



Reports of Cases

OPINION OF ADVOCATE GENERAL

BOT

delivered on 17 May 2017¹

Case C-171/16

Trayan Beshkov

Other party:

**Sofiyska rayonna prokuratura
(Request for a preliminary ruling**

from the Sofiyski Rayonen sad (District Court, Sofia, Bulgaria))

(Area of freedom, security and justice — Framework Decision 2008/675/JHA — Taking account of previous convictions in the Member States — Concept of ‘new criminal proceedings’ — Exclusion of change in execution of the previous conviction by the Member State bringing new criminal proceedings)

1. In the present case, the Court is called upon, for the first time, to interpret the provisions contained in 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
2. More specifically, the Court is asked by the referring court to clarify the concept of ‘criminal proceedings’ within the meaning of Article 3(1) of that framework decision. That court is unsure whether that concept includes proceedings for the enforcement of a sentence imposed by a court of a Member State with respect to which a previous conviction handed down by a court of another Member State must be taken into account.
3. Furthermore, the referring court seeks to ascertain whether that same provision precludes national legislation, such as that at issue in the main proceedings, which provides that the request to take into account a previous conviction handed down by a court of another Member State cannot be made directly by the sentenced person.
4. Last, the referring court’s third question is concerned with the specific arrangements for the taking into account, by a national court, of the previous conviction handed down by a court of another Member State, where the resulting sentence has been fully executed.
5. In this Opinion, I shall state first that, to my mind, for the purposes of taking into account, in the course of new criminal proceedings in a Member State, pursuant to the provisions of Framework Decision 2008/675, a judicial decision from another Member State belonging to the area of freedom, security and justice does not need to be recognised in advance by means of a special procedure, such as that provided for in the Nakazatelno-protsesualen kodeks (the Bulgarian Code of Criminal Procedure).

¹ Original language: French.

² OJ 2008 L 220, p. 32.

6. I shall go on to describe why I think that Article 3(1) of Framework Decision 2008/675 must be interpreted as meaning that proceedings for the enforcement of a sentence imposed by a court of a Member State with respect to which a previous conviction handed down by a court of another Member State must be taken into account constitute ‘criminal proceedings’ within the meaning of that provision. I shall also propose that the Court find that that provision must be interpreted as meaning that the request to take into account a previous conviction handed down by the court of another Member State may be made directly by the sentenced person.

7. I shall then explain why, in my view, Article 3(1) and (3) of that framework decision must be interpreted as meaning that it precludes national legislation, such as that at issue in the main proceedings, which provides that a national court must review, in the course of new criminal proceedings, the sentence imposed by the court of another Member State and already executed, for the purposes of imposing a total custodial sentence including the sentence imposed by that other Member State.

8. Lastly, I take the view that, in order to ensure the effectiveness of that framework decision, the national court must, where appropriate, and subject to the conditions and provisos laid down therein, apply the provisions contained in Article 3(1), (3) and (5) of that framework decision, read in the light of recitals 8 and 9 thereof.

I. Legal context

A. EU Law

9. Recital 1 of Framework Decision 2008/675 states that the objective of maintaining and developing an area of freedom, security and justice requires that it be possible for information on convictions handed down in the Member States to be taken into account outside the convicting Member State, both in order to prevent new offences and in the course of new criminal proceedings.

10. Recitals 8 and 9 of that framework decision state:

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

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

11. Article 2 of that framework decision provides:

‘For the purposes of this Framework Decision “conviction” means any final decision of a criminal court establishing guilt of a criminal offence.’

12. Under Article 3 of Framework Decision 2008/675:

‘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.’

B. Bulgarian law

13. In accordance with Article 8(2) of the Nakazatelen kodeks (Criminal Code), in the version in force as of 27 May 2011 (‘the Criminal Code’), a final sentence imposed in another Member State of the European Union, in respect of an act constituting an offence under that code, is to be taken into account in any criminal proceedings initiated against that person in Bulgaria.

14. Article 23(1) of that code provides that if one and the same act has been the means for the commission of several offences or if one person has committed several separate offences before a final sentence is imposed on him in respect of one of those offences, the court, after determining a penalty for each of those offences separately, is to impose the highest penalty.

15. Under Article 25(1) and (2) of that code, the provisions contained in Article 23 are also to apply where the person has been convicted by means of separate judgments. Furthermore, where the penalty imposed in one of the judgments has been fully or partially executed, it is to be deducted for the purposes of enforcement of the penalty if it is of the same kind as the total penalty.

16. In addition, Article 24 of the Criminal Code provides that the court may, where the penalties imposed are of the same kind, as in the present case, increase the total penalty by one half provided that the resulting sentence does not then exceed two maximums, namely, on the one hand, the maximum of the penalties imposed for each of the offences of that kind and, on the other hand and in any event, the maximum stipulated for the most severe of those penalties.

17. Article 4(2) of the *Nakazatelno-protsesualen kodeks* (the Code of Criminal Procedure), in the version in force in 2010, provides that a final sentence handed down by a court of another Member State and which is not recognised under the procedure provided for in Bulgarian law is not to be subject to enforcement by the Bulgarian authorities. Article 4(3) states that paragraph 2 is not to apply if an international treaty to which the Republic of Bulgaria is party provides otherwise, provided that treaty has been ratified and published and has entered into force.

18. In the section dealing with the recognition and enforcement of sentences handed down by a foreign court, Article 463 of the Code of Criminal Procedure states that a final sentence imposed by a foreign court is to be recognised and enforced by the Bulgarian authorities where, under Bulgarian law, the act in respect of which the request is made constitutes an offence and the perpetrator is criminally liable, where the sentence has been imposed in full compliance with the principles laid down in the European Convention on Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and the protocols thereto to which the Republic of Bulgaria is party, where the perpetrator has not been convicted of an offence regarded as a political offence or of an offence linked to such an offence, or for a war crime, where the Republic of Bulgaria has not already recognised a sentence imposed by another foreign court on the same perpetrator and for the same offence and where the sentence is not contrary to the fundamental principles of Bulgarian criminal law and criminal procedure.

19. Article 466(1) of that code provides that a decision recognising a conviction handed down by a foreign court has the same effect as a conviction handed down by a Bulgarian court.

II. Factual context

20. By decision delivered on 13 December 2010 by the *Landesgericht Klagenfurt* (Regional Court, Klagenfurt, Austria), Mr Trayan Beshkov, a Bulgarian national, was convicted of receiving stolen goods in Austrian territory on 14 November 2010 and sentenced to a term of imprisonment of 18 months, 6 months being served and 12 months being suspended, with a probation period of three years.

21. The referring court explains that the six-month custodial portion of the sentence was executed between 13 December 2010 and 14 May 2011, following deduction of the period during which Mr Beshkov was detained in custody pending trial. The three-year probation period began to run from 14 May 2011.

22. By decision delivered on 29 April 2013 by the *Sofiyski Rayonen sad* (District Court, Sofia, Bulgaria), Mr Beshkov was sentenced to a term of imprisonment of one year for having committed, on 19 November 2008, in Sofia, acts categorised as minor assault, causing injury, and hooliganism.

23. Since the whereabouts of Mr Beshkov are not known to the Bulgarian authorities, that sentence has not yet been enforced.

24. On 14 May 2015 the Sofiyski Rayonen sad (District Court, Sofia) received a request, made by Mr Beshkov and sent via his legal representative, in which he sought the application of Article 23(1) and of Article 25(1) of the Criminal Code. Thus, he is seeking, for the purposes of the enforcement of the sentence imposed by the decision of 29 April 2013, the imposition upon him of a single total custodial sentence corresponding to the highest of the penalties imposed by the Austrian and Bulgarian courts.

25. In so far as one of the penalties was imposed by a foreign court, the referring court is unsure whether it must first recognise the decision of the Austrian court or whether, on the basis of Framework Decision 2008/675, it can or even must grant Mr Beshkov's request.

III. The questions referred for a preliminary ruling

26. Since it has doubts as to the correct interpretation of EU law, the Sofiyski Rayonen sad (District Court, Sofia) decided to stay the proceedings and refer the following questions to the Court:

- '(1) How must the expression "new criminal proceedings" used in Council Framework Decision 2008/675 be interpreted, and must that expression necessarily be connected with a finding of guilt in respect of an offence committed or can it also relate to proceedings in which, under the national law of the second Member State, the penalty imposed in an earlier judgment must absorb another sanction or be included in it or must be enforced separately?
- (2) Must Article 3(1), read in conjunction with recital 13, of Council Framework Decision 2008/675 be interpreted as permitting national rules which provide that proceedings in which an earlier judgment delivered in another Member State must be taken into account may not be initiated by the sentenced person but only by the Member State in which the earlier judgment was delivered or by the Member State in which the new criminal proceedings are taking place?
- (3) Must Article 3(3) of Council Framework Decision 2008/675 be interpreted as meaning that the Member State in which the new criminal proceedings are taking place may not change the manner of execution of the penalty imposed by the Member State which issued the earlier sentence, including in the event that, under the national law of the second Member State, the penalty imposed by the earlier judgment must absorb another sanction or be included in it or must be enforced separately?'

IV. My analysis

27. Even though the referring court does not formally include the question among those referred to the Court for a preliminary ruling, it asks whether the decision of the Landesgericht Klagenfurt (Regional Court, Klagenfurt) must first be recognised as a foreign decision pursuant to the specific process provided for in Article 463 of the Nakazatelno-protsesualen kodeks.

28. Since that question is fundamental, I will incorporate it into my reasoning, in keeping with the traditional practice of reformulation.

29. To my mind it is clear that the answer to that question must be in the negative.

30. Given that both the Republic of Austria and the Republic of Bulgaria are members of the area of freedom, security and justice, the principle of mutual recognition must be applied in the context of the circulation and the application of judicial decisions within that area, in accordance with the rules arising from the legislation in force as interpreted by the Court. Thus, it must be recalled that, according to the line of case-law commencing with the judgment of 11 February 2003, *Gözütok and*

Brügge,³ mutual recognition has the effect that the court of a Member State must accept the judicial decision of another Member State as though it were its own, even if national law would have led to a different outcome.

31. As regards Framework Decision 2008/675, which itself refers, in recital 2 thereof, to mutual recognition, it must be noted that prior recognition of that kind would be contrary not only to the actual wording of that framework decision, which does not require any formality of that kind, but also to the principles recalled in the preceding point.

32. With that in mind, it is appropriate to return to the questions submitted to the Court in the present case, which relate to one of the most technical, and consequently one of the most complicated, areas of criminal law and criminal procedure, namely that of sentencing law.

33. More specifically, the issues raised by the referring court are concerned with the implementation of Framework Decision 2008/675, making provision for the taking into account, by national courts of a Member State, of decisions in criminal matters delivered by another Member State.

34. That obligation to take such decisions into account is a direct consequence of the existence of the area of freedom, security and justice which the European Union affords its citizens.

35. A prerequisite for the practical attainment of that area is that national legislation and practice are capable of combining in such a way that they do not give rise to any incompatibilities which would hamper not only mutual recognition but also simple, everyday judicial cooperation. Otherwise, the result would be either that there would be some areas of territory where offenders could be confident of finding refuge, where they would be free from arrest warrants or requests for enforcement of sentences lawfully imposed in other Member States or that there would be identical situations which were treated differently depending on whether the offence or offences were committed on one or the other side of a river forming one of the borders whose elimination is, rightly, the underlying principle of the area of freedom, security and justice.⁴

36. The very concept of a single area in criminal matters must take into account the reality of how offenders behave and the common rules applied by national courts, which constitute general principles of sentencing law.

37. Offenders move within the single area in just the same way as honest citizens move throughout the territory of the Member States. Within those Member States, as within the European Union, they may commit isolated offences or a series of offences. National legislation treats the former differently from the latter. A series of offences constitutes, as a general rule, recidivism, reoffending or a 'combination of offences'.

38. Recidivism is legally constituted where, following a criminal conviction that has become final — especially one that has already been enforced —, the offender commits another offence which is identical to the previous one or classified as such by law.

39. Reoffending is similar to recidivism, the essential difference being that in this second scenario the offence or offences following the first conviction do not exhibit the similarity described in the preceding point.

40. A 'combination of offences', by contrast, occurs where all the offences are committed without the criminal acts committed being separated in time by a final conviction.

³ C-187/01 and C-385/01, EU:C:2003:87.

⁴ Pascal, B., 'Vérité en deçà des Pyrénées, erreur au-delà, plaisante justice qu'une rivière borne' ('Truth on this side of the Pyrenees, error on the other; a strange justice that is bounded by a river'), *Pensées*, 1970.

41. Recidivism entails an increase in the maximum penalty attached to the subsequent offence. In addition, it is possible that any previous suspended sentences may be revoked and that the opportunity to benefit from certain types of preferential measures, such as a suspended sentence, may be withdrawn. That strictness is based on the idea that, by the first conviction, the offender has, at least, become aware that the punishment for the criminal act was a reality, that it could prove unpleasant for him and that, because it was the first time, he may have benefited from leniency or supervision, offering him a chance to reform and thereafter become a law-abiding citizen. From that perspective, recidivism signals that criminal behaviour is persistent, because the same offence is committed repeatedly, and therefore justifies a stronger social response.

42. Reoffending reflects a lesser degree of persistence in a specific type of criminal behaviour. It therefore does not occasion an increase in the maximum penalty applicable to subsequent offences but, nevertheless, does justify an increase in the severity of the punishment by means of the possible revocation of previous suspended sentences and the possibility of being deprived of them in future.

43. In the case of a combination of offences, the situation is different. The warning, designed to promote awareness, constituted by the first conviction has not been given. The multiple offences therefore cannot be ascribed the meaning described above and society's response cannot, consequently, take the same form.

44. However, the court is faced with a number of offences in respect of which it is possible, in theory, to impose as many separate sentences as there were offences committed. The specific situation before it may fall within one of two categories: either the offences committed are all included in one set of proceedings or they are the subject of separate proceedings. In the first case, the issue will be dealt with in a single judgment; in the second scenario, it will be necessary to determine whether or not to aggregate the various penalties imposed and so determine how the court which is ruling on the enforcement of the sentences can or must combine its decision with those handed down by another court.

45. Those other courts will all be from the same Member State or, at least in part, from different Member States. That is precisely where the problem lies in the present case. Fortunately, there is already guidance for dealing with that delicate problem in the existence of general principles relating to sentencing law.

46. Enforcement of the sentence itself cannot be reduced to a simple calculation of the number of days of imprisonment. Quite apart from issues of dignity relating to the material conditions of detention, the enforcement of a criminal penalty must also meet the requirements of the function to be fulfilled by a sentence.

47. It should be recalled that the function of a sentence, whilst not expressed as such either in the European Convention on Human Rights and Fundamental Freedoms or in the Charter of Fundamental Rights of the European Union, nevertheless has a value expressing a particular view of both human relations in a society and the capacity of individuals to rehabilitate themselves and to reintegrate into society.

48. Originally conceived as a form of revenge, punishment evolved to become a penalty first experienced as retribution, then as reparation and, finally, as being necessary to allow the social rehabilitation of the convicted person, which is the modern view. Criminal recidivism immediately raised the question of its prevention. It very quickly became apparent that isolating the offender by means of a custodial sentence, whilst unavoidable in a number of cases, could, far from preventing recidivism, on the contrary, encourage it. There developed the rehabilitation function of the sentence, a function which is related, at the enforcement stage, to the fundamental principle that the sentence must be tailored to the individual.

49. In a scenario involving a combination of offences, as in the present case, the central issue is precisely the principle that the sentence must be tailored to the individual. 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.

50. Those penalties can come in a great variety of forms, some consisting, for example, in short custodial sentences and others in longer suspended sentences or sentences suspended with probation, for example. This requires that the court has discretion, enabling it to adapt its solution to the seriousness of the offences, the circumstances in which they were carried out and the personality of the offender, in particular his age.

51. Furthermore, as regards taking into account and combining decisions from courts situated in various Member States, any particular features of the respective legislation applied must also be observed, in so far as they do not jeopardise the unity, efficacy and supremacy of EU law.

52. Framework Decision 2008/675 lays down precisely that principle.

53. Recitals 4 and 5 of that framework decision clearly affirm that national law which attaches effects only to convictions handed down by national courts must be disregarded by the court. Recital 5 of that framework decision requires the courts of the Member States to attach to convictions handed down in other courts within the European Union the effects that national law attaches to those handed down by the national courts.

54. 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.

55. Therefore, in taking account of that earlier foreign decision, the court subsequently seised may not change it in any way. Clearly, that means that in order to apply its own decision the court later seised may neither increase nor reduce the previous sentence, nor revoke any suspension period attached to it. That principle is laid down in Article 3(3) of Framework Decision 2008/675.

56. The national court before which proceedings have been brought subsequently must simply attach to that decision the effects which would be attached to a prior national decision.

57. That said, the questions asked by the referring court require more detailed examination.

58. In that respect, the answers to be given to the first and second questions, do not, to my mind, present any difficulties.

59. As regards the first question, I take the view that the proceedings initiated are unquestionably of a criminal nature, on account of the subject matter with which they are concerned, that is to say the enforcement of a sentence. Proceedings may be regarded as criminal proceedings even if they are not concerned with a new prosecution. At issue here is the enforcement of a sentence, a procedure which uses the techniques and principles of criminal law and its particular purpose, thereby playing a part in its autonomy. Moreover, if the legislature had wanted to limit the application of Framework Decision 2008/675 to prosecution proceedings alone, it would most certainly have employed the precise term 'prosecution' and not the general term 'proceedings'.

60. I note, in that regard, that the concept of ‘criminal proceedings’ is defined in Article 2(b) of Framework Decision 2009/315/JHA⁵ as meaning ‘the pre-trial stage, the trial stage itself and the execution of the conviction’. That framework decision and Framework Decision 2008/675 are closely linked, in so far as the former seeks to facilitate the exchange between Member States of information relating to the criminal record of a person convicted in a Member State and the latter enables, consequently, account to be taken of the convictions thus disclosed. I would also point out that, on several occasions, the wording of Framework Decision 2008/675 expressly refers to the execution of the conviction, which to my mind serves to put an end to the debate.⁶

61. As regards the second question, in so far as that framework decision relates to the execution of the penalty and the tailoring of it to the individual, the latter principle is, in my view, laid down as much in the interests of society as in the interests of the sentenced person, which is sufficient to allow him to rely on national laws providing for the taking into account of a previous conviction delivered in another Member State. If the sentence has the rehabilitation function that I highlighted above, it is clear that there is an alignment of the two sets of interests, namely those of the offender in becoming a law-abiding citizen once again and those of society in having one less offender in its midst.

62. Moreover, to grant him that right is simply to apply the principle of the right of access to a court, especially since the latter’s decision may result in the sentence being better tailored to the individual.

63. Furthermore, as the referring court states, Bulgarian national law expressly provides that the sentenced person has the right to initiate proceedings before courts for the purposes of the setting of a total sentence corresponding to the highest of the penalties imposed, where the convictions have all been handed down by national courts. Refusing that right to a sentenced person who has had a sentence imposed on him by a court of another Member State would deprive Framework Decision 2008/675 of all practical effectiveness, in so far as the initiative would then fall solely on the public prosecutor, who may not necessarily be aware of the previous foreign convictions (as was the case, moreover, in the present case) and whose failure to act would deprive the sentenced person of any opportunity of having a total sentence imposed. Moreover, it would result, within the area of freedom, security and justice, in discrimination between individuals who are in similar situations.

64. In that regard, the fact that the public prosecutor’s authority is exclusive stems, in the national law, from the fact that the foreign conviction must be recognised in advance. As I have stated above, the principle of mutual recognition requires that the previous conviction handed down in another Member State be recognised without any other formal process and, in particular, without the initiation of proceedings for prior recognition, as suggested by the referring court.

65. Lastly, this would infringe the principle of equivalence, which also underpins the philosophy of Framework Decision 2008/675. In those circumstances, I take the view that the national provision establishing that difference in treatment must simply be disregarded.

66. The third question raises more difficulties. What are the solutions which may be applied to a situation such as that at issue in the main proceedings? I would reiterate that, by definition, the case before the Court is concerned with neither recidivism nor a single prosecution.

67. In the first place, mathematical addition alone cannot be deemed an acceptable solution based on the reasons and general principles set out above. Framework Decision 2008/675 itself, in recital 9 thereof, gives the court that is second seised freedom not to apply, as the automatic effect of taking into account the previous decision, a sentence which would be disproportionate if the imposition of a more lenient sentence is still in keeping with the purpose of the punishment.

⁵ Council Framework Decision of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States (OJ 2009 L 93, p. 23).

⁶ See, in particular, Article 3(2) of that framework decision.

68. In the second place, the court may aggregate the penalties imposed up to the limit of the maximum penalty attached to the most serious of the offences committed.

69. In the third place, the court may consider that the first sentence imposed is sufficient and deliver a sentence of the same nature and the same degree, stipulating that it is to be combined with the previously imposed sentence. If that sentence has been imposed but not yet enforced, the second court must communicate with its foreign counterpart in order to obtain assurances that the foreign court has enforced the sentence previously imposed or to request that enforcement of that sentence be transferred to it, a decision which will have to be made in the context of the rules laid down, in this case, in Framework Decision 2008/909/JHA.⁷

70. In both cases, the integrity of the foreign decision will be respected and the sovereignty of the court which delivered it will be preserved.

71. In addition to these classic scenarios which are widespread throughout the European Union, there are others resulting from specific provisions particular to certain national laws.

72. So far as I understand the order from the referring court, this is the case in Bulgarian law.

73. Regrettably, in that regard, neither the Bulgarian Government nor any other government deemed it useful to attend the hearing, leading the Court to cancel the hearing which it had initially planned to hold. It is therefore without having had either the opportunity to clarify important details or the benefit of the assessments of other Member States whose courts daily encounter similar problems that I shall pursue, with that caveat, my argument.

74. As I see it, in the situation described by the referring court, the following are features of the national legislation:

- the court must impose a total sentence, normally the higher penalty, possibly adjusted, of the two sentences imposed, including aggravating factors pursuant to Article 24 of the Criminal Code;
- having regard to Bulgarian national law, the highest sentence capable of constituting the total sentence is that of 18 months imprisonment, with 12 months suspended, imposed by the Landesgericht Klagenfurt (Regional Court, Klagenfurt);
- the court is prevented from taking account of a suspended sentence, since national law prohibits a measure of that kind, given Mr Beshkov's criminal record, other than the decision of the Landesgericht Klagenfurt (Regional Court, Klagenfurt).

75. From this, I draw the conclusion that taking into account the Austrian conviction for the purposes of the execution of the Bulgarian sentence would have the effect, in the circumstances described above, of changing the manner of execution of the Austrian sentence, which the Bulgarian court should, for example, convert into a term of actual imprisonment when establishing a total sentence.⁸

76. However, Framework Decision 2008/675 specifically precludes the changing of a foreign decision in the context of merely taking it into account, as stipulated by the rule laid down in Article 3(3) of that framework decision, which states that the taking into account of a previous foreign conviction may not have the effect of reviewing it, which would be the case if the Bulgarian national rules were applied.

⁷ Council Framework Decision 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).

⁸ I would reiterate here the reservations I set out in point 73 of this Opinion.

77. That finding leads to the conclusion that the Bulgarian national court may not impose concurrent sentences in accordance with the rules laid down in its domestic law. After all, that framework decision is governed by the principle of equivalence.⁹ In accordance with that principle, the taking into account of previous convictions handed down by the court of another Member State is mandatory for a national court before which new criminal proceedings are brought only in so far as taking into account such convictions is possible in a purely domestic situation.

78. I therefore draw the conclusion that the Bulgarian court is not to take account of the conviction handed down by the Landesgericht Klagenfurt (Regional Court, Klagenfurt).

79. According to my analysis, no imposition of concurrent sentences is therefore possible in this instance, since that question has arisen where there are only two convictions and one of them cannot be taken into account.

80. This means, specifically, that Mr Beshkov will in fact have to serve the 12-month custodial sentence imposed in Bulgaria, in addition to the 6 months already served in Austria. That situation may seem excessively harsh to the Bulgarian court.

81. Therefore, taking into account the function of a sentence which I referred to previously, the national court may use the option afforded by Framework Decision 2008/675 of ensuring application of the principle that the sentence must be tailored to the individual by adopting an approach connected with the principle of proportionality.

82. It is clear from Article 3(5) of that framework decision, as it must be interpreted in the light of recitals 8 and 9 thereof, that, where the inability of the national court to apply its rules (as is the case here) obliges it to take an unreasonable decision (which the question referred for a preliminary ruling seems to suggest), that court may impose a more lenient sentence if it considers that the circumstances in which the offence was committed so permit and the purpose of the sentence is ensured.

83. The scenarios and specific solutions outlined above serve merely as examples to illustrate my reasoning since, in any event, it falls to the national court alone to determine the arrangements for enforcing the Bulgarian sentence, in accordance with its national domestic law and having regard to the rules provided for in Framework Decision 2008/675.

V. Conclusion

84. In the light of all of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Sofiyski Rayonen sad (Sofia District Court, Bulgaria) as follows:

- (1) For the purposes of taking into account, in the course of new criminal proceedings in a Member State, pursuant to the provisions of 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, a decision of a court of another Member State belonging to the area of freedom, security and justice, that decision does not need to be recognised in advance by means of a special procedure, such as that provided for in the Nakazatelno-protsesualen kodeks (the Bulgarian Code of Criminal Procedure).

⁹ See recitals 5 to 7 of that framework decision.

- (2) Article 3(1) of Framework Decision 2008/675 must be interpreted as meaning that:
- proceedings for the enforcement of a sentence imposed by a court of a Member State with respect to which a previous conviction handed down by a court of another Member State must be taken into account constitute ‘criminal proceedings’, and
 - the request to take into account a previous conviction handed down by the court of another Member State may be made directly by the sentenced person.
- (3) Article 3(1) and (3) of Framework Decision 2008/675 must be interpreted as meaning that it precludes national legislation, such as that at issue in the main proceedings, which provides that a national court must review, in the course of new criminal proceedings, the sentence imposed by the court of another Member State, and already executed, for the purposes of imposing a total custodial sentence including the sentence imposed by that other Member State.
- (4) In order to ensure the effectiveness of Framework Decision 2008/675, the national court must, where appropriate, and subject to the conditions and the provisos laid down therein, apply the provisions contained in Article 3(1), (3) and (5) of that framework decision, read in the light of recitals 8 and 9 thereof.