Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 26 November 2019[1]

Case C-717/18

Procureur-generaal
Joined parties:
X

(Request for a preliminary ruling from the Hof van Beroep te Gent (Court of Appeal of Ghent, Belgium))

(Reference for a preliminary ruling — Judicial cooperation in criminal matters — Council Framework Decision 2002/584/JHA — European arrest warrant — Article 2(2) — Removal of verification of double criminality — Conditions — Offences punishable in the issuing Member State by a maximum penalty of at least 3 years — Assessment of the length of the penalty by reference to the law of the issuing Member State applicable to the facts or to the law in force at the time of issuing the EAW — Principles of legality and legal certainty)

I. Introduction

1. The requested person subject to the European arrest warrant ('EAW') in the present case is a rapper and composer. He was sentenced in Spain for several offences committed in 2012 and 2013. 'Glorification of terrorism and humiliation of the victims of terrorism' was one of those offences. The law applicable to that offence at the time of its commission provided that it was punishable by a custodial sentence of a *maximum of 2 years*.

2. The requested person left Spain for Belgium. The competent Spanish judicial authority issued an EAW with a view to executing the custodial sentence. The EAW indicated that the offence of glorification of terrorism and humiliation of the victims of terrorism fell under the category 'terrorism'. It also indicated that the length of the maximum custodial sentence for the offence of glorification of terrorism and humiliation of the victims of terrorism was *3 years*, following an amendment to the Spanish Criminal Code in 2015.

3. 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[2] states that the offences listed therein, including that of 'terrorism', shall not give rise to verification of double criminality, if they are punishable by a custodial sentence of a *maximum period of at least 3 years*. But what is the

1 Original language: English.

2 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 Framework Decision').

appropriate reference point for assessing whether that requirement is fulfilled? Is it the maximum custodial sentence *applicable to the case at hand*, which is normally governed by the law that applied when the offence was committed? Or is it the maximum sentence provided for by the national law in force *at the time of issuing the EAW*?

II. Legal framework

4. Article 2 of the Framework Decision states:

'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 4 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 3 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,

…

3. The Council may decide at any time, acting unanimously after consultation of the European Parliament under the conditions laid down in Article 39(1) of the Treaty on European Union (TEU), to add other categories of offence to the list contained in paragraph 2. The Council shall examine, in the light of the report submitted by the Commission pursuant to Article 34(3), whether the list should be extended or amended.

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.'

III. Facts, procedure and the questions referred for a preliminary ruling

5. In 2012 and 2013, the requested person composed, performed and published on the internet several rap songs.

6. By judgment of 21 February 2017, the Audiencia Nacional (National High Court, Spain) condemned the requested person in relation to those activities to: (A) a prison sentence of 2 years for the offence of glorification of terrorism and the humiliation of the victims of terrorism, punishable under Articles 578 and 579 of the Spanish Criminal Code ('penalty (A)'); (B) a prison sentence of 1 year for the offence of slander and serious insult of the Crown, punishable under Article 490.3 of the Spanish Criminal Code; and (C) a prison sentence of 6 months for the offence of making unconditional threats, punishable under Article 169.2 of the Spanish Criminal Code.

7. The conviction and sentences were imposed in application of the provisions of the Criminal Code that were in force at the time of the facts, that is, before its amendment in 2015.

8. The appeal against the judgment of 21 February 2017 was dismissed by the Spanish Supreme Court by judgment of 15 February 2018.

9. The requested person left Spain for Belgium. On 25 May 2018, an EAW was issued by the Audiencia Nacional (National High Court) against the requested person, with a view to executing the custodial sentence for the three offences mentioned above ('the first EAW').

10. According to the information in the file before this Court, the Rechtbank van eerste aanleg Oost-Vlaanderen, afdeling Gent (Court of First Instance, Oost-Vlaanderen, Ghent Division, Belgium), requested additional information from the Audiencia Nacional (National High Court) for the purposes of taking a decision on the execution of the first EAW. Following that request, the same Spanish court issued another EAW on 27 June 2018 ('the second EAW'). The second EAW relates to the same set of facts as the first EAW.

11. Both arrest warrants contain the same information in box (c)(2) (information on the penalties imposed for the three offences) and under box (e)(I), where the box marked 'terrorism' was ticked with regard to the offences that gave rise to penalty (A).

12. However, the second EAW contains additional information in boxes (e) and (f). Regarding box (e) (offences), whereas the first EAW contained a short outline of the offences, the second EAW added a detailed description of those offences, including the lyrics of the rap songs that gave rise to the offences. Regarding box (f) (optional information on other circumstances relevant to the case), while it was not filled out in the first EAW, the second EAW contained detailed references to the relevant provisions of the Spanish Criminal Code on the offences committed, in the version of that law in force at the time of issuing the EAW, namely the wording as amended in 2015.

13. The Rechtbank van eerste aanleg Oost-Vlaanderen, afdeling Gent (Court of First Instance, Oost-Vlaanderen, Ghent Division) made a further request for additional information from the Audiencia Nacional (National High Court). In a letter in response from that Spanish court, additional information was offered regarding the system of penalties. That letter also stated that the reference in the second EAW to provisions of the Spanish Criminal Code as amended in 2015 was a mistake.

14. By order of 17 September 2018, the Rechtbank van eerste aanleg Oost-Vlaanderen, afdeling Gent (Court of First Instance, Oost-Vlaanderen, Ghent Division) refused to execute the second EAW. According to the information in the file before this Court, that court considered that the offence of glorification of terrorism and humiliation of the victims of terrorism could not be considered as an offence of 'terrorism' under the list in Article 2(2) of the Framework Decision. Furthermore, the requirement of double criminality was not fulfilled with regard to all of the offences for which the EAW was issued.

15. On 17 September 2018, the public prosecution service lodged an appeal against the aforementioned order. On 26 September 2018, the Procureur-Generaal (Prosecutor General) lodged a claim stating that the conduct defined in the EAW that gave rise to penalty (A) corresponds to the listed offence of 'terrorism' in accordance with Article 5(2), second subparagraph, of the Wet van 19 december 2003 betreffende het Europees aanhoudingsbevel (Law of 19 December 2003 on the European arrest warrant) ('the Wet EAB'), which transposes Article 2(2) of the Framework Decision into Belgian law.

16. The Hof van Beroep te Gent, kamer van inbeschuldigingstelling (Indictment Chamber of the Court of Appeal of Ghent, Belgium), the referring court, considers that the condition regarding the level of the penalty imposed laid down in Article 2(1) of the Framework Decision, which requires a sentence of imprisonment for a period of at least 4 months, is satisfied in this case, having regard to the penalties referred to above in point 6. However, that court has doubts as to which version of the law of the issuing Member State is relevant in order to rule on whether the requirement for a maximum

length of penalty of at least 3 years set out in Article 2(2) of the Framework Decision is met. That is because the offences that gave rise to penalty (A) were committed in 2012 and 2013, when Article 578 of the Spanish Criminal Code made the crime of glorification of terrorism and humiliation of the victims of terrorism punishable by a prison sentence of from 1 to 2 years. It was only later, on 30 March 2015, that Article 578 of the Spanish Criminal Code was amended to provide that that crime is punishable by a prison sentence of from 1 to 3 years.

17. It is in those circumstances that the Hof van Beroep te Gent, kamer van inbeschuldigingstelling (Indictment Chamber of the Court of Appeal, Ghent) stayed the proceedings and referred the following questions for a preliminary ruling:

'1. Does Article 2(2) [of the Framework Decision], as transposed into Belgian law by the Wet EAB, permit, for the purposes of the executing Member State's assessment of the minimum maximum 3-year threshold imposed therein, recourse to be had to the criminal legislation that was applicable in the issuing Member State at the point in time at which the European arrest warrant was issued?

2. Does Article 2(2) [of the Framework Decision], as transposed into Belgian law by the Wet EAB, permit, for the purposes of the executing Member State's assessment of the minimum maximum 3-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, allowing for a more severe penalty, as compared to the criminal legislation that was applicable in the issuing Member State at the point in time the offences were committed?'

18. The requested person, the Belgian and Spanish Governments and the European Commission submitted written observations. Those interested parties, as well as the Procureur-Generaal (Prosecutor General), presented oral submissions at the hearing held on 16 September 2019.

IV. Analysis

19. Article 2(2) is a crucial provision of the Framework Decision. It does away with the requirement of double criminality. It does so, however, subject to two conditions. *First*, it is only with regard to the 32 offences listed therein that surrender pursuant to an EAW must be granted without verification of double criminality. *Second*, the offence on the basis of which the EAW was issued must be punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 3 years.

20. The two preliminary questions posed by the referring court, which in my view are best dealt with together, concern the second requirement. They seek to ascertain the point in time (and the relevant national law) to which Article 2(2) of the Framework Decision refers: the law in force *at the time of issuing* the EAW or the law *actually applicable* to the specific case of the requested person?

21. In order to provide an answer to that question, I shall first deal with the interpretation of Article 2(2) of the Framework Decision. After examining its wording, which is indeed inconclusive, it becomes clear, to my mind, that its context and purpose and the overall logic of the system warrant the conclusion that Article 2(2) is meant to refer to the law of the issuing Member State that is actually applicable to the case of the requested person (A). In addition, for the sake of completeness and because it has been discussed extensively by the interested parties in the present proceedings, I shall briefly examine the possible implications of the principle of legality in this case (B). I shall conclude with a few final remarks on what this case is not about (C).

A. Interpretation of Article 2(2) of the Framework Decision

22. Article 2 governs the scope of the Framework Decision. Its first paragraph establishes an essential preliminary condition for issuing an EAW. That condition has two alternatives. For cases in which an EAW is issued *for the purpose of prosecution*, the acts at issue need to be punishable under the law of the issuing Member State by a custodial sentence or detention order for a maximum period of at least 12 months. Alternatively, when a sentence has already been passed or a detention order has been made and therefore, the EAW is issued *for the purpose of execution*, that sentence must be of at least 4 months.

23. In the present case, the referring court has found that the latter alternative was fulfilled. The sentence already passed is of more than 4 months.

24. Once the condition of Article 2(1) of the Framework Decision is fulfilled, paragraphs 2 and 4 of Article 2 lay down two 'regimes'. On the one hand, Article 2(2) contains the list of offences for which surrender pursuant to an EAW must be granted without verification of double criminality. On the other hand, Article 2(4) provides that, for offences other than those listed in Article 2(2), verification of double criminality may be required. Article 2(3) constitutes a 'gateway' clause between the two abovementioned regimes. It provides for the possibility of expanding the list of offences in Article 2(2) by unanimous decision of the Council, thus effectively moving offences from the Article 2(4) regime to the Article 2(2) one.

25. Article 2(2) of the Framework Decision provides for two cumulative conditions.[3] *First*, the offence at issue must fall within one of the 32 categories of offences listed in that provision. Article 2(2) makes clear that what is relevant for the application of those categories is the definition of the offence under the law of the issuing Member State. *Second*, the offence at issue must be punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 3 years.

26. The interested parties that presented observations in this case advance opposing interpretations of that second condition, which I shall refer to as the 'condition relating to the length of the penalty'.

27. The requested person and the Commission submit that the law to be taken into account for the assessment of the second condition of Article 2(2) is the law applicable to the requested person in the criminal case. In the present case, that is the pre-2015 version of the Spanish Criminal Code, which is applicable to the facts of the case and which was in fact applied by the national courts in the issuing Member State for the purpose of imposing the sentence on the requested person, the execution of which is now sought.

28. Conversely, the Spanish and Belgian Governments, as well as the Procureur-Generaal (Prosecutor General), submit that the relevant point in time for that assessment is the moment when the EAW is issued. In the present case, that would be the law in force after the amendment of the Spanish Criminal Code in 2015, which increased the maximum penalty for the offence of glorification of terrorism and humiliation of the victims of terrorism from 2 to 3 years.

29. In order to answer the questions posed by the referring court, it is necessary to analyse the text, context and purpose of Article 2(2) of the Framework Decision.

3 If those conditions are not met, that does not necessarily mean that the EAW cannot be executed. Rather, it means that the regime in Article 2(4) of the Framework Decision becomes applicable. According to that provision, surrender may be subject to the condition of double criminality, so that the executing judicial authority may refuse execution if the act on which the EAW is based does not constitute an offence under the law of the executing Member State, according to the optional ground for non-execution laid down in Article 4(1) of the Framework Decision.

(a) Text

30. The wording of Article 2(2) of the Framework Decision does not offer a conclusive answer to the questions raised by the referring court. Indeed, that provision merely refers in rather general terms to '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 3 years and as they are defined by the law of the issuing Member State …'.[4] The precise point in time when those offences must be punishable on those terms is therefore not explicitly stated.

31. Despite this vagueness, the Spanish and Belgian Governments and the Procureur-Generaal rely on textual arguments to support their claim that the legal framework of reference for the assessment of the second condition of Article 2(2) of the Framework Decision is the law of the issuing Member State in force at the time when the EAW is issued.

32. Those interested parties claim that the use of the present tense in the expression 'are punishable' in Article 2(2) of the Framework Decision indicates that the relevant time is the moment when the EAW is issued.

33. That argument does not convince. The use of the present tense in itself and in a rather generic and neutral form can hardly be said to determine the interpretation of Article 2(2) of the Framework Decision. Legal language normally uses the present tense in establishing general rights or obligations, without making any statements on, or limiting in any way, the temporal applicability of such provisions.

34. Moreover, that argument is immediately rebutted when other provisions of the Framework Decision are considered. As the Spanish Government admitted at the hearing, Article 2(1) of the Framework Decision, which similarly refers to 'acts punishable by the law of the issuing Member State', is to be understood as referring to the law actually applicable to the criminal case in the context of which the EAW is issued, and not to the law applicable at the later time of issuing the warrant.

35. In this connection, the Belgian Government submitted at the hearing that despite the fact that both Article 2(1) and Article 2(2) of the Framework Decision refer to the same term 'punishable', those provisions must be interpreted differently because Article 2(1) refers to *acts* and Article 2(2) to *offences*.

36. That argument seems to imply that the reference in Article 2(1) of the Framework Decision to punishable *acts* links the interpretation of that provision to the specific punishable acts at issue in the given case, which would mean that the relevant law is the one applicable to those acts. Conversely, the fact that Article 2(2) refers, in the abstract, to punishable *offences* would mean that the point in time that should be taken into account is the time when the EAW is issued. In other words, the provisions should be interpreted as referring to different points in time because Article 2(1) refers to 'acts', and not to 'offences' as in the case of Article 2(2).

37. In my view, that argument cannot be sustained. The use of the same word 'punishable' in both paragraph 1 and paragraph 2 of Article 2 of the Framework Decision would normally suggest that those paragraphs should be interpreted in the same way. The argument against that interpretation just outlined is based on a rather peculiar *a contrario* reasoning, which relies on the fact that the word

4 Emphasis added.

'punishable' is used to qualify two different nouns ('acts' and 'offences'). However, it follows from the logic behind the operation of the Framework Decision,[5] which is explained further in the next section,[6] that the use of different nouns results instead from the systemic interplay between Article 2(1) and (2) of the Framework Decision.

38. Thus, a purely textual interpretation of Article 2(2) of the Framework Decision remains inconclusive. For that reason, it is necessary to turn to systemic and purposive arguments.

(b) Context

39. Three types of considerations support the interpretation that the relevant law for the assessment of the conditions in Article 2(2) of the Framework Decision is that applicable to the specific case: the internal system of Article 2 itself (i); the broader system of the Framework Decision, when Article 2 is considered in conjunction with Article 8(1) and the form in the Annex to the Framework Decision (ii); and the general logic and operability of the EAW system as a whole (iii).

(i) The internal system of Article 2

40. Article 2(1) of the Framework Decision establishes as an essential condition that an EAW can be issued only (a) 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, (b) where a sentence has been passed or a detention order has been made, for sentences of at least 4 months. As admitted by the Belgian and Spanish Governments, it is difficult to imagine how the assessment of the length of penalties referred to therein could be made without taking into account the law which is actually applicable to the case. This is more obvious with regard to (b), where a sentence has already been passed, as in the present case.

41. Once it is established that the point of reference for assessing the conditions of Article 2(1) of the Framework Decision in the present case is the law of the issuing Member State applied in the sentence imposing the penalty, it becomes clear that the application of a different approach for the purposes of the assessment of Article 2(2) would lead to strikingly divergent approaches to *the relevant law in the issuing Member State* within the same EU provision and potentially within the same proceedings at national level.

42. The textual argument based on the fact that Article 2(1) of the Framework Decision refers to 'acts' while Article 2(2) refers to 'offences' is not sufficient to support the view that those provisions refer to different points in time for assessing the relevant legal framework of the issuing Member State.[7] A systemic reading of Article 2 shows that there are other reasons for the use of the different terms 'acts' and 'offences' in paragraphs 1 and 2 of that provision respectively. The reference to 'acts' in Article 2(1) fits neatly within the overall structure of Article 2, which covers EAWs issued with two objectives: prosecution and execution of judgments. When referring *to prosecution*, Article 2(1) logically refers to a 'punishable act', whereas when it comes *to execution*, it refers to a 'sentence'. Article 2(2) uses the different and more neutral terminology 'punishable offences' because it covers *both types* of situations in which an EAW can be issued (for prosecution and for execution).

5 Above, points 22 to 25.

6 Below, points 40 to 43.

7 As outlined above, at points 35 to 37.

43. Thus, the reason why Article 2(2) refers to 'offences' and not 'acts' has nothing to do with a desire on the part of the legislature to establish different temporal frameworks for the assessment of the conditions laid down in different paragraphs of one and the same provision. The fact that Article 2(2) focuses on 'offences' is better explained by the fact that the aim of that provision is to provide a list of *offences* for which the requirement of double criminality is dispensed with, whether in prosecution or execution situations. In that context, it is only logical that its wording refers to 'punishable offences'.

44. The Procureur-Generaal (Prosecutor General) advanced an additional systemic argument at the hearing, namely, that Article 2(4) of the Framework Decision leads the executing Member State to carry out the examination of the requirement of double criminality according to what is provided for in its legal order at the time of execution of the EAW.

45. That argument is certainly valid in the framework of the assessment required *under Article 2(4)* with regard to the *executing* Member State. I see, however, no analogy that could be made with the requirements in *Article 2(2)* with regard to the *issuing* Member State.

46. Article 2(4) of the Framework Decision provides for the option of declining to execute an EAW with respect to conduct which the executing Member State does not consider morally wrong and therefore does not constitute an offence in its legal order.[8] Accordingly, the issue of the relevant law in the executing Member State pertains to the logic of the assessment of criteria for *recognition* from the point of view of the executing Member State. It does not affect in any way the requirements of the legal context of reference in the issuing Member State. In other words, the assessment of the legal framework relevant for Article 2(4) relates to the rules of the executing Member State which are by definition *not applicable* to the case, but that are used as a yardstick for dual criminality as a condition of recognition. Conversely, like Article 2(1), Article 2(2) relies on the legal framework of the issuing Member State, which forms the basis for the court decision to be recognised through the execution of the EAW.

47. It is one thing for an *executing* Member State to verify double criminality on the basis of an assessment of the moral standards conveyed by its criminal legislation at the time of execution of an EAW. It is an entirely different matter for an *issuing* Member State to issue an EAW under a specific simplified regime by reference to legislation that is not applicable to the offences at issue and that contains a different assessment of the seriousness of the offence in the form of a higher penalty than the one imposed by the judgment underlying the EAW.

48. Finally, the Spanish Government raises another argument. It submits that any interpretation contrary to the one that it supports would mean that, if the European legislature were to add more offences to the list in Article 2(2) pursuant to Article 2(3), it would not be possible to execute an EAW in respect of facts and sentences that predate that new legislation.

49. I fail to see the relevance of such a highly speculative argument. The addition of new offences to the list in Article 2(2) in the future might indeed give rise to issues of temporal applicability. But those issues would need to be addressed at that stage in a comprehensive and transversal way, since a number of general provisions and conditions of the Framework Decision would be in play.[9] Such issues cannot be addressed pre-emptively, with regard to just one of the categories of issues potentially concerned. Nor should such potential issues be allowed to contort the interpretation of a general condition of the Framework Decision in a completely unrelated case, such as the case at hand.

8 See, by analogy, judgment of 11 January 2017, *Grundza* (C-289/15, EU:C:2017:4, paragraph 45) as well as my Opinion in that case (C-289/15, EU:C:2016:622, point 68).

9 By way of example, it can be recalled that the Framework Decision regulates its own temporal scope with regard to the point in time at which new surrender requests are issued. According to Article 34(1), Member States were obliged to transpose the Framework Decision by 31 December 2003. Therefore, Article 32 states that requests received after 1 January 2004 are governed by the rules adopted pursuant to the Framework Decision.

(ii) Article 8(1) and the annexed form

50. The Commission argues, in essence, that the form annexed to the Framework Decision, read in conjunction with Article 8(1) of that instrument, supports the view that the relevant law for the assessment of the condition relating to the length of the penalty in Article 2(2) of the Framework Decision is the law actually applicable to the case in respect of which the surrender is requested.

51. Article 8(1) of the Framework Decision specifies the content of the EAW, laying down the main requirements that must be observed if the EAW is to be valid.[10] It provides that an EAW must contain, in accordance with the form contained in the Annex, different types of information, such as (a) the identity and nationality of the requested person; (b) the contact details of the issuing judicial authority; (c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2; (d) the nature and legal classification of the offence, particularly in respect of Article 2; (e) a description of the circumstances in which the offence was committed; (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 and (g) if possible, other consequences of the offence.

52. The form annexed to the Framework Decision contains different boxes to be filled in. The boxes do not correspond exactly to the specific subparagraphs of Article 8(1), but they cover the same information.

53. Boxes (b), (c) and (e) in the annexed form demonstrate that the information requested relates to the specific case. According to box (b), the issuing judicial authority must provide specific information on the *decision* on which the warrant is based. In box (c), that authority shall indicate the *length of the sentence*, including (1) 'the maximum length of the custodial sentence or detention order which may be imposed for the offence(s)' and (2) the length of the custodial sentence or detention order imposed and the remaining sentence to be served.

54. The fact that compliance with the conditions of Article 2(2) of the Framework Decision is necessarily linked to the law applicable to the case is made even more explicit by box (e). In that box, the issuing judicial authority is to provide information relating to the *offences*, including 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', as well as the 'nature and legal classification of the offence(s) and the applicable statutory provision/code'. Immediately thereafter, box (e) of the form reproduces the list of 32 offences in Article 2(2) of the Framework Decision and states: 'if applicable, tick one or more of the following offences 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'.

55. It would defy all logic to require an issuing judicial authority to fill in box (e) with the statutory provision *applicable* to the case and, immediately thereafter, to fill in box (e)(I) using a different statutory provision *not applicable* to the case.

56. From those considerations, the Commission draws the conclusion that the issuing judicial authority, when giving information, cannot refer to sanctions more severe than those applicable to the criminal case concerned.

57. I agree with the Commission.

10 See, to that effect, judgments of 1 June 2016, *Bob-Dogi* (C-241/15, EU:C:2016:385, paragraphs 63 and 64), and of 6 December 2018, *IK (Enforcement of an additional sentence)* (C-551/18 PPU, EU:C:2018:991, paragraph 43).

58. Both Article 8(1) of the Framework Decision and the information specifically requested in the form in the Annex thereto in order to fulfil the requirements of that article point to the same conclusion: the information that must be provided in the EAW all specifically relates to the *concrete* acts, offences, judicial decisions and sentences in the *actual* criminal case.

59. That is particularly the case of box (e) of the annexed form. In line with Article 8(1)(d) of the Framework Decision, box (e) must be filled in to provide details of the offence for the purposes of applying Article 2. Box (e) explicitly requires information to be provided on the offences to which the warrant 'relates' and a description of the circumstances in which the offence(s) was (were) committed, as well as information regarding the 'nature and legal classification of the offence(s) and the *applicable statutory provision/code*'.[11]

60. There is no doubt that those requirements relate to the *specific statutory provisions applicable* to the offences to which the warrant relates and that correspond to the actual circumstances, which must also be described under box (e). It would again be counterintuitive, to say the least, to depart radically from that logic when it comes specifically to subsection I of box (e) so as to understand the reference to 'offences punishable … 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' as actually referring to a posterior law not applicable to the offences to which the EAW relates.

61. At the hearing, there was some discussion of the interpretative value of the annexed form. In my view, there is limited scope for argument on that point. When annexes form an integral part of the legal act to which they are attached, they are relevant for the interpretation of the provisions to which they correspond.[12] The case-law of this Court clearly confirms that interpretative value precisely in connection with the form annexed to the Framework Decision.[13] The Annex provides a specific form, which the issuing judicial authorities are required to complete by furnishing the specific information requested.[14]

62. Moreover, there is no contradiction between the terms of the Annex containing the EAW form and the legal provisions of the Framework Decision in this regard. On the contrary, the specific nature of the information required by the form in the Annex, and in particular box (e), lends further support to the (to my mind rather clear) conclusion that can be inferred from Article 8(1) and Article 2(2) of the Framework Decision, as already outlined.

63. The Procureur-Generaal (Prosecutor General) and the Belgian Government argued at the hearing that box (c)(1) of the form, which refers to the 'the maximum length of the custodial sentence or detention order which may be imposed for the offence(s)', does not need to be filled in if the EAW is issued for the purpose of *execution*, but only if it is issued for the purpose of *prosecution*.

11 Emphasis added.

12 See, for example, specifically on the subject of annexes to instruments of judicial cooperation, judgments of 16 September 2015, *Alpha Bank Cyprus* (C-519/13, EU:C:2015:603, paragraph 49 et seq.), and of 2 March 2017, *Henderson* (C-354/15, EU:C:2017:157, paragraph 56). See also, judgment of 5 July 2018, *X* (C-213/17, EU:C:2018:538, paragraph 52).

13 See, for example, judgments of 1 June 2016, *Bob-Dogi* (C-241/15, EU:C:2016:385, paragraph 44); of 10 August 2017, *Tupikas* (C-270/17 PPU, EU:C:2017:628, paragraph 89); and of 23 January 2018, *Piotrowski* (C-367/16, EU:C:2018:27, paragraphs 57 to 59).

14 Judgment of 6 December 2018, *IK (Enforcement of an additional sentence)* (C-551/18 PPU, EU:C:2018:991 paragraph 49).

64. Admittedly, if there is a final judgment, that box of the annex, read in conjunction with Article 8(1)(f), requires the issuing judicial authority to provide only information on the penalty imposed.[15] The information on the scale of penalties to which box (c)(1) of the form refers therefore appears to be necessary only in the absence of such a judgment, when the EAW is issued for the purposes of prosecution.[16]

65. I shall leave aside for the moment box (e),[17] which again, if read together with box (c), dispels the doubts expressed by the Procureur-Generaal (Prosecutor General) and the Belgian Government. However, even if one focuses only on box (c)(1), it cannot be inferred from the fact that information on the scale of penalties need not be inserted in that box where a sentence has been passed that the relevant law for the assessment of the requirements of Article 2(2) of the Framework Decision is different from the law actually applicable to the case.

66. It is true that the Court attached interpretative consequences to the fact that certain *information is not required* by Article 8(1) of the Framework Decision or by the annexed form in *Piotrowski*.[18] However, the reasons why such interpretative consequences were attached to that fact in that case are not present in the case at hand.

67. What was at stake in *Piotrowski* was the assessment of one of the mandatory grounds for refusal of execution of an EAW.[19] In that context, it is only logical that the refusal can only be based on information actually made available to the executing judicial authority through the form. Conversely, the present case does not concern a ground of refusal. It concerns one of the requirements for the application of the regime of non-verification of dual criminality under Article 2(2) of the Framework Decision. If that requirement is not fulfilled, the EAW can still be executed, but only under the regime under Article 2(4).

68. Moreover, the fact that information on the maximum sentence that may be imposed for the offence is not explicitly required by the form annexed to the Framework Decision in this case, because a sentence has already been imposed, does not lead to the conclusion that the point of reference for the purposes of Article 2(2) of the Framework Decision must therefore be the law applicable at the time when the EAW is issued. The logical conclusion of an interpretation that attaches such weight to that fact is rather that, because the information is not required in the form in this case, the conditions in Article 2(2) itself are not applicable. That interpretation would, however, render the condition relating to the length of the penalty in Article 2(2) nugatory.

69. Therein lies the general, structural problem with that argument. It interprets the content of a criterion to be applied by the issuing judicial authority with regard to Article 2(2) of the Framework Decision as a function of the fact that such a criterion is not to be checked by the executing judicial authority. However, mutual trust is based on the opposite assumption: the modus operandi of the

15 That interpretation is supported by judgment of 6 December 2018, *IK (Enforcement of an additional sentence)* (C-551/18 PPU, EU:C:2018:991, paragraphs 48 to 51).

16 That interpretation is also echoed in the Commission Notice — Handbook on how to issue and execute a European arrest warrant, (OJ 2017 C 335, p. 1), according to which the purpose of box (c) of the annexed form is 'to place on record the fact that the EAW meets the requirements for punishment thresholds laid down in Article 2(1) of the Framework Decision on EAW. During the pre-trial stage, that minimum will apply to the sentence which could be imposed in principle, and where a sentence has been passed, it will apply to the length of the actual penalty. …'

17 Described above, in points 59 and 60.

18 Judgment of 23 January 2018, *Piotrowski* (C-367/16, EU:C:2018:27).

19 The case concerned the mandatory non-execution ground contained in Article 3(3) of the Framework Decision, according to which the executing judicial authority shall refuse execution of an EAW if the requested person 'may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State'. Since, inter alia, the form provided for in the Annex does not contain any specific information that would enable the executing judicial authorities to assess the additional conditions based on individual circumstances which allow prosecuting a minor under the criminal law of the issuing Member State, the Court concluded that the executing judicial authority must simply verify whether the person concerned has reached the minimum age required to be regarded as criminally responsible in the executing Member State for the acts on which the warrant is based without having to consider those additional conditions. Judgment of 23 January 2018, *Piotrowski* (C-367/16, EU:C:2018:27, paragraphs 59 and 62).

Framework Decision strives for a balance between, on the one hand, mutual trust, and on the other, minimal residual control. Trust is placed in the issuing authorities on the assumption that they strictly comply with the material requirements that underlie the EAW system. That is all the more so in the context of Article 2(2), where mutual trust operates at its highest level, preventing verification of dual criminality with regard to particularly serious crimes. Moreover, trust cannot be pushed as far as precluding the executing judicial authority from verifying compliance with the conditions of Article 2(2) if the elements before it lead such judicial authority to harbour doubts.

70. In other words, the fact that Article 2(2) of the Framework Decision relies on a system of self-declaration, where only a minimum and prima facie review by the executing judicial authority is provided for,[20] does not mean that the underlying criteria to be used by the issuing judicial authority are not subject to any rules. The opposite is true: there are only two conditions, but those two conditions must be observed strictly by the issuing Member State.[21]

(iii) The logic and operability of the EAW system

71. The previous discussion reveals that there are compelling reasons of both a logical and a systemic nature stemming from the Framework Decision to reject an interpretation that would dissociate the law actually applicable to the criminal case for which the surrender is requested from the law of reference for the purposes of Article 2(2) of the Framework Decision.

72. There are at least two further arguments relating to the broader operation and the operability of the EAW system that merit a mention.

73. First, the undeniable virtue of the interpretation of Article 2(2) of the Framework Decision as referring to the law actually applicable to the case is that it offers a *foreseeable* and *stable* frame of reference.

74. By contrast, the competing interpretation advocated by the Spanish and Belgian Governments, as well as by the Procureur-Generaal (Prosecutor General), would risk making a moving target of the legal framework underlying the EAW for the purposes of applying Article 2(2) of the Framework Decision. It would mean that the legal framework taken into account under Article 2(2) could potentially be subject to repeated change. This could create a situation where subsequent EAWs are issued with reference to different provisions of national law, or different versions of the same provision, depending on the changing legal context of the issuing Member State, which could progressively differ from the actual legal context applicable to the criminal case. With the exception of (national) rules on limitation periods, there would be no limits to the potential to re-issue EAWs concerning the same offences under different legal frameworks. One can thus easily imagine successive EAWs issued over the years concerning the same facts which remain punishable under the same provisions, but which point to a different legal regime in the Framework Decision every time that the national law changes.

20 On the discussion and constitutional reticence on the application of Article 2(2) in several Member States, see for example Ambos, K., *European Criminal Law*, Cambridge University Press, Cambridge, 2018, at p. 432 et seq.

21 On a side note, I must nonetheless admit that the argument made by the Procureur-Generaal (Prosecutor General) and the Belgian Government vividly illustrates the inherent tension between the terminology used, on the one hand, and the legal set-up and operation of the EAW system (or many other systems of mutual recognition in the EU, for that matter), on the other. The guiding principle is said to be one of (mutual) trust, which is supposed to be brought into being and fostered by the law. But if one trusts, there is little need for law. It is only when there is no (more) trust that enforceable legal rules become necessary. At a certain point, enforceable legal rules could indeed be superseded by mutual trust. But that can happen only gradually and organically in a bottom-up social interaction. Trust cannot be created normatively by decree from above.

75. The intrinsic instability of such a frame of reference would be further amplified by the fact that the moment when the EAW is issued may depend on different circumstantial factors and is not uniform in the practice of the different Member States. [22]

76. The combination of these two temporal variables would turn the operation of the system into an unforeseeable game of billiards, in which it would be difficult, if not impossible, to ascertain whether the conditions of Article 2(2) of the Framework Decision are (or will be) fulfilled.

77. The lack of a fixed and objective point determining the law governing the fulfilment of the conditions of Article 2(2) in the issuing Member State could even give rise to tactical choices, including delaying the issuing of an EAW in view of impending legal amendments that could make it possible to apply Article 2(2) instead of Article 2(4). But a reasonably designed rule should rather seek to incentivise the opposite behaviour on the part of national judicial authorities, namely that they request the surrender of a person in a speedy and timely fashion. Furthermore, in a purely hypothetical scenario, the potential for misuse of temporal rules defined in that way cannot be entirely ruled out, since it would allow for *ex post* amendments of penalty thresholds under national law with a view to obtaining or facilitating the surrender of specific requested persons.

78. In view of all those considerations, only the interpretation of Article 2(2) of the Framework Decision as referring to the law applicable to the facts of the case offers a simple, clear and foreseeable legal framework, which is fixed by the law actually applicable to the case underpinning the EAW. With the potential (and only) exception of subsequent amendments to national criminal law that would be more favourable to the accused, thus triggering the application of the *lex mitior* principle, that frame of reference would remain immutable and stable.

79. Second, the interpretation advocated by the Spanish and Belgian Governments and by the Procureur-Generaal (Prosecutor General) would lead to a rather counterintuitive situation that would hinder the smooth functioning of the system of the EAW in one additional respect.

80. Article 2(2) of the Framework Decision applies to EAWs issued for the purposes of both execution and prosecution. Executing judicial authorities could thus face situations in which the legal provisions relied on by the issuing judicial authority for the purposes of filling in box (e) could contradict the information given under box (c)(1) or the additional information given in box (f). [23] There would even be a risk that different provisions could be relied on in the different fields of box (e) itself. In that situation, executing judicial authorities, faced with different legal frameworks mentioned in one and the same EAW, may reasonably harbour doubts about compliance with the conditions of Article 2(2) of the Framework Decision, and would likely consider it necessary to request additional information from the issuing judicial authority. [24] That would endanger the smooth functioning of the EAW system, in which additional requests for information under Article 15(2) of the Framework Decision should be, as the Spanish Government correctly notes, the exception rather than the rule. [25]

22 Practice shows that the point in time when an EAW is issued varies greatly between the different Member States and can include, for example, the beginning of the investigation; the end of the investigation; the moment when pre-trial detention is normally imposed; when the person is considered a suspect; or any stage of the criminal proceedings until the end of the trial. See *EAW — Rights. Analysis of the implementation and operation of the European Arrest Warrant from the point of view of defence practitioners*, Council of Bars and Law Societies of Europe / European Lawyers Foundation, Brussels / The Hague, 2016, pp. 25-26.

23 See above, point 54 of this Opinion.

24 See, on the empowerment of executing judicial authorities in this regard, judgments of 10 August 2017, *Tupikas* (C-270/17 PPU, EU:C:2017:628, paragraph 91) and judgment of 10 August 2017, *Zdziaszek* (C-271/17 PPU, EU:C:2017:629, paragraph 103).

25 See, to that effect, judgment of 23 January 2018, *Piotrowski* (C-367/16, EU:C:2018:27, paragraph 61).

81. The preceding discussion can be summed up by the following candid question: why seek a counterintuitive interpretation of Article 2(2), creating systemic problems, when using the maximum penalty actually applicable to the case as the point of reference offers a much more logical, reasonable, foreseeable and practical solution? The only remaining argument in this regard is an appeal to effectiveness, voiced by both the Spanish and Belgian Governments, to which I now turn.

(c) Purpose

82. The Framework Decision is the flagship of mutual trust in EU judicial cooperation in criminal matters. It was designed to replace the multilateral system of extradition procedures and facilitate the surrender of requested persons between the Member States by establishing a new, simplified and more effective system of judicial cooperation based on mutual trust. Its clear aim is to facilitate and accelerate judicial cooperation. The principle of mutual recognition being the cornerstone of this instrument, executing judicial authorities should execute EAWs as a general rule and only refuse to do so on the grounds for non-execution listed in the Framework Decision, which are exhaustive and must be interpreted strictly.[26]

83. The teleological argument put forward by the Belgian and Spanish Governments relies on that well-established case-law to lend support to their interpretation of Article 2(2) of the Framework Decision, according to which reliance on the law in force in the issuing Member State at the time of issuing the EAW would best serve the objectives of the Framework Decision.

84. I believe that three important clarifications are called for in that regard.

85. First, the effectiveness of the Framework Decision, understood as facilitating surrender as much as possible, is not the only value pursued by that instrument. This is made apparent not only by recital 12 and by Article 1(3), which emphasise the obligation to respect fundamental rights in the field of the EAW, but also by the fact that the Framework Decision establishes different procedural rules and guarantees that must be complied with in the implementation and application of the EAW system. If effectiveness were the only overarching value, which must be allowed to trump all other values and considerations, why then have different surrender regimes subject to different rules and provide for different grounds for refusal?

86. Second, and perhaps even more crucially in the context of the present case, the effectiveness of a specific EAW in an individual case (*individual effectiveness*) should not be mistaken for the effectiveness of the Framework Decision (*structural effectiveness*). In my understanding, the case-law of the Court quoted by both Governments is concerned with structural effectiveness, namely the smooth operation and operability of the EAW system as such. For the reasons explained above,[27] interpreting Article 2(2) of the Framework Decision in the sense that it refers to the law applicable when the EAW is issued would perhaps facilitate surrender in the present individual case, but would certainly not foster the smooth operation and structural effectiveness of the EAW system as a whole.[28]

87. Third, and finally, the interpretation propounded by the Belgian and Spanish Governments and by the Procureur-General (Prosecutor General) also demonstrates why *ad hoc effectiveness* in an individual case is difficult to translate into generally efficient and operational rules. Indeed, besides the law applicable to the criminal case and the law applicable at the time of issuing the EAW, on which the

26 See, to that effect judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraphs 39 to 41 and the case-law cited).

27 Points 72 to 81 of this Opinion.

28 The metaphor that readily springs to mind in this context is that of the general who, for the sake of winning a battle, is prepared to lose the war.

submissions in this case are focused, other options could also be considered as relevant, such as the law applicable at the time of the facts (which might not coincide with the law applicable to the criminal case, due to the *lex mitior* principle); the law applicable at the time of receipt of the EAW by the executing Member State; or the law applicable at the time when the decision on the EAW is made.

88. Any of these different legal frameworks could, in a given case, be considered as the most effective in order to successfully ensure the surrender of a requested person, depending on the classification and scale of penalties that they adopt, and the circumstances of the individual case. Thus, unless foreseeability is to be reduced to the knowledge that the issuing judicial authority is allowed to simply pick and choose any legal framework of reference that it wishes for the purposes of Article 2(2), the argument based on effectiveness in the individual case simply does not produce a foreseeable frame of reference.

(d) Interim conclusion

89. The arguments considered above relating to the text, context and purpose of the Framework Decision, lead me to the conclusion that what is referred to in Article 2(2) of the Framework Decision is the law that is actually applicable to the case at hand.

90. It might be added that that conclusion also happens to be aligned with the fundamental instincts of any (criminal) lawyer. The rather technical arguments canvassed in this case must not become the proverbial trees that obscure our sight of the wood. The contours of the wood remain remarkably simple: when requesting the surrender of a specific person for a specific offence, logically the maximum length of the punishment should be that applicable to the specific case, and not one that might potentially become applicable under national law a few or many years later.

91. The questions referred by the Hof van Beroep te Gent (Court of Appeal of Ghent) should therefore be answered in the sense that Article 2(2) of the Framework Decision is to be interpreted as referring, for the purposes of assessing the threshold maximum period of at least 3 years contained in that article, to the criminal legislation that is applicable in the issuing Member State to the specific criminal offence(s) to which the EAW relates.

B. The principle of legality

92. To my mind, the analysis of the logic, operation and structure of Article 2(2) of the Framework Decision carried out in the first part of this Opinion provides a self-standing, sufficient and conclusive answer to the issue raised by the referring court. I do not think that the principle of legality would have any bearing on that conclusion. However, since that principle was raised by the parties and extensively discussed, I shall offer, for the sake of clarity and completeness, a few concluding remarks concerning the implications of the legality principle for the present case.

93. The requested person invokes arguments based on the principle of legality in his written submissions. In his view, the legality principle applies to the execution of an EAW. The Belgian and Spanish Governments and the Procureur-Generaal (Prosecutor General) disagree with that position. According to the definition of the legality principle in the case-law of the Court, while also bearing in mind the case-law of the European Court of Human Rights (ECtHR), the legality principle does not apply in this case. Even though the written submissions of the Commission are based on considerations linked to the legality principle, it modified its position at the hearing and stated that the principle of legality is not relevant for the purposes of interpreting Article 2(2) of the Framework Decision.

94. According to the case-law of the Court, 'under the principle that offences and penalties must have a proper basis in law (*nullum crimen, nulla poena sine lege*), as enshrined in particular in the first sentence of Article 49(1) of the Charter [of Fundamental Rights of the European Union], which constitutes a specific expression of the general principle of legal certainty, no one is to be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed.'[29] The principle of legality therefore requires EU legislation to give a clear definition of offences and the penalties which they attract. That requirement is satisfied 'where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable'.[30] The principle of non-retroactivity of criminal law means 'in particular that a court cannot, in the course of criminal proceedings, impose a criminal penalty for conduct which is not prohibited by a national rule adopted before the commission of the alleged offence or aggravate the rules on criminal liability of those against whom such proceedings are brought.'[31]

95. The Spanish and Belgian Governments and the Procureur-Generaal (Prosecutor General) submit that, in this case, the interpretation of Article 2(2) of the Framework Decision that they support would not mean that the principle of legality is infringed. This is because neither the determination of the behaviour that constitutes the offence nor the penalty applicable is in any way affected. The reference to the law applicable at the time of issuing the EAW would not modify the law applicable to the criminal case. It would only be used for the purposes of the application of an instrument of judicial cooperation. Those governments claim that according to the case-law of the ECtHR, the principle of legality is not applicable to instances of international cooperation for the enforcement of criminal sanctions.

96. I agree. According to the case-law of the ECtHR, the circumstances of the present case would not fall within the protection of Article 7 of the European Convention on Human Rights ('ECHR'). Admittedly, that case-law recognises that the distinction between a 'penalty' (the 'substance', which ought to be covered by Article 7(1) ECHR) and a measure which concerns the execution or enforcement of a penalty (leaning more towards the elements of 'procedure') is not clear cut.[32] However, the case-law of the ECtHR has consistently declared that the application of different instruments of international cooperation for the enforcement of criminal sanctions does not concern the penalty itself, but its execution, remaining therefore outside the scope of Article 7 ECHR.

97. For example, in *Szabó v. Sweden*, the ECtHR ruled that no issue under Article 7 ECHR arose even though at the time when the applicant committed the offence, the Additional Protocol to the Convention on the Transfer of Sentenced Persons[33] had not yet been ratified by Sweden and the transfer had negative implications for his conditional release. The ECtHR held that the applicant's transfer or, more specifically, the provisions for conditional release — which were harsher in Hungary than in Sweden — may not be considered as amounting to a 'penalty' within the meaning of Article 7

29 See, for example, judgment of 20 December 2017, *Vaditrans* (C-102/16, EU:C:2017:1012, paragraph 50).

30 See, for example, judgment of 3 June 2008, *The International Association of Independent Tanker Owners and Others* (C-308/06, EU:C:2008:312, paragraph 71 and the case-law cited). See in particular, judgment of 3 May 2007, *Advocaten voor de Wereld* (C-303/05, EU:C:2007:261, paragraph 50).

31 Judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraph 57 and the case-law cited).

32 See, on this discussion, my Opinion in *Scialdone* (C-574/15, EU:C:2017:553, point 151), referring to the judgment of the ECtHR of 21 October 2013, *Del Río Prada v. Spain* [GC], (CE:ECHR:2013:1021JUD004275009, § 85 et seq. and the case-law cited).

33 Additional Protocol to the Convention on the Transfer of Sentenced Persons of 18 December 1997 (European Treaty Series No. 167).

of the ECHR because questions of conditional release concerned *the execution of a sentence*.[34] The ECtHR has confirmed the same approach with regard to the Framework Decision by considering that 'surrender …[is] not a penalty inflicted … for committing an offence, but a procedure intended to permit the execution of a judgment given in [another Member State].'[35]

98. In line with that approach, the ECtHR does not deem problematic the fact that different instruments concerning international cooperation are applied to offences committed or to judgments rendered before their entry into force in a given State.[36] This position has also been confirmed with regard to an EAW.[37]

99. This conception of the legality principle has also inspired the case-law of this Court in the field of the EAW. In *Advocaten voor de Wereld*, the Court declared that the fact that Article 2(2) of the Framework Decision dispenses with verification of double criminality does not entail a violation of the legality principle, since the definition of the offences and of the penalties applicable continue to be matters determined by the law of the issuing Member State.[38] That judgment placed the emphasis on mutual trust and on the fact that compliance with the legality principle should be ensured by the issuing Member State.

100. It seems, therefore, that in accordance with the case-law of both this Court and the ECtHR, consideration of the law of the issuing Member State at the time of the issuing of the EAW, for the purposes of assessing the condition relating to the length of the penalty in Article 2(2) of the Framework Decision, would not infringe the principle of legality enshrined in Article 49 of the Charter of Fundamental Rights of the European Union, interpreted in conformity with the scope of Article 7 ECHR. This is because such an interpretation would not lead to the imposition in the criminal case of a penalty which was not provided for by the issuing Member State at the time when the offences were committed.

101. Nonetheless, three additional considerations must be borne in mind.

102. First, beyond the strict understanding of the scope of the legality principle, consideration of the principle of legal certainty lends further support to the interpretation of Article 2(2) of the Framework Decision proposed in point 91 of this Opinion. Indeed, that principle means that, beyond the strict realm of the definition of offences and penalties in criminal law, EU law and national implementing legislation must be certain and its application foreseeable to those who are subject to it, in particular in the area of criminal law. The application of that standard must be observed all the more strictly in the case of rules liable to entail consequences for individuals.[39] That is the case not only for substantive criminal rules, but also for procedural criminal law provisions such as the Framework Decision, which may lead to the deprivation of liberty of the requested person.[40]

34 ECtHR, *Szabó v. Sweden*, decision on admissibility of 27 June 2006 (CE:ECHR:2006:0627DEC002857803). See also, on the Additional Protocol to the Transfer Convention, ECtHR, decisions on admissibility of 27 June 2006, *Csoszánszki v. Sweden* (CE:ECHR:2006:0627DEC002231802); of 6 September 2011, *Müller v. Czech Republic* (CE:ECHR:2011:0906DEC004805809); and of 23 October 2012, *Ciok v. Poland* (CE:ECHR:2012:1023DEC000049810). See, on other instances of international cooperation, ECtHR, decision on admissibility of 5 July 2007, *Saccoccia v. Austria* (CE:ECHR:2007:0705DEC006991701).

35 ECtHR, decision on admissibility of 7 October 2008, *Monedero Angora v. Spain* (CE:ECHR:2008:1007DEC004113805, § 2). See also ECtHR, decision on admissibility of 23 October 2012, *Giza v. Poland* (CE:ECHR:2012:1023DEC000199711, §§ 30 to 34).

36 ECtHR, decision on admissibility of 27 June 2006, *Szabó v. Sweden* (CE:ECHR:2006:0627DEC002857803), and decision on admissibility of 6 September 2011, *Müller v. Czech Republic* (CE:ECHR:2011:0906DEC004805809).

37 ECtHR, decision on admissibility of 7 October 2008, *Monedero Angora v. Spain* (CE:ECHR:2008:1007DEC004113805, § 2).

38 Judgment of 3 May 2007, *Advocaten voor de Wereld* (C-303/05, EU:C:2007:261, paragraph 53).

39 See, for example, judgment of 9 July 2015, *Salomie and Oltean* (C-183/14, EU:C:2015:454, paragraph 31 and the case-law cited.)

40 Legality, broadly understood (in the sense of lawfulness and in connection with the concept of the rule of law) features in the case-law of the Court regarding a number of elements unrelated to the definition of offences and penalties, such as the rules regarding the authorities competent to impose sanctions. See, for example, judgments of 1 October 2015, *Weltimmo* (C-230/14, EU:C:2015:639, paragraph 56), and of 17 January 2019, *Dzivev and Others* (C-310/16, EU:C:2019:30, paragraphs 34 and 35). Similarly, the requirements of clarity and precision apply generally to the 'law' that provides for limitations to fundamental rights. See judgments of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 81), and of 17 January 2019, *Dzivev and Others* (C-310/16, EU:C:2019:30, paragraph 40).

103. It is in that broader context that the case-law on legal certainty requires that the national legal rules must be worded unequivocally, not only to give the persons concerned a clear and precise understanding of their rights and obligations, but also to enable national courts to ensure their application. The unpredictable situation that would be created by interpreting the inconclusive wording of Article 2(2) in such a way that the relevant law for assessing the condition relating to the length of the penalty could subsequently change at any time would be difficult to reconcile with the requirements of clarity and foreseeability imposed by the principle of legal certainty.

104. Second, while it is true that the Court held in *Advocaten voor de Wereld* that Article 2(2) of the Framework Decision is not contrary to the principle of legality, it did so on the basis that the definition of offences and of the penalties applicable 'continue to be matters determined by the law *of the issuing Member State*, which, as is, moreover, stated in Article 1(3) of the Framework Decision, must respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU, and, consequently, the principle of the legality of criminal offences and penalties.'[41] The requirements imposed in that provision regarding the qualification of the offences, as well as the seriousness of those offences, by reference to the scale of penalties in the issuing Member State, must be applied in accordance with the highest standard of legal certainty. They form the basis of the trust that is required from the executing Member State and upon which the success of the Framework Decision as a system fully depends.

105. Finally, it is apparent from recent case-law of this Court that Member States have different approaches to the scope of the principle of legality.[42] Those different approaches may also resonate in their consideration of the different conditions for the application of instruments of judicial cooperation in the Area of Freedom, Security and Justice, in particular the Framework Decision. An interpretation of the provision at issue such as the one advocated by the Spanish and Belgian Governments and by the Procureur-Generaal (Prosecutor General) would risk coming into conflict with some of the national conceptions of the legality principle in a field where the Framework Decision itself does not provide an unequivocal answer.[43]

C. Final remarks

106. Having suggested an answer to the specific question posed by the referring court, I believe it might be useful to recall in lieu of a conclusion what this case, as put before this Court, is *not about*.

107. First, on a certain construction, the facts and legal context underlying the criminal case in the issuing Member State could be seen as coming into conflict with the fundamental right of freedom of expression. The case before this Court is nonetheless not concerned with such matters, nor is it in any way concerned with the merits of the sentencing decisions the execution of which is sought by the EAW at issue.

108. Second, this case is also not concerned with the assessment of the first condition to trigger the applicability of Article 2(2) of the Framework Decision: can the offence of 'glorification of terrorism and humiliation of the victims of terrorism' as defined by the Spanish Criminal Code automatically be subsumed under 'terrorism', which features as one of the 32 offences on the list in Article 2(2)?

41 Judgment of 3 May 2007, *Advocaten voor de Wereld* (C-303/05, EU:C:2007:261, paragraph 53). Emphasis added.

42 Judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraph 60).

43 A good example of this diversity can be found in the discussions in the European Committee on Crime Problems of the Council of Europe. The discussions on the point in time of reference when considering double criminality as regards extradition requests shows that several Member States consider that the point in time should be that of the facts giving rise to the offence due to considerations of legality, while other Member States consider that the point in time should be that of the extradition request, in order to foster judicial cooperation. See *Compilation of Replies to the questionnaire on the reference moment to be applied when considering double criminality as regards extradition requests*, PC-OC(2013)12Bil.Rev3, European Committee on Crime Problems, Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters, Strasbourg, 25 November 2014.

109. Third, the answer given to the questions in the present case equally does not have any impact on other aspects affecting the potential success of the EAW at issue, such as consideration of surrender for the other two offences for which surrender has been requested, or the assessment by the executing judicial authority of the double criminality criterion of Article 2(4) of the Framework Decision with regard to the three offences at issue.

110. Fourth, it might also be recalled that, from the point of view of the possible practical and systemic consequences, the discussion on the determination of the relevant (temporal version of the) applicable law with regard to *the issuing Member State* under Article 2(2) of the Framework Decision is not automatically transposable to the interpretation of Article 2(4).[44]

V. Conclusion

111. On the basis of the foregoing considerations, I propose that the Court answer the question referred by the Hof van Beroep te Gent (Court of Appeal of Ghent, Belgium) as follows:

– 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 shall be interpreted as referring, for the purposes of assessing the threshold maximum period of at least 3 years imposed therein, to the criminal legislation that is applicable in the issuing Member State to the specific criminal offence(s) to which the EAW relates.

44 As discussed above at points 45 to 47.