

Case C-219/22**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

28 March 2022

Referring court:

Rayonen sad Nesebar (Bulgaria)

Date of the decision to refer:

25 March 2022

Criminal proceedings against:

QS

Subject matter of the main proceedings

Criminal proceedings against the Romanian national QS for a criminal offence under Article 343b(1) of the Nakazatelen kodeks (Criminal Code, Bulgaria; ‘the NK’), committed in Bulgaria during the probation period imposed on him in a previous conviction for a criminal offence under Article 336(1) of the Criminal Code in force in Romania, in which he was sentenced to a term of imprisonment suspended for a probation period of two years.

Subject matter and legal basis of the request

Interpretation of EU law; Article 267 TFEU

Question referred for a preliminary ruling

Must 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** be interpreted as precluding national legislation such as Article 68(1) of the NK, in conjunction with Article 8(2) thereof, which provides that the national court seised of an application for execution of the sentence imposed by a previous conviction handed down by a

court of another Member State may, for that purpose, alter the arrangements for executing that sentence by ordering its actual execution?

EU legislation and case-law

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: Articles 1 to 3

Judgment in Case C-221/19 of 15 April 2021, EU:C:2021:278;

Judgment in Case C-171/16 of 21 September 2017, EU:C:2017:710;

Judgment in Case C-390/16 of 5 July 2018, EU:C:2018:532.

Provisions of national law

NK: Articles 8, 66, 68 and 343b

Nakazatelno-protsesualen kodeks (Code of Criminal Procedure, Bulgaria; ‘the NPK’): Articles 306, 381, 382 and 383

Judgments of the Varhoven kasatsionen sad (Supreme Court of Cassation, Bulgaria; ‘the VKS’) of the Republic of Bulgaria: Judgment of 2 January 2019 of the Third Criminal Division of the VKS in a criminal case from 2018, and judgment of 26 February 2021 of the Second Criminal Division of the VKS in a criminal case from 2020

Succinct presentation of the facts and procedure in the main proceedings

- 1 In a case from 2018, the court of Tur[d]a, by judgment of 3 April 2019, which was definitively upheld by a decision of the Court of Appeal, Cluj, which became final on 24 June 2019, convicted QS – a Romanian national permanently resident in Sibiu, Romania, single, previously convicted, student – of a criminal offence under Article 336(1) of the Romanian Criminal Code, sentencing him to a term of imprisonment of one year and six months, the execution of which was suspended for a probation period of two years.
- 2 During the probation period, on 1 September 2020, QS committed a criminal offence under Article 343b(1) of the NK of the Republic of Bulgaria. At around 2.04 a.m. on 1 September 2020, he was driving a passenger car of the make ‘Dacia’ near the Nesebar stadium in Nesebar, in the direction of the Slanchev Bryag holiday resort, with a blood alcohol content exceeding 0.12%, namely 0.229% (zero point two nine), which was duly established by means of a ‘Dräger Alcotest 7510’ measuring device. By order of the Rayonen sad Nesebar (District Court, Nesebar) – which became final on 9 March 2022 – concerning the approval

of an agreement [between the offender and the public prosecutor's office] in a criminal case from 2021, subject to public prosecution, the following penalties were imposed on QS for the abovementioned criminal offence: a custodial sentence of 3 (three) months, initially to be served under the general regime in accordance with Article 57(1)(3) of the *Zakon za izpalnenie na nakazaniata i zadarzhnieto pod strazha* (Law on the enforcement of penalties and on remand in custody; 'the ZINZS'); a fine of 150 000 Bulgarian leva (BGN); and withdrawal of the right to drive a motor vehicle for a period of 12 months in accordance with Article 343d of the NK, in conjunction with Article 343b(1) and Article 37(1)(7) thereof.

- 3 In accordance with Article 68(1) of the NK, a prosecutor of the Rayonna prokuratura Burgas (District Public Prosecutor's Office, Burgas), Nesebar territorial division, requested that the custodial sentence of one year and six months which had been imposed in the criminal case of the Court of Appeal, Cluj be executed, as the offence in the case of 2021 of the District Court, Nesebar was committed during the probation period set by the Court of Appeal, Cluj.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 4 For the reasons set out below, the referring court considers that the request for a preliminary ruling is relevant to the correct resolution of the case in the main proceedings.
- 5 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 lays down the principle that it is necessary 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. The principles enshrined in the abovementioned framework decision were transposed into Bulgarian law by the provision of Article 8(2) of the NK. Under that provision, a conviction handed down in another Member State of the European Union, that has become final, for an act which constitutes a criminal offence under the NK is to be taken into account in any criminal proceedings initiated against the same person in the Republic of Bulgaria.
- 6 According to Article 3(1) of the framework decision, each Member State is to 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 [that] 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. Article 3(3) of the framework decision provides that

the taking into account of previous convictions handed down in other Member States, as provided for in paragraph 1, is not to 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.

- 7 In a series of judgments, the Court of Justice of the European Union ('the Court') interpreted Article 3(3) of the framework decision. By its judgment in Case C-221/19 of 15 April 2021, it ruled that Article 3(3) of Council Framework Decision 2008/675/JHA of 24 July 2008 on the European arrest warrant and the surrender procedures between Member States, read in the light of recital 14 thereof, must be interpreted as permitting the issue of an aggregate sentence covering not only one or more previous convictions handed down against the person concerned in the Member State in which that aggregate sentence is delivered, but also one or more convictions handed down against him in another Member State and which are enforced, under Framework Decision 2008/909, as amended by Framework Decision 2009/299, in the first Member State, on condition that that aggregate sentence observes, in so far as concerns the latter convictions, the conditions and limits arising from Article 8(2) to (4), Article 17(2) and Article 19(2) of that framework decision 2008/909, as amended.
- 8 By its judgment in Case C-390/16 of 5 July 2018, it ruled that 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 Article 82 TFEU, must be interpreted as precluding the taking into account in a Member State, in new criminal proceedings brought against a person, of a final judgment previously handed down by a court of another Member State convicting that person of other offences being conditional on a special procedure for prior recognition, such as that at issue in the main proceedings, by the courts of the first Member State.
- 9 According to point 3 of the operative part of the judgment in Case C-171/16 of 21 September 2017, 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.
- 10 It can be concluded from the framework decision cited and from the Court's judgments interpreting the provisions of that framework decision that, first, the conviction in another Member State must be taken into account by the Member State in which the new criminal proceedings have been brought, without the need to conduct an execution procedure. That is precisely the situation in the case in the main proceedings, since the conviction in Romania preceded the conviction in the Republic of Bulgaria. It is apparent from the conviction handed down by the court of Tur[d]a on 3 April 2019 in the case from 2018, which was definitively upheld by the decision of the Court of Appeal, Cluj that became final on 24 June 2019,

and which was duly requested (through instruments of mutual legal assistance), that the convicted person was convicted of a criminal offence under Article 336(1) of the Criminal Code in force in Romania and was sentenced to a term of imprisonment of one year and six months, the execution of which was suspended for a probation period of two years (until 24 June 2021). On the basis of the information collected in the course of the pre-trial stage of the proceedings by means of mutual legal assistance, it was established that the criminal offence within the meaning of Article 336(1) of the Criminal Code in force in Romania is similar to that described in Article 343b(1) of the NK of the Republic of Bulgaria – driving a motor vehicle while under the influence of alcohol. During the probation period, on 1 September 2020, the person committed a criminal offence under Article 343b(1) of the NK. By order concerning the approval of an agreement [between the offender and the public prosecutor's office], which became final on 9 March 2021, he was given a custodial sentence of three months for that criminal offence, initially to be served under the general regime in accordance with Article 57(1)(3) of the ZINZS. For such cases, Article 68(1) of the NK provides that the convicted person must also serve the suspended custodial sentence if, during the probation period, he or she commits another intentional criminal offence which is subject to public prosecution and for which a custodial sentence is imposed on him or her, even if the conviction takes place after the expiry of that period.

- 11 It follows that, under Article 68(1) of the NK, all the requirements for the execution of the custodial sentence of one year and six months imposed by the Court of Appeal, Cluj are met: the convicted person committed another intentional criminal offence (on 1 September 2020, under Article 343b(1) of the NK) before the expiry of the probation period (before 24 June 2021), a criminal offence which is subject to public prosecution and for which a custodial sentence (of three months) was imposed on him. On the other hand, the provision of Article 3(3) of Council Framework Decision 2008/675/JHA stipulates that the taking into account of previous convictions handed down in other Member States, as provided for in paragraph 1, is not to 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.
- 12 It follows that, on the one hand, the referring court is required, under Article 68(1) of the NK, in conjunction with Article 8(2) thereof, to take into account the effects and to enforce the previous conviction by the Romanian court. On the other hand, Article 3(3) of the framework decision requires that a decision relating to the execution of a sentence not be subject to a review. Since the present case does not involve a typical review, but rather a statutory obligation to enforce the sentence under Article 68(1) of the NK (that is to say, the court is bound by the requirements provided for in Article 68(1) of the NK and does not review, at its own discretion, a previous conviction suspended for a certain period of time), and since no cases concerning the relationship between Article 3(3) of the framework decision and Article 68(1) of the NK (or similar provisions in other legal systems) have been referred to the Court to date, there is a need for an interpretation of the

provisions cited. That is the case because, under the framework decision, a review of the regime for executing the sentence is not permissible, and the Court has ruled to that effect. However, the judgments in question differ from the present case (for example, the facts of Case C-171/16, in which it was ruled, by judgment delivered on 21 September 2017, that it is prohibited to alter the arrangements for enforcing the sentence imposed in another Member State when determining an overall custodial sentence). The referring court submits that the case in the main proceedings is different in nature, since the manner in which the sentence is executed is not altered at the discretion of the Bulgarian court, but is the consequence of a mandatory provision in force in Bulgaria, namely Article 68(1) of the NK, which does not permit the court to take its own decision, but rather, if all the requirements are met (as in the present case), obliges the court to execute the sentence which has been suspended for a certain probation period.

- 13 That issue has been only marginally addressed in the case-law of the Bulgarian courts. In the judgment of 2 January 2019 in a criminal case from 2018, the Third Criminal Division [of the VKS] stated that the non-recognition of a conviction handed down by a foreign court is an obstacle only to the possibility of its execution in Bulgaria. However, it is not an obstacle to the taking into account of its secondary effects, which, according to the law and case-law, are inter alia as follows: the legal qualification of the criminal offence in the new criminal proceedings; the application of the provisions of Articles 23 to 25 of the NK; the possibility of suspended sentencing or **the execution of a sentence on the basis of Article 68 of the NK**; the assessment of whether there are circumstances which aggravate guilt; the establishment of a risk of absconding and/or reoffending. In the judgment of 26 February 2021 in a criminal case from 2020, the Second Criminal Division of the VKS stated that the provision of Article 8(2) [of the NK] brings Bulgarian law into line with Council Framework Decision 2008/675/JHA and applies to the taking into account of convictions handed down in another Member State against the same person but in respect of different criminal offences (Article 3(1)), for example with a view to applying Article 23 and Article 25 of the NK. However, the statements in those judgments were made by way of example, and the application of Article 68(1) of the NK was not the subject of consideration by the respective compositions of that court.