Portugal

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Preliminary Considerations Regarding the Portuguese Judicial Context

For a better understanding of this report, it is necessary to outline the most distinctive features of the Portuguese judicial system.

The judicial organisation is divided into judicial and administrative courts, each with three jurisdictional levels. The Constitutional Court rules on the constitutionality and legality of legal acts, within a system of norms control; there is no such thing as a constitutional complaint or a direct action for the protection of fundamental rights. Further, there is no principle of judicial precedent.

After a slow start, the Portuguese judiciary has become increasingly familiar with European Union (hereafter "EU") law. Nowadays it is not uncommon for judicial reasoning to refer to EU legal acts or principles, showing a growing awareness for EU matters by national judges. However, references to EU law within a consistent line of reasoning are still scattered, which makes it difficult to draw tendencies or make a consistent reading of Portuguese caselaw. In fact, too often references by national courts merely uphold decisions that would, in any case, have been reached by the exclusive application of domestic law, or in situations that are primarily governed by the latter. In particular, there is still a tendency to invoke the Charter of Fundamental Rights of the European Union (hereafter "Charter") in cases where EU law is not applicable, which has sometimes led the Court of Justice of the European Union (hereafter "CJEU") to consider a number of preliminary references submitted by Portuguese courts as inadmissible.[1] Another notable feature of

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1 See, for instance, CJEU 26 October 2017, case C-333/17, *Caixa Económica Montepio Geral v. Carlos Samuel Pimenta Marinho* et alii, EU:C:2017:810; Judgment of 23 November 2017, C-131/17, *Hélder José Cunha Martins v. Fundo de Garantia Automóvel*, ECLI:EU:C:2017:902.

the reasoning followed by Portuguese courts is the tendency to quote scholars more often than CJEU caselaw: the latter is often considered through the lenses of handbooks.

Given the extremely open nature of the questionnaire, the reporters had to circumscribe the matters covered. For questions 1, 2, 3 and 4, attention was mostly given to civil jurisdictions; question 5 covers mostly civil and constitutional matters; and question 6 focused mostly on civil and administrative jurisdictions. The reporters were concerned with only taking national caselaw from the past 5-7 years into consideration;[2] moreover, most decisions that were considered were delivered by second instance or superior courts. Whenever relevant, however, references to other jurisdictions were also made.

Question 1

1.1

The direct effect of EU norms is reasonably accepted by the Portuguese judiciary, both in its vertical and horizontal dimensions, mostly in cases where a potential non-application of national law is at stake. However, the most notable examples can be found in areas which have been subject to harmonisation, such as in the context of civil liability, Labour law, the recognition and enforcement of judgments and criminal procedural guarantees. Most preliminary questions that are referred to the CJEU by Portuguese courts relate to the interpretation of secondary acts, not of EU Treaty norms or EU principles.

In other words, EU principles are more easily identified as such by the national courts whenever they are incorporated into secondary law. A few cases where the compatibility of Public law acts with EU law was discussed, include the following:

– The *Tribunal da Relação de Évora* (a second instance judicial court) correctly recognised that the interpretation of Directive 2009/103/CE[3] would affect the outcome of a litigation between an individual and an insurance company regarding compulsory insurance coverage. Therefore, it decided to refer a question to the CJEU concerning the notion of "third parties who have been victims". The decision of the CJEU[4] lead the national court to perform a corrective interpretation of the Portuguese law[5] that implemented

2 Extensive coverage of the national application of EU Law by Portuguese courts until *circa* 2009 may be found in F. P. Coutinho, *Os tribunais nacionais na ordem jurídica da União Europeia – o caso Português,* Coimbra, Coimbra Editora, 2013.

3 Directive 2009/103/EC of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles.

4 CJEU 14 September 2017 in case C-503/16, *Luís Isidro Delgado Mendes v. Crédito Agrícola Seguros – Companhia de Seguros de Ramos Reais SA*, ECLI:EU:C:2017:681.

5 Judgment of the *Tribunal da Relação de Évora* of 16 June 2016, in case 46/13.9TBGLG.

the Directive, ruling against the insurance company and providing compensation for the claimant. The decision was later confirmed by the *Supremo Tribunal de Justiça* (hereafter "Supreme Court of Justice"),[6] in a unanimous decision.

- In the context of Labour law, in cases concerning the application of Directive 2003/88[7], the Portuguese courts[8] recognised the need to interpret national implementing acts in accordance with art. 31 of the Charter, following the caselaw of the CJEU on the weekly rest period. Also, concerning the interpretation of Regulation (EU) nr. 1215/2012,[9] the Supreme Court of Justice took due account of the need to interpret the notion of "labour contract" in light of EU law and jurisprudence, in order to decide whether a choice of forum clause could prevail over the Regulation provisions.[10]
- Finally, and moving to Criminal law, we highlight a decision in respect of Directive 2012/13/EU.[11] The *Tribunal da Relação de Évora* correctly identified provisions of the Directive that had not been adequately transposed into national law – *in casu,* the right to interpretation and translation within the proceedings (art. 3(1)(d)) – and recognised that they were directly applicable. Consequently, it ordered that every subsequent procedural act be declared void.[12]

These types of decisions confirm that national courts are eager to recognise the direct application of EU legal acts and can correctly identify principles and fundamental rights that underpin the legal solutions enshrined therein. This reasoning process is in accordance with the CJEU caselaw concerning the potential direct effect of directive norms, the duty of consistent interpretation of national implementing acts with directives, and the all-binding nature of regulations.

1.2

Notwithstanding the above, outside of the most harmonised areas, there are fewer examples of the autonomous application of EU principles. Their application seems unproblematic whenever they are specific to EU law – e.g. the principle of non-discrimination on grounds of nationality in cases concerning economic freedoms. A good example is a paradigmatic

6 Judgment of the *Supremo Tribunal de Justiça* of 27 November 2018, in case 46/13.9TBGLG.E1.S1. See also decision of 1 June 2017, in case 4573/17.0T8BRG.G1.S1.

7 Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time.

8 Decisions of the *Tribunal da Relação do Porto* 11 July 2018 in case 1266/15.7T8MTS.P1, and 23 May 2016 in case 1282/15.9T8MTS.P1.

9 Regulation 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

10 Decision of the *Supremo Tribunal de Justiça* of 8 May 2019 in case 27383/17.0T8LSB.L1.S1.

11 Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings.

12 Decision of the *Tribunal da Relação de Évora* of 20 December 2019 in case 55/2017.9GBLGS.E1.

internal market case in which a first instance tax court was called to rule on the Portuguese annual road tax for motor vehicles, that was discriminatory against imported vehicles. The tax court correctly identified the relevant principle, enshrined in art. 110 Treaty on the Functioning of the European Union (hereafter "TFEU"), and referred the question to the CJEU.[13]

However, apart from these clear-cut cases, there is a propensity to confine the judicial reasoning to principles of domestic law, avoiding the EU rationale and disregarding or paying little attention to EU law principles. For instance, in a case from 2018, the *Supremo Tribunal Administrativo* (hereafter "Supreme Administrative Court") had to rule on the validity of a governmental decision that confirmed the public interest in existing large oil installations owned by the claimant on the grounds that, by their capacity and location, they were of strategic importance to the oil market and the national security of oil supply. Given that the decision had consequences on price fixing and access to installations and imposed the obligation to provide specific information and secure a certain amount of oil supply, the owner of the installations considered that it amounted to a restriction on the right to conduct a business and the right to property (founded in both the Portuguese Constitution and the European Treaties), and the right to establishment (prescribed in the Treaties). The Supreme Administrative Court analysed[14] the constitutionality of the measure in detail but was much more synthetic when considering the caselaw of the CJEU in relation to these principles. Even if the outcome would not have been different if it had done otherwise, a little more consideration on the proportionality and necessity of the restriction to the freedom of establishment in light of the caselaw of the CJEU would had been desirable.

Conversely, EU principles, in particular fundamental rights enshrined in the Charter, are sometimes invoked outside the scope of the application of EU law, in order to sustain or stress considerations or arguments of domestic law. Examples of this can be found in decisions where references were made to art. 9 of the Charter in respect of evidence of the existence of a civil union,[15] or to art. 47 concerning the pleading of partiality of a judge,[16] both in cases unrelated to the application of EU law. In some cases where national

13 CJEU 17 April 2018, C-640/17, *Luís Manuel dos Santos v. Fazenda Pública,* ECLI:EU:C:2018:275. In a different matter, also concerning the Portuguese tax system, see Judgment of 13 July 2016, C-18/15, *Brisal – Auto-estradas do Litoral, SA and KBC Finance Ireland v. Fazenda Pública*, ECLI:EU:C:2016:549.

14 Decision of the *Supremo Tribunal Administrativo* of 13 December 2018 in case 077/16.7BALSB. See para. 102-109.

15 Decision of the *Supremo Tribunal de Justiça* of 22 March 2018 in case 6380/16.9T8CBR.C1.S1.

16 Decision of the *Tribunal da Relação do Porto* of 9 January 2019 in case 215/16.0T9STS-B.P1.

jurisdictions went further and decided to refer a preliminary question to the CJEU, it dismissed the request on the ground that the situation fell outside of the scope of EU law.[17]

The above cases reveal a difficulty the national courts have with identifying situations that are governed by EU law outside of the harmonised areas and with giving proper effect to general principles therein. The near all-encompassing nature of EU principles have the double – and somewhat paradoxical – effect of providing Portuguese judicial courts with a source of inspiration for decisions, while still not being able to offer them useful criteria for their practical application. Accordingly, courts tend to rely generally on rights and principles of domestic and international law, ignoring the EU equivalents.

1.3

Moving forward to the final part of the question, concerning the relevance of EU law principles in connection with situations derived entirely from the exercise of private autonomy, the national judicial prose appears even more blunted. This could be a consequence of the culture of the national judiciary to deal very cautiously with the problem of how private parties are bound by fundamental rights.

The only known example of how Portuguese courts deal with the question is a decision delivered by the *Tribunal da Relação do Porto* (a second instance judicial court) in which the effect of EU norms was considered in the context of a potential conflict with a private agreement.[18] The Court was called upon to rule on the alleged breach of a non-compete clause inserted into a contract concluded between a real-estate company and a former worker. The defendant held that the clause amounted to a restriction on his fundamental right to work, granted not only by the Portuguese Constitution but also by the Charter. The Court considered the extent to which the restriction was admissible and concluded that it was disproportionate if not accompanied by adequate financial compensation (which in its view was the case). The Court's reasoning included a reference to art. 15 of the Charter and the argument that the right prescribed therein

> *naturally follows from the free movement of persons and workers, the freedom of establishment and to provide services enshrined in the Treaty on the Functioning of the European Union, founding principles which form the common market and European citizenship.*

17 E.g. CJEU (order) 26 October 2017, C-333/17, *Caixa Económica Montepio Geral v Carlos Samuel Pimenta Marinho and Others*, ECLI:EU:C:2017:810; and CJEU (order) 23 November 2017, C-131/17, *Hélder José Cunha Martins v Fundo de Garantia Automóvel*, ECLI:EU:C:2017:902.

18 Decision of the *Tribunal da Relação do Porto* of 7 December 2018 in case 2521/16.4T8STS.P1.

Notwithstanding, the final conclusion was grounded exclusively on national law – the relevant provision of the Labour Code, interpreted in accordance with the Portuguese Constitution – probably due to the fact that all elements of the case were domestically located. This seems to confirm the analysis developed *supra* 1.2.

Question 2

2.1

For the sake of clarity, it is relevant to explain that the Portuguese Constitution (art. 8(4)) recognises the primacy of EU law in the following terms:

> *The provisions of the treaties that govern the European Union and the norms issued by its institutions in the exercise of their respective competences are applicable in Portuguese internal law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law.*

The primacy of EU law is thus not recognised in absolute terms, echoing some of the historical reservations that the Constitutional Courts of Member States had in relation to the principle developed by the CJEU – namely, the competence of the Union and the protection of the State's fundamental rights and principles. Furthermore, there is no consensus in national scholarship on what should be considered to be the "fundamental principles of a democratic state based on the rule of law" able to trump EU law, which allows for various interpretations, such as that the expression refers to the Constitution as a whole (and EU law is subject to conformity with it[19]), or to some fundamental aspects of it,[20] or that it should be taken as a mere political statement.[21] Consequently, there is a general acceptance of the primacy of EU law over Statutes and Regulations, but a strong resistance in recognising primacy over Constitutional law. This constitutional background can be traced to several judicial decisions, where an insufficient account of EU law was taken and primacy was accepted exclusively under the conditions of the aforementioned

19 J. Miranda, "Art. 8º", in J. Miranda and R. Medeiros, *Constituição Portuguesa Anotada,* Vol. 1, 2nd ed., Coimbra, Coimbra Editora, 2010, p. 172.

20 R. Medeiros, *A Constituição Portuguesa num contexto global*, Lisboa, Universidade Católica Portuguesa, 2015, p. 384 et seq.

21 D. F. Amaral, *Manual de Introdução ao Direito,* vol. I, Coimbra, Almedina, 2004, p. 567 et seq.

article of the Constitution.[22] In practice, the Portuguese courts often avoid the sensitive question of primacy by bringing together national and European sources of the same principles, thus masking the autonomy of EU Law in their construction. As one Author has put it, there is a generalised perception within Portuguese legal doctrine that the core legal values of the Portuguese Constitution are shared by the EU legal order and, therefore, it is unlikely that an EU legal act will go against the Constitution.[23]

2.2

A good example of the acceptance of the primacy of EU law can be found in a decision concerning direct taxation in which the Supreme Administrative Court[24] decided in favour of the applicant, by declaring a decision by the *Autoridade Tributária* (national tax authority) to be void because it was based on national rules that established a differential treatment between residents and non-residents regarding the taxation of capital gains on immovable property. By referring to CJEU caselaw, the Court correctly decided that the principle of non-discrimination was at the heart of free movement of capital, and hence the TFEU would prevail over national legislation.

2.3

Despite this clear-cut decision, when it comes to the potential conflict between a EU legal act and a constitutional principle, the caselaw of the CJEU is often ignored. A simple search in caselaw databases of second instance and Supreme Courts, both judicial and administrative, shows very few results with references to *Costa/ENEL*,[25] and almost none to *International Handelsgeselchaft*[26] or *Wachauf*.[27] This is remarkable and self-evident of the fact that national courts disregard the autonomy of EU law when considering potential reasons for its disapplication. These are rarely grounded in EU law itself – *eg* the

22 See Decision of the *Supremo Tribunal de Justiça* in case 27383/17.0T8LSB.L1.S1; decision of 16 January 2014 in case 6430/07.0TBBRG.S1.

23 F. P. Coutinho and N. Piçarra, "Portugal: The Impact of European Integration and the Economic Crisis on the Identity of the Constitution", in Anneli Albi and Samo Bardutzky (Eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (ebook), Berlin, Asser Press/SpringerOpen, 2019, p. 602. Similarly, J. M. Campos and J. L. M. Campos, *Manual de Direito Europeu,* 6a ed., Coimbra, Wolters Kluwer/Coimbra Editora, 2010, p. 408.

24 Decision of 20 February 2019 in case 0901/11.0BEALM 0692/17.

25 Judgment of 15 July 1964, case 6/64, *Flaminio Costa v E.N.E.L.,* ECLI:EU:C:1964:66.

26 Judgment of 17 December 1970, case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114.

27 Judgment of 13 July 1989, case 5/88, *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft*, ECLI:EU:C:1989:321.

incompatibility with fundamental rights prescribed therein – but rather exclusively in national law.

For instance, in a series of cases concerning the resolution process of a Portuguese bank, the *Tribunal da Relação de Lisboa* (a second instance judicial court) had the opportunity to deal with the question of the compatibility of the decisions taken by *Banco de Portugal* (the Portuguese Central Bank), which were based on European regulations, and the right to property – as enshrined both in the Charter and the Portuguese Constitution. The Court analysed both together, without seeking possible differences between the scope and meaning of the right protected in both instances.[28]

In a different matter, the *Tribunal da Relação do Porto* ruled on the impossibility of issuing a European Arrest Warrant (hereafter "EAW") on the grounds that it was inadequate and disproportionate[29] as it was merely intended for the purpose of obtaining a Statement of Identity and Residence. Those principles were grounded exclusively in the Portuguese Constitution, despite the obvious relevance and the consonance of the principles of the EU legal order.

Sometimes the disregard shown towards EU law is more conscious. An example can be found in a decision of the *Tribunal da Relação de Coimbra*[30] (a second instance judicial court): the claimant had been working for the defendant (a public body) for some years and was dismissed. She asked for compensation according to Labour law. The defendant argued that the labour contract was void because it had not been preceded by a competitive public selection procedure in accordance with Portuguese law, but the claimant stated that such understanding would be contrary to Directive 1999/70/CE[31] on fixed-term work. The Court agreed with the employer, by stating that that the primacy of EU law was not absolute, and that, in that particular case, the Directive was contrary to art. 47 of the Portuguese Constitution, which guarantees access to the public service, where para. 2 states that "every citizen has the right of access to the public service under equal and free conditions, as a general rule by means of a competitive selection process". The national jurisdiction concluded with a reference to art. 8(4) of the Constitution, stating that the protection of fundamental rights constitutes a reason to deny the application of EU law.

Although it was not clear from the proceedings that the Directive was applicable to the facts, the importance of this *obiter dictum* should not be underestimated. Not only is it in contrast with the CJEU caselaw on primacy and fundamental rights, but also disregards the preliminary reference procedure as a useful tool in finding an adequate balance between both principles in light of EU law itself. The suggestion that a preliminary referral to the

28 Decision of 7 February 2019 in case 19902/16.6T8LSB.L1-2.

29 Decision of 18 March 2015 in case 612/08.4GBOBR-A.P1.

30 Decision of 19-01-2018, in case 2651/17.5T8CBR.C1.

31 Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

CJEU could have been useful in the case may be found in a decision delivered by the CJEU only six months later, in response to a question submitted by a different Portuguese court on a related matter. In that case,[32] when considering employee rights in the event of transfers of undertakings, the Court had to deal with the same constitutional provision which, in the defendant's opinion, required that, in the event of a transfer and where the transferee is a municipality, the employees concerned must undergo a public competitive selection procedure. The CJEU ruled that art. 4(2) TEU on the respect for national fundamental structures (which could include the abovementioned art. 47 of the Portuguese Constitution) "cannot be interpreted so as to deprive a worker of the protection granted to her by the Union law in force in that area".[33]

The same *Tribunal da Relação de Coimbra* was later again responsible for another blatant example of the misunderstanding of the primacy principle. Criminal proceedings[34] were brought against the owner of a restaurant regarding the violation of copyright through radio broadcasting. The Court ruled in favour of the defendant based on a prior decision of the Supreme Court of Justice (a "uniformity decision"[35]), which was explicitly contrary to the interpretation given by the CJEU on the definition of "communication to the public" in the case of *Sociedade Portuguesa de Autores*.[36] The *Tribunal da Relação* took into consideration the fact that the CJEU's interpretation of the Directive would result in liability for the defendant. However, the principles that were considered – namely *nulla poena sine legem* – were rooted exclusively in the European Convention on Human Rights and in the Universal Declaration of Human Rights, without any reference whatsoever to the jurisprudence of the CJEU, namely the analogous principles developed in the *Berlusconi*[37] case.

2.4

The Constitutional Court does not add to this state of affairs, since, mostly for reasons attributable to its own competence, it does not assume a prominent, or at least differentiating, position regarding the application of EU law.

32 Judgment of 13 June 2019, C-317/18, *Cátia Correia Moreira v. Município de Portimão*, ECLI:EU:C:2019:499.
33 Para. 62.
34 Decision of 26 June 2019 in case 103/16.0GBAGN.C1.
35 The Supreme Court of Justice and the Supreme Administrative Court can deliver "uniformity decisions" in order to guarantee a minimum of uniformity on a legal question. However, they are not binding on lower courts.
36 Judgment of 14 July 2015, C-151/15, *Sociedade Portuguesa de Autores CRL contra Ministério Público e o.*, ECLI:EU:C:2015:468.
37 Judgment of 3 May 2005, C-387/02, *Berlusconi,* ECLI:EU:C:2005:270, para. 74.

While the Constitutional Court has consistently stressed that it considers itself to be a "court of a Member State", for the purpose of art. 267 TFEU, and thus subject to the obligation to refer preliminary questions to the CJEU, the fact remains that in more than 30 years of Portugal's membership to the European Union, it has never made use of this mechanism. The reasons for this are presented on a case by case basis and are generally connected to the irrelevance of EU law for the question of constitutionality / legality at hand.[38]

Actually, the fact that the Constitutional Court is not an active player in the application of EU law relates mostly to the self-perception of its own competence: the main parameter for the control of the validity of norms is the Constitution, against which any legal act (domestic, international or European) can be judged. Additionally, the Court can also rule on the conformity of domestic acts with international conventions, but not secondary legislation of International Organisations.

This weakens the European dimension of the reasoning, and the result is that, if there is a case in which a constitutionality issue is raised concerning an EU act (say, for instance, regarding compatibility with a fundamental right), it would be highly improbable that the Constitutional Court would convert the question into one relating to the EU norm's own validity *vis a vis* EU law, simply because it considers this analysis to be outside its competence.

This is not to imply that the Constitutional Court does not recognise the autonomy of EU law. Whenever urged to rule on the question of compatibility of a domestic norm with a secondary EU act, it states that it should not be treated as a matter of constitutionality (not even if indirectly considered, through the reception clause of the Constitution), and therefore it cannot exercise that control.[39] In a consistent statement, the Constitutional Court has held that

> *The "reception" of Community law involves (or involved) also the institutional mechanisms specifically aimed at ensuring its application. Now, since the Community legal order - received in these 'comprehensive' terms by Portuguese law, by means of a clause in the Constitution itself - comprises a jurisdictional body which is primarily concerned with its own protection (and not only in relation to interstate relations), and concentrating on this authority the competence to ensure uniform application and the prevalence of its norms, it would be incongruous to allow another instance of the same or similar type (as*

38 See A. G. Martins, *Manual de Direito da União Europeia,* 2nd ed., Coimbra, Almedina, 2017, p. 547.

39 E.g. decisions 682/14 of 15 October 2014 in case 201/14, and 569/16 of 19 October 2016 in case 238/16.

would be the Constitutional Court) to intervene to the same effect, and at the internal level.[40]

From the opposite point of view, the Constitutional Court acknowledged that a declaration of invalidity of a Directive by the CJEU does not, in itself, render the national norm that implemented it invalid, given the autonomy of both legal orders. Hence, the Constitutional Court went on to analyse whether the domestic norm was unconstitutional. It concluded that, given the differences between the national transposing act and the European Directive, and given that the former had already taken in account the safeguards that the CJEU considered the Directive lacked, the national norm should be upheld.[41]

Question 3

3.1

Many of the considerations in question 2 can help understand the national caselaw on the obligation for mutual recognition and mutual trust. Cases on the recognition of foreign decisions or on the execution of EAWs, for instance, are usually decided on the basis of EU secondary legislation, but subject to claim of final authority by the constitutional sovereignty clause (art. 8 para. 4 of the Portuguese Constitution).

In any case, we have no knowledge of national caselaw that refused the recognition of judicial decisions from other Member States on grounds solely related to national requirements. The implementation of the EAW Framework Decision[42] by national law adapted the new procedures to guarantees prescribed by Portuguese law, and the judicial criminal cooperation within the European Union expressly provided for in the Constitution, allows for limitations and constraints to rights that are not accepted in typical extradition procedures.[43] As a consequence, there is a general consonance between the new procedures that are based on mutual recognition and the domestic legal framework.

An example of this tendency – both cooperative but resistant to relinquishing final authority – may be found in a decision of 2018,[44] in a case where the Supreme Court of

40 Decision 569/2016 of the Constitutional Court of 19 October 2016 in case 238/16. The quoted part of the judgment was actually a quotation from J. M. Cardoso da Costa, "O Tribunal Constitucional português e o Tribunal de Justiça das Comunidades Europeias", in *Ab Uno Ad Omnes*, Coimbra, Coimbra Editora, 1998, p. 1371.

41 Decision 420/2017 of the Constitutional Court of 13 July 2017 in case 917/16.

42 Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

43 Art. 35(5) of the Portuguese Constitution.

44 Decision of 11 January 2018 in case 259/17.4YRPRT.P1.S1.

Justice was called on to rule on the execution of an EAW. The requested person had opposed the detention by arguing, *inter alia,* that it violated the principle of proportionality and ran counter to the "criminal sovereignty of the State".[45] The Supreme Court stated that:

> *only if the execution of a measure blatantly violated its legal order and the values contained therein, it would be legitimate for the executing State to refrain from executing it, based on the fundamental values that govern its society.*[46]

Although the decision accepts the duty to execute an EAW, and the exceptional circumstances for a refusal, it is not consistent with the CJEU standing on the need to internalise the fundamental values rationale within EU law.

One should not overestimate this reasoning, though, for the same Court has taken due account of EU law on the same matter on different occasions. It has contrasted the mutual recognition and mutual trust principles against the protection of fundamental rights, in particular the right to a fair hearing, in a case where an individual claimed that the executing authority had taken insufficient account of the motives of non-execution, namely relating to the fact that offences have been committed in whole or in part in the territory of the executing Member State (art. 4(7)of the EAW Framework Decision). The Court decided that the execution of an EAW was subject to fundamental rights as part of EU law, namely the principles of due process, stated in art. 47 of the Charter. This formed the main argument for it to interpret the national implementing statute as demanding that the requested person had to be reheard in relation to the possible existence of optional non-execution grounds.[47]

The guarantees included in the framework decision and the fact that its application is subject to the Charter, in addition to the constitutional explicit acceptance of EU judicial cooperation, seem enough to ward off any concerns in respect of the compatibility of the EAW regime with the Constitution.[48]

3.2

The situation does not seem problematic either when it comes to the recognition of judgments in civil matters. In a 2017 decision, the Supreme Court of Justice was called on to rule on the refusal of recognition of a judgment[49] and correctly sustained, by referring

45 Para. I.a) *EE).*
46 Para. II.b) 5.
47 Decision of the *Supremo Tribunal de Justiça* of 12 December 2018 in case 94/18.2YRPRT.S2.
48 F. P. Coutinho and N. Piçarra, 2019, p. 602, p. 609 et seq.
49 Decision of 14 March 2017 in case 736/14.9TVLSB.L1.S1.

to the caselaw of the CJEU,[50] that the grounds of refusal could be founded on the State's public policy, but should nonetheless be interpreted strictly.[51] Of course, the relevant European legal act already ascribed weight to the States' fundamental values, by accepting that the State's public policy may be a reason for the refusal to recognise a judgment.[52]

3.3

In short, the constitutional culture in which the courts operate has not yet allowed for decisions to be framed strictly within the standards of European law. Thus, whenever principles and fundamental rights are perceived to inspire European legislation in a way which is recognisable as equivalent to national standards (for instance, if secondary legislation was aimed directly at enhancing rights of specific categories of individuals, like workers, or persons subject to judicial proceedings), the Portuguese courts adopt a cooperative attitude towards the primacy of EU law. Conversely, if the national judge is called upon to rule on the compatibility of a European act in relation to a general principle of law or a fundamental right, he tends to rely on the national standards prescribed in the Constitution, without seeking an alternative standard of review offered by EU law itself.

Question 4

4.1

Art. 47 of the Charter establishes the principle of the right to an effective remedy. This principle is enshrined in art. 20 of the Portuguese Constitution.

4.2

Regarding Administrative and Fiscal law, we did not come across any pressing issues regarding either the independence of the administrative and fiscal courts (within the meaning of art. 47 of the Charter and the jurisprudence of the CJEU regarding its

50 For instance, Judgment of 2 June 1994, C-414/92, *Solo Kleinmotoren/Boch*, ECLI:EU:C:1994:221; Judgment of 11 May 2000 in case C-38/98, *Régie nationale des usines Renault SA/Maxicar SpA e Orazio Formento*, ECLI:EU:C:2000:225.

51 Para. 3 of the decision.

52 Art. 34 nr. 1 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

constitutional and legal powers[53]) or its organisation and operation, so as to minimally respect the obligation of the Portuguese State, as an EU Member State, to ensure the effective application of EU law.

Bearing in mind the rules and guarantees that structure and ground the Portuguese Democratic Rule of Law and its judicial system, in particular the administrative and fiscal jurisdiction[54] in force, it appears that the concept of the independence of the courts, which forms part of the jurisdiction (as 'judicial bodies'), is observed and fully respected, in light of what is established by the CJEU.[55]

In fact, the administrative and fiscal courts are bodies which carry out their judicial functions with full autonomy, without being subject to any hierarchical or subordinate relationships. They also do not receive orders or instructions from any source, thus being protected against external intervention or pressure, which may affect the independence of judgments and influence members decisions.

4.3

It is also our understanding that the Portuguese judicial system, by means of the legal framework, ensures the principle of effective judicial protection of the rights conferred to litigants under EU law. In particular, through the possibility of granting provisional measures until such time as the competent court has given a ruling on the conformity of national rules with EU law issued under Administrative law provisions, where the granting of such measures is necessary to ensure the full effectiveness of the judicial decision to be taken, as regards the existence of such rights (art. 130 of the Code of Procedure in the Administrative Courts (hereafter "CPTA").

4.4

However, in relation to Environmental law, some concerns have arisen in the Portuguese Academia about the judicial independence of the courts in relation to Executive Power.

53 See art. 212 of the Constitution, and arts 1 to 3 of the Statute of the Administrative and Fiscal Courts.

54 See, especially, arts 2, 8, 9, 20, 22, 202 to 205, 209, 212, 215 to 218 of the Constitution; arts 2, 4 to 8, 22, 24 to 26, and 144 of Law 62/2013, of 26.08 (Law of the Organization of the Judicial System); arts 1 to 3, and 57 of the ETAF; and arts 1, 3 to 7, of the Statutes of the Judicial Magistrates.

55 See, inter alia, Judgment of 19 June 2006 in case C-506/04, *Wilson*, ECLI:EU:C:2006:587, §§ 49, 51; Judgment of 16 February 2017 in case C-503/15, *Margarit Panicello*, ECLI:EU:C:2017:126, § 37; Judgment of 27 February 2019 in case C-64/16, *Trade Union of the Portuguese Judges*, ECLI:EU:C:2018:117, §§ 36, 37, 41 and 44.

There was a case on oil rigging in the Portuguese continental platform where two NGO's required provisional measures suspending oil rigging work. The court of first instance suspended the work by an order dated 12/08/2018. However, the Appeal Court decided, notably, that the precautionary principle (a controversial principle in doctrine and jurisprudence) is neither a principle of national law nor a principle of EU law, but a *mere political orientation*.[56] However, the Supreme Administrative Court considered that the act was not contentious, and ended up not deciding on the merits of the case. Hence, it can also be argued that there was no clear infringement of the obligation to make a reference for a preliminary ruling.

4.5

All things considered, even though we believe that the Portuguese courts generally tend to comply with the principle of effective application of EU law, it is still a subject that is sometimes seen as somewhat less important than national law. Thus, awareness of EU law matters in the Portuguese legal order should be reinforced, in particular with judges (in various instances and disputes), prosecutors and lawyers, leading to a better understanding of how EU law directly, through Regulations, and indirectly, through the transposition of Directives as well as Recommendations and Guidelines, affects Portuguese law. This is essentially a matter of public awareness of EU law and its essential role.

In Portugal, the perception regarding judicial independence is in line with the European average. However, structural independence, which is generally well preserved, does not guarantee that environmental decisions are often unfavorable to the developer, resulting in a certain government-friendly tendency that does not result from any interference or direct pressure from the public authorities, but rather from a hierarchy of values that gives priority to the initiatives that promote development and the creation of employment, potentially to the detriment of environmentalist positions, blocking and creating obstacles to development. Precautionary measures could be used more often and be more efficient.

4.6

The consequences of non-compliance with EU law, especially in the case of the civil liability of the State, have been the subject of judgments by the national courts.[57]

56 Proceedings n. 243/17.8 BELLE, p. 48.

57 See inter alia, Ac. STA of 28.05.2015 - P. 035/15; Acs. TCA Norte of 04.11.2011 - P. 00213/06.1BELLE, of 02.07.2015 - P. 00462/06.2BEPRT; Ac. TCA Sul of 21.02.2008 - P. 00481/04

Furthermore, it is also worth mentioning that, in December 2017, the Porto Court of Appeal,[58] in a case arising from a vehicle liability insurance dispute based on Directives 84/5/CEE and 90/232/CEE, expressly rejected the application of a provision of Portuguese law that required, as a precondition, the setting aside of the decision given by that court or tribunal which caused the loss or damage, when such setting aside is, in practice, impossible.[59] The Court had decided not to follow the jurisprudence from the Supreme Court of Justice, the highest Portuguese court in the judicial hierarchy, which had previously refused to render that provision inapplicable.[60]

The Court based its decision on the CJEU jurisprudence – *i.e.* the *Ferreira Brito e Silva* decision,[61] among others – stating that in cases in which there is a possible breach of EU law, the aforementioned provision of Portuguese law cannot be applicable.

Question 5

5.1

Although the Portuguese courts' usage of the reference for a preliminary ruling mechanism is improving when compared to countries with similar population sizes (e.g. the Czech Republic, Hungary, Belgium, Austria), there is still room for improvement, especially when considering the high level of knowledge of European law in Portugal.

In matters of access to the courts and effective judicial protection, for Administrative and Fiscal law, the Portuguese administrative litigation allows for a wide range of potential plaintiffs, due to the regime defined in terms of active procedural legitimacy, namely in arts 9, 55, 68, 73, and 112 of the CPTA.

In this context, and in light of the regime established in arts 9 and 55(1)(f) of the CPTA, there are no restrictions in terms of active procedural legitimacy by, inter alia, associations and foundations defending the concerned interests, in the main and injunctive proceedings for the defense of constitutionally protected values and assets such as public health, urban development, land-use planning, quality of life, cultural heritage and assets of the State, Autonomous Regions and local authorities, since this procedural legitimacy is not restricted or conditioned only to associations or foundations with a minimum number of associates or members.[62]

58 Decision of the *Tribunal da Relação do Porto*, case 2872/15.5T8PNF.P1 (14-12-2017).

59 Art. 13 (2) Law 67/2007, of 31 December.

60 Decisions of the Supreme Court of Justice, cases 9180/07.3TBBRG.G1.S1 (03-12-2009) and 2210/12.9TVLSB.L1.S1 (24-02-2015).

61 Judgment of 9 September 2015, C - 160/14, *João Filipe Ferreira da Silva e Brito*, ECLI:EU:C:2015:565

62 See, among others, Acs. STA of 17.05.2007 - P. 0107/07, of 23.11.2016 - P. No. 0456/15.

Specifically, in terms of environmental protection, the conclusion is identical to the aforementioned regime, in particular, art. 10 of Law no. 35/98, of 18.07, which regulates the procedural legitimacy of the Nongovernmental Environmental Organisations.[63]

However, in terms of access to the law, there have been issues regarding the regime and the refusal of the possibility of legal protection for legal persons operating for profit, arising from art. 7(3) of Law no. 34/2004.[64] This regime was questioned in several judicial decisions and ended up being declared unconstitutional, with general binding force, by Judgment of the Constitutional Court [TC] No. 242/2018, since the refusal of legal protection for legal persons operating for profit, without regard to their concrete economic situation, would violate art. 20(1) of the Portuguese Constitution.

5.2

Regarding standing, no concerns arose. On the contrary, in our view, Portugal has one of the most favorable systems in the European Union. It is noteworthy to mention the Portuguese regime of *actio popularis*, which, to a great extent, broadens the class of beneficiaries entitled to bring a legal challenge before a court of law, as well as the scope of interests to be protected. Adopted by the Portuguese Constitutional law, under art. 52(3) and complemented by Law 83/95 of 31 August, there are several characteristics worth highlighting in the *actio popularis* regime.

The first one is the fact that the system of *actio popularis* protects particular interests, such as public health, environment, quality of life, consumer protection, cultural heritage and public property, according to art. 1(2) of Law 83/95. These interests match the constitutional list.

In what relates to the diffuse entitlement of *actio popularis*, art. 2(1) of Law 83/95 establishes that, for the protection of the abovementioned civil and political interests, every citizen, as well as associations and foundations, have the right to participate in administrative procedures and the right of a*ctio popularis,* regardless of whether or not they have a direct interest in the matter. It should be stressed that one of the specific characteristics of the *actio popularis* regime is that it relies on the protection of diffuse interests, meaning that these are determined by the actual needs of the members of a community.

63 See, inter alia, Ac. STA, 28.01.2016 - P. 01362/12, Ac. TCA South of 11.06.2015 - P. No. 08199/11 [to that extent, the issue examined by the Court of Justice EU in 15 October 2009, case C-263/08, *Djurgården-Lilla Värtans Miljöskyddsförening*, ECLI:EU:C:2009:631 is excluded in our litigation].

64 As amended by Law no. 47/2007, of 28.08.

5.3

Regarding Competition law, Directive 2014/104/EU on private enforcement was transposed by Law 23/2018 of 5 June, effectively recognising that individuals are entitled to bring actions for damages for the harm they suffered, resulting from an infringement of competition rules. The new law sets out certain rules that seek to facilitate claims for damages before national courts, particularly by victims of cartels and abuses of dominance. In addition to the objective of ensuring full compensation for damages suffered by anti-competitive infringements, the law aims to safeguard the effectiveness of the public enforcement of Competition law, in particular by seeking to prevent leniency and transaction mechanisms from losing their appeal.

5.4

Reflecting on the above, art. 19 of Law 23/2018 broadens Law 83/95 in what concerns the class of beneficiaries entitled to bring a legal action based on the *actio popularis* regime (which is not mentioned by the Directive).

A number of specific rules are set up to facilitate the receipt of compensation, relating to: (i) active legitimacy for bringing actions (including associations and foundations that aimed at consumer protection and business associations whose members have been injured, even if the respective statutory objectives do not include the defense of Competition); (ii) various operational aspects, such as the criteria for identifying injured parties and quantifying damages, the method of distributing compensation and the entity responsible for their receipt, management and payment.

Last but not least, concerning the structure of the regime. There are two types of popular action: (i) administrative; (ii) and civil. The purpose of the *actio popularis* may be preventive, repressive or compensatory, and it is not based solely on illegality, and can be exercised against public and private persons.

Furthermore, to prevent the abuse of the right of access to justice, the courts have dismissed applications based on *actio popularis* when the judge believes that the merit of the claim is unjustified. Nevertheless, the judge can only come to this conclusion after hearing the public prosecutor and after an initial inquiry (art. 13 of Law 83/95) or when the citizen or association is representing interests that are mostly personal and not concerning the whole community.

Thus, the right of popular action is a proper instrument for the realisation of participatory democracy, insofar as the right to judicial action is actually a specific characteristic of participatory democracy.

5.5

Two very relevant cases arose from preliminary rulings requested by the *Tribunal da Relação do Faro* (a second instance judicial court), both concerning labour disputes between the Municipality of Portimão and former workers of a municipality-owned company, *Portimão Urbis,* particularly regarding the interpretation of the concept of "employee" under Directive 2001/23/EC of 12 March 2001.[65]

In October 2014, the Municipality of Portimão decided to wind up *Portimão Urbis*, where it was the sole shareholder. The activities of that undertaking were then divided among the Municipality of Portimão and another company also held by the Municipality, *EMARP*.

The first dispute was opposed by Mr. Piscarreta Ricardo, who had worked as a "tourism officer" for *Portimão Urbis* since 1999, on the basis of a contract of indefinite duration. From September 2011, he was on an unpaid leave, which had been granted by his employer.

However, after the winding up of *Portimão Urbis*, Mr. Ricardo was informed that his employment contract had come to an end, following the definitive closure of the employer company. Since he was still on unpaid leave at the time (his contract was suspended and he was not performing his duties), he had neither been transferred to another municipal-owned company nor been integrated into the municipality itself.

The Court asked the CJEU whether an employee not in active service (in particular, because his employment contract was suspended) could be considered to be included in the concept of "employee" within the meaning of Directive 2001/23 and, accordingly, whether the rights and obligations arising from the contract of employment should be considered to be transferred to the transferee (Municipality of Portimão). The CJEU responded affirmatively.

In fact, in the context of a legal dispute between Ms. Correia Moreira, former manager of the administrative management and human resources unit at *Portimão Urbis* (a municipality-owned company) and the Municipality of Portimão, over the allegedly illegal termination of Ms. Correia Moreira's contract by the Municipality, the Court determined, though with some limitations, that a person who has entered into a contract for a position of trust, within the meaning of the Portuguese legislation, with the transferor may be regarded as an "employee" and thus benefit from the protection which the Directive affords.

Consequently, in both of the abovementioned decisions[66], the Court decided to provide a broader interpretation of the concept of "employee" in light of the Directive, therefore

65 Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

66 CJEU 20 July 2017, C-416/16, *Piscarreta Ricardo*, ECLI:EU:C:2017:574; and Judgment of 13 June 2019, C-317/18, *Correia Moreira*, ECLI:EU:C:2019:499.

enlarging the group of beneficiaries capable of benefitting from the legal protection conferred by Portuguese legislation on both "employees": (i) who were not in active service; and (ii) who had a contract for a position of trust, at the moment when the contracts were been terminated by the employer.

5.6

The Constitutional Court has invoked the jurisprudence of the CJEU[67] to uphold its decision to consider Portuguese Law 34/2004 of 9 July, which denied judicial protection to profit-seeking organisations without evaluating their concrete economic situation, as partially unconstitutional, based on the violation of the right to effective judicial protection set forth in art. 47 of the Charter.[68] The Judge-Rapporteur confirmed that, based on the CJEU jurisprudence, the legal assistance granted to those companies, after a thorough evaluation of the concrete situation of the company requesting such assistance (e.g. financial situation, circumstances of the case, etc.), would not jeopardise the efficient functioning of the markets and fair competition.

However, this line of argument was not unanimous among the judges. *Indeed, judges Almeida Ribeiro, Mata-Mouros and Caupers criticised the interpretation of the EU jurisprudence made by the Judge-Rapporteur.*

Question 6

6.1

EU law, under the terms of art. 8(4) of the Portuguese Constitution, is automatically enforceable under the Portuguese legal order, which imposed a change in the paradigm of our system and legal regime, by virtue, in particular, of the principles of the primacy of and loyalty to EU law, and the interpretation in accordance with the Treaties and the legal rules of the Union.

As far as Administrative and Fiscal law are concerned, between 2014 and 2018 the Portuguese Courts made a total of 73 referrals,[69] a figure which is relevant in the context

67 CJEU 22 December 2010, C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH.*, ECLI:EU:C:2010:811.

68 Decision by the *Tribunal Constitucional*, case 242/2018.

69 08 (2014), 08 (2015), 21 (2016), 21 (2017), and 15 (2018) - cfr. 'Relatório Anual de 2018 do TJUE - Atividade Judiciária', p. 133, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-05/_ra_2018_pt.pdf.

of the total of 189 referrals that have ever been made by Portugal (p. 153 of the same report), which proves, in general, that the Portuguese courts and judges are increasingly attentive to EU law and to the compliance with the obligations of referral, as well as being committed and engaged in the dialogue between the national courts and the CJEU.

6.2

Recently, on 28 March 2019, in case C-637/17[70], the CJEU ruled on a request for a preliminary ruling under art. 267 TFEU from the Lisbon District Court, from a decision of 25 July 2017, received at the Court on 15 November 2017. This request for a preliminary ruling concerned the interpretation of arts 9(1), 10(2) to (4), 21(1) and 22 of Directive 2014/104/EU,[71] as well as art. 102 TFEU and the principles of equivalence and effectiveness. The request was made in the context of proceedings between Cogeco Communications Inc. and Sport TV Portugal SA, Controlinveste-SGPS SA and NOS-SGPS SA, concerning compensation for the damages arising from Sport TV Portugal's anticompetitive practices as a subsidiary of Controlinveste-SGPS SA and NOS-SGPS SA. The CJEU ruled that art. 22 of Directive 2014/104/EU must be interpreted as meaning that that Directive is not applicable to the dispute; and that art. 102 TFEU and the principle of effectiveness must be interpreted as precluding national legislation which, first, provides that the limitation period in respect of actions for damages is three years and starts to run from the date on which the injured party was aware of its right to compensation, even if unaware of the identity of the person liable and, secondly, does not include any possibility of suspending or interrupting that period during proceedings before the national competition authority.

Another noteworthy case was a referral from the Porto Appeal Court, in case Ac. TRP of 21 February 2018, 572/17.0T8PRT.P1. The case concerned the execution of a direct debit payment order, which presupposes the existence of a previous service agreement between the bank account holder and the respective banking institution, the burden of proof lying with the banking institution. The issue at stake was the application of Directive 2007/64/EC, thus the Appeal Court referred the case to the CJEU, as it had doubts regarding the scope of art. 2 and the definition of a service provider as set out in art. 4 (9) of the Directive, which affected whether or not the account holder could be regarded as a user of payment services for the purposes of art. 58 of the same Directive.

Another example was a referral from the Supreme Court of Justice, in case 2312/16.2T8FNC.L1.S1, of 19 December 2018. The issue was whether Portuguese courts had jurisdiction in relation to Competition law infringements of art. 102 TFEU, given that

70 CJEU 28 March 2019, C-637/17, *Cgeco Communications*, ECLI:EU:C:2019:263.

71 Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the Competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1).

there were jurisdictional contractual clauses. Since EU law was involved, it had to be interpreted using the principle of the autonomous interpretation of the laws of the Member States (the uniform application of EU law). Thus, interpretation of EU regulations could not be done in light of Portuguese normative and doctrinal concepts and/or jurisprudence. From the CJEU's jurisprudence it is clear: (i) that Competition law infringements give rise to non-contractual liability, being "civil and commercial matters" for the purpose of applying the regime of Regulation 44/2001 (which, in view of the principle of continuous interpretation, is valid for the regime contained in Regulation 1215/2012); (ii) and that non-contractual liability, in particular for breaches of Competition law, arising from conduct that, at the same time or in part, constitutes a breach of contractual obligations, must be assessed by the competent court to hear the breach; (iii) and that, in actions relating to liability for certain infringements of Competition law, the prevalence of contractual clauses conferring jurisdiction over the rule of jurisdiction in art. 5 of Regulation No 1215/2012 depends on the parties' predictability that such non-contractual liability would be covered by such clauses. The application of these criteria to the case raised doubts with the Supreme Court of Justice, which had the same questions as those raised in the referral for a preliminary ruling concerning the interpretation of rules of Regulation No 44/2001, pending at the time with the CJEU, following a referral by the French *Cour de Cassation*. The CJEU ruled on these questions in case C-595/17[72], thus the Supreme Court of Justice followed its jurisprudence, concluding that the question of international jurisdiction must be resolved in the sense that the jurisdiction clauses in the contracts at hand (under which jurisdiction was conferred to the Irish courts) should prevail over the rule of art. 7(2) of Regulation No 1215/2012, under which Portuguese courts would be competent.

In contrast, in case Ac. TRP of 22 October 2018, 19835/16.6T8LSB.P1, the Porto Appeal Court refused to refer the case to the CJEU, despite the fact that there was a plausible argument. The case revolved around the revocation of the authorization for the exercise of the activity of a Bank, which is equivalent to a declaration of insolvency. Thus, only in insolvency proceedings, within the administrative jurisdiction, and in accordance with the procedural means provided by Insolvency law, can creditors of the Bank claim their rights. The Appeal Court considered there was no need to adjudicate on the case, as the problem of the appealed judgment was not one of nullity of the judgment for failure to refer it, but a possible error of judgment.

72 CJEU 24 October 2018, C-595/17, *Apple Sales International*, ECLI:EU:C:2018:854.

Question 7

Portuguese Supreme Court of Justice judgment 120/17.2YREVR.S1, of 14.02.2019, seems to rule against the judgment of the Court in case C-327/18 PPU, of 19 September 2018, following a request for a preliminary ruling under art. 267 TFEU from the High Court (Ireland), under decision of 17 May 2018, in proceedings relating to the execution of two EAWs.

On the one hand, the CJEU considered, when referring to Brexit, that art. 50 TEU must be interpreted as meaning that the mere notification by a Member State of its intention to withdraw from the European Union in accordance with that article does not have the consequence that, in the event that that Member State issues a EAW with respect to an individual, the executing Member State must refuse to execute that EAW or postpone its execution pending clarification of the law that will be applicable in the issuing Member State after its withdrawal from the European Union. In the absence of substantial grounds to believe that the person who is the subject of that EAW is at risk of being deprived of rights recognised by the Charter and the Council Framework Decision 2002/584/JHA of 13 June 2002,[73] following the withdrawal from the European Union of the issuing Member State, the executing Member State cannot refuse to execute that EAW while the issuing Member State remains a member of the European Union.

On the other end, the Supreme Court of Justice ruled, on appeal, that there were strong grounds for the Portuguese State to refuse to surrender a criminal who had already served four years' imprisonment for money laundering to the United Kingdom, following an EAW for the criminal to serve a period of 10 years imprisonment in the UK, as a result of the failure to pay the amount of the confiscation within the established period. The Portuguese Court considered that this penalty would be inadequate, disproportionate and not absolutely required and made a clear reference to Brexit, considering that the fact that the UK is leaving the EU makes the usage of the EAW inadequate, as the criminal would be imprisoned in a non-Member State, not regulated by EU norms and unable to use EU legislation for his defense. This position clearly contradicts the previous CJEU ruling.

73 Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Framework Decision 2009/299/JHA of 26 February 2009.