

Anonymised version

Translation

C-583/22 PPU – 1

Case C-583/22 PPU

Request for a preliminary ruling

Date lodged:

7 September 2022

Referring court:

Bundesgerichtshof (Germany)

Date of the decision to refer:

29 June 2022

Accused person:

MV

BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE, GERMANY)

ORDER

[...]

of

29 June 2022

in the criminal proceedings

against

MV, born on 21 January 1958 in St. Chamond (France),

for seriously aggravated rape

Other party to the proceedings:

Generalbundesanwalt beim Bundesgerichtshof (Federal Public Prosecutor General at the Federal Court of Justice) [...]

On 29 June 2022, the First Criminal Chamber of the Federal Court of Justice made the following order:

[...] The following questions concerning the interpretation 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 (OJ 2008 L 220, p. 32) are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to the third paragraph of Article 267 of the Treaty on the Functioning of the European Union (TFEU):

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

2. If the first question is answered in the affirmative:

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

[...] [information on the national proceedings]

Grounds:

- 1 The First Criminal Chamber of the Bundesgerichtshof (Federal Court of Justice) is called on to rule on the appeal on a point of law brought by the accused person against a judgment of the Landgericht Freiburg im Breisgau (Regional Court, Freiburg im Breisgau), which imposed on the accused person a custodial sentence of six years for seriously aggravated rape.

I.

- 2 1. The preliminary ruling proceedings are based on the following facts established by the Regional Court:

- 3 (a) On 10 October 2003, at approximately 12:30 a.m., in the grounds of the University of Freiburg im Breisgau (Federal Republic of Germany), the accused person held a 20-year-old female student at knifepoint and took her to a secluded forest area by vehicle. There, he engaged in anal and vaginal sexual intercourse with her in the vehicle, against her will, for several hours. At approximately 4:45 a.m., the student managed to escape.
- 4 (b) The accused person is a French national; he has no previous convictions in the Federal Republic of Germany. His French criminal record contains 25 entries. The five convictions listed below were committed after 10 October 2003, the date of the offence that is the subject of the present proceedings. They relate to offences committed by the accused person in France in the period from August 2002 to September 2003.
- 5 On 30 September 2004, the Tribunal de grande instance de Guéret (Regional Court, Guéret) imposed a custodial sentence of two years on the accused person.
- 6 The Cour d'assises du Loir-et-Cher (Assize Court, Loir-et-Cher) in Blois imposed a custodial sentence of 15 years on the accused person by judgment of 29 February 2008. The accused person's further convictions, resulting in a custodial sentence of six years imposed by the Cour d'assises de Loire-Atlantique (Assize Court, Loire-Atlantique) in Nantes on 16 May 2008 and a custodial sentence of one year and six months imposed by the Cour d'appel de Grenoble (Court of Appeal, Grenoble) on 23 April 2012, were included in that sentence.
- 7 Most recently, the Cour d'assises du Maine-et-Loire (Assize Court, Maine-et-Loire) in Angers imposed a further custodial sentence of seven years on the accused person on 24 January 2013.
- 8 (c) On 20 October 2003, the accused person was arrested in the Netherlands on foot of a French arrest warrant and, after almost seven months of detention pending extradition, was transferred to France on 17 May 2004. There, he was imprisoned without interruption until 23 July 2021; of the abovementioned custodial sentences, 17 years and nine months were executed. The accused person was subsequently transferred to the German authorities; he has been detained on remand in custody pending trial in the Federal Republic of Germany since 23 July 2021 on foot of an arrest warrant issued by the Amtsgericht Freiburg im Breisgau (Local Court, Freiburg im Breisgau) on 23 July 2004.
- 9 2. In determining the sentence, the Regional Court, Freiburg im Breisgau, proceeded on the basis of a sentence of seven years, which was commensurate to the degree of guilt per se, and, since the subsequent formation of a cumulative sentence together with the French sentences referred to in section 1.1.(b) is not possible, it deducted one year in order to compensate for the associated disadvantage. On that basis, the Regional Court imposed a custodial sentence of six years in the case to be ruled on.

- 10 3. By his appeal on a point of law ('Revision'), the accused person challenges the conviction and alleges an infringement of substantive law.

II.

- 11 The present Chamber considers that an answer to the questions referred is necessary to enable it to rule on the appeal on a point of law. It therefore submits those questions to the Court of Justice of the European Union for a preliminary ruling pursuant to the third paragraph of Article 267 TFEU.

- 12 1. The relevant legal framework is as follows:

- 13 (a) EU law

- 14 The provisions of Article 3(1) and (5) of Framework Decision 2008/675/JHA, which lay down 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 are taken into account (see Article 1(1) of Framework Decision 2008/675/JHA), are relevant to the questions referred in the context of EU law.

- 15 Article 3(1) of the Framework Decision provides that previous convictions handed down against the same person for different facts in other Member States are taken into account to the extent that previous national convictions are taken into account, and that equivalent legal effects are attached to them as to previous national convictions.

- 16 According to the first sentence of Article 3(5) of Framework Decision 2008/675/JHA, if the offence for which the new proceedings being conducted was committed before the previous conviction had been handed down or fully executed, Article 3(1) of that decision is not to have the effect of requiring Member States to apply their national rules on imposing sentences, where the application of those rules to foreign convictions would limit the judge in imposing a sentence in the new proceedings; however, the Member States are required to ensure that in such cases their courts can otherwise take into account previous convictions handed down in other Member States (second sentence of Article 3(5) of Framework Decision 2008/675/JHA).

- 17 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; in that respect, the obligation to take into account previous convictions handed down in other Member States exists only to the extent that previous national convictions are taken into account under national law (recital 5 of Framework Decision 2008/675/JHA).

- 18 (b) National (German) law

- 19 The relevant provisions governing the formation of a cumulative sentence from several individual sentences are contained in Paragraphs 53 to 55 of the German Strafgesetzbuch (Criminal Code; ‘the StGB’).
- 20 Paragraph 53 of the StGB (Multiple offences committed by multiple acts) provides as follows, in subparagraph 1:

‘(1) Where a person has committed several offences which are tried together and has thereby incurred several custodial sentences or several fines, a cumulative sentence shall be imposed.’
- 21 Paragraph 54 of the StGB (Formation of the cumulative sentence) contains the following provisions in subparagraphs 1 and 2:

‘(1) Where one of the individual sentences is life imprisonment, the cumulative sentence shall be life imprisonment. In all other cases, the cumulative sentence is formed by increasing the largest sentence imposed, and, in the case of sentences of different types, by increasing the sentence which is most severe by nature. In that respect, the person of the offender and the individual offences are assessed in summarised form.

(2) The cumulative sentence may not amount to the sum of the individual sentences. It may not exceed fifteen years in the case of non-life custodial sentences and seven hundred and twenty daily fines in the case of a fine.’
- 22 Paragraph 55 of the StGB (Subsequent formation of the cumulative sentence) provides as follows in subparagraph 1:

‘(1) Paragraphs 53 and 54 shall also apply where a person who has been finally convicted is convicted, before the sentence imposed on him or her has been executed, become time-barred or has been remitted, of another offence which he or she committed prior to the previous conviction. A previous conviction shall be deemed to be the conviction in previous proceedings in which the underlying findings of fact could be examined for the last time.’
- 23 2. The decision on the accused person’s appeal on a point of law depends on the answer to the questions referred.
- 24 (a) The first question:
- 25 Whether it is at all possible for a further enforceable custodial sentence to be imposed on the accused person in Germany for the rape which is the subject matter of the present proceedings – in addition to the sentences imposed in France – depends on the interpretation of the principle of equal treatment of national convictions and those handed down in other Member States in Article 3(1) of Framework Decision 2008/675/JHA (‘equivalent legal effects’), in conjunction with the first sentence of Article 3(5) of that framework decision.

- 26 (aa) The sentences for the French convictions referred to in section 1.1.(b) could, if treated like German convictions, in principle be included in the cumulative sentence; they could have been tried at the same time because the rape that is now the subject of the proceedings was committed before the French convictions. Accordingly, if German criminal law were applied, a subsequent cumulative sentence would have to be formed in accordance with Paragraph 55(1) of the StGB. Under Paragraph 55(1) of the StGB, the court ruling on the substance must form a subsequent cumulative sentence in its judgment where a person who has been finally convicted is convicted of another offence that is eligible for inclusion in the cumulative sentence before the sentence imposed on him or her has been executed, become time-barred or has been remitted. The court ruling on the substance is obliged to apply Paragraph 55 of the StGB where the requirements are met (see, *inter alia*, Federal Court of Justice, order of 7 April 2020, 3 StR 630/19, ECLI:DE:BGH:2020:070420B3STR630.19.0, paragraph 2).
- 27 However, when determining the cumulative custodial sentence to be formed, the maximum sentence of 15 years would have to be observed in accordance with the second sentence of Paragraph 54(2) of the StGB; this means that, although an individual sentence could be imposed for the rape that is the subject of the present proceedings, the result would be that, if that individual sentence were included, a – newly formed – cumulative sentence of 15 years would remain and thus no further execution would be possible. The maximum permissible cumulative non-life custodial sentence under German law would already have been reached with the custodial sentence of 15 years imposed by the Assize Court, Loir-et-Cher, in Blois on 29 February 2008.
- 28 However, the formation of a cumulative sentence together with foreign sentences is ruled out because such formation is impermissible for reasons of international law, due to the associated interference with the binding nature of the foreign conviction and the foreign State's sovereignty with regard to execution (settled case-law; see Federal Court of Justice, orders of 4 July 2018, 1 StR 599/17, ECLI:DE:BGH:2018:040718B1STR599.17.0, paragraph 5, and of 23 April 2020, 1 StR 15/20, ECLI:DE:BGH:2020:230420B1STR15.20.0, paragraph 13).
- 29 (bb) Having regard to the absence of a possibility of forming a cumulative sentence [in the case of] a national conviction and one handed down in another EU Member State, Article 3(1) of Framework Decision 2008/675/JHA requires the Member States to ensure that, in the course of new criminal proceedings against a person, previous convictions handed down against the same person for different facts in other Member States are, first, taken into account to the extent that previous national convictions are taken into account, and that, second, equivalent legal effects are attached to them as to previous national convictions, in accordance with national law, whether those effects be regarded as matters of fact or of procedural or substantive law. According to the case-law of the Court of Justice of the European Union, this is intended to prevent the person concerned from being treated less favourably than if the previous criminal conviction in question had been a national conviction (CJEU, judgment of 15 April 2021,

C-221/19, EU:C:2021:278, paragraphs 49, 50, 57, 58; see also, to that effect, CJEU, judgment of 21 September 2017, C-171/16, EU:C:2017:710, paragraph 26, and CJEU, judgment of 5 July 2018, C-390/16, EU:C:2018:532, paragraph 28). However, under the first sentence of Article 3(5) of Framework Decision 2008/675/JHA, Article 3(1) of that framework decision is not to have the effect of requiring Member States to apply their national rules [...] on imposing sentences, where the application of those rules to foreign convictions would limit the judge in imposing a sentence in the new proceedings.

- 30 (cc) Accordingly, the present Chamber takes the view that the imposition of a sentence for the offence that is the subject matter of the proceedings would be permissible only if the first sentence of Article 3(5) of Framework Decision 2008/675/JHA were to be interpreted as meaning that the principle of equal treatment provided for in Article 3(1) of that framework decision would have no effect (even) where a notional inclusion of the sentence handed down in the other EU Member State would result in the maximum permissible cumulative (non-life) custodial sentence of 15 years under the second sentence of Paragraph 54(2) of the StGB being exceeded. However, such an understanding is not obvious, as it would run counter to the basic tenet of Article 3(1) of Framework Decision 2008/675/JHA and the decisions of the Court of Justice cited above, in so far as, contrary to the principle of equal treatment provided for in that provision, it would be permissible to exceed the maximum level laid down in the second sentence of Paragraph 54(2) of the StGB.
- 31 (b) The second question:
- 32 Should the Court of Justice answer the first question in the affirmative, the present Chamber takes the view that the further question referred – as to whether the taking into account of the sentence handed down in the other EU Member State, as provided for under the second sentence of Article 3(5) of Framework Decision 2008/675/JHA, must take place in such a way that the disadvantage resulting from the impossibility to form a subsequent cumulative sentence is to be specifically documented and justified in the sentencing for the domestic offence – becomes relevant to the decision to be given.
- 33 (aa) In accordance with the second sentence of Article 3(5) of Framework Decision 2008/675/JHA, the Member States are required to ensure that, in the cases referred to in the first sentence of Article 3(5) thereof, their courts can otherwise take into account previous convictions handed down in other Member States. When transposing Framework Decision 2008/675/JHA into German law, the German legislature did not see any need for transposition with regard to Article 3 of the Framework Decision; the reason given for this was that the approach that previous foreign convictions cannot be formally integrated into the sentencing (via a subsequent formation of the cumulative sentence), but that, to the greatest extent possible, the convicted person should nevertheless not be placed at a disadvantage as a result, corresponds to the compensation for hardship which is applied also to previous foreign convictions in the German case-law [...].

- 34 According to the existing case-law of the Federal Court of Justice referred to in that respect, the disadvantage that arises from the impossibility to form a subsequent cumulative sentence together with convictions handed down in another EU Member State is usually taken into account in the sentencing by means of a – non-quantified – compensation for hardship, which is at the discretion of the court ruling on the substance (see, most recently, BGH, order of 26 January 2022, StR 461/21, ECLI:DE:BGH:2022:260122B3STR461.21.0). In that connection, it is ultimately considered sufficient that the court ruling on the substance takes into account the impossibility to form a subsequent cumulative sentence – in addition to other sentencing factors to be taken into account – as a factor in favour of the accused person in the determination of the new sentence.
- 35 (bb) However, that case-law does not sufficiently take into account the provisions of Paragraphs 54 and 55 of the StGB and the provisions of Framework Decision 2008/675/JHA. This is because there is a risk that the compensation for hardship will amount to nothing more than a dead letter. The present Chamber therefore considers that the question as to whether Article 3(1) and (5) of Framework Decision 2008/675/JHA must be interpreted as meaning that the disadvantage resulting from the impossibility to form a subsequent cumulative sentence from previous convictions handed down in other EU Member States and those handed down by national courts is to be specifically documented by way of a notional inclusion of the sentence from the other EU Member State, and justified in detail in terms of its quantification, requires clarification and is relevant to the decision to be given.
- 36 (cc) The present Chamber takes the view that only a comprehensibly justified and quantified compensation for disadvantage will be compliant with the regulatory content of Article 3(1) and (5) of Framework Decision 2008/675/JHA.
- 37 It follows from the case-law of the Court of Justice of the European Union on Framework Decision 2008/675/JHA, as outlined above, that the manner in which previous convictions handed down in other EU Member States are taken into account should be as similar as possible to that in which previous national convictions are taken into account. The present Chamber takes the view that, in order to come as close as possible to a (subsequent) formation of a cumulative sentence, in which, under German law, a cumulative sentence, which must also be specifically quantified, is formed from specifically quantified individual sentences, by increasing the largest individual sentence (Paragraphs 54 and 55 of the StGB), it is necessary specifically to identify a disadvantage resulting from the impossibility to form a cumulative sentence and to deduct it from the new (cumulative) sentence to be imposed. That situation – which corresponds to the first sentence of Paragraph 55 of the StGB – also differs significantly from other cases in which the facts have been definitively established (such as sentences which have been executed in full), in which the granting of unquantified compensation for hardship is sufficient because a cumulative sentence is no longer a possibility.

- 38 It is true that in cases of convictions handed down in different States – unlike in cases of domestic convictions – the sentence included does not cease to be an independently enforceable decision (see Federal Court of Justice, order of 26 January 2022, 3 StR 461/21, ECLI:DE:BGH:2022:260122B3STR461.21.0, paragraph 9 et seq., in particular paragraph 14, also concerning the fact that Framework Decision 2008/675/JHA does not necessarily require the specific quantification of the compensation for disadvantage); however, a comprehensible justification of the compensation and its quantification appears to be indispensable for reasons of transparency, but in particular for reasons pertaining to the possibility for the court ruling on the appeal on a point of law to review the sentencing as an essential part of the decision of the court ruling on the substance.
- 39 This is also supported in particular by the fact that the formation of the cumulative sentence – as follows from the third sentence of Paragraph 54(1) of the StGB – is an independent act of assessment specific to the cumulative sentence (settled case-law; see Federal Court of Justice, order of 12 November 2019, 1 StR 415/19, ECLI:DE:BGH:2019:121119B1STR415.19.0, paragraph 3; judgment of 24 August 2016, 2 StR 504/15, ECLI:DE:BGH:2016:240816U2STR504.15.0, paragraph 20; with further references in each case). That requirement cannot be met simply by taking into account unquantified compensation for hardship as a mere sentencing factor in favour of the accused person, because the measure is in no way reviewable, with the result that a decisive part of the decision of the court ruling on the substance is ultimately removed from the scope of judicial review under the law governing appeals on points of law.
- 40 (dd) The present Chamber takes the view that the manner in which the court ruling on the substance determines the compensation in concrete terms is left to the discretion of that court. It can directly take into account the fact that a cumulative sentence cannot be formed together with the previous sentence when determining the new sentence – by quantifying the part to be deducted – or it can also proceed on the basis of a ‘notional cumulative sentence’, formed by taking into account the foreign sentence, and reduce it by the foreign sentence. The only requirement is that it grant appropriate compensation and comprehensibly justify and quantify it in the grounds of its judgment – in a manner comparable to the formation of a cumulative sentence under Paragraphs 54 and 55 of the StGB.
- 41 (ee) In its sentencing decision, the Regional Court did not take into account the fact that, by imposing a custodial sentence of six years, the maximum limit for a cumulative custodial sentence of 15 years under German law was factually exceeded; moreover, it did not specify any appropriate criteria as to how it took the convictions in another EU Member State into account in accordance with the second sentence of Article 3(5) of Framework Decision 2008/675/JHA, with the result that it appears questionable whether sufficient account was taken of requirements under EU law.
- 42 (c) The interpretation of Framework Decision 2008/675/JHA is a matter for the Court of Justice of the European Union alone. It has not yet ruled on this issue and

there is therefore no *acte éclairé*. Nor is the interpretation so obvious as to leave no scope for reasonable doubt, in the sense of an *acte clair* (see, regarding the requirements for an *acte clair*, CJEU, judgment of 6 October 1982, *CILFIT and Others*, 283/81, EU:C:1982:335).

43 [...] [information on the national proceedings]

III.

44 The present Chamber requests an order requiring the preliminary ruling proceedings to be given priority pursuant to Article 53(3) of the Rules of Procedure of the Court of Justice of the European Union, in conjunction with the fourth paragraph of Article 267 TFEU. The questions referred are relevant to the decision to be given in pending criminal proceedings, to which the right of the accused person detained on remand pending trial to have the case decided within a reasonable period of time, which derives from Article 5(3) of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), applies in particular.

[...] [details regarding the composition of the court and the previous instance]