

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

3 March 2020 (*)

(Reference for a preliminary ruling — Judicial cooperation in criminal matters — Framework Decision 2002/584/JHA — European arrest warrant — Article 2(2) — Execution of a European arrest warrant — Removal of verification of the double criminality of the act — Conditions — Offence punishable by the issuing Member State by a custodial sentence for a maximum period of at least three years — Amendment of the criminal legislation of the issuing Member State between the date of the acts and the date of issue of the European arrest warrant — Version of the law to be taken into account in verifying the maximum sentence threshold of at least three years)

In Case C-717/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hof van beroep te Gent (Court of Appeal, Ghent, Belgium), made by decision of 7 November 2018, received at the Court on 15 November 2018, in proceedings relating to the execution of a European arrest warrant issued against

X,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Arabadjiev, E. Regan, P.G. Xuereb and L.S. Rossi (Rapporteur) and I. Jarukaitis, Presidents of Chambers, M. Ilešič, J. Malenovský, L. Bay Larsen, T. von Danwitz, C. Toader, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: M. Bobek,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 16 September 2019,

after considering the observations submitted on behalf of:

- the Procureur-generaal, by I. De Tandt,
- X, by S. Bekaert and P. Bekaert, advocaten, and by G. Boye, abogado,
- the Belgian Government, by C. Van Lul and C. Pochet and by J.-C. Halleux, acting as Agents,
- the Spanish Government, initially by M. Sampol Pucurull, subsequently by S. Centeno Huerta, acting as Agents,
- the European Commission, by S. Grünheid and R. Troosters, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 November 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(2) of 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).

2 The request has been made in the context of the execution in Belgium of a European arrest warrant issued by the Audencia Nacional (National High Court, Spain) in respect of X.

Legal context

EU law

3 Recitals 5 and 6 of Framework Decision 2002/584 state:

‘(5) The objective set for the [European] Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Furthermore, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.

(6) The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the “cornerstone” of judicial cooperation.’

4 Article 2 of that framework decision, entitled ‘Scope of the European arrest warrant’, provides:

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

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

– ...

– terrorism;

– ...

...

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

5 Article 8 of the framework decision, headed ‘Content and form of the European arrest warrant’, states, in paragraph 1 thereof:

‘The European arrest warrant shall contain the following information set out in accordance with the form contained in the Annex:

...

(f) the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State;

...’

6 Article 17(1) of Framework Decision 2002/584 is worded as follows:

‘A European arrest warrant shall be dealt with and executed as a matter of urgency.’

7 The annex to that framework decision contains a European arrest warrant form. That form provides, in section (c), that ‘indications on the length of the sentence’ are to include, according to point 1 of that section, the ‘maximum length of the custodial sentence or detention order which may be imposed for the offence(s)’ and, according to point 2 of that section, the ‘length of the custodial sentence or detention order imposed’.

8 That form also provides, in section (e), entitled ‘Offences’, for the communication of information on the offences to which the European arrest warrant ‘relates’ and, in particular, for a ‘description of the circumstances in which the offence(s) was (were) committed, including the time, place and degree of participation in the offence(s) by the requested person’.

Spanish law

9 Article 578 of the Código Penal (Criminal Code), in the version in force at the date of the facts in the main proceedings, laid down a prison sentence of a maximum of two years for the offence of glorification of terrorism and humiliation of the victims of terrorism.

10 On 30 March 2015, Article 578 of that code was amended, such that that offence would henceforth be punishable inter alia by a prison sentence of a maximum of three years.

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 By a judgment of 21 February 2017, the Audiencia Nacional (National High Court, Spain) convicted X, inter alia, for acts, committed between 1 January 2012 and 31 December 2013, constituting the offence of glorification of terrorism and humiliation of the victims of terrorism, set out in Article 578 of the Criminal Code as was in force at the time of those acts, and imposed the maximum prison sentence of two years. That judgment has become final in so far as the Tribunal Supremo (Supreme Court, Spain), by a judgment of 15 February 2018, dismissed the appeal lodged against it.

12 X having left Spain for Belgium, the Audiencia Nacional (National High Court) issued, on 25 May 2018, a European arrest warrant against him and, on 27 June 2019, an additional European arrest warrant, for the offence of ‘terrorism’, within the meaning of the second indent of Article 2(2) of Framework Decision 2002/584, with a view to the execution of the sentence imposed in its judgment of 21 February 2017.

13 In order to ascertain whether, in accordance with Article 2(2) of Framework Decision 2002/584, the offence at issue was punishable under Spanish law by a custodial sentence or a detention order for a maximum period of at least three years and therefore gave rise to surrender without verification of

the double criminality of the act, the Rechtbank van eerste aanleg Oost-Vlaanderen, afdeling Gent (Court of First Instance, East Flanders, Ghent Division, Belgium), as executing judicial authority, took into account Article 578 of the Criminal Code in the version in force at the date of the facts in the main proceedings. After finding that there was no double criminality of the act, that court, by an order of 17 September 2018, refused execution of the additional European arrest warrant of the previous 27 June.

- 14 Hearing the appeal brought by the Procureur-generaal (public prosecutor, Belgium) against that order, the Hof van beroep te Gent (Court of Appeal, Ghent, Belgium) entertains doubts as to the version of the law of the issuing Member State to be taken into account for determining whether the condition setting the threshold of a custodial sentence for a maximum period of at least three years, laid down in Article 2(2) of Framework Decision 2002/584, is satisfied. It is of the view that, in the light of Article 578 of the Criminal Code, in the version in force on the date of the facts in the main proceedings, the Rechtbank van eerste aanleg Oost-Vlaanderen, afdeling Gent (Court of First Instance, East Flanders, Ghent Division) was entitled to verify the double criminality of the act and to refuse execution of the additional European arrest warrant, since, in that version, Article 578 of that code provided for a custodial sentence for a maximum period of two years. It however notes that, had the version of that article to be taken into account been the one in force at the date of issue of that European arrest warrant, it would have been necessary to find that the Rechtbank van eerste aanleg Oost-Vlaanderen, afdeling Gent (Court of First Instance, East Flanders, Ghent Division) was not entitled to verify the double criminality of the act and could not therefore refuse execution of that European arrest warrant, since, in that new version, that article now provides for a custodial sentence of a maximum of three years.
- 15 In those circumstances, the Hof van beroep te Brussel (Court of Appeal, Ghent) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘(1) Does Article 2(2) [of Framework Decision 2002/584], as transposed into Belgian law by the [Law of 19 December 2003 on the European arrest warrant (*Belgisch Staatsblad* of 22 December 2003, p. 60075)], permit, for the purposes of the executing Member State’s assessment of the minimum maximum three year threshold imposed therein, recourse to be had to the criminal legislation that was applicable in the issuing Member State on the date when the European arrest warrant was issued?
- (2) Does Article 2(2) [of Framework Decision 2002/584], as transposed into Belgian law by [the Law of 19 December 2003], permit, for the purposes of the executing Member State’s assessment of the minimum maximum three year threshold imposed therein, recourse to be had to criminal legislation, applicable at the point in time of the issue of the European arrest warrant, [that has made the scale of penalties more severe], as compared to the criminal legislation that was applicable in the issuing Member State on the date when the acts were committed?’

Consideration of the questions referred

- 16 By its questions referred for a preliminary ruling, which it is appropriate to examine together, the referring court asks, in essence, whether Article 2(2) of Framework Decision 2002/584 must be interpreted as meaning that, in order to ascertain whether the offence for which a European arrest warrant has been issued is punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years, as it is defined in the law of the issuing Member State, the executing judicial authority must take into account the law of the issuing Member State in the version applicable to the facts giving rise to the case in which the European arrest warrant was issued or the law of the issuing Member State in the version in force at the date of issue of that arrest warrant.
- 17 In order to answer those questions, it must be borne in mind that, according to Article 2(2) of

Framework Decision 2002/584, under the terms of that framework decision and without verification of the double criminality of the act, the offences enumerated in that provision, if punishable in the issuing Member State by a custodial sentence or detention order of a maximum of at least 3 years as defined by the laws of the issuing Member State, give rise to surrender.

- 18 Thus, it follows from that provision that the definition of those offences and the penalties applicable are those which stem from the law ‘of the issuing Member State’ (judgment of 3 May 2007, *Advocaten voor de Wereld*, C-303/05, EU:C:2007:261, paragraph 52).
- 19 However, the wording of Article 2(2) of Framework Decision 2002/584 does not specify which version of that law must be taken into account by the executing judicial authority in order to verify whether the condition of the threshold of a custodial sentence for a maximum period of three years, set out in that provision, is satisfied, where that law has been the subject of amendments between the date of the facts giving rise to the case in which the European arrest warrant has been issued and the date of issue, or execution, of that arrest warrant.
- 20 Contrary to what the Belgian and Spanish Governments and the Procureur-generaal argue, the fact that the present indicative is used in Article 2(2) of Framework Decision 2002/584 does not support the conclusion that the version of the law of the issuing Member State to be taken into account to that end is the one in force at the time the European arrest warrant was issued. As the Advocate General noted in points 33 and 42 of his Opinion, first, the present indicative is commonly used in legislation to express the mandatory nature of a provision and, second, Article 2(2) concerns both those European arrest warrants issued for the purpose of prosecution and, thus, at a time when the offence at issue has not yet been punished, and those issued for the purpose of executing a custodial sentence. It is therefore impossible to infer any indication whatsoever from the use of the present indicative in that provision as to the version of the law of the issuing Member State that is relevant for assessing the conditions of application of that provision.
- 21 In those circumstances, according to the Court’s settled case-law, for the purpose of 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 (judgments of 19 December 2013, *Koushkaki*, C-84/12, EU:C:2013:862, paragraph 34; of 16 November 2016, *Hemming and Others*, C-316/15, EU:C:2016:879, paragraph 27, and of 25 January 2017, *Vilkas*, C-640/15, EU:C:2017:39, paragraph 30).
- 22 In the first place, so far as concerns the context of Article 2(2) of Framework Decision 2002/584, it must be pointed out that that Article 2 defines, as its title indicates, the scope of the European arrest warrant. According to Article 2(1) of that framework decision, a European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months. As the Advocate General observed in points 22 and 24 of his Opinion, once the condition of that Article 2(1) is fulfilled, as an alternative, for the issuance of a European arrest warrant, paragraphs 2 and 4 of that article draw a distinction between those offences for which execution of the European arrest warrant thereby issued must take place without verification of the double criminality of the act and those for which that execution may be subject to such verification.
- 23 It follows from the wording of paragraph 1 of the same article that, as regards the issuance of a European arrest warrant with a view to enforcing a decision to convict, as is the case here, the minimum of four months can refer only to the sentence actually imposed in that decision in accordance with the law of the issuing Member State applicable to the facts giving rise to that decision and not to the sentence which could have been passed under the law of that Member State applicable at the date of issue of that arrest warrant.
- 24 The same must hold for the execution of a European arrest warrant pursuant to Article 2(2) of

Framework Decision 2002/584.

- 25 First of all, the interpretation whereby the executing judicial authority should take into account the law of the issuing Member State applicable at a different date, according to whether that authority verifies whether the European arrest warrant could be issued in accordance with Article 2(1) of that framework decision or whether that arrest warrant must be executed without verification of the double criminality of the act pursuant to Article 2(2) of that framework decision, would undermine the consistent application of those two provisions.
- 26 The fact that Article 2(1) of Framework Decision 2002/584 refers to ‘acts punishable by the law of the issuing Member State’, whereas Article 2(2) of that framework decision mentions ‘offences [which] are punishable in the issuing Member State’, cannot, contrary to what the Belgian and Spanish Governments and the Procureur-generaal argue, support that interpretation. Irrespective of the reason for which the EU legislature adopted those two formulations, the difference between them in no way supports the conclusion that the version of the law of that Member State which the executing judicial authority must take into account for the purposes of Article 2(2) of that framework decision should be the one in force at the date of issue of that arrest warrant.
- 27 Likewise, with regard to Article 2(4) of Framework Decision 2002/584, contrary to what the Procureur-generaal claimed at the hearing before the Court, that provision is irrelevant for determining the version of the law of the issuing Member State to be taken into account for the purposes of Article 2(2) of that framework decision, especially given that it refers only to the law of the executing Member State.
- 28 Next, the interpretation whereby the version of the law of the issuing Member State to be taken into account by the executing judicial authority for the purposes of Article 2(2) of Framework Decision 2002/584 is the one applicable to the facts giving rise to the case in which the European arrest warrant has been issued is borne out by Article 8 of that framework decision. That article indicates the information intended to provide the minimum official information required to enable the executing judicial authorities to give effect to the European arrest warrant swiftly by adopting their decision on the surrender as a matter of urgency (see, to that effect, judgment of 23 January 2018, *Piotrowski*, C-367/16, EU:C:2018:27, paragraph 59).
- 29 In particular, according to Article 8(1)(f) of that framework decision, the European arrest warrant contains, inter alia, information on the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State, such information having to be set out ‘in accordance with the form contained in the Annex’ to that framework decision, a form which should therefore be taken into account in interpreting that provision (judgment of 1 June 2016, *Bob-Dogi*, C-241/15, EU:C:2016:385, paragraph 44).
- 30 In that regard, under section (c) of that form, it is stated that the indications on the length of the sentence that the issuing judicial authority must provide include, according to point 1 of that section, the ‘maximum length of the custodial sentence or detention order which may be imposed for the offence(s)’, and, according to point 2 of that section, the ‘length of the custodial sentence or detention order imposed’.
- 31 It is thus apparent from the very wording of section (c) of that form and, in particular, from the term ‘imposed’ used to describe the sentence in respect of which it is appropriate to provide indications that that sentence is the one which, depending on the case, is liable to be imposed or has actually been imposed in the conviction decision and, thus, the one resulting from the version of the law of the issuing Member State which is applicable to the facts in question.
- 32 Moreover, as the Advocate General noted in points 58 and 59 of his Opinion, the information to be included in the form contained in the annex to Framework Decision 2002/584 relates to concrete elements of the case in which the European arrest warrant has been issued, as is apparent more specifically from section (e) of that form, according to which the issuing judicial authority is

required to describe the circumstances in which the offence was committed.

- 33 In those conditions, the executing judicial authority cannot, for the purpose of verifying compliance with the penalty threshold laid down in Article 2(2) of Framework Decision 2002/584, take into account a version of the law of the issuing Member State different from the one applicable to the facts giving rise to the case in which a European arrest warrant has been issued.
- 34 In the second place, that interpretation of Article 2(2) of Framework Decision 2002/584 is supported by the purpose of that framework decision.
- 35 Indeed, as follows from recital 5 of that framework decision, that framework decision seeks, by the establishment of a new simplified and more effective system for the surrender of persons convicted or suspected of having infringed criminal law, to facilitate and accelerate judicial cooperation with a view to contributing to the objective set for the European Union of becoming an area of freedom, security and justice, on the basis of the high level of confidence which should exist between the Member States (judgments of 16 July 2015, *Lanigan*, C-237/15 PPU, EU:C:2015:474, paragraph 28; of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 76, and of 25 January 2017, *Vilkas*, C-640/15, EU:C:2017:39, paragraph 31).
- 36 If the law of the issuing Member State, which must be mentioned by the issuing judicial authority in accordance with the form contained in the annex to Framework Decision 2002/584 and which the executing judicial authority must take into account in order to determine whether a European arrest warrant must be executed, pursuant to Article 2(2) of that framework decision, without verification of the double criminality of the act, was not the one which is applicable to the facts giving rise to the case in which that arrest warrant has been issued, the executing judicial authority could experience difficulties in identifying the relevant version of that law where that law has been amended between the date of the acts and the date at which that latter authority must decide whether to execute the European arrest warrant.
- 37 Accordingly, the executing judicial authority must be able to rely, in the application of Article 2(2) of Framework Decision 2002/584, on the information on the length of the sentence set out in the European arrest warrant itself, in accordance with the form contained in the annex to that framework decision. Given that, in accordance with Article 17(1) of that framework decision, a European arrest warrant must be dealt with and executed as a matter of urgency, the examination of the law of the issuing Member State which that authority is required to conduct in applying that Article 2(2), must necessarily be timely and, accordingly, be carried out on the basis of the information available in the European arrest warrant itself. Requiring that authority to verify, for the purposes of executing that warrant, whether the law of the issuing Member State which is applicable to the facts at issue has not been amended subsequent to the date of those facts would run counter to the purpose of Framework Decision 2002/584 as has been recalled in paragraph 35 of the present judgment.
- 38 A different interpretation would moreover be a source of uncertainty, in view of the difficulties the executing judicial authority may encounter in identifying the various versions of that law that might be relevant and would, consequently, be contrary to the principle of legal certainty. In addition, making the execution of a European arrest warrant dependent on the law applicable at the time of its issuance would undermine the requirements of foreseeability that stem from that same principle of legal certainty.
- 39 Furthermore, Article 2(2) of Framework Decision 2002/584 cannot be interpreted as meaning that it could permit an issuing Member State, by amending the penalties provided for in its legislation, to bring within the scope of that provision persons who, at the date of the acts constituting the offence, could have benefitted from verification of the double criminality of the act.
- 40 As regards moreover the contention advanced by the Belgian and Spanish Governments, that the obligation, for the executing judicial authority, to take into account, for the purposes of Article 2(2)

of Framework Decision 2002/584, the version of the law of the issuing Member State in force at the time of issue of the European arrest warrant would contribute, in the case at hand, to the objective of facilitating the surrender of the person concerned in that, having regard to that version, the condition of verification of the double criminality of the act is no longer applicable, it should be noted that the interpretation to be made of that provision cannot depend on the specific factual circumstances of a given case.

- 41 It is appropriate, last, to recall that, in the area governed by Framework Decision 2002/584, the principle of mutual recognition, which constitutes, as is stated in particular in recital 6 thereof, the ‘cornerstone’ of judicial cooperation in criminal matters, is given effect in Article 1(2) of that decision, pursuant to which Member States are, in principle, obliged to give effect to a European arrest warrant. It follows that the executing judicial authority may refuse to execute such a warrant only in the cases, exhaustively listed, of obligatory non-execution laid down in Article 3 of Framework Decision 2002/584, or of optional non-execution, laid down in Article 4 and 4a of that framework decision. Moreover, the execution of the European arrest warrant may be made subject only to one of the conditions exhaustively laid down in Article 5 of that Framework Decision (see, to that effect, judgment of 12 December 2019, *Openbaar Ministerie (Procureur du Roi de Bruxelles)*, C-627/19 PPU, EU:C:2019:1079, paragraphs 23 and 24 and the case-law cited).
- 42 Accordingly, the fact that the offence at issue cannot give rise to surrender without verification of the double criminality of the act, pursuant to Article 2(2) of Framework Decision 2002/584, does not necessarily mean that execution of the European arrest warrant has to be refused. The executing judicial authority is under the responsibility to examine the criterion of double criminality of the act set out in Article 2(4) of that framework decision in the light of that offence.
- 43 In the light of all the foregoing considerations, the answer to the questions referred is that Article 2(2) of Framework Decision 2002/584 must be interpreted as meaning that, in order to ascertain whether the offence for which a European arrest warrant has been issued is punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years, as it is defined in the law of the issuing Member State, the executing judicial authority must take into account the law of the issuing Member State in the version applicable to the facts giving rise to the case in which the European arrest warrant was issued.

Costs

- 44 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 2(2) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States must be interpreted as meaning that, in order to ascertain whether the offence for which a European arrest warrant has been issued is punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years, as it is defined in the law of the issuing Member State, the executing judicial authority must take into account the law of the issuing Member State in the version applicable to the facts giving rise to the case in which the European arrest warrant was issued.

[Signatures]

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_ Language of the case: Dutch.