FIDE 2012

Questionnaire General Topic 3

– Portugal –

The Area of Freedom, Security and Justice and the Information Society

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PART I: Harmonisation of substantive criminal law

1. Terrorism

Before the adoption of Framework Decisions 2002/475/JHA [2002] OJ L164/3 (henceforth Framework Decision 2002/475/JHA) and 2008/919/JHA [2008] OJ L330/21 (henceforth Framework Decision 2008/919/JHA), former articles 300 and 301 of the Portuguese Criminal Code[1] already foresaw the criminalisation of terrorism. The exact terms were, however, different.

The national legislation implementing Framework Decision 2002/475/JHA is Law No. 52/2003, of 22 August[2] (henceforth Law 52/2003). One of the most relevant changes brought by this law has been the enlargement of the concept of terrorist group. In fact, the crime of terrorism foreseen in the Portuguese Criminal Code concerned only actions carried out by terrorist groups aiming at the integrity or independence of the Portuguese State and the Portuguese institutions and authorities or human lives. Currently, Law 52/2003 punishes the same actions when aimed at other states. [3] Another significant change in the fight against terrorism that is directly related with the implementation of Framework Decision 2002/475/JHA is the liability of legal persons for terrorist acts committed on their behalf or by people who have a leading position within the legal person. Likewise, the Portuguese legislation has criminalised the

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[1] The Portuguese Criminal Code, enacted by Decree-Law No. 400/82, of 23 September (DR I Series, 221, of 23.09.1982), as amended. Note that "DR" stands for "*Diário da República*" (Portuguese Official Gazette) and will be used throughout the text.

[2] DR I-A Series, 193, of 22.08.2003 and amended by Rectification No. 16/2003, of 29 October (DR I-A Series, 251, of 29.10.2003), Law No. 59/2007, of 4 September (DR I Series, 170, of 04.09.2007), Law No. 25/2008, of 5 June (DR I Series, 108, of 05.06.2008), Rectification No. 41/2008, of 4 August (DR I Series, 149, of 04.08.2008) and Law No. 17/2011, of 3 May (DR I Series, 85, of 03.05.2011).

[3] In general, J. Figueiredo Dias and P. Caeiro, 'A Lei de combate ao terrorismo (Lei n.º 52/2003, de 22 de Agosto)', Vol. III *Direito Penal Económico e Europeu: Textos Doutrinários*, Eduardo Correia [et al.], Coimbra Editora, Coimbra, 2009, Vol. III, p.70 at 89.

research and development of chemical or biological weapons and the use of nuclear, chemical or biological weapons and explosives. Yet, we wonder why Law 52/2003 does not foresee the criminalisation of investigation and development of nuclear weapons or explosives. Finally, the sanctions for committing these crimes are more severe, complying with what is established in Framework Decision 2002/475/JHA.

Very recently, Law No. 17/2011, of 3 May[4] implementing Framework Decision 2008/919/JHA has introduced in the Portuguese legal system the crimes of incitation to terrorism, recruitment and training for terrorism that until now were not criminalised.[5]

In practical terms there are few concrete court cases of terrorism in Portugal. It is paramount the case of the alleged member of ETA[6] captured in Portuguese territory, but the Portuguese Supreme Court has accepted the European Arrest Warrant[7] and the person at stake was surrendered to the Spanish authorities.[8] [9].

2. Cybercrime

The implementing legislation of Framework Decision 2005/222/JHA [2005] OJ L69/67 (henceforth Framework Decision 2005/222/JHA) is Law No. 109/2009, of 15 September[10] (henceforth Law 109/2009).[11] This Law also fulfils the obligations deriving from the signature and ratification of the Council of Europe's Convention on Cybercrime[12] (henceforth, Convention on Cybercrime).

The impact of Framework Decision 2005/222/JHA was more relevant from the point of view of procedural changes than from the point of view of substantive innovation (those changes are based on the Convention on Cybercrime).

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[4] DR I Series, 85, 03.05.2011.

[5] Implementing Framework Decision 2002/475/JHA. There is also Law No. 25/2008 (DR I Series, 108, 05.06.2008) condemning the financing of terrorism and implementing Directives 2006/70/EC [2006] OJ L 214/29 and 2005/60/EC [2005] OJ L 309/15.

[6] The Bask terrorist group *Euskadi Ta Askatasuna*.

[7] Decision of the Portuguese Supreme Court of Justice (henceforth "SCJ"), 25.03.2010, Case 76/10.2YRLSB.S1, available at www.dgsi.pt.

[8] The other terrorism case also concerned alleged members of ETA. This case will be decided in Portugal.

[9] B. Oliveira Martins, 'A abordagem europeia do terrorismo no Tratado de Lisboa e o caso de Portugal', *A luta contra o terrorismo transnacional: contributos para uma reflexão*, A.P. Brandão.et al (2001), Coimbra, Almedina, p. 121 at 138.

[10] Published in the DR I Series, 179, of 15.09.2009.

[11] The previous regime, in Portuguese Criminal Code, which was clearly inspired in the Council of Europe's Recommendation No R (89) 9 on computer-related crime of 13.09.1989 (P. Verdelho, 'A Nova Lei do Cibercrime', t.58 n.320 *Scientia Ivridica* (Out.-Dez.2009), Braga, p.717 at 717), had a narrower application defining and punishing computer related crimes.

[12] Opened for signature in Budapest, on 23 November 2001. Assembleia da República's Resolution No. 88/2009, of 15 September (DR I Series, 179, of 15.09.2009) and Presidential Decree No. 91/2009, of 15 September (DR I Series, 179, of 15.09.2009).

From the point of view of substantive changes, we should call the attention to the introduction of the crime of "identity theft"[13] that despite not having direct correspondence in the Framework Decision 2005/222/JHA, finds Article 2 (illegal access to information systems) as one of its sources. There has been the introduction of new concepts, such as "information system",[14] which is more comprehensive than the previous equivalent concept and technologically more neutral, comprising traditional PCs, new communication or computer devices, smart phones, tablets, inter alia.

The procedural changes to the previous regime brought about by the implementation of European Union (henceforth "EU") law have been the most relevant ones. Among those, two of them strike us to be the ones with the greatest influence from the Framework Decision 2005/222/JHA. The first regards jurisdiction. Article 27 (1) of Law 109/2009 states that Portuguese legislation is applicable and Portuguese courts have jurisdiction whenever: the crimes are committed by one of its nationals or for the benefit of a legal person that has its head office in Portugal; the offender commits the crime when physically present on Portuguese territory, but the offence is against an information system outside Portuguese territory; the offender is not physically present in Portugal when committing a crime against an information system located on Portuguese territory. This is clearly an extension of the Portuguese general jurisdiction and applicability of Portuguese law rule, which determines the jurisdiction of Portuguese courts when the crime is committed in Portugal,[15] and is based on Article 10 of the Framework Decision. The purpose of those rules is to guarantee that cybercrimes, which by nature are not physically committed in the same place where the perpetrator is located, are effectively detected and brought to justice. If by virtue of application of these rules more than one Member State has jurisdiction over a case, Law 109/2009 foresees an innovative[16] solution based on Article 10 (4) of Framework Decision 2005/222/JHA. Article 27 (2) of Law 109/2009 allows Portuguese judicial authorities to recourse to the bodies or mechanisms established within the EU in order to facilitate cooperation between the judicial authorities of the Member States and the coordination of their action. The decision of acceptance or transmission of the case

[13] Article 6 (2) Law 109/2009.
[14] Article 2 (1) (a) Law 109/2009 ("any device or group of interconnected or related devices, one or more of which, pursuant to a program, performs automatic processing of computer data, as well as the network that supports communications between those devices computer data stored, processed, retrieved or transmitted by them for the purposes of their operation, use, protection and maintenance").
[15] Article 4 of the Portuguese Criminal Code.
[16] P. Verdelho, 'A Nova Lei do Cibercrime', t.58 n.320 *Scientia Ivridica* (Out.-Dez.2009), Braga, p.717 at 749.

should take account, sequentially, of the following elements: the territory where offences have been committed; the nationality of the perpetrator; and where the perpetrator has been found.

The second important amendment concerns international cooperation, where Law 109/2009 goes beyond the scope of Framework Decision 2005/222/JHA embracing the solutions adopted in the Cybercrime Convention, notably with respect to access to cyberdata (Article 24) and interception of communications (Article 26).

3. Gaps in legal responses to cybercrime

The main challenge with regard the fight to cybercrime is its very nature – being virtual. Although, as referred above, EU law and its Portuguese implementation law, foresee an enlarged list of criteria that may lead to establishing jurisdiction of EU courts, the authorities are very often required to deal with cybercrimes that are (by legal definition) committed in several countries, that may or may not be EU Member States. Therefore, it is not uncommon (at least looking at the Portuguese reality) that these crimes become unpunished. In fact, as many cybercrimes materialize in the access to banking systems, it is only with the cooperation of those banks that the offenders may be identified. This being said, we believe that not only more EU legislation would be welcomed, but also more international cooperation is required.

Commission proposal COM (2010) 517 final seems a good initiative. Its provisions are more comprehensive than Framework Decision 2005/222/JHA (in line with the Cybercrime Convention)[17] and it is an effective instrument for implementation in the Member states legislation (it is worth noting that many Member States have not yet ratified the Convention).

[17] Although some of the proposal's provisions go even further in the protection against cybercrime. The proposal includes the following new elements: criminalisation of the production, sale, procurement for use, import, distribution or otherwise making available of devices/tools used for committing the offences; aggravating circumstances (large scale attacks, botnets, concealing the real identity of the perpetrator and causing prejudice to the rightful identity owner); "illegal interception" is a criminal offence; improves European criminal justice cooperation by strengthening the existing structure of 24/7 contact points; definitions of criminal offences (such as access to information systems, illegal systems interference and illegal interference). See Opinion of the European Economic and Social Committee on the "Proposal for a Directive of the European Parliament and of the Council on attacks against information systems and repealing Council Framework Decision 2005/222/JHA" (OJ C 218/130, 23.07.2011).

4. Criminal organisation

Criminal association[18] is foreseen in Article 299 of the Portuguese Criminal Code and has been integrated[19] in the category of highly organized crime (Article 1 (1) (m) of the Portuguese Criminal Procedural Code[20]) defined as the conducts that, among others, integrate crimes of criminal association, trafficking in human beings, weapons and drugs, corruption and money laundering. Although not having exactly the same structure as it is established in Framework Decision 2008/841/JHA [2008] OJ L300/42 (henceforth "Framework Decision 2008/841/JHA")[21], the definition of criminal association is somewhat close to criminal organization as set forth in Article 1 (1) of Framework Decision 2008/841/JHA[22]. The penalties associated with this crime are within the imprisonment time limits foresee n in Article 3 of Framework Decision 2008/841/JHA and legal persons may be held liable for criminal association (Article 11 of the Portuguese Criminal Code). This crime has the nature of a public crime, meaning that it is not dependent upon requirement of a report or accusation by the victims.[23]

There is also special legislation concerning organised crime. Decree-Law No. 15/93, of 22 January[24] foresees the crime of criminal association for committing drug trafficking. The punishment of the crime is harsher than Article 299 of the Portuguese Criminal Code and the attenuating circumstances are more in line with Framework Decision 2008/841/JHA. It is interesting to notice that Article 24 (j) Decree-Law 15/93

[18] According to SCJ case law, criminal association is formally a different crime from the ones that are committed under that association, meaning that the offenders may be punished by both crimes. Those crimes should be offensive of "public peace" and not petty crimes. As an association a criminal association requeires the existence of a leadership. Decision of the SCJ of 27.05.2010, Case 187/07.2GAAMT.P1.S1, available at www.dgsi.pt. G. Marques da Silva, *Direito Penal Português, Parte Geral, Vol. II – Teoria do Crime* (Editorial Verbo 1998), p. 297 at p.300. 'The crimes committed when executing the criminal association's plan are autonomous from the criminal type of "criminal association", crimes that may be committed by associates or by strangers to the association'.

[19] See Decision of the SCJ of 21.07.2010, Case 227/07.4JAPRT-D.S, available at www.dgsi.pt.

[20] Decree-Law No. 78/87, of 17 February (DR I Series, No. 40, of 17.02.1987) As amended by Law No. 26/2010, of 30 August, DR I Series, No. 168, of 30/08/2010. The categorization of highly organised crime in terms of Criminal Procedure means the application of special rules, for instance regarding pre-trial detention (which is usually four months, but may be extended to one year, Article 215 of the Portuguese Criminal Procedure Code).

[21] Notably, it is not so precise in the solutions adopted. For example, like Article 4 of Framework Decision 2008/841/JHA, No. 4 of Article 299 of the Portuguese Criminal Code foresees special attenuating circumstances when the offender cooperates with the authorities. However, the concrete solution established in the Portuguese legislation seems not as comprehensive (for instance, it does not foresee as a special circumstance depriving the criminal organisation of illicit resources). In our opinion, the wording of Article 299 (4) is wide enough to embrace the same solutions, especially when bearing in mind the *Pupino* rule that domestic legislation should be interpreted in light of the EU one.

[22] Particularly after the introduction of its No. 5 by virtue of an amendment to the Portuguese Criminal Code operated by Law No. 59/2007, of 4 September (DR I Series, 170, of 04.09.2007).

[23] J. Figueiredo Dias, *As "Associações Criminosas" no Código Penal de 1982* (Coimbra Editora 1988) p. 26. – "(…) its' existence, regardless of the effective commission of any of the offences it proposed to commit, poses, by itself, a danger to public peace."

[24] DR I-A Series, 18, of 22.01.1993, as amended by ulterior legislation.

has introduced a new aggravating circumstance – the "*gang*" – which differs from the criminal organisation and is only applicable to crimes committed under the regime of this Decree-Law.[25] On a different perspective, Article 89 of Law No. 15/2001, of 5 June[26] especially criminalises criminal associations for the practice of tax crimes. Law No. 5/2002, of 11 January[27] on the measures to fight organised and economic crime, while not establishing any new crimes, provides for a special regime to gather evidence, such as the breach of professional privilege, and the rule of confiscation in favour of the State in crimes of criminal association, corruption, terrorism, money laundering, among others.[28]

5. Racism and xenophobia

The Portuguese legislation has embraced the principles of equality and non discrimination by virtue of race, ethnicity or nationality long before the need to implement EU and EC legislation. The Portuguese Constitution establishes those principles in Articles 13 and 15. Law No. 134/99, of 28 August[29] (anti-discrimination law) generally forbids discriminatory behaviour for public and private parties.[30]

The Portuguese Criminal Code foresees the crime of racial, religious and sexual discrimination, including publicly inciting to violence or hatred (Article 240).[31] These crimes are punishable with imprisonment sanctions harsher than the time limits foreseen in Framework Decision 2008/913/JHA [2008] OJ L328/55 (henceforth "Framework Decision 2008/913/JHA"). Additionally, Article 246 of the Portuguese Criminal Code establishes as an ancillary sanction the loss of electoral capacity. Legal persons may be held responsible for these crimes (Article 11 (2) of the Portuguese Criminal Code). The crimes of racial, religious or sexual discrimination are "public" crimes, which means that investigations into or prosecution of the conducts shall not be dependent on a report or an accusation made by a victim of the conduct, as it is established in Article 8 of

[25] Decision of the SCJ of 27.05.2010, Case 18/07.2GAAMT.P1.S1, available at www.dgsi.pt.
[26] DR I-A Series, 130, of 05.06.2001, as amended by ulterior legislation.
[27] DR I-A Series, 9, of 11.01.2002, as amended by ulterior legislation.
[28] Articles 7 to 12 of Law 5/2002. See Lisbon Court of Appeal (henceforth "LCA") Decision of 23.10.2007, Case 7123/2007-5, available at www.dgsi.pt
[29] Published in the DR I-A Series, 201, of 28.08.1999
[30] This law does not criminalise those offences; it rather establishes them as administrative offences.
[31] Other legislative sources foresee anti-discrimination rules: Article 19 (2) of Organic Law No.2/2003 of 22 August (Political Parties Law); Article 7 (2) (d) of Decree-Law No. 330/90 of 23 October (Publicity Code); Article 5 (1) of Decree-Law No. 442/91, of 15 November (Administrative Procedure Code), Law No. 39/2009, of 30 July (Fight against violence, racism, xenophobia and intolerance in sports events), Law No. 15/98, of 26 March (Asylum and refugees), Law No. 27/2007, of 30 July (Television Law), among others (we are referring to the integral text of such legislation as amended by ulterior legislation).

Framework Decision 2008/913/JHA. Additionally, when in presence of a racial crime, Law No. 20/96 of 6 July admits the participation of immigrant communities' associations for the defence of anti-racist interest in the criminal procedure[32].

Portuguese legislation foresees specific incrimination of genocide, crimes against humanity and war crimes[33] with imprisonment sanctions more severe than those foreseen in Framework Decision 2008/913/JHA.[34] Although racist and xenophobic motivation (Article 4 of Framework Decision 2008/913/JHA) is not considered a general aggravating circumstance, we may argue that it may be taken into consideration by the courts in the determination of the penalties (Article 71 (2) (c) of the Portuguese Criminal Code, which establishes that the concrete penalty should be determined taking into account the feelings, the end and the motivation of the commission of the crime).[35] The racist and xenophobic motivation is an aggravating circumstance for the crimes of homicide (Article 132 (2) (f) of the Portuguese Criminal Code) and physical integrity offence (Article 145 (2) of the Portuguese Criminal Code).

As a matter of practice, there are not many cases where the offenders have been convicted for crimes based on racism and xenophobia[36]. There has been one paramount case of racism commissioned by a group of "Skinheads" against citizens in the African origin community in Lisbon.[37]-[38]

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[32] The legal standing is as "assistant" and among its rights is the entitlement to seek damages (DR I-A Series, 155, of 06/07/1996).

[33] Law No. 31/2004, of 22 July (DR I-A Series, 171, of 22.07.2004). Former Article 239 of the Portuguese Criminal Code foresaw the crime of genocide.

[34] Publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes are criminalised under Article 298 of the Portuguese Criminal Code that generally criminalises the public condoning of a crime. The same can be said as to the instigation, aiding and abetting under Article 2 of Framework Decision 2008/913/JHA, since aiding and abetting are generally punished under Article 27 of the Portuguese Criminal Code.

[35] Edite Rosário, Tiago Santos, Sílvia Lima, "Discursos do racismo em Portugal: essencialismo e inferiorização nas trocas coloquiais sobre categorias limitadas", *Estudos e Documentos do Observatório da Imigração*, no 44, Março 2010, Edição do Alto Comissariado para a Imigração e Diálogo Intercultural (ACIDI, I.P.), p. 70 at 75.

[36] European Commission against racism and intolerance, Third Report on Portugal, adopted on 30 June 2006, available at, http://hudoc.ecri.coe.int/XMLEcri/ENGLISH/Cycle_03/03_CbC_eng/PRT-CbC-III-2007-4-ENG.pdf.

[37] These crimes were punished with former Article 189 (genocide), Articles 132 and 144 of the Portuguese Criminal Code. Article 240 of the Portuguese Criminal Code, as it exists now, had not yet been adopted. See Decision of the SCJ of 12.11.1997, Case 97P1203, BMJ N471 ANO1997, p. 47. There are also cases of racism against the Portuguese Roma community, usually more related to discrimination than homicide or physical offences.

[38] As a final note, the implementation of EC instruments, such as Directive 2000/43/CE, of 15 December 2000 (implemented by Law No. 99/2003, of 27 August, revoked by Law No. 7/2009, of 12 February, establishing the Labour Code) and Directive 2000/787CE, of 27 November 2000 (implemented by Law No. 18/2004 of 11 May), have meant a clear strengthening of the Portuguese legal framework in protecting citizens against racism and xenophobia in the workplace or in the access to jobs and in other areas of social life, notably access to social security, health, social benefits, education, among others.

PART II: Judicial cooperation in criminal matters via mutual recognition

6. Mutual recognition

Implementing the European Arrest Warrant (henceforth "EAW")[39]-[40] had a great impact on Portuguese legislation and practice. In first place, the EAW brought about more efficacy and celerity in the execution of the decisions given that a direct contact is established between the issuing and executing judicial authorities. Second, the rights of the person concerned have been improved with the guarantees foreseen in Framework Decision 2002/584/JHA, notably the right to benefit from an attorney and an interpreter and, most relevantly, the shorter time limits regarding the extradition process.

With regard to the Portuguese legal system, there was the need to adapt the Portuguese Constitution. As of 2001[41] the Portuguese Constitution expressly foresees the European objective of building an area of freedom, security and justice, and as of 2004[42], the European objective of definition and execution of a common external security and defence policy (Article 7 (6) of the Portuguese Constitution). Article 33 (5) is particularly relevant of the influence of the EU since it establishes that the former rules do not prejudice the application of the criminal judicial cooperation rules. This influence was not, however, unilateral. Framework Decision 2002/584/JHA embraces in its Article 5 (2) a rule that has been influenced by Portugal[43].

Generally, the main challenges regarding mutual recognition in criminal matters originate from the differences among EU Member States' legal orders that may lead to

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[39] Framework Decision No. 2002/584/JHA [2002] OJ L 190/1, henceforth "Framework Decision 2002/584/JHA".

[40] Portugal has also implemented several other EU instruments regarding mutual recognition in criminal matters, such as Framework Decision No. 2003/577/JHA [2003] OJ L 196/45 (Execution in the European Union of orders freezing property or evidence) through Law No. 25/2009, of 5 June – DR I Series, 109, of 05.06.2009); Framework Decision No. 2005/214/JHA [2005] OJ L 76/16 (Application of the principle of mutual recognition to financial penalties) through Law No. 93/2009, of 1 September – DR I Series, 169; Framework Decision 2006/783 [2006] OJ L 328/59 (Application of the principle of mutual recognition to confiscation orders) through Law No. 88/2009, of 31 August – DR I Series, 168; Council Decision 2007/845/JHA [2007] OJ L 332/103 (Cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of process form, or other property related to crime) through Order of the Minister of Justice No. 11389/2010, of 6 July – DR II Series, 134, of 13.07.2010 – and Law No. 45/2011, of 24 June – DR I Series, 120, of 24.06.2011; and Framework Decision 2003/568/JHA [2003] OJ L 192/54 (Combating corruption in the private sector) through Law No. 20/2008, of 21 April – DR I Series, 78, of 21.04.2008 – 2291. Nevertheless, other instruments have not been implemented, such as Framework Decision 2008/978/JHA [2008] OJ 350/72 (European Evidence Warrant).

[41] Constitutional Law No. 1/2001, of 12 December (DR I Series, 286, of 12.12.2001).

[42] Constitutional Law No. 1/2004, of 24 July (DR I Series, 173, of 24.07.2004). This amendment has also formally included primacy of EU law in the Portuguese Constitution (Article 8 (4) of the Portuguese Constitution).

[43] N. Piçarra, 'As revisões constitucionais em matéria de extradição. A influência da União Europeia.', *Themis* (2006) p. 217 at 218.

lack of trust and unwillingness towards cooperation between judicial authorities. For example, there is a recent case involving a Portuguese citizen (*João Vale e Azevedo*) wanted for crimes committed while being president of *Sport Lisboa e Benfica* (a Portuguese football club), who fled to London. The Portuguese Authorities have issued more than once an EAW, which already has taken three years with no conclusion.

Very relevant challenges arise from Article 2 (2) of Framework Decision 2002/584/JHA that eliminates the need for verifying the dual criminality of the committed conduct, which is the very essence of mutual trust and the acceptance of the axiological system of another member state. The application of this (essential) rule may however lead to negative consequences. First, it may foster a repressive "European criminal space". Second, it may pose practical difficulties to the judicial authorities, because when executing an EAW, the executing judicial authority is bound to the facts as defined by the issuing judicial authority as well as to the elements of the crime as foreseen in the issuing Member State legislation. This is why harmonisation of the legislations of the Member States on the minimum common procedural rules appears so important in this area[44].

The effective respect for fundamental rights is a major challenge in applying the EAW rules,[45] since nowhere in Framework Decision 2002/584/JHA is foreseen the non execution of the EAW on the grounds of disrespect for human rights. Although all the Member States of the EU are part of the European Convention of Human Rights ("ECHR") and are bound by the EU Charter of Fundamental Rights ("Charter"), it is settled case law of the ECtHR[46] that the fact of a State being a party to the ECHR does not preclude the possibility of that State violating human rights in some situations. Thus there is need to continue to monitor this respect[47].

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[44] A. Rodrigues, 'O mandado de detenção europeu – na via da construção de um sistema penal europeu: um passo ou um salto?', Vol. III *Direito Penal Económico e Europeu: Textos Doutrinários*, Eduardo Correia [et al.], Coimbra Editora, Coimbra, 2009, Vol. III, p.33 at p.43 – 45. Also European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, COM(2011) 573 final, 20.09.2011, available at http://www.europarl.europa.eu/meetdocs/2009_2014/documents/ com/com_com(2011)0573_/com_com(2011)0573_pt.pdf.

[45] V. Mitsilegas, 'The third wave of third pillar law: which direction for EU criminal justice?', *E.L. Review*, August 2009, p. 523 at 560.

[46] Among many, Kaboulov v. Ukraine (Application No. 41015/04) of 19.11.2009.

[47] A. Rodrigues, 'O mandado de detenção europeu – na via da construção de um sistema penal europeu: um passo ou um salto?', Vol. III *Direito Penal Económico e Europeu: Textos Doutrinários*, Eduardo Correia [et al.], Coimbra Editora, Coimbra, 2009, p. 33 at p. 48, is of the opinion that Framework Decision 2002/584/JHA should be interpreted as not depriving Member States from non executing the EAW when there on grounds of disrespect for human rights. See also M. Monteiro Guedes Valente, *Do Mandado de Execução Europeu*, (Almedina 2006), p. 292.

7. Limits of mutual trust in the execution of European Arrest Warrants

Law No.65/2003 of 23 August 2003[48], the domestic implementing legislation of Framework Decision 2002/584/JHA, foresees almost identical grounds for refusal to execute an EAW.

Concerning the grounds for mandatory non-execution of the EAW, Portuguese law (Article 11) establishes, in addition to the three grounds of refusal set forth by Framework Decision 2002/584/JHA, two other situations where the Portuguese judicial authority shall refuse to execute the EAW: a) in case the offence on the basis of which the EAW has been issued is punishable by death penalty or any other penalty resulting in irreversible damage to physical integrity; and b) in case the EAW issuing was based on political motives/persecution.Both situations can be portrayed as particular specifications of EU and Portuguese principles of EAW law as both refer to fundamental rights of the defendant (see whereas (12) and (13) of Framework Decision 2002/584/JHA and Articles 24, 25 and 33 (6) of the Portuguese Constitution).

With reference to the grounds for optional non-execution of the EAW, Portuguese law (Article 12) establishes precisely the same grounds as Framework Decision 2002/584/JHA.

Regarding the use of grounds for refusal by Portuguese courts, there are hardly any superior courts' rulings rejecting the execution of EAWs on the grounds of fundamental rights or proportionality concerns, mostly due to two sorts of reasons. On the one hand, Portuguese courts would seldom find the issuing Member State as not compliant with the EU's principles of law, as set out on Whereas (10) and (12). On the other, defences tend to confuse "fundamental rights" with "humanitarian reasons"[49]. The most recurrent ground for refusal to execute EAW is the territoriality clause set forth in Article 4 (6) of Framework Decision 2002/584/JHA, predominantly, and not surprisingly, in cases regarding Portuguese nationals[50].

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[48] DR I – A Series, 194, of 23.08.2003.

[49] According to the Portuguese law (and of the Framework Decision 2002/584/JHA), "serious humanitarian reasons" can merely temporarily postpone the surrender and only on exceptional circumstances. For reference, see Decision of the SCJ on Case 53/10.3YREVR.S2 (13.04.2011), Decision of the Coimbra Court of Appeal ("CCA") on Case 80/10.0YRCBR (09.06.2010) and Decision of Guimarães Court of Appeal ("GCA") on Case 11/10.8YRGMR (21.12.2010), available at www.dgsi.pt.

[50] For example, Decisions of the SCJ, Cases 50/11.1YFLSB (12.05.2011), 26/11.9YRGMR.S1 (27.04.2011) and 53/10.3YREVR.S2 (13.04.2011), available at www.dgsi.pt. It is however noteworthy that the SCJ considers that the optional grounds for refusal to execute an EAW are not a discretionary power of the courts; they rather bind the courts to make a correct interpretation of the situation and evaluation of fulfilment of the circumstances justifying such refusal. In particular, the courts must bear in mind the correct balance between the crime committed (and the legal interest protected by the

8. Gaps in the protection of fundamental rights

Gaps in the protection of fundamental rights may originate from differences in the solutions established in domestic criminal legislation, in particular with reference to defendants' rights, criminal procedure and penalties. Mutual recognition may be undermined if authorities of a Member State perceive other legislations as violating fundamental rights.

In line with whereas (12) of Framework Decision 2002/584/JAI, the case law of the Portuguese Supreme Court of Justice is clear when stating that the construction of an European area of freedom, security and justice is based on mutual trust, because there is a high respect for the fundamental rights in the EU. Therefore Member States should not be prevented from applying their constitutional rules with regard to the right to a due process, freedom of association, freedom of press and freedom of expression in the media[51]. Portuguese authors are of the opinion that the lack of respect for fundamental rights are grounds to refuse surrender under an EAW.[52] Consequently, harmonization of EU criminal law (at least its minimum standards) is paramount for the full application of mutual recognition (or mutual trust). Notwithstanding, in our opinion, the gaps in the protection of fundamental rights (when existent) may be overcome if we consider that the Member States of the EU have the highest standards of human rights protection[53] and that, after the entry into force of the Lisbon Treaty, the jurisdiction of the EU Court of Justice fully covers the previous third pillar matters.

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criminalisation of such conduct) and the human interests of the arrested person (Case 53/10.3YREVR.S2 (13.04.2011), Decision of the SCJ of 25.03.2010, Case 76/10.2YRLSB.S1). It is also interesting to notice that SCJ has stated that the Portuguese provision establishing that the execution of a two years imprisonment penalty may be suspended in certain circumstances (Article 50 of the Portuguese Criminal Code) does not merit application when a Portuguese Court opts not to execute an EAW on the basis of the Portuguese correspondent to Article 4 (6) of Framework Decision 2002/584/JHA (Article 12 (1) (g) of Law 65/2003). In fact, the Portuguese Court must not evaluate the foreign decision, but only verify whether the formal requirements are fulfilled. See Decisions of the SCJ of 27.04.2011 on Case 26/11.9YRGMR.S1, 06.01.2011 on Case 1217/10.5YRLSB.S1 and 29.09.2010 on Case 143/10.2YRCBR.S1, available at www.dgsi.pt.

[51] Decision of the SCJ of 13.04.2011, Case 53/10YREVR.S2, and Decision of the CCA of of 09.06.2010, Case 3776/09 Case 80/10.0YRCBR available at www.dgsi.pt.

[52] A. Rodrigues, 'O mandado de detenção europeu – na via da construção de um sistema penal europeu: um passo ou um salto?', Vol. III *Direito Penal Económico e Europeu: Textos Doutrinários*, Eduardo Correia [et al.], Coimbra Editora, Coimbra, 2009, p. 33 at p. 39. It is interesting to notice that in Decision of the SCJ, 25.03.2010, Case 76/10.2YRLSB.S1, available at www.dgsi.pt (referred above), the Spanish citizen accused of belonging to terrorist group ETA invoked disrespect for fundamental rights in Spain to alleged members of ETA as a ground for refusal of the EAW. The SCJ, however, did not accept this reasoning and surrendered her to the Spanish authorities.

[53] The Portuguese legislative framework (Constitution, Criminal Procedure Code and Law 65/2003), for instance, is a good example of fundamental rights effective respect. J. Costa, 'O mandado de detenção europeu e a protecção dos direitos fundamentais', *Estudos em memória do Conselheiro Luís Nunes de Almeida*, (2007), Coimbra Editora, p. 461 at 477.

9. Minimum standards on the rights of the defendant

If the EU develops an area of freedom, security and justice, it is imperative that not only the repression institutes are harmonised, but also the rights of the defendant.

Framework Decision 2002/584/JHA already establishes some common rights of the defendant. However, those are the ones that do not impair Member States legislations, i.e., right to information on the content of the EAW and right to an attorney and an interpreter (Article 11 of Framework Decision 2002/584/JHA).

The inexistence of a minimum set of rights may sometimes lead to differences in the treatment of the concerned person. This is why, in our opinion, it has been of paramount importance the approval of the Council Roadmap for strengthening procedural rights ([2009] OJ C295/1, henceforth "Council Roadmap"). With regard to Portuguese legislation, nearly every measure on defence rights outlined in the Council Roadmap is foreseen, whether directly or as a regular procedure, under Portuguese jurisdiction[54]. Besides the constitutional general provision[55], Portuguese Criminal Procedure Code foresees explicitly Measures A[56], B[57] and D[58]. Concerning Measure C, the right to legal advice is stated by Law No. 34/2004 of 29 July 2009 and Law No.71/2005 of 17 March 2005 and by Order No.10/2008 of 3 January 2007 and Order no.1085-A/2004 of 31 August 2004. Law 65/2003 on the EAW also foresees the right to an attorney. Measure E is not directly foreseen by the Portuguese legislation but is an everyday right on national criminal procedure. Regarding Measure F, Portuguese law foresees different time periods for pre-trial detention according to the circumstances and enforcement measures of the case[59], therefore making "the time that a person can spend in detention before being tried in court and during the court proceedings" fluctuate considerably even in the same Member State (and not only among Member States).[60]

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[54] Even though Portuguese legal system is not a Common Law legal system, courts' rulings play a key role establishing defendants' procedural rights and judicial authorities' *praxis*.
[55] Article 32 of the Portuguese Constitution (Guarantees in criminal proceedings).
[56] Articles 92 and 93 Portuguese Criminal Procedure Code.
[57] Articles 61 (1.c, d, and g) and 194 (5) Portuguese Criminal Procedure Code.
[58] Articles 194 (8) and 260 Portuguese Criminal Procedure Code.
[59] Articles 254 (1), 201, 215 (3) and (8), 218 (3) Portuguese Criminal Procedure Code and Article 30 of Law 65/2003.
[60] The European Commission has released its Green Paper on Pre-Trial Detention in 14.06.2011, available at http://ec.europa.eu/justice/policies/criminal/procedural/docs/com_2011_327_en.pdf. National legislation already addresses the majority of the concerns on the matter, such as **non-custodial alternatives to pre-trial detention** [articles 27 (3) and 28 of the Portuguese Constitution, articles 196 to 201 and articles 193, 202, 204, 212 to 217 and 312 (3) of the Portuguese Criminal Procedure Code], **post trial alternative measures to custody** (articles 41 to 69 of the Portuguese Criminal Code), **statutory maximum length of detention** [articles 193, 202 (1), 204, 212 and 213 of the Portuguese Criminal

Finally, even though Portugal has not formally[61] brought into force the legislation to implement the Directive on the right to interpretation and translation in criminal proceedings (Directive 2010/64/EU [2010] OJ L280/1), it poses little challenge for the Portuguese legal system as the right to interpretation and translation in criminal proceedings already exists under Portuguese law (Articles 92 and 93 of the Portuguese Criminal Procedure Code[62] and Article 17 of Law 65/2003). However, there is no proper official "*procedure or mechanism (...) to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter*"[63]. Judicial authorities' effort is mostly intuitive, laying on objective and subjective criteria to verify the need for assistance, such as nationality/place of birth or Q&A method. Nevertheless, the procedural rights outlined in the Directive 2010/64/EU [2010] OJ L280/1 are granted to any suspected or accused person who is not able to speak or understand the Portuguese language[64].

PART III: Data collection and exchange and data protection

10. EC data retention Directive

The Portuguese Constitution foresees, as of its very original version, that electronic communications privacy may be limited in criminal procedure, given that the limitation is expressly established by law (Article 34 (4) of the Portuguese Constitution).[65] Intrusion in the electronic communications must, nevertheless, respect the rules applicable to the restriction of rights, freedoms and guarantees.[66]

Procedure Code], **special regulations for juveniles and young adults** [Law No. 166/99, of 14 September (DR I-A Series, 215, of 14.09.1999), Decree-Law No. 401/82, of 23 September (DR I Series, 1st supplement, 221, of 23.09.1982)] or **detention conditions** [Law No. 115/2009, of 12 October (DR I Series, 197, of 12.10.2009) and Decree-Law No. 51/2011, of 11 April (DR I Series, 71, 11.04.2011)].

[61] That is to say, by an implementing Law, Regulation or Order.

[62] Complemented by Articles 120 (2.c), 153 and 162.

[63] Article 2 (4) and (5), of the Directive 2010/64/EU [2010] OJ L280/1

[64] For reference: SCJ on Cases 25/10.8MAVRS-B.S1 (09.02.2011), 490/00.1JAPTM-A.S1 (10.03.2010), 617/09.8YFLSB (12.11.2009) and 06P4179 (09.11.2006); Porto Court of Appeal ("PCA") on Cases 0817737 (14.10.2009) and 0513062 (08.06.2005); CCA on Case 146/05.9GCVIS.C1 (06.12.2006); ECA on Cases 739/08-1 (29.04.2008), 331/08-1 (01.04.2008), where the right to translation was derived not only from the Criminal Procedure Code, but also from Article (3) (a) ECHT, and 848/07-1 (26.06.2007). All available at www.dgsi.pt.

[65] The limitation of the fundamental right to privacy, especially electronic communications secrecy has long been established by the ECtHR when interpreting Article 8 ECHR (see decision of 02.08.1984, Case *Malone v. UK*, available at www.echr.coe.int).

[66] Article 18 (2) and (3) of the Portuguese Constitution: provided for by law, necessity and proportionality, have general and abstract application, non retroactive and respect the essence of those rights. See Decision of the Constitutional Court 28.09.2009 on Case 4/09, available at www.tribunalconstitucional.pt.

The Portuguese Criminal Procedure Code provides for communications interception (telephone tapping, as well as monitoring of other forms of data transmission, such as electronic mail), as a means to obtain evidence in case of certain specific crimes[67] (Articles 187 to 189 of the Portuguese Criminal Procedure Code). These Articles have been reviewed in 2007[68] in order to extend their application to traffic and location, regarding the data object of the interception. More specifically as to electronic communications, Article 4 (1) of Law No. 41/2004 of 18 August[69], implementing Directive 2002/58/EC[70]-[71] establishes the principle of inviolability of electronic communications.

EC data retention Directive domestic implementing legislation, Law No. 32/2008, of 17 July (henceforth Law 32/2008)[72], brought about some clarifications that have revealed better definition of the obligations of the electronic communications companies, further protection of citizens personal data and right to privacy and last but not least more certainty in having access to the communications data when fighting against serious crimes. With regard to the first aspect, this clarification has been felt especially on the provision for precise categories of data to retain (Article 4 of Law 32/2008, which is a faithful reproduction of Article 5 of the EC Retention Data Directive). The establishment of time periods of retention (Article 6 of Law 32/2008) and the rules regarding protection and destruction of such data meant an important improvement with regard to every aspect referred. First, those rules ease the electronic communications providers' task.[73] Second, from the point of view of privacy protection, although the data retained under the Criminal Procedure Code have always been subject to confidentiality and professional privilege, before the implementing legislation the rules existed only with regard the data that was actually requested for a criminal

[67] Offence punishable by a maximum term of imprisonment of at least three years, trafficking in narcotic drugs, trafficking in weapons and unlawful carrying of weapons, smuggling, slander, threat, coercion, wanton of privacy and disturbance of peace and quiet, when made by telephone, criminal threat or abuse and simulation of danger signs and escape, when the defendant had been convicted of any crimes previously mentioned. These measures must be reviewed by an examining judge before being executed. It is noteworthy that although EC retention Directive foresees another set of crimes, Portuguese case law has stated that Article 189 (2) has not been revoked. In fact, they are applicable to different situations. See Decision of the CCA of 09.12.2009 on Case 135/09.4JAAVR-A.C1, available at www.dgsi.pt.
[68] Law No. 48/2007, of 29 August (DR I Series166 of 29.08.2009)
[69] DR I Series 194 of 18.08.2004.
[70] OJ [2002] L 201/37, 31.7.2002
[71] Subsequently amended by Directive 2006/24/EC, OJ [2006] L 105/54 and Directive 2009/136/EC, OJ [2009] L 337/11, that has been implemented into Portuguese legislation by Law No. 51/2011, of 13 September, DR I Series, 176, 13.09.2011.
[72] DR I Series, No. 137, of 17.07.2008.
[73] There were quite a lot of doubts in interpretation. See Opinion of the Portuguese General Attorney's Office No. 79/2008, of 07.05.2009 (DR II Series, 192 of 02.10.2009).

investigation. Now, Law 32/2008 not only establishes that the retention of data requested for a criminal investigation is still under the scrutiny of a judge (who will determine whether such data shall be retained or destroyed)[74], but it also establishes that the remaining data, as foreseen in Article 4, must be retained for one year from the date of the communication (Article 6 of Law 32/2008). Third, this means that law enforcement authorities have more means to prosecute serious crime.[75]

Finally, considering the intrusive nature of communications' data on privacy rights and personal data[76], the main challenge in data retention sphere is to ensure all players (judicial authorities but, in particular, providers of publicly available electronic communications services or of public communications networks) are, in fact, complying with the law.[77]-[78]

11. EU measures facilitating the exchange of personal data

The main challenges posed to fundamental rights by the mechanisms of data sharing arise from Law 74/2009[79] (exchange of criminal data and information between law enforcement authorities) and Law 5/2008[80] (creation of a DNA profile data base)[81]

[74] Article 7 (1) (e) and (f) of Law 32/2008.

[75] Terrorism, violent crimes, highly organised crime , kidnapping, hostage taking, crimes against cultural identity personal integrity, crimes against national security, counterfeiting currency and equivalent securities, and crimes covered by conventions on safety of air and sea navigation (Article 2 (1)(g) of Law 32/2008). Some commentators have argued that this solution may have gone too far endangering the right to privacy (as enshrined in Article 8 of the ECHR and Article 7 of the Charter) and the right to data protection (as enshrined in Article 8 of the Charter). See P. Ferreira, 'A retenção de dados pessoais nas comunicações electrónicas' Vol. 2 *Estudos Comemorativos dos 10 anos da Universidade Nova de Lisboa (2008)*, Almedina, p. 417-447.

[76] Articles 26, 32 (8), 34 (1) (4) and 35 of the Portuguese Constitution. See Decision of the Constitutional Court 05.09.2003 on Case 594/03, available at www.tribunalconstitucional.pt and Decision of the SCJ 03.03.2010, on Case 886/07.8PSLSB.L1.S1, available at www.dgsi.pt.

[77] Regarding this aspect it is interesting to mention a recent case occurring in Portugal that shows how, in practice electronic communications providers are applying the law. In the 2011 summer news has been released that a certain journalist's mobile phone had been illegally tapped. The Portuguese National Data Protection Authority ("NDPA") has analysed the treatment, retention and procedures of the two electronic communications providers with which the journalist was a client. NDPA has released the first of its reports regarding one of the two providers and concluded that the technical and organizational security measures taken by such provider were adequate to grant protection of personal data (see NDPC Decision 951/2011, of 26.11.2011, available at http://www.cnpd.pt/bin/relatorios/outros/Del%20951_2011%20(TMN).pdf.

[78] For a comprehensive understanding on how the Portuguese legislation addresses these matters see the Decision of the PCA 07.07.2010 on Case 1978/09.4JAPRT-B.P1 and the Decision of the CCA 06.04.2011 on Case 111/10.4JALRA-A.C1, available at www.dgsi.pt.

[79] Published in the DR I Series, 155, of 12.08.2009. Portugal has also implemented measures on the pure domestic context (Law No.73/2009 of 12 July, published in the DR I Series, 155, of 12.08.2009,, which foresees exchange of personal data between Portuguese police and judicial authorities).

[80] Published in the DR I Series, 30, of 12.02.2008.

[81] Note that there is no universal DNA profile database.

and are mainly related with privacy and data protection[82] (please refer to answer to Question 13).[83] Law 74/2009, implementing Framework Decision 2006/960/JAI, poses the risk of undermining the protection of these rights in case the personal data is transferred to a Member State where the data protection does not include crime investigation.[84]

Law 5/2008 has been enacted in a clever balance between security and freedom. There is one DNA profile database (composed of six files) limited to certain purposes and to certain group of citizens[85] that is based on two grounds: consent or judicial decision weighting the principle of minimum intervention in fundamental rights (as per Article 18 (2) of the Portuguese Constitution, Article 52 (1) of the Charter and Article 18 of the ECHR).[86]

Portugal is generally complying with EU measures facilitating the exchange of personal data between national police and judicial authorities[87] and has been passing laws in order to be able fulfil its European obligations[88]. Portugal also implemented, and has been constantly modernising, legislation on criminal records[89]. Even so, there is still no implementing legislation of the exchange of criminal records and the European

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[82] As well as the right to moral and physical integrity (Article 25 of the Portuguese Constitution, Article 3 of the Charter, as well as Article 10 of Law 5/2008).

[83] Another fundamental right that may be at stake is the presumption of innocence (Article 32 (2) of the Portuguese Constitution, Article 48 (1) of the Charter and Article 6 (2) ECHR). This is especially linked with Law 5/2008 (DNA profile database). This is why Portuguese law does not have a file on accused people, only on actually convicted ones (Article 15 of Law 5/2008) or at his/hers request or by a court order, during the criminal proceedings (Article 8 of Law 5/2008). See H. Moniz, 'A base de dados de perfis de ADN para fins de identificação civil e criminal e a cooperação transfronteiras em matéria de transferência de perfis de ADN', No. 120 *Revista do Ministério Público* (Oct/Dec 2009), p. 145 at p.155.

[84] See Opinion of the NDPA 1/2009, of 09.01.2009, available at www.cnpd.pt. This is not the case in Portugal, which data protection law (Law 67/98) is applicable to criminal investigation (Article 4 (7) of Law 67/98).

[85] The database may only include information regarding individual identification, gender and common physical characteristics, such as colour of the eyes, hair etc, but never genetic characteristics associated to health conditions (Article 7 of Law 67/98, Article 12 (1) of Law 5/2008 and Article 11 of Deliberation 3191/2008). I. Ferreira Leite, 'A nova base de dados de perfis de ADN', Year I No. 5 *Boletim Informativo da Faculdade de Direito da Universidade de Lisboa* (Oct/Nov 2009).

[86] Individual consent is required to the following files: volunteers, reference (including relatives of victims and missing people) and DNA professionals. Judicial decision is required for the following files: convicted people and crime scenes (both for civil and for criminal purposes, which constitute different files). The base is built not only for criminal but also for civil purposes (Article 4 of Law 5/2008).

[87] E.g., Framework Decision 2006/960/JHA [2006] OJ L 386/89. However, Portugal has not complied neither with Framework Decision 2005/876/JHA [2005] OJ L 322/33 (repealed by Framework Decision 2009/315/JHA [2009] OJ L 93/23), nor with Framework Decision 2008/615/JHA [2008] OJ L 210/1 (except with the previsions concerning DNA profiles – Council Decision 2011/472/EU [2011], OJ L 195/71).

[88] Law No.12/2005 of 26 January, DR I-A Series, 18, of 26.01.2005, on genetic and health personal information.

[89] Law No.57/98 of 18 August (DR I-A Series, 189, of 18.08.1998), Decree-Law No. 62/99 of 2 March (DR I-A, 51, of 02.03.199) and Decree-Law No. 381/98 of 27 November (DR I-A Series, 275, of 27.11.1998).

Criminal Records Information System (ECRIS). Finally, regarding the Prüm Decision[90] it is worth to note Council Decision of 19 July 2011[91] on the launch of automated data exchange with regard to DNA data in Portugal stating that Portugal has fully implemented the general provisions on data protection on Chapter 6 of Decision 2008/615/JHA and is therefore entitled to exchange DNA data for that purpose.

12. Passenger name records (PNR)

The EU-US PNR Agreement poses some doubts as to its compliance with the minimum standards of protection of privacy and data established in Directive 95/46/EC and Framework Decision 2008/977/JHA[92] and the USA have not signed the Convention 108.[93]- [94] Notably, there seems to be some lack of procedural safeguards, because there is no independent authority[95] that effectively controls the way such data is processed.

The material provisions also admit variable interpretations. For instance, paragraph III of the DHS letter declares that there will not be access to sensitive data (personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, and data concerning the health or sex life of the individual). However, the same paragraph continues stating that access to those data is possible in case of "exceptional circumstances" without limiting precisely those circumstances.[96] This conclusion is even more striking if we take into account that the data collected regards anyone – innocent, suspect, accused or actually convicted.[97] Also, the data retention period appears to be very long (paragraph VII of the DHS letter), especially for people who are not subject of an investigation.[98] Finally we should

[90] Portugal has yet not signed the Prüm Treaty, but has asked for accession in 2006 and has an observer status since then.
[91] Council Decision 2011/472/EU, OJ [2011] L 195/71, 27.7.2011.
[92] The protection includes giving individuals the right of access, the right of rectification, erasure and blocking, as well as the right to compensation and judicial redress.
[93] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (STE No.108), of the Council of Europe, 28.I.1981.
[94] But also non discrimination or non discriminatory profiling as in Article 13 of the Portuguese Constitution, Article 14 ECHR and Article 21 of the Charter. See Opinion of the European Union Agency for Fundamental Rights of 14.06.2011 on the Proposal for a Directive on the use of PNR data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, available at http://www.statewatch.org/news/2011/jun/eu-pnr-fra-opinion.pdf.
[95] As interpreted by the ECJ on its decision of 09.03.2010, Case C-518/07, *Commission v. Germany*, Col. p. 1885, para. 56.
[96] It rather gives a broad definition "the life of a data subject or of others could be imperilled or seriously impaired".
[97] This may be contrary to ECtHR case law. See *S. & Marper v UK*, 04.12.2008, (Case 30562/04 [2008] ECHR 1581, of 4 December 2008).
[98] There are other EU PNRs that have shorter retention periods (EU-Canada PNR of 2005, Council Decision of 18 July 2005 on the conclusion of an Agreement between the European Community and the Government of Canada on the processing of API/PNR data, and EU-Australia PNR of 2008, Agreement

question whether these restrictions comply with the established rules on restriction of fundamental rights.[99]

The Proposal for a Directive on the use of PNR data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime (henceforth the "Proposal") confers more guarantees as to privacy and data protection.[100]-[101]

13. Protection of right to private life and right to data protection

Although Portugal has not yet implemented the Framework Decision on data protection (Framework Decision 2008/977/JHA [2008] OJ L350/60), the Portuguese National Data Protection Authority (NDPA) has proposed equivalent solutions several times in its opinions as an adequate response in ensuring the right to private life and the right to data protection.[102]

As to the scope of application of the Framework Decision on Data Protection, it is our opinion that the enforcement of data protection within the EU would gain if such Framework decision would apply to the processing operation of law enforcement authorities in general and not only to cross-border transfers of personal data.[103] This may be expected now that the Lisbon Treaty has created an obligation on the Council to adopt a decision laying down the rules relating to the protection of individuals with

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between the European Union and Australia on the processing and transfer of European Union sourced passenger name record (PNR) data by air carriers to the Australian customs service; OJ L213 of 08/08/2008).

[99] Article 52 of the Charter. Article 18 of the Portuguese Constitution, Article 8 (2) ECHR.

[100] See as example: the scope of application is limited as well as the use that law enforcement authorities may make of the data (Article 1 of the Proposal); the Proposal tries to restrict the possibility of innocent citizens seeing their data processed (Article 9 of the Proposal, it is worth noting that the retention period is 5 years, after which data will be deleted. Moreover, data must be anonymised after a period of 30 days. See Explanatory memorandum of the Proposal); the collection and use of sensitive data is prohibited (Article 11 (2) of the Proposal); an independent data protection authority will be responsible for advising and monitoring how PNR data are processed (Article 12 of the Proposal); among others (for instance Article 11 (1) of the Proposal). For an analysis of the principle of non discrimination, see Opinion of the European Union Agency for Fundamental Rights on the Proposal for a Directive on the use of Passenger Name Record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime (COM(2011) 32 final), of 14 June 2011, available on www.fra.europa.eu.

[101] In this chapter it is worth noting that Portugal has recently ratified a bilateral agreement Portugal-US on the transfer of biometric and genetic data (signed on 30.06.2009, aproved by the Assembleia Parliament on 31.08.2011 and by the President on 17.10.2011), available at http://www.dhs.gov/xlibrary/assets/dhs_portugal_crimeagreement.pdf. Although coming into force, this agreement was squashed by the NDPA in Opinion 10/2010 stating that the agreement did not grant an adequate standard of protection.

[102] NDPA Opinions No.76/2009, 62/2010, 66/2010, 39/2011 and 53/2011, available on www.cnpd.pt. Notably, establishment of minimum standards (Article 1 (5) of the Framework Decision) and limited purpose of the data processing (Article 1 (2) of the Framework Decision).

[103] See M. V.A. Cunha, *Privacy, Security and the Council Framework Decision 2008/977/JHA*, 26.08.2010, available at SSRN, p. 24.

regard to the processing of personal data and the rules relating to the free-movement of such data (Article 39 TEU).

Data protection legislation is widely used by domestic courts revealing a great concern of the subject. [104] Courts also deal with matters falling under the former third pillar applying Law No.67/98 of 26 October[105] (Data Protection Law, implementing Directive 95/46/EC).[106]

Finally as to the existence of gaps in the protection of fundamental rights, it is noteworthy that on the one hand, the right balance between fight against crime and the right to privacy and data protection is difficult to attain and the views are very divergent.[107] On the other hand, EU has not yet reached complete harmonisation in order to establish an adequate minimum protection standard.[108]-[109] Since there are different legislations there will be different criteria and practical measures in its application. In conclusion, the strengthening of European law enforcement authorities' powers in criminal matters should be accompanied by equal strengthening of fundamental rights.

PART IV: Constitutional aspects

14. Principles of EU law (in particular indirect effect in light of *Pupino*)

Domestic courts make use of general principles of law, notably EU law, when interpreting national implementing legislation. Specifically regarding *Pupino*, we may call attention to the Guimarães Appeal Court decision of 09.112009 that dealt with a similar situation and invoked the *Pupino* case[110], but especially to the decision of Évora

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[104] Decision of the Constitutional Court's on Cases 4/2009 and 671/07, available at www.tribunalconstitucional.pt. Decision of the SCJ on Cases Proc. n.º886/07.8PSLSB.L1.S1 (03.03.2010), available at www.dgsi.pt.

[105] DR I-A Series, 247, of 26.10.1998, as amended by ulterior legislation.

[106] OJ L 281/31. See, for example Decision of the CCA of 09.12.2009 on Case 135/09.4JAAVR-A.C1, available at www.dgsi.pt.

[107] See the Decision of the Constitutional Court on Case 671/07 (02.04.2008), Decision of the PCA on Case 125/08.4GAPRD.P1 (22.09.2010), Decision of the LCA on Case 10210/2008-9 (28.05.2009).

[108] See, for instance, European Data Protection Authority's opinion 2011/C 279/01 (OJ [2011] C270/1).

[109] There is also a concern about the efficiency of control in a system of decentralized control by the several national data protection authorities and the introduction of obligations on the private actors (such as electronic communications providers and air companies). See Franziska Boehm, *Confusing fundamental rights protection in Europe: Loopholes in Europe's fundamental rights protection exemplified on European data protection rules*, Law Working Paper series No, 2009-01, University of Luxembourg, available at www.ssrn.com.

[110] GCA of 09.11.2009 on Case 371/07.8TAFAF.G1, available at www.dgsi.pt. Despite Portuguese legislation establishing the possibility for minors to be heard in special circumstances (outside the court, case where the witness statements are fully documented by the use of sound and audiovisual equipment), the defendant invoked criminal procedural principles (the evidence shall be produced in front of a judge)

Appeal Court of 03.07.2007 clearly stating the principle of conforming interpretation when dealing with the interpretation of Law 65/2003 (implementing Framework Decision 2002/584/JHA).[111]

It is also important to notice that the 2004 amendment to the Portuguese Constitution[112] has formally established that EU Treaties and secondary legislation are applicable in the domestic legal order as foreseen by EU law, with respect for the fundamental principles of a democratic State (Article 8 (4) of the Portuguese Constitution).

15. Lisbon Treaty

The importance of the Lisbon Treaty regarding the protection of fundamental rights is paramount. First, the Lisbon Treaty has given (without any doubt) binding effect to the EU Charter of Fundamental Rights.[113] This has contributed to the establishment of a minimum standard in fundamental rights (although with the limitations in Article 51 of the Charter) and therefore to enhancing mutual trust between Member States and the development of the EU as an ASFJ. Second, it has given the EU competence to legislate in criminal law. Hence, decision making on criminal matters is now subject to the ordinary legislative procedure (notably, qualified majority voting). Third, the Lisbon Treaty has removed ECJ's jurisdiction limitations over EU criminal cooperation law. The Commission has now the power to bring infringement proceedings against Member States before the ECJ in this policy area.

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to justify the non acceptance of the witness's statement. Among other reasons, the GCA remembered the *Pupino* case to reject the defendant's pretensions.

[111] ECA of 03.07.2007 on Case 1317/07-1, available at www.dgsi.pt. See also, ECA of 19.08.2010 on Case 118/10.1YREVR, available at www.dgsi.pt.

[112] Constitutional Law No. 1/2004, of 24 July (DR I-A Series, 173, of 24.07.2004).

[113] Article 6 (1) of the Treaty on the European Union.