

JUDGMENT OF THE COURT (Third Chamber)

1 December 2008\*

In Case C-388/08 PPU,

REFERENCE for a preliminary ruling under Article 35 EU from the Korkein oikeus (Finland), made by decision of 5 September 2008, received at the Court on the same day, in the criminal proceedings against

**Artur Leymann,**

**Aleksei Pustovarov,**

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J.N. Cunha Rodrigues, J. Klučka, P. Lindh (Rapporteur) and A. Arabadjiev, Judges,

Advocate General: J. Mazák,  
Registrar: C. Strömholm, Administrator,

\* Language of the case: Finnish.

having regard to the request of the referring court of 5 September 2008, received at the Court on the same day, that the reference for a preliminary ruling be dealt with under an urgent procedure pursuant to Article 104b of the Rules of Procedure,

having regard to the decision of the Third Chamber of 11 September 2008 granting that request,

having regard to the written procedure and further to the hearing on 4 November 2008,

after considering the observations submitted on behalf of:

— Mr Leymann, by M. Annala, asianajaja,

— Mr Pustovarov, by H. Tuominen, oikeustieteen maisteri,

— the Finnish Government, by A. Guimaraes-Purokoski, acting as Agent,

— the Spanish Government, by J.M. Rodríguez Cárcamo, acting as Agent,

— the Netherlands Government, by C. ten Dam, acting as Agent,

— the Commission of the European Communities, by I. Koskinen, R. Troosters and S. Grünheid, acting as Agents,

after hearing the Advocate General,

gives the following

### **Judgment**

- <sup>1</sup> This reference for a preliminary ruling concerns the interpretation of Article 27(2) to (4) 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; ‘the Framework Decision’).
  
- <sup>2</sup> The reference was made in criminal proceedings brought in Finland against Mr Leymann and Mr Pustovarov, who were accused of a serious (‘törkeä’) narcotics offence and surrendered to the Finnish authorities pursuant to European arrest warrants.

## Legal framework

### *European Union law*

3 Article 2(1) of the Framework Decision provides:

‘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 ...’

4 Article 2(2) of the Framework Decision lists 32 offences, including illicit trafficking in narcotic drugs and psychotropic substances, which, 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, are, without verification of the double criminality of the act, to give rise to surrender pursuant to a European arrest warrant.

5 Under Article 2(4) of the Framework Decision, a verification of the double criminality of the act can be carried out in relation to offences other than those listed in Article 2(2).

6 Article 3 of the Framework Decision lists the grounds for mandatory non-execution of the European arrest warrant.

7 Article 4 of the Framework Decision lists the grounds for optional non-execution of the European arrest warrant.

8 Article 8 of the Framework Decision concerns the content and form of the European arrest warrant. The information required under Article 8(1)(d) and (e) is as follows:

‘(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, including the time, place and degree of participation in the offence by the requested person’.

9 Article 27(2) of the Framework Decision provides that ‘a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered’, except in the case referred to in Article 27(1), under which consent for such surrender can be presumed to have been given, and in the cases provided for in Article 27(3).

10 Article 27(3) of the Framework Decision provides that Paragraph 2 does not apply in the following cases:

- '(a) when the person having had an opportunity to leave the territory of the Member State to which he or she has been surrendered has not done so within 45 days of his or her final discharge, or has returned to that territory after leaving it;
  
- (b) the offence is not punishable by a custodial sentence or detention order;
  
- (c) the criminal proceedings do not give rise to the application of a measure restricting personal liberty;
  
- (d) when the person could be liable to a penalty or a measure not involving the deprivation of liberty, in particular a financial penalty or a measure in lieu thereof, even if the penalty or measure may give rise to a restriction of his or her personal liberty;
  
- (e) when the person consented to be surrendered, where appropriate at the same time as he or she renounced the speciality rule, in accordance with Article 13;
  
- (f) when the person, after his/her surrender, has expressly renounced entitlement to the speciality rule with regard to specific offences preceding his/her surrender. ...
  
- (g) where the executing judicial authority which surrendered the person gives its consent in accordance with paragraph 4'.

11 Article 27(4) of the Framework Decision is worded as follows:

‘A request for consent shall be submitted to the executing judicial authority, accompanied by the information mentioned in Article 8(1) and a translation as referred to in Article 8(2). Consent shall be given when the offence for which it is requested is itself subject to surrender in accordance with the provisions of this Framework Decision. Consent shall be refused on the grounds referred to in Article 3 and otherwise may be refused only on the grounds referred to in Article 4. The decision shall be taken no later than 30 days after receipt of the request.

...’

12 Under Article 31(1) of the Framework Decision, the corresponding provisions of various conventions applicable in the field of extradition in relations between the Member States are to be replaced, inter alia the European Convention on Extradition, signed on 13 December 1957, the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on simplified extradition procedure between the Member States of the European Union, signed on 10 March 1995 (OJ 1995 C 78, p. 2) and the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, relating to extradition between the Member States of the European Union, signed on 27 September 1996 (OJ 1996 C 313, p. 12; ‘the 1996 Convention’).

13 It is apparent from the information concerning the date of entry into force of the Treaty of Amsterdam, published in the *Official Journal of the European Communities* of 1 May 1999 (OJ 1999 L 114, p. 56), that the Republic of Finland made a declaration on the basis of Article 35(2) EU by which it accepted the jurisdiction of the Court to give preliminary rulings in accordance with the arrangements laid down in Article 35(3)(b) EU.

*National law*

- <sup>14</sup> According to Paragraph 1 of Chapter 50 of the Criminal Code (Rikoslaki, in the version deriving from Law 1304/1993), in force at the time of the facts mentioned in the indictment, a person who, inter alia, unlawfully imports or attempts to import a narcotic substance, transports or has it transported, sells, deals in as an intermediary, hands over to another person or otherwise distributes or attempts to distribute a narcotic substance or possesses or attempts to obtain a narcotic substance, commits a narcotics offence.
- <sup>15</sup> According to Paragraph 2 of Chapter 50 of that Code, a narcotics offence is ‘serious’ if, inter alia, it concerns an especially dangerous narcotic substance or a large quantity of narcotic substances, and the offence is also serious when assessed as a whole. A person convicted of a serious narcotics offence is to be sentenced to a period of imprisonment of at least one year and at most 10 years.
- <sup>16</sup> Law 1286/2003 on the surrender of persons between the Republic of Finland and the other Member States of the European Union (Laki rikoksen johdosta tapahtuvasta luovuttamisesta Suomen ja muiden Euroopan unionin jäsenvaltioiden välillä) aims to transpose the Framework Decision. Paragraph 14 of the law provides that the request for arrest and surrender must set out the nature and legal classification of the offence, particularly in respect of acts where double criminality is not a requirement, along with a description of the circumstances in which the offence was committed, including the time and place of the offence and the degree of participation in the offence of the requested person.
- <sup>17</sup> Paragraph 58(1) of the law provides that a person surrendered to the Republic of Finland by a Member State may not be prosecuted, sentenced or deprived of liberty for an offence committed before the surrender other than the offence on which the surrender was based. Paragraph 58(2) provides that that prohibition does not apply, inter alia, where the criminal proceedings do not give rise to the application of a

measure restricting the liberty of the surrendered person or where the Member State that has surrendered the person consents to an exception from the prohibition.

### **The main proceedings and the questions referred for a preliminary ruling**

- 18 The order for reference concerns criminal proceedings against Mr Leymann and Mr Pustovarov, who are being prosecuted by the Finnish authorities for a serious narcotics offence. They were remanded in custody, Mr Leymann by a decision of the Helsingin käräjäoikeus (Helsinki District Court) (Finland) of 21 March 2006 taken in his absence, and Mr Pustovarov by a decision of that court of 5 May 2006 taken in his absence.

#### *The criminal proceedings against Mr Leymann*

- 19 By a European arrest warrant of 21 March 2006, the Helsinki District Public Prosecutor requested the Polish judicial authority to arrest and surrender Mr Leymann for the purposes of his prosecution for a serious narcotics offence he was suspected of having committed between 1 January 2005 and 21 March 2006. According to the arrest warrant, Mr Leymann unlawfully imported into Finland, with the aid of accomplices, a large quantity of amphetamines, a substance classified as an especially dangerous narcotic substance, with the intention of reselling it.
- 20 On 28 June 2006, the Polish judicial authority decided to surrender Mr Leymann to the Republic of Finland on the basis of the request set out in the arrest warrant.

- 21 On 2 October 2006, the Helsinki District Public Prosecutor instituted criminal proceedings against Mr Leymann before the Helsingin käräjäoikeus for a serious narcotics offence committed between 15 and 26 February 2006. The indictment stated that Mr Leymann had, together with Mr Pustovarov and others, imported into Finland 26 kg of hashish with the intention of reselling it. Mr Pustovarov and another person were said to have organised the import, with the assistance of Mr Leymann. Mr Leymann imported the hashish into Finland via the port of Hanko, in a private car, and handed it over in Kouvola (Finland) by leaving it for another person to collect.
- 22 The Helsinki District Public Prosecutor stated that, before the start of the hearing of the case by the Helsingin käräjäoikeus, information had been received from a representative of the Republic of Poland at Eurojust, the European body responsible for reinforcing judicial cooperation, that it was not necessary to request the consent of that Member State under Article 27(3)(g) and (4) of the Framework Decision for prosecution of Mr Leymann for the serious narcotics offence consisting of the import of hashish, even though the surrender had taken place on the basis of the suspected import of amphetamines.
- 23 On 7 November 2006, the Helsingin käräjäoikeus, before which no objection had been raised to the surrender or indictment of the accused persons, convicted the alleged offenders, including Mr Leymann, who was sentenced to a term of imprisonment.
- 24 Mr Leymann appealed against that conviction to the Helsingin hovioikeus (Court of Appeal, Helsinki), claiming that he should not have been prosecuted for the serious narcotics (hashish) offence committed between 15 and 26 February 2006 because he had not been surrendered to the Finnish judicial authority for that offence. By decision of 16 August 2007, that court took the view that the Helsingin käräjäoikeus had obtained the consent of the Polish judicial authority, expressed through its representative at Eurojust, to prosecute Mr Leymann for that offence.

25 On 30 November 2007, the Helsingin hovioikeus gave judgment on the substance of the case and sentenced Mr Leymann to three years and four months in prison. Although, according to the order for reference, Mr Leymann has been deprived of his liberty since his arrest in the surrender proceedings, his representative stated at the hearing before the Court that he has been on parole since February 2008.

*Criminal proceedings against Mr Pustovarov*

26 By a European arrest warrant of 8 May 2006, the Helsinki District Public Prosecutor requested the Spanish judicial authority to arrest and surrender Mr Pustovarov for the purposes of his prosecution for a serious narcotics offence he was suspected of having committed between 19 and 25 February 2006. According to the arrest warrant, Mr Pustovarov unlawfully imported into Finland, with the assistance of accomplices, a large quantity of amphetamines classified as especially dangerous narcotic drugs, with the intention of reselling them. Mr Pustovarov was described as having organised the importation of the drugs and their resale. The arrest warrant also related to two other serious narcotics offences consisting of the importation and resale of large quantities of hashish, one committed in September and October 2005, the other in November of that year.

27 On 20 June 2006, the Spanish judicial authority decided to surrender Mr Pustovarov to the Republic of Finland on the basis of the request set out in the European arrest warrant of 8 May 2006.

28 On 2 October 2006, the Helsinki District Public Prosecutor instituted criminal proceedings against Mr Pustovarov before the Helsingin käräjäoikeus on the basis set out with respect to him in paragraph 21 of this judgment.

- 29 On 24 October 2006, while the hearing of the case by the court was in progress, the Public Prosecutor issued another European arrest warrant, requesting the Spanish judicial authority to consent to the prosecution of Mr Pustovarov for a serious narcotics offence committed between 19 and 25 February 2006, consisting of the importation for resale of a large quantity of hashish, not of amphetamines as had been stated in the original arrest warrant.
- 30 By a judgment of 7 November 2006, which was delivered before the consent of the Spanish judicial authority requested under the second arrest warrant had been obtained, the Helsingin käräjäoikeus sentenced Mr Pustovarov to a term of imprisonment for the serious narcotics offence committed between 15 and 26 February 2006, as set out in the indictment, and two other serious narcotics offences of which he was accused.
- 31 Mr Pustovarov appealed against that conviction to the Helsingin hovioikeus, claiming that he should not have been prosecuted for the serious narcotics (hashish) offence committed between 15 and 26 February 2006 because he had not been surrendered to the Finnish judicial authority for that offence.
- 32 On 11 July 2007, the Spanish judicial authority gave its consent to the prosecution of Mr Pustovarov on the grounds set out in the second arrest warrant.
- 33 The Helsingin hovioikeus considered that, even though the consent of the Spanish judicial authority had been obtained only after the judgment of the Helsingin käräjäoikeus, that court had not been precluded from hearing the case against Mr Pustovarov concerning the serious narcotics offence committed between 15 and 26 February 2006.

34 On 30 November 2007, the Helsingin hovioikeus convicted Mr Pustovarov of that offence and of the two other offences of which he was accused, and sentenced him to imprisonment for a total of five years and eight months.

*The appeal proceedings before the referring court*

35 On 28 May 2008, Mr Leymann and Mr Pustovarov were given leave to appeal to the Korkein oikeus (Supreme Court) on the question whether the specialty principle in the national legislation transposing Article 27(2) of the Framework Decision precluded them from being prosecuted for the serious narcotics offence, relating to hashish, committed between 15 and 26 February 2006.

*Questions referred for a preliminary ruling*

36 In those circumstances, the Korkein oikeus decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) How must the expression “offence ... other than that for which he or she was surrendered”, used in Article 27(2) of the Framework Decision, be interpreted and, more specifically, what criteria are decisive in assessing whether the description of the offence on which the prosecution is based differs so much from the description of the offence on which the surrender was based that it must be regarded as an “other” offence within the meaning of Article 27(2), with the result that any prosecution requires consent in accordance with Article 27(3)(g) and (4)?

- (2) Must Article 27(2) of the Framework Decision be interpreted as meaning that the consent procedure referred to in Article 27(3)(g) and (4) is to be applied in a situation where both the arrest warrant and the final prosecution were based on a (serious) narcotics offence but the description of the offence was subsequently altered so that the prosecution concerned a different kind of narcotics from that referred to in the arrest warrant?
- (3) How must Article 27(2) of the Framework Decision — according to which a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for another offence — be interpreted, in relation in particular to the consent procedure referred to in Article 27(4) and taking into account Article 27(3)(c), under which the specialty rule does not apply if the criminal proceedings do not give rise to the application of a measure restricting personal liberty?
- (a) In cases which fall within the scope of the consent procedure, must the abovementioned provisions be interpreted as meaning that they do not preclude prosecution being brought, proceedings conducted or judgment given in relation to the offence in question before consent is received, provided that the person under suspicion does not suffer a deprivation or restriction of liberty as a result of that suspicion?
- (b) Of what relevance is it that the criminal proceedings associated with the restriction on liberty relate to several offences, one of which falls within the scope of the consent procedure? Must the abovementioned provisions be interpreted in that case as not precluding prosecution being brought, proceedings conducted or judgment given in relation to the offence for which consent is required, even before consent is received, despite the fact that the suspect's liberty has been restricted in connection with the proceedings, where that restriction has a lawful basis because of other charges?

## **The urgent procedure**

37 By letter of 5 September 2008, lodged at the Court Registry on the same day, the Korkein oikeus asked for the reference for a preliminary ruling to be dealt with under an urgent procedure pursuant to Article 104b of the Rules of Procedure.

38 The referring court justified its request by pointing out that Mr Pustovarov is currently serving a sentence of imprisonment for various offences, including the offence of unlawful importation of 26 kg of hashish, the criminal proceedings in respect of which gave rise to the reference for a preliminary ruling. Mr Pustovarov must be released on parole on 18 March 2009. The referring court states that, if prosecution for that offence is ruled out, the length of the sentence imposed on Mr Pustovarov would be reduced and his release brought forward.

39 On a proposal from the Judge-Rapporteur, the Third Chamber of the Court, after hearing the Advocate General, decided to grant the referring court's request for the reference for a preliminary ruling to be dealt with under an urgent procedure.

## **The questions referred**

40 As a preliminary point, it should be noted that, as is apparent from paragraph 13 of this judgment, the Court has jurisdiction in the present case to rule on the interpretation of the Framework Decision under Article 35 EU.

*First question*

41 By its first question, the referring court asks, essentially, what the decisive criteria are which would enable it to determine whether the person surrendered is being prosecuted for an 'offence other' than that for which he was surrendered within the meaning of Article 27(2) of the Framework Decision, making it necessary to apply the consent procedure laid down in Article 27(3)(g) and 27(4).

42 It is clear from Article 1(1) and (2) of the Framework Decision and from recitals 5, 6, 7 and 11 in its preamble that the purpose of the Framework Decision is to replace the multilateral system of extradition between Member States with a system of surrender, as between judicial authorities, of convicted persons or suspects for the purpose of enforcing judgments or of criminal proceedings based on the principle of mutual recognition. The Framework Decision aims in particular to facilitate and accelerate judicial cooperation (see Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 28).

43 Article 27(2) of the Framework Decision lays down the specialty rule, according to which a person who has been surrendered may not be prosecuted, sentenced or otherwise deprived of liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered.

44 That rule is linked to the sovereignty of the executing Member State and confers on the person requested the right not to be prosecuted, sentenced or otherwise deprived of liberty except for the offence for which he or she was surrendered.

- 45 The Member States may waive the application of the specialty rule, in accordance with Article 27(1) of the Framework Decision. That rule is subject, moreover, to a number of exceptions, laid down in Article 27(3).
- 46 In order to assess the scope of Article 27(2) of the Framework Decision, and more specifically of the expression 'offence other' than that for which the person was surrendered, it is necessary to take into account the objective pursued by the Framework Decision.
- 47 In that regard, recital 5 in the preamble to the Framework Decision states that the objective set for the 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.
- 48 That recital adds that traditional cooperation relations 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.
- 49 Recital 6 in the preamble to the Framework Decision points out that the European arrest warrant is the first concrete measure in the field of criminal law implementing the principle of mutual recognition, which the European Council has referred to as the 'cornerstone' of judicial cooperation.

50 According to recital 10 in the preamble to the Framework Decision, the implementation of the mechanism of the European arrest warrant requires a high degree of confidence between the Member States.

51 The principle of mutual recognition, which underpins the Framework Decision, also means that, in accordance with Article 1(2) of the Framework Decision, the Member States are in principle obliged to act upon a European arrest warrant. They must or may refuse to execute a warrant only in the cases listed in Articles 3 and 4.

52 In order to decide on surrender of the person requested for the purposes of prosecution of an offence defined by the national law applicable in the issuing Member State, the judicial authority of the executing Member State, acting on the basis of Article 2 of the Framework Decision, will examine the description of the offence in the European arrest warrant. That description must, in accordance with the form in the annex to the Framework Decision, contain the information referred to in Article 8 of the Framework Decision, that is, *inter alia*, the nature and legal classification of the offence, a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person, and the prescribed scale of penalties for the offence.

53 As the Commission pointed out in its observations, the surrender request is based on information which reflects the state of investigations at the time of issue of the European arrest warrant. It is therefore possible that, in the course of the proceedings, the description of the offence no longer corresponds in all respects to the original description. The evidence which has been gathered can lead to a clarification or even a modification of the constituent elements of the offence which initially justified the issue of the European arrest warrant.

- 54 The terms ‘prosecuted’, ‘sentenced’ or ‘deprived of liberty’ in Article 27(2) of the Framework Decision indicate that the concept of an ‘offence other’ than that for which the person was surrendered must be assessed with regard to the different stages of the proceedings and in the light of any procedural document capable of altering the legal classification of the offence.
- 55 In order to assess, in the light of the consent requirement, whether it is possible to infer from a procedural document an ‘offence other’ than that referred to in the European arrest warrant, the description of the offence in the European arrest warrant must be compared with that in the later procedural document.
- 56 To require the consent of the executing Member State for every modification of the description of the offence would go beyond what is implied by the specialty rule and interfere with the objective of speeding up and simplifying judicial cooperation of the kind referred to in the Framework Decision between the Member States.
- 57 In order to establish whether what is at issue is an ‘offence other’ than that for which the person was surrendered, it is necessary to ascertain whether the constituent elements of the offence, according to the legal description given by the issuing State, are those for which the person was surrendered and whether there is a sufficient correspondence between the information given in the arrest warrant and that contained in the later procedural document. Modifications concerning the time or place of the offence are allowed, in so far as they derive from evidence gathered in the course of the proceedings conducted in the issuing State concerning the conduct described in the arrest warrant, do not alter the nature of the offence and do not lead to grounds for non-execution under Articles 3 and 4 of the Framework Decision.

58 It is for the national court having jurisdiction to ascertain, in the light of the criteria referred to in the preceding paragraph, whether the offence described in the indictment constitutes an offence other than that described in the arrest warrants issued in respect of Mr Leymann and Mr Pustovarov.

59 The answer to the first question is therefore that, in order to establish whether the offence under consideration is an ‘offence other’ than that for which the person was surrendered within the meaning of Article 27(2) of the Framework Decision, requiring the implementation of the consent procedure referred to in Article 27(3)(g) and 27(4), it must be ascertained whether the constituent elements of the offence, according to the legal description given by the issuing State, are those in respect of which the person was surrendered and whether there is a sufficient correspondence between the information given in the arrest warrant and that contained in the later procedural document. Modifications concerning the time or place of the offence are allowed, in so far as they derive from evidence gathered in the course of the proceedings conducted in the issuing State concerning the conduct described in the arrest warrant, do not alter the nature of the offence and do not lead to grounds for non-execution under Articles 3 and 4 of the Framework Decision.

### *Second question*

60 By its second question, the referring court asks essentially whether a modification of the description of the offence, concerning only the kind of narcotics in question and not changing the legal classification of the offence, is such as to define an ‘offence other’ than that for which the person was surrendered within the meaning of Article 27(2) of the Framework Decision, and makes it necessary to have recourse to the consent procedure referred to in Article 27(3)(g) and 27(4).

61 In the main proceedings, the indictment relates to the importation of hashish whereas the arrest warrants refer to the importation of amphetamines.

62 However, the offence concerned is still punishable by imprisonment for a maximum period of at least three years and comes under the rubric 'illegal trafficking in narcotic drugs' in Article 2(2) of the Framework Decision.

63 The answer to the second question is therefore that, in circumstances such as those in the main proceedings, a modification of the description of the offence concerning the kind of narcotics concerned is not such, of itself, as to define an 'offence other' than that for which the person was surrendered within the meaning of Article 27(2) of the Framework Decision.

### *Third question*

64 By its third question, the referring court asks, essentially, how the exception to the speciality rule in Article 27(3)(c) of the Framework Decision must be interpreted, taking into account the consent procedure laid down in Article 27(4) of the Framework Decision. It asks in particular whether those provisions permit a person to be prosecuted and sentenced for an 'offence other' than that for which he was surrendered, requiring the consent of the executing Member State, before that consent has been received, in so far as his liberty is not restricted. It also asks whether the fact that the person concerned is, in addition, detained on the basis of other charges providing a lawful basis for his detention affects the possibility of prosecuting and sentencing him for that 'other offence'.

65 As a preliminary point, it should be noted that the third question is only relevant where the case before the competent judicial authorities concerns an ‘offence other’ than that for which the person was surrendered since, by definition, the exceptions to the specialty rule only apply in such a situation.

66 In order to determine the scope of Article 27(3) of the Framework Decision, it is necessary to interpret that provision taking into account the subject-matter, structure and purpose of the Framework Decision.

67 The exceptions laid down in Article 27(1) and (3)(a) to (g) of the Framework Decision reproduce the exceptions contained in the earlier extradition conventions, including those referred to in the 1996 Convention. The exceptions in Article 27(3)(b) to (d) of the Framework Decision correspond to the exceptions provided for in Article 10(1)(a) to (c) of that convention.

68 There are various reasons for those exceptions. The exceptions in Article 27(1) and (3)(e) to (g) of the Framework Decision are based on the consent of the Member States concerned or on that of the judicial authorities of the executing Member State, or on the consent of the person to whom the European arrest warrant applies. The exceptions in Article 27(3)(b) to (d) relate to the applicable penalties or measures. The exception in Article 27(3)(c) refers to the criminal proceedings.

69 The exceptions based on consent apply irrespective of the proceedings which have been conducted and of the nature of the penalty incurred.

70 The exceptions set out in Article 27(3)(b) to (d) of the Framework Decision also contain different kinds of provisions. Thus, the exception in Article 27(3)(b) covers situations where the offence is not punishable by a custodial sentence or detention order. The Article 27(3)(c) exception concerns situations in which the criminal proceedings do not give rise, by law or in the assessment of the judicial authority, to the application of a measure restricting the liberty of the person concerned. Article 27(3)(d) of the Framework Decision deals with situations in which the person could be liable to a penalty or a measure not involving the deprivation of liberty, even if the penalty or measure may give rise to a restriction of his or her personal liberty. That would cover cases where pecuniary penalties were applied, including fines, or measures such as community service, or again orders to do or to refrain from doing certain things, such as a prohibition on going to certain places or an obligation not to leave the Member State concerned.

71 If the proceedings result in the finding that there has been an 'offence other' than that for which the person was surrendered, that offence cannot be prosecuted without consent having been obtained, unless the exceptions provided for in Article 27(3)(a) to (f) of the Framework Decision apply.

72 The exception in Article 27(3)(c) of the Framework Decision concerns a situation in which the criminal proceedings do not give rise to the application of a measure restricting personal liberty.

73 It follows that, in the case of that exception, a person can be prosecuted and sentenced for an 'offence other' than that for which he was surrendered, which gives rise to a penalty or measure involving the deprivation of liberty, without recourse being necessary to the consent procedure, provided that no measure restricting liberty is applied during the criminal proceedings. If however, after judgment has been given, that person is sentenced to a penalty or a measure restricting liberty, consent is required in order to enable that penalty to be executed.

74 That interpretation also reflects the provisions of Article 10(1)(b) of the 1996 Convention, as is made clear by the explanatory report to that convention, approved by the Council on 26 May 1997 (OJ 1997 C 191, p. 13). According to that report, a requesting Member State may start or continue prosecution, or try a person, for acts other than those for which he was extradited, even where the offence is punishable by a sanction restricting personal liberty, to the extent that the person is not, either during or as a result of the proceedings, restricted in his personal liberty. Thus, according to the report, if the person concerned is sentenced to a penalty or a measure involving deprivation of liberty, that sentence may not be executed unless the requesting Member State obtains the consent either of that person or the requested State.

75 Article 27(3)(c) of the Framework Decision does not, however, preclude a measure restricting liberty from being imposed on the person surrendered before consent has been obtained, where that restriction is lawful on the basis of other charges which appear in the European arrest warrant.

76 The answer to the third question is therefore that the exception in Article 27(3)(c) of the Framework Decision must be interpreted as meaning that, where there is an 'offence other' than that for which the person was surrendered, consent must be requested, in accordance with Article 27(4) of the Framework Decision, and obtained if a penalty or a measure involving the deprivation of liberty is to be executed. The person surrendered can be prosecuted and sentenced for such an offence before that consent has been obtained, provided that no measure restricting liberty is applied during the prosecution or when judgment is given for that offence. The exception in Article 27(3)(c) does not, however, preclude a measure restricting liberty from being imposed on the person surrendered before consent has been obtained, where that restriction is lawful on the basis of other charges which appear in the European arrest warrant.

## Costs

<sup>77</sup> Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Third Chamber) hereby rules:

- 1. In order to establish whether the offence under consideration is an ‘offence other’ than that for which the person was surrendered within the meaning of Article 27(2) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, requiring the implementation of the consent procedure referred to in Article 27(3)(g) and 27(4) of that Framework Decision, it must be ascertained whether the constituent elements of the offence, according to the legal description given by the issuing State, are those in respect of which the person was surrendered and whether there is a sufficient correspondence between the information given in the arrest warrant and that contained in the later procedural document. Modifications concerning the time or place of the offence are allowed, in so far as they derive from evidence gathered in the course of the proceedings conducted in the issuing State concerning the conduct described in the arrest warrant, do not alter the nature of the offence and do not lead to grounds for non-execution under Articles 3 and 4 of the Framework Decision.**
- 2. In circumstances such as those in the main proceedings, a modification of the description of the offence concerning the kind of narcotics concerned is not**

**such, of itself, as to define an ‘offence other’ than that for which the person was surrendered within the meaning of Article 27(2) of Framework Decision 2002/584.**

- 3. The exception in Article 27(3)(c) of Framework Decision 2002/584 must be interpreted as meaning that, where there is an ‘offence other’ than that for which the person was surrendered, consent must be requested, in accordance with Article 27(4) of the Framework Decision, and obtained if a penalty or a measure involving the deprivation of liberty is to be executed. The person surrendered can be prosecuted and sentenced for such an offence before that consent has been obtained, provided that no measure restricting liberty is applied during the prosecution or when judgment is given for that offence. The exception in Article 27(3)(c) does not, however, preclude a measure restricting liberty from being imposed on the person surrendered before consent has been obtained, where that restriction is lawful on the basis of other charges which appear in the European arrest warrant.**

[Signatures]