Reports of Cases

OPINION OF ADVOCATE GENERAL
PIKAMÄE
delivered on 16 May 2019[1]

Case C-314/18

Openbaar Ministerie
v
SF

(Request for a preliminary ruling from the Rechtbank Amsterdam (District Court, Amsterdam, the Netherlands))

(Reference for a preliminary ruling — Judicial cooperation in criminal matters — Framework Decisions 2002/584/JHA and 2008/909/JHA — Return of a requested person to the issuing Member State subject to a guarantee of return to the executing Member State in order to serve there a custodial sentence or a measure involving deprivation of liberty — Moment of return — Penalty or additional measure)

I. Introduction

1. The present request for a preliminary ruling concerns the interpretation of Article 1(3) and Article 5(3) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States,[2] as amended by Council Framework Decision 2009/299/JHA of 26 February 2009,[3] and of Articles 1(a) and (b), 3(3) and (4) and 25 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.[4]

2. That request was submitted in the context of the execution, in the Netherlands, of a European arrest warrant issued on 3 March 2017, for the purposes of criminal proceedings, by a judge at Canterbury Crown Court (United Kingdom) against SF.

3. Article 5(3) of Framework Decision 2002/584 provides that the Member State executing a European arrest warrant may make the execution of that warrant subject to the provision by the issuing Member State of a guarantee that a person who has received a sentence or a detention order in the latter Member State will be returned to the former Member State in order to serve the penalty there. The present case provides the Court with the opportunity to clarify the scope of that guarantee of return and to reassert the requirements arising under the principle of mutual cooperation which guides judicial cooperation in criminal matters within the European Union.

1 Original language: French.

2 OJ 2002 L 190, p. 1.

3 OJ 2009 L 81, p. 24, 'Framework Decision 2002/584'.

4 OJ 2008 L 327, p. 27.

II. Legal framework

A. EU law

1. Framework Decision 2002/584

4. Article 1 of Framework Decision 2002/584 provides:

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

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

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

5. Article 2(1) of that framework decision states:

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

6. In the words of Article 5(3) of that framework decision:

‘The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions:

…

3. where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.’

2. Framework Decision 2008/909

7. Article 1(a) and (b) of Framework Decision 2008/909 is worded as follows:

‘For the purposes of this Framework Decision:

(a) “judgment” shall mean a final decision or order of a court of the issuing State imposing a sentence on a natural person;

(b) “sentence” shall mean 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.’

8. Article 3 of that framework decision states:

‘1. The purpose of this Framework Decision is to establish the rules under which a Member State, with a view to facilitating the social rehabilitation of the sentenced person, is to recognise a judgment and enforce the sentence.

2. This Framework Decision shall apply where the sentenced person is in the issuing State or in the executing State.

3. This Framework Decision shall apply only to the recognition of judgments and the enforcement of sentences within the meaning of this Framework Decision. The fact that, in addition to the sentence, a fine and/or a confiscation order has been imposed, which has not yet been paid, recovered or enforced, shall not prevent a judgment from being forwarded. The recognition and enforcement of such fines and confiscation orders in another Member State shall be based on the instruments applicable between the Member States, in particular Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties [5] and Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders. [6]

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

9. According to Article 8 of that framework decision:

‘1. The competent authority of the executing State shall recognise a judgment which has been forwarded in accordance with Article 4 and following the procedure under Article 5, 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.

2. Where the sentence is incompatible with the law of the executing State in terms of its duration, the competent authority of the executing State may decide to adapt the sentence only where that sentence exceeds the maximum penalty provided for similar offences under its national law. The adapted sentence shall not be less than the maximum penalty provided for similar offences under the law of the executing State.

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

4. The adapted sentence shall not aggravate the sentence passed in the issuing State in terms of its nature or duration.’

5 OJ 2005 L 76, p. 16.

6 OJ 2006 L 328, p. 59.

10. Article 25 of that framework decision provides:

'Without prejudice to Framework Decision [2002/584], provisions of this Framework Decision shall apply, *mutatis mutandis* to the extent they are compatible with provisions under that Framework Decision, to enforcement of sentences in cases where a Member State undertakes to enforce the sentence in cases pursuant to Article 4(6) of that Framework Decision, or where, acting under Article 5(3) of that Framework Decision, it has imposed the condition that the person has to be returned to serve the sentence in the Member State concerned, so as to avoid impunity of the person concerned.'

B. Netherlands law

11. The Overleveringswet (Law on surrender)[7] of 29 April 2004 implements Framework Decision 2002/584. Article 6(1) of that law reads as follows:

'The surrender of a Netherlands national may be allowed provided that the request is made for the purposes of a criminal investigation against that person and provided that the executing judicial authority considers that it is guaranteed that if, for the offences in respect of which the surrender may be authorised in the executing Member State, he is given a definitive custodial sentence, he will be able to serve that sentence in the Netherlands.'

12. Article 28(2) of the OLW provides:

'If the Rechtbank [District Court] finds … that the surrender cannot be authorised …, it must refuse that surrender in its decision.'

13. The Wet wederzijdse erkenning en tenuitvoerlegging vrijheidsbenemende en voorwaardelijke sancties (Law on the mutual recognition and enforcement of custodial and suspended sentences)[8] of 12 July 2012 implements Framework Decision 2008/909. Article 2:2 of that law, entitled 'Competent authority', provides in paragraph 1:

'The Minister shall be competent to recognise a judicial decision forwarded by one of the issuing Member States, for the purposes of its execution in the Netherlands.'

14. Article 2:11 of the WETS, entitled 'Role of the court: adaptation of the sentence', states:

'1. The Minister shall forward the judicial decision and the certificate to the Advocate General of the Prosecutor's Office at the Court of Appeal, unless he considers at the outset that there are grounds for refusing to recognise the judicial decision.

2. The Advocate General shall immediately present the judicial decision to the specialised chamber of the Gerechtshof Arnhem-Leeuwarden [Court of Appeal, Arnhem-Leuvarde, the Netherlands] …

3. The specialised chamber of the Gerechtshof [Court of Appeal] shall decide:

…

c. how the custodial sentence passed is to be adapted in accordance with [paragraph 4, 5 or 6].

7 Stb. 2004, No 195, 'the OLW'.

8 Stb. 2012, No 333, 'the WETS'.

4. If the term of the custodial sentence passed is higher than the maximum term of the penalty that may be imposed under Netherlands law for the offence concerned, the term of the custodial sentence shall be reduced to that maximum term.

5. Where the convicted person is surrendered against a guarantee that he will be returned within the meaning of Article 6(1) of the [OLW], paragraph 4 shall not apply, but it must then be determined whether the custodial sentence imposed corresponds to the sentence that would have been passed in the Netherlands for the offence concerned. Where appropriate, the sentence shall be adapted accordingly, having regard to the opinions issued in the issuing Member State concerning the gravity of the offence committed.'

III. The facts of the dispute in the main proceedings and the questions for a preliminary ruling

15. On 3 March 2017, a judge at Canterbury Crown Court issued a European arrest warrant against SF, a Netherlands national, seeking the latter's surrender for the purposes of criminal proceedings relating to two offences, namely conspiracy to import 4 kg of heroin and 14 kg of cocaine into the United Kingdom.

16. On 30 March 2017, the officier van justitie (Public Prosecutor, the Netherlands) requested the issuing judicial authority to supply the guarantee referred to in Article 6(1) of the OLW, which transposes Article 5(3) of Framework Decision 2002/584.

17. The letter of 20 April 2017 from the Home Office (United Kingdom) reads as follows:

'…

The [United Kingdom] undertakes that should SF receive a custodial sentence in the [United Kingdom], he will, in accordance with section 153C of the Extradition Act 2003, be returned to the Netherlands as soon as is reasonably practicable after the sentencing process in the [United Kingdom] has been completed and any other proceedings in respect of the offence for which extradition was sought are concluded.

Full details of any sentence imposed on SF will be provided when he is returned to the Netherlands. It is considered that a transfer under [Framework Decision 2002/584] does not allow the Netherlands to alter the duration of any sentence imposed by a [United Kingdom] court.'

18. After being asked to clarify the procedures covered by the expression 'any other proceedings' within the meaning of section 153C(4) of the Extradition Act 2003, the Home Office replied as follows in an email of 19 February 2018:

'I can advise that the "other proceedings" process may include:

(a) Consideration of confiscation;

(b) The procedure for setting any period of imprisonment which will fall to be served in default of payment of any financial penalty;

(c) The exhaustion of any available avenues of appeal; and

(d) The expiry of any period for payment of a confiscation order or financial penalty.'

19. The referring court states that the passage 'it is considered that a transfer under [Framework Decision 2002/584] does not allow the Netherlands to alter the duration of any sentence imposed by a [United Kingdom] court' relates to the fact that the request of the Openbaar Ministerie (Public Prosecutor's Office, the Netherlands) to provide a guarantee in earlier similar cases included the observation that the Kingdom of the Netherlands may adapt the custodial sentence or detention order to the national provisions, in accordance with Article 2:11(5) of the WETS.

20. According to the referring court, the guarantee provided by the issuing Member State, as formulated by that State, raises questions as to its compatibility with a number of provisions of Framework Decisions 2002/584 and 2008/909. If that guarantee should in fact prove to be incompatible with those framework decisions, SF's surrender would have to be refused.

21. The first aspect of those questions concerns the time when the issuing Member State must implement the guarantee to return the person on whom a custodial sentence or detention order has been imposed to the executing Member State, as provided for in Article 5(3) of Framework Decision 2002/584. More specifically, the problem arises whether the issuing Member State may, after the custodial sentence or detention order has become final, wait until any other proceedings in respect of the offence for which the surrender was requested, such as a confiscation procedure, has been definitively closed before returning the person concerned to the executing Member State.

22. The referring court observes, in that regard, that, although the objective of facilitating the social reintegration of the person on whom a custodial sentence or detention order has been imposed argues in favour of that person being returned to the executing Member State as soon as that sentence has become final, without awaiting the outcome of other proceedings in respect of the offence on the basis of which surrender was requested, there are however arguments in favour of the opposite interpretation, such as the effectiveness of combating crime and the protection of the rights of defence of the person concerned.

23. The second aspect of the questions raised by the referring court originates in the statement, in the wording of the guarantee of return made by the issuing Member State, that 'a transfer under [Framework Decision 2002/584] does not allow the Netherlands to alter the duration of any sentence imposed by a [United Kingdom] court'.

24. According to the referring court, that statement prompts the question whether the executing Member State, after it has surrendered the requested person on the basis of a guarantee that he will be returned and once it is required to execute the custodial sentence or detention order imposed on him, may adapt that penalty and, if so, within what limits.

25. In those circumstances, the Rechtbank Amsterdam (District Court, Amsterdam, the Netherlands) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Articles 1(3) and 5(3) of Framework Decision [2002/584] and Articles 1(a) and (b), 3(3) and (4) and 25 of Framework Decision [2008/909] be interpreted as meaning that the issuing Member State, in its capacity as issuing State, in a case in which the executing Member State has made the surrender of one of its own nationals for the purpose of prosecution subject to the guarantee set out in Article 5(3) of Framework Decision [2002/584], providing that the person concerned, after being heard, is to be returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State, is in fact required — after the conviction involving a custodial sentence or detention order has become legally enforceable — to return the person concerned only once "any other proceedings in respect of the offence for which extradition was sought" — such as confiscation proceedings — "are concluded"?

(2) Must Article 25 of Framework Decision [2008/909] be interpreted as meaning that a Member State, when it has surrendered one of its own nationals on the basis of the guarantee referred to in Article 5(3) of Framework Decision [2002/584], may, in its capacity as the executing State for the recognition and execution of the judgment delivered against that person — in derogation from Article 8(2) of Framework Decision [2008/909] — consider whether the custodial sentence imposed on that person corresponds to the sentence which it would itself have imposed for the offence concerned and, if necessary, may adapt that imposed custodial sentence accordingly?'

IV. Analysis

26. Before examining the substance of the questions submitted by the referring court, it is appropriate to answer the arguments put forward by the Kingdom of the Netherlands in support of its contention that the present request for a preliminary ruling is inadmissible.

A. The admissibility of the request for a preliminary ruling

27. The Kingdom of the Netherlands disputes the admissibility of the request for a preliminary ruling, maintaining, in essence, that the answers to the questions submitted would not be necessary in order for the referring court to be able to adjudicate on the execution of the European arrest warrant at issue in the main proceedings and emphasising the hypothetical nature of those questions.

28. It should be borne in mind in that regard that, according to the Court's settled case-law, 'in the context of the cooperation between the Court and the national courts provided for in 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. Consequently, where the questions submitted concern the interpretation of EU law, the Court is, in principle, bound to give a ruling'. [9]

29. It follows that 'questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for this Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its object, 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'. [10]

30. In this instance, it is not apparent from the file submitted to the Court that the present situation corresponds to one of those hypotheses. The referring court must adjudicate on the execution of a European arrest warrant. In order to do so, it is necessarily required to assess whether the guarantee of return, as formulated by the issuing judicial authority, is consistent with what is allowed by Article 5(3) of Framework Decision 2002/584, so that it might then comply with the request to surrender SF. In order to carry out that examination, the referring court needs the Court to provide it with clarification on the scope of Article 5(3) of Framework Decision 2002/584. The same applies as regards the scope of Article 25 of Framework Decision 2008/909. It follows from the foregoing that the action taken by the referring court with regard to the European arrest warrant at issue in the main proceedings is directly dependent on the answers which will be provided by the Court to the questions submitted.

9 See, in particular, judgment of 25 July 2018, *AY* (Arrest warrant — Witness) (C-268/17, EU:C:2018:602, paragraph 24 and the case-law cited).
10 Ibid. (paragraph 25 and the case-law cited).

31. I would add that, quite clearly, at this stage of the proceedings, no one knows whether or not SF will be found guilty of the offences with which he is charged, still less what penalties, if any, will be imposed on him. From that aspect, the hypothetical dimension is inherent in the normal course taken by criminal proceedings and in the presumption of innocence. Nonetheless, one thing is certain: the referring court must adjudicate on the execution of the European arrest warrant at issue in the main proceedings and in order to do so needs the Court to provide it with clarification on the scope of the guarantee of return provided for in Article 5(3) of Framework Decision 2002/584, to which the execution of that warrant is subject.

32. I therefore consider that the present request for a preliminary ruling is admissible.

B. First question

33. By its first question, the referring court asks, in essence, whether Article 5(3) of Framework Decision 2002/584 must be interpreted as meaning that the guarantee that the person who is the subject of a European arrest warrant for the purposes of criminal proceedings, after he has been heard, will have to be returned to the executing Member State in order to serve there the custodial sentence or detention order imposed on him in the issuing Member State means that his return may be postponed until a definitive decision has been taken on a penalty or an additional measure such as a confiscation order.

34. As a preliminary point, it should be borne in mind that 'the purpose of Framework Decision 2002/584, as is apparent in particular from Article 1(1) and (2), read in the light of recitals 5 and 7 thereof, is to replace the multilateral system of extradition based on the European Convention on Extradition, signed in Paris on 13 December 1957, with a system of surrender between judicial authorities of convicted or suspected persons for the purpose of enforcing judgments or of conducting prosecutions, the system of surrender being based on the principle of mutual recognition'.[11]

35. Framework Decision 2002/584 'thus seeks, by the establishment of a new simplified and more effective system for the surrender of persons convicted or suspected of having infringed criminal law, to facilitate and accelerate judicial cooperation with a view to contributing to the attainment of the objective set for the European Union of becoming an area of freedom, security and justice, and has as its basis the high level of trust which must exist between the Member States'.[12]

36. Thus, 'in accordance with Article 1(1) of that framework decision, the aim of the mechanism of the European arrest warrant is to enable the arrest and surrender of a requested person, in the light of the objective pursued by the framework decision, so that the crime committed does not go unpunished and that that person is prosecuted or serves the custodial sentence ordered against him'.[13]

37. In the field governed by Framework Decision 2002/584, the principle of mutual recognition, which, as is apparent, in particular, from recital 6 of that framework decision, constitutes the 'cornerstone' of judicial cooperation in criminal matters, is put into practice in Article 1(2) of that framework decision, which enshrines the rule that Member States are to execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of that framework decision. The executing judicial authorities 'may therefore, in principle, refuse to execute such a

11 See, in particular, judgment of 12 February 2019, *TC* (C-492/18 PPU, EU:C:2019:108, paragraph 40 and the case-law cited).

12 Ibid. (paragraph 41 and the case-law cited).

13 See judgment of 6 December 2018, *IK* (Execution of an additional sentence) (C-551/18 PPU, EU:C:2018:991, paragraph 39).

warrant only on the grounds for non-execution exhaustively listed by the framework decision and execution of the warrant may be made subject only to one of the conditions exhaustively laid down in Article 5. Accordingly, while execution of the European arrest warrant constitutes the rule, refusal to execute is intended to be an exception which must be interpreted strictly'. [14]

38. Framework Decision 2002/584 explicitly states the grounds for mandatory non-execution (Article 3) and optional non-execution (Articles 4 and 4a) of a European arrest warrant, as well as the guarantees to be given by the issuing Member State in particular cases (Article 5). [15]

39. Thus, 'although the system established by Framework Decision 2002/584 is based on the principle of mutual recognition, that recognition does not mean that there is an absolute obligation to execute the arrest warrant that has been issued. The system established by that framework decision … makes it possible for the Member States to allow the competent judicial authorities, in specific situations, to decide that a sentence must be enforced on the territory of the executing Member State'. [16]

40. That is so, in particular, under Article 4(6) and Article 5(3) of Framework Decision 2002/584. For both the types of European arrest warrant envisaged by that framework decision, 'those provisions have, in particular, the objective of enabling particular weight to be given to the possibility of increasing the requested person's chances of reintegrating into society'. [17]

41. In particular, Article 5(3) of Framework Decision 2002/584 provides that, 'where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State'.

42. However, that provision does not specify the time when the person against whom a custodial sentence or a detention order has been passed in the issuing Member State must be returned to the executing Member State.

43. In view of that lack of precision, it is necessary to choose between two arguments.

44. According to the first argument, which is put forward by SF and by the Italian and Polish Governments, priority must be given to the objective pursued by Article 5(3) of Framework Decision 2002/584, namely to increase the prospects of the social reintegration of the person who is the subject of a European arrest warrant for the purposes of criminal proceedings. From that aspect, the issuing Member State should guarantee to the executing Member State that the person subject to that European arrest warrant will be returned to the executing Member State as soon as the decision imposing a custodial sentence or detention order has become final, since his guilt will then be definitively established. The fact that the passing of a custodial sentence or a detention order may be followed by another stage in the criminal proceedings in which a penalty or an additional measure, such as a confiscation order, may be passed is immaterial in that regard. In fact, it would be contrary to the objective of promoting the social reintegration of convicted persons to delay returning a person who has been the subject of a custodial sentence or a detention order which has become definitive pending the possible adoption, within an indeterminate period, of a penalty or additional measure.

14 See, in particular, judgment of 13 December 2018, *Sut* (C-514/17, EU:C:2018:1016, paragraph 28 and the case-law cited).

15 Ibid. (paragraph 29 and the case-law cited).

16 See, in particular, judgment of 13 December 2018, *Sut* (C-514/17, EU:C:2018:1016, paragraph 30 and the case-law cited), and judgment of 21 October 2010, *B.* (C-306/09, EU:C:2010:626, paragraph 51).

17 See, in particular, judgment of 21 October 2010, *B.* (C-306/09, EU:C:2010:626, paragraph 52 and the case-law cited).

The execution of the custodial sentence or detention order in the Member State of nationality or residence of the person convicted, envisaged in Article 5(3) of that framework decision, cannot depend on that element of uncertainty caused by the particular characteristics of the criminal procedure in the issuing Member State.

45. According to the second argument, on the other hand, which, with certain subtle differences between the parties, is put forward by the Public Prosecutor's Office, the Netherlands, Austrian and United Kingdom Governments and also by the European Commission, the effectiveness of criminal prosecutions and the protection of the procedural rights of the accused imply that the person concerned should be returned to the executing Member State only after the time when the other stages of the criminal procedure in which a penalty or an additional measure, such as a confiscation order, may be imposed are definitively closed.

46. It is the second argument that finds my support. I would add to it, however, certain clarifications intended to ensure that the objective of facilitating the social reintegration of convicted persons is not rendered meaningless as a result of particular characteristics or of the excessive duration of the criminal proceedings in the issuing Member State.

47. As a starting point for my analysis, I recall that it follows from Article 1(1) of Framework Decision 2002/584 that a European arrest warrant may be issued either for the purposes of conducting a criminal prosecution or for the purposes of executing a custodial sentence or detention order.

48. It follows from Article 2(1) and (2) of Framework Decision 2002/584 that a European arrest warrant may be issued only for offences punishable in the issuing Member State by a custodial sentence or a detention order.

49. While a European arrest warrant for the purposes of a criminal prosecution can therefore be issued only for offences punishable by a custodial sentence or detention order, that does not mean, however, that such prosecutions may result only in the passing of such a sentence or such an order. In fact, it is often the case that a custodial sentence or a detention order, which constitutes the main penalty, is accompanied by a penalty or additional measure, such as a fine or a confiscation order.

50. It is on that latter type of penalty or additional measure that the referring court places the emphasis in its request for a preliminary ruling.

51. In view of the fact that the criminal prosecution in the issuing Member State may thus result in a main penalty and one or more additional penalties or measures, and do so in the context of criminal proceedings that may be divided into several stages, the question arises as to when the person on whom a custodial sentence or detention order has been imposed must be returned in order to serve that penalty. I would observe, in that regard, that, in the absence of sufficient harmonisation, there exists within the Union a variety of procedural models, which is reflected, in particular, in the differences between the Member States as regards the conduct of criminal proceedings.

52. In order to answer that question, it is appropriate to take account of the rules set out in Framework Decision 2008/909. It follows from Article 25 of that framework decision that the provisions of that framework decision are to apply in principle in the context of the return for the purpose of executing the penalty governed by Article 5(3) of Framework Decision 2002/584.

53. Article 1(a) of Framework Decision 2008/909 defines 'judgment' as 'a *final decision or order* of a court of the issuing State imposing a sentence on a natural person'.[18] In the words of Article 1(b) of that framework decision, 'sentence' is to mean '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'.[19] Thus, the application of Framework Decision 2008/909 requires the existence a final sentence or a measure involving deprivation of liberty.[20]

54. It follows that a person on whom a custodial sentence or detention order is imposed can be returned to the executing Member State, as provided for in Article 5(3) of Framework Decision 2002/584, *only after the time when that sentence has become final*, in accordance with Article 1(a) and (b) of Framework Decision 2008/909.

55. Does that mean, however, that a person on whom a custodial sentence or detention order has been imposed in the issuing Member State must always be returned to the issuing Member State *immediately after that sentence has become final*?

56. I do not think so.

57. In fact, I consider that Article 5(3) of Framework Decision 2002/584 allows the issuing Member State to provide that the person who has been surrendered to it may be returned to the executing Member State only after the time when a final decision has been adopted on the additional penalties or measures relating to the offence on the basis of which the European arrest warrant was issued.

58. In other words, although Article 5(3) of Framework Decision 2002/584 allows the executing judicial authority to make the execution of a European arrest subject to a condition that the person concerned will be returned, that provision does not authorise that authority to require that the person concerned be returned immediately after he has been definitively sentenced to a custodial penalty or a detention order. Thus, the absence of a guarantee of immediate return does not constitute a situation in which it should be possible for the executing authority to refuse to surrender a person falling within the scope of Article 5(3) of Framework Decision 2002/584.

59. I base that opinion on the principal consideration that, although Article 5(3) of Framework Decision 2002/584 must of course be interpreted in such a way that its main objective, namely to promote the prospects of the social reintegration of the person convicted, is attained, it is also important to adopt an interpretation that allows that objective to be reconciled with the objectives of ensuring a complete and effective punishment of the offence on the basis of which the European arrest warrant was issued and of ensuring the protection of that person's procedural rights. I also recall that Framework Decision 2002/584 pursues the overriding objective of combating impunity.[21]

60. In support of that opinion, I shall underline the following factors.

61. First, by analogy with the Court's rulings with regard to Article 4(6) of Framework Decision 2002/584, it must be observed that the Member States have a certain margin of discretion when they implement Article 5(3) of that framework decision.[22] Furthermore, it should be emphasised that, while the objective of the guarantee of return laid down in that provision is, in particular, to increase the prospects of the social reintegration of the requested person on expiry of the penalty to which he has been sentenced, such an aim, however important it may be, cannot prevent the Member States, when they implement Framework Decision 2002/584, from limiting, in a manner consistent with the

18 Emphasis added.

19 Emphasis added.

20 See, in that regard, judgment of 25 January 2017, *van Vemde* (C-582/15, EU:C:2017:37, paragraphs 24 and 27).

21 See point 36 of this Opinion.

22 See, by analogy, judgment of 6 October 2009, *Wolzenburg* (C-123/08, EU:C:2009:616, paragraph 61).

essential rule stated in Article 1(2) of that framework decision, the situations in which it should be possible to refuse to surrender a person who falls within the scope of Article 5(3) of that framework decision.[23] The objective of facilitating the social reintegration of the convicted person is therefore not absolute and may be weighed against other requirements.

62. Second, it must be made clear that a penalty or an additional measure, such as a confiscation order, plays an essential role in the punishment of offences, like those at issue in the main proceedings, on the basis of which the European arrest warrant was issued.[24]

63. As stated in recital 1 of Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceedings of crime in the European Union,[25] 'the main motive for cross-border organised crime, including mafia-type criminal organisation, is financial gain'. That is why 'the effective prevention of and fight against organised crime should be achieved by neutralising the proceeds of crime and should be extended, in certain cases, to any property deriving from activities of a criminal nature'.

64. In recital 3 of that directive, the EU legislature emphasises that 'among the most effective means of combating organised crime is providing for severe legal consequences for committing such a crime, as well as effective detection and the freezing and confiscation of the instrumentalities and proceeds of crime'.[26]

65. In view of the importance of confiscation orders in combating crime, it is appropriate to apply an interpretation that allows such orders to be made without impediments, including after the accused has been definitively sentenced to a custodial penalty or a detention order. That assumes that the person concerned remains at the disposal of the competent authorities of the issuing Member State, both in the context of the investigation to identify the pecuniary advantages which he has derived from the offence and to evaluate the extent of those advantages and during the proceedings that may lead to the making of a confiscation order. In other words, the sound administration of justice with a view to the effective and complete punishment of the reprehensible conduct which is at the origin of the European arrest warrant requires the presence of the person who is being prosecuted until that procedural stage, which forms an integral part of the criminal prosecution, is definitively closed. It is of the utmost importance that the competent authorities of the issuing Member State are not faced with evidential or practical problems connected with the absence of the person concerned that might hinder the making of a confiscation order.

66. Third, the presence of the person being prosecuted in the process that might lead to a confiscation order constitutes an essential procedural guarantee for that person.

23 Ibid. (paragraph 62).

24 I recall that the European arrest warrant at issue in the main proceedings was issued for the purposes of proceedings in respect of two offences, namely conspiracy to import 4 kg of heroin and 14 kg of cocaine into the United Kingdom.

25 OJ 2014 L 127, p. 39.

26 See also recital 3 of Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders (OJ 2018 L 303, p. 1), which states that 'the freezing and the confiscation of instrumentalities and proceeds of crime are among the most effective means of combating crime'.

67. I observe, in that regard, that, in the words of Article 1(3) of Framework Decision 2002/584, that framework decision 'shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [TEU]'.[27] Since a confiscation order is capable of substantially affecting the rights of the persons who are prosecuted[28] and since that order is part of the criminal proceedings for the purpose of determining the penalty, it is important to ensure the protection of the procedural rights which those persons enjoy, which include the right of the accused to appear in person at his trial, which is included in the right to a fair trial.

68. As the Court observed in its judgment of 10 August 2017, *Zdziaszek*,[29] 'it is apparent from the case-law of the European Court of Human Rights that the guarantees laid down in Article 6 of the ECHR apply not only to the finding of guilt, but also to the determination of the sentence (see, to that effect, ECtHR, 28 November 2013, *Dementyev v. Russia*, CE:ECHR:2013:1128JUD004309505, § 23). Thus, compliance with the requirement of a fair trial entails the right of the person concerned to be present at the hearing because of the significant consequences which it may have on the quantum of the sentence to be imposed (see, to that effect, ECtHR, 21 September 1993, *Kremzov v. Austria*, CE:ECHR:1993:0921JUD001235086, § 67)'.[30] In that they form part of the determination of the sentence, the criminal proceedings carried out with a view to the making of a confiscation order must respect that procedural right of the accused.[31]

69. In the light of those factors, the issuing Member State is entitled, in my view, to provide, under Article 5(3) of Framework Decision 2002/584, a guarantee that the person concerned will be returned only after a definitive decision has been reached on a sentence or additional measure such as a confiscation order.

70. It follows that the executing judicial authority cannot refuse to execute the European arrest warrant by arguing that such a guarantee is contrary to Article 5(3) of Framework Decision 2002/584.

71. In order to define the scope of the solution which I propose, I would emphasise, however, the following factors.

72. In the first place, it is clear that the stage of the criminal proceedings that may lead to the imposition of a penalty or an additional measure, such as a confiscation order, must relate to the same offence as the offence that gave rise to the issuing of a European arrest warrant for the purposes of a criminal prosecution.

73. In the second place, the determination of a penalty or an additional measure, such as a confiscation order, must form part of the criminal proceedings for the purposes of which the European arrest warrant was issued. In particular, it must be a confiscation order made in the context of criminal proceedings and not in the context of civil or administrative proceedings.

27 See also, as regards Framework Decision 2008/909, Article 3(4) thereof. In accordance with the Court's settled case-law, the rules of secondary legislation of the Union must be interpreted and applied in compliance with fundamental rights, an integral part of which is respect for the rights of the defence, flowing from the right to a fair trial, enshrined in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union and in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR') (see, in particular, judgment of 10 August 2017, *Tupikas* (C-270/17 PPU, EU:C:2017:628, paragraph 60 and the case-law cited)).

28 See, to that effect, recital 33 of Directive 2014/42.

29 C-271/17 PPU, EU:C:2017:629.

30 Judgment of 10 August 2017, *Zdziaszek* (C-271/17 PPU, EU:C:2017:629, paragraph 87).

31 It should also be emphasised that the fact that the person against whom a confiscation order has been made did not appear in person in the proceedings that resulted in that order is likely, subject to certain reservations, subsequently to constitute a ground for non-recognition and non-execution of that order: see, in that regard, recital 32 and Article 19(1)(g) of Regulation 2018/1805.

74. In the third place, it must be emphasised that my suggested interpretation of Article 5(3) of Framework Decision 2002/584 must not have the consequence that, owing to the particular characteristics of the criminal procedures of the Member States, the objective pursued by that provision, and likewise by Framework Decision 2008/909,[32] namely to facilitate the social reintegration of the person concerned, is undermined. Consequently, that objective cannot be ignored by the competent authorities of the issuing Member State after the person subject to the European arrest warrant has been surrendered. It is important, on that point, to emphasise that the Court has already held that 'the social rehabilitation of the Union citizen in the State in which he has become genuinely integrated is not only in his interest but also in that of the … Union in general'.[33] Accordingly, while I acknowledge, for the reasons stated above, that the return to the executing Member State of the person who has been given a sentence or a custodial measure may be delayed until a penalty or additional measure such as a confiscation order has been definitively imposed, such a delay cannot exceed a reasonable time.

75. It must not be forgotten that, from the time when the passing of a custodial sentence or a detention order has become final, any continuation of the detention of the convicted person in the issuing Member State forms part of the execution of that sentence. Having regard to the purpose of Article 5(3) of Framework Decision 2002/584, the execution of the sentence in the issuing Member State is permissible only during a brief period. Therefore, where a European arrest warrant for the purposes of prosecution is executed subject to the guarantee that the person concerned will be returned provided for in Article 5(3) of Framework Decision 2002/584, the competent authorities of the issuing Member State must do everything within their power to ensure that the period between the final imposition of a custodial sentence or a detention order and the determination of additional penalties or measures, such as a confiscation order, is as brief as possible, in such a way as to expedite the convicted person's return to the executing Member State. From that aspect, those authorities should, where their national law so permits, favour the setting of a penalty or an additional measure, such as a confiscation order, concurrently with the imposition of the main custodial sentence, so that the person on whom such penalties are definitively imposed may then be returned more rapidly to the executing Member State.

76. In the fourth place, and in any event, his return cannot be delayed until a penalty or an additional measure, such as a confiscation measure, has been executed. Article 3(3) of Framework Decision 2008/909 is clear in that regard, since it provides, in particular, that 'the fact that, in addition to the sentence, a fine and/or a confiscation order has been imposed, which has not yet been paid, recovered or enforced, shall not prevent a judgment from being forwarded'. Furthermore, it follows from that provision that the recognition and enforcement of fines and confiscation orders in another Member State is to comply with specific regimes in EU law.

77. I therefore consider that the clarification supplied by the United Kingdom, according to which the expression 'other proceedings' may include 'The expiry of any period for payment of a confiscation order or financial penalty',[34] is not consistent with Article 5(3) of Framework Decision 2002/584. While the return may in my view be delayed until a confiscation order has been made, it is, on the contrary, precluded that the duration of that delay may be extended to the stage of execution of such an order. The United Kingdom should therefore, on that point, revise the wording of the guarantee of return, failing which the executing judicial authority would to my mind be justified in considering that that guarantee is not consistent with what is allowed under Article 5(3) of Framework Decision 2002/584.

32 See Article 3(1) of that framework decision.

33 See, in particular, judgment of 17 April 2018, *B and Vomero* (C-316/16 and C-424/16, EU:C:2018:256, paragraph 75 and the case-law cited).

34 See point 18 of this Opinion.

78. It follows from the foregoing that, in my view, Article 5(3) of Framework Decision 2002/584 must be interpreted as meaning that the guarantee that the person subject to a European arrest warrant for the purposes of criminal prosecution, after having been heard, will have to be returned to the executing Member State in order to serve there any custodial sentence or detention order imposed on him in the issuing Member State, means that such return may be delayed until a final decision is reached on a penalty or an additional measure, such as a confiscation order, provided that such a measure or order is imposed in the context of criminal proceedings and that that procedural stage relates to the same offence as that giving rise to the European arrest warrant at issue. Having regard to the objective pursued by that provision, namely to facilitate the social reintegration of convicted persons, the competent authorities of the issuing Member State must however do everything within their power to ensure that such a return takes place within as short a time as possible.

C. The second question

79. By its second question, the referring court asks, in essence, whether Article 25 of Framework Decision 2008/909 must be interpreted as meaning that the executing Member State, after it has surrendered the requested person on condition of a guarantee that he will be returned and once it is called upon to execute the decision imposing a custodial sentence or a detention order on that person, may adapt that penalty to make it correspond with the penalty that would have been imposed in that Member State for the offence in question.

80. That question originates in the concept argued by the Kingdom of the Netherlands — which to my mind runs counter to the principle of the territoriality of criminal law — according to which foreign criminal sentences imposed on Netherlands nationals who were surrendered to another Member State on condition of a guarantee that they would be returned must be converted to a sentence normally applicable in the Netherlands for a similar offence. That concept is based on the Kingdom of the Netherlands' desire to ensure equal treatment of such nationals and Netherlands nationals who are tried in that Member State.

81. That concept is expressed in Article 2:11(5) of the WETS, from which it follows that Article 2:11(4) of that law, which transposes Article 8(2) of Framework Decision 2008/909, is not to apply where the person concerned has been surrendered by the Kingdom of the Netherlands in return for the guarantee referred to in Article 6(1) of the OLW, which transposes Article 5(3) of Framework Decision 2002/584. Article 2:11(5) of the WETS provides instead that 'it must then be determined whether the custodial sentence imposed corresponds to the sentence that would have been given in the Netherlands for the offence concerned' and that 'where appropriate, the sentence shall be adapted accordingly, having regard to the opinions issued in the issuing Member State concerning the gravity of the offence committed'.

82. According to the Kingdom of the Netherlands, Article 25 of Framework Decision 2008/909 authorises, in the situation of a person who has been surrendered in return for a guarantee that he will be returned, an adaptation of the penalty beyond that provided for in Article 8(2) of that framework decision.

83. I do not agree with that reading of Article 25 of Framework Decision 2008/909, which in my view contains no legal basis that would support such a practice.

84. I recall that it follows from that article that the provisions of Framework Decision 2008/909 are to apply in principle where a person is returned, in accordance with Article 5(3) of Framework Decision 2002/584, for execution of the sentence.

85. Framework Decision 2008/909 lays down an obligation to recognise the judgment passed in another Member State and to execute the sentence contained in that judgment. As the Court indicated in its judgment of 8 November 2016, *Ognyanov*,[35] 'Article 8 of Framework Decision 2008/909 lays down strict conditions governing the adaptation, by the competent authority of the executing State, of the sentence imposed in the issuing State, those conditions being the sole exceptions to the obligation imposed on that authority, in principle, to recognise the judgment forwarded to it and to enforce the sentence, which is to correspond in its length and nature to the sentence imposed in the judgment delivered in the issuing State'.[36]

86. Furthermore, the Court has already emphasised that the competent judicial authority in the executing Member State is not justified in undertaking a substantive re-examination of the analysis already carried out in the context of the judicial decision adopted in the issuing Member State. In fact, 'such a re-examination would infringe and render ineffective the principle of mutual recognition, which implies that there is mutual trust as to the fact that each Member State accepts the application of the criminal law in force in the other Member States, even though the implementation of its own national law might produce a different outcome, and does not therefore allow the executing judicial authority to substitute its own assessment of the criminal responsibility of the [person concerned] for that previously carried out in the issuing Member State'.[37]

87. In addition, as the Court has made clear in the context of a European arrest warrant issued for the purposes of the execution of a custodial sentence or a detention order, 'the basis for the enforcement of a custodial sentence lies in the enforceable judgment pronounced in the issuing Member State'.[38]

88. I infer from all of those factors that it is only in the strict conditions laid down in Article 8 of Framework Decision 2008/909 that a custodial sentence or a detention order imposed in the issuing Member State might, where appropriate, be adapted in the executing Member State. In particular, having regard to the difference in the length of the custodial sentences or detention orders that may be imposed in those two Member States for offences of the type of which SF is accused,[39] Article 8(2) of Framework Decision 2008/909 seems to be the only provision that might allow the sentence that may be imposed on SF in the United Kingdom to be adapted. I recall that, in the words of that provision, 'where the sentence is incompatible with the law of the executing State in terms of its duration, the competent authority of the executing State may decide to adapt the sentence only where that sentence exceeds the maximum penalty provided for similar offences under its national law. The adapted sentence shall not be less than the maximum penalty provided for similar offences under the law of the executing State'.

89. In all likelihood the United Kingdom was aware that Netherlands law afforded wide scope for sentences to be adapted following the convicted person's return and wished to inform the Kingdom of the Netherlands that it was opposed to any adaptation of the sentence thus broadly permitted by including, in the wording of the return guarantee, the phrase 'a transfer under [Framework Decision

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

36 Paragraph 36 of that judgment.

37 See, by analogy, judgment of 23 January 2018, *Piotrowski* (C-367/16, EU:C:2018:27, paragraph 52). See also judgment of 8 November 2016, *Ognyanov* (C-554/14, EU:C:2016:835, paragraphs 46 to 49), and also, concerning Framework Decision 2006/783, judgment of 10 January 2019, *ET* (C-97/18, EU:C:2019:7, paragraph 33).

38 See judgment of 6 December 2018, *IK* (Execution of an additional sentence) (C-551/18 PPU, EU:C:2018:991, paragraph 56).

39 In that regard, it is apparent from the written observations submitted by SF that the offences in respect of which he must be surrendered ('conspiracy to evade the prohibition of the importation of category A drugs, namely diamorphine (heroin)' and 'conspiracy to evade the prohibition of the importation of category A drugs, namely cocaine (cocaine hydrochloride)', are both punishable by life imprisonment in the United Kingdom. In the Netherlands, the importation of those narcotic substances is an offence under Article 2(A) of the Opiumwet (Opium law) of 1 October 1928 (Stb. 1928, No 167) and, under Article 10(5) of that law, is punishable by up to 12 years' imprisonment. The United Kingdom therefore provides for a higher maximum penalty than the Netherlands for the same offences.

2002/584] does not allow the Netherlands to alter the duration of any sentence imposed by a [United Kingdom] court'. That being the case, it is appropriate to point out that such a phrase cannot prevent the Kingdom of the Netherlands from being able to adapt the sentence as expressly permitted by Article 8(2) of Framework Decision 2008/909.

90. It follows from the foregoing developments that, in my view, Article 25 of Framework Decision 2008/909 must be interpreted as meaning that the executing Member State, after it has surrendered the requested person on condition of a guarantee that he will be returned and once it is required to execute the custodial sentence or detention order imposed on that person, cannot adapt that sentence in such a way as to make it correspond to the sentence that would have been imposed in that Member State for the offence in question. Only on the strict conditions laid down by Article 8 of Framework Decision 2008/909 and, in particular, in the light of the circumstances of the dispute in the main proceedings, by paragraph 2 of that article, can the sentence passed in the issuing Member State be adapted, where appropriate, in the executing Member State.

V. Conclusion

91. Having regard to all of the foregoing considerations, I propose that the Court answer the questions for a preliminary ruling referred by the Rechtbank Amsterdam (District Court, Amsterdam, the Netherlands) as follows:

(1) Article 5(3) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as meaning that the guarantee that the person subject to a European arrest warrant for the purposes of criminal prosecution, after having been heard, will have to be returned to the executing Member State in order to serve there any custodial sentence or detention order imposed on him in the issuing Member State, means that such return may be delayed until a final decision is reached on a penalty or an additional measure, such as a confiscation order, provided that such a measure or order is imposed in the context of criminal proceedings and that that procedural stage relates to the same offence as that giving rise to the European arrest warrant at issue. Having regard to the objective pursued by that provision, namely to facilitate the social reintegration of convicted persons, the competent authorities of the issuing Member State must however do everything within their power to ensure that such a return takes place within as short a time as possible.

(2) Article 25 of Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, must be interpreted as meaning that the executing Member State, after it has surrendered the requested person on condition of a guarantee that he will be returned and once it is required to execute the custodial sentence or detention order imposed on that person, cannot adapt that sentence in such a way as to make it correspond to the sentence that would have been imposed in that Member State for the offence in question. Only on the strict conditions laid down by Article 8 of Framework Decision 2008/909 and, in particular, in the light of the circumstances of the dispute in the main proceedings, by paragraph 2 of that article, can the sentence passed in the issuing Member State be adapted, where appropriate, in the executing Member State.