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The Taking Account of EU Previous Convictions in Joint/ Accumulated Punishment: The Spanish Case[1]

Abstract

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 is governed by the principle of equivalence. The principle means that the taking 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 to the extent previous national convictions are taken into account in a purely domestic situation. Questions about the application of the principle of equivalence arise, amongst others, when the penalty imposed in an EU previous judgment must absorb another sanction or be included in it (accumulation/absorption/confusion of punishments). This has been a huge problem in Spain.
Keywords: Taking account of EU criminal convictions, joint/accumulated punishments.

I. Introduction.

The principle of equivalence is established for the first time by *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* (FWD). This EU legal instrument requires Member States to take account of previous convictions handed down by the court of another Member State when they are dealing with new criminal proceedings *to the extent previous national convictions are taken* into account in a purely domestic situation (Art. 3 para. 1 FWD). The principle of equivalence operates at the pre-trial stage, at the trial stage itself and at the time of execution of the conviction (Art. 3 para. 2 FWD).

However, there are limitations to the taking account of previous convictions handed down in another Member State (Art. 3 paras. 3, 4 and 5 FWD). Firstly, the domestic

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court may not change or modify the previous conviction delivered in another Member State (Art. 3 para. 3 FWD). Non-modification is to be understood as any interference with, revocation or review of the previous conviction or any decision relating to its execution (Art. 3 para. 4 FWD). Last but not least, Art. 3 para. 5 FWD prevents the application of the principle of equivalence whenever the offence for which the new proceedings are being conducted was committed before the previous conviction had been handed down or fully executed when the application of national rules on imposing sentences would limit the judge in imposing a sentence in the new proceedings.

Questions about the application of the FWD arise, amongst others, when the penalty imposed in a previous judgment must absorb another sanction or be included in it (accumulation/absorption/confusion of punishments). This has been a huge problem in Spain.

II. The context.

In December 2014, the *Audiencia Nacional* [Spanish High Court] surprised with contradictory rulings on identical facts. Members of the Basque terrorist organization (ETA) had been sentenced in France and subsequently surrendered to Spain. Once in Spain, they were prosecuted and convicted for the commission of other offences. They applied for a review of their sentences imposed in both France and Spain, referring to rules of accumulation with previous penalties according to Art. 76 of the Spanish Penal Code (hereinafter SPC)[2]. This disposition applies when a person is punished with more than one penalty for the commission of different offences. In this case, a total sentence is imposed which may not exceed three times the most serious of the penalties imposed. The result may not exceed 20 years[3].

Taking the French sentences into account would mean that the court would deduct all periods of prison time served in France from the total sentence to be served in

2 Art. 76 SPC: "1. (…) The maximum effective sentence to be served by a convict may not exceed triple the time imposed for the most serious of the penalties incurred, declaring the others to be extinguished from when those already imposed cover that maximum, which may not exceed twenty years. Exceptionally, such maximum limit shall be:
a) Of twenty- five- years, when a convict has been found guilty of two or more felonies and one of them is punished with Law with a prison sentence of up to twenty years;
b) Of thirty years, when a convict has been found guilty of two or more felonies and one of them is punishable by Law with a prison sentence exceeding twenty years;
c) Of forty years, when a convict has been found guilty of two or more felonies and at least two of them are punishable by Law with a prison sentence exceeding twenty years;
d) Of forty years, when a convict has been found guilty of two or more felonies elated to terrorist organizations and groups and offences of terrorism under Section two of Chapter VII of Title XXII of Book II of this Code and any of them is punishable by Law with a prison sentence exceeding twenty years.
3. The limitation shall be applied, even though the penalties have been imposed in different proceedings, if the facts, due to their connection or the moment when committed, could have been tried as a single case.

3 Depending on the cases, such maximum limit shall be of 25, 30 or even 40 years.

Spain. In consequence, the convicted persons would be released from prison earlier. The Second[4] and the Third Section[5] of the Spanish High Court refused any such deduction. In contrast, the First Section[6] took account of the time spent in prison while serving the respective sentences in France by holding that the *Tribunal Supremo* [Spanish Supreme Court] (SSC) in its Judgment no. 186/2014, of 13 March, had supported the taking account of a sentence imposed by a French court. On that occasion, FWD 2008/675 had not been implemented yet. Thus, the SSC stated that rules on joint/accumulated punishments should be interpreted in conformity with the European FWD and the principle of equivalence has to be applied.

Faced with such different criteria, in the context of the landmark case *Picabea* (Judgment n. 874/2014, of 27 January 2015), the SSC closed the door to the taking account of EU previous sentences when it comes to joint/accumulated punishments. It did so with a small majority (9 votes for, 6 against) on the following grounds.

Firstly, the SSC indicated that there was no obligation of conforming interpretation. The new law implementing the FWD, *Act no. 7/2014, of 12 November, on the exchange of information on criminal records and the consideration of criminal sentences in the EU*[7] (hereinafter, *Act no. 7/2014*) expressly denies the taking account of sentences imposed in other Member States in cases of joint/accumulated punishments, that is to say, when a person commits more than a crime and is punished with several penalties which then are accumulated, giving rise to a global penalty. Due to this legal exception to the principle of equivalence, the principle of conforming interpretation could not serve as the basis for an interpretation of national law *contra legem* (II).

Secondly, Mr. Picabea demanded the application of the FWD as interpreted by the SSC in its Judgment no. 186/2014. He considered that by refusing the taking account of the French conviction based on a new law interpreting the FWD, the principle of non-retroactivity had been breached. However, the SSC stipulated that it was not possible to apply the FWD since a framework decision "has no direct effect". Furthermore, the principle of non-retroactivity could not be applicable to this case since there was no "temporal succession of laws", nor was there a consistent case-law practice on the matter. Therefore, the non-application of Judgment no. 186/2014 would not imply a violation of the principle of non-retroactivity or a frustration of expectations in the sense of the ECtHR Judgment delivered in the *Del Río Prada* case[8].

Thirdly, the taking account of the French sentence was not, in the SSC's view, a duty arising from the FWD, but a possibility which is within national legislators' discretion when implementing their European commitments. The Spanish legislator through *Act*

4 See, among others, SHC Decision (Second Section), of 2 December 2014 (executory resolution no. 25/02).
5 SHC Decision (Third Section), of 4 September 2014 (executory resolution no. 14/05).
6 See, among others, SHC Decision (First Section), of 2 December 2014 (executory resolution no. 43/1988) and SHC Judgment (First Section), of 2 December 2014 (executory resolution no. 4/1992).
7 Official Bulletin of State no. 275, of 13 November 2014.
8 ECHR, *Del Río Prada v. Spain*, Application no. 42750/09, Judgement of 21 October 2013.

no. 7/2014 decided to lay down objective and temporal limitations to the principle of equivalence (III). Fourthly, the SSC was so convinced that the FWD allowed Member States to limit the recognition of criminal sentences imposed in other EU countries that it considered it unnecessary to refer for a preliminary ruling to the European Court of Justice (ECJ) (IV).

II. The principle of interpretation of national laws in conformity with EU law.

Act no. 7/2014 specifically prohibits the taking account of criminal sentences imposed in other Member States when joint/accumulated punishments are concerned. It entered into force after Mr. Picabea's appeal (3 December 2014). However, at the time of the ruling on the appeal it was already in force (27 January 2015). At first sight, *Act no. 7/2014* could not be applied given the principle of non-retroactivity. To avoid this drawback, *Act no. 7/2014* was used by the SCC as a tool for the interpretation of domestic provisions governing rules for joint/accumulated punishments. In the SSC's view, as *Act no. 7/2014* expressly denies the taking account of previous convictions handed down in another Member State, the principle of conforming interpretation cannot be used as the basis for an interpretation of national law *contra legem*.

Indeed, ECJ case-law[9] vetoes conforming interpretation when a national act exists that both clearly and expressly contradicts the provisions in the European legal instrument that is to be interpreted. *A priori*, *Act no. 7/2014* should not contradict the FWD provisions that are under interpretation. If it were to contradict the FWD, it would be as much as to recognize that the Spanish legislator had incorrectly implemented the FWD. The SSC energetically denies an incorrect implementation of the FWD. Supposing that the SSC were right, it could be asked whether it is possible to qualify an interpretation as *contra legem* when the domestic act, that is contradicted by an interpretation, was not in force at the time the offence was committed. In other words: Could conforming interpretation be vetoed for being *contra legem* if the use of the implementing act even as tool of interpretation might imply a violation of a fundamental right? If the starting point is that conforming interpretation is limited by EU general principles (in this case, it is a question of a fundamental right: the principle of non-retroactivity), it is paradigmatic to use another limitation of the principle of conforming interpretation, interpretation *contra legem*, to arrive at a result that can in turn lead to a violation of fundamental rights.

The SSC stated that *Act no. 7/2014* was not applied, but simply used as a hermeneutic criterion. That recalls the *Del Río Prada* case, in which Spain was convicted by the ECtHR. The appellant was in an unfavourable situation due to a change in case-law. *Del Río Prada* referred to the *Parot doctrine* set by the SSC in its Judgment no. 197/2006 of 28 February 2006. According to this new approach, when a person commits a combination of offences, and the penalties imposed for each one are cumulated

9 See, among others, see *European Court of Justice* (ECJ), of 8 October 1987, case 80/86 *(Kolpinghuis)*, and of 11 June 1987, case 14/86 (*Pretore di Saló).*

in such a way that a total penalty is finally passed, sentence adjustments and remissions are no longer to be applied to the maximum term of imprisonment (30 years at that time) obtained as a result of the accumulation proceeding, but successively to each of the sentences imposed. The *Parot doctrine* was applied in a retroactive way and that frustrated the expectations of the offender. In particular, the ECtHR determined on the basis of existing practice in relation to case-law prior to 2006, that the maximum limit of the total penalty (30 years) was taken as a reference to calculate remissions. For the ECtHR the departure from the case-law had the effect of modifying the scope of the penalty imposed to the applicant's detriment and that was not reasonably foreseeable given the pre-existing case-law. Therefore, it declared a violation of Art. 7 ECHR (principle of legality).

In the *Picabea* case, one could arrive at the same conclusion: A change in case-law has the effect of modifying the scope of the penalty imposed to the applicant's detriment and that is not reasonably foreseeable given the pre-existing SSC Judgment no. 186/2014. However, the SSC considered that that judgment was not a consistent practice on the matter that makes the taking account of a European sentence in a cumulative proceeding as foreseeable (Legal Ground no. 3). The SSC explains that apart from Judgment 186/2014, Judgment no. 2117/2002, of 18 December, merited consideration. Here it declared that the taking account of a previous foreign sentence, which has been totally served, is a different situation from the transfer of sentenced persons, as such cases are normally guided by an international convention on the matter. Accumulation of a French previous served sentence with a Spanish one was not possible because the facts had been committed in different national territories (Legal Ground no. 3), under different state sovereignty, and that had given rise to trial the facts under different national jurisdictions (Legal Ground no. 4). If there is no transfer of sovereignty, there is no obligation for recognition or consideration.

At the time Judgment no. 2117/2002 was delivered, there was not a convention on which to base the transfer of sovereignty. At the time Judgment no. 184/2014 was handed down, the FWD had been adopted by unanimity of all Member States. That is why the SSC upheld that there were no barriers of any sort to the taking account of European convictions for purposes of joint/accumulation punishments, provided that the requirements for the chronological connection of the offences were met.

It is hard to understand the way the SSC argues the lack of consistent case-law on the matter. The SSC assumed that Judgment no. 2117/2002 was common practice. Then it considers that no case-law implies that the matter was not controversial. For the SCC, missing case-law is evidence of the fact that *"very few people have been benefited from accumulation when it comes to a foreign conviction"* (Legal Ground no. 4). However, the SSC would have to be asked how it can deduct from a *single judgement* in a contrary sense to the appellant's interests that non-recognition of a foreign sentence is common and foreseeable. Perhaps there have not been many judgments on the matter, because the FWD was implemented in mid-July 2008. Obviously, prior to that date, neither Mr. Picabea nor any other person in the same situation would be able to ground their arguments for joint/accumulated punishments on the FWD. It is true that

over seven years had passed at the time of the appeal, but the fact that there have been no more cases hardly appears a well-founded reason to affirm that the question has been bridged. Rather, there can surely be no doubts regarding the importance of the question given the long list of cases brought before the SSC with the same outcome as in the *Picabea case*[10]. Now, the non-taking account of an EU sentence in accumulation proceedings is a consistent practice. However, it was not at the time the *Picabea case* was discussed.

In any case, the question is not so much whether or not pre-existing consistent case-law allowed the taking account of EU sentences, but whether the retroactive application of unfavourable aspects of a new law, *Act no. 7/2014,* through jurisprudential channels, is in compliance with the principle of non-retroactivity[11]. Once again there is a similarity with the *Del Río Prada* case that the magistrate Conde Pumpido rightly observed in his dissenting opinion[12]: If, in the *Del Río Prada* case, the ECtHR considered that the *Parot doctrine* was contrary to the ECHR[13] and could not be applied retroactively, because it was unfavourable, then the same decision could be taken in relation to Mr. Picabea. Therefore, when faced with the choice between avoiding interpretations *contra legem* and avoiding violations of fundamental laws, only the latter may come out on top. This is reinforced by the fact that there are doubts over the compatibility of the implementing norm, *Act no. 7/2014* (III).

However, in the SSC's view, the principle of non-retroactivity was not violated. The same stated the Constitutional Court in its Judgment no. 155/2016, of 20 September, by which Mr. Picabea's application for *amparo* was dismissed. It upheld that in the *Del Río Prada* case, the appellant had obtained a first judicial decision by which her remissions and prison leaves had already been calculated in applicant's favour. This first judicial decision gave rise to an unequivocal expectation. However, this expectation was frustrated when later a court changed the manner of calculating. This change resulted, *de facto*, in a substantial modification of the penalty that the appellant had to serve. Given the existing judicial practice up to that time, such a variation of the penalty was not foreseeable. In the Constitutional Court's opinion, that does not happen in the *Picabea case "since the penalty definitively imposed on him has remained unchanged following consistent case-law practice"* (Legal Ground no. 4): He never obtained a judicial

10 SSC Judgments no. 336/2015, of 24 May; no. 628/2015, of 19 October; no. 763/2015, of 18 November; no. 829/2015, of 25 November; no. 789/2015, of 7 December; no. 854/2015, of 11 December; no. 804/2015, of 14 December; no. 818/2015, of 22 December; no. 8/2016, of 21 January; no. 12/2016, of 25 January; no. 50/2016, of 3 February; no. 76/2016, of 10 February; no. 81/2016 of 10 February; no. 750/2016, of 25 February; no. 241/2016, of 29 March; no. 333/2016, of 20 April; no. 457/2016, of 26 May; no. 95/2017, of 16 February; no. 344/2017, of 12 May.

11 J.L. Manzanares Samaniego, La acumulación de penas y la Decisión Marco 2008/675/JAI del Consejo, *La Ley*, no. 8463, 21 February 2015.

12 Dissenting opinion expressed by the hon. Magistrate Mr. Cándido Conde-Pumpido Tourón in Judgment no. 874/2014, of 27 January 2015.

13 *Ibídem* and dissenting opinion of the hon. Magistrates Mr. Miguel Colmenero in Judgment 874/2014, of 27 January 2015.

decision by which the manner of calculating joint/accumulated punishments benefited him by taking into account EU previous convictions.

III. The Spanish transposition of the FWD.

Supposing that a conforming interpretation was no longer possible since *Act no. 7/2014* entered into force, it would still remain to determine whether the exclusion of joint/accumulated punishments from the principle of equivalence is in compliance with the FWD. In particular, it should be clarified whether such exclusion could be supported by any of the limitations set out in Art. 3 FWD.

Art. 14 para. 2 of *Act no. 7/2014* states that the principle of equivalence[14] shall not have any effect where it implies review or revocation either on "final sentences handed down by Spanish judges or courts or any resolution for purposes of execution of penalties" (letter a). Besides, letter b and c prohibit the application of the principle of equivalence when it comes to "*convictions imposed in subsequent proceedings followed in Spain for crimes committed before the conviction has been imposed by the courts of another Member State*" or to "*decisions issued or to be issued according to [joint/accumulated proceedings], setting the limits for enforcement of sentences, including any of the convictions indicated in letter b of this disposition*".

According to the SSC's view, these exceptions are in compliance with the FWD since Art. 3 paras 3, 4 and 5 FWD allows Member States to exclude the principle of equivalence in these cases and, thus, has just been implemented by the Spanish legislator in Art. 14 para. 2 *Act no. 7/2014*.

1. Impossibility of interfering with, revoking or reviewing previous convictions or any decision relating to their execution.

1.1. The relationship between Art. 3 paras. 3 and 4 FWD.

It must be recognized that one of the most controversial points in the European Commission's proposal was the taking account of EU sentences when it comes to accumulation/absorption of punishments. The SSC is right when it claims that limitations added to Art. 3 FWD had this problem in mind. Art. 3 para. 3 stipulates that "*the taking into account of previous convictions handed down in other Member States (…) 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 pro-*

14 *Act no. 7/2014* also sets a time limit: "No EU convictions shall be taken into account when they had been handed down earlier than 15 August 2010" (*Single Additional Provision*). This limitation was also controversial. For reasons of length, it cannot be dealt with here. On this topic, see M. Muñoz de Morales Romero/C. Rodríguez Yagüe *Terrorismo vs. Leyes y Jueces: El reconocimiento mútuo de condenas penales europeas a efectos de acumulación. A propósito del caso Picabea*, Valencia, (Tirant lo Blanch, 2016), pp. 146-157.

ceedings". The doubt lies in Art. 3 para. 4 which stipulates that the principle of equivalence *"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"*.

Art. 3 para 4 has at least two different interpretations. For the SSC, Art. 3 para. 4 means that the principle of equivalence does not apply, if it is contrary to a previous conviction handed down by the Member State in which the proceedings are being conducted. In other words, this disposition vetoes a Spanish judge from taking into account a French judgment delivered previously for the purposes of joint/accumulated punishments because it would interfere with Spanish previous convictions. However, there is, in my opinion, a more convincing interpretation: Art. 3 para. 4 complements the meaning and scope of limitation foreseen in paragraph 3 in such a way that it refers to any interference in a previous conviction handed down by the first Member State. This position is reinforced not only by a literal interpretation of Art. 3 para. 4 which starts as follows "in accordance with paragraph 3 (…)", but also by a historical interpretation.

Art. 3 para. 3 is included for the first time by *Council Document No 11663/06 of 18 July 2006* with the following wording: *"3. (…) there is not an obligation of take into account previous convictions handed down in another Member State when imposing [a joint] [aggregate penalty or an accumulated] punishment"*. Furthermore, paragraph 4 was also included: *"4. Taking into account previous convictions handed down in other Member States (…), shall not have the effect of modifying nor revoking nor reviewing previous convictions nor any decision of their execution"*.

Two footnotes gave reasons for the introduction of both paragraphs. Some delegations – the German, Polish and Swedish ones – were concerned about the FWD application when imposing joint/accumulated punishments as well as when probation (conditional judgment) or conditional release were to be at stake. These delegations thought that the situation should be regulated separately. In this respect, paragraph 3 intended to cover concerns about joint/accumulated punishments leaving them outside the FWD but only in the specific case of joint/accumulated punishment between custodial sentences and/or fines and accessory penalties[15].

Paragraph 4 seemed to address the second issue (probation and conditional release). However, in the Council document it was stated that *"the basic concern, relating to both matters, was that where a Member State takes previous convictions of other Member States into account, it should not revoke them nor take any decision regarding their execution"* (p. 6). If, for example, a person convicted in France in 2012 of committing a crime in 2010 and on probation since 2014 was transferred to Spain where he/she committed a new crime again in 2014 and was sentenced in 2015, according to Spanish law,

15 Joint/accumulated punishment does not take place in Germany when it comes to accessory penalties.

had the previous conviction been a domestic one, the court should *a priori* revoke probation. That would make a decision on the enforcement of the sentence imposed in France. And that was precisely what paragraph 4 was intended to avoid.

Paragraph 4 would also meet concerns relating to unfavourable treatment of the person: *"since Member States, as far as previous convictions would not be touched upon, would not be prevented from taking them into account in favour of the person, to the extent it would be possible under their legislation"* (p. 6). Therefore, in the example above, had the person benefited of conditional release and then had he/she been convicted of a prison sentence of less than two years in Spain in 2015 for acts committed before the date of the French conviction, the offender could benefit from probation in Spain. According to Art. 80 SPC, when deciding whether or not to order probation the judge has to bear into consideration, among other things, "the personal circumstances of the offender, his/her criminal records, his/her personal behaviour after the commission of the crime". It is assumed that, having been granted conditional release in France, the subject is supposed to have an adequate prognosis of dangerousness and be in process of rehabilitation. Therefore, that should be relevant for the Spanish judge to decide in favour of probation.

Paragraph 4 also covered cases of joint/accumulated penalties. Thus, if a German judge in a "combination of offences" would have to calculate in a new criminal proceeding a total penalty taking into account a previous conviction handed down in Italy, it would have to annul the foreign conviction, as happens in a purely domestic case. This outcome was already vetoed by paragraph 4. That is why the Council thought about the possibility of deleting paragraph 3 with the mention to joint/accumulated punishments as finally happened.

Months later, the Council endowed paragraphs 3 and 4 of the current wording with very few modifications. The Council[16] indicated that paragraph 3 responded to the concerns of many delegations that thought that *"it should be clear in the text that the taking into account of previous convictions of other Member States shall not have the effect of interfering with such previous convictions"*. Paragraph 4 reinforces paragraph 3 because, according to the Council, Germany and Poland considered that *"it was important to make it clear that [the principle of equivalence] would only apply to the extent that this would not involve against Art. 3 para. 3"*[17]. Consequently, while paragraph 3 means that the principle of equivalence does not imply interference with, revocation or review of the previous convictions or any decision relating to their execution, paragraph 4 provides for clarification. In particular, it specifies that such interference/revocation/review is not possible even if the national law of the State in which the new proceedings are conducted so permits, had such a prior conviction been national[18].

16 *Council Document no. 13101/1/06 REV, of 29 September 2006*, p. 4.

17 *Ibidem*.

18 In same vein, see D. Floré, Droit penal européen: Les enjeux d'une justice pénale européenne, Primento, 2014, pp. 691 et seq.

1.2. Recital 14 to the FWD.

This position is also supported by *recital 14*: "*Interference with a judgment or its execution covers, inter alia, situations where, according to the national law of the second Member State, the sanction imposed in a previous judgment is to be absorbed by or included in another sanction, which is then to be effectively executed, to the extent that the first sentence has not already been executed or its execution has not been transferred to the second Member State*". In other words, accumulation/absorption of a previous conviction handed down in other Member State is possible where the first conviction has been fully served or its execution has been transferred to the second Member State. The problem at stake is that *recital 14* says "inter alia", that is to say, these situations vetoed may not be the only ones.

Recital 14 is the key to understand the judgment of the *Cour de Cassation no. 13-80161*[19] which the SSC uses for denying accumulation in the *Picabea case*. The appellant had been convicted in three countries: Germany (2003), Belgium (2005) and France (2006). In France, he had asked for confusion of penalties on the basis of the principle of equivalence provided for in Art. 132-23-1 of the French Penal Code. The French court did not order accumulation because the French sentence had already been fully enforced and also because the taking into account of previous convictions could not interfere with the previous sentence handed down by another Member State (Art. 3 para. 3 FWD). It is true that the *Cour de Cassation* does not cite *recital 14*. However, it is implicitly present in its reasoning that the German and Belgian authorities would be deprived of their right to enforce sentences in their respective territories. As indicated above, *recital 14* excludes the principle of equivalence when under the national law of the second State (in this case, France), the penalty imposed by another country (Belgium or Germany) must be incorporated into or included in another penalty, which shall then be enforced to the extent that the first conviction has not yet been enforced or its enforcement has not yet been transferred to the second member State. Neither the German nor the Belgian sentence had been fully executed, nor had their execution been transferred to France. Therefore, *confusion* caused a clear interference vetoed by Art. 3 para. 3 read in the light of *Recital 14*.

It is not clear why the SSC compares the *Cour de Cassation* judgment with the *Picabea case*. In the French case, the last sentence, the French sentence, had already been executed, while the Belgian and German sentences were not (they were in the execution phase). In contrast to the situation in the French case, in the *Picabea* case the last conviction, the Spanish one, was being executed and the previous one, the French one, had already been executed. These are important differences. Furthermore, scholarship's comments on the French implementation of the FWD agree that the new system does not prevent previous convictions of other Member States from being taken into

19 *Cour de Cassation Judgment, Chambre Criminnel, no. 13-80161, of 19 November 2014.*

account for the purposes of confusion[20]. Indeed, scholarship agrees that the solution could have been different, had the French penalty not been executed and had the previous foreign convictions already been executed[21]. In fact, the *Cour de Cassation no. 17-80833* has confirmed that confusion may be ordered when it comes to a French penalty and an EU one, provided that the latter has been totally executed when confusion is ordered[22].

This reasoning contradicts the SSC's statement on the Commission's report on the implementation of the FWD by Member States[23]. The SSC states that of the 13 States analysed by the Commission, *"joint punishments between domestic and EU penalties is not specified"* (Legal Ground no. 4). However, in France the implementation of the FWD was much simpler than in Spain: A single provision (Art. 132-23-1 CP) states that *"convictions handed down by criminal courts of an EU Member State shall be taken into consideration under the same conditions as convictions handed down by French criminal courts and shall produce the same legal effects as domestic ones".* As the *Cour de Cassation* has stated, nothing prevents the effect of equivalence in the case of confusion, if legal requirements are met. That is proof of the fact that, although the Commission's report does not indicate anything about the application of the principle of equivalence in those cases, it does not mean that this is not feasible. It must be beard in mind that the Commission collects examples on the basis of information provided by Member States which is not always exhaustive. As the SSC rightly points out, only 13 States sent complete information, while 9 (including France) *"did not provide further details in respect of the types of legal effects they attach to previous foreign convictions and at what stage of proceedings (…) these effects apply in their national criminal justice system"* (Commission's Report, p. 4). The Commission recognised a satisfactory level of compliance with the letter and spirit of the FWD. Nevertheless, it also invited those States *"that have transposed it incorrectly to review and align their national implementation legislation with the provisions of this Framework Decision"* (Commission's Report, p. 12).

The ECJ has had the chance to deal with the interpretation of Art. 3 paras. 3 and 4 FWD in the ECJ Judgement, of 21 September 2017 (the *Beshkov case)*[24]. A Bulgarian court had to impose a total sentence, normally the higher penalty, possibly adjusted, of

20 M. Herzog-Evans, Droit de l'exécution des peines prononcées par des juridictions pénales d'États membres de l'Union européenne, *Droit Pénal*, no. 2, 2015, comm. 28, p. 3; M. Lena, La difficile prise en compte des condamnations pénales au sein de l'UE, Dalloz actualité (DA), 7 January 2015.

21 E. Bonis-Garçon, Confusion de peines prononcées par des juridictions pénales d'États membres de l'Union européenne", *Droit pénal*, no. 2, Février 2015, comm. 28, p. 3; and M. Lena, La difficile prise en compte des condamnations pénales, op., cit., fn 19.

22 *Cour de Cassation Judgment, Chambre Criminnel, no. 17-80833, of 2 November 2017.*

23 COM (2014) 312 final.

24 *European Court of Justice* (ECJ) Jugement, of 21 September 2017, case C-171/16 *(Trayan Beshkov and Sofiyska rayonna prokuratura).* For a comment of this case, see M. Ollé Sesé, Acumulación de penas impuestas en diferentes Estados de la Unión Europea, *La Ley Unión Europea*, nº 54, 31 December 2017.

the two sentences imposed, including aggravating factors. The highest sentence imposed was the EU foreign one. It accounted for 18 months' imprisonment, with 12 months suspended. However, according to the Bulgarian legislation the court was prevented from taking account of a suspended sentence, given the offender's criminal record. Taking into account the EU sentence for the purposes of its execution in Bulgaria would have had the effect of changing the manner of execution of the EU sentence (coming from Austria), which the Bulgarian court should convert into a term of actual imprisonment when establishing a total sentence. The ECJ indicates, first of all, that FWD 2008/675 is applicable not only to proceedings concerned with establishing that an accused person is or is not guilty of an offence. So that, it is also applicable to proceedings relating to the enforcement of the sentence "where account must be taken of a sentence imposed following a previous conviction handed down in another Member State" (para. 28). Secondly, it states that as Art. 3 para. 3 of the FWD specifically precludes the changing of a foreign decision in the context of merely taking it into account, "*a national court cannot (…) review and alter the arrangements for execution of previous convictions handed down in another Member State that have been previously executed, in particular by revoking a suspension attached to the sentence imposed on that conviction and converting that sentence to a period of imprisonment. Nor can a national court order, in that context, further execution of that sentence as thus altered*" (para. 46).

Art. 14 para. 2 a) of *Act no. 7/2014* prevents the application of the principle of equivalence when it comes of any "final sentences handed down by Spanish judges or courts or any resolution for purposes of execution of penalties", that is to say, in any case. Therefore, the ECJ's judgment in the *Beshkov case* casts doubt on the compliance with the FWD of the Spanish exception foreseen in Art. 14 para. 2 a). Furthermore, in the *Picabea case*, there is no revocation at all of the EU sentence given that the taking account of the French sentence only implies the deduction of the prison time served in France. The nature of the French conviction is neither modified nor executed in Spain.

2. Judicial limitation in imposing a sentence in the new proceedings (Art. 3 para. 5 FWD).

Another country which showed concerns on accumulation proceedings was the Netherlands. For this State "*there should be no obligation to take into account the previous foreign conviction where the penalty imposed in the previous conviction would be deducted from the penalty to be imposed in the new proceedings in case of a previous national conviction*"[25]. The concerns of the Dutch delegation are understandable, taking into account the system of absorption of penalties foreseen in its legal order. As the SSC made clear[26], "*if, for example, in Member State A a penalty of 5 years has been imposed in a previous conviction, and the Netherlands in a subsequent case as a starting*

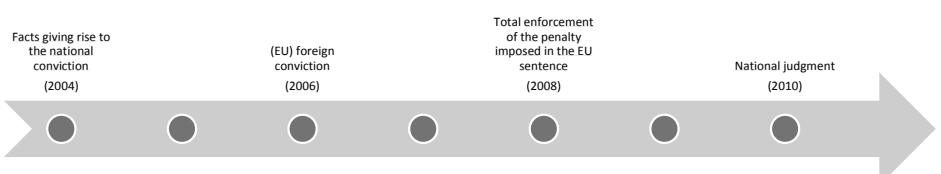
25 *Council Document no. 13101/1/06 REV 1, of 29 September 2006*, p. 5.
26 Endorsing the 3rd fn on page 11 of *Council Document no. 13101/1/06 REV 1*.

point would impose 5 years, the full application of the principle of assimilation in Art. 3 para. 1 would imply that no penalty could be imposed in the new proceedings"[27]. The Dutch Penal Code (Art. 56) foresees a maximum limit of the penalty when two or more offences are committed by the same person. In these cases, the maximum limit of the penalty corresponds to the sum of the highest penalties imposed, provided that the highest maximum limit foreseen in theory and increased by one third, is not exceeded. When the offences are tried separately, the previous punishment is neither annulled nor is a new one imposed for both offences, but the court will impose a penalty in the second proceeding discounting the penalty already imposed, taking into account the maximum limit that would have been imposed if the crimes had been jointly tried.

Paragraph 5 of Art. 3 FWD was written to satisfy the Dutch demands: "*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 court in imposing a sentence in the new proceedings".*

What does this limit mean? There are two elements to assess: on the one hand, the date on which the offence was committed that gave rise to a second sentence (new proceeding); on the other hand, the date on which the EU previous sentence was pronounced or totally enforced. If the date on which the EU conviction was delivered or totally enforced is subsequent to the date on which the offences referred to in the national sentence were committed, there is no obligation to recognize it. For example, if a court issues a guilty verdict in 2010 in relation to an offence committed in 2004 and the accused requests an EU previous conviction wholly served in 2008 to be taken into account handed down in another Member State in 2006, the Member State would not be obliged to take into account the EU sentence (Figure no. 1).

Figure no. 1. No obligation on Member States to take account of EU convictions (Art. 3 para. 5 FWD).

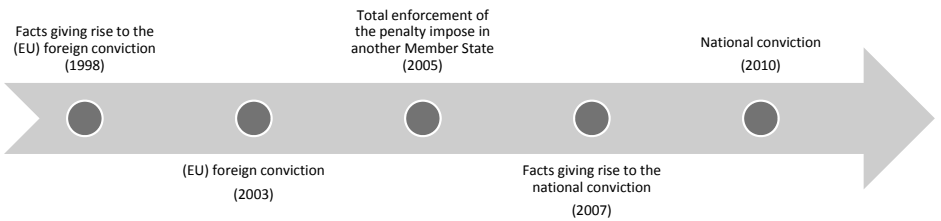


However, Member States would be to apply the principle of equivalence when the EU sentence had been delivered or enforced before the date of commission of the offence that gave rise to the national conviction. For example, a person is sentenced in 2003 and, subsequently, in another State, is sentenced in 2010, for committing an offence in 2007. In this case, the taking into account of the EU previous conviction would be

27 SSC Judgment no. 874/2014, of 27 January 2015 (Legal Ground no. 4).

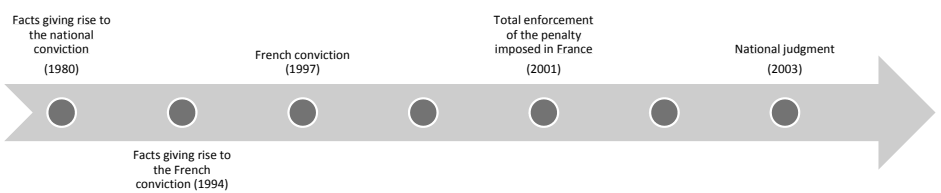
mandatory, because the 2010 national sentence is related to offences committed in 2007 and the EU sentence was previously delivered in 2003 (Figure no. 2). There would also be an obligation on Member States to take into account of it in those cases in which the facts that give rise to the second sentence are subsequent to the first one, but the latter has yet to be enforced.

Figure no. 2. Obligation on Member States to take account of EU convictions (Art. 3 para. 5 FWD)



In the *Picabea case* the chronological sequence of facts and convictions is as presented above in Figure no. 1. In effect, the new proceedings held in Spain ended up with a judgment delivered in 2003. In this judgment the appellant was punished with a prison penalty of ten years, for the commission of offences committed in 1980. Therefore, the facts giving rise to the Spanish conviction were committed before the French conviction took place in 1997 and the penalty was totally served in 2001 (Figure no. 3).

Figure no. 3. The Picabea case.



However, claiming that Art. 3 para. 5 FWD avoids the taking account of EU sentences in any case when it comes to accumulation proceedings is another question. Exclusion of the taking account of EU foreign sentences in accumulation proceedings as it happens in Spain results in paradoxical situations:

1) If the earlier conviction were national instead of foreign, accumulation of convictions would take place. However, as it is a European sentence, *Act no. 7/2014* prevents domestic courts from taking account of it. If this logic is applied to the *Picabea case* and the previous conviction had been Spanish instead of French, penalties would have been accumulated since legal requirements were met. However, as the first sentence was French, there is no obligation to recognize it.

2) If the facts of the previous conviction are committed before the offences giving rise to the national conviction, there would be an obligation of taking account of the EU sentence. However, in compliance with Spanish Law, accumulation would not be possible since the facts leading to the second national conviction were committed after the date of the first foreign sentence and, under those circumstances (offences committed after a sentence had been imposed by another Member State), domestic law prohibits accumulation in any case regardless of where the conviction comes from[28]. That means that any European or national citizen requiring a legal accumulation of convictions in Spain, that includes sentences handed down in other EU countries, will serve a longer sentence than if those sentences had been handed down by a Spanish judge for similar acts committed at the same time in different parts of Spain[29].

Does Art. 3 para. 5 FWD allow Member States to do so and to what extent? Is that an exception to be applicable in any case? In my opinion, the exception foreseen in Art. 3 para. 5 must not apply. Although it is settled case-law that the preamble to an EU legal act has no binding legal force[30], EU legal acts must be read in the light of their recitals. In this regard, *Recitals 8 and 9* FWD are of some interest.

2.1. Recital 8 FWD

Recital nº 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.*"[31]. Its introduction sought to avoid placing the convicted person in a substantially different situation from that which would have arisen if the previous conviction had been national. In other words, pernicious effects for the individual should be avoided when EU convictions are taken into account. Therefore, as the SCC also pointed out: "*the application of the Framework decision may involve a higher punishment for the convicted person than if the previous conviction had been handed down in the State of the new proceedings*", for example, "*by reason of the severity of the previous conviction*" (Legal Ground no. 4). The SSC

28 See Dissenting opinion of the hon. Magistrate Mr. Miguel Colmenero; dissenting opinion of their hon. Magistrates Mr. Cándido Conde-Pumpido Tourón and dissenting opinion of the hon. Magistrate Mr. Luciano Varela Castro.

29 J. Nistal Burón/M. Trancón Rodríguez, Excepciones a la ley española al principio de equivalencia de condenas de otros Estados miembros de la Unión Europea. Consecuencias y efectos en el ámbito de la ejecución penal, *Diario La Ley*, no. 8599, 7 September 2015.

30 *European Court of Justice* (ECJ) 24.11.2005, case C-136/04 *(Deutsches Milch-Kontor GmbH v. Hauptzollamt Hamburg-Jonas)*, 19.11.1998, case C-162/97 *(Nilsson and Others)* [1998] ECR I-7477, margin no. 54; 25.11.1998, case C-308/97 *(Manfredi)* [1998] ECR I-7685, margin no 30.

31 With a similar wording to the present, the text of the recital appeared for the first time in *Council Document no. 13101/1/06 REV 1, of 29 September 2006*.

gives no examples, although one might think of cases in which the individual has been sentenced in another Member State to a higher sentence than foreseen for that type of offence in the second State, in such a way that when taking it into consideration in the second State, procedural rules will be more severe[32]. For example, if the fact of having a criminal record for offences punishable by imprisonment for over 2 years in the legal order of Member $State_b$ is an indicator of the potential danger of the offender and leads to provisional detention in a subsequent criminal procedure, then an individual convicted to 2 years imprisonment for theft in Member $State_a$, should not be sent to pre-trial detention. He/she should not since had the first offence been committed in Member $State_b$, the maximum prison penalty imposed on him/her would have been a year and 6 months and that does not lead to pre-trial detention in the context of a new proceeding. To put it differently, had the earlier conviction imposed in Member $State_a$ been national (had it been delivered in Member $State_b$), it would not have entailed the aforementioned legal outcome. Another example thinking of the Spanish legal order would be the taking account of previous sentences when the aggravating factor of reoffending is at stake. In these cases, Spanish courts have margin of discretion to impose the sentence (Art. 66 para. 1, 5º SPC): They might decide to impose the minimum limit foreseen by law for the given offence, because the offender was previously punished by an EU court with more severity than he/she had been previously punished in Spain.

The second *raison d'être* of *recital 8*, which the SSC seems to ignore, is to achieve the same legal solution, regardless of whether the previous conviction is national or foreign even when the concerned person – according to national law – can benefit from having been convicted at an early stage. The effects of taking account of previous convictions are normally unfavourable to the convicted person. However, that should not imply an exception to the principle of equivalence where it might be of benefit. In no way is that the spirit behind the wording of the FWD. By exclusion of the principle of equivalence in accumulation proceedings Mr. Picabea, who requests the previous conviction handed down and executed in France to be considered, is placed in a substantially different situation from the one in which he would have found himself, had the earlier conviction been a national one. The SSC however discounted *Recital 8* as a hermeneutic criterion, because it appears in the explanatory part and not in any disposition of the FWD.

2.2. Recital 9 FWD.

Recital 9 was included to complete the meaning of paragraph 5 of Art. 3. That disposition "*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 impos-*

32 The generic example is that of K.C. Katouya, *Réflexions sur les instruments de droit pénal international et européen de lutte contre le terrorisme*, Collection Droit et sciences politiques (Editions Publibook, 2013), p. 286.

ing 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".

Recital 9 for the SSC merely confirms that there is no existing obligation to recognize a previous foreign sentence in cases of accumulation. However, *Recital 9* does not allude to accumulation and its scope and meaning would suggest quite the opposite standpoint. What *Recital 9* does is to oblige the court to take an EU previous conviction into account within the limits of the principle of proportionality. As magistrate Mr. Conde-Pumpido accurately highlights in his dissenting opinion, it is paradoxical to use *Recital 9* that obliges an interpretation of the content of the FWD in the sense of avoiding "*disproportionately harsh circumstances for the offender*" as a "*norm covering the transposition of a provision into internal domestic law that prejudices the convicted person, rendering the time of imprisonment served in another country of any effect whatsoever*"[33]. In this regard, it has been said above that EU case-law does not recognize binding legal force to the preambles of EU legal acts. However, the ECJ has also stated that recitals cannot "*be relied on either as a ground for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner clearly contrary to their wording*"[34].

2.3. Grammatical interpretation of Art. 3 para. 5 FWD.

A third reason that leads to discuss the SSC's solution rests on an interpretation of a grammatical type. Literally, Art. 3 para. 5 FWD indicates that the principle of equivalence is facultative when the criminal act giving rise to the new proceedings had been committed before the foreign conviction had been handed down or enforced. However, this disposition has a second requirement: The principle of equivalence will only not apply "*where the application of [domestic] rules to foreign convictions would limit the judge in imposing a sentence in the new proceedings*". These cases could be those in which there is no room at all for the judge or court for determining the type, the level and the degree of the punishment or sanction. In the Netherlands that happens in accumulation proceedings. In the debate before the transposition of the norm in the Netherlands, it was rejected that EU previous convictions were taken into account for accumulation purposes[35].

In any case, the key is the interpretation that should be given to the second requirement "*would limit the judge in imposing a sentence in the new proceedings*". The ECJ has recently discussed whether the concept of "criminal proceedings" within the meaning of Art. 3 para. 1 FWD includes proceedings concerning arrangements of enforcement of a sentence imposed by a court of a Member State with respect to which a

33 Dissenting opinion of the hon. Magistrate Mr. Cándido Conde-Pumpido.
34 See above fn 27.
35 *Council Document No 13101/06 of 26 September 2006*, p. 4.

previous conviction handed down by a court of another Member State must be taken into account (*case Trayan Beshkov*)[36]. The ECJ considered that the FWD *"is applicable to a national procedure that is concerned with the imposition, for the purposes of execution, of an overall custodial sentence that takes into account the sentence imposed on that person by a national court and also that imposed following a previous conviction handed down by a court of another Member State against the same person for different facts"*. According to the ECJ, it follows from Art. 3 para. 2 and *Recitals 2 and 7* that the FWD *"is applicable not only to proceedings concerned with the establishing that an accused person is or is not guilty of an offence, but also to proceedings relating to the enforcement of the sentence where account must be taken of a sentence imposed following a previous conviction handed down in another Member State"* (paragraph 28). It is not far to seek that the concept of 'criminal proceedings' within the meaning of Art. 3 para. 1 is also applicable to Art. 3 para. 5. Therefore, accumulation proceedings are also included in Art. 3 para. 5 FWD. However, it must be questioned whether and to what extent a judge is limited in imposing the penalty when joint/accumulated punishments are concerned. To put it differently, do accumulation proceedings always limit the judge in imposing a sentence in the new proceedings? For the SSC, they do. In my opinion, they do not at least in the Spanish case. Spanish law does not provide so far for a retrospective model of joint penalties or accumulation[37]. Spanish judges or courts cannot "create" a new global penalty, replacing the one imposed in a previous judgment. That is to say, they are not allowed to take into account a penalty imposed in previous proceedings and impose a new global one. What they are allowed is to calculate the maximum limit of the penalty to be served when different acts have been tried in different proceedings and they could have been tried in a single one.

Following this reasoning, a distinction could be made between absorption/accumulation at the trial stage itself and absorption/accumulation at the time of execution of the conviction. *A priori*, it seems that the exception to the principle of equivalence is reasonable when accumulation proceedings take place at the trial phase itself. It might not be so when accumulation is carried out at the enforcement phase of the penalty. However, the ECJ has still not yet taken any decision on the meaning of Art. 3 para. 5 FWD.

The Netherlands was concerned because accumulation proceedings take place at the trial stage itself, where judicial discretion is seriously affected. There is need for remembering that if a prison punishment of five years were imposed in a Member State and the Netherlands punished the person to 5 years in a subsequent case, as a starting point, the full application of the principle of equivalence would mean that, in the new proceedings, no punishment at all could be imposed. That does not happen in the *Picabea case*.

36 *European Court Justice* (ECJ) Jugement, *Trayan Beshkov and Sofiyska rayonna prokuratura* (fn. 23).

37 See M. Muñoz Morales Romero/C. Rodríguez Yagüe, Terrorismo vs. Leyes y jueces, op., cit., p. 57 (see above fn 13.

The Belgium Criminal Code has also vetoed the taking into account of foreign convictions under similar circumstances. Paragraph 2 of Art. 65 foresees that when the offences committed are the successive and continued expression of the same criminal intent and have been judged in different proceedings, the court charged of prosecuting the facts in the second proceeding, can take the previous sanctions into account when imposing the sentence. If the previous penalties appeared as fair punishment for the set of offences, then the court will only pronounce on the guilt of the person and in compliance with the principle of proportionality would refer to those sentences already passed. In any case, the punishments pronounced on the basis of this disposition will be no higher than the maximum term for the most serious crime. So, the same Belgium legislator when transposing the FWD[38] decided to exclude any effect stemming from considering foreign convictions in the case of continuous offences when one of the offences had been sentenced in different courts.

The Spanish delegation at no time "complained" during the elaboration of the FWD. The FWD could only be approved by unanimity. At no point did the principle of equivalence in relation to accumulation proceedings raise problems of any sort. It was not a problem until the SSC judgment no. 184/2014, of 11 March, which led to the inclusion *in extremis* of an amendment from the Popular Parliamentary Group in the Senate, approved in the Spanish Congress[39], by which the taking into account of EU previous convictions would not apply to accumulation proceedings.

IV. On the (im)pertinence to refer for a preliminary ruling to the ECJ.

From the beginning, the preliminary ruling was devised as a mechanism of cooperation between the ECJ and national courts. With it, the ECJ indicates to them how they have to interpret EU Law.

Since the *Cilfit case* and the so-called *acte clair* doctrine[40], "*a court or tribunal against whose decisions there is no judicial remedy under national law is obliged, where a question of EU law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the provision of EU law concerned has already been interpreted by the Court or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt*"[41]. In order to determine whether or not the question is irrelevant, or

38 Art. 99bis of the Belgian PC: "The convictions pronounced by the criminal courts of another Member State of the European Union are taken into account under the same conditions as the convictions pronounced by a Belgian criminal court, and they will produce the same legal effects as these convictions. *The rule mentioned in paraghaph one is not applicable to the circumstances envisaged in article 65, paragraph 2"* (my italics). Art. 99bis was introduced by *Loi portant des dispositions diverses en matière de Justice* [2014-04-25/23]. See above fn 12.

39 Official Gazette of the Spanish Parliament-– Senate, no. 401, of 22 September 2014, p. 204.

40 *European Court Justice* (ECJ) Jugement, of 6 October 1982, case C-283/81 *(Sri Cilfit)*, Rec. p. 3415, margin no. 16.

41 More recently, see *European Court Justice* (ECJ) Jugement, of 9 of September 2015, case C-160/14 (*João Filipe Ferreira da Silva e Brito and others v. Estado portugês)*, margin no. 38.

the provision has been already interpreted by ECJ, *"the specific characteristics of [EU] law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the [Union] should be evaluated"*[42].

It is, moreover, the national judge who should appraise *"whether the correct application of [Union] Law is so obvious as to leave no scope for any reasonable doubt and, for deciding, as a result, to refrain from referring to the Court of Justice a question concerning the interpretation of [Union] Law which has been raised before it"*[43]. However, national courts and tribunals must exercise particular caution before ruling out the existence of any reasonable doubt. Therefore, they have to give "*the reasons why they are certain that EU law is being applied correctly"*[44].

In the Picabea case, the SSC was certain that EU law (FWD) was being applied correctly, as the impossibility of taking into account the French conviction was literally justified in the exception foreseen in Art. 3 para. 5 FWD. As explained above, the SSC justified its positions on the basis of an historic interpretation of the European legal instrument; a systematic interpretation of Art. 3 para. 5 FWD read in line with *Recitals 8 and 9*; an analyse of the case-law of other European courts on the same matter and the report from the Commission on the state of the FWD implementation. In consequence, *"a preliminary ruling before the ECJ is neither decisive nor necessary for deciding on the dismissal of this appeal"* (Legal Ground no. 5).

It can be drawn from the preceding presentation that there are more than reasonable doubts that recommended referring a preliminary question to the ECJ:

A) In relation to the objective limitation, it is not clear that any accumulation proceedings may be excluded from the principle of equivalence using as basis the exception contained in Art. 3 para. 5 FWD.
B) The fact that six magistrates dissented may be considered an indicator of the lack of any doubt on the matter. However, the SSC stated that the dissenting opinion of six magistrates does not necessary lead to doubts of interpretation[45]: *"(…) [T]he interpretative doubt does not concur in the circumstances in which the court with jurisdiction is not unanimous in reaching its decision. Understanding the contrary, in the case of a tripartite jurisdictional organ, if one of its members were to*

42 *European Court Justice* (ECJ) Judgement, of 15 Septembre 2005, case C-495/03, *(Intermodal Transports EU)*, margin no. 33; and ECJ *(João Filipe Ferreira da Silva e Brito and others v. Estado português)* (fn. 41), margin no. 39.

43 *European Court Justice* (ECJ) Judgement, of 15 September 2005, *(Intermodal Transports EU)* (fn. 42), margin no. 37; *European Court Justice* (ECJ), of 10 September 2009, case C-206/08 *(Wasser- und Abwasserzweckverband Gotha und Landkreisgemeinden (WAZV Gotha) v. Eurawasser Aufbereitungs- und Entsorgungsgesellschaft mbH)* and *European Court Justice* (ECJ) *(João Filipe Ferreira da Silva e Brito and others v. Estado português)* (fn. 41), margin no. 40.

44 See Conclusions of the Attorney General Sr. Yves Bot, presented on 11 June 2015, in C-160/14, *case of João Filipe Ferreira da Silva e Brito and others v. the State of Portugal*, margin no. 94.

45 SSC Judgment no. 874/2014, of 27 January 2015 (Legal Ground no. 4).

issue a dissenting opinion, the decision of the court would have to be placed in doubt, with the subsequent consequences that it might imply, for example, in the application of the principle in dubio pro reo". In his dissenting opinion, the magistrate Giménez García however expressed that the existence of a large minority which expressed and reasoned its doubts in the sense that the exceptions foreseen in *Act no. 7/2014* are in compliance with the principle of equivalenceis an indicator that the preliminary ruling is necessary[46]. It is worth recalling that the Constitutional Court in its Judgment no. 58/2004, of 19 April, ruled that the obligation to request a preliminary ruling before the ECJ remains when the inexistence of a doubt is based on "*a subjective conviction of the court on a particular interpretation of the EU Law*". To put it differently, the obligation does not remain only when there is no reasonable doubt at all, but also when the question is in doubt.

C) Different sections of the High National Court had arrived at different solutions in identical cases[47]. It is true that the ECJ has ruled that "*the fact that other national courts or tribunals have given contradictory decisions is not a conclusive factor capable of triggering the obligation set out in the third paragraph of Art. 267 TFEU*"[48]. What is more: "*A court or tribunal adjudicating at last instance may take the view that, although the lower courts have interpreted a provision of EU law in a particular way, the interpretation that it proposes to give of that provision, which is different from the interpretation espoused by the lower courts, is so obvious that there is no reasonable doubt*"[49]. However, taking the complexity of the matter into account and the burdensome need to turn to different methods of interpretation, not only of FWD dispositions but also of the specific use of the principle of conforming interpretation, prudence appears to be more inclined towards the preliminary ruling.

D) As it is a relatively "young" framework decision, there had been hardly jurisprudence on the matter[50] and the submission of a preliminary ruling "*may prove particularly useful when there is a new question of general interest for the uniform application of the EU law*"[51]. So, with the preliminary question, the sense and scope of the limitations foreseen in Art. 3 para. 5 could be determined, which would in turn serve as a guide to the Commission in its future reports on the FWD implementation.

46 Dissenting opinion expressed by their Excellency Sr. Magistrado D. Joaquín Giménez García.

47 In this sense, vid. Dissenting Opinion of the hon. Magistrate Mr. Cándido Conde-Pumpido Tourón to Supreme Court judgment no. 750/2016, of 25 February 2016.

48 *European Court Justice* (ECJ) *João Filipe Ferreira da Silva e Brito and others v. Estado português* (fn. 40), margin no. 41.

49 *Ibídem*, margin no. 42.

50 Only *European Court Justice* (ECJ) *Trayan Beshkov and Sofiyska rayonna prokuratura* (fn. 22). It is also treated in the pending case C-390/16 *(Lada)*. However, this does not relate to Art. 3 para. 5 FWD.

51 This criterion appeared in the *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings,* point 13 [OJ C 338, 6.11.2012].

The non-submission of a request for a preliminary ruling cannot be excused by the time that the ECJ requires to rule on it, because according to Art. 267 TFEU and as Conde-Pumpido[52] very precisely pointed out, the urgent preliminary ruling procedure would be activated and a ruling on the question could be delivered within a time of less than three months.

The non-referral for a preliminary ruling may lead to a violation of the right to effective legal protection (Art. 24 of the Spanish Constitution) and, even, to the right to a fair trial (Art. 6 ECHR). On the one hand, the ECtHR turns to the duty of motivation to test the violation. To put it differently, the refusal by a national court of last instance to make a preliminary reference to the ECJ amounts to a breach of Art. 6 ECHR if the national court does not provide reasons to justify its decision[53]. Therefore, the ECtHR has recalled that national courts are required, in accordance with the Cilfit case, to indicate the reasons why they have found that the question is irrelevant, the EU law provisions at issue have already been interpreted by the ECJ, or the correct application of EU law is so obvious that no reasonable doubt is left. What the ECtHR will never do is to analyse the potential mistakes that the national courts would have committed in the interpretation of such exception to the duty to refer for a preliminary ruling.

On the other hand, the Constitutional Court has indicated that there was a breach of the right to effective legal protection under three circumstances[54]: 1) when the court has applied a norm in an arbitrary or a manifestly unreasonable way; 2) when the decision incurs in a manifest error; and 3) when the court takes its decision delinking it from the system of sources[55]. What the Constitutional Court has called an "excess of jurisdiction"[56] is however of interest in this last circumstance, that is produced when the national court usurps the ECJ authority for interpreting and controlling the validity of EU Law[57] and on its own account performs the exegesis of an EU legal instrument on the scope of which it has doubts. Interpretation of the scope and content of Art. 3 FWD could be included in this type without forcing constitutional doctrine.

52 Dissenting opinion of the hon. Magistrate Mr. D. Cándido Conde-Pumpido Tourón to Judgment no. 750/2016, of 25 February 2016.

53 *Ullens De Schooten and Rezabak v. Belgium*, Application no. 3989/07 and no. 38353/07, Judgment of 20 September 2011, margin no. 54 et seqq.; *Vergauwen v. Belgium,* Application no. 4832/04, Judgment of 10 April 2012, margin no. 89-90; *Dhahbi v. Italy,* Application no. 17120/2009, Judgment of 10 April 2012, margin no. 31 et seq. Not as recent, but in the same sense, *Canela Santiago v. Spain,* Application no. 60350/00, Judgment of 4 October 2001, and *John v. Germany,* Application no. 15073/03, Judgment of 13 February 2007.

54 J. Huelín Martínes de Velasco "La cuestión prejudicial europea. Facultad/obligación de plantearla", in R. Alonso/J.I. Urgatemendía Eceizabarrena (Eds.): *La cuestión prejudicial europea, European Inklings (EUi)*, no. 4 (2014), p. 52.

55 In more detail, vid. J. Huelín Martínes de Velasco, Las implicaciones constitucionales del incumplimiento del deber de plantear cuestión prejudicial ante el Tribunal de Justicia de la Unión Europea (una aproximación "post-Lisboa"), Revista Española de Derecho Europeo, no. 39 (2011), pp. 375 et seq.

56 SCC Judgment no. 58/2004, of 19 April (Legal Ground no. 14).

57 SCC Judgment no. 64/1991, of 22 March, subsequently reiterated in SSC Judgment no. 58/2004, of 19 April.

Mr. Picabea submitted an application for *amparo* which was denied by the Constitutional Court[58]. The Constitutional Court only assessed the reasoning of the SSC's Judgment no. 874/2014 and held that the SSC applied correctly the *acte clair doctrine*. Following the reasoning of the SSC, also according to the Constitutional Court the exception of the principle of equivalence when it comes to accumulation proceedings is well-founded since Art. 3 para. 5 FWD allows Member States to implement such an exception. This is said to be corroborated by the interpretation of Art. 3 para. 5 FWD performed by other high courts of different Member States (i.e. the Netherlands) and the European Commission Report on the state of implementation of the FWD in which it is declared that Member States had correctly implemented the FWD. The Constitutional Court also stated that the existence of dissenting opinions does not in itself provide proof of an unreasonable or arbitrary motivation or of a lack of it in SSC Judgment no. 874/2014, of 27 January 2015.

In this regard, it is worth bearing into consideration the dissenting opinion of hon. Magistrate Adela Asúa. She explains that a correct decision not to refer for a preliminary ruling based on the *acte clair doctrine*, does not mean that the interpretation of the court is a possible one amongst the potential interpretations which could have done from an EU law perspective. However, it means that there are doubts as to the possibility of other potential interpretations of EU law. In the *Picabea case*, the SSC knew that an alternative interpretation of the FWD was also possible. This alternative interpretation was well-founded by dissenting opinions supported by 6 magistrates. The dissenting opinions show that the interpretation supported by the majority of the magistrates in Judgment no. 874/2014 was not so obvious and left room for reasonable doubt. Therefore, the referral for the preliminary ruling was mandatory, and the SSC did not comply with it.

V. Conclusions.

The European Area of Freedom, Security and Justice fully justifies the adoption of legal instruments to prevent impunity and improve judicial and police cooperation to "catch the bad guys". Those instruments imply "a handing over of sovereignty in pursuit of shared sovereignty between all the Member States in the matters of EU concern"[59]. That ceding of sovereignty took place with the *Council Framework Decision 2008/675/JHA, of 24 July, on the taking account of convictions in the Member States of the European Union in the course of new criminal proceedings*. That means that, for reasons of legal certainty, previous convictions handed down in other Member States must have equivalent effects to those that are attached to previous domestic convictions. This is mandatory not only when the taking into account of those convictions leads to a higher punishment (i.e. recidivism) or prevents more flexible conditions of

58 Constitutional Court Decision no. 155/2016, of 20 September..

59 Dissenting opinion expressed by the hon. Magistrate Mr. Miguel Colmenero Menéndez de Luarca.

enforcement, but also in other types of cases that may benefit the offender such as the accumulation of convictions.

The SSC used many and various arguments to refuse accumulation when a previous EU conviction is at stake. With this paper, an attempt has been made to explain and also criticize the SSC's view. However, it seems that what is behind the SSC judgment in the *Picabea case* is the concern that particularly terrorists would benefit from accumulation. Bearing in mind the failure of the *Parot doctrine* before the ECtHR, which implied progressive releases from prison of many terrorists, a decision in another sense would imply again the release of a large number of terrorists. New releases of ETA terrorists had been a brutal "blow" for the Government and for the victims of terrorism. There was pressure[60]. The precedent is not of course a justification but would serve *grosso modo* to arrive at an understanding of the SSC's position. However, as the magistrate Colmenero accurately pointed out in his dissenting opinion, the objective limitations of *Act no. 7/2014* do not only affect terrorists, but any type of criminal[61].

It should also be taken into account that the judgment did not only impact the future of Mr. Picabea. The future of at least fifty or so terrorists was also at stake[62]. Among them, there were members of ETA who were released on 4 December 2014 as a consequence of the Court Orders of the First Section of the High Court, which agreed to take their period of imprisonment served in French prisons into account when reviewing their convictions. They returned to prison after the State Prosecutor appealed against each of the respective orders of prison release.

The *Picabea case* once again places terrorism in the limelight, a criminal scope in which Spain has proceeded to various legal reforms with controversial and restrictive judicial interpretations that have toughen the execution of penalties in cases of terrorism.

However, the most worrying aspect of the *Picabea case* and subsequent ones is the refusal to refer for a preliminary ruling to the ECJ. The refusal raises concern regarding the traditional concept of sovereignty. Probably the ECJ's answer to the Constitutional Court in the *Melloni case* was also present in the SSC's and Constitutional Court's views. Perhaps the classic concept of sovereignty has never been abandoned when it comes to questions that "touch on" especially sensitive areas for the State such as terrorism. *Picabea* is an example of such sensitivity.

60 "Catalá confía en que el Supremo vete el descuento de penas a etarras [Catalá is confident that the SSC would veto the shortened sentences for members of ETA]", *El País*, http://politica.elpais.com/politica/2014/12/13/actualidad/1418491387_156830.html (last accessed 20/03/2018).

61 Dissenting opinion of the hon. Magistrate Mr. Miguel Colmenero, p. 144.

62 According to some sources, around 50 members of ETA were in a similar situation. See, for example, *RTVE*, 13.1.2015 (http://www.rtve.es/noticias/20150113/tribunal-supremo-rechaza-excarcelaciones-etarras-provocadas-norma-europea/1082015.shtml), and *El Mundo*, 14.1.2015 (http://www.elmundo.es/espana/2015/01/13/54b5243bca474105678b457e.html) (last accessed 21/03/2018). Most of them appealed without success before the SSC. See abouve fn. 10.