Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 8 December 2022 [1]

Case C-583/22 PPU

MV
intervener:
Generalbundesanwalt beim Bundesgerichtshof

(Request for a preliminary ruling from the Bundesgerichtshof (Federal Court of Justice, Germany))

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – Framework Decision 2008/675/JHA – Article 3 – Criminal convictions in several Member States – Determination of a cumulative sentence – Inclusion of the conviction handed down in another State – Maximum cumulative sentence provided for by national law exceeded)

I. Introduction

1. This case presents the Court with its first opportunity to interpret Article 3(5) of Framework Decision 2008/675/JHA, [2] which concerns the delicate question of the possible formation of a cumulative sentence [3] in the event of multiple offences committed by multiple acts [4] in several Member States.

[1] Original language: French.

[2] Council Framework Decision of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings (OJ 2008 L 220, p. 32).

[3] For the purposes of this Opinion, by 'formation of a cumulative sentence' I mean both the imposition of an overall sentence the quantum of which corresponds to the highest initial sentence that absorbs the most lenient sentence, which is regarded as being included in the former, and the imposition of a cumulative sentence that combines sentences within the limits of a maximum quantum.

[4] By 'multiple offences committed by multiple acts', I mean a situation in which a person who has committed an offence commits a second offence, although he or she has not yet been convicted of the first offence by final judgment.

II. Legal context

A. Framework Decision 2008/675

2. Recitals 1, 5, 7, 8, 9, and 14 of Framework Decision 2008/675 state:

‘(1) The European Union has set itself the objective of maintaining and developing an area of freedom, security and justice. This objective requires that it be possible for information on convictions handed down in the Member States to be taken into account outside the convicting Member State, both in order to prevent new offences and in the course of new criminal proceedings.

…

(5) The principle that the Member States should attach to a conviction handed down in other Member States effects equivalent to those attached to a conviction handed down by their own courts in accordance with national law should be affirmed, whether those effects be regarded by national law as matters of fact or of procedural or substantive law. However, this Framework Decision does not seek to harmonise the consequences attached by the different national legislations to the existence of previous convictions, and the obligation to take into account previous convictions handed down in other Member States exists only to the extent that previous national convictions are taken into account under national law.

…

(7) The effects of a conviction handed down in another Member State should be equivalent to the effects of a national decision at the pre-trial stage of criminal proceedings, at the trial stage and at the time of execution of the sentence.

(8) Where, in the course of criminal proceedings in a Member State, information is available on a previous conviction in another Member State, it should as far as possible be avoided that the person concerned is treated less favourably than if the previous conviction had been a national conviction.

(9) Article 3(5) should be interpreted, inter alia, in line with recital 8, in such a manner that if the national court in the new criminal proceedings, when taking into account a previously imposed sentence handed down in another Member State, is of the opinion that imposing a certain level of sentence within the limits of national law would be disproportionately harsh on the offender, considering his or her circumstances, and if the purpose of the punishment can be achieved by a lower sentence, it may reduce the level of sentence accordingly, if doing so would have been possible in purely domestic cases.

…

(14) Interference with a judgment or its execution covers, inter alia, situations where, according to the national law of the second Member State, the sanction imposed in a previous judgment is to be absorbed by or included in another sanction, which is then to be effectively executed, to the extent that the first sentence has not already been executed or its execution has not been transferred to the second Member State.’

3. Article 1(1) of that framework decision provides:

'The purpose of this Framework Decision is to determine the conditions under which, in the course of criminal proceedings in a Member State against a person, previous convictions handed down against the same person for different facts in other Member States, are taken into account.'

4. According to Article 2 of that framework decision, '"conviction" means any final decision of a criminal court establishing guilt of a criminal offence'.

5. Article 3 of that framework decision, entitled 'Taking into account, in the course of new criminal proceedings, a conviction handed down in another Member State', provides:

'1. Each Member State shall ensure that in the course of criminal proceedings against a person, previous convictions handed down against the same person for different facts in other Member States, in respect of which information has been obtained under applicable instruments on mutual legal assistance or on the exchange of information extracted from criminal records, are taken into account to the extent previous national convictions are taken into account, and that equivalent legal effects are attached to them as to previous national convictions, in accordance with national law.

2. Paragraph 1 shall apply at the pre-trial stage, at the trial stage itself and at the time of execution of the conviction, in particular with regard to the applicable rules of procedure, including those relating to provisional detention, the definition of the offence, the type and level of the sentence, and the rules governing the execution of the decision.

3. The taking into account of previous convictions handed down in other Member States, as provided for in paragraph 1, shall not have the effect of interfering with, revoking or reviewing previous convictions or any decision relating to their execution by the Member State conducting the new proceedings.

…

5. If the offence for which the new proceedings being conducted was committed before the previous conviction had been handed down or fully executed, paragraphs 1 and 2 shall not have the effect of requiring Member States to apply their national rules on imposing sentences, where the application of those rules to foreign convictions would limit the judge in imposing a sentence in the new proceedings.

However, the Member States shall ensure that in such cases their courts can otherwise take into account previous convictions handed down in other Member States.'

B. German law

6. The provisions governing the formation of a cumulative sentence are contained in Paragraphs 53 to 55 of the Strafgesetzbuch (the German Criminal Code; 'the StGB').

7. Paragraph 53(1) of the StGB, which concerns multiple offences committed by multiple acts, provides:

'Where a person has committed several offences which are tried together and has incurred several custodial sentences or several fines, a cumulative sentence shall be imposed.'

8. Paragraph 54 of the StGB, which concerns the formation of a cumulative sentence, provides in subparagraphs 1 and 2 thereof:

'1. Where one of the individual sentences is life imprisonment, the cumulative sentence shall be life imprisonment. In all other cases, the cumulative sentence is formed by increasing the maximum sentence imposed, and, in the case of penalties of different types, by increasing the sentence which is most severe in nature. In that respect, the person of the offender and the individual offences are considered as a whole.

2. The cumulative sentence cannot correspond to the sum of the individual sentences. It may not exceed 15 years in the case of non-life custodial sentences and 720 daily fines in the case of a fine.'

9. Paragraph 55(1) of the StGB, which concerns the formation of a subsequent cumulative sentence, provides:

'Paragraphs 53 and 54 shall also apply where a person who has been convicted by final judgment, and has had imposed on him or her a sentence which has not been executed, become time-barred or been remitted, is convicted of another offence which he or she committed prior to the previous conviction. A previous conviction shall be deemed to be the conviction in previous proceedings in which the underlying findings of fact could be examined for the last time.'

III. The dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

10. The appellant in the main proceedings is a French national.

11. Between August 2002 and September 2003, the appellant in the main proceedings committed various criminal offences in France. On 10 October 2003 he abducted a female student from a university campus in Germany and raped her.

12. On 20 October 2003, the appellant in the main proceedings was arrested in the Netherlands under an arrest warrant issued by the French authorities, placed in detention pending extradition for almost seven months and then transferred to France on 17 May 2004, where he was imprisoned.

13. On 30 September 2004, the Tribunal de grande instance de Guéret (Regional Court, Guéret, France) imposed a custodial sentence of two years on the appellant in the main proceedings.

14. On 29 February 2008, the Cour d'assises du Loir-et-Cher (Assize Court, Loir-et-Cher, France) in Blois (France) imposed a custodial sentence of 15 years on the accused. That sentence absorbed the subsequent convictions of 16 May 2008 to a custodial sentence of six years by the Cour

d'assises de Loire-Atlantique (Assize Court, Loire-Atlantique, France) in Nantes (France), on the one hand, and of 23 April 2012 to a custodial sentence of one year and six months by the Cour d'appel de Grenoble (Court of Appeal, Grenoble, France), on the other.

15. On 24 January 2013, the Cour d'assises du Maine-et-Loire (Assize Court, Maine-et-Loire, France) in Angers (France) imposed a further custodial sentence of seven years on the appellant in the main proceedings.

16. Those five convictions all related to offences committed by the appellant in the main proceedings between September 2002 and September 2003. A total of 17 years and 9 months of the custodial sentences were executed, with the result that the appellant in the main proceedings remained in prison in France without interruption until 23 July 2021, the date on which he was surrendered to the German authorities.

17. Since that date, the appellant in the main proceedings has been remanded in custody in Germany under an arrest warrant issued by the Amtsgericht Freiburg im Breisgau (Local Court, Freiburg im Breisgau, Germany).

18. On 21 February 2022, the Landgericht Freiburg im Breisgau (Regional Court, Freiburg im Breisgau, Germany) tried the appellant in the main proceedings for the offences committed on 10 October 2003 in Germany and imposed on him a custodial sentence of six years for aggravated rape. That court considered that the sentence which was actually commensurate with the offences committed was seven years' imprisonment. However, since it was not possible to form a subsequent cumulative sentence which included the five sentences imposed by the French courts, that court reduced its sentence by one year by way of compensation for severity.

19. The appellant in the main proceedings lodged an appeal on a point of law against that judgment before the Bundesgerichtshof (Federal Court of Justice, Germany).

20. In the first place, the referring court points out that whether it is possible to impose a custodial sentence on the appellant in the main proceedings, for the offence of aggravated rape which is the subject matter of the main proceedings, depends on the interpretation of the principle of equal treatment of criminal convictions handed down in other Member States, which is implemented in Article 3(1) of Framework Decision 2008/675, read in conjunction with the first subparagraph of Article 3(5) thereof.

21. The referring court states that if the convictions handed down by the French courts were to be treated in the same way as German convictions, it would be necessary, pursuant to Paragraph 55(1) of the StGB, to order the formation of a subsequent cumulative sentence, combining the sentences imposed by those French courts and the sentence imposed for aggravated rape in the main proceedings, since that rape was committed before the convictions were handed down in France.

22. In that situation, it would have also been necessary to take into account the maximum custodial sentence of 15 years laid down in the second sentence of Paragraph 54(2) of the StGB. The referring court notes that that maximum had already been reached with the custodial sentence of 15 years imposed on 29 February 2008 by the Cour d'assises du Loir-et-Cher (Assize Court, Loir-et-Cher) in Blois. It points out that, as a consequence, in the event of the formation of a cumulative sentence, although an individual sentence could be imposed on the appellant in the

main proceedings for the rape which is the subject matter of the main proceedings, the cumulative sentence would nevertheless remain, by virtue of that maximum, a custodial sentence of 15 years and no further sentence could be executed against him.

23. The referring court notes that, according to its established case-law, the formation of a cumulative sentence which encompasses foreign sentences cannot be ordered as such for reasons of public international law, since it would interfere with the binding nature of the foreign conviction and the foreign State's sovereignty.

24. Given that impossibility, Article 3(1) of Framework Decision 2008/675 requires Member States to ensure that, in the course of new criminal proceedings against a person, previous convictions handed down against that person for different facts in another Member State are taken into account to the extent that previous national convictions are taken into account under national law. The idea is to avoid the person concerned being treated less favourably than if the previous criminal conviction in question had been a national conviction.

25. However, the referring court raises the issue of the scope of the first subparagraph of Article 3(5) of Framework Decision 2008/675, under which Member States are not required, if the offence for which the new proceedings being conducted was committed before the previous conviction had been handed down or fully executed, to apply their national rules on imposing sentences, where the application of those rules to foreign convictions would limit the judge in imposing a sentence in the new proceedings.

26. Therefore, according to the referring court, a sentence could be imposed for the offences which form the subject matter of the main proceedings only if the first subparagraph of Article 3(5) of Framework Decision 2008/675 were to be interpreted as meaning that the principle of equality laid down in Article 3(1) of that framework decision is inapplicable where the addition of the sentence imposed in another Member State results in the maximum custodial sentence of 15 years laid down in the second sentence of Paragraph 54(2) of the StGB being exceeded. Such an interpretation would, however, be contrary to the principle of equal treatment of convictions handed down in other Member States, in that it would allow that maximum to be exceeded with regard to the latter sentences.

27. In the second place, in the event that the first subparagraph of Article 3(5) of Framework Decision 2008/675 is in fact to be interpreted as meaning that the principle of equality laid down in Article 3(1) of that framework decision is inapplicable in the circumstances of the main proceedings, the referring court raises the issue of the interpretation of the second subparagraph of Article 3(5) of that framework decision.

28. More specifically, the referring court asks whether the taking into account of the sentence imposed in the other Member State, as provided for under the latter provision, must take place in such a way that the disadvantage resulting from the impossibility of forming a subsequent cumulative sentence is to be specifically documented and justified when determining the sentence for the offence committed on national territory.

29. The referring court states that, according to its own case-law on that point, the disadvantage resulting from the impossibility of forming a subsequent cumulative sentence which encompasses convictions handed down in another Member State is usually taken into account when determining the sentence by means of a non-quantified and compensatory reduction, which is at the discretion of the court ruling on the substance.

30. However, the referring court considers that only compensation for the disadvantage which is clearly justified and quantified is consistent with the provisions of Article 3(1) and (5) of Framework Decision 2008/675.

31. According to that framework decision, the manner in which previous convictions handed down in another Member State are taken into account should be as similar as possible to the manner in which previous national convictions are taken into account. In order to approximate as closely as possible the formation of a cumulative sentence, as provided for in Paragraphs 54 and 55 of the StGB, which requires a quantitative assessment, the referring court takes the view that it is necessary specifically to identify a disadvantage resulting from the impossibility of forming a cumulative sentence and to deduct that disadvantage from the new (cumulative) sentence to be imposed.

32. That court adds that compensation for the disadvantage which is justified and quantified is indispensable not only for reasons of transparency, but also to allow the court hearing the appeal on a point of law to review the determination of the sentence. The application of an unquantified compensatory reduction, as an approach that simply favours the accused when determining the sentence, cannot, in itself, fulfil that requirement.

33. The referring court further states that the manner in which the court ruling on the substance actually determines the compensation is left to the discretion of that court. That court can directly take into account the fact that it is not possible to form a cumulative sentence which encompasses the previous sentence when determining the new sentence, by quantifying the part to be deducted, or it can for example contemplate a 'notional cumulative sentence', formed by taking into account the foreign sentence and deducting that sentence from the new sentence. The only requirements in that context are that the compensation be appropriate and justified in an intelligible and quantified manner, as with the formation of a cumulative sentence under Paragraphs 54 and 55 of the StGB.

34. As regards the main proceedings, the referring court notes that the Landgericht Freiburg im Breisgau (Regional Court, Freiburg im Breisgau) did not take into account, in the sentence imposed in its judgment, the fact that a custodial sentence of 6 years' would result in the maximum custodial sentence of 15 years laid down in the second sentence of Paragraph 54(2) of the StGB being exceeded. Moreover, that court referred to no specific criterion which might have informed the way it took into account the convictions handed down in another Member State in accordance with the second subparagraph of Article 3(5) of Framework Decision 2008/675.

35. In those circumstances, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) In view of the principle of equal treatment under Article 3(1) of [Framework Decision 2008/675], and against the background of Article 3(5) of that decision, in the case of an actually existing situation of a cumulative sentence involving convictions handed down in Germany and in another Member State, can a sentence be imposed for the offence committed in Germany even where a notional inclusion of the sentence imposed in the other Member State would mean that the maximum permissible level under German law for a cumulative sentence for non-life custodial sentences is exceeded?

(2) If the first question is answered in the affirmative:

Must the taking into account of the sentence imposed in the other Member State, as provided for under the second sentence of Article 3(5) of [Framework Decision 2008/675], take place in such a way that the disadvantage resulting from the impossibility to form a subsequent cumulative sentence is to be specifically documented and justified in the sentencing for the offence committed in Germany, in accordance with the principles governing the formation of cumulative sentences under German law?'

36. On 27 September 2022, the Second Chamber of the Court decided that the present case should be dealt with under the urgent preliminary ruling procedure, pursuant to Article 107(1) of the Rules of Procedure of the Court.

37. The Generalbundesanwalt beim Bundesgerichtshof (Federal Public Prosecutor General at the Federal Court of Justice, Germany) and the European Commission submitted written observations.

38. Those parties and the appellant in the main proceedings attended the hearing, which was held on 14 November 2022.

IV. Analysis

A. The first question referred

39. By its first question, the referring court asks, in essence, whether Article 3(5) of Framework Decision 2008/675 must be interpreted as meaning that a Member State is required, in the course of criminal proceedings against a person, to apply its national rules on the formation of a cumulative sentence by taking into account previous convictions handed down in another Member State against the same person for other offences committed previously, where the offence giving rise to the new proceedings was committed before those previous convictions were handed down, in so far as the application of those national rules means that no sentence can be handed down or, at the very least, executed in the new proceedings. [5]

40. First of all, I would like to point out that, as stated by the Public Prosecutor General at the Federal Court of Justice and as is apparent from the order for reference, under German law the formation of a cumulative sentence which encompasses a sentence imposed abroad is not permitted on grounds of international public law. However, the case-law of the Bundesgerichtshof (Federal Court of Justice) ensures that a defendant is not thereby disadvantaged, by introducing a 'severity compensation' mechanism which allows the trial court to take into account the previous conviction when determining the sentence in the new proceedings, as it would have done if the formation of a cumulative sentence in the strict sense had been possible.

[5] I would note that it is not clear from the order for reference whether the national rules referred to by the referring court prevent a sentence from being imposed for the offences which are the subject matter of the criminal proceedings pending before it, or whether a sentence could be imposed but could not be executed. The referring court asserts that either a sentence could be imposed only if the Court adopts a particular interpretation of Article 3(5) of Framework Decision 2008/675, or that a sentence could indeed be imposed but that no other sentence could be executed. However, as I shall demonstrate, I take the view that Article 3(1) and (5) of that framework decision must be interpreted in the same way in both cases, with the result that the Court's answer to the question referred for a preliminary ruling cannot differ should it transpire that the national rules prevent not only the execution of any sentence imposed in the course of new criminal proceedings but also the very imposition of such a sentence.

41. It is also important to point out that, according to the information provided by the Public Prosecutor General at the Federal Court of Justice, it is apparent from the case-law of the Bundesgerichtshof (Federal Court of Justice) that the 15-year maximum laid down in German law for cumulative custodial sentences is, as a rule, intended to apply when that severity compensation mechanism is implemented.

42. Those clarifications having been made, I shall begin my analysis with some preliminary remarks on the purpose of Framework Decision 2008/675 and its impact on the issue of the formation of a cumulative sentence encompassing sentences imposed in several Member States, before examining Article 3(5) of that framework decision, which is central to the first question referred.

1. The purpose of Framework Decision 2008/675 and issues relating to the formation of a cumulative sentence

43. Framework Decision 2008/675 establishes a minimum obligation for Member States to take into account convictions handed down in other Member States.[6] That obligation is easy to understand in the area of freedom, security and justice established by the European Union, in which it is unacceptable for a person's criminal record to be treated differently according to whether an offence was committed in one Member State or another.

44. To that end, Article 3(1) of Framework Decision 2008/675, read in the light of recital 5 thereof, obliges Member States to ensure that, in the course of new criminal proceedings in a Member State against the same person and for different facts, previous convictions handed down in other Member States are taken into account to the extent that previous national convictions are taken into account under national law, and that the legal effects attached to them are equivalent to those attached to previous national convictions, in accordance with national law, whether in relation to questions of fact or questions of substantive or procedural law.[7] That framework decision thus lays down a principle of equal treatment irrespective of whether the convictions were handed down in a single Member State or in several Member States.

45. It is therefore necessary to allow an individual's criminal record to be taken into account in a Member State, not only, as the Commission points out, when this may be to his or her disadvantage – I am thinking in particular of recidivism – but also when taking the criminal record into account may benefit the person, in particular in the event of multiple offences committed by multiple acts which may result in the sentences for each offence being formed into a cumulative sentence.

46. The formation of a cumulative sentence is a mechanism which makes it possible to limit the severity of a sentence by ensuring that sentences imposed for multiple offences committed by multiple acts are not simply added together. Not only could simply adding the sentences together have effects which conflict with the principle of proportionality, it would, as noted by Advocate General Richard de la Tour, also undermine one of the essential functions of punishment.[8] Sentences cannot have the sole function of retribution, but must also prevent the commission of offences and facilitate the social rehabilitation of offenders. However, in a situation where there

6 Recital 3 of Framework Decision 2008/675.

7 Judgment of 21 September 2017, *Beshkov* (C-171/16, EU:C:2017:710, paragraphs 25 and 26).

8 Opinion in *A V (Aggregate sentence)* (C-221/19, EU:C:2020:815, point 35).

are multiple offences committed by multiple acts, the warning constituted by the first conviction and designed to promote the perpetrator's awareness of the offence has not been given, and the sentence imposed may therefore be adapted. [9]

47. The taking into account of previous convictions by a court therefore makes it possible to deal, inter alia, with those situations and, in accordance with the provisions of its national law, to form a cumulative sentence encompassing sentences imposed for multiple offences committed by multiple acts. Framework Decision 2008/675 allows for the implementation of such mechanisms in situations where there are cross-border concurrent offences. Accordingly, the Court has ruled that that framework decision is applicable to a national procedure that is concerned with the imposition, for the purposes of execution, of an overall custodial sentence that takes into account the sentence imposed on that person by a national court and also that imposed following a previous conviction handed down by a court of another Member State against the same person for different facts. [10]

48. Nevertheless, the obligation to take previous convictions into account may give rise to difficulties where those convictions were handed down abroad, with the result that Framework Decision 2008/675 sets out the scope of that obligation in Article 3(3) thereof.

49. Thus, in accordance with Article 3(3) of Framework Decision 2008/675, the taking into account, in new criminal proceedings, of previous convictions handed down in another Member State may not have the effect either of interfering with those previous convictions or with any decision relating to their execution in the Member State in which the new criminal proceedings are conducted, or of revoking or reviewing those convictions, which must be taken into account in the terms in which they were handed down. [11]

50. Such clarification is naturally relevant in situations where there are multiple offences committed by multiple acts which may lead to a cumulative sentence in a Member State. Indeed, recital 14 of Framework Decision 2008/675 expressly contemplates this, stating that Article 3(3) of that framework decision covers situations in which a sentence imposed in a previous judgment and not already executed is to be absorbed by or included in another sentence, which is then to be effectively executed. In such a situation, the formation of a cumulative sentence in the Member State of the court which orders it necessarily affects the execution of the earlier sentence imposed by a court in another Member State.

51. However, Article 3(3) of Framework Decision 2008/675 is not limited solely to the issue of the formation of a cumulative sentence. The fact that the national court takes previous foreign convictions into account may interfere with those previous convictions in other situations, for example by revoking a suspension attached to the sentence imposed by the previous decision and converting that sentence to a period of imprisonment. [12]

[9] Opinion of Advocate General Bot in *Beshkov* (C-171/16, EU:C:2017:386, point 43).

[10] Judgments of 21 September 2017, *Beshkov* (C-171/16, EU:C:2017:710, paragraph 29), and of 15 April 2021, *AV (Aggregate sentence)* (C-221/19, EU:C:2021:278, paragraph 52).

[11] Judgment of 21 September 2017, Beshkov (C-171/16, EU:C:2017:710, paragraphs 37 and 44), and of 15 April 2021, *AV (Aggregate sentence)* (C-221/19, EU:C:2021:278, paragraph 53).

[12] Judgment of 21 September 2017, *Beshkov* (C-171/16, EU:C:2017:710, paragraph 46).

52. It is therefore necessary to safeguard the authority of *res judicata* of decisions delivered in other Member States, so that taking previous convictions into account cannot lead to an interference by the national court with the previous judgment handed down in another Member State. Accordingly, Article 3(3) of Framework Decision 2008/675 establishes a general limit on the obligation to take into account previous convictions handed down in another Member State.

53. In addition to that limitation, Framework Decision 2008/675 also provides, in Article 3(5) thereof, that, in the event that the offence for which the new proceedings being conducted was committed before the previous conviction had been handed down or fully executed, paragraphs 1 and 2 are not to have the effect of requiring Member States to apply their national rules on imposing sentences, where the application of those rules to foreign convictions would limit the judge in imposing a sentence in the new proceedings.

2. Article 3(5) of Framework Decision 2008/675

54. Article 3(5) of Framework Decision 2008/675 provides for an exception to Article 3(1) of that framework decision.

55. Indeed, it is clear from the wording of Article 3(5) of Framework Decision 2008/675 that in the situation to which it refers, Member States are not required under Article 3(1) thereof to apply their national rules on imposing sentences. In other words, the principle of equal treatment provided for in Article 3(1) of that framework decision does not have to be applied in the event that the application of national sentencing rules to convictions handed down in another Member State limits the judge in imposing a sentence in the new proceedings.

56. Contrary to what the Commission argued at the hearing, Article 3(5) of Framework Decision 2008/675 is thus addressed to the Member States, leaving them discretion as to whether or not to provide for an exception to the principle of equal treatment laid down in Article 3(1) and provides that, should they opt to implement such an exception, they must nonetheless ensure that the courts can otherwise take into account foreign convictions.

57. I note that this provision is intended to apply only in a situation where the offence for which the new proceedings being conducted was committed before the previous conviction had been handed down or fully executed.

58. That condition is satisfied in the present case since the rape at issue in the main proceedings was committed before the French convictions were handed down. It could be inferred, as is maintained by the Public Prosecutor General at the Federal Court of Justice and the Commission, that Article 3(5) of Framework Decision 2008/675 should be applicable in the present case and allow the referring court not to apply the 15-year maximum laid down in German law for cumulative non-life custodial sentences, in so far as such a rule would prevent the German court from imposing on the appellant in the main proceedings a sentence which is capable of being executed.

59. I am not convinced by that interpretation, however, for the reasons I shall set out below.

(a) The transposition of Article 3(5) of Framework Decision 2008/675 into national law and the lack of direct effect of that provision

60. In the light of the case-law of the Bundesgerichtshof (Federal Court of Justice) set out in points 40 and 41 of this Opinion, the German legislature considered that there was no need to adopt additional measures transposing Framework Decision 2008/675, since the severity compensation mechanism in the event of foreign convictions, interpreted in accordance with the procedure under Article 3 of that framework decision, makes it possible to ensure that a defendant in criminal proceedings in Germany is not placed at a disadvantage, on the basis that a foreign conviction has been handed down, in relation to a person who has been convicted of several offences in that Member State alone. [13]

61. However, it is settled case-law that, where a framework decision is intended to create rights for individuals, its provisions must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the requirement of legal certainty, under which the persons concerned must be able to ascertain the full extent of their rights. [14]

62. Those requirements of unquestionable binding force, specificity and clarity are all the more important in criminal matters, in situations in which the provisions of a framework decision could cause the criminal liability of an individual defendant to be aggravated.

63. I would note in that regard that the severity compensation mechanism provided for in German law is a mechanism favourable to a defendant in criminal proceedings, in that it allows account to be taken of previous convictions handed down against him or her for the purpose of adapting the sentence which may be imposed on that person. Article 3(5) of Framework Decision 2008/675, for its part, has an adverse effect on the defendant's situation, in that it allows the national court to choose not to apply such a mechanism.

64. In the present case, and although Article 3(5) of Framework Decision 2008/675 has, in particular, the effect of leading to an aggravation of the situation of defendants in criminal proceedings, the case-law of the Bundesgerichtshof (Federal Court of Justice) appears uncertain. The Public Prosecutor General at the Federal Court of Justice referred to various judgments, some of which observe the 15-year maximum, whilst others disregard it. [15]

65. The case-law of the Bundesgerichtshof (Federal Court of Justice) therefore does not constitute a measure which adequately transposes Article 3(5) of Framework Decision 2008/675. [16]

[13] Deutscher Bundestag, Drucksache 16/13673 (bundestag.de), p. 5.

[14] Judgments of 13 March 1997, *Commission* v *France* (C-197/96, EU:C:1997:155, paragraph 15); of 17 December 2020, *Commission* v *Hungary (Reception of applicants for international protection)* (C-808/18, EU:C:2020:1029, paragraph 288); and of 24 March 2022, *Commission* v *Ireland* (Transposition of Framework Decision 2008/909) (C-125/21, not published, EU:C:2022:213, paragraph 21).

[15] Moreover, I note that, in the main proceedings, the first instance court refused to apply the 15-year maximum laid down in German law for cumulative custodial sentences when implementing the severity compensation mechanism.

[16] Even if the case-law of the Bundesgerichtshof (Federal Court of Justice) could be interpreted as adequately transposing Article 3(5) of Framework Decision 2008/675 by unequivocally requiring observance of the 15-year maximum in implementing the compensation for severity, I am of the view that this could not lead the referring court to disregard that maximum. That provision states that, in the situations which it covers, 'paragraphs 1 and 2 shall not have the effect of requiring Member States to apply their national rules on imposing sentences', and specifies that, in such cases, the Member States are to ensure that their courts can otherwise take into account previous foreign convictions. Since the German legislature opted for transposition by means of case-law, thereby excluding, in the case of multiple offences committed by multiple acts, the formation of a cumulative sentence in the strict sense, while establishing, by means of the severity compensation mechanism, an alternative means for the courts to take into account previous foreign convictions, the imposition of a maximum cumulative custodial sentence of 15 years which takes into account the previous convictions applies. In those circumstances, and in so far as the national case-law strictly implements Article 3(5) of Framework Decision 2008/675 within the scope of the discretion enjoyed by the Member States, that provision can in no way be interpreted as nonetheless allowing the national court not to apply that 15-year maximum laid down in German law for cumulative custodial sentences.

66. In that regard, I would point out that, since Framework Decision 2008/675 was adopted on the basis of the former third pillar of the European Union, in particular, under Article 34(2)(b) EU, its provisions have no direct effect. That provision stated, first, that framework decisions are binding on the Member States as to the result to be achieved, but leave to the national authorities the choice of form and methods, and, second, that framework decisions are not to entail direct effect. [17]

67. Since Article 3(5) of Framework Decision 2008/675 does not have direct effect, that provision cannot therefore be interpreted as allowing the national court not to apply the 15-year maximum laid down in German law for cumulative custodial sentences.

(b) The obligation to interpret national law in conformity with Framework Decision 2008/675 and the limits thereon

68. It is certainly true that, although the framework decisions cannot have direct effect, their binding character nevertheless places on national authorities an obligation to interpret national law in conformity with EU law as from the date of expiry of the period for the transposition of those framework decisions. [18]

69. When applying national law, those authorities are therefore required to interpret it, to the greatest extent possible, in the light of the text and the purpose of the framework decision in order to achieve the result sought by that decision. [19]

70. Accordingly, it follows that, in so far as the application of the 15-year maximum laid down in German law for cumulative custodial sentences has the effect of limiting the court's power to impose a sentence in the proceedings pending before it, the interpretation of German law in conformity with EU law could result in that court not applying that maximum but otherwise taking into account the previous foreign convictions.

71. However, the principle of interpreting national law in conformity with EU law has certain limits. Thus, the general principles of law, in particular the principles of legal certainty and non-retroactivity, preclude inter alia that obligation to interpret national law in conformity with EU law from leading to the criminal liability of individuals being determined or aggravated, on the basis of a framework decision alone, in the absence of any legislation implementing its provisions, where they committed an infringement. [20]

72. It seems to me that this is precisely the situation with respect to Article 3(5) of Framework Decision 2008/675 if that provision were to be interpreted as allowing the national court to disregard the 15-year maximum laid down in German law for cumulative custodial sentences. In such circumstances, the obligation to interpret national law in conformity with EU law would

[17] Judgments of 8 November 2016, *Ognyanov* (C-554/14, EU:C:2016:835, paragraph 56), and of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraph 69).

[18] Judgments of 8 November 2016, *Ognyanov* (C-554/14, EU:C:2016:835, paragraphs 58 and 61), and of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraph 72).

[19] Judgments of 16 June 2005, *Pupino* (C-105/03, EU:C:2005:386, paragraph 43); of 8 November 2016, *Ognyanov* (C-554/14, EU:C:2016:835, paragraph 59), and of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraph 73).

[20] Judgments of 8 November 2016, *Ognyanov* (C-554/14, EU:C:2016:835, paragraphs 63 and 64); of 29 June 2017, *Popławski* (C-579/15, EU:C:2017:503, paragraph 32), and of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraph 75).

result in an aggravation of the situation of the person concerned under criminal law, as compared with the situation which would have existed under national law, by depriving that person of the benefit of that 15-year maximum.

73. In that regard, I must clarify that, although the case-law of the Court refers to *aggravation of the criminal liability* of the person who has committed an offence, this does not seem to me to exclude the possibility that it may also apply to situations, such as that at issue in the main proceedings, in which the provision of a framework decision aggravates not the criminal liability of the person concerned as such but the sentence imposed on that person.

74. The case-law of the Court is based, inter alia, on the principle of legal certainty,[21] which is of particular importance in criminal matters and is not limited in scope to the determination of an individual's criminal liability, but extends also to the effects of such liability, foremost of which is the sentence which may be imposed on him or her. Moreover, the Court itself acknowledges this where, when applying that case-law, it examines not only whether the provision of the framework decision at issue in the case before the Court would cause the criminal liability of the person concerned to be determined or aggravated, but also whether that provision would 'alter, to his [or her] disadvantage, the length of the sentence imposed on him [or her]'.[22]

75. In those circumstances, the principle that national law must be interpreted in conformity with the provisions of Framework Decision 2008/675 cannot mean that the national court is permitted to disregard the 15-year maximum laid down in national law for cumulative custodial sentences imposed on the basis of the severity compensation mechanism.

(c) The lack of precision in national law as to the existence of a maximum for cumulative custodial sentences resulting from implementation of the severity compensation mechanism

76. I would point out that the analysis which I have just set out is based on the premiss that the case-law of the Bundesgerichtshof (Federal Court of Justice) applies the requirement of respect for a 15-year maximum for cumulative custodial sentences, which exists concerning the formation of a cumulative sentence, to the severity compensation mechanism. It is only in so far as German law itself provides that, in a situation in which there are multiple offences committed by multiple acts in several Member States, such a maximum must be applied that Article 3(5) of Framework Decision 2008/675 must be interpreted as not allowing that maximum to be disregarded.

77. However, I must point out that the discussions at the hearing may have caused confusion as to whether such a 15-year maximum was also intended to apply to the severity compensation mechanism, since the Public Prosecutor General at the Federal Court of Justice stated that either that maximum applied to the severity compensation mechanism according to the case-law of the Bundesgerichtshof (Federal Court of Justice) or that such a maximum could not be applied and indeed never had been. Moreover, it is apparent from the background to the dispute in the main proceedings that the first instance court refused to apply such a maximum. It has therefore not been established with certainty that German law provides for the application of the 15-year maximum to the imposition of a cumulative sentence when implementing the severity compensation mechanism.

[21] Judgments of 16 June 2005, *Pupino* (C-105/03, EU:C:2005:386, paragraph 44); of 8 November 2016, *Ognyanov* (C-554/14, EU:C:2016:835, paragraph 64), and of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraph 75).

[22] Judgment of 8 November 2016, *Ognyanov* (C-554/14, EU:C:2016:835, paragraph 65).

78. However, if such a maximum is not provided for under German law in relation to the severity compensation mechanism, the interpretation of the provisions of national law in the light of Article 3(5) of Framework Decision 2008/675 could lead to an outcome which would conflict with the one I am proposing.

79. In those circumstances, it will be for the referring court to ascertain whether the 15-year maximum laid down in German law for cumulative custodial sentences is indeed applicable when implementing the severity compensation mechanism.

80. It follows from the foregoing, in my view, that Article 3(5) of Framework Decision 2008/675 must be interpreted as meaning that, in the absence of measures transposing that provision, and in so far as national law places a limitation on the imposition of a custodial sentence in the event that convictions handed down in another Member State are taken into account, a Member State is required, in the course of criminal proceedings against a person, to apply its national rules by taking into account those previous foreign convictions handed down against the same person for other offences committed previously, where the offence giving rise to the new proceedings was committed before those previous convictions were handed down, even if the application of those national rules means that no sentence can be handed down or, at the very least, executed in the new proceedings.

B. The second question referred

81. By its second question, the referring court asks, in essence, whether, in the event that the Member State is not required, on the basis of the first subparagraph of Article 3(5) of Framework Decision 2008/675, to apply its national rules on the formation of a cumulative sentence by taking into account previous convictions handed down in another Member State, the second subparagraph of Article 3(5) of that framework decision must be interpreted as meaning that otherwise taking into account previous convictions handed down in other Member States, as provided for in that provision, requires the national court to establish clearly and in a quantified manner, when determining the sentence for the offence committed on national territory, the disadvantage resulting from the impossibility of ordering the formation of a cumulative sentence in accordance with the national rules.

82. According to my analysis of the first question referred, it is not necessary to answer this second question. I shall nonetheless examine it for the sake of completeness, in case the Court does not concur with that analysis.

83. Article 3(5) of Framework Decision 2008/675 provides that, where the first subparagraph of that provision is implemented and allows the national court, in disregard of the principle of equal treatment provided for in Article 3(1) of that framework decision, not to take into account a previous conviction in a situation in which there are multiple offences committed by multiple acts, Member States must nonetheless ensure that their courts can *otherwise* take into account previous convictions.

84. In other words, Article 3(5) of Framework Decision 2008/675 ensures that, even in cases in which previous convictions handed down abroad are not taken into account, the criminal record of the person concerned in the new proceedings is not disregarded, in order to guarantee, in the absence of strict equal treatment, some form of fairness.

85. However, as the Commission and the Public Prosecutor General at the Federal Court of Justice point out, that provision does not lay down any requirement as to the practical arrangements for taking those convictions into account, in particular as regards the calculation of the sentence imposed. That question must therefore be left to the discretion of the courts of the Member States referred to in that provision, and it is not possible to infer from Article 3(5) of Framework Decision 2008/675 any requirement other than the requirement to take those convictions into account, with the aim of compensating for non-application of the principle of equal treatment.

86. In those circumstances, I am of the view that the second subparagraph of Article 3(5) of Framework Decision 2008/675 must be interpreted as meaning that otherwise taking into account previous convictions handed down in other Member States, as provided for in that provision, does not require the national court to establish clearly and in a quantified manner, when determining the sentence for the offence committed on national territory, the disadvantage resulting from the impossibility of ordering the formation of a cumulative sentence in accordance with the national rules.

V. Conclusion

87. In the light of the foregoing considerations, I propose that the Court reply as follows to the questions referred by the Bundesgerichtshof (Federal Court of Justice, Germany):

Article 3(5) of Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings

must be interpreted as meaning that in the absence of measures transposing that provision, and in so far as national law places a limitation on the imposition of a custodial sentence in the event that convictions handed down in another Member State are taken into account, a Member State is required, in the course of criminal proceedings against a person, to apply its national rules by taking into account those previous foreign convictions handed down against that person for other offences committed previously, where the offence giving rise to the new proceedings was committed before those previous convictions were handed down, even if the application of those national rules means that no sentence can be handed down or, at the very least, executed in the new proceedings.