



Reports of Cases

OPINION OF ADVOCATE GENERAL
EMILIOU

delivered on 4 May 2023¹

Case C-819/21

Staatsanwaltschaft Aachen
joined parties:
MD

(Request for a preliminary ruling from the Landgericht Aachen (Regional Court, Aachen, Germany))

(Reference for a preliminary ruling – Framework Decision 2008/909/JHA – Judicial cooperation in criminal matters – Custodial sentence imposed in a Member State in which, in the view of the court in the executing Member State, the judicial system no longer guarantees the right to a fair trial – Possibility of refusing the enforcement of a foreign judgment)

I. Introduction

1. MD is a Polish national who was sentenced by the Sąd Rejonowy Szczecin-Prawobrzeże (District Court, Szczecin-Prawobrzeże, Poland) to a six-month custodial sentence. The initial suspension of that sentence was subsequently revoked by the same court and, in order to enforce that sentence, the Sąd Okręgowy Szczecin (Regional Court, Szczecin, Poland) issued a European arrest warrant ('EAW') on the basis of which MD was arrested in Germany. However, execution of that EAW was refused by the German authorities on the ground that MD's habitual residence was in Germany. Therefore, the competent Polish court requested the German authorities to enforce the sentence imposed upon MD in accordance with the regime established by Framework Decision 2008/909/JHA.²

2. The Landgericht Aachen (Regional Court, Aachen, Germany), the referring court in the present case, seeks clarification as to whether it may refuse such a request, given the situation that has arisen from the controversial judicial reforms in Poland, which have given rise to several judgments of this Court. That situation causes the referring court to doubt whether MD's right to a fair trial can be considered to be safeguarded in a context where, according to the referring court, generalised deficiencies affect the rule of law and the requirement of independence of that Member State's judiciary.

¹ Original language: English.

² Council Framework Decision of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ 2008 L 327, p. 27), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24) ('Framework Decision 2008/909').

3. The referring court enquires more specifically as to the applicability, to the mutual recognition regime established by Framework Decision 2008/909, of the case-law of the Court, relating to the EAW Framework Decision,³ according to which the execution of such a warrant may exceptionally be refused, beyond the grounds expressly provided for therein, where it appears, following a two-step examination (the nature of which will be explained and discussed in this Opinion) that such an execution would result in a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').⁴ In that respect, the referring court seeks clarity on the conditions under which such an examination is to be carried out, and the appropriate point in time by reference to which it ought to be carried out.

II. Legal framework

4. The first sentence of the second paragraph of Article 47 of the Charter states that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law'.

5. Article 3(4) of Framework Decision 2008/909 states that the latter 'shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [TEU]'.

6. Article 4(1)(a) to (c) of that framework decision lists three different categories of executing Member States to which a request for recognition of a judgment and enforcement of a sentence may be forwarded. These are (a) the Member State of nationality of the sentenced person in which he or she lives; or (b) the Member State of nationality, to which, while not being the Member State where he or she lives, the sentenced person will be deported, once he or she is released from the enforcement of the sentence on the basis of an expulsion or deportation order included in the judgment or in a judicial or administrative decision or any other measure taken consequential to the judgment; or (c) any Member State other than a Member State referred to in (a) or (b), the competent authority of which consents to the forwarding of the judgment and the certificate to that Member State.

7. Article 8(1) states that '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'.

8. Points (a) to (l) of Article 9(1) of Framework Decision 2008/909 list grounds allowing 'the competent authority of the executing [Member] State [to] refuse to recognise the judgment and enforce the sentence'.

³ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24) ('the EAW Framework Decision').

⁴ See, notably, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586; 'the judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*').

III. Facts, national proceedings and the questions referred

9. MD is a Polish national whose habitual residence is in Germany. On 7 August 2018, the Sąd Rejonowy Szczecin-Prawobrzeże (District Court, Szczecin-Prawobrzeże) imposed on him a custodial sentence of six months and suspended the execution of that sentence with probation ('the initial judgment'). MD was not present at the trial.

10. By order of 16 July 2019, that same court revoked the suspension and ordered the execution of the custodial sentence.

11. On 17 December 2020, the Generalstaatsanwaltschaft Köln (General Prosecutor's Office, Cologne, Germany) decided not to execute the EAW issued by the Sąd Okręgowy Szczecin (Regional Court, Szczecin) on the ground that MD's habitual residence was in Germany and that he had objected to his surrender to the Polish authorities.⁵

12. On 26 January 2021, the Sąd Okręgowy Szczecin (Regional Court, Szczecin) sent to the Generalstaatsanwaltschaft Berlin (General Prosecutor's Office, Berlin, Germany) a certified copy of the initial judgment, together with the certificate referred to in Article 4 of Framework Decision 2008/909 for the purposes of the execution of the custodial sentence imposed. Those documents were forwarded to the territorially competent Staatsanwaltschaft Aachen (Public Prosecutor's Office, Aachen, Germany; 'the PPO Aachen').

13. After hearing MD, and taking the view that the conditions for the enforcement of the custodial sentence at issue were met, the PPO Aachen requested that the Landgericht Aachen (Regional Court, Aachen) enforce the initial judgment, in conjunction with the order withdrawing the suspension of the execution of the sentence, and impose a custodial sentence of six months.

14. However, the referring court wonders whether it may refuse the recognition of the judicial decisions at issue and the enforcement of the sentence imposed given that, in its view, objective, reliable, specific and properly updated information on the situation of the judiciary in Poland indicate that there are grounds for believing that the conditions prevailing at the time of the adoption of the initial judgment and of the order withdrawing the probation were (and remain) incompatible with the principle of the rule of law enshrined in Article 2 TEU and the requirement of judicial independence which forms the essence of MD's fundamental right to a fair trial under the second paragraph of Article 47 of the Charter.

⁵ The order for reference states that that decision was based on Article 83b, paragraph 2, [point 2] of Gesetz über die internationale Rechtshilfe in Strafsachen (Law on international mutual assistance in criminal matters). It thus appears, as the Commission also observes, that the situation at hand is the one falling under Article 4(6) of the EAW Framework Decision. That provision makes it possible to refuse the execution of an EAW issued for the purposes of executing a custodial sentence, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence in accordance with its domestic law.

15. In that context, the referring court relies on the Commission's Proposal on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law,⁶ on the case-law relating to the independence of the Polish judiciary adopted by the Court,⁷ by the European Court of Human Rights, and by the national courts. It also draws attention to several situations in which the Polish authorities considered themselves not to be bound by the primacy of EU law.

16. In those circumstances, the Landgericht Aachen (Regional Court, Aachen) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- '(1) Can a court of the executing Member State which has been called on to rule on a declaration of enforceability refuse, on the basis of Article 3(4) of [Framework Decision 2008/909], in conjunction with the second paragraph of Article 47 of the [Charter], to recognise the judgment of another Member State and to enforce the sentence imposed by that judgment in accordance with Article 8 of [Framework Decision 2008/909] where there are reasons to believe that the conditions prevailing in that Member State at the time of the adoption of the decision to be enforced or of the related subsequent decisions are incompatible with the fundamental right to a fair trial because, in that Member State, the judicial system itself is no longer in conformity with the principle of the rule of law enshrined in Article 2 TEU?
- (2) Can a court of the executing Member State which has been called on to rule on a declaration of enforceability refuse, on the basis of Article 3(4) of [Framework Decision 2008/909], in conjunction with the principle of the rule of law enshrined in Article 2 TEU, to recognise the judgment of another Member State and to enforce the sentence imposed by that judgment in accordance with Article 8 of [Framework Decision 2008/909] where there are reasons to believe that the judicial system in that Member State is no longer in conformity with the principle of the rule of law enshrined in Article 2 TEU at the time of the ruling on the declaration of enforceability?
- (3) If Question 1 is answered in the affirmative:

Before the recognition of a judgment of a court of another Member State and the enforcement of the sentence imposed by that judgment is refused by reference to Article 3(4) of [Framework Decision 2008/909], in conjunction with the second paragraph of Article 47 of the [Charter], on the ground that there are reasons to believe that the conditions prevailing in that Member State are incompatible with the fundamental right to a fair trial because, in that Member State, the judicial system itself is no longer in conformity with the principle of the rule of law, is it necessary to review, in a second step, whether the prevailing conditions which are incompatible with the fundamental right to a fair trial had a detrimental effect specifically on the sentenced person(s) in the proceedings in question?

⁶ European Commission's Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (COM(2017) 835 final).

⁷ Judgments in *Minister for Justice and Equality (Deficiencies in the system of justice)*; of 5 November 2019, *Commission v Poland (Independence of ordinary courts)* (C-192/18, EU:C:2019:924); of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982); of 2 March 2021, *A. B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153); of 15 July 2021, *Commission v Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596); and of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* (C-748/19 to C-754/19, EU:C:2021:931), as well as the pending case C-204/21, *Commission v Poland*.

- (4) If Question 1 and/or Question 2 is/are answered in the negative to the effect that the decision as to whether the conditions prevailing in a Member State are incompatible with the fundamental right to a fair trial because, in that Member State, the judicial system itself is no longer in conformity with the principle of the rule of law is a matter not for the courts of the Member States but for the Court of Justice of the European Union:

Was the judicial system in the Republic of Poland in conformity with the principle of the rule of law under Article 2 TEU on 7 August 2018 and/or 16 July 2019, and is it currently in conformity with it?’

17. Written observations have been submitted by the Governments of the Netherlands and Poland, as well as by the European Commission. Those intervening parties have also replied to the question put to them by the Court.

IV. Analysis

18. By its four questions, the referring court seeks clarification on whether and under what circumstances it may exceptionally refuse to recognise a judgment, forwarded to it pursuant to the regime established by Framework Decision 2008/909 in view of the enforcement of a custodial sentence, beyond the express grounds provided for that purpose in that instrument, where the application of that regime would, in essence, result in condoning a previous infringement of the right to a fair trial. That breach results, in the view of the referring court, from the generalised deficiencies affecting the independence of the judiciary of the issuing Member State, which makes it impossible for that right to be properly safeguarded.

19. To begin my analysis, I will first provide preliminary comments on the context and content of the order for reference (A). I will then examine the questions referred by addressing, first, the unwritten ground for exceptionally refusing to execute an EAW which the Court developed in the context of the EAW Framework Decision and which has inspired the present reference concerned with, specifically, Framework Decision 2008/909 (B). I will then assess whether and to what extent that unwritten ground is transposable to that instrument, which constitutes another tool of judicial cooperation in criminal matters within the European Union, in respect of which that issue arises before the Court for the first time (C). Finally, I will address the question of what is the appropriate point in time by reference to which the application of that unwritten and exceptional ground must be made (D).

A. Preliminary observations on the context and content of the order for reference

20. As already noted, the present request for a preliminary ruling concerns the operation of Framework Decision 2008/909. That instrument falls within the area of freedom, security and justice which is governed by the principle of mutual recognition and relies on the mutual trust that the Member States must have in the criminal justice systems of the other Member States.⁸ In short, that mutual trust requires each Member State to presume that EU law, including fundamental rights guaranteed thereby, are respected in all other Member States.⁹

⁸ See, to that effect, *Opinion 2/13 (Accession of the European Union to the ECHR)* of 18 December 2014 (EU:C:2014:2454, paragraph 191 and the cited case-law).

⁹ See, for example, 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 40 and 41 and the case-law cited; ‘the judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*’).

21. It follows from those brief observations that Framework Decision 2008/909 is governed by the same general underlying principles as, for what is relevant in the present case, the EAW Framework Decision.¹⁰

22. As will be explained in more detail, that framework decision relies on the obligation to execute an EAW, subject only to the exhaustively listed grounds for refusal. At the same time, the Court made it clear that the execution of an EAW cannot expose the person concerned to a real risk that certain of his or her fundamental rights guaranteed by the Charter will be infringed nor, as it was held later, can its application condone certain breaches that have already occurred. To prevent those situations from materialising, the Court has developed an additional and unwritten ground for refusing to execute an EAW that can nevertheless apply only in exceptional circumstances.

23. In order to identify whether such circumstances exist, the Court developed a two-step examination to be applied by the respective national competent authority. In short, that examination requires the determination, as a *first* step, of whether there are, in the issuing Member State, systemic or generalised deficiencies that may affect the fundamental right at issue. If so, the *second* step of the examination requires the verification of whether those systemic or generalised deficiencies create a real risk of infringement of the fundamental right at issue or whether they have already tangibly affected that right.

24. I understand that it is the similarity of the principles underlying the judicial cooperation under the EAW Framework Decision, on the one hand, and Framework Decision 2008/909, on the other hand, that prompted the referring court to enquire whether the unwritten ground referred to above applies also in the context of that framework decision. At the same time, I understand that certain differences between those instruments lead the referring court to enquire whether that ground applies under the same modalities.

25. In addition to the main and implicit question relating to the applicability of the unwritten ground for exceptionally refusing to execute an EAW, developed in the Court's case-law on the EAW Framework Decision, the referring court raises, expressly or impliedly, four specific questions which can be presented as follows.

26. It wonders, first, whether it is possible for the two-step examination required by the unwritten and exceptional ground at issue to be limited to the first step or whether it is also necessary to carry out the second step and verify whether the identified deficiencies concerning the independence of the issuing Member State's judiciary affected MD's fundamental right to a fair trial before refusing to enforce the judgment of that other Member State (the third question read in conjunction with the first and second questions).

27. Second, in the specific circumstances of the present case, the referring court harbours doubts as to the point in time by reference to which that examination should be carried out: whether it is the date on which the initial judgment imposing the sentence was delivered, or the date on which the suspension of the execution of the sentence was revoked (first question), or whether it is the date on which the executing authority has to decide upon the recognition of the judgment and enforcement of the sentence (second question).

¹⁰ In the context of Framework Decision 2008/909 see, to that effect, recital 5 thereof and Commission notice – Handbook on the transfer of sentenced persons and custodial sentences in the European Union (OJ 2019 C 403, p. 2), paragraph 1.2.

28. Finally, the referring court is unsure whether the assessment of the situation prevailing in respect of the issuing Member State's judiciary is a matter for the national court, or whether it constitutes a question on the 'interpretation of the Treaties', reserved to the Court of Justice. In the latter case, the referring court wonders whether that judicial system was, on the relevant dates, in conformity with the principle of the rule of law (fourth question).

29. In the following sections of the present Opinion, I will address those questions together by recalling, first, the genesis of the unwritten ground for exceptionally refusing to execute an EAW before turning, second, to its applicability and the conditions for its application to Framework Decision 2008/909, including, third, its appropriate time frame.

B. The unwritten ground for exceptionally refusing to execute an EAW

30. The Court introduced the unwritten ground for exceptionally refusing to execute an EAW in its judgment in *Aranyosi and Căldăraru*¹¹ in which the surrender of the persons concerned was considered to carry the risk that those persons would be exposed to an infringement of the absolute prohibition of inhuman or degrading treatment,¹² given the systemic deficiencies in the detention conditions in the issuing Member State.

31. In that context, the Court recalled that the Member States are in principle obliged to execute an EAW,¹³ subject only to the grounds for the mandatory and optional refusal to execute, exhaustively laid down in Articles 3, 4 and 4a of the EAW Framework Decision. Neither of the grounds listed in those provisions applied to the situation at hand. However, the Court found that the execution of an EAW may also be refused, in exceptional circumstances, where *first*, there is a finding of systemic or generalised deficiencies which may affect the protection of a fundamental right concerned and where, *second*, there are substantial grounds for believing that the person concerned by the EAW will run a real risk that his or her fundamental right at issue will be breached if he or she is surrendered.¹⁴

32. The Court confirmed the application of this unwritten ground for exceptionally refusing to execute an EAW, and of the two-step examination on which it rests, in its judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*, in the context of the fundamental right to a fair trial before an independent tribunal, as laid down in the second paragraph of Article 47 of the Charter. It follows from that judgment that the executing judicial authority may refrain from giving effect to an EAW where, *first*, based on objective, reliable, specific and properly updated information concerning the functioning of the justice system in the issuing Member State, it observes that there is a real risk, regarding the lack of independence of the courts of that Member State due to systemic or generalised deficiencies, that the fundamental right to a fair trial may be infringed and where, *second*, in the particular circumstances of the case, there are substantial grounds for believing that, following his or her surrender, the requested person will run that risk.¹⁵

¹¹ Judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198; 'the judgment in *Aranyosi and Căldăraru*').

¹² Provided for in Article 4 of the Charter.

¹³ As provided for in Article 1(2) of the EAW Framework Decision.

¹⁴ Judgment in *Aranyosi and Căldăraru*, paragraphs 94 and 104. See also judgments of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)* (C-220/18 PPU, EU:C:2018:589), and of 15 October 2019, *Dorobantu* (C-128/18, EU:C:2019:857).

¹⁵ Judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*, paragraphs 61 and 68.

33. In its judgments in *Openbaar Ministerie (Independence of the issuing judicial authority)*¹⁶ and *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*,¹⁷ the Court confirmed that, where the national court is satisfied that the first condition of the two-step examination is met, it is *still* necessary to proceed to the second step and assess the specific circumstances of the situation.

34. Moreover, while the application of the unwritten ground for exceptionally refusing to execute an EAW was initially considered against factual circumstances which made it relevant to examine only a *prospective* infringement of the fundamental right at issue ('real risk'), the Court clarified that that ground applies also to situations entailing evidence of a *past* breach (where the EAW concerned was issued in order to execute a custodial sentence imposed in criminal proceedings which were tangibly influenced by the identified systemic or generalised deficiencies as regards the independence of the issuing Member State's judiciary).¹⁸

C. The unwritten ground for exceptionally refusing to execute an EAW and Framework Decision 2008/909

35. Before turning to the main issue of whether the unwritten ground for exceptionally refusing to execute an EAW also applies *mutatis mutandis* to Framework Decision 2008/909 (2), I will comment on whether such consideration is at all relevant for the situation in the main proceedings. Indeed, such relevance should exist only if the referring court finds itself in a situation in which the legal regime of that instrument imposes an *obligation* to recognise the judgment and enforce the sentence at issue (1).

1. On the existence of an obligation to recognise the judgment and enforce the sentence

36. I recall that the unwritten ground for exceptionally refusing to execute an EAW was developed to prevent a real risk of a breach of certain fundamental rights protected by the Charter (or to prevent a breach from being subsequently condoned), which, if such a need is established, leads to an exception to the *obligation* to execute an EAW.

37. Thus, for that ground to become relevant in the context of Framework Decision 2008/909, it must be determined that the executing authority finds itself in a situation in which it has an obligation to recognise the judgment that has been forwarded to it and enforce the sentence imposed by that judgment. However, not all cases that are covered by that instrument give rise to such an obligation.

38. Indeed, that instrument differentiates between various situations, depending on the relationship between the sentenced person concerned and the Member State to which the request for recognition has been sent.

¹⁶ 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, in particular paragraphs 60 and 61, 'the judgment in *Openbaar Ministerie (Independence of the issuing judicial authority)*').

¹⁷ Judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, paragraph 66.

¹⁸ Ibid., paragraphs 83, 86 and 102. As the Netherlands Government observes, that judgment was handed down after the order for reference in the present case was made on 30 December 2021. See, however, also judgment in *Openbaar Ministerie (Independence of the issuing judicial authority)*, paragraph 68.

39. Pursuant to Article 4(1) of Framework Decision 2008/909, the issuing Member State may address a request to that effect to: (a) the Member State of nationality of the sentenced person in which he or she lives; (b) the Member State of nationality, to which, while not being the Member State where he or she lives, the sentenced person will be deported, once he or she has served his or her sentence; or (c) to any other Member State, ‘the competent authority of which consents to the forwarding of the judgment and the certificate to that Member State’.

40. In other words, while the first two scenarios create an obligation to recognise the judgment and enforce the sentence at issue, the third is subject to consent that may or may not be given.¹⁹ Consequently, that third scenario does not, in and of itself, entail an obligation to grant a request sent to that effect.

41. The order for reference contains information explaining that MD is a national of the issuing Member State and a resident in the executing State. That information seems to indicate, subject to verification by the referring court, that he is not (also) a national of the latter. However, in my view, the differentiation established by Article 4(1) of Framework Decision 2008/909 ceases to be, in any event, relevant when the request for recognition has been made following a refusal to execute an EAW within the meaning of Article 4(6) of the EAW Framework Decision. Indeed, pursuant to that provision, as already pointed out, the executing Member State may refuse to execute an EAW if it undertakes to execute the sentence at issue.²⁰

42. I understand from the case file that this appears to be the situation in the main proceedings²¹ which is generally reflected in Article 25 of Framework Decision 2008/909, pursuant to which ‘the provisions of [that instrument] shall apply, *mutatis mutandis* to the extent they are compatible with provisions under [the EAW] 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 [the EAW Framework Decision]’.

43. I am of the view that, if the executing Member State were to be authorised to refuse, under Article 4(1)(c) of Framework Decision 2008/909, the recognition of a judgment after it had refused to execute an EAW based on Article 4(6) of the EAW Framework Decision, that would result in a situation which is incompatible with the latter instrument.²² I consider, therefore, that where the request for recognition and enforcement is made in that specific context, that leaves no room for discretion, even if, otherwise, the situation at hand would fall under the discretionary scenario envisaged in Article 4(1)(c) of Framework Decision 2008/909.²³

44. In those circumstances, whether the unwritten and exceptional ground referred to above applies to that instrument, and under what conditions, must be examined in greater detail.

¹⁹ As also explained in *Commission notice – Handbook on the transfer of sentenced persons and custodial sentences in the European Union* (OJ 2019 C 403, p. 2), ‘the Handbook on the transfer’, paragraphs 2.3.4 and 2.5. However, pursuant to Article 4(7) of Framework Decision 2008/909, Member States can waive the requirement of their consent in the situations described in that provision.

²⁰ See footnote 5 above. The objective of that provision of the EAW Framework Decision being the same as the purpose of Framework Decision 2008/909 expressed in its Article 3(1), namely to facilitate the social reintegration of the sentenced persons. See judgment of 13 December 2018, *Sut* (C-514/17, EU:C:2018:1016, paragraph 33 and the case-law cited).

²¹ See above, point 11 and footnote 5.

²² That reading is confirmed by the structure of the standard form provided in Annex I to Framework Decision 2008/909 which has to be forwarded to the executing Member State together with the judgment to be recognised. The ‘Box’ (g) of that form requires the issuing authority to indicate which of the scenarios envisaged by Article 4(1) of Framework Decision 2008/909, as described in point 39 of the present Opinion, applies. At the same time, it is stated that such indication is no longer necessary when the issuing authority confirms, by ‘ticking’ the Box (f), that the request constitutes a follow-up of the situation falling within Article 4(6) of the EAW Framework Decision.

²³ See above, point 39.

2. *Applicability of the unwritten ground for exceptionally refusing to execute an EAW to Framework Decision 2008/909*

45. To assess that question I will start by recalling my earlier observation that Framework Decision 2008/909, like the EAW Framework Decision, is an instrument within the area of freedom, security and justice.

46. Second, as has already been observed, just like the EAW Framework Decision, it relies on the principle of mutual recognition, which itself stems from the mutual confidence that Member States should have in each other's legal systems. That mutual trust requires that Member States, save in exceptional circumstances, consider that all the other Member States comply with EU law and the fundamental rights recognised by EU law.²⁴

47. Third, that is why, as a rule, when that instrument places upon the executing authority an obligation to recognise a judgment and enforce a sentence, a request made to that effect should be granted pursuant to Article 8(1) of Framework Decision 2008/909 subject only to the grounds for refusal exhaustively listed in Article 9(1) of that instrument.²⁵ I understand that none of those grounds apply in the case in the main proceedings.²⁶

48. However, as it has been recalled, mutual trust does not amount to a blind trust.²⁷ EU law must always be interpreted in conformity with the Charter, so as to avoid situations where its application would lead to a real risk of a breach of the fundamental rights guaranteed therein or, for what is relevant in the present case, where its application would condone certain situations in which such a breach has already occurred. That idea is captured in the 'fundamental rights' clause laid down in Article 3(4) of Framework Decision 2008/909 which, in the same way as Article 1(3) of the EAW Framework Decision, states that it shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU.²⁸

49. It follows from the Court's case-law, referred to in the previous section of this Opinion, that if the execution of an EAW were to lead to the enforcement of a sentence which had been adopted as a result of criminal proceedings which were affected by systemic or generalised deficiencies as regards the independence of the judiciary of the issuing Member State and, for that reason, tangibly influenced the handling of the given criminal case, that would result in an infringement of the concerned person's right to a fair trial being condoned.²⁹

²⁴ See above, footnotes 8 and 9.

²⁵ In other words, while the obligation to execute is the rule, the decision not to is an exception. As regards the EAW Framework Decision, see, most recently, judgment of 23 March 2023, *LU and PH (Lifting of the suspension)* (C-514/21 and C-515/21, EU:C:2023:235, 'the judgment in *LU and PH*', paragraphs 47 and 77 and the case-law cited).

²⁶ From my understanding, the fact that MD's trial was held *in absentia* was not relevant when the German authorities decided not to execute the EAW, and is not relevant either to the present case, in view of the conditions under which recognition of a judgment and enforcement of a sentence may be refused in such a situation in accordance with Article 9(1)(i) of Framework Decision 2008/909.

²⁷ See Lenaerts, K. 'La vie après l'avis: exploring the principle of mutual (yet not blind) trust', *Common Market Law Review*, Vol. 54, No 3, 2017, pp. 805 to 840, and Mitsilegas, V., 'Mutual Recognition and Fundamental Rights in EU Criminal Law', in Iglesias Sánchez, S. and González Pascual, M., *Fundamental Rights in the EU Area of Freedom, Security and Justice*, Cambridge University Press, 2021, pp. 253 to 271, esp. pp. 270 and 271.

²⁸ See also recital 13 of Framework Decision 2008/909.

²⁹ See, to that effect, judgments in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, paragraphs 83, 86 and 102 and in *Openbaar Ministerie (Independence of the issuing judicial authority)*, paragraph 68.

50. Given that Framework Decision 2008/909 and the EAW Framework Decision operate on the same underlying basis of mutual trust and mutual recognition which may lead to an effective enforcement of a custodial sentence, I consider that the unwritten ground permitting the exceptional refusal of a request made by the competent authority of another Member State must apply in respect of both of those instruments. Indeed, the practical operation of both instruments may give rise to a situation where it is necessary to prevent the negative consequences described in general terms in the preceding point.

51. Furthermore, the similarity of the underlying features of those instruments leads me to consider that the unwritten ground at issue must be applied under the same conditions irrespective of which of those two instruments is invoked. That means that, as also suggested by the Netherlands and Polish Government, as well as the Commission, the application of that ground must rest on the same two-step examination that the Court developed in the context of the EAW Framework Decision. Indeed, similar to what the Court observed in that context, I am of the view that, regardless of how serious the systemic or generalised deficiencies may be, the simple fact that they exist does not necessarily affect every decision that the courts of the Member State concerned may be led to adopt in each particular case.³⁰

52. This is what makes the second and individualised step of the examination necessary under the EAW Framework Decision and this is also what makes it necessary in the context of Framework Decision 2008/909.

53. That finding is, in my view, affected neither by the Court's judgment in *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*,³¹ nor by the absence, in Framework Decision 2008/909, of a provision equivalent to recital 10 of the EAW Framework Decision. The referring court relies on both of those elements to support its view that the application of the first step of the examination suffices.

54. As regards, first, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, the Court explained in that judgment, in short, what requirements 'an issuing judicial authority' within the meaning of the EAW Framework Decision must satisfy in order to be considered 'independent' and to thus be able to issue EAWs capable of triggering the legal effects that EU law attaches to it. The public prosecutors' offices at issue in those cases did not meet those requirements which disqualified them from the status of 'issuing judicial authority' within the meaning of the EAW Framework Decision.

55. In reaction to that judgment, the Court was faced with the question whether the conclusion reached in that case means that, where systemic or generalised deficiencies as regards the independence of a judiciary are identified, those deficiencies imply that *all* the courts of the affected Member State lose their status as 'an issuing judicial authority', which would then relieve the executing authority of the need to carry out the second step of the examination underlying the application of the unwritten ground for exceptionally refusing to execute an EAW.³²

³⁰ See, for instance, judgment in *Openbaar Ministerie (Independence of the issuing judicial authority)*, paragraph 42.

³¹ Judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)* (C-508/18 and C-82/19 PPU, EU:C:2019:456).

³² Judgment in *Openbaar Ministerie (Independence of the issuing judicial authority)*, paragraph 33.

56. The Court replied in the negative. It explained that the conclusion reached in the judgment in *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)* relied not on systemic or generalised deficiencies of the national system concerned, but on the fact that the public prosecutors' offices at issue in that case were subordinate to the executive which could instruct them as to whether an EAW should be issued in a given case or not.³³

57. By contrast, the situations which led to the development of the unwritten ground for exceptionally refusing to execute an EAW involve a scenario in which an EAW was issued by a *court*, whose structural independence from the executive is *prima facie* not to be doubted because, precisely, it is a court and not a public prosecutor. It follows from the Court's case-law that that premiss may be tested only in the exceptional situation of systemic or generalised deficiencies of the judicial system as such, which trigger doubts about how the courts which form part of that system operate *in fact*. However, because such systemic or generalised deficiencies may have a different impact across the judiciary at issue, it is necessary to establish not only that they exist (step one), but also that they are liable to affect, or have already affected, the particular case at hand (step two).

58. The same reasoning must, in my view, apply in the context of Framework Decision 2008/909. The operation of that instrument relies on mutual recognition of judgments handed down by the Member States' courts whose independence may not be doubted, save in exceptional circumstances. Since, as already observed, those exceptional circumstances may have a differentiated impact across the judiciary of the affected issuing State, their specific consequences, for the individual case, must be examined.

59. Second, and contrary to what the referring court suggests, the conclusion as to the applicability of *both* steps of the examination is not affected by the absence, in Framework Decision 2008/909, of a provision equivalent to recital 10 of the EAW Framework Decision. That recital states that the implementation of the mechanism of the EAW 'may be suspended only in the event of serious and persistent breach by one of the Member States of the principles referred to in [Article 2 TEU]' and in accordance with the procedure provided for in Article 7 TEU.

60. It is true that in its judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*, the Court relied on that recital, to state that the second step of the examination need not be carried out if the Council were to suspend the EAW Framework Decision in respect of the given Member State as a result of the procedure provided for in Article 7(2) TEU.³⁴

61. However, it does not follow that the absence of a provision in Framework Decision 2008/909 referring to that procedure means that that procedure may be replaced by a decision of a national court.

62. In the context of the EAW Framework Decision, the Court was very clear when it stated that the non-application of the second step of the examination would lead to a (unacceptable) general exclusion of the application of the principle of mutual trust and mutual recognition to the decisions adopted by the courts of the given Member State.³⁵

³³ Judgment in *Openbaar Ministerie (Independence of the issuing judicial authority)*, paragraphs 48 and 50.

³⁴ Judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*, paragraphs 70 to 72.

³⁵ See, to that effect, judgment in *Openbaar Ministerie (Independence of the issuing judicial authority)*, paragraph 43.

63. I am of the view that the same observation holds true in respect of Framework Decision 2008/909. As also observed in principle by the Netherlands and Polish Government as well as by the Commission, the absence of an express reference, in such an act of secondary law, to the suspension mechanism provided for in Article 7(2) TEU does not change the fact that the *general* suspension of its operation in respect of a given Member State can result only from that mechanism.

64. Finally, as regards the referring court's uncertainty as to whether the first step of the examination should be carried out by the national courts, or whether it is a matter of interpretation of EU law reserved to the Court of Justice, I fully acknowledge the referring court's concern when it comes to the significance of that determination. However, as regards the referring court's suggestion (as further reflected in the wording of the fourth question referred)³⁶ that such determination should be made in a uniform manner so as to avoid legal insecurity within the European Union, I observe that such a uniform determination may result only from the procedure based on Article 7(2) TEU, referred to above, which, in turn, results in the operation of the instrument in question being suspended vis-à-vis the given Member State. In the absence of such determination, Framework Decision 2008/909 continues to apply. That being said, for the reasons set out above, I consider that the fundamental rights clause of Article 3(4) thereof provides the executing authority with a possibility, and indeed an obligation, to prevent the condoning of a previous breach of the fundamental right to a fair trial by exceptionally refusing to recognise a judgment and enforce a sentence, under the conditions described above in the present Opinion.

65. In that respect, I also observe that, while the question of whether it is possible to transpose the unwritten ground for exceptionally refusing the execution of an EAW to Framework Decision 2008/909, as well as the conditions under which it applies, is a matter of interpretation of EU law which the Court may provide in response to a question referred to it pursuant to Article 267 TFEU, the determination as to whether that ground must be triggered in a given case depends on the factual circumstances of the case at issue and constitutes a matter of application of EU law falling within the jurisdiction of the national court alone.³⁷ That is true, not only as regards the second step of the examination concerned with the specific circumstances of the given case, but also as regards the first step concerned with the determination of the existence of the general or systemic deficiencies when it comes, in the present case, to the issuing Member State's judiciary. In accordance with that starting premiss, the case-law referred to throughout the present Opinion concerned with the EAW Framework Decision provides the national court with guidance on the factors to be taken into account for that purpose.³⁸

66. In view of the foregoing analysis, I therefore conclude that Article 3(4) of Framework Decision 2008/909 must be interpreted to the effect that, in situations where that instrument places an obligation on the executing authority to recognise a judgment and enforce a sentence, and where, *first*, that authority has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State, it may refuse such recognition and

³⁶ I note that the fourth question is asked only on a subsidiary basis, if the Court were to respond to the first and second questions to the effect that the executing authority cannot refuse recognition and enforcement of a request by the (sole) reference to the existence of the systemic or generalised deficiencies (because, as I understand the referring court's reasoning, that assessment would not be for the national court, but rather for the Court of Justice to make).

³⁷ See judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* (C-748/19 to C-754/19, EU:C:2021:931, paragraph 75 and the case-law cited), and, to that effect, judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi* (C-561/19, EU:C:2021:799, paragraph 35 and the case-law cited).

³⁸ See, for instance, judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, paragraphs 78 to 80 and the case-law cited.

enforcement only if, *second*, it concludes that, in the particular circumstances of the case, there are substantial grounds for believing that, having regard, inter alia, to the relevant information provided by the sentenced person concerned, relating to the manner in which his or her criminal case was handled, there has been a breach of that person's fundamental right to a fair trial, as laid down in the second paragraph of Article 47 of the Charter.

D. The relevant time frame reference

67. It remains to be established what is the relevant point in time by reference to which the application of the unwritten ground referred to above should be considered and by reference to which the two-step examination discussed in the present case should be made.

68. In the circumstances of the case in the main proceedings, the question which specifically arises is whether that point in time is, *first*, either at the adoption of the initial judgment by which a custodial sentence was imposed upon MD, or whether it could also be, *second*, the time when the suspension of the execution of the sentence was revoked or, whether that includes, *third*, the point in time at which the referring court is called upon to decide on the request for the enforcement of the sentence at issue.

69. I observe that the relevance of the *first* point in time identified by the referring court does not raise any particular concern. I understand that, at that moment, the custodial sentence at issue was imposed upon MD following a trial in which MD's guilt was assessed. Such proceedings must clearly offer the appropriate procedural guarantees, including the right to a fair trial enshrined in the second paragraph of Article 47 of the Charter, which is at issue in the main proceedings. Thus, as the Commission and the Polish Government also submit, the application of the unwritten ground considered by the referring court must logically refer to the situation prevailing in the issuing Member State at the time of those proceedings in order to determine whether they occurred against a background of systemic or generalised deficiencies affecting the independence of the issuing Member State's judiciary and whether, moreover, those deficiencies tangibly affected MD's fundamental right to a fair trial.

70. Should the national court consider that the two-step examination produces an answer in the affirmative, I take the view that, as the Commission also suggests, the examination of any subsequent decisions adopted following the initial judgment becomes redundant because the possibility of their recognition and enforcement is dependent on the possibility of recognition and enforcement of the initial judgment.

71. Should, however, the assessment carried out in respect of the initial judgment leave open the possibility of its recognition and enforcement, the question arises whether the application of the unwritten ground at issue may be made also by reference to the situation prevailing in the issuing Member State at the time when the revocation order was adopted (*second* point in time identified in point 68 above).

72. On that issue, the Polish Government and the Commission have diverging views. While the Commission considers that that point in time is relevant (albeit on a subsidiary basis, which I explained in points 70 and 71 above), the Polish Government argues to the contrary.

73. I agree, in principle, with the Commission, although that observation will be further nuanced below.

74. In support of its argument as to the irrelevance of the second point in time identified above, the Polish Government states that the revocation order does not fulfil the definition of ‘judgment’ within the meaning of Article 1(a) of Framework Decision 2008/909 and therefore does not fall within the scope of that instrument.

75. In this respect, it is true that Framework Decision 2008/909 applies, pursuant to Article 3(3) thereof ‘only to the recognition of judgments ... within the meaning of [that framework decision]’. Its Article 1(a) defines ‘judgment’ as ‘a final decision or order of a court of the issuing [Member] State imposing a sentence on a natural person’. It is also true that the sentence at issue was imposed upon MD by the initial judgment, while the subsequent order ‘merely’ revoked the initial suspension of its execution.

76. However, that observation does not mean, in my view, that that order is not relevant for the operation of Framework Decision 2008/909.

77. I note, in agreement with the Commission that, in the present case, the initial judgment could trigger the specific application of the recognition regime of Framework Decision 2008/909, only when the initial suspension of the execution of the sentence was revoked by the order at issue because, prior to its adoption, MD was not yet obliged to start serving the sentence imposed on him. It is, therefore, that order (considered together with the initial judgment) that in principle triggers, upon the satisfaction of the applicable conditions, the obligation on the part of the executing authority to enforce the sentence imposed. That, in my view, suffices not to rule out, at least at this stage of the analysis, the relevance of the second moment in time identified in point 68 above for the purposes of the consideration of the unwritten ground for exceptionally refusing to grant a request made under Framework Decision 2008/909.

78. That being said, the Polish Government also argues that the consideration of the situation prevailing in the issuing Member State at such point in time is irrelevant because the revocation order modified neither the nature, nor the quantum of the sentence imposed. That makes the consideration of the situation, in short, superfluous. The Polish Government further explained that the applicable national rules make the revocation of the suspension mandatory where the person concerned committed an intentional offence during the probation period³⁹ and that, in such a situation, the national court enjoys no discretion and must revoke the suspension of the sentence.

79. I observe that the Court was presented with a somewhat similar situation in *Ardic*.⁴⁰ In that case, the suspension of the execution of a custodial sentence was revoked because the person concerned did not comply with the conditions of probation. That person participated in the trial, culminating in the judgment imposing a custodial sentence, but did not take part in the subsequent proceedings in which the suspension of the execution of that sentence was revoked. In those circumstances, the Court was asked to determine whether the absence of the person concerned in the proceedings that led to that subsequent revocation decision may, under certain conditions, constitute a ground for the refusal to execute an EAW, pursuant to Article 4a(1) of the EAW Framework Decision.

³⁹ According to the Polish Government, that results from Article 75 of ustawa z dnia 6 czerwca 1997 r. – Kodeks karny (Law of 6 June 1997 on the Criminal Code).

⁴⁰ Judgment of 22 December 2017, *Ardic* (C-571/17 PPU, EU:C:2017:1026; ‘the judgment in *Ardic*’).

80. The Court provided a negative response and explained that the consideration of that ground for refusal may relate only to a decision, resulting from proceedings (held *in absentia*), that definitively rules on the guilt and, where relevant, on the custodial sentence. By contrast, that ground does not concern decisions on the execution or application of a custodial sentence, except where it modifies either the nature or quantum of that sentence and the authority which adopted it enjoyed discretion in that regard.⁴¹

81. It follows from the case file that the revocation order at issue in the present case modified neither the nature, nor the quantum, of the sentence imposed. Moreover, and subject to verification by the referring court, the Polish Government explained that the national court enjoyed no discretion as to whether to adopt it or not.

82. In my view, however, it does not follow from those elements that the circumstances in the issuing Member State that led to that revocation become necessarily irrelevant for the purpose of considering whether the unwritten ground for exceptionally refusing to recognise a judgment and enforce a sentence may be applicable *in casu*. The reason for this is that the person concerned may provide specific elements to indicate that the decisive circumstance that led to the revocation of the suspension of the execution of the sentence was a tangible consequence of the general or systemic deficiencies referred to above.

83. That being said, there are no such specific elements in the order for reference, nor is it specified therein exactly what was the decisive circumstance that led to the adoption of the revocation order at issue.

84. In that respect, the reasons leading to the decision to revoke a suspension of a custodial sentence may be diverse and depend on the applicable national law. I understand from the explanation provided by the Polish Government, as described in point 78 above, that the adoption of a revocation order, such as the one at issue, is an automatic consequence of a new (intentional) offence being committed.

85. In those conditions, should it be established that the revocation of the suspension at issue resulted automatically from MD's new criminal conviction, I consider, as the Commission also argues in principle, that the circumstances under which that conviction occurred (and therefore the time of that new criminal conviction) become relevant for the subsidiary application of the unwritten and exceptional ground at issue where the evidence put forward before the executing authority invites such an approach.

86. Indeed, should it be established that the systemic or generalised deficiencies affecting the issuing Member State's judiciary tangibly impacted on the concerned person's right to a fair trial within new proceedings in which he or she was found guilty of a new criminal offence, that finding will necessarily bear relevance for the assessment of the subsequent revocation for the purpose of the recognition and enforcement regime under Framework Decision 2008/909. That is because, without such a new criminal conviction, the revocation of the suspension of the execution of the sentence would not have occurred.⁴²

⁴¹ See also the judgment in *LU and PH*, paragraph 53.

⁴² See also, by analogy, the judgment in *LU and PH*, paragraphs 65 to 68 and 70 holding that the criminal conviction handed down *in absentia* and without which the suspension of the custodial sentence for the execution of which the EAW was issued in that case would not have been revoked is part of the 'trial resulting in the decision', within the meaning of Article 4a(1) of the EAW Framework Decision.

87. By contrast, as regards finally the *third point in time* mentioned in point 68 above, namely the point in time when the executing authority is called upon to decide on the recognition of the judgment and the enforcement of the sentence, like the Polish Government and the Commission, I fail to see its relevance for the purpose of the application of the unwritten ground at issue given that the situation in the issuing Member State at that time cannot retrospectively affect the criminal proceedings that have already been closed there.⁴³

88. In view of the foregoing analysis, I conclude that, where a request for recognition and enforcement under Framework Decision 2008/909 concerns a judgment by which a custodial sentence has been imposed, and whose execution – initially suspended – was subsequently ordered, without the nature or the quantum of that sentence being modified, the application of the unwritten ground for exceptionally refusing recognition of a judgment and enforcement of a sentence, as described above in point 66 of this Opinion, should be considered, and the two-step examination on which it relies made, by reference to the point in time when the initial judgment imposing the custodial sentence was handed down. If that examination does not lead to the conclusion that the recognition and enforcement must be refused, the same examination must be carried out, where the evidence before the authority of the executing Member State invites such an approach, by reference to the point in time when the decisive circumstance that caused the suspension of the execution of the sentence to be revoked occurred.

V. Conclusion

89. In the light of the foregoing, I propose that the Court answer the questions referred for a preliminary ruling by the Landgericht Aachen (Regional Court, Aachen, Germany) as follows:

Article 3(4) 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 in situations where that framework decision places an obligation on the executing authority to recognise a judgment and enforce a sentence, and where, *first*, that authority has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State, it may refuse such recognition and enforcement only where, *second*, it concludes that, in the particular circumstances of the case, there are substantial grounds for believing that, having regard, *inter alia*, to the relevant information provided by the sentenced person concerned, relating to the manner in which his or her criminal case was handled, there has been a breach of that person's fundamental right to a fair trial, as laid down in the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union.

Where the request for recognition of the judgment and enforcement of the sentence under Framework Decision 2008/909 concerns a judgment by which a custodial sentence has been imposed, and whose execution – initially suspended – was subsequently ordered, without the nature or the quantum of that sentence being modified, the two-step examination referred to above must be carried out by reference to the point in time when the initial judgment imposing

⁴³ I add that, contrary to the regime of the EAW Framework Decision, the Framework Decision 2008/909 does not entail the transferring of the sentenced person *from the executing Member State to the issuing one but the opposite* or it entails no transfer at all when the person concerned, such as MD, is already in the executing Member State.

the custodial sentence was handed down. If that examination does not lead to the conclusion that the recognition and enforcement must be refused, the same examination shall be carried out, where the evidence before the authority of the executing Member State invites such an approach, by reference to the point in time when the decisive circumstance that caused the suspension of the execution of the sentence to be revoked occurred.