Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 3 May 2016 [1]

Case C-554/14

Criminal proceedings
against
Atanas Ognyanov
(Request for a preliminary ruling

from the Sofiyski gradski sad (Sofia City Court, Bulgaria))

(Reference for a preliminary ruling — Police and judicial cooperation in criminal matters — Framework Decision 2008/909/JHA — Article 17 — Law governing the enforcement of a custodial sentence — National rule of the executing State providing for remission on account of work done by the sentenced person during detention in the issuing State — Lawfulness — Principle of territoriality in criminal law — Principle that penalties must be tailored to the individual — Objective of social rehabilitation — Obligation to interpret national law in conformity with EU law)

I – Introduction

1. This request for a preliminary ruling invites the Court to consider an aspect of police and judicial cooperation in criminal matters that has not yet been addressed to any great extent in the case-law. It is the question of which law and which procedural rules apply to the enforcement of a custodial sentence where a sentenced person is transferred, on the basis of Framework Decision 2008/909/JHA, [2] from the Member State in which he was convicted [3] to his or her Member State of origin or residence. [4]

2. Specifically, the Sofiyski gradski sad (Sofia City Court, Bulgaria) questions which rules apply to the grant of remission.

3. By judgment of 28 November 2012, Mr Atanas Ognyanov, a Bulgarian national, was sentenced by the Danish judicial authorities to a term of 15 years' imprisonment for aggravated robbery and murder, offences which he had committed on Danish territory. He was held in a Danish prison from 10 January 2012 to 1 October 2013, on which date he was transferred to the Bulgarian judicial authorities.

4. Mr Ognyanov worked during his period of detention in Denmark.

1 — Original language: French.

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

3 — Hereafter 'the issuing State'. Pursuant to Article 1(c) of the Framework Decision, this is the Member State in which the judgment is delivered.

4 — Hereafter 'the executing State'. Pursuant to Article 1(d) of the Framework Decision, this is the Member State to which a judgment is forwarded for the purpose of its recognition and enforcement.

5. The Sofiyski gradski sad (Sofia City Court) is currently required to give a ruling on questions relating to the procedures for enforcing the custodial sentence, in particular the part thereof that still remains to be served. It is in that context that the issue has arisen of remission based on the work which Mr Ognyanov did during his period of detention in Denmark.

6. Since such a reduction in a prison sentence is not possible under Danish law, the referring court questions whether, in accordance with the case-law of the Varhoven kasatsionen sad (Supreme Court of Appeal, Bulgaria), it is entitled to apply its more lenient national legislation to the period of detention served by Mr Ognyanov in Denmark. Under the Nakazatelen Kodeks (Bulgarian Criminal Code),[5] two days of work equate to three days of imprisonment. Mr Ognyanov would therefore benefit from remission of his sentence amounting to 2 years, 6 months and 24 days, rather than 1 year, 8 months and 20 days, and thus be entitled to be released earlier.[6]

7. In this connection, the national court refers to the wording of Article 17 of the Framework Decision.

8. In accordance with that provision, the enforcement of a sentence is to be governed by the law of the executing State. The EU legislature states that the judicial authorities of that State alone are competent to decide on the procedures for enforcing a sentence and to determine all measures relating to it, provided, first, that they deduct the full period of deprivation of liberty already served in the issuing State and, secondly, that they comply with the duty to inform referred to in Article 17(3).

9. The referring court therefore asks the Court of Justice whether, in accordance with Article 17 of the Framework Decision, it is entitled to substitute its national legislation for the more stringent Danish legislation and so grant Mr Ognyanov remission of his sentence on account of the work which he did prior to his transfer.

10. In this Opinion, I shall propose that the Court hold that the provisions of Article 17(1) and (2) of the Framework Decision preclude a national rule such as that at issue in the main proceedings, even if it is more favourable to the sentenced person.

11. In particular, my analysis will be guided by two principles, namely the principle of territoriality in criminal law and the principle that penalties must be tailored to the individual, on which all law on the enforcement of criminal sentences is founded. I shall outline the scope of those principles and explain why their observance demands that the enforcement of measures involving the deprivation of liberty, and in particular the grant of remission, be governed by the law of the Member State in which the sentenced person is actually detained. I shall also address the need to safeguard the national sovereignty of the issuing State and what is entailed by the mutual confidence that the Member States must have as to the implementation of the Framework Decision.

12. Whilst I recognise that, in a situation such as that at issue in the main proceedings, the Bulgarian legislation indeed appears to be more lenient on Mr Ognyanov, I shall nevertheless conclude that, in view of their respective spheres of territorial jurisdiction, the executing State cannot legitimately apply certain provisions of its penal code to the enforcement of a sentence on the territory of the issuing State. Given the inapplicability of the Bulgarian legislation, the rule on the retroactive effect of a more lenient criminal law, set out in the last sentence of Article 49(1) of the Charter of Fundamental Rights of the European Union,[7] equally cannot apply.

5 — 'The NK'.

6 — In the order for reference in *Ognyanov* (C-614/14), pending before the Court, in which I have also delivered an Opinion, the Public Prosecutor at the Sofiyska gradska prokuratura (Public Prosecutor's Office, Sofia, Bulgaria) takes issue with the calculation of the referring court for not deducting days on which Mr Ognyanov was not working.

7 — 'The Charter'.

II – Legal framework

A – *EU law*

1. The Framework Decision

13. The Framework Decision rests on the principle of the mutual recognition [8] of judicial decisions, in accordance with which court decisions are executed directly throughout the Union without the need for any endorsement procedures. [9]

14. According to recital 9 and Article 3(1) of the Framework Decision, the purpose of that decision is to ensure the recognition and enforcement of judgments [10] imposing a custodial sentence [11] in a Member State other than the issuing State, so as to facilitate the social rehabilitation of the sentenced person.

15. As a necessary concomitant of freedom of movement, the transfer of sentenced persons to their Member State of origin or residence is meant to improve the prospects of their social rehabilitation by giving them a chance to maintain family, linguistic and cultural links.

16. After satisfying itself that the enforcement of a sentence by the executing State will serve that purpose, an issuing State is to forward the judgment imposing a sentence to the authorities of the executing State in accordance with the rules and procedures laid down in Articles 4 and 5 of the Framework Decision.

17. The issuing State must send with the judgment a duly completed certificate, for which the standard form is provided in Annex I to the Framework Decision. That certificate contains various parts in which the issuing State may provide information on the identity of the person prosecuted and of the court which delivered the judgment, the nature of the offence committed and the nature and length of the sentence imposed.

18. In part (i) of Annex I, headed ‘Status of the judgment imposing the sentence’, section 2, which concerns the length of the sentence, requires the competent authority of the issuing State to provide the following information:

‘2.1. Total length of the sentence (in days): …

2.2.

The full period of deprivation of liberty already served in connection with the sentence in respect of which the judgment was issued (in days):

… as per … (give date on which calculation was made: dd-mm-yyyy): …

8 — Recitals 1, 2 and 5 of the Framework Decision.

9 — See, on this point, the Conclusions of the European Council meeting in Tampere on 15 and 16 October 1999.

10 — Pursuant to Article 1(a) of the Framework Decision, a ‘judgment’ is ‘a final decision or order of a court of the issuing State imposing a sentence on a natural person’.

11 — Pursuant to Article 1(b) of the Framework Decision, a ‘sentence’ is ‘any custodial sentence or any measure involving deprivation of liberty imposed for a limited or unlimited period of time on account of a criminal offence on the basis of criminal proceedings’.

2.3. Number of days to be deducted from total length of the sentence for reasons other than the one referred to under 2.2 (eg. amnesties, pardons or clemencies, etc. already granted with respect to the sentence):

… as per (give date on which calculation was made: dd-mm-yyyy): …

…'

19. Article 8(1) of the Framework Decision, headed 'Recognition of the judgment and enforcement of the sentence', provides:

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

20. Article 17 of the Framework Decision, headed 'Law governing enforcement', of which the interpretation is requested in the present case, is drafted as follows:

'1. The enforcement of a sentence shall be governed by the law of the executing State. The authorities of the executing State alone shall, subject to paragraphs 2 and 3, be competent to decide on the procedures for enforcement and to determine all the measures relating thereto, including the grounds for early or conditional release.

2. The competent authority of the executing State shall deduct the full period of deprivation of liberty already served in connection with the sentence in respect of which the judgment was issued from the total duration of the deprivation of liberty to be served.

3. The competent authority of the executing State shall, upon request, inform the competent authority of the issuing State of the applicable provisions on possible early or conditional release. The issuing State may agree to the application of such provisions or it may withdraw the certificate.

4. Member States may provide that any decision on early or conditional release may take account of those provisions of national law, indicated by the issuing State, under which the person is entitled to early or conditional release at a specified point in time.'

21. Pursuant to the first indent of Article 26(1) thereof, the Framework Decision replaces, with effect from 5 December 2011, the European Convention on the Transfer of Sentenced Persons, signed in Strasbourg on 21 March 1983[12] and the Additional Protocol thereto of 18 December 1997.

22. Pursuant to Article 29(1) thereof, the Framework Decision was to be implemented by the Member States by 5 December 2011. The Kingdom of Denmark has transposed it, but the Republic of Bulgaria has not.

B – *Bulgarian law*

23. Article 41(3) of the NK provides that work done by a sentenced person is to be taken into account for the purposes of reducing the length of the sentence and that two days of work equate to three days of detention.

12 — Hereafter 'the Convention on transfers'. The convention is available of the website of the European Council. It was ratified by 64 States and entered into force on 1 July 1985. All the Member States, except the Republic of Croatia and the Republic of Finland, are signatories to the convention.

24. Article 457 of the Nakazatelno protsesualen Kodeks (Bulgarian Code of Criminal Procedure) [13] headed 'Resolution by the court of issues relating to the enforcement of the judgment', provides:

'1. Once a sentenced person enters the Republic of Bulgaria, or once it has been established that he or she is present in the Republic of Bulgaria, the Public Prosecutor shall forward the judgment accepted for enforcement, together with the documents appended thereto, to the Sofiyski gradski sad (Sofia City Court …) with a proposal for the resolution of any issues relating to its enforcement.

2. The [Sofiyski gradski sad (Sofia City Court)] shall adopt a decision on the proposal by way of an order made in a hearing attended by the Public Prosecutor at which the sentenced person shall be summoned to appear.

3. The order shall mention the number and date of the judgment accepted for enforcement, the case in which it was delivered, the text of the Bulgarian law providing for liability for the criminal offence committed and the length of the custodial sentence handed down by the foreign court and shall determine the initial regime that applies to the sentence to be served and the type of prison.

4. Where the maximum term of imprisonment provided for under Bulgarian law for the offence committed is less than the term imposed in the judgment, the [Sofiyski gradski sad (Sofia City Court)] shall reduce the sentence imposed to that term. Where Bulgarian law does not provide for a custodial sentence for the offence committed, it shall determine a punishment that corresponds as far as possible to that imposed in the judgment.

5. The period of remand in custody pending trial and any part of the sentence already served in the issuing State shall be deducted and, in the event that the convictions are different, taken into account for the purposes of determining the term of imprisonment.

6. Additional punishments imposed in the judgment shall be enforced if they are provided for in the corresponding provisions of Bulgarian law and have not been enforced in the issuing State.

7. The order of the [Sofiyski gradski sad (Sofia City Court)] shall be subject to appeal before the Sofiyski Apelativen sad (Court of Appeal, Sofia, Bulgaria).'

III – The facts and the case in the main proceedings

25. Mr Ognyanov, a Bulgarian national, was sentenced in Denmark to 15 years' imprisonment for aggravated robbery and murder, offences which he had committed on Danish territory. He was held in a Danish prison from 10 January 2012 to 1 October 2013, on which date he was transferred to the Bulgarian judicial authorities.

26. Mr Ognyanov worked during his period of detention in Denmark, specifically from 23 January 2012 to 30 September 2013.

27. The Danish judicial authorities applied the provisions of the Framework Decision in carrying out the transfer of Mr Ognyanov. In particular, they asked their Bulgarian counterparts to inform them of the sentence which they intended to enforce and of the applicable rules on early release. In this connection, they expressly indicated that, under Danish legislation, it was not possible to grant the person concerned a reduction in his sentence on account of the work he had done during his period of detention. It is not, in my view, inconceivable that the Danish authorities took the work which Mr Ognyanov did while he was in prison into account in a different fashion.

13 — 'The NPK'.

28. It is apparent from the order for reference that the Bulgarian judicial authorities recognised the judgment delivered by the Danish court and agreed to enforce the sentence imposed. To that end, and in accordance with the terms of Article 457 of the NPK, the Public Prosecutor at the Public Prosecutor's Office of the City of Sofia requested of the referring court that it give a ruling on the issues relating to enforcement of the sentence and, in particular, that it determine the length of the sentence remaining to be enforced.

29. In that context, the referring court questions whether, in accordance with the case-law of the Varhoven kasatsionen sad (Supreme Court of Appeal), it is entitled to grant Mr Ognyanov remission on account of the work he did while in prison in Denmark.

30. In a judgment of 12 November 2013 the Varhoven kasatsionen sad (Supreme Court of Appeal) held that, for the purposes of applying Article 457(5) of the NPK, 'work that is in the general interest, undertaken in the issuing State by a Bulgarian national convicted of an offence, who is transferred, must be taken into account by the [Sofiyski gradski sad (Sofia City Court)] for the purposes of reducing the length of the sentence, unless the sentence remaining to be served, as determined by the issuing State, has been calculated after taking the work done into account'.

31. The Varhoven kasatsionen sad (Supreme Court of Appeal) relied on the terms of Article 9(3) of the Convention on transfers and the further information contained in the explanatory memorandum to the convention.

32. According to that court, the transfer of the prisoner results, in particular, in the conferral on the executing State of exclusive competence as regards the enforcement of the sentence, both in the case of continued enforcement and in the case of conversion of the sentence.

33. It is interesting to note the grounds of the judgment of the Varhoven kasatsionen sad (Supreme Court of Appeal):

'Bulgarian legislation provides for the possibility of reducing a custodial sentence on the basis of Article 41(3) of the NK where the Bulgarian national transferred has, while serving his sentence, undertaken work that is in the general interest. There is no question that a sentenced person is entitled to remission [of his sentence] if he works after being transferred to Bulgaria. *However, that matter must also be taken into account where the sentenced person has undertaken work of the kind contemplated by Article 178 of the* [*zakon za izpalnenie na nakazaniyata i zadarzhanieto pod strazha (Law on the application of punishments and provisional detention)] [*[14]*] in the sentencing Member State, even if that is not provided for in that State's legislation*. Indeed, the undertaking of work is not an aspect of the custodial sentence per se, but rather a consequence of its enforcement. It may be inferred that the taking into account of work carried out, for the purposes of reducing the length of a sentence in accordance with Article 41(3) of the NK, is unconnected with the principle of the sentence being tailored to the individual, but is instead an action taken in the context of its enforcement. *Consequently, competence lies with the executing State, whose rules on the enforcement of sentences apply in their entirety*, including in so far as concerns the grounds for, and the form of any commutation of the sentence.

… The taking into account of any work carried out, for the purposes of reducing a custodial sentence in accordance with Article 41(3) of the NK, reflects the positive value of work in the re-education and rehabilitation of the sentenced person. The sentenced person's participation in work is an important prerequisite for his reintegration into society, and its legal effects and consequences are the subject of a single assessment, no distinction being drawn according to whether the work was done abroad or in the territory of the Republic of Bulgaria. *Under the law — pursuant to Article 41(3) of the NK — the*

14 — DV No 25 of 3 April 2009.

period for which the sentenced person has undertaken work in the general interest is regarded as a period of enforcement of the custodial sentence, irrespective of where the work was done. The deduction of any days worked is a legal privilege. It does not constitute a review of the custodial sentence handed down by the sentencing State or an alteration of the "length" of that sentence. It is instead a positive, mandatory consequence, based on the very fact that the sentenced person carried out work that is in the general interest while serving his sentence and while in detention. *It is, therefore, an instance of commutation of the sentence [*[15]*] in accordance with Article 12 of the Convention on transfers.*

…

In the light of the foregoing, in order to resolve the issue between the Public Prosecutor of the Republic of Bulgaria and the competent authority of the other State relating to the transfer of Bulgarian nationals, the agreement reached by the two authorities mentioned must be accompanied by precise information indicating whether or not the sentenced person has undertaken work (or attended courses or training sessions) during the period of enforcement of the custodial sentence in a prison … abroad, if so, for what period, *and whether the length of the sentence remaining to be served as determined by the issuing State has been calculated after taking the work done abroad into account.'* [16]

IV – The questions referred for a preliminary ruling

34. In those circumstances that the Sofiyski gradski sad (Sofia City Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Do the provisions of [the Framework Decision] preclude the executing State, in the course of the transfer procedure, from reducing the length of the custodial sentence imposed by the issuing State on account of work undertaken while that sentence was being served in the issuing State, as follows:

(a) reduction of the sentence by the application, in accordance with Article 17(1) of [the Framework Decision], of the law of the executing State to the enforcement of the sentence: does that provision permit the law of the executing State on the enforcement of the sentence to be applied even at the stage of the transfer procedure in respect of matters (namely work undertaken in prison in the issuing State) which occurred while the sentenced person was under the jurisdiction of the issuing State;

(b) reduction of the sentence as a result of a deduction made in accordance with Article 17(2) of [the Framework Decision]: does that provision permit the deduction of a period that is longer than the period of deprivation of liberty determined in accordance with the law of the issuing State, where the law of the executing State is applied and, as a result, a fresh legal assessment is made of matters which occurred in the issuing State (namely work undertaken in prison in the issuing State)?

(2) In the event that these or other provisions of [the Framework Decision] are applicable to the reduction in sentence at issue, must the issuing State be notified if it has made a specific request to that effect and is the transfer procedure to be discontinued if the issuing State objects? If there is a notification requirement, what should the nature of that notification be: should it be in general and abstract terms as regards the applicable law, or should it relate to the specific reduction in sentence which the court will impose on a particular sentenced person?

15 — Contrary to what the Varhoven kasatsionen sad (Supreme Court of Appeal) states, this is, to my mind, not a case of 'commutation of the sentence, but of the reduction of a sentence.

16 — My italics.

(3) In the event that the Court rules that the provisions of Article 17(1) and (2) of [the Framework Decision] preclude the executing State from reducing the sentence on the basis of its domestic law (on account of work undertaken in the issuing State), is a decision by the national court nevertheless to apply its national law — because it is more favourable than Article 17 of [the Framework Decision] — compatible with EU law?'

35. The German, Spanish, Netherlands, Austrian and United Kingdom Governments and the European Commission have submitted observations.

36. Regrettably, the parties to the main proceedings and the Bulgarian Government have failed to participate, having lodged no written observations and having also failed to attend the hearing.

V – Preliminary observations

37. Before proceeding to examine the questions raised by the referring court, it is necessary for me to make two remarks, in order to confirm the Court's jurisdiction to give a preliminary ruling on the questions referred and to confirm the usefulness of an interpretation of Article 17 of the Framework Decision.

38. First, contrary to what is suggested in the order for reference, the transfer of the sentenced person was carried out not on the basis of the provisions of the Framework Decision, but on the basis of the provisions of the Convention on transfers.

39. That is expressly stated in the request for Mr Ognyanov's transfer which the Danish Ministry of Justice made on 26 March 2013 and from all the subsequent related correspondence contained in the national case file.

40. The Danish judicial authorities clearly referred to the provisions of the Convention on transfers, since the Framework Decision had not been transposed by the Republic of Bulgaria.

41. Does that mean, *ipso facto*, that the Court has no jurisdiction?

42. I think not.

43. I believe it was in full awareness of that position that the national court referred in its questions to the provisions of the Framework Decision. Indeed, pursuant to Article 29(1) of the Framework Decision, the Republic of Bulgaria was, in principle, required to transpose the Framework Decision by 5 December 2011 at the latest. Pursuant to the first indent of Article 26(1) thereof, it was therefore on that date that the Framework Decision should have replaced the Convention on transfers and the Additional Protocol to that convention.

44. Since the request for Mr Ognyanov's transfer was made on 26 March 2013 and his transfer took place, once the Bulgarian judicial authorities had given their consent, on 1 October 2013, the only provisions applicable to Mr Ognyanov's transfer between the two Member States ought, in principle, to have been those of the Framework Decision.

45. The national court therefore decided to refer to the Court questions on the interpretation of the Framework Decision.

46. It must be borne in mind that, in proceedings under Article 267 TFEU, 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.[17]

47. The presumption of relevance attaching to questions referred for a preliminary ruling by a national court may be set aside only in exceptional cases, where it is quite obvious that the interpretation of the provisions of EU law that is sought bears no relation to the actual facts of the main action or to its purpose, or 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.[18]

48. None of those conditions is fulfilled in the present case.

49. Consequently, I see no obstacle to the Court's giving a ruling in this case on the interpretation of the provisions of the Framework Decision.

50. Second, it must be emphasised that one of the obstacles that might have prevented the referring court from fulfilling its obligation to interpret national law in conformity with EU law — and here I am referring to the case-law of the Varhoven kasatsionen sad (Supreme Court of Appeal) on the scope of Article 41(3) of the NK — no longer exists.

51. Indeed, in its judgment of 19 April 2016 in *DI*,[19] the Court held that the obligation to interpret national law in conformity with EU law 'entails the obligation for national courts to change its established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive'.[20]

52. That principle, established by the Court, applies equally in relation to the Framework Decision.

53. Indeed, I would recall that, in its judgment of 16 June 2005 in *Pupino*,[21] the Court held that the binding character of framework decisions, formulated in terms identical to those of the third paragraph of Article 288 TFEU, and the principle of sincere cooperation, which is binding in the area of police and judicial cooperation in criminal matters,[22] place on national authorities, and particularly national courts, an obligation to interpret national law in conformity with EU law.[23] It is also necessary to bear in mind that this obligation is inherent in the system of the FEU Treaty, since it permits national courts, for matters within their jurisdiction, to ensure the full effectiveness of EU law when they determine the disputes before them.[24]

54. Consequently, it is, to my mind, perfectly possible to interpret Article 41(3) of the NK in conformity with Article 17(1) of the Framework Decision.

55. Moreover, the referring court is not restricted, in this exercise, by the need to observe the principles of legal certainty and non-retroactivity. We know from settled case-law that those principles prevent that 'obligation [to interpret national law in conformity with EU law] 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 [the existence of] an implementing law'.[25]

17 — Judgment of 26 February 2013 in *Melloni* (C-399/11, EU:C:2013:107, paragraph 28 and the case-law cited).

18 — Judgment of 26 February 2013 in *Melloni* (C-399/11, EU:C:2013:107, paragraph 29 and the case-law cited).

19 — C-441/14, EU:C:2016:278.

20 — Paragraph 33 and the case-law cited.

21 — C-105/03, EU:C:2005:386.

22 — Paragraph 42.

23 — Paragraph 34.

24 — See, inter alia, judgment of 24 January 2012 in *Dominguez* (C-282/10, EU:C:2012:33, paragraph 24 and the case-law cited).

25 — Judgment of 16 June 2005 in *Pupino* (C-105/03, EU:C:2005:386, paragraph 45). It is clear from that judgment 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' (paragraph 44).

56. However, in the present case, the provision to which the request for a preliminary ruling relates does not concern the extent of the criminal liability of the person concerned, but rather the procedure for enforcing that person's sentence, and in particular the grant of remission.

57. In the light of the foregoing, there is, consequently, and in the absence of transposition of the Framework Decision in Bulgaria, nothing to prevent the referring court from interpreting the relevant rules of the NK as far as possible in the light of the wording and purpose of the Framework Decision, in order to attain the result sought by that decision.

VI – My analysis

A – *The first question*

58. By its first question, the referring court asks the Court of Justice, in substance, whether the provisions of Article 17(1) and (2) of the Framework Decision are to be interpreted as precluding a national rule which, in a situation such as that at issue in the main proceedings, permits an executing State to grant the sentenced person remission of his sentence on account of work he has done while being held in detention in the issuing State.

59. In accordance with Article 17(1) of the Framework Decision, the enforcement of a sentence, including the grounds for early or conditional release, is governed by the law of the executing State.

60. In the present case, the Sofiyski gradski sad (Sofia City Court) therefore wonders whether it should not apply the law of the executing State, that is to say, in this case, Article 41(3) of the NK, to the part of the custodial sentence served by the sentenced person in Denmark.

61. The wording which the EU legislature employs in the first sentence of Article 17(1) of the Framework Decision is indeed capable of giving rise to doubt as to the division of jurisdiction relating to the enforcement of the measure involving the deprivation of liberty, and the 'travaux préparatoires' relating to that provision do not offer any real clarification as to its interpretation.

62. First, the EU legislature does not define what is meant by the 'enforcement of a sentence' for the purposes of Article 17(1) of the Framework Decision.

63. Secondly, it does not state whether that means the enforcement of the sentence from the moment the judgment is delivered in the issuing State or merely from the moment the person concerned is transferred to the executing State.

1. The definition of 'enforcement of a sentence'

64. Defining the concept of 'enforcement of a sentence' is an essential prerequisite.

65. Indeed, if the Court is to rule on the respective competences of the issuing State and the executing State in so far as concerns the enforcement of sentences, it must first take the trouble to define that concept.

66. Moreover, in order to ensure the mutual recognition of judgments imposing custodial sentences and ensure the effective enforcement of sentences in a State other than the issuing State, it is necessary to define this concept 'at Union level', since the complexity and sometimes even uncertainty of legislation and of enforcement practices relating to criminal convictions can render that task difficult. The effective enforcement of custodial sentences is, however, an essential component of criminal law policy, in general, and of the European area of justice in criminal matters, in particular.

67. I must therefore begin my analysis with a definition of the concept of 'enforcement of a sentence'.

68. In accordance with Article 1(b) of the Framework Decision, a 'sentence' (in the French-language version of the Framework Decision, a 'condamnation' [26]) is a custodial sentence or any other measure involving the deprivation of liberty for a limited or unlimited period of time that is imposed by a national court on account of a criminal offence and on the basis of criminal proceedings. [27]

69. The measures which constitute such a 'sentence' are governed by Article 49 of the Charter and Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950. [28]

70. Measures for the 'enforcement of a sentence' are thus measures designed to put a 'penalty' or 'sentence' into effect. The European Court of Human Rights considers that such measures are not an integral part of the 'penalty' (or sentence) and are therefore not governed by Article 7 of the ECHR. [29]

71. The enforcement of a sentence takes place after the final judgment imposing it has been delivered. It is, therefore, the last stage in the criminal process, during which effect is given to the penalty imposed.

72. It covers all the measures capable of ensuring the physical enforcement of the sentence, such as arrest warrants, and of ensuring the social rehabilitation of the sentenced person. In that context, the competent judicial authorities will establish the details of how the sentence is to be served and organised, deciding, for example, on placement in the community, on permitted absences and day release, on the serving of a sentence in instalments, on the suspension of a sentence, on the early or conditional release of a prisoner or on his being placed under electronic surveillance. The laws governing the enforcement of sentences may also include measures that apply after the sentenced person has been released, such as placement under judicial supervision or participation in rehabilitation programmes, or measures for the compensation of victims.

73. In the cases that have been brought before it, the European Court of Human Rights has frequently been confronted with situations which have shown that the distinction between a penalty or sentence and measures taken for enforcement may not always be clear-cut. It then becomes necessary to distinguish, from among the measures taken after the final judgment imposing the sentence has been delivered, which of those measures are in fact capable of redefining or altering the scope of the penalty or sentence. [30]

74. That said, the definition of 'enforcement of the sentence' is not sufficient to resolve the issue raised in the present case.

26 — In the English-language version of the Framework Decision, the same word, 'sentence', is used to cover both 'peine' and 'condamnation' in the French.

27 — According to the case-law of the European Court of Human Rights, 'the starting-point in any assessment of the existence of a penalty (or "peine" in the French version of the judgment) is whether the measure in question is imposed following conviction for a "criminal offence". Other factors that may be taken into account as relevant in this connection are the nature and purpose of the measure; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity … The severity of the order is not in itself decisive, however, since many non-penal measures of a preventive nature may have a substantial impact on the person concerned' (see, in that regard, ECtHR, 21 October 2013, *Del Río Prada v. Spain*, CE:ECHR:2013:1021JUD004275009, § 82 and the case-law cited).

28 — Hereafter 'the ECHR'. In the ECHR and the Charter, the word 'penalty' is used to convey the French 'peine', used in the Framework Decision to mean 'sentence' or 'custodial sentence'.

29 — ECtHR, 29 November 2005, *Uttley v. United Kingdom*, CE:ECHR:2005:1129DEC003694603, and 21 October 2013, *Del Río Prada v. Spain*, CE:ECHR:2013:1021JUD004275009.

30 — ECtHR, 21 October 2013, *Del Río Prada v. Spain*, CE:ECHR:2013:1021JUD004275009, §§ 59, 83, 85 and the case-law cited and § 89. In that judgment, the European Court of Human Rights held that recourse to the new approach to the application of remissions of sentence for work done in detention could not be regarded as a measure relating solely to the execution of the penalty imposed. Since it led to the extension of the term of imprisonment by almost nine years, that new approach, according to the European Court of Human Rights, led to the redefinition of the scope of the 'penalty' imposed and therefore had to be assessed in the light of the guarantee laid down in the last sentence of Article 7(1) of the ECHR (§§ 109 and 110).

2. The meaning and scope of Article 17 of the Framework Decision

75. Strict application of the principle that 'the enforcement of a sentence shall be governed by the law of the executing State' in itself raises a difficulty inasmuch as the enforcement of the sentence will already have commenced in the territory of the issuing State before continuing under the jurisdiction of the executing State. Which 'enforcement', therefore are we speaking of? Is the EU legislature referring to enforcement of the sentence from the moment the judgment is delivered by the issuing State or enforcement of the sentence from the moment the sentenced person is transferred to the judicial authorities of the executing State?

76. The answer becomes apparent if one considers the principles which underlie the Framework Decision and the general scheme of which Article 17 of the decision is a part.

(a) The principle of territoriality in criminal law

77. Article 17 of the Framework Decision is intended to govern conflicts of laws and conflicts of jurisdiction, relating to the enforcement of sentences, which inevitably arise from the transfer of a sentenced person by the authorities of an issuing State to the authorities of an executing State. Indeed, the transfer of a sentenced person implies that he or she has already begun serving a sentence in the territory of the issuing State and will continue to do so, where appropriate, in a prison in the executing State. [31]

78. This explains why, pursuant to Article 17(2) of the Framework Decision, the executing State is required, in order to calculate the length of the sentence remaining to be enforced in its territory, to deduct the period of deprivation of liberty 'already served' in the issuing State.

79. To permit the executing State to apply its laws retroactively to the initial enforcement of a sentenced person's sentence in the issuing State would infringe the commonly recognised principle of territoriality in criminal law.

80. The principle of territoriality of criminal law is a principle common to all the Member States. Criminal law has a territorial scope because it is an expression of the sovereignty of the Member States. Thus, the territorial jurisdiction of the courts in criminal matters is normally, under national law, a matter of public policy. Territorial jurisdiction necessarily determines which national law applies.

81. Consequently, as a matter of principle, the question is not whether, in the interests of Mr Ognyanov, it would be better, in accordance with the principle of retroactivity *in mitius* [32] laid down in the last sentence of Article 49(1) of the Charter, to apply Bulgarian criminal law, because it is more favourable to him, rather than Danish criminal law. No such choice exists in a cross-border situation such as that at issue in the main proceedings, because the applicability of criminal law is determined by the very principle of territoriality.

82. Moreover, the principle of retroactivity *in mitius* does not seem to me to apply in this case. Traditionally, that principle applies within the sphere of temporal conflicts of law, rather than in the sphere of territorial conflicts of law, as in the present case. Unquestionably, this principle would apply if, following an amendment of Danish criminal law, the offence committed by Mr Ognyanov were to cease to exist after he had been convicted, if his sentence were still ongoing. In such circumstances,

31 — Nevertheless, in certain cases, the convicted person may already be present in the territory of the executing State.

32 — In accordance with the principle of the legality of criminal offences and penalties, criminal law cannot apply retroactively. The principle of retroactivity *in mitius* constitutes an exception to that rule in insisting that the provisions of criminal law that are most favourable to the convicted person are those that should be applied.

the Bulgarian judicial authorities would have no choice but to release Mr Ognyanov. On the other hand, if the decriminalisation of the act which he committed occurred under Bulgarian law, I strongly doubt that that would entail Mr Ognyanov's release, *ipso facto*, since that act would remain punishable under Danish law as an offence against public order in Denmark, and thus fall outside the scope of Bulgarian law. Interestingly, a situation of this kind renders transfer impossible under the provisions of Article 3(1)(e) of the Convention on transfers.

83. The provisions of the Framework Decision seem to me to support this view. Indeed, the decision does not require double criminality for the offences listed in Article 7(1) thereof, and it provides for double criminality in respect of other offences only to the extent that the executing State may, pursuant to Article 7(3), make it a condition of recognition and enforcement. That rule therefore seems to me to confirm the territorial nature of criminal law and to exclude as inappropriate the principle of retroactivity *in mitius* in a situation such as that at issue in this case.

(b) The principle that penalties must be tailored to the individual

84. The principal objective of the Framework Decision is to further the social rehabilitation of persons who have been sentenced to imprisonment by enabling individuals who have been deprived of their liberty as a result of a criminal conviction to serve their sentence, or the remainder of it, within their own social environment.

85. That is clearly expressed in recital 9 and Article 3(1) of the Framework Decision. [33]

86. This means that all measures concerning how the sentence is to be enforced and organised must be tailored to the individual by the judicial authorities, in such a way as to further the social inclusion or social rehabilitation of the sentenced person, while at the same time respecting the interests of society and the rights of victims and the aim of preventing repeat offending.

87. In the context of the implementation of Article 17 of the Framework Decision, the principle that penalties must be tailored to the individual, which is one of the very functions of the sentence, therefore demands that jurisdiction be clearly divided between the issuing State and the executing State in such a way as to ensure that decisions concerning the enforcement of the sentence are adopted by the judicial authority that is best placed to assess the conduct of the individual concerned.

88. Accordingly, it is the judicial authorities for the place where the individual is actually being detained that should rule on all measures relating to sentence organisation, including measures for any remission of the sentence that might be granted to the sentenced person.

89. These are unquestionably the authorities that are close to the sentenced person and they are therefore the authorities for the place where he or she is actually being detained. [34]

33 — See also the declaration of the Council of the European Union on the objective of rehabilitation pursued by the Framework Decision, in which it stated that, 'bearing in mind that the successful rehabilitation of the sentenced person in a State with which he or she has the closest links is the fundamental purpose of this Framework Decision … and agreeing that the mutual trust between the Member States does not necessitate the introduction of the additional ground for refusal based on the [incompatibility] of the recognition of the judgment with the rehabilitation purpose, the Council underlines that this purpose should be a factor of primary importance for the issuing State each time [a] decision on the need [to forward a] judgment and the certificate to the executing State is … made' (see Annex II, Part I of Council document 6070/1/09 REV 1), and also point 4.1 of the Report from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention (COM(2014) 57 final).

34 — See the Communication from the Commission to the Council and the European Parliament entitled 'Mutual Recognition of Final Decisions in Criminal Matters' (COM(2000) 495 final), in which the Commission stated that 'decisions relevant [to enforcement], which are based on the behaviour of the prisoner, should fall within the competence of the executing Member State … it is the authorities of the executing Member State who are in direct contact with the prisoner and thus best placed to form an opinion on his or her behaviour' (point 9.1).

90. As regards, in particular, a reduction in the sentence on account of work done in prison, such a measure, tailored to the individual, would only make sense if it were adopted by the authority that has actually monitored and evaluated the work done by the individual in question.

91. There is, therefore, no sense in applying Article 41(3) of the NK, rather than the Danish legislation, to the period of detention which Mr Ognyanov served in Denmark, nor is there any legal basis for doing so. To take such a step would in itself be contrary to the principle that penalties must be tailored to the individual, since the Bulgarian judicial authorities would, as a result, be granting remission to a sentenced person with whom they were unacquainted and, moreover, whose work, and even whose progress, they had never monitored. On the other hand, there is nothing to prevent the Bulgarian judicial authorities, when carrying out a more general assessment of the efforts made by Mr Ognyanov with a view to his social rehabilitation, from taking into account the work he did while in prison in Denmark or any appraisal thereof by their Danish opposite numbers. That would merely be one criterion among many on the basis of which the competent judicial authorities could assess whether granting his conditional release was justified.

92. It is only once the person in question has been placed in a Bulgarian prison that the Bulgarian judicial authorities may, if appropriate, apply Article 41(3) of the NK. Reducing a sentence in this way must be done in the context of regular, personalised monitoring of the individual and should not, as is suggested to me by the judgment of the Varhoven kasatsionen sad (Supreme Court of Appeal),[35] be automatic.

93. In the light of all the foregoing, I consider that observance of the principle of territoriality in criminal law and of the principle that penalties must be tailored to the individual, on which principles the Framework Decision is based, demands that the enforcement of a measure involving the deprivation of liberty, and in particular the grant of remission, should be governed by the law of the Member State in which the sentenced person is actually being held.

94. That interpretation is corroborated by the general scheme of the Framework Decision, of which Article 17 is a part.

(c) The general scheme of the Framework Decision

95. From an examination of the general scheme of the Framework Decision it appears that Article 17 thereof establishes the principles which apply to the enforcement of sentences after a sentenced person has been transferred.

96. First, account must be taken of the context in which the principles expressed in Article 17 of the Framework Decision were developed. The Framework Decision was adopted on the basis of a certain number of existing instruments, in particular, the Convention on transfers,[36] which, moreover, is mentioned in recitals 4 and 5 of the Framework Decision.

97. The wording of Article 17(1) of the Framework Decision is, in substance, the same as that used in Article 9(3) of the Convention on transfers, which provides that 'the enforcement of the sentence shall be governed by the law of the administering State and that State alone shall be competent to take all appropriate decisions'. Significantly, the title of Article 9 of the convention is '*Effect of transfer* for administering State'.[37]

35 — Indeed, this explains why the deduction of any days worked is 'a positive, *mandatory* consequence, based on the very fact that the convicted person carried out work that is in the general interest while serving his sentence and while in detention' (my italics).

36 — See, inter alia, point 3.2.1.5 of the Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union (COM(2004) 334 final).

37 — My italics.

98. Given the context in which the Framework Decision was adopted, it is therefore highly likely that, in giving Article 17 of the decision the heading 'Law governing enforcement', the EU legislature intended to indicate the law governing the enforcement of a sentence 'after the transfer of the sentenced person'.

99. Second, account must be taken of the fact that the establishment of the principles in the Framework Decision follows chronological order.

100. As regards the first phase, Articles 4 to 14 of the Framework Decision lay down the rules which the Member States must follow in order to effect the transfer of a sentenced person. More specifically, Articles 4 to 6 define the procedures for forwarding judgments and certificates to executing States. Next, Articles 7 to 14 lay down the principles which apply to decisions to recognise a judgment and decisions to enforce a sentence. Article 13 of the Framework Decision states, in this connection, that the issuing State retains the right to withdraw a certificate 'as long as *the enforcement of the sentence in the executing State has not begun*'.[38]

101. As regards the second phase, Article 15 of the Framework Decision establishes the procedure which applies to the transfer of sentenced persons and Article 16 makes special provision for the situation where individuals transit through the territory of another Member State.

102. Those provisions thus follow a perfectly logical order in which Article 17 of the Framework Decision clearly constitutes the next step, laying down the principles which apply to the enforcement of a sentence 'once the sentenced person has been transferred' to the judicial authorities of the executing State.

103. Article 17 of the Framework Decision must also be read in the light of the rules laid down in the provisions which follow it, in particular, in Article 22 of the decision.

104. Article 22, entitled 'Consequences of the transfer of the sentenced person', conveys with particular clarity the transfer of competence which necessarily accompanies the transfer of a sentenced person.

105. Indeed, the EU legislature indicates in Article 22(1) of the Framework Decision that the issuing State may no longer enforce a sentence 'once its enforcement in the executing State has begun'. That very clearly signifies that, if the executing State has not begun enforcing a sentence, the issuing State retains competence to enforce it. Furthermore, Article 22(2) of the Framework Decision provides that, where an executing State finds it impossible to enforce a sentence because the sentenced person has escaped from custody, '*the right to enforce* the sentence *shall revert* to the issuing State'.[39]

106. Therefore, it is only after the judgment has been recognised by the executing State and the sentenced person has been transferred that the law of the executing State applies to the enforcement *stricto sensu* of the custodial sentence. Until the judgment is recognised and so long as the sentenced person remains under the jurisdiction of the judicial authorities of the issuing State, it is the law of that State that applies to the enforcement of the sentence. It therefore falls to the issuing State to decide, in accordance with its national legislation, any issues relating to remission.

107. Third, it must be pointed out that, within the scheme of the Framework Decision, it of course falls to the issuing State to consider whether there are grounds for arranging the transfer of a prisoner to his or her Member State of origin or residence.[40]

38 — My italics.

39 — My italics.

40 — See Article 4(1) of the Framework Decision.

108. A transfer, it must be noted, is a measure of enforcement of a sentence,[41] and perhaps one of the last that may be adopted by the judicial authorities of the issuing State. It is, specifically, a measure tailored to the individual, the objective of which is to further the social rehabilitation of the sentenced person.

109. In accordance with Article 4(2) of the Framework Decision, the forwarding of the judgment for recognition may only take place once the judicial authorities of the issuing State, after consulting the judicial authorities of the executing State if necessary, have satisfied themselves that the enforcement of the sentence by the executing State will serve that purpose.

110. The EU legislature states, in recital 9 of the Framework Decision, that, in order to satisfy themselves of that fact, the judicial authorities of the issuing State must, 'take into account such elements as, for example, the person's attachment to the executing State [and] whether he or she considers it the place of family, linguistic, cultural, social or economic and other links …'

111. As it falls to the issuing State to carry out that assessment, so too does it fall to that State, alone, to consider whether, in the light of the period of detention served in its territory and the efforts made by the person in question, he or she should benefit from any remission permitted under its national legislation.

112. The fact that the issuing State is required to state in the certificate accompanying the judgment the number of extra days to be added to the period of deprivation of liberty already served corroborates that interpretation.

113. The certificate is to be in the standard form provided in Annex I to the Framework Decision.[42] The form contains various sections which must be filled in by the judicial authorities of the issuing State. The various sections enable the issuing State to provide information, inter alia, on the court which delivered the judgment, the person prosecuted, the nature of the offence committed and the nature and length of the sentence imposed. That information must be certified as accurate by the competent authority of the issuing State.[43] Indeed, that is essential information which enables the executing State to check the judgment[44] and which, ultimately, ensures that the judgment is properly enforced. The competent authority of the executing State will recognise the judgment on the basis of the certificate forwarded by the judicial authority of the issuing State, which attests to the judgment's validity and enforceability. If the certificate is incomplete or inaccurate, this constitutes a ground for non-recognition of the judgment and non-enforcement of the sentence, pursuant to Article 9 of the Framework Decision.

114. For the purposes of the present analysis, it is necessary to refer to the information required in part (i), section 2, of the standard certificate given in Annex I to the Framework Decision, which concerns the length of the sentence. That information ensures the *effet utile* of Article 17(2) of the Framework Decision.

115. In part (i), section 2.2, the issuing State is required to indicate, as a number of days, the full period of deprivation of liberty already served in connection with the sentence in question. These are calendar days served.

41 — See, on this point, ECtHR, 27 June 2006, *Szabó v. Sweden*, CE:ECHR:2006:0627DEC002857803, p. 12.

42 — The EU legislature followed the approach of using a certificate stipulated in Article 54 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

43 — Article 5(2) of the Framework Decision.

44 — The executing State must satisfy itself that the decision to be enforced emanates from a competent authority in accordance with the law of the issuing State and falls within the scope of the Framework Decision.

116. However, under part (i), section 2.3, the issuing State may also indicate a number of additional days to be deducted from the sentence 'for reasons other than the one referred to under 2.2'. The EU legislature gives as examples amnesties, pardons and clemencies. Section 2.3 thus enables the issuing State to provide additional information where particular circumstances have already led to a reduction in the sentence.

117. This demonstrates that it indeed falls to the issuing State to decide on any reductions in the sentence connected with the period of detention served in its territory, inasmuch as, in the certificate, the issuing State is required to inform the executing State if it is necessary to deduct a greater number of days than the number of calendar days spent in detention and, if so, the exact number of those additional days. The terms used by the EU legislature to describe the nature of the grounds that are capable of giving rise to such a reduction are obviously rather vague. Moreover, the list of grounds is not exhaustive, as is clear from the use of the adverbial phrase 'for example'. The EU legislature thus meant to cover as broadly as possible all the specific circumstances that might entail a remission of sentence in the various Member States. Consequently, it is reasonable to suppose that remission granted on account of the progress made by the sentenced person fits within those grounds.

118. In the light of those factors, I am satisfied that the executing State cannot substitute its own laws on the enforcement of sentences, and in particular its national laws on remission, for those of the issuing State, and thereby alter the deduction made by the latter, for that would not only seriously undermine the principle of mutual recognition, but would also seriously impinge on the territorial sovereignty of the Kingdom of Denmark.

119. Indeed, in a case such as that in the main proceedings, the Kingdom of Denmark expressly stated that it did not grant remission of the sentence on account of work done in prison. In accordance with the principle of mutual recognition, on which the Framework Decision rests, the Republic of Bulgaria therefore has no choice but to accept the application of the law in force in the issuing State, even if, to quote the Court's judgment of 11 February 2003 in *Gözütok and Brügge*[45] 'the outcome would be different if its own national law were applied'.[46]

120. If the law of the executing State, rather than that of the issuing State, were to prevail, that would inevitably reduce the mutual confidence the Member States have in one another and would jeopardise the attainment of the objectives pursued by the Framework Decision.

121. It should also be borne in mind that the right to punish is an essential power of the State and that criminal law, including the right to enforce sentences, lies at the heart of national sovereignty. The right to enforce sentences therefore falls within the sphere of the power of the Member States to decide their own criminal law policy, as is evidenced by its territorial nature.[47]

122. In the present case, it was the public order of the Kingdom of Denmark that Mr Ognyanov offended by his conduct. It is therefore the judicial authorities of that Member State that have jurisdiction to try him and to sentence him for the offences which he committed. It is also in Danish territory and under the jurisdiction of the Danish authorities that Mr Ognyanov served the first part of his sentence.

123. Given the respective spheres of territorial jurisdiction, it is therefore obvious that Article 41(3) of the NK cannot apply to the enforcement of the sentence on Danish territory without undermining the territorial sovereignty of the Kingdom of Denmark.

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

46 — Paragraph 33.

47 — See, on this point, ECtHR, 21 October 2013, *Del Río Prada v. Spain*, CE:ECHR:2013:1021JUD004275009, § 84.

124. Last, if Article 17 of the Framework Decision were to be interpreted as permitting the application of the law of the executing State to the enforcement of the sentence in the issuing State, that would also undermine the fundamental principle of equal treatment: prisoners serving a sentence in the same prison would be subject or potentially subject to different legal systems in so far as concerns the enforcement of their sentence, and in particular the rules on remission.

125. That would give rise to insoluble difficulties which would make it impossible to ensure the fair and just application of the rules and could, most certainly, compromise the success of the Framework Decision.

126. In the light of all the foregoing, I consider that, in view of the principles on which the Framework Decision rests, namely mutual confidence among the Member States, the principle of territoriality in criminal law and the principle that penalties must be tailored to the individual, the provisions of Article 17(1) and (2) of the Framework Decision must be interpreted as precluding national legislation under which the judicial authorities of the executing State may grant a sentenced person remission of his or her sentence on account of work which he or she did while in detention in the issuing State.

127. I recognise that that interpretation does not make it possible to differentiate the Framework Decision, which is founded on the principle of mutual recognition, from the traditional mechanisms for judicial cooperation, which are conceived of as a form of cooperation between sovereign States. Nevertheless, it is, to my mind, the only possible interpretation if full account is to be taken of the absence of harmonisation of the rules on the enforcement of sentences in the European Union.

B – *The second question*

128. The second question concerns the extent of the duty to inform which is imposed on the judicial authorities of the executing State by Article 17 of the Framework Decision. This question is asked in the event that that provision permits the Bulgarian national authorities to apply Article 41(3) of the NK to the period of detention served by the person concerned in Denmark.

129. The Sofiyski gradski sad (Sofia City Court) questions whether, if a request to that effect is made to the Bulgarian judicial authorities, they are required to inform their Danish counterparts of the applicability of that legislation and, if so, what information they are required to communicate in that connection.

130. In view of the answer which I propose be given to the first question, I consider that there is no need to answer the second question.

C – *The third question*

131. In the event that the Court holds that the provisions of Article 17(1) and (2) of the Framework Decision preclude a national rule such as that at issue in the main proceedings, the referring court asks by its third question, in essence, whether EU law prevents it from 'nevertheless' choosing to apply Article 41(3) of the NK to the period of detention which Mr Ognyanov served in Denmark, on the ground that that legislation is more lenient.

132. It must certainly be admitted that the remission of sentence at issue is not negligible.

133. In that the Danish legislation is more stringent with regard to remission on account of work done while in detention, the application of Article 41(3) of the NK to the period of detention served by Mr Ognyanov in Denmark would enable him to benefit from remission of his sentence amounting to 2 years, 6 months and 24 days, rather than 1 year, 8 months and 20 days, which would mean that he could be released earlier.

134. Nevertheless, the question which the referring court asks is based on an assumption which must immediately be dismissed. The Sofiyski gradski sad (Sofia City Court) is in fact asking whether it may apply a national rule that has nevertheless been held contrary to EU law on the ground that it is more favourable to the person concerned.

135. This question is also asked, in different terms, by the referring court in its request, pending before the Court, for a preliminary ruling in *Ognyanov* (C-614/14).

136. I shall therefore propose an answer in the same terms as in my Opinion in *Ognyanov*,[48] albeit making a few additional observations.

137. First, in accordance with Article 280 TFEU, 'the judgments of the Court of Justice … shall be enforceable'. As I indicated in point 111 of that Opinion, in proceedings brought pursuant to Article 267 TFEU, the Court does not provide an advisory opinion. It is settled case-law that a judgment in which the Court gives a preliminary ruling is binding on the national court, as regards the interpretation or the validity of the acts of the EU institutions in question, for the purposes of the decision to be given in the main proceedings.[49]

138. Second, if the Court holds that the provisions of Article 17(1) and (2) of the Framework Decision preclude a national rule such as that at issue in the main proceedings, the referring court will, as I have said, be required to interpret Article 41(3) of the NK in the light of the wording and purpose of the Framework Decision, and, if necessary, to disregard the case-law established by the Varhoven kasatsionen sad (Supreme Court of Appeal), by reason of its obligation to interpret national law in conformity with EU law.

139. Third, and in any event, it is appropriate to remind the referring court that, given the inapplicability of Article 41(3) of the NK to the period of detention served by Mr Ognyanov in Denmark, the rule on the retroactive effect of a more lenient criminal law, laid down in the last sentence of Article 49(1) of the Charter, (the principle of retroactivity *in mitius*) cannot apply.

140. Fourth and last, the referring court's focus on the remission of sentence at issue should not obscure the fact that Mr Ognyanov's transfer to Bulgaria is in itself intended to be more favourable to him, in that he will be able to serve the remainder of his sentence within his own social environment, which will favour his social rehabilitation.

141. In view of those considerations, and in the event that the Court should conclude that the provisions of Article 17(1) and (2) of the Framework Decision preclude a national rule such as that at issue in the main proceedings, the referring court will be required, in accordance with its obligation to interpret national law in conformity with EU law, to disregard the interpretation given by the Varhoven kasatsionen sad (Supreme Court of Appeal) of Article 41(3) of the NK and disapply that provision to the period of detention served by Mr Ognyanov in Denmark.

48 — C-614/14, EU:C:2016:111.

49 — Judgment of 5 October 2010 in *Elchinov* (C-173/09, EU:C:2010:581, paragraph 29 and the case-law cited).

142. Following on from those arguments, I should like to draw some conclusions regarding the division of jurisdiction between the judicial authorities of the issuing State and those of the executing State established by the Framework Decision.

D – *Summary of the division of jurisdiction between the judicial authorities of the issuing State and those of the executing State established by the Framework Decision*

1. The law which governs the enforcement of a custodial sentence prior to the transfer of the sentenced person

143. Where, in a situation such as that at issue in the main proceedings, the individual is initially imprisoned in the issuing State, the law applicable to the enforcement of the sentence is clearly the law of that State. All the measures affecting the enforcement of the sentence in the territory of that State, whether they are measures relating to the implementation of the custodial sentence, such as the order remanding the person to prison, or measures relating to sentence organisation, such as placement in the community, fall within the scope of the law of the issuing State.

144. As I have said, it also falls to the issuing State to consider whether there are grounds for arranging the transfer of the prisoner to his or her Member State of origin or residence. [50]

145. A transfer is certainly a measure of enforcement of a sentence and, specifically, a measure tailored to the individual, the objective of which is to ensure that the person concerned may serve his sentence as close as possible to his family environment and to the social environment within which he must be rehabilitated. [51]

146. As it falls to the issuing State to carry out that assessment, so too does it fall to that State to consider whether, in accordance with national legislation and in the light of the efforts made by the prisoner, he or she should benefit from other measures relating to sentence organisation, including measures relating to remission.

147. That division of jurisdiction obliges the issuing State to rule on all matters relating to remission of the sentence prior to the transfer of the sentenced person. [52]

148. I would reiterate, moreover, that that is the very purpose of part (i), section 2.3, of the standard certificate provided in Annex I to the Framework Decision.

149. Indeed, the transfer of the sentenced person must not render nugatory any remission of sentence to which the individual may be entitled under the law of the issuing State or in accordance with decisions adopted by competent courts. [53] The judicial authorities of the issuing State must therefore be in a position to issue a certificate stating not only the length of the sentence and the period of detention served, *stricto sensu*, but also the number of days deducted, by way of remission of the sentence in accordance with national legislation. They should also be in a position to provide some information on any assessment of the efforts which the individual has made toward his rehabilitation.

50 — See Article 4(1) of the Framework Decision.

51 — ECtHR, 27 June 2006, *Szabó v. Sweden*, CE:ECHR:2006:0627DEC002857803, p. 14.

52 — Because of the division of jurisdiction, remission is granted in respect not of the full length of the sentence, but in respect of each of the periods of detention served in the issuing State and in the executing State successively.

53 — See, on this point, ECtHR, 21 October 2013, *Del Río Prada v. Spain*, CE:ECHR:2013:1021JUD004275009, § 107.

150. The executing State therefore cannot substitute its own laws on the enforcement of sentences for those of the issuing State, even if its own legislation is more favourable to the person concerned, for that would not only infringe the provisions of Article 17 of the Framework Decision, but would also seriously impinge on the sovereignty of the issuing State and thereby seriously undermine the principle of mutual recognition.

2. The request for information preceding a transfer

151. If a sentenced person is transferred to an executing State, it is perfectly logical that the judicial authorities of the issuing State should inform themselves about the applicable provisions on possible early or conditional release, as is provided for in Article 17(3) of the Framework Decision. Again, it is important to bear in mind that it is the public order of the issuing State that has been offended by the criminal conduct in question. The issuing State must therefore be sure that enforcement of the sentence in the territory of the executing State will provide a satisfactory solution to the disturbance to public order caused on its own territory. Accordingly, the issuing State will evaluate whether, in the light of these new provisions, the sentence will generally retain the coherence it had when it was imposed. If the issuing State fears that a transfer might lead to what it regards as too early a release from prison or if it considers that the sentence would cease to be proportionate to the offence, it may decide against transferring the sentenced person and withdraw the certificate.

152. The request for information must be made before the individual is transferred, since, once the transfer has been effected, the issuing State will no longer be able to impose its own conception of enforcement measures and will not be able to retract its decision on the transfer.

3. The law governing enforcement of the sentence after the transfer of the person concerned

153. The transfer of the individual automatically and necessarily entails a concomitant transfer to the executing State of powers with regard to the enforcement of the sentence, for the same reasons as I have just mentioned: first, because the enforcement of the sentence will henceforth take place in the territory and under the jurisdiction of that State, and secondly because, from the time of the transfer onwards, the judicial authorities of the executing State will alone be in a position to determine the conditions under which the sentence is to be enforced, in the light of the efforts which the person has made with a view to rehabilitation and the person's physical, family and social circumstances.

154. Once the transfer has been effected, the executing State clearly cannot be required to seek the authorisation of the issuing State before adopting measures tailored to the individual in the form of a reduction of the sentence or early or conditional release, for example. As I have said, issues surrounding the existence of a release scheme, the procedures for implementing such a scheme and the grounds for such release fall within the scope of the powers of the States to decide their own criminal law policy. In such circumstances, any authorisation on the part of an issuing State would amount to an intrusion upon the sovereignty of the executing State and interference with the independence of its judicial system.

155. The executing State must enforce the sentence as if the judgment imposing it had been handed down by its own judicial authorities. As for the issuing State, in accordance with the principle of mutual confidence, it has no choice but to accept the application of the laws in force in the executing State, even if, to quote again the Court's judgment of 11 February 2003 in *Gözütok and Brügge*[54] 'the outcome would be different if its own national law were applied'.[55]

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

55 — Paragraph 33.

156. The Member States were perfectly well aware, when the Council adopted the Framework Decision, of the differences between their respective legal systems with regard to the enforcement of criminal judgments. In so far as concerns the rules which apply to early or conditional release, for example, in certain Member States a sentenced person may be released after serving one third of the sentence, while in others early release is only possible after two thirds of the sentence has been served. The Member States were thus perfectly conscious of the fact that the transfer of a sentenced person could have an effect on the actual length of the period of deprivation of liberty, by comparison with the length of the sentence initially imposed, and thus on the date on which the prisoner may be released. [56] Moreover, it is for that reason, and in particular to prevent instances of early release that an issuing State would regard as 'premature' in the light of the criminal act perpetrated on its territory, that the EU legislature provided for the 'reservation' stipulated in Article 17(3) of the Framework Decision. [57]

157. It is true that, where an executing State applies more stringent rules, the transfer of a sentenced person to that State could, as a matter of fact, entail a longer term of imprisonment than would have been served in the issuing State.

158. The European Court of Human Rights sees no objection to that from the perspective of the right to liberty and security enshrined in Article 5 of the ECHR, provided that the sentence to be served does not exceed the sentence imposed in the original criminal proceedings. Nevertheless, the European Court of Human Rights does not exclude the possibility that a markedly longer de facto term of imprisonment in the executing State could give rise to an issue under Article 5 and hence engage the responsibility of the issuing State under that provision, to the extent of the consequences that were foreseeable at the time when the transfer decision was taken. [58]

VII – Conclusion

159. In the light of the foregoing, I propose that the Court answer the questions submitted by the Sofiyski gradski sad (Sofia City Court, Bulgaria) as follows:

(1) In the light of the principles underlying 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, namely the principle of mutual confidence among the Member States, the principle of territoriality in criminal law and the principle that penalties must be tailored to the individual, the provisions of Article 17(1) and (2) of that framework decision are to be interpreted as precluding a national rule, such as that at issue in

56 — See the study by the Institute for International Research on Criminal Policy, Ghent University, entitled 'Material detention condition, execution of custodial sentences and prisoner transfer in the EU Member States', 2011. See also point 4.1.8 of the Commission's Green Paper, cited in footnote 36 to this Opinion, in which the Commission noted that 'the differences in the Member States' legislation regarding the minimum term of imprisonment to be served … have created difficulties of application and in some cases even refusals to transfer as they can entail lighter penalties and even immediate release'. Such difficulties arose in the same fashion with the application of the Convention on transfers.

57 — Pursuant to that provision, 'the competent authority of the executing State shall, upon request, inform the competent authority of the issuing State of the applicable provisions on possible early or conditional release. The issuing State may agree to the application of such provisions or it may withdraw the certificate'.

58 — ECtHR, 27 June 2006, *Szabó v. Sweden*, CE:ECHR:2006:0627DEC002857803, p. 9. In the case that gave rise to that judgment, the individual in question could reasonably have expected to be released, in Sweden, after serving two thirds of his 10-year prison sentence, that is to say, after 6 years and 8 months. As a result of his transfer to Hungary, he could not expect conditional release until he had served four fifths of the sentence, that is, after eight years in prison. Whilst, in law, his sentence had not been increased, as a matter of fact he could expect to serve a term of imprisonment in Hungary one year and four months longer than the term he would have served in Sweden. The European Court of Human Rights was therefore called on to consider whether the transfer to Hungary and the de facto increase in the period of detention were capable of constituting an infringement of Article 5 of the ECHR. The court found that the additional period in detention which Mr Szabó could expect to serve in Hungary equated to 20% of the time he could have expected to serve in Sweden. After noting that the difference of one year and four months was not negligible, the court nevertheless held that the period of imprisonment which Mr Szabó would serve remained within the limits of the sentence initially imposed.

the main proceedings, in accordance with which the judicial authorities of the Member State to which a judgment is forwarded for the purpose of its recognition and enforcement may grant a sentenced person remission on account of work done by that person while detained in the Member State in which that judgment was delivered.

(2) The Sofiyski gradski sad (Sofia City Court) is required, in accordance with its obligation to interpret national law in conformity with EU law, to disregard the interpretation adopted by the Varhoven kasatsionen sad (Supreme Court of Appeal, Bulgaria) of Article 41(3) of the Nakazatelen Kodeks (Bulgarian Criminal Code) and to disapply that provision to the period of detention served by the individual in question in the Kingdom of Denmark.