Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 28 July 2016 [1]

Case C-289/15

Grundza

(Request for a preliminary ruling from the Krajský súd v Prešove (Regional Court, Prešov, Slovakia))

(Judicial cooperation in criminal matters — Framework Decision 2008/909/JHA — A national of the executing State sentenced in the issuing State for obstruction of implementation of an official decision — Condition of double criminality)

I – Introduction

1. Mr Grundza is a Slovak national. He was intercepted driving a car on the streets of Prague in violation of a previous decision of a Czech administrative authority banning him from driving motor vehicles. Subsequently, he was sentenced by a Czech court to 15 months' imprisonment for, inter alia, 'obstructing the implementation of an official decision'.

2. On the basis of Framework Decision 2008/909/JHA, [2] the competent Czech judicial authority requested the judgment against Mr Grundza to be recognised and the sentence to be served in Slovakia. However, the Slovak court seised of that request has doubts over whether the condition of double criminality is satisfied in the present case given that the decision obstructed had been issued by a Czech authority and not by a Slovak authority.

3. This case invites the Court to interpret the condition of double criminality in the context of Article 7(3) of Framework Decision 2008/909. What elements are relevant and at what level of abstraction should those elements be considered in order to satisfy the condition of double criminality?

II – Legal Framework

A – *EU Law*

4. Under Article 3(1), the purpose of Framework Decision 2008/909 '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'.

1 — Original language: English.

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).

5. Article 7(1) of Framework Decision 2008/909 contains a list of 32 offences for which the condition of double criminality shall not be verified in order to recognise a judgment or to enforce a sentence.

6. Article 7(3) of Framework Decision 2008/909 provides that 'for offences other than those covered by paragraph 1, the executing State may make the recognition of the judgment and enforcement of the sentence subject to the condition that it relates to acts which also constitute an offence under the law of the executing State, whatever its constituent elements or however it is described'.

7. Article 9 of Framework Decision 2008/909 contains a list of grounds for non-recognition of a judgment and non-enforcement of a sentence. What is relevant for this case is the ground listed under subparagraph (d) pursuant to which the competent authority of the executing State may refuse to recognise a judgment and enforce a sentence, if: 'in a case referred to in Article 7(3) …, the judgment relates to acts which would not constitute an offence under the law of the executing State. However, in relation to taxes or duties, customs and exchange, execution of a judgment may not be refused on the ground 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, duties and customs and exchange regulations as the law of the issuing State'.

B – *National law*

8. Framework Decision 2008/909 was transposed by the Slovak Republic by Law No 549/2011, zákon o uznávaní a výkone rozhodnutí, ktorými sa ukladá trestná sankcia spojená s odňatím slobody v Európskej únii (Law No 549/2011 on the recognition and enforcement of decisions imposing penal sanctions involving restriction on personal liberty in the European Union). When transposing Article 7(3) of Framework Decision 2008/909, the Slovak Republic chose to retain the condition of double criminality for the offences covered by that provision.

9. Under Article 4(1) of Law No 549/2011, it is in principle possible to recognise and enforce a judgment in the Slovak Republic if the act for which that judgment was issued also constitutes an offence under Slovak law. Under Article 16(1)(b) of Law No 549/2011, 'the Court must refuse recognition and enforcement of the decision if the facts on the basis of which the decision was issued do not constitute an offence under Slovak law …'.

10. The offence of obstructing the implementation of an official decision exists under both Slovak and Czech law. The definition of that offence is almost identical in both legal orders.

11. Pursuant to Article 337(1)(a) of Law No 40/2009 Sb., trestní zákoník (Czech Criminal Code)'any person who thwarts or renders substantially more difficult the implementation of a decision of the judicial authority or other public authority by carrying on an activity which was forbidden to him by such a decision or for which he thereby lost or had withdrawn the corresponding authorisation under other legal provisions shall be punished by imprisonment of up to two years'.

12. Pursuant to Article 348(1)(d) of Law 300/2005 Z.z., Trestný zákon (Slovak Criminal Code)'any person who thwarts or renders substantially more difficult the implementation of a decision of the judicial authority or other public authority by carrying on an activity which was forbidden to him by such a decision shall be punished by imprisonment of up to two years'.

13. The condition of double criminality has already been examined in two decisions of the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) ('the NS'), both of which are referred to in the order for reference. Both of those decisions concerned the transfer of sentenced persons and the application of the condition of double criminality in factually similar

circumstances — the recognition in Slovakia of a sentence imposed in the Czech Republic for the offence of obstructing the implementation of an official decision. However, those decisions were not issued in the particular context of Framework Decision 2008/909, but rather under the previous legal regime, applicable at the relevant time.

14. In 2010, the NS held that the condition of double criminality was not fulfilled for the offence at issue in that case, namely, obstructing the implementation of an official decision. The reason was the so-called *in concreto* analysis of double criminality, which led the NS to the conclusion that one of the elements of the criminal offence was missing under Slovak law: the Czech judgment to be recognised did not relate to a decision issued by a Slovak authority. [3]

15. Subsequently, however, the NS took a different approach. It concluded, in a different case, that the *in concreto* assessment of double criminality was actually satisfied for the offence of obstructing the implementation of an official decision. The NS considered that the protected interest of the Czech Republic affected by the obstruction of the official Czech decision had to be considered by analogy as if it were an interest of the Slovak State. In other words, the fact that the criminal offence did not concern an official decision issued by a Slovak authority but an official decision of a Czech authority did not prevent the conclusion that the condition of double criminality was satisfied. [4]

III – Facts, national proceedings and question referred

16. On 12 February 2014, the municipal authority of Přerov (Czech Republic) imposed a ban on driving motor vehicles on Mr Grundza. On 9 March 2014, Mr Grundza committed a theft in the Czech Republic. On 9 August 2014, Mr Grundza drove a motor vehicle in Prague and was intercepted. On 28 August 2014, he was found guilty of the criminal offence of the obstruction of the implementation of an official decision. Eventually, on 3 October 2014, a cumulative [5] sentence of 15 months' imprisonment for the theft and the obstruction of the implementation of an official decision was imposed on him.

17. Subsequently, the competent Czech judicial authority requested, under Framework Decision 2008/909, that the final judgment against Mr Grundza be recognised and that the sentence be served in Slovakia.

18. Examining that request and considering the diverging case-law of the Slovak Supreme Court on the assessment of double criminality presented above, the referring Court doubts whether the condition of double criminality is satisfied in the present case given that the decision obstructed was issued by a Czech authority.

19. In these circumstances Krajský súd v Prešove (Regional Court, Prešov) stayed proceedings and referred the following question to the Court of Justice:

'On a proper interpretation of Articles 7(3) and 9(1)(d) of Framework Decision [2008/909], is the condition of double criminality to be considered satisfied only where the facts to which the decision to be recognised refers constitute an offence *in concreto*, i.e. on the basis of a concrete assessment of the facts (whatever its constituent elements or however it is described) also in the law of the executing State, or is that condition sufficiently satisfied where the facts generally constitute (*in abstracto*) an offence also in the legal order of the executing State?'

3 — Judgment of the NS dated 26 January 2010, sp. Zn. 2 Urto 1/2011, published in Zbierka stanovísk NS a súdov SR under 2/2011, No 17, p. 9, accessible at http://www.supcourt.gov.sk/data/files/88_stanoviska_rozhodnutia_2_2011.pdf.

4 — Order of the NS dated 5 September 2012, sp. zn. 3 Urto 1/2012 accessible at http://www.supcourt.gov.sk/data/att/23S02_subor.pdf.

5 — Under Czech law, when imposing a 'cumulative sentence' ('souhrnný trest'), the court punishes two or more criminal offences committed by the same perpetrator with a single sentence. The court annuls the operative part of the pre-existing judgment(s) dealing with sentencing and then 'absorbs', in a way, the already imposed sentence(s) into a new single sentence.

20. Written observations were submitted by the Austrian, Czech, Slovak and Swedish Governments as well as by the Commission. The Czech and Slovak Governments and the Commission presented oral arguments at a hearing held on 25 May 2016.

IV – Assessment

A – *Introduction: A note on terminology*

21. All of the Member States that have presented observations as well as the Commission agree that the condition of double criminality is satisfied in the present case. What differs, however, is their reasoning for arriving at such a conclusion.

22. The question referred by the national court relies on the terminological distinction between *in abstracto* and *in concreto* assessments of the condition of double criminality.

23. That terminology is frequently used in criminal law doctrine. The specific and precise content of those terms (*in concreto* and *in abstracto*) is, however, less clear. It seems to be understood differently by various authors. [6]

24. When looking for a common denominator within the various definitions, it could be perhaps suggested that the assessment of double criminality *in abstracto* calls for verification of the question of whether the behaviour and acts referred to in the judgment of the issuing State would amount to a criminal offence if committed on the territory of the executing State.

25. The assessment of double criminality *in concreto* seems to require much more, including the satisfaction of other conditions of criminal liability as defined by the laws of the executing state, such as the age or mental state of the accused or consideration of further factual circumstances in which the act was committed.

26. The written submissions as well as the discussion that unfolded at the hearing demonstrate that considerable diversity exists among the Member States as to the exact understanding of the notions of *in concreto* and *in abstracto* in the context of double criminality.

27. That discussion also made it clear that the distinction between the assessment of double criminality *in abstracto* or *in concreto* is not a binary choice, but rather a sliding scale. That distinction is based on the level of abstraction chosen to analyse double criminality. At the highest level of abstraction, it could be argued that the focus is on the mere immorality of an act: a certain act is considered wrong in both systems. Further down, one finds the basic constituent elements of the crime. Even further down on the scale of abstraction, one may look into all the other particular elements of criminal liability, including for example the question of age, or the (non-)existence of exceptional circumstances, but also the severity of sanctions. At the lowest level of abstraction (or rather the highest level of concretisation), all the individual factual elements of the act are relevant as well. What is required there is in fact virtual identity of the act and its legal assessment under both legal systems in question.

6 — See, for example, Plachta, M., 'The Role of Double Criminality in International Cooperation in Penal Matters', in Jareborg (ed) *Double criminality*: *Studies in International Criminal Law*, Kriminalistik Institut, 1989, p. 105; Wouter van Ballegooij, *The Nature of Mutual Recognition in European Law: Re-examining the Notion from an Individual Rights Perspective with a View to Its Further Development in the Criminal Justice Area*, Intersentia, 2015, p. 127; Flore, D., 'Reconnaissance mutuelle, double incrimination et territorialité' in *La reconnaissance mutuelle des décisions judiciaires pénales dans l'Union européenne*, Éditions de l'Université de Bruxelles, 2001, pp. 69 to 70; Keijzer,N., 'The Double Criminality Requirement' in Blekxtoon et al (ed.) *Handbook on the European Arrest Warrant*, T.M.C. Asser Press, 2005, p. 137; Cahin, G., *La double incrimination dans le droit de l'extradition*, RGDIP, 2013, No 3, p. 586; Cameron, I., 'Double criminality under pressure' in Festskrift Till Per Ole Träskman, Norstedts Juridik AB, 2011, p. 124.

28. Where then is the dividing line between *in abstracto* and *in concreto* to be drawn? Similar to the position expressed by the Commission at the hearing, I am of the view that arguing about these notions and their specific content is perhaps not entirely helpful for the purpose of providing the national court with a useful reply in this case. Moreover, in view of the diversity in the understanding of the intervening Member States of how precisely the terms *in abstracto* and *in concreto* are to be defined, attaching terminological 'stickers' might be potentially misleading, since it is bound to be understood differently.

29. For these reasons, rather than looking at notions, the analysis in this Opinion will be functional. I shall suggest an answer to the national court based on the operation of the double criminality condition in the context of the intra-EU system of judicial cooperation in criminal matters and under Framework Decision 2008/909 in particular.

30. However, before embarking on that functional analysis, it is useful to briefly consider the evolution of the concept of double criminality in an international law and European law context. That evolution sharpens our understanding of what Framework Decision 2008/909 was supposed to achieve.

B – *Evolution of the double criminality condition*

31. The requirement of double criminality generally makes the exercise of the extraterritorial jurisdiction of a State conditional on the fact that the conduct concerned is criminalised under both the law which applies in the place where the act was committed and the law of the State punishing the act.[7] It is linked to the principle of legality and, more specifically, the foreseeability of sanctions (*nulla poena sine lege*).

32. Double criminality has been a traditional condition for extradition. Although international law instruments may list specific criminal offences that will be subject to extradition, extradition will often be subject to the additional requirement that the offence is criminalised in the legal orders of both States involved.[8]

33. The double criminality requirement is embedded in the principles of sovereignty, reciprocity and non-intervention, which constitute the fundamental elements of cooperation between States enshrined in instruments of international public law. This cooperation essentially aims at avoiding interference in the domestic affairs of the States involved.[9]

34. By contrast, the system of intra-EU judicial cooperation in criminal matters relies primarily on the principle of mutual recognition.[10] Within this system, the legal orders of the different Member States are open to each other based on enhanced mutual confidence in each other's criminal justice systems.

35. On a more practical level, this means that once a judicial decision has been adopted in one Member State, it 'shall be recognised and executed in other Member States as quickly as possible and with as little conflict as possible, as if it was a national decision'.[11]

36. The principle of mutual recognition has led to, among other things, the establishment of a list of criminal offences in respect of which the review of the condition of double criminality has been done away with and therefore *shall not* be conducted.

7 — Cameron, I., 'Double criminality under pressure' in Festskrift Till Per Ole Träskman, Norstedts Juridik AB, 2011, pp. 122-123.

8 — Thouvenin, J.-M., 'L'extradition' in Ascensio, Decaux, Pellet, *Droit international pénal*, Pedone, Paris, 2nd ed. revised, 2012, pp. 1123 to 1124.

9 — Daillier and Pellet, *Droit international public*, LGDJ, Paris, 7th ed., 2008, p. 515, paragraph 337.

10 — Recital 1 of Framework Decision 2008/909. See also Opinion of Advocate General Bot in *Ognyanov* (C–554/14, EU:C:2016:319, point 13).

11 — Plachta, M., 'Cooperation in Criminal Matters in Europe' in Bassiouni, *International Criminal Law, Third Edition, vol. II Multilateral and Bilateral Enforcement Mechanisms*, Martinus Nijhoff, 2008, p. 458. See also recital 5 of Framework Decision 2008/909.

37. The, albeit partial, departure from the requirement of double criminality represents a qualitative shift from the practice under international public law instruments. The departure was first introduced by Framework Decision 2002/584 on the European arrest warrant and the surrender procedures between Member States [12] and has since been extended in a number of other EU law acts, [13] including Framework Decision 2008/909.

38. Framework Decision 2002/584 replaced the multilateral system of extradition previously in place between the Member States. [14] In a similar vein, Framework Decision 2008/909 has replaced several international law instruments with the aim of increasing the level cooperation between Member States.

39. The international law instruments that preceded Framework Decision 2008/909 were the Convention on the Transfer of Sentenced Persons, the Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences, and the European Convention on the International Validity of Criminal Judgments. [15] All of those instruments contained provisions on double criminality. [16]

40. It is important to keep these historical dynamics in mind when considering the function of the double criminality condition in Framework Decision 2008/909. The operation of that rule under Framework Decision 2008/909 should not produce less developed or more cumbersome interactions between the Member States, compared to the previous less integrated system based on the aforementioned international law instruments.

C – *The operation of the double criminality condition in the context of Framework Decision 2008/909*

41. By its preliminary question, the referring court enquires, in essence, about the appropriate level of abstraction or generalisation at which a criminal act attracting a sentence should be considered for the purpose of verifying the condition of double criminality under Framework Decision 2008/909. More specifically, the question aims at ascertaining whether Articles 7(3) and 9(1)(d) of the framework decision should be interpreted as meaning that the condition of double criminality is satisfied when:

(a) recognition of the judgment and enforcement of the sentence are sought in respect of acts which were classified in the issuing State as the criminal offence of 'obstruction of implementation of an official decision', and when

(b) a similarly described criminal offence also exists in the law of the executing State, but when

12 — 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). On the validity of Framework Decision 2002/584 to the extent to which it dispenses with the verification of double criminality of the offences listed in a provision equivalent to Article 7(1) of Framework Decision 2008/909, see judgment of 3 May 2007 in *Advocaten voor de Wereld* (C-303/05, EU:C:2007:261, paragraphs 48 to 61).

13 — Article 3(2) of Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ 2003 L 196, p. 45); Article 6(1) of Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (OJ 2006, L 328, p. 59); Article 5(1) of Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (OJ 2005 L 76, p. 16); Article 10(1) of Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition of probation decisions and alternative sanctions (Probation and Alternative Sanctions) (OJ 2008 L 337, p. 102); Article 14(1) of Council Framework Decision 2009/829/JHA of 23 October 2009 on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (European Supervision Order) (OJ 2009 L 294, p. 20).

14 — See judgment of 28 August 2015 in *Minister for Justice and Equality* (C–237/15 PPU, EU:C:2015:474, paragraphs 27 to 28 and cited case-law) and judgment of 6 October 2009 in *Wolzenzburg* (C–123/08, EU:C:2009:616, paragraph 59 and case-law cited).

15 — See Article 26(1) of Framework Decision 2008/909.

16 — Article 3(1)(e) of the Convention on the Transfer of Sentenced Persons of 21 March 1983, ETS No 112; Article 5, first indent (b) of the Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences of 13 November 1991. Article 4(1) of the European Convention on the International Validity of Criminal Judgments of 28 May 1970, ETS No 70.

(c) the law, or rather, the case-law of the executing State apparently requires, for such an offence to occur, the official decision to have been issued by one of its own authorities.

42. It ought to be restated at the outset that the operation of Framework Decision 2008/909 and the review of double criminality depends on whether the criminal offence concerned is included in the list in Article 7(1). For the offences listed therein, the courts of the executing State are not, in principle,[17] allowed to examine whether the condition of double criminality is satisfied when recognising the judgment and enforcing the sentence imposed in the issuing State.

43. The offence of obstructing the implementation of an official decision is not on that list.

44. Where a criminal offence is not listed in Article 7(1), double criminality may be examined. Whether or not double criminality is examined for such offences is an option for the Member State, not an obligation. Therefore, Member States are free to decide whether they will apply the condition of double criminality to offences not listed in Article 7(1).

45. Slovakia has made use of that possibility. Accordingly, Slovak courts must verify that condition when considering requests for the transfer of persons sentenced in other Member States.

46. Against this background, in order to provide the referring court with useful guidance on the test applicable to the assessment of double criminality, I will first consider the relevant elements to be taken into account when making such an assessment (1), before turning to the specific issue of the protected State interest which arises in the present case (2).

1. Elements relevant for the assessment of double criminality

47. Article 7(3) of Framework Decision 2008/909 defines the scope of the assessment of double criminality by requiring that the competent authority verify whether the *acts* concerned also constitute an *offence* under the law of the executing State, *whatever its constituent elements* or *however it is described*.

48. Two elements are worth highlighting. First, by stressing the flexible approach to be taken to the *constituent elements* of the criminal offence, Article 7(3) of Framework Decision 2008/909 makes it clear that there does not have to be an exact match between all of the components of the crime, as defined respectively by the law of the issuing and executing Member States.

49. Second, by insisting on flexibility with regard to the *description* of the criminal offence, Article 7(3) of the framework decision makes it equally clear that there is no need for an exact match in the name or taxonomy of the offence between the issuing and the executing Member State.

50. Conversely, what Article 7(3) of Framework Decision 2008/909 does highlight as being relevant, and indeed decisive, is a match between the basic *factual* elements of the criminal act, as reflected in the judgment of the issuing State, on the one hand, and the definition of a criminal offence provided by the law of the executing State, on the other.

51. The assessment of double criminality thus requires essentially two steps: (1) *delocalisation* which involves taking the basic characteristics of the act committed in the issuing State, and considering that act as if it had occurred in the executing State and (2) *subsumption* of those basic facts under whatever fitting offence as defined by the law of the executing State.

17 — Unless the given Member State has made a declaration to the contrary based on Article 7(4) of Framework Decision 2008/909.

52. In other words, the questions to be asked by the judicial authority of the executing State in the process of such a 'conversion' are: can the act(s) that have led to the judgment in the issuing State be subsumed under any criminal offence provided for by the criminal law of the executing State? Would such an act be considered criminally punishable per se if committed on the territory of the executing State?

53. When responding to these questions and defining the relevant act(s) to be converted, I am of the view that these questions ought to be considered at a relatively high level of abstraction. A match is sought between basic *factual elements* that the judicial authorities of the issuing State considered as being relevant for the criminal conviction of the offender and the *constitutive elements* of a crime as described in the criminal law of the executing State.

54. Conversely, the wording of Article 7(3) of Framework Decision 2008/909 ('*whatever its constituent elements or however it is described*') makes it clear that the match is not to be sought between the respective normative definitions of the criminal offence in the legal systems of the issuing and executing States. [18]

55. Certainly, in a number of cases, it will be rather easy to find a match already at the normative level. This seems to be the case here. The criminal offence of obstructing the implementation of an official decision is defined almost identically under the Czech and Slovak Criminal Codes. In other cases, however, the criminal offence in the executing State can be construed slightly differently from the offence in the issuing State. The constitutive elements of the two offences may not be exactly the same. Or the constitutive elements can be rather similar but the offences might be called something different in the respective legal systems. Further, in criminal codes the definition of the 'initial' criminal offence may be quite narrow and it may be part of a broader category of criminal offences which ought to be read together for the purposes of the assessment of double criminality.

56. However, as has already been stressed, it is quite clear that the intended conversion of an offence from the issuing state to the executing state is supposed to be 'diagonal' (basic factual elements from the issuing State being subsumed under the laws of the executing State), not 'horizontal' (whereby a match would be sought between the normative definitions of an offence in both States).

57. To provide a more concrete example, in the present case of Mr Grundza, what is supposed to be converted is the basic description of the act, which could be simply captured as: the act of a person driving a motor vehicle despite the existence of an official decision prohibiting such conduct.

58. Next, the question is: would such an act also be punishable under the laws of the executing State, if committed on its territory? In the Slovak context, the answer appears to be in the affirmative.

59. However, delocalisation and subsumption might in general go even further, so as to amount to changes in the taxonomy of the offence under the laws of the executing State. The example given by the Czech Government at the hearing provides a useful illustration in this regard. It concerns the criminal offence of 'driving without a licence' in the German Criminal Code. [19] It seems that, under German criminal law, the act committed by Mr Grundza would potentially not be classified as 'obstructing the implementation of an official decision', but as 'driving without a licence'. However,

18 — Referring back to the example of extradition in the context of which the condition of double criminality historically emerged, it might be of relevance that the UN Model Treaty on Extradition explicitly provides, in Article 2(2), that 'in determining whether an offence is an offence punishable under the laws of both Parties, it shall not matter whether: (a) The laws of the Parties place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same terminology; (b) Under the laws of the Parties the constituent elements of the offence differ, it being understood that the totality of the acts or omissions as presented by the requesting State shall be taken into account': Model Treaty on Extradition, A/RES/45/116, 14 December 1990.

19 — See Paragraph 21(1) of the Straßenverkehrsgesetz (Law on Road Traffic) (StVG) (BGBl. 2003 I, p. 310, 919) concerning the criminal offence of 'Fahren ohne Fahrerlaubnis' ('driving without a licence'). '(1) Any person who: 1. drives a vehicle while not holding the driving licence required for that purpose or while banned from driving a vehicle … shall be sentenced to a term of imprisonment of up to one year or to payment of a fine …'

even if that were the case, in my point of view, the condition of double criminality under Article 7(3) of Framework Decision 2008/909 would still be satisfied. Changes in the criminal law taxonomy are expressly foreseen and authorised by the wording of that provision when converting criminal offences from one legal system to another.

60. In other words, in my view, the approach that should be adopted to the assessment of double criminality under Framework Decision 2008/909 relies on generalising at a higher level of abstraction the conduct that was considered and sentenced by the court of the issuing State. That generalisation necessarily implies some flexibility in the process of conversion during which the act concerned is examined by reference to the various available definitions of criminal offences in the executing State.

61. Furthermore, the suggestion that the assessment of double criminality necessitates a considerable level of abstraction is also confirmed by the rather limited scope of information that is provided by the competent authorities of the issuing State on the standardised form in Annex I to Framework Decision 2008/909.

62. The level of information to be provided depends on whether the request for recognition of the judgment and enforcement of the sentence concern criminal offences listed in Article 7(1) (points 1 and 2 of subsection (h) of Annex I) or whether the request concerns other (non-listed) offences (points 1 and 3 of subsection (h) of Annex I).

63. However, even for the non-listed offences that can be subject to the review of double criminality, the standardised information to be provided is quite basic. As the Swedish Government noted in its written submissions, such a limited amount of information would certainly not permit a fuller assessment of the case.

64. In sum, there can be individual differences in criminal law taxonomy but those particularities are not relevant for the purpose of the assessment of the condition of double criminality. What matters is whether the type of act, if committed on the territory of the executing Member State, would be *per se* criminally punishable in the executing State.

65. A particular emphasis should be put on the words *per se punishable*, as opposed to whether, if criminally prosecuted, the sentenced person would have also been found guilty and sentenced if the criminal trial were conducted under the laws of the executing State.

66. In this respect, I note that the objective pursued by Framework Decision 2008/909 is to facilitate the social reintegration of sentenced persons by making it possible for them to serve their sentences in another Member State.

67. This means that the objective is the transfer of already sentenced persons and their social reintegration. It is most definitely not to start challenging final decisions or conducting anew criminal trials in the executing Member State. It is not without reason that the cooperation established by Framework Decision 2008/909 may be triggered *only once* the trial has been conducted and the *final* judgment has been given in the issuing State.

68. Within that framework, the condition of double criminality of Article 7(3) of Framework Decision 2008/909 is properly to be understood as a residual safety valve that the executing Member State may trigger in order to refuse the execution of a sentence for an act that is not *per se* criminalised under its own laws. In other words, a Member State cannot be obliged to recognise and to execute a sentence for behaviour which the State and its society do not consider to be morally wrong so as to be

criminalised. [20]

2. Relevance of the specific protected State interest

69. As already stated above, the assessment of the double criminality condition in the context of Framework Decision 2008/909 requires a delocalisation of facts, carried out at a high level of abstraction, and their subsumption under the criminal law of the executing State.

70. It is only logical that that conversion will also be carried out with regard to the particular State interest involved in the crime. For the purpose of the definition of the act to be converted, a State interest cannot be considered as *the* national interest of *the* particular State (that is, the issuing State) but rather as *a* State interest that will be assessed, together with other basic elements of the act concerned, under the criminal law of the executing State.

71. It may be readily acknowledged that in particular and rather extreme cases, there may be exceptions to an unreserved conversion of the respective State interests of the issuing and executing States. However, with regard to a vast majority of other criminal offences, including obstructing the implementation of an official decision, a system of mutual recognition can only operate if what is indeed protected is the authority of 'an official decision', and not just the 'authority of the decisions issued exclusively by the authorities of Member State X'.

72. This understanding of the meaning of Article 7(3) of Framework Decision 2008/909 is also confirmed by two further systemic arguments.

73. First, I note that some of the criminal offences listed in Article 7(1) of Framework Decision 2008/909 (in respect of which the double criminality condition has been removed altogether) clearly aim at protecting the specific State interest against which they are committed. These are, for example, sabotage, corruption, counterfeiting currency, facilitation of unauthorised entry and residence, forgery of administrative documents and the trafficking therein or forgery of means of payment.

74. Second, Article 9(1)(d) of Framework Decision 2008/909 provides for the possibility to refuse the recognition of a judgment and enforcement of a sentence if the condition of double criminality is not satisfied. However, it states that '[…] in relation to taxes or duties, customs and exchange, execution of a judgment may not be refused on the ground 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, duties and customs and exchange regulations as the law of the issuing State'.

75. Both of those provisions corroborate, in my point of view, the conclusion that mutual recognition under Framework Decision 2008/909 is supposed to transcend, in general, the particularism of Member State interests. After all, is it not precisely what mutual recognition and respect are supposed to be about?

76. In the light of the above, I conclude that Articles 7(3) and 9(1)(d) of Framework Decision 2008/909 should be interpreted as meaning that the condition of double criminality is satisfied if recognition of the judgment and enforcement of the sentence are sought with regard to an act, which, captured at a relatively high level of abstraction, is per se criminally punishable under the laws of the executing State, irrespective of an exact match between the taxonomy used to describe that criminal offence in the legal orders of the issuing State and the executing State.

20 — The obvious examples in this category would be acts which may be considered criminal in one Member State but not a crime at all in another State, such as euthanasia or denial of the holocaust. The same would also apply, in my view, to acts which are classified as criminal offences in one State, but as mere administrative infractions in another (i.e. pursued only administratively but not criminally).

V – Conclusion

77. In the light of the foregoing considerations, I propose to the Court to answer the question referred to it by Krajský súd v Prešove (Regional Court, Prešov) as follows:

Articles 7(3) and 9(1)(d) 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 should be interpreted as meaning that the condition of double criminality is satisfied if recognition of the judgment and enforcement of the sentence are sought with regard to an act, which, captured at a relatively high level of abstraction, is per se criminally punishable under the laws of the executing State, irrespective of an exact match between the taxonomy used to describe that criminal offence in the legal orders of the issuing State and the executing State.