Anonymised version

Case C-221/19

Request for a preliminary ruling

Date lodged:

11 March 2019

Referring court:

Sąd Okręgowy w Gdańsku (Poland)

Date of the decision to refer:

15 February 2019

Criminal proceedings against:

AV

Request for a preliminary ruling

1. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union:

a. Should 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, 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 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 State of the European Union but also the inclusion in the aggregate sentence of such a conviction which was taken over for execution in another State of the European Union, together with a conviction handed down in the latter State, within the framework of the aggregate sentence?

b. In light of the provisions 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 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(1) and (2) thereof – which provides that *an amnesty or pardon may be granted by the issuing State and also by the executing State (paragraph 1); 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 State of the European Union that was taken over for execution in another State of the European Union, together with a conviction handed down in the latter State, within the framework of the aggregate sentence?

GROUNDS

I. Legal framework.

1. EU law:

a. Provisions of the Treaty on the Functioning of the European Union […] ('the TFEU'):

b. **[Or. 2]** 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 (OJ 2008 L 220, p. 32);

c. 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 (OJ 2008 L 327, p. 27).

2. National law:

a. **Article 85(4) of the kodeks karny** (Penal Code), which provides that *aggregate sentences shall not extend to the sentences imposed by the judgments referred to in Article 114a of the Penal Code*;

Article 114a of the Penal Code, which provides:

1. A final conviction for a criminal offence handed down by a court having jurisdiction in criminal matters ***in a Member State of the European Union*** *is also a conviction, unless pursuant to Polish criminal law the act in question is not a criminal offence, the offender is not subject to punishment or a sentence not provided for in Polish criminal law has been handed down.*

2. In the event of a conviction by the court referred to in paragraph 1, in cases:

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

(2) concerning cancellation of the conviction in the criminal record,

- the law of the place of conviction shall apply. Article 108 shall not apply.

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 liable to be remitted in the State where the conviction was handed down.

II. The facts and the main proceedings

On 31 July 2018, the Sąd Okręgowy w Gdańsku (Regional Court, Gdańsk) received an application from AV's defence counsel requesting that an aggregate sentence be imposed on AV.

It follows from the convicted person's current conviction record, the case files and the copies of judgments included in the present case file that in total he has been convicted by four individual judgments, of which three:

- the judgment of the Sąd Rejonowy w Wejherowie (District Court, Wejherowo, Poland) of 23 October 1998 […];

- the judgment of the Regional Court, Gdańsk, of 24 February 2010 […];

- the judgment of the Sąd Rejonowy w Gdyni (District Court, Gdynia, Poland) of 23 November 2011 […];

[Or. 3] were handed down by Polish courts, while one judgment, of the Landgericht Lüneburg (Regional Court, Lüneburg, Germany) of 15 February 2017 […], was handed down by a German court.

In the course of the proceedings concerning the aggregate sentence, it was established that the judgment of the Regional Court, Lüneburg, of 15 February 2017 […] was taken over for execution in Poland by the order of 12 January 2018 […] of the Regional Court, Gdańsk. In the order, the legal classification of AV's offences under Polish law was indicated and it was also indicated that a total sentence of 5 years and 3 months' imprisonment was to be executed; this sentence is identical in duration to that imposed by the judgment of the Regional Court, Lüneburg.

Currently, the sentences *to be enforced* are as follows:

- the sentence handed down by the Regional Court, Gdańsk […], which AV is to serve from 29 November 2021 until 30 March 2030;

- the sentence handed down by the Regional Court, Lüneburg, of 15 February 2017, which was taken over for execution in Poland by the order [of 12 January 2018] […], which AV is serving from 1 September 2016 until 29 November 2021.

In the application for an aggregate sentence to be imposed, AV's defence counsel argued that, since the aforementioned German sentence had been taken over for execution in Poland, the conditions for an aggregate sentence to be imposed had been met. This would include the above sentence, with the shorter sentence being fully absorbed into the longer one.

By decision of 5 November 2018, after evidence had been gathered, a hearing was set for 10 December 2018 at which the aggregate sentence would be passed. The prosecutor did not appear at that hearing. In addition, the defence counsel requested an adjournment in order to establish which institution had received the letter from AV containing his request that the time spent on remand in Poland and Germany be credited towards the aggregate sentence. Due to these circumstances, the court postponed the hearing until 10 January 2019. At the hearing on 10 January 2019, the defence counsel applied for the admission of evidence from

the files in case IV K 228/13 concerning the fact that in that case the judgment handed down by a German court was taken over for execution in Poland and included in the aggregate sentence.

The court included the aforementioned files in the evidence. It follows from those files that in its judgment of 29 January 2014, handed down in case IV K 228/13, the Regional Court, Gdańsk, aggregated with the judgment of the Polish court, inter alia, the custodial sentence of convict Z. K. imposed by judgment of the Landgericht Göttingen (Regional Court, Göttingen, Germany) of 13 March 2012, which was taken over for execution in Poland.

That judgment was appealed against by Z. K.'s defence counsel. At the appeal hearing on 7 May 2014, the Sąd Apelacyjny w Gdańsku (Court of Appeal, Gdańsk), pursuant to Article 3 of the ustawa o Trybunale Konstytucyjnym (Law on the Constitutional Court), asked the Trybunał Konstytucyjny (Constitutional Court) whether Article 92a of the Penal Code, which prohibits the inclusion in an aggregate sentence of convictions handed down in other Member States of the European Union, is consistent with Article 32 **[Or. 4]** of the Konstytucja Rzeczypospolitej Polskiej (Constitution of the Republic of Poland) and Article 20 of the Charter of Fundamental Rights of the European Union. As a result of amendments to the Penal Code, the question was modified by order of 29 July 2015.

In its order of 23 November 2016, the Court of Appeal decided not to hear the appeal lodged by the defence counsel, due to its withdrawal by the latter with the convict's consent. As a result, in its order of 15 December 2016, the Constitutional Tribunal discontinued the proceedings in the case, since they were no longer relevant owing to the change in the procedural situation.

The above means that the judgment in case IV K 228/13 is a final judgment and one of the aggregate sentences it imposes is a custodial sentence that includes a judgment of a German court (Regional Court, Göttingen) which was taken over for execution in Poland.

At the hearing on 10 January 2019, the referring court postponed the judgment until 14 January 2019, and at that hearing it resumed court proceedings in order to consider referring a question for a preliminary ruling to the Court of Justice of the European Union.

III. Admissibility of the question referred.

[…]

IV. [Or. 5] Consideration of the question referred for a preliminary ruling.

The referring court points out that the essence of the case before it is to determine the correct interpretation of the provisions of EU law as set out in the two aforementioned framework decisions: the issue is whether their content, including without limitation the provisions highlighted in the question referred, in fact precludes the inclusion in an aggregate sentence of sentences handed down in one State of the European Union and taken over for execution in another State of the European Union together with sentences handed down in that other State, where the convict serves the sentence taken over for execution within the framework of the aggregate sentence. This issue is not clear-cut and the Court has not ruled thereon to date.

Article 85(4) of the Polish Penal Code sets out a condition which precludes an aggregate sentence from being passed — an aggregate sentence is not to extend to sentences imposed by the judgments referred to in Article 114a of the Penal Code, i.e. final convictions for an offence handed down by a court having jurisdiction in criminal matters in a Member State of the European Union.

The aforementioned provision is equivalent to the solution which had been in force prior to the amendment of Article 92a of the Penal Code, whose function was subsequently taken over by Article 85(4) of the Penal Code.

Article 92a of the Penal Code was introduced into the Polish legal order by the Law of 20 January 2011 and became effective as of 8 May 2011. It constitutes implementation by the Republic of Poland of Framework Decision […] 2008/675 […].

The explanatory memorandum to the draft law states that its purpose was to enable Polish courts to take into account in criminal proceedings convictions handed down in Member States of the European Union in respect of criminal offences committed by the offender.

Pursuant to the ustawa z dnia 20 lutego 2015 roku o zmianie ustawy Kodeks karny oraz niektórych innych ustaw (Law of 20 February 2015 amending the Penal Code and certain other laws) […], Articles 92 to 93 of the Penal Code were repealed (by Article 1(54) of the Law of 20 February 2015). Article 1(46) of the aforementioned law introduced new regulations concerning the rules for passing aggregate sentences, giving a new wording to Article 85 of the Penal Code, paragraph 4 of which provides that aggregate sentences are not to extend to the convictions referred to in Article 114a of the Penal Code. Thus, the prohibition on giving such rulings remains in force as regards the inclusion in aggregate sentences of judgments handed down in Poland and in another State of the European Union.

The referring court considers, first of all, that it is important to decide how Article 3(3) of Framework Decision […] 2008/675 […] should be interpreted with

respect to the possibility of passing an aggregate sentence that would include a sentence taken over for execution in another State of the European Union and a sentence passed in the executing State within the framework of an aggregate sentence.

[Or. 6] The referring court has no doubt that the *taking into account* of convictions referred to in Framework Decision […] 2008/675 […] may not in any way lead to these convictions being *interfered with, revoked or reviewed* as laid down in Article 3(3) thereof in the sense that one State of the European Union has no power to interfere with a judgment issued in another State of the European Union.

This also follows from recital 14 of Framework Decision […] 2008/675 […], 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. This recital clearly distinguishes matters related to the execution of a sentence from sentencing (in the Member State concerned), which is always a matter for the State where the judgment is issued.

However, the problem that arises in the present case is of a different nature. Once the *exequatur* procedure has been completed, a judgment which was handed down in a State of the European Union is no longer […] merely a judgment issued in another State of the European Union; it becomes the basis for all procedural decisions and decisions concerning execution which the courts in the State where it is to be executed are both entitled and obliged to make. It is precisely this issue which gives rise to doubts in connection with the procedure concerning the imposition of the aggregate sentence, since from the moment a sentence is taken over for execution in another State of the European Union, a new factual situation arises. The taking over results in the sentence which has been taken over becoming part of the national legal order, and it should be enforced in accordance with that order, as is also clear from Article 17(1) of Framework Decision […] 2008/909 […].

Therefore, the question arises as to whether Article 3(3) of Framework Decision […] 2008/675 […] only concerns judgments that are handed down and executed in one State of the European Union but have never been taken over for execution in another State of the European Union and as such are to be *taken into account* in the manner provided for in the provisions of the aforementioned decision, or whether it also covers judgments which have been taken over for execution in another State of the European Union.

Framework Decision […] 2008/909 […] **[Or. 7]** includes an extensive procedural mechanism for taking over the execution of a custodial sentence.

Pursuant to Article 17(1) thereof, the enforcement of a sentence is governed by the law of the executing State, which means that if a judgment given in one State in the European Union has been transferred for execution to another State of the European Union, it becomes, pursuant to that provision, a judgment enforced under the law of that latter State, and hence it in fact becomes in a certain sense — with respect to its enforcement — a judgment governed by the law of that State. While the question of sentencing remains with the convicting State (which is in line with Article 3(3) of Framework Decision […] 2008/675 […]), the question of enforcement is fully transferred to the State where the sentence is to be enforced.

In Article 8(2) to (4), Framework Decision […] 2008/909 […] lays down rules for the *exequatur* procedure from which it follows that, while in principle no interference with the transferred sentence is permitted, it may be reduced to the maximum penalty provided for in the national system or the nature of the penalty may be adapted in the case of discrepancies.

Therefore, the question arises as to whether a modification of the duration of a sentence (or possibly its nature) under the *exequatur* procedure essentially constitutes a modification of the same type as under aggregate sentence proceedings, which de facto may also only modify the duration of the sentence.

The referring court considers that a certain analogy may be drawn between the arrangement described in Article 8(2) to (4) of [Framework] Decision [2008/909] and an aggregate sentence, which does not interfere with the substance of individual judgments but only modifies the duration of the sentence. An aggregate sentence cannot be considered to constitute a much more far-reaching interference in a judgment taken over for execution, since it also merely modifies the duration of the sentence.

It appears that the possibility of passing an aggregate sentence in such circumstances should be a natural consequence of taking over the sentence for execution: since such a sentence becomes part of the national legal order, there are no reasonable grounds for not combining the sentence already taken over for execution and adapted to the national law with another sentence or with other sentences served in the executing country. That would amount to a certain disregard for the principle of mutual recognition of judgments, especially since, given the nature of the aggregate sentence, it is appropriate to pass it as it constitutes a summed up assessment of the criminal activities of the offender in question and there are no reasonable grounds for leaving his criminal activities in another State of the European Union outside the scope of this assessment where a sentence is taken over for execution.

[Or. 8] Under the principle of mutual recognition of judgments a foreign judgment should be treated as a national one, and hence, it would seem, passing an aggregate sentence in a situation where a sentence has been taken over for execution and is enforced according to the regulations in force in the executing

State would give full expression to this principle and contribute to building a common area of justice.

One should also take note of Article 19 of Framework Decision […] 2008/909 […], which provides that, although only the issuing State may decide on applications for review of the judgment, which is reasonable and consistent with Article 3(3) of Framework Decision […] 2008/675 […], an amnesty or pardon may be granted by the issuing State and also by the executing State (Article 19(1)). It is therefore a provision which gives broad powers to the executing State, and it appears beyond dispute that both the decisions mentioned (amnesty and pardon) may be much more far-reaching modifications of a court ruling (with respect to the sentence) than an aggregate sentence, and in fact they take place — similarly as in the case of an aggregate sentence —after the conviction has become final.

As regards the very arrangement constituted by aggregate sentences, it should be pointed out that it is a special one, sitting on the border between substantive ruling and enforcement, since proceedings concerning the imposition of an aggregate sentence take place only after the convictions which are examined in terms of the possibility of combining the sentences imposed by them have become final.

The aggregate sentence is not an arrangement peculiar to Polish law. There are other countries in the European Union which also have this arrangement in their legal systems. They include, inter alia, Italy (*continuazione in esecuzione*) and Germany, where the aggregate sentence (*Gesamtstrafenurteil*) is regulated in Articles 53 to 55 of the German Strafgesetzbuch (Penal Code). The arrangement has also been recognised in the case-law of the Court of Justice of the European Union, namely in the judgment of 10 August 2017 in *Zdziaszek* (C-271/17 PPU).

An aggregate sentence is intended to ‘adjust’, in a manner of speaking, the legal response to the offences committed for which the offender could have potentially been sentenced in a single trial. Therefore, it serves to rationalise the penalties imposed. Not only does the passing of an aggregate sentence which includes the sentence taken over for execution not undermine the purpose of such proceedings concerning the imposition of an aggregate sentence, but, on the contrary, it serves this purpose. It should also be borne in mind that where the conditions for imposing an aggregate sentence are met, the imposition of such a sentence is mandatory.

In the opinion of the referring court, the aggregate sentence does not interfere with any individual judgment in the sense that it does not undermine its essence, since the most important elements of the judgment such as the determination of guilt and of the offender remain unchanged. The main purpose of the aggregate sentence is to prevent the offender **[Or. 9]** from reoffending. The aggregate sentence should be an effective response which takes into account all of the offender’s criminal activities. In the eyes of the public, it is of a technical nature and does not arouse such strong feelings as sentencing for an individual crime.

Given this nature of the aggregate sentence, taking into account the sentences passed in States of the European Union and taken over for execution in another State of the European Union together with the sentences passed in the latter State within the framework of an aggregate sentence provides an opportunity to assess the criminal activity of an offender in its entirety and sums it up, which is desirable. It would certainly not be a distortion of the common area of justice, but would rather serve to reinforce mutual trust and the common area of justice at EU level. As already indicated, a sentence taken over for execution becomes part of the enforcement system of the State in which it is enforced and is fully subject to the regulations of that State.

Summing up, it should be pointed out that Article 19(1) of the Treaty on European Union […] provides that Member States are to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law.

In the opinion of the referring court, one remedy which ensures effective legal protection is the possibility of imposing an aggregate sentence which includes convictions from various States of the European Union if these are taken over for execution in another State together with national judgments within the framework of the aggregate sentence, since effective protection precisely means the equal treatment of citizens in similar situations at EU level. Since a sentence taken over for execution becomes part of the legal order of the State in which it is to be enforced, just like a national judgment, the inability to pass an aggregate sentence in such a situation would mean that a citizen who has been convicted twice (or more) in one State would be in a better position than a citizen who has been convicted in different States of the European Union and his two (or more) sentences are being enforced in one State.

The referring court considers that the case-law of the Court to date does not provide an answer to the questions raised in the case at issue. A ruling on the correct interpretation of the provisions of EU secondary law indicated in the request for a preliminary ruling is essential if the proceedings pending before the national court are to be resolved.

[…]