Reports of Cases

OPINION OF ADVOCATE GENERAL
JEAN RICHARD DE LA TOUR
delivered on 8 October 2020 [1]

Case C-221/19

AV

other party:

Pomorski Wydział Zamiejscowy Departamentu Do Spraw Przestępczości Zorganizowanej i Korupcji Prokuratury Krajowej

(Request for a preliminary ruling
from the Sąd Okręgowy w Gdańsku (Regional Court, Gdańsk, Poland))

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – Framework Decision 2008/909/JHA – Article 8(2) to (4), Article 17(1) and Article 19 – Taking account, in aggregate sentencing proceedings, of a conviction handed down in another Member State where enforcement of the sentence has been transferred to the Member State in which the aggregate sentencing order is to be made – Framework Decision 2008/675/JHA – Scope – Article 3(3) – Effect of the taking into account of previous convictions on those convictions)

I. Introduction

1. This request for a preliminary ruling relates to the interpretation of Article 3(3) 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, [2] and to Article 8(2) to (4), Article 17(1) and Article 19 of Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, [3] as amended by Council Framework Decision 2009/299/JHA of 26 February 2009. [4]

2. The request has been made in proceedings before the Sąd Okręgowy w Gdańsku (Regional Court, Gdańsk, Poland), in which that court is asked to make an aggregate sentencing order in respect of AV encompassing, inter alia, a custodial sentence imposed by a court of another Member State which is to be enforced in Poland.

1 Original language: French.

2 OJ 2008 L 220, p. 32.

3 OJ 2008 L 327, p. 27, and corrigendum OJ 2018 L 243, p. 21.

4 OJ 2009 L 81, p. 24; 'Framework Decision 2008/909'.

3. Aggregate sentencing proceedings enable an aggregate sentence to be imposed on the basis of a number of sentences imposed following a number of convictions. Where those convictions have been handed down by courts of different Member States, the introduction of aggregate sentencing proceedings raises issues as to the compatibility of such proceedings with Framework Decisions 2008/675 and 2008/909.

4. This matter provides the Court with the opportunity to clarify the relationship between the rules laid down by those two framework decisions. More specifically, the Court will need to determine whether a previous conviction handed down in another Member State can be taken into account in aggregate sentencing proceedings, such as those before the referring court, where enforcement of the sentence has been transferred to the Member State in which the aggregate sentencing order is to be made.

5. In this Opinion, I will suggest that the Court should rule that Article 3(3) of Framework Decision 2008/675, read in the light of recital 14 of that framework decision, is to be interpreted such that, in principle, it does not preclude a court of one Member State from taking into account, in new criminal proceedings in the form of aggregate sentencing proceedings such as those before the referring court, a previous conviction handed down by a court of another Member State, where enforcement of the sentence has been transferred to the Member State conducting those proceedings pursuant to Framework Decision 2008/909. It is however for the court hearing the aggregate sentencing proceedings to satisfy itself, by means of a case-by-case examination, on the particular facts of the matter, that such proceedings do not have the effect of interfering with, revoking or reviewing the previous convictions or any decision relating to their execution in the Member State conducting the proceedings. In particular, aggregate sentencing proceedings must not result either in the imposition of an aggregate sentence which is more lenient than the initial sentence imposed following the conviction handed down by a court of another Member State, or in the effects of that conviction being nullified.

6. I will also suggest that the Court should rule that Article 8, Article 17(1) and Article 19 of Framework Decision 2008/909 are to be interpreted as not precluding the introduction by a Member State of aggregate sentencing proceedings such as those before the referring court, provided that such proceedings conform to the obligation imposed on the competent authority of the executing State, in principle, to recognise the judgment forwarded to it and to enforce the sentence, which is to correspond in its length and nature to the sentence imposed in the judgment delivered in the issuing State. It is only within the strict limits provided for by Article 8(2) to (4) of that framework decision that the duration or the nature of the initial sentence to which the aggregate sentencing proceedings relate can, where appropriate, be adapted prior to the making of an aggregate sentencing order.

II. Legal background

A. European Union law

1. Framework Decision 2008/675

7. Recitals 2, 3, 6, 7 and 14 of Framework Decision 2008/675 state:

'(2) On 29 November 2000 the Council, in accordance with the conclusions of the Tampere European Council, adopted the programme of measures to implement the principle of mutual recognition of decisions in criminal matters, … which provides for the "adoption of one or more instruments establishing the principle that a court in one Member State must be able to take account of final criminal judgments rendered by the courts in other Member States for the purposes of assessing the offender's criminal record and establishing whether he has reoffended, and in order to determine the type of sentence applicable and the arrangements for enforcing it".

(3) The purpose of this Framework Decision is to establish a minimum obligation for Member States to take into account convictions handed down in other Member States …

…

(6) In contrast to other instruments, this Framework Decision does not aim at the execution in one Member State of judicial decisions taken in other Member States, but rather aims at enabling consequences to be attached to a previous conviction handed down in one Member State in the course of new criminal proceedings in another Member State to the extent that such consequences are attached to previous national convictions under the law of that other Member State.

Therefore this Framework Decision contains no obligation to take into account such previous convictions, for example, in cases where the information obtained under applicable instruments is not sufficient, where a national conviction would not have been possible regarding the act for which the previous conviction had been imposed or where the previously imposed sanction is unknown to the national legal system.

(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.

…

(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.'

8. Article 1(1) of Framework Decision 2008/675 records that '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'.

9. Article 3 of that framework decision, which is headed 'Taking into account, in the course of new criminal proceedings, a conviction handed down in another Member State', reads as follows:

'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.

4. In accordance with paragraph 3, paragraph 1 shall not apply to the extent that, had the previous conviction been a national conviction of the Member State conducting the new proceedings, the taking into account of the previous conviction would, according to the national law of that Member State, have had the effect of interfering with, revoking or reviewing the previous conviction or any decision relating to its execution.

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.'

2. Framework Decision 2008/909

10. Article 1 of Framework Decision 2008/909 provides that:

'For the purposes of this Framework Decision:

(a) "judgment" shall mean a final decision or order of a court of the issuing State imposing a sentence on a natural person;

(b) "sentence" shall mean any custodial sentence or any measure involving deprivation of liberty imposed for a limited or unlimited period of time on account of a criminal offence on the basis of criminal proceedings;

(c) "issuing State" shall mean the Member State in which a judgment is delivered;

(d) "executing State" shall mean the Member State to which a judgment is forwarded for the purpose of its recognition and enforcement.'

11. Article 3 of Directive 2008/909 is worded as follows:

'1. The purpose of this Framework Decision is to establish the rules under which a Member State, with a view to facilitating the social rehabilitation of the sentenced person, is to recognise a judgment and enforce the sentence.

…

3. This Framework Decision shall apply only to the recognition of judgments and the enforcement of sentences within the meaning of this Framework Decision …'

12. Article 8 of Framework Decision 2008/909, which is headed 'Recognition of the judgment and enforcement of the sentence', provides:

'1. The competent authority of the executing State shall recognise a judgment which has been forwarded in accordance with Article 4 and following the procedure under Article 5, and shall forthwith take all the necessary measures for the enforcement of the sentence, unless it decides to invoke one of the grounds for non-recognition and non-enforcement provided for in Article 9.

2. Where the sentence is incompatible with the law of the executing State in terms of its duration, the competent authority of the executing State may decide to adapt the sentence only where that sentence exceeds the maximum penalty provided for similar offences under its national law. The adapted sentence shall not be less than the maximum penalty provided for similar offences under the law of the executing State.

3. Where the sentence is incompatible with the law of the executing State in terms of its nature, the competent authority of the executing State may adapt it to the punishment or measure provided for under its own law for similar offences. Such a punishment or measure shall correspond as closely as possible to the sentence imposed in the issuing State and therefore the sentence shall not be converted into a pecuniary punishment.

4. The adapted sentence shall not aggravate the sentence passed in the issuing State in terms of its nature or duration.'

13. Article 17 of that framework decision, which is headed 'Law governing enforcement', provides in paragraph 1:

'The enforcement of a sentence shall be governed by the law of the executing State. The authorities of the executing State alone shall, subject to paragraphs 2 and 3, be competent to decide on the procedures for enforcement and to determine all the measures relating thereto, including the grounds for early or conditional release.'

14. Article 19 of that framework decision, which is headed 'Amnesty, pardon, review of judgment', provides:

'1. An amnesty or pardon may be granted by the issuing State and also by the executing State.

2. Only the issuing State may decide on applications for review of the judgment imposing the sentence to be enforced under this Framework Decision.'

B. Polish law

15. Article 85(4) of the ustawa – Kodeks karny (Law establishing a criminal code) [5] of 6 June 1997, in the version applicable to the matter before the referring court, is worded as follows:

'Aggregate sentencing shall not extend to sentences imposed by the judgments referred to in Article 114a.'

16. Article 114a of the Criminal Code provides:

'1. A final conviction for the commission of an offence handed down by a competent court of a Member State of the European Union shall also be regarded as a convicting judgment, except where, under Polish law, the act does not constitute an offence or the perpetrator is not liable to be punished, or where the sentence imposed is unknown to Polish law.

2. In relation to convictions handed down by the courts referred to in paragraph 1, the questions of:

(1) applicability of a new criminal law which entered into force after the conviction;

(2) expungement of the conviction from the offender's criminal record;

– are governed by the law of the place where the conviction was handed down.

3. Paragraph 1 shall not apply if the information obtained from the criminal record or from a court of a Member State of the European Union is not sufficient to establish a conviction or the sentence imposed is subject to remission in the State where the conviction was handed down.'

III. The facts of the dispute in the main proceedings and the questions referred for a preliminary ruling

17. It is apparent from the order for reference that AV has been sentenced in four separate judgments, three of which were handed down by Polish courts and one by a German court.

18. On 31 July 2018, AV brought an application by which he asked the referring court to make an aggregate sentencing order in respect of him. According to that court, two sentences are executory. The first of these is a sentence passed by the Landgericht Lüneburg (Regional Court, Lüneburg, Germany), by judgment of 15 February 2017, which AV is required to serve between 1 September 2016 and 29 November 2021. The second is a sentence passed by the referring

[5] Dz. U. No 88, item 553; 'the Criminal Code'.

court, by judgment of 24 February 2010, which AV is required to serve between 29 November 2021 and 30 March 2030. The judgment of the Landgericht Lüneburg (Regional Court, Lüneburg) was recognised for the purposes of enforcement in Poland by order of the referring court of 12 January 2018. The referring court states that, within that order, the legal classification of AV's offences under Polish law was indicated, and it was also indicated that a total sentence of five years and three months' imprisonment was to be executed; that sentence being identical in duration to that imposed by the judgment of the Landgericht Lüneburg (Regional Court, Lüneburg).

19. In his application for an aggregate sentencing order, AV submitted that, since the judgment of the Landgericht Lüneburg (Regional Court, Lüneburg) has been recognised for the purposes of enforcement in Poland, the prerequisites for the making of an aggregate sentencing order are met, and that the order should be made on the basis of complete absorption.

20. In support of his application, AV referred to an aggregate sentencing order made by the referring court on 29 January 2014, which had combined a sentence imposed by judgment of the Landgericht Göttingen (Regional Court, Göttingen, Germany) of 13 March 2012, and recognised for the purposes of enforcement in Poland, with a sentence passed by judgment of the referring court. The referring court states that that aggregate sentence has become final.

21. Against that background, the referring court explains that it is faced with the issue of whether the relevant provisions of Framework Decisions 2008/675 and 2008/909 dictate that an aggregate sentence imposed in Poland cannot combine sentences imposed in that Member State with sentences imposed in another Member State and recognised for the purposes of enforcement in Poland.

22. The referring court explains, furthermore, that under Article 85(4) of the Criminal Code, read in conjunction with Article 114a of that code, under Polish law, aggregate sentencing does not extend to sentences imposed by a court of criminal jurisdiction in another Member State.

23. As regards the aggregate sentencing proceedings provided for by Polish law, the referring court explains that the judgment given at the conclusion of such proceedings lies at the boundary between substantive judgments and enforcement of sentences, and covers convictions handed down in judgments which have become final, with the aim of 'adjusting' the legal response to the offences committed, which could have been tried together, and thus of 'rationalis[ing] the penalties imposed', without interfering with the individual judgments concerned. In particular, an aggregate sentence must not undermine the finding of guilt made in respect of the offender, as appearing in the substantive judgment.

24. The referring court takes the view that if sentences imposed in one Member State and recognised for the purposes of enforcement in another could be taken into account in aggregate sentencing proceedings, together with sentences imposed in the latter Member State, it would be possible to make an overall assessment of the criminal activity of offenders who had been convicted on a number of occasions. It considers that this would contribute to the construction of a 'common area of justice'.

25. Furthermore, once a judgment delivered in one Member State is recognised for the purposes of enforcement in another Member State, in accordance with Framework Decision 2008/909, the referring court considers that it must be treated as the basis for all procedural decisions and decisions concerning execution which the courts of the Member State where it is to be executed

are obliged to make. A judgment recognised for the purposes of execution in another Member State thus becomes part of the legal order of that Member State and must be executed in accordance with that legal order. The referring court observes, moreover, that this is clear from Article 17(1) of Framework Decision 2008/909.

26. Finally, in the view of the referring court, if it were impossible to make an aggregate sentencing order which takes account of sentences imposed in one Member State and recognised for the purposes of enforcement in another, this would mean that a citizen who had been convicted more than once in a single Member State would be in a better position than a citizen who had been convicted in different Member States. It is thus a matter of ensuring equal treatment, at EU level, of citizens in similar situations.

27. In those circumstances, the Sąd Okręgowy w Gdańsku (Regional Court, Gdańsk) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Should Article 3(3) of [Framework Decision 2008/675], which provides that "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", be interpreted as meaning that interference [with such convictions] for the purposes of that provision is to be taken to mean not only the inclusion in an aggregate sentence of a conviction handed down by a judgment delivered in a [Member State] but also the inclusion in the aggregate sentence of such a conviction which was taken over for execution in another [Member State], together with a conviction handed down in the latter State, within the framework of the aggregate sentence?

(2) In light of the provisions of [Framework Decision 2008/909] which are laid down in Article 8(2) to (4) thereof and concern the principles of the *exequatur* procedure, and also in the light of Article 19 … thereof – which provides that "an amnesty or pardon may be granted by the issuing State and also by the executing State" (paragraph 1), [and that] "only the issuing State may decide on applications for review of the judgment imposing the sentence to be enforced under this Framework Decision" (paragraph 2) – and of the first sentence of Article 17(1) thereof – which provides that the enforcement of a sentence is to be governed by the law of the executing State – is it possible to pass an aggregate sentence which would include the sentences imposed by a judgment delivered in a [Member State] that was taken over for execution in another [Member State], together with a conviction handed down in the latter State, within the framework of the aggregate sentence?'

28. The Polish, Czech, Spanish and Hungarian Governments and the European Commission submitted written observations. The Polish, Czech and Spanish Governments and the Commission responded within the time allowed to the questions posed by the Court, which were to be answered in writing.

IV. Analysis

29. The referring court asks the Court to interpret Article 3(3) of Framework Decision 2008/675, as well as Article 8(2) to (4), the first sentence of Article 17(1) and Article 19 of Framework Decision 2008/909.

30. It essentially wishes to establish whether those provisions are to be interpreted as precluding the court of a Member State in which, pursuant to Framework Decision 2008/909, a sentence involving deprivation of liberty imposed by a court of another Member State is to be enforced, from imposing an aggregate sentence encompassing sentences imposed by courts of both of those Member States.

31. It is seeking clarification as to the interpretation of those provisions, while indicating that Article 85(4) of the criminal code, read in conjunction with Article 114a of that code, prevents the making of an aggregate sentencing order which incorporates a sentence imposed by a court of another Member State.

32. Before turning to the issue of whether a previous conviction handed down in another Member State is or is not to be taken into account by a court of a Member State hearing an application for an aggregate sentencing order, I will make some observations on proceedings of this type.

A. Preliminary observations on the combination of sentences

33. In general terms, the combination of sentences, which takes the form of aggregate sentencing proceedings in Poland, is a matter arising where there are concurrent offences. The expression 'concurrent offences' covers the situation where a person commits a number of offences not separated by a final conviction. The person concerned may be tried separately for these different acts, with the trials potentially taking place before the courts of different Member States. In that situation, the combination of sentences enables the same treatment to be given to situations where the concurrent offences are tried together and situations where they are tried separately.

34. Combination of initial sentences consists in the imposition of a single punishment corresponding, in quantitative terms, to the initial sentence provided for in respect of the most severely punishable offence, which then 'absorbs' the initial sentences provided for in respect of the other offences, which are regarded as included in the most severe sentence. The convicted person serves only that sentence. This is a legal fiction according to which all the sentences are regarded as running concomitantly and simultaneously. Combination of sentences thus makes it possible to avoid a situation where the initial sentences are simply left to accumulate, or where they accumulate by virtue of a positive decision, imposing the sentences attaching to each of the concurrent offences on the basis that they are to be served separately and consecutively. A combined sentence may be imposed where several offences have been tried together, by the original conviction, or where such offences have been tried separately, in which case it is passed in aggregate sentencing or similar proceedings.

35. Combined sentencing is a mechanism which, by avoiding the arithmetical addition of sentences, permits a reduction in the duration of the sentences ultimately required to be served by a person who has committed a number of concurrent offences, and has consequently been convicted a number of times. This mechanism thus corrects for the potential of consecutive sentences to conflict with the principle of proportionality. It is based on the idea that simply adding the sentences together would undermine one of the main functions of punishment in the modern system of repression of crime; that of facilitating the social rehabilitation of offenders. This is an application of the principle that sentences are to be tailored to the individual, which, in sharp contrast to arithmetical addition of the sentences imposed, enables the conduct of the convicted person to be taken into account as well as his character and financial, family and social

situation. [6]

36. It may therefore prove necessary to correct the negative effects of accumulation at the stage during which sentences are enforced. In that regard, the criminal courts must retain their freedom of assessment so that, in relation to the enforcement of sentences imposed in separate proceedings, the proper balance can be struck between effective deterrence and the objective of social rehabilitation of offenders. At this stage, the issue is no longer whether the defendant is or is not guilty of an offence, or, if guilty, what penalty would be appropriate to the offending conduct. In concurrent sentencing proceedings heard at the stage of enforcement of those sentences within the territory of a single Member State, the role of the judge is to identify an overall sentence which does not run counter to the need for effective deterrence and which, by virtue of the necessary tailoring, is consistent with both the principle that punishment must be proportionate and the sentencing function of social rehabilitation. The judge thus has some latitude, given that it is his or her role to determine the severity of the overall sentence. In this regard, the judge's assessment may depend on a variety of factors, including the circumstances of the matters resulting in the various convictions, the character of the offender and the nature, number, and seriousness of the offences.

37. Where domestic law provides for concurrent sentencing proceedings, the judge's role must be performed – whether the criminal proceedings took place in a single Member State or in several – in accordance with the rules and limits laid down in Framework Decision 2008/675. The judge hearing an application for concurrent sentencing is thus subject to the particular constraint laid down by Article 3(3) of that framework decision, namely that the decision he or she is required to make must not affect the conviction handed down in another Member State.

B. Aggregate sentencing proceedings

38. Aggregate sentencing is the legal mechanism used in the Polish legal system to address situations of concurrent offences, be they crimes, misdemeanours or tax misdemeanours.

39. An aggregate sentence is a special sentence imposed following decisions finding a person guilty of a number of offences and imposing sentences in respect of each of them (the initial sentences). It is determined by the court hearing the matter on the basis of the initial sentences. An aggregate sentence can only be imposed where the relevant initial sentences are executory and have not yet been fully executed. Consequently, a sentence which has already been fully executed cannot be included with other sentences with a view to the imposition of an aggregate sentence.

40. It is for the court hearing the matter to determine the appropriate severity of the aggregate sentence, subject to the limits laid down by the national legislation and having regard to factors such as the state of health and conduct of the person concerned, as well as the proximity between the offences in terms of their substance, chronology and the persons involved.

[6] See, in that regard, Opinion of Advocate General Bot in *Beshkov* (C-171/16, EU:C:2017:386), where he states that 'adding together all the penalties imposed for offences committed during a period in which no warning or supervision had been provided is most often disproportionate in the light of the offender's personality and the circumstances of the commission of the offences and, therefore, unfair. If a sentence is unfair, there is a greater likelihood that it will result in resistance, and therefore recidivism, rather than reform. That is the justification for granting to a court, in its assessment of the required tailoring of the sentence to the individual and within the limits imposed by law, the power best to combine the penalties imposed for the offences committed during that period of an offender's life' (point 49).

41. Where the commission of several offences has given rise to several prosecutions, an aggregate sentence can be imposed in separate aggregate sentencing proceedings, on the basis of the initial sentences imposed by the various sentencing decisions. The rationale for this procedure is that a person who has committed a number of offences should not be in a worse position where those offences are prosecuted separately than where they are prosecuted together. The imposition of an aggregate sentence accordingly enables those two situations to be treated in the same way. Moreover, the aggregate sentencing order relates only to the determination of an aggregate sentence and not to the guilt of the person concerned.

42. The present case concerns a situation where the aggregate sentencing proceedings relate to one sentence imposed by a Polish court and another imposed by a court of a different Member State. As I observed above, the combined effect of Article 85(4) and Article 114a of the Criminal Code would seem to be that the aggregate sentencing provisions are inapplicable to decisions handed down by courts of other Member States. It follows that, having regard to Polish law alone, initial sentences imposed by the courts of other Member States must be served consecutively with those imposed by Polish courts. On the sole basis of Polish law, where a person has been convicted in another Member State and enforcement of the sentence has been transferred to Poland pursuant to Framework Decision 2008/909, that person cannot rely on the national rules concerning aggregate sentencing and the imposition of an aggregate punishment; he must serve that sentence consecutively with those imposed on him in Poland, rather than concurrently as part of an aggregate sentence.

43. The essential issue raised by the questions referred is whether the approach thus taken by Polish law is compatible with the rules laid down by Framework Decision 2008/675 and Framework Decision 2008/909. More specifically, where the enforcement of a sentence imposed by a court of another Member State is transferred to the Member State in which the aggregate sentencing proceedings are brought, what is the relationship between the rules laid down by Framework Decision 2008/675 and the rules laid down by Framework Decision 2008/909? Is the court hearing the aggregate sentencing proceedings required, as a matter of EU law, to have regard to the conviction handed down in another Member State when it determines the aggregate sentence, as it would in the case of a national conviction?

44. I reiterate that, in the aggregate sentencing proceedings before the referring court, it has been established that the judgment delivered on 15 February 2017 by the Landgericht Lüneburg (Regional Court, Lüneburg), imposing a custodial sentence on AV, was recognised for the purposes of enforcement in Poland by an order of the referring court of 12 January 2018, and is executory in Poland until 29 November 2021. The aggregate sentencing proceedings covering that sentence were brought on AV's application, on 31 July 2018. The sentence imposed by the referring court, by judgment of 24 February 2010, is also executory, and is to be served by AV between 29 November 2021 and 30 March 2030. Furthermore, the referring court has stated that it has previously imposed an aggregate sentence, in 2014, covering a custodial sentence imposed by another German court and enforced in Poland. That aggregate sentence has since become definitive.

45. As I have observed above, as regards the aggregate sentencing proceedings provided for by Polish law, the referring court explains that the judgment which concludes such proceedings lies at the boundary between substantive judgments and enforcement of sentences, and covers convictions handed down in judgments which have become final, with the aim of 'adjusting' the legal response to the offences committed, which could have been tried together, and thus of

'rationalis[ing] the penalties imposed', without interfering with the individual judgments concerned. In particular, the referring court states, an aggregate sentence must not undermine the finding of guilt made in respect of the offender, as determined by the substantive judgment.

46. In this regard, it is apparent from the judgment of 10 August 2017, *Zdziaszek*,[7] that aggregate sentencing proceedings do not affect the finding of guilt made by the previous decision, which is definitive.[8] The Court held that the decision made in such proceedings modifies the quantum of the penalty or penalties imposed.[9] It is therefore necessary to distinguish between proceedings of that kind, which relate to the level of custodial sentences, and measures relating to the methods of execution of custodial sentences.[10]

47. The Court also observed that such proceedings, consisting in commuting into a single sentence one or more sentences handed down previously in respect of the person concerned, necessarily results in a more favourable result for that person. Following several convictions, each of which involves the imposition of a sentence, the sentences may be combined to obtain a cumulative sentence which is less than the sum of the various sentences resulting from previous separate decisions.[11] Aggregate sentencing as provided for in Polish law goes beyond a 'purely formal and arithmetic exercise' and entails a margin of discretion on the part of the competent court as regards the determination of the aggregate sentence.[12]

48. I emphasise that aggregate sentencing proceedings are a matter for which the Member States are responsible. Nonetheless, as is apparent from settled case-law of the Court, the powers enjoyed by the Member States in this respect must be exercised in accordance with EU law.[13] Accordingly, Member States that decide to provide for proceedings of this type, in their national legislation, must comply with EU law, and particularly with the instruments adopted in the field of judicial cooperation in criminal matters, such as Framework Decisions 2008/675 and 2008/909. In the spirit of the area of freedom, security and justice for legislation of a Member State, it seems doubtful that it would be compatible with EU law for legislation of a Member State to restrict the sentences to be taken into account, in aggregate sentencing proceedings, to those imposed by the courts of that Member State.

C. The applicability of Framework Decision 2008/675

49. As is apparent from Article 1(1) and Article 3(1) of Framework Decision 2008/675, that framework decision lays down a minimum obligation requiring Member States to take account of previous convictions handed down in other Member States, so as to ensure that equivalent legal effects are attached to them as to previous national convictions, in accordance with national law. The objective is to enable the criminal record of the person concerned to be considered in new criminal proceedings brought against that person for different facts.

7 C-271/17 PPU, EU:C:2017:629.

8 Judgment of 10 August 2017, *Zdziaszek* (C-271/17 PPU, EU:C:2017:629, paragraph 84).

9 Judgment of 10 August 2017, *Zdziaszek* (C-271/17 PPU, EU:C:2017:629, paragraph 85).

10 Idem.

11 Judgment of 10 August 2017, *Zdziaszek* (C-271/17 PPU, EU:C:2017:629, paragraph 86).

12 Judgment of 10 August 2017, *Zdziaszek* (C-271/17 PPU, EU:C:2017:629, paragraph 88).

13 See inter alia, to that effect, judgment of 24 November 1998, *Bickel and Franz* (C-274/96, EU:C:1998:563, paragraph 17). See also, judgment of 2 April 2020, *Ruska Federacija* (C-897/19 PPU, EU:C:2020:262, paragraph 48 and the case-law cited).

50. It is undoubtedly true that Framework Decision 2008/675 does not aim at the execution in one Member State of judicial decisions taken in other Member States, as stated in recital 6 of that framework decision.

51. Nonetheless, it is clear that previous convictions can be taken into account at the execution stage.

52. This is apparent from the judgment of 21 September 2017, *Beshkov*. [14]

53. In the case which gave rise to that judgment, the Court ruled that Framework Decision 2008/675 must be interpreted as meaning that it 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. [15]

54. In support of that conclusion, the Court first observed that Article 1(1) of that framework decision provides that the purpose of that framework decision is to determine the conditions under which previous convictions handed down in one Member State against a person are taken into account in the course of new criminal proceedings brought in another Member State against the same person and for different facts. [16]

55. To that end, Article 3(1) of that Framework Decision, read in the light of recital 5 thereof, obliges Member States to ensure that, when such criminal proceedings are brought, previous convictions handed down 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 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. [17]

56. The Court then observed that Article 3(2) of Framework Decision 2008/675 adds that that obligation is to 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 the rules relating to the definition of the offence, the type and level of the sentence, and the rules governing the execution of the decision. Thus, recitals 2 and 7 of that framework decision state that a national court must be able to take account of convictions handed down in other Member States including how arrangements for enforcement might be implemented and that the effects of those convictions should be equivalent to the effects of national decisions at each of those procedural stages. [18]

57. The Court ultimately concluded, on that basis, that Framework Decision 2008/675 is applicable not only to proceedings concerned with establishing that an accused person is or is not guilty of an offence, but also to proceedings relating to the enforcement of the sentence

[14] C-171/16, EU:C:2017:710; 'the judgment in *Beshkov*'.

[15] See the judgment in *Beshkov* (paragraph 29).

[16] See the judgment in *Beshkov* (paragraph 25).

[17] See the judgment in *Beshkov* (paragraph 26).

[18] See the judgment in *Beshkov* (paragraph 27).

where account must be taken of a sentence imposed following a previous conviction handed down in another Member State. In that regard, the Court observed that, in the case before it, the proceedings seeking the imposition of an overall sentence brought by Mr Trayan Beshkov fell into the second category, and consequently that procedure fell within the scope of that framework decision. [19]

58. It follows from the above, in particular, that the framework decision is directed in principle to situations in which new criminal proceedings have been brought against a person previously convicted in another Member State. That concept of 'new criminal proceedings' covers the pre-trial stage, the trial stage itself and the execution of the conviction. [20]

59. For the purposes of applying Framework Decision 2008/675, and in line with the Court's judgment in *Beshkov*, it must be observed that the determination of an aggregate sentence in aggregate sentencing proceedings such as those before the referring court belongs to the stage of execution of the conviction, and accordingly that that framework decision applies where such proceedings are brought. It is in the course of such national proceedings seeking a determination, for the purposes of execution, of the quantum of an overall custodial sentence, that the question arises of whether a punishment imposed by a sentencing decision taken previously, in another Member State, must be taken into account.

60. Moreover, although Framework Decision 2008/675 states, in recital 6, that it 'does not aim at the execution in one Member State of judicial decisions taken in other Member States', I do not detect any indication in that framework decision that the taking into account, by the courts of one Member State, of convictions handed down in other Member States, does not apply to a sentence which has been transferred to that Member State for the purposes of enforcement, pursuant to Framework Decision 2008/909. If the EU legislature had intended to exclude that situation from the scope of Framework Decision 2008/675, it would have given an express indication to that effect. On the contrary, however, recital 14 of that framework decision – to which I will return below – expresses the legislature's intention to include, within the scope of that framework decision, the situation where the execution of a sentence has been transferred to a Member State other than the Member State of conviction.

61. It having been established, in my view, that Framework Decision 2008/675 is applicable to proceedings such as those before the referring court, I should now consider whether that framework decision prevents the taking into account, in aggregate sentencing proceedings brought in Poland, of a previous conviction imposed in another Member State, where enforcement of the sentence has transferred to Poland or, on the contrary, requires it.

D. Compatibility of aggregate sentencing proceedings with Framework Decision 2008/675

62. Recital 2 of Framework Decision 2008/675 states that the aim of that framework decision is to implement the principle of mutual recognition of judgments and decisions in criminal matters, a principle enshrined in Article 82(1) TFEU, which has replaced the provision – Article 31 EU – on the basis of which that framework decision was adopted. As stated in recital 3, the purpose of that framework decision is 'to establish a minimum obligation for Member States to take into account convictions handed down in other Member States'.

[19] See the judgment in *Beshkov* (paragraph 28).

[20] See judgment of 5 July 2018, *Lada* (C-390/16, EU:C:2018:532, paragraph 30).

63. Where criminal proceedings have been brought against the same person on a number of occasions, in a number of Member States, on the basis of different facts, it is one of the fundamental principles of Framework Decision 2008/675 that, as stated in recital 8 of that framework decision, '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'.

64. The principle laid down by the framework decision, to that end, is that account is to be taken, in the Member State where new criminal proceedings are conducted, of a conviction handed down in another Member State, in accordance with the principle of equivalence. Nonetheless, the framework decision does not seek to harmonise the consequences attaching to previous convictions under the national legislation of different Member States.

65. When it adopted Framework Decision 2008/675, the EU legislature proceeded on the basis that, as stated in recital 4, 'some Member States attach effects to convictions handed down in other Member States, whereas others take account only of convictions handed down by their own courts'.

66. That is why recital 5 of the framework decision goes on to state: '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 …'. A court hearing new criminal proceedings is therefore obliged, under Framework Decision 2008/675, to ensure that the effects of a decision of a court of another Member State are 'equivalent to the effects of a national decision', even 'at the time of execution of the sentence'. [21]

67. That framework decision thus lays down the principle that convictions handed down by courts of the Member State conducting the new criminal proceedings – in this case, aggregate sentencing proceedings – are to be assimilated to convictions handed down by courts of another Member State. This principle of assimilation means that such convictions are given the same legal effect as national convictions. Thus, the court hearing new criminal proceedings is, in principle, obliged to take account of a previous decision of a court of another Member State in the same way as it would take into consideration a decision of a court of the Member State to which it belongs, so as to give that decision the effect attached by law to the offender's criminal record.

68. As Advocate General Bot observed in his Opinion in *Beshkov*, [22] that requirement 'is clearly linked to the attainment of the area of freedom, security and justice and thereby to mutual recognition, which requires not only that the foreign decision be taken into account but also that it be complied with'. [23] Framework Decision 2008/675 thus contributes, as the Court has held, 'to strengthening mutual trust within the European area of justice, in that it encourages a judicial culture in which previous convictions handed down in another Member State are in principle taken into account'. [24]

[21] See recital 7 of Directive 2008/675.

[22] C-171/16, EU:C:2017:386.

[23] Opinion of Advocate General Bot in *Beshkov* (C-171/16, EU:C:2017:386, point 54); Opinion of Advocate General Bot in *Lada* (C-390/16, EU:C:2018:65, point 77).

[24] See judgment of 5 July 2018, *Lada* (C-390/16, EU:C:2018:532, paragraph 36).

69. At first sight, the Polish legislation appears to run counter to the intention thus evinced by the EU legislature, and to conflict with the principle of mutual recognition. Nonetheless, it is necessary to determine whether, in the particular context of the proceedings before the referring court, the fact that no account can be taken of convictions imposed by courts of other Member States conforms to the rules laid down by Framework Decision 2008/675.

70. In Article 3(3) to (5) of that framework decision, the EU legislature has laid down limits on the obligation to take account, in new criminal proceedings, of previous convictions handed down in other Member States, in accordance with the principle of equivalence.

71. In particular, Article 3(3) of that framework decision provides that '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'. Article 3(3) thus contains a proviso under which the taking into account of previous convictions handed down in other Member States must not undermine those decisions. It expresses the need to preserve the *res judicata* status of the foreign decision.

72. Thus, where, in the course of new criminal proceedings, a national court takes account of a previous foreign decision, it cannot alter that decision in any way. In accordance with this principle of non-interference, the court subsequently seised cannot reopen matters decided by the court of another Member State. The court before which the new proceedings are brought must simply attach to the previous foreign decision the effects which would be attached to a prior national decision, in accordance with the principle of equivalence.[25] In other words, convictions previously handed down in other Member States must be taken into account in the terms in which they were handed down.[26]

73. The Court was applying that principle of non-interference when it ruled, in the judgment in *Beshkov*, that 'Article 3(3) of Framework Decision 2008/675 must be interpreted as precluding national legislation which provides that a national court, seised of an application for the imposition, for the purposes of execution, of an overall custodial sentence that takes into account, inter alia, the sentence imposed following a previous conviction handed down by a court of another Member State, may alter for that purpose the arrangements for execution of that latter sentence'.[27]

74. In particular, the Court held that 'a national court cannot, pursuant to that Framework Decision, review and alter the arrangements for execution of previous convictions handed down in another Member State that have been previously executed, in particular by revoking a suspension attached to the sentence imposed on that conviction and converting that sentence to a period of imprisonment. Nor can a national court order, in that context, further execution of that sentence as thus altered'.[28]

75. Elsewhere, in its judgment of 5 July 2018, *Lada*,[29] the Court has held that 'even though Framework Decision 2008/675 precludes a review … that may lead to a reclassification of the criminal offence and an alteration of the sentence imposed in another Member State, it must be

[25] See Opinion of Advocate General Bot in *Beshkov* (C-171/16, EU:C:2017:386, points 55 and 56).

[26] See the judgment in *Beshkov* (paragraphs 37 and 44) and judgment of 5 July 2018, *Lada* (C-390/16, EU:C:2018:532, paragraph 39).

[27] See the judgment in *Beshkov* (paragraph 47).

[28] See the judgment in *Beshkov* (paragraph 46).

[29] C-390/16, EU:C:2018:532.

stated that the framework decision does not prevent the Member State in which the new criminal proceedings take place from being able to lay down rules for taking into account previous convictions handed down in that other Member State, since the sole purpose of laying down such rules is to determine whether it is possible to attach to those convictions legal effects equivalent to those that attach to previous national convictions in accordance with national law'.[30] It observed that 'the adoption of a decision enabling equivalent legal effects to be attached to a previous conviction in another Member State, such as that mentioned in recital 13 of Framework Decision 2008/675, requires an examination on a case-by-case basis in the light of a specific situation. That possibility cannot justify the implementation of a special procedure for recognition with respect to convictions handed down in another Member State which, first, is necessary for those convictions to be taken into account in new criminal proceedings and, second, is liable to lead to a reclassification of the offence committed and the sentence imposed'.[31]

76. In the light of that clarification, I consider that, contrary to the submissions of the Polish and Czech Governments, Article 3(3) of Framework Decision 2008/675 does not necessarily preclude the introduction of aggregate sentencing proceedings such as those before the referring court. It does so only where it is also demonstrated that the taking into account, in such a context, of previous convictions handed down in another Member State, would have the effect of 'interfering with … previous convictions or any decision relating to their execution'. I note, moreover, that in the judgment in *Beshkov*, the Court did not hold that Article 3(3) of Framework Decision 2008/675 precluded the national proceedings at issue in itself, but only to the extent that those proceedings would, in the circumstances under consideration in that judgment, have compromised the integrity of the foreign conviction by revoking the suspension attached to the sentence imposed on that conviction.

77. I would also point out that Article 3(3) of Framework Decision 2008/675 must be read in conjunction with recital 14 of that framework decision, which states that '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'.

78. I consider, in the same vein as the Commission in its written response to the Court's questions, that Article 3(3) of Framework Decision 2008/675, read in conjunction with recital 14 of that framework decision, does not categorically prevent previous convictions handed down abroad from being taking into account in national aggregate sentencing proceedings, but requires an individual examination of whether, in the particular case, the imposition of an aggregate sentence would constitute interference with the previous judgment or its execution.

79. As the Commission rightly observes in its written response to the Court's questions, recital 14 of Framework Decision 2008/675 is relevant in two respects. First, it confirms that cases in which an aggregate sentence is imposed are not excluded, as such, from the scope of that framework decision. Second, it follows from that recital that the imposition of an aggregate sentence interferes with the previous conviction or its execution in two situations: where the first sentence has not already been executed, and where its execution has not been transferred to the second

[30] See judgment of 5 July 2018, *Lada* (C-390/16, EU:C:2018:532, paragraph 40).

[31] See judgment of 5 July 2018, *Lada* (C-390/16, EU:C:2018:532, paragraph 45).

Member State. If a sentence remains to be served in another Member State, a concurrent sentencing decision would indeed affect the execution of the previous conviction imposed by a court of that Member State.

80. On the other hand, in principle, there is no interference with the previous conviction or its execution where that conviction has already been executed. In that situation, the right of the convicting Member State to execute the sentence imposed by its own courts, in the manner provided for by its national law, is not affected, even where another Member State takes account of the conviction in new criminal proceedings, in the exercise of its own judicial authority.

81. In the absence of a requirement for the conviction handed down in a Member State to have been fully executed, a concurrent sentencing order made in another Member State might override the authorities and courts of the convicting Member State in relation to the execution of sentences handed down in that Member State, and thus undermine its right to execute, within its territory, sentences handed down by its national courts. Concurrent sentencing would then have the effect of interfering with the execution of such sentences, which is precluded by Article 3(3) of Framework Decision 2008/675, read in the light of recital 14 of that framework decision.

82. That having been said, even in the situation where a previous conviction handed down in a Member State has already been executed, a court of another Member State, when taking such a conviction into account 'cannot … review and alter the arrangements for execution' of that conviction.[32] The presumption that there is no interference with the previous conviction or its execution can thus be rebutted where taking that conviction into account results, on the particular facts, in reopening matters decided in the first Member State.

83. For the same reasons that apply where a previous conviction which has already been executed is taken into account, there is, in principle, no interference with the previous conviction or its execution where the execution of that conviction has been transferred from the convicting state to another Member State, in accordance with the rules laid down by Framework Decision 2008/909. In that situation, it is the first Member State which has decided to transfer execution of the conviction to the second Member State because it has satisfied itself, in accordance with Article 4(2) of that framework decision, that the enforcement of the sentence in the second Member State 'would serve the purpose of facilitating the social rehabilitation of the sentenced person'. Given that the sentencing Member State has consented to the transfer of enforcement of the sentence, there is no prejudice to the right of that Member State to execute, within its territory, in the manner provided for by its domestic law, a conviction handed down by its national courts.

84. In my view, it follows from Article 3(3) of Framework Decision 2008/675, read in the light of recital 14 of that framework decision, that where a previous conviction has already been executed, or where its execution has been transferred to another Member State, and a court in that Member State envisages the making of an aggregate sentencing order, the determination of the aggregate sentence does not, in itself, interfere with the previous conviction or its execution. Accordingly, Article 3(3) of that framework decision cannot be read as laying down a principle that a national court hearing new criminal proceedings may not make an aggregate sentencing order which takes into account a previous conviction handed down by a court of another Member State.

[32] See the judgment in *Beshkov* (paragraph 46). Thus, the national court of the second Member State cannot revoke a suspension attached to a sentence imposed on a previous conviction handed down in another Member State, and already executed, by converting it into a period of imprisonment.

85. Once that is accepted, the adoption of a decision enabling a previous conviction handed down in another Member State to be given legal effects equivalent to those attaching to a previous conviction handed down by a court of the Member State in which that decision is to be adopted, as referred to in recital 13 of Framework Decision 2008/675, requires an examination on a case-by-case basis in the light of a specific situation. [33]

86. Where the need arises for the court hearing the new proceedings to determine, in accordance with its national law and the principle of equivalence referred to in Article 3(1) of that framework decision, what aggregate sentence would be appropriate, on the basis of convictions handed down in a number of Member States, that court must verify whether an order imposing such an aggregate sentence would or would not be liable to interfere with a previous conviction handed down in another Member State. That question must be examined on a case-by-case basis so as to comply with the principle of non-interference laid down in Article 3(3) of the framework decision.

87. In circumstances such as those of the main proceedings, it does not seem to me that the aggregate sentencing proceedings prejudice the execution of the initial sentence imposed in Germany.

88. In that regard I would reiterate that, as is apparent from the order for reference, the judgment of the Landgericht Lüneburg (Regional Court, Lüneburg) of 15 February 2017 was taken over for execution in Poland by an order of the Sąd Okręgowy w Gdańsku (Regional Court, Gdańsk) of 12 January 2018. That order recorded the legal classification of the offences in Polish law and indicated that an aggregate sentence of five years and three months' imprisonment was executory. This sentence was identical in duration to that imposed by the judgment of the Landgericht Lüneburg (Regional Court, Lüneburg).

89. Thus, it is indeed the custodial sentence, as imposed by the judgment of the Landgericht Lüneburg (Regional Court, Lüneburg) which is to be executed in Poland. As the referring court has explained, what is sought in the aggregate sentencing proceedings is the imposition of an aggregate sentence, encompassing the custodial sentence of five years and three months, on the basis of complete absorption. Such absorption does not affect the judgment of the Landgericht Lüneburg (Regional Court, Lüneburg), given that the sentence imposed is to be executed, in its entirety, in Poland. The fact that that sentence will be served concurrently with another sentence imposed by a Polish court does not, in itself, affect the content and effectiveness of the judgment of the Landgericht Lüneburg (Regional Court, Lüneburg).

90. Thus, in my view, an aggregate sentencing order encompassing the sentence imposed by the Sąd Okręgowy w Gdańsku (Regional Court, Gdańsk) on 24 February 2010 and the sentence imposed by the Landgericht Lüneburg (Regional Court, Lüneburg) does not, inasmuch as it absorbs the latter sentence without prejudicing it, conflict with the rules laid down by Framework Decision 2008/675.

91. That having been said, in order to be compatible with Article 3(3) of Framework Decision 2008/675, it is important that the aggregate sentencing proceedings do not extinguish the previous sentence, so that the existence and integrity of that sentence are preserved. The effect of a concurrent sentencing order must not be to strip the combined sentences of their existence,

[33] See judgment of 5 July 2018, *Lada* (C-390/16, EU:C:2018:532, paragraph 45).

independence and legal consequences, but to determine that they are to be executed simultaneously with the most severe sentence. It follows that if the absorbing sentence is extinguished, the absorbed sentence must still be capable of being executed as it was imposed.

92. In other words, if aggregate sentencing proceedings are to be compatible with Article 3(3) of Framework Decision 2008/675, they must respect the integrity of the foreign decision and preserve the sovereignty of the court which delivered it, avoiding any interference with the res judicata status of that decision. [34] In that regard, an aggregate sentencing order interferes with a conviction handed down by a court of another Member State if it results in the imposition of an aggregate sentence which is less severe than the initial sentence imposed on that conviction, which would be contrary to that provision. [35]

93. The Czech Government argues that to make an aggregate sentencing order encompassing a sentence previously imposed in another Member State is necessarily to interfere with that sentence. It submits that, by its very nature, such an order entails the revocation of the initial decision, the suppression of the effects of the previous conviction and the absorption of those effects by the new aggregate sentence which is imposed.

94. In the same vein, the Polish Government states that it is of the essence of an aggregate sentencing order that its effect is to set aside the judgments which are combined in the aggregate sentence. According to that Member State, this means that the convicting judgments which are combined in the context of an aggregate sentencing order cease to exist in law, contrary to the express terms of Article 3(3) of Framework Decision 2008/675.

95. In the light of those arguments, the referring court will need to determine whether the making of an aggregate sentencing order would have the effect of revoking the previous conviction within the meaning of Article 3(3) of Framework Decision 2008/675.

96. In my view it follows from the considerations set out above that Article 3(3) of Framework Decision 2008/675, read in the light of recital 14 of that framework decision, is to be interpreted such that, in principle, it does not prevent a court of a Member State from taking into account, in new criminal proceedings in the form of aggregate sentencing proceedings such as those before the referring court, a previous conviction handed down by a court of another Member State, the execution of which has been transferred to the Member State conducting those proceedings in accordance with the rules laid down by Framework Decision 2008/909. It is nevertheless incumbent on the court hearing the aggregate sentencing proceedings to verify, on a case-by-case basis, having regard to the particular factual situation, that such proceedings do not have the effect of interfering with, revoking or reviewing those previous convictions or any decision relating to their execution in the Member State conducting those proceedings. In particular, aggregate sentencing proceedings must not result either in the imposition of an aggregate sentence which is more lenient than the initial sentence imposed following the conviction handed down by a court of another Member State, or in the effects of that conviction being nullified.

[34] See Opinion of Advocate General Bot in *Beshkov* (C-171/16, EU:C:2017:386, point 70).

[35] Given that the punishment of certain offences may vary in severity from one Member State to another, aggregate sentencing proceedings must not result in the policy pursued in criminal matters by the Member State in which those proceedings are conducted being substituted for that pursued in the Member State where the previous sentence was imposed.

97. The compatibility of aggregate sentencing proceedings with EU law, however, in a context such as that of the present case, where the enforcement of a sentence has been transferred to a Member State other than that in which the sentence was imposed, is dependent on verifying that such proceedings do not conflict with the rules laid down in Framework Decision 2008/909. In particular, it is necessary to verify that the conditions and limits on the adaptation of such a sentence, as set out in that framework decision, are observed.

E. Compatibility of aggregate sentencing proceedings with Framework Decision 2008/909

98. In this section, I will consider whether Framework Decision 2008/909 contains limits on the introduction of aggregate sentencing proceedings such as those before the referring court.

99. Given that the situation under consideration in the main proceedings is that of a transfer to one Member State of the enforcement of a sentence imposed in another Member State, made pursuant to that framework decision, it is important to verify that the aggregate sentencing proceedings are compatible with the rules laid down by that framework decision. This, moreover, is the subject of the second question referred.

100. I do not detect any indication in Framework Decision 2008/909 that the introduction, in the executing State, of aggregate sentencing proceedings such as those before the referring court, is excluded for the purposes of enforcement of a sentence imposed in the convicting State. On the contrary, provided that the rules laid down by that framework decision are complied with, and in so far as the law of the executing State provides for it in relation to national convictions, the transfer to that Member State of enforcement of a sentence imposed in another Member State necessarily entails full and complete compliance with the obligation to take that sentence into account in the context of aggregate sentencing proceedings in the executing State.

101. Unlike Framework Decision 2008/675, which, as indicated in recital 6 to that framework decision, does not aim at the execution in one Member State of judicial decisions taken in other Member States, Framework Decision 2008/909 provides for the power to enforce a sentence imposed in one Member State to be transferred to another Member State.

102. As is apparent from recital 2 of that framework decision, it is intended to implement the principle of mutual recognition of judicial decisions in criminal matters. Pursuant to that principle, as soon as a decision is taken by a judicial authority in compliance with the law of its home Member State, it takes full and direct effect throughout the European Union, meaning that the competent authorities of all the other Member States are under an obligation to assist its execution as if it originated from one of their own judicial authorities.

103. It is apparent from Article 3(1) of that framework decision that it establishes the rules under which one Member State is to recognise a judgment and enforce a sentence imposed by a court of another Member State, with a view to facilitating the social rehabilitation of the sentenced person.

104. To that end, as stipulated in Article 8(1) of Framework Decision 2008/909, the competent authority of the executing State is to recognise a judgment which has been forwarded by the competent authority of the issuing State and to take, forthwith, all the necessary measures for the enforcement of the sentence, which is to correspond in its length and nature to the sentence

imposed in the judgment delivered in the issuing State.[36] The principle of mutual recognition therefore precludes the executing judicial authority from adapting the sentence imposed by the issuing judicial authority, even if the implementation of the law of the executing State would have led to the imposition of a penalty of a different length or nature. As the Commission pointed out in its report on the implementation of Framework Decision 2008/909, 'as the framework decisions are based on mutual trust in other Member States' legal systems, the decision of the judge in the issuing State should be respected and, in principle, there should be no revision or adaptation of this decision'.[37]

105. This is not an absolute rule, however. Article 8(2) to (4) of Framework Decision 2008/909 lay down strict conditions for the adaptation, by the competent authority of the executing State, of the sentence imposed in the issuing State. Those conditions are the sole exceptions to the obligation imposed on that authority, in principle, by Article 8(1) of that framework decision.[38]

106. In particular, Article 8(2) of Framework Decision 2008/909 permits the competent authority of the executing State, subject to certain conditions, to adapt the sentence imposed in the issuing State, where that sentence is incompatible with the law of the executing Member State in terms of its duration. That authority may decide to adapt the sentence only where it exceeds the maximum penalty provided, under its national law, for offences similar to that to which the sentence relates. The adapted sentence may not be less than the maximum penalty provided for similar offences under the law of the executing State. Furthermore, where the sentence imposed in the issuing State is incompatible with the law of the executing State in terms of its nature, Article 8(3) of that framework decision permits the competent authority of the executing State to adapt it to the punishment or measure provided for in its own law for similar offences, provided that the adapted sentence corresponds as closely as possible to the sentence imposed in the issuing State. The sentence may not be converted into a pecuniary punishment. In any event, Article 8(4) of Framework Decision 2008/909 stipulates that the adapted sentence may not aggravate the sentence passed in the issuing Member State in terms of its nature or duration. Finally, under Article 12(1) and Article 21(e) of Framework Decision 2008/909, any decision to adapt the sentence in accordance with Article 8(2) or (3) must be communicated in writing to the competent authority of the issuing State.

107. In the present case, as I have stated above, it is the custodial sentence of five years and three months, as imposed by the Landgericht Lüneburg (Regional Court, Lüneburg) in its judgment, that is to be enforced in Poland. It does not appear from the file before the Court that there is any need for the sentence imposed by that judgment to be adapted, in accordance with Article 8(2) or (3) of Framework Decision 2008/909, in order to be capable of enforcement in Poland.

108. In my opinion, the making of an aggregate sentencing order cannot be regarded as an 'adaptation' by the competent authority of the executing State of the sentence imposed in the issuing State within the meaning of Article 8(2) to (4) of Framework Decision 2008/909.

[36] See, to that effect, judgments of 8 November 2016, *Ognyanov* (C-554/14, EU:C:2016:835, paragraph 36), and of 11 January 2017, *Grundza* (C-289/15, EU:C:2017:4, paragraph 42).

[37] Report from the Commission to the European Parliament and the Council of 5 February 2014 on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention (COM(2014) 57 final, p. 8).

[38] As the Commission states in the report cited in the previous footnote, 'it is important to find the right balance between respect of the sentence originally imposed and the legal traditions of Member States so that conflicts that could adversely affect the functioning of the Framework Decisions do not arise' (p. 8).

'Adaptation', within the meaning of that provision, has a very specific purpose, which is to enable the sentence to be enforced in the territory of the executing State, by making it compatible with the national law of that State. By contrast, the purpose of aggregate sentencing proceedings, in circumstances such as those of the main proceedings, is entirely different. It is to determine whether, for the purposes of execution of a number of sentences resulting from separate proceedings, those sentences are to be served consecutively or concurrently, while ensuring compliance with the principles of proportionality and individualisation of the sentence at the time of its execution.

109. Accordingly, it cannot be said to follow, from the fact that Article 8 of Framework Decision 2008/909 does not contain an exception relating to the introduction of aggregate sentencing proceedings such as those before the referring court, that the introduction of such proceedings is contrary to that provision.

110. That having been said, the introduction of aggregate sentencing proceedings, in circumstances where the enforcement of a sentence has been transferred to another Member State pursuant to that framework decision, is subject to compliance with 'the obligation imposed on [the competent authority of the executing State], in principle, to recognise the judgment forwarded to it and to enforce the sentence, which is to correspond in its length and nature to the sentence imposed in the judgment delivered in the issuing State'.[39] Accordingly, it is only within the strict limits provided for by Article 8(2) to (4) of that framework decision that the duration or nature of the initial sentence to which the aggregate sentencing proceedings relate can, where appropriate, be adapted. I note in that regard that, while it is not the purpose of aggregate sentencing proceedings, it is conceivable that, before an aggregate sentencing order can be made, it may be necessary to adapt the duration or nature of the initial sentence imposed in another Member State, in accordance with Article 8(2) to (4) of that framework decision, in order for it to be capable of enforcement in the executing state. In such circumstances, it is the adapted sentence which, following aggregate sentencing proceedings, must be executed concurrently with another as part of an aggregate sentence.

111. It does not seem to me that Article 17 of Framework Decision 2008/909 has any bearing on the compatibility of aggregate sentencing proceedings with that framework decision. That article, paragraph 1 of which provides that the enforcement of a sentence is governed by the law of the executing State, establishes the general rules applicable to the enforcement of the sentence once the sentenced person has been transferred to the competent authority of that State.[40] These are measures that have to ensure the physical enforcement of the sentence and the social rehabilitation of the sentenced person.[41] As I have stated above, and as is apparent from the judgment of 10 August 2017, *Zdziaszek*,[42] measures of that kind, concerning the detailed arrangements for enforcement of sentences, must be distinguished from measures which, by altering the quantum of the sentence or sentences imposed, relate to the determination of the level of punishment. Since aggregate sentencing proceedings belong to this second category, they are not affected by Article 17 of Framework Decision 2008/909, which concerns measures relating

[39] See judgment of 8 November 2016, *Ognyanov* (C-554/14, EU:C:2016:835, paragraph 36).

[40] See judgment of 8 November 2016, *Ognyanov* (C-554/14, EU:C:2016:835, paragraph 39).

[41] In point 72 of his Opinion in *Ognyanov* (C-554/14, EU:C:2016:319), Advocate General Bot stated that, in that context, the competent judicial authorities will establish the details of how the sentence is to be served and organised, deciding, for example, on placement in the community, on permitted absences and day release, on the serving of a sentence in instalments, on the suspension of a sentence, on the early or conditional release of a prisoner or on his being placed under electronic surveillance. He also indicated that the law governing the enforcement of sentences may also include measures that apply after the sentenced person has been released, such as placement under judicial supervision or participation in rehabilitation programmes, or measures for the compensation of victims.

[42] C-271/17 PPU, EU:C:2017:629.

to the detailed arrangements for enforcement of sentences. In that regard, the fact that aggregate sentencing proceedings are conducted at the stage of enforcement of the sentences does not alter the essential purpose of such proceedings, which is to lead to a new determination of the level of the custodial sentences imposed previously. [43]

112. Similarly, it does not seem to me that Article 19 of Framework Decision 2008/909 has any bearing on the compatibility of aggregate sentencing proceedings with that framework decision. Article 19(1) of that framework decision provides that 'an amnesty or pardon may be granted by the issuing State and also by the executing State'. An amnesty or pardon brings the enforcement of a sentence to an end, [44] which is not the object or purpose of aggregate sentencing proceedings. Furthermore, as regards Article 19(2) of Framework Decision 2008/909, which provides that 'only the issuing State may decide on applications for review of the judgment imposing the sentence to be enforced under this Framework Decision', it follows that the executing State cannot decide to review such a judgment or take measures which might prevent it being reviewed in the issuing State. Again, aggregate sentencing proceedings do not have the object or effect of reviewing the decision which resulted in the sentence that is taken into account in those proceedings. In my opinion, therefore, there is no argument by analogy to be made, on the basis of Article 19 of that framework decision, as to the compatibility of aggregate sentencing proceedings with that framework decision.

113. In my view, it follows from the foregoing considerations that Article 8, Article 17(1) and Article 19 of Framework Decision 2008/909 are to be interpreted as not precluding the introduction by a Member State of aggregate sentencing proceedings such as those before the referring court, provided that such proceedings conform to the obligation imposed on the competent authority of the executing State, in principle, to recognise the judgment forwarded to it and to enforce the sentence, which is to correspond in its length and nature to the sentence imposed in the judgment delivered in the issuing State. It is only within the strict limits provided for by Article 8(2) to (4) of that framework decision that the duration or nature of the initial sentence to which aggregate sentencing proceedings relate can, where appropriate, be adapted prior to the making of an aggregate sentencing order.

114. My analysis of Framework Decisions 2008/675 and 2008/909 leads me to the conclusion that, subject to the conditions and limits referred to above, those framework decisions do not, in principle, preclude the introduction in a Member State of aggregate sentencing proceedings, in a situation where the enforcement of a sentence imposed in another Member State has been transferred to that Member State.

115. If it were otherwise then, as the referring court and the Hungarian Government have rightly observed, there would be an unjustified difference of treatment as between persons subject to a number of sentences imposed in a single Member State and those sentenced in several Member States where, in both cases, the sentences were to be enforced in the same Member State.

116. The benefit of aggregate sentencing proceedings would be available to persons subject to custodial sentences imposed in Poland, but as regards persons subject to custodial sentences imposed not only in Poland, but also in other Member States, those sentences would simply accumulate.

[43] Judgment of 10 August 2017, *Zdziaszek* (C-271/17 PPU, EU:C:2017:629, paragraph 90).

[44] See, in that regard, Article 21(f) of Framework Decision 2008/909, which refers to 'any decision not to enforce the sentence for the reasons referred to in Article 19(1) [of that framework decision]'.

117. It seems to me that to prevent the application of the principles of proportionality and individualisation of sentences, on the sole basis of the place in which the judgment was handed down, would undermine the construction of an area of freedom, security and justice founded on the principle of mutual recognition and trust on the part of the Member States.

118. Conversely, given that Polish law makes provision for aggregate sentencing proceedings, it is entirely consistent with the objectives pursued by Framework Decisions 2008/675 and 2008/909 for such proceedings to be introduced with a view to the imposition of an aggregate sentence encompassing a sentence handed down in another Member State. The exercise of discretion by the court subsequently seised, in aggregate sentencing proceedings, leads to better individualisation of the sentence at the stage of its execution, combining the taking into account of the offender's criminal record with the sentencing function of social rehabilitation. It would be contrary to those objectives, and to the principle of mutual recognition, for the benefit of proceedings enabling a number of sentences to be served concurrently not to be available to convicted persons who, in the interests of their social rehabilitation, were serving their sentences in their State of origin, purely because those sentences had been imposed by criminal courts of different Member States.

119. Consequently, where the safeguards on the implementation of those two framework decisions are observed – that is, where the integrity of the foreign decision is preserved along with the sovereignty of the court which delivered it – [45] an approach must be preferred which gives full effect to the modern function of sentencing, by taking account, at the stage of enforcement of the sentence, of the criminal record of the convicted person, in such a way as to ensure effective repression of crime while also observing the principles of proportionality and individualisation of sentences.

120. As I have already stated, it appears from the material available to the Court that there is an obstacle in Polish law to the taking into account, in aggregate sentencing proceedings, of a sentence handed down in another Member State. If the referring court confirms that that is the position, it must remove that obstacle in accordance with the guidance given by the Court in its judgment of 24 June 2019, *Popławski*, [46] or in other words by interpreting its national law, as far as possible, in such a way that it complies with the requirements of Framework Decisions 2008/675 and 2008/909.

V. Conclusion

121. Having regard to all of the foregoing considerations, I suggest that the Court should answer the questions referred for a preliminary ruling by the Sąd Okręgowy w Gdańsku (Regional Court, Gdańsk, Poland) as follows:

(1) Article 3(3) 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, read in the light of recital 14 of that framework decision, is to be interpreted such that it does not, in principle, prevent a court of a Member State from taking into account, in new criminal proceedings in the form of aggregate sentencing proceedings such as those before the referring court, a previous conviction handed down by a court of another Member State, the execution of which has been transferred to the Member State conducting

[45] See Opinion of Advocate General Bot in *Beshkov* (C-171/16, EU:C:2017:386, point 70).

[46] C-573/17, EU:C:2019:530.

those proceedings, in accordance with the rules laid down by Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009. It is nevertheless incumbent on the court hearing aggregate sentencing proceedings to verify, on a case-by-case basis, having regard to the particular factual situation, that such proceedings do not have the effect of interfering with, revoking or reviewing those previous convictions or any decision relating to their execution in the Member State conducting those proceedings. In particular, aggregate sentencing proceedings must not result either in the imposition of an aggregate sentence which is more lenient than the initial sentence imposed following the conviction handed down by a court of another Member State, or in the effects of that conviction being nullified.

(2) Article 8, Article 17(1) and Article 19 of Framework Decision 2008/909, as amended by Framework Decision 2009/299, are to be interpreted as not precluding the introduction by a Member State of aggregate sentencing proceedings such as those before the referring court, provided that such proceedings conform to the obligation imposed on the competent authority of the executing State, in principle, to recognise the judgment forwarded to it and to enforce the sentence, which is to correspond in its length and nature to the sentence imposed in the judgment delivered in the issuing State. It is only within the strict limits provided for by Article 8(2) to (4) of that framework decision that the duration or nature of the initial sentence to which aggregate sentencing proceedings relate can, where appropriate, be adapted prior to the making of an aggregate sentencing order.