Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 31 March 2022[1]

Case C-168/21

Procureur général près la cour d'appel d'Angers
v
KL

(Request for a preliminary ruling
from the Cour de cassation (Court of Cassation, France))

(Reference for a preliminary ruling – Police and judicial cooperation in criminal matters – European arrest warrant – Framework Decision 2002/584/JHA – Article 2(4) and Article 4(1) – Condition of double criminality – Verification by the judicial authority of the executing Member State – Constituent elements of the criminal offence differing between the issuing and executing Member States – Sentence imposed as punishment for a single offence intended to suppress multiple acts of which some do not constitute an offence in the executing Member State – Charter of Fundamental Rights of the European Union – Article 49(3) – Principle of proportionality of the penalty)

I. Introduction

1. In EU law, the condition of double criminality can be defined as the fact that the conduct to which the cooperation relates constitutes an offence both in the requesting State (or issuing Member State) and in the requested State (or executing Member State).[2] In certain circumstances, the surrender of the requested person specified in a European arrest warrant ('EAW') may be made subject to the condition of double criminality.

2. In the present case, an EAW was issued by the Italian judicial authorities with a view to the execution of a sentence relating, in particular, to a single offence intended to suppress multiple acts regarded as forming one and the same wrong. The Cour de cassation (Court of Cassation, France) wishes to know whether the judicial authorities of the executing Member State, France, may refuse to execute that EAW, having regard to Article 2(4) and Article 4(1) of Framework Decision 2002/584/JHA[3] as well as Article 49(3) of the Charter of Fundamental Rights of the European Union ('the Charter').

1 Original language: French.

2 See Flore, D., and Bosly, S., *Droit pénal européen*, 2nd Ed., Larcier, Brussels, 2014, p. 580, § 1013. On the development of the condition of double criminality, see the Opinion of Advocate General Bobek in *Grundza* (C-289/15, EU:C:2016:622, points 31 to 40).

3 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1).

3. In that regard, the referring court observes, first, that the constituent elements of the offence differ between the two Member States concerned and, second, that some of the acts to which the offence relates are not punishable under the criminal law of the executing Member State. The Court is thus called on to clarify the scope of the condition of double criminality, as laid down by Framework Decision 2002/584 ('the framework decision').

4. In this Opinion, I will suggest that the Court's answer to the questions referred should be that, in the circumstances described by the referring court, the provisions of the framework decision require the EAW to be executed.

II. Legal background

A. European Union law

5. Recitals 6, 10 and 12 of Framework Decision 2002/584 state:

'(6) The [EAW] provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the "cornerstone" of judicial cooperation.

…

(10) The mechanism of the [EAW] is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) [TEU], determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.

…

(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 [TEU] and reflected in the [Charter], in particular Chapter VI thereof. …'

6. Article 1 of the framework decision, which is headed 'Definition of the [EAW] and obligation to execute it', provides:

'1. The [EAW] 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 [EAW] 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].'

7. Article 2 of the framework decision, which is headed 'Scope of the [EAW]', provides:

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

2. The following offences, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to [an EAW]:

…

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

8. Article 4 of the framework decision, which is headed 'Grounds for optional non-execution of the [EAW]', provides in paragraph 1:

'The executing judicial authority may refuse to execute the [EAW]:

(1) if, in one of the cases referred to in Article 2(4), the act on which the [EAW] is based does not constitute an offence under the law of the executing Member State; …

…'

B. French law

9. Article 695-23 of the code de procédure pénale (Code of Criminal Procedure), in the version applicable to the dispute in the main proceedings, provides:

'Execution of [an EAW] shall also be refused if the act to which it relates does not constitute an offence under French law.

By way of exception to the first paragraph, [an EAW] shall be executed without consideration of whether the alleged acts constitute criminal offences in both States where the acts in question are, under the law of the issuing Member State, punishable by a custodial sentence of at least three years' imprisonment, or by a detention order of similar duration, and fall within one of the categories of offences provided for by Article 694-32.

Where the preceding subparagraph applies, the legal characterisation of the acts and the determination of the available sentences shall be matters for the judicial authority of the issuing Member State alone.

…'

III. The dispute in the main proceedings, the questions referred and the procedure before the Court

10. On 6 June 2016, the Italian judicial authorities issued an EAW in respect of KL, with a view to the execution of a custodial sentence of 12 years and 6 months which had been passed by the Corte d'appello di Genova (Court of Appeal, Genoa, Italy) in a judgment of 9 October 2009, and had become enforceable on 13 July 2012, after the Corte suprema di cassazione (Supreme Court of Cassation, Italy) dismissed KL's appeal.

11. This was a cumulative sentence representing four sentences imposed for the four following offences: theft committed in conjunction with others and while carrying a weapon (1 year's imprisonment), devastation and looting (10 years' imprisonment), carrying weapons (9 months' imprisonment) and detonation of explosive devices (9 months' imprisonment).

12. In relation, in particular, to the offence referred to as 'devastation and looting', which is provided for in Article 419 of the codice penale (Criminal Code, Italy),[4] the EAW described the circumstances in which that offence was committed as follows: 'in conjunction with more than five others, taking part in the demonstration against the G8 summit, [KL] committed acts of devastation and looting in circumstances – with regard to time and place – in which there was an objective danger to public order; several instances of damage to street furniture and public property with consequential damage which could not be precisely quantified, but which represented hundreds of millions of lira; damage, looting and destruction by fire of credit institution[s], cars and other commercial property, with the aggravating factor of causing serious financial loss to the persons concerned'.

13. It is apparent from the judgment of the Corte d'appello di Genova (Court of Appeal, Genoa) of 9 October 2009 that, under that classification of 'devastation and looting', KL was charged with the commission of seven acts, punishable as a single offence, namely damage to street furniture and public property, damage to and looting of a construction site, destruction of premises belonging to Credito Italiano, a credit institution, destruction by fire of a Fiat Uno vehicle, destruction by fire of a Fiat Brava vehicle and destruction and looting of a supermarket.

14. KL did not consent to surrender pursuant to the EAW. By judgment of 23 August 2019, the indictment division of the cour d'appel de Rennes (Court of Appeal, Rennes, France), made an order for further information requiring, amongst other things, the production of the judgment of the Corte d'appello di Genova (Court of Appeal, Genoa) of 9 October 2009 and the subsequent judgment of the Corte suprema di cassazione (Supreme Court of Cassation). By judgment of 15 November 2019, the indictment division refused to surrender KL, on the ground that no evidence had been produced in the proceedings to demonstrate that KL's request for legal representation had been forwarded to the Italian Republic, and ordered KL to be released.

15. By judgment of 18 December 2019, the Cour de cassation (Court of Cassation) set aside that judgment and referred the case back to the indictment division of the cour d'appel d'Angers (Court of Appeal, Angers, France). By judgment of 4 November 2020, that indictment division refused to surrender KL to the Italian judicial authorities by way of execution of the EAW in so far as the EAW had been issued with a view to the enforcement of the 10-year custodial sentence

[4] That article, which is headed 'Devastation and looting', provides, in the version applicable to the dispute in the main proceedings: 'any person committing, otherwise than in the circumstances set out in Article 285, acts of devastation and looting, shall be punished by a term of imprisonment of 8 to 15 years. The sentence shall be increased if the offence relates to weapons, ammunition or foodstuffs in a place of sale or storage.'

imposed for 'devastation and looting'. It also made an order for further information seeking an indication from the Italian judicial authorities as to whether they wished the sentence of two years and six months' imprisonment imposed in respect of the other three offences covered by the EAW to be executed in France. The procureur général près la cour d'appel d'Angers (Public Prosecutor attached to the Court of Appeal, Angers) and KL brought an appeal against that judgment before the Cour de cassation (Court of Cassation), which is the referring court.

16. That court observes that the Court of Justice interpreted the condition of double criminality in its judgment of 11 January 2017, *Grundza* (C-289/15, EU:C:2017:4; 'judgment in *Grundza*'),[5] and states that, in setting out the basis for its refusal to surrender KL to the Italian judicial authorities in respect of the offence of 'devastation and looting', the indictment division of the cour d'appel d'Angers (Court of Appeal, Angers) observed that two of the seven acts in respect of which that sentence was imposed – namely destruction of the premises of the Credito Italiano credit institution and destruction by fire of a Fiat Brava vehicle – did not constitute an offence in France. According to the referring court, the indictment division considered it to follow that, as the Corte di appello di Genova (Court of Appeal, Genoa) and the Corte suprema di cassazione (Supreme Court of Cassation) had 'expressed the clear intention' to analyse those seven acts as forming an indivisible whole, the condition of double criminality meant that all of those indivisible acts had to be disregarded.

17. It is apparent, in the view of the referring court, from the judgment of the Corte suprema di cassazione (Supreme Court of Cassation) of 13 July 2012 that the objective element of the offence of devastation and looting, which is provided for in Article 419 of the Italian penal code, is the commission of acts of devastation, through any action, by any means, which cause wrecking, destruction or damage, in any event total, indiscriminate, wide-ranging and extensive, of a significant amount of moveable or immoveable property, so as not only to cause damage to the assets of one or more persons, together with the social damage consequent on an attack on private property, but also, in a concrete sense, to offend and endanger public order, taken in its specific meaning of the proper configuration and smooth running of life in civil society, understood in accordance with opinion within the community and its sense of peace and security. Thus, according to the referring court, in Italian criminal law, the offence of 'devastation and looting' relates to multiple acts of wholesale destruction and damage that not only result in losses to the owners of the property in question, but also cause a breach of the peace by threatening the normal course of life in civil society.

18. The referring court emphasises that, under French criminal law, there is no specific offence of endangering the public peace through the wholesale destruction of movable or immovable property. The only such offences are destruction, damage and theft accompanied by damage, whether or not involving multiple offenders, causing loss to the owners of the property in question. The question therefore arises, according to the referring court, of whether the breach of the peace attributed to KL by the Corte d'appello di Genova (Court of Appeal, Genoa) and the Corte suprema di cassazione (Supreme Court of Cassation), as an essential element of the offence of 'devastation and looting', is relevant in determining whether the condition of double criminality is met.

[5] On that judgment, see Falkiewicz, A., 'The Double Criminality Requirement in the Area of Freedom, Security and Justice – Reflections in Light of the European Court of Justice Judgment of 11 January 2017, C-289/15, Criminal Proceedings against Jozef Grundza', *European Criminal Law Review*, 2017, vol. 7, No 3, pp. 258-274.

19. In the event that the condition of double criminality is met in the present case, the referring court observes that Framework Decision 2002/584 does not contain any provision permitting the executing Member State to refuse to surrender the person concerned on the ground that the sentence imposed by the issuing Member State appears to be disproportionate to the acts covered by the EAW. Furthermore, while it is true that under Article 5 of that framework decision, the execution of the EAW by the executing judicial authority may be made conditional, by the law of the executing Member State, on the existence of provisions, within the legal order of the issuing Member State, enabling the sentence imposed to be reviewed, that applies only where the offence which forms the basis for the EAW is punishable by a custodial life sentence or lifetime detention order. Therefore, even if the executing Member State considers that there are serious difficulties with regard to the proportionality of the EAW, it cannot refuse, on that ground, to order the surrender of the person requested with a view to the execution of the sentence imposed by the issuing Member State.

20. While, in principle, it is for the issuing Member State to verify that the EAW is proportionate before issuing it, that verification does not mean, in the view of the referring court, that the principle of proportionality cannot be infringed where, as in the main proceedings, the EAW has been issued with a view to the execution of a sentence imposed in respect of a single offence characterised by multiple acts, of which only some constitute an offence in the executing Member State. In such a situation, the sentence imposed by the issuing Member State relates to all of those acts, whereas surrender is precluded in relation to some of them. According to the referring court, it follows that while the EAW may have been proportionate when it was issued, that may no longer be the case when it comes to be executed.

21. It is apparent from Article 1(3) of Framework Decision 2002/584, read in conjunction with recital 12 of that framework decision, that fundamental rights and fundamental legal principles, as reflected in the Charter, must be observed and respected in the context of an EAW. In that regard, Article 49(3) of the Charter sets out the principle that the severity of penalties must not be disproportionate to the offence.

22. In those circumstances the Cour de cassation (Court of Cassation) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 2(4) and Article 4(1) of Framework Decision 2002/584 be interpreted as meaning that the condition of double criminality is met in a situation, such as that at issue in the main proceedings, in which surrender is sought for acts which, in the issuing State, have been categorised as devastation and looting and which consist of acts of devastation and looting such as to cause a breach of the public peace when, in the executing State, there are criminal offences of theft accompanied by damage or offences of causing destruction or damage that do not require that element of a breach of the public peace?

(2) In the event that the first question is answered in the affirmative, must Article 2(4) and Article 4(1) of Framework Decision 2002/584 be interpreted as meaning that the courts in the executing State may refuse to execute [an EAW] issued for the enforcement of a sentence where they find that the judicial authorities in the issuing State imposed that sentence on the person concerned for the commission of a single offence covering various acts and where only some of those acts constitute a criminal offence in the executing State? Does a distinction need to be made depending on whether or not the trial court in the issuing State considered those various acts to be divisible or indivisible?

(3) Does Article 49(3) of the [Charter] require the judicial authorities in the executing Member State to refuse to execute [an EAW] where, first, that warrant was issued in order to enforce a single sentence imposed for a single offence and, second, where, given that some of the acts for which that sentence was imposed do not constitute an offence under the law of the executing Member State, a surrender can only be ordered in relation to some of those acts?'

23. The referring court requested that this reference for a preliminary ruling be dealt with under the expedited procedure provided for in Article 105(1) of the Rules of Procedure of the Court of Justice. By decision of 13 April 2021, the President of the Court refused that request. He did, however, decide that the case would be given priority over others, pursuant to Article 53(3) of the Rules of Procedure.

24. Written observations were submitted by KL, the French and Italian Governments, and the European Commission. KL, the French Government and the Commission also made oral submissions at the hearing, which took place on 20 January 2022.

IV. Analysis

A. The first question referred

25. By its first question, the referring court asks, essentially, whether Article 2(4) and Article 4(1) of Framework Decision 2002/584 are to be interpreted as meaning that the condition of double criminality laid down by those provisions is satisfied where the EAW is issued in respect of acts which relate, in the issuing Member State, to an offence requiring that those acts constitute a breach of the peace, when the same acts are also punishable under the criminal law of the executing Member State, without any requirement that they constitute a breach of the peace.

26. The French and Italian Governments, as well as the Commission, suggest that this question should be answered in the affirmative, whereas KL submits that it should be answered in the negative.

27. As a preliminary point, it should be observed that, in accordance with Article 2(4) of Framework Decision 2002/584, as regards offences which are not among the 32 listed in paragraph 2 of that article, the surrender of the requested person may be made conditional on the acts for which the EAW has been issued constituting an offence under the law of the executing Member State, whatever the constituent elements of that offence or however it is described. In other words, that provision permits the executing Member State to make the execution of the sentence conditional on the double criminality test being met.[6] At the same time, Article 4 of the framework decision, which concerns the grounds for optional non-execution of the EAW, provides in paragraph 1(1) that the executing judicial authority may refuse to execute the EAW where the condition of double criminality is not met. As is apparent from the order for reference, those provisions were transposed by Article 695-23 of the French Code of Criminal Procedure.

28. In the present case, the EAW states the nature and legal classification of the offences to which it relates and describes the circumstances in which they were committed, in accordance with Article 8(1)(d) and (e) of Framework Decision 2002/584. In that regard, some of the acts in

[6] See, to that effect, judgment in *Grundza*, paragraph 28.

respect of which KL was charged relate to the offence of 'devastation and looting', provided for in Article 419 of the Italian penal code. The referring court states that that offence covers multiple acts of wholesale destruction and damage that not only result in losses to the owners of the property in question but also cause a breach of the peace, threatening the normal course of life in civil society. In its written observations, the Italian Government has stated that the requirement for a breach of the peace is not expressly laid down in Article 419 of the Italian penal code, but arises from the case-law of the Italian courts.

29. According to the referring court, under French criminal law, there is no specific offence of endangering the public peace through the wholesale destruction of movable or immovable property. The only such offences are destruction, damage and theft accompanied by damage, whether or not involving multiple offenders, causing loss to the owners of the property.

30. Therefore, the referring court wishes to establish whether the condition of double criminality laid down by Article 2(4) and Article 4(1) of Framework Decision 2002/584 is satisfied in circumstances such as those of the main proceedings. It has made reference to the judgment in *Grundza*, which concerned the interpretation of Article 7(3)[7] and Article 9(1)(d)[8] of Framework Decision 2008/909/JHA.[9]

31. In that judgment, with regard to Article 7(3) of the latter framework decision, the Court observed that in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it forms part.[10]

32. The Court observed, in the first place, that it is apparent from the very wording of Article 7(3) of Framework Decision 2008/909 that the necessary and sufficient condition for the purpose of assessing double criminality resides in the fact that the acts giving rise to the sentence imposed in the issuing State also constitute an offence in the executing State, and that it follows that the offences do not need to be identical in the two Member States concerned.[11] The Court added that that interpretation is borne out by the words 'whatever [the] constituent elements' of the offence as laid down in the executing State and 'however it is described', which make it clear that there does not have to be an exact match between the constituent elements of the offence, as defined in the law of the issuing State and the executing State, respectively, or between the name given to or the classification of the offence under the national law of the respective States.[12] Accordingly, that provision advocates a *flexible approach* by the competent authority of the executing State when assessing the condition of double criminality, both as regards the constituent elements of the offence and its description.[13]

7 That provision reads as follows: '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'.

8 Under that provision, 'the competent authority of the executing State may refuse to recognise the judgment and enforce the sentence, if: … in a case referred to in Article 7(3) and, where the executing State has made a declaration under Article 7(4), in a case referred to in Article 7(1), the judgment relates to acts which would not constitute an offence under the law of the executing State'.

9 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).

10 Judgment in *Grundza*, paragraph 32.

11 Judgment in *Grundza*, paragraph 34.

12 Judgment in *Grundza*, paragraph 35.

13 Judgment in *Grundza*, paragraph 36.

33. Thus, when assessing double criminality, the competent authority of the executing State is required to verify whether the factual elements underlying the offence, as reflected in the judgment handed down by the competent authority of the issuing State, would also, per se, be subject to a criminal penalty in the executing State if they were present in that State. [14]

34. In relation to that textual interpretation, it should be observed that the wording of Article 2(4) and Article 4(1) of Framework Decision 2002/584 is similar, respectively, to that of Article 7(3) and Article 9(1)(d) of Framework Decision 2008/909. Thus, Article 2(4) of the former framework decision provides that surrender may be subject to the condition that the *acts for which the EAW has been issued* constitute an offence under the law of the executing Member State, *whatever the constituent elements or however it is described*. Consequently, the interpretation of the condition of double criminality set out in the preceding point of this Opinion applies in the same way to Framework Decision 2002/584.

35. In the second place, the Court held, in the judgment in *Grundza*, that the context of Article 7(3) and Article 9(1)(d) of Framework Decision 2008/909 also militates in favour of such an assessment of double criminality. [15] That framework decision is based primarily on the principle of mutual recognition, which constitutes, as stated in recital 1 of the decision, read in the light of Article 82(1) TFEU, the 'cornerstone' of judicial cooperation in criminal matters within the European Union, which, according to recital 5 of the decision, is founded on a special mutual confidence of the Member States in their respective legal systems. [16]

36. The Court added that since the condition of double criminality is an exception to the general rule of recognition of judgments and enforcement of sentences, the scope of the grounds for refusing to recognise a judgment or enforce a sentence, on the basis of lack of double criminality, as provided for in Article 9(1)(d) of Framework Decision 2008/909, must be interpreted strictly in order to limit cases of non-recognition and non-enforcement. [17] In assessing double criminality, the competent authority of the executing State must ascertain, not whether an interest protected by the issuing State has been infringed, but whether, in the event that the offence at issue were committed in the territory of the executing State, it would be found that a similar interest, protected under the national law of that State, had been infringed. [18]

37. In the present case, the context of Article 2(4) and Article 4(1) of Framework Decision 2002/584 is the same as that of Article 7(3) and Article 9(1)(d) of Framework Decision 2008/909. As stated in recitals 6 and 10 and in Article 1(2) of Framework Decision 2002/584, that framework decision is also based on the principle of mutual recognition. [19]

38. In the third place, as the Court observed in the judgment in *Grundza*, Article 3(1) of Framework Decision 2008/909 states that the purpose of that 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 to enforce a sentence. [20]

14 Judgment in *Grundza*, paragraph 38.

15 Judgment in *Grundza*, paragraph 39.

16 Judgment in *Grundza*, paragraph 41 and the case-law cited.

17 Judgment in *Grundza*, paragraph 46.

18 Judgment in *Grundza*, paragraph 49.

19 See, to that effect, judgment of 22 February 2022, *Openbaar Ministerie (Tribunal established by law in the issuing Member State)* (C-562/21 PPU and C-563/21 PPU, EU:C:2022:100, paragraph 43 and the case-law cited).

20 Judgment in *Grundza*, paragraph 50.

39. It is true that Framework Decision 2002/584 does not state that its objective is to facilitate the social rehabilitation of the sentenced person. Nevertheless, that framework decision seeks, by the establishment of a new, simplified and more effective system for the surrender of persons convicted of or suspected of having infringed criminal law, to facilitate and accelerate judicial cooperation with a view to contributing to the objective set for the European Union of becoming an area of freedom, security and justice by basing itself on the high degree of confidence which should exist between the Member States.[21] The objective pursued by that framework decision is, in particular, to facilitate and accelerate surrenders between the judicial authorities of the Member States and respect for the fundamental rights of the surrendered person.[22] More generally, the EAW system is intended, amongst other things, to avoid the situation, where a requested person is not in the territory where the alleged offence was committed, of that person going unpunished.[23] In my view, those objectives dictate, in the same way as for Framework Decision 2008/909, that the condition of double criminality laid down by Framework Decision 2002/584 must be interpreted strictly.

40. In those circumstances, contrary to the submissions contained in KL's written observations, the interpretation adopted in the judgment in *Grundza* appears to be transposable to Framework Decision 2002/584. Accordingly, in parallel with the Court's ruling in that case,[24] Article 2(4) and Article 4(1) of that framework decision must be interpreted as meaning that the condition of double criminality must be considered to be met where the factual elements underlying the offence, as reflected in the judgment handed down by the competent authority of the issuing State, would also, per se, be subject to a criminal sanction in the territory of the executing State if they were present in that State.

41. In the present case, it is apparent from the order for reference that the offence classified as 'devastation and looting' in Italian law is not among the 32 offences listed in Article 2(2) of Framework Decision 2002/584. In those circumstances, pursuant to Article 2(4) and Article 4(1) of that framework decision, and in accordance with French law, the surrender of KL may be subject to the condition that the acts for which the EAW has been issued constitute an offence under the law of the executing Member State.

42. In that regard, as the referring court observes, in Italian law, it is a requirement of the offence classified as 'devastation and looting' that the acts in question constitute a breach of the peace, unlike in French law. The referring court goes as far as to describe this as an 'essential element' of the offence. It must be observed, however, that the requirement for a breach of the peace relates to the *constituent elements* of that offence and not to the acts in themselves, as committed by the requested person and stated in the EAW.[25] As is clear from the case-law of the Court, there does not have to be an exact match between the constituent elements of the offence, as defined in the law of the issuing State and the executing State, respectively, or between the name given to or the classification of the offence under the national law of the respective States.[26]

[21] See judgment of 26 October 2021, *Openbaar Ministerie (Right to be heard by the judicial authority of the executing Member State)* (C-428/21 PPU and C-429/21 PPU, EU:C:2021:876, paragraph 38 and the case-law cited).

[22] See judgment of 26 October 2021, *Openbaar Ministerie (Right to be heard by the judicial authority of the executing Member State)* (C-428/21 PPU and C-429/21 PPU, EU:C:2021:876, paragraph 58 and the case-law cited).

[23] Judgment of 17 December 2020, *Openbaar Ministerie (Independence of the issuing judicial authority)* (C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033, paragraph 62).

[24] See paragraph 54 of the judgment in *Grundza*.

[25] As Advocate General Bobek observed in his Opinion in *Grundza* (C-289/15, EU:C:2016:622, point 51), the assessment of double criminality 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.

[26] See point 32 of this Opinion.

43. Moreover, again in accordance with the case-law of the Court, in assessing double criminality, the competent authority of the executing State must ascertain, whether, in the event that the offence at issue was committed in the territory of that State, it would be found that a similar interest, protected under the national law of that State, had been infringed.[27] The offence classified as 'devastation and looting' is defined in part by the fact that damage has been caused to the assets of one or more persons, together with the social damage consequent on an attack on private property.[28] In the present case, as is apparent from the order for reference, the acts covered by that offence are punishable under French criminal law, for which the interest at stake is the protection of the owners of the property concerned. Consequently, the interest protected by the law of the executing Member State is similar to that taken into consideration in the issuing Member State.

44. Accordingly, the fact that a breach of the peace is an essential constituent element of the offence of 'devastation and looting' in the issuing Member State does not appear to be relevant in determining whether the executing judicial authority had due regard for the condition of double criminality.

45. I therefore propose that the answer to the first question should be that Article 2(4) and Article 4(1) of Framework Decision 2002/584 are to be interpreted as meaning that the condition of double criminality laid down by those provisions is satisfied where an EAW is issued in respect of acts which relate, in the issuing Member State, to an offence requiring that those acts constitute a breach of the peace, when the same acts are also punishable under the criminal law of the executing Member State, without any requirement that they constitute a breach of the peace.

B. The second and third questions

46. By its second and third questions, which should be examined together, the referring court asks, essentially, in the event that the first question is answered in the affirmative, whether Article 2(4) and Article 4(1) of Framework Decision 2002/584, and Article 49(3) of the Charter, are to be interpreted as meaning that the executing judicial authority may refuse to execute an EAW issued with a view to execution of a sentence, in circumstances where that sentence relates to the commission, by the requested person, of multiple acts, punished as a single offence in the issuing Member State, when some of those acts are not punishable under the criminal law of the executing Member State.

1. Admissibility

47. In its written observations, the Italian Government states that, according to the indictment division of the cour d'appel d'Angers (Court of Appeal, Angers), the condition of double criminality is not met in the main proceedings in respect of two of the seven acts pursued under the classification of 'devastation and looting' as referred to in Article 419 of the Italian penal

[27] See point 36 of this Opinion.

[28] See point 17 of this Opinion, which refers to the order for reference. It is argued in KL's written observations that the social value protected by the offence classified as 'devastation and looting' is not respect for property, but public peace and order. However, according to settled case-law of the Court, questions concerning the interpretation of EU law submitted by a national court in the regulatory and factual context which that court determines as a matter of its own responsibility, the accuracy of which is not for the Court to verify, enjoy a presumption of relevance (judgment of 25 November 2021, *Finanzamt Österreich (Family benefits for development aid workers)*, C-372/20, EU:C:2021:962, paragraph 54). In those circumstances, the Court must look to the order for reference when determining what interest is protected by the offence classified as 'devastation and looting'.

code.[29] The indictment division observed that in relation to those two acts, KL was merely identified as having been in the vicinity of the credit institution and the vehicle concerned, without actually taking part in the acts of destruction. The referring court considered it to follow that since, in French law, the offence of destroying, damaging or causing the deterioration of property is only made out where the accused himself commits the acts constituting that offence, the indictment division had justified its conclusion that, in relation to the two acts in question, the condition of double criminality was not met.

48. According to the Italian Government, the question raised by the indictment division was not, in reality, a question of whether the condition of double criminality was met, but one of proof, in that, in respect of certain of the acts ascribed to KL, the division did not consider it to have been proved that those acts had been committed by KL. On that basis, the Italian Government argues that the second and third questions are inadmissible in part, in so far as they are directed to Article 49 of the Charter, concerning the principles of legality and proportionality of criminal offences and penalties, when they ought to have been directed to Article 48 of the Charter, which relates to the presumption of innocence and right of defence. Furthermore, on the basis that certain acts pursued under the Italian law classification of 'devastation and looting' do not constitute an offence under French law, it is Article 49(1) of the Charter that is relevant, and not Article 49(3), which is the provision cited by the referring court in its third question.

49. In that regard, I would observe that the referring court began, in its decision, from the premiss that two of the seven acts on the basis of which KL was convicted of the offence of 'devastation and looting' are not punishable under French criminal law. That premiss, which was based on an examination of the circumstances in which the two acts were committed, is not raised for discussion by the request for a preliminary ruling. The referring court's questions relate not to proof of the acts in question, but to the conclusions to be drawn in that situation as regards the interpretation of the condition of double criminality, as understood in EU law, and as regards the execution of the EAW in question.

50. In particular, the referring court expresses doubt as to whether that condition is met in circumstances such as those of the main proceedings. In my view, therefore, it is clear that the questions submitted concern the interpretation of EU law, and that the response to those questions will be useful and relevant in resolving the dispute before the referring court. I therefore consider that the second and third questions are admissible in their entirety.

2. Substance

51. In the present case, the referring court wishes to know whether, in order for the condition of double criminality to be met, having regard to Article 2(4) and Article 4(1) of Framework Decision 2002/584, and to Article 49(3) of the Charter, it is necessary for all of the acts pursued as a single offence in the issuing Member State also to be capable of constituting a criminal offence in the executing Member State.

52. The French and Italian Governments, as well as the Commission, with some nuances, suggest that this question should be answered in the negative, whereas KL submits that it should be answered in the affirmative.

[29] The Italian Government states that under Italian law, it is not only the person who actually commits the acts who can be punished, but also any person who participates, by deliberate conduct, whether active or passive, in the commission of the offence.

53. In that regard, I will consider the scope of the condition of double criminality in relation to a single offence (section (a) below) and then compliance with the principle of proportionality contained in Article 49(3) of the Charter (section (b)).

(a) The scope of the condition of double criminality in relation to a single offence

54. First, as has already been pointed out, it is apparent from the wording of Article 2(4) of Framework Decision 2002/584 that there does not have to be an *exact match* between the constituent elements of the offence, as defined in the law of the issuing State and the executing State, respectively, or between the name given to or the classification of the offence under the national law of the respective States.[30] Accordingly, that provision does not require that all of the acts constituting a single offence in respect of which an EAW has been issued constitute an offence in the executing Member State.

55. Second, with regard to the context of Article 2(4) and Article 4(1) of Framework Decision 2002/584, it is important to bear in mind that that provision seeks, by the establishment of a simplified and effective system for the surrender of persons convicted or suspected of having infringed criminal law, to facilitate and accelerate judicial cooperation with a view to contributing to the attainment of the objective set for the European Union of becoming an area of freedom, security and justice, and has as its basis the high level of trust which must exist between the Member States. The principle of mutual recognition is expressed in Article 1(2) of that framework decision, which lays down the rule that Member States are required to execute any EAW on the basis of that principle and in accordance with the provisions of the framework decision. It follows that executing judicial authorities may therefore, in principle, refuse to execute an EAW only on the grounds for non-execution exhaustively listed in the framework decision and that execution of the warrant may be made subject only to one of the conditions exhaustively laid down in Article 5 thereof. Accordingly, while the execution of the EAW constitutes the rule, a refusal to execute is intended to be an exception which must be *interpreted strictly*.[31] That context militates in favour of an interpretation of the condition of double criminality on which it is sufficient for some – and not all –of the acts constituting a single offence in respect of which an EAW has been issued to be punishable under the criminal law of the executing Member State.

56. Certainly, in relation to the grounds for optional non-execution of the European arrest warrant set out in Article 4 of Framework Decision 2002/584, as the Court has stated, it is clear from the wording of that article – in particular from the use of the verb 'may' together with the infinitive of the verb 'refuse', the subject of which is the executing judicial authority – that that authority must, itself, have a margin of discretion as to whether or not it is appropriate to refuse to execute the EAW on the grounds referred to in Article 4.[32] It follows that, when they do opt to transpose one or more of the grounds for optional non-execution provided for in Article 4 of the Framework Decision, Member States cannot provide that judicial authorities are required to refuse to execute any EAW formally falling within the scope of those grounds, without those authorities having the opportunity to take into account the circumstances specific to each case.[33]

30 See, to that effect, judgment in *Grundza*, paragraph 35.

31 See, to that effect, judgment of 22 February 2022, *Openbaar Ministerie (Tribunal established by law in the issuing Member State)* (C-562/21 PPU and C-563/21 PPU, EU:C:2022:100, paragraphs 42 to 44 and the case-law cited).

32 Judgment of 29 April 2021, *X (European arrest warrant* – Ne bis in idem) (C-665/20 PPU, EU:C:2021:339, paragraph 43 and the case-law cited).

33 Judgment of 29 April 2021, *X (European arrest warrant* – Ne bis in idem) (C-665/20 PPU, EU:C:2021:339, paragraph 44 and the case-law cited).

57. In the present case, it is apparent from the order for reference that some of the acts referred to in the EAW, in relation to the offence classified as 'devastation and looting' could be charged as theft accompanied by damage, or as destruction or damage in the executing Member State. To my mind, that situation does not enable the executing judicial authority, even in the exercise of the discretion it is acknowledged to possess, to refuse to execute the EAW on the ground set out in Article 4(1) of Framework Decision 2002/584.

58. Lastly, in accordance with Article 1(1) of that framework decision, the aim of the mechanism of the EAW 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. [34] As the French Government pointed out in its written observations, the interpretation on which execution of an EAW may be refused on the ground that some of the acts to be punished in the issuing Member State are not culpable acts in the executing Member State would mean that the convicted person would go unpunished in respect of all the acts in question, including those which are culpable in both States.

59. In those circumstances, I consider that, in the main proceedings, on the basis that some of the acts to which the EAW relates are punishable under the criminal law of the executing Member State, the condition of double criminality is met. Thus, to respond to a query from the referring court, no distinction needs to be made depending on whether or not the trial court in the issuing Member State considered those various acts to be divisible or indivisible. That issue, which relates moreover to the classification of the offence, has no relevance to the execution of the EAW. [35]

(b) Compliance with the principle of proportionality enshrined in Article 49(3) of the Charter

60. The referring court asks whether the principle of proportionality, as laid down in Article 49(3) of the Charter, is complied with where the EAW has been issued with a view to the execution of a sentence relating to a single offence characterised by multiple acts of which only some constitute an offence in the executing Member State. According to the referring court, while the warrant may have been proportionate when it was issued, that may no longer be the case at the time of execution, and if it is not then the surrender of the requested person should be refused.

61. In that regard, I think it is important to distinguish between the proportionality of the EAW and that of the punishment in question. First, as regards a measure, such as the issuing of an EAW, which is capable of impinging on the right to liberty of the person concerned, that protection means that a decision meeting the requirements inherent in effective judicial protection should be adopted. [36] In addition, the protection of the rights of the person concerned requires that the issuing judicial authority review observance of the conditions to be met when issuing an EAW and examine objectively – taking into account all incriminatory and exculpatory evidence, without being exposed to the risk of being subject to external instructions, in particular from the executive – *whether it is proportionate to issue that warrant.* [37] In that sense, as the referring court has observed, it is for the issuing Member State to verify that the EAW is

[34] Judgment of 13 January 2021, *MM* (C-414/20 PPU, EU:C:2021:4, paragraph 76 and the case-law cited).

[35] I would note that, in its written observations, the Italian Government maintains that, having regard to the intrinsic unity of the various acts constituting the offence classified as 'devastation and looting', it does not seem that they can be regarded as divisible.

[36] See, to that effect, judgment of 13 January 2021, *MM* (C-414/20 PPU, EU:C:2021:4, paragraph 63 and the case-law cited).

[37] See, to that effect, judgment of 13 January 2021, *MM* (C-414/20 PPU, EU:C:2021:4, paragraph 64 and the case-law cited).

proportionate before issuing it, a situation which tends to strengthen the principle of mutual recognition. In the present case, the referring court does not maintain that the EAW at issue is disproportionate.

62. Furthermore, where an EAW is issued for the purposes of executing a sentence, it follows that it is proportional from the sentence imposed, which, as is clear from Article 2(1) of Framework Decision 2002/584, must consist of a custodial sentence or a detention order of at least four months.[38] In the main proceedings, the sentence imposed is in excess of that duration of four months. In those circumstances, the EAW does appear to be proportionate, in my view, for the purposes of Article 2(1) of the framework decision.

63. Second, as regards the proportionality of the sentence imposed, according to the provisions of the framework decision, the Member States may refuse to execute an EAW only in the cases of mandatory non-execution provided for in Article 3 thereof and in the cases of optional non-execution listed in Articles 4 and 4a. Furthermore, the executing judicial authority may make the execution of an EAW subject solely to the conditions set out in Article 5 of the framework decision.[39] I would point out that disproportionality of the sentence is not among the grounds for non-execution provided for by Framework Decision 2002/584.

64. Nevertheless, as Article 1(3) of the framework decision stipulates, the framework decision is not to have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU. From that point of view, the Court has recognised that limitations may be placed on the principles of mutual recognition and mutual trust between Member States 'in exceptional circumstances'. It has thus acknowledged that, subject to certain conditions, the executing judicial authority has the power to bring the surrender procedure established by the framework decision to an end where that surrender may result in the requested person being subject to inhuman or degrading treatment within the meaning of Article 4 of the Charter.[40] However, in the present case there do not appear to be any such exceptional circumstances. The referring court does not suggest that KL's fundamental right to a fair trial, as guaranteed by the second paragraph of Article 47 of the Charter, might be infringed, or that the surrender of KL might lead to inhuman or degrading treatment within the meaning of Article 4 of the Charter. Furthermore, it does not seem to me that the mere fact that not all of the acts pursued as a single offence in the issuing Member State constitute a criminal offence in the executing Member State is a sufficient basis for establishing a new 'exceptional circumstance' where there has been no infringement of the fundamental rights of the requested person in the issuing Member State.

65. The Commission maintains that if the information contained in the EAW does not indicate that the acts constituting offences under the law of the executing Member State are the essential facts on which that EAW is based, the executing judicial authority should use the procedure provided for by Article 15(2)[41] of Framework Decision 2002/584 to establish whether it is possible, under the law of the issuing Member State, to divide the sentence a posteriori. If it is possible, the issuing judicial authority should seek to respond to the concerns of the executing

[38] Judgment of 12 December 2019, *Openbaar Ministerie (Public Prosecutor, Brussels)* (C-627/19 PPU, EU:C:2019:1079, paragraph 38).

[39] Judgment of 12 December 2019, *Openbaar Ministerie (Public Prosecutor's Office, Sweden)* (C-625/19 PPU, EU:C:2019:1078, paragraph 36).

[40] Judgment of 19 September 2018, *RO* (C-327/18 PPU, EU:C:2018:733, paragraphs 39 and 40 and the case-law cited).

[41] That provision reads as follows: 'if the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to Articles 3 to 5 and Article 8, be furnished as a matter of urgency and may fix a time limit for the receipt thereof, taking into account the need to observe the time limits set in Article 17'.

judicial authority by issuing a new EAW limited to the acts constituting an offence under the law of the executing Member State. If, on the other hand, it is not possible to divide the sentence under the law of the issuing Member State, the executing judicial authority should exercise its discretion having regard, first, to its right not to raise a ground for non-execution which is optional, and second, to the risk of the requested person going unpunished if the EAW is not executed. That authority must thus be able, exceptionally, to refuse to execute the EAW in circumstances where the acts in respect of which the condition of double criminality is satisfied, with regard to the law of the executing Member State, are of marginal importance in relation to the acts in respect of which that condition is not satisfied.

66. I have difficulties with that approach. First, Framework Decision 2002/584 established a simplified and effective system for the surrender of persons convicted of or suspected of having infringed criminal law.[42] If the Commission's interpretation were adopted, this would make the system more complex and would considerably slow down the procedure for surrender of requested persons. Second, the framework decision does not provide that the issuing Member State is to issue a new EAW, if the sentence can be divided, depending on the law of the executing Member State – even though the law of one Member State can differ considerably from that of another. Third, where the condition of double criminality is satisfied in respect of the majority of the acts at issue[43] – which is not disputed in the main proceedings – the executing judicial authority cannot, in my view, refuse to execute the EAW, having regard to the logic and purpose of the framework decision.

67. Last, KL submits that, having regard to the seriousness of the acts in question, it is reasonable to consider that the sentence imposed would have been significantly less severe if the Italian court had not taken account of the acts which were subsequently disregarded by the executing judicial authority. However, in circumstances such as those of the main proceedings, where the condition of double criminality is satisfied, it is for the issuing judicial authority alone to verify, in the light of its national law, that the sentence complies with the principle of proportionality as referred to in Article 49(3) of the Charter.

68. Having regard to all of the foregoing, I suggest that the answer to the second and third questions should be that Article 2(4) and Article 4(1) of Framework Decision 2002/584, and Article 49(3) of the Charter, are to be interpreted as meaning that the executing judicial authority may not refuse to execute an EAW issued with a view to execution of a sentence, in circumstances where that sentence relates to the commission, by the requested person, of multiple acts, punished as a single offence in the issuing Member State, when some of those acts are not punishable under the criminal law of the executing Member State.

[42] See point 39 of this Opinion.

[43] Accordingly, it does not seem to me to be necessary to examine, in this Opinion, the situation raised by the Commission, in which the acts in respect of which the condition of double criminality is satisfied are of marginal importance in relation to those in respect of which it is not satisfied.

V. Conclusion

69. In the light of the foregoing considerations, I suggest that the Court should respond to the questions referred for a preliminary ruling by the Cour de cassation (Court of Cassation, France) as follows:

(1) Article 2(4) and Article 4(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States are to be interpreted as meaning that the condition of double criminality laid down by those provisions is satisfied where a European arrest warrant is issued in respect of acts which relate, in the issuing Member State, to an offence requiring that those acts constitute a breach of the peace, when the same acts are also punishable under the criminal law of the executing Member State, without any requirement that they constitute a breach of the peace.

(2) Article 2(4) and Article 4(1) of Framework Decision 2002/584, and Article 49(3) of the Charter of Fundamental Rights of the European Union, are to be interpreted as meaning that the executing judicial authority may not refuse to execute an European arrest warrant issued with a view to execution of a sentence, in circumstances where that sentence relates to the commission, by the requested person, of multiple acts, punished as a single offence in the issuing Member State, when some of those acts are not punishable under the criminal law of the executing Member State.