring court is therefore unsure whether, under the principle of the primacy of EU law, it can disapply the provisions of Netherlands law which are incompatible with the provisions of a framework decision, even if the latter provisions do not have direct effect. It states that, if it disapplied Article 6(2) and (5) of the OLW, there would no longer be any ground for refusing to surrender Mr Popławski to the Polish authorities.

29 Moreover, the referring court is unsure whether Article 6(3) of the OLW, as amended by the WETS, may be applied to the dispute in the main proceedings, bearing in mind that, since that amendment, that provision no longer refers to a basis in the convention for the actual enforcement of the sentence in the Netherlands.

30 It is true that that court states that, by virtue of Article 5:2(3) of the WETS, its provisions, which transpose Framework Decision 2008/909, do not apply to court decisions which became final before 5 December 2011, as is the case with the decision which imposed a custodial sentence on Mr Popławski. The referring court states, however, that Article 5:2(3) of the WETS implements the declaration made by the Netherlands pursuant to Article 28(2) of Framework Decision 2008/909 and that the Court of Justice has not ruled on the validity of that declaration, in particular on the fact that it might have been out of time, in so far as that declaration was not made until after that framework decision was adopted.

31 That court states that, if that declaration were found to be invalid, the national provisions transposing Framework Decision 2008/909, including Article 6 of the OLW, as amended by the WETS, would apply, in accordance with Article 26 of that framework decision, to the enforcement of the EAW issued against Mr Popławski.

32 However, the application of those national provisions to the dispute in the main proceedings assumes that Article 5:2(3) of the WETS may be interpreted in accordance with Framework Decision 2008/909 and, conversely, that that court may disapply that provision by virtue of the principle of the primacy of EU law. In addition, it should be ascertained that, in the event of a refusal to surrender based on Article 6 of the OLW, as amended by the WETS, the sentence would actually be executed in the Netherlands.

33 If so, it could refuse to surrender Mr Popławski and the sentence could be executed in the Netherlands, in accordance with Article 6(2) and (5) of the OLW and with Article 4(6) of Framework Decision 2002/584.

34 It was in those circumstances that the rechtbank Amsterdam (District Court, Amsterdam) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) If the executing judicial authority cannot interpret the national provisions implementing a framework decision in such a way that their application leads to an outcome in conformity with the framework decision, must it then, in accordance with the primacy principle, disapply those national provisions not in conformity with that framework decision?

(2) Does a declaration of a Member State within the meaning of Article 28(2) of Framework Decision 2008/909, which it did not make “on the adoption of this Framework Decision”, but at a later date, have legal effect?’

Consideration of the questions referred

The second question

35 By its second question, which it is appropriate to examine first, the referring court asks, in essence, whether Article 28(2) of Framework Decision 2008/909 must be interpreted as meaning that a declaration made pursuant to that provision by a Member State after that framework decision was adopted is capable of producing legal effects.

36 According to Article 3(1), the purpose of Framework Decision 2008/909 is to set the rules which make it possible for a Member State, with a view to facilitating the social rehabilitation of the sentenced person, to recognise a judgment and enforce the sentence pronounced by a court in another Member State. It follows from Article 25 of that framework decision that it applies, *mutatis mutandis* in so far as its provisions are compatible with the provisions of Framework Decision 2002/584, to the enforcement of sentences in cases where a Member State undertakes to enforce the sentence pursuant to Article 4(6) of that framework decision.

37 In accordance with Article 26, as of 5 December 2011 Framework Decision 2008/909 replaces the provisions of the conventions on the transfer of sentenced persons referred to in that article, applicable in relations between the Member States. It is also apparent from Article 28(1) of that framework decision that requests for the recognition and enforcement of a sentence received as from 5 December 2011 are no longer to be governed by existing legal instruments on the transfer of sentenced persons, but by the rules adopted by the Member States pursuant to that framework decision.

38 However, Article 28(2) of Framework Decision 2008/909 allows each Member State, at the time of the adoption of that framework decision, to make a declaration indicating that it will continue to apply, as an issuing and an

executing State, the existing legal instruments on the transfer of sentenced persons applicable before 5 December 2011 in cases where the final sentence was pronounced before the date which that Member State sets, provided that that date is not later than 5 December 2011. Where a Member State makes such a declaration, those instruments will apply in cases covered by that declaration to all the other Member States, whether or not those Member States have made the same declaration.

39 Decision 2008/909 was adopted on 27 November 2008. On 24 March 2009, the Kingdom of the Netherlands sent a declaration to the Council pursuant to Article 28(2) of that framework decision (OJ 2009 L 265, p. 41), in which that Member State indicated that it would apply the existing legal instruments on the transfer of sentenced persons applicable before 5 December 2011 for all cases where the final sentence is pronounced before that date.

40 It is apparent from the information provided by the referring court that, after the submission of the request for a preliminary ruling examined in the present case, that declaration was withdrawn by the Kingdom of the Netherlands with effect from 1 June 2018. Nevertheless, the referring court considered that it was necessary to retain its second question on the ground, inter alia, that the Republic of Poland had itself made a declaration under Article 28(2) of Framework Decision 2008/909 after the date on which that framework decision was adopted, meaning that that declaration might also have been out of time.

41 In that regard, it should be recalled that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of a rule of EU law, the Court is in principle bound to give a ruling (judgment of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paragraph 26 and the case-law cited).

42 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paragraph 27 and the case-law cited).

43 In the present case, despite the withdrawal of the declaration made under Article 28(2) of Framework Decision 2008/909 by the Kingdom of the Netherlands, the conditions which may lead the Court to refuse to rule on the question referred have not been met.

44 Suffice it to state that the question whether the declaration made by the Republic of Poland produces legal effects may be important in the dispute in the main proceedings, given that, in accordance with Article 28(2) of Framework Decision 2008/909, such a declaration requires other Member States, in their relations with the Republic of Poland, to continue to apply, in the cases laid down by that declaration, the existing legal instruments on the transfer of sentenced persons applicable before 5 December 2011.

45 As to the substance, it should be stated that Article 28(2) of Framework Decision 2008/909 derogates from the general arrangements laid down in Article 28(1) of that framework decision and that the implementation of that derogation is, moreover, unilaterally entrusted to each Member State. It follows that that provision must be given a strict interpretation (see, to that effect, judgment of 25 January 2017, *van Vemde*, C-582/15, EU:C:2017:37, paragraph 30).

46 It is apparent from the actual wording of that provision that the declaration to which it refers must be made by the Member State on the date that framework decision is adopted. It follows that a declaration made after that date does not satisfy the conditions expressly laid down by the EU legislature for that declaration to produce legal effects.

47 Such an interpretation is supported by the general scheme of Framework Decision 2008/909. As the Advocate General stated in paragraph 47 of his Opinion, where the EU legislature intended to allow a declaration to be made, not only when that framework decision is adopted, but also subsequently, such a power was expressly laid down by that framework decision, as is illustrated by Article 4(7) and Article 7(4) thereof.

48 It should also be observed that, contrary to what the Netherlands Government argues in its written observations, the mere fact that a Member State, when that framework decision is adopted or sometime before it is drawn up, expresses its intention to make a declaration in accordance with Article 28(2) of that framework decision does not amount to a declaration for the purposes of that provision. Such a declaration, unlike a mere declaration of intent, must reveal unambiguously the date of delivery of the final sentences which the Member State concerned intends to have excluded from the application of that framework decision.

49 In the light of the foregoing considerations, the answer to the second question is that Article 28(2) of Framework Decision 2008/909 must be interpreted as meaning that a declaration made pursuant to that provision by a Member State, after that framework decision was adopted, is not capable of producing legal effects.

The first question

50 By its first question, the referring court asks in essence whether the principle of the primacy of EU law must be interpreted as meaning that it imposes an obligation on a Member State court to disapply a provision of the law of that State which is incompatible with the provisions of a framework decision.

51 It is apparent from the documents before the Court that the referring court wishes to ascertain in particular whether it is possible to disregard the application of national provisions which it considers to be contrary to Framework Decisions 2002/584 and 2008/909.

52 In order to answer that question, it should be noted, in the first place, that EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves. These essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other (see, inter alia, Opinion 2/13 of 18 December 2014, EU:C:2014:2454, paragraphs 166 and 167; judgment of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paragraph 45; and Opinion 1/17, of 30 April 2019, EU:C:2019:341, paragraph 109).

53 The principle of the primacy of EU law establishes the pre-eminence of EU law over the law of the Member States (judgment of 15 July 1964, *Costa*, 6/64, EU:C:1964:66, pp. 1159 and 1160).

54 That principle therefore requires all Member State bodies to give full effect to the various EU provisions, and the law of the Member States may not undermine the effect accorded to those various provisions in the territory of those States (see, to that effect, judgments of 26 February 2013, *Melloni*, C-399/11, EU:C:2013:107, paragraph 59, and of 4 December 2018, *Minister for Justice and Equality and Commissioner of An Garda Síochána*, C-378/17, EU:C:2018:979, point 39).

55 In that regard, it should be pointed out that the principle that national law must be interpreted in conformity with EU law, by virtue of which the national court is required, to the greatest extent possible, to interpret national law in conformity with the requirements of EU law, is inherent in the system of the treaties, since it permits the national court, within the limits of its jurisdiction, to ensure the full effectiveness of EU law when it determines the dispute before it (judgments of 19 December 2013, *Koushkaki*, C-84/12, EU:C:2013:862, paragraphs 75 and 76; of 8 November 2016, *Ognyanov*, C-554/14, EU:C:2016:835, paragraph 59; and of 29 June 2017, *Popławski*, C-579/15, EU:C:2017:503, paragraph 31).

56 Similarly, the full effectiveness of EU rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain reparation when their rights are infringed by a breach of EU law for which a Member State can be held responsible (judgment of 19 November 1991, *Francovich and Others*, C-6/90 and C-9/90, EU:C:1991:428, paragraph 33).

57 It follows from the foregoing that, in order to ensure the effectiveness of all provisions of EU law, the primacy principle requires, inter alia, national courts to interpret, to the greatest extent possible, their national law in conformity with EU law and to afford individuals the possibility of obtaining redress where their rights have been impaired by a breach of EU law attributable to a Member State.

58 It is also in the light of the primacy principle that, where it is unable to interpret national law in compliance with the requirements of EU law, the national court which is called upon within the exercise of its jurisdiction to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for that court to request or await the prior setting aside of such provision by legislative or other constitutional means (see, to that effect, judgment of 4 December 2018, *Minister for Justice and Equality and Commissioner of An Garda Síochána*, C-378/17, EU:C:2018:979, paragraph 35 and the case-law cited).

59 That said, account should also be taken of the other essential characteristics of EU law and, more particularly, the fact that only some of the provisions of that law have direct effect.

60 Thus, the principle of the primacy of EU law cannot have the effect of undermining the essential distinction between provisions of EU law which have direct effect and those which do not and, consequently, of creating a single set of rules for the application of all of the provisions of EU law by the national courts.

61 In that regard, it should be pointed out that any national court, hearing a case within its jurisdiction, has, as an organ of a Member State, the obligation to disapply any provision of national law which is contrary to a provision of EU law with direct effect in the case pending before it (see, to that effect, judgments of 8 September 2010, *Winner Wetten*, C-409/06, EU:C:2010:503, paragraph 55 and the case-law cited; of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 41; and of 6 November 2018, *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:871, paragraph 75).

62 On the other hand, a provision of EU law which does not have direct effect may not be relied on, as such, in a dispute coming under EU law in order to disapply a provision of national law that conflicts with it.

63 Thus the national court is not required, solely on the basis of EU law, to disapply a provision of national law which is incompatible with a provision of the Charter of Fundamental Rights of the European Union which, like Article 27, does not have direct effect (see, to that effect, judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraphs 46 to 48).

64 Similarly, reliance on a provision of a directive which is not sufficiently clear, precise and unconditional to confer on it direct effect may not, solely on the basis of EU law, lead to a provision of national law being disapplied by a court of a Member State (see, to that effect, judgments of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 41; of 6 March 2014, *Napoli*, C-595/12, EU:C:2014:128, paragraph 50; of 25 June 2015, *Indėlių ir investicijų draudimas and Nemaniūnas*, C-671/13, EU:C:2015:418, paragraph 60; and of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt*, C-108/14 and C-109/14, EU:C:2015:496, paragraphs 51 and 52).

65 In addition, according to settled case-law, a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against that individual before a national court (see, to that effect, judgments of 26 September 1996, *Arcaro*, C-168/95, EU:C:1996:363, paragraph 36 and the case-law cited; of 17 July 2008, *Arcor and Others*, C-152/07 to C-154/07, EU:C:2008:426, paragraph 35; and of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43, paragraph 72 and the case-law cited).

66 It should be recalled that, in accordance with the third paragraph of Article 288 TFEU, the binding nature of a directive, which constitutes the basis for the possibility of relying on it, exists only in relation to 'each Member State to which it is addressed' and that the European Union has the power to enact, in a general and abstract manner, obligations for individuals with immediate effect, only where it is empowered to adopt regulations (see, to that effect, judgments of 12 December 2013, *Portgás*, C-425/12, EU:C:2013:829, paragraph 22, and of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43, paragraph 72).

67 It follows from the foregoing that, even a clear, precise and unconditional provision of a directive does not allow a national court to disapply a provision of its national law which conflicts with it, if, in doing so, an additional obligation were to be imposed on an individual (see, to that effect, judgments of 3 May 2005, *Berlusconi and Others*, C-387/02, C-391/02 and C-403/02, EU:C:2005:270, paragraphs 72 and 73; of 17 July 2008, *Arcor and Others*, C-152/07 to C-154/07, EU:C:2008:426, paragraphs 35 to 44; of 27 February 2014, *OSA*, C-351/12, EU:C:2014:110, paragraphs 46 and 47; of 7 August 2018, *Smith*, C-122/17, EU:C:2018:631, point 49; and of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43, paragraph 73).

68 As confirmed by the case-law recalled in paragraphs 64 to 67 above, a national court's obligation to disapply a provision of its national law which is contrary to a provision of EU law, if it stems from the primacy afforded to the latter provision, is nevertheless dependent on the direct effect of that provision in the dispute pending before that court. Therefore, a national court is not required, solely on the basis of EU law, to disapply a provision of its national law which is contrary to a provision of EU law if the latter provision does not have direct effect.

69 It should be stated, in the second place, that neither Framework Decision 2002/584 nor Framework Decision 2008/909 has direct effect. That is because those framework decisions were adopted on the basis of the former third pillar of the European Union, in particular, under Article 34(2)(b) EU. That provision stated, first, that framework decisions are binding on the Member States as to the result to be achieved, but leave to the national authorities the choice of form and methods, and, second, that framework decisions are not to entail direct effect (judgments of 8 November 2016, *Ognyanov*, C-554/14, EU:C:2016:835, paragraph 56, and of 29 June 2017, *Popławski*, C-579/15, EU:C:2017:503, paragraph 26).

70 In that regard, it is important to point out that, in accordance with Article 9 of Protocol (No 36) on transitional provisions, annexed to the treaties, the legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the Treaty on European Union prior to the entry into force of the Treaty of Lisbon are to be preserved until those acts are repealed, annulled or amended in implementation of the treaties. Since Framework Decisions 2002/584 and 2008/909 have not been subject to any such repeal, annulment or amendment, they continue therefore to have the legal effect attributed to them under Article 34(2)(b) EU (judgment of 8 November 2016, *Ognyanov*, C-554/14, EU:C:2016:835, paragraph 57).

71 Since those framework decisions do not have direct effect under the EU Treaty itself, it follows from paragraph 68 above that a court of a Member State is not required, solely on the basis of EU law, to disapply a provision of its national law which is contrary to those framework decisions.

72 In the third place, it should be recalled that, although the framework decisions cannot have direct effect, their binding character nevertheless places on national authorities an obligation to interpret national law in conformity with EU law as from the date of expiry of the period for the transposition of those framework decisions (judgment of 8 November 2016, *Ognyanov*, C-554/14, EU:C:2016:835, paragraphs 58 and 61).

73 When applying national law, those authorities are therefore required to interpret it, to the greatest extent possible, in the light of the text and the purpose of the framework decision in order to achieve the result sought by that decision (see, to that effect, judgments of 16 June 2005, *Pupino*, C-105/03, EU:C:2005:386, paragraph 43; of 5 September 2012, *Lopes Da Silva Jorge*, C-42/11, EU:C:2012:517, paragraph 54; of 8 November 2016, *Ognyanov*, C-554/14, EU:C:2016:835, paragraph 59; and of 29 June 2017, *Popławski*, C-579/15, EU:C:2017:503, paragraph 31).

74 However, the principle of interpreting national law in conformity with EU law has certain limits.

75 Thus, the general principles of law, in particular the principles of legal certainty and non-retroactivity, preclude inter alia that obligation to interpret national law in conformity with EU law from leading to the criminal liability of individuals being determined or aggravated, on the basis of a framework decision alone, in the absence of any legislation implementing its provisions, where they committed an infringement (judgments of 8 November 2016, *Ognyanov*, C-554/14, EU:C:2016:835, paragraphs 63 to 64 and the case-law cited, and of 29 June 2017, *Popławski*, C-579/15, EU:C:2017:503, paragraph 32).

76 Similarly, the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem* (judgment of 29 June 2017, *Popławski*, C-579/15, EU:C:2017:503, paragraph 33 and the case-law cited). In other words, the obligation to interpret national law in conformity with EU law ceases when the former cannot be applied in a way that leads to a result compatible with that envisaged by the framework decision concerned (judgment of 8 November 2016, *Ognyanov*, C-554/14, EU:C:2016:835, paragraph 66).

77 That being so, the principle that national law must be interpreted in conformity with EU law requires that the whole body of domestic law be taken into consideration and that the interpretative methods recognised by domestic law be applied, with a view to ensuring that the framework decision concerned is fully effective and to achieving an outcome consistent with the objective pursued by it (see, to that effect, judgments of 5 September 2012, *Lopes Da Silva Jorge*, C-42/11, EU:C:2012:517, paragraph 56; of 29 June 2017, *Popławski*, C-579/15, EU:C:2017:503, paragraph 34; and of 12 February 2019, *TC*, C-492/18 PPU, EU:C:2019:108, paragraph 68).

78 In that context, the Court has already held that the obligation to interpret domestic law in conformity with EU law requires national courts to change established case-law, where necessary, if it is based on an interpretation of domestic law that is incompatible with the objectives of a framework decision and to disapply, on their own authority, the interpretation adopted by a higher court which it must follow in accordance with its national law, if that interpretation is not compatible with the framework decision concerned (see, to that effect, judgments of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paragraph 33, and of 29 June 2017, *Popławski*, C-579/15, EU:C:2017:503, paragraphs 35 and 36).

79 Consequently, a national court cannot validly claim that it is impossible for it to interpret a provision of national law in a manner that is consistent with EU law merely because that provision has consistently been interpreted in a manner that is incompatible with EU law (judgments of 8 November 2016, *Ognyanov*, C-554/14, EU:C:2016:835, paragraph 69, and of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, paragraph 60) or is applied in such a manner by the relevant national authorities.

80 In the present case, with regard to the obligation to interpret Netherlands law, and more particularly the OLW, in conformity with Framework Decision 2002/584, the following should be noted.

81 In paragraph 37 of the judgment of 29 June 2017, *Popławski* (C-579/15, EU:C:2017:503), the Court found that the national court's obligation to ensure the complete effectiveness of Framework Decision 2002/584 brings with it the obligation for the Kingdom of the Netherlands to execute the EAW at issue in the main proceedings or, in the event of a refusal, the obligation to ensure that the sentence pronounced in Poland against Mr Popławski is actually executed in the Netherlands.

82 It should be observed that the impunity of the requested person would be incompatible with the objective pursued both by Framework Decision 2002/584 (see, to that effect, judgments of 29 June 2017, *Popławski*, C-579/15, EU:C:2017:503, paragraph 23, and of 13 December 2018, *Sut*, C-514/17, EU:C:2018:1016, paragraph 47) and by Article 3(2) TEU, under which the European Union offers its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures, in particular with respect to external border controls and the prevention and combating of crime (judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paragraph 86).

83 The Court also stated that, since the obligation referred to in paragraph 81 above has no bearing on the determination of Mr Popławski's criminal liability which stems from the judgment pronounced against him on 5 February 2007 by the Sąd Rejonowy w Poznaniu (District Court, Poznań) it cannot, a fortiori, be regarded as aggravating that liability, within the meaning of paragraph 75 above (judgment of 29 June 2017, *Popławski*, C-579/15, EU:C:2017:503, paragraph 37).

84 It is apparent from the documents before this Court that the referring court, unless it resorts to an interpretation *contra legem*, seems to rule out the possibility that the OLW may be applied in such a way that the EAW at issue in the main proceedings is enforced and that Mr Popławski is surrendered to the Polish judicial authorities.

85 Therefore, if the outcome of an interpretation of national law is that the enforcement of the EAW issued against Mr Popławski actually proves to be impossible, which is a matter for the referring court to establish, it falls again to that court to interpret the relevant Netherlands legislation, and in particular Article 6 of the OLW, upon which Mr Popławski's surrender to the Polish authorities is refused, to the greatest extent possible in such a way that the application of that legislation makes it possible, by the sentence pronounced against Mr Popławski actually being executed in the Netherlands, to avoid his impunity and thus to produce a solution that is compatible with the objective pursued by Framework Decision 2002/584, as recalled in paragraph 82 above.

86 In that regard, as the Court stated in paragraph 23 of its judgment of 29 June 2017, *Popławski* (C-579/15, EU:C:2017:503), legislation of a Member State, such as Article 6 of the OLW, which implements the ground for optional non-execution of an EAW in order to execute a custodial sentence or detention order contained in Article 4(6) of Framework Decision 2002/584 by providing that the judicial authorities of that Member State are, in any event, obliged to refuse to execute an EAW if the requested person resides in that State, without those authorities having any margin of discretion and without that Member State actually undertaking to execute the

custodial sentence pronounced against that requested person, thereby creating a risk of impunity of that person, cannot be regarded as compatible with that framework decision.

87 In those circumstances, it should be stated that the Court, when called on to provide answers that are of use to the national court in the context of a reference for a preliminary ruling, may offer clarification intended to provide the national court with guidance and indicate to it which interpretation of national law would fulfil its obligation to interpret that law in conformity with EU law (judgment of 17 October 2018, *Klohn*, C-167/17, EU:C:2018:833, paragraph 68).

88 In the present case, with regard, first of all, to the obligation, laid down in Article 4(6) of Framework Decision 2002/584 and recalled to in paragraph 86 above, to ensure, in the event of a refusal to execute the EAW, that the custodial sentence is actually enforced by the executing Member State, it should be pointed out that that obligation presupposes an actual undertaking on the part of that State to execute the custodial sentence imposed on the requested person, even though, in any event, the mere fact that that Member State declares itself 'willing' to execute the sentence could not be regarded as justifying such a refusal. It follows that any refusal to execute an EAW must be preceded by the executing judicial authority's examination of whether it is actually possible to execute the sentence in accordance with its domestic law (judgment of 29 June 2017, *Popławski*, C-579/15, EU:C:2017:503, paragraph 22).

89 It is apparent from paragraph 38 of the judgment of 29 June 2017, *Popławski* (C-579/15, EU:C:2017:503), that, according to the referring court, the declaration, in which the Openbaar Ministerie (Public Prosecutor, Netherlands) informed the issuing judicial authority that, pursuant to Article 6(3) of the OLW in the version applicable until the entry into force of the WETS, it was willing to take over the execution of the sentence on the basis of the EAW at issue in the main proceedings, cannot be interpreted as constituting an actual undertaking on the part of the Kingdom of the Netherlands to execute that sentence, unless Article 4(6) of Framework Decision 2002/584 can be regarded as a formal legal basis, for the purposes of Article 6(3) of the OLW, for the actual execution of such a sentence in the Netherlands.

90 Although it falls to the referring court to assess whether Netherlands law may be interpreted as meaning that Framework Decision 2002/584 may be treated as a formal legal basis for the purposes of applying Article 6(3) of the OLW in the version applicable until the entry into force of the WETS, the Court has already held that EU law does not preclude such treatment.

91 First, as is apparent from the Court's case-law, according to recitals 5, 7 and 11 and Article 1(1) and (2) of Framework Decision 2002/584, in relations between Member States, that decision replaces all the previous instruments concerning extradition, including the conventions which existed between the different Member States. In addition, given that that framework decision coexists, whilst having its own legal arrangements defined by EU law, with the extradition conventions in force between the various Member States and third States, it is not inconceivable that that framework decision could be placed on the same footing as such a convention (see, to that effect, judgments of 29 June 2017, *Popławski*, C-579/15, EU:C:2017:503, paragraph 41, and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 39).

92 Secondly, the Court also held that Framework Decision 2002/584 does not contain any provision which leads to the conclusion that it precludes the term 'another applicable convention' in Article 6(3) of the OLW, in the version applicable until the entry into force of the WETS, from being interpreted as meaning that it also covers Article 4(6) of that framework decision, provided that such an interpretation would ensure that the discretionary power of the executing judicial authority to refuse to execute the EAW is exercised only on condition that the sentence pronounced against Mr Popławski is in fact executed in the Netherlands, and a solution that is compatible with the purpose of that framework decision is thus achieved (judgment of 29 June 2017, *Popławski*, C-579/15, EU:C:2017:503, paragraph 42).

93 It is apparent from the request for a preliminary ruling that the referring court confirms that such treatment would make it possible, according to its interpretation of Netherlands law, to ensure that the sentence handed down to Mr Popławski is actually executed in the Netherlands. Nevertheless, it states that the Minister, called on to intervene in the main proceedings by virtue of Article 6(4) of the OLW, considers that Framework Decision 2002/584 was not a convention for the purposes of Article 6(3) of the OLW in the version applicable until the entry into force of the WETS.

94 In that regard, it should be recalled first that, as was stated in paragraph 72 above, the obligation to interpret national law in conformity with Framework Decision 2002/584 binds all Member State authorities, including, in the present case, the Minister. The Minister, like the judicial authorities, is therefore required to interpret Netherlands law, to the greatest extent possible, in the light of the text and the purpose of the framework decision, in such a way that, by the sentence pronounced against Mr Popławski being enforced in the Netherlands, the effectiveness of Framework Decision 2002/584 is preserved, which is guaranteed by the interpretation of Article 6(3) of the OLW in the version applicable until the entry into force of the WETS, recalled in paragraph 92 above.

95 Secondly, the fact that an interpretation of national law which is incompatible with EU law is endorsed by the Minister in no way impedes the referring court's obligation to interpret domestic law in conformity with EU law.

96 This is all the more so since Framework Decision 2002/584 creates a mechanism for cooperation between the judicial authorities of the Member States and the decision on the execution of the EAW must be taken by a judicial authority that meets the requirements inherent in effective judicial protection, including the guarantee of independence, so that the entire procedure provided for by the framework decision is carried out under judicial supervision (see, to that effect, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 56). It follows that, since the Minister is not a judicial authority for the purposes of the framework decision (see, to that effect, judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, EU:C:2016:861, paragraph 45), the decision on the execution of the EAW made against Mr Popławski cannot depend on the Minister's interpretation of Article 6(3) of the OLW.

97 Consequently, the referring court cannot, in the main proceedings, validly claim that it is impossible for it to interpret Article 6(3) in a manner that is compatible with EU law, for the sole reason that that provision has been interpreted, by the Minister, in a way that is not compatible with EU law (see, by analogy, judgment of 8 November 2016, *Ognyanov*, C-554/14, EU:C:2016:835, paragraph 69).

98 It follows from the foregoing that, although the referring court concluded that Framework Decision 2002/584, in accordance with the methods of construction recognised by Netherlands law, may be treated as a convention for the purposes of the application of Article 6(3) of the OLW in the version applicable until the entry into force of the WETS, it is required to apply that provision, as interpreted, to the dispute in the main proceedings, without having regard to the fact that the Minister is opposed to that interpretation.

99 Next, with regard to the obligation, laid down in Article 4(6) of Framework Decision 2002/584 and referred to in paragraph 86 above, to ensure that the executing judicial authority has a margin of discretion in the implementation of the ground for optional non-execution of the EAW provided for in that provision, it should be recalled, first of all, that that authority must be able to take into consideration the objective pursued by the ground for optional non-execution set out in that provision, which, according to the Court's well-established case-law, means enabling the executing judicial authority to give particular weight to the possibility of increasing the requested person's chances of reintegrating into society when the sentence imposed on him expires (judgment of 29 June 2017, *Popławski*, C-579/15, EU:C:2017:503, paragraph 21).

100 It follows that the option conferred on the executing judicial authority to refuse, on the basis of Article 4(6), to surrender the requested person may be exercised only if that authority, after having ascertained, first, that the person is staying in, or is a national or a resident of the executing Member State and, second, that the custodial sentence passed in the issuing Member State against that person can actually be enforced in the executing Member State, considers that there is a legitimate interest which would justify the sentence imposed in the issuing Member State being enforced in the executing Member State (judgment of 13 December 2018, *Sut*, C-514/17, EU:C:2018:1016, paragraph 37).

101 Therefore, it falls primarily to the referring court to interpret its national law, to the greatest extent possible, in conformity with the requirement set out in the preceding paragraph.

102 At the very least, that court should interpret its national law in a way that makes it possible for it to reach a solution which, in the main proceedings, is not contrary to the objective pursued by Framework Decision 2002/584. The obligation to interpret national law in conformity with EU law persists for as long as the former can be applied in a way that leads to a result which is compatible with that envisaged by that framework decision (see, to that effect, judgment of 8 November 2016, *Ognyanov*, C-554/14, EU:C:2016:835, paragraph 66).

103 In that regard, it is apparent from the conditions governing the implementation of the ground for optional non-execution of the EAW, provided for in Article 4(6) of Framework Decision 2002/584, that the EU legislature wanted to avoid any risk of impunity of the requested person (see, to that effect, judgment of 13 December 2018, *Sut*, C-514/17, EU:C:2018:1016, paragraph 47), in accordance with the general purpose of that framework decision, as was stated in paragraph 82 above.

104 An interpretation of Article 6 of the OLW by which the referring court may not, under any circumstances, execute the EAW issued against Mr Popławski does not necessarily preclude the removal of any risk of impunity as regards Mr Popławski and therefore the fulfilment of both the objective pursued by that framework decision and the obligation which it imposes, in the present case on the Kingdom of the Netherlands, as recalled in paragraphs 81 and 82 above.

105 On the other hand, the existence of a requirement, in order for the interpretation of Article 6 of the OLW to be considered compatible with EU law, that that provision should give the referring court a margin of discretion enabling it to execute the EAW issued against Mr Popławski, if it considers that no legitimate interest justifies the sentence which he received being executed in the Netherlands, would lead to a risk, if national law could not be interpreted in accordance with such a requirement, of making it impossible, in view of the lack of direct effect of Framework Decision 2002/584, not only to surrender Mr Popławski to the Polish judicial authorities, but also to have his sentence actually executed in the Netherlands.

106 Such an outcome would provide for the impunity of the requested person and would run counter to the purpose of Framework Decision 2002/584 and the obligation which it imposes, in the present case on the Netherlands, as recalled in paragraphs 81 and 82 above.

107 In those circumstances, the referring court would adopt an interpretation of Netherlands law in conformity with the objectives pursued by Framework Decision 2002/584 if it interpreted that law in such a way that the refusal to execute the EAW at issue in the main proceedings, issued by the Republic of Poland, is subject to the guarantee that the custodial sentence which Mr Popławski received will actually be enforced in the Netherlands, even if Netherlands law provides that that refusal occurs automatically.

108 In view of the information provided in the order for reference, such an interpretation of Netherlands in conformity with Article 4(6) of Framework Decision 2002/584 seems possible, and therefore the execution in the Netherlands of the custodial sentence which Mr Popławski received in Poland appears to be permissible, a matter which must, however, be verified by the referring court.

109 In the light of the foregoing, the answer to the first question is that the principle of the primacy of EU law must be interpreted as meaning that it does not require a national court to disapply a provision of national law which is incompatible with the provisions of a framework decision, such as the framework decisions at issue in the main proceedings, the legal effects of which are preserved in accordance with Article 9 of Protocol (No 36) on transitional provisions, annexed to the treaties, since those provisions do not have direct effect. The authorities of the Member States, including the courts, are nevertheless required to interpret their national law, to the greatest extent possible, in conformity with EU law, which enables them to ensure an outcome that is compatible with the objective pursued by the framework decision concerned.

Costs

110 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 28(2) of Council Framework Decision 2008/909/JHA 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 must be interpreted as meaning that a declaration made pursuant to that provision by a**

Member State, after that framework decision was adopted, is not capable of producing legal effects.

2. **The principle of the primacy of EU law must be interpreted as meaning that it does not require a national court to disapply a provision of national law which is incompatible with the provisions of a framework decision, such as the framework decisions at issue in the main proceedings, the legal effects of which are preserved in accordance with Article 9 of Protocol (No 36) on transitional provisions, annexed to the treaties, since those provisions do not have direct effect. The authorities of the Member States, including the courts, are nevertheless required to interpret their national law, to the greatest extent possible, in conformity with EU law, which enables them to ensure an outcome that is compatible with the objective pursued by the framework decision concerned.**

[Signatures]

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* Language of the case: Dutch.

JUDGMENT OF THE COURT (Grand Chamber)

25 July 2018 (*)

(Reference for a preliminary ruling — Urgent preliminary ruling procedure — Police and judicial cooperation in criminal matters — European arrest warrant — Framework Decision 2002/584/JHA — Article 1(3) — Surrender procedures between Member States — Conditions for execution — Charter of Fundamental Rights of the European Union — Article 47 — Right of access to an independent and impartial tribunal)

In Case C-216/18 PPU,

REQUEST for a preliminary ruling under Article 267 TFEU from the High Court (Ireland), made by decision of 23 March 2018, received at the Court on 27 March 2018, in proceedings relating to the execution of European arrest warrants issued against

LM,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta (Rapporteur), M. Ilešič, J.L. da Cruz Vilaça, J. Malenovský, E. Levits and C.G. Fernlund, Presidents of Chambers, A. Borg Barthet, J.-C. Bonichot, A. Arabadjiev, S. Rodin, F. Biltgen, C. Lycourgos and E. Regan, Judges,

Advocate General: E. Tanchev,

Registrar: L. Hewlett, Principal Administrator,

having regard to the referring court's request of 23 March 2018, received at the Court on 27 March 2018, that the reference for a preliminary ruling be dealt with under the urgent procedure, pursuant to Article 107 of the Rules of Procedure of the Court,

having regard to the decision of 12 April 2018 of the First Chamber granting that request,

having regard to the written procedure and further to the hearing on 1 June 2018,

after considering the observations submitted on behalf of:

– the Minister for Justice and Equality, by M. Browne, acting as Agent, S. Ní Chúlacháin, Barrister-at-Law, R. Farrell, Senior Counsel and K. Colmcille, Barrister-at-Law,

– LM, by C. Ó Maolchallann, Solicitor, M. Lynam, Barrister-at-Law, S. Guerin, Senior Counsel, and D. Stuart, Barrister-at-Law,

– the Spanish Government, by M.A. Sampol Pucurull, acting as Agent,

– the Hungarian Government, by M.Z. Fehér, acting as Agent,

– the Netherlands Government, by M.K. Bulterman, acting as Agent,

– the Polish Government, by Ł. Piebiak, B. Majczyna and J. Sawicka, acting as Agents,

– the European Commission, by J. Tomkin, H. Krämer, B. Martenczuk, R. Troosters and K. Banks, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 June 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(3) of Council Framework Decision 2002/584/JHA 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').

2 The request has been made in connection with the execution, in Ireland, of European arrest warrants issued by Polish courts against LM ('the person concerned').

Legal context

The EU Treaty

3 Article 7 TEU provides:

'1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.

...'

The Charter

4 Title VI of the Charter of Fundamental Rights of the European Union ('the Charter'), headed 'Justice', includes Article 47, entitled 'Right to an effective remedy and to a fair trial', which states:

'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

…'

5 The Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17) point out that the second paragraph of Article 47 of the Charter corresponds to Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR').

6 Article 48 of the Charter, entitled 'Presumption of innocence and rights of defence', states:

'1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.

2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.'

Framework Decision 2002/584

7 Recitals 5 to 8, 10 and 12 of Framework Decision 2002/584 are worded as follows:

'(5) … 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. …

(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 means 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. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) [EU, now, after amendment, Article 2 TEU], determined by the [European] Council pursuant to Article 7(1) [EU, now, after amendment, Article 7(2) TEU,] with the consequences set out in Article 7(2) thereof [now, after amendment, Article 7(3) TEU].

…

(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 [EU] and reflected in the [Charter], in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.

…'

8 Article 1 of Framework Decision 2002/584, 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 modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [EU].'

9 Articles 3, 4 and 4a of Framework Decision 2002/584 set out the grounds for mandatory or optional non-execution of a European arrest warrant.

10 Article 7 of Framework Decision 2002/584, entitled 'Recourse to the central authority', provides:

'1. Each Member State may designate a central authority or, when its legal system so provides, more than one central authority to assist the competent judicial authorities.

2. A Member State may, if it is necessary as a result of the organisation of its internal judicial system, make its central authority(ies) responsible for the administrative transmission and reception of European arrest warrants as well as for all other official correspondence relating thereto.

Member State wishing to make use of the possibilities referred to in this Article shall communicate to the General Secretariat of the Council information relating to the designated central authority or central authorities. These indications shall be binding upon all the authorities of the issuing Member State.'

11 Article 15 of Framework Decision 2002/584, entitled 'Surrender decision', states:

'1. The executing judicial authority shall decide, within the time limits and under the conditions defined in this Framework Decision, whether the person is to be surrendered.

2. 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.

...'

Irish law

12 Framework Decision 2002/584 was transposed into Irish law by the European Arrest Warrant Act 2003.

13 Section 37(1) of the European Arrest Warrant Act 2003 provides:

'A person shall not be surrendered under this Act if—

(a) his or her surrender would be incompatible with the State's obligations under—

(i) the [ECHR], or

(ii) the Protocols to the [ECHR],

(b) his or her surrender would constitute a contravention of any provision of the Constitution ...'

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 On 1 February 2012, 4 June 2012 and 26 September 2013, Polish courts issued three European arrest warrants ('the EAWs') against the person concerned, in order for him to be arrested and surrendered to those courts for the purpose of conducting criminal prosecutions, inter alia for trafficking in narcotic drugs and psychotropic substances.

15 On 5 May 2017 the person concerned was arrested in Ireland on the basis of those EAWs and brought before the referring court, the High Court (Ireland). He informed that court that he did not consent to his surrender to the Polish judicial authorities and was placed in custody pending a decision on his surrender to them.

16 In support of his opposition to being surrendered, the person concerned submits, inter alia, that his surrender would expose him to a real risk of a flagrant denial of justice in contravention of Article 6 of the ECHR. In this connection, he contends, in particular, that the recent legislative reforms of the system of justice in the Republic of Poland deny him his right to a fair trial. In his submission, those changes fundamentally undermine the basis of the mutual trust between the authority issuing the European arrest warrant and the executing authority, calling the operation of the European arrest warrant mechanism into question.

17 The person concerned relies, in particular, on the Commission's reasoned proposal of 20 December 2017 submitted in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland (COM(2017) 835 final) ('the reasoned proposal') and on the documents to which the reasoned proposal refers.

18 In the reasoned proposal, the Commission, first of all, sets out in detail the context and history of the legislative reforms, next, addresses two particular issues of concern — namely (i) the lack of an independent and legitimate constitutional review and (ii) the threats to the independence of the ordinary judiciary — and, finally, invites the Council to determine that there is a clear risk of a serious breach by the Republic of Poland of the values referred to in Article 2 TEU and to address to that Member State the necessary recommendations in that regard.

19 The reasoned proposal also sets out the findings of the Commission for Democracy through Law of the Council of Europe relating to the situation in the Republic of Poland and to the effects of the recent legislative reforms on its system of justice.

20 Finally, the reasoned proposal notes the serious concerns expressed in that regard, during the period preceding the reasoned proposal's adoption, by a number of international and European institutions and bodies, such as the United Nations Human Rights Committee, the European Council, the European Parliament and the European Network of Councils for the Judiciary, and, at national level, by the Sąd Najwyższy (Supreme Court, Poland), the Trybunał Konstytucyjny (Constitutional Tribunal, Poland), the Rzecznik Praw Obywatelskich (Ombudsman, Poland), the Krajowa Rada Sądownictwa (National Council for the Judiciary, Poland) and associations of judges and lawyers.

21 On the basis of the information in the reasoned proposal and of the findings of the Commission for Democracy through Law of the Council of Europe relating to the situation in the Republic of Poland and to the effects of the recent legislative reforms on its system of justice, the referring court concludes that, as a result of the cumulative impact of the legislative changes that have taken place in the Republic of Poland since 2015 concerning, in particular, the Trybunał Konstytucyjny (Constitutional Court), the Sąd Najwyższy (Supreme Court), the National Council for the Judiciary, the organisation of the ordinary courts, the National School of Judiciary and the Public Prosecutor's Office, the rule of law has been breached in that Member State. The referring court bases that conclusion on changes found by it to be particularly significant, such as:

- the changes to the constitutional role of the National Council for the Judiciary in safeguarding independence of the judiciary, in combination with the Polish Government's invalid appointments to the Trybunał Konstytucyjny (Constitutional Tribunal) and its refusal to publish certain judgments;

- the fact that the Minister for Justice is now the Public Prosecutor, that he is entitled to play an active role in prosecutions and that he has a disciplinary role in respect of presidents of courts, which has the potential for a chilling effect on those presidents, with consequential impact on the administration of justice;

- the fact that the Sąd Najwyższy (Supreme Court) is affected by compulsory retirement and future appointments, and that the new composition of the National Council for the Judiciary will be largely dominated by political appointees; and

– the fact that the integrity and effectiveness of the Trybunał Konstytucyjny (Constitutional Court) have been greatly interfered with in that there is no guarantee that laws in Poland will comply with the Polish Constitution, which is sufficient in itself to have effects throughout the criminal justice system.

22 That being so, the referring court considers, on the ground that the 'wide and unchecked powers' of the system of justice in the Republic of Poland are inconsistent with those granted in a democratic State subject to the rule of law, that there is a real risk of the person concerned being subjected to arbitrariness in the course of his trial in the issuing Member State. Thus, surrender of the person concerned would result in breach of his rights laid down in Article 6 of the ECHR and should, accordingly, be refused, in accordance with Irish law and with Article 1(3) of Framework Decision 2002/584 read in conjunction with recital 10 thereof.

23 In this connection, the referring court observes that, in the judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198), the Court of Justice held, in the context of a surrender liable to result in a breach of Article 3 of the ECHR, that, if a finding of general or systemic deficiencies in the protections in the issuing Member State is made by the executing judicial authority, that authority must make an assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to a real risk of being subject in that Member State to inhuman or degrading treatment. It states that in that judgment the Court also established a two-step procedure to be applied by an executing judicial authority in such circumstances. That authority must, first of all, make a finding of general or systemic deficiencies in the protections provided in the issuing Member State and, then, seek all necessary supplementary information from the issuing Member State's judicial authority as to the protections for the individual concerned.

24 The referring court is uncertain whether, where the executing judicial authority has found that the common value of the rule of law enshrined in Article 2 TEU has been breached by the issuing Member State and that that systemic breach of the rule of law constitutes, by its nature, a fundamental defect in the system of justice, the requirement to assess, specifically and precisely, in accordance with the judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198), whether there are substantial grounds to believe that the individual concerned will be exposed to a risk of breach of his right to a fair trial, as enshrined in Article 6 of the ECHR, is still applicable, or whether, in such circumstances, the view may readily be taken that no specific guarantee as to a fair trial for that individual could ever be given by an issuing authority, given the systemic nature of the breach of the rule of law, so that the executing judicial authority cannot be required to establish that such grounds exist.

25 In those circumstances, the High Court decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Notwithstanding the conclusions of the Court of Justice in [the judgment of 5 April 2016,] *Aranyosi and Căldăraru* [(C-404/15 and C-659/15 PPU, EU:C:2016:198)], where a national court determines there is cogent evidence that conditions in the issuing Member State are incompatible with the fundamental right to a fair trial because the system of justice itself in the issuing Member State is no longer operating under the rule of law, is it necessary for the executing judicial authority to make any further assessment, specific and precise, as to the exposure of the individual concerned to the risk of unfair trial where his trial will take place within a system no longer operating within the rule of law?

(2) If the test to be applied requires a specific assessment of the requested person's real risk of a flagrant denial of justice and where the national court has concluded that there is a systemic breach of the rule of law, is the national court as executing judicial authority obliged to revert to the issuing judicial authority for any further necessary information that could enable the national court discount the existence of the risk to an unfair trial and if so, what guarantees as to fair trial would be required?'

The urgent procedure

26 The referring court requested that the present reference be dealt with under the urgent preliminary ruling procedure provided for in Article 107 of the Rules of Procedure of the Court.

27 In support of that request, the referring court relied, in particular, on the fact that the person concerned is currently deprived of his liberty, pending the decision on his surrender to the Polish authorities, and that the answer to the questions referred will be decisive for adopting that decision.

28 It must be stated, first, that the present reference for a preliminary ruling concerns the interpretation of Framework Decision 2002/584, which falls within the fields covered by Title V of Part Three of the FEU Treaty, relating to the area of freedom, security and justice. Consequently, the reference can be dealt with under the urgent preliminary ruling procedure.

29 Second, as regards the criterion relating to urgency, it is necessary, in accordance with the settled case-law of the Court, to take into account the fact that the person concerned is currently deprived of his liberty and that the question as to whether he may continue to be held in custody depends on the outcome of the dispute in the main proceedings. In addition, the situation of the person concerned must be assessed as it stands at the time when consideration is given to the request that the reference be dealt with under the urgent procedure (judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, EU:C:2017:629, paragraph 72 and the case-law cited).

30 In the present instance, it is not in dispute that, at that time, the person concerned was in custody. Also, his continued detention depends on the outcome of the main proceedings, the detention measure against him having been ordered, according to the explanations provided by the referring court, in the context of the execution of the EAWs.

31 In those circumstances, on 12 April 2018 the First Chamber of the Court, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decided to grant the referring court's request that the present reference be dealt with under the urgent preliminary ruling procedure.

32 It was also decided to remit the present case to the Court for it to be assigned to the Grand Chamber.

Consideration of the questions referred

33 First of all, it is apparent from the grounds of the order for reference and from the express mention of the judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198), in the first question, that the questions asked by the referring court relate to the circumstances in which the executing judicial authority may, on the basis of Article 1(3) of Framework Decision 2002/584, refrain from giving effect to a European arrest warrant on account of the risk of breach, if the requested person is surrendered to the issuing judicial authority, of the fundamental right to a fair trial before an independent tribunal, as enshrined in Article 6(1) of the ECHR, a provision which, as is clear from paragraph 5 of the present judgment, corresponds to the second paragraph of Article 47 of the Charter.

34 Thus, by its two questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 1(3) of Framework Decision 2002/584 must be interpreted as meaning that, where the executing judicial authority, called upon to decide whether a person in respect of whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution is to be surrendered, has material, such as that set out in a reasoned proposal of the Commission adopted pursuant to Article 7(1) TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, that authority must determine, specifically and precisely, whether there are substantial grounds for believing that the individual concerned will run such a risk if he is surrendered to that State. If the answer is in the affirmative, the referring court asks the Court of Justice to specify the conditions which such a check must satisfy.

35 In order to answer the questions referred, it should be recalled that EU law is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the European Union is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the EU law that implements them will be respected (judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraph 34 and the case-law cited).

36 Both the principle of mutual trust between the Member States and the principle of mutual recognition, which is itself based on the mutual trust between the latter (see, to that effect, judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, EU:C:2017:628, paragraph 49 and the case-law cited), are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly as regards the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (judgment of 10 November 2016, *Poltorak*, C-452/16 PPU, EU:C:2016:858, paragraph 26 and the case-law cited).

37 Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but also, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the European Union (Opinion 2/13 (*Accession of the European Union to the ECHR*) of 18 December 2014, EU:C:2014:2454, paragraph 192).

38 It is apparent from recital 6 of Framework Decision 2002/584 that the European arrest warrant provided for in that framework decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition.

39 The purpose of Framework Decision 2002/584, as is apparent in particular from Article 1(1) and (2) and recitals 5 and 7 thereof, is to replace the multilateral system of extradition based on the European Convention on Extradition of 13 December 1957 with a system of surrender between judicial authorities of convicted or suspected persons for the purpose of enforcing judgments or of conducting prosecutions, the system of surrender being based on the principle of mutual recognition (judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, EU:C:2016:861, paragraph 25 and the case-law cited).

40 Framework Decision 2002/584 thus seeks, by the establishment of a new simplified and more effective system for the surrender of persons convicted or suspected of having infringed criminal law, to facilitate and accelerate judicial cooperation with a view to contributing to the attainment of the objective set for the European Union of becoming an area of freedom, security and justice, and has as its basis the high level of trust which must exist between the Member States (judgment of 10 November 2016, *Poltorak*, C-452/16 PPU, EU:C:2016:858, paragraph 25 and the case-law cited).

41 In the field governed by Framework Decision 2002/584, the principle of mutual recognition, which, as is apparent in particular from recital 6 of that framework decision, constitutes the 'cornerstone' of judicial cooperation in criminal matters, is applied in Article 1(2) thereof which lays down the rule that Member States are required to execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of the framework decision. Executing judicial authorities may therefore, in principle, refuse to execute such a warrant only on the grounds for non-execution exhaustively listed by the framework decision and execution of the warrant may be made subject only to one of the conditions exhaustively laid down in Article 5. Accordingly, while execution of the European arrest warrant constitutes the rule, refusal to execute is intended to be an exception which must be interpreted strictly (see, to that effect, judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, EU:C:2017:628, paragraphs 49 and 50 and the case-law cited).

42 Thus, Framework Decision 2002/584 explicitly states the grounds for mandatory non-execution (Article 3) and optional non-execution (Articles 4 and 4a) of a European arrest warrant, as well as the guarantees to be given by the issuing Member State in particular cases (Article 5) (see judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, EU:C:2017:628, paragraph 51).

43 Nonetheless, the Court has recognised that limitations may be placed on the principles of mutual recognition and mutual trust between Member States 'in exceptional circumstances' (see, to that effect, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 82 and the case-law cited).

44 In that context, the Court has acknowledged that, subject to certain conditions, the executing judicial authority has the power to bring the surrender procedure established by Framework Decision 2002/584 to an end where surrender may result in the requested person being subject to inhuman or degrading treatment within the

meaning of Article 4 of the Charter (see, to that effect, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 104).

45 For that purpose, the Court has relied, first, on Article 1(3) of Framework Decision 2002/584, which provides that the framework decision is not to have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Articles 2 and 6 TEU and, second, on the absolute nature of the fundamental right guaranteed by Article 4 of the Charter (see, to that effect, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 83 and 85).

46 In the present instance, the person concerned, relying upon the reasoned proposal and the documents to which it refers, has opposed his surrender to the Polish judicial authorities, submitting, in particular, that his surrender would expose him to a real risk of a flagrant denial of justice on account of the lack of independence of the courts of the issuing Member State resulting from implementation of the recent legislative reforms of the system of justice in that Member State.

47 It should thus, first of all, be determined whether, like a real risk of breach of Article 4 of the Charter, a real risk of breach of the fundamental right of the individual concerned to an independent tribunal and, therefore, of his fundamental right to a fair trial as laid down in the second paragraph of Article 47 of the Charter is capable of permitting the executing judicial authority to refrain, by way of exception, from giving effect to a European arrest warrant, on the basis of Article 1(3) of Framework Decision 2002/584.

48 In that regard, it must be pointed out that the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded.

49 Indeed, the European Union is a union based on the rule of law in which individuals have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act (judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 31 and the case-law cited).

50 In accordance with Article 19 TEU, which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States and judicial protection of the rights of individuals under that law (see, to that effect, judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 32 and the case-law cited, and of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraph 36 and the case-law cited).

51 The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law (judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 36 and the case-law cited).

52 It follows that every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by EU law meet the requirements of effective judicial protection (judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 37).

53 In order for that protection to be ensured, maintaining the independence of those bodies is essential, as confirmed by the second paragraph of Article 47 of the Charter, which refers to access to an 'independent' tribunal as one of the requirements linked to the fundamental right to an effective remedy (judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 41).

54 The independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU, in that, in accordance with the Court's settled case-law, that mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence (judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 43).

55 Since, as stated in paragraph 40 of the present judgment, Framework Decision 2002/584 is intended to establish a simplified system of direct surrender between 'judicial authorities' for the purpose of ensuring in the area of freedom, security and justice the free movement of judicial decisions in criminal matters, maintaining the independence of such authorities is also essential in the context of the European arrest warrant mechanism.

56 Framework Decision 2002/584 is founded on the principle that decisions relating to European arrest warrants are attended by all the guarantees appropriate for judicial decisions, inter alia those resulting from the fundamental rights and fundamental legal principles referred to in Article 1(3) of the framework decision. This means that not only the decision on executing a European arrest warrant, but also the decision on issuing such a warrant, must be taken by a judicial authority that meets the requirements inherent in effective judicial protection — including the guarantee of independence — so that the entire surrender procedure between Member States provided for by the framework decision is carried out under judicial supervision (see, to that effect, judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, EU:C:2016:861, paragraph 37 and the case-law cited).

57 Furthermore, in criminal procedures for the purpose of prosecution, or of enforcement of a custodial sentence or detention order, or indeed in substantive criminal proceedings, which lie outside the scope of Framework Decision 2002/584 and of EU law, the Member States are still obliged to observe fundamental rights enshrined in the ECHR or laid down by their national law, including the right to a fair trial and the guarantees deriving from it (see, to that effect, judgment of 30 May 2013, *F*, C-168/13 PPU, EU:C:2013:358, paragraph 48).

58 The high level of trust between Member States on which the European arrest warrant mechanism is based is thus founded on the premiss that the criminal courts of the other Member States — which, following execution of a European arrest warrant, will have to conduct the criminal procedure for the purpose of prosecution, or of enforcement of a custodial sentence or detention order, and the substantive criminal proceedings — meet the requirements of effective judicial protection, which include, in particular, the independence and impartiality of those courts.

59 It must, accordingly, be held that the existence of a real risk that the person in respect of whom a European arrest warrant has been issued will, if surrendered to the issuing judicial authority, suffer a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, a right guaranteed by the second paragraph of Article 47 of the Charter, is capable of permitting the executing judicial authority to refrain, by way of exception, from giving effect to that European arrest warrant, on the basis of Article 1(3) of Framework Decision 2002/584.

60 Thus, where, as in the main proceedings, the person in respect of whom a European arrest warrant has been issued, pleads, in order to oppose his surrender to the issuing judicial authority, that there are systemic deficiencies, or, at all events, generalised deficiencies, which, according to him, are liable to affect the independence of the judiciary in the issuing Member State and thus to compromise the essence of his fundamental right to a fair trial, the executing judicial authority is required to assess whether there is a real risk that the individual concerned will suffer a breach of that fundamental right, when it is called upon to decide on his surrender to the authorities of the issuing Member State (see, by analogy, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 88).

61 To that end, the executing judicial authority must, as a first step, assess, on the basis of material that is objective, reliable, specific and properly updated concerning the operation of the system of justice in the issuing Member State (see, to that effect, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 89), whether there is a real risk, connected with a lack of independence of the courts of that Member State on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached. Information in a reasoned proposal recently addressed by the Commission to the Council on the basis of Article 7(1) TEU is particularly relevant for the purposes of that assessment.

62 Such an assessment must be carried out having regard to the standard of protection of the fundamental right that is guaranteed by the second paragraph of Article 47 of the Charter (see, by analogy, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 88 and the case-law cited).

63 As regards the requirement that courts be independent which forms part of the essence of that right, it should be pointed out that that requirement is inherent in the task of adjudication and has two aspects. The first aspect, which is external in nature, presupposes that the court concerned exercises its functions wholly autonomously,

without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions (see, to that effect, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 44 and the case-law cited).

64 That essential freedom from such external factors requires certain guarantees appropriate for protecting the person of those who have the task of adjudicating in a dispute, such as guarantees against removal from office (judgment of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraph 51 and the case-law cited). Their receipt of a level of remuneration commensurate with the importance of the functions that they carry out also constitutes a guarantee essential to judicial independence (judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 45).

65 The second aspect, which is internal in nature, is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law (judgment of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraph 52 and the case-law cited).

66 Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it. In order to consider the condition regarding the independence of the body concerned as met, the case-law requires, inter alia, that dismissals of its members should be determined by express legislative provisions (judgment of 9 October 2014, *TDC*, C-222/13, EU:C:2014:2265, paragraph 32 and the case-law cited).

67 The requirement of independence also means that the disciplinary regime governing those who have the task of adjudicating in a dispute must display the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions. Rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary.

68 If, having regard to the requirements noted in paragraphs 62 to 67 of the present judgment, the executing judicial authority finds that there is, in the issuing Member State, a real risk of breach of the essence of the fundamental right to a fair trial on account of systemic or generalised deficiencies concerning the judiciary of that Member State, such as to compromise the independence of that State's courts, that authority must, as a second step, assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run that risk (see, by analogy, in the context of Article 4 of the Charter, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 92 and 94).

69 That specific assessment is also necessary where, as in the present instance, (i) the issuing Member State has been the subject of a reasoned proposal adopted by the Commission pursuant to Article 7(1) TEU in order for the Council to determine that there is a clear risk of a serious breach by that Member State of the values referred to in Article 2 TEU, such as that of the rule of law, on account, in particular, of actions impairing the independence of the national courts, and (ii) the executing judicial authority considers that it possesses, on the basis, in particular, of such a proposal, material showing that there are systemic deficiencies, in the light of those values, at the level of that Member State's judiciary.

70 It is apparent from recital 10 of Framework Decision 2002/584 that implementation of the European arrest warrant mechanism may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 2 TEU, determined by the European Council pursuant to Article 7(2) TEU, with the consequences set out in Article 7(3) TEU.

71 It thus follows from the very wording of that recital that it is for the European Council to determine a breach in the issuing Member State of the principles set out in Article 2 TEU, including the principle of the rule of law, with a view to application of the European arrest warrant mechanism being suspended in respect of that Member State.

72 Therefore, it is only if the European Council were to adopt a decision determining, as provided for in Article 7(2) TEU, that there is a serious and persistent breach in the issuing Member State of the principles set out in Article 2 TEU, such as those inherent in the rule of law, and the Council were then to suspend Framework Decision 2002/584 in respect of that Member State that the executing judicial authority would be required to refuse automatically to execute any European arrest warrant issued by it, without having to carry out any specific assessment of whether the individual concerned runs a real risk that the essence of his fundamental right to a fair trial will be affected.

73 Accordingly, as long as such a decision has not been adopted by the European Council, the executing judicial authority may refrain, on the basis of Article 1(3) of Framework Decision 2002/584, to give effect to a European arrest warrant issued by a Member State which is the subject of a reasoned proposal as referred to in Article 7(1) TEU only in exceptional circumstances where that authority finds, after carrying out a specific and precise assessment of the particular case, that there are substantial grounds for believing that the person in respect of whom that European arrest warrant has been issued will, following his surrender to the issuing judicial authority, run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial.

74 In the course of such an assessment, the executing judicial authority must, in particular, examine to what extent the systemic or generalised deficiencies, as regards the independence of the issuing Member State's courts, to which the material available to it attests are liable to have an impact at the level of that State's courts with jurisdiction over the proceedings to which the requested person will be subject.

75 If that examination shows that those deficiencies are liable to affect those courts, the executing judicial authority must also assess, in the light of the specific concerns expressed by the individual concerned and any information provided by him, whether there are substantial grounds for believing that he will run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant.

76 Furthermore, the executing judicial authority must, pursuant to Article 15(2) of Framework Decision 2002/584, request from the issuing judicial authority any supplementary information that it considers necessary for assessing whether there is such a risk.

77 In the course of such a dialogue between the executing judicial authority and the issuing judicial authority, the latter may, where appropriate, provide the executing judicial authority with any objective material on any changes concerning the conditions for protecting the guarantee of judicial independence in the issuing Member State, material which may rule out the existence of that risk for the individual concerned.

78 If the information which the issuing judicial authority, after having, if need be, sought assistance from the central authority or one of the central authorities of the issuing Member State, as referred to in Article 7 of Framework Decision 2002/584 (see, to that effect, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 97), has sent to the executing judicial authority does not lead the latter to discount the existence of a real risk that the individual concerned will suffer in the issuing Member State a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, the executing judicial authority must refrain from giving effect to the European arrest warrant relating to him.

79 In the light of the foregoing considerations, the answer to the questions referred is that Article 1(3) of Framework Decision 2002/584 must be interpreted as meaning that, where the executing judicial authority, called upon to decide whether a person in respect of whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution is to be surrendered, has material, such as that set out in a reasoned proposal of the Commission adopted pursuant to Article 7(1) TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter, on account of

systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, that authority must determine, specifically and precisely, whether, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant, and in the light of the information provided by the issuing Member State pursuant to Article 15(2) of the framework decision, there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State.

Costs

80 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 1(3) 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, must be interpreted as meaning that, where the executing judicial authority, called upon to decide whether a person in respect of whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution is to be surrendered, has material, such as that set out in a reasoned proposal of the European Commission adopted pursuant to Article 7(1) TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, that authority must determine, specifically and precisely, whether, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant, and in the light of the information provided by the issuing Member State pursuant to Article 15(2) of Framework Decision 2002/584, as amended, there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State.

JUDGMENT OF THE COURT (First Chamber)

25 July 2018 (*)

(Reference for a preliminary ruling — Urgent preliminary ruling procedure — Police and judicial cooperation in criminal matters — European arrest warrant –Framework Decision 2002/584/JHA — Article 1(3) — Surrender procedures between Member States –– Conditions for execution –– Grounds for non-execution — Charter of Fundamental Rights of the European Union — Article 4 — Prohibition of inhuman or degrading treatment –– Detention conditions in the issuing Member State — Scope of the assessment undertaken by the executing judicial authorities –– Existence of a legal remedy in the issuing Member State — Assurance given by the authorities of that Member State)

In Case C-220/18 PPU,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court, Bremen, Germany), made by decision of 27 March 2018, received at the Court on the same date, in the proceedings relating to the execution of a European arrest warrant issued against

ML

intervener:

Generalstaatsanwaltschaft Bremen,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.-C. Bonichot, A. Arabadjiev, S. Rodin and E. Regan (Rapporteur), Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 14 June 2018,

after considering the observations submitted on behalf of:

– ML, by A. Jung, Rechtsanwalt,

– the Generalstaatsanwaltschaft Bremen, by M. Glasbrenner, Oberstaatsanwalt,

– the German Government, by T. Henze and M. Hellmann, acting as Agents,

– the Belgian Government, by C. Van Lul, C. Pochet and A. Honhon, acting as Agents,

– the Danish Government, by M. Søndahl Wolff, acting as Agent,

– Ireland, by G. Mullan, Barrister-at-Law,

– the Spanish Government, by Sampol Pucurull, acting as Agent,

– the Hungarian Government, by M.Z. Fehér, G. Tornyai and M.M. Tátrai, acting as Agents,

– the Netherlands Government, by J. Langer, acting as Agent,

– the Romanian Government, by E. Gane and C.-M. Florescu, acting as Agents,

– the European Commission, by R. Troosters and S. Grünheid, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 July 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4 of the Charter of Fundamental Rights of the European Union ('the Charter') and of Article 1(3), Article 5 and Article 6(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24) ('the Framework Decision').

2 The request has been made in connection with the execution in Germany of a European arrest warrant issued on 31 October 2017 by the Nyíregyházi Járásbíróság (District Court, Nyíregyházi, Hungary) against ML for the purpose of executing a custodial sentence in Hungary.

Legal context

European Union law

The Charter

3 Article 4 of the Charter, entitled 'Prohibition of torture and inhuman or degrading treatment or punishment', provides:

'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

4 The Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17) state that 'the right in Article 4 [of the Charter] is the right guaranteed by Article 3 of the [European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ("the ECHR")], which has the same wording ... By virtue of Article 52(3) of the Charter, it therefore has the same meaning and the same scope as the ECHR Article'.

5 Article 47 of the Charter, entitled 'Right to an effective remedy and to a fair trial', provides:

'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

...'

6 Article 51 of the Charter, entitled 'Field of application', provides in paragraph 1:

'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. ...'

7 Article 52 of the Charter, entitled 'Scope and interpretation of rights and principles', provides in paragraph 3:

'In so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

The Framework Decision

8 Recitals 5 to 7 of the Framework Decision are worded as follows:

(5) … 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. …

(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.'

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 modifying 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. In particular, under point 6 of Article 4 of the Framework Decision, the executing judicial authority may refuse to execute the European arrest warrant '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'.

11 Under Article 5 of the Framework Decision, entitled 'Guarantees to be given by the issuing Member State in particular cases':

'The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions:

…

(2) if the offence on the basis of which the European arrest warrant has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure;

(3) where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.'

12 Article 6 of the Framework Decision, entitled 'Determination of the competent judicial authorities', provides in paragraph 1:

'The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State.'

13 Article 7 of the Framework Decision, entitled 'Recourse to the central authority', provides in paragraph 1:

'Each Member State may designate a central authority or, when its legal system so provides, more than one central authority to assist the competent judicial authorities.'

14 Article 15 of the Framework Decision, 'Surrender decision', reads as follows:

'1. The executing judicial authority shall decide, within the time limits and under the conditions defined in this Framework Decision, whether the person is to be surrendered.

2. 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.

3. The issuing judicial authority may at any time forward any additional useful information to the executing judicial authority.'

15 Article 17 of the Framework Decision, entitled 'Time limits and procedures for the decision to execute the European arrest warrant', provides:

'1. A European arrest warrant shall be dealt with and executed as a matter of urgency.

2. In cases where the requested person consents to his surrender, the final decision on the execution of the European arrest warrant should be taken within a period of 10 days after consent has been given.

3. In other cases, the final decision on the execution of the European arrest warrant should be taken within a period of 60 days after the arrest of the requested person.

4. Where in specific cases the European arrest warrant cannot be executed within the time limits laid down in paragraphs 2 or 3, the executing judicial authority shall immediately inform the issuing judicial authority thereof, giving the reasons for the delay. In such case, the time limits may be extended by a further 30 days.

5. As long as the executing judicial authority has not taken a final decision on the European arrest warrant, it shall ensure that the material conditions necessary for effective surrender of the person remain fulfilled.

...

7. Where in exceptional circumstances a Member State cannot observe the time limits provided for in this Article, it shall inform Eurojust, giving the reasons for the delay. In addition, a Member State which has experienced repeated delays on the part of another Member State in the execution of European arrest warrants shall inform the Council with a view to evaluating the implementation of this Framework Decision at Member State level.'

German law

16 The Framework Decision was transposed into the German legal order by Paragraphs 78 to 83K of the Gesetz über die internationale Rechtshilfe in Strafsachen (Law on international mutual legal assistance in criminal matters) of 23 December 1982, as amended by the Europäisches Haftbefehlsgesetz (Law on the European Arrest Warrant) of 20 July 2006 (BGBl. 2006 I, p. 1721) ('IRG').

17 Under Paragraph 29(1) of the IRG, the Oberlandesgericht (Higher Regional Court, Germany) is to give a ruling, at the request of the Public Prosecutor's Office, on the legality of the extradition where the individual sought has not consented to extradition. The decision is to be made by order, in accordance with Paragraph 32 of the IRG.

18 Paragraph 73 of the IRG provides:

'In the absence of a request to that effect, mutual legal assistance and the transmission of information shall be unlawful if contrary to the essential principles of the German legal system. In the event of a request under Parts VIII, IX and X, mutual legal assistance shall be unlawful if contrary to the principles stated in Article 6 [TEU].'

The dispute in the main proceedings and the questions referred for a preliminary ruling

19 On 2 August 2017, the Nyíregyházi Járásbíróság (District Court, Nyíregyházi, Hungary) issued a European arrest warrant against ML, a Hungarian national, so that he could be prosecuted and tried for offences of bodily harm, damage, fraud and burglary, committed in Nyíregyháza (Hungary) between February and July 2016.

20 On 16 August 2017, the Hungarian Ministry of Justice forwarded the European arrest warrant to the Generalstaatsanwaltschaft Bremen (Public Prosecutor's Office, Bremen, Germany).

21 By judgment of 14 September 2017, the Nyíregyházi Járásbíróság (District Court, Nyíregyházi) sentenced ML in absentia to a custodial sentence of one year and eight months.

22 By letter of 20 September 2017, the Hungarian Ministry of Justice informed the Bremen Public Prosecutor's Office, in response to a request sent by the latter, that, if ML were surrendered, he would initially be detained, for the duration of the surrender procedure, in Budapest prison (Hungary) and thereafter in Szombathely regional prison (Hungary). The Ministry also gave an assurance that ML would not be subjected to any inhuman or degrading treatment within the meaning of Article 4 of the Charter as a result of the proposed detention in Hungary. The Ministry added that that assurance could equally well be given in the event of ML being transferred to another prison.

23 On 31 October 2017, the Nyíregyházi Járásbíróság (District Court, Nyíregyházi) issued a further European arrest warrant in respect of ML, this time for the purpose of executing the custodial sentence imposed by that court on 14 September 2017.

24 On 23 November 2017, the Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court, Bremen, Germany) ordered that ML be detained pending extradition for the purpose of executing the European arrest warrant issued on 2 August 2017. Since then, ML has been held in the prison of Bremen-Oslebshausen (Germany).

25 On 12 December 2017, the Amtsgericht Bremen (District Court, Bremen, Germany) made an order on the basis of the European arrest warrant issued on 31 October 2017 placing ML in detention whilst awaiting his possible surrender to the Hungarian authorities. ML did not consent to his surrender.

26 By order of 19 December 2017, the Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court, Bremen) held that ML should continue to be detained pending extradition pursuant to that arrest warrant. However, in order to assess the legality of the surrender from the point of view of detention conditions in Hungarian prisons, that court considered it necessary to obtain additional information.

27 In its order of 9 January 2018, the Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court, Bremen) explained that, on the basis of the information available to it, ML's detention in Szombathely prison did not present any difficulties. However, as the Hungarian Ministry of Justice had mentioned in its letter of 20 September 2017 that ML might be transferred to other detention centres, the court deemed it necessary to send the Ministry a request for information comprising a list of 78 questions concerning the conditions in which persons are detained in Budapest prison as well as in other detention centres to which ML might be transferred.

28 On 10 January 2018, the Bremen Public Prosecutor's Office sent that request to the Hungarian Ministry of Justice.

29 On 12 January 2018, in response to that request, the Ministry stated that the national legislature, by Law No CX adopted on 25 October 2016 amending, inter alia, Paragraph 144/B, subparagraph 1, of Law No CCXL of 2013 on the execution of sentences and penalties, certain coercive measures and detention for minor offences ('the 2016 Law'), introduced (i) a legal remedy enabling persons in detention to challenge the legality of the conditions of their detention and (ii) a new form of detention known as 'reintegration'. 'Reintegration' entails the possibility of prisoners who have not yet fully served their custodial sentence having their prison sentence commuted to house arrest. The Hungarian Ministry of Justice added that since 2015 1 000 new prison places had been creation, which had helped to reduce prison overcrowding.

30 By email of 1 February 2018 to the Bremen Public Prosecutor's Office, an official of the Hungarian Ministry of Justice stated that, circumstances permitting, ML would be detained in Budapest for a period of one to three weeks while certain unspecified measures relating to execution of the surrender procedure were taken in his regard.

31 By order of 12 February 2018, the Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court, Bremen) asked the Hungarian authorities to provide it, by 28 February 2018, with information about the conditions in which persons are held, first, in Budapest prison and, secondly, in the other prisons to which ML might be transferred. It also wished to know on what basis it would be able to verify the conditions in which persons detained there are held.

32 On 15 February 2018, the Bremen Public Prosecutor's Office sent that request to the Hungarian Ministry of Justice.

33 On 27 March 2018, the Hungarian Ministry of Justice, in conjunction with the directorate-general for the enforcement of sentences, gave a further assurance that, wherever ML was incarcerated, he would not be subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter during his detention in Hungary.

34 In its order for reference, the Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court, Bremen) finds that ML does not have an interest that merits protection which would justify him serving his sentence in Germany. As ML does not have a command of the German language and as his partner does not have a job or any entitlement to social security benefits in Germany, he cannot increase his chances of social reintegration by serving his sentence in Germany. ML should therefore, in principle, be surrendered to Hungary.

35 However, before taking a final decision in that regard, the referring court considers that it must ascertain whether the information provided by the Hungarian authorities in response to its requests for information is sufficient to rule out, when Paragraph 73 of the IRG is applied and in view of the interpretation of Article 1(3), Article 5 and Article 6(1) of the Framework Decision and of Article 4 of the Charter, the existence of a real risk of inhuman or degrading treatment.

36 To that end, the referring court raises the question, in the first place, of the extent of the assessment that it is required to undertake, in view of the fact that there is now a legal remedy in Hungary enabling prisoners to challenge the conditions of their detention in the light of the fundamental rights. More specifically, it wonders whether that remedy makes it possible to rule out all real risk of inhuman or degrading treatment when there is –– as is clear, inter alia, from the judgment of the ECtHR of 10 March 2015, *Varga and Othersv.Hungary* (CE:ECHR:2015:0310JUD001409712, §§ 79 to 92) –– evidence of systemic or generalised deficiencies as regards detention conditions in Hungary. In that regard, the referring court is uncertain about the effect of the fact that the European Court of Human Rights recently held, in its judgment of 14 November 2017, *Domján v. Hungary* (CE:ECHR:2017:1114DEC000543317, § 22), that nothing proved that the remedy concerned was not going to offer realistic prospects of improving unsuitable conditions of detention in order to ensure compliance with the requirements arising under Article 3 ECHR.

37 Should the legal remedy in question not avert the risk of a prisoner being subjected to inhuman or degrading treatment as a result of the conditions of his detention, the referring court enquires, in the second place, about the extent, in view of the information and assurances obtained from the Hungarian authorities, of any obligation it may have to review the arrangements for and conditions of detention in all the prisons in which ML might be held.

38 In that regard, the referring court is uncertain, first of all, whether the assessment of detention conditions must concern all the prisons in which ML might be held, including those used on a transitional or temporary basis, or whether the review may be limited to those in which, according to the information provided by the issuing Member State, ML is likely to be incarcerated for most of the time. Although the referring court is able to rule out all risk of inhuman or degrading treatment at Szombathely prison, the Hungarian authorities have not provided enough information for such a finding to be made with regard to Budapest prison or the other detention centres to which they may, having left themselves that option, subsequently decide to transfer ML. That court also raises the question of the extent of the assessment to be made in this regard and the criteria to be used. In particular, it is uncertain whether it must take into account the case-law of the European Court of Human Rights, as stated in its judgment of 20 October 2016, *Muršić v. Croatia* (CE:ECHR:2016:1020JUD000733413).

39 Moreover, in the event of the executing judicial authorities being required to assess all the prisons in which ML might be detained, the referring court raises the question, first, of whether it may be satisfied with the general statements made by the Hungarian authorities that ML will not be exposed to a risk of inhuman or degrading treatment, or whether it may make ML's surrender subject to the sole condition that he will not be exposed to such treatment. Should that not be the case, the referring court asks, first, what significance it should attach to the fact that the Hungarian authorities have stated that ML's 'transitional' detention will not exceed three weeks, given that the statement is expressed subject to the reservation 'circumstances permitting'. Secondly, it wishes to ascertain whether it may take into account information when it is not possible to determine whether that information has been provided by the issuing judicial authority within the meaning of Article 6(1) of the Framework Decision or by a central authority within the meaning of Article 7(1) of that decision, acting in response to a request by the issuing judicial authority.

40 In those circumstances, the Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court of Bremen) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) What significance does it have, for the purpose of the interpretation of [Article 1(3), Article 5 and Article 6(1) of the Framework Decision, in conjunction with Article 4 of the Charter] if legal remedies exist for detainees in the issuing Member State in respect of the conditions of their detention?

(a) If, taking account of the aforementioned provisions, the executing judicial authority is in possession of evidence of systemic or general deficiencies affecting certain groups of persons or certain prisons in the issuing Member State, is a real risk of inhuman or degrading treatment of the person whose surrender is sought in the event of his surrender, which would render the surrender inadmissible, to be ruled out merely by reason of the fact that such legal remedies have been introduced, without the need for further assessment of the conditions of detention?

(b) Is it of significance in this regard that the European Court of Human Rights has held in respect of such legal remedies that there is no evidence that they do not offer detainees realistic perspectives of improving unsuitable conditions of detention?

(2) If Question 1 is answered to the effect that the existence of such legal remedies for detainees, without further assessment of the specific conditions of detention in the issuing Member State by the executing judicial authority, does not of itself exclude a real risk of inhuman or degrading treatment of the person whose surrender is sought:

(a) Are the aforementioned provisions to be interpreted as meaning that the assessment by the executing judicial authority of the conditions of detention in the issuing Member State extends to all prisons or other detention facilities in which the person whose surrender is sought may be incarcerated? Does this also apply to simply temporary or transitional detention in certain prisons? Or can the assessment be limited to the prison in which, according to information from the authorities of the issuing Member State, the person whose surrender is sought is likely to be incarcerated for most of the time?

(b) For this purpose, is it necessary to conduct a comprehensive assessment of the conditions of detention concerned that determines both the personal space available to each prisoner and other conditions of detention? Are the conditions of detention thus determined to be assessed on the

basis of the case-law of the European Court of Human Rights established in its judgment of 20 October 2016, *Muršić v. Croatia* (CE:ECHR:2016:1020JUD000733413)?

(3) If Question 2 is also answered to the effect that the assessment required by the executing judicial authority must extend to all prisons [to which the person concerned might be transferred]:

(a) Can the assessment by the executing judicial authority of the conditions of detention in each individual prison envisaged be rendered superfluous by a general assurance given by the issuing Member State that the person whose surrender is sought will not be exposed to any risk of inhuman or degrading treatment?

(b) Or, in lieu of an assessment of the conditions of detention of each individual prison envisaged, can the decision by the executing judicial authority on the admissibility of the surrender be made contingent upon the person whose surrender is sought not being exposed to any such treatment?

(4) If Question 3 is also answered to the effect that the provision of assurances and the imposition of conditions cannot render the assessment by the executing judicial authority of the conditions of detention in each individual prison [to which the person concerned might be transferred] superfluous:

(a) Must the duty of assessment by the executing judicial authority extend to the conditions of detention in all prisons envisaged, even in the case where the judicial authority of the issuing Member State advises that the period of detention in them of the person whose surrender is sought will not exceed three weeks, circumstances permitting?

(b) Does this also apply if the executing judicial authority is unable to ascertain whether that information was provided by the issuing judicial authority or whether it originates from a central authority in the issuing Member State acting in response to a request by the issuing judicial authority for support?'

The urgent preliminary ruling procedure

41 The referring court has requested that the present reference for a preliminary ruling be dealt with under the urgent preliminary ruling procedure provided for in Article 107 of the Rules of Procedure of the Court.

42 In support of its request, that court has stated that the person concerned has been deprived of his liberty since 23 November 2017 in connection with the execution of a European arrest warrant issued by the Hungarian authorities. The referring court also considers that, if it were required to assess detention conditions in the transit prisons or other facilities to which the person concerned might subsequently be transferred, it would –– unless it was in a position to rule out all risk of inhuman or degrading treatment –– be bound to conclude that the requested surrender is unlawful. Consequently, it would also be obliged to release that person from the custody ordered for the purposes of extradition.

43 In that regard, it should be stated, in the first place, that the present reference for a preliminary ruling concerns the interpretation of the Framework Decision, which falls within the fields covered by Title V of Part Three of the FEU Treaty, relating to the area of freedom, security and justice. Consequently, the reference can be dealt with under the urgent preliminary ruling procedure.

44 In the second place, as regards the criterion relating to urgency, it is necessary, in accordance with the settled case-law of the Court, to take into account the fact that the person concerned is currently deprived of his liberty and that the question whether he may continue to be held in custody depends on the outcome of the dispute in the main proceedings. In addition, the situation of the person concerned must be assessed as it stands at the time when consideration is given to the request that the reference be dealt with under the urgent procedure (judgment of 22 December 2017, *Ardic*, C-571/17 PPU, EU:C:2017:1026, paragraph 58 and the case-law cited).

45 In the present case, it is not in dispute that, at that time, the person concerned was in custody and thus deprived of his liberty. Moreover, it is apparent from the explanation provided by the referring court that that person's continued detention depends on the outcome of the case in the main proceedings. Indeed, the detention

measure against him was ordered in the context of the execution of a European arrest warrant issued in relation to him. Consequently, the decision of that court on his possible surrender to the Hungarian authorities will depend on the answers that the Court of Justice gives to the questions referred for a preliminary ruling in this case.

46 In those circumstances, on 17 April 2018 the First Chamber of the Court, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decided to grant the referring court's request that the present reference be dealt with under the urgent preliminary ruling procedure.

Consideration of the questions referred

47 By its questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 1(3), Article 5 and Article 6(1) of the Framework Decision must be interpreted as meaning that, when the executing judicial authority has information showing there to be systemic or generalised deficiencies in the detention conditions in the prisons of the issuing Member State, that authority may rule out the existence of a real risk that the person in respect of whom a European arrest warrant has been issued for the purpose of executing a custodial sentence will be subjected to inhuman and degrading treatment, within the meaning of Article 4 of the Charter, merely because that person has, in the issuing Member State, a legal remedy enabling him to challenge the conditions of his detention and, if that is not the case, whether that authority is then required to assess the conditions of detention in all the prisons in which the person concerned could potentially be detained, including on a temporary or transitional basis, or only the conditions of detention in the prison in which, according to the information available to that authority, he is likely to be detained for most of the time. That court also asks whether the abovementioned provisions must be interpreted as meaning that the executing judicial authority must assess all the conditions of detention and whether, in the context of that assessment, that authority may take into account information provided by authorities of the issuing Member State other than the executing judicial authority, such as, in particular, an assurance that the person concerned will not be subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.

Preliminary observations

48 In order to answer the questions referred, it should be recalled that EU law is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the European Union is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the EU law that implements them will be respected (judgment of today's date, *Minister for Justice and Equality (Deficiencies in the System of Justice)*, C-216/18 PPU, paragraph 35 and the case-law cited).

49 Both the principle of mutual trust between the Member States and the principle of mutual recognition, which is itself based on the mutual trust between the latter, are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly as regards the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (judgment of today's date, *Minister for Justice and Equality (Deficiencies in the System of Justice)*, C-216/18 PPU, paragraph 36 and the case-law cited).

50 Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but also, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the European Union (judgment of today's date, *Minister for Justice and Equality (Deficiencies in the System of Justice)*, C-216/18 PPU, paragraph 37 and the case-law cited).

51 It is apparent from recital 6 of the Framework Decision that the European arrest warrant provided for in that framework decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition (judgment of today's date, *Minister for Justice and Equality (Deficiencies in the System of Justice)*, C-216/18 PPU, paragraph 38).

52 As is apparent in particular from Article 1(1) and (2) of the Framework Decision, read in the light of recitals 5 and 7 thereof, the purpose of that decision is to replace the multilateral system of extradition based on the European Convention on Extradition of 13 December 1957 with a system of surrender between judicial authorities of convicted or suspected persons for the purpose of enforcing judgments or of conducting prosecutions, the system of surrender being based on the principle of mutual recognition (judgment of today's date, *Minister for Justice and Equality (Deficiencies in the System of Justice)*, C-216/18 PPU, paragraph 39 and the case-law cited).

53 The Framework Decision thus seeks, by the establishment of a new simplified and more effective system for the surrender of persons convicted or suspected of having infringed criminal law, to facilitate and accelerate judicial cooperation with a view to contributing to the attainment of the objective set for the European Union of becoming an area of freedom, security and justice, and has as its basis the high level of trust which must exist between the Member States (judgment of today's date, *Minister for Justice and Equality (Deficiencies in the System of Justice)*, C-216/18 PPU, paragraph 40 and the case-law cited).

54 In the field governed by the Framework Decision, the principle of mutual recognition, which, as is apparent in particular from recital 6 of that framework decision, constitutes the 'cornerstone' of judicial cooperation in criminal matters, is applied in Article 1(2) thereof which lays down the rule that Member States are required to execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of the framework decision. Executing judicial authorities may therefore, in principle, refuse to execute such a warrant only on the grounds for non-execution exhaustively listed by the framework decision and execution of the warrant may be made subject only to one of the conditions exhaustively laid down in Article 5. Accordingly, while execution of the European arrest warrant constitutes the rule, refusal to execute is intended to be an exception which must be interpreted strictly (judgment of today's date, *Minister for Justice and Equality (Deficiencies in the System of Justice)*, C-216/18 PPU, paragraph 41 and the case-law cited).

55 Thus, the Framework Decision explicitly states the grounds for mandatory non-execution (Article 3) and optional non-execution (Articles 4 and 4a) of a European arrest warrant, as well as the guarantees to be given by the issuing Member State in particular cases (Article 5) (judgment of today's date, *Minister for Justice and Equality (Deficiencies in the System of Justice)*, C-216/18 PPU, paragraph 42 and the case-law cited).

56 Nonetheless, the Court has recognised that limitations may be placed on the principles of mutual recognition and mutual trust between Member States 'in exceptional circumstances' (judgment of today's date, *Minister for Justice and Equality (Deficiencies in the System of Justice)*, C-216/18 PPU, paragraph 43 and the case-law cited).

57 In that context, the Court has acknowledged that, subject to certain conditions, the executing judicial authority has the power to bring the surrender procedure established by the Framework Decision to an end where surrender may result in the requested person being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter (judgment of today's date, *Minister for Justice and Equality (Deficiencies in the System of Justice)*, C-216/18 PPU, paragraph 44 and the case-law cited).

58 For that purpose, the Court has relied, first, on Article 1(3) of the Framework Decision, which provides that that decision is not to have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Articles 2 and 6 TEU and, second, on the absolute nature of the fundamental right guaranteed by Article 4 of the Charter (judgment of today's date, *Minister for Justice and Equality (Deficiencies in the System of Justice)*, C-216/18 PPU, paragraph 45 and the case-law cited).

59 Accordingly, where the judicial authority of the executing Member State is in possession of information showing there to be a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State, measured against the standard of protection of fundamental rights guaranteed by EU law and, in particular, by Article 4 of the Charter, that judicial authority is bound to assess the existence of that risk when it is called upon to decide on the surrender to the authorities of the issuing Member State of the individual concerned by a European arrest warrant. The consequence of the execution of such a warrant must not be that that individual suffers inhuman or degrading treatment (judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 88).

60 To that end, the executing judicial authority must, initially, rely on information that is objective, reliable, specific and properly updated concerning the detention conditions within the prisons of the issuing Member State and that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain

groups of people, or which may affect certain places of detention. That information may be obtained from, inter alia, judgments of international courts, such as judgments of the European Court of Human Rights, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the United Nations (judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 89).

61 Nonetheless, a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of detention in the issuing Member State cannot lead, in itself, to the refusal to execute a European arrest warrant. The mere existence of evidence that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people or certain places of detention, with respect to detention conditions in the issuing Member State does not necessarily imply that, in a specific case, the individual concerned will be subjected to inhuman or degrading treatment in the event that he is surrendered to the authorities of that Member State (judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 91 and 93).

62 Thus, in order to ensure observance of Article 4 of the Charter in the particular circumstances of a person who is the subject of a European arrest warrant, the executing judicial authority, when faced with evidence of the existence of such deficiencies that is objective, reliable, specific and properly updated, is then bound to determine, specifically and precisely, whether, in the particular circumstances of the case, there are substantial grounds for believing that, following the surrender of that person to the issuing Member State, he will run a real risk of being subject in that Member State to inhuman or degrading treatment, within the meaning of Article 4, because of the conditions for his detention envisaged in the issuing Member State (judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 92 and 94).

63 To that end, that authority must, pursuant to Article 15(2) of the Framework Decision, request of the judicial authority of the issuing Member State that there be provided as a matter of urgency all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained in that Member State. That request may also relate to the existence, in the issuing Member State, of any national or international procedures and mechanisms for monitoring detention conditions, linked, for example, to visits to prisons, which make it possible to assess the current state of detention conditions in those prisons (judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 95 and 96).

64 The issuing judicial authority is obliged to provide that information to the executing judicial authority (judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 97).

65 If, in the light of the information provided pursuant to Article 15(2) of the Framework Decision, and of any other information that may be available to the executing judicial authority, that authority finds that there exists, for the individual in respect of whom the European arrest warrant has been issued, a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, the execution of that warrant must be postponed but it cannot be abandoned (judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 98).

66 By contrast, in the event that the information received by the executing judicial authority from the issuing judicial authority leads it to rule out the existence of a real risk that the individual concerned will be subject to inhuman and degrading treatment in the issuing Member State, the executing judicial authority must adopt, within the time limits prescribed by the Framework Decision, its decision on the execution of the European arrest warrant, without prejudice to the opportunity of the individual concerned, after surrender, to have recourse, within the legal system of the issuing Member State, to legal remedies that may enable him to challenge, if need be, the lawfulness of the conditions of his detention in a prison of that Member State (judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 103).

67 In the present case, the referring court considers that it is in possession of information which shows that there are systemic or generalised deficiencies in detention conditions in Hungary. According to that court, it follows from the judgment of the ECtHR of 10 March 2015, *Varga and Others v. Hungary* (CE:ECHR:2015:0310JUD001409712, §§ 79 to 92), that, as Hungary is experiencing prison overcrowding, there is a risk that the persons who are held there will be subjected to inhuman or degrading treatment. That court considers that, at the date on which the order for reference was made, there continued to be such overcrowding, since, according to the Hungarian authorities, 1 000 prison places had been created, whilst 5 500

extra places were needed. The referring court also states that it is difficult to gauge the extent to which the possibility, introduced by the 2016 Law, of commuting imprisonment into house arrest has actually had an impact in reducing prison overcrowding in Hungary.

68 In its written observations and at the hearing, Hungary has disputed the existence of such deficiencies affecting the conditions of detention in its territory. It submits that the referring court wrongly attaches overmuch importance to the judgment of the ECtHR of 10 March 2015, *Varga and Others v. Hungary* (CE:ECHR:2015:0310JUD001409712), and fails to take account of matters subsequent to the delivery of that judgment. In particular, the referring court has not taken into account the improvements made to prison life, the legislative amendments made to give effect to that judgment or more recent decisions of the European Court of Human Rights.

69 In that regard, the point should be made, however, that, in the present reference for a preliminary ruling, the Court is not asked about the existence of systemic or generalised deficiencies in detention conditions in Hungary.

70 In fact, by its questions, which are based on the premiss that such deficiencies do exist, the referring court in essence seeks to ascertain whether, having regard to the case-law referred to in paragraphs 61 to 66 of this judgment, the various pieces of information that have been provided to it by the issuing Member State allow it to rule out the existence of a real risk that the individual concerned will be subjected in the issuing Member State to inhuman or degrading treatment within the meaning of Article 4 of the Charter.

71 The Court must therefore reply to those questions on the basis of the premiss adopted by the referring court on its sole responsibility, whose accuracy that court must verify by taking account of properly updated information, as stated in paragraph 60 of this judgment, having regard, in particular, to the fact that the provisions of the 2016 Law have been in force since 1 January 2017, as those provisions may, if applied, call that premiss into question.

The existence of a legal remedy in the issuing Member State concerning the legality of detention conditions in the light of the fundamental rights

72 It is not disputed that, by the 2016 Law, Hungary introduced, with effect from 1 January 2017, a remedy enabling prisoners to challenge, in court proceedings, the legality of the conditions of their detention in the light of the fundamental rights.

73 As all the interested persons who have participated in the present proceedings have submitted, although a remedy of that kind can constitute an effective judicial remedy for the purposes of Article 47 of the Charter, it cannot, on its own, suffice to rule out a real risk that the individual concerned will be subject in the issuing Member State to inhuman or degrading treatment within the meaning of Article 4 of the Charter.

74 Such subsequent judicial review of detention conditions in the issuing Member State is an important development, which may act as an incentive to the authorities of that State to improve detention conditions and which may therefore be taken into account by the executing judicial authorities when, for the purpose of deciding on whether a person who is the subject of a European arrest warrant should be surrendered, they make an overall assessment of the conditions in which it is intended that a person will be held. However, such review is not, as such, capable of averting the risk that that person will, following his surrender, be subjected to treatment that is incompatible with Article 4 of the Charter on account of the conditions of his detention.

75 Therefore, even if the issuing Member State provides for legal remedies that make it possible to review the legality of detention conditions from the perspective of the fundamental rights, the executing judicial authorities are still bound to undertake an individual assessment of the situation of each person concerned, in order to satisfy themselves that their decision on the surrender of that person will not expose him, on account of those conditions, to a real risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter.

76 That interpretation is not in any way inconsistent with what was held by the European Court of Human Rights in its judgment of 14 November 2017, *Domján v. Hungary* (CE:ECHR:2017:1114DEC000543317). In that judgment the European Court of Human Rights, first, merely found that, since the remedies introduced by the 2016 Law guaranteed in principle genuine redress for ECHR infringements originating in prison overcrowding and other unsuitable conditions of detention in Hungary, the application brought before it in that case had to be dismissed as inadmissible as long as those domestic avenues of redress had not been exhausted. Secondly, it made clear

that it reserved the right to re-examine the effectiveness of those remedies in the light of their application in practice.

The extent of the assessment of conditions of detention in the issuing Member State

The prisons to be assessed

77 In accordance with the case-law referred to in paragraphs 61 to 66 of this judgment, the executing judicial authorities responsible for deciding on the surrender of a person who is the subject of a European arrest warrant must determine, specifically and precisely, whether, in the circumstances of a particular case, there is a real risk that that person will be subjected in the issuing Member State to inhuman or degrading treatment.

78 It follows that the assessment which those authorities are required to make cannot, in view of the fact that it must be specific and precise, concern the general conditions of detention in all the prisons in the issuing Member State in which the individual concerned might be detained.

79 The Court observes in that regard that the option available to the executing judicial authorities under Article 15(2) of the Framework Decision to request that the necessary supplementary information be furnished as a matter of urgency when they find the information provided by the issuing Member State to be insufficient to allow them to decide on surrender is a last resort, to which recourse may be had only in exceptional cases in which the executing judicial authority considers that it does not have all the formal elements necessary to adopt a decision on surrender as a matter of urgency (see, to that effect, judgment of 23 January 2018, *Piotrowski*, C-367/16, EU:C:2018:27, paragraphs 60 and 61).

80 That provision thus cannot be used by the executing judicial authorities to request, as a matter of course, that the issuing Member State provide general information concerning detention conditions in the prisons in which a person who is the subject of a European arrest warrant might be detained.

81 Moreover, such a request would in most cases entail requesting information about all the prisons located in the issuing Member State, since a person who is the subject of a European arrest warrant can, as a general rule, be detained in any prison in the territory of that State. It is generally not possible at the stage of executing a European arrest warrant to identify all the prisons in which such a person will actually be detained, as a transfer from one prison to another may be warranted because of unforeseen circumstances that may even be unrelated to the individual concerned.

82 Those considerations are borne out by the objective of the Framework Decision, which, as has already been made clear in paragraph 53 of this judgment, is to facilitate and accelerate surrenders through the introduction of a simplified and more effective system for the surrender between judicial authorities of persons convicted or suspected of having infringed criminal law.

83 That objective underlies, inter alia, the treatment of the time limits for adopting decisions relating to a European arrest warrant with which Member States are required to comply and the importance of which is stated in a number of provisions of the Framework Decision, including Article 17 (see, to that effect, judgment of 23 January 2018, *Piotrowski*, C-367/16, EU:C:2018:27, paragraphs 55 and 56).

84 An obligation on the part of the executing judicial authorities to assess the conditions of detention in all the prisons in which the individual concerned might be detained in the issuing Member State is clearly excessive. Moreover it is impossible to fulfil such an obligation within the periods prescribed in Article 17 of the Framework Decision. Such an assessment could in fact substantially delay that individual's surrender and, accordingly, render the operation of the European arrest warrant system wholly ineffective.

85 That would result in a risk of impunity for the requested person, especially when, as in the case in the main proceedings, which concerns the execution of a European arrest warrant issued for the purpose of executing a custodial sentence, the executing judicial authority has found that the conditions for applying the ground of optional non-execution set out in Article 4(6) of the Framework Decision –– which permits the issuing Member State to undertake to execute that sentence in accordance with its domestic law, with a view, inter alia, to increasing the chances of the individual concerned of reintegrating into society (see, inter alia, judgment of 5 September 2012, *Lopes Da Silva Jorge*, C-42/11, EU:C:2012:517, paragraph 32) –– were not met.

86 Such impunity would be incompatible with the objective pursued both by the Framework Decision (see, to that effect, judgment of 29 June 2017, *Popławski*, C-579/15, EU:C:2017:503, paragraph 23) and by Article 3(2) TEU, in the context of which the Framework Decision must be seen and under which the European Union offers its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls and the prevention and combating of crime (judgment of 6 September 2016, *Petruhhin*, C-182/15, EU:C:2016:630, paragraphs 36 and 37).

87 Consequently, in view of the mutual trust that must exist between Member States, on which the European arrest warrant system is based, and taking account, in particular, of the time limits set by Article 17 of the Framework Decision for the adoption of a final decision on the execution of a European arrest warrant by the executing judicial authorities, those authorities are solely required to assess the conditions of detention in the prisons in which, according to the information available to them, it is actually intended that the person concerned will be detained, including on a temporary or transitional basis. The compatibility with the fundamental rights of the conditions of detention in the other prisons in which that person may possibly be held at a later stage is, in accordance with the case-law referred to in paragraph 66 of this judgment, a matter that falls exclusively within the jurisdiction of the courts of the issuing Member State.

88 In the present case, even if this information has not been provided by the issuing judicial authority, it is common ground among all the interested persons that have participated in the present proceedings that the person concerned, if he is surrendered to the Hungarian authorities, will initially be held in Budapest prison for a period of one to three weeks, before being transferred to Szombathely prison, but it was not inconceivable that he might subsequently be transferred to another place of detention.

89 In those circumstances, the executing judicial authority must review the conditions of detention of the person concerned in those two prisons alone.

The assessment of the conditions of detention

90 In the absence of minimum standards under EU law regarding detention conditions, it should be recalled that, as has already been held in the judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 90), Article 3 of the ECHR imposes on the authorities of the State in whose territory a person is being detained a positive obligation to satisfy themselves that a prisoner is detained in conditions which guarantee respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured (ECtHR, 25 April 2017, *Rezmiveș and Others v. Romania*, CE:ECHR:2017:0425JUD006146712, § 72).

91 In that regard, if it is to fall within the scope of Article 3 of the ECHR, ill-treatment must attain a minimum level of severity, which depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (ECtHR, 20 October 2017, *Muršić v. Croatia,* CE:ECHR:2016:1020JUD000733413, §§ 97 and 122).

92 In view of the importance attaching to the space factor in the overall assessment of conditions of detention, a strong presumption of a violation of Article 3 of the ECHR arises when the personal space available to a detainee is below 3 m² in multi-occupancy accommodation (ECtHR, 20 October 2017, *Muršić v. Croatia,* CE:ECHR:2016:1020JUD000733413, § 124).

93 The strong presumption of a violation of Article 3 of the ECHR will normally be capable of being rebutted only if (i) the reductions in the required minimum personal space of 3 m^2 are short, occasional and minor, (ii) such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities, and (iii) the general conditions of detention at the facility are appropriate and there are no other aggravating aspects of the conditions of the individual concerned's detention (ECtHR, 20 October 2017, *Muršić v. Croatia,* CE:ECHR:2016:1020JUD000733413, § 138).

94 In the present case, the referring court itself is of the opinion that the information available to it concerning detention conditions at Szombathely prison, in which it is accepted that the person concerned should serve the majority of the custodial sentence imposed on him in Hungary, rules out the existence of a real risk of that person

being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter: that has, moreover, not been disputed by any of the interested parties who have participated in these proceedings.

95 Accordingly, the executing judicial authority must determine whether the person concerned will, on the other hand, be exposed to such a risk in Budapest prison.

96 It is not decisive in that regard that detention in that facility is intended to last only for the duration of the surrender procedure and therefore, according to the information provided by the authorities of the issuing Member State, should not in principle exceed three weeks.

97 It is true that the case-law of the European Court of Human Rights indicates that the length of a detention period may, as has already been stated in paragraphs 91 and 93 of this judgment, be a relevant factor in assessing the gravity of suffering or humiliation caused to a detainee by the inadequate conditions of his detention (ECtHR, 20 October 2017, *Muršić v. Croatia,* CE:ECHR:2016:1020JUD000733413, § 131).

98 However, the relative brevity of a detention period does not automatically mean that the treatment at issue falls outside the scope of Article 3 of the ECHR when other factors are sufficient to mean that it is caught by that provision.

99 The European Court of Human Rights has also held, that, when the detainee has space below 3 m², a period of detention of a few days may be treated as a short period. However, a period of around 20 days such as that envisaged in the case in the main proceedings by the authorities of the issuing Member State, which, moreover, may quite possibly be extended in the event of (undefined) 'circumstances preventing [that period coming to an end]', cannot be regarded as a short period (see, to that effect, ECtHR, 20 October 2017, *Muršić v. Croatia,* CE:ECHR:2016:1020JUD000733413, §§ 146, 152 and 154).

100 Accordingly, the fact that detention in such conditions is temporary or transitional does not, on its own, rule out all real risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter.

101 In those circumstances, if the executing judicial authority considers that the information available to it is insufficient to allow it to adopt a surrender decision, it may, as has already been stated in paragraph 63 of this judgment, request, in accordance with Article 15(2) of the Framework Decision, that the issuing judicial authority provide it with the supplementary information it deems necessary in order to obtain further details on the actual and precise conditions of detention of the person concerned in the prison in question.

102 In the present case, it appears from the material submitted to the Court that the Hungarian authorities have not answered the 78 questions that the Bremen Public Prosecutor's Office sent to them, in accordance with the referring court's order of 9 January 2018, on 10 January 2018 to enquire about detention conditions in Budapest prison and in any other facility in which the person concerned might, depending on the circumstances, be held.

103 A number of those questions, taken individually, are relevant for the assessment of the actual and precise conditions of the person concerned's detention in the light of the factors referred to in paragraph 93 of this judgment. However, as the Advocate General has also in essence observed in point 76 of his Opinion, those questions –– because of their number, their scope (every prison in which the person concerned might be held) and their content (aspects of detention that are of no obvious relevance for the purposes of that assessment, such as, for example, opportunities for religious worship, whether it is possible to smoke, the arrangements for the washing of clothing and whether there are bars or slatted shutters on cell windows) –– make it, in practice, impossible for the authorities of the issuing Member State to provide a useful answer, given, in particular, the short time limits laid down in Article 17 of the Framework Decision for the execution of a European arrest warrant.

104 A request of that nature, which results in the operation of the European arrest warrant being brought to a standstill, is not compatible with the duty of sincere cooperation, laid down in the first subparagraph of Article 4(3) TEU, which must inform the dialogue between the executing and issuing judicial authorities when, inter alia, information is provided pursuant to Article 15(2) and (3) of the Framework Decision.

105 At the hearing the Bremen Public Prosecutor's Office thus stated that it has never received an answer to this type of request for information, which the referring court is said to send as a matter of course to the authorities of

three issuing Member States, including Hungary. It thus explained that, in the absence of a decision of the referring court approving the surrender, no European arrest warrant issued by a court of one of those three Member States is now being executed by that office.

106 Nevertheless, it is not disputed that, in response to the request of 10 January 2018, the Hungarian authorities gave the Bremen Public Prosecutor's Office –– in their letters of 20 September 2017 and 27 March 2018 –– an assurance that the person concerned, irrespective of the facility he is detained in, will not be subject to any inhuman or degrading treatment within the meaning of Article 4 of the Charter, as a result of his detention in Hungary.

107 Consideration must therefore be given to whether and, if so, to what extent such an assurance may be taken into account by the executing judicial authority in taking its decision on the surrender of the person concerned.

The taking into account of assurances given by the authorities of the issuing Member State

108 It should be recalled that Article 15(2) of the Framework Decision explicitly enables the executing judicial authority, if it finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, to request that the necessary supplementary information be furnished as a matter of urgency. In addition, under Article 15(3) of the Framework Decision, the issuing judicial authority may at any time forward any additional useful information to the executing judicial authority.

109 Moreover, in accordance with the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, the European Union and the Member States are, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties (judgment of 6 September 2016, *Petruhhin*, C-182/15, EU:C:2016:630, paragraph 42).

110 In accordance with those provisions, the executing judicial authority and the issuing judicial authority may, respectively, request information or give assurances concerning the actual and precise conditions in which the person concerned will be detained in the issuing Member State.

111 The assurance provided by the competent authorities of the issuing Member State that the person concerned, irrespective of the prison he is detained in in the issuing Member State, will not suffer inhuman or degrading treatment on account of the actual and precise conditions of his detention is a factor which the executing judicial authority cannot disregard. As the Advocate General has noted in point 64 of his Opinion, a failure to give effect to such an assurance, in so far as it may bind the entity that has given it, may be relied on as against that entity before the courts of the issuing Member State.

112 When that assurance has been given, or at least endorsed, by the issuing judicial authority, if need be after requesting the assistance of the central authority, or one of the central authorities, of the issuing Member State, as referred to in Article 7 of the Framework Decision, the executing judicial authority, in view of the mutual trust which must exist between the judicial authorities of the Member States and on which the European arrest warrant system is based, must rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of Article 4 of the Charter.

113 In the present instance, the assurance given by the Hungarian Ministry of Justice on 20 September 2017, and repeated on 27 March 2018, that the person concerned will not be subjected to any inhuman or degrading treatment on account of the conditions of his detention in Hungary was, however, neither provided nor endorsed by the issuing judicial authority, as the Hungarian Government explicitly confirmed at the hearing.

114 As the guarantee that such an assurance represents is not given by a judicial authority, it must be evaluated by carrying out an overall assessment of all the information available to the executing judicial authority.

115 In that regard, the Court observes that the assurance given by the Hungarian Ministry of Justice appears to be borne out by the information in the possession of the Bremen Public Prosecutor's Office. In response to questions put by the Court, that office explained at the hearing that that information, which has been gleaned, in particular, from the experience gained in the course of surrender procedures carried out before delivery of the judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198), gives grounds for

considering that detention conditions within Budapest prison, through which every person who is the subject of a European arrest warrant transits, are not in breach of Article 4 of the Charter.

116 That being so, it appears that the person concerned may be surrendered to the Hungarian authorities without any breach of Article 4 of the Charter, a matter which must, however, be verified by the referring court.

117 Having regard to all the foregoing considerations, the answer to the questions referred is that Article 1(3), Article 5 and Article 6(1) of the Framework Decision must be interpreted as meaning that when the executing judicial authority has information showing there to be systemic or generalised deficiencies in the conditions of detention in the prisons of the issuing Member State, the accuracy of which must be verified by the referring court in the light of all the available updated data:

– the executing judicial authority cannot rule out the existence of a real risk that the person in respect of whom a European arrest warrant has been issued for the purpose of executing a custodial sentence will be subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter, merely because that person has, in the issuing Member State, a legal remedy permitting him to challenge the conditions of his detention, although the existence of such a remedy may be taken into account by the executing judicial authority for the purpose of deciding on the surrender of the person concerned;

– the executing judicial authority is required to assess only the conditions of detention in the prisons in which, according to the information available to it, it is likely that that person will be detained, including on a temporary or transitional basis;

– the executing judicial authority must assess, to that end, solely the actual and precise conditions of detention of the person concerned that are relevant for determining whether that person will be exposed to a real risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter;

– the executing judicial authority may take into account information provided by authorities of the issuing Member State other than the issuing judicial authority, such as, in particular, an assurance that the individual concerned will not be subject to inhuman or degrading treatment within the meaning of Article 4 of the Charter.

Costs

118 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Article 1(3), Article 5 and Article 6(1) 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, must be interpreted as meaning that when the executing judicial authority has information showing there to be systemic or generalised deficiencies in the conditions of detention in the prisons of the issuing Member State, the accuracy of which must be verified by the referring court in the light of all the available updated data:

– **the executing judicial authority cannot rule out a real risk that the person in respect of whom a European arrest warrant has been issued for the purpose of executing a custodial sentence will be subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, merely because that person has, in the issuing Member State, a legal remedy permitting him to challenge the conditions of his detention, although the existence of such a remedy may be taken into account by the executing judicial authority for the purpose of deciding on the surrender of the person concerned;**

– **the executing judicial authority is required to assess only the conditions of detention in the prisons in which, according to the information available to it, it is likely that that person will be detained, including on a temporary or transitional basis;**

– **the executing judicial authority must assess, to that end, solely the actual and precise conditions of detention of the person concerned that are relevant for determining whether that person will be exposed to a real risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights;**

– **the executing judicial authority may take into account information provided by authorities of the issuing Member State other than the issuing judicial authority, such as, in particular, an assurance that the individual concerned will not be subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights.**

[Signatures]

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* Language of the case: German.

JUDGMENT OF THE COURT (Grand Chamber)

15 October 2019 (*)

(Reference for a preliminary ruling — Police and judicial cooperation in criminal matters — Framework Decision 2002/584/JHA — European arrest warrant — Grounds for refusal of execution — Article 4 of the Charter of Fundamental Rights of the European Union — Prohibition of inhuman or degrading treatment — Conditions of detention in the issuing Member State — Assessment by the executing judicial authority — Criteria)

In Case C-128/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hanseatisches Oberlandesgericht Hamburg (Higher Regional Court, Hamburg, Germany), made by decision of 8 February 2018, received at the Court on 16 February 2018, in the proceedings relating to the execution of a European arrest warrant issued for

Dumitru-Tudor Dorobantu

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Arabadjiev, E. Regan, M. Safjan (Rapporteur) and P.G. Xuereb, Presidents of Chambers, M. Ilešič, J. Malenovský, L. Bay Larsen, K. Jürimäe, C. Lycourgos and N. Piçarra, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 5 February 2019,

after considering the observations submitted on behalf of:

– Mr Dorobantu, by G. Strate, J. Rauwald and O.-S. Lucke, Rechtsanwälte,

– Generalstaatsanwaltschaft Hamburg, by G. Janson and B. von Laffert, acting as Agents,

– the German Government, initially by T. Henze, M. Hellmann and A. Berg, subsequently by M. Hellmann and A. Berg, acting as Agents,

– the Belgian Government, by C. Van Lul, A. Honhon and J.-C. Halleux, acting as Agents,

– the Danish Government, by J. Nymann-Lindegren and M.S. Wolff, acting as Agents,

– Ireland, by G. Hodge and A. Joyce, acting as Agents, and by G. Mullan, Barrister-at-Law,

– the Spanish Government, by M.A. Sampol Pucurull, acting as Agent,

– the Italian Government, by G. Palmieri, acting as Agent, and by S. Fiorentino and S. Faraci, avvocati dello Stato,

– the Hungarian Government, by M.Z. Fehér, G. Koós, G. Tornyai and M.M. Tátrai, acting as Agents,

– the Netherlands Government, by M.K. Bulterman and J. Langer, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the Romanian Government, by C.-R. Canţăr, C.-M. Florescu, A. Wellman and O.-C. Ichim, acting as Agents,

– the European Commission, by S. Grünheid and R. Troosters, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 April 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4 of the Charter of Fundamental Rights of the European Union ('the Charter') and Council Framework Decision 2002/584/JHA 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').

2 The request has been made in the context of the execution, in Germany, of a European arrest warrant issued on 12 August 2016 by the Judecătoria Medgidia (Court of First Instance, Medgidia, Romania) in respect of Mr Dumitru-Tudor Dorobantu for the purposes of conducting a criminal prosecution in Romania.

Legal context

The ECHR

3 Under the heading, 'Prohibition of torture', Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), provides:

'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

European Union law

The Charter

4 Article 4 of the Charter, headed 'Prohibition of torture and inhuman or degrading treatment or punishment', states:

'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

5 The explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17, 'the explanations relating to the Charter') state, with regard to Article 4 of the Charter, that 'the right in Article 4 is the right guaranteed by Article 3 of the ECHR, which has the same wording' and that, 'by virtue of Article 52(3) of the Charter, it therefore has the same meaning and the same scope as the ECHR Article'.

6 Article 52 of the Charter, headed 'Scope and interpretation of rights and principles', provides, in paragraph 3:

'In so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

7 The explanations relating to the Charter state, with regard to Article 52(3), that 'the reference to the ECHR covers both the Convention and the Protocols to it', that 'the meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights and by the Court of Justice of the European Union', that 'the last sentence of the paragraph is designed to

allow the [European] Union to guarantee more extensive protection' and that, 'in any event, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR'.

8 As provided in Article 53 of the Charter, headed 'Level of protection':

'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the [ECHR], and by the Member States' constitutions.'

Framework Decision 2002/584

9 Article 1 of Framework Decision 2002/584, headed '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 modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [EU].'

10 Articles 3, 4 and 4a of Framework Decision 2002/584 set out the grounds for mandatory and optional non-execution of the European arrest warrant.

11 Article 5 of Framework Decision 2002/584 sets out the guarantees to be given by the issuing Member State in particular cases.

12 As provided in Article 6 of Framework Decision 2002/584, headed 'Determination of the competent judicial authorities':

'1. The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State.

2. The executing judicial authority shall be the judicial authority of the executing Member State which is competent to execute the European arrest warrant by virtue of the law of that State.

...'

13 Article 7 of Framework Decision 2002/584, headed 'Recourse to the central authority', provides in paragraph 1:

'Each Member State may designate a central authority or, when its legal system so provides, more than one central authority to assist the competent judicial authorities.'

14 Article 15 of Framework Decision 2002/584, headed 'Surrender decision', provides:

'1. The executing judicial authority shall decide, within the time limits and under the conditions defined in this Framework Decision, whether the person is to be surrendered.

2. 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.

3. The issuing judicial authority may at any time forward any additional useful information to the executing judicial authority.'

15 According to Article 17 of Framework Decision 2002/584, headed 'Time limits and procedures for the decision to execute the European arrest warrant':

'1. A European arrest warrant shall be dealt with and executed as a matter of urgency.

2. In cases where the requested person consents to his surrender, the final decision on the execution of the European arrest warrant should be taken within a period of 10 days after consent has been given.

3. In other cases, the final decision on the execution of the European arrest warrant should be taken within a period of 60 days after the arrest of the requested person.

4. Where in specific cases the European arrest warrant cannot be executed within the time limits laid down in paragraphs 2 or 3, the executing judicial authority shall immediately inform the issuing judicial authority thereof, giving the reasons for the delay. In such case, the time limits may be extended by a further 30 days.

...'

German law

Basic Law for the Federal Republic of Germany

16 The second sentence of Article 101(1) of the Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany) of 23 May 1949 (BGBl. 1949, p. 1) provides:

'No one may be removed from the jurisdiction of his lawful judge.'

Law on international mutual legal assistance in criminal matters

17 Framework Decision 2002/584 was transposed into the German legal order by Paragraphs 78 to 83k of the Gesetz über die internationale Rechtshilfe in Strafsachen (Law on international mutual legal assistance in criminal matters) of 23 December 1982, as amended by the Europäisches Haftbefehlsgesetz (Law on the European arrest warrant) of 20 July 2006 (BGBl. 2006 I, p. 1721).

18 Paragraph 73 of that law, as amended by the Law on the European arrest warrant, states:

'Mutual legal assistance and the transmission of information, if not requested, shall be unlawful if contrary to essential principles of the German legal order. If a request is made under Parts VIII, IX or X, mutual legal assistance shall be unlawful if contrary to the principles laid down in Article 6 TEU.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

19 On 12 August 2016, the Judecătoria Medgidia (Court of First Instance, Medgidia) issued a European arrest warrant for Mr Dorobantu, a Romanian national, for the purposes of conducting a criminal prosecution for offences relating to property and to forgery or the use of forged documents ('the European arrest warrant of 12 August 2016').

20 By orders of 3 and 19 January 2017, the Hanseatisches Oberlandesgericht Hamburg (Higher Regional Court, Hamburg, Germany) declared the surrender, pursuant to the European arrest warrant of 12 August 2016, of Mr Dorobantu to the Romanian authorities to be lawful.

21 The Hanseatisches Oberlandesgericht Hamburg (Higher Regional Court, Hamburg) recalled, to that end, the requirements laid down by the judgment of the Court of Justice of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198), according to which the executing judicial authority must, first, assess whether, as regards the detention conditions, there are in the issuing Member State deficiencies, which may be systemic

or generalised, or which may affect certain groups of people or certain places of detention, and, second, check whether there are substantial grounds for believing that the person concerned will be exposed to a real risk of inhuman or degrading treatment because of the conditions in which it is intended that that person will be detained in that State.

22 In the context of the first stage of that review, the Hanseatisches Oberlandesgericht Hamburg (Higher Regional Court, Hamburg) found, notably on the basis of decisions of the European Court of Human Rights concerning Romania and a report of the Bundesministerium der Justiz und für Verbraucherschutz (Federal Ministry of Justice and Consumer Protection, Germany), that there was specific evidence of systemic and generalised deficiencies in detention conditions in Romania.

23 Following that finding, the Hanseatisches Oberlandesgericht Hamburg (Higher Regional Court, Hamburg) assessed, in the context of the second stage of that review, the information communicated, in particular, by the court that issued the European arrest warrant concerned and by the Ministerul Justiției (Ministry of Justice, Romania), concerning Mr Dorobantu's detention conditions in the event of his surrender to the Romanian authorities.

24 In that regard, the Hanseatisches Oberlandesgericht Hamburg (Higher Regional Court, Hamburg) took into account the information that Mr Dorobantu would, while being held on remand during his trial, be detained in a 4-person cell measuring 12.30 m^2, 12.67 m^2 or 13.50 m^2, or in a 10-person cell measuring 36.25 m^2. Should Mr Dorobantu be given a custodial sentence, he would be detained, initially, in a penal institution in which each prisoner has an area of 3 m^2, and subsequently in the same conditions if serving a custodial sentence in a closed prison, or, if he were to be held in an open or semi-open prison, in a cell with 2 m^2 of space per person.

25 On the basis of the judgments of the European Court of Human Rights of 22 October 2009, *Orchowski v. Poland* (CE:ECHR:2009:1022JUD001788504), of 19 March 2013, *Blejuşcă v. Romania* (CE:ECHR:2013:0319JUD000791010), and of 10 June 2014, *Mihai Laurenţiu Marin v. Romania* (CE:ECHR:2014:0610JUD007985712), the Hanseatisches Oberlandesgericht Hamburg (Higher Regional Court, Hamburg) made an overall assessment of detention conditions in Romania. In that respect, it found that there had been an improvement in those conditions since 2014, although an area of 2 m^2 per person does not satisfy the requirements laid down in the case-law of the European Court of Human Rights. The lack of space available to individuals in custody is, however, said to be largely compensated for by other detention conditions. The Hanseatisches Oberlandesgericht Hamburg (Higher Regional Court, Hamburg) also noted that Romania had introduced an effective mechanism for monitoring conditions of detention.

26 The Hanseatisches Oberlandesgericht Hamburg (Higher Regional Court, Hamburg) found, moreover, that, should the surrender of Mr Dorobantu to the Romanian authorities be refused, the offences of which he is accused would go unpunished, which would run counter to the objective of ensuring the effectiveness of the criminal justice system in the European Union.

27 On the basis of the orders of 3 and 19 January 2017 of the Hanseatisches Oberlandesgericht Hamburg (Higher Regional Court, Hamburg), the Generalstaatsanwaltschaft Hamburg (Public Prosecutor's Office, Hamburg, Germany) authorised the surrender of Mr Dorobantu to the Romanian authorities, which was to take effect at the end of the custodial sentence imposed on him in respect of separate offences committed in Germany.

28 Mr Dorobantu served the sentence imposed on him for the offences committed in Germany and was released on 24 September 2017.

29 Mr Dorobantu lodged a constitutional complaint with the Bundesverfassungsgericht (Federal Constitutional Court, Germany) against those orders of the Hanseatisches Oberlandesgericht Hamburg (Higher Regional Court, Hamburg).

30 By order of 19 December 2017, the Bundesverfassungsgericht (Federal Constitutional Court) set aside those orders on the ground that they infringed Mr Dorobantu's right to be heard by a court or tribunal established in accordance with the law, as provided for in the second sentence of Article 101(1) of the Basic Law for the Federal Republic of Germany. The case was remitted to the Hanseatisches Oberlandesgericht Hamburg (Higher Regional Court, Hamburg).

31 In its order, the Bundesverfassungsgericht (Federal Constitutional Court) noted that, in the judgment of 20 October 2016, *Muršić v. Croatia* (CE:ECHR:2016:1020JUD000733413), the European Court of Human Rights held that a 'strong presumption' of a violation of Article 3 of the ECHR arises when the personal space available to a detainee falls below 3 m^2 in multi-occupancy accommodation, a presumption that is capable of being rebutted if the reductions in the required minimum personal space of 3 m^2 are short, occasional and minor, if they are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities, if the general conditions of detention at the facility in which the detainee is confined are appropriate and there are no other aggravating aspects of the conditions of the individual concerned's detention.

32 In addition, according to the Bundesverfassungsgericht (Federal Constitutional Court), certain criteria applied by the Hanseatisches Oberlandesgericht Hamburg (Higher Regional Court, Hamburg) in its overall assessment of detention conditions in Romania have not, until now, been expressly accepted by the European Court of Human Rights as factors capable of compensating for a reduction in the personal space available to detainees. These include the ability to take leave, to receive visitors, to have personal clothing laundered and to buy goods. Nor, moreover, is it certain that improvements in the heating system, sanitary facilities and hygiene conditions are capable of compensating for such a reduction in personal space, in view of the recent case-law of the European Court of Human Rights.

33 The Bundesverfassungsgericht (Federal Constitutional Court) also pointed out that neither the Court of Justice of the European Union nor the European Court of Human Rights has, until now, ruled on the relevance, in a case such as that in the main proceedings, of criteria relating to the cooperation of the criminal courts within the European Union and to the need to avoid impunity for offenders and the creation of 'safe havens' for them.

34 The national arrest warrant issued by the Hanseatisches Oberlandesgericht Hamburg (Higher Regional Court, Hamburg) for the purposes of surrendering Mr Dorobantu was executed until the suspension of his provisional detention by an order of that court of 20 December 2017.

35 In order to enable it to give a ruling after the case was remitted to it by the Bundesverfassungsgericht (Federal Constitutional Court), the Hanseatisches Oberlandesgericht Hamburg (Higher Regional Court, Hamburg) seeks to establish the requirements that arise under Article 4 of the Charter with respect to detention conditions in the issuing Member State and the criteria to be adopted in assessing whether those requirements have been met in accordance with the judgment of the Court of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198).

36 In those circumstances, the Hanseatisches Oberlandesgericht Hamburg (Higher Regional Court, Hamburg) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) In the context of Framework Decision 2002/584, what are the minimum standards for custodial conditions required under Article 4 of the Charter?

(a) Specifically, is there, under EU law, an "absolute" minimum limit for the size of custody cells, pursuant to which the use of cells under that limit will always constitute an infringement of Article 4 of the Charter?

(i) When determining an individual's portion of a custody cell, should the fact that a given cell is being used for single or multiple occupancy be taken into account?

(ii) When calculating the size of the custody cell, should areas covered by furniture (beds, wardrobes, etc.) be discounted?

(iii) What infrastructural requirements, if any, are relevant for the purposes of compliance of custodial conditions with EU law? Does direct (or only indirect) open access from the custody cell to, for example, sanitary facilities or other rooms, or the provision of hot and cold water, heating, lighting, etc. have any significance?

(b) To what extent do the various "prison regimes", such as differing unlock times and varying degrees of freedom of movement within a penal institution, play a role in the assessment?

(c) Can legal and organisational improvements in the issuing Member State (introduction of an ombudsman system, establishment of courts of enforcement of penalties, etc.) also be taken into account, as the present Chamber did in its decisions on the permissibility of the surrender)?

(2) What standards are to be used to assess whether custodial conditions comply with the fundamental rights guaranteed by EU law? To what extent do those standards influence the interpretation of the term "real risk" within the meaning of the judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198)?

(a) In that regard, are the judicial authorities of the executing Member State authorised to undertake a comprehensive assessment of the custodial conditions in the issuing Member State, or are they limited to an "examination as to manifest errors"?

(b) To the extent that, in the context of its reply to the first question referred for a preliminary ruling, the Court of Justice concludes that there are "absolute" requirements under EU law for custodial conditions, would a failure to meet those minimum standards be, in a sense, "unquestionable", so that, as a result, such a failure would always immediately constitute a "real risk", thereby prohibiting surrender, or can the executing Member State nevertheless carry out its own assessment? In that regard, can factors such as the maintenance of mutual legal assistance between Member States, the functioning of European criminal justice or the principles of mutual trust and recognition be taken into account?'

Procedure before the Court

37 By order of 25 September 2018, received at the Court of Justice on 27 September 2018, the Hanseatisches Oberlandesgericht Hamburg (Higher Regional Court, Hamburg) informed the Court that, after the European arrest warrant of 12 August 2016 had been issued in respect of Mr Dorobantu, he had been sentenced *in absentia*, in Romania, to a term of imprisonment of 2 years and 4 months. Consequently, the Romanian judicial authority cancelled that European arrest warrant and issued a new European arrest warrant on 1 August 2018 for the purposes of executing that custodial sentence ('the European arrest warrant of 1 August 2018'). The referring court maintained the questions it had referred for a preliminary ruling following the substitution of the European arrest warrant.

38 On 14 November 2018, the Court sent a request for clarification to the Hanseatisches Oberlandesgericht Hamburg (Higher Regional Court, Hamburg), in accordance with Article 101 of the Rules of Procedure of the Court, inviting it to clarify, in particular, whether the authorisation to execute and the execution of the European arrest warrant of 1 August 2018 could be considered to be certain and not hypothetical.

39 By letter of 20 December 2018, received at the Court on that date, the Hanseatisches Oberlandesgericht Hamburg (Higher Regional Court, Hamburg) replied that, subject to the Court's answer to the questions referred for a preliminary ruling, the authorisation to execute and the execution of the European arrest warrant of 1 August 2018 were certain.

40 It thus follows from the information given in the order of the Hanseatisches Oberlandesgericht Hamburg (Higher Regional Court, Hamburg) of 25 September 2018 and in that letter of 20 December 2018 that the referring court is called upon to rule on the execution of a valid European arrest warrant (see, *a contrario*, order of 15 November 2017, *Aranyosi*, C-496/16, not published, EU:C:2017:866, paragraphs 26 and 27). Accordingly, it is appropriate to answer the questions put by the referring court.

Consideration of the questions referred

41 By its questions, which should be considered together, the referring court queries, in the first place, the extent and scope of the review which the executing judicial authority, being in possession of information showing that there are systemic or generalised deficiencies in detention conditions in the prisons of the issuing Member State, must, in the light of Article 1(3) of Framework Decision 2002/584, read in conjunction with Article 4 of the Charter, undertake for the purpose of assessing whether there are substantial grounds for believing that, following the

surrender to that Member State of the person subject to a European arrest warrant, that person will run a real risk of being subjected to inhuman or degrading treatment, within the meaning of Article 4 of the Charter. It queries, in particular, whether that review must be comprehensive or, on the contrary, limited to cases of manifest inadequacies in those conditions of detention.

42 In the second place, it asks whether, in the context of that assessment, it must take account of a minimum requirement as to space per detainee in a prison cell. It also asks about the rules on calculating that space if the cell contains furniture and sanitary infrastructure, and the relevance, for the purposes of such an assessment, of other conditions of detention, such as sanitary conditions or the extent of freedom of movement of the detainee within the prison.

43 In the third place, it wishes to know whether the existence of legislative and structural measures relating to the improvement of the review of detention conditions in the issuing Member State must be taken into account for the purposes of that assessment.

44 In the fourth place, it asks whether any failure by the issuing Member State to comply with the minimum requirements in relation to detention conditions may be weighed against considerations relating to the efficacy of judicial cooperation in criminal matters and to the principles of mutual trust and recognition.

Preliminary observations

45 In order to answer the questions referred, it must, as a preliminary point, be recalled that, as is apparent from the case-law of the Court, EU law is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the European Union is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the EU law that implements them will be respected (judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 35, and of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paragraph 48).

46 Both the principle of mutual trust between the Member States and the principle of mutual recognition, which is itself based on the mutual trust between the latter, are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly as regards the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 36, and of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paragraph 49).

47 Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but also, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the European Union (judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 37 and the case-law cited, and of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paragraph 50).

48 In the field governed by Framework Decision 2002/584, the principle of mutual recognition, which, as is apparent in particular from recital 6 of that framework decision, constitutes the 'cornerstone' of judicial cooperation in criminal matters, is applied in Article 1(2) thereof which lays down the rule that Member States are required to execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of that framework decision. Executing judicial authorities may therefore, in principle, refuse to execute such a warrant only on the grounds for non-execution exhaustively listed by Framework Decision 2002/584 and execution of the warrant may be made subject only to one of the conditions exhaustively laid down in Article 5. While execution of the European arrest warrant constitutes the rule, refusal to execute is intended to be an exception which must be interpreted strictly. Thus, Framework Decision 2002/584 explicitly states the grounds for mandatory non-execution (Article 3) and optional non-execution (Articles 4 and 4a) of a European

arrest warrant, as well as the guarantees to be given by the issuing Member State in particular cases (Article 5) (judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraphs 41 and 42, and of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paragraphs 54 and 55).

49 Nonetheless, the Court has also recognised that other limitations may be placed on the principles of mutual recognition and mutual trust between Member States 'in exceptional circumstances' (judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 43 and the case-law cited, and of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paragraph 56).

50 In that context, the Court has stated that, subject to certain conditions, the executing judicial authority has an obligation to bring the surrender procedure established by Framework Decision 2002/584 to an end where surrender may result in the requested person being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter (see, to that effect, judgments of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 84; of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 44 and the case-law cited; and of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paragraph 57).

51 Accordingly, where the judicial authority of the executing Member State is in possession of information showing there to be a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State, in the light of the standard of protection of fundamental rights guaranteed by EU law and, in particular, by Article 4 of the Charter, that judicial authority is bound to assess the existence of that risk when it is called upon to decide on the surrender to the authorities of the issuing Member State of the individual concerned by a European arrest warrant. The consequence of the execution of such a warrant must not be that that individual suffers inhuman or degrading treatment (judgments of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 88, and of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paragraph 59).

52 To that end, the executing judicial authority must, initially, rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention. That information may be obtained from, inter alia, judgments of international courts, such as judgments of the European Court of Human Rights, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the United Nations (judgments of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 89, and of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paragraph 60).

53 In the present case, as the documents available to the Court show, the referring court found, on the basis of decisions of the European Court of Human Rights concerning Romania, decisions of the German courts and a report from the Federal Ministry of Justice and Consumer Protection, that there was specific evidence of systemic and generalised deficiencies in detention conditions in Romania. Its questions are thus based on the premiss that such deficiencies exist, the accuracy of which it is for the referring court to verify by taking account of properly updated information (see, to that effect, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paragraph 71).

54 In any event, the mere existence of evidence that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people or certain places of detention, with respect to detention conditions in the issuing Member State does not necessarily imply that, in a specific case, the individual concerned will be subjected to inhuman or degrading treatment in the event that he is surrendered to the authorities of that Member State (judgments of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 91 and 93, and of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paragraph 61).

55 Thus, in order to ensure observance of Article 4 of the Charter in the particular circumstances of a person who is the subject of a European arrest warrant, the executing judicial authority, when faced with evidence of the existence of such deficiencies that is objective, reliable, specific and properly updated, is then bound to

determine, specifically and precisely, whether, in the particular circumstances of the case, there are substantial grounds for believing that, following the surrender of that person to the issuing Member State, he will run a real risk of being subject in that Member State to inhuman or degrading treatment, within the meaning of Article 4 of the Charter, because of the conditions for his detention envisaged in the issuing Member State (see, to that effect, judgments of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 92 and 94, and of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paragraph 62).

56 The interpretation of Article 4 of the Charter referred to in paragraphs 50 to 55 of the present judgment corresponds, in essence, to the meaning conferred on Article 3 of the ECHR by the European Court of Human Rights.

57 The European Court of Human Rights has ruled that a court of a Member State party to the ECHR could not refuse to execute a European arrest warrant on the ground that the requested person was exposed to a risk of being subjected, in the issuing State, to detention conditions involving inhuman or degrading treatment if that court had not first carried out an up-to-date and detailed examination of the situation as it stood at the time of its decision and had not sought to identify structural deficiencies in relation to detention conditions and a risk that is both real, and specific to the individual, of infringement of Article 3 of the ECHR in that State (ECtHR, 9 July 2019, *Romeo Castaño v. Belgium*, CE:ECHR:2019:0709JUD000835117, § 86).

The extent and scope of the review by the executing judicial authority of detention conditions in the issuing Member State

58 As regards, in the first place, the referring court's queries as to the extent and scope of the review by the executing judicial authority of detention conditions in the issuing Member State in the light of Article 1(3) of Framework Decision 2002/584, read in conjunction with Article 4 of the Charter, it must, as a preliminary point, be recalled that, in accordance with the first sentence of Article 52(3) of the Charter, in so far as the right set out in Article 4 of the Charter corresponds to the right guaranteed by Article 3 of the ECHR, its meaning and scope are to be the same as those laid down by the ECHR. In addition, the explanations relating to the Charter make clear, with respect to Article 52(3), that the meaning and the scope of the rights guaranteed by the ECHR are determined not only by the text of the ECHR, but also by the case-law of the European Court of Human Rights and by that of the Court of Justice of the European Union.

59 That preliminary point having been made, it must be emphasised, first, that if it is to fall within the scope of Article 3 of the ECHR, ill-treatment must attain a minimum level of severity, which must be assessed by taking account of all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the individual (see, to that effect, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paragraph 91 and the case-law cited).

60 Article 3 of the ECHR is intended to ensure that any prisoner is detained in conditions which guarantee respect for human dignity, that the way in which detention is enforced does not cause the individual concerned distress or hardship of an intensity exceeding the unavoidable level of suffering that is inherent in detention and that, having regard to the practical requirements of imprisonment, the health and well-being of the prisoner are adequately protected (judgments of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 90, and of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paragraph 90 and the case-law cited).

61 In that context, the review of detention conditions in the issuing Member State which, in the exceptional circumstances referred to in paragraphs 50 to 52 of the present judgment, is to be carried out by the executing judicial authority for the purposes of assessing whether there are substantial grounds for believing that, following the surrender to the issuing Member State of the person concerned by the European arrest warrant, that person will run a real risk of being subjected in that Member State to inhuman or degrading treatment, must be based on an overall assessment of the relevant physical conditions of detention.

62 In view of the fact that, as the Advocate General noted in point 107 of his Opinion, the prohibition of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, is absolute (see, to that effect, judgments of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 85 to 87, and of

19 March 2019, *Jawo*, C-163/17, EU:C:2019:218, paragraph 78), the respect for human dignity that must be protected pursuant to that article would not be guaranteed if the executing judicial authority's review of conditions of detention in the issuing Member State were limited to obvious inadequacies only.

63 As regards, second, the scope of that review in relation to the prisons of the issuing Member State, it must be recalled that that authority, which is responsible for deciding on the surrender of a person who is the subject of a European arrest warrant, must determine, specifically and precisely, whether, in the circumstances of a particular case, there is a real risk that that person will be subjected in the issuing Member State to inhuman or degrading treatment (see, to that effect, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paragraph 77).

64 It follows that the assessment which that authority is required to make cannot, in view of the fact that it must be specific and precise, concern the general conditions of detention in all the prisons in the issuing Member State in which the individual concerned might be detained (see, to that effect, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paragraph 78).

65 Furthermore, an obligation on the part of the executing judicial authorities to assess the conditions of detention in all the prisons in which the individual concerned might be detained in the issuing Member State would be clearly excessive. It would, moreover, be impossible to fulfil such an obligation within the periods prescribed in Article 17 of Framework Decision 2002/584. Such an assessment could thus in fact substantially delay that individual's surrender and, accordingly, render the operation of the European arrest warrant system wholly ineffective. That would result in a risk of impunity for the requested person (judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paragraphs 84 and 85).

66 Consequently, in view of the mutual trust that must exist between Member States, on which the European arrest warrant system is based, and taking account, in particular, of the time limits set by Article 17 of Framework Decision 2002/584 for the adoption of a final decision on the execution of a European arrest warrant by the executing judicial authorities, those authorities are solely required to assess the conditions of detention in the prisons in which, according to the information available to them, it is actually intended that the person concerned will be detained, including on a temporary or transitional basis (judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paragraph 87).

67 To that end, the executing judicial authority must, pursuant to Article 15(2) of Framework Decision 2002/584, request of the judicial authority of the issuing Member State that there be provided as a matter of urgency all necessary supplementary information on the conditions in which it is actually intended that the individual concerned will be detained in that Member State (judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paragraph 63 and the case-law cited).

68 When the assurance that the person concerned will not suffer inhuman or degrading treatment on account of the actual and precise conditions of his detention, irrespective of the prison in which he is detained in the issuing Member State, has been given, or at least endorsed, by the issuing judicial authority, if need be after the assistance of the central authority, or one of the central authorities, of the issuing Member State, as referred to in Article 7 of Framework Decision 2002/584, has been requested, the executing judicial authority must rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of Article 4 of the Charter (see, to that effect, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paragraph 112).

69 It is, therefore, only in exceptional circumstances, and on the basis of precise information, that the executing judicial authority can find that, notwithstanding an assurance such as that referred to in the preceding paragraph, there is a real risk of the person concerned being subjected to inhuman or degrading treatment, within the meaning of Article 4 of the Charter, because of the conditions of that person's detention in the issuing Member State.

The assessment of the conditions of detention having regard to the personal space available to the detainee

70 With regard, in the second place, to the assessment by the executing judicial authority of conditions of detention having regard to the personal space available to each detainee in a prison cell, it should be noted that it is apparent from the order for reference that Mr Dorobantu will, if surrendered to the Romanian authorities, be detained in a multi-occupancy cell and not in a single-occupancy cell. Therefore, and notwithstanding the wording of the first question referred, it is necessary in the context of the present case to determine the minimum requirements, in terms of personal space per detainee, only with regard to incarceration in a multi-occupancy cell.

71 On that basis, it must be noted that the Court has relied — having regard the considerations referred to in paragraph 58 of the present judgment, and in the absence, currently, of minimum standards in that respect under EU law — on the case-law of the European Court of Human Rights in relation to Article 3 of the ECHR and, more specifically, on the judgment of 20 October 2016, *Muršić v. Croatia* (CE:ECHR:2016:1020JUD000733413).

72 In so doing, the Court of Justice has ruled that, in view of the importance attaching to the space factor in the overall assessment of conditions of detention, a strong presumption of a violation of Article 3 of the ECHR arises when the personal space available to a detainee is below 3 m^2 in multi-occupancy accommodation (judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paragraph 92 and the case-law cited).

73 The strong presumption of a violation of Article 3 of the ECHR will normally be capable of being rebutted only if (i) the reductions in the required minimum personal space of 3 m^2 are short, occasional and minor, (ii) such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities, and (iii) the general conditions of detention at the facility are appropriate and there are no other aggravating aspects of the conditions of the individual concerned's detention (judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paragraph 93 and the case-law cited).

74 It must be added in that regard that it is true that the length of a detention period may be a relevant factor in assessing the gravity of suffering or humiliation caused to a detainee by the inadequate conditions of his detention. However, the relative brevity of a detention period does not necessarily mean that the treatment concerned falls outside the scope of Article 3 of the ECHR where other factors are sufficient to bring it within that provision (see, to that effect, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paragraphs 97 and 98 and the case-law cited).

75 In addition, it is apparent, in essence, from the case-law of the European Court of Human Rights that, in cases where a multi-occupancy prison cell — measuring in the range of 3 to 4 m^2 of personal space per inmate — is at issue, the space factor remains an important factor in the assessment of the adequacy of conditions of detention. In such instances it may be concluded that there is a violation of Article 3 of the ECHR if the space factor is coupled with other aspects of inappropriate physical conditions of detention, including lack of access to outdoor exercise, natural light or air, poor ventilation, inadequacy of room temperature, the impossibility of using the toilet in private, and non-compliance with basic sanitary and hygienic requirements (see, to that effect, ECtHR, 20 October 2016, *Muršić v. Croatia*, CE:ECHR:2016:1020JUD000733413, § 139).

76 In cases where a detainee disposes of more than 4 m^2 of personal space in multi-occupancy prison accommodation and where therefore no issue with regard to the question of personal space arises, other aspects of physical conditions of detention, as referred to in the preceding paragraph, remain relevant for the assessment of adequacy of an individual's conditions of detention under Article 3 of the ECHR (see, to that effect, ECtHR, 20 October 2016, *Muršić v. Croatia* (CE:ECHR:2016:1020JUD000733413, § 140).

77 With regard to the detailed rules on calculating — for the purposes of assessing whether there is a real risk of the person concerned being subjected to inhuman or degrading treatment, within the meaning of Article 4 of the Charter — the minimum space that must be available to a detainee in a multi-occupancy cell containing furniture and sanitary infrastructure, it is necessary also, in the absence, currently, of minimum standards in that respect under EU law, to take account of the criteria laid down by the European Court of Human Rights in the light of Article 3 of the ECHR. That court considers that although, in calculating the available surface area in such a cell, the area occupied by sanitary facilities should not be taken into account, the calculation should include space occupied by furniture, albeit that the detainees must still have the possibility of moving around normally within

the cell (see, to that effect, ECtHR, 20 October 2016, *Muršić v. Croatia*, CE:ECHR:2016:1020JUD000733413, §§ 75 and 114 and the case-law cited).

78 In the present case, it is apparent from the observations made by the Romanian Government at the hearing that Mr Dorobantu should, once surrendered, be detained in a prison regime that would enable him to enjoy significant freedom of movement and also to work, which would limit the time spent in a multi-occupancy cell. It is for the referring court to verify that information and to assess any other relevant circumstances for the purposes of the analysis it is required to make, in accordance with the particulars set out in paragraphs 71 to 77 of the present judgment, if necessary by asking the issuing judicial authority for the necessary supplementary information if it considers the information already communicated by that authority to be insufficient to allow it to rule on surrender.

79 Last, it should be pointed out that, while it is open to the Member States to make provision in respect of their own prison system for minimum standards in terms of detention conditions that are higher than those resulting from Article 4 of the Charter and Article 3 of the ECHR, as interpreted by the European Court of Human Rights, a Member State may nevertheless, as the executing Member State, make the surrender to the issuing Member State of the person concerned by a European arrest warrant subject only to compliance with the latter requirements, and not with those resulting from its own national law. The opposite solution would, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined by EU law, undermine the principles of mutual trust and recognition which Framework Decision 2002/584 is intended to uphold and would, therefore, compromise the efficacy of that framework decision (see, to that effect, judgment of 26 February 2013, *Melloni*, C-399/11, EU:C:2013:107, paragraph 63).

The relevance of general measures intended to improve the monitoring of detention conditions in the issuing Member State

80 As regards, in the third place, the adoption in the issuing Member State of measures, such as the establishment of an ombudsman system or establishment of courts of enforcement of penalties, which are intended to reinforce the monitoring of detention conditions in that Member State, it must be stated that such monitoring, including judicial review of those detention conditions carried out subsequently is an important factor, which may act as an incentive to the authorities of that State to improve detention conditions and which may therefore be taken into account by the executing judicial authorities when, for the purpose of deciding on whether a person who is the subject of a European arrest warrant should be surrendered, they make an overall assessment of the conditions in which it is intended that the person will be held. However, the fact remains that such a review is not, by itself, capable of averting the risk of that person being subjected, following his surrender, to treatment that is incompatible with Article 4 of the Charter on account of the conditions of his detention (see, to that effect, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paragraph 74).

81 Therefore, even if the issuing Member State provides for legal remedies that make it possible to review the legality of detention conditions from the perspective of the fundamental rights, the executing judicial authorities are still bound to undertake an individual assessment of the situation of each person concerned, in order to satisfy themselves that their decision on the surrender of that person will not expose him, on account of those conditions, to a real risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter (judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paragraph 75).

Whether considerations relating to the efficacy of judicial cooperation in criminal matters and to the principles of mutual trust and recognition should be taken into account

82 As regards, in the fourth place, the question as to whether the existence of a real risk that the person concerned will be subjected to inhuman or degrading treatment because detention conditions in the issuing Member State do not meet minimum requirements according to the case-law of the European Court of Human Rights may be weighed, by the executing judicial authority required to decide on that surrender, against considerations relating to the efficacy of judicial cooperation in criminal matters and to the principles of mutual trust and recognition, it should be noted that the fact that the prohibition of inhuman or degrading treatment within the meaning of Article 4 of the Charter is absolute, as recalled in paragraph 62 of the present judgment, precludes the fundamental right not to be subjected to such treatment from being in any way limited by such considerations.

83 In those circumstances, the need to guarantee that the person concerned will not, in the event of his surrender to the issuing Member State, be subjected to any inhuman or degrading treatment within the meaning of Article 4 of the Charter justifies, exceptionally, a limitation of the principles of mutual trust and recognition (see, to that effect, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 82, 98 to 102 and 104).

84 It follows from this that a finding, by the executing judicial authority, that there are substantial grounds for believing that, following the surrender to the issuing Member State of the person concerned by a European arrest warrant, that person will run a real risk of being subjected to such treatment, because of the conditions of detention prevailing in the prison in which it is actually intended that he will be detained, cannot be weighed, for the purposes of deciding on that surrender, against considerations relating to the efficacy of judicial cooperation in criminal matters and to the principles of mutual trust and recognition.

85 In the light of all the foregoing considerations, the answer to the questions referred is as follows:

– Article 1(3) of Framework Decision 2002/584, read in conjunction with Article 4 of the Charter, must be interpreted as meaning that when the executing judicial authority has objective, reliable, specific and properly updated information showing there to be systemic or generalised deficiencies in the conditions of detention in the prisons of the issuing Member State, it must, for the purpose of assessing whether there are substantial grounds for believing that, following the surrender to the issuing Member State of the person subject to a European arrest warrant, that person will run a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter, take account of all the relevant physical aspects of the conditions of detention in the prison in which it is actually intended that that person will be detained, such as the personal space available to each detainee in a cell in that prison, sanitary conditions and the extent of the detainee's freedom of movement within the prison. That assessment is not limited to the review of obvious inadequacies. For the purposes of that assessment, the executing judicial authority must request from the issuing judicial authority the information that it deems necessary and must rely, in principle, on the assurances given by the issuing judicial authority, in the absence of any specific indications that the conditions of detention infringe Article 4 of the Charter.

– As regards, in particular, the personal space available to each detainee, the executing judicial authority must, in the absence, currently, of minimum standards in that respect under EU law, take account of the minimum requirements under Article 3 of the ECHR, as interpreted by the European Court of Human Rights. Although, in calculating that available space, the area occupied by sanitary facilities should not be taken into account, the calculation should include space occupied by furniture. Detainees must, however, still have the possibility of moving around normally within the cell.

– The executing judicial authority cannot rule out the existence of a real risk of inhuman or degrading treatment merely because the person concerned has, in the issuing Member State, a legal remedy enabling that person to challenge the conditions of his detention or because there are, in the issuing Member State, legislative or structural measures that are intended to reinforce the monitoring of detention conditions.

– A finding, by the executing judicial authority, that there are substantial grounds for believing that, following the surrender of the person concerned to the issuing Member State, that person will run such a risk, because of the conditions of detention prevailing in the prison in which it is actually intended that he will be detained, cannot be weighed, for the purposes of deciding on that surrender, against considerations relating to the efficacy of judicial cooperation in criminal matters and to the principles of mutual trust and recognition.

Costs

86 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 1(3) 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 conjunction with Article 4 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that when the executing judicial authority has objective, reliable, specific and properly updated information showing there to be systemic or generalised deficiencies in the conditions of detention in the prisons of the issuing Member State, it must, for the purpose of assessing whether there are substantial grounds for believing that, following the surrender to the issuing Member State of the person subject to a European arrest warrant, that person will run a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter, take account of all the relevant physical aspects of the conditions of detention in the prison in which it is actually intended that that person will be detained, such as the personal space available to each detainee in a cell in that prison, sanitary conditions and the extent of the detainee's freedom of movement within the prison. That assessment is not limited to the review of obvious inadequacies. For the purposes of that assessment, the executing judicial authority must request from the issuing judicial authority the information that it deems necessary and must rely, in principle, on the assurances given by the issuing judicial authority, in the absence of any specific indications that the conditions of detention infringe Article 4 of the Charter of Fundamental Rights.

As regards, in particular, the personal space available to each detainee, the executing judicial authority must, in the absence, currently, of minimum standards in that respect under EU law, take account of the minimum requirements under Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, as interpreted by the European Court of Human Rights. Although, in calculating that available space, the area occupied by sanitary facilities should not be taken into account, the calculation should include space occupied by furniture. Detainees must, however, still have the possibility of moving around normally within the cell.

The executing judicial authority cannot rule out the existence of a real risk of inhuman or degrading treatment merely because the person concerned has, in the issuing Member State, a legal remedy enabling that person to challenge the conditions of his detention or because there are, in the issuing Member State, legislative or structural measures that are intended to reinforce the monitoring of detention conditions.

A finding, by the executing judicial authority, that there are substantial grounds for believing that, following the surrender of the person concerned to the issuing Member State, that person will run such a risk, because of the conditions of detention prevailing in the prison in which it is actually intended that he will be detained, cannot be weighed, for the purposes of deciding on that surrender, against considerations relating to the efficacy of judicial cooperation in criminal matters and to the principles of mutual trust and recognition.

[Signatures]

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* Language of the case: German.

JUDGMENT OF THE COURT (First Chamber)

19 September 2018 (*)

(Reference for a preliminary ruling — Urgent preliminary ruling procedure — Police and judicial cooperation in criminal matters — European arrest warrant — Framework Decision 2002/584/JHA — Grounds for non-execution — Article 50 TEU — Warrant issued by the judicial authorities of a Member State that has initiated the procedure for withdrawal from the European Union — Uncertainty as to the law applicable to the relationship between that State and the Union following withdrawal)

In Case C-327/18 PPU,

REQUEST for a preliminary ruling under Article 267 TFEU from the High Court (Ireland), made by decision of 17 May 2018, received at the Court on 18 May 2018, in proceedings relating to the execution of European arrest warrants issued with respect to

RO,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, C.G. Fernlund (Rapporteur), A. Arabadjiev, S. Rodin and E. Regan, Judges,

Advocate General: M. Szpunar,

Registrar: L. Hewlett, Principal Administrator,

having regard to the referring court's request of 17 May 2018, received at the Court on 18 May 2018, that the reference for a preliminary ruling be dealt with under the urgent procedure, pursuant to Article 107 of the Rules of Procedure of the Court,

having regard to the decision of the First Chamber of 11 June 2018 granting that request,

having regard to the written procedure and further to the hearing on 12 July 2018,

after considering the observations submitted on behalf of:

– RO, by E. Martin-Vignerte and J. MacGuill, Solicitors, C. Cumming, Barrister-at-law, and P. McGrath, Senior Counsel,

– the Minister for Justice and Equality, by M. Browne, G. Hodge, A. Joyce and G. Lynch, acting as Agents, and by E. Duffy, Barrister-at-law, and R. Barron, Senior Counsel,

– the Romanian Government, by L. Liţu and C. Canţăr, acting as Agents,

– the United Kingdom Government, by S. Brandon and C. Brodie, acting as Agents, and by J. Holmes QC and D. Blundell, Barrister,

– the European Commission, by S. Grünheid, R. Troosters and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 August 2018,

gives the following

1 This request for a preliminary ruling concerns the interpretation of Article 50 TEU and of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24) ('the Framework Decision').

2 The request has been made in connection with the execution, in Ireland, of two European arrest warrants issued by the courts of the United Kingdom of Great Britain and Northern Ireland with respect to RO.

Legal context

The EU Treaty

3 Article 50(1) to (3) TEU provide:

'1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union is to negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) [TFEU]. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.'

The Framework Decision

4 Recitals 10 and 12 of the Framework Decision are worded as follows:

> '(10) The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in [Article 2 TEU], determined by the Council pursuant to [Article 7(2) TEU] with the consequences set out in [Article 7(3) TEU].
>
> ...
>
> (12) This Framework Decision respects fundamental rights and observes the principles recognised by [Articles 2 and 6 TEU] and reflected in the Charter of Fundamental Rights of the European Union ... in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.'

5 Article 1(2) and (3) of the Framework Decision, that article being headed 'Definition of the European arrest warrant and obligation to execute it', provide:

'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 [TEU].'

6 Article 26(1) of the Framework Decision, that article being headed 'Deduction of the period of detention served in the executing Member State', provides:

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

7 Article 27(2) of the Framework Decision, that article being headed 'Possible prosecution for other offences', provides:

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

8 Article 28 of the Framework Decision governs surrender or subsequent extradition to a State other than the executing Member State.

Irish law

9 The Framework Decision was transposed into Irish law by the European Arrest Warrant Act, 2003.

The dispute in the main proceedings and the questions referred for a preliminary ruling

10 RO is the subject of two European arrest warrants issued by the courts of the United Kingdom and sent to Ireland.

11 The first, issued on 27 January 2016, relates to crimes of murder and arson alleged to have been committed on 2 August 2015. The second, issued on 4 May 2016, relates to a crime of rape alleged to have been committed on 30 December 2003. Those crimes each carry potential sentences of life imprisonment.

12 RO was arrested and remanded in custody in Ireland on 3 February 2016. Since that date he has remained on remand in custody within that Member State, by virtue of the two European arrest warrants to which he is subject.

13 RO raised objections to his surrender to the United Kingdom on the basis of, inter alia, the withdrawal of that Member State from the European Union and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), claiming that he could suffer inhuman and degrading treatment if he were to be imprisoned in Maghaberry prison in Northern Ireland.

14 Due to his state of health, RO's case could not be heard until 27 July 2017.

15 By a decision of 2 November 2017, the High Court (Ireland), after examining RO's claims in relation to the treatment that he might suffer in Northern Ireland, held that, on the basis of specific and updated information on the conditions of detention in Maghaberry prison, there was a real risk that, because of his vulnerability, RO might suffer inhuman and degrading treatment. The High Court considered it necessary, in the light of the judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198), to ask for further information from the United Kingdom authorities on the conditions of RO's detention in the event of his being surrendered.

16 On 16 April 2018 the judicial authority that had issued the European arrest warrants concerned, Laganside Court in Belfast (United Kingdom), provided information as to how the Northern Irish Prison Service would address the risks to RO of being subjected to inhuman or degrading treatment in Northern Ireland.

17 The High Court states that it has rejected all the objections raised by RO to his surrender with the exception of those relating to the withdrawal of the United Kingdom from the European Union and the objection in relation

to Article 3 of the ECHR, considering that it could not make a decision on those objections before obtaining from the Court an answer to a number of questions referred for a preliminary ruling.

18 The High Court states that on 29 March 2017 the United Kingdom notified the President of the European Council of its intention to withdraw from the European Union, on the basis of Article 50 TEU, and that that notification should lead to the withdrawal of the United Kingdom from the European Union as from 29 March 2019.

19 The High Court states that if RO is surrendered, it is highly probable that he will remain in prison in the United Kingdom after 29 March 2019.

20 The High Court also observes that agreements may perhaps be entered into by the European Union and the United Kingdom to regulate the relationship of those parties immediately after that withdrawal or in the longer term, in areas such as those covered by the Framework Decision.

21 Nonetheless, currently, that possibility remains uncertain and the nature of the measures which will be adopted, particularly with respect to the jurisdiction of the Court to give preliminary rulings, is not known.

22 The High Court states that, in the view of the Minister for Justice and Equality (Ireland), the law should be applied as it stands today and not as it might become in the future after the withdrawal of the United Kingdom from the European Union. The referring court considers that the Minister is correct to conclude that the surrender of RO is mandatory on the basis of national law that gives effect to the Framework Decision.

23 The High Court sets out the contrary position of RO, who argues that, given the uncertainty as to the law which will be in place in United Kingdom after the withdrawal of that Member State from the European Union, it cannot be guaranteed that the rights which he enjoys under EU law will, in practice, be capable of enforcement as such, so that he ought not to be surrendered.

24 The referring court states that RO has identified four aspects of EU law which might theoretically be engaged, namely:

- the right to a deduction of a period spent in custody in the executing Member State, provided for in Article 26 of the Framework Decision;
- the so-called 'specialty' rule, the subject of Article 27 of the Framework Decision;
- the right limiting further surrender or extradition, the subject of Article 28 of the Framework Decision, and
- respect for the fundamental rights of the person surrendered under the Charter of Fundamental Rights of the European Union ('the Charter').

25 In the view of the referring court, the question arises whether, in the event of a dispute concerning one of those four aspects and in the absence of measures conferring on the Court jurisdiction to give preliminary rulings with respect to them, the surrender of an individual, such as RO, gives rise to a significant risk, rather than a merely theoretical possibility, of injustice, with the consequence that the request for surrender ought not to be accepted.

26 In those circumstances, the High Court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Having regard to:

- (a) the giving by the United Kingdom of notice under Article 50 [TEU];
- (b) the uncertainty as to the arrangements which will be put in place between the European Union and the United Kingdom to govern relations after the departure of the United Kingdom; and

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

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

(i) in all cases?

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

(iii) in no cases?

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

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

(i) in all cases?

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

(iii) in no cases?

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

The urgent procedure

27 The referring court requested that this reference for a preliminary ruling be dealt with under the urgent preliminary ruling procedure provided for in Article 107 of the Rules of Procedure of the Court.

28 In support of its request, that court has stated that the person concerned is currently remanded in custody in Ireland solely on the basis of the European arrest warrants issued by the United Kingdom for the purposes of conducting criminal prosecutions and that his surrender to that Member State is dependent on the Court's answer. The referring court has stated that the ordinary procedure would significantly extend the duration of that person's detention, while he is presumed to be innocent.

29 In that regard, it should be stated, in the first place, that the present reference for a preliminary ruling concerns the interpretation of the Framework Decision, which falls within the fields covered by Title V of Part Three of the FEU Treaty, relating to the area of freedom, security and justice. Consequently, this reference can be dealt with under the urgent preliminary ruling procedure.

30 In the second place, as regards the criterion relating to urgency, it is necessary, in accordance with the Court's settled case-law, to take into account the fact that the person concerned is currently deprived of his liberty and that the question as to whether he may continue to be held in custody depends on the outcome of the dispute in the main proceedings. In addition, the situation of the person concerned must be assessed as it stands at the time when consideration is given to the request that the reference be dealt with under the urgent procedure (judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, EU:C:2017:629, paragraph 72 and the case-law cited).

31 In this case, it is undisputed, first, that at that time, RO was remanded in custody in Ireland and, second, that whether he continues to be so remanded is dependent on the decision that will be taken on his surrender to the United Kingdom, a decision that has been stayed pending the Court's answer in the present case.

32 In those circumstances, on 11 June 2018, the First Chamber of the Court, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decided to grant the referring court's request that the present reference be dealt with under the urgent preliminary ruling procedure.

Consideration of the questions referred

33 By its questions, which can be examined together, the referring court seeks, in essence, to ascertain whether Article 50 TEU must be interpreted as meaning that a consequence of the notification by a Member State of its intention to withdraw from the European Union in accordance with that article is that, in the event that that Member State issues a European arrest warrant with respect to an individual, the executing Member State must refuse to execute that European arrest warrant or postpone its execution pending clarification as to the law that will apply in the issuing Member State after its withdrawal from the European Union.

34 In that regard, it must be borne in mind that, as follows from Article 2 TEU, EU law is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the European Union is founded. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore, that EU law implementing them will be respected (judgments of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraph 34, and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the System of Justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 35).

35 The principle of mutual trust between the Member States requires, particularly as regards the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (see, to that effect, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the System of Justice*), C-216/18 PPU, EU:C:2018:586, paragraph 36).

36 The purpose of the Framework Decision, as is apparent, in particular, from Article 1(1) and (2) and recitals 5 and 7 thereof, is to replace the multilateral system of extradition based on the European Convention on Extradition of 13 December 1957 with a system of surrender between judicial authorities of convicted or suspected persons for the purpose of enforcing judgments or of conducting prosecutions, the system of surrender being based on the principle of mutual recognition. The Framework Decision thus seeks, by the establishment of that simplified and more effective system, to facilitate and accelerate judicial cooperation with a view to contributing to the attainment of the objective set for the European Union of becoming an area of freedom, security and justice, and has as its basis the high level of trust which must exist between the Member States (judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the System of Justice)*, C-216/18 PPU, EU:C:2018:586, paragraphs 39 and 40).

37 The principle of mutual recognition is applied in Article 1(2) of the Framework Decision, which lays down the rule that Member States are required to execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of the Framework Decision. Executing judicial authorities may therefore, in principle, refuse to execute such a warrant only on the grounds for non-execution exhaustively listed in the Framework Decision. Accordingly, while execution of the European arrest warrant constitutes the rule, refusal to execute is intended to be an exception which must be interpreted strictly (judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the System of Justice)*, C-216/18 PPU, paragraph 41).

38 Accordingly, the Framework Decision explicitly states the grounds for mandatory non-execution of a European arrest warrant (Article 3), the grounds for optional non-execution (Articles 4 and 4a), and the guarantees to be given by the issuing Member State in particular cases (Article 5) (judgments of 10 August 2017, *Tupikas*, C-270/17 PPU, EU:C:2017:628, paragraph 51, and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the System of Justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 42).

39 Nonetheless, the Court has recognised that limitations may be placed on the principles of mutual recognition and mutual trust between Member States 'in exceptional circumstances' (judgments of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 82, and of 25 July 2018*, Minister for Justice and Equality (Deficiencies in the System of Justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 43).

40 The Court has thus acknowledged that, subject to certain conditions, the executing judicial authority has the power to bring the surrender procedure established by the Framework Decision to an end where that surrender may result in the requested person being subject to inhuman or degrading treatment within the meaning of Article 4 of the Charter (judgments of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 104, and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the System of Justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 44).

41 For that purpose, the Court has relied, first, on Article 1(3) of the Framework Decision, which provides that that decision is not to have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Articles 2 and 6 TEU and, second, on the absolute nature of the fundamental right guaranteed by Article 4 of the Charter (judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the System of Justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 45).

42 In order to assess whether there is a real risk that a person who is the subject of a European arrest warrant may suffer inhuman or degrading treatment, the executing judicial authority must, in particular, as the referring court has done in the main proceedings, pursuant to Article 15(2) of the Framework Decision, request from the issuing judicial authority any supplementary information that it considers necessary for assessing whether there is such a risk (judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the System of Justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 76).

43 However, RO argues that, because of the notification by the United Kingdom of its intention to withdraw from the European Union pursuant to Article 50 TEU, he is exposed to the risk that a number of the rights he enjoys under the Charter and the Framework Decision may no longer be respected after the withdrawal of the United Kingdom from the European Union. According to RO, the principle of mutual trust, which is at the basis of mutual recognition, has been irreparably eroded by that notification, and consequently the surrender provided for by the Framework Decision ought not to be executed.

44 In that regard, the question arises whether mere notification by a Member State of its intention to withdraw from the European Union in accordance with Article 50 TEU is such as to justify, under EU law, a refusal to execute a European arrest warrant issued by that Member State on the ground that the person surrendered would not be able, after that withdrawal, to rely in the issuing Member State on the rights that he derives from the Framework Decision and to have the conformity with EU law of implementation of those rights by that Member State reviewed by the Court.

45 In that context, it must be observed that such a notification does not have the effect of suspending the application of EU law in the Member State that has given notice of its intention to withdraw from the European Union and, consequently, EU law, which encompasses the provisions of the Framework Decision and the principles of mutual trust and mutual recognition inherent in that decision, continues in full force and effect in that State until the time of its actual withdrawal from the European Union.

46 As is apparent from Article 50(2) and (3) TEU, that article lays down a procedure for withdrawal that consists of, first, notification to the European Council of the intention to withdraw, second, negotiation and conclusion of an agreement setting out the arrangements for withdrawal, taking into account the future relationship between the State concerned and the European Union and, third, the actual withdrawal from the Union on the date of entry into force of that agreement or failing that, two years after the notification given to the European Council, unless the latter, in agreement with the Member State concerned, unanimously decides to extend that period.

47 Such a refusal to execute a European arrest warrant would, as the Advocate General stated in point 55 of his Opinion, be the equivalent of unilateral suspension of the provisions of the Framework Decision and would, moreover, run counter to the wording of recital 10 of that decision, which states that it is for the European Council to determine a breach in the issuing Member State of the principles set out in Article 2 TEU, with a view to application of the European arrest warrant mechanism being suspended in respect of that Member State (judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the System of Justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 71).

48 Consequently, mere notification by a Member State of its intention to withdraw from the European Union in accordance with Article 50 TEU cannot be regarded, as such, as constituting an exceptional circumstance, within

the meaning of the case-law cited in paragraphs 39 and 40 of the present judgment, capable of justifying a refusal to execute a European arrest warrant issued by that Member State.

49 However, it remains the task of the executing judicial authority to examine, after carrying out a specific and precise assessment of the particular case, whether there are substantial grounds for believing that, after withdrawal from the European Union of the issuing Member State, the person who is the subject of that arrest warrant is at risk of being deprived of his fundamental rights and the rights derived, in essence, from Articles 26 to 28 of the Framework Decision, as relied on by RO and referred to in paragraph 24 of the present judgment (see, by analogy, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the System of Justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 73).

50 As regards the fundamental rights enshrined in Article 4 of the Charter, which correspond to those stated in Article 3 of the ECHR (judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 86), in a situation where the referring court were to consider, as appears to be the case, given the wording of the questions referred for a preliminary ruling and the documents sent to the Court, that the information received enables it to discount the existence of a real risk that RO will suffer, in the issuing Member State, inhuman or degrading treatment, within the meaning of Article 4 of the Charter, it would not be appropriate, as a general rule, to refuse to surrender him on that basis, without prejudice to RO's opportunity, after surrender, to have recourse, within the legal system of the issuing Member State, to legal remedies that may enable him to challenge, where appropriate, the lawfulness of the conditions of his detention in a prison of that Member State (see, to that effect, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 103).

51 However, the Court must also examine whether the referring court might contest that finding on the ground that the rights enjoyed by an individual following his surrender pursuant to the Framework Decision would no longer be safeguarded after the withdrawal from the European Union of the issuing Member State.

52 In that regard, it must be observed that, in this case, the issuing Member State, namely the United Kingdom, is party to the ECHR and, as stated by that Member State at the hearing before the Court, it has incorporated the provisions of Article 3 of the ECHR into its national law. Since its continuing participation in that convention is in no way linked to its being a member of the European Union, the decision of that Member State to withdraw from the Union has no effect on its obligation to have due regard to Article 3 of the ECHR, to which Article 4 of the Charter corresponds, and, consequently, cannot justify the refusal to execute a European arrest warrant on the ground that the person surrendered would run the risk of suffering inhuman or degrading treatment within the meaning of those provisions.

53 As regards the other rights relied on by RO, and, first, the rule of specialty which is the subject of Article 27 of the Framework Decision, it must be recalled that that rule is linked to the sovereignty of the executing Member State and confers on the person requested the right not to be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence other than that for which he or she was surrendered (judgment of 1 December 2008, *Leymann and Pustovarov*, C-388/08 PPU, EU:C:2008:669, paragraph 44).

54 As is apparent from that judgment, it is necessary that an individual should be able to challenge an alleged infringement of that rule before the courts or tribunals of the issuing Member State after his or her surrender.

55 It must, however, be observed that the order for reference and the observations submitted by RO to the Court do not mention any ongoing legal proceedings concerning that rule and further that they do not present any concrete evidence to suggest that legal proceedings on that subject are contemplated.

56 The same is true of the right that is the subject of Article 28 of the Framework Decision relating to the limits on subsequent surrender or extradition to a State other than the executing Member State, no evidence on that subject having been produced in the order for reference.

57 In addition, it must be emphasised that Articles 27 and 28 of the Framework Decision respectively reflect Articles 14 and 15 of the European Convention on Extradition of 13 December 1957. As was stated at the hearing before the Court, the United Kingdom has ratified that convention and has transposed the latter articles into its national law. It follows that the rights relied on by RO in those areas are, in essence, covered by the national

legislation of the issuing Member State, irrespective of the withdrawal of that Member State from the European Union.

58 As regards the deduction by the issuing Member State of any period of custody served in the executing Member State, in accordance with Article 26 of the Framework Decision, the United Kingdom has stated that it has also incorporated that obligation into its national law and that it applies that obligation, irrespective of EU law, to any person who is extradited into the United Kingdom.

59 Since the rights resulting from Articles 26 to 28 of the Framework Decision and the fundamental rights laid down in Article 4 of the Charter are protected by provisions of national law in cases not only of surrender, but also of extradition, those rights are not dependent on the application of the Framework Decision in the issuing Member State. It therefore appears, though subject to verification by the referring court, that there is no concrete evidence to suggest that RO will be deprived of the opportunity to assert those rights before the courts and tribunals of that Member State after its withdrawal from the European Union.

60 The fact that it will undoubtedly not be possible, in the absence of a relevant agreement between the Union and the United Kingdom, for those rights to be the subject of a reference to the Court for a preliminary ruling, after the withdrawal of that Member State from the European Union, cannot alter that analysis. First, as follows from the preceding paragraph, the person surrendered should be able to rely on all those rights before a court or tribunal of that Member State. Second, it must be recalled that recourse to the mechanism of a preliminary ruling procedure before the Court has not always been available to the courts and tribunals responsible for the application of the European arrest warrant. In particular, as the Advocate General stated in point 76 of his Opinion, only on 1 December 2014, that is, five years after the entry into force of the Treaty of Lisbon, did the Court obtain full jurisdiction to interpret the Framework Decision, which was to be implemented in the Member States as from 1 January 2004.

61 Consequently, as the Advocate General stated in point 70 of his Opinion, in a case such as that in the main proceedings, in order to decide whether a European arrest warrant should be executed, it is essential that, when that decision is to be taken, the executing judicial authority is able to presume that, with respect to the person who is to be surrendered, the issuing Member State will apply the substantive content of the rights derived from the Framework Decision that are applicable in the period subsequent to the surrender, after the withdrawal of that Member State from the European Union. Such a presumption can be made if the national law of the issuing Member State incorporates the substantive content of those rights, particularly because of the continuing participation of that Member State in international conventions, such as the European Convention on Extradition of 13 December 1957 and the ECHR, even after the withdrawal of that Member State from the European Union. Only if there is concrete evidence to the contrary can the judicial authorities of a Member State refuse to execute the European arrest warrant.

62 The answer to the questions referred is, therefore, that Article 50 TEU must be interpreted as meaning that mere notification by a Member State of its intention to withdraw from the European Union in accordance with that article does not have the consequence that, in the event that that Member State issues a European arrest warrant with respect to an individual, the executing Member State must refuse to execute that European arrest warrant or postpone its execution pending clarification of the law that will be applicable in the issuing Member State after its withdrawal from the European Union. In the absence of substantial grounds to believe that the person who is the subject of that European arrest warrant is at risk of being deprived of rights recognised by the Charter and the Framework Decision following the withdrawal from the European Union of the issuing Member State, the executing Member State cannot refuse to execute that European arrest warrant while the issuing Member State remains a member of the European Union.

Costs

63 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Article 50 TEU must be interpreted as meaning that mere notification by a Member State of its intention to withdraw from the European Union in accordance with that article does not have the consequence that, in the event that that Member State issues a European arrest warrant with respect to an individual, the executing Member State must refuse to execute that European arrest warrant or postpone its execution pending clarification of the law that will be applicable in the issuing Member State after its withdrawal from the European Union. In the absence of substantial grounds to believe that the person who is the subject of that European arrest warrant is at risk of being deprived of rights recognised by the Charter of Fundamental Rights of the European Union and 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, following the withdrawal from the European Union of the issuing Member State, the executing Member State cannot refuse to execute that European arrest warrant while the issuing Member State remains a member of the European Union.

JUDGMENT OF THE COURT (Fourth Chamber)

14 January 2021 (*)

(Reference for a preliminary ruling – Public procurement contracts – Directive 2014/24/EU – Article 57(6) – Optional grounds for exclusion – Measures taken by the economic operator to demonstrate its reliability despite the existence of an optional ground for exclusion – Obligation of the economic operator to provide evidence of such measures on its own initiative – Direct effect)

In Case C-387/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Raad van State (Council of State, Belgium), made by decision of 7 May 2019, received at the Court on 17 May 2019, in the proceedings

RTS infra BVBA,

Aannemingsbedrijf Norré-Behaegel BVBA

v

Vlaams Gewest,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, N. Piçarra, D. Šváby (Rapporteur), S. Rodin and K. Jürimäe, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– RTS infra BVBA and Aannemingsbedrijf Norré-Behaegel BVBA, by J. Goethals, advocaat,

– the Belgian Government, by J.-C. Halleux and by L. Van den Broeck and C. Pochet, acting as Agents, and by F. Judo and N. Goethals, advocaten,

– the Estonian Government, by N. Grünberg, acting as Agent,

– the Hungarian Government, by M. Z. Fehér, acting as Agent,

– the Austrian Government, by J. Schmoll and by M. Fruhmann, acting as Agents,

– the European Commission, by L. Haasbeek and by P. Ondrůšek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 September 2020,

gives the following

1 This request for a preliminary ruling concerns the interpretation of Article 57(4),(6) and (7) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), as amended by Commission Delegated Regulation (EU) 2015/2170 of 24 November 2015 (OJ 2015 L 307, p. 5), ('Directive 2014/24').

2 The request has been made in proceedings between RTS infra BVBA and Aannemingsbedrijf Norré-Behaegel BVBA and the Vlaams Gewest (Flemish Region, Belgium) concerning the latter's decision to exclude those two companies from a public procurement procedure.

Legal context

EU law

Directive 2014/24

3 Recital 102 of Directive 2014/24 states:

'Allowance should … be made for the possibility that economic operators can adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour. Those measures might consist in particular of personnel and organisational measures such as the severance of all links with persons or organisations involved in the misbehaviour, appropriate staff reorganisation measures, the implementation of reporting and control systems, the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation rules. Where such measures offer sufficient guarantees, the economic operator in question should no longer be excluded on those grounds alone. Economic operators should have the possibility to request that compliance measures taken with a view to possible admission to the procurement procedure be examined. However, it should be left to Member States to determine the exact procedural and substantive conditions applicable in such cases. They should, in particular, be free to decide whether to allow the individual contracting authorities to carry out the relevant assessments or to entrust other authorities on a central or decentralised level with that task.'

4 Article 18 of that directive, headed 'Principles of procurement', provides in paragraph 1 thereof:

'Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

…'

5 Article 57 of that directive, entitled 'Exclusion grounds', provides in paragraphs 4 to 7 thereof:

' 4. Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

…

(c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;

…

(g) where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions;

(h) where the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, has withheld such information or is not able to submit the supporting documents required pursuant to Article 59; …

…

5. …

At any time during the procedure, contracting authorities may exclude or may be required by Member States to exclude an economic operator where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraph 4.

6. Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision.

An economic operator which has been excluded by final judgment from participating in procurement or concession award procedures shall not be entitled to make use of the possibility provided for under this paragraph during the period of exclusion resulting from that judgment in the Member States where the judgment is effective.

7. By law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article. They shall, in particular, determine the maximum period of exclusion if no measures as specified in paragraph 6 are taken by the economic operator to demonstrate its reliability. Where the period of exclusion has not been set by final judgment, that period shall not exceed five years from the date of the conviction by final judgment in the cases referred to in paragraph 1 and three years from the date of the relevant event in the cases referred to in paragraph 4.’

6 Article 59 of that directive, entitled ‘European Single Procurement Document’, provides in paragraphs 1 and 2:

‘ 1. At the time of submission of requests to participate or of tenders, contracting authorities shall accept the European Single Procurement Document (ESPD), consisting of an updated self-declaration as preliminary evidence in replacement of certificates issued by public authorities or third parties confirming that the relevant economic operator fulfils the following conditions:

(a) it is not in one of the situations referred to in Article 57 in which economic operators shall or may be excluded;

…

The ESPD shall consist of a formal statement by the economic operator that the relevant ground for exclusion does not apply and/or that the relevant selection criterion is fulfilled and shall provide the relevant information as required by the contracting authority. The ESPD shall further identify the public authority or third party responsible for establishing the supporting documents and contain a formal statement to the effect that the economic operator will be able, upon request and without delay, to provide those supporting documents.

…

2. The ESPD shall be drawn up on the basis of a standard form. The Commission shall establish that standard form, by means of implementing acts. …'

7 Article 69 of Directive 2014/24, entitled 'Abnormally low tenders', provides in paragraph 1:

'Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.'

8 Article 90(1) of Directive 2014/24 provides that Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with that directive by 18 April 2016 at the latest, while the first paragraph of Article 91 of that directive provides that Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) is repealed with effect from 18 April 2016.

Implementing Regulation (EU) 2016/7

9 Annex 2, Part III, C, to Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document (OJ 2016 L 3, p. 16) contains, inter alia, the following two headings:

' …	…
Is the economic operator guilty of grave professional misconduct … ? If yes, please provide details:	[] Yes [] No [……]
	If yes, has the economic operator taken self-cleaning measures? [] Yes [] No If it has, please describe the measures taken: [……]
…	…
Has the economic operator experienced that a prior public contract, a prior contract with a contracting entity or a prior concession contract was terminated early, or that damages or other comparable sanctions were imposed in connection with that prior contract? If yes, please provide details:	[] Yes [] No [……]
	If yes, has the economic operator taken self-cleaning measures? [] Yes [] No If it has, please describe the measures taken: [……]
…	…'

Belgian law

10 Article 61(2)(4) of the koninklijk besluit van 15 juli 2011 plaatsing overheidsopdrachten klassieke sectoren (Royal Decree of 15 July 2011 on the award of public contracts in traditional sectors) (*Belgisch Staatsblad* of 9 August 2011, p. 44862), in the version applicable to the dispute in the main proceedings, provides:

'In accordance with Article 20 of the Law [of 15 June 2006 on public procurement and certain works, supply and service contracts (Wet van 15 juni 2006 overheidsopdrachten en bepaalde opdrachten voor werken, leveringen en diensten, *Belgisch Staatsblad* of 15 February 2007, p. 7355)], a candidate or tenderer may be excluded from the procedure at any time:

...

4) if it has been guilty of grave professional misconduct;

...'

11 Article 70 of the wet van 17 juni 2016 inzake overheidsopdrachten (Law of 17 June 2016 on public procurement) (*Belgisch Staatsblad* of 14 July 2016, p. 44219), which entered into force on 30 June 2017 ('the Law of 17 June 2016'), provides:

'Any candidate or tenderer who is in one of the situations referred to in Articles 67 or 69 may provide evidence to show that the measures it has taken are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If the contracting authority considers that evidence to be sufficient, the candidate or tenderer concerned shall not be excluded from the award procedure.

To that end, the candidate or tenderer shall prove on its own initiative that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, has clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 By contract notice published on 11 May 2016 in the *Bulletin der Aanbestedingen* (Public Procurement Bulletin) and on 13 May 2016 in the *Official Journal of the European Union*, the afdeling Wegen en Verkeer Oost-Vlaanderen (Department of Roads and Traffic of East Flanders, Belgium) of the Agentschap Wegen en Verkeer van het Vlaamse gewest (Agency for Roads and Traffic of the Flemish Region, Belgium) launched a public call for tenders for a works contract concerning the remodelling of the Nieuwe Steenweg (N60) junction and the access and exit spurs to and from the E17 in De Pinte. The contract notice referred in particular to the grounds for exclusion under Article 61(1) and (2) of the Royal Decree of 15 July 2011 on the award of public contracts in traditional sectors, in the version applicable to the main proceedings, which included 'grave professional misconduct'.

13 Following the submission of six tenders, including that of the applicants in the main proceedings, the Flemish Region, by decision of 13 October 2016, excluded the applicants from access to the procedure and awarded the contract to the undertaking which had submitted the economically most advantageous tender in order.

14 The Flemish Region justified the exclusion of the applicants in the main proceedings on the ground that, in the context of the performance of earlier contracts awarded by the same contracting authority as in the main proceedings, they had committed acts of 'grave professional misconduct' which had, for the most part, been the subject of penalties and which concerned aspects that were important for the performance of the contract for which they were now tendering. In that context, the Flemish Region took the view that the serious and repeated contractual breaches by the applicants in the main proceedings raised doubts and uncertainties as to their ability to ensure the proper performance of the new contract.

15 The applicants in the main proceedings brought an action before the referring court seeking the annulment of the decision of 13 October 2016. They submit in that regard that, before being excluded on the grounds of alleged grave professional misconduct, they should have had been afforded the opportunity to defend themselves in

that regard and to demonstrate that they had remedied the consequences of that misconduct by taking appropriate corrective measures, as provided for in Article 57(6) of Directive 2014/24, which is directly effective.

16 The contracting authority disputes the assertion that Article 57 of Directive 2014/24 can be regarded as being directly effective. The contracting authority also submits that, although it did not enter into force until 30 June 2017, that is to say, after the adoption of the decision of 13 October 2016, the Law of 17 June 2016 provides specifically, in Article 70 thereof, that the economic operator concerned must declare the corrective measures taken on its own initiative. Since Directive 2014/24 does not contain any provision prescribing the time of manner in which evidence of corrective measures should be provided, the contracting authority seeks to rely, in such circumstances, on Article 70 of the Law of 17 June 2016.

17 In order to be able to assess the merits of the action brought before it, the referring court asks whether Article 57(4), (6) and (7) of Directive 2014/24 precludes an economic operator from being excluded from a procurement procedure for grave professional misconduct without first having been invited by the contracting authority or the tender specifications to provide evidence that it remains reliable despite that misconduct.

18 The court notes that, in so far as the classification of the grave professional misconduct alleged against the tenderer concerned is a matter for the discretion of the contracting authority, that classification may prove unforeseeable for the tenderer. Furthermore, according to the referring court, tenderers would not be inclined to engage in a form of self-accusation by providing a list of failures that could possibly be classified by the contracting authority as 'grave misconduct'. Ensuring an adversarial procedure could therefore favour competition in the procurement procedure. On the other hand, the referring court submits that leaving it to the tenderer to provide evidence of the corrective measures taken would allow greater transparency, particularly since that operator knows, because of the maximum duration of exclusion, the period of time during which it must, on its own initiative, report the corrective measures.

19 If the answer to the first question is in the affirmative, the referring court also wishes to know whether the abovementioned provisions of Directive 2014/24 have direct effect. In particular, the referring court is uncertain whether certain elements of those provisions constitute, in relation to self-cleaning, minimum guarantees which allow them to be classified as 'sufficiently precise and unconditional' to confer direct effect on them.

20 In those circumstances, the Raad van State (Council of State, Belgium) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1) Should the provisions of Article 57(4)(c) and (g), in conjunction with paragraphs 6 and 7 of that article, of Directive 2014/24 … be interpreted as precluding an application whereby the economic operator is required to provide evidence on its own initiative of the measures that the economic operator has taken to demonstrate its reliability?

2) If so, do the provisions of Article 57(4)(c) and (g), in conjunction with paragraphs 6 and 7 of that article, of [Directive 2014/24] therefore have direct effect?'

The questions referred

Preliminary observations

21 As a preliminary point, it should be noted that, given that the provisions of Article 57(6) of Directive 2014/24, the interpretation of which is sought, do not correspond to any provision in the EU legislation applicable to public procurement until the date of adoption and entry into force of that directive, the questions referred for a preliminary ruling can be relevant only if that directive is applicable to the situation at issue in the main proceedings. The referring court is of the view that this is the case because the publication of the contract notice on 11 and 13 May 2016 took place after 18 April 2016, the date on which, in accordance with Articles 90 and 91 thereof, Directive 2014/24, first, should have been transposed by the Member States and, second, repealed Directive 2004/18.

22 Nevertheless, it is apparent from the documents before the Court that that contract notice was preceded by a prior information notice, which was published on 17 October 2015, the date on which Directive 2004/18 was still applicable.

23 In that regard, it is apparent from settled case-law that the applicable directive is, as a rule, the one in force when the contracting authority chooses the type of procedure to be followed and decides definitively whether a prior call for competition needs to be issued for the award of a public contract. Conversely, the provisions of a directive are not applicable if the period prescribed for its transposition expired after that date (judgment of 27 November 2019, *Tedeschi and Consorzio Stabile Istant Service*, C-402/18, EU:C:2019:1023, paragraph 29 and the case-law cited).

24 In the present case, in view of the fact that the prior information notice was published before the deadline for transposing Directive 2014/24, whereas the contract notice was published after that date, it is for the referring court to ascertain on which date the contracting authority chose the type of procedure which it intended to follow and decided definitively whether or not there was an obligation to issue a prior call for competition for the award of the public contract at issue in the main proceedings.

The first question

25 By its first question, the referring court asks, in essence, whether Article 57(6) of Directive 2014/24 must be interpreted as precluding a practice of a Member State whereby the economic operator concerned is required, at the time of submission of their requests to participate or of their tenders in a public procurement procedure, to provide voluntarily evidence of the corrective measures taken to demonstrate its reliability despite the existence, in respect of that operator, of an optional ground for exclusion referred to in Article 57(4) of that directive, where such an obligation does not arise either from the applicable national rules or from the tender specifications.

26 In that regard, it should be recalled, in the first place, that, under Article 57(6) of Directive 2014/24, any tenderer which is concerned, in particular, by one of the optional grounds for exclusion referred to in Article 57(4) of that directive may provide evidence to show that the measures which it has taken are sufficient to demonstrate its reliability, it being specified that, if that evidence is deemed sufficient, the economic operator concerned may not be excluded from the procurement procedure for that reason. That provision thus introduces a 'self-cleaning' mechanism by conferring on tenderers a right which the Member States must guarantee when transposing that directive, in compliance with the conditions laid down by the directive (see, by analogy, as regards Article 38(9) of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1), which is equivalent to Article 57(6) of Directive 2014/24, judgment of 11 June 2020, *Vert Marine*, C-472/19, EU:C:2020:468, paragraphs 16 and 17).

27 It should be noted that neither the wording of Article 57(6) of Directive 2014/24 nor recital 102 of that directive specifies how or at what stage of the procurement procedure the evidence of corrective measures can be provided.

28 In those circumstances, it should be noted that, having regard solely to the wording of Article 57(6) of Directive 2014/24, the possibility for tenderers to provide evidence of the corrective measures taken may just as well be exercised on their own initiative or on the initiative of the contracting authority, as well as at the time of submission of requests to participate or of tenders or at a later stage of the procedure.

29 That interpretation is supported by the objective pursued in Article 57(6) of Directive 2014/24. By providing that an economic operator must be able to provide evidence of the corrective measures taken, that provision seeks to underline the importance attaching to the reliability of economic operators and to ensure an objective assessment of economic operators and to ensure effective competition (see, by analogy, judgment of 11 June 2020, *Vert Marine*, C-472/19, EU:C:2020:468, paragraph 22). That objective can be achieved where evidence of corrective measures is provided at any stage of the procedure preceding the adoption of the award decision, the key point being that the economic operator must have the opportunity to put forward and to have examined the measures which, in its view, enable a ground for exclusion concerning it to be remedied.

30 That interpretation is also supported by the context of Article 57(6) of Directive 2014/24. In that regard, it should be borne in mind that, in accordance with Article 57(7) of that directive, the implementing conditions for that

article and, furthermore, Article 57(6) of that directive must be specified by the Member States having regard to EU law. Within the framework of the discretion the latter enjoy when determining the procedural terms and conditions of Article 57(6) of that directive (see, by analogy, judgment of 11 June 2020, *Vert Marine*, C-472/19, EU:C:2020:468, paragraph 23), the Member States may provide that evidence of corrective measures must be provided voluntarily by the economic operator concerned at the time of submission of their requests to participate or of their tenders, just as they may also provide that such evidence may be adduced after that economic operator has been formally invited to do so by the contracting authority at a later stage of the procedure.

31 That discretion of the Member States is, however, without prejudice to the provisions of Directive 2014/24 which provide that operators may voluntarily provide evidence of corrective measures at the time of submission of their requests to participate in the public procurement procedure or of their tenders. As the Advocate General observed, in essence, in point 49 of his Opinion, Article 59(1)(a) of Directive 2014/24 provides that the contracting authorities must accept, when submitting such requests or such tenders, the ESPD, by means of which the economic operator declares on its honour that it is concerned by a ground for exclusion and has taken self-cleaning measures, subject to subsequent verification.

32 That said, the provisions in Article 59 of Directive 2014/24, relating to the ESPD, do not preclude Member States from deciding, in the context of the discretion referred to in paragraph 30 of the present judgment, to leave to the contracting authority the initiative to request evidence of corrective measures after the request to participate or the tender has been submitted, even if the request to participate or the tender is accompanied by an ESPD.

33 It is apparent from the textual, teleological and contextual interpretation of Article 57(6) of Directive 2014/24, as set out in paragraphs 27 to 30 of the present judgment, that that provision does not preclude the economic operator concerned from providing evidence of corrective measures on its own initiative or at the express request of the contracting authority, or from that evidence being provided at the time of submission of requests to participate or of tenders, or at a later stage of the procurement procedure.

34 In the second place, it should be noted that, as is apparent from Article 57(7) of Directive 2014/24, the Member States are required, when determining the implementing conditions for Article 57, to comply with EU law. In particular, they must observe not only the principles for the award of contracts set out in Article 18 of Directive 2014/24, which include, inter alia, the principles of equal treatment, transparency and proportionality, but also the principle of respect for the rights of the defence which, as a fundamental principle of EU law, of which the right to be heard in any procedure is an integral part, is applicable where the authorities are minded to adopt a measure which will adversely affect an individual, such as an exclusion decision adopted in the context of a public procurement procedure (judgment of 20 December 2017, *Prequ' Italia*, C-276/16, EU:C:2017:1010, paragraphs 45 and 46 and the case-law cited).

35 In those circumstances, it should be recalled at the outset, first, that, in accordance with the principle of transparency, all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way (judgment of 14 December 2016, *Connexxion Taxi Services*, C-171/15, EU:C:2016:948, paragraph 40 and the case-law cited). Second, the principle of equal treatment requires tenderers interested in a public contract to be afforded equality of opportunity when formulating their tenders, to be made aware of the exact constraints of the procedure and to be in fact assured that all tenderers are subject to the same conditions (judgment of 14 December 2016, *Connexxion Taxi Services*, C-171/15, EU:C:2016:948, paragraph 39 and the case-law cited).

36 It follows that, where a Member State provides that evidence of corrective measures can be provided only voluntarily by the economic operator at the time of submission of requests to participate or of tenders, without that operator having the opportunity to provide such evidence at a later stage of the procedure, the principles of transparency and equal treatment require, as the Advocate General observed, in essence, in points 66 and 67 of his Opinion, that economic operators be openly informed in advance, in a clear, precise and unequivocal manner, of the existence of such an obligation, whether that information results directly from the tender specifications or from a reference in those documents to the relevant national rules.

37 Next, the right to be heard means that, as the Advocate General observed, in essence, in points 90 and 91 of his Opinion, those economic operators must be in a position to make known their views effectively in that request

or in that tender, to identify, by themselves, the grounds for exclusion which may be relied on against them by the contracting authority in the light of the information contained in the tender specifications and the national rules on that subject.

38 Lastly, in so far as it does not constitute an unreasonable obstacle to the exercise of the system of corrective measures, the obligation on tenderers to voluntarily provide evidence of corrective measures in their request to participate or in their tender is, since it is exercised under the conditions set out in paragraphs 36 and 37 of the present judgment, consistent with the principle of proportionality, under which the rules laid down by the Member States or contracting authorities in the context of the implementation of the provisions of Directive 2014/24, such as the rules intended to specify the implementing conditions for Article 57 of that directive, must not go beyond what is necessary to achieve the objectives of that directive (see, to that effect, judgment of 30 January 2020, *Tim*, C-395/18, EU:C:2020:58, paragraph 45 and the case-law cited).

39 In the present case, it should be noted, as the referring court points out, that, although the Kingdom of Belgium transposed into its national law, by means of Article 70 of the Law of 17 June 2016, Article 57(6) of Directive 2014/24, specifying that evidence of corrective measures must be provided on the initiative of the economic operator, that law had not entered into force on the date of publication of the contract notice or even on the date of submission of the applicants' tender in the main proceedings. Furthermore, it is apparent from the documents before the Court that, although they referred to the grounds for exclusion laid down by the national legislation in force at the time, the tender specifications did not expressly state that such evidence had to be provided voluntarily by the economic operator concerned.

40 In those circumstances, and without prejudice to the obligation on the applicants in the main proceedings, in accordance with the requirements of transparency and fairness, to inform the contracting authority of the grave professional misconduct that they had committed in the context of the performance of earlier contracts awarded by the same contracting authority, those applicants could reasonably expect, solely on the basis of Article 57(6) of Directive 2014/24, that they would subsequently be invited by the contracting authority to provide evidence of the corrective measures taken to remedy any optional ground for exclusion which that authority may have identified.

41 It is also apparent from paragraphs 34 to 37 of the judgment of 3 October 2019, *Delta Antrepriză de Construcţii şi Montaj 93* (C-267/18, EU:C:2019:826), which relates to national legislation which did not specify whether evidence of corrective measures had to be provided voluntarily by the economic operator or at what stage of the procedure it should be provided, that, although it is for economic operators to inform the contracting authority, upon submission of their request to participate or their tender, of the termination of a previous contract on grounds of serious deficiency, the contracting authority, where it concludes that there is a ground for exclusion arising from such termination or from the withholding of information relating to such termination, must nevertheless give the operators concerned the possibility of providing evidence of the corrective measures taken.

42 In the light of the foregoing considerations, the answer to the first question referred is that Article 57(6) of Directive 2014/24 must be interpreted as precluding a practice whereby an economic operator is required, at the time of submission of their requests to participate or of their tenders, to provide voluntarily evidence of the corrective measures taken to demonstrate its reliability despite the existence, in respect of that operator, of an optional ground for exclusion referred to in Article 57(4) of that directive, where such an obligation does not arise either from the applicable national rules or from the tender specifications. By contrast, Article 57(6) of that directive does not preclude such an obligation where it is laid down in a clear, precise and unequivocal manner in the applicable national rules and is brought to the attention of the economic operator concerned by means of the tender specifications.

The second question

43 By its second question, the referring court asks, in essence, whether Article 57(6) of Directive 2014/24 must be interpreted as having direct effect.

44 In that regard, it is settled case-law that, whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied on before the national courts by individuals against the Member State concerned where that state has failed to transpose the directive into

national law within the time limit or has transposed it incorrectly (judgment of 13 February 2019, *Human Operator*, C-434/17, EU:C:2019:112, paragraph 38).

45 In the present case, it should be noted that, as is apparent, in essence, from the order for reference, the Law of 17 June 2016 intended to transpose Directive 2014/24 into Belgian law did not enter into force until 30 June 2017, that is to say, after the expiry of the period for transposition of that directive, namely 18 April 2016. Therefore, the question of the direct effect of Article 57(6) of that directive is relevant.

46 The Court has stated that a provision of EU law is, first, unconditional where it sets forth an obligation which is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure either by the institutions of the European Union or by the Member States and, second, sufficiently precise to be relied on by an individual and applied by a court where it sets out an obligation in unequivocal terms (judgment of 1 July 2010, *Gassmayr*, C-194/08, EU:C:2010:386, paragraph 45 and the case-law cited).

47 Furthermore, the Court has held that even though a directive leaves the Member States a degree of latitude when they adopt rules in order to implement it, a provision of that directive may be regarded as unconditional and precise where it imposes on Member States in unequivocal terms a precise obligation as to the result to be achieved, which is not coupled with any condition regarding application of the rule laid down by it (see, to that effect, judgments of 5 October 2004, *Pfeiffer and Others*, C-397/01 à C-403/01, EU:C:2004:584, paragraphs 104 and105, and of 14 October 2010, *Fuß*, C-243/09, EU:C:2010:609, paragraphs 57 and 58).

48 In the present case, it must be held that, by providing that any tenderer may provide evidence to show that the measures it has taken are sufficient to demonstrate its reliability despite the existence of a ground for exclusion concerning that tenderer, Article 57(6) of Directive 2014/24 confers on tenderers a right which, first, is formulated in unequivocal terms and, second, places on the Member States an obligation as to the result to be achieved which, although its material and procedural conditions of application must be adopted by the Member States pursuant to Article 57(7) of that directive, is not dependent on transposition into national law in order to be invoked by the economic operator concerned and applied to its benefit.

49 Irrespective of the specific rules for the application of Article 57(6) of Directive 2014/24, that provision provides in a sufficiently precise and unconditional manner, within the meaning of the case-law cited in paragraph 46 of the present judgment, that the economic operator concerned cannot be excluded from the procurement procedure if it is able to establish, to the satisfaction of the contracting authority, that the corrective measures taken restore its reliability despite the existence of a ground for exclusion concerning that operator. Consequently, Article 57(6) of that directive provides, for the benefit of that economic operator, a minimum level of protection irrespective of the margin of discretion left to Member States in determining the procedural conditions of that provision (see, to that effect, judgments of 14 July 1994, *Faccini Dori*, C-91/92, EU:C:1994:292, paragraph 17, and of 5 October 2004, *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraph 105). That is all the more true given that, as the Advocate General observed, in essence, in point 102 of his Opinion, Article 57(6) of that directive lays down the fundamental elements of the system of corrective measures and the right conferred on the economic operator by indicating the minimum elements to be proved and the assessment criteria to be met.

50 In the light of the foregoing considerations, the answer to the second question referred is that Article 57(6) of Directive 2014/24 must be interpreted as having direct effect.

Costs

51 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Article 57(6) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, as amended by Commission Delegated Regulation (EU) 2015/2170 of 24 November 2015, must be interpreted as precluding a**

practice whereby an economic operator is required, at the time of submission of their requests to participate or of their tenders, to provide voluntarily evidence of the corrective measures taken to demonstrate its reliability despite the existence, in respect of that operator, of an optional ground for exclusion referred to in Article 57(4) of that directive, as amended by Delegated Regulation 2015/2170, where such an obligation does not arise either from the applicable national rules or from the tender specifications. By contrast, Article 57(6) of that directive, as amended by Delegated Regulation 2015/2170, does not preclude such an obligation where it is laid down in a clear, precise and unequivocal manner in the applicable national rules and is brought to the attention of the economic operator concerned by means of the tender specifications.

2. **Article 57(6) of Directive 2014/24, as amended by Delegated Regulation 2015/2170, must be interpreted as having direct effect.**

[Signatures]

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* Language of the case: Dutch.

JUDGMENT OF THE COURT (Grand Chamber)

23 November 2021 (*)

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – Directive 2010/64/EU – Article 5 – Quality of the interpretation and translation – Directive 2012/13/EU – Right to information in criminal proceedings – Article 4(5) and Article 6(1) – Right to information about the accusation – Right to interpretation and translation – Directive 2016/343/EU – Right to an effective remedy and to a fair trial – Article 48(2) of the Charter of Fundamental Rights of the European Union – Article 267 TFEU – Second subparagraph of Article 19(1) TEU – Admissibility – Appeal in the interests of the law against a decision ordering a reference for a preliminary ruling – Disciplinary proceedings – Power of the higher court to declare the request for a preliminary ruling unlawful)

In Case C-564/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Pesti Központi Kerületi Bíróság (Central District Court, Pest, Hungary), made by decision of 11 July 2019, received at the Court on 24 July 2019, supplemented by a decision of 18 November 2019, received at the Court on the same date, in the criminal proceedings against

IS,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, K. Jürimäe, C. Lycourgos, E. Regan, S. Rodin and I. Jarukaitis (Rapporteur), Presidents of Chambers, J.-C. Bonichot, P.G. Xuereb, N. Piçarra, L.S. Rossi and A. Kumin, Judges,

Advocate General: P. Pikamäe,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 18 January 2021,

after considering the observations submitted on behalf of:

– IS, by A. Pintér and B. Csire, ügyvédek,

– the Hungarian Government, par M.Z. Fehér and R. Kissné Berta, acting as Agents,

– the Netherlands Government, by M.K. Bulterman, P. Huurnink and J. Langer, acting as Agents,

– the Swedish Government, initially by H. Eklinder, C. Meyer-Seitz, H. Shev, J. Lundberg and A. Falk, and subsequently by O. Simonsson, H. Eklinder, C. Meyer-Seitz, H. Shev, J. Lundberg, M. Salborn Hodgson, A.M. Runeskjöld and R. Shahsavan Eriksson, acting as Agents,

– the European Commission, initially by A. Tokár, H. Krämer and R Troosters, and subsequently by A. Tokár, M. Wasmeier and P.J.O. Van Nuffel, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 April 2021,

gives the following

1 This request for a preliminary ruling concerns the interpretation of Article 5(2) of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ 2010 L 280, p. 1), Article 4(5) and Article 6(1) of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ 2012 L 142, p. 1), Article 6(1) and the second subparagraph of Article 19(1) TEU, Article 267 TFEU and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in criminal proceedings brought against IS, a Swedish national of Turkish origin, for infringement of the provisions of Hungarian law governing the acquisition or transport of firearms or ammunition.

Legal context

EU law

Directive 2010/64

3 Recitals 5, 12 and 24 of Directive 2010/64 state:

'(5) Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms [, signed at Rome on 4 November 1950,] and Article 47 of the [Charter] enshrine the right to a fair trial. Article 48(2) of the Charter guarantees respect for the right of defence. This Directive respects those rights and should be implemented accordingly.

...

(12) This Directive ... lays down common minimum rules to be applied in the fields of interpretation and translation in criminal proceedings with a view to enhancing mutual trust among Member States.

...

(24) Member States should ensure that control can be exercised over the adequacy of the interpretation and translation provided when the competent authorities have been put on notice in a given case.'

4 Article 2 of that directive, entitled 'Right to interpretation', reads as follows:

'1. Member States shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings.

...

5. Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for interpretation and, when interpretation has been provided, the possibility to complain that the quality of the interpretation is not sufficient to safeguard the fairness of the proceedings.

...

8. Interpretation provided under this Article shall be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence.'

5 Article 3 of Directive 2010/64, entitled 'Right to translation of essential documents', provides:

‘1. Member States shall ensure that suspected or accused persons who do not understand the language of the criminal proceedings concerned are, within a reasonable period of time, provided with a written translation of all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings.

2. Essential documents shall include any decision depriving a person of his liberty, any charge or indictment, and any judgment.

…

5. Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for the translation of documents or passages thereof and, when a translation has been provided, the possibility to complain that the quality of the translation is not sufficient to safeguard the fairness of the proceedings.

…

9. Translation provided under this Article shall be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence.’

6 Article 5 of that directive, entitled ‘Quality of the interpretation and translation’, provides:

‘1. Member States shall take concrete measures to ensure that the interpretation and translation provided meets the quality required under Article 2(8) and Article 3(9).

2. In order to promote the adequacy of interpretation and translation and efficient access thereto, Member States shall endeavour to establish a register or registers of independent translators and interpreters who are appropriately qualified. Once established, such register or registers shall, where appropriate, be made available to legal counsel and relevant authorities.

…’

Directive 2012/13

7 Recitals 5, 30 and 34 of Directive 2012/13 are worded as follows:

‘(5) Article 47 of the [Charter] and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “the ECHR”) enshrine the right to a fair trial. Article 48(2) of the Charter guarantees respect for the rights of the defence.

…

(30) Documents and, where appropriate, photographs, audio and video recordings, which are essential to challenging effectively the lawfulness of an arrest or detention of suspects or accused persons in accordance with national law, should be made available to suspects or accused persons or to their lawyers at the latest before a competent judicial authority is called to decide upon the lawfulness of the arrest or detention in accordance with Article 5(4) ECHR, and in due time to allow the effective exercise of the right to challenge the lawfulness of the arrest or detention.

…

(34) Access to the materials of the case, as provided for by this Directive, should be provided free of charge, without prejudice to provisions of national law providing for fees to be paid for documents to be copied from the case file or for sending materials to the persons concerned or to their lawyer.’

8 Article 1 of that directive, which defines its subject matter, provides:

'This Directive lays down rules concerning the right to information of suspects or accused persons, relating to their rights in criminal proceedings and to the accusation against them. It also lays down rules concerning the right to information of persons subject to a European Arrest Warrant relating to their rights.'

9 Article 3 of Directive 2012/13, entitled 'Right to information about rights', is worded as follows:

'1. Member States shall ensure that suspects or accused persons are provided promptly with information concerning at least the following procedural rights, as they apply under national law, in order to allow for those rights to be exercised effectively:

(a) the right of access to a lawyer;

(b) any entitlement to free legal advice and the conditions for obtaining such advice;

(c) the right to be informed of the accusation, in accordance with Article 6;

(d) the right to interpretation and translation;

(e) the right to remain silent.

2. Member States shall ensure that the information provided for under paragraph 1 shall be given orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons.'

10 Article 4 of that directive, entitled 'Letter of Rights on arrest', provides:

'1. Member States shall ensure that suspects or accused persons who are arrested or detained are provided promptly with a written Letter of Rights. They shall be given an opportunity to read the Letter of Rights and shall be allowed to keep it in their possession throughout the time that they are deprived of liberty.

...

5. Member States shall ensure that suspects or accused persons receive the Letter of Rights written in a language that they understand. Where a Letter of Rights is not available in the appropriate language, suspects or accused persons shall be informed of their rights orally in a language that they understand. A Letter of Rights in a language that they understand shall then be given to them without undue delay.'

11 Article 6 of Directive 2012/13, entitled 'Right to information about the accusation', provides:

'1. Member States shall ensure that suspects or accused persons are provided with information about the criminal act they are suspected or accused of having committed. That information shall be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence.

2. Member States shall ensure that suspects or accused persons who are arrested or detained are informed of the reasons for their arrest or detention, including the criminal act they are suspected or accused of having committed.

3. Member States shall ensure that, at the latest on submission of the merits of the accusation to a court, detailed information is provided on the accusation, including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person.

...'

12 Article 7 of that directive, entitled 'Right of access to the materials of the case', provides:

'1. Where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are

essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers.

2. Member States shall ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence.

…'

13 Under Article 8 of Directive 2012/13, entitled 'Verification and remedies':

'1. Member States shall ensure that when information is provided to suspects or accused persons in accordance with Articles 3 to 6 this is noted using the recording procedure specified in the law of the Member State concerned.

2. Member States shall ensure that suspects or accused persons or their lawyers have the right to challenge, in accordance with procedures in national law, the possible failure or refusal of the competent authorities to provide information in accordance with this Directive.'

Directive (EU) 2016/343

14 Recitals 1 and 9 of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ 2016 L 65, p. 1), state:

'(1) The presumption of innocence and the right to a fair trial are enshrined in Articles 47 and 48 of the [Charter], Article 6 of the [ECHR], Article 14 of the International Covenant on Civil and Political Rights (the ICCPR) and Article 11 of the Universal Declaration of Human Rights.

…

(9) The purpose of this Directive is to enhance the right to a fair trial in criminal proceedings by laying down common minimum rules concerning certain aspects of the presumption of innocence and the right to be present at the trial.'

15 Article 8 of that directive, entitled 'Right to be present at the trial', provides:

'1. Member States shall ensure that suspects and accused persons have the right to be present at their trial.

2. Member States may provide that a trial which can result in a decision on the guilt or innocence of a suspect or accused person can be held in his or her absence, provided that:

(a) the suspect or accused person has been informed, in due time, of the trial and of the consequences of non-appearance; or

(b) the suspect or accused person, having been informed of the trial, is represented by a mandated lawyer, who was appointed either by the suspect or accused person or by the State.

…

4. Where Member States provide for the possibility of holding trials in the absence of suspects or accused persons but it is not possible to comply with the conditions laid down in paragraph 2 of this Article because a suspect or accused person cannot be located despite reasonable efforts having been made, Member States may provide that a decision can nevertheless be taken and enforced. In that case, Member States shall ensure that when suspects or accused persons are informed of the decision, in particular when they are apprehended, they are also informed of the possibility to challenge the decision and of the right to a new trial or to another legal remedy, in accordance with Article 9.

…'

16 Article 9 of Directive 2016/343, entitled 'Right to a new trial', provides:

'Member States shall ensure that, where suspects or accused persons were not present at their trial and the conditions laid down in Article 8(2) were not met, they have the right to a new trial, or to another legal remedy, which allows a fresh determination of the merits of the case, including examination of new evidence, and which may lead to the original decision being reversed. In that regard, Member States shall ensure that those suspects and accused persons have the right to be present, to participate effectively, in accordance with procedures under national law, and to exercise the rights of the defence.'

Hungarian law

17 Article 78(1) of the büntetőeljárásról szóló 2017. évi XC. törvény (Law XC of 2017 establishing the Code of Criminal Procedure, *Magyar Közlöny* 2017/90.; 'the Code of Criminal Procedure') provides, in essence, that if a party to criminal proceedings wishes, for the purposes of those proceedings, to use a language other than Hungarian, he or she is entitled to use his or her mother tongue and to be assisted by an interpreter.

18 Under Article 201(1) of the Code of Criminal Procedure, only an interpreter with an official qualification may be appointed in that capacity in criminal proceedings, but if it is not possible to make such an appointment, an interpreter with sufficient knowledge of the language concerned may be appointed.

19 Article 490(1) and (2) of that code provides, in essence, that a national court may, of its own motion or at a party's request, stay proceedings and make a request for a preliminary ruling to the Court of Justice of the European Union.

20 Article 491(1)(a) of the Code of Criminal Procedure provides, in essence, that the stayed criminal proceedings must be resumed if the grounds for the stay have ceased to exist.

21 Article 513(1)(a) of that code provides that an order for reference is not subject to an ordinary appeal.

22 Under Article 667(1) of the Code of Criminal Procedure, the legfőbb ügyész (Prosecutor General, Hungary) may bring an appeal before the Kúria (Supreme Court, Hungary), known as 'an appeal in the interests of the law', seeking a declaration that a judgment or order delivered by a lower court is unlawful.

23 Article 669 of that code provides:

'1. If the Kúria [(Supreme Court)] considers the appeal in the interests of the law to be well founded, it shall find, in a judgment, that the decision being appealed against is unlawful and, otherwise, it shall dismiss the appeal by way of order.

2. If the Kúria [(Supreme Court)] finds the decision at issue unlawful, it may acquit the accused person, rule out forced medical treatment, terminate the proceedings, impose a lighter penalty or apply a lighter measure, set aside the contested decision and, if appropriate, refer the case back to the competent court with a view to new proceedings being initiated.

3. Except in the cases referred to in paragraph 2, the decision of the Kúria [(Supreme Court)] shall be limited to a finding of illegality.

...'

24 Under Article 755(1)(a)(aa) of the Code of Criminal Procedure, where an accused person, residing at a known address abroad, is duly summoned and fails to appear at a hearing, the criminal proceedings must be continued *in absentia* if it is not appropriate to issue a European or international arrest warrant, or if such a warrant is not issued, if the prosecutor does not propose that the accused person be sentenced to a custodial sentence or placement in a correctional education facility.

The dispute in the main proceedings and the questions referred for a preliminary ruling

25 The referring court, sitting as a single-judge formation at the Pesti Központi Kerületi Bíróság (Central District Court, Pest, Hungary) ('the referring judge'), is hearing criminal proceedings brought against IS, a Swedish national of Turkish origin, for an alleged infringement of the provisions of Hungarian law governing the acquisition, possession, manufacture, marketing, import, export or transport of firearms or ammunition. The language of the judicial proceedings is Hungarian, which the accused does not speak. It is apparent from the request for a preliminary ruling that the accused can communicate only as a result of the services of an interpreter.

26 IS was arrested in Hungary on 25 August 2015 and questioned as a 'suspect' on the same day. Before that questioning, IS requested the assistance of a lawyer and an interpreter and, during the questioning, which the lawyer was unable to attend, was informed of the suspicions against him. IS refused to give a statement, on the ground that he could not consult his lawyer.

27 During the questioning, the officer in charge of the investigation had recourse to a Swedish-language interpreter. However, according to the referring judge, there is no information as to how the interpreter was selected, how that interpreter's competence was verified, or whether the interpreter and IS understood each other.

28 IS was released after the questioning. He is, it is stated, currently resident outside Hungary and the letter sent to the address previously communicated was returned marked 'unclaimed'. The referring judge states that, at the stage of the judicial proceedings, the presence of the accused person is, however, mandatory at the pre-trial hearing and that the issuing of a national arrest warrant or a European arrest warrant is possible only where the accused person may receive a custodial sentence. He notes that in the present case, however, the prosecutor seeks a fine and that, consequently, if the accused person does not appear on the date indicated, the referring judge is required to continue the proceedings *in absentia*.

29 In those circumstances, the referring judge observes, in the first place, that Article 5(1) of Directive 2010/64 provides that Member States must take concrete measures to ensure that the interpretation and translation provided meet the quality required under Article 2(8) and Article 3(9) of that directive, which means that the interpretation must be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspects or accused persons have knowledge of the case against them and are able to exercise their right of defence. He also points out that Article 5(2) of that directive provides that, in order to promote the adequacy of interpretation and translation and efficient access thereto, Member States must endeavour to establish a register or registers of independent translators and interpreters who are appropriately qualified.

30 In addition, the referring judge states that Article 4(5) and Article 6(1) of Directive 2012/13 provide that suspects or accused persons must be immediately informed in writing of their rights in a language which they understand and of the criminal act they are suspected or accused of having committed.

31 In that context, the referring judge states that Hungary does not have an official register of translators and interpreters and that Hungarian law does not specify who may be appointed in criminal proceedings as an ad hoc translator or interpreter, nor according to what criteria, as only the certified translation of documents is regulated. In the absence of such law, neither the lawyer nor the court is able to verify the quality of the interpretation. A suspect or accused person who does not speak Hungarian is informed, through an interpreter, of the suspicions against him or her and of his or her procedural rights at his or her first questioning in that capacity, but if the interpreter does not have the appropriate expertise, the right of the person concerned to be informed of his or her rights and his or her rights of defence could, in the referring judge's view, be infringed.

32 Thus, according to the referring judge, the question arises whether Hungarian law and practice are compatible with Directives 2012/13 and 2010/64 and whether it follows from EU law that, if they are not compatible, a national court may not continue the criminal proceedings *in absentia*.

33 In the second place, the referring judge states that since the entry into force on 1 January 2012 of a judicial reform, responsibility for the central administration and management of the judicial system has lain with the President of the Országos Bírósági Hivatal (National Office for the Judiciary ('NOJ'), Hungary, 'the President of the NOJ'), who is appointed by the Hungarian National Assembly for a nine-year term. That president has extensive powers, which include deciding on judicial appointments, making senior judicial appointments and commencing disciplinary proceedings against judges.

34 The referring judge adds that the Országos Bírói Tanács (National Judicial Council, 'NJC') – whose members are elected by the judiciary – is responsible for overseeing the actions of the President of the NOJ and approving his or her decisions in certain cases. Further, on 2 May 2018, the NJC adopted a report stating that the President of the NOJ had infringed the law through the practice of declaring vacancy notices for judicial appointments and appointments to the presidency of courts unsuccessful without sufficient explanation and then, in many cases, appointing on a temporary basis court presidents who were the choice of the NOJ President. According to the referring judge, on 24 April 2018 the President of the NOJ stated that the NJC's functioning did not comply with the law and has since refused to cooperate with that body and its members. The NJC has already pointed out, on several occasions, that the NOJ President and the court presidents appointed by the latter disregard that body's powers.

35 The referring judge further states that the President of the Fővárosi Törvényszék (Budapest High Court, Hungary), which is the appellate court for the referring court, was thus appointed on a temporary basis by the President of the NOJ. In order to underline the relevance of that information, the referring judge specifies the influence which the President of the NOJ may exert on the work and career advancement of judges, including with regard to the allocation of cases, disciplinary power and working environment.

36 In that context, while referring, first, to a number of international opinions and reports which have noted the excessive concentration of powers in the hands of the President of the NOJ and the absence of any counterbalance thereto and, secondly, to the case-law of the Court of Justice and the European Court of Human Rights, the referring judge asks whether such a situation is compatible with the principle of judicial independence enshrined in Article 19 TEU and Article 47 of the Charter. He also enquires whether, in such a context, the proceedings pending before him may be regarded as fair.

37 In the third place, the referring judge states that by a legislative amendment which entered into force on 1 September 2018, certain additional remuneration of prosecutors was increased, whereas the rules on the remuneration of judges were not amended. Consequently, for the first time in decades the salaries of judges are now lower than those of prosecutors of the same level and with the same grade and length of service. The NJC reported that situation to the Hungarian Government, which promised a salary reform by 1 January 2020 at the latest, but the draft law to that effect has still not been introduced, with the result that judicial salaries have remained unchanged since 2003. The referring judge is, therefore, uncertain whether, having regard in particular to inflation and the increase in the average salary in Hungary over the years, the failure to adjust judicial salaries over the long term is not tantamount to a salary reduction and whether that consequence is not the result of a deliberate intention on the part of the Hungarian Government, with the aim of placing judges at a disadvantage in relation to prosecutors. Moreover, the practice of granting bonuses and rewards, which are sometimes very high in relation to the basic judicial salary, to some judges, on a discretionary basis by the President of the NOJ and by the presidents of the courts would amount to a general and systematic infringement of the principle of judicial independence.

38 In those circumstances the Pesti Központi Kerületi Bíróság (Central District Court, Pest, Hungary) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) (a) Must Article 6(1) TEU and Article 5(2) of [Directive 2010/64] be interpreted as meaning that, in order to guarantee the right to a fair trial for accused persons who do not speak the language of the proceedings, a Member State must create a register of properly qualified independent translators and interpreters or – failing that – ensure by some other means that it is possible to review the quality of language interpretation in judicial proceedings?

(b) If the previous question is answered in the affirmative and if, in the specific case, since the language interpretation is not of adequate quality, it is not possible to establish whether the accused person has been informed of the subject matter of the charge or indictment against him or her, must Article 6(1) TEU and Article 4(5) and [Article] 6(1) of [Directive 2012/13] be interpreted as meaning that, in those circumstances, the proceedings cannot continue in his or her absence?

(2) (a) Must the principle of judicial independence referred to in the second subparagraph of Article 19(1) TEU, Article 47 of the [Charter] and the case-law of the Court of Justice be interpreted as meaning that that principle is infringed where the [President of the NOJ], who is responsible for the central administration of the courts and who is appointed by the parliament, the only body to which he or she is accountable and which may remove him or her from office, fills the post of president of a court – a president who, inter alia, has powers in relation to organisation of the

allocation of cases, commencement of disciplinary procedures against judges, and assessment of judges – by means of a direct temporary nomination, circumventing the applications procedure and constantly disregarding the opinion of the competent self-governance bodies of judges?

(b) If Question 2(a) is answered in the affirmative and if the court hearing the specific case has reasonable grounds to fear that that case is being unduly prejudiced as a result of the president's judicial and administrative activities, must the principle of judicial independence be interpreted as meaning that a fair trial is not guaranteed in that case?

(3) (a) Must the principle of judicial independence referred to in the second subparagraph of Article 19(1) TEU, Article 47 of the [Charter] and the case-law of the Court of Justice be interpreted as precluding a situation in which, since 1 September 2018 – unlike the practice followed in previous decades – Hungarian judges receive by law lower remuneration than prosecutors of the equivalent category who have the same grade and the same length of service, and in which, in view of the country's economic situation, judges' salaries are generally not commensurate with the importance of the functions they perform, particularly in the light of the practice of discretionary bonuses applied by holders of high level posts?

(b) If the previous question is answered in the affirmative, must the principle of judicial independence be interpreted as meaning that, in such circumstances, the right to a fair trial cannot be guaranteed?'

39 By decision of 18 November 2019 ('the supplementary request for a preliminary ruling'), the referring judge submitted a request seeking, inter alia, to supplement his initial request for a preliminary ruling.

40 It is apparent from the supplementary request for a preliminary ruling that, on 19 July 2019, the Prosecutor General brought an appeal in the interests of the law before the Kúria (Supreme Court), on the basis of Article 667 of the Code of Criminal Procedure, which was directed against the initial request for a preliminary ruling. It is also apparent from the supplementary request that, by decision of 10 September 2019, the Kúria (Supreme Court) held that the initial request for a preliminary ruling was unlawful on the ground, in essence, that the questions referred were not relevant for the resolution of the dispute in the main proceedings ('the Kúria decision').

41 The referring judge states that it is to be inferred from the Kúria decision that the purpose of the preliminary ruling system established by Article 267 TFEU is to ask the Court of Justice to rule on questions relating not to the constitutional order of a Member State, but rather to EU law, in such a way as to ensure that EU law is interpreted consistently within the European Union. According to the referring judge, under the Kúria decision criminal proceedings may, moreover, be stayed only for the purposes of giving a final decision on an accused person's guilt. In the referring judge's view, the Kúria (Supreme Court) considers that the questions referred, as formulated by him in his initial request for a preliminary ruling, are irrelevant for the purposes of assessing IS's guilt, with the result that that request is unlawful. The Kúria decision also refers to that court's own earlier decisions of principle, according to which a request for a preliminary ruling should not be submitted in order to obtain a declaration that the applicable Hungarian law is inconsistent with the fundamental principles protected by EU law.

42 According to the referring judge, even though the Kúria decision merely declares the initial request for a preliminary ruling unlawful without setting aside the order for reference itself, that decision, given in the context of an appeal in the interests of the law, will have a fundamental impact on the subsequent case-law of the lower courts, since the purpose of such appeals is to harmonise national case-law. Accordingly, the Kúria decision might, in the future, have a deterrent effect on judges in the lower courts contemplating making a request for a preliminary ruling to the Court under Article 267 TFEU.

43 Moreover, the referring judge is uncertain as to the action to be taken upon the criminal proceedings pending before him, which are currently stayed, and considers that that action depends on whether or not the Kúria decision is unlawful.

44 If that decision is lawful, then the Kúria (Supreme Court) was fully entitled to examine the request for a preliminary ruling and to declare it unlawful. In that case, the referring judge would have to consider resuming the case in the main proceedings, since, under Article 491(1)(a) of the Code of Criminal Procedure, if the grounds for the stay have ceased to exist, the court is to resume its handling of the case. Admittedly, according to the referring judge, there is no provision of Hungarian law that provides for what is to be done if a case has been unlawfully stayed.

However, on the basis of reasoning by analogy, the abovementioned provision of the Code of Criminal Procedure could be interpreted as meaning that the court should, in such circumstances, be required to resume its handling of the case.

45 Alternatively, the Kúria (Supreme Court) was wrong to declare that request for a preliminary ruling unlawful and, in that case, the lower court should disregard the decision of that supreme court as being contrary to EU law, notwithstanding that court's constitutional jurisdiction to ensure the uniformity of national law.

46 In addition, the Kúria decision is based on national case-law according to which the conformity of Hungarian law with EU law cannot be the subject of a preliminary ruling procedure. Such case-law would be contrary to the principle of the primacy of EU law and to the case-law of the Court of Justice.

47 The referring judge adds that, on 25 October 2019, the President of the Fővárosi Törvényszék (Budapest High Court) instituted disciplinary proceedings against him, on the same grounds as those set out in the Kúria decision.

48 Following information communicated by the Hungarian Government to the effect that those proceedings had been brought to an end, the Court of Justice sent a question to the referring judge. In his reply of 10 December 2019, the referring judge confirmed that, by a document dated 22 November 2019, the President of the Fővárosi Törvényszék (Budapest High Court) had withdrawn the decision requesting that those disciplinary proceedings be commenced.

49 However, the referring judge also stated that he did not intend to amend in that regard the supplementary request for a preliminary ruling, given that his concern stems not from the fact that he himself is the subject of disciplinary proceedings, but rather from the fact that such proceedings may be commenced in such circumstances.

50 According to the referring judge, the quality of his work as a judge has not been called into question either by his direct superior or by the Head of the Criminal Division of the Pesti Központi Kerületi Bíróság (Central District Court, Pest), with the result that the only reason for those disciplinary proceedings is the content of the initial order for reference.

51 In those circumstances the Pesti Központi Kerületi Bíróság (Central District Court, Pest) decided to refer the following two supplementary questions to the Court of Justice for a preliminary ruling:

(4) (a) Must Article 267 [TFEU] be interpreted as precluding a national practice whereby the court of last instance, in proceedings to harmonise the case-law of the Member State, declares as unlawful a decision by which a lower court makes a request for a preliminary ruling, without altering the legal effects of the decision in question?

(b) If [Question 4(a)] is answered in the affirmative, must Article 267 [TFEU] be interpreted as meaning that the referring court must disregard contrary decisions of the higher court and positions of principle adopted in the interest of harmonising the law?

(c) If [Question 4(a)] is answered in the negative, in that case can the suspended criminal proceedings be continued given that the preliminary ruling proceedings are pending?

(5) Must the principle of judicial independence, established in the second subparagraph of Article 19(1) TEU, in Article 47 of the Charter and in the case-law of the Court of Justice, read in the light of Article 267 TFEU, be interpreted as meaning that that principle precludes disciplinary proceedings being brought against a judge for having made a request for a preliminary ruling?'

The request for an expedited procedure

52 By his supplementary request for a preliminary ruling, the referring judge also requested that the present case be determined pursuant to an expedited procedure under Article 105 of the Rules of Procedure of the Court of Justice. In support of that request, he states that the commencement of such a procedure is justified, in particular, in view of the fact that the Kúria decision and the disciplinary proceedings brought against him are likely to have

an extremely negative deterrent effect, which could have an impact on all decisions whether or not to initiate a preliminary ruling procedure under Article 267 TFEU in Hungary in the future.

53 Article 105(1) of the Rules of Procedure provides that, at the request of the referring court or tribunal or, exceptionally, of his own motion, the President of the Court may, where the nature of the case requires that it be dealt with within a short time, after hearing the Judge-Rapporteur and the Advocate General, decide that a reference for a preliminary ruling is to be determined pursuant to an expedited procedure.

54 It must be borne in mind, in that regard, that such an expedited procedure is a procedural instrument intended to address matters of exceptional urgency. Furthermore, it is also apparent from the Court's case-law that the expedited procedure may not be applied where the sensitive and complex nature of the legal problems raised by a case does not lend itself easily to the application of such a procedure, in particular where it is not appropriate to shorten the written part of the procedure before the Court (judgment of 18 May 2021, *Asociaţia "Forumul Judecătorilor din România" and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 103 and the case-law cited).

55 In the present case, by decision of 19 December 2019, the President of the Court, after hearing the Judge-Rapporteur and the Advocate General, refused the request that the present be determined pursuant to an expedited procedure. As is apparent from paragraph 48 above, the decision requesting that disciplinary proceedings be brought against the referring judge has been withdrawn. Furthermore, the criminal case in the main proceedings does not concern an individual who is subject to a measure involving deprivation of liberty.

56 In those circumstances, it did not appear, on the basis of the information and explanations thus provided by the referring court, that the present case, which, as is apparent from paragraph 52 above, also raises questions that are of a high degree of sensitivity and complexity, was so urgent that it would be justified to derogate, exceptionally, from the ordinary rules of procedure applicable to requests for a preliminary ruling.

Consideration of the questions referred

The fourth question

57 By his fourth question, which it is appropriate to examine in the first place, the referring judge asks, in essence, whether Article 267 TFEU must be interpreted as precluding the supreme court of a Member State from declaring, following an appeal in the interests of the law, that a request for a preliminary ruling which has been submitted under Article 267 TFEU to the Court of Justice by a lower court is unlawful, without, however, altering the legal effects of the decision containing that request, and, if that is the case, whether the principle of the primacy of EU law must be interpreted as requiring that lower court to disregard such a decision of the supreme court.

Admissibility

58 The Hungarian Government submits that the fourth question is inadmissible, since the grounds set out in the supplementary request for a preliminary ruling concerning the need for an interpretation of EU law are irrelevant to the outcome of the main proceedings, having regard in particular to the fact that the Kúria decision has no legal effect on the order for reference. In addition, the referring judge's assumptions concerning the effect that that decision might in the future have on preliminary ruling procedures are based on future and hypothetical events and, as such, those assumptions are also irrelevant for the outcome of the main proceedings.

59 It must be recalled, at the outset, that the procedure for referring questions for a preliminary ruling under Article 267 TFEU establishes a relationship of close cooperation between the national courts and the Court of Justice based on the assignment to each of different functions and constitutes an instrument by means of which the Court provides the national courts with the criteria for the interpretation of EU law which they need in order to dispose of disputes which they are called upon to resolve (see, to that effect, judgment of 21 June 2007, *Omni Metal Service*, C-259/05, EU:C:2007:363, paragraph 16 and the case-law cited).

60 In accordance with the Court's settled case-law, in the context of that cooperation, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary

ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle required to give a ruling (judgment of 24 November 2020, *Openbaar Ministerie (Forgery of documents)*, C-510/19, EU:C:2020:953 paragraph 25 and the case-law cited).

61 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 24 November 2020, *Openbaar Ministerie (Forgery of documents)*, C-510/19, EU:C:2020:953, paragraph 26 and the case-law cited).

62 In the present case, since the referring judge is uncertain as to the action to be taken upon the criminal proceedings before him if the Kúria decision were to be considered contrary to EU law, it must be held that, even though that decision neither sets aside nor alters the order for reference, nor requires the referring judge to withdraw or amend that request, the Kúria decision is not without consequences for that judge and the criminal proceedings before him.

63 Where that supreme court classifies a request for a preliminary ruling made by a lower court as unlawful, such a classification necessarily has consequences for that court, even in the absence of direct effects on the validity of the order for reference. Thus, in the present case, the referring judge must, in particular, decide whether or not he maintains his questions submitted for a preliminary ruling and, therefore, at the same time, decide whether or not he maintains his decision to stay the proceedings, which the Kúria (Supreme Court) has, in essence, held to be unlawful, or whether, on the contrary, he withdraws his questions in the light of that latter decision and continues the criminal proceedings before him.

64 Moreover, as is apparent from the order for reference, the Kúria decision was published in the official reports of decisions of principle, with a view to ensuring the harmonisation of national law.

65 Furthermore, in such circumstances, the referring judge must also assess whether, by maintaining his initial request for a preliminary ruling, he does not cause his decision on the merits of the case in the main proceedings to be open to appeal on the ground that, in the course of the proceedings, he made an order submitting a request for a preliminary ruling which was declared unlawful by the Kúria (Supreme Court).

66 In the light of the foregoing considerations, it must be held that the fourth question cannot be regarded as irrelevant to the outcome of the main proceedings and that it is, therefore, admissible.

Substance

67 As regards, in the first place, the question whether Article 267 TFEU must be interpreted as precluding the supreme court of a Member State from declaring, following an appeal in the interests of the law, that a request for a preliminary ruling which has been submitted under Article 267 TFEU to the Court of Justice by a lower court is unlawful, without, however, altering the legal effects of the decision containing that request, it should be recalled that the keystone of the judicial system established by the Treaties is the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniformity in the interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (see, to that effect, judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 90 and the case-law cited).

68 In that regard, the Court has repeatedly held that national courts have the widest discretion in referring questions to the Court involving interpretation of relevant provisions of EU law, that discretion being replaced by an obligation for courts of final instance, subject to certain exceptions recognised by the Court's case-law (judgment of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 32 and the case-law cited).

69 Both that discretion and that obligation are an inherent part of the system of cooperation between the national courts and the Court of Justice established by Article 267 TFEU and of the functions of the court responsible for

the application of EU law entrusted by that provision to the national courts (judgment of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 33).

70 As a consequence, where a national court before which a case is pending considers that a question concerning the interpretation or validity of EU law has arisen in that case, it has the discretion, or is under an obligation, to request a preliminary ruling from the Court of Justice, and national rules imposed by legislation or case-law cannot interfere with that discretion or that obligation (judgment of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 34).

71 In the present case, even though the Kúria decision simply declares the initial request for a preliminary ruling unlawful and does not set aside the decision containing that request nor require the referring judge to withdraw the request and continue the main proceedings, the Kúria (Supreme Court), by reviewing the legality of that request in the light of Article 490 of the Code of Criminal Procedure, carried out – as the Advocate General also observed in point 43 of his Opinion – a review of the initial request for a preliminary ruling similar to the review carried out by the Court of Justice in order to determine whether a request for a preliminary ruling is admissible.

72 Even though Article 267 TFEU does not preclude an order for reference from being subject to a judicial remedy under national law, a decision of a supreme court, by which a request for a preliminary ruling is declared unlawful on the ground that the questions referred are not relevant and necessary for the resolution of the dispute in the main proceedings is incompatible with that article, since the assessment of those factors falls within the exclusive jurisdiction of the Court to rule on the admissibility of the questions referred for a preliminary ruling, as is apparent from the case-law of the Court set out in paragraphs 60 and 61 above (see, to that effect, judgment of 16 December 2008, *Cartesio*, C-210/06, EU:C:2008:723, paragraphs 93 to 96).

73 In addition, as the Advocate General also observed in point 48 of his Opinion, the effectiveness of EU law would be in jeopardy if the outcome of an appeal to the highest national court could have the effect of deterring a national court hearing a case governed by EU law from exercising the discretion conferred on it by Article 267 TFEU to refer to the Court of Justice questions concerning the interpretation or validity of EU law in order to enable it to decide whether or not a provision of national law was compatible with that EU law (see, to that effect, judgment of 22 June 2010, *Melki and Abdeli*, C-188/10 and C-189/10, EU:C:2010:363, paragraph 45 and the case-law cited).

74 Indeed, even though the Kúria (Supreme Court) did not require the referring judge to withdraw the initial request for a preliminary ruling, the fact remains that, by its decision, that supreme court held that that request was unlawful. Such a finding of illegality is liable to weaken both the authority of the answers that the Court will provide to the referring judge and the decision which he will give in the light of those answers.

75 Furthermore, that decision of the Kúria (Supreme Court) is likely to prompt the Hungarian courts to refrain from referring questions for a preliminary ruling to the Court, in order to preclude their requests for a preliminary ruling from being challenged by one of the parties on the basis of the Kúria decision or from being the subject of an appeal in the interests of the law.

76 It should be recalled, in that regard, that, as regards the preliminary ruling procedure, 'the vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles [258 and 259 TFEU] to the diligence of the Commission and the Member States' (judgment of 5 February 1963, *van Gend & Loos*, 26/62, EU:C:1963:1, p. 13). Limitations on the exercise by national courts of the jurisdiction conferred on them by Article 267 TFEU would have the effect of restricting the effective judicial protection of the rights which individuals derive from EU law.

77 Consequently, the Kúria decision is prejudicial to the prerogatives granted to national courts and tribunals by Article 267 TFEU and, therefore, to the effectiveness of the cooperation between the Court and the national court and tribunals established by the preliminary ruling mechanism (see, by analogy, judgment of 5 July 2016, *Ognyanov*, C-614/14, EU:C:2016:514, paragraph 25).

78 As regards, in the second place, the question whether the principle of the primacy of EU law requires the national court which has made a reference for a preliminary ruling to the Court of Justice – the unlawfulness of which has been found by the supreme court of the Member State concerned without, however, altering the legal effects of the national court's decision to make a reference – to disregard such a decision of the supreme court, it should

be noted, first, that, in accordance with the Court's settled case-law, the principle of the primacy of EU law establishes the pre-eminence of EU law over the law of the Member States. That principle therefore requires all Member State bodies to give full effect to the various EU provisions, and the law of the Member States may not undermine the effect accorded to those various provisions in the territory of those States (judgment of 18 May 2021, *Asociaţia "Forumul Judecătorilor din România" and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 244 and the case-law cited).

79 Thus, the Court has repeatedly held that, by virtue of the principle of the primacy of EU law, a Member State's reliance on rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of EU law. In accordance with settled case-law, the effects of the principle of the primacy of EU law are binding on all the bodies of a Member State, without, inter alia, provisions of domestic law relating to the attribution of jurisdiction, including constitutional provisions, being able to prevent that (judgment of 18 May 2021, *Asociaţia "Forumul Judecătorilor din România" and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 245 and the case-law cited).

80 Secondly, as is apparent from settled case-law, a provision of national law which prevents the procedure laid down in Article 267 TFEU from being implemented must be set aside without the court concerned's having to request or await the prior setting aside of that provision of national law by legislative or other constitutional means (judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 141 and the case-law cited).

81 It follows that the principle of the primacy of EU law requires a lower court to disregard a decision of the supreme court of the Member State concerned if it considers that the latter is prejudicial to the prerogatives granted to that lower court by Article 267 TFEU and, consequently, to the effectiveness of the cooperation between the Court and the national court and tribunals established by the preliminary ruling mechanism. It should be pointed out that, in view of the extent of those prerogatives, the possibility that, in its decision ruling on the request for a preliminary ruling, the Court may find that the questions referred to it for a preliminary ruling by that lower court are inadmissible in whole or in part, cannot provide grounds for maintaining the decision of the supreme court concerned.

82 In the light of the foregoing considerations, the answer to the fourth question is, first, that Article 267 TFEU must be interpreted as precluding the supreme court of a Member State from declaring, following an appeal in the interests of the law, that a request for a preliminary ruling which has been submitted to the Court under Article 267 TFEU by a lower court is unlawful on the ground that the questions referred are not relevant and necessary for the resolution of the dispute in the main proceedings, without, however, altering the legal effects of the decision containing that request, and, secondly, that the principle of the primacy of EU law requires that lower court to disregard such a decision of the national supreme court.

The fifth question

83 By his fifth question, which it is appropriate to examine in the second place, the referring judge asks, in essence, whether the second subparagraph of Article 19(1) TEU, Article 47 of the Charter and Article 267 TFEU must be interpreted as precluding disciplinary proceedings from being brought against a national judge on the ground that he or she made a request for a preliminary ruling to the Court under Article 267 TFEU.

Admissibility

84 The Hungarian Government and the Commission contend that the fifth question is inadmissible. The Hungarian Government contends, in essence, that the disciplinary proceedings that were brought against the referring judge, but subsequently withdrawn and closed, are irrelevant since their effects on the referring judge's task of adjudication cannot be determined. For its part, the Commission contends, in essence, that the fifth question is irrelevant for the purposes of resolving the dispute in the main proceedings and that, in any event, the referring judge has not provided any information concerning the effect of the commencement of the disciplinary proceedings on the continuation of the criminal proceedings before him.

85 In that regard, in the light of the case-law already referred to in paragraphs 60 and 61 above, it should be noted that, in his reply of 10 December 2019 to the request for information sent to him by the Court, the referring judge stated that, notwithstanding the withdrawal of the disciplinary proceedings against him, his question remained

relevant since it stems from the very fact that disciplinary proceedings may be brought in such circumstances and is, therefore, independent of the continuation of those proceedings.

86 Furthermore, it should be noted that the fourth and fifth questions referred for a preliminary ruling are closely connected. Indeed, it is apparent from the supplementary request for a preliminary ruling that it was because of the Kúria decision declaring the initial request for a preliminary ruling unlawful that the President of the Fővárosi Törvényszék (Budapest High Court) adopted the measure requesting that disciplinary proceedings be commenced against the referring judge. Thus, by his fifth question, the referring judge seeks, in essence, to ascertain whether he will be able to refrain from complying with the Kúria decision when he rules on the substance of the case in the main proceedings without having to fear that, in so doing, the disciplinary proceedings that were brought against him, based on the Kúria decision, will be reopened.

87 Consequently, as in the case of the fourth question, the referring judge is faced with a procedural obstacle, arising from the application of national legislation against him, which he must address before he can decide the main proceedings without external interference, and therefore, in accordance with Article 47 of the Charter, in complete independence (see, to that effect, judgment of 16 July 2020, *Governo della Repubblica italiana (Status of Italian magistrates)*, C-658/18, EU:C:2020:572, paragraph 46 and the case-law cited). He is uncertain as to the conditions for the continuation of the main proceedings following the Kúria decision declaring the initial request for a preliminary ruling unlawful and which also served as a ground for commencing disciplinary proceedings against him. In that regard, the present case is distinguishable from those which gave rise to the judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234), in which the answers to the questions of interpretation of EU law referred to the Court would not have been necessary for the referring courts concerned in order to resolve procedural questions of national law before being able to rule on the substance of the disputes before them.

88 It follows that the fifth question is admissible.

Substance

89 As a preliminary point, it should be noted that the fifth question refers to the interpretation of the second subparagraph of Article 19(1) TEU, Article 47 of the Charter and Article 267 TFEU. However, it is apparent from the grounds of the order for reference that, as has already been pointed out in essence in paragraphs 86 and 87 above, that question arises in relation to a procedural difficulty, which must be resolved before a decision can be taken on the substance of the main proceedings and which calls into question the powers of the referring judge in the context of the procedure laid down in Article 267 TFEU. Thus, the fifth question must be examined only in the light of Article 267 TFEU.

90 In that regard, in the light of the case-law of the Court referred to in paragraphs 68 to 70 and 72 above, it must be pointed out that the Court has already held that provisions of national law which expose national judges to disciplinary proceedings as a result of the fact that they have made a reference for a preliminary ruling to the Court of Justice cannot be permitted. Indeed, the mere prospect of being the subject of disciplinary proceedings as a result of making such a reference, or deciding to maintain that reference after it was made, is likely to undermine the effective exercise by the national judges concerned of their discretion to make a reference to the Court and of their role as judges responsible for the application of EU law (see, to that effect, judgments of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 58 and the case-law cited, and of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 227).

91 The fact that those judges may not be exposed to disciplinary proceedings or measures for having exercised that discretion to make a reference for a preliminary ruling to the Court, which is exclusively within their jurisdiction, also constitutes a guarantee that is essential to judicial independence, which independence is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU (judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 59 and the case-law cited).

92 Furthermore, it should be noted that disciplinary proceedings commenced on the ground that a national judge has decided to make a reference for a preliminary ruling to the Court are liable to deter all national courts from making such references, which could jeopardise the uniform application of EU law.

93 In the light of the foregoing, the answer to the fifth question is that Article 267 TFEU must be interpreted as precluding disciplinary proceedings from being brought against a national judge on the ground that he or she has made a reference for a preliminary ruling to the Court of Justice under that provision.

The first question

Admissibility

94 According to the Hungarian Government, the case in the main proceedings is, as the Kúria (Supreme Court) found, one which is straightforward to assess in fact and in law and which, fundamentally, does not require an interpretation of EU law. Referring to the Kúria decision, the Hungarian Government submits, in general terms, that the criminal proceedings before the referring judge do not disclose any facts or circumstances from which it may be concluded that there was a breach of the provisions governing the use of languages during those proceedings or a failure on the part of the authorities responsible for the case from which the referring judge could have inferred the need for an interpretation of EU law. Since no real issue actually arises in the main proceedings with regard to the quality of interpretation, the first part of the first question is hypothetical and, accordingly, it is neither necessary nor possible for the Court to answer it. Similarly, an answer to the second part of that question is also unnecessary in view of the facts of the case in the main proceedings, given that, according to the Hungarian Government, it is possible to find, on the basis of the facts established by the Kúria (Supreme Court) from the investigation file, that the accused person understood the charges against him.

95 In that regard, in the light of the case-law of the Court referred to in paragraphs 60 and 61 above, it should be noted that the referring judge clearly sets out, in the initial request for a preliminary ruling, the circumstances in which he decided to refer the first question and the grounds for doing so. As is apparent from paragraphs 25 to 28 above, the case in the main proceedings concerns criminal proceedings *in absentia* brought against a Swedish national born in Turkey, who is being prosecuted for an infringement of the Hungarian legislation on firearms and ammunition; this follows an investigation during which he was questioned by the police in the presence of a Swedish-language interpreter, but without the assistance of a lawyer, even though this was the interview at which he was informed that he was suspected of having committed offences under that national legislation. Thus, the dispute in the main proceedings has a clear connection with the provisions of Directives 2010/64 and 2012/13 to which the first question relates.

96 Moreover, as regards the Hungarian Government's argument that the case in the main proceedings is one which is straightforward to assess in fact and in law and consequently does not require an interpretation of EU law by the Court, with the result that the reference for a preliminary ruling was unnecessary, it is sufficient, first, to point out, as is apparent from the case-law of the Court mentioned in paragraph 60 above, that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Secondly, such a circumstance cannot prevent a national court from referring a question for a preliminary ruling to the Court, and does not have the effect of rendering the question referred inadmissible (see, to that effect, judgment of 29 April 2021, *Ubezpieczeniowy Fundusz Gwarancyjny*, C-383/19, EU:C:2021:337, paragraph 33 and the case-law cited).

97 Accordingly, it must be held that the first question is admissible.

Substance

98 As a preliminary point, it should be noted that the first question refers to Article 6(1) TEU. However, apart from a general reference to the applicability of the Charter, that provision does not assist the referring judge's reasoning, as is evidenced from the grounds of the initial request for a preliminary ruling. Moreover, it is a general provision by which the European Union recognises that the Charter has the same legal value as the Treaties, makes clear that the provisions of the Charter are not in any way to extend to the competences of the European Union as defined in the Treaties and provides details of the method of interpreting the rights, freedoms and principles in the Charter. In those circumstances, that provision appears irrelevant for the purposes of analysing the first question.

99 However, in accordance with its settled case-law, the Court may find it necessary to consider provisions of EU law which the national court has not referred to in its question (judgment of 7 August 2018, *Smith*, C-122/17, EU:C:2018:631, paragraph 34 and the case-law cited).

100 In accordance with Article 48(1) of the Charter, everyone who has been charged must be presumed innocent until proved guilty according to law. Moreover, Article 48(2) of the Charter states that respect for the rights of the defence of anyone who has been charged must be guaranteed.

101 In that regard, it should be noted that Article 52(3) of the Charter states that, in so far as that charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights must be the same as those laid down by the ECHR. As is apparent from the explanations relating to Article 48 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, must be taken into consideration for the interpretation of the Charter, Article 48 corresponds to Article 6(2) and (3) ECHR. The Court must, accordingly, ensure that its interpretation of Article 48 of the Charter ensures a level of protection which does not disregard that guaranteed by Article 6 ECHR, as interpreted by the European Court of Human Rights (see, to that effect, judgment of 29 July 2019, *Gambino and Hyka*, C-38/18, EU:C:2019:628, paragraph 39 and the case-law cited).

102 In those circumstances, by the first part of his first question, the referring judge asks, in essence, whether Article 5 of Directive 2010/64 must be interpreted as requiring Member States to create a register of independent translators and interpreters or to ensure that the adequacy of the interpretation provided in judicial proceedings can be reviewed.

103 In that regard, it should be noted that Article 5(2) of Directive 2010/64 provides that 'Member States shall endeavour to establish a register or registers of independent translators and interpreters who are appropriately qualified'.

104 According to the Court's settled case-law, for the purposes of interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgments of 2 September 2015, *Surmačs*, C-127/14, EU:C:2015:522, paragraph 28, and of 16 November 2016, *DHL Express (Austria)*, C-2/15, EU:C:2016:880, paragraph 19).

105 It is apparent from the very wording of Article 5(2) of Directive 2010/64, which uses the verb 'endeavour', that the creation of a register of independent translators or interpreters who are appropriately qualified constitutes more a programmatic requirement than an obligation to achieve a certain result, which, moreover does not, in itself, have any direct effect.

106 That literal interpretation is borne out by the context of that provision and by the objectives pursued by Directive 2010/64.

107 As set out in recital 12 thereof, Directive 2010/64 lays down common minimum rules to be applied in the fields of interpretation and translation in criminal proceedings

108 In accordance with recital 17 of that directive, such rules should ensure that there is free and adequate linguistic assistance, allowing suspects or accused persons who do not speak or understand the language of the criminal proceedings fully to exercise their right of defence and safeguarding the fairness of the proceedings.

109 Recital 24 of Directive 2010/64, for its part, states that Member States should ensure that control can be exercised over the quality of the interpretation and translation provided, when the competent authorities have been put on notice in a given case of a deficiency in that regard. In addition, Article 5(1) of Directive 2010/64 provides that Member States must take concrete measures to ensure that the interpretation and translation provided meets the quality required under Article 2(8) of that directive, with that latter provision specifying that interpretation must be 'of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence'.

110 It is apparent from those provisions and recitals, irrespective of the specific methods of implementing Article 5 of Directive 2010/64, that that directive requires Member States to adopt 'concrete measures' to ensure the 'sufficient quality' of the interpretation, so as to guarantee, first, that the persons concerned have knowledge of the case against them and are able to exercise their right of defence and, secondly, the sound administration of justice. In that regard, the creation of a register of independent translators or interpreters is one of the means likely to contribute to the attainment of such an objective. Although the establishment of such a register cannot, therefore, be regarded as being required of Member States by that directive, the fact remains that Article 5(1) of Directive 2010/64 provides, in a sufficiently precise and unconditional manner in order to be relied upon by an individual and applied by the national court, that Member States are to adopt concrete measures to ensure the quality of the interpretation and translation provided and to promote, to that end, the adequacy of those services and efficient access thereto.

111 Article 2(5) of Directive 2010/64 provides, in that regard, in unconditional and precise terms, that Member States are to ensure that, in accordance with procedures in national law, suspects or accused persons have 'the possibility to complain that the quality of the interpretation is not sufficient to safeguard the fairness of the proceedings'.

112 However, such a possibility does not relieve Member States of their obligation, referred to in Article 5(1) of Directive 2010/64, read in conjunction with, inter alia, Article 2(8) thereof, to take 'concrete measures' to ensure that the interpretation provided is of a 'sufficient quality', in particular in the absence of a register of independent translators or interpreters.

113 In that regard, compliance with the requirements relating to a fair trial means ensuring that the accused person knows what is being alleged against him or her and can defend himself or herself (see, to that effect, judgment of 15 October 2015, *Covaci*, C-216/14, EU:C:2015:686, paragraph 39 and the case-law cited). The obligation of the competent authorities is not, therefore, limited to the appointment of an interpreter. If they are put on notice in the particular circumstances, it may also extend to a degree of subsequent control over the adequacy of the interpretation provided (see, to that effect, ECtHR, 18 October 2006, *Hermi v. Italy*, CE:ECHR:2006:1018JUD001811402, § 70).

114 Failure on the part of the national courts to examine allegations that an interpreter provides inadequate services may entail an infringement of the rights of the defence (see, to that effect, ECtHR, 24 June 2019, *Knox v. Italy*, CE:ECHR:2019:0124JUD007657713, §§ 182 and 186).

115 Thus, in order to ensure that the suspect or accused person who does not speak and understand the language of the criminal proceedings has nevertheless been properly informed of the allegations against him or her, the national courts must review whether he or she has been provided with interpretation of a 'sufficient quality' in order to understand the accusation against him or her, so that the fairness of the proceedings is safeguarded. In order to enable national courts to carry out that verification, those courts must, inter alia, have access to information relating to the selection and appointment procedure for independent translators and interpreters.

116 In the present case, it is apparent from the file before the Court that there is no register of independent translators or interpreters in Hungary. The referring judge states that, because of gaps in the national legislation, it is in practice impossible to guarantee the quality of the interpretation provided to suspects and accused persons. The Hungarian Government contends, however, that the national legislation governing the activity of professional interpreters and translators and the rules of criminal procedure enable any person who does not speak Hungarian to receive linguistic assistance of a quality meeting the requirements of fair proceedings. Leaving aside those considerations relating to national law, it is for the referring court to carry out a specific and precise assessment of the facts of the particular case in the main proceedings, in order to ascertain that the interpretation provided in that case to the person concerned was of a sufficient quality, in the light of the requirements arising from Directive 2010/64, to enable that person to be aware of the reasons for his or her arrest or the accusations against him or her, and thus to be able to exercise his or her rights of defence.

117 Consequently, Article 5 of Directive 2010/64 must be interpreted as requiring Member States to take concrete measures in order to ensure that the quality of the interpretation and translations provided is sufficient to enable the suspect or accused person to understand the accusation against him or her and in order that that interpretation can be reviewed by the national courts.

118 The second part of the first question referred for a preliminary ruling seeks to ascertain whether, in the absence of such a register or other method of reviewing the adequacy of the interpretation and where it is impossible to establish whether the suspect or accused person has been informed of the suspicions or accusation against him or her, Article 4(5) and Article 6(1) of Directive 2012/13, read in the light of Article 48(2) of the Charter, must be interpreted as precluding the proceedings from being continued *in absentia*.

119 That question is based upon the premiss that the absence of national measures intended to guarantee the quality of interpretation would result in the referring court's being deprived of means for it to review the adequacy of the interpretation. It must be borne in mind that, irrespective of the question whether there are general national measures which make it possible to guarantee and review the quality of the interpretation provided in criminal proceedings, it is for the referring court to carry out a specific and precise assessment of the facts of the case in the main proceedings in order to ascertain that the interpretation provided in that case to the person concerned was of a sufficient quality in the light of the requirements arising from Directive 2010/64.

120 Following that verification, the referring court may conclude that it cannot establish whether the person concerned was informed, in a language which he or she understands, of the accusation against him or her, either because the interpretation provided to that person was inadequate or because it is impossible to ascertain the quality of that interpretation. Consequently, the second part of the first question referred for a preliminary ruling must be understood as seeking to ascertain whether Article 4(5) and Article 6(1) of Directive 2012/13, read in the light of Article 48(2) of the Charter, are to be interpreted as precluding a person from being tried *in absentia* while, on account of inadequate interpretation, he or she has not been informed in a language which he or she understands of the accusation against him or her or where it is impossible to ascertain the quality of the interpretation provided and, therefore, to establish that he or she has been informed in a language he or she understands of the accusation against him or her.

121 In that regard, it should be noted that, under Article 6(3) ECHR, everyone charged with a criminal offence has the right to 'be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him'. The protections afforded by Article 6(1) and (3) ECHR apply to a person subject to a 'criminal charge', within the autonomous ECHR meaning of that term. A 'criminal charge' exists from the moment that an individual is officially notified by the competent authority of an allegation that he or she has committed a criminal offence, or from the point at which his or her situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him or her. Thus, for example, a person arrested on suspicion of having committed a criminal offence can be regarded as being 'charged with a criminal offence' and claim the protection of Article 6 ECHR (ECtHR, 12 May 2017, *Simeonovi v. Bulgaria*, CE:ECHR:2017:0512JUD002198004, §§ 110 and 111).

122 According to the ECtHR's case-law, in criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair. The right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his or her defence (ECtHR, 25 March 1999, *Pélissier and Sassi v. France*, CE:ECHR:1999:0325JUD002544494, §§ 52 and 54). To inform someone of a prosecution brought against him or her is a legal act of such importance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's rights; vague and informal knowledge cannot suffice (ECtHR, 1 March 2006, *Sejdovic v. Italy*, CE:ECHR:2006:0301JUD005658100, § 99).

123 The fairness of the proceedings entails that everyone must be able to understand the accusation against him or her in order to be able to defend himself or herself. A person who does not speak or understand the language of the criminal proceedings to which he or she is subject and has not been provided with linguistic assistance such as to enable him or her to understand the accusations against him or her cannot be regarded as having been in a position to exercise his or her rights of defence.

124 That fundamental guarantee is implemented, inter alia, by the right to interpretation provided for in Article 2 of Directive 2010/64, which provides, in respect of any questioning or hearing during criminal proceedings, that suspects or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation, as well as by the right to translation of essential documents, referred to in Article 3 of that directive.

125 Where suspects or accused persons are arrested or detained, Article 4 of Directive 2012/13 requires Member States to provide them with a written Letter of Rights setting out, inter alia, the procedural rights listed in Article 3 of that directive.

126 Article 4(5) of Directive 2012/13 also provides that Member States must ensure that suspects or accused persons receive the Letter of Rights written in a language that they understand. Where a Letter of Rights is not available in the appropriate language, suspects or accused persons must be 'informed of their rights orally in a language that they understand'.

127 Article 6(1) of Directive 2012/13 provides that Member States must ensure that suspects or accused persons are provided with information about the criminal act they are suspected or accused of having committed. That information shall be provided 'promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence'.

128 Admittedly, Directive 2012/13 does not regulate the procedures whereby the information about the accusation, provided for in Article 6 of that directive, must be supplied to the accused person. However, those procedures cannot undermine the objective referred to, inter alia, in Article 6 of Directive 2012/13, which, as is also apparent from recital 27 of that directive, consists in enabling suspects or persons accused of having committed a criminal offence to prepare their defence and in safeguarding the fairness of the proceedings (judgment of 13 June 2019, *Moro*, C-646/17, EU:C:2019:489, paragraph 51 and the case-law cited).

129 It follows that the information which must be communicated to any person suspected or accused of having committed a criminal act, in accordance with Article 6 of Directive 2012/13, must be provided in a language understood by that person, where necessary by means of linguistic assistance from an interpreter or by means of a written translation.

130 Given that the right to be informed of the accusation against him or her is decisive for the criminal proceedings as a whole, the fact that a person, who does not speak or understand the language of those proceedings, was not provided with linguistic assistance such as to enable him or her to understand the content thereof and to defend himself or herself, is sufficient to deprive the proceedings of their fairness and to undermine the effective exercise of the rights of the defence.

131 Admittedly, Article 6(3) of Directive 2012/13 provides that Member States are to ensure that, at the latest on submission of the merits of the accusation to a court, detailed information is provided on the accusation, including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person. That provision therefore allows the failure to provide that information, in particular because it was not given in a language understood by the accused person, to be rectified at the criminal trial.

132 However, it also follows that a criminal court cannot, without disregarding Article 6 of Directive 2012/13, as well as the fairness of the proceedings and the effective exercise of the rights of the defence which that article seeks to safeguard, rule on the merits of the accusation in the absence of the accused person from his or her trial, where the latter has not been previously informed in a language which he or she understands of the accusation against him or her.

133 In the present case, if, on the basis of the factual checks to be carried out by the referring court, it were established that the interpretation provided were not of a sufficient quality to enable the accused person to understand the reasons for his arrest and the accusations against him, this would be such as to preclude the criminal proceedings from being continued *in absentia*.

134 Moreover, as the right of suspects and accused persons to be present at their trial is enshrined in Article 8(1) of Directive 2016/343, the possibility of organising the criminal trial *in absentia* is made subject by Article 8(2) of that directive to those persons' having been informed, in due time, of the trial and the consequences of non-appearance.

135 Lastly, it is true that, under Article 9 of that directive, Member States are to ensure that suspects or accused persons who were not present at their trial, when the conditions laid down in Article 8(2) of that directive were not met, have the right to a new trial, or to another legal remedy, which allows a fresh determination of the merits of the case. However, such a provision cannot justify a person being convicted *in absentia* when he or she has not

been informed of the accusation against him or her, in accordance with the requirements of Article 8(2), where that failure to inform is the result of inadequate interpretation and therefore constitutes an infringement of other provisions of EU law.

136 Furthermore, if, in the present case, on the basis of the factual checks to be carried out by the referring court, it were to prove impossible to ascertain the quality of the interpretation provided, such a circumstance would also preclude the criminal proceedings from being continued *in absentia*. Indeed, the fact that it is impossible to ascertain the quality of the interpretation provided means that it is impossible to establish whether the accused person was informed of the suspicions or accusation against him or her. Thus, all the considerations concerning the situation examined in paragraphs 121 to 135 above are, given the decisive nature for the criminal proceedings as a whole of the accused person's right to be informed of the accusation against him or her and the fundamental nature of the rights of the defence, applicable *mutatis mutandis* to this second situation.

137 Consequently, Article 2(5) of Directive 2010/64 and Article 4(5) and Article 6(1) of Directive 2012/13, read in the light of Article 48(2) of the Charter, must be interpreted as precluding a person from being tried *in absentia* when, on account of inadequate interpretation, he or she has not been informed, in a language which he or she understands, of the accusation against him or her or where it is impossible to ascertain the quality of the interpretation provided and therefore to establish that he or she has been informed, in a language which he or she understands, of the accusation against him or her.

138 In the light of all the foregoing considerations, the answer to the first question is that:

– Article 5 of Directive 2010/64 must be interpreted as requiring Member States to take concrete measures in order to ensure that the quality of the interpretation and translations provided is sufficient to enable the suspect or accused person to understand the accusation against him or her and in order that that interpretation can be reviewed by the national courts;

– Article 2(5) of Directive 2010/64 and Article 4(5) and Article 6(1) of Directive 2012/13, read in the light of Article 48(2) of the Charter, must be interpreted as precluding a person from being tried *in absentia* when, on account of inadequate interpretation, he or she has not been informed, in a language which he or she understands, of the accusation against him or her or where it is impossible to ascertain the quality of the interpretation provided and therefore to establish that he or she has been informed, in a language which he or she understands, of the accusation against him or her.

The second and third questions

139 By his second question, the referring judge asks, in essence, whether the principle of judicial independence, enshrined in Article 19 TEU and Article 47 of the Charter, must be interpreted as precluding the President of the NOJ from appointing the president of a court, by circumventing the applications procedure for judges and having recourse to direct temporary appointments, bearing in mind that the president of a court is empowered, inter alia, to decide on the allocation of cases, to commence disciplinary proceedings against judges and to assess judicial performance and, if the answer is in the affirmative, whether the proceedings before a court so presided over are fair. By his third question, the referring judge asks, in essence, whether the principle of judicial independence must be interpreted as precluding a remuneration system which provides that judges receive lower remuneration than prosecutors of the same category and allows discretionary bonuses to be awarded to judges and, if so, whether that principle must be interpreted as meaning that the right to a fair trial cannot be guaranteed in such circumstances.

140 Since the admissibility of those questions is disputed by the Hungarian Government and by the Commission on the ground, in essence, that neither the interpretation of Article 19 TEU nor that of Article 47 of the Charter is relevant for the purposes of resolving the dispute in the main proceedings, it should be recalled that, as is apparent from the actual wording of Article 267 TFEU, the question referred for a preliminary ruling must be 'necessary' to enable the referring court to 'give judgment' in the case before it (judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 45 and the case-law cited).

141 The Court has thus repeatedly held that it is clear from both the wording and the scheme of Article 267 TFEU that a national court or tribunal is not empowered to bring a matter before the Court by way of a request for a

preliminary ruling unless a case is pending before it in which it is called upon to give a decision which is capable of taking account of the preliminary ruling (judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 46 and the case-law cited).

142 In such proceedings, there must therefore be a connecting factor between that dispute and the provisions of EU law whose interpretation is sought, by virtue of which that interpretation is objectively required for the decision to be taken by the referring court (judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 48 and the case-law cited).

143 In the present case, it is not apparent from the order for reference that there is a connecting factor between the provisions of EU law to which the second and third questions referred for a preliminary ruling relate and the dispute in the main proceedings, which makes it necessary to have the interpretation sought so that the referring judge may, by applying the guidance provided by such an interpretation, make the decision needed to rule on that dispute (see, by analogy, judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 52 and the case-law cited).

144 First, as the Advocate General also observed in points 90 and 91 of his Opinion, the main proceedings do not concern the Hungarian judicial system as a whole, of which some aspects may undermine the independence of the judiciary and, more particularly, that of the referring court in its implementation of EU law. In that regard, the fact that there may be a material connection between the substance of the main proceedings and Article 47 of the Charter, if not more broadly with Article 19 TEU, is not sufficient to satisfy the criterion of necessity, referred to in Article 267 TFEU. In order to do so, it would be necessary for the interpretation of those provisions, as requested in the second and third questions, to be objectively required for the decision on the merits of the main proceedings, which is not the case here.

145 Secondly, although the Court has already held admissible questions referred for a preliminary ruling on the interpretation of procedural provisions of EU law which the referring court concerned is required to apply in order to deliver its judgment (see, to that effect, judgment of 17 February 2011, *Weryński*, C-283/09, EU:C:2011:85, paragraphs 41 and 42), that is not the scope of the second and third questions raised in the present case (see, by analogy, judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 50).

146 Thirdly, an answer by the Court to those questions does not appear capable of providing the referring court with an interpretation of EU law which would allow it to resolve procedural questions of national law before being able to rule on the substance of the dispute before it (see, by analogy, judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 51).

147 It follows from all the foregoing that the second and third questions are inadmissible.

Costs

148 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 267 TFEU must be interpreted as precluding the supreme court of a Member State from declaring, following an appeal in the interests of the law, that a request for a preliminary ruling which has been submitted to the Court under Article 267 TFEU by a lower court is unlawful on the ground that the questions referred are not relevant and necessary for the resolution of the dispute in the main proceedings, without, however, altering the legal effects of the decision containing that request. The principle of the primacy of EU law requires that lower court to disregard such a decision of the national supreme court.**

2. **Article 267 TFEU must be interpreted as precluding disciplinary proceedings from being brought against a national judge on the ground that he or she has made a reference for a preliminary ruling to the Court of Justice under that provision.**

3. **Article 5 of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings must be interpreted as requiring Member States to take concrete measures in order to ensure that the quality of the interpretation and translations provided is sufficient to enable the suspect or accused person to understand the accusation against him or her and in order that that interpretation can be reviewed by the national courts.**

Article 2(5) of Directive 2010/64 and Article 4(5) and Article 6(1) of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, read in the light of Article 48(2) of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding a person from being tried *in absentia* when, on account of inadequate interpretation, he or she has not been informed, in a language which he or she understands, of the accusation against him or her or where it is impossible to ascertain the quality of the interpretation provided and therefore to establish that he or she has been informed, in a language which he or she understands, of the accusation against him or her.

[Signatures]

JUDGMENT OF THE COURT (Grand Chamber)

17 December 2020 (*)

(Reference for a preliminary ruling – Urgent preliminary ruling procedure – Police and judicial cooperation in criminal matters – European arrest warrant – Framework Decision 2002/584/JHA – Article 1(3) – Article 6(1) – Surrender procedures between Member States – Conditions for execution – Charter of Fundamental Rights of the European Union – Second paragraph of Article 47 – Right of access to an independent and impartial tribunal – Systemic or generalised deficiencies – Concept of 'issuing judicial authority' – Taking into consideration of developments after the European arrest warrant concerned has been issued – Obligation of the executing judicial authority to determine specifically and precisely whether there are substantial grounds for believing that the person concerned will run a real risk of breach of his or her right to a fair trial if he or she is surrendered)

In Joined Cases C-354/20 PPU and C-412/20 PPU,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands), made by decisions of 31 July and 3 September 2020, received at the Court on 31 July and 3 September 2020, in proceedings relating to the execution of European arrest warrants issued in respect of

L (C-354/20 PPU),

P (C-412/20 PPU),

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, M. Vilaras (Rapporteur), E. Regan, L. Bay Larsen, N. Piçarra and A. Kumin, Presidents of Chambers, T. von Danwitz, D. Šváby, S. Rodin, K. Jürimäe, L.S. Rossi, I. Jarukaitis and N. Jääskinen, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: M. Ferreira, Principal Administrator,

having regard to the requests of the Rechtbank Amsterdam (District Court, Amsterdam) of 31 July and 3 September 2020 that the references for a preliminary ruling be dealt with under the urgent procedure, pursuant to Article 107 of the Rules of Procedure of the Court,

having regard to the written procedure and further to the hearing on 12 October 2020,

after considering the observations submitted on behalf of:

– L, by M.A.C. de Bruijn and H.A.F.C. Tack, advocaten,

– P, by T.E. Korff and T. Mustafazade, advocaten,

– the Openbaar Ministerie, by K. van der Schaft and C.L.E. McGivern,

– the Netherlands Government, by M.K. Bulterman and J. Langer, acting as Agents,

– the Belgian Government (C-354/20 PPU), by M. Van Regemorter and M. Jacobs, acting as Agents,

– Ireland, by J. Quaney, acting as Agent, and by C. Donnelly, Barrister-at-Law,

– the Polish Government, by B. Majczyna, A. Dalkowska, J. Sawicka and S. Żyrek, acting as Agents,

– the European Commission, by P. Van Nuffel, J. Tomkin, K. Herrmann and S. Grünheid, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 November 2020,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 19(1) TEU, the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and Council Framework Decision 2002/584/JHA 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').

2 The requests have been made in proceedings in the Netherlands concerning the execution of two European arrest warrants issued respectively in Case C-354/20 PPU on 31 August 2015 by the Sąd Okręgowy w Poznaniu (Regional Court, Poznań, Poland) in connection with criminal proceedings in respect of L and, in Case C-412/20 PPU, on 26 May 2020 by the Sąd Okręgowy w Sieradzu (Regional Court, Sieradz, Poland), for the purposes of executing a custodial sentence imposed on P.

Legal context

European Union law

3 Recitals 5, 6 and 10 of Framework Decision 2002/584 read as follows:

'(5) The objective set for the [European] 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.

...

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

4 Article 1 of that 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 modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [TEU].'

5 Articles 3, 4 and 4a of Framework Decision 2002/584 set out the grounds for mandatory or optional non-execution of a European arrest warrant.

6 Article 6 of that framework decision, entitled 'Determination of the competent judicial authorities', provides:

'1. The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State.

2. The executing judicial authority shall be the judicial authority of the executing Member State which is competent to execute the European arrest warrant by virtue of the law of that State.

3. Each Member State shall inform the General Secretariat of the Council of the competent judicial authority under its law.'

7 Article 15 of Framework Decision 2002/584, entitled 'Surrender decision', states:

'1. The executing judicial authority shall decide, within the time limits and under the conditions defined in this Framework Decision, whether the person is to be surrendered.

2. 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.

3. The issuing judicial authority may at any time forward any additional useful information to the executing judicial authority.'

Netherlands law

8 Framework Decision 2002/584 was transposed into Netherlands law by the Wet tot implementatie van het kaderbesluit van de Raad van de Europese Unie betreffende het Europees aanhoudingsbevel en de procedures van overlevering tussen de lidstaten van de Europese Unie (Law implementing the Framework Decision of the Council of the European Union on the European arrest warrant and the surrender procedures between the Member States of the European Union) of 29 April 2004 (Stb. 2004, No 195), as last amended by the Law of 22 February 2017 (Stb. 2017, No 82).

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C-354/20 PPU

9 On 7 February 2020, the officier van justitie (representative of the public prosecution service, Netherlands) requested the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands) to execute a European arrest warrant issued on 31 August 2015 by the Sąd Okręgowy w Poznaniu (Regional Court, Poznań**)**.

10 That European arrest warrant is for the arrest and surrender of L, a Polish national who is not domiciled or permanently resident in the Netherlands, for the purposes of conducting a criminal prosecution in respect of drugs trafficking and possession of false identity documents.

11 The referring court examined the request for execution of the European arrest warrant at a public hearing on 10 March 2020. On 24 March 2020, it delivered an interlocutory judgment suspending the investigation in order to enable L and the public prosecution service to submit their written observations on the most recent

developments concerning the rule of law in Poland and their consequences as regards the obligations of that court arising from the judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586).

12 On 12 June 2020, at a public hearing held after L's and the public prosecution service's observations had been submitted, the referring court delivered a new interlocutory judgment, by which it requested the public prosecution service to refer certain questions to the judicial authority which issued the European arrest warrant in question. The latter replied, on 25 June and 7 July 2012, to the questions referred, with the exception of those concerning the Sąd Najwyższy (Izba Dyscyplinarna) (Supreme Court, Disciplinary Chamber, Poland), in respect of which it stated that the referring court should approach the Sąd Najwyższy (Supreme Court) directly.

13 At the request of the referring court, the public prosecution service again referred a question concerning the Sąd Najwyższy (Supreme Court) to the judicial authority which issued the European arrest warrant in question and, through Eurojust, to the Sąd Najwyższy (Supreme Court) itself, without, however, obtaining any answer.

14 The referring court refers to several recent developments in the light of which it has doubts as to the independence of the judiciary in Poland, including, in particular:

- the judgments of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982) and of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234);

- the judgment of the Sąd Najwyższy (Izba Pracy i Ubezpieczeń Społecznych) (Supreme Court, Chamber of Labour and Social Insurance) of 5 December 2019, in which that court, ruling in the dispute which gave rise to the request for a preliminary ruling in Case C-585/18, held that the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland) was not, in its current composition, an impartial body independent of the legislature and the executive;

- the action for failure to fulfil obligations brought by the European Commission against the Republic of Poland (Case C-791/19), and the order of 8 April 2020, *Commission* v *Poland* (C-791/19 R, EU:C:2020:277);

- the adoption on 20 December 2019 by the Republic of Poland of a new law on the system of justice, which entered into force on 14 February 2020 and led the Commission to initiate infringement proceedings on 29 April 2020 by sending that Member State a letter of formal notice concerning that new law and

- the holding of a hearing on 9 June 2020 before the Sąd Najwyższy (Izba Dyscyplinarna) (Supreme Court, Disciplinary Chamber) concerning the lifting of the criminal immunity of a Polish judge and the delivery of a judgment on the same date, according to official information received by the referring court.

15 The referring court considers, on the basis, inter alia, of those new matters, that the independence of the Polish courts, including of the court which issued the European arrest warrant at issue in the main proceedings, is not ensured. In the opinion of the referring court, Polish judges run the risk of being the subject of disciplinary proceedings before a body whose independence is not ensured, in particular where those judges determine whether a judge or a court satisfies the safeguards of independence required by EU law.

16 According to the referring court, in the first place, the question arises as to whether European Union law precludes an executing judicial authority from executing a European arrest warrant issued by an issuing judicial authority whose independence is no longer guaranteed, in the light of developments which occurred after that arrest warrant was issued.

17 In that regard, the referring court considers that it is apparent from the judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)* (C-508/18 and C-82/19 PPU, EU:C:2019:456, paragraph 74) that, even if the authority issuing a European arrest warrant were a judge or a court, that authority must be in a position to give assurances to the executing judicial authority that it acts independently in the execution of those of its responsibilities which are inherent in the issuing of such an arrest warrant. In addition, according to the referring court, a court which has issued a European arrest warrant must continue to satisfy that requirement even after that arrest warrant has been issued, since it could be called upon to carry out tasks that are intrinsically

linked to the issue of a European arrest warrant, such as the provision of supplementary or additional information, within the meaning of Article 15(2) and (3) of Framework Decision 2002/584, or of a guarantee as to the conditions of detention or reception of the person surrendered. The question whether the executing judicial authority must execute a European arrest warrant issued by an issuing judicial authority which may no longer satisfy the requirements of effective judicial protection has not yet been resolved by the Court.

18 In the second place, in the event that the first question referred for a preliminary ruling is answered in the negative, the referring court notes that it is apparent from the recent developments mentioned in paragraph 14 of this judgment that there are systemic and generalised deficiencies concerning the independence of the Polish judiciary, with the result that the right to an independent tribunal is no longer guaranteed for any person obliged to appear before a Polish court. The question therefore arises whether such a finding is sufficient in itself to justify non-execution of a European arrest warrant, without its being necessary to examine, as required by the judgment of 25 July 2018, *Minister for Justice and Equality* (C-216/18 PPU, EU:C:2018:586, paragraph 79), the personal situation of the person in respect of whom such an arrest warrant has been issued.

19 According to the referring court, that question must be answered in the affirmative, notwithstanding that judgment, which does not concern the situation where systemic and generalised deficiencies relating to the independence of the judiciary are such that the legislation of the issuing Member State no longer guarantees that independence.

20 In the third place, if the second question referred is answered in the negative, the referring court notes that although the question referred to the issuing judicial authority of the European arrest warrant at issue in the main proceedings, concerning the Sąd Najwyższy (Izba Dyscyplinarna) (Supreme Court, Disciplinary Chamber), has remained unanswered, it knows from other sources that the latter has continued to rule on cases concerning Polish judges even after the adoption of the order of the Court of 8 April 2020, *Commission* v *Poland* (C-791/19 R, EU:C:2020:277). In those circumstances, the referring court wonders whether that finding provides sufficient grounds for taking the view that there are substantial grounds for believing that the person in respect of whom a European arrest warrant such as that at issue in the main proceedings has been issued will run a real risk of breach of his fundamental right to a fair trial, even if his personal situation, the nature of the offences in respect of which he is being prosecuted and the factual context in which the arrest warrant is issued do not permit the presumption that the executive or legislature will exert pressure on the courts of the issuing Member State in order to influence the criminal proceedings initiated against him. In its view, that question must also be answered in the affirmative.

21 In those circumstances, the Rechtbank Amsterdam (District Court, Amsterdam) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Do Framework Decision [2002/584], the second paragraph of Article 19(1) TEU and/or the second paragraph of Article 47 of the Charter indeed preclude the executing judicial authority from executing a [European arrest warrant] issued by a court where the national legislation of the issuing Member State has been amended after that [European arrest warrant] was issued such that the court no longer meets the requirements of effective or actual judicial protection since that legislation no longer guarantees the independence of that court?

(2) Do Framework Decision [2002/584] and the second paragraph of Article 47 of the Charter indeed preclude the executing judicial authority from executing a [European arrest warrant] when it has established that there is a real risk in the issuing Member State of breach of the fundamental right to an independent tribunal for any suspected person – and thus also for the requested person – irrespective of which courts of that Member State have jurisdiction over the proceedings to which the requested person will be subject and irrespective of the requested person’s personal situation, the nature of the offence for which he is being prosecuted and the factual context that forms the basis of the [European arrest warrant], where that real risk is related to the fact that the courts of the issuing Member State are no longer independent on account of systemic and generalised deficiencies?

(3) Do Framework Decision [2002/584] and the second paragraph of Article 47 of the Charter indeed preclude the executing judicial authority from executing a [European arrest warrant] when it has established that:

– there is a real risk in the issuing Member State of breach of the fundamental right to a fair trial for any suspected person, where that risk is connected with systemic and generalised deficiencies relating to the independence of that Member State's judiciary,

– those systemic and generalised deficiencies are therefore not only liable to have negative consequences, but actually do have such consequences for the courts of that Member State with jurisdiction over the proceedings to which the requested person will be subject, and

– there are therefore serious and established grounds for believing that the requested person runs a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial,

even though, aside from those systemic and generalised deficiencies, the requested person has not expressed any specific concerns, and even though the requested person's personal situation, the nature of the offences for which he is being prosecuted and the context that forms the basis of the [European arrest warrant], aside from those systemic and generalised deficiencies, do not give rise to fears that the executive and/or legislature will exert concrete pressure on or influence his trial?'

Case C-412/20 PPU

22 On 23 June 2020, the public prosecution service requested the Rechtbank Amsterdam (District Court, Amsterdam) to execute a European arrest warrant issued on 26 May 2020 by the Sąd Okręgowy w Sieradzu (Regional Court, Sieradz).

23 That European arrest warrant is for the arrest and surrender of P, for the purposes of the execution of the balance of a custodial sentence imposed on P by a judgment of the Sąd Rejonowy w Wieluniu (District Court, Wieluń, Poland) of 18 July 2019. The referring court states that P was convicted on various counts of threatening behaviour and ill-treatment, all of which he committed within a period of 5 years after serving a custodial sentence equal to or greater than six months which had been imposed on him for similar offences.

24 The referring court makes reference to the grounds relied on in the request for a preliminary ruling which is the subject of Case C-354/20 PPU. That court states that, in its view, a court which issues a European arrest warrant must satisfy the conditions necessary to ensure effective judicial protection both where the surrender of the requested person is sought for the purpose of criminal prosecution and where it is sought for the purpose of the execution of a custodial sentence. It adds that, in Case C-412/20 PPU, the European arrest warrant at issue in the main proceedings was issued after the recent developments mentioned in paragraph 15 of this judgment.

25 In those circumstances, the Rechtbank Amsterdam (District Court, Amsterdam) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Do Framework Decision [2002/584], the second subparagraph of Article 19(1) [TEU] and/or the second paragraph of Article 47 of the [Charter] indeed preclude an executing judicial authority from executing a European arrest warrant issued by a court in the case where that court does not meet the requirements of effective judicial protection/actual judicial protection, and at the time of issuing the European arrest warrant already no longer met those requirements, because the legislation in the issuing Member State does not guarantee the independence of that court, and at the time of issuing the European arrest warrant already no longer guaranteed that independence?'

Procedure before the Court

26 The referring court requested that this request for a preliminary ruling be dealt with under the urgent procedure provided for in Article 107 of the Court's Rules of Procedure. In support of its requests, it relied on the fact that both L and P are currently deprived of their liberty.

27 It should be noted, in the first place, that these requests for a preliminary ruling concern, inter alia, the interpretation of Framework Decision 2002/584, which falls within the scope of the fields referred to in Title V of

Part Three of the FEU Treaty on the area of freedom, security and justice. They may therefore be dealt with under the urgent preliminary ruling procedure.

28 In the second place, it is necessary, according to the case-law of the Court, to take into account the fact that the person concerned in the case in the main proceedings is currently deprived of his liberty and that the question whether he may continue to be held in custody depends on the outcome of the dispute in the main proceedings (judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*), C-508/18 and C-82/19 PPU, EU:C:2019:456, paragraph 38 and the case-law cited).

29 According to the explanations provided by the referring court, the detention measure to which L is subject was ordered in the context of the execution of the European arrest warrant issued in respect of him. As regards P, although the referring court stated that, when the reference for a preliminary ruling in Case C-412/20 PPU was communicated to the Court, he was still being held in custody pursuant to a custodial sentence imposed by a Netherlands court, it nevertheless specified that that custody would end on 20 October 2020 and that, from the following day, P would be held in custody for the purposes of the execution of the European arrest warrant issued in respect of him.

30 In those circumstances, the Fourth Chamber of the Court, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decided, on 12 August and 10 September 2020, respectively, to accede to the referring court's requests that the present references for a preliminary ruling be dealt with under the urgent preliminary ruling procedure.

31 That chamber also decided to remit Cases C-354/20 PPU and C-412/20 PPU to the Court for them be assigned to the Grand Chamber.

32 By decision of the Court of 15 September 2020, Cases C-354/20 PPU and C-412/20 PPU were joined for the purposes of the oral part of the procedure and of the judgment, in view of the connection between them.

Consideration of the questions referred

33 By its questions in these two cases, which it is appropriate to examine together, the referring court asks, in essence, whether Article 6(1) and Article 1(3) of Framework Decision 2002/584 must be interpreted as meaning that, where the executing judicial authority, called upon to decide whether a person in respect of whom a European arrest warrant has been issued is to be surrendered, has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the Member State that issues that arrest warrant which existed at the time of issue of that warrant or which arose after that issue, that authority may deny the status of 'issuing judicial authority' to the court which issued that arrest warrant and may presume that there are substantial grounds for believing that that person will, if he or she is surrendered to that Member State, run a real risk of breach of his or her fundamental right to a fair trial, guaranteed by the second paragraph of Article 47 of the Charter, without carrying out a specific and precise verification which would take account of, inter alia, his or her personal situation, the nature of the offence in question and the factual context in which that warrant was issued.

34 In order to answer the questions referred, it is necessary, in the first place, to determine whether Article 6(1) of Framework Decision 2002/584 must be interpreted as meaning that an executing judicial authority may deny the status of 'issuing judicial authority', within the meaning of that provision, to the court which issued a European arrest warrant on the sole ground that it has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State which existed at the time of the issue of that arrest warrant or which arose after that issue.

35 In that regard, it should be noted that both the principle of mutual trust between the Member States and the principle of mutual recognition, which is itself based on the mutual trust between the latter, are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly as regards the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (Opinion 2/13 of

18 December 2014, EU:C:2014:2454, paragraph 191, and judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, EU:C:2019:456, paragraph 43).

36 In particular, as far as concerns Framework Decision 2002/584, it is clear from recital 6 thereof that the European arrest warrant established by that 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'. As the Court has observed, that principle is applied in Article 1(2) thereof which lays down the rule that Member States are required to execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of that framework decision (judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 41).

37 It follows that executing judicial authorities may therefore, in principle, refuse to execute such a warrant only on the grounds for non-execution exhaustively listed by Framework Decision 2002/584 and that execution of the warrant may be made subject only to one of the conditions exhaustively laid down in Article 5 thereof. Accordingly, while execution of the European arrest warrant constitutes the rule, refusal to execute is intended to be an exception which must be interpreted strictly (judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 41 and the case-law cited).

38 However, the principle of mutual recognition proceeds from the assumption that only European arrest warrants, within the meaning of Article 1(1) of Framework Decision 2002/584, must be executed in accordance with the provisions of that decision, which requires that such a warrant, which is classified in that provision as a 'judicial decision', be issued by a 'judicial authority' within the meaning of Article 6(1) of that framework decision (judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, EU:C:2019:456, paragraph 46 and the case-law cited). That latter term implies that the authority concerned acts independently in the execution of those of its responsibilities which are inherent in the issuing of a European arrest warrant (see, to that effect, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, EU:C:2019:456, paragraphs 74 and 88).

39 In that regard, it must be recalled that the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded (judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 48).

40 In those circumstances, it is for each Member State, in order to ensure the full application of the principles of mutual trust and mutual recognition which underpin the operation of the mechanism of the European arrest warrant established by Framework Decision 2002/584, to ensure, subject to final review by the Court, that the independence of its judiciary is safeguarded by refraining from any measure capable of undermining that independence.

41 Nonetheless, an executing judicial authority which has evidence of systemic or generalised deficiencies concerning the independence of the judiciary of the issuing Member State which existed at the time of issue of the European arrest warrant concerned or which arose after that issue cannot deny the status of 'issuing judicial authority', within the meaning of Article 6(1) of Framework Decision 2002/584, to all judges or all courts of that Member State acting by their nature entirely independently of the executive.

42 Indeed, the existence of such deficiencies does not necessarily affect every decision that the courts of that Member State may be led to adopt in each particular case.

43 An interpretation to the contrary would amount to extending the limitations that may be placed on the principles of mutual trust and mutual recognition beyond 'exceptional circumstances', within the meaning of the case-law referred to in paragraph 35 of this judgment, by leading to a general exclusion of the application of those principles in the context of European arrest warrants issued by the courts of the Member State concerned by those deficiencies.

44 Moreover, it would mean that no court of that Member State could any longer be regarded as a 'court or tribunal' for the purposes of the application of other provisions of EU law, in particular Article 267 TFEU (see, in that regard,

judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraphs 38 and 43).

45 The principles laid down in the judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)* (C-508/18 and C-82/19 PPU, EU:C:2019:456), which is mentioned by the referring court, cannot call into question the foregoing considerations.

46 In that judgment, the Court first of all recalled that the words 'judicial authority', contained in Article 6(1) of Framework Decision 2002/584, are not limited to designating only the judges or courts of a Member State, but must be construed as designating, more broadly, the authorities participating in the administration of criminal justice in that Member State, as distinct from, inter alia, ministries or police services which are part of the executive (judgment of 27 May 2019, *OG and PI (Lübeck and Zwickau Public Prosecutor's Offices)*, C-508/18 and C-82/19 PPU, EU:C:2019:456, paragraph 50).

47 The Court then held that the issuing judicial authority must be in a position to give assurances to the executing judicial authority that, as regards the guarantees provided by the legal order of the issuing Member State, it acts independently in the execution of those of its responsibilities which are inherent in the issuing of a European arrest warrant. That independence requires that there are statutory rules and an institutional framework capable of guaranteeing that the issuing judicial authority is not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, inter alia, to an instruction in a specific case from the executive (judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, EU:C:2019:456, paragraph 74).

48 The Court thus held that the public prosecutors' offices at issue in the cases which gave rise to that judgment did not satisfy the requirement of independence inherent in the concept of 'issuing judicial authority', within the meaning of Article 6(1) of Framework Decision 2002/584, not on the basis of material indicating the existence of systemic or generalised deficiencies concerning the independence of the judiciary of the Member State to which those public prosecutors belonged, but on account of statutory rules and an institutional framework, adopted by that Member State by virtue of its procedural autonomy, which made those public prosecutors' offices legally subordinate to the executive and thus exposed them to the risk of being subject to directions or instructions in a specific case from the executive in connection with the adoption of a decision to issue a European arrest warrant.

49 In European Union law, the requirement that courts be independent precludes the possibility that they may be subject to a hierarchical constraint or subordinated to any other body and that they may take orders or instructions from any source whatsoever (see, to that effect, judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 44; of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 63, and of 21 January 2020, *Banco de Santander*, C-274/14, EU:C:2020:17, paragraph 57).

50 In those circumstances, it cannot be inferred from the judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)* (C-508/18 and C-82/19 PPU, EU:C:2019:456), that systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, however serious, may be sufficient, on their own, to enable an executing judicial authority to consider that all the courts of that Member State fail to fall within the concept of an 'issuing judicial authority', within the meaning of Article 6(1) of Framework Decision 2002/584.

51 In the second place, it is necessary to determine whether Article 1(3) of Framework Decision 2002/584 must be interpreted as meaning that, where the executing judicial authority, which is called upon to decide whether a person in respect of whom a European arrest warrant has been issued is to be surrendered, has evidence of a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter, on account of systemic or generalised deficiencies concerning the independence of the judiciary of the issuing Member State, it may presume that there are substantial grounds for believing that that person will run such a risk if he or she is surrendered to that Member State, without carrying out a specific and precise verification which would take account of, inter alia, his or her personal situation, the nature of the offence in question and the factual context in which that warrant was issued.

52 In that regard, it should be recalled that, in the judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraph 79), the Court held that Article 1(3) of Framework Decision 2002/584 must be interpreted as meaning that, where the executing judicial authority, which is called upon to decide whether a person in respect of whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution is to be surrendered, has material, such as that set out in a reasoned proposal of the Commission adopted pursuant to Article 7(1) TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, that authority must determine, specifically and precisely, whether, having regard to his or her personal situation, to the nature of the offence for which he or she is being prosecuted and the factual context in which the European arrest warrant was issued, and in the light of the information provided by that Member State pursuant to Article 15(2) of that framework decision, there are substantial grounds for believing that that person will run such a risk if he or she is surrendered to that Member State.

53 It follows that the possibility of refusing to execute a European arrest warrant on the basis of Article 1(3) of Framework Decision 2002/584, as interpreted in that judgment, presupposes a two-step examination.

54 In the context of a first step, the executing judicial authority of the European arrest warrant in question must determine whether there is objective, reliable, specific and properly updated material indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary (see, to that effect, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 61).

55 In the context of a second step, that authority must determine, specifically and precisely, to what extent those deficiencies are liable to have an impact at the level of the courts of that Member State which have jurisdiction over the proceedings to which the requested person will be subject and whether, having regard to his or her personal situation, to the nature of the offence for which he or she is being prosecuted and the factual context in which that arrest warrant was issued, and in the light of any information provided by that Member State pursuant to Article 15(2) of Framework Decision 2002/584, there are substantial grounds for believing that that person will run such a risk if he or she is surrendered to that Member State (see, to that effect, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraphs 74 to 77).

56 It should be pointed out that, as was noted in paragraphs 53 to 55 of this judgment, the two steps of that examination involve an analysis of the information obtained on the basis of different criteria, with the result that those steps cannot overlap with one another.

57 It must be borne in mind in that regard that, as is apparent from recital 10 of Framework Decision 2002/584, implementation of the European arrest warrant mechanism may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 2 TEU, including that of the rule of law, determined by the European Council pursuant to Article 7(2) TEU, with the consequences set out in Article 7(3) TEU.

58 The Court has thus held that it is only if the European Council were to adopt a decision, such as that envisaged in the preceding paragraph, and the Council were then to suspend Framework Decision 2002/584 in respect of the Member State concerned that the executing judicial authority would be required to refuse automatically to execute any European arrest warrant issued by it, without having to carry out any specific assessment of whether the individual concerned runs a real risk that the essence of his or her fundamental right to a fair trial will be affected (judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 72).

59 To accept that systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, however serious they may be, give rise to the presumption that, with regard to the person in respect of whom a European arrest warrant has been issued, there are substantial grounds for believing that that person will run a real risk of breach of his or her fundamental right to a fair trial if he or she is surrendered to that Member State – which would justify the non-execution of that arrest warrant – would lead to an automatic refusal to execute any arrest warrant issued by that Member State and therefore to a de facto suspension of the

implementation of the European arrest warrant mechanism in relation to that Member State, whereas the European Council and the Council have not adopted the decisions envisaged in the preceding paragraph.

60 Consequently, in the absence of such decisions, although the finding by the executing judicial authority of a European arrest warrant that there are indications of systemic or generalised deficiencies so far as concerns the independence of the judiciary of the issuing Member State, or that there has been an increase in such deficiencies, must, as the Advocate General noted, in essence, in point 76 of his Opinion, prompt that authority to exercise vigilance, it cannot, however, rely on that finding alone in order to refrain from carrying out the second step of the examination referred to in paragraphs 53 to 55 of this judgment.

61 It is for that authority, in the context of that second step, to assess, where appropriate in the light of such an increase, whether, having regard to the personal situation of the person whose surrender is requested by the European arrest warrant concerned, the nature of the offence for which he or she is being prosecuted and the factual context in which the arrest warrant was issued, such as statements by public authorities which are liable to interfere with the way in which an individual case is handled, and having regard to information which may have been communicated to it by the issuing judicial authority pursuant to Article 15(2) of Framework Decision 2002/584, there are substantial grounds for believing that that person will run a real risk of breach of his or her right to a fair hearing once he or she has been surrendered to the issuing Member State. If that is the case, the executing judicial authority must refrain, pursuant to Article 1(3) of that framework decision, from giving effect to the European arrest warrant concerned. Otherwise, it must execute that warrant, in accordance with the obligation of principle laid down in Article 1(2) of that framework decision.

62 In that regard, it should also be added that the objective of the mechanism of the European arrest warrant is in particular to combat the impunity of a requested person who is present in a territory other than that in which he or she has allegedly committed an offence (see, to that effect, judgment of 6 December 2018, *IK (Execution of an additional sentence)*, C-551/18 PPU, EU:C:2018:991, paragraph 39).

63 That objective precludes an interpretation of Article 1(3) of Framework Decision 2002/584 according to which the existence of or increase in systemic or generalised deficiencies so far as concerns the independence of the judiciary in a Member State is sufficient, in itself, to justify a refusal to execute a European arrest warrant issued by a judicial authority of that Member State.

64 Such an interpretation would entail a high risk of impunity for persons who attempt to flee from justice after having been convicted of, or after they have been suspected of committing, an offence, even if there is no evidence, relating to the personal situation of those individuals, to suggest that they would run a real risk of breach of their fundamental right to a fair trial if they were surrendered to the Member State which issued the European arrest warrant concerned.

65 As regards the question whether the executing judicial authority must, where appropriate, take account of systemic or generalised deficiencies so far as concerns the independence of the judiciary in the issuing Member State which may have occurred after the issue of the European arrest warrant whose execution is sought, it must be recalled that, under Article 1(1) of Framework Decision 2002/584, a European arrest warrant may be issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, both for the purposes of conducting a criminal prosecution and for the purposes of executing a custodial sentence or detention order.

66 Where a European arrest warrant is issued by a Member State with a view to the surrender of a requested person for the purposes of conducting a criminal prosecution, such as that at issue in the main proceedings in Case C-354/20 PPU, the executing judicial authority must, in order to assess specifically and precisely whether in the particular circumstances of the case there are substantial grounds for believing that following that surrender that person will run a real risk of breach of his or her fundamental right to a fair trial, examine in particular to what extent the systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary are liable to have an impact at the level of that Member State's courts with jurisdiction over the proceedings to which that person will be subject (see, to that effect, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraphs 68 and 74). That examination therefore involves taking into consideration the impact of such deficiencies which may have arisen after the issue of the European arrest warrant concerned.

67 That will also be the case where a European arrest warrant is issued by a Member State with a view to the surrender of a requested person for the purposes of executing a custodial sentence or detention order when, following his or her possible surrender, he or she will be subject to new court proceedings, on account of the bringing of an action relating to the execution of that custodial sentence or that detention order or of an appeal against the judicial decision the execution of which is the subject of that European arrest warrant, as the case may be.

68 However, in the second case, the executing judicial authority must also examine to what extent the systemic or generalised deficiencies which existed in the issuing Member State at the time of issue of the European arrest warrant have, in the particular circumstances of the case, affected the independence of the court of that Member State which imposed the custodial sentence or detention order the execution of which is the subject of that European arrest warrant.

69 In the light of all the foregoing considerations, the answer to the questions referred is that Article 6(1) and Article 1(3) of Framework Decision 2002/584 must be interpreted as meaning that, where the executing judicial authority, which is called upon to decide whether a person in respect of whom a European arrest warrant has been issued is to be surrendered, has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the Member State that issues that arrest warrant which existed at the time of issue of that warrant or which arose after that issue, that authority cannot deny the status of 'issuing judicial authority' to the court which issued that arrest warrant and cannot presume that there are substantial grounds for believing that that person will, if he or she is surrendered to that Member State, run a real risk of breach of his or her fundamental right to a fair trial, guaranteed by the second paragraph of Article 47 of the Charter, without carrying out a specific and precise verification which takes account of, inter alia, his or her personal situation, the nature of the offence in question and the factual context in which that warrant was issued, such as statements by public authorities which are liable to interfere with how an individual case is handled.

Costs

70 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 6(1) and Article 1(3) 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, must be interpreted as meaning that, where the executing judicial authority, which is called upon to decide whether a person in respect of whom a European arrest warrant has been issued is to be surrendered, has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the Member State that issues that arrest warrant which existed at the time of issue of that warrant or which arose after that issue, that authority cannot deny the status of 'issuing judicial authority' to the court which issued that arrest warrant and cannot presume that there are substantial grounds for believing that that person will, if he or she is surrendered to that Member State, run a real risk of breach of his or her fundamental right to a fair trial, guaranteed by the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, without carrying out a specific and precise verification which takes account of, inter alia, his or her personal situation, the nature of the offence in question and the factual context in which that warrant was issued, such as statements by public authorities which are liable to interfere with how an individual case is handled.

[Signatures]

* Language of the case: Dutch.

JUDGMENT OF THE COURT (Grand Chamber)

22 February 2022 (*)

(Reference for a preliminary ruling – Urgent preliminary ruling procedure – Judicial cooperation in criminal matters – European arrest warrant – Framework Decision 2002/584/JHA – Article 1(3) – Surrender procedures between Member States – Conditions for execution – Charter of Fundamental Rights of the European Union – Second paragraph of Article 47 – Fundamental right to a fair trial before an independent and impartial tribunal previously established by law – Systemic or generalised deficiencies – Two-step examination – Criteria for application – Obligation of the executing judicial authority to determine, specifically and precisely, whether there are substantial grounds for believing that the person in respect of whom a European arrest warrant has been issued, if surrendered, runs a real risk of breach of his or her fundamental right to a fair trial before an independent and impartial tribunal previously established by law)

In Joined Cases C-562/21 PPU and C-563/21 PPU,

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands), made by decisions of 14 September 2021, received at the Court on 14 September 2021, in proceedings relating to the execution of European arrest warrants issued against

X (C-562/21 PPU)

Y (C-563/21 PPU)

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Arabadjiev, A. Prechal, C. Lycourgos, S. Rodin, I. Jarukaitis, N. Jääskinen (Rapporteur), I. Ziemele, J. Passer, Presidents of Chambers, M. Ilešič, J.-C. Bonichot, L.S. Rossi, A. Kumin and N. Wahl, Judges,

Advocate General: A. Rantos,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 16 November 2021,

after considering the observations submitted on behalf of:

– X, by N.M. Delsing and W.R. Jonk, advocaten,

– Openbaar Ministerie, by C.L.E. McGivern and K. van der Schaft,

– the Netherlands Government, by M.K. Bulterman and J. Langer, acting as Agents,

– Ireland, by J. Quaney, acting as Agent, and R. Kennedy, Senior Counsel,

– the Polish Government, by S. Żyrek, J. Sawicka and B. Majczyna, acting as Agents,

– the European Commission, by S. Grünheid, K. Herrmann, P. Van Nuffel and J. Tomkin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 December 2021,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 1(3) of Council Framework Decision 2002/584/JHA 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') as well as Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The requests have been made in proceedings in the Netherlands concerning the execution of two European arrest warrants issued respectively, in Case C-562/21 PPU, on 6 April 2021 by the Sąd Okręgowy w Lublinie (District Court, Lublin, Poland) for the purposes of executing a custodial sentence imposed on X and, in Case C-563/21 PPU, on 7 April 2021 by the Sąd Okręgowy w Zielonej Górze (District Court, Zielona Góra, Poland) for the purposes of conducting a criminal prosecution of Y.

Legal context

European Union law

3 Recitals 5, 6 and 10 of Framework Decision 2002/584 read as follows:

'(5) The objective set for the [European] 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.

...

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

4 Article 1 of that 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 modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [TEU].'

5 Articles 3, 4 and 4a of that framework decision set out the grounds for mandatory or optional non-execution of a European arrest warrant.

6 Article 8 of the framework decision specifies the content and form of the European arrest warrant.

7 Under Article 15 of Framework Decision 2002/584, entitled 'Surrender decision':

'1. The executing judicial authority shall decide, within the time limits and under the conditions defined in this Framework Decision, whether the person is to be surrendered.

2. 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.

3. The issuing judicial authority may at any time forward any additional useful information to the executing judicial authority.'

Netherlands law

8 Framework Decision 2002/584 was transposed into Netherlands law by the Wet tot implementatie van het kaderbesluit van de Raad van de Europese Unie betreffende het Europees aanhoudingsbevel en de procedures van overlevering tussen de lidstaten van de Europese Unie (Overleveringswet) (Law implementing the Framework Decision of the Council of the European Union on the European arrest warrant and the surrender procedures between the Member States of the European Union (Law on Surrender)) of 29 April 2004 (Stb. 2004, No 195), as amended by the Law of 17 March 2021 (Stb. 2021, No 155).

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C-562/21 PPU

9 The referring court, the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands) received a request to execute a European arrest warrant issued on 6 April 2021 by the Sąd Okręgowy w Lublinie (District Court, Lublin). That European arrest warrant is for the arrest and surrender of a Polish national, for the purposes of executing a two-year custodial sentence imposed on the person concerned by a final judgment of 30 June 2020 for extortion and threats of violence.

10 The person concerned has not consented to his surrender to the Republic of Poland. He is currently in custody in the Netherlands, pending the referring court's ruling on that surrender.

11 The referring court states that it identified no grounds that could prevent that surrender, except for that raised in the question referred to the Court for a preliminary ruling.

12 The referring court finds that since 2017 there have been systemic or generalised deficiencies relating to the independence of the judiciary in the issuing Member State. Those deficiencies, which already existed at the time the European arrest warrant referred to in paragraph 9 above was issued, have been further exacerbated. According to the referring court, there is consequently a real risk that, in the event of surrender to the issuing Member State, the person concerned would suffer a breach of his fundamental right to a fair trial guaranteed in the second paragraph of Article 47 of the Charter.

13 According to that court, those deficiencies affect, in particular, the fundamental right to a tribunal previously established by law, guaranteed by that provision.

14 That court finds that the deficiencies at issue result, inter alia, from the ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (Law amending the Law on the National Council of the Judiciary and certain other laws) of 8 December 2017 (Dz. U. of 2018, item 3) ('the Law of 8 December 2017'), which entered

into force on 17 January 2018 and, in particular, from the role of the Krajowa Rada Sądownictwa (the Polish National Council of the Judiciary; 'the KRS') in the appointment of members of the Polish judiciary.

15 In that regard, the referring court refers to the resolution adopted by the Sąd Najwyższy (Supreme Court, Poland) on 23 January 2020, in which the latter court found that the KRS, because it is subordinated directly to political authorities since the entry into force of the Law of 8 December 2017, is not an independent body. That lack of independence results in deficiencies in the judicial appointment procedure. With regard to the courts other than the Sąd Najwyższy (Supreme Court), the referring court states that it is apparent from that resolution that the panel of judges is unduly appointed, for the purposes of the Kodeks postępowania karnego (Polish Code of Criminal Procedure), where it includes a person appointed to the office of judge on application of the KRS, in accordance with the legislation that entered into force on 17 January 2018, in so far as the deficiency at issue leads, in the circumstances of the case, to a breach of the guarantees of independence and impartiality within the meaning of the Polish Constitution, Article 47 of the Charter and Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (ECHR).

16 The referring court refers also to the judgment of 15 July 2021, Commission v Poland (Disciplinary regime for judges) (C-791/19, EU:C:2021:596, paragraphs 108 and 110).

17 That court states, moreover, that it is aware of a list, established on 25 January 2020, containing the names of 384 judges appointed on application of the KRS since the entry into force of the Law of 8 December 2017. According to the referring court, it is likely that the number of such appointments has increased since.

18 In those circumstances, it finds that there is a real risk that one or more judges appointed on application of the KRS since the entry into force of the Law of 8 December 2017 have been involved in the criminal proceedings in respect of the person concerned.

19 In that respect, it explains that the person concerned is no longer able, since 14 February 2020, effectively to challenge the validity of the appointment of a judge or the lawfulness of the performance of that judge's judicial functions. Under the ustawa o zmianie ustawy – Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw (Law amending the Law on the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws) of 20 December 2019 (Dz. U. of 2020, item 190), which entered into force on 14 February 2020, Polish courts may not consider such matters.

20 In addition, the referring court points out that the European Court of Human Rights considers in its case-law that the right to a tribunal 'established by law', as is guaranteed by Article 6(1) ECHR, while being a 'stand-alone' right, has nevertheless a very close relationship with the guarantees of independence and impartiality laid down in that provision. The referring court refers in that respect to the criteria established by that case-law for the purpose of assessing whether irregularities in a judicial appointment procedure entail a breach of the right to a tribunal established by law, within the meaning of Article 6(1) ECHR (ECtHR, 1 December 2020, *Ástráðsson v. Iceland*, CE:ECHR:2020:1201JUD002637418, §§ 243 to 252, and ECtHR, 22 July 2021, *Reczkowicz v. Poland*, CE:ECHR:2021:0722JUD004344719, §§ 221 to 224).

21 It is unclear to the referring court whether those criteria should also be applied in the context of the execution of a European arrest warrant issued for the purposes of executing a custodial sentence or detention order.

22 In those circumstances, the Rechtbank Amsterdam (District Court, Amsterdam) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'What test should an executing judicial authority apply when deciding whether to execute [a European arrest warrant] for the purpose of executing a final custodial sentence or detention order when examining whether, in the issuing Member State, the trial resulting in the conviction was conducted in breach of the right to a tribunal previously established by law, where no effective remedy was available in that Member State for any breach of that right?'

Case C-563/21 PPU

23 The referring court also received a request to execute a European arrest warrant issued on 7 April 2021 by the Sąd Okręgowy w Zielonej Górze (District Court, Zielona Góra). That European arrest warrant seeks the arrest and surrender of a Polish national for the purposes of conducting a criminal prosecution.

24 The person concerned, who has not consented to his surrender to the Republic of Poland, is remanded in custody in the Netherlands, pending the referring court's ruling on that surrender.

25 The referring court notes that it identified no grounds that could prevent that surrender, except for that raised in the questions referred for a preliminary ruling in that case.

26 That court relies on the same grounds as those referred to in paragraphs 12 to 17 above, to which it refers in the request for a preliminary ruling which is the subject of Case C-562/21 PPU and on the basis of which it considers that systemic or generalised deficiencies relating to the independence of the judiciary in the issuing Member State affect, inter alia, the fundamental right of the person concerned to a tribunal previously established by law, guaranteed by the second paragraph of Article 47 of the Charter.

27 As regards the situation of the person whose surrender is sought in Case C-563/21 PPU, the referring court considers that there is a real risk that one or more judges appointed on application of the KRS since the entry into force of the Law of 8 December 2017, referred to in paragraph 14 above, would be called upon to hear the criminal case of the person concerned, if his surrender to the Republic of Poland for the purposes of conducting a criminal prosecution was authorised.

28 The referring court notes that it is factually impossible for a person whose surrender is sought for the purposes of conducting a criminal prosecution to bring an individual claim alleging irregularities that occurred in the appointment of one or more judges who will be called upon to hear his or her criminal case. Unlike a person whose surrender is sought for the purposes of executing a custodial sentence or detention order, a situation covered in Case C-562/21 PPU, a person whose surrender is sought for the purposes of conducting a criminal prosecution cannot indicate before the executing judicial authority, by reason of the manner in which cases are randomly allocated among the Polish courts, the composition of the panel of judges who will be called upon to hear that person's criminal case after his or her surrender. Furthermore, because of the entry into force, on 14 February 2020, of the law of 20 December 2019 referred to in paragraph 19 above, that person cannot challenge effectively, after his or her surrender to the Republic of Poland, the validity of the appointment of a judge or the lawfulness of the performance of that judge's judicial functions.

29 Furthermore, as regards the case-law of the European Court of Human Rights, referred to in paragraph 20 above, the referring court asks whether the criteria applied by that court in order to assess whether irregularities in a judicial appointment procedure entail a breach of the right to a tribunal established by law, within the meaning of Article 6(1) ECHR, must also be applied in the context of the execution of a European arrest warrant for the purposes of conducting a criminal prosecution.

30 Lastly, the referring court has doubts as to whether the criteria laid down in the judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice) (C-216/18 PPU, EU:C:2018:586), and confirmed by the judgment of 17 December 2020, Openbaar Ministerie (Independence of the issuing judicial authority) (C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033), apply to the assessment of whether, in the event of surrender, the person concerned runs a real risk of breach of his or her fundamental right to a tribunal previously established by law and, if so, how these criteria should be applied.

31 In those circumstances, the Rechtbank Amsterdam (District Court, Amsterdam) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is it appropriate to apply the test set out in the judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice) (C-216/18 PPU, EU:C:2018:586), and affirmed in the judgment of 17 December 2020, Openbaar Ministerie (Independence of the issuing judicial authority) (C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033), where there is a real risk that the person concerned will stand trial before a court not previously established by law?

(2) Is it appropriate to apply the test set out in the judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice) (C-216/18 PPU, EU:C:2018:586), and affirmed in the judgment of

17 December 2020, Openbaar Ministerie (Independence of the issuing judicial authority) (C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033), where the requested person seeking to challenge his [or her] surrender cannot meet that test by reason of the fact that it is not possible at that point in time to establish the composition of the courts before which he [or she] will be tried by reason of the manner in which cases are randomly allocated?

(3) Does the absence of an effective remedy to challenge the validity of the appointment of judges in Poland, in circumstances where it is apparent that the requested person cannot at this point in time establish that the courts before which he [or she] will be tried will be composed of judges not validly appointed, amount to a breach of the essence of the right to a fair trial, thus requiring the executing judicial authority to refuse the surrender of the requested person?'

Procedure before the Court

32 The referring court requested that the present references for a preliminary ruling be dealt with under the urgent procedure provided for in Article 107 of the Rules of Procedure of the Court of Justice.

33 In support of its request, the referring court notes that the questions referred concern an area covered in Title V of Part Three of the FEU Treaty, that X and Y are currently deprived of liberty and that the Court's answer to those questions will have a direct and decisive influence on the duration of the detention of the persons concerned.

34 According to the Court's case-law, it is necessary to take into consideration the fact that the person concerned in the main proceedings is currently deprived of liberty and that the question as to whether that person may continue to be held in custody depends on the outcome of the dispute in the main proceedings (judgment of 26 October 2021, Openbaar Ministerie (Right to be heard by the executing judicial authority), C-428/21 PPU and C-429/21 PPU, EU:C:2021:876, paragraph 32 and the case-law cited).

35 In the present case, as is apparent from the orders for reference, the persons concerned are currently remanded in custody and the Court's answer to the questions referred will have a direct and decisive influence on the duration of that detention.

36 In those circumstances, the First Chamber of the Court, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decided, on 29 September 2021, to grant the referring court's requests that the present references for a preliminary ruling be dealt with under the urgent preliminary ruling procedure.

37 The First Chamber of the Court also decided to remit Cases C-562/21 PPU and C-563/21 PPU to the Court for them to be assigned to the Grand Chamber.

38 By decision of the President of the Court of Justice of 29 September 2021, Cases C-562/21 PPU and C-563/21 PPU were joined for the purposes of the written and oral parts of the procedure and the judgment.

Consideration of the questions referred

39 By its single question in Case C-562/21 PPU and its three questions in Case C-563/21 PPU, which it is appropriate to examine together, the referring court asks, in essence, whether Article 1(2) and (3) of Framework Decision 2002/584 must be interpreted as meaning that, where the executing judicial authority called upon to decide on the surrender of a person in respect of whom a European arrest warrant has been issued has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State, in particular as regards the procedure for the appointment of the members of the judiciary, that authority may refuse to surrender that person, by reason of the fact that, in the event of such surrender, there is a real risk of breach of that person's fundamental right to a fair trial before a tribunal previously established by law, enshrined in the second paragraph of Article 47 of the Charter, where:

– in the context of a European arrest warrant issued for the purposes of executing a custodial sentence or detention order, no effective judicial remedy is available for any breach of that fundamental right during the procedure which led to that person's conviction and

– in the context of a European arrest warrant issued for the purposes of conducting a criminal prosecution, the person concerned cannot determine, at the time of that surrender, the composition of the panel of judges before which that person will be tried, by reason of the manner in which cases are randomly allocated among the courts concerned, and there is no effective remedy in the issuing Member State to challenge the validity of the judicial appointment.

Preliminary observations

40 It is important to recall, first of all, that both the principle of mutual trust between the Member States and the principle of mutual recognition, which is itself based on the mutual trust between the latter, are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly as regards the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (judgment of 26 October 2021, Openbaar Ministerie (Right to be heard by the executing judicial authority), C-428/21 PPU and C-429/21 PPU, EU:C:2021:876, paragraph 37 and the case-law cited).

41 Thus, when Member States implement EU law, they may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but also, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the European Union (Opinion 2/13 *(Accession of the European Union to the ECHR)* of 18 December 2014, EU:C:2014:2454, paragraph 192).

42 In that respect, Framework Decision 2002/584 seeks, by the establishment of a simplified and effective system for the surrender of persons convicted or suspected of having infringed criminal law, to facilitate and accelerate judicial cooperation with a view to contributing to the attainment of the objective set for the European Union of becoming an area of freedom, security and justice, and has as its basis the high level of trust which must exist between the Member States (judgment of 26 October 2021, Openbaar Ministerie (Right to be heard by the executing judicial authority), C-428/21 PPU and C-429/21 PPU, EU:C:2021:876, paragraph 38 and the case-law cited).

43 The principle of mutual recognition, which, according to recital 6 of Framework Decision 2002/584, constitutes the 'cornerstone' of judicial cooperation in criminal matters, is expressed in Article 1(2) thereof which lays down the rule that Member States are required to execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of the framework decision (judgment of 26 October 2021, Openbaar Ministerie (Right to be heard by the executing judicial authority), C-428/21 PPU and C-429/21 PPU, EU:C:2021:876, paragraph 40 and the case-law cited).

44 It follows that executing judicial authorities may therefore, in principle, refuse to execute such a European arrest warrant only on the grounds for non-execution exhaustively listed by that framework decision and that execution of the warrant may be made subject only to one of the conditions exhaustively laid down in Article 5 thereof. Accordingly, while execution of the European arrest warrant constitutes the rule, refusal to execute is intended to be an exception which must be interpreted strictly (judgments of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C-216/18 PPU, EU:C:2018:586, paragraph 41 and the case-law cited, and of 17 December 2020, Openbaar Ministerie (Independence of the issuing judicial authority), C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033, paragraph 37).

45 That said, the high level of trust between Member States on which the European arrest warrant mechanism is based is thus founded on the premiss that the criminal courts of the other Member States – which, following execution of a European arrest warrant, will have to conduct the criminal procedure for the purpose of prosecution, or of enforcement of a custodial sentence or detention order, and the substantive criminal proceedings – meet the requirements inherent in the fundamental right to a fair trial enshrined in the second paragraph of Article 47 of the Charter (see, to that effect, judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C-216/18 PPU, EU:C:2018:586, paragraph 58). That fundamental right is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded (see, to that effect, judgment of 17 December 2020, Openbaar Ministerie

(Independence of the issuing judicial authority), C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033, paragraph 39 and the case-law cited).

46 In those circumstances, while it is primarily for each Member State, in order to ensure the full application of the principles of mutual trust and mutual recognition which underpin the operation of that mechanism to ensure, subject to final review by the Court, that the requirements inherent in that fundamental right are safeguarded by refraining from any measure capable of undermining it (see, to that effect, judgment of 17 December 2020, Openbaar Ministerie (Independence of the issuing judicial authority), C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033, paragraph 40), the existence of a real risk that the person in respect of whom a European arrest warrant has been issued would, if surrendered to the issuing judicial authority, suffer a breach of that fundamental right is capable of permitting the executing judicial authority to refrain, exceptionally, from giving effect to that European arrest warrant on the basis of Article 1(3) of that framework decision (see, to that effect, judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C-216/18 PPU, EU:C:2018:586, paragraph 59).

47 Next, the Court has also stated that Framework Decision 2002/584, read in the light of the provisions of the Charter, cannot be interpreted in such a way as to call into question the effectiveness of the system of judicial cooperation between the Member States, of which the European arrest warrant, as provided for by the EU legislature, constitutes one of the essential elements (judgment of 26 October 2021, Openbaar Ministerie (Right to be heard by the executing judicial authority), C-428/21 PPU and C-429/21 PPU, EU:C:2021:876, paragraph 43 and the case-law cited).

48 The Court has thus held that, in order, in particular, to ensure that the operation of the European arrest warrant is not brought to a standstill, the duty of sincere cooperation laid down in the first subparagraph of Article 4(3) TEU must inform the dialogue between the executing judicial authorities and the issuing ones. It follows from the principle of sincere cooperation, inter alia, that the Member States are, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties (judgment of 26 October 2021, Openbaar Ministerie (Right to be heard by the executing judicial authority), C-428/21 PPU and C-429/21 PPU, EU:C:2021:876, paragraph 44 and the case-law cited).

49 Lastly, and following on from the foregoing considerations, the issuing and executing judicial authorities must, in order to ensure effective cooperation in criminal matters, make full use of the instruments provided for, inter alia, in Article 8(1) and Article 15 of Framework Decision 2002/584 in order to foster mutual trust on the basis of that cooperation (judgment of 6 December 2018, IK (Enforcement of an additional sentence), C-551/18 PPU, EU:C:2018:991, paragraph 63 and the case-law cited).

The conditions on which the executing judicial authority may refuse, on the basis of Article 1(3) of Framework Decision 2002/584, the surrender of a person in respect of whom a European arrest warrant has been issued on the ground that there is a real risk that that person, if surrendered to the issuing judicial authority, would suffer a breach of his or her fundamental right to a fair trial before a tribunal previously established by law

50 In the light, in particular, of the considerations set out in paragraphs 40 to 46 above, the Court held, with regard to Article 1(3) of Framework Decision 2002/584, that, where the executing judicial authority called upon to decide on the surrender of a person in respect of whom a European arrest warrant has been issued has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State, it cannot, however, presume that there are substantial grounds for believing that that person runs a real risk of breach of his or her fundamental right to a fair trial if surrendered to that Member State, without carrying out a specific and precise verification which takes account of, inter alia, that person's personal situation, the nature of the offence in question and the factual context in which that warrant was issued, such as statements or acts by public authorities which are liable to interfere with how an individual case is handled (see, to that effect, judgment of 17 December 2020, Openbaar Ministerie (Independence of the issuing judicial authority), C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033, paragraph 69).

51 Therefore, information regarding the existence of or increase in systemic or generalised deficiencies so far as concerns the independence of the judiciary in a Member State is not sufficient, in itself, to justify a refusal to execute such a warrant issued by a judicial authority of that Member State (see, to that effect, judgment of

17 December 2020, Openbaar Ministerie (Independence of the issuing judicial authority), C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033, paragraph 63).

52 In the context of the two-step examination referred to in paragraph 50 above and set out for the first time, in respect of the second paragraph of Article 47 of the Charter, in the judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice) (C-216/18 PPU, EU:C:2018:586, paragraphs 47 to 75), the executing judicial authority must, as a first step, determine whether there is objective, reliable, specific and duly updated material indicating that there is a real risk of breach, in the issuing Member State, of the fundamental right to a fair trial guaranteed by that provision, on account of systemic or generalised deficiencies so far as concerns the independence of that Member State's judiciary (judgment of 17 December 2020, Openbaar Ministerie (Independence of the issuing judicial authority), C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033, paragraph 54 and the case-law cited).

53 As a second step, the executing judicial authority must determine, specifically and precisely, to what extent the deficiencies identified in the first step are liable to have an impact at the level of the courts of that Member State which have jurisdiction over the proceedings in respect of the person concerned and whether, having regard to that person's personal situation, the nature of the offence for which he or she is prosecuted and the factual context in which that arrest warrant was issued, and having regard to any information provided by that Member State pursuant to Article 15(2) of Framework Decision 2002/584, there are substantial grounds for believing that that person will run such a risk if he or she is surrendered to the latter (see, to that effect, judgment of 17 December 2020, Openbaar Ministerie (Independence of the issuing judicial authority) , C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033, paragraph 55 and the case-law cited).

54 In the present case, the referring court asks, in essence, whether that two-step examination, which was established by the Court, in the judgments of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice) (C-216/18 PPU, EU:C:2018:586), and of 17 December 2020, Openbaar Ministerie (Independence of the issuing judicial authority) (C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033), under the guarantees of independence and impartiality inherent in the fundamental right to a fair trial enshrined in the second paragraph of Article 47 of the Charter, is applicable where the guarantee, also inherent in that fundamental right, of a tribunal previously established by law is at issue and, if so, what are the conditions and detailed rules for applying the said examination. In particular, it raises the question of the influence, on that examination in that respect, of the fact that a body such as the KRS, which is, for the most part, made up of members representing or chosen by the legislature or the executive, is involved in the appointment or career development of the members of the judiciary in the issuing Member State.

55 As regards the applicability of the two-step examination referred to in paragraphs 52 and 53 above, in the case referred to in the previous paragraph, it is necessary, in the first place, to stress the inextricable links which, according to the wording of the second paragraph of Article 47 of the Charter, exist, for the purposes of the fundamental right to a fair trial, within the meaning of that provision, between the guarantees of judicial independence and impartiality as well as that of access to a tribunal previously established by law.

56 It thus follows from the Court's case-law, developed in the light of that of the European Court of Human Rights, that, while the right to such a tribunal, which is guaranteed both by Article 6(1) ECHR and by the second paragraph of Article 47 of the Charter, constitutes an independent right, it is nevertheless inextricably linked to the guarantees of independence and impartiality flowing from those two provisions. More specifically, although all the requirements laid down by those provisions have specific aims which render them specific guarantees of a fair trial, those safeguards seek to observe the fundamental principles of the rule of law and the separation of powers. The need to maintain public confidence in the judiciary and to safeguard its independence vis-à-vis the other powers underlies each of those requirements (see, to that effect, judgment of 6 October 2021, W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment), C-487/19, EU:C:2021:798, paragraph 124 and the case-law cited).

57 As regards, more specifically, the judicial appointment procedure, the Court has held, again referring to the case-law of the European Court of Human Rights, that having regard to its fundamental implications for the proper functioning and the legitimacy of the judiciary in a democratic State governed by the rule of law, the procedure for the appointment of judges necessarily constitutes an inherent element of the concept of a 'tribunal established by law', within the meaning of Article 6(1) ECHR, while noting that the independence of a tribunal within the meaning of that provision, may be measured, inter alia, by the way in which its members are appointed

(see, to that effect, judgment of 6 October 2021, W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment), C-487/19, EU:C:2021:798, paragraph 125 and the case-law cited).

58 The Court has also pointed out that the guarantees of access to an independent and impartial tribunal previously established by law, and in particular those which determine what constitutes a tribunal and how it is composed, represent the cornerstone of the right to a fair trial. Checking whether, as composed, a court constitutes such a tribunal where a serious doubt arises on that point is necessary for the confidence which the courts in a democratic society must inspire in those subject to their jurisdiction (judgment of 6 October 2021, W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment), C-487/19, EU:C:2021:798, paragraph 126 and the case-law cited).

59 In the second place, it is important to note that to accept that an executing judicial authority may refrain from giving effect to a European arrest warrant merely because of a circumstance such as that mentioned in the second sentence of paragraph 54 above would lead to an interpretation of Article 1(3) of Framework Decision 2002/584 that fails to have regard to the case-law of the Court referred to in paragraphs 44 and 46 above.

60 Moreover, in the context of the interpretation of that provision, it is necessary to ensure not only respect for the fundamental rights of the persons whose surrender is requested, but also the taking into account of other interests, such as the need to respect, where appropriate, the fundamental rights of the victims of the offences concerned.

61 In that regard, the existence of rights of third parties in criminal proceedings implies, in the context of the European arrest warrant mechanism, a duty of cooperation on the part of the executing Member State. In addition, having regard to those rights, a finding that there is a real risk, if the person concerned is surrendered to the issuing Member State, of breach of that person's fundamental right to a fair trial must have a sufficient factual basis (see also, to that effect, ECtHR, 9 July 2019, *Castaño v. Belgium*, CE:ECHR:2019:0709JUD000835117, §§ 82, 83 and 85).

62 In the same vein, one of the objectives of Framework Decision 2002/584 is to combat impunity. If the existence of systemic or generalised deficiencies so far as concerns the independence of the judiciary in the issuing Member State were, in itself, sufficient to enable the executing judicial authority not to carry out the two-step examination referred to in paragraphs 52 and 53 above and to refuse to execute, on the basis of Article 1(3) of that framework decision, a European arrest warrant issued by the issuing Member State, that would entail a high risk of impunity for persons who attempt to flee from justice after having been convicted of, or after they have been suspected of committing, an offence, even if there is no evidence to suggest a real risk, if they were surrendered, of breach of their fundamental right to a fair trial (see, to that effect, judgment of 17 December 2020, Openbaar Ministerie (Independence of the issuing judicial authority), C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033, paragraph 64).

63 In the third place, the approach referred to in the preceding paragraph above would lead to a de facto suspension of the implementation of the European arrest warrant mechanism in respect of that Member State, in disregard of the competence of the European Council and the Council in that respect.

64 As recalled by the Court, that implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 2 TEU, including that of the rule of law, determined by the European Council pursuant to Article 7(2) TEU, with the consequences provided for in Article 7(3) TEU (judgment of 17 December 2020, Openbaar Ministerie (Independence of the issuing judicial authority), C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033, paragraph 57).

65 Therefore, it is only if the European Council were to adopt a decision and to suspend Framework Decision 2002/584 in respect of the Member State concerned that the executing judicial authority would be required to refuse automatically to execute any European arrest warrant issued by that Member State, without having to carry out any specific assessment of whether the individual concerned runs a real risk that the essence of his or her fundamental right to a fair trial will be affected (judgment of 17 December 2020, Openbaar Ministerie (Independence of the issuing judicial authority), C-354/20, EU:C:2020:1033, paragraph 58 and the case-law cited).

66 It follows from the considerations set out in paragraphs 55 to 65 above that the executing judicial authority is required to carry out the two-step examination referred to in paragraphs 52 and 53 above, in order to assess whether, if the person concerned is surrendered to the issuing Member State, that person runs a real risk of

breach of his or her fundamental right to a fair trial before a tribunal previously established by law, enshrined in the second paragraph of Article 47 of the Charter.

The first step of the examination

67 As a first step in that examination, the executing judicial authority must make a general assessment of whether there is a real risk of breach of the fundamental right to a fair trial, connected in particular with a lack of independence of the courts of the issuing Member State or a failure to comply with the requirement for a tribunal established by law, on account of systemic or generalised deficiencies in that Member State (see, to that effect, judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C-216/18 PPU, EU:C:2018:586, paragraph 61 and the case-law cited).

68 Such an assessment must be carried out having regard to the standard of protection of the fundamental right that is guaranteed by the second paragraph of Article 47 of the Charter (see, to that effect, judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C-216/18 PPU, EU:C:2018:586, paragraph 62 and the case-law cited).

69 In that respect, as regards, first, the requirements of independence and impartiality, which, as has been pointed out in paragraphs 55 to 58 above, are inextricably linked to that relating to a tribunal previously established by law, those requirements presuppose rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (see, to that effect, judgment of 16 November 2021, Prokuratura Rejonowa w Mińsku Mazowieckim and Others, C-748/19 to C-754/19, EU:C:2021:931, paragraph 67 and the case-law cited).

70 As regards appointment decisions, it is in particular necessary for the substantive conditions and detailed procedural rules governing the adoption of those decisions to be such that they cannot give rise to such reasonable doubts with respect to the judges appointed (judgment of 26 March 2020, Review of Simpson v Council and HG v Commission, C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, paragraph 71 and the case-law cited).

71 Secondly, as regards the requirement for a tribunal previously established by law, the Court has held, referring to the case-law of the European Court of Human Rights concerning Article 6 ECHR (ECtHR, 8 July 2014, *Biagioli v. San Marino*, CE:ECHR:2014:0708DEC000816213, §§ 72 to 74, and ECtHR, 2 May 2019, *Pasquini v. San Marino*, CE:ECHR:2019:0502JUD005095616, §§ 100 and 101 and the case-law cited), that the phrase 'established by law' reflects, inter alia, the principle of the rule of law. It covers not only the legal basis for the very existence of a tribunal, but also the composition of the panel of judges in each case and any other provision of domestic law which, if breached, would render irregular the participation of one or more judges in the examination of the case, including, in particular, provisions concerning the independence and impartiality of the members of the body concerned. Furthermore, the right to be judged by a tribunal 'established by law' encompasses, by its very nature, the judicial appointment procedure (see, to that effect, judgment of 26 March 2020, *Review of Simpson v Council and HG v Commission*, C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, paragraph 73).

72 As regards the criteria for assessing whether there has been a breach of the fundamental right to a tribunal previously established by law, within the meaning of the second paragraph of Article 47 of the Charter, it is important to note that not every irregularity in the judicial appointment procedure can be regarded as constituting such a breach.

73 An irregularity committed during the appointment of judges within the judicial system concerned entails such a breach, particularly when that irregularity is of such a kind and of such gravity as to create a real risk that other branches of the State, in particular the executive, could undermine the integrity of the outcome of the appointment procedure and thus give rise to reasonable doubt in the minds of individuals as to the independence and impartiality of the judge or judges concerned (see, to that effect, judgment of 6 October 2021, W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment), C-487/19, EU:C:2021:798, paragraph 130 and the case-law cited).

74 A finding that there has been a breach of the requirement for a tribunal previously established by law and the consequences of such a breach is subject to an overall assessment of a number of factors which, taken together, serve to create in the minds of individuals reasonable doubt as to the independence and impartiality of the judges (see, to that effect, judgments of 2 March 2021, A.B. and Others (Appointment of judges to the Supreme Court – Actions), C-824/18, EU:C:2021:153, paragraphs 131 and 132, and of 6 October 2021, W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment), C-487/19, EU:C:2021:798, paragraphs 152 to 154).

75 Thus, the fact that a body, such as a national council of the judiciary, which is involved in the procedure for the appointment of judges is, for the most part, made up of members chosen by the legislature cannot, in itself, give rise to any doubt as to the independence of the judges appointed at the end of that procedure (see, to that effect, judgment of 9 July 2020, Land Hessen, C-272/19, EU:C:2020:535, paragraphs 55 and 56). However, the situation may be different where that fact, combined with other relevant factors and the conditions under which those choices were made, leads to such doubts being raised (see, to that effect, judgment of 15 July 2021, Commission v Poland (Disciplinary regime for judges) (C-791/19, EU:C:2021:596, paragraph 103)).

76 The fact that a body made up, for the most part, made up of members representing or chosen by the legislature or the executive, intervenes in the judicial appointment procedure in the issuing Member State is therefore not sufficient, in itself, to justify a decision of the executing judicial authority refusing to surrender the person concerned.

77 It follows that, in the context of a surrender procedure linked to the execution of a European arrest warrant, the assessment of whether there is a real risk of breach of the fundamental right to a fair trial, connected in particular with a lack of independence of the courts of the issuing Member State or a failure to comply with the requirement for a tribunal previously established by law, on account of systemic or generalised deficiencies in that Member State, presupposes an overall assessment, on the basis of any evidence that is objective, reliable, specific and properly updated concerning the operation of that Member State's judicial system, in particular the general context of appointment of judges in that Member State.

78 In the present case, in addition to the information contained in a reasoned proposal addressed by the European Commission to the Council on the basis of Article 7(1) TEU (judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C-216/18 PPU, EU:C:2018:586, paragraph 61), the factors that are particularly relevant for the purposes of that assessment include, inter alia, those mentioned by the referring court, namely the resolution of the Sąd Najwyższy (Supreme Court) of 23 January 2020 and the Court's case-law, such as that resulting from the judgments of 19 November 2019, A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court) (C-585/18, C-624/18 and C-625/18, EU:C:2019:982), of 2 March 2021, A.B. and Others (Appointment of judges to the Supreme Court – Actions) (C-824/18, EU:C:2021:153), of 15 July 2021, Commission v Poland (Disciplinary regime for judges) (C-791/19, EU:C:2021:596), and of 6 October 2021, W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment) (C-487/19, EU:C:2021:798), which contain indications as to the state of operation of the issuing Member State's judicial system.

79 In the context of that assessment, the executing judicial authority may also take account of the case-law of the European Court of Human Rights, in which a breach of the requirement for a tribunal established by law in respect of the procedure for the appointment of judges has been established (see, inter alia, ECtHR, 22 July 2021, *Reczkowicz v. Poland*, CE:ECHR:2021:0722JUD004344719).

80 For the sake of completeness, it should also be added that those relevant factors also include constitutional case-law of the issuing Member State, which challenges the primacy of EU law and the binding nature of the ECHR as well as the binding force of judgments of the Court of Justice and of the European Court of Human Rights relating to compliance with EU law and with that convention of rules of that Member State governing the organisation of its judicial system, in particular the appointment of judges.

81 Where the executing judicial authority considers, on the basis of factors such as those referred to in paragraphs 78 to 80 above, that there is a real risk of breach of the fundamental right to a fair trial, connected in particular with a lack of judicial independence in the issuing Member State or a failure to comply with the requirement for a tribunal previously established by law, on account of systemic or generalised deficiencies in the issuing Member

State, it cannot refuse to execute a European arrest warrant without proceeding to the second step of the examination referred to in paragraphs 52 and 53 above.

The second step of the examination

82 As a second step, the executing judicial authority must assess whether the systemic or generalised deficiencies found in the first step of that examination are likely to materialise if the person concerned is surrendered to the issuing Member State and whether, in the particular circumstances of the case, that person thus runs a real risk of breach of his or her fundamental right to a fair trial before a tribunal previously established by law, enshrined in the second paragraph of Article 47 of the Charter.

83 It is for the person in respect of whom a European arrest warrant has been issued to adduce specific evidence to suggest, in the case of a surrender procedure for the purposes of executing a custodial sentence or detention order, that systemic or generalised deficiencies in the judicial system of the issuing Member State had a tangible influence on the handling of his or her criminal case and, in the case of a surrender procedure for the purposes of conducting a criminal prosecution, that such deficiencies are liable to have such an influence. The production of such specific evidence relating to the influence, in his or her particular case, of the abovementioned systemic or generalised deficiencies is without prejudice to the possibility for that person to rely on any ad hoc factor specific to the case in question capable of establishing that the proceedings for the purposes of which his or her surrender is requested by the issuing judicial authority will tangibly undermine his or her fundamental right to a fair trial.

84 In the event that the executing judicial authority considers that the evidence put forward by the person concerned, although suggesting that those systemic and generalised deficiencies have had, or are liable to have, a tangible influence in that person's particular case, is not sufficient to demonstrate the existence, in such a case, of a real risk of breach of the fundamental right to a tribunal previously established by law, and thus to refuse to execute the European arrest warrant in question, that authority must, pursuant to Article 15(2) of Framework Decision 2002/584, request the issuing judicial authority to furnish as a matter of urgency all the supplementary information that it deems necessary.

85 Since the issuing judicial authority is obliged to provide that information to the executing judicial authority (judgment of 25 July 2018, Generalstaatsanwaltschaft (Conditions of detention in Hungary), C-220/18 PPU, EU:C:2018:589, paragraph 64 and the case-law cited), any conduct showing a lack of sincere cooperation on the part of the issuing judicial authority may be regarded by the executing judicial authority as a relevant factor for the purposes of assessing whether the person whose surrender is requested, if surrendered, runs a real risk of breach of his or her right to a fair trial before a tribunal previously established by law, enshrined in the second paragraph of Article 47 of the Charter.

86 That said, and as regards, first, the case, covered in Case C-562/21 PPU, of a European arrest warrant issued with a view to surrender for the purposes of executing a custodial sentence or detention order, it is for the person whose surrender is sought to rely on specific factors on the basis of which he or she considers that the systemic or generalised deficiencies of the judicial system in the issuing Member State had a tangible influence on the criminal proceedings in his or her respect, in particular on the composition of the panel of judges who were called upon to hear the criminal case in question, with the result that one or more judges in that panel did not offer the guarantees of independence and impartiality required under EU law.

87 As is apparent from paragraphs 74 to 76 above, and contrary to the assertions of the Netherlands Government, information concerning the fact that one or more of the judges who participated in the proceedings that led to the conviction of the person whose surrender is sought were appointed on application of a body made up, for the most part, of members representing or chosen by the legislature or the executive, as is the case with the KRS since the entry into force of the Law of 8 December 2017, is not sufficient in that regard.

88 Therefore, the person concerned would also have to provide, as regards the panel of judges who heard his or her criminal case, information relating to, inter alia, the procedure for the appointment of the judge or judges concerned and their possible secondment, on the basis of which the executing judicial authority would be able to establish, in the circumstances of the case, that there are substantial grounds for considering that the composition of that panel of judges was such as to affect that person's fundamental right to a fair trial before an

independent and impartial tribunal previously established by law, enshrined in the second paragraph of Article 47 of the Charter, in the criminal proceedings in respect of that person.

89 Thus, for example, information which the executing judicial authority possesses and which refers to the secondment of a particular judge within the panel of judges hearing the criminal case concerning the person whose surrender is sought, secondment decided by the Minister for Justice on the basis of criteria not known in advance and revocable at any time by a decision which is not reasoned by that minister, may give rise to substantial grounds for concluding that there is a real risk of breach, in the specific case of the relevant person, of that fundamental right (see, by analogy, judgment of 16 November 2021, Prokuratura Rejonowa w Mińsku Mazowieckim and Others, C-748/19 to C-754/19, EU:C:2021:931, paragraphs 77 to 90).

90 In addition, any information relating to the course of the criminal proceedings that led to the conviction of the person concerned, such as, where appropriate, the possible exercise by that person of the legal remedies available to that person, is relevant. In particular, account must be taken of the possibility that that person may request, in the issuing Member State, the rejection of one or more members of the panel of judges for breach of that person's fundamental right to a fair trial, the possible exercise by that person of his or her right to request such rejection and the information obtained concerning the outcome of such a request in those proceedings or in any appeal proceedings.

91 In the present case, the Polish Government stated in its written observations, without being challenged on that point at the hearing, that Polish procedural law provides for the possibility that the person concerned may request the rejection of one of the judges, or of the panel of judges as a whole, called upon to hear the criminal case in respect of that person, if that person has doubts as to the independence or impartiality of one or more judges of the panel concerned.

92 However, there is nothing in the file before the Court in the present preliminary ruling procedure to support the conclusion, in the absence of more detailed information as to the state of national law and the various relevant provisions thereof, that the existence of the possibility that the person concerned may assert his or her rights was called into question by the mere circumstance, noted by the referring court and set out in paragraph 19 above, that, since the entry into force of the Law of 20 December 2019 on 14 February 2020, it is no longer possible effectively to challenge the validity of the appointment of a judge or the lawfulness of the performance of the judge's judicial functions.

93 As regards, secondly, the case, covered in Case C-563/21 PPU, of a European arrest warrant issued for the purposes of conducting a criminal prosecution, it must be pointed out that the fact, mentioned by the referring court, that the person whose surrender is sought cannot know, before his or her possible surrender, the identity of the judges who will be called upon to hear the criminal case to which that person may be subject after that surrender cannot in itself be sufficient for the purposes of refusing that surrender.

94 Nothing in the system created in Framework Decision 2002/584 permits the inference that the surrender of a person to the issuing Member State for the purposes of conducting a criminal prosecution is conditional on the assurance that such prosecution will result in criminal proceedings before a specific court, and even less so on the precise identification of the judges who will be called upon to hear that criminal case.

95 An interpretation to the contrary would render the second step of the examination referred to in paragraphs 52 and 53 above redundant and would undermine not only the attainment of the objective of Framework Decision 2002/584, recalled in paragraph 42 above, but also the mutual trust between the Member States which underpins the European arrest warrant mechanism established in that framework decision.

96 That said, in circumstances such as those at issue in Case C-563/21 PPU, where the composition of the panel of judges called upon to hear the case concerning the person in respect of whom the European arrest warrant has been issued is not known at the time when the executing judicial authority has to decide on the surrender of that person to the issuing Member State, that authority cannot, nevertheless, dispense with an overall assessment of the circumstances of the case, in order to determine, on the basis of the information provided by that person and supplemented, where appropriate, by the information provided by the issuing judicial authority, whether, in the event of surrender, there is a real risk of breach of that person's fundamental right to a fair trial before a tribunal previously established by law.

97 As the Advocate General observed, in essence, in point 63 of his Opinion, such information may, in particular, relate to statements made by public authorities which could have an influence on the specific case in question. The executing judicial authority may also rely on any other information which it considers relevant, such as that relating to the personal situation of the person concerned, the nature of the offence for which that person is prosecuted and the factual context in which the European arrest warrant concerned is issued, but also, where appropriate, on any other information available to it concerning the judges who make up the panels likely to have jurisdiction to hear the proceedings in respect of that person after his or her surrender to the issuing Member State.

98 In that regard, it must nevertheless be stated, following on from the considerations set out in paragraph 87 above, that information relating to the appointment, on application of a body made up, for the most part, of members representing or chosen by the legislature or the executive, as is the case with the KRS since the entry into force of the Law of 8 December 2017, of one or more judges sitting in the competent court or, where it is known, in the relevant panel of judges, is not sufficient to establish that the person concerned, if surrendered, runs a real risk of breach of his or her fundamental right to a fair trial before a tribunal previously established by law. Such a finding presupposes, in any event, a case-by-case assessment of the procedure for the appointment of the judge or judges concerned.

99 Similarly, if the executing judicial authority cannot exclude that the person in respect of whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution may, if surrendered, run a real risk of breach of that fundamental right solely on the ground that that person has, in the issuing Member State, the possibility of requesting the rejection of one or more members of the panel of judges who will be called upon to hear his or her criminal case, the existence of such a possibility may nevertheless be taken into account by that authority as a relevant factor for the purposes of assessing the existence of such a risk (see, by analogy, judgment of 25 July 2018, Generalstaatsanwaltschaft (Conditions of detention in Hungary), C-220/18 PPU, EU:C:2018:589, paragraph 117).

100 In that regard, the fact that such rejection may, where appropriate, be requested, in the context of a European arrest warrant issued for the purposes of conducting a criminal prosecution, only after the surrender of the person concerned and once that person has become aware of the composition of the panel of judges called upon to rule on the prosecution in respect of that person is irrelevant in the context of the assessment of whether there is a real risk that that person would suffer, if surrendered, a breach of that fundamental right.

101 If, following an overall assessment, the executing judicial authority finds that there are substantial grounds for believing that the person concerned, if surrendered, runs a real risk of breach of his or her fundamental right to a fair trial before an independent and impartial tribunal previously established by law, that authority must refrain, under Article 1(3) of Framework Decision 2002/584, from executing the European arrest warrant concerned. Otherwise, it must execute that warrant, in accordance with the obligation of principle laid down in Article 1(2) of that framework decision (see, to that effect, judgment of 17 December 2020, Openbaar Ministerie (Independence of the issuing judicial authority), C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033, paragraph 61).

102 In the light of all of the foregoing, the answer to the questions referred is that Article 1(2) and (3) of Framework Decision 2002/584 must be interpreted as meaning that, where the executing judicial authority called upon to decide on the surrender of a person in respect of whom a European arrest warrant has been issued has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State, in particular as regards the procedure for the appointment of the members of the judiciary, that authority may refuse to surrender that person:

- in the context of a European arrest warrant issued for the purposes of executing a custodial sentence or detention order, only if that authority finds that, in the particular circumstances of the case, there are substantial grounds for believing that, having regard inter alia to the information provided by that person relating to the composition of the panel of judges who heard his or her criminal case or to any other circumstance relevant to the assessment of the independence and impartiality of that panel, there has been a breach of that person's fundamental right to a fair trial before an independent and impartial tribunal previously established by law, enshrined in the second paragraph of Article 47 of the Charter, and

- in the context of a European arrest warrant issued for the purposes of conducting a criminal prosecution, only if that authority finds that, in the particular circumstances of the case, there are substantial grounds

for believing that, having regard inter alia to the information provided by the person concerned relating to his or her personal situation, the nature of the offence for which that person is prosecuted, the factual context surrounding that European arrest warrant or any other circumstance relevant to the assessment of the independence and impartiality of the panel of judges likely to be called upon to hear the proceedings in respect of that person, the latter, if surrendered, runs a real risk of breach of that fundamental right.

Costs

103 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 1(2) and (3) 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, must be interpreted as meaning that, where the executing judicial authority called upon to decide on the surrender of a person in respect of whom a European arrest warrant has been issued has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State, in particular as regards the procedure for the appointment of the members of the judiciary, that authority may refuse to surrender that person:

– **in the context of a European arrest warrant issued for the purposes of executing a custodial sentence or detention order, only if that authority finds that, in the particular circumstances of the case, there are substantial grounds for believing that, having regard inter alia to the information provided by that person relating to the composition of the panel of judges who heard his or her criminal case or to any other circumstance relevant to the assessment of the independence and impartiality of that panel, there has been a breach of that person's fundamental right to a fair trial before an independent and impartial tribunal previously established by law, enshrined in the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, and**

– **in the context of a European arrest warrant issued for the purposes of conducting a criminal prosecution, only if that authority finds that, in the particular circumstances of the case, there are substantial grounds for believing that, having regard inter alia to the information provided by the person concerned relating to his or her personal situation, the nature of the offence for which that person is prosecuted, the factual context surrounding that European arrest warrant or any other circumstance relevant to the assessment of the independence and impartiality of the panel of judges likely to be called upon to hear the proceedings in respect of that person, the latter, if surrendered, runs a real risk of breach of that fundamental right.**

[Signatures]

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* Language of the case: Dutch.

JUDGMENT OF THE COURT (First Chamber)

1 August 2022 (*)

(Reference for a preliminary ruling – Urgent preliminary ruling procedure – Judicial cooperation in criminal matters – Directive 2010/64/EU – Right to interpretation and translation – Article 2(1) and Article 3(1) – Concept of an 'essential document' – Directive 2012/13/EU – Right to information in criminal proceedings – Article 3(1)(d) – Scope – Not implemented in domestic law – Direct effect – Charter of Fundamental Rights of the European Union – Article 47 and Article 48(2) – European Convention for the Protection of Human Rights and Fundamental Freedoms – Article 6 – Suspended prison sentence with probation – Breach of the probation conditions – Failure to translate an essential document and absence of an interpreter when that document was being drawn up – Revocation of the suspension of the prison sentence – Failure to translate the procedural acts relating to that revocation – Consequences for the validity of that revocation – Procedural defect resulting in relative nullity)

In Case C-242/22 PPU,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal da Relação de Évora (Court of Appeal, Évora, Portugal), made by decision of 8 March 2022, received at the Court on 6 April 2022, in the criminal proceedings against

TL,

intervening parties:

Ministério Público,

THE COURT (First Chamber),

composed of A. Arabadjiev, President of the Chamber, K. Lenaerts, President of the Court, L. Bay Larsen, Vice-President of the Court, acting as Judges of the First Chamber, I. Ziemele (Rapporteur) and A. Kumin, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 27 June 2022,

after considering the observations submitted on behalf of:

– TL, by L.C. Esteves, advogado,

– the Portuguese Government, by P. Almeida, P. Barros da Costa and C. Chambel Alves, acting as Agents,

– the European Commission, by B. Rechena and M. Wasmeier, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 July 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 1 to 3 of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ 2010 L 280, p. 1) and of Article 3 of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ 2012 L 142, p. 1).

2 The request has been made in proceedings between TL and the Ministério Público (Public Prosecutor's Office, Portugal) concerning the consequences of the lack of assistance of an interpreter and the failure to translate various documents relating to the criminal proceedings against TL.

Legal context

European Union law

Directive 2010/64

3 Recitals 5 to 7, 9, 14, 17, 22 and 33 of Directive 2010/64 state:

'(5) Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[, signed in Rome on 4 November 1950, ("the ECHR")] and Article 47 of the Charter of Fundamental Rights of the European Union [("the Charter")] enshrine the right to a fair trial. Article 48(2) of the Charter guarantees respect for the rights of the defence. This Directive respects those rights and should be implemented accordingly.

(6) Although all the Member States are party to the ECHR, experience has shown that that alone does not always provide a sufficient degree of trust in the criminal justice systems of other Member States.

(7) Strengthening mutual trust requires a more consistent implementation of the rights and guarantees set out in Article 6 of the ECHR. It also requires, by means of this Directive and other measures, further development within the Union of the minimum standards set out in the ECHR and the Charter.

...

(9) Common minimum rules should lead to increased confidence in the criminal justice systems of all Member States, which, in turn, should lead to more efficient judicial cooperation in a climate of mutual trust. Such common minimum rules should be established in the fields of interpretation and translation in criminal proceedings.

...

(14) The right to interpretation and translation for those who do not speak or understand the language of the proceedings is enshrined in Article 6 of the ECHR, as interpreted in the case-law of the European Court of Human Rights. This Directive facilitates the application of that right in practice. To that end, the aim of this Directive is to ensure the right of suspected or accused persons to interpretation and translation in criminal proceedings with a view to ensuring their right to a fair trial.

...

(17) This Directive should ensure that there is free and adequate linguistic assistance, allowing suspected or accused persons who do not speak or understand the language of the criminal proceedings fully to exercise their rights of defence and safeguarding the fairness of the proceedings.

...

(22) Interpretation and translation under this Directive should be provided in the native language of the suspected or accused persons or in any other language that they speak or understand in order to allow them fully to exercise their right of defence, and in order to safeguard the fairness of the proceedings.

...

(33) The provisions of this Directive that correspond to rights guaranteed by the ECHR or the Charter should be interpreted and implemented consistently with those rights, as interpreted in the relevant case-law of the European Court of Human Rights and the Court of Justice of the European Union.'

4 Article 1 of Directive 2010/64, entitled 'Subject matter and scope', provides, in paragraphs 1 and 2 thereof:

'1. This Directive lays down rules concerning the right to interpretation and translation in criminal proceedings and proceedings for the execution of a European arrest warrant.

2. The right referred to in paragraph 1 shall apply to persons from the time that they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether they have committed the offence, including, where applicable, sentencing and the resolution of any appeal.'

5 Article 2 of that directive, entitled 'Right to interpretation', provides:

'1. Member States shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings.

2. Member States shall ensure that, where necessary for the purpose of safeguarding the fairness of the proceedings, interpretation is available for communication between suspected or accused persons and their legal counsel in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications.

...

5. Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for interpretation and, when interpretation has been provided, the possibility to complain that the quality of the interpretation is not sufficient to safeguard the fairness of the proceedings.

...'

6 Article 3 of that directive, entitled 'Right to translation of essential documents', provides:

'1. Member States shall ensure that suspected or accused persons who do not understand the language of the criminal proceedings concerned are, within a reasonable period of time, provided with a written translation of all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings.

2. Essential documents shall include any decision depriving a person of his liberty, any charge or indictment, and any judgment.

3. The competent authorities shall, in any given case, decide whether any other document is essential. Suspected or accused persons or their legal counsel may submit a reasoned request to that effect.

...

5. Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for the translation of documents or passages thereof and, when a translation has been provided, the possibility to complain that the quality of the translation is not sufficient to safeguard the fairness of the proceedings.

...'

7 Recitals 5, 7, 8, 10, 19, 25 and 40 to 42 of Directive 2012/13 state:

'(5) Article 47 of the [Charter] and Article 6 of the [ECHR] enshrine the right to a fair trial. Article 48(2) of the Charter guarantees respect for the rights of the defence.

...

(7) Although all the Member States are party to the ECHR, experience has shown that that alone does not always provide a sufficient degree of trust in the criminal justice systems of other Member States.

(8) Strengthening mutual trust requires detailed rules on the protection of the procedural rights and guarantees arising from the Charter and from the ECHR.

...

(10) Common minimum rules should lead to increased confidence in the criminal justice systems of all Member States, which, in turn, should lead to more efficient judicial cooperation in a climate of mutual trust. Such common minimum rules should be established in the field of information in criminal proceedings.

...

(19) The competent authorities should inform suspects or accused persons promptly of [their] rights ... In order to allow the practical and effective exercise of those rights, the information should be provided promptly in the course of the proceedings and at the latest before the first official interview of the suspect or accused person ...

...

(25) Member States should ensure that, when providing information in accordance with this Directive, suspects or accused persons are provided, where necessary, with translations or interpretation into a language that they understand, in accordance with the standards set out in Directive [2010/64].

...

(40) This Directive sets minimum rules. Member States may extend the rights set out in this Directive in order to provide a higher level of protection also in situations not explicitly dealt with in this Directive. The level of protection should never fall below the standards provided by the [ECHR] as interpreted in the case-law of the European Court of Human Rights.

(41) This Directive respects fundamental rights and observes the principles recognised by the Charter. In particular, this Directive seeks to promote the right to liberty, the right to a fair trial and the rights of the defence. It should be implemented accordingly.

(42) The provisions of this Directive that correspond to rights guaranteed by the ECHR should be interpreted and implemented consistently with those rights, as interpreted in the case-law of the European Court of Human Rights.'

8 Article 1 of Directive 2012/13, entitled 'Subject matter', is worded as follows:

'This Directive lays down rules concerning the right to information of suspects or accused persons, relating to their rights in criminal proceedings and to the accusation against them. ...'

9 Article 2 of that directive, entitled 'Scope', provides, in paragraph 1:

'This Directive applies from the time persons are made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or

accused person has committed the criminal offence, including, where applicable, sentencing and the resolution of any appeal.'

10 Article 3 of that directive, entitled 'Right to information about rights', provides:

'1. Member States shall ensure that suspects or accused persons are provided promptly with information concerning at least the following procedural rights, as they apply under national law, in order to allow for those rights to be exercised effectively:

...

(d) the right to interpretation and translation;

...

2. Member States shall ensure that the information provided for under paragraph 1 shall be given orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons.'

Portuguese law

11 Article 92 of the Código do processo penal (Code of Criminal Procedure; 'the CCP'), entitled 'Language of acts and appointment of an interpreter', provides, in paragraphs 1 and 2 thereof:

'1. The Portuguese language is to be used is to be used in both written and oral procedural acts, on pain of nullity.

2. Where a person with no knowledge or command of Portuguese is required to take part in proceedings, a suitable interpreter must be appointed, free of charge for that person.'

12 Under Article 120 of the CCP:

'1. Any nullity other than those referred to in the preceding article must be pleaded by the parties concerned and shall be subject to the rules laid down in the present article and in the following article.

2. In addition to those penalised in other legal provisions, the following situations shall constitute nullities which must be pleaded:

...

(c) failure to appoint an interpreter, in cases where the law deems it mandatory.

...

3. The nullities referred to in the preceding paragraphs must be pleaded:

(a) in the event of the nullity of an act at which the person concerned is present, before that act is finalised;

...'

13 Article 122 of the CCP, entitled 'Effects of nullity' provides, in paragraph 1 thereof:

'Nullities shall entail the invalidity of the act in which they are found, as well as that of ancillary acts which they may affect'.

14 Article 196 of the CCP, relating to the 'declaration of identity and residence' ('*Termo de Identidade e Residência*'; 'the DIR'), is worded as follows:

‘1. The judicial authority or criminal police body must, in the course of the procedure, require any person under investigation to make a [DIR], even if that person has already been identified …

2. The person under investigation shall indicate his or her place of residence, place of work or any other address of his choice.

3. The declaration must indicate that the following information and obligations have been communicated to the person whose criminal liability is being determined:

(a) the obligation to appear before the competent authority or to remain at that authority’s disposal where required by law or where the person has been duly notified;

(b) the obligation not to change residence or to be absent from that residence for more than five days without notifying the new address or the place where he or she may be located;

(c) that subsequent notifications will be effected by ordinary post to the address mentioned in paragraph 2, unless the person whose criminal liability is being determined notifies another address by an application delivered or sent by registered post to the registry where the case file is being held at that time;

(d) failure to comply with the provisions of the previous paragraphs will legitimise his or her representation by a lawyer in all the procedural acts in which he or she is entitled or required to participate in person, and the holding of the trial in his or her absence …;

(e) in the event of a conviction, the [DIR] shall lapse only when the sentence is spent.

…’

The dispute in the main proceedings and the question referred for a preliminary ruling

15 On 10 July 2019, TL, a Moldavian citizen who does not have a command of the Portuguese language, was placed under judicial investigation, in Portugal, in connection with the offences of resisting and coercing an official, reckless driving of a road vehicle and driving without a valid licence. The formal record of the placement under investigation was translated into Romanian, the official language of Moldova.

16 On the same day, the DIR was adopted by the competent authorities, without an interpreter being appointed and without that document being translated into Romanian.

17 By judgment of 11 July 2019, which became final on 26 September 2019, TL was sentenced to 3 years’ imprisonment, suspended for the same period with probation, an additional penalty prohibiting TL from driving motor vehicles for a period of 12 months and a fine of EUR 6 per day for 80 days, that is to say, a total of EUR 480. During the trial, TL was assisted by a lawyer and an interpreter.

18 With a view to implementing the probation scheme prescribed by the judgment of 11 July 2019, the competent authorities tried unsuccessfully to contact TL at the address stated in the DIR.

19 TL was then summoned to appear by an order of the Tribunal Judicial da Comarca de Beja (District Court, Beja, Portugal) of 7 January 2021, notified on 12 January 2021 to the address indicated in the DIR, in order to be heard in respect of his failure to comply with the conditions of the probation scheme prescribed by the judgment of 11 July 2019. On 6 April 2021, a further notification of that order was made at the same address. Those two notifications were made in Portuguese.

20 Since TL did not appear on the date indicated, that court, by order of 9 June 2021, revoked the suspension of the prison sentence. That order, which was notified on 25 June 2021 in Portuguese to TL at the address indicated in the DIR and to his lawyer, became final on 20 September 2021.

21 On 30 September 2021, TL was arrested at his new address for the purpose of enforcing his sentence. He has been imprisoned since that date.

22 On 11 October 2021, TL appointed a new lawyer and, on 18 November 2021, he brought an action seeking a declaration of the nullity of, inter alia, the DIR, the order of 7 January 2021 summoning him to appear and the order of 9 June 2021 revoking the suspension of the prison sentence.

23 In support of that action, TL claimed that, because of a change of residence after the DIR was drawn up, he could not have been contacted at the address indicated in the DIR and, consequently, he could not have received the notifications of those orders. He submitted that he had not disclosed that change of residence because he had not been aware of the obligation to do so or of the consequences of a failure to comply with that obligation, since the DIR, in which that obligation and those consequences were set out, had not been translated into Romanian. In addition, he had not been assisted by an interpreter either on that occasion or when the formal record of his placement under investigation was being drawn up. Lastly, neither the order of 7 January 2021 summoning him to appear following the failure to comply with the conditions of the probation scheme nor the order of 9 June 2021 revoking the suspension of the prison sentence had been translated into a language which he speaks or understands.

24 At first instance, the Tribunal Judicial da Comarca de Beja (District Court, Beja) dismissed the action on the ground that, although the procedural defects invoked by TL were established, they had been rectified, since TL had not invoked them within the periods laid down in Article 120(3) of the CCP.

25 The referring court, hearing an appeal against that decision at first instance, has doubts as to whether that national provision is compatible with Directives 2010/64 and 2012/13, read in conjunction with Article 6 ECHR.

26 First, that court notes that those directives have not yet been transposed into Portuguese law, even though the periods for transposition have expired. It considers, however, that the relevant provisions of those directives must be deemed to have direct effect and therefore apply directly to the dispute in the main proceedings, since they are unconditional, sufficiently clear and precise and confer on individuals a right to interpretation, translation and information in criminal proceedings.

27 Secondly, the referring court considers that the acts at issue in the main proceedings, namely the DIR, the order of 7 January 2021 summoning TL to appear and the order of 9 June 2021 revoking the suspension of the prison sentence, constitute 'essential documents' within the meaning of Article 3(1) and (2) of Directive 2010/64, given the importance of such acts for the rights of defence of persons whose criminal liability is being determined and having regard to the procedural information provided therein. In that context, it emphasises, in particular, that the DIR is the means by the which the person concerned is informed of the information relating to his or her residence obligations and, in particular, the obligation to inform the authorities of any change of address.

28 In the light of those considerations, the referring court questions whether it is necessary to set aside the national legislation at issue in the main proceedings, since it provides that, as in the present case, procedural defects linked to the lack of assistance by an interpreter and the failure to translate essential documents into a language understood by the person concerned must be invoked within prescribed periods, failing which the challenge will be time-barred.

29 In those circumstances, the Tribunal da Relação de Évora (Court of Appeal, Evora, Portugal) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is it possible to interpret Articles 1 to 3 of [Directive 2010/64] and Article 3 of [Directive 2012/13], alone or in conjunction with Article 6 of the ECHR, as meaning that they do not preclude a provision of national law which imposes a penalty of relative nullity, which must be pleaded, for failure to appoint an interpreter and to translate essential procedural documents for an accused person who does not understand the language of the proceedings, and which permits the rectification of that type of nullity owing to the passage of time?'

The request that the reference be dealt with under the urgent preliminary ruling procedure

30 The referring court has requested that the present reference for a preliminary ruling be dealt with under the urgent preliminary ruling procedure provided for in the first paragraph of Article 23a of the Statute of the Court of Justice of the European Union and Article 107 of the Rules of Procedure of the Court of Justice.

31 In the present case, it must be found that the conditions laid down for the application of that procedure have been satisfied.

32 First, the request for a preliminary ruling concerns the interpretation of provisions of Directives 2010/64 and 2012/13, which fall within the fields covered by Title V of Part Three of the TFEU on the area of freedom, security and justice. Accordingly, that request may be dealt with under the urgent preliminary ruling procedure.

33 Secondly, as regards the criterion relating to urgency, it follows from settled case-law that that criterion is satisfied where the person concerned in the case in the main proceedings is, at the time when the request for a preliminary ruling is made, deprived of his or her liberty and that the question whether he or she may continue to be held in custody depends on the outcome of the dispute in the main proceedings (judgment of 28 April 2022, *C and CD (Legal obstacles to the execution of a decision on surrender)*, C-804/21 PPU, EU:C:2022:307, paragraph 39 and the case-law cited).

34 It is apparent from the description of the facts provided by the referring court that TL, the person concerned in the main proceedings, was in fact deprived of his liberty at the time when the request for a preliminary ruling was made.

35 In addition, the referring court asks the Court about the compatibility with EU law of the application, in circumstances such as those at issue in the main proceedings, of national legislation that makes the possibility of invoking certain defects which vitiate criminal proceedings and which have led, inter alia, to the revocation of the suspension of the prison sentence imposed on the person concerned subject to compliance with prescribed time limits, with the result that that court could, depending on the answer given by the Court to the question referred, be led to annul the vitiated acts and consequently, order that TL be released.

36 In those circumstances, on 12 May 2022 the First Chamber of the Court of Justice, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decided to accede to the referring court's request that the present reference for a preliminary ruling be dealt with under the urgent procedure.

Consideration of the question referred

37 Under the cooperation procedure provided for in Article 267 TFEU, even if, formally, the referring court has limited its question to the interpretation of a particular provision of EU law, that does not prevent the Court from providing the referring court with all the elements of interpretation of EU law which may be of assistance in adjudicating in the case pending before it, whether or not the referring court has referred to them in the wording of its questions. It is, in this regard, for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision to make the reference, the points of EU law which require interpretation in view of the subject matter of the dispute in the main proceedings (judgment of 15 July 2021, *DocMorris*, C-190/20, EU:C:2021:609, paragraph 23 and the case-law cited).

38 Since the question referred for a preliminary ruling refers to Articles 1 to 3 of Directive 2010/64 and Article 3 of Directive 2012/13, considered in isolation or in conjunction with Article 6 ECHR, it should be borne in mind, first, that the latter provision guarantees the right to a fair trial and respect for the rights of the defence, which includes, in accordance with Article 6(3) ECHR, the right of every accused person to be informed promptly, in a language which he or she speaks or understands and in detail, of the nature and cause of the accusation against him or her and to have the free assistance of an interpreter if he or she cannot understand or speak the language used in court.

39 In addition, Article 52(3) of the Charter states that, in so far as that charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights must be the same as those laid down by the ECHR. In addition, according to the explanations relating to Article 47 and Article 48(2) of the Charter – which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, must be taken into consideration for the interpretation of the Charter – those provisions corresponds to Article 6(1) and Article 6(2) and (3) ECHR (see, to that effect, judgment of 23 November 2021, *IS (Illegality of the order for reference)*, C-564/19, EU:C:2021:949, paragraph 101).

40 Furthermore, as regards the interpretation of the directives at issue in the main proceedings, it must be borne in mind that, in accordance with recitals 5 to 7, 9 and 33 and Article 1 of Directive 2010/64 and recitals 5, 7, 8, 10 and 42 and Article 1 of Directive 2012/13, those directives are intended to establish common minimum rules on the protection of the procedural rights and guarantees arising from Article 47 and Article 48(2) of the Charter and from Article 6 ECHR, in particular in the fields of interpretation, translation and information in criminal proceedings, and that those rules should be interpreted and implemented consistently with those rights and guarantees, in order to strengthen mutual trust in the criminal justice systems of Member States and thus increase the efficiency of judicial cooperation in that area.

41 Thus, Article 2(1) of Directive 2010/64 requires Member States to ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with the assistance of an interpreter during criminal proceedings before investigative services and judicial authorities, while Article 3(1) of that directive requests them to ensure that suspected or accused persons who do not understand the language of the criminal proceedings concerned are, within a reasonable period of time, provided with a written translation of all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings. As regards Article 3(1)(d) of Directive 2012/13, it requires Member States to ensure that suspects or accused persons are provided promptly with information on their right to interpretation and translation, in order to allow for that right to be exercised effectively.

42 Accordingly, it must be held, first, that the dispute at issue in the main proceedings concerns, in particular, Article 2(1) and Article 3(1) of Directive 2010/64 and Article 3(1)(d) of Directive 2012/13 and, secondly, that those provisions give specific expression to the fundamental rights to a fair trial and to respect for the rights of the defence, as enshrined in particular in Article 47 and Article 48(2) of the Charter and must be interpreted in the light of those provisions.

43 In those circumstances, it must be noted that the referring court asks, in essence, whether Article 2(1) and Article 3(1) of Directive 2010/64 and Article 3(1)(d) of Directive 2012/13, read in the light of Article 47 and Article 48(2) of the Charter, must be interpreted as precluding national legislation under which, first, the infringement of the rights laid down in those provisions of those directives may be effectively invoked only by the beneficiary of those rights and, secondly, that infringement must be pleaded within a prescribed period, failing which the challenge will be time-barred.

44 In that regard, it should be noted, first of all, that it is apparent from the order for reference that TL was not assisted by an interpreter when the DIR was being drawn up and that that document was not translated for him into a language which he speaks or understands. Furthermore, neither the order of 7 January 2021 summoning him to appear following the alleged failure to comply with the probation conditions, nor the order of 9 June 2021 revoking the suspension of the prison sentence was translated into a language understood by TL.

45 Next, although the order for reference does not expressly state that TL was not informed, when he was placed under judicial investigation, of his right to an interpreter and to the translation of the essential documents of the criminal proceedings against him, it appears that the referring court proceeds on the implicit basis that that information was not provided, which is why it is asking the Court not only about the interpretation of Directive 2010/64 but also that of Directive 2012/13.

46 Lastly, the order for reference states that Article 92(2) of the CCP, which is applicable to the facts in the main proceedings, requires the appointment of an interpreter in proceedings concerning a person who is not familiar with or who does not have a command of the Portuguese language and that, in accordance with Article 120 of the CCP, the failure to appoint an interpreter during the drawing up of an act at which the person concerned is present may entail the nullity of that act, subject to the double condition that (i) the request for a declaration of nullity is made by that person and (ii) that request is made before the finalisation of that act.

47 Accordingly, it is in the light of that context that the question, as reformulated in paragraph 43 of the present judgment, must be examined.

48 In order to answer that question, it should be noted, in the first place, that, even if Article 2(1) and Article 3(1) of Directive 2010/64 and Article 3(1) (d) of Directive 2012/13 have not been transposed or have not been fully transposed into the Portuguese legal system – a situation which the referring court considers to be established,

whereas the Portuguese Government appears to dispute it – TL may rely on the rights arising from those provisions, since, as observed by the referring court as well as by all of the parties which intervened before the Court, those provisions have direct effect.

49 It should be recalled that, whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the Member State concerned, where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (judgment of 14 January 2021, *RTS infra and Aannemingsbedrijf Norré-Behaegel*, C-387/19, EU:C:2021:13, paragraph 44 and the case-law cited).

50 In that regard, the Court has stated that a provision of EU law is, first, unconditional where it sets forth an obligation which is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure either by the institutions of the European Union or by the Member States and, secondly, sufficiently precise to be relied on by an individual and applied by a court where it sets out an obligation in unequivocal terms (judgment of 14 January 2021, *RTS infra and Aannemingsbedrijf Norré-Behaegel*, C-387/19, EU:C:2021:13, paragraph 46 and the case-law cited).

51 Furthermore, the Court has held that, even though a directive leaves the Member States a degree of latitude when they adopt rules in order to implement it, a provision of that directive may be regarded as unconditional and precise where it imposes on Member States in unequivocal terms a precise obligation as to the result to be achieved, which is not coupled with any condition regarding application of the rule laid down by it (judgment of 14 January 2021, *RTS infra and Aannemingsbedrijf Norré-Behaegel*, C-387/19, EU:C:2021:13, paragraph 47 and the case-law cited).

52 Since, as noted by the Advocate General in points 58 to 62 of his Opinion, Article 2(1) and Article 3(1) of Directive 2010/64 and Article 3(1)(d) of Directive 2012/13 state, in a precise and unconditional manner, the content and scope of the rights of every suspected or accused person to receive interpretation services and the translation of essential documents, and to be informed of those rights, those provisions must be regarded as having direct effect, with the result that any person benefiting from those rights may rely on them against a Member State, before the national courts.

53 In the second place, it should be noted that the three procedural acts at issue in the main proceedings, namely the DIR, the order of 7 January 2021 summoning TL to appear and the order of 9 June 2021 revoking the suspension of the prison sentence, fall within the scope of Directives 2010/64 and 2012/13 and constitute, inter alia, essential documents of which a written translation should have been provided to TL under Article 3(1) of Directive 2010/64.

54 In that regard, it should be borne in mind that, in accordance with Article 1(2) of Directive 2010/64 and Article 2(1) of Directive 2012/13, the rights conferred therein apply to persons from the time they are made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the criminal offence, including, where applicable, sentencing and the resolution of any appeal.

55 Thus, it follows from the provisions cited in the previous paragraph that that directive applies to criminal proceedings in so far as the purpose of those proceedings is to determine whether the suspect or accused person has committed a criminal offence (see, to that effect, judgment of 16 December 2021, *AB and Others (Revocation of an amnesty)*, C-203/20, EU:C:2021:1016, paragraph 69).

56 However, proceedings the purpose of which is not to determine a person's criminal liability, such as a legislative procedure relating to the revocation of an amnesty or to a judicial procedure the purpose of which is to review the compliance of that revocation with the national constitution, cannot come within the scope of Directive 2012/13 (see, to that effect, judgment of 16 December 2021, *AB and Others (Revocation of an amnesty)*, C-203/20, EU:C:2021:1016, paragraphs 70 and 71).

57 Similarly, a special procedure, such as a procedure which has as its purpose the recognition of a final judicial decision handed down by a court of another Member State, of which the person concerned has already obtained

a translation in accordance with Article 3 of Directive 2010/64, does not fall within the scope of that directive, since, first, such a procedure takes place, by definition, after the final determination of whether the suspected or accused person committed the offence in question and, where applicable, after the sentencing of that person and, secondly, a new translation of that judicial decision is not necessary for the purpose of ensuring the right to a fair hearing or the right to effective judicial protection of the person concerned and is not, therefore, justified in the light of the objectives pursued by Directive 2010/64 (see, to that effect, judgment of 9 June 2016, *Balogh*, C-25/15, EU:C:2016:423, paragraphs 37 to 40).

58 In that context, as, inter alia, recitals 14, 17 and 22 of Directive 2010/64 state, that directive seeks to ensure, for suspected or accused persons who do not speak or understand the language of the proceedings, the right to interpretation and translation by facilitating the application of that right with a view to ensuring that those persons have a fair trial. Thus, Article 3(1) and (2) of that directive provide that Member States are to ensure that those persons are, within a reasonable period of time, provided with a written translation of all essential documents, including, inter alia, any decision depriving them of liberty, any charge or indictment, and any judgment handed down in their regard, so as to allow them to exercise their rights of defence and to safeguard the fairness of the proceedings (see, to that effect, judgment of 9 June 2016, *Balogh*, C-25/15, EU:C:2016:423, paragraph 38).

59 It should be pointed out that, unlike the situations at issue in the cases that gave rise to the judgments of 16 December 2021, *AB and Others (Revocation of an amnesty)* (C-203/20, EU:C:2021:1016) and of 9 June 2016, *Balogh* (C-25/15, EU:C:2016:423), the three procedural acts at issue in the main proceedings are, as noted, in essence, both by the referring court and all the interested parties who intervened in the proceedings before the Court, an integral part of the procedure which established the criminal liability of TL and the application of Directives 2010/64 and 2012/13 to those acts is fully justified by the objectives pursued by those directives.

60 Thus, as regards, first, the DIR, it is apparent from the order for reference and from Article 196 of the CCP that that declaration, which is drawn up when a person is placed under investigation as a step in the criminal proceedings, constitutes a preliminary coercive measure which sets out a series of obligations for that person and the procedural consequences in the event of non-compliance with those obligations and, in particular, informs the competent authorities of the address at which that person is supposed to be available, that person being required, inter alia, to declare any change in that respect. In the event of a conviction, that coercive measure remains in force until the sentence is spent. Thus, failure to comply with that coercive measure may lead to the revocation of the suspension of a sentence. In view of the obligations and significant consequences which the DIR entails for the person concerned throughout the criminal proceedings and the fact that that person is informed of that obligation and of those consequences by that declaration, that document constitutes, as the referring court rightly notes, an 'essential document', within the meaning of Article 3(1) and (2) of Directive 2010/64, and paragraph 3 of that article states, moreover, that 'the competent authorities shall, in any given case, decide whether any other document is essential'.

61 Accordingly, under Article 2(1) and Article 3(1) of Directive 2010/64, TL was entitled to a written translation of the DIR and to the assistance of an interpreter when that declaration was being drawn up. In addition, in accordance with Article 3(1)(d) of Directive 2012/13, TL had the right to be informed of those rights. In that regard, it is apparent from recital 19 of Directive 2012/13 that the information referred to in that directive should be provided promptly in the course of the proceedings and at the latest before the first official interview of the suspect or accused person by the police or by another competent authority, in order to allow the practical and effective exercise of his or her procedural rights.

62 Although the Portuguese Government indicated at the hearing before the Court that, as a general rule, the rights provided for by the provisions mentioned in the previous paragraph are respected in criminal proceedings conducted in Portugal against persons who do not understand Portuguese, it is nevertheless apparent from the order for reference that that was not the case in the situation at issue in the main proceedings, since TL was not informed of the obligation, laid down in Article 196 of the CCP, not to change his place of residence without communicating his new address and that he was therefore unable to fulfil that obligation. As a result, the authorities responsible for implementing the probation conditions attempted unsuccessfully to contact him at the address indicated in the DIR. Similarly, the order of 7 January 2021 summoning TL to appear following the failure to comply with those conditions and the order of 9 June 2021 revoking the suspension of the prison sentence were sent to that address, and not to his new address, and therefore TL could not have been aware of those orders.

63 Secondly, it should be noted that, as the Portuguese Government and the Commission have observed, those orders constitute procedural acts which are ancillary to the sentencing of the person concerned and which still form part of the criminal proceedings, within the meaning of Directives 2010/64 and 2012/13.

64 In that regard, the application of Directives 2010/64 and 2012/13 to procedural acts relating to a potential revocation of the suspension of the prison sentence imposed on the person concerned, who was not enabled to understand the essential documents drawn up in the course of the criminal proceedings, is necessary in the light of the objective of those directives of ensuring respect for the right to a fair trial, as enshrined in Article 47 of the Charter, and respect for the rights of the defence, as guaranteed in Article 48(2) of the Charter, and thus to strengthen mutual trust in the criminal justice systems of the Member States in order to increase the efficiency of judicial cooperation in that field.

65 Those fundamental rights would be infringed if a person, who has been sentenced for a criminal offence to a term of imprisonment suspended with probation, were deprived – because of the failure to translate the summons or the absence of an interpreter at the hearing relating to the possible revocation of that suspension – of the opportunity to be heard, inter alia, on the reasons for which he or she had failed to comply with the probation conditions. Thus, that opportunity presupposes, first, that the person concerned receives the summons to the hearing on the possible revocation of the suspension in a language which he or she speaks or understands, failing which he or she cannot be regarded as having been duly summoned and informed of the reason for that summons, and, secondly, that he or she may, if necessary, be assisted by an interpreter at that hearing, in order to be able to explain the reasons for his or her failure to comply with the probation conditions, which may, depending on the circumstances, be legitimate and thus justify the continued suspension of the sentence.

66 Furthermore, since the decision revoking the suspension entails the execution of the prison sentence imposed of the person concerned, that decision must also be translated where the person concerned does not speak or understand the language of the proceedings, in order to enable him, inter alia, to understand the reasons for that decision and, where appropriate, to bring an appeal against that decision.

67 That interpretation is supported by the scheme of Directive 2010/64. While, first, in accordance with Article 1(2) thereof, that directive refers expressly to 'sentencing' and, secondly, in accordance with Article 3(2), the concept of 'essential documents' expressly includes 'any decision depriving a person of his liberty', it would be inconsistent to exclude from the scope of that directive acts relating to the potential revocation of the suspension of a sentence, since those acts may ultimately lead to the imprisonment of the person concerned and, thus to the most significant interference in his or her fundamental rights during the criminal proceedings.

68 Moreover, the Court has already held that where a procedural act is addressed to an individual only in the language of the proceedings in question even though the individual has no command of that language, that individual is unable to understand what is alleged against him or her, and cannot therefore exercise his or her rights of defence effectively if he or she is not provided with a translation of that act in a language which he or she understands (see, to that effect, judgment of 12 October 2017, *Sleutjes*, C-278/16, EU:C:2017:757, paragraph 33).

69 In the present case, it is apparent from the order for reference that neither the order of 7 January 2021 summoning TL to appear, nor the order of 9 June 2021 revoking the suspension of the prison sentence was translated into Romanian. Furthermore, it appears that TL was not informed of his right to receive a translation of those orders. Lastly, it does not appear from the documents before the Court that, at the hearing relating to the breaches of the probation conditions, TL was assisted by an interpreter or had even been informed of that right.

70 In those circumstances, and as follows from paragraphs 61 and 69 above, the rights that TL derives from Article 2(1) and Article 3(1) of Directive 2010/64 and Article 3(1)(d) of Directive 2012/13 were infringed in the criminal proceedings at issue in the main proceedings.

71 In the third place, as regards the consequences of those infringements, it follows from the findings of the referring court that the infringement of the right to interpretation constitutes, in the Portuguese legal system, a procedural defect which entails, in accordance with Article 120 of the CCP, the relative nullity of the corresponding procedural acts. However, first, under paragraph 2(c) of that article, it is for the person concerned to plead the infringement of the right in question. Secondly, under paragraph 3(a) of that article, where the act in question is drawn up in

the presence of the person concerned, the procedural defect must be invoked before the finalisation of that act, failing which the challenge will be time-barred.

72 In response to a question put by the Court at the hearing, the Portuguese Government confirmed that Article 120 of the CCP was also applicable to the pleading of defects arising from the infringement of the right to translation of essential documents in criminal proceedings, which it is for the referring court to ascertain, as is the applicability of that provision to the infringement of the right to be informed of the rights to interpretation and to the translation of essential documents.

73 In that respect, it must be borne in mind that Article 2(5) and Article 3(5) of Directive 2010/64 require Member States to ensure that, in accordance with procedures in national law, the persons concerned have the right to challenge a decision finding that there is no need for interpretation or translation.

74 However, neither that directive nor Directive 2012/13 specifies the consequences of an infringement of the rights provided for therein, inter alia in a situation such as that at issue in the main proceedings, where the person concerned has not been informed of the existence of such a decision, of his right to obtain the assistance of an interpreter and a translation of the documents in question, or even of the establishment of some of those documents.

75 According to settled case-law, in the absence of specific EU rules governing the matter, the rules implementing the rights which individuals derive from EU law are a matter for the domestic legal system of the Member States in accordance with the principle of the procedural autonomy of the Member States. However, those rules must not be less favourable than those governing similar domestic actions (principle of equivalence); nor may they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness) (see, to that effect, judgment of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19 to C-782/19, EU:C:2021:470, paragraph 27 and the case-law cited).

76 As regards the principle of equivalence, subject to the verifications to be carried out by the referring court, nothing in the file before the Court suggests that that principle would be infringed by the application of Article 120 of the CCP in the case of an infringement of rights arising from Directives 2010/64 and 2012/13. That article governs the conditions under which a nullity may be invoked, irrespective of the question whether that nullity results from the infringement of a rule which has its basis in provisions of national law or in provisions of EU law.

77 As regards the principle of effectiveness, although Directives 2010/64 and 2012/13 do not set out the detailed rules for the implementation of the rights which they lay down, those rules cannot undermine the objective pursued by those directives, namely safeguarding the fairness of criminal proceedings and ensuring respect for the rights of the defence of suspects and accused persons during those proceedings (see, to that effect, judgments of 15 October 2015, *Covaci*, C-216/14, EU:C:2015:686, paragraph 63, and of 22 March 2017, *Tranca and Others*, C-124/16, C-188/16 and C-213/16, EU:C:2017:228, paragraph 38).

78 First, the obligation, imposed on national authorities by Article 3(1)(d) of Directive 2012/13, to inform suspects and accused persons of their rights to interpretation and translation, laid down in Article 2(1) and Article 3(1) of Directive 2010/64, is of essential importance in order effectively to guarantee those rights and, thus, to comply with Article 47 and Article 48(2) of the Charter. Without that information, the person concerned could not know the existence and scope of those rights or demand that they be respected, with the result that he or she would not be able to exercise his or her rights of defence fully and have a fair trial.

79 Thus, to require the person concerned by criminal proceedings conducted in a language which he or she does not speak or understand to plead that he or she has not been informed of his or her rights to interpretation and translation, laid down in Article 2(1) and Article 3(1) of Directive 2010/64, within a prescribed period, failing which that challenge will be time-barred, would have the effect of rendering meaningless the right to be informed, guaranteed by Article 3(1)(d) of Directive 2012/13, and would consequently undermine that person's rights to a fair trial, enshrined in Article 47 of the Charter, and to respect for the rights of the defence, enshrined in Article 48(2) of the Charter. In the absence of such information, that person could not be aware that his or her right to information has been infringed and would therefore be unable to plead that infringement.

80 Furthermore, that conclusion also applies, for the same reason, as regards the rights to interpretation and translation, laid down in Article 2(1) and Article 3(1) of Directive 2010/64 respectively, where the person concerned has not been informed of the existence and scope of those rights.

81 In the present case, since, as noted in paragraph 45 of the present judgment, the order for reference does not expressly state that TL was not informed, when he was placed under examination, of his right to an interpreter and to the translation of the essential documents of the criminal proceedings brought against him, it is for the referring court to ascertain, if necessary, whether or not he was given that information.

82 Secondly, even where the person concerned has actually received that information in good time, it is also necessary, as the Advocate General observed, in essence, in points 83 to 87 of his Opinion, for that person to be aware of the existence and content of the essential document in question and of the effects arising from it, in order to be able to invoke an infringement of his or her right to the translation of that document or of his or her right to the assistance of an interpreter when that document is being drawn up, guaranteed by Article 2(1) and Article 3(1) of Directive 2010/64, and thus to be able to have a fair trial in compliance with his or her rights of defence, as required by Article 47 and Article 48(2) of the Charter.

83 Accordingly, that principle of effectiveness would be undermined if the period in which, under a national procedural provision, an infringement of the rights granted by Article 2(1) and Article 3(1) of Directive 2010/64 and Article 3(1)(d) of Directive 2012/13 may be invoked began to run even before the person concerned was informed, in a language which he speaks or understands, first, of the existence and scope of his or her right to interpretation and translation and, secondly, of the existence and content of the essential document in question as well as its effects (see, by analogy, judgment of 15 October 2015, *Covaci*, C-216/14, EU:C:2015:686, paragraphs 66 and 67).

84 In the present case, it follows from the findings made by the referring court, which alone has jurisdiction to interpret the provisions of its national law, that the mere application of Article 120 of the CCP to the situation at issue in the main proceedings, as it appears to have been carried out by the court of first instance, was not capable of ensuring that the requirements arising from the preceding paragraph of the present judgment were respected.

85 In particular, it is apparent from the information before the Court that, pursuant to Article 120(3)(a) of the CCP, where an act is drawn up in the presence of the person concerned, the nullity of that act must be pleaded before the act is finalised, failing which that challenge will be time barred.

86 That means, in particular in respect of an act such as the DIR, that a person in a situation such as that of TL is deprived, de facto, of the possibility of pleading its nullity. Where that person, who does not know the language of the criminal proceedings, is unable to understand the meaning of the procedural act and its implications, he or she does not have sufficient information to assess the need for the assistance of an interpreter when it is drawn up or for a written translation of that document, which may appear to be a mere formality. Furthermore, the possibility of invoking the nullity of that act is subsequently prejudiced, first, by the lack of information as to the right to such a translation and to the assistance of an interpreter and, secondly, by the fact that the period for raising that nullity expires, in essence, instantaneously, solely on account of the finalisation of the act in question.

87 In those circumstances, it is for the referring court to ascertain whether it can arrive at an interpretation of the national legislation which makes it possible to comply with the requirements arising from paragraph 83 of the present judgment and thus to guarantee the exercise of the rights of the defence in the context of a fair trial.

88 In the event that the referring court were to take the view that such an interpretation of the national legislation at issue in the main proceedings is not possible, it should be borne in mind that the principle of primacy places the national court which is called upon within the exercise of its jurisdiction to apply provisions of EU law under a duty, where it is unable to interpret national legislation in compliance with the requirements of EU law, to give full effect to the requirements of that law in the dispute before it, if necessary disapplying of its own motion any national legislation or practice, even if adopted subsequently, which is contrary to a provision of EU law with direct effect, and it is not necessary for that court to request or await the prior setting aside of such national legislation or practice by legislative or other constitutional means (judgment of 8 March 2022, *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)*, C-205/20, EU:C:2022:168, paragraph 37).

89 In the light of the foregoing considerations, the answer to the question referred for a preliminary ruling is that Article 2(1) and Article 3(1) of Directive 2010/64 and Article 3(1)(d) of Directive 2012/13, read in the light of Articles 47 and 48(2) of the Charter and the principle of effectiveness, must be interpreted as precluding national legislation under which the infringement of the rights provided for by those provisions of those directives must be invoked by the beneficiary of those rights within a prescribed period, failing which that challenge will be time-barred, where that period begins to run before the person concerned has been informed, in a language which he or she speaks or understands, first, of the existence and scope of his or her right to interpretation and translation and, secondly, of the existence and content of the essential document in question and the effects thereof.

Costs

90 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Article 2(1) and Article 3(1) of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings and Article 3(1)(d) of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, read in the light of Article 47 and Article 48(2) of the Charter of Fundamental Rights of the European Union and the principle of effectiveness, must be interpreted as precluding national legislation under which the infringement of the rights provided for by those provisions of those directives must be invoked by the beneficiary of those rights within a prescribed period, failing which that challenge will be time-barred, where that period begins to run before the person concerned has been informed, in a language which he or she speaks or understands, first, of the existence and scope of his or her right to interpretation and translation and, secondly, of the existence and content of the essential document in question and the effects thereof.

[Signatures]

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* Language of the case: Portuguese.

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 27 June 2024 (1)(i)

Case C-202/24 [Alchaster] (i)

Minister for Justice and Equality
v
MA

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

(Reference for a preliminary ruling – EU-UK Trade and Cooperation Agreement – Surrender of persons – Article 49(1) of the Charter of Fundamental Rights of the European Union – Principle of legality of criminal offences and penalties – Amendment of the parole system)

I. Introduction

1. The present reference for a preliminary ruling from the Supreme Court (Ireland) concerns the interpretation of, first, the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part ('the TCA') (2) and, secondly, Article 49(1) of the Charter of Fundamental Rights of the European Union ('the Charter').

2. This request was made in the context of the execution in Ireland of an arrest warrant issued by the judicial authorities of the United Kingdom for MA for the purpose of conducting a criminal prosecution. The referring court seeks to determine the obligations of a judicial authority executing an arrest warrant where the requested person argues that his or her fundamental rights will be breached by the authorities of the issuing State.

3. I shall argue in this Opinion that, while the provisions of the TCA on surrender procedures enshrine a high level of trust between the European Union and the United Kingdom in their respective legal systems, and while, under certain circumstances, the executing judicial authority can refuse to execute an arrest warrant, there is no reason not to execute the arrest warrant in the present case.

II. Legal framework

4. The TCA is an association agreement based on Article 217 TFEU (3) and Article 101 of the Treaty establishing the European Atomic Energy Community. (4) After an initial provisional application from 1 January 2021, (5) it entered into force on 1 May 2021, further to its ratification by the European Union and the United Kingdom. (6) The agreement is composed of seven parts. (7)

5. Article 5 of the TCA, entitled 'Private rights', which is contained in Part One, (8) Title II (9) of the TCA, reads as follows:

'1. Without prejudice to Article SSC.67 of the Protocol on Social Security Coordination and with the exception, with regard to the Union, of Part Three of this Agreement, nothing in this Agreement or any supplementing

agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement or any supplementing agreement to be directly invoked in the domestic legal systems of the Parties.

2. A Party shall not provide for a right of action under its law against the other Party on the ground that the other Party has acted in breach of this Agreement or any supplementing agreement.'

6. Part Three concerns law enforcement and judicial cooperation in criminal matters.

7. Article 524 of the TCA, in Part Three, Title I, (10) is headed 'Protection of human rights and fundamental freedoms' and is worded as follows:

'1. The cooperation provided for in this Part is based on the Parties' and Member States' long-standing respect for democracy, the rule of law and the protection of fundamental rights and freedoms of individuals, including as set out in the Universal Declaration of Human Rights and in the European Convention on Human Rights, and on the importance of giving effect to the rights and freedoms in that Convention domestically.

2. Nothing in this Part modifies the obligation to respect fundamental rights and legal principles as reflected, in particular, in the European Convention on Human Rights and, in the case of the Union and its Member States, in the [Charter].'

8. Title VII of Part Three (Articles 596 to 632), headed 'Surrender', establishes a surrender regime between the Member States and the United Kingdom. These provisions are complemented by Annex 43, which sets out the information to be contained in an arrest warrant. (11)

9. Article 599(3) of the TCA (12) reads:

'Subject to Article 600, points (b) to (h) of Article 601(1), and Articles 602, 603 and 604, a State shall not refuse to execute an arrest warrant issued in relation to the following behaviour where such behaviour is punishable by deprivation of liberty or a detention order of a maximum period of at least 12 months:

(a) the behaviour of any person who contributes to the commission by a group of persons acting with a common purpose of one or more offences in the field of terrorism referred to in Articles 1 and 2 of the European Convention on the Suppression of Terrorism, done at Strasbourg on 27 January 1977, or in relation to illicit trafficking in narcotic drugs and psychotropic substances, or murder, grievous bodily injury, kidnapping, illegal restraint, hostage-taking or rape, even where that person does not take part in the actual execution of the offence or offences concerned; such contribution must be intentional and made with the knowledge that the participation will contribute to the achievement of the group's criminal activities; or

(b) terrorism as defined in Annex 45.'

10. Article 604, point (c), of the TCA (13) provides that 'if there are substantial grounds for believing that there is a real risk to the protection of the fundamental rights of the requested person, the executing judicial authority may require, as appropriate, additional guarantees as to the treatment of the requested person after the person's surrender before it decides whether to execute the arrest warrant'.

III. The main proceedings and the question referred

11. Four warrants for the arrest of MA were issued by the District Judge of the Magistrates' Courts of Northern Ireland (United Kingdom) on 26 November 2021 in respect of four offences involving terrorism, (14) alleged to have been committed between 18 and 20 July 2020.

12. By judgment of 24 October 2022 and orders of 24 October and 7 November 2022, the High Court (Ireland) ordered MA's surrender to the United Kingdom, while refusing him leave to appeal to the Court of Appeal (Ireland).

13. By decision of 17 January 2023, the Supreme Court granted MA leave to appeal against that judgment and those orders of the High Court.

14. MA submits that his surrender is incompatible with the principle of legality of criminal offences and penalties.

15. In that regard, the referring court notes that the TCA provides that surrender mechanisms apply between the United Kingdom and the Member States. It considers that, pursuant to the applicable Irish legislation and to Council Framework Decision 2002/584/JHA, (15) the United Kingdom must be treated as if it were a Member State.

16. The referring court states that, were MA to be surrendered to the United Kingdom and sentenced to imprisonment, his right to conditional release would be governed by United Kingdom legislation adopted after the alleged commission of the offences in respect of which he is subject to criminal proceedings.

17. Indeed, the regime permitting conditional release in Northern Ireland was amended with effect from 30 April 2021. Prior to this change, a person convicted of certain terrorism-related offences was eligible for automatic parole after serving half of his or her sentence. Under the regime applicable from that date, the conditional release of such a person will have to be approved by a specialised authority and may only take place after the person concerned has served two thirds of his or her sentence.

18. In that regard, the referring court states that the European Court of Human Rights ('the ECtHR') has rejected the argument that retroactive changes to remission or early release schemes constitute an infringement of Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'). However, the ECtHR considered, in the judgment in *Del Río Prada v. Spain*, (16) that measures taken during the enforcement of a sentence may affect its scope. It is therefore essential, in the view of the referring court, to determine the precise effects of that judgment in order to rule on the dispute in the main proceedings.

19. The compatibility of the United Kingdom legislation in question with the ECHR has been reviewed by the United Kingdom courts. Thus, in its judgment of 19 April 2023, the Supreme Court (United Kingdom) held that the application of the scheme to offences committed before its entry into force was not incompatible with Article 7 ECHR, in so far as the scheme only amended how the custodial sentences of the persons concerned were served, without increasing the duration of those sentences.

20. In that context, having regard, in particular, to the guarantees offered by the United Kingdom's judicial system as regards the application of the ECHR, given the absence of any demonstration of a systemic flaw which would suggest a probable and flagrant breach of the rights guaranteed by the ECHR in the event of surrender, and given the possibility open to MA of bringing an application before the ECtHR, the referring court rejected MA's argument that there was a risk of breach of those rights.

21. Nevertheless, the referring court wonders whether it is possible to reach a similar conclusion as regards a risk of breach of Article 49(1) of the Charter.

22. That court points out in that regard that, in so far as Article 49(1) of the Charter corresponds to Article 7 ECHR, those two provisions must in principle be given the same scope, in accordance with Article 52(3) of the Charter. It might therefore be possible to rely on the reasoning adopted in relation to Article 7 ECHR without further verification. However, the referring court notes that the Court of Justice has not yet ruled on the implications of Article 49 of the Charter as regards an amendment to the provisions on conditional release.

23. Moreover, given that the executing State is obliged to surrender the requested person, the referring court considers it necessary to assess whether that State has jurisdiction to rule on an argument based on the incompatibility of Article 49(1) of the Charter with provisions on penalties which are likely to be applied in the issuing State, when that State is not obliged to comply with the Charter and the Court has laid down high requirements as regards taking into account a risk of breach of fundamental rights in the issuing Member State.

24. The referring court therefore considers that it must ask the Court what criteria the executing judicial authority should apply in order to assess compliance in the issuing State with the principle of legality of penalties

and whether there is a risk of breach of that principle in circumstances in which surrender is not precluded by either the national constitution or the ECHR.

25. In those circumstances, by order of 7 March 2024, received at the Court on 14 March 2024, the Supreme Court (Ireland) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Where, pursuant to the [TCA] (incorporating the provisions of [Framework Decision 2002/584]) surrender is sought for the purposes of prosecution on terrorist offences and the individual seeks to resist such surrender on the basis that he [or she] contends that it would be a breach of [Article] 7 [ECHR] and [Article] 49(2) of the [Charter] on the basis that a legislative measure was introduced altering the portion of a sentence which would be required to be served in custody and the arrangements for release on parole and was adopted after the date of the alleged offence in respect of which his [or her] surrender is sought and, where the following considerations apply:

(i) The requesting State (in this case the [United Kingdom]) is a party to the ECHR and gives effect to the [ECHR] in its domestic law pursuant [to] the Human Rights Act, 1998;

(ii) The application of the measures in question to prisoners already serving a sentence imposed by a court ... has been held by the courts of the United Kingdom (including the Supreme Court of the United Kingdom) to be compatible with the [ECHR];

(iii) It remains open to any person including the individual if surrendered, to make a complaint to the [ECtHR];

(iv) There is no basis for considering that any decision of the [ECtHR] would not be implemented by the requesting State;

(v) Accordingly, the [Supreme] Court is satisfied that it has not been established that surrender involves a real risk of [an infringement] of [Article] 7 [ECHR] or the Constitution;

(vi) It is not suggested that surrender is precluded by [Article] 19 of the Charter;

(vii) Article 49 of the Charter does not apply to the trial or sentencing process;

(viii) It has not been submitted that there is any reason to believe there is any appreciable difference in the application of [Article] 7 [ECHR] and [Article] 49 of the Charter;

Is a court against whose decision there is no right of appeal for the purposes of [the third paragraph of] Article 267 TFEU, and having regard to [Article] 52(3) of the Charter and the obligation of trust and confidence between [Member States] and those obliged to operate surrender [pursuant] to the [European arrest warrant] provisions [and] pursuant to the [TCA], entitled to conclude that the requested person has failed to establish any real risk that his [or her] surrender would be a breach of [Article] 49(2) of the Charter or is such a court obliged to conduct some further inquiry, and if so, what is the nature and scope of that inquiry?'

IV. Procedure before the Court

26. The Supreme Court, by separate document of 25 March 2024, requested that the present case be determined pursuant to the expedited procedure provided for in Article 105 of the Rules of Procedure of the Court of Justice.

27. Article 105(1) of the Rules of Procedure provides that, at the request of the referring court or tribunal or, exceptionally, of his own motion, the President of the Court may, after hearing the Judge-Rapporteur and the Advocate General, decide that a reference for a preliminary ruling is to be determined pursuant to an expedited procedure where the nature of the case requires that it be dealt with within a short time. (17)

28. On 22 April 2024, the President of the Court decided, after hearing the Judge-Rapporteur and the Advocate General, to grant the referring court's request that the present request for a preliminary ruling be determined pursuant to an expedited procedure in accordance with Article 105(1) of the Rules of Procedure. The President of the Court based his decision on the fact that the question referred for a preliminary ruling by the referring

court has been raised in a case with regard to a person in custody, within the meaning of the fourth paragraph of Article 267 TFEU. Furthermore, the answer to that question is liable, in the light of the nature of the question and the circumstances in which it is raised, to have an effect on the continued detention of the person concerned. (18)

29. The President of the Court set the time limit for the submission of written observations for 7 May 2024. In accordance with Article 105(2) of the Rules of Procedure of the Court, the date of the hearing was set at 4 June 2024.

30. Written observations were submitted by the parties to the main proceedings, by the Hungarian Government, by the European Commission and by the United Kingdom Government. (19) All the parties save for the Hungarian Government attended the hearing, which was held on 4 June 2024.

V. Assessment

31. By its question, the referring court seeks, in essence, to ascertain whether the judicial authorities of a Member State may refuse to execute an arrest warrant issued for the purposes of prosecution by a judicial authority in the United Kingdom under the TCA on the ground that there may be a risk of infringement of Article 49(1) of the Charter because the requested person will, if convicted, be subject to a more severe parole regime than that in force when the alleged offence was committed. Moreover, the referring court seeks guidance on the nature and scope of the review to be carried out before ruling, on that ground, for a refusal to execute the arrest warrant in question.

A. Preliminary observations

1. The TCA and the Charter as the law applicable

32. In order to provide a reply to the question, I shall first determine which legal rules govern the present case and, crucially, which interpretative and jurisprudential yardstick is to be applied, before turning to the substantive issue of what these rules require of the executing judicial authority. (20)

33. As the four arrest warrants (21) were issued after the TCA entered into force, the provisions of that agreement govern the present case. In that connection, I observe that, contrary to the assertion of the referring court, it is *not* Framework Decision 2002/584 that is to be applied. Indeed, that framework decision (i) was applicable before the United Kingdom's withdrawal from the European Union (22) (ii) continued to apply during the ensuing transition period (23) and (iii) ceased to apply with respect to the United Kingdom thereafter.

34. In addition, the Charter is applicable. This case comes within the scope of EU law within the meaning of Article 51(1) of the Charter, as the present case concerns the interpretation of the TCA. In so far as the question referred by the national court refers to the obligations of an (executing) judicial authority of a Member State of the European Union, that authority must, when acting within the scope of EU law, respect the requirements of the Charter.

2. Balancing mutual trust and the protection of fundamental rights

(a) General considerations

35. Any system dealing with cross-border surrender and the execution of arrest warrants comes up against seemingly conflicting interests which must, for the system to work, be reconciled. On the one hand, the effectiveness per se of the system must be considered. For a surrender procedure to work, arrest warrants must be executed. This requires and supposes a high level of mutual trust and confidence which translates legally to what is known as the principle of 'mutual recognition'. This principle implies that there is a broad functional equivalence between participating States as regards their respective legal systems in general and the safeguarding of the fundamental rights of those concerned in particular. On the other hand, those very fundamental rights must be respected. This obligation applies to both the issuing and the executing judicial authority.

36. Typically, the fundamental rights of the requested person are primarily at stake and States are under an obligation to protect those rights. However, the matter can be more complex. There can be situations in which (both issuing and executing) States must safeguard several fundamental rights that do not necessarily, but may, conflict, making it necessary to carry out a delicate balancing exercise of those fundamental rights. For example, an executing judicial authority is under an obligation, obviously, to see that the fundamental rights of the requested person are respected in the issuing State. At the same time, as the case may be, that same executing judicial authority can be under an obligation to ensure what is known as the procedural side of the right to life, enshrined in Article 2 of the Charter, (24) meaning that it must contribute to the conduct of an effective investigation when an individual's right to life has been breached or is at risk of being breached – which warrants intrinsically a swift surrender to the issuing State. (25)

37. A system requiring arrest warrants to be executed, where to do so would entail a breach of fundamental rights, is not conceivable or, as far as EU law is concerned, compatible with the Charter.

38. Mutual trust is not absolute or a binary concept. Instead, it constitutes, as put figuratively by the Commission at the hearing, a sliding scale. There are different forms and permutations of mutual trust. Put simply, the greater the mutual trust between the parties, the lower the degree of scrutiny, for a judicial authority executing an arrest warrant, regarding whether, in individual cases, the person to be surrendered faces issues in relation to their fundamental rights. However, even in that situation, mutual trust does not mean 'blind' trust. (26) This leads us to Framework Decision 2002/584.

(b) Under Framework Decision 2002/584

39. Regarding intra-EU situations, that is to say, situations between Member States, it should be borne in mind that these situations are governed, as the Court put it figuratively in Opinion 2/13, (27) by 'essential characteristics of EU law [which] have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the [European Union] and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a "process of creating an ever closer union among the peoples of Europe"'. (28) This legal structure is based on the fundamental premiss that, as stated in Article 2 TEU, each Member State shares, and recognises that it shares, with all the other Member States, a set of common values on which the European Union is founded. (29) That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that EU law implementing them will be respected. (30)

40. Consequently, the highest level of mutual trust regarding situations of surrender is found in Framework Decision 2002/584 on the European arrest warrant. Here, as is regularly recalled by the Court, (31) recital 6 of Framework Decision 2002/584 points out that the European arrest warrant is the first concrete measure in the field of criminal law implementing the principle of mutual recognition, which the European Council (32) referred to as the 'cornerstone' of judicial cooperation.

41. This implies that the threshold for an executing judicial authority not to execute an arrest warrant on fundamental rights grounds is extremely high. To this end, the Court has consistently held that executing judicial authorities may refuse to execute a European arrest warrant only on grounds stemming from Framework Decision 2002/584, as interpreted by the Court, and that, while execution of the European arrest warrant constitutes the rule, refusal to execute is intended to be an exception which must be interpreted strictly. (33)

42. Nevertheless, given that it is apparent from Article 1(3) of Framework Decision 2002/584 that that framework decision is not to have the effect of modifying the obligation to respect the fundamental rights guaranteed by the Charter, the Court has held that the risk of breach of those rights may allow the executing judicial authority to refrain, exceptionally and following an appropriate examination, from executing a European arrest warrant. The Court has hitherto held this to be applied to the right not to be subjected to inhuman or degrading treatment or punishment, enshrined in Article 4 of the Charter, (34) to the right to an effective remedy, under Article 47 of the Charter, (35) and to the right to private and family life and the protection of the best interests of the child, guaranteed by Articles 7 and 24 of the Charter respectively. (36)

43. As regards the methodology to be applied by the executing judicial authority in assessing such a risk, the Court habitually requires that authority to carry out a two-step examination. This involves an analysis based on different criteria, meaning that those steps cannot overlap with one another and must be carried out

successively. (37) To that end, the executing judicial authority must, as a first step, determine whether there is objective, reliable, specific and properly updated information to demonstrate that there is a real risk of breach, in the issuing Member State, of the fundamental rights. That information may be obtained from, inter alia, judgments of international courts, decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the United Nations, or information collected in relevant databases of the European Union Agency for Fundamental Rights (FRA). (38) To take the example of an alleged infringement of Articles 7 and 24 of the Charter, in the context of a second step, the executing judicial authority must determine, specifically and precisely, to what extent the deficiencies identified in the first step of the examination are liable to have an impact on the conditions of detention of the person who is the subject of the European arrest warrant or of the care of his or her children, and whether, having regard to their personal situation, there are substantial grounds for believing that that person or his or her children will run a real risk of breach of those fundamental rights. (39)

44. Moreover, the Court has clarified, with respect to Article 47 of the Charter (40) and to Articles 7 and 24 thereof that a two-step examination is to be carried out, even if the person in question does not invoke systemic or generalised deficiencies. (41) By contrast, the Court has held that an executing judicial authority could be required, on the basis of Article 4 of the Charter, to refuse to execute a European arrest warrant for a seriously ill person where it was unable to rule out a risk of infringement of that article, without having to satisfy the first step of the two-step examination. (42)

(c) Outside Framework Decision 2002/584

45. Turning to the relationship between the EU Member States and the non-member countries, the point of departure is that, axiomatically, the relationship is not and cannot be rooted in the same level of mutual trust. This is so because the general legal relationship between the parties is, by definition, less close.

(1) Member States – Iceland and Norway

46. Iceland and Norway, as two of the three States that are members of the European Economic Area, have concluded an agreement governing a surrender procedure with the European Union. (43) As indicated in the preamble to the agreement and as stressed by the Court, the contracting parties to the agreement have expressed their 'mutual confidence' in the structure and functioning of their legal systems and their ability to guarantee a fair trial. (44)

47. In order to dispel any possible doubts regarding terminology, I should like to stress that, to the best of my knowledge, the terms 'mutual trust' and 'mutual confidence' are used interchangeably. As a matter of fact, in the vast majority of EU official languages, only one term is used. Consequently, given that (i) all the official languages of the European Union are authentic drafting languages and, (ii) therefore, all the language versions of an act of the European Union must, as a matter of principle, be recognised as having the same value, (45) (iii) an interpretation of a provision of EU law thus involves a comparison of the different language versions (46) and (iv) the various language versions of a text of EU law must be given a uniform interpretation, (47) I would propose to the Court not to search for a difference where mutual trust or mutual confidence is referred to in English.

48. Regarding the surrender agreement with Iceland and Norway, the Court has, moreover, found the provisions of this agreement to be 'very similar to the corresponding provisions of Framework Decision 2002/584'. (48)

49. In that connection, I observe that, in interpreting that agreement, the Court relies on its interpretation of the corresponding provisions in Framework Decision 2002/584. (49) Even where the agreement does not contain a provision similar to a fundamental provision of Framework Decision 2002/584, (50) the Court has found that, 'despite the absence of an express provision to that effect in the Agreement relating to the surrender procedure, the State parties to that agreement are, in principle, required to act upon an arrest warrant issued by another Member State to that agreement and may refuse to execute such a warrant only for reasons arising from the same agreement'. (51)

50. Furthermore the Court has, in the context of an intra-EU surrender involving Norway incidentally, described the relationship between the European Union and Norway as a 'special relationship … going beyond economic and commercial cooperation'. (52) This was because Norway 'is a party to the Agreement on the European Economic Area, participates in the Common European Asylum System, implements and applies the

Schengen *acquis*, and has concluded with the European Union the Agreement on the surrender procedure between the Member States of the European Union and Iceland and Norway'. (53)

51. It is noteworthy that the Court relies, in support of its argument, on Norway's application of the Schengen *acquis.* My explanation for this is that this is warranted by the specific features of the cases at issue. Each time, the facts of the cases involved both a State that is a member of the European Economic Area and an intra-EU situation. (54) The present case, on the other hand, is more clear-cut, as it concerns merely a Member State (Ireland) and a non-member country (the United Kingdom).

(2) Member States – Third States

52. In the case which gave rise to the judgment in *Petruhhin*, (55) one of the questions was, in a situation coming within the scope of the Charter under Article 51(1) thereof, (56) which criteria the executing judicial authority could apply in executing an extradition request from a third State with which the European Union had not concluded an extradition agreement. (57)

53. Relying on relevant case-law from the ECtHR, (58) the Court held that the existence of declarations and accession to international treaties guaranteeing respect for fundamental rights in principle are not *in themselves* sufficient to ensure adequate protection against the risk of ill-treatment, where reliable sources have reported practices, carried out or tolerated by the authorities, which are manifestly contrary to the principles of the ECHR. (59) It followed for the Court that, in so far as the competent authority of the requested Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals in the requesting third State, it is required to assess the existence of that risk when it is called upon to decide on the extradition of a person to that State. (60) To that end, the competent authority of the requested Member State must rely on information that is objective, reliable, specific and properly updated. That information may be obtained from, inter alia, judgments of international courts, such as judgments of the ECtHR, judgments of courts of the requesting third State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the United Nations. (61)

54. I understand the examination required by the Court in the judgment in *Petruhhin* to be less rigid and strict than the two-step examination under Framework Decision 2002/584. It is the specific circumstances of the case, not necessarily possible deficiencies of the legal system of the issuing State in general, which are decisive.

B. The TCA

1. Legal basis, purpose and general structure

55. As briefly set out in the section relating to the legal framework in this Opinion, the TCA is an association agreement based on Article 217 TFEU. (62) It was adopted as an 'EU-only', not a mixed, agreement, meaning that the Member States are not contracting parties.

56. The arguably cardinal question for the provisions of any international agreement is whether (some of) its provisions have direct effect, meaning that they can be relied on by individuals before national (EU) courts. The Court usually resolved this question by examining the spirit, general scheme and terms of the provisions of the international agreement in question. (63) As regards the provisions on 'surrender' under Part Three, Title VII, of the TCA, this question can, in my view, be resolved by examining Article 5(1) of the TCA and applying an *a contrario* reasoning. Pursuant to Article 5(1) of the TCA, with the exception, with regard to the European Union, of Part Three of the TCA, (64) nothing in the TCA or any supplementing agreement is to be construed as conferring rights or imposing obligations on persons other than those created between the parties under public international law, nor as permitting the TCA or any supplementing agreement to be directly relied on in the domestic legal systems of the parties. Given that Part Three of the TCA is expressly excluded, there is no reason to assume that its provisions, once they have met the usual criteria of direct effect, should not have direct effect within the EU legal order.

57. As is clear from Article 216(2) TFEU and the settled case-law of the Court, as an international agreement concluded by the European Union, the TCA is binding on it and forms an integral part of its legal order from its entry into force. (65) In interpreting international agreements, the Court places a particular emphasis on the objectives of an agreement. Accordingly, it is settled case-law that an international treaty must be interpreted not

solely by reference to the terms in which it is worded but also in the light of its objectives. (66) Crucially, as a result, the fact that the wording of the provisions of an agreement and the corresponding provisions of EU law are identical does not mean that they must necessarily be interpreted identically. (67)

58. The purpose of the TCA is defined in Article 1 as establishing the basis for a broad relationship between the European Union and the United Kingdom, within an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation, respectful of the parties' autonomy and sovereignty. Article 3 of the TCA goes on to specify that the parties, in full mutual respect and good faith, are to assist each other in carrying out tasks flowing from the agreement. Interpretation of the agreement is, pursuant to Article 4(1) thereof, to be done in good faith in accordance with its ordinary meaning in context and in the light of the object and purpose of the agreement in accordance with customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties. (68) For greater certainty, neither the TCA nor any supplementing agreement establishes an obligation to interpret their provisions in accordance with the domestic law of either party; (69) similarly, no interpretation of the TCA or any supplementing agreement made by the courts of either party is binding on the courts of the other party. (70)

59. Without going into the details of the corresponding provisions in the EU Treaty and the FEU Treaty, it becomes immediately apparent that this purpose is, as regards its ambition and intent, a far cry from what is found in the preamble to and the first articles of the EU Treaty and the FEU Treaty.

60. Nevertheless, as the TCA continues, and on reading its substantive provisions, there emerges a degree of ambition considerably higher than that alluded to in its opening articles. Thus, Part Three on law enforcement and judicial cooperation in criminal matters, (71) and, more specifically, Title VII of Part Three on surrender, contains a detailed set of rules with reciprocal rights and obligations for the European Union and the United Kingdom.

61. First, Article 524 of the TCA (72) stipulates, for the entire Part Three of the TCA, that (i) the cooperation provided for in Part Three of the TCA is based on the parties' and Member States' long-standing respect for democracy, the rule of law and the protection of fundamental rights and freedoms of individuals, including those set out in the Universal Declaration of Human Rights and in the ECHR, and on the importance of giving effect to the rights and freedoms in that convention domestically, and (ii) nothing in Part Three of the TCA modifies the obligation to respect fundamental rights and legal principles as reflected, in particular, in the ECHR and, in the case of the European Union and its Member States, in the Charter.

62. To the extent that such a description is permitted with respect to an international agreement concluded by the European Union and a third State, Article 524 of the TCA is a provision of constitutional significance. Law enforcement and judicial cooperation in criminal matters is, by definition, a field of law that intrinsically involves fundamental rights. For the European Union and the United Kingdom to affirm their mutual commitment to democracy, the rule of law and fundamental rights sends a strong signal as to the closeness of the cooperation covered by Part Three of the TCA and serves as an interpretational yardstick for that entire part.

2. The surrender mechanism under the TCA

63. The objective of Part Three, Title VII, of the TCA is described in Article 596 of that agreement as ensuring that the extradition system between the Member States, on the one hand, and the United Kingdom, on the other hand, is based on a mechanism of surrender.

64. Given that this provision resorts to the terms 'extradition' and 'surrender', a very short observation regarding terminology is appropriate. In EU law, 'surrender' under Framework Decision 2002/584 refers to a situation between two Member States, whereas 'extradition' in general refers to a situation between a Member State and a third State. (73) However, when those third States are closely linked to the European Union, such as States that are members of the European Economic Area, the term used is 'surrender procedures'. (74) The same goes for the TCA. Title VII routinely refers to 'surrender' when describing a situation between Member States and the United Kingdom and to 'extradition' when referring to a situation between either the Member States or the United Kingdom and a third State. (75) Why, then, does Article 596 of the TCA refer to both extradition and surrender? My explanation for this is that 'extradition' is regarded as the standard term in public international law, whereas 'surrender' refers to situations involving the European Union and some of its closest partners, as described above. (76)

65. Article 599 of the TCA deals with the scope of the surrender mechanism and specifies when an arrest warrant may be issued. Pursuant to Article 599(1) of the TCA, an arrest warrant may be issued for acts punishable by the law of the issuing State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences or detention orders of at least 4 months. Moreover, as a result of Article 599(3) of the TCA, subject in particular to Article 600, Article 601(1), points (b) to (h), and Article 604 of the TCA, a State is not to refuse to execute an arrest warrant relating, inter alia, to terrorist offences where those offences are punishable by a custodial sentence of at least 12 months.

66. Articles 600 and 601 of the TCA set out a series of mandatory (77) and optional (78) grounds for non-execution of an arrest warrant. Just as in the corresponding provisions of Framework Decision 2002/584, (79) none of these grounds relates directly to fundamental rights in general or, obviously, to Article 49(1) of the Charter in particular.

67. Pursuant to Article 604, point (c), of the TCA, the execution of an arrest warrant by an executing judicial authority may be subject to the guarantee that if there are substantial grounds for believing that there is a real risk to the protection of the fundamental rights of the requested person, the executing judicial authority may require, as appropriate, additional guarantees as to the treatment of the requested person after the person's surrender before it decides whether to execute the arrest warrant.

68. Article 613 of the TCA governs surrender decisions. According to the first paragraph of that provision, the executing judicial authority is to decide whether the person is to be surrendered within the time limits and in accordance with the conditions defined in Title VII, in particular the principle of proportionality as set out in Article 597. (80) Pursuant to the second paragraph of Article 613 of the TCA, if the executing judicial authority finds the information communicated by the issuing State to be insufficient to allow it to decide on surrender, it is to request that the necessary supplementary information, in particular with respect to Article 597, Articles 600 to 602, Article 604 and Article 606, 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 provided for in Article 615.

69. It is noteworthy that no provision matches Article 1(2) of Framework Decision 2002/584 directly. (81) This, however, does not alter the fact that there is an implicit general obligation for authorities to execute an arrest warrant issued on the basis of the TCA. I understand all the provisions in Part Three, Title VII, of the TCA to be based on this premiss.

70. The provisions of Part Three, Title VII, of the TCA are marked by a high level of trust between the European Union and the United Kingdom as regards a commitment to upholding fundamental rights. A mutual trust that fundamental rights have been, are being and will be protected in future permeates the entire text. (82)

71. It follows from this succinct and by no means comprehensive overview of some of the key provisions of Part Three, Title VII, of the TCA that the European Union and the United Kingdom have established a surrender system which is marked by considerable closeness and a high level of mutual trust. Indeed, the referring court considers the provisions contained in Part Three, Title VII, of the TCA to be 'identical to the [surrender] arrangements provided for under [Framework Decision 2002/584]'. (83)

72. This statement of the referring court goes to the heart of the present case and warrants a word of caution at this stage. Even though the greater part of the provisions contained in Part Three, Title VII, of the TCA resemble those in Framework Decision 2002/584, to the extent that they are worded identically, there are points on which the two texts differ, (84) a glaring example being the issue of political offences. (85)

3. Obligations of the executing judicial authority

73. This leads us to the core of the present case, which is the question of the obligations of the executing judicial authority with regard to the respect of fundamental rights by authorities of the issuing State. This calls for the following remarks.

74. First, given that the situation in question is within the scope of EU law pursuant to Article 51(1) of the Charter, the executing judicial authority deciding on the execution of an arrest warrant is bound by the Charter

in that it must ensure that the surrender of the requested person will not lead to a breach of his or her rights under the Charter.

75. Secondly, the executing judicial authority is to carry out that examination only when such exceptional breach of fundamental rights is alleged by the person subject to the arrest warrant.

76. Thirdly, it is, in my view, futile to attempt to transpose to the letter the two-step examination, applicable since the judgment in *Aranyosi and Căldăraru* (86) to intra-EU situations, to the system established by the TCA. As explained in detail above, this test in the case-law is based on the highest level of mutual trust possible within the EU legal order, that is, that of the mutual trust between EU Member States. The level of mutual trust between the European Union and the United Kingdom is high, but not as high as the level of trust underlying Framework Decision 2002/584.

77. Fourthly, mutual trust is not a binary concept, but is rather a sliding scale and, as set out above, the relevant provisions of the TCA are underpinned by a considerable level of mutual trust, which exceeds the trust enjoyed between a Member State and the overwhelming majority of non-member countries. The executing judicial authority is therefore expected, in principle, to execute the arrest warrant and may refuse to do so only if there is tangible evidence of a real risk of a breach of fundamental rights. The European Union and the United Kingdom, through the relevant provisions of the TCA, have expressed confidence that the European Union and the United Kingdom will both honour their obligations regarding fundamental rights. There is therefore a presumption, subject to rebuttal, that fundamental rights have been until now protected, are being protected and will also be protected in the future by the contracting parties.

78. In that connection, I propose that the Court (i) as a starting point, apply criteria comparable to those developed in the judgment in *Petruhhin*, (87) but (ii) that this is on the understanding that the executing judicial authority will be carrying out *its own* assessment of the fundamental rights relied on.

79. For the present case, should the Irish authorities be in possession of evidence of a real risk of a breach of fundamental rights in the requesting third State, they are required to assess that risk when called upon to decide on the extradition of a person to that State. To that end, the executing judicial authority must rely on information that is objective, reliable, specific and properly updated. That information may be obtained from, inter alia, judgments of international courts, such as judgments of the ECtHR, judgments of courts of the requesting third State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the United Nations. The mere existence of declarations and accession to international treaties guaranteeing respect for fundamental rights is in principle insufficient.

80. Crucially, it should be stressed that it is not sufficient for the executing judicial authority to rely merely on the fact that the United Kingdom, following its withdrawal from the European Union, continues to be a member of the ECHR. Similarly, it is not sufficient to refer formally only to the case-law of the courts of the United Kingdom to show that the surrender procedure is compatible with the fundamental right in question. It is for the executing judicial authority to carry out its own examination in order to, figuratively speaking, make up its own mind on whether a surrender is compatible with fundamental rights. This implies that the executing judicial authority cannot simply take note of the existence of relevant judgments of the United Kingdom Courts. While such judgments may constitute an indication that fundamental rights are being respected, the executing judicial authority must still carry out its own assessment and make its own 'subsumption' of the matter.

C. Article 49(1) of the Charter

81. While I am obviously aware of the fact that it is ultimately for the referring court to determine whether in the present case there is a risk of an infringement of Article 49(1) of the Charter, I do believe that, based on the information available to it, the Court is in a position to guide the referring court at this stage.

82. It should be borne in mind that the regime permitting conditional release in Northern Ireland was amended with effect from 30 April 2021. Prior to this change, a person convicted of certain terrorism-related offences was eligible for automatic parole after serving half of his or her sentence. Under the regime applicable from that date, the conditional release of such a person has to be approved by a specialised authority and may only take place after the person concerned has served two thirds of his or her sentence.

83. The question is whether this change in the parole regime is contrary to the principle of non-retroactivity, enshrined in the second sentence of Article 49(1) of the Charter.

84. Pursuant to Article 49(1) of the Charter, no one is to be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Similarly, no heavier penalty is to be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty is applicable.

85. Article 49 of the Charter thus contains the requirements for the imposition of penalties. This provision does not contain (mere) principles within the meaning of Article 52(5) of the Charter, but lays down enforceable rights. (88)

86. The Court has already held that Article 49 of the Charter must be interpreted as containing the same requirements as those stemming from Article 7 ECHR, (89) thereby confirming the information given in the non-binding but nevertheless instructive (90) explanations relating to the Charter. (91) Incidentally, the wording of the first two sentences of Article 49(1) is identical to that of Article 7(1) ECHR. Accordingly, the relevant case-law of the ECtHR can be relied on. (92)

87. In that connection, I emphasise that the guarantee enshrined in Article 7 ECHR, which is an essential element of the rule of law, occupies a prominent place in the ECHR system of protection, as is shown by the fact that no derogation from it is permissible under Article 15 ECHR. (93)

88. As the referring court itself points out, the ECtHR has rejected the argument that retrospective changes to systems of remission or early release are in breach of Article 7 ECHR, given that such measures do not form part of the 'penalty' for the purposes of that article.

89. While the concept of 'penalty' is autonomous in scope, (94) the ECtHR (95) draws a distinction in its case-law between a measure that constitutes a penalty per se and a measure that concerns the execution or enforcement of the penalty. Consequently, where the nature and purpose of a measure relates to the remission of a sentence or a change in a regime for early release, this does not form part of the 'penalty' within the meaning of Article 7 ECHR. (96)

90. In that connection, the referring court notes that the ECtHR has stated that 'in practice the distinction between a measure that constitutes a "penalty" and a measure that concerns the "execution" or "enforcement" of the "penalty" may not always be clear-cut' and that it is possible that a measure taken during the execution of a sentence, rather than merely concerning the manner of execution of the sentence could, on the contrary, affect its scope. Here, the referring court points to the judgment in *Del Río Prada v. Spain*. The referring court wonders whether and, if so, to what extent that judgment is a departure from previous ECtHR case-law.

91. I do not consider that the ECtHR decision referred to by the national court constitutes a departure from that court's long-standing case-law on Article 7(1) ECHR.

92. The cited passage of the judgment in *Del Río Prada v. Spain* refers to previous and consistent case-law of that court. Ergo, the ECtHR has, already before that judgment was delivered, paid very close attention to whether a measure which seemingly concerns the execution or enforcement of a penalty does, in fact, affect the scope of the penalty. In other words, I see no room for asserting, as does MA, that the judgment in *Del Río Prada v. Spain* shows 'a more flexible approach on the part of the ECtHR to the application of Article 7 [ECHR] than its previous jurisprudence'. (97)

93. In the judgment in *Del Río Prada v. Spain*, the terms of imprisonment to which the applicant, Ms del Río Prada, was sentenced, in respect of offences committed between 1982 and 1987, amounted to over 3 000 years. (98) This was subsequently significantly reduced under the Spanish Criminal Code of 1973, which allowed for a maximum of 30 years of actual imprisonment. In that connection, the applicant was entitled to certain remissions of her sentence for work and study in prison. Subsequently, that is to say, after the conviction of the applicant and her release from prison, the Tribunal Supremo (Supreme Court, Spain) introduced a new legal doctrine, (99) under which sentence remissions should be applied to each individual sentence rather than

to the maximum 30-year term. This resulted in an extension of the time many prisoners, including Ms del Río Prada, would spend in prison, leading the ECtHR to a finding of infringement of Article 7 ECHR.

94. In doing so, the ECtHR found it crucial that, at the time of the *conviction* of the applicant and at the time when she was notified of the decision to combine her sentences and set a maximum term of imprisonment, there was no indication of any perceptible line of case-law development in keeping with the Spanish Supreme Court's judgment in question. (100)

95. The exceptional nature of the judgment in *Del Río Prada v. Spain* is confirmed by the subsequent decision of the ECtHR in the *Devriendt* case. (101) Here, regarding convictions of life imprisonment, a Belgian law raised the minimum threshold for parole from 10 to 15 years. (102) This increase occurred between the criminal offences having been committed by the person in question and the (final) sentencing. The ECtHR explicitly distinguished this case from the judgment in *Del Río Prada v. Spain* and found there to be no infringement of Article 7 ECHR. In particular, it held that the conditional release in question was a method of enforcing a custodial sentence whereby the convicted person serves the sentence outside prison, subject to compliance with the conditions imposed during a specified probationary period and that that case differed in this respect from the judgment in *Del Río Prada v. Spain*, where the issue concerned a reduction in the sentence to be served and not a mere reduction or adjustment of the conditions of enforcement. (103) It also noted that while the effect of the new regime was to increase the time threshold for eligibility for conditional release, which undoubtedly resulted in a harsher situation for the applicant's detention, contrary to the situation in the judgment in *Del Río Prada v. Spain*, such harsher treatment was not to make it impossible to grant conditional release. (104)

96. In order to determine whether a measure taken during the execution of a sentence concerns the manner of execution of the sentence only or, on the contrary, affects its scope, one must examine in each case what the 'penalty' imposed actually entailed under the domestic law in force at the material time or, in other words, what its intrinsic nature was. In doing so, one must have regard to domestic law as a whole and how it was applied at the material time. (105)

97. Here, I note that there is no indication whatsoever that sentences applicable to the alleged acts, namely life imprisonment, have changed from the alleged date on which the acts were committed to the present day.

98. Moreover, the fact that, under the amended regime permitting conditional release in Northern Ireland, a person convicted of certain terrorism-related offences is no longer eligible for automatic parole after serving half of his or her sentence, but rather the conditional release of such a person will have to be approved by a specialised authority and may only take place after the person concerned has served two thirds of his or her sentence, does not alter the fact that, even when conditionally released, that person will still be serving the sentence.

99. In conclusion, it can be stated that the regime permitting conditional release does not come within the definition of a 'penalty' under the second sentence of Article 49(1) of the Charter and is not, therefore, caught by that provision.

100. Pursuant to Article 52(3) of the Charter, in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights are the same as those laid down by the ECHR. This does not prevent EU law from providing more extensive protection.

101. To the extent that this raises the question whether Article 49(1) of the Charter has a broader scope or imposes stricter requirements than Article 7(1) ECHR, I see no scope for considering or reason to consider that this might be the case. In particular, as underlined by the Commission, there is no discernible constitutional tradition common to the Member States to the effect that the scope of Article 49(1) of the Charter would or should be broader than that of Article 7(1) ECHR.

VI. Conclusion

102. In the light of the foregoing considerations, I propose that the Court answer the question referred by the Supreme Court (Ireland) as follows:

Where a Member State receives a request from the United Kingdom, under the provisions of Part Three, Title VII, of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, seeking the surrender of a requested person, and where argument is made and evidence adduced to the effect that surrender of the requested person would be in breach of his or her rights under Article 49(1) of the Charter of Fundamental Rights of the European Union, the judicial authorities of the Member State:

– must make their own assessment so as to determine whether the surrender will prejudice the rights referred to in Article 49(1) of the Charter of Fundamental Rights;

– must in this respect rely on information that is objective, reliable, specific and properly updated;

– may refuse surrender where there are substantial and established grounds to believe that the requested person would be exposed to a real risk that his or her fundamental rights guaranteed by Article 49(1) of the Charter of Fundamental Rights would be breached in case of a surrender.

The fact that the requested person will, if convicted, be subject to a more severe parole regime than that in force on the day on which the alleged offence was committed does not, as such, constitute in itself a breach of Article 49(1) of the Charter of Fundamental Rights.

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1 Original language: English.

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i The wording of footnote 102 of this document has been amended since it was first put online.

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i The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

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2 OJ 2021 L 149, p. 10.

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3 Council Decision (EU) 2021/689 of 29 April 2021 on the conclusion, on behalf of the Union, of the TCA, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information (OJ 2021 L 149, p. 2).

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4 Council Decision (Euratom) 2020/2253 of 29 December 2020 approving the conclusion, by the European Commission, of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the European Atomic Energy Community for Cooperation on the Safe and Peaceful Uses of Nuclear Energy and the conclusion, by the European Commission, on behalf of the European Atomic Energy Community, of the TCA (OJ 2020 L 444, p. 11).

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5 See Article 783(2) of the TCA.

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6 See Article 783(1) of the TCA and notice concerning the entry into force of the TCA and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information (OJ 2021 L 149, p. 2540).

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7 On common and institutional provisions (Part One), on trade, transport, fisheries and other arrangements (Part Two), on law enforcement and judicial cooperation in criminal matters (Part Three), on thematic cooperation (Part Four), on participation in EU programmes, sound financial management and financial provisions (Part Five), on dispute settlement and horizontal provisions (Part Six) and on final provisions (Part Seven).

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8 Common and institutional provisions.

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9 Principles of interpretation and definitions.

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10 General provisions.

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11 Pursuant to Article 778(2)(r) of the TCA, Annex 43 forms an integral part of Title VII of Part Three. See also Article 606 of the TCA, on the content and form of the arrest warrant.

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12 Article 599 of the TCA is headed ‘Scope’.

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13 Article 604 of the TCA is headed 'Guarantees to be given by the issuing State in particular cases'.

14 The four offences are being a member of a proscribed organisation, directing the activities of an organisation concerned with the commission of acts of terrorism, conspiring to direct the activities of an organisation concerned with the commission of acts of terrorism, and preparing to commit acts of terrorism.

15 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').

16 Judgment of 21 October 2013 (CE:ECHR:2013:1021JUD004275009; 'the judgment in *Del Río Prada v. Spain*').

17 Moreover, where a case raises serious uncertainties that affect fundamental issues of national constitutional law and EU law, it may be necessary, having regard to the particular circumstances of such a case, to deal with it within a short time. See order of the President of the Court of 19 October 2018, *Wightman and Others* (C-621/18, EU:C:2018:851, paragraph 10 and the case-law cited).

18 See order of the President of the Court of 22 April 2024, *Alchaster* (C-202/24, EU:C:2024:343, paragraph 7).

19 The United Kingdom's right to intervene and participate in the procedure is governed by Article 90(1) of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020 L 29, p. 7, 'the Withdrawal Agreement'), approved by the Council of the European Union, on behalf of the European Union and the European Atomic Energy Community by Council Decision (EU) 2020/135 of 30 January 2020 (OJ 2020 L 29, p. 1). Pursuant to Article 90(1) of the Withdrawal Agreement, until the judgments and orders of the Court in all proceedings and requests for preliminary rulings referred to in Article 86 [on pending cases before the Court] have become final, the United Kingdom may intervene in the same way as a Member State or, in the cases brought before the Court in accordance with Article 267 TFEU, participate in the procedure before the Court in the same way as a Member State. During that period, the Registrar of the Court of Justice of the European Union shall notify the United Kingdom, at the same time and in the same manner as the Member States, of any case referred to the Court of Justice for a preliminary ruling by a court or tribunal of a Member State. Given that there are still pending cases for the purposes of Article 86 of the Withdrawal Agreement, the United Kingdom has a right to intervene in the present proceedings.

20 Under Article 598, point (c), of the TCA, an 'executing judicial authority' is the judicial authority of the executing State which is competent to execute the arrest warrant by virtue of the domestic law of that State.

21 Under Article 598, point (a), of the TCA, an 'arrest warrant' is a judicial decision issued by a State with a view to the arrest and surrender by another State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

22 The United Kingdom's withdrawal from the European Union took effect on 31 January 2020.

23 The transition period ended on 31 December 2020. Article 127 of the Withdrawal Agreement provides that EU law is to be applicable to and in the United Kingdom during the transition period unless the Withdrawal Agreement provides otherwise. Since the Withdrawal Agreement does not provide for a derogation from Article 127 for the provisions relating to the European arrest warrant, those provisions continued to apply during the transition period.

24 And the corresponding Article 2 ECHR.

25 See on this issue, by way of example, judgment of the ECtHR, 9 July 2019, *Romeo Castaño v. Belgium* (CE:ECHR:2019:0709JUD000835117).

26 See, on this topic Lenaerts, K., 'La vie après l'avis: exploring the principle of mutual (yet not blind) trust', *Common Market Law Review*, Vol. 54, 2017, pp. 805 to 840, at p. 806, and Bay Larsen, L., 'Some reflections on mutual recognition in the area of freedom, security and justice', in Cardonnel, P., Rosas, A. and Wahl, N. (eds.), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh*, Hart Publishing, London, 2012, pp. 139 to 152, at p. 140.

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

28 See Opinion 2/13 *(*Accession of the European Union to the ECHR*)* of 18 December 2014 (EU:C:2014:2454, paragraph 167).

29 Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which are an integral part of the very identity of the European Union as a common legal order; those values are given concrete expression in principles containing legally binding obligations for the Member States. See judgment of 16 February 2022, Hungary v Parliament and Council (C-156/21, EU:C:2022:97, paragraph 232). For a recent appraisal of Article 2 TEU in doctrine, see Nettesheim, M., 'Die föderale Homogenitätsklausel des Art. 2 EUV', in *Europarecht,* 2024, pp. 269-299, at p. 273, who terms that provision a 'federal homogeneity clause'.

30 Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014 (EU:C:2014:2454, paragraph 168). See also my Opinion in Republic of Moldova (C-741/19, EU:C:2021:164, point 87).

31 See, by way of example, judgment of 6 September 2016, Petruhhin (C-182/15, EU:C:2016:630, paragraph 43 and the case-law cited).

32 The Tampere European Council of 15 and 16 October 1999.

33 See judgment of 18 April 2023, E.D.L. (Ground for refusal based on illness) (C-699/21, EU:C:2023:295, paragraph 34 and the case-law cited).

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

35 See judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice) (C-216/18 PPU, EU:C:2018:586).

36 See judgment of 21 December 2023, GN (Ground for refusal based on the best interests of the child) (C-261/22, EU:C:2023:1017).

37 See judgment of 21 December 2023, GN (Ground for refusal based on the best interests of the child) (C-261/22, EU:C:2023:1017, paragraph 46 and the case-law cited).

38 See judgment of 21 December 2023, GN (Ground for refusal based on the best interests of the child) (C-261/22, EU:C:2023:1017, paragraph 47 and the case-law cited).

39 See judgment of 21 December 2023, GN (Ground for refusal based on the best interests of the child) (C-261/22, EU:C:2023:1017, paragraph 48 and the case-law cited).

40 See judgment of 31 January 2023, Puig Gordi and Others (C-158/21, EU:C:2023:57, paragraph 111).

41 See judgment of 21 December 2023, GN (Ground for refusal based on the best interests of the child) (C-261/22, EU:C:2023:1017).

42 See judgment of 18 April 2023, E.D.L. (Ground for refusal based on illness) (C-699/21, EU:C:2023:295, paragraph 55).

43 See Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway (OJ 2006 L 292, p. 2). This agreement was approved on behalf of the European Union by, first, Council Decision 2006/697/EC of 27 June 2006 (OJ 2006 L 292, p. 1) and, following the entry into force of the Treaty of Lisbon, which made another approval necessary, by Council Decision 2014/835/EU of 27 November 2014 (OJ 2014 L 343, p. 1). It has been in force since 1 November 2019 (see the relevant notice published in the *Official Journal of the European Union*, OJ 2019 L 230, p. 1).

44 See judgment of 2 April 2020, Ruska Federacija (C-897/19 PPU, EU:C:2020:262, paragraph 73).

45 See, by way of example, judgment of 25 June 2020, *A and Others (Wind turbines at Aalter and Nevele)* (C-24/19, EU:C:2020:503, paragraph 39 and the case-law cited).

46 See judgment of 6 October 1982, Cilfit and Others (283/81, EU:C:1982:335, paragraph 18).

47 See, by way of example, judgment of 30 May 2013, Genil 48 and Comercial Hostelera de Grandes Vinos (C-604/11, EU:C:2013:344, paragraph 38 and the case-law cited).

48 See judgments of 2 April 2020, Ruska Federacija (C-897/19 PPU, EU:C:2020:262, paragraph 73), and of 14 September 2023, Sofiyska gradska prokuratura and Others (Successive arrest warrants) (C-71/21, EU:C:2023:668, paragraph 30).

49 See judgment of 14 September 2023, Sofiyska gradska prokuratura and Others (Successive arrest warrants) (C-71/21, EU:C:2023:668, paragraphs 33 to 43 and 45 to 61).

50 Such as the pivotal provision of Article 1(2) of that framework decision, under which Member States are to execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of that framework decision.

51 See judgment of 14 September 2023, Sofiyska gradska prokuratura and Others (Successive arrest warrants) (C-71/21, EU:C:2023:668, paragraph 48).

52 See judgment of 17 March 2021, JR (Arrest warrant – Conviction in a third State, Member of the EEA) (C-488/19, EU:C:2021:206, paragraph 60).

53 Ibid. See also judgment of 2 April 2020, Ruska Federacija (C-897/19 PPU, EU:C:2020:262, paragraph 44).

54 In its judgment of 17 March 2021, JR (Arrest warrant – Conviction in a third State, Member of the EEA) (C-488/19, EU:C:2021:206), the Court in essence had to reply to the referring court of the executing State (Ireland) and to determine whether a European arrest warrant could be issued under Framework Decision 2002/584 in order to execute a prison sentence which was handed down by the court of a third State (Norway) and recognised in the issuing State (Lithuania).

55 See judgment of 6 September 2016 (C-182/15, EU:C:2016:630).

56 See judgment of 6 September 2016, Petruhhin (C-182/15, EU:C:2016:630, paragraph 52).

57 *In casu*, the third State was Russia.

58 See judgment of the ECtHR, 28 February 2008, *Saadi v. Italy* (CE:ECHR:2008:0228JUD003720106, § 147).

59 See judgment of 6 September 2016, Petruhhin (C-182/15, EU:C:2016:630, paragraph 57).

60 See judgment of 6 September 2016, Petruhhin (C-182/15, EU:C:2016:630, paragraph 58).

61 See judgment of 6 September 2016, Petruhhin (C-182/15, EU:C:2016:630, paragraph 59).

62 And Article 101 of the Treaty establishing the European Atomic Energy Community.

63 This constitutes consistent case-law since the judgment of 12 December 1972, International Fruit Company and Others (21/72 to 24/72, EU:C:1972:115, paragraph 20). See also judgments of 9 September 2008, *FIAMM and Others* v *Council and Commission* (C-120/06 P and C-121/06 P, EU:C:2008:476, paragraph 108), and of 13 January 2015, Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe (C-404/12 P and C-405/12 P, EU:C:2015:5, paragraph 45).

64 Law enforcement and judicial cooperation in criminal matters.

65 This constitutes consistent case-law since the judgment of 30 April 1974, Haegeman (181/73, EU:C:1974:41, paragraph 5). See also judgments of 1 August 2022, Sea Watch (C-14/21 and C-15/21, EU:C:2022:604, paragraph 94), and of 27 February 2024, EUIPO v The KaiKai Company Jaeger Wichmann (C-382/21 P, EU:C:2024:172, paragraph 57).

66 See Opinion 1/91 *(*First Opinion on the EEA Agreement*)* of 14 December 1991 (EU:C:1991:490, paragraph 14), and judgment of 24 November 2016, SECIL (C-464/14, EU:C:2016:896, paragraph 94).

67 See Opinion 1/91 *(*First Opinion on the EEA Agreement*)* of 14 December 1991 (EU:C:1991:490, paragraph 14).

68 Done at Vienna on 23 May 1969.

69 See Article 4(2) of the TCA.

70 See Article 4(3) of the TCA.

71 Articles 522 to 701 of the TCA.

72 This provision figures in Title I ('General provisions') of Part Three of the TCA.

73 See also my Opinion in R O (C-327/18 PPU, EU:C:2018:644, point 68 and footnote 61).

74 See the wording used in Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway.

75 See Article 614(3), Article 623(6) and Article 626 of the TCA.

76 Such an interpretation is, moreover, corroborated by the wording of Article 629 of the TCA and by the terminology employed in the European Convention on Extradition of the Council of Europe, done at Paris on 13 December 1957 (ETS No 24, available at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/024).

77 In the case of Article 600 of the TCA.

78 In the case of Article 601 of the TCA.

79 Article 3 et seq. of Framework Decision 2002/584.

80 This provision is worded almost identically to that of Article 15(1) of Framework Decision 2002/584, the only substantial difference being that in Article 613(1) of the TCA the principle of proportionality is also referred to.

81 Pursuant to this provision, Member States are to execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of Framework Decision 2002/584.

82 The point has been made by the Commission in particular, in both its written and oral submissions, that the fact that the United Kingdom is not a country in the Schengen area is a decisive criterion in this respect. I respectfully disagree with such an assertion. When the United Kingdom was a Member State of the European Union, it was not part of the Schengen area either. Nor is, at present, Ireland (or Cyprus). At the time the Court handed down its seminal judgment of 5 April 2016, Aranyosi and Căldăraru (C-404/15 and C-659/15 PPU, EU:C:2016:198), Romania was not part of the Schengen area, and is not, even at present, a full member (Romania and Bulgaria are currently Member States in the Schengen area only in so far as internal air and sea borders are concerned). Schengen is, therefore, not a decisive criterion.

83 See point 3 of the request for a preliminary ruling.

84 See Peers, S., 'So close, yet so far: the EU/UK Trade and Cooperation Agreement', *Common Market Law Review*, Vol. 59, 2022, pp. 49 to 80, at p. 68. See also, in detail, Grange, E., Keith, B. and Kerridge, S., 'Extradition under the EU-UK Trade and Cooperation Agreement', *New Journal of European Criminal Law*, Vol. 12, 2021, pp. 213 to 221, at pp. 217 and 218.

85 See Article 602 of the TCA. There is no corresponding provision in Framework Decision 2002/584.

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

87 That is to say, a situation coming within the scope of EU law but involving an extradition to a third country.

88 See Lemke, S., in von der Groeben, H., Schwarze, J. and Hatje, A., (eds), *Europäisches Unionsrecht (Kommentar)*, Band 1, 7th ed., Nomos, Baden-Baden, 2015, Art. 49 GRC, point 2.

89 See judgment of 10 November 2022, DELTA STROY 2003 (C-203/21, EU:C:2022:865, paragraph 46).

90 In accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, the explanations were drawn up in order to provide guidance on the interpretation of the Charter and must be duly taken into consideration both by the Courts of the European Union and by the courts of the Member States.

91 See Explanation on Article 52 – Scope and interpretation of rights and principles, contained in Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17).

92 See also Szwarc, M., in Wróbel, A., *Karta Praw Podstawowych Unii Europejskiej. Komentarz*, C.H.Beck, Warsaw, 2020, p. 1221.

93 See judgments of the ECtHR, 22 November 1995, *C.R. v. the United Kingdom* (CE:ECHR:1995:1122JUD002019092, § 32); 22 November 1995, *S.W. v. the United Kingdom* (CE:ECHR:1995:1122JUD002016692, § 34); and 12 February 2008, *Kafkaris v. Cyprus* (CE:ECHR:2008:0212JUD002190604, § 137).

94 It should be pointed out, however, that, as a starting point, after examining whether the measure in question is imposed following conviction for a 'criminal offence', the ECtHR can take other factors into account, such as the nature and purpose of the measure in question, *its characterisation under national law*, the procedures involved in the making and implementation of the measure, and the severity of the measure. See, to that effect, judgments of the ECtHR, 9 February 1995, *Welch v. the United Kingdom* (CE:ECHR:1995:0209JUD001744090, § 28); 8 June 1995, *Jamil v. France* (CE:ECHR:1995:0608JUD001591789, § 31); and 12 February 2008, *Kafkaris v. Cyprus* (CE:ECHR:2008:0212JUD002190604, § 142).

95 And the former European Commission of Human Rights, prior to the entry into force on 1 November 1998 of Protocol No. 11 to the ECHR, restructuring the control machinery established thereby.

96 See decisions of the European Commission of Human Rights of 3 March 1986, *Hogben v. the United Kingdom* (CE:ECHR:1986:0303DEC001165385), and of 28 February 1996, *Hosein v. the United Kingdom* (CE:ECHR:1996:0228DEC002629395). See also decision of the ECtHR, 29 November 2005, *Uttley v. the United Kingdom* (CE:ECHR:2005:1129DEC003694603), and judgment of the ECtHR, 12 February 2008, *Kafkaris v. Cyprus* (CE:ECHR:2008:0212JUD002190604, § 142).

97 See order of the referring court for a preliminary ruling, paragraph 12.

98 See the judgment in *Del Río Prada v. Spain*, paragraph 12.

99 Known as the 'Parot doctrine'.

100 See the judgment in *Del Río Prada v. Spain*, paragraph 117.

101 See decision of the ECtHR, 31 August 2021, *Devriendt v. Belgium* (CE:ECHR:2021:0831DEC003556719).

102 On 26 September 2006, the applicant was sentenced to life imprisonment by the Cour d'assises de Brabant (Assize Court, Brabant, Belgium) for a murder committed on the night of 24-25 August 2003. At that time, the minimum threshold for eligibility for parole was 10 years for life sentences. On 30 January 2007, the Cour de cassation (Court of Cassation, Belgium) rejected the applicant's appeal. On 17 February 2015, the ECtHR made a finding of infringement of Article 6(1) ECHR, due to the lack of reasoning in the jury's decision. Consequently, on 16 June 2015, the Cour de cassation (Court of Cassation) ordered the proceedings to be reopened, retracted its earlier judgment and quashed the judgment of the Cour d'assises, Brabant (Assize Court, Brabant), to which it referred the case for reconsideration. On 29 June 2016, the Assize Court sentenced the applicant to life imprisonment *in absentia*. Following the applicant's opposition, he was again sentenced to life imprisonment on 28 April 2017, and the Cour de cassation (Court of Cassation) dismissed his appeal on 24 October 2017. Meanwhile, a law passed on 17 March 2013 raised the minimum threshold for parole eligibility from 10 to 15 years for life sentences. On 16 August 2018, the applicant applied for parole, arguing he had met the 10-year threshold. However, on 25 February 2019, the tribunal de l'application des peines, Gent (Sentence Enforcement Court, Ghent, Belgium) declared the application inadmissible, as the applicant had not yet served the required 15 years. On 26 March 2019, the Cour de cassation (Court of Cassation) rejected the applicant's appeal, clarifying that there was no increase in the sentence but a change in the terms of its execution, which did not infringe Article 7 ECHR.

103 See decision of the ECtHR, 31 August 2021, *Devriendt v. Belgium* (CE:ECHR:2021:0831DEC003556719, paragraph 26).

104 See decision of the ECtHR, 31 August 2021, *Devriendt v. Belgium* (CE:ECHR:2021:0831DEC003556719, paragraph 28).

105 See judgments of the ECtHR, 12 February 2008, *Kafkaris v. Cyprus* (CE:ECHR:2008:0212JUD002190604, § 145), and in *Del Río Prada v. Spain* (§ 90).

JUDGMENT OF THE COURT (Grand Chamber)

29 July 2024 (*)

(Reference for a preliminary ruling – Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other – Surrender of a person to the United Kingdom for criminal prosecution – Competence of the executing judicial authority – Risk of breach of a fundamental right – Article 49(1) and Article 52(3) of the Charter of Fundamental Rights of the European Union – Principle that offences and penalties must be defined by law – Changes, to the detriment of that person, to the licence regime)

In Case C-202/24 [Alchaster], (i)[i]

REQUEST for a preliminary ruling under Article 267 TFEU from the Supreme Court (Ireland), made by decision of 7 March 2024, received at the Court on 14 March 2024, in proceedings relating to the execution of arrest warrants issued against

MA,

intervening party:

Minister for Justice and Equality,

THE COURT (Grand Chamber)

composed of K. Lenaerts, President, L. Bay Larsen (Rapporteur), Vice-President, K. Jürimäe, C. Lycourgos, E. Regan, T. von Danwitz, F. Biltgen and Z. Csehi, Presidents of Chambers, S. Rodin, A. Kumin, N. Jääskinen, M.L. Arastey Sahún and M. Gavalec, Judges,

Advocate General: M. Szpunar,

Registrar: A. Lamote, Administrator,

having regard to the written procedure and further to the hearing on 4 June 2024,

after considering the observations submitted on behalf of:

– the Minister for Justice and Equality and Ireland, by M. Browne, Chief State Solicitor, D. Curley, S. Finnegan and A. Joyce, acting as Agents, and by J. Fitzgerald, Senior Counsel, and A. Hanrahan, Barrister-at-Law,

– MA, by S. Brittain, Barrister-at-Law, M. Lynam, Senior Counsel, C. Mulholland, Solicitor, and R. Munro, Senior Counsel,

– the Hungarian Government, by Z. Biró-Tóth and M.Z. Fehér, acting as Agents,

– the United Kingdom Government, by S. Fuller, acting as Agent, and by V. Ailes, J. Pobjoy, Barristers, and J. Eadie KC,

– the European Commission, by H. Leupold, F. Ronkes Agerbeek and J. Vondung, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 June 2024,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (OJ 2021 L 149, p. 10; 'the TCA'), in conjunction with Article 49(1) and Article 52(3) of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in connection with the execution, in Ireland, of four arrest warrants issued by the courts of the United Kingdom of Great Britain and Northern Ireland against MA for the purposes of conducting a criminal prosecution.

Legal context

The Convention for the Protection of Human Rights and Fundamental Freedoms

3 Article 7(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), provides:

'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.'

European Union law

Framework Decision 2002/584/JHA

4 Recital 6 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1) states:

'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.'

5 Article 1(1) of that framework decision provides:

'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.'

Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community

6 Article 126 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020 L 29, p. 7) provides:

'There shall be a transition or implementation period, which shall start on the date of entry into force of this Agreement and end on 31 December 2020.'

The TCA

7 Recital 23 of the TCA is drafted as follows:

'CONSIDERING that cooperation between the United Kingdom and the [European] Union relating to the prevention, investigation, detection or prosecution of criminal offences and to the execution of criminal penalties, including the safeguarding against and prevention of threats to public security, will enable the security of the United Kingdom and the Union to be strengthened.'

8 Article 1 of the TCA provides:

'This Agreement establishes the basis for a broad relationship between the Parties, within an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation, respectful of the Parties' autonomy and sovereignty.'

9 Article 3(1) of the TCA is worded as follows:

'The Parties shall, in full mutual respect and good faith, assist each other in carrying out tasks that flow from this Agreement and any supplementing agreement.'

10 Article 522(1) of the TCA provides:

'The objective of this Part is to provide for law enforcement and judicial cooperation between the Member States and Union institutions, bodies, offices and agencies, on the one side, and the United Kingdom, on the other side, in relation to the prevention, investigation, detection and prosecution of criminal offences and the prevention of and fight against money laundering and financing of terrorism.'

11 Article 524 of the TCA states:

'1. The cooperation provided for in this Part is based on the Parties' and Member States' long-standing respect for democracy, the rule of law and the protection of fundamental rights and freedoms of individuals, including as set out in the Universal Declaration of Human Rights [adopted by the General Assembly of the United Nations on 10 December 1948] and in the [ECHR], and on the importance of giving effect to the rights and freedoms in that Convention domestically.

2. Nothing in this Part modifies the obligation to respect fundamental rights and legal principles as reflected, in particular, in the [ECHR] and, in the case of the [European] Union and its Member States, in the [Charter].'

12 Article 596 of the TCA provides:

'The objective of this Title is to ensure that the extradition system between the Member States, on the one side, and the United Kingdom, on the other side, is based on a mechanism of surrender pursuant to an arrest warrant in accordance with the terms of this Title.'

13 Article 599(3) of the TCA is worded as follows:

'Subject to Article 600, points (b) to (h) of Article 601(1), and Articles 602, 603 and 604, a State shall not refuse to execute an arrest warrant issued in relation to the following behaviour where such behaviour is punishable by deprivation of liberty or a detention order of a maximum period of at least 12 months:

(a) the behaviour of any person who contributes to the commission by a group of persons acting with a common purpose of one or more offences in the field of terrorism referred to in Articles 1 and 2 of the European Convention on the Suppression of Terrorism, done at Strasbourg on 27 January 1977 ..., or

(b) terrorism as defined in Annex 45.'

14 Articles 600 and 601 of the TCA respectively list the grounds for mandatory non-execution of the arrest warrant.

15 Article 602(1) and (2) of the TCA provides:

‘1. The execution of an arrest warrant may not be refused on the grounds that the offence may be regarded by the executing State as a political offence, as an offence connected with a political offence or as an offence inspired by political motives.

2. However, the United Kingdom and the Union, acting on behalf of any of its Member States, may each notify the Specialised Committee on Law Enforcement and Judicial Cooperation that paragraph 1 will be applied only in relation to:

(a) the offences referred to in Articles 1 and 2 of the European Convention on the Suppression of Terrorism;

(b) offences of conspiracy or association to commit one or more of the offences referred to in Articles 1 and 2 of the European Convention on the Suppression of Terrorism, if those offences of conspiracy or association correspond to the description of behaviour referred to in Article 599(3) of this Agreement; and

(c) terrorism as defined in Annex 45 to this Agreement.’

16 Article 603(1) and (2) of the TCA provides:

‘1. The execution of an arrest warrant may not be refused on the grounds that the requested person is a national of the executing State.

2. The United Kingdom, and the Union, acting on behalf of any of its Member States, may each notify the Specialised Committee on Law Enforcement and Judicial Cooperation that that State’s own nationals will not be surrendered or that the surrender of their own nationals will be authorised only under certain specified conditions. The notification shall be based on reasons related to the fundamental principles or practice of the domestic legal order of the United Kingdom or the State on behalf of which a notification was made. In such a case, the Union, on behalf of any of its Member States or the United Kingdom, as the case may be, may notify the Specialised Committee on Law Enforcement and Judicial Cooperation within a reasonable time after the receipt of the other Party’s notification that the executing judicial authorities of the Member State or the United Kingdom, as the case may be, may refuse to surrender its nationals to that State or that surrender shall be authorised only under certain specified conditions.’

17 Article 604(c) of the TCA provides:

‘The execution of the arrest warrant by the executing judicial authority may be subject to the following guarantees:

…

(c) if there are substantial grounds for believing that there is a real risk to the protection of the fundamental rights of the requested person, the executing judicial authority may require, as appropriate, additional guarantees as to the treatment of the requested person after the person’s surrender before it decides whether to execute the arrest warrant.’

18 Article 613(2) of the TCA states:

‘If the executing judicial authority finds the information communicated by the issuing State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to Article 597, Articles 600 to 602, Article 604 and Article 606, be furnished as a matter of urgency and may fix a time limit for the receipt thereof …’

The dispute in the main proceedings and the question referred for a preliminary ruling

19 The District Judge of the Magistrates’ Courts of Northern Ireland (United Kingdom) issued four arrest warrants against MA for terrorist offences allegedly committed between 18 and 20 July 2020, some of which may justify the imposition of a life prison sentence.

20 By judgment of 24 October 2022 and by orders of the same day and of 7 November 2022, the High Court (Ireland) ordered MA to be surrendered to the United Kingdom and did not grant MA leave to appeal to the Court of Appeal (Ireland).

21 By decision of 17 January 2023, the Supreme Court (Ireland), the referring court, granted MA leave to appeal against that judgment and those orders of the High Court.

22 MA claims before the referring court that his surrender to the United Kingdom would be incompatible with the principle that offences and penalties must be defined by law.

23 In that regard, that court notes that the TCA provides for a surrender mechanism applicable between the United Kingdom and the Member States. In the light of the identity between that mechanism and the mechanism established by Framework Decision 2002/584 and the Irish legislation transposing that framework decision and the TCA, it considers that, under that Irish legislation and that framework decision, the United Kingdom must be treated as if it were a Member State.

24 That court states that, in the event of MA being surrendered to the United Kingdom and sentenced to a term of imprisonment, MA's possible release on licence will be governed by United Kingdom legislation adopted after the suspected commission of the offences in respect of which he is prosecuted.

25 The regime permitting release on licence in Northern Ireland (United Kingdom) was amended with effect from 30 April 2021. Before that amendment, a person convicted of certain terrorist offences could be granted automatic release on licence after serving half of his or her sentence. Under the regime in force from that date, the release on licence of such a person must be approved by a specialised authority and may take place only after that person has served two thirds of his or her sentence.

26 In that regard, the referring court states that the European Court of Human Rights rejected the argument that retroactive changes to systems for remission or early release constituted a violation of Article 7 ECHR. However, the European Court of Human Rights held, in the judgment of 21 October 2013, *Del Río Prada v. Spain* (CE:ECHR:2013:1021JUD004275009), that measures taken during the execution of a sentence may affect its scope. It is therefore essential, in order to rule on the dispute in the main proceedings, to determine whether that judgment constitutes a change to the earlier case-law of the European Court of Human Rights.

27 By judgment of 19 April 2023, the Supreme Court of the United Kingdom held that the application of the new licence regime, as from 30 April 2021, to offences committed before its entry into force is not incompatible with Article 7 ECHR, in so far as that regime amends only the way in which the custodial sentences of the persons concerned are to be executed without increasing the duration of those sentences.

28 In that context, in the light, in particular, of the guarantees provided by the United Kingdom judicial system as regards the application of the ECHR, the failure to demonstrate the existence of a systemic deficiency that would suggest a probable and flagrant violation of the rights guaranteed by the ECHR in the event of MA being surrendered, and MA's ability to make an application to the European Court of Human Rights, the referring court rejected MA's argument alleging a risk of a breach of Article 7 ECHR.

29 The referring court is uncertain, however, whether a similar conclusion may be reached with regard to a risk of infringement of Article 49(1) of the Charter.

30 That court observes, in that regard, that, in so far as Article 49(1) of the Charter corresponds to Article 7(1) ECHR, those two provisions must in principle be given the same scope, in accordance with Article 52(3) of the Charter. Therefore, reliance on the reasoning adopted in relation to Article 7(1) ECHR could be envisaged, without carrying out further checks.

31 However, the Court of Justice has not yet ruled on the implications of Article 49 of the Charter as regards an amendment of national provisions relating to release on licence.

32 Furthermore, given that the executing State is required to surrender the requested person, it is necessary to assess whether that State is competent to rule on an argument alleging that provisions relating to sentences that

may be imposed in the issuing State are incompatible with Article 49(1) of the Charter, where the latter State is not required to comply with the Charter and the Court of Justice has laid down stringent requirements relating to consideration of a risk of a breach of fundamental rights in the issuing Member State.

33 Accordingly, the referring court considers it necessary to ask the Court of Justice about the criteria which the executing judicial authority must apply in order to assess whether there is a risk of a breach of the principle of legality in respect of criminal penalties in circumstances where surrender is not precluded either by the national Constitution or by the ECHR.

34 In those circumstances, the Supreme Court decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Where, pursuant to the [TCA], surrender is sought for the purposes of prosecution on terrorist offences and the individual seeks to resist such surrender on the basis that he contends that it would be a breach of [Article] 7 [ECHR] and [Article] 49(1) of the [Charter] on the basis that a legislative measure was introduced altering the portion of a sentence which would be required to be served in custody and the arrangements for release on [licence] and was adopted after the date of the alleged offence in respect of which his surrender is sought and, where the following considerations apply:

(i) the requesting state (in this case the [United Kingdom]) is a party to the ECHR and gives effect to [the ECHR] in its domestic law …;

(ii) the application of the measures in question to prisoners already serving a sentence imposed by a court has been held by the courts of the United Kingdom … to be compatible with the [ECHR];

(iii) it remains open to any person including the individual if surrendered, to make a complaint to the European Court of Human Rights;

(iv) there is no basis for considering that any decision of the European Court of Human Rights would not be implemented by the requesting state;

(v) accordingly, the Supreme Court is satisfied that it has not been established that surrender involves a real risk of a violation of [Article] 7 [ECHR] or the [national] Constitution;

(vi) it is not suggested that surrender is precluded by [Article] 19 of the Charter;

(vii) Article 49 of the Charter does not apply to the trial or sentencing process;

(viii) it has not been submitted that there is any reason to believe there is any appreciable difference in the application of [Article] 7 [ECHR] and [Article] 49 of the Charter;

is a court against whose decision there is no right of appeal for the purposes of Article 267(3) TFEU, and having regard to [Article] 52(3) of the Charter and the obligation of trust and confidence between Member States and those obliged to operate surrender to the [European arrest warrant] provisions pursuant to the [TCA], entitled to conclude that the requested person has failed to establish any real risk that his surrender would be a breach of [Article] 49([1]) of the Charter or is such a court obliged to conduct some further inquiry, and if so, what is the nature and scope of that inquiry?'

Procedure before the Court

35 By order of 22 April 2024, *Alchaster* (C-202/24, EU:C:2024:343), the President of the Court decided to initiate the expedited preliminary ruling procedure provided for in Article 105(1) of the Rules of Procedure of the Court of Justice.

Consideration of the question referred

36 As a preliminary point, since the national court refers, both in the grounds of the order for reference and in the wording of its question, to Framework Decision 2002/584, it must be borne in mind, as the Advocate General stated in point 33 of his Opinion, that it follows from Article 1(1) of that framework decision that its scope is limited to the execution of European arrest warrants issued by the Member States. It follows that that framework decision does not govern the execution of arrest warrants, such as those at issue in the main proceedings, issued by the United Kingdom after the expiry of the transition period on 31 December 2020, in accordance with Article 126 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.

37 Accordingly, the Court of Justice takes the view that, by its question, the referring court asks, in essence, whether the TCA, read in conjunction with Article 49(1) of the Charter, must be interpreted as meaning that, where a person who is the subject of an arrest warrant issued on the basis of that agreement invokes a risk of a breach of Article 49(1) in the event of surrender to the United Kingdom, on account of a change, which is unfavourable to that person, in the conditions for release on licence, which occurred after the alleged commission of the offence for which that person is being prosecuted, the executing judicial authority must assess the existence of that risk before deciding on the execution of that arrest warrant, in a situation where that judicial authority has already ruled out the risk of a breach of Article 7 ECHR by relying on the guarantees offered generally by the United Kingdom as regards compliance with the ECHR and on the possibility for that person to bring an action before the European Court of Human Rights.

38 In that regard, even if, formally, the referring court has not referred in its question to any specific provision of the TCA, that does not, however, prevent the Court of Justice from providing the referring court with all the elements of interpretation of EU law which may be of assistance in adjudicating in the case pending before it, whether or not the referring court has specifically referred to them in the wording of its question (see, by analogy, judgment of 18 April 2023, *E.D.L. (Ground for refusal based on illness)*, EU:C:2023:295, paragraph 29).

39 Article 1 of the TCA provides that that agreement establishes the basis for a broad relationship between the European Union and the United Kingdom, within an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation, respectful of the parties' autonomy and sovereignty.

40 To that end, the TCA seeks, inter alia, as is apparent from recital 23 of that agreement, to enhance the security of the European Union and of the United Kingdom by allowing cooperation relating to the prevention, investigation, detection or prosecution of criminal offences and to the execution of criminal penalties, including the safeguarding against and prevention of threats to public security.

41 That specific objective, which forms part of the general objective of the TCA set out in Article 1 of that agreement (see, to that effect, judgment of 16 November 2021, *Governor of Cloverhill Prison and Others*, C-479/21 PPU, EU:C:2021:929, paragraph 67), is implemented in Part Three of that agreement, as stated in Article 522(1) thereof.

42 As regards the general conditions for the application of Part Three, Article 524(1) of the TCA stipulates that the cooperation provided for in Part Three is based on the long-standing respect of the European Union, the United Kingdom and the Member States for democracy, the rule of law and the protection of fundamental rights and freedoms of individuals, including as set out in the Universal Declaration of Human Rights and in the ECHR, and on the importance of giving effect to the rights and freedoms in the ECHR domestically.

43 In the context of that cooperation, Title VII of Part Three has the objective, in accordance with Article 596 of the TCA, of ensuring that the extradition system between the Member States, on the one side, and the United Kingdom, on the other side, is based on a mechanism of surrender pursuant to an arrest warrant in accordance with the terms of that title.

44 Articles 600 and 601 of the TCA set out the cases in which the execution of an arrest warrant issued on the basis of that agreement must or may be refused.

45 In addition, Articles 602 and 603 of the TCA lay down the rules relating, respectively, to the political offence exception and to the nationality exception, while Article 604 of that agreement defines the guarantees to be provided by the issuing State in more specific cases.

46 Although no provision of the TCA expressly provides that the Member States are required to act upon an arrest warrant issued by the United Kingdom on the basis of that agreement, it follows from the structure of Title VII of Part Three of that agreement and in particular from the respective functions of Articles 600 to 604 of that agreement that, as the Advocate General stated in point 69 of his Opinion, a Member State may refuse to execute such an arrest warrant only for reasons arising from the TCA (see, by analogy, judgment of 14 September 2023, *Sofiyska gradska prokuratura and Others (Successive arrest warrants)*, C-71/21, EU:C:2023:668, paragraph 48).

47 As regards, more specifically, a situation such as that at issue in the main proceedings, Article 599(3) of the TCA, moreover, specifically provides that, subject to Article 600, Article 601(1)(b) to (h) and Articles 602 to 604 of that agreement, a State is not under any circumstances to refuse to execute an arrest warrant related, inter alia, to terrorism, where the offences in question are punishable by deprivation of liberty or a detention order for a maximum period of at least 12 months.

48 Although it follows from the foregoing that an executing judicial authority is in principle required to give effect to an arrest warrant such as those at issue in the main proceedings, the fact remains that Article 524(2) of the TCA states that no provision of Part Three of that agreement alters the obligation to respect fundamental rights and legal principles as set out, in particular, in the ECHR and, in the case of the European Union and its Member States, in the Charter.

49 The obligation to comply with the Charter, recalled in Article 524(2), is binding on the Member States when they decide on the surrender of a person to the United Kingdom, given that a decision on such surrender constitutes an implementation Union law within the meaning of Article 51(1) of the Charter. The executing judicial authorities of the Member States are therefore required, when adopting that decision, to ensure respect for the fundamental rights afforded by the Charter to the person who is the subject of an arrest warrant issued on the basis of the TCA, without the fact that the Charter is not applicable to the United Kingdom being relevant in that regard (see, by analogy, judgment of 6 September 2016, *Petruhhin*, C-182/15, EU:C:2016:630, paragraphs 52 and 53).

50 Those rights include, in particular, the rights arising from Article 49(1) of the Charter, which states, inter alia, that no heavier penalty is to be imposed than that which was applicable at the time the criminal offence was committed.

51 Accordingly, the existence of a risk of a breach of those rights is capable of permitting the executing judicial authority to refrain, following an appropriate examination, from giving effect to an arrest warrant on the basis of the TCA (see, by analogy, judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 59; of 31 January 2023, *Puig Gordi and Others*, C-158/21, EU:C:2023:57, paragraph 72, and of 21 December 2023, *GN (Ground for refusal based on the best interests of the child)*, C-261/22, EU:C:2023:1017, paragraph 43).

52 As regards the manner in which such an examination is carried out, it is apparent from the Court's case-law on Framework Decision 2002/584 that the assessment, during a procedure for the execution of a European arrest warrant, of whether there is real risk of a breach of the fundamental rights enshrined in Articles 4, 7, 24 and 47 of the Charter must, in principle, be carried out by means of an examination in two separate steps which cannot overlap with one another, in so far as they involve an analysis on the basis of different criteria, and which must therefore be carried out in turn (see, to that effect, judgments of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 89 to 94; of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraphs 60, 61 and 68; of 18 April 2023, *E.D.L. (Ground for refusal based on illness)*, C-699/21, EU:C:2023:295, paragraph 55, and of 21 December 2023, *GN (Ground for refusal based on the best interests of the child)*, C-261/22, EU:C:2023:1017, paragraph 46 and the case-law cited).

53 To that end, the executing judicial authority must, as a first step, determine whether there is objective, reliable, specific and properly updated information to demonstrate that there is a real risk of infringement, in the issuing Member State, of one of those fundamental rights on account of either systemic or generalised deficiencies, or deficiencies affecting more specifically an objectively identifiable group of persons (see, to that effect, judgments of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 89; of 31 January 2023, *Puig Gordi and Others*, C-158/21, EU:C:2023:57, paragraph 102, and of 21 December 2023, *GN (Ground for refusal based on the best interests of the child)*, C-261/22, EU:C:2023:1017, paragraph 47).

54 In the context of a second step, the executing judicial authority must determine, specifically and precisely, to what extent the deficiencies identified in the first step of the examination, referred to in the preceding paragraph of the present judgment, are liable to have an impact on the person who is the subject of a European arrest warrant and whether, having regard to his or her personal situation, there are substantial grounds for believing that that person will run a real risk of a breach of those fundamental rights if surrendered to the issuing Member State (see, to that effect, judgments of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 94; of 31 January 2023, *Puig Gordi and Others*, C-158/22, EU:C:2023:57, paragraph 106, and of 21 December 2023, *GN (Ground for refusal based on the best interests of the child)*, C-261/22, EU:C:2023:1017, paragraph 48).

55 However, as the Advocate General observed, in essence, in point 76 of his Opinion, the requirement to carry out such a two-step examination cannot be transposed to the assessment, during the procedure for the execution of an arrest warrant issued on the basis of the TCA, of the risk of a breach of Article 49(1) of the Charter.

56 The simplified and effective system for the surrender of convicted or suspected persons established by Framework Decision 2002/584 has as its basis the high level of trust which must exist between the Member States and on the principle of mutual recognition which, according to recital 6 of that framework decision, constitutes the 'cornerstone' of judicial cooperation between Member States in criminal matters (see, to that effect, judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraphs 40 and 41, and of 21 December 2023, *GN (Ground for refusal based on the best interests of the child)*, C-261/22, EU:C:2023:1017, paragraphs 35 and 36).

57 The principle of mutual trust requires, particularly as regards the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (see, to that effect, Opinion 2/13 *(Accession of the European Union to the ECHR)* of 18 December 2014, EU:C:2014:2454, paragraph 191, and judgment of 31 January 2023, *Puig Gordi and Others*, C-158/21, EU:C:2023:57, paragraph 93).

58 Thus, when Member States implement EU law, they may, under that law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but also, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the European Union (see, to that effect, Opinion 2/13 *(Accession of the European Union to the ECHR)* of 18 December 2014, EU:C:2014:2454, paragraph 192, and judgment of 31 January 2023, *Puig Gordi and Others*, C-158/21, EU:C:2023:57, paragraph 94).

59 In that context, the obligation to find that there are deficiencies such as those referred to in paragraph 53 above before being able to verify, specifically and precisely, whether the person who is the subject of a European arrest warrant runs a real risk of a breach of a fundamental right is precisely aimed at preventing such an investigation from being conducted outside exceptional cases and is thus the consequence of the presumption of respect for fundamental rights by the issuing Member State which stems from the principle of mutual trust (see, to that effect, judgment of 31 January 2023, *Puig Gordi and Others*, C-158/21, EU:C:2023:57, paragraphs 114 to 116).

60 Compliance with that obligation makes it possible, in particular, to ensure the division of responsibilities between the issuing Member State and the executing Member State as regards safeguarding the requirements inherent in the fundamental rights arising from the full application of the principles of mutual trust and mutual recognition which underpin the operation of the European arrest warrant mechanism (see, to that effect, judgments of 22 February 2022, *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, C-562/21 PPU and C-563/21 PPU, EU:C:2022:100, paragraph 46; of 31 January 2023, *Puig Gordi and Others*, C-158/21, EU:C:2023:57, paragraphs 72 and 96, and of 21 December 2023, *GN (Ground for refusal based on the best interests of the child)*, C-261/22, EU:C:2023:1017, paragraph 43).

61 The principle of mutual trust specifically characterises relations between Member States.

62 That principle is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the European Union is founded, as stated in Article 2 TEU (see, to that effect, Opinion 2/13 *(Accession of the European Union to the ECHR)* of 18 December 2014, EU:C:2014:2454, paragraph 168).

63 That principle is also of fundamental importance to the European Union and its Member States in so far as it allows a European area without internal borders to be created and maintained (see, to that effect, Opinion 2/13 *(Accession of the European Union to the ECHR)* of 18 December 2014, EU:C:2014:2454, paragraph 191).

64 The Court has further stated that the limitation to exceptional cases of the possibility of verifying whether another Member State has actually complied, in a specific case, with the fundamental rights enshrined in the Charter is linked to the intrinsic nature of the European Union and contributes to the balance on which the Charter is founded (see, to that effect, Opinion 2/13 *(Accession of the European Union to the ECHR)* of 18 December 2014, EU:C:2014:2454, paragraphs 193 and 194).

65 It is true that it cannot be ruled out that an international agreement may establish a high level of confidence between the Member States and certain third countries.

66 The Court thus held that that was the case as regards relations between the Member States and the Kingdom of Norway (see, to that effect, judgment of 14 September 2023, *Sofiyska gradska prokuratura (Successive arrest warrants)*, C-71/21, EU:C:2023:668, paragraphs 32 and 39).

67 That third country is, however, in a particular situation in that it has a special relationship with the European Union, going beyond economic and commercial cooperation, since it is a party to the Agreement on the European Economic Area, it participates in the Common European Asylum System, it implements and applies the Schengen *acquis* and it has concluded with the European Union the Agreement on the surrender procedure between the Member States of the European Union and Iceland and Norway, which entered into force on 1 November 2019 (see, to that effect, judgment of 17 March 2021, *JR (Arrest warrant – Conviction in a third State, Member of the EEA)*, C-488/19, EU:C:2021:206, paragraph 60).

68 The Court also pointed out, first, that, in the preamble to that agreement, the contracting parties expressed their mutual confidence in the structure and functioning of their legal systems and their ability to guarantee a fair trial and, second, that the provisions of that agreement are very similar to the corresponding provisions of Framework Decision 2002/584 (see to that effect, judgment of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, EU:C:2020:262, paragraphs 73 and 74).

69 The consideration referred to in paragraph 66 above, which is based on specific relations between the European Union and certain EEA Member States, cannot, however, be extended to all third countries.

70 As regards, more specifically, the arrangements established by the TCA, it is important, first of all, to note that that agreement does not establish, between the European Union and the United Kingdom, a relationship as special as the one described in the case-law cited in paragraphs 67 and 68 above. In particular, the United Kingdom is not part of the European area without internal borders, the construction of which is permitted, inter alia, by the principle of mutual trust.

71 Next, although it is apparent from the wording of Article 524(1) of the TCA, referred to in paragraph 42 above, that cooperation between the United Kingdom and the Member States is based on long-standing respect for the protection of the fundamental rights and freedoms of individuals, that cooperation is not presented as being based on the preservation of mutual trust between the States concerned which existed before the United Kingdom left the European Union on 31 January 2020.

72 Finally, there are substantial differences between the provisions of the TCA relating to the surrender mechanism established by that agreement and the corresponding provisions of Framework Decision 2002/584.

73 In that regard, it should be noted, in particular, that that framework decision does not contain any exceptions relating to the political nature of the offences or the nationality of the requested person that allow a derogation from the execution of European arrest warrants in situations comparable to those referred to in Article 602(2) and Article 603(2) of the TCA. Such exceptions illustrate the limits of the trust established between the parties to that agreement.

74 Similarly, that framework decision does not include a provision comparable to Article 604(c) of the TCA, which specifically provides that, if there are substantial grounds for believing that there is a real risk to the protection

of one or more of any of the fundamental rights of the requested person, the executing judicial authority may require, as appropriate, additional guarantees as to the treatment of the requested person after the person's surrender before it decides whether to execute the arrest warrant.

75 Article 604(c) thus allows additional guarantees to be sought in order to seek to dispel doubts relating to respect for fundamental rights in the issuing State, which cannot be discarded on the basis of the trust between the United Kingdom and the Member States without the implementation of that mechanism being subject to a prior finding of systemic or generalised deficiencies or deficiencies affecting more specifically an objectively identifiable group of persons.

76 It is true that Article 604(c) of the TCA does not expressly provide that the executing judicial authority may refuse to give effect to the arrest warrant in a situation where it has not received additional guarantees or where the additional guarantees received are insufficient to exclude the reasons which had initially led it to believe that there was a real risk to the protection of the requested person's fundamental rights.

77 However, any other interpretation of that provision would deprive the mechanism provided for therein of any practical effect.

78 It follows that the executing judicial authority called upon to rule on an arrest warrant issued on the basis of the TCA cannot order the surrender of the requested person if it considers, following a specific and precise examination of that person's situation, that there are valid reasons for believing that that person would run a real risk to the protection of his or her fundamental rights if that person were surrendered to the United Kingdom.

79 Therefore, where the person who is the subject of an arrest warrant issued on the basis of the TCA claims before that executing judicial authority that there is a risk of a breach of Article 49(1) of the Charter if that person is surrendered to the United Kingdom, that executing judicial authority cannot, without disregarding the obligation to respect the fundamental rights enshrined in Article 524(2) of that agreement, order that surrender without having specifically determined, following an appropriate examination, within the meaning of paragraph 51 above, whether there are valid reasons to believe that that person is exposed to a real risk of such a breach.

80 For the purposes of that determination, it is necessary, in the first place, to point out that, although the existence of declarations and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of a breach of fundamental rights and freedoms (see, to that effect, judgment of 6 September 2016, *Petruhhin*, C-182/15, EU:C:2016:630, paragraph 57), the executing judicial authority must, however, take into account the long-standing respect by the United Kingdom for the protection of the fundamental rights and freedoms of individuals, including as set out in the Universal Declaration of Human Rights and in the ECHR, which is expressly referred to in Article 524(1) of the TCA, and the provisions laid down and implemented in United Kingdom law to ensure respect for the fundamental rights set out in the ECHR (see, by analogy, judgment of 19 September 2018, *RO*, C-327/18 PPU, EU:C:2018:733, paragraph 52).

81 However, the fact that the executing judicial authority has already ruled out the risk of a breach of Article 7 ECHR, by relying on the guarantees offered generally by the United Kingdom as regards compliance with the ECHR and on the possibility for the requested person to bring an action before the European Court of Human Rights, cannot, in itself, be decisive.

82 It follows from paragraph 78 above that Article 524(2) and Article 604(c) of the TCA, read in conjunction with Article 49(1) of the Charter, require the executing judicial authority to examine all the relevant factors in order to assess the foreseeable situation of the requested person if he or she is surrendered to the United Kingdom, which, unlike the two-step examination referred to in paragraphs 52 to 54 above, assumes that both the rules and practices that are generally in place in that country and, if the principles of mutual trust and mutual recognition are not applied, the specific features of that person's individual situation are to be taken into account simultaneously.

83 Therefore, as the Advocate General observed in points 78 and 79 of his Opinion, the executing judicial authority must carry out an independent assessment, in the light of the provisions of the Charter, without merely taking into account the case-law of the Supreme Court of the United Kingdom, referred to in paragraph 27 above, or the general guarantees provided by the judicial system of that State, referred to in paragraph 28 above.

84 In that context, the possible finding of a real risk, if the person concerned is surrendered to the United Kingdom, of a breach of Article 49(1) of the Charter must have a sufficient factual basis (see, by analogy, judgment of 22 February 2022, *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, C-562/21 PPU and C-563/21 PPU, EU:C:2022:100, paragraphs 60 and 61).

85 Consequently, the executing judicial authority may refuse to give effect to an arrest warrant on the basis of Article 524(2) and Article 604(c) of the TCA, read in conjunction with Article 49(1) of the Charter, only if it has, having regard to the individual situation of the requested person, objective, reliable, specific and properly updated information establishing substantial grounds for believing that there is a real risk of a breach of Article 49(1) of the Charter (see, by analogy, judgments of 6 September 2016, *Petruhhin*, C-182/15, EU:C:2016:630, paragraph 59, and of 19 September 2018, *RO*, C-327/18 PPU, EU:C:2018:733, paragraph 61).

86 In the second place, in accordance with the obligation of mutual assistance in good faith laid down in Article 3(1) of the TCA, the executing judicial authority must, when examining whether there is a risk of a breach of Article 49(1) of the Charter, make full use of the instruments provided for in that agreement in order to foster cooperation between it and the issuing judicial authority.

87 In that regard, first, Article 613(2) of the TCA provides that, if the executing judicial authority finds the information communicated by the issuing State to be insufficient to allow it to decide on surrender, it is to request that the necessary supplementary information, in particular with respect to Article 604 of the TCA, be furnished as a matter of urgency.

88 That judicial authority is therefore required to request that any supplementary information it deems necessary in order to adopt a decision on the surrender of a person who is the subject of an arrest warrant issued on the basis of the TCA be furnished as a matter of urgency.

89 Thus, since a finding that there is a serious risk of infringement of Article 49(1) of the Charter is necessarily based on an analysis of the law of the issuing State, the executing judicial authority cannot, if it is not to infringe the obligation of mutual assistance in good faith laid down in Article 3(1) of the TCA, make that finding without first requesting from the issuing judicial authority information concerning the rules of that law and the manner in which they may be applied to the individual situation of the requested person.

90 Second, in accordance with Article 604(c) of the TCA, it is for the executing judicial authority to request the grant of additional guarantees where it considers that there are valid reasons to believe that there is a real risk of a breach of Article 49(1) of the Charter.

91 Therefore, the executing judicial authority will be able to refuse to give effect to an arrest warrant issued on the basis of the TCA on the ground that such a risk exists only in the situation where additional guarantees have been requested by the executing judicial authority and where that authority has not obtained sufficient guarantees to rule out the risk of a breach of Article 49(1) of the Charter which it had initially identified.

92 In the third place, as regards, more specifically, the scope of Article 49(1) of the Charter, it follows from the case-law of the Court that Article 49 of the Charter contains, at the very least, the same guarantees as those provided for in Article 7 ECHR, which must be taken into account by virtue of Article 52(3) of the Charter as a minimum threshold of protection (see, to that effect, judgments of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 164; of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraph 54; of 2 February 2021, *Consob*, C-481/19, EU:C:2021:84, point 37, and of 10 November 2022, *DELTA STROY 2003*, C-203/21, EU:C:2022:865, paragraph 46 and the case-law cited).

93 In that regard, the referring court notes that, under United Kingdom legislation adopted after the alleged commission of the offences at issue in the main proceedings, the perpetrators of certain terrorist offences, such as those of which MA is accused, can benefit from release on licence only in so far as it is approved by a specialised authority and only after having served two thirds of their sentence, whereas the old system provided for automatic release on licence after the convicted person had served half of his or her sentence.

94 It follows from the case-law of the European Court of Human Rights that, for the purposes of applying Article 7 ECHR, a distinction must be drawn between a measure that constitutes in substance a 'penalty' and a measure that concerns the 'execution' or 'enforcement' of the penalty. Thus, where the nature and purpose of a measure

relate to the remission of a sentence or a change in the regime for release on licence, this does not form part of the 'penalty' within the meaning of Article 7 (ECtHR, 21 October 2013, *Del Río Prada v. Spain*, CE:ECHR:2013:1021JUD004275009, § 83).

95 Since the distinction between a measure that constitutes a 'penalty' and a measure that concerns the 'execution' of a penalty is not always clear-cut in practice, it is necessary, in order to determine whether a measure taken during the execution of a sentence concerns only the manner of execution of the sentence or, on the contrary, affects its scope, to ascertain in each case what the 'penalty' imposed actually entailed under domestic law in force at the material time or, in other words, what its intrinsic seriousness was (ECtHR, 21 October 2013, *Del Río Prada v. Spain*, CE:ECHR:2013:1021JUD004275009, §§ 85 and 90).

96 In that regard, the European Court of Human Rights has recently confirmed that the fact that the extension of the eligibility threshold for release on licence after a conviction may have led to a hardening of the detention situation concerned the execution of the sentence and not the sentence itself and that, therefore, it cannot be inferred from such a circumstance that the penalty imposed would be more severe than the one imposed by the trial judge (ECtHR, 31 August 2021, *Devriendt v. Belgium*, CE:ECHR:2021:0831DEC003556719, § 29).

97 Therefore, a measure relating to the execution of a sentence will be incompatible with Article 49(1) of the Charter only if it retroactively alters the actual scope of the penalty provided for on the day on which the offence at issue was committed, thus entailing the imposition of a heavier penalty than the one initially provided for. Although that is not, in any event, the case where that measure merely delays the eligibility threshold for release on licence, the position may be different, in particular, if that measure essentially repeals the possibility of release on licence or if it forms part of a series of measures which have the effect of increasing the intrinsic seriousness of the sentence initially provided for.

98 In the light of all of the foregoing, the answer to the question referred is that Article 524(2) and Article 604(c) of the TCA, read in conjunction with Article 49(1) of the Charter, must be interpreted as meaning that, where a person who is the subject of an arrest warrant issued on the basis of that agreement invokes a risk of a breach of Article 49(1) in the event of surrender to the United Kingdom, on account of a change, which is unfavourable to that person, in the conditions for release on licence, which occurred after the alleged commission of the offence for which that person is being prosecuted, the executing judicial authority must undertake an independent examination as to the existence of that risk before deciding on the execution of that arrest warrant, in a situation where that judicial authority has already ruled out the risk of a breach of Article 7 ECHR by relying on the guarantees offered generally by the United Kingdom as regards compliance with the ECHR and on the possibility for that person to bring an action before the European Court of Human Rights. Following that examination, that executing judicial authority will have to refuse to execute that arrest warrant only if, after requesting additional information and guarantees from the issuing judicial authority, it has objective, reliable, specific and properly updated information establishing that there is a real risk of a change to the actual scope of the penalty provided for on the day on which the offence at issue was committed, involving the imposition of a heavier penalty than the one that was initially provided for.

Costs

99 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 524(2) and Article 604(c) of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, read in conjunction with Article 49(1) of the Charter of Fundamental Rights of the European Union

must be interpreted as meaning that, where a person who is the subject of an arrest warrant issued on the basis of that agreement invokes a risk of a breach of Article 49(1) in the event of surrender to the

United Kingdom of Great Britain and Northern Ireland, on account of a change, which is unfavourable to that person, in the conditions for release on licence, which occurred after the alleged commission of the offence for which that person is being prosecuted, the executing judicial authority must undertake an independent examination as to the existence of that risk before deciding on the execution of that arrest warrant, in a situation where that judicial authority has already ruled out the risk of a breach of Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, by relying on the guarantees offered generally by the United Kingdom as regards compliance with the ECHR and on the possibility for that person to bring an action before the European Court of Human Rights. Following that examination, that executing judicial authority will have to refuse to execute that arrest warrant only if, after requesting additional information and guarantees from the issuing judicial authority, it has objective, reliable, specific and properly updated information establishing that there is a real risk of a change to the actual scope of the penalty provided for on the day on which the offence at issue was committed, involving the imposition of a heavier penalty than the one that was initially provided for.

[Signatures]

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* Language of the case: English.

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i The name of the present case is a fictitious name. It does not correspond to the real name of any of the parties to the proceedings.