

Case C-215/24 [Fira] ⁱ**Request for a preliminary ruling****Date lodged:**

20 March 2024

Referring court:

Tribunal Judicial da Comarca do Porto – Juízo Local Criminal de Vila Nova de Gaia (Portugal)

Date of the decision to refer:

19 March 2024

Applicant:

Ministério Público

Defendant:

YX

**Tribunal Judicial da Comarca do Porto (District Court, Oporto, Portugal)
Juízo Local Criminal de Vila Nova de Gaia (Local Criminal Court, Vila Nova de Gaia, Portugal) – Juiz 2 (Judge No 2)**

Ordinary procedure (Single Judge)

- 1 Judge No 2 from the Juízo Local Criminal de Vila Nova de Gaia (Local Criminal Court, Vila Nova de Gaia, Portugal) within the Tribunal Judicial da Comarca do Porto (District Court, Oporto, Portugal) has submitted the present request for a preliminary ruling in criminal proceedings No 4860/13.7TB VNG brought by the Ministério Público (Office of the Public Prosecutor), which resulted in the conviction of YX [...].

I. Introduction

- 2 On 9 October 2018, YX was sentenced to six months' imprisonment, replaced by a sentence of 180 day-fines, for having committed the offence of tax fraud

ⁱ The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

established and sanctioned – at the time of the events – by Article 23(1) and (4) of Decreto-Lei n.º 20-A/90 (Decree-Law No 20-A/90) of 15 January 1990. This decision can be explained by the fact that Portuguese law requires a balancing of interests and an analysis of the appropriateness of imposing an alternative sentence when an individual is given a custodial sentence that meets the formal requirements for such an alternative sentence and is likely, *in abstracto*, to be the subject of such a decision. Alternative sentences include, in particular, sentencing in the form of fines, as provided for in Article 45 of the Portuguese Criminal Code: ‘1. *If a prison sentence of up to one year is imposed, this sentence shall be replaced by a fine or another applicable non-custodial sentence, unless the need to prevent future offences being committed requires that the prison sentence be served.*’

- 3 As the fine had not been paid, the enforcement of the principal sentence of six months’ imprisonment was ordered in accordance with Article 45(2) of the Portuguese Criminal Code, which provides that ‘*if the fine is not paid, the convicted individual shall serve the prison sentence imposed in the judgment. The provisions of Article 49(3) of that Code shall apply by analogy.*’
- 4 Article 49(3) of the Portuguese Criminal Code states that: ‘*Enforcement of the alternative prison sentence may be suspended, for a period of one to three years, if the convicted individual demonstrates that the fine has not been paid for reasons for which he or she is not responsible, provided that this suspension is contingent upon fulfilment of obligations or rules of conduct that are not economic or financial in nature. The alternative prison sentence shall be served if the obligations or rules of conduct are not fulfilled, and shall be declared extinguished if they have been fulfilled.*’
- 5 Because the convicted individual YX did not prove that the non-payment of the fine was not his fault, the court revoked the alternative sentence and ordered that the custodial sentence be served by issuing the corresponding arrest warrants.
- 6 However, this warrant could not be served because the individual concerned went abroad, which led to him being declared a fugitive from justice for the purposes of the sentence imposed.
- 7 Steps taken to locate the individual concerned revealed that he was living in Spain.
- 8 A European arrest warrant (‘EAW’) was then issued on 22 February 2022 with a view to obtaining the surrender of the individual concerned, so that he could serve the six-month custodial term to which he had been sentenced.
- 9 When this EAW was served, the Spanish judicial authorities refused to surrender the individual concerned on the grounds that he was legally resident in Spain and wished to serve his sentence in that country, but undertook to recognise the (Portuguese) sentence handed down and to enforce it in Spain.

- 10 In this respect, the Spanish authorities have complied with Article 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 (OJ 2008 L 327, p. 27, 'Framework Decision 2008/909'), issuing a declaration in which they state that they recognise the sentence imposed by the Portuguese court, thus preventing the impunity of the convicted individual.
- 11 However, on 11 October 2023, in accordance with Article 80 of the Spanish Criminal Code, which allows the court to impose a suspended sentence of between two and five years in the case of a custodial sentence of less than two years in criminal proceedings under Spanish law, the Juzgado Central de lo Penal n.º 1 de Madrid (Central Criminal Court No 1, Madrid, Spain) suspended for a period of two years the enforcement of the sentence of six months' imprisonment imposed on YX for having committed the offence in question.
- 12 As the Portuguese Public Prosecutor's Office could not agree with the Spanish court's decision, that office requested that a question be referred to the Court of Justice of the European Union for a preliminary ruling on the **following grounds**:

II. Grounds

- 13 The provisions of Framework Decision 2008/909 and of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision (OJ 2002 L 190, p. 1, 'Framework Decision 2002/584') are applicable to the present case.
- 14 According to the Court's settled case-law, a framework decision is binding on national authorities, including national courts, even if it has no direct effect, imposing on national courts an obligation to interpret national law in conformity with EU law. When those courts apply domestic law, they are therefore bound to interpret it in the light of the wording and the purpose of the framework decision concerned (judgments of 29 June 2017, *Popławski*, C-579/15, EU:C:2017:503, paragraph 31, and of 8 November 2016, *Ognyanov*, C-554/14, EU:C:2016:835, paragraphs 62 to 64).
- 15 Furthermore, 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 is part (judgment of 16 July 2015, *Lanigan*, C-237/15 PPU, EU:C:2015:474, paragraph 35).
- 16 According to Article 1(2) of Framework Decision 2002/584, Member States are required to execute any EAW on the basis of the principle of mutual recognition and in accordance with the provisions of that framework decision.

- 17 Article 4(6) of Framework Decision 2002/584 lays down a ground for optional non-execution of a European arrest warrant whereby the executing judicial authority may refuse to execute such a warrant that has been 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 ensure that that sentence is enforced in accordance with its domestic law.
- 18 Furthermore, Article 25 of Framework Decision 2008/909 states that the provisions of that framework decision shall apply, to the extent they are compatible with the provisions of Framework Decision 2002/584, to enforcement of sentences in cases where a Member State undertakes to enforce the sentence in cases pursuant to Article 4(6) of that framework decision. In this case, the Spanish judicial authorities invoked the ground for optional non-execution of the EAW based on the fact that the requested person is resident in that country, and undertook to enforce the sentence.
- 19 Article 8 of Framework Decision 2008/909 lays down the limited conditions under which the competent authority of the executing State may adapt the sentence imposed in the issuing State. In the light of the spirit and substance underlying this framework decision, these conditions appear to be the sole exceptions to the obligation imposed on the executing authority to recognise the judgment forwarded to it and to enforce the sentence, which is to correspond in its length and nature to the sentence imposed in the judgment delivered in the issuing State.
- 20 This court considers that the executing State cannot retroactively modify the decision of the court in the issuing State, ultimately substituting its own decision for that of the court that handed down the sentence. Consequently, the authority of the executing State that is competent to enforce the sentence cannot suspend enforcement, even if this possibility exists for domestic judgments. A decision to the contrary could undermine the objectives sought by Framework Decision 2008/909, including observance of the principle of mutual recognition, which is the cornerstone of judicial cooperation in criminal matters in the European Union.
- 21 Indeed, the fact that a national court in the executing State grants a suspension of the actual custodial sentence (even though that suspension is in accordance with the provisions of its domestic law governing decisions of its courts) after having recognised the sentencing judgment delivered by a court in the [issuing] State, where the competent authorities of the issuing State have not suspended that sentence under their domestic law, would undermine the special mutual trust that the Member States have in each other's judicial systems.
- 22 This court considers that the Court of Justice recognised this impossibility, at least implicitly, in paragraph 65 of the judgment of 11 March 2020, *SF* (European arrest warrant – Guarantee of return to the executing State) (C-314/18,

EU:C:2020:191), which states that the provisions of Article 8 of Framework Decision 2008/909 lay down strict conditions governing the adaptation, by the competent authority of the executing State, of the sentence imposed in the issuing State, *‘those conditions being the sole exceptions to the obligation imposed on that authority, in principle, to recognise the judgment forwarded to it and to enforce the sentence, which is to correspond in its length and nature to the sentence imposed in the judgment delivered in the issuing State (see, to that effect, judgment of 8 November 2016, Ognyanov, C-554/14, EU:C:2016:835, paragraph 36)’*. This position is also confirmed in paragraph 35 of the judgment of 15 April 2021, AV (Aggregate Sentence) (C-221/19, EU:C:2021:278).

- 23 As the Court held in paragraph 2 of the operative part of the judgment of 11 March 2020, SF (European arrest warrant – Guarantee of return to the executing State) (C-314/18, EU:C:2020:191): *‘Article 25 of Framework Decision 2008/909, as amended by Framework Decision 2009/299, must be interpreted as meaning that, when the execution of a European arrest warrant issued for the purposes of criminal proceedings is subject to the condition set out in Article 5(3) of Framework Decision 2002/584, as amended by Framework Decision 2009/299, the executing Member State can, in order to enforce the execution of a custodial sentence or a detention order imposed in the issuing Member State on the person concerned, adapt the duration of that sentence or detention only within the strict conditions set out in Article 8(2) of Framework Decision 2008/909, as amended by Framework Decision 2009/299’*.
- 24 This court believes that the same reasoning must be followed in the present case.
- 25 The adaptation or modification of the sentence by the competent authority of the Spanish court (by suspending the sentence) other than in the cases provided for in Article 8 of Framework Decision 2008/909, applicable by virtue of Article 25 of that decision, cannot be accepted since, if it were to be accepted, the principle of mutual recognition would be infringed.
- 26 This court also considers that, although Article 17 of Framework Decision 2008/909 provides that the enforcement of a sentence is governed by the law of the executing State, it refers only to measures intended to ensure the material enforcement of a custodial sentence. There is no basis for interpreting the provisions of that article as meaning that its material scope includes a decision to suspend enforcement of a custodial sentence to which the requested person has been sentenced.
- 27 In short, the Spanish court undertook to enforce the decision because it invoked its right to refuse to execute the EAW on the basis that the convicted individual was resident in Spain. Following that undertaking, the criminal conviction delivered by the Portuguese court was forwarded to it for recognition and enforcement, in accordance with Framework Decision 2008/909. The Spanish court may not invoke its domestic legislation to review or alter the nature of the sentence imposed on the sentenced individual other than in accordance with the conditions

and limitations resulting from Articles 8(2) and (4), 17(2) and 19(2) of Framework Decision 2008/909/EC.

- 28 As the Court of Justice held in the judgment of 29 June 2017, *Popławski* (C-79/15, EU:C:2017: 503, paragraph 22), any refusal to execute an EAW under Article 4(6) of Framework Decision 2002/584 presupposes an actual undertaking on the part of the executing Member State to execute the sentence imposed on the requested person in the issuing State, because any execution of an EAW must be preceded by the executing judicial authority's examination of whether it is actually possible to enforce the sentence. Consequently, if the executing Member State is not able to guarantee that the sentence will be enforced, it is required to avoid the impunity of the requested person and must execute the EAW by surrendering that individual to the issuing Member State.
- 29 When Spain refused to execute the EAW, it therefore declared its willingness to take on the enforcement of the sentence in its entirety, without the possibility of transforming the custodial sentence into an alternative measure (as the strict conditions for doing so had not been met). Such a transformation would require the decision of the court in the issuing State to be modified, which Framework Decision 2008/909 does not allow.
- 30 Furthermore, this court considers that, in accordance with the provisions of the abovementioned international instruments, the Spanish judicial authorities should in any event have informed the issuing State in advance of the possibility that the custodial sentence might be suspended, in order to allow the issuing State to respond in accordance with Articles 12 and 13 of the framework decision.

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- 31 In the light of the foregoing, the factual framework at issue in the present case involves the application of rules of Union law. This context makes it difficult for this court to decide whether to pursue or close the case. Given this situation, it is essential that a detailed analysis of the facts and the relevant legal provisions be carried out.
- 32 In accordance with Article 19(3)(b) of the Treaty of Lisbon, the Court of justice's task is to '*give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions*'.
- 33 Similarly, Article 267 TFEU provides that '*the Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: [...] (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union*' and that '*where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon*'.

- 34 Since the conditions laid down by Union law have been met, a preliminary ruling is, unless this court is mistaken, relevant and necessary in order to ensure its primacy.
- 35 This case raises a reasonable doubt as to the interpretation and application of Union law, which has crucial consequences for the final outcome of the case. Referral to the Court of Justice of the European Union is therefore necessary in order to avoid divergent interpretations of the provisions of Union law in question. In addition, having consulted the national case-law and the case-law of the Court of Justice, this court considers that the question at issue does not appear to have been the subject of an in-depth analysis that could dispel the doubt raised and that the interpretation of the rules laid down still creates difficulties.
- 36 **The Court of Justice therefore has jurisdiction to give preliminary rulings on the interpretation of the Treaty and any court or tribunal of a Member State may, when such a question is raised before it, request that the Court give a ruling** if it considers that a decision **on the question** is necessary to enable it to give judgment. This is the well-known mechanism of referral for preliminary rulings from national courts to European courts. The first and principal function of this mechanism is to obtain an interpretation and, through that interpretation, a uniform application of Union law in all the Member States so that its effectiveness is always the same.
- 37 The decision to request a preliminary ruling rests solely with the court, which may do so **of its own motion**. Similarly, it is up to the judge to **formulate the questions** to be submitted to the Court of Justice.
- 38 In the present case, this court considers that the Court's reply is **essential in order to decide on the next steps in the proceedings**.

III. QUESTIONS REFERRED FOR A PRELIMINARY RULING

For these reasons, Judge No 2 from the Local Criminal Court in Vila Nova de Gaia (Portugal) within the Oporto District Court hereby decides to **stay the proceedings until the Court of Justice of the European Union has given a preliminary ruling on the following questions**, in accordance with the first paragraph of Article 267(b) TFEU:

1. **After having refused to execute a European arrest warrant pursuant to Article 4(6) of Framework Decision 2002/584 on the ground of the place of residence of the convicted individual, and after having recognised the sentencing judgment, may the executing State rely on the application of its domestic law and its jurisdiction as the executing State to suspend the actual custodial sentence imposed by the issuing State, when the procedure for enforcement of that judgment has already begun?**

2. May the judicial authority of the executing State amend the decision of the judicial authority of the issuing State where that decision has become *res judicata*, other than in the cases provided for in Article 8 and Article 17(1) and (2) of Framework Decision 2008/909?

3. Should Article 17(1) of Framework Decision 2008/909 be interpreted as meaning that it allows the executing State to grant a suspension of the actual custodial sentence, by applying the conditions of its domestic law, where the competent authorities of the issuing State have not done so in accordance with their law?

In the event that the previous questions are answered in the affirmative:

4. In view of the provisions of Articles 12, 13 and 17(3) of Framework Decision 2008/909, should the Spanish judicial authorities (the executing State) have informed the issuing State in advance of their views on the possibility of suspending the custodial sentence imposed on the requested person?

IV. URGENT PRELIMINARY RULING PROCEDURE

Article 107(1) of the Rules of Procedure of the Court of Justice states as follows:

‘1. A reference for a preliminary ruling which raises one or more questions in the areas covered by Title V of Part Three of the Treaty on the Functioning of the European Union may, at the request of the referring court or tribunal or, exceptionally, of the Court’s own motion, be dealt with under an urgent procedure derogating from the provisions of these Rules. 2. The referring court or tribunal shall set out the matters of fact and law which establish the urgency and justify the application of that exceptional procedure and shall, in so far as possible, indicate the answer that it proposes to the questions referred. [...]’

There is no doubt that the case in question falls within the scope of Title V of Part Three of the Treaty on the Functioning of the European Union, and more specifically Chapter 4 thereof, entitled ‘Judicial Cooperation in Criminal Matters’. The article that opens this chapter – Article 82 TFEU – enshrines the principle of mutual recognition of judgments and judicial decisions between Member States.

Furthermore, the present reference for a preliminary ruling arises in the context of a refusal to surrender in execution of an EAW in which the Spanish judicial authorities, having taken account of the convicted individual’s lawful residence in Spain and his wish to serve the sentence in that country, undertook to recognise and enforce the sentence handed down, but decided to apply their domestic law by suspending the sentence. The urgent procedure should therefore be applied, as the questions raised are crucial for the assessment of the convicted individual’s legal situation in the context of the ongoing proceedings.

Accordingly, this court proposes **that the questions referred for a preliminary ruling should be answered as follows:**

1. This Court considers that the principle of mutual recognition means that a judicial decision taken by the judicial authorities of a Member State in accordance with its law may be directly enforced by the judicial authorities of another Member State with effects at least equivalent to those of a decision taken by a national judicial authority. In the event of a refusal to execute the EAW, as in the present case, the executing State is therefore required to agree to enforce the sentence under conditions identical to those under which it was enforced in the issuing State.

2. The referring court considers that the question should be answered in the negative, since Articles 8 and 17(2) of Framework Decision 2008/909 lay down the strict circumstances in which the issuing State may adapt the sentence. Thus, *'the power to adapt the sentence can only be used very restrictively [...] – because of the general objective of mutual recognition', 'which is, in the final analysis, to give a final decision full and direct effect throughout the Union, because recognising the effects of a foreign decision also means recognising it as valid where it concerns citizens – and appropriate, if account is taken of the mutual trust placed in each of the different legal and judicial systems, which is motivated by their legal and cultural proximity and by their common subordination to the protection of fundamental rights'* (judgment of the Third Chamber of the Supremo Tribunal de Justicia (Supreme Court, Portugal) of 13 April 2011, Case No 53/10.3 YREVR.S2).

3. Article 17 of Framework Decision 2008/909 should be interpreted as meaning that it does not allow the actual custodial sentence imposed in the issuing State to be modified by an alternative sentence, more specifically by suspension of the sentence on the basis of the requirements of the domestic law of the executing State, where the competent authorities of the issuing State have not done so in accordance with their law.

4. With regard to the final question, this court considers that the preceding questions must be answered in the negative. However, in the event that the Court of Justice does not share that view, this court proposes to reply that the executing State should inform the issuing State of its views on the possibility of suspending the custodial sentence to which the defendant has been sentenced before adapting that sentence in accordance with its domestic law, under Article 12(1) and for the purposes of Articles 13 and 17(3) of Framework Decision 2008/909, since in that case the issuing State could either accept the application of those provisions or withdraw the certificate.

[...] [Considerations relating to the national proceedings]

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Vila Nova de Gaia,

The Trainee Judge

Done and electronically signed on 19 March 2024

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