

Case C-819/21**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

30 December 2021

Referring court:

Landgericht Aachen (Germany)

Date of the decision to refer:

6 December 2021

Applicant:

Staatsanwaltschaft Aachen

Subject matter of the main proceedings

Recognition and enforcement of foreign judgments in criminal matters – Framework Decision 2008/909/JHA – Right to a fair trial – Member State in which, in the view taken by the court in the executing Member State, the judicial system is no longer in conformity with the principle of the rule of law – Possibility for the court in the executing Member State to refuse to enforce the foreign judgment

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred 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 Council Framework Decision 2008/909/JHA of 27 November 2008, in conjunction with the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, to recognise the judgment of another Member State and to enforce the sentence imposed by that judgment in accordance with Article 8 of Council Framework Decision 2008/909/JHA

of 27 November 2008 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 Council Framework Decision 2008/909/JHA of 27 November 2008, 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 Council Framework Decision 2008/909/JHA of 27 November 2008 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 Council Framework Decision 2008/909/JHA of 27 November 2008, in conjunction with the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, 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?

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?

Provisions of EU law relied on

Charter of Fundamental Rights of the European Union, first paragraph of Article 47

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 (OJ 2008 L 327, p. 27)

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)

Provisions of national law relied on

Gesetz über die internationale Rechtshilfe in Strafsachen (Law on international mutual assistance in criminal matters; 'the IRG'), in particular the second sentence of Paragraph 73, which corresponds to Article 3(4) of Framework Decision 2008/909.

Succinct presentation of the facts and procedure in the main proceedings

- 1 The Polish national M.D. has his habitual residence in Germany. On 7 August 2018, the Sąd Rejonowy Szczecin-Prawobrzeże (District Court, Szczecin-Prawobrzeże, Poland) imposed a custodial sentence of six months on M.D. and suspended the execution of that sentence with probation. M.D. was not present at the trial held on 7 August 2018. According to the Sąd Okręgowy Szczecin (Regional Court, Szczecin, Poland), the summons for the trial of 7 August 2018 was sent to M.D. at his address in Pyrzyce (Poland), specified in the preliminary investigation.
- 2 The acts underlying the sentence, committed in the period from March 2009 to 31 July 2009, would be punishable under the Strafgesetzbuch (German Criminal Code; 'the StGB') as embezzlement and forgery under Paragraph 246(1) and Paragraph 267, respectively, of the StGB.
- 3 By order of 16 July 2019, the District Court, Szczecin-Prawobrzeże withdrew the probation and ordered the execution of the custodial sentence.
- 4 On 17 December 2020, the Generalstaatsanwaltschaft Köln (General Prosecutor's Office, Cologne, Germany) decided not to extradite M.D. despite the European arrest warrant issued by the Regional Court, Szczecin on 13 August 2020, on the grounds that his habitual residence was in Germany and he had objected to the extradition.

- 5 On 26 January 2021, the Regional Court, Szczecin requested the Generalstaatsanwaltschaft Berlin (General Prosecutor's Office, Berlin, Germany), pursuant to Article 4 of Framework Decision 2008/909, to assess whether to take over the custodial sentence imposed on M.D. The General Prosecutor's Office, Berlin forwarded that request to the competent Staatsanwaltschaft Aachen (Public Prosecutor's Office, Aachen, Germany) because M.D. resides within its jurisdiction in Germany.
- 6 The Public Prosecutor's Office, Aachen heard M.D. in relation to the request of the Regional Court, Szczecin.
- 7 On 18 June 2021, M.D. informed the Public Prosecutor's Office, Aachen by telephone that he was attempting to resolve the matter with the Polish authorities through a lawyer. M.D. also stated that he had not received a summons. In addition, he claimed that the allegations were also incorrect on the substance.
- 8 On 11 August 2021, the Public Prosecutor's Office, Aachen received M.D.'s written observations. In those observations, he stated that the passenger car which had been the subject of the sentence of 7 August 2018 was given to him as remuneration. He did not flee to Germany. Rather, he wanted to have a better life with his family in Germany. He has been living there with his family since 2011. No one had informed him of the proceedings being conducted against him in Poland. In 2016, he was contacted by a Polish public prosecutor. He subsequently travelled to Poland and gave a statement to the police. He also left his German address as a contact address. In the next letter that he received from the Polish authorities, he was informed that he had been finally sentenced.
- 9 On 2 November 2021, the Public Prosecutor's Office, Aachen requested the referring court to declare the enforcement of the judgment of the District Court, Szczecin-Prawobrzeże, in conjunction with the order of that court of 16 July 2019, to be permissible and to fix a custodial sentence of six months in accordance with the Polish enforcement regime. According to the Public Prosecutor's Office, Aachen, the conditions for the enforcement of the Polish judgment are met.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 10 The referring court first provides a very detailed overview of the Court's case-law on Polish judicial reform and on the rule of law in Poland, namely the judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586), 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 15 July 2021, *Commission v Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596), of 2 March 2021, *A. B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153) (including the subsequent decision given by the Polish Constitutional Court on 7 October 2021),

and of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim* (C-748/19 to C-754/19, EU:C:2021:931), and the orders of the Vice-President of the Court of 14 July 2021, *Commission v Poland* (C-204/21 R, not published), and of 27 October 2021, *Commission v Poland* (C-204/21 R, not published, EU:C:2021:877).

- 11 In addition, the 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) is reproduced in detail, and two judgments of the European Court of Human Rights are also mentioned, namely the two judgments delivered against Poland on 7 May 2021 (*Xero Flor w Polsce sp. z o.o. v. Poland*, application no. 4907/18) and on 8 November 2021 (*Dolińska-Ficek and Ozimek v. Poland*, application nos. 49868/19 and 57511/19).
- 12 The first question referred: the case-law reproduced and the Commission's measures lead the referring court to conclude that, on the basis of information that is objective, reliable, specific and properly updated concerning the operation of the judicial system in Poland, there are reasons to believe that the conditions prevailing in the Polish judicial system at the time of the judgment of the District Court, Szczecin-Prawobrzeże of 7 August 2018 and at the time of that court's order of 16 July 2019 were incompatible with M.D.'s fundamental right to a fair trial under the second paragraph of Article 47 of the Charter.
- 13 Therefore, it is unclear whether the decision to be taken in accordance with Article 3(4) of Framework Decision 2008/909 as to whether, on 7 August 2018 and 16 July 2019, respectively, the judicial system in the Republic of Poland complied with the principle of the rule of law under Article 2 TEU, and whether M.D.'s fundamental right to a fair trial under the second paragraph of Article 47 of the Charter was respected, is a matter for the Member State court called on to rule on the declaration of enforceability or constitutes a question on the 'interpretation of the Treaties', which is reserved to the Court of Justice of the European Union pursuant to point (a) of the first paragraph of Article 267 TFEU.
- 14 It is true that the Court held in the judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim* (C-748/19 to C-754/19, EU:C:2021:931), that Article 267 TFEU does not empower it to apply rules of EU law to a particular case, but only to rule on the interpretation of the Treaties and of acts adopted by the EU institutions.
- 15 However, the referring court takes the view that the question as to whether the conditions prevailing in a Member State were compatible with the principle of the rule of law under Article 2 TEU and the fundamental right of the person concerned to a fair trial under the second paragraph of Article 47 of the Charter constitutes a question that is so fundamental in nature that it should be ruled on not by the individual courts of the Member States, but in a uniform manner by the Court under point (a) of the first paragraph of Article 267 TFEU. Otherwise, there would be a risk of legal uncertainty due to divergent interpretations by the

Member State courts of provisions that are of central importance to the European Union as a community based on the rule of law.

- 16 The second question referred: the referring court takes the view that, at the time of the reference to the Court, there are indications, based on information that is objective, reliable, specific and properly updated concerning the operation of the judicial system in Poland, that the conditions prevailing in the Polish judicial system are incompatible with the principle of the rule of law, a common value enshrined in Article 2 TEU, as a result of various measures taken in the course of the ‘judicial reform’.
- 17 In its judgment of 15 July 2021, *Commission v Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596), the Court stated that compliance by a Member State with the values enshrined in Article 2 TEU – including, therefore, compliance with the principle of the rule of law – is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State.
- 18 The referring court takes the view that it follows that, even if the situation in a Member State complied with the principle of the rule of law at the time when the decision to be enforced or the related subsequent decisions were adopted by the judicial authorities of the requesting Member State, the declaration of enforceability must be refused in accordance with Article 3(4) of Framework Decision 2008/909 where, in the meantime – that is to say, before the ruling of the court called on to rule on the declaration of enforceability – the situation in the requesting Member State has changed in such a way that it is now no longer compatible with the principle of the rule of law. If the Member State concerned no longer complies with the principle of the rule of law, as a value enshrined in Article 2 TEU, it could, in accordance with the Court’s statements in the abovementioned judgment, lose the rights deriving from the application of the Treaties – and therefore also of the right, under Article 8 of Framework Decision 2008/909, to have its own judgment recognised and enforced by the judicial authorities of another Member State.
- 19 In that connection also, it is unclear whether the decision as to whether the Republic of Poland does not comply (or no longer complies) with the value of the rule of law enshrined in Article 2 TEU, and therefore loses its rights deriving from the application of the Treaties, can be taken by the courts of the Member States or is a matter for the Court of Justice of the European Union alone, in accordance with point (a) of the first paragraph of Article 267 TFEU.
- 20 The answer to that question is relevant to the present proceedings, because even if it were to be assumed – contrary to the view taken by the referring court – that, at the time of the decisions of the District Court, Szczecin-Prawobrzeże of 7 August 2018 and 16 July 2019, the conditions prevailing in Poland were not incompatible with the fundamental right to a fair trial, there are in any event concrete reasons, based on current developments, to believe that the principle of the rule of law

enshrined in Article 2 TEU is not (or is no longer) complied with in the Republic of Poland.

- 21 In support of that view, the referring court states that, in Case C-204/21, the Republic of Poland did not comply, or did not sufficiently comply, with the interim measures ordered by the Vice-President of the Court of Justice on 14 July 2021, with the result that the Vice-President of the Court of Justice imposed a periodic penalty payment of EUR 1 000 000 per day by order of 27 October 2021.
- 22 In a judgment of 7 October 2021, the Polish Constitutional Court, in response to the judgment of 2 March 2021, *A. B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153), held that parts of EU law, in particular the attempt of the Court of Justice of the European Union to interfere in the Polish judiciary, infringed the Polish Constitution.
- 23 The referring court concludes from that that the Republic of Poland no longer feels bound by the precedence of EU law.
- 24 The third question referred: in the context of this question, the referring court refers once again to the judgment of the Court of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586), in which the Court of Justice justified the requirement to assess a specific breach of, or threat to, fundamental rights with regard to the European arrest warrant by pointing to the wording in recital 10 of Framework Decision 2002/584, which confers on the European Council sole decision-making power with regard to the suspension of the European arrest warrant mechanism.
- 25 However, Framework Decision 2008/909 does not contain a comparable provision. Therefore, it is unclear whether, in the present case also, it is necessary to make an assessment – in accordance with the two-step assessment approach established by the Court in the judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586) – as to whether M.D.’s sentencing by the District Court, Szczecin-Prawobrzeże of 7 August 2018, in conjunction with that court’s order of 16 July 2019, exposed him to a real risk of a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial.
- 26 The referring court takes the view that a specific assessment of a breach of, or threat to, M.D.’s fundamental rights is not necessary because Framework Decision 2008/909 does not contain a provision which is comparable to recital 10 of Framework Decision 2002/584. It also refers to the judgment of the Court 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), which also concerned the scope of the requirement of judicial independence and in which the Court held that the mere abstract possibility of political involvement by the Minister for Justice was sufficient to establish the risk that the German public prosecutors’ offices could be exposed to the risk of being influenced by the executive in their decision to issue a

European arrest warrant. For that reason, the German public prosecutors' offices could not be an 'issuing judicial authority' within the meaning of Article 6(1) of Framework Decision 2002/584.

- 27 The referring court takes the view that the two-step approach developed by the Court in relation to the execution of a European arrest warrant cannot be applied *mutatis mutandis* to the decision on the enforcement of a judgment either, since the issues involved are not comparable.
- 28 That is because, in the abovementioned 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 Court stated that – after establishing an objective breach of the principle of the rule of law – it is necessary to assess, as a second step, whether the person concerned will, following his or her surrender to the issuing judicial authority, run a real risk of a breach of his or her fundamental right to an independent tribunal and thus of the essence of his or her fundamental right to a fair trial being compromised. Therefore, the object of the specific assessment required by the Court was a prognosis of the expected course of the proceedings after the execution of the European arrest warrant. However, it is the referring court's understanding that the Court does not require an *ex post* consideration of the question as to whether the very issuing of the European arrest warrant may have infringed the fundamental right of the person concerned to an independent tribunal.
- 29 It is in the nature of the present case that a prognostic decision is not possible, as the proceedings are concluded with the decision on the declaration of enforceability in the bilateral relationship between the Federal Republic of Germany and the Republic of Poland.
- 30 Therefore, the only conceivable possibility in the present case would be an assessment as to whether the breach of the principle of the rule of law established in a first step also had an effect on the specific case in a second step. If, however, as in the case of the Republic of Poland in the present dispute, the independence of the courts as a whole is curtailed by structural intervention in the judicial system, no proceedings at all are conceivable in which the possibility of a breach of the fundamental right to a fair trial could be ruled out. Whether the judicial reforms already adopted as at 7 August 2018 and 16 July 2019, respectively, affected the decision of the District Court, Szczecin-Prawobrzeże in the present case can no longer be determined *ex post*. In any event, the possibility that they did affect it cannot be ruled out with the required degree of certainty.
- 31 It follows that an assessment of a specific breach of, or threat to, fundamental rights is *a fortiori* not required if the court of the executing Member State called on to rule on the declaration of enforceability refuses to recognise the judgment on the basis of Article 3(4) of Framework Decision 2008/909, in conjunction with Article 2 TEU, because the judicial system in the requesting Member State at the

time of the ruling on the declaration of enforceability no longer complies with the principle of the rule of law enshrined in Article 2 TEU.

- 32 The referring court does not make any observations on the fourth question referred.

WORKING DOCUMENT