



Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 22 January 2020¹

Case C-634/18

Prokuratura Rejonowa w Słupsku

v
Ji

(Request for a preliminary ruling from the Sąd Rejonowy w Słupsku (Poland))

(Reference for a preliminary ruling — Judicial cooperation in criminal matters — Framework Decision 2004/757/JHA — Minimum provisions on the constituent elements of criminal acts and penalties involving illicit drug trafficking — Scope — Article 2(1)(c) and Article 4(2)(a) — Personal consumption — Large quantities of drugs — Principle of legality of criminal offences and penalties)

1. *Nullum crimen nulla poena sine lege scripta, praevia, certa et stricta*. The terms of that saying, expressing a clear rule and a fundamental principle, that both crime and punishment must be defined by law, nevertheless continue to require interpretation.²

2. In the present case, the Sąd Rejonowy w Słupsku — XIV Wydział Karny (District Court of Słupsk (XIV Criminal Division), Poland) seeks guidance as to the interpretation of Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking.³ In essence, the referring court asks whether a situation under national law in which the concept of ‘large quantities of drugs’, which triggers an aggravated offence under Article 4(2)(a) of Framework Decision 2004/757, is defined not by national legislation but by the national courts on a case-by-case basis, is compatible with that Framework Decision and the principle of legality of criminal offences and penalties. In order to answer that question the Court will have first to address the issue of whether it is competent to answer preliminary questions in cases concerning possession of drugs for personal consumption, a situation that is exempted from the scope of the Framework Decision by virtue of Article 2(2) thereof, as well as whether the Charter of Fundamental Rights of the European Union (‘the Charter’) is applicable here.⁴

¹ Original language: English.

² See, for example, my Opinion in *IK (Enforcement of an additional sentence)*, C-551/18 PPU, EU:C:2018:890. See also the Opinion of my late and esteemed colleague Advocate General Bot in *M.A.S. and M.B.*, C-42/17, EU:C:2017:564, point 74, recalling that the principle that offences and penalties must be defined by law is one of the essential principles of modern criminal law, identified in particular by the Italian criminologist Cesare Beccaria, who cited the works of Montesquieu (*De l'Esprit des Lois* (Book XI, Chapter VI, de la Constitution d'Angleterre), 1748) in his famous treatise *On crimes and punishments* (1764).

³ OJ 2004 L 335, p. 8.

⁴ OJ 2007 C 303, p. 1.

Legal framework

The European Convention for the Protection of Human Rights and Fundamental Freedoms

3. Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 ('the ECHR') provides that: 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.'

EU law

The Treaty on European Union

4. Article 31(1)(e) of the Treaty on European Union, in the version applicable when Framework Decision 2004/757 was adopted, provides that common action on judicial cooperation in criminal matters includes 'progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking'. Article 34(2)(b) thereof gives the Council, acting unanimously on the initiative of any Member State or of the European Commission, the competence to adopt framework decisions 'for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect'.

The Charter

5. Article 49 of the Charter mirrors and expands upon Article 7(1) of the ECHR. It provides that:

'1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.

...'

6. In accordance with Article 51(1) thereof, the provisions of the Charter 'are addressed to the institutions, bodies, offices and agencies of the Union ... and to the Member States only when they are implementing [EU] law'. Article 52(3) provides that 'in so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the [ECHR] ...'.

Framework Decision 2004/757

7. The following statements are made in the recitals of Framework Decision 2004/757. ‘Illicit drug trafficking poses a threat to health, safety and the quality of life of citizens of the European Union, and to the legal economy, stability and security of the Member States.’⁵ ‘It is necessary to adopt minimum rules relating to the constituent elements of the offences of illicit trafficking in drugs and precursors which will allow a common approach at European Union level to the fight against such trafficking.’⁶ EU action should focus ‘on the most serious types of drug offence’, whilst ‘the exclusion of certain types of behaviour as regards personal consumption from the scope of [Framework Decision 2004/757] does not constitute a Council guideline on how Member States should deal with these other cases in their national legislation’.⁷ ‘Penalties provided for by the Member States should be effective, proportionate and dissuasive, and include custodial sentences. To determine the level of penalties, factual elements such as the quantities and the type of drugs trafficked, and whether the offence was committed within the framework of a criminal organisation, should be taken into account.’⁸ ‘The effectiveness of the efforts made to tackle illicit drug trafficking depends essentially on the harmonisation of the national measures implementing this Framework Decision.’⁹

8. Article 2 provides that:

‘1. Each Member State shall take the necessary measures to ensure that the following intentional conduct when committed without right is punishable:

- (a) the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of drugs;
- (b) the cultivation of opium poppy, coca bush or cannabis plant;
- (c) the possession or purchase of drugs with a view to conducting one of the activities listed in (a);
- (d) the manufacture, transport or distribution of precursors, knowing that they are to be used in or for the illicit production or manufacture of drugs.

2. The conduct described in paragraph 1 shall not be included in the scope of this Framework Decision when it is committed by its perpetrators exclusively for their own personal consumption as defined by national law.’

9. Article 4 states that:

‘1. Each Member State shall take the measures necessary to ensure that the offences defined in Articles 2 and 3 are punishable by effective, proportionate and dissuasive criminal penalties.

Each Member State shall take the necessary measures to ensure that the offences referred to in Article 2 are punishable by criminal penalties of a maximum of at least between one and three years of imprisonment.

⁵ Recital 1.

⁶ Recital 3.

⁷ Recital 4.

⁸ Recital 5.

⁹ Recital 9.

2. Each Member State shall take the necessary measures to ensure that the offences referred to in Article 2(1)(a), (b) and (c) are punishable by criminal penalties of a maximum of at least between 5 and 10 years of imprisonment in each of the following circumstances:

(a) the offence involves large quantities of drugs;

...

National law

10. Article 62 of the Ustawa z dnia 29 lipca 2005 roku o przeciwdziałaniu narkomanii (Law of 29 July 2005 on combating drug addiction, ‘the Law on combating drug addiction’) provides that:

‘1. Any person who, contrary to the provisions of this Law, possesses narcotic drugs or psychotropic substances shall be liable to a term of imprisonment of up to three years.

2. If the offence referred to in paragraph 1 involves a significant quantity of narcotic drugs or psychotropic substances, the offender shall be liable to a term of imprisonment of between one and ten years.’

Facts, procedure and the questions referred

11. The Prokuratura Rejonowa w Słupsku (District Prosecutor’s Office, Słupsk, Poland, ‘the Prokuratura’) brought proceedings against JI for, inter alia, possessing: (i) on 7 November 2016, a significant quantity of psychotropic substances in the form of amphetamines with a total net weight of 10.73 grams and narcotic drugs in the form of marijuana with a total weight of 16.07 grams, an offence under Article 62(2) of the Law on combating drug addiction; and (ii) on 28 November 2016, narcotic drugs in the form of marijuana with a net weight of 2.00 grams and psychotropic substances in the form of amphetamines with a net weight of 0.49 grams, an offence under Article 62(1) of that law.

12. It is common ground that JI was in possession of those drugs for personal use. During the criminal proceedings that followed the facts, JI pleaded guilty to all the offences of which he was accused.

13. The Sąd Rejonowy w Słupsku — XIV Wydział Karny (District Court of Słupsk (XIV Criminal Division)) observes that Framework Decision 2004/757 does not define the term ‘large quantities of drugs’. National law likewise does not define the term ‘a significant quantity’ of drugs used in Article 62(2) of the Law on combating drug addiction. The referring court explains that case-law attempted to fill that gap by establishing a set of criteria designed to determine whether the quantity of drugs is ‘significant’, ‘not significant’ or ‘normal’. Those criteria are the weight (grams, kilograms, tonnes, quantity of portions), the type of narcotic drug (division of drugs into ‘hard’ and ‘soft’) and the intended use (for commercial reasons, for personal use). However, the term ‘significant quantity’ of drugs remains vague and is defined differently by different national courts. The referring court provides several examples of differing interpretation of that term from national case-law.¹⁰

14. On that basis, the referring court expresses doubts as to the compatibility of that case-law with the principle of legality of criminal offences and penalties enshrined in Article 7 of the ECHR. It also observes that the fact that the term ‘large quantities of drugs’ is not defined at EU level but is apparently left to the discretion of the Member States could lead to citizens of the European Union being treated differently depending on the Member State of their residence.

¹⁰ See further below, point 76 and footnotes 45 and 46.

15. The referring court mentions that those issues have already been addressed by the Trybunał Konstytucyjny (Constitutional Court, Poland) which held in a judgment of 14 February 2012 that Article 62(2) of the Law on combating drug addiction is, with regard to the constituent element of the offence related to ‘a significant quantity’ of a substance, compatible with the Polish Constitution.

16. Against that background, the referring court asks the Court the following questions:

- (1) Must the rule of EU law contained in Article 4(2)(a) of [Framework Decision 2004/757] read in conjunction with Article 2(1)(c) thereof, be interpreted as meaning that that rule does not preclude the expression “a significant quantity of drugs” from being interpreted on a case-by-case basis as part of the individual assessment of a national court, and that that assessment does not require the application of any objective criterion, in particular that it does not require a finding that the offender possesses drugs for the purpose of performing acts covered by Article 4(2)(a) of that Framework Decision, that is to say production, offering, offering for sale, distribution, brokerage, or delivery on any terms whatsoever?
- (2) In so far as the [Law on combating drug addiction] contains no precise definition of “a significant quantity of drugs” and leaves the interpretation thereof to the bench adjudicating in a specific case in the exercise of its “judicial discretion”, are the judicial remedies necessary to ensure the effectiveness and efficiency of the rules of EU law contained in [Framework Decision 2004/757], and in particular Article 4(2)(a) of that Framework Decision, read in conjunction with Article 2(1)(c) thereof, sufficient to afford Polish citizens effective protection resulting from the rules of EU law laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking?
- (3) Is the rule of national law contained in Article 62(2) of the [Law on combating drug addiction] compatible with EU law, and in particular [with the rule] contained in Article 4(2)(a) of [Framework Decision 2004/757], read in conjunction with Article 2(1)(c) thereof, and, if so, is the interpretation which the national Polish courts place on the expression “a significant quantity of psychotropic substances and narcotic drugs” contrary to the rule of EU law pursuant to which a person who has committed the offence of possessing large quantities of drugs to perform activities covered by Article 2(1)(c) of [Framework Decision 2004/757] is to be subject to stricter criminal liability?
- (4) Is Article 62(2) of the [Law on combating drug addiction], which lays down stricter criminal liability for the offence of possessing a significant quantity of psychotropic substances and narcotic drugs, as interpreted by the Polish national courts, contrary to the principles of equality and non-discrimination (Article 14 [of the ECHR] and Articles 20 and 21 [of the Charter], read in conjunction with Article 6(1) [of the Treaty on European Union])?’

17. Written observations were submitted by the Prokuratura, the Czech, Netherlands, Polish, Spanish and Swedish Governments and the Commission. At the hearing on 2 October 2019, the Prokuratura, the Polish, Spanish and Swedish Governments and the Commission made oral submissions.

Assessment

The jurisdiction of the Court

18. The Prokuratura submits that the Court is not competent to answer the preliminary questions submitted by the referring court because they concern the interpretation of national law, namely Article 62(2) of the Law on combating drug addiction, and the compatibility of that provision with Framework Decision 2004/757.

19. In that respect, it is settled case-law that the Court has no power, within the framework of Article 267 TFEU, to give preliminary rulings on the interpretation of rules pertaining to national law. The jurisdiction of the Court is confined to considering provisions of EU law only.¹¹ It may, however, provide the national court with all the criteria for the interpretation of EU law which might be useful in assessing the effects of such provisions of national law. Furthermore, there is nothing to stop the Court from reformulating the questions with a view to providing the referring court with an interpretation of EU law provisions that would help it resolve the dispute before it.¹²

20. In the present case, the questions referred concern the interpretation of Article 2(1)(c) and Article 4(2)(a) of Framework 2004/757. It is also necessary to interpret Article 2(2) thereof in order to determine whether the present case is within the ambit of EU law. The questions referred are therefore *prima facie* admissible.

21. The Commission argues that the present case falls outwith the scope of Framework Decision 2004/757. It appears from the facts as presented by the referring court that JI was in possession of drugs for personal consumption. Article 2(2) exempts such conduct from the scope of Framework Decision 2004/757.

22. At the hearing, Prokuratura and the Polish, Spanish and Swedish Governments agreed with the Commission's submission.

23. It is indeed apparent from the wording of Article 2(2) that possession of drugs for a person's 'own personal consumption' is not included within the scope of Framework Decision 2004/757 and that it is national law that regulates (and penalises) such conduct. However, as recital 4 of the Framework Decision explains, the exclusion of certain types of behaviour as regards personal consumption from the scope of the Framework Decision does not constitute a Council guideline on how Member States should deal with those other cases in their national legislation.

24. Thus, the Polish Government explained at the hearing that the Law on combating drug addiction, which transposed Framework Decision 2004/757, does *not* distinguish, for the purposes of criminalising the possession of drugs, between possession for personal consumption and possession for other purposes. Thus, in Article 62(1) (possession of drugs punishable by imprisonment of up to 3 years) and (2) (possession of a significant quantity of drugs punishable by imprisonment of between 1 and 10 years), possession of drugs is criminalised *independently* of its purpose. In treating possession of drugs in that way, Article 62 of the Law on combating drug addiction goes beyond the scope of possession of drugs within the meaning of Article 2(1) of the Framework Decision and indeed also covers possession of drugs for personal consumption.

25. The information provided by the Polish Government thus confirms that national legislation treats possession of drugs for personal consumption in the same way as possession of drugs linked to trafficking in drugs punishable under Article 2(1)(c) of Framework Decision 2004/757.¹³ Moreover, under Polish law, it is only possible to discontinue criminal proceedings for possession of drugs for personal consumption if the quantity of drugs involved is 'insignificant'.

11 Judgment of 21 July 2011, *Fuchs and Köhler*, C-159/10 and C-160/10, EU:C:2011:508, paragraph 30.

12 Judgment of 5 March 2009, *Kattner Stahlbau*, C-350/07, EU:C:2009:127, paragraphs 24 and 25.

13 See the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 (*Treaty Series*, Vol. 1582, p. 95). Article 3(2) thereof provides that: 'Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.' Both the European Union and Poland are Parties to that Convention.

26. It is settled case-law that the Court has jurisdiction to give preliminary rulings on questions concerning EU law in situations where the facts of the cases being considered by the national courts are outside the direct scope of EU law but EU law provisions have been rendered applicable by domestic law, which has adopted, for internal situations, the same approach as that provided for under EU law.¹⁴ In those circumstances, it is clearly in the interest of the European Union that, in order to forestall future differences of interpretation, provisions or concepts taken from EU law should be interpreted uniformly, irrespective of the circumstances in which they are to apply.¹⁵

27. Subject to the necessary verification of the facts by the national court, it seems to me that that case-law applies here. The Law on combating drug addiction transposes Framework Decision 2004/757 into the national legal order. Article 62 of that law renders applicable to situations that would otherwise fall outwith the scope of the Framework Decision the same approach as that provided for under EU law. Specifically, Article 62(2) of that law treats offences involving a ‘significant quantity of narcotic drugs’ as aggravated offences. I understand that term to be the transposition into national law of the concept of ‘large quantities of drugs’ in Article 4(2)(a) of Framework Decision 2004/757. Possession for personal consumption is defined and punished in the same way as possession falling within the scope of Article 2(1)(c) of the Framework Decision.

28. The constituent elements of those offences are defined by the Framework Decision and must accordingly be interpreted uniformly, as EU law concepts. The Framework Decision does not define ‘large quantities of drugs’. It is therefore for the Court to give any necessary guidance as to the meaning of that concept, in the interest of forestalling future differences of interpretation.

29. It is moreover clear from the Court’s settled case-law that the binding character of framework decisions places on national authorities, including national courts, an obligation to interpret national law in conformity with EU law. When those courts apply domestic law, they are therefore bound to interpret it, so far as possible, in the light of the wording and the purpose of the framework decision concerned in order to achieve the result sought by that decision.¹⁶

30. At the hearing, the Spanish Government argued that the term ‘large quantities of drugs’ in Article 4(2)(a) of the Framework Decision is irrelevant when possession of drugs is for personal consumption. In the context of the present proceedings, I reject that argument. That is because the national legislature chose to treat possession for personal consumption and possession with a view to trafficking in the same way. Thus, the interpretation of what constitutes a ‘large quantity of drugs’ is relevant in both situations.

31. The Spanish and Swedish Governments submitted that the principles laid down in *Ullens de Schooten*¹⁷ are not applicable in the present case because there is no need to give a uniform interpretation to concepts that the EU legislature did not wish to define in the context of a framework decision. However, the principle that EU law must be interpreted in a uniform manner also applies to the interpretation of provisions of framework decisions.¹⁸ Where a provision of EU law leaves Member States a margin of discretion for its implementation, an authoritative and uniform interpretation of the meaning of that EU law provision is an essential precursor to defining the limits to that margin of discretion.

14 See, to that effect, judgment of 15 November 2016, *Ullens de Schooten*, C-268/15, EU:C:2016:874, paragraph 53 and the case-law cited.

15 Judgment of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 20 and the case-law cited.

16 Judgment of 29 June 2017, *Popławski*, C-579/15, EU:C:2017:503, paragraph 31.

17 Judgment of 15 November 2016, C-268/15, EU:C:2016:874.

18 See, for example, judgment of 24 May 2016, *Dworzecki*, C-108/16 PPU, EU:C:2016:346, paragraphs 28 and 30.

32. In any event, it is settled case-law that in the context of cooperation between the Court and the national courts, established by Article 267 TFEU, it is for the national courts alone to assess, in view of the special features of each case, both the need for a preliminary ruling in order to enable them to give their judgment and the relevance of the questions which they put to the Court. Consequently, where questions submitted by national courts concern the interpretation of a provision of EU law, the Court is, in principle, obliged to give a ruling.¹⁹

33. In those circumstances, I consider that the Court has jurisdiction to answer the questions submitted.

The applicability of the Charter

34. The referring court enquires as to the interpretation of several articles of the Charter in order to determine whether the situation under national law that it describes is compatible with EU law.

35. The Commission in its written submissions expresses doubts as to whether the Charter applies here. In its view, Article 62(2) of the Law on combating drug addiction does not implement EU law.

36. Article 51(1) makes clear that the provisions of the Charter are addressed to the Member States only when they are implementing EU law.

37. It is settled case-law that ‘the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by [EU] law, but not outside such situations. In this respect, the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of [EU] law. On the other hand, if such legislation falls within the scope of [EU] law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures’. The Court has likewise stated that ‘since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of [EU] law, situations cannot exist which are covered in that way by [EU] law without those fundamental rights being applicable. The applicability of [EU] law entails applicability of the fundamental rights guaranteed by the Charter’. ‘Where, on the other hand, a legal situation does not come within the scope of [EU] law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction.’²⁰ The concept of ‘implementing Union law’, as referred to in Article 51 of the Charter, thus ‘assumes a degree of connection between an EU legal measure and the national measure in question, above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other’.²¹

38. It is clear that the Court cannot rule on the interpretation of the Framework Decision without taking into account the Charter, which is EU primary law.²² As I have explained in points 26 to 28 above, Article 62(2) of the Law on combating drug addiction transposes the aggravated offence related to ‘large quantities of drugs’ provided for by Article 4(2)(a) of Framework Decision 2004/757 into national law. It is therefore clear that that provision *is* national legislation that ‘falls within the scope of EU law’: it is, indeed, the vehicle by which Poland is ‘implementing Union law’ (here, the Framework Decision) within the meaning of Article 51(1) of the Charter.

19 Judgment of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 19 and the case-law cited.

20 Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraphs 19, 21, 22 and the case-law cited.

21 Judgment of 6 October 2016, *Paoletti and Others*, C-218/15, EU:C:2016:748, paragraph 14.

22 See Article 6(1) TEU: ‘The Union recognises the rights, freedoms and principles set out in [the Charter], which shall have the same legal value as the Treaties.’

39. The ruling that the Court hands down as to the interpretation of Article 4(2)(a) of Framework Decision 2004/757 *in the light of the Charter* will (evidently) govern the interpretation of Article 62(2) of that law in respect of persons charged with possession of a ‘significant quantity of narcotic drugs’ for trafficking. It is beyond argument that, *in that context*, a Member State is bound to comply with the fundamental rights guaranteed by the Charter. For the sake of completeness, I add here that it is settled case-law that Protocol (No 30) to the Treaties²³ does not call into question the applicability of the Charter in Poland, nor is it intended to exempt the Republic of Poland from the obligation to comply with the provisions of the Charter.²⁴

40. The Framework Decision — it will be recalled — deals only with ‘the most serious types of drug offence’²⁵ and thus covers trafficking but not consumption for personal use. In the context of the former, the defendant is protected by the requirement that the interpretation given to the aggravated offence related to ‘large quantities of drugs’ *must* be Charter-compliant. Yet Article 62(2) of the Law on combating drug addiction, as we have seen, draws *no distinction whatsoever* between possession for personal use and possession for trafficking. The national legislature *chose* to treat the two situations in exactly the same way.

41. Against that background, can it legally be correct that, whilst Article 62(2) of the Law on combating drug addiction *must* bear a Charter-compliant meaning when persons are charged under it with one of ‘the most serious types of drug offence’ (the aggravated offence in respect of drug trafficking), exactly the same provision may bear a different (*ex hypothesi*, non-Charter compliant) meaning when it forms the basis for prosecuting someone for a *less* serious offence, namely possessing *the same quantities* of drugs for personal use?

42. Ultimately, it will fall to the national court to answer that question in the light of both its national constitutional law and the requirements of the ECHR. I shall confine myself to two observations.

43. First, it seems to me that such a result would be both strange and inappropriate. Questions immediately spring to mind as to the coherence and proportionality of such treatment in the context of criminal law, together with issues of legal certainty if one and the same legal text bears two radically different meanings depending on whether it is used to prosecute (i) possession of large quantities of drugs for trafficking or (ii) possession of large quantities of drugs for personal use. For my part, I would therefore reject the possibility that such a distinction could legally be correct.

44. Second, it is clear that this Court must give guidance to the national court as to what the Charter-compliant interpretation of Article 4(2)(a) of Framework Decision 2004/757 is. Unless it does so, the national court will not be in position to resolve the case before it.

23 Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom. Article 1(1) of that Protocol provides that ‘the Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms’.

24 Judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 85 and the case-law cited. See also judgment of 21 December 2011, *N.S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, paragraphs 119 and 120.

25 Recital 4 to the Framework Decision (see point 7 above).

The questions referred

45. The four questions referred are best addressed together. In essence, the referring court asks whether Article 4(2)(a) of Framework Decision 2004/757, combined with Article 2(1)(c) thereof, and the principles of equality, of non-discrimination and of legality of criminal offences and penalties enshrined in Articles 20, 21 and 49 of the Charter respectively, must be interpreted as precluding national legislation which does not define the aggravated offence related to ‘large quantities of drugs’ by using any objective criteria (such as the purpose of the possession of drugs) but leaves the interpretation of that concept to the individual assessment of national courts on a case-by-case basis.

Extending criminal liability for the aggravated offence related to possession of large quantities of drugs to possession of drugs outwith the scope of the offences listed in Framework Decision 2004/757

46. Article 2(1)(c) of Framework Decision 2004/757 covers ‘the possession or purchase of drugs’ with a view to conducting one of the (extensive) list of activities detailed in Article 2(1)(a).²⁶ Article 4(2)(a) of the Framework Decision introduces an aggravated offence, ‘punishable by criminal penalties of a maximum of at least between 5 and 10 years of imprisonment’, when the offences defined in Article 2(1)(a), (b) and (c) involve ‘large quantities of drugs’. Article 2(2) exempts from the scope of the Framework Decision conduct covered by Article 2(1) when it is ‘committed by its perpetrators’ exclusively for their own personal consumption as defined by national law.²⁷

47. However the Member States remain free to treat possession of large quantities of drugs for personal consumption as an aggravated offence. The Framework Decision states that it lays down ‘minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking’.²⁸ By definition therefore, Member States can go beyond those minimum requirements.

48. Recital 4 of the Framework Decision usefully explains that ‘the exclusion of certain types of behaviour as regards personal consumption from the scope of [Framework Decision 2004/757] does not constitute a Council guideline on how Member States should deal with these other cases in their national legislation’. That recital reflects the legislative history of the Framework Decision. The European Parliament amended the proposed Framework Decision by introducing Article 2(2) to reflect the principle of subsidiarity. It explained that the amendment meant that if Member States so wished, they could penalise personal consumption but that they were not obliged to do so by the Framework Decision.²⁹ I agree with that analysis. It follows that Member States are free to criminalise possession of drugs for personal consumption and to lay down the constituent elements of that offence and the penalties attached to it.

49. I therefore conclude that Article 2(1)(c) and (2) and Article 4(2)(a) of Framework Decision 2004/757 do not preclude Member States from extending criminal liability for the aggravated offence related to possession of large quantities of drugs for trafficking, as defined thereunder, to possession of drugs outwith the scope of the offences listed in that Framework Decision.

²⁶ Namely, ‘the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of drugs’.

²⁷ Some of the activities listed in Article 2(1)(a) seem, in any event, to be irreconcilable with possession for personal consumption (offering, offering for sale, distribution, sale, delivery, brokerage, dispatch and dispatch in transit).

²⁸ See also recital 3.

²⁹ Report of the European Parliament on the proposal for a Council Framework Decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of drug trafficking, A5-0095/2004, 23 February 2004, p. 6.

The concept of 'large quantities of drugs' in Article 4(2)(a) of Framework Decision 2004/757 and the principles of equality, non-discrimination and legality of criminal offences and penalties

50. Does the interpretation of the concept of 'large quantities of drugs' in Article 4(2)(a) of Framework Decision 2004/757 in the light of those principles preclude a situation where the term transposing that concept into national law is not defined by the legislature, but interpreted on a case-by-case basis by the national courts?

51. Framework Decision 2004/757 does not define the concept of 'large quantities of drugs' that appears in Article 4(2)(a) and that constitutes one of the aggravating circumstances attracting harsher penalties for the offences whose constituent elements are laid down by the Framework Decision.

52. The purpose of Framework Decision 2004/757 is to lay down minimum rules relating to the constituent elements of, and penalties for, the offences of illicit trafficking in drugs.³⁰ At that time, framework decisions were used for the approximation of the laws and regulations of the Member States in those areas of law. Such decisions were binding as to the result to be achieved but left to Member States the choice of form and methods.³¹

53. Framework Decision 2004/757 thus merely imposes on Member States a minimum requirement to introduce an aggravating circumstance into their criminal law, the choice of form and methods being left to their discretion. Member States were also required to ensure that the penalties for such offences were effective, proportionate and dissuasive.³² Recital 9 additionally encouraged them to safeguard the effectiveness of the efforts made to tackle illicit drug trafficking.

54. The material placed before the Court in these proceedings has not afforded it much assistance with defining what are 'large quantities of drugs' such as to trigger the aggravated offence formulated in Article 4(2)(a) of the Framework Decision. With some reticence, I offer the following thoughts by way of guidance, so as to clothe that concept with some tangible meaning.

55. First, a 'large quantity' may in part be recognised by its opposite: the small quantity of drugs that would plausibly supply the personal needs of the individual possessing them. A supply that would be adequate for one person over at most a few weeks is not a 'large quantity'. Conversely, amounts that would supply a single addict for a year *are* 'large quantities' and may point to the real possibility that the drugs are not for personal use, but intended to be traded.

56. Second, it seems to me plausible to conclude that one is in the presence of 'large quantities of drugs' when the drugs found comprise *either* a range of different drugs, each of which is present in moderate quantities, *or* a very significant quantity of a single drug. Again, both phenomena would tend to point, I think, towards possession for trafficking rather than possession for personal use.

57. Third, I think that 'quantity' is more relevantly to be measured in terms of the 'dose' required to obtain a single 'high' from a particular drug than in terms of weight. Different drugs produce different psychotropic effects. Those with the necessary technical expertise in combating drug trafficking will be able to lay down plausible guidance for what that 'dose' means for drugs in common use and to expand that guidance as and when (alas) new drugs are developed. The concept of what constitutes a 'large quantity' will then be comparable (as between different types of drug) when stated in terms of the number of *doses*, but might imply rather different amounts of each drug when measured by reference to *weight*.

30 Article 31(1)(e) of the Treaty on European Union provides a legal basis for establishing *minimum* rules in certain areas of criminal law, which include drug trafficking. See also recital 3 of Framework Decision 2004/757/JHA.

31 Article 34(2)(b) of the Treaty on European Union. See also judgment of 8 November 2016, *Ognyanov*, C-554/14, EU:C:2016:835, paragraph 56.

32 Article 4(1) of Framework Decision 2004/757.

58. Against that background, Member States enjoy a considerable margin of discretion as to what precise figures they use to underpin the concept of ‘large quantities of drugs’ within their territory. They must, however, ensure both that the application of the criminal law is reasonably foreseeable³³ and that the effectiveness of the Framework Decision is safeguarded.

59. The referring court observes that a result of the discretion enjoyed by Member States when transposing the concept of ‘large quantities of drugs’, different regimes may apply under the criminal laws of different Member States. Also, the lack of precision of the national rule here at issue may result in persons who commit offences with similar facts receiving different treatment.³⁴

60. Regarding the first issue raised by the referring court, Framework Decision 2004/757 does not seek to harmonise completely the applicable provisions on the constituent elements of criminal acts and penalties in the area it covers. It follows that differences between national transposition measures cannot be deemed to infringe the principles of equality and non-discrimination.³⁵

61. As regards the second issue, according to settled case-law the principles of equality and non-discrimination require that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.³⁶

62. In the present case, it does not appear from the information submitted to the Court that the Law on combating drug addiction treats comparable situations differently. Neither does the fact that national courts enjoy a certain degree of discretion when interpreting national law constitute, per se, an infringement of those principles.

63. The situation as presented by the referring court should, however, be examined under the prism of the principle of legality of criminal offences and penalties, as enshrined in Article 49 of the Charter. The Charter applies because one and the same provision of national law (Article 62(2) of the Law on combating drug addiction) *both* transposes Article 4(2)(a) of the Framework Decision and applies to situations (possession for personal use) falling outwith its scope (see point 36 et seq. above).

64. The referring court expresses doubts as to whether a situation in which national law does not define the concept of ‘significant quantity of narcotic drugs’ and the case-law does not always interpret that term in the same way is compatible with that principle.

65. In its written submissions, the Polish Government confirmed that national law indeed does not define ‘significant quantity of narcotic drugs’. The Polish Government argues that that allows the courts to consider the relevant circumstances of each particular case, which is essential for a proper assessment of whether a ‘significant quantity of narcotic drugs’ was involved. When doing so, the national courts must apply the principles resulting from the case-law of the Sąd Najwyższy (Supreme Court, Poland). At the hearing, the Polish Government mentioned case-law of that court of 23 September 2009 laying down certain guidelines for assessing whether the circumstances of a particular case involved a ‘significant quantity of narcotic drugs’.

³³ See point 66 et seq. below.

³⁴ I recall that the penalty for unlawful possession of drugs under Article 62(1) of the Law on combating drug addiction is ‘a term of imprisonment of up to three years’, whereas under Article 62(2) thereof the involvement of a ‘significant quantity’ of drugs attracts ‘a term of imprisonment of between one and ten years’ (see point 10 above).

³⁵ See, to that effect, judgment of 3 May 2007, *Advocaten voor de Wereld*, C-303/05, EU:C:2007:261, paragraph 59.

³⁶ Judgments of 6 October 2009, *Wolzenburg*, C-123/08, EU:C:2009:616, paragraph 63 and of 3 May 2007, *Advocaten voor de Wereld*, C-303/05, EU:C:2007:261, paragraph 56.

66. The principle that criminal offences and penalties must be defined by law and the consequent requirements as to foreseeability, precision and non-retroactivity are of paramount importance both in the EU legal order and in national legal systems. That principle is enshrined in Article 49 of the Charter, but also forms part of the constitutional traditions common to the Member States.³⁷

67. In accordance with Article 52(3) of the Charter, the right guaranteed in Article 49 thereof has the same meaning and scope as the right guaranteed by the ECHR, including the case-law of the European Court of Human Rights ('the Strasbourg Court').³⁸

68. Under the principle of legality of criminal offences and penalties, provisions of criminal law must comply with certain requirements of accessibility and foreseeability, as regards both the definition of the offence and the determination of the penalty.³⁹

69. The requirement that the applicable law must be precise, which is inherent in that principle, means that the law must clearly define offences and the penalties which they attract. That condition is met where the individual is in a position, on the basis of the wording of the relevant provision and if necessary with the help of the interpretation made by the courts, to know which acts or omissions will make him criminally liable.⁴⁰

70. The Strasbourg Court has explained that 'as a consequence of the principle that laws must be of general application, the wording of statutes is not always precise. That means that many laws are inevitably couched in terms which, to a greater or lesser extent are vague, and their interpretation and application depend on practice. Consequently, in any system of law, however clearly drafted a legal provision, including a criminal law provision, may be, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. A law may still satisfy the requirement of "foreseeability" where the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'.⁴¹ Furthermore, 'the level of precision required of domestic legislation — which cannot in any case provide for every eventuality — depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the status of those to whom it is addressed'.⁴²

71. In that respect, the case-law of this Court holds that the principle of legality of criminal offences and penalties 'cannot be interpreted as prohibiting the gradual clarification of rules of criminal liability by means of interpretations in the case-law, provided that those interpretations are reasonably foreseeable'.⁴³

72. It follows from the case-law just cited that the principle of legality of criminal offences and penalties requires that: (i) the law must clearly define offences and the penalties which they attract; (ii) it must be accessible and foreseeable; (iii) the fact that certain provisions require judicial interpretation does not automatically mean that those requirements are not fulfilled (including in criminal matters); (iv) the level of precision required of domestic legislation depends to a considerable degree on the nature and the context of such legislation; (v) it follows that, whilst for example the nature of

37 Judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraphs 51 to 53 and the case-law cited.

38 See the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17).

39 Judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraph 55 and the case-law of the Strasbourg Court cited.

40 Judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraph 56 and the case-law cited.

41 ECtHR, 15 July 2014, *Ashlarba v. Georgia*, CE:ECHR:2014:0715JUD004555408, §34.

42 ECtHR, 15 January 2009, *Association of Citizens Radko & Paunkovski v. the former Yugoslav Republic of Macedonia*, CE:ECHR:2009:0115JUD007465101 § 54.

43 Judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 167.

constitutional provisions may justify a lower level of precision,⁴⁴ criminal law, which often entails serious penalties of imprisonment, requires a higher level of precision; (vi) gradual clarification of the rules of criminal liability by means of interpretations in the case-law, provided that those interpretations are reasonably foreseeable, is permitted; (vii) the person concerned must however be able to assess (with appropriate legal advice to a degree that is reasonable in the circumstances) the consequences which a given action may entail and which acts or omissions will make him criminally liable.

73. In my view, that last proposition also encompasses assessing the extent of one's potential criminal liability, and in particular whether there will be considered to be aggravating circumstances which may entail more severe penalties as well as the gravity of those penalties.

74. It is for the national court to ascertain whether the situation that it describes, in which the concept of 'significant quantities of narcotic drugs' is not defined in the Law on combating drug addiction but is interpreted by the courts on a case-by-case basis, permit an individual to know which acts or omissions will make him criminally liable and the extent of that liability.

75. The hierarchy, links and interaction between different instances of jurisdictions are defined by the legal order of each Member State. Against that background, and with some diffidence, I offer the following general observations by way of guidance for the referring court in undertaking that exercise.

76. It appears from the material presented to this Court by the referring court that national case-law over the period from 1997 (that is, before the adoption of the Framework Decision and the Law on combating drug addiction) to 2012 applied a quantitative criterion to define 'significant quantities of narcotic drugs', linked to the number of persons for whom the quantity of drugs in question could provide a single 'high'. However, according to the referring court, the reference number used varies.⁴⁵ National courts complement those rules with further criteria.⁴⁶

77. The Polish Government pointed to the role of the superior jurisdictions in ensuring uniform application of the criminal law. It drew the Court's attention to the constant case-law of the Sąd Najwyższy (Supreme Court) (from 2006 to 2018) defining 'significant quantities of narcotic drugs' by reference to a single quantitative criterion: a quantity that fulfils, at one and the same time, the needs of at least several dozen addicts. Moreover, it also referred to some additional or subsidiary criteria, such as the mass of the product, its type ('soft' or 'hard') and whether it was intended for trafficking or for personal use. The Sąd Najwyższy (Supreme Court), in its ruling of 23 September 2009, had also stated that 'an attempt by the Sąd Najwyższy (Supreme Court) to create a quasi-legal definition [of that concept] would amount to a non-authorised exercise of the legislature's prerogative' and that 'no model [definition] created by the Sąd Najwyższy (Supreme Court) could encompass all potential future situations, given the present rate of technological advance (and the production of new synthetic drugs, even more dangerous to human life and health, capable of generating the desired effect from smaller and smaller quantities)'.

78. The progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of Europe's legal tradition.⁴⁷ That is particularly true when it comes to assessing circumstances concerning substances such as drugs. The nature, variety, effects and intrinsic properties of different types of drugs make it difficult to establish a 'one size fits all' definition of what

⁴⁴ ECtHR, 20 May 1999, *Rekvényi v. Hungary*, CE:ECHR:1999:0520JUD002539094, § 34.

⁴⁵ The figures cited to the Court ranged from 'at least several dozen people' to 'several hundred people', 'several tens of thousands' or '2 000 portions'.

⁴⁶ For example, a quantity of drugs that could fulfil the needs of at least several dozen addicts, or establishing whether it is possible at all to take the quantity of the drug found and whether, having regard to the kind of drug, it could induce a high.

⁴⁷ ECtHR, 21 October 2013, *Del Río Prada v. Spain*, CE:ECHR:2013:1021JUD004275009, § 93.

constitute ‘large quantities’ of those substances. As the Strasbourg Court has held, ‘the need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague. The interpretation and application of such enactments depend on practice’.⁴⁸

79. That said, however, a situation in which existing case-law of the lower courts does not permit an individual to know whether possession of drugs sufficient for a single high for several dozen persons suffices for the aggravated offence or whether that offence is only triggered by holding quantities sufficient for several hundreds (or indeed thousands) of persons would not, in my view, satisfy the criterion of foreseeability. It would go beyond the level of flexibility necessary to avoid excessive rigidity and to keep pace with changing circumstances. If the facts are as suggested by the referring court in its order for reference, the harmonised criterion that is said to have been established by the case-law of the Sąd Najwyższy (Supreme Court) does not seem to me to be generating a reasonably foreseeable application of the criminal law. The Sąd Najwyższy (Supreme Court) has also indicated its unwillingness to define the concept of ‘significant quantities of narcotic drugs’ more comprehensively, regarding that as usurping the role of the legislature.⁴⁹ In those circumstances, the unfettered case-by-case interpretation by the national courts of the aggravating circumstance of what constitutes ‘a significant quantity’ of drugs is not compatible with the principle of legality of criminal offences and penalties.

80. I therefore conclude that the interpretation of Article 4(2)(a) of Framework Decision 2004/757, in the light of the principles of equality, non-discrimination and legality of criminal offences and penalties, does not preclude a situation where the term transposing ‘large quantities of drugs’ into national law is not defined by the legislature but is clarified by means of interpretations in the case-law. That interpretation must, however, permit the person concerned to assess the existence and the extent of his criminal liability when found in possession of a certain quantity of drugs. A case-by-case interpretation of that concept by the national courts on the basis of a criterion which does not provide a reasonable degree of foreseeability and certainty is not compatible with the principle of legality of criminal offences and penalties enshrined in Article 49 of the Charter. It is for the national court to determine whether that is in fact the situation that pertains within its national legal order.

Conclusion

81. In the light of all the foregoing considerations, I suggest that the Court should answer the questions posed by the Sąd Rejonowy w Słupsku — XIV Wydział Karny (District Court of Słupsk (XIV Criminal Division), Poland) as follows:

- Article 2(1)(c) and (2) and Article 4(2)(a) of Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking do not preclude Member States from extending criminal liability for the aggravated offence related to possession of large quantities of drugs for trafficking, as defined thereunder, to possession of drugs outwith the scope of the offences listed in that Framework Decision.
- The interpretation of Article 4(2)(a) of Framework Decision 2004/757, in the light of the principles of equality, non-discrimination and legality of criminal offences and penalties, does not preclude a situation where the term transposing ‘large quantities of drugs’ into national law is not defined by the legislature but is clarified by means of interpretations in the case-law. That interpretation must, however, permit the person concerned to assess the existence and the extent of his criminal

⁴⁸ ECtHR, 17 February 2004, *Maestri v. Italy*, CE:ECHR:2004:0217JUD003974898, § 26.

⁴⁹ See point 77 above.

liability when found in possession of a certain quantity of drugs. A case-by-case interpretation of that concept by the national courts on the basis of a criterion which does not provide a reasonable degree of foreseeability and certainty is not compatible with the principle of legality of criminal offences and penalties enshrined in Article 49 of the Charter of Fundamental Rights of the European Union. It is for the national court to determine whether that is in fact the situation that pertains within its national legal order.