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EDITIONS DE L'UNIVERSITE DE BRUXELLES

The future of mutual recognition in criminal matters in the European Union / L'avenir de la reconnaissance mutuelle en matière pénale dans l'Union européenne

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Cordial e grata homenagem de

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Foreword

This book is based on a study entitled *Analysis of the future of mutual recognition in criminal matters in the European Union*. The Institute for European Studies of the Université Libre de Bruxelles (ULB) was selected by the European Commission * to carry out the study and the research was done with the support of the academic network ECLAN (*European Criminal Law Academic Network*, www.eclan.eu) throughout the year 2008. Updates to contributions to this volume were made up until March 2009.

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The editors would like to express their gratitude to all those who were involved in the preparation of the study and, in particular, to the national *rapporteurs* who did a considerable amount of work and gave detailed responses to specific questions and requests for additional information. The editors would also like to thank the numerous experts and practitioners who, without exception, contributed to the project with great patience and openness. Special thanks are due to Julian Hale for his help in proofreading the English for some chapters of this book. Everybody's expertise, assistance and enthusiasm were gratefully received.

* Directorate-General for Justice, Freedom and Security, tender n° JLS/D3/2007/03. The total amount allocated for the study was € 231,250.77. The views expressed in this study cannot be taken to represent the official position of the European Commission.

5. Conclusions

The purpose of this chapter was to present a Polish perspective on the principle of mutual recognition and the concept of mutual trust. The emerging picture is mixed. The European Arrest Warrant is arguably up and running, functioning rather smoothly. Despite the constitutional drama and with a few high profile Supreme Court cases the EAW machinery is serving its purpose. Yet, those major challenges encapsulate numerous legal phenomena which will clearly come back in the future case law. They also show the potential limits of mutual recognition. The overuse of the EAW is another issue that will have to be addressed in not too distant future. Following the judgment of the Constitutional Tribunal in case Kp 3/08 Poland is likely to accept the jurisdiction of the European Court of Justice pursuant to Art. 35 EU[99]. Thus one may expect that at some point Polish courts will submit references for preliminary rulings on police and judicial cooperation in criminal matters[100]. The question remains as to the extent the Polish authorities are ready to employ the remaining mutual recognition tools. The lack of practice in relation to the freezing of property and evidence legislation is quite discouraging. It triggers serious questions as to the contents of the measures, or even, the need for such a legal instrument. This also touches the heart of the matter – the role of mutual recognition in this sensitive area of integration. Arguably, "from EU with trust" was not the best option to be followed. Mutual trust is limited when imposed by political circles, it is far more effective when coming naturally from practitioners. Also, mutual recognition is not unlimited. This is not only in the case of police and judicial cooperation in criminal matters but it is a wider phenomenon known and acknowledged in all other areas of legal integration within the European Union/European Communities. Finally, the principle of mutual recognition is not a self sustained concept, it has to go together with a degree of harmonization. This, as proved in this contribution, may be inevitable in the coming years.

[99] Polish Constitutional Tribunal, 18 February 2009, Judgment Kp 3/08 re Recognition of Jurisdiction of the European Court of Justice under Art. 35 EU, not yet reported (on file with the author).

[100] As already noted, the lack of jurisdiction to refer has been already acknowledged by the Supreme Court in case I KZP 21/06.

The Portuguese experience of mutual recognition in criminal matters: five years of European Arrest Warrant

Pedro CAEIRO and Sónia FIDALGO

1. Introduction

The purpose of this study is to assess the Portuguese experience of mutual recognition in criminal matters, which consists of the *implementation* and *application* of the rules on the European Arrest Warrant (EAW). The authors do not intend to provide an exhaustive analysis of the EAW in the Portuguese legal system, but rather to select a few critical issues that, in their view, might be of general interest for the comprehension of the EAW as a mechanism of cooperation springing from mutual recognition[1].

The first part of this article deals with the *legislative level*, describing the implementation of the Framework Decision on the European Arrest Warrant (FD

[1] The Portuguese report (S. FIDALGO, "Analysis of the future of mutual recognition in criminal matters in the European Union – Portuguese Report", 2008) for the project that gave origin to this book included an assessment of the observations made by a pool of policymakers and practitioners who kindly answered a "questionnaire" drafted by the coordinators. Some of their thoughts and remarks have been embodied in both parts of this study.

Following explicit instructions from the editors, interviewees are not quoted individually throughout the text; the reader will rather find the mention "some interviewees".

The authors are most grateful to Drs. Carlos Almeida, José Manuel Cruz Bucho, Jorge Costa, Francisca Van Dunem, Joana Ferreira, Marcos Gonçalves, Patrícia Lisa, Teresa Alves Martins, Ricardo Bragança de Matos, José Luís Lopes da Mota, Delfim Neves, João Arsénio de Oliveira, Inês Horta Pinto, Vânia Costa Ramos, Fátima Russo and Euclides Dâmaso Simões for their time and for sharing their knowledge and insights. Without their help, this study would have been considerably poorer.

EAW)[2] and evaluating the compliance of the current national regime with European law from a theoretical point of view.

The second part deals with the *judicial level*, reviewing some decisions of the Portuguese courts concerning the EAW.

2. The legislative level

A. National legal framework: the Portuguese Constitution and Law no. 65/2003 of 23 August 2003

1. Portuguese legislation does not define mutual recognition and its possible limits. The only reference to mutual recognition in criminal matters[3] is found in Art. 1°, no. 2, of Law 65/2003 of 23 August 2003 (hereafter, PTL EAW)[4], which transposed the FD EAW: "the European arrest warrant shall be executed on the basis of the principle of mutual recognition".

In fact, the FD on the execution of orders freezing property or evidence[5], the FD on financial penalties[6] and the FD on confiscation orders[7] have not been transposed into Portuguese law yet.

Therefore, the Portuguese experience concerning the principle of mutual recognition in criminal matters is based only on the EAW.

2. The full transposition of the FD and the introduction of the concept of mutual recognition in criminal matters into Portuguese law has required an amendment of the Constitution of the Portuguese Republic (hereafter, CRP), in order to exempt the cooperation under the EAW from the tight constitutional limits set to the extradition /surrender of Portuguese citizens[8] and persons who can be subject to actual life sentences (or life-time security measures)[9].

[2] Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *OJ*, no. L 190, 18 July 2002, p. 1.

[3] The concept of mutual recognition is mentioned in other fields as, for instance, in *Lei* 23/2007, 4 July 2007 (*Diário da República*, Série I, 4 July 2007), which transposes Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals, *OJ*, no. L 149, 2 June 2001, p. 34.

[4] *Lei* no. 65/2003, 23 August 2003, *Diário da República*, I Série-A, 23 August 2003.

[5] Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, *OJ*, no. L 196, 2 August 2003, p. 45. The Portuguese Government has already submitted to the Parliament a draft law transposing this FD, which should be discussed and voted soon (*Proposta de Lei* no. 237/X, in *Diário da Assembleia da República*, II Série A, no. 37/X/4, 4 December 2008, p. 66 and f.).

[6] Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, *OJ*, no. L 76, 22 March 2005, p. 16. The Portuguese Government has already drafted a preparatory draft law (*anteprojecto de lei*) for the transposition of this FD, and is now consulting several entities in the justice area for their opinion on the document.

[7] Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, *OJ*, no. L 328, 24 November 2006, p. 59.

[8] Art. 33°, no. 3, CRP.

[9] Art. 33°, no. 4, CRP.

Thus Art. 33°, no. 5, CRP[10] provides that the strict requirements that condition the extradition/surrender in the two mentioned situations, set in the previous numbers of the same article, do not apply to judicial cooperation in criminal matters established in the ambit of the EU[11].

Notably, this "EU exemption clause" affects neither the prohibition of extradition/ surrender for political motives or in cases where the crime is punishable with the death penalty (or a penalty that causes irreversible bodily harm) by the law of the requesting State[12], nor the exclusive competence of the judicial authorities for ordering the extradition/surrender of the requested person[13], nor the right to asylum[14].

3. The transposition of the FD EAW followed the procedure that is usually adopted for the implementation of EU law in areas where Parliament enjoys exclusive legislative competence: draft law (*Proposta de Lei*) submitted by the Government[15], subsequent passing of the law by Parliament and its ratification by the President of the Republic.

As noted by an interviewee, judicial authorities are often invited to give their advisory opinion on draft national laws transposing EU legislation, in various ways and moments: through direct involvement (mostly of prosecutors) in the negotiations of the EU act; through direct consultation of judges and prosecutors by the policymakers during the drafting of the implementing law; through requests for written contributions addressed by the Governmental Departments to the High Council of the Bench (*Conselho Superior da Magistratura*) and to the Prosecutor-General's Office, that can lead to modifications of the initial draft; and also through auditions promoted by Parliament when discussing the draft laws proposed by the Government. However, as a structured and systematic contribution at the stage of negotiations and of drafting implementing legislation does not exist, that "written institutional collaboration" has little visibility, and many practitioners do not know whether judges, prosecutors and lawyers are consulted at all. Some interviewees suggested that a deeper involvement of practitioners could help avoiding certain practical problems and find better solutions.

B. Compliance of Portuguese law with the FD EAW

In general, it can be said that Portuguese law complies with the FD EAW. Nevertheless, there are a few aspects where national law seems to deviate from the FD (*infra*, 1, 2, 3 4, and 5) or raises some interpretative issues (*infra*, 6).

[10] Introduced by *Lei Constitucional* no. 1/2001, of 12 December 2001, *Diário da República*, Série I-A, 12 December 2001.

[11] Art. 33°, no. 5, CRP: "*O disposto nos números anteriores não prejudica a aplicação das normas de cooperação judiciária penal estabelecidas no âmbito da União Europeia*".

[12] Art. 33°, no. 6, CRP; see *infra*, B, 1.

[13] Art. 33°, no. 7, CRP.

[14] Art. 33°, no. 8, CRP.

[15] *Proposta de Lei* no. 42/IX, in *Diário da Assembleia da República*, II Série A, no. 71/ IX/1, 20 February 2003, p. 3086 and f. Actually, in this particular case, the draft law submitted by the Government was merged with a draft law that had been previously submitted by some Members of Parliament (*Projecto de Lei* no. 207/IX, in *Diário da Assembleia da República*, II Série A, no. 61/IX/1, 25 January 2003, p. 2460 and f.).

1. In the first place, Art. 11° PTL EAW lays down two grounds for mandatory non-execution that are not *explicitly* enshrined in Art. 3 FD: the execution of the EAW shall be refused when the law of the issuing State punishes the underlying offence with the death penalty, or a penalty that causes irreversible bodily harm [16] [*infra*, a], and when the issuance of the EAW is determined by "political motives" [17] [*infra*, b]. Both obstacles to cooperation enjoy constitutional rank [18] and are unaffected by the "EU exemption clause" [19].

a. The applicability of the death penalty, or a penalty that causes irreversible bodily harm, by a Member State (MS) seems to be highly improbable and would infringe upon EU law itself. The death penalty has been abolished in all MS and is forbidden by Art. 2(2) of the Charter of Fundamental Rights of the European Union (CFREU), and corporal punishment, as a whole, has been considered as a "degrading punishment" by the European Court of Human Rights (Eur. Court HR) [20], and thus forbidden by Art. 3 of the European Convention on Human Rights (ECHR) and Art. 4 CFREU. Finally, the FD itself undertakes to respect fundamental rights as reflected in the CFREU [21]. Therefore, a request for cooperation based on facts that are punishable with those (forbidden) penalties in the issuing State would be beyond the ambit of applicability of the FD.

b. It could be argued that the same reasoning applies to the refusal of execution based on the "political motives" that might underlie an EAW: the aim of the FD is to improve cooperation in criminal matters between the MS, not to enable political persecutions. However, there is an obvious difference between the two grounds for refusal: the applicability, by the issuing MS, of the penalties that contravene EU law is in itself, for the executing MS, a *matter of fact*, not open to interpretation, and the refusal of execution may claim "universal" validity within the EU; whereas the assertion that a concrete EAW is based on "political motives" amounts, ultimately, to a *particular qualification* made by the courts of the executing MS, not necessarily shared by the courts of other MS (or, indeed, other courts of the *same* MS). Therefore, the alleged non compliance of Art. 11°, al. e) PTL EAW, with the FD would not lie in the exclusion of political persecutions from the ambit of the EAW (since it does not cover such acts), but in the *attribution of a competence to national courts* for which there is no provision in the FD.

Then again, one should bear in mind that the FD categorically states: "*Nothing* in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European Arrest Warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her (...) political opinions" [22]. Thus, if the FD allows MS to refuse cooperation in those cases, it necessarily allows them to vest their courts with the power to ascertain that a concrete request for cooperation is, in reality, a political persecution.

c. In sum, it is submitted that both "grounds for refusal" comply with the FD.

2. Art. 12°, no. 1, al. f) PTL EAW transposes Art. 4(5) FD (*non bis in idem* originating from a judgment in a third State). The transposition is not correct, since the last part of the European norm refers to "the law of the sentencing country", while the Portuguese norm refers to "Portuguese law" [23]. It is, most obviously, a *lapsus calami*.

3. Art. 23(5) FD provides that "Upon expiry of the time limits referred to in paragraphs 2 to 4, if the person is still being held in custody he shall be released". Art. 29° PTL EAW, while transposing all the other paragraphs of Art. 23 of the FD accurately, contains no similar (absolute) temporal limit for the surrender.
Arguably, Portuguese law does not comply with the FD in this respect.
Moreover, Portuguese courts may not apply Art. 23(5) of the FD, despite its obvious direct effect [24], since Art. 34(2)(b) EU clearly excludes the right for individuals to rely on the direct effect of the norms of a FD [25].

[16] Art. 11°, al. d) PTL EAW.

[17] Art. 11°, al. e) PTL EAW.

[18] I. Godinho, "O mandado de detenção europeu e a "Nova Criminalidade": a definição da definição ou o pleonasmo do sentido", *Politeia, Revista do Instituto Superior de Ciências Policiais e Segurança Interna*, 2, 2005, p. 103 and f., 133, criticises Law 65/2003 for not including other similar obstacles to cooperation, such as the persecution for racial, religious or other motives. Arguably, this "omission" is due to the fact that only the persecution for political motives and the applicability of the said penalties enjoy *explicit* constitutional rank as bars to extradition/surrender, although it is true that the constitutional norm may be applied, by analogy, to other similar situations (P. Caeiro, "Proibições constitucionais de extraditar em função da pena aplicável: o estatuto constitucional das proibições de extraditar fundadas na natureza da pena correspondente ao crime segundo o direito do estado requerente, antes e depois da Lei Constitucional n°1/97", *Revista Portuguesa de Ciência Criminal*, 8, 1998, p. 7 and f., 20 and f.).

[19] See *supra*, 2, A, 2.

[20] See the Court's Judgment in the leading case Eur. Court HR, 25 April 1978, *Tyrer v. The United Kingdom*, Series A, no. 26, para. 28 and f., esp. 33 and f.; arguably, a penalty that causes "*irreversible* bodily harm" would also amount to "inhumane punishment".

[21] Preamble of the FD EAW, para. (12) and (13). See also L. Silva Pereira, "Alguns aspectos da implementação do regime relativo ao Mandado de Detenção Europeu: Lei no. 65/2003, de 23 de Agosto", *Revista do Ministério Público*, 96, 2003, p. 39 and f., 60.

[22] Preamble, para. (12) (emphasis added).

[23] "(...) *a pena tenha sido integralmente cumprida, esteja a ser executada ou já não possa ser cumprida* segundo a lei portuguesa" (emphasis added).

[24] Actually, Art. 23(5) FD creates a precise and unequivocal obligation for the MS to release the person when the time limits set therein expire.

[25] It is known that Art. 34(2)(b) EU literally excludes the "direct effect" of the norms contained in framework decisions. However, the "direct effect" is a consequence of the *contents* of the *norm itself* (*i. e.*, the capacity of creating rights by its own scope), not of its *applicability* (defined by the type of *act* at stake), and therefore cannot be excluded by the "legislator" (*in casu*, the drafters of the Treaty). Nevertheless, the legislative power can, indeed, model, limit or exclude the right for individuals to invoke norms that entail a "direct effect" but do not bear direct applicability (in detail, P. Caeiro, *Fundamento, Conteúdo e Limites da Jurisdição Penal do Estado: o Caso Português*, Dissertação de Doutoramento em Ciências Jurídico-Criminais pela Faculdade de Direito da Universidade de Coimbra, unpublished, Coimbra, 2007, p. 452 and f.).

It seems that this is not a matter of *interpretation* of the national law, but rather a lack of regulation (*lacuna*), and, as a consequence, the stance taken by the ECJ in the *Pupino* case[26] is of no avail to the Portuguese judiciary.

4. Art. 5 FD provides that the execution of the EAW may be subject to certain conditions[27], while Art. 13° PTL EAW reads "the execution of the EAW will only take place if the issuing State provides *one* of the following *guarantees*" (emphasis added).

The wording of the Portuguese norm raises two issues:

- First, and contrary to the Portuguese provision, the issuing judicial authority is not bound by the FD to provide a *concrete* assurance in situations other than those described in Art. 5(1). In the case of para. (2), where the underlying offence is punishable by custodial life sentence (or life-time detention order), it is for the *executing* judicial authority to verify whether the law of the issuing State meets the requirements set therein. Finally, if the requested person is a national or resident of the Portuguese State (para. 3), the court may *order* that he or she is returned to Portugal to serve the sentence there[28]. This ruling should be respected by the issuing State, but there is no place for a concrete act assuring that it will do so[29].

  Arguably, Portuguese law does not comply with the FD in this respect, since it makes it incumbent upon the national judicial authorities to ask for guarantees that the issuing MS is not obliged to provide.
- Secondly, and despite the wording of most linguistic versions of the FD ("*one* of the following conditions"), replicated in Art. 13° of the PTL EAW, it is clear that the FD allows the MS to make surrender dependent on the verification of *more than one condition* whenever the situations to which they refer are present. For instance: as an executing State, the Portuguese judicial authority should ask for a guarantee for retrial (or appeal) in the cases of Art. 5(1) of the FD and, would that be the case, make sure that the law of the issuing State complies with the requirements set in para. (2)[30]. Therefore, it is submitted that the English version ("be subject to the following conditions") is the one which expresses most accurately the normative meaning of Art. 5 of the FD.

[26] ECJ, 16 June 2005, Judgment C-105/03, *Maria Pupino*, *ECR*, p. I-5285.

[27] "(...) may be subject to the following conditions: (...)".

[28] This is a case where judicial discretion is fully justified, because it may be more convenient that the requested person serves the sentence in the issuing State (*e. g.*, if he or she is a Portuguese national residing in that country): on the issue of mandatory regulation *versus* judicial discretion, see *infra*, 6, and 3, B, 3.

[29] In the opposite sense, holding that the Portuguese executing judicial authority may ask from the issuing judicial authority concrete "guarantees" concerning the conditions set in Art. 13°, als. b) and c) PTL EAW (= Art. 5(2) and 5(3) FD), see L. Silva Pereira, *op. cit.* [fn. 21], p. 48 and f.

[30] In the same sense, agreeing that the conditions (in the Author's view, the "guarantees") may be cumulative, see also L. Silva Pereira, *op. cit.* [fn. 21], p. 48 and f.

5. In cases where the decision has been rendered *in absentia* and the defendant has not been summoned in person or otherwise informed of the date and place of the hearing that led to the decision, Art. 5(1) of the Portuguese version of the FD provides that the execution of the EAW may be subject to the condition that the requested person "may appeal or apply for a retrial of the case in the issuing Member State", whereas the versions in other languages do not refer to the possibility of *appealing*, but solely to the application for a *retrial*[31].

For its part, Art. 13°, al. a) PTL EAW copies the Portuguese version of the FD and thus refers also to the possibility of appealing against the conviction as an alternative condition for granting surrender.

In order to assess the compliance of this norm with the FD, it is necessary to set apart the cases where Portugal is the executing and the issuing State.

In the first case, and since the implementation of this requirement is optional, Portugal can ask from the issuing State a guarantee that the requested person will benefit from *either one* of the alternatives (appeal or retrial). In any of those cases, that will suffice for surrender. Thus, Portuguese law enlarges the ambit of possible cooperation: even if the law of the issuing State does not provide for a retrial, the possibility of appealing against the conviction suffices for the execution of the EAW.

In the second case, acting as an issuing State, Portugal cannot offer a guarantee for retrial, due to the rules of domestic penal procedure: the person convicted *in absentia* may appeal against the decision, but may not apply directly for a retrial of the case[32].

[31] It is not the first time that the Portuguese version of a FD differs from the versions in other languages, leading sometimes to very unfortunate results: for instance, Art. 5(3) of the FD on combating terrorism (Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, *OJ*, no. L 164, 22 June 2002, p. 3), in its several linguistic versions, provides for the punishment of the leader of a terrorist organisation with imprisonment for a *maximum* period of not less than 15 years; however, the Portuguese version of the FD omitted the word "maximum" and, as a result, the drafters of the transposing law set the applicable penalty in imprisonment for a *minimum* of 15 (!) and a maximum of 20 years [Article 2, no. 3, of the Portuguese law on combating terrorism (*Lei* 52/2003, of 22 August 2003, *Diário da República* no. 193, Série I-A, 22 August 2003)] – in the context of a penal system where murder is punished with imprisonment of 8 to 16 years. On this issue, see J. de Figueiredo Dias and P. Caeiro, "A Lei de Combate ao Terrorismo (Lei no. 52/2003, de 22 de Agosto)", *Revista de Legislação e de Jurisprudência*, 3935, 2005, p. 70 and f., 89; and S. Fidalgo, "Direito Penal Europeu: entre uma Europa securitária e uma Europa solidária", *Boletim da Faculdade de Direito*, 81, 2005, p. 931 and f., 947 and f.

[32] In this sense, see also A. L. dos Santos Alves, "Mandado de Detenção Europeu: julgamento na ausência e garantia de novo julgamento", *Revista do Ministério Público*, 103, 2005, p. 65 and f., 72 and f.; and R. Santiago, "O defensor e o arguido no processo penal português: aspectos polémicos", *Revista Portuguesa de Ciência Criminal*, 17, 2007, p. 207 and f., 251.

Prior to 2000, Art. 380°-A of the Code of Penal Procedure granted individuals convicted *in absentia* the right to apply for a retrial of the case (on this, see M. J. Antunes, "A falta do arguido à audiência de julgamento e a revisão do Código de Processo Penal", *Revista Portuguesa de Ciência Criminal*, 8, 1998, p. 215 and f.). However, *Decreto-Lei* no. 320-C/2000, of 15 December 2000, has struck that right (on this, see R. Santiago, "Breves reflexões sobre a novíssima revisão do Código de Processo Penal", *Revista Portuguesa de Ciência Criminal*,

Therefore, the execution of the EAW will depend on the law of the executing State: if it strictly requires the possibility of applying for a retrial, there will be no surrender.

None of these solutions violates the FD.

6. As to the transposition of Art. 2(4) and 4(1) FD, the regime provided by Portuguese law is unclear.

In the first place, it is crucial to set out the correct interpretation of the FD in respect of double criminality. It is known that one of the most important and controversial features of the FD EAW is to exempt from the double criminality test the requests for surrender based on the offences listed in Art. 2(2), as long as such offences are punishable by the law of the issuing State with a deprivation of liberty for a maximum period of not less than three years[33]. Regarding EAWs based on offences that do *not* meet those requirements – *i. e.*, offences that do *not belong* to the areas of criminality listed, irrespective of the applicable penalties, *or* that, although being listed, are *not* punishable with a custodial sentence for a maximum period not less than three years[34] –, Art. 2(4) FD allows the MS to *choose*[35] whether or not the surrender is dependent on double criminality. Then, Art. 3 and 4 FD draw a general

10, 2000, p. 535 and f.), providing only for a grounds for appealing against the decision. It is doubtful that current Portuguese law complies with the ECHR, as interpreted by the Eur. Court HR: see A. L. dos Santos Alves, *ibid*, p. 77.

[33] In the view of Portuguese policymakers, the abolition of the double criminality test for the list of the 32 offences is justified by two main reasons: they are serious offences and are more or less harmonised under EU instruments. This means that there is a basis for a common understanding of the meaning and scope of those categories of offences. Hence, Portuguese policymakers agree that there is no justification for the control of double criminality in respect of such offences.

This view is not fully shared by the practitioners and the literature.

As to the former, some of the interviewees put forward that the description of the "domains of criminality" in Art. 2°, no. 2 PTL EAW (which copies Art. 2(2) FD) is too vague, causing uncertainty for the citizens and for the judicial authorities, although they admit that an exhaustive description of the offences might be inconsistent with the very principle of mutual recognition. Some practitioners also feel that they lack information and knowledge regarding the law of other MS. Two interviewees suggested that it might be useful to set "general criteria, to the attention of the issuing judicial authorities, on the indication of a given offence as pertaining to the categories listed in the EU instrument. These criteria could draw on the experience of the application of the EAW regime and take into account the concrete decisions of the courts resulting in a refusal of surrender".

The literature on the EAW also raises some objections regarding the abolition of double criminality, namely because it might strengthen the repressive profile of European criminal law: see A. Miranda Rodrigues, "O mandado de detenção europeu – na via da construção de um sistema penal europeu: um passo ou um salto", *Revista Portuguesa de Ciência Criminal*, 13, 2003, p. 27 and f., 31, 44; Id., "O Tribunal de Justiça das Comunidades Europeias no espaço de Liberdade, de Segurança e de Justiça – A caminhar se faz o caminho", *ibid.*, 17, 2007, p. 387 and f., 389; R. Bragança de Matos, "O princípio do reconhecimento mútuo e o mandado de detenção europeu", *ibid.*, 14, 2004, p. 325 and f., 352 and f.; and M. Guedes Valente, *Do mandado de detenção europeu*, Coimbra, Almedina, 2006, p. 61.

[34] See A. Miranda Rodrigues, "O mandado...", *op. cit.* [fn. 33], p. 40, footnote 44.

[35] "(...) surrender *may* be subject to the condition that (...)" (emphasis added).

distinction between grounds for "mandatory" and "optional" non-execution, that is to say, grounds upon which the MS are, respectively, *obliged* or *entitled* not to execute the EAW. Consistently with the regime set in Art. 2(4), Art. 4(1) provides that, in the cases mentioned in the former, the "executing judicial authority may refuse to execute the EAW" – "may", because the MS at stake may have chosen *not* to consider the lack of double criminality as an obstacle to surrender.

Thus Art. 4(1) FD is *not* to be construed in the sense that MS that choose to control double criminality for offences other than those set in Art. 2(2) *must* leave the ultimate decision over execution to the discretion of their courts[36]. Rather, it is for the MS to choose: (i) whether or not, and under which circumstances, those grounds should lead to non-execution; (ii) whether such non-execution should be imposed by the law, binding for the courts, or left to judicial discretion[37].

As far as Portuguese law is concerned, Art. 2°, no. 2 PTL EAW transposes Art. 2(2) FD adequately, ruling that the control of double criminality shall not take place when (i) the underlying facts constitute one of the listed offences, and (ii) such offence is punishable by the law of the issuing State by a custodial sentence or a detention order for a maximum period of at least three years.

Then, still in line with Art. 2(4) FD, the Portuguese legislator chose to make the execution of a EAW dependent on the ascertainment of double criminality in respect of the offences that are not included in Art. 2°, no. 2 PTL EAW: in fact, Art. 2°, no. 3, provides that "regarding the offences not included in the previous number, the surrender of the requested person is admissible *only* where the act underlying the EAW constitutes an offence punishable by Portuguese law, irrespective of its constituent elements or legal qualification" (emphasis added)[38]. The wording of the norm suggests that the legislator chose to require the double criminality test for all the offences "not included" in no. 2, *i. e.*, the offences that do not meet *both* conditions: those not listed in the several paragraphs (whatever the penalties applicable by the issuing State may be) *and* the offences listed that are punishable with deprivation of liberty for a maximum period of less than three years. The consequence is also obvious: if an offence pertaining to one of those two groups is not punishable by Portuguese law, the EAW *cannot* be executed. This interpretative result complies with the margin of discretion left to the MS by Art. 2(4) FD.

However, Art. 12°, no. 1, al. a) PTL EAW, transposing Art. 4(1) FD, provides that, for the offences not included in Art. 2°, no. 2, the absence of double criminality

[36] In the opposite sense, however, see I. Godinho, *op. cit.*, p. 137, asserting that the "transformation" of optional grounds for non-execution into mandatory ones would infringe upon the FD.

[37] Writing before the transposition of the FD EAW, Anabela Miranda Rodrigues has clearly put forward that Art. 2(4) of the FD entitles the national legislator to opt for *either one* of the alternatives: see A. Miranda Rodrigues, "O mandado...", *op. cit.* [fn. 33], p. 40, footnote 45.

[38] "*No que respeita às infracções não previstas no número anterior só é admissível a entrega da pessoa reclamada se os factos que justificam a emissão do mandado de detenção europeu constituírem infracção punível pela lei portuguesa, independentemente dos seus elementos constitutivos ou da sua qualificação*".

is a mere ground for *optional* non-execution of the EAW, to be decided by the court, which seems to contradict Art. 2°, no. 3 (mandatory non-execution).

Most authors acknowledge this normative contradiction, but all do not agree on how it should be overcome. Some claim that Art. 12°, no. 1, al. a), should be ignored, since judiciary discretion to decide over the execution is explicitly excluded by Art. 2°, no. 3[39], whereas others rely on the principle of mutual recognition for interpretative guidance and tend to disregard the imperative nature of the latter norm, which is of course less "cooperation-friendly"[40].

It is indisputable that the *commands* of the two norms are contradictory, because Art. 2°, no. 3, provides for mandatory non-execution, while Art. 12°, no. 1, al. a), provides for possible non-execution (to be decided by the court)[41]. Hence, the only way to reconcile them (and preserve their normative value) would be to differentiate their scope.

A *restrictive* interpretation of both norms could lead to the following constructions:

- Art. 2°, no. 3, would refer only to the offences that *do not* pertain to the areas of criminality listed (where the absence of double criminality would be a ground for *mandatory* non-execution), while Art. 12°, no. 1, al. a), would refer only to the offences *listed* that are not punishable with a maximum custodial sentence of at least three years (where the absence of double criminality would be a ground for *optional* non-execution). Such construction would be consistent with the purpose of the FD, since it enhances the role of the list of offences for which cooperation should be made easier.
- According to yet a different view, Art. 2°, no. 3, would refer exclusively to offences *not listed* that are *not punishable* with deprivation of liberty of at least three years (where the absence of double criminality would be a ground for *mandatory* non-execution), whereas Art. 12°, no. 1, al. a), would refer to all the remaining offences, *i. e.*, offences listed that are not punishable with deprivation of liberty of at least three years *and* offences that are not listed but are punishable with deprivation of liberty for a period of at least three years (where the absence of double criminality would be a ground for *optional* non-execution)[42].

It is more than doubtful that those constructions can be accepted.

In the first place, one should dismiss the "European conformity" argument. The so called "conform interpretation" should serve to interpret national law in a way that is compatible with European law, and thus supposes a previous determination of the meaning and scope of national norms. In other words, it is not for European law to *clarify* the domestic law, or to solve its contradictions (except in the case where one of the possible constructions would turn out to be incompatible with European law).

[39] L. Silva Pereira, *op. cit.* [fn. 21], p. 60.

[40] I. Godinho, *op. cit.* , p. 137; and M. Guedes Valente, *op. cit.*, p. 241.

[41] L. Silva Pereira, *op. cit.* [fn. 21], p. 59.

[42] Putting forward this interpretation, see Tribunal da Relação de Evora, *Acórdão*, 3 July 2007, Case no. 1317/07-1, available at www.dgsi.pt (in detail, see *infra*, 3.).

Moreover, even if European law could be used as a guidance for overcoming this contradiction (which, as submitted, is not the case), one should not rely on an *abstract formulation* of the principle of mutual recognition, as if it were equivalent to "maximum execution", in order to justify the most "execution-friendly" interpretation[43]. In fact, the FD gives shape to the *concretisation* of that principle in the field of extradition/surrender (*i. e.*, its actual contents and, indeed, its *limits*), and, in the context of the FD, mutual recognition means *also* that the issuing State must recognise the *ius non puniendi* of the executing State as a valid grounds for non-execution in the cases where it is permitted.

Finally, a national law that considers the lack of double criminality as a cogent ground for non-execution, binding for the courts, is not "less conform" with the FD EAW than the one that leaves the decision to judicial discretion: as said above, the FD does not intend to regulate the way in which the national legislator implements "optional" grounds for non-execution.

If we now turn to the interpretation of Portuguese law itself, it is probable that the contradictory norms do not embody two *genuine* normative purposes. It is submitted that the drafters of the PTL EAW did not fully comprehend the distinction between "mandatory" and "optional" non-execution set in Art. 3 and 4 FD. Apparently, the contradiction is due to the plain fact that the Portuguese legislator has misunderstood Art. 4 of the FD as a whole, erroneously assuming that it would impose upon the MS the duty to leave optional non-execution to judicial discretion, while forgetting, at the same time, that he clearly chose to make non-execution mandatory for the courts in the absence of double criminality (Art. 2°, no. 3)[44]. This mistake is confirmed by the fact that *all* the grounds for "optional non-execution" provided in Art. 4 FD have been transposed into Portuguese law as grounds for judicial discretion on refusal.

The *explanation* of the probable reasons underlying the contradiction between Art. 2°, no. 3, and Art. 12°, no. 1, al. a) PTL EAW provides context for the problem, but does not suffice to set aside the applicability of the latter. It is submitted that, while some of the grounds for "optional non-execution" are perfectly compatible with (and perhaps better assessed by) concrete judicial decisions, that does not apply to the absence of double criminality[45]. In fact, it is understandable that, for instance,

[43] However, such equivalence seems to be a common perception among the practitioners interviewed, and it certainly reflects on some case law of the Portuguese courts (see *infra*, 3, B, 3).

[44] In this precise sense, L. Silva Pereira, *op. cit.* [fn. 21], p. 60.

[45] This is certainly the reason why most of the national laws transposing the FD EAW provide, *as a rule binding for their courts*, that there is no surrender in the absence of double criminality, except where the EAW is based on offences listed *and* punishable with deprivation of liberty for a period of not less than three years: IT: Art. 7, no. 1, and 8, no. 1, of Law no. 69, of 22 April 2005, *Gazzetta Ufficiale*, 98, 29 April 2005; FR: Art. 695-23, of the *Code de Procédure Pénale*; BE: Art. 5 of Law 19 December 2003; IE: section 38(1) of the *European Arrest Warrant Act* 2003; NL: Art. 7(1) of the Act of 29 April 2004, *Overleveringswet, Staatsblad*, no. 195, 2004. The sole exception seems to be Spanish Law 3/2003, of 14 March 2003, where Art. 9, no. 2, and 12, no. 2, al. a), clearly leave the decision on surrender, in the absence of double criminality, to the judicial authorities.

the decision either to surrender or to continue the domestic criminal procedure for the same acts (Art. 4(2) FD) should be conferred upon the courts, so that all the relevant interests (the grounds on which each State purports to exercise its jurisdiction, the stage of the procedure in each State, etc.), *which differ, in their concrete features, from case to case*, can be given due consideration and be pondered by the judicial authority. However, the interest underlying the requirement for double criminality (no repressive action, including detention and surrender, beyond the boundaries of [national] criminal law) is of a *general* nature and its relevance is not dependent on the *concrete* features of a given case[46]. Therefore, the decision on whether or not such interest shall prevail over the interest in judicial cooperation must lie with the legislator, not with the courts[47].

In sum, it is submitted that the contradiction between Art. 2°, no. 3, and 12°, no. 1, al. a), PTL EAW was caused by an inadequate transposition of the FD. Bearing in mind the scope of the requirement for double criminality, current Portuguese law should be interpreted in the sense that EAWs based on acts that do not meet both the conditions set in Art. 2(2) FD (= Art. 2°, no. 2, PTL EAW) cannot be executed if such acts do not constitute an offence under Portuguese law (Art. 2°, no. 3). Correspondently, Art. 12°, no. 1, al. a), PTL EAW should be simply disregarded[48]. This result complies with Art. 2(4) and 4(1) FD.

3. The judicial level

A. Mutual recognition as a topic and a ground for judicial decisions

The general perception of mutual recognition by Portuguese judges, prosecutors and lawyers is based on the application of the EAW. The EAW is seen as an instrument that replaces the extradition procedure between Member States, the main feature of which being that foreign judicial decisions should be, in principle, executed, and grounds for non-execution should be exceptional.

Despite the absence of a clear concept defined in the law, Portuguese courts often use mutual recognition, based on mutual trust, as a topic to justify some decisions concerning the EAW.

1. At a general level, the Supreme Court has characterised the EAW, in a *dictum*, as embodying three features that, in its view, symbolise mutual recognition: the duty to execute decisions taken by foreign judicial authorities; the limitation of the grounds for non-execution; and the evolution of the rules on double criminality.

[46] Arguably, the same reasoning applies to the grounds set in Art. 4 (4) and 4(5) FD, which have also been transposed into Portuguese law as grounds for "optional" non-execution (Art. 12°, no. 1, als. e), f)). However, in those cases, there is no norm similar to Art. 2°, no. 3 PTL EAW, and those provisions for judicial discretion, although inadequate, have to be applied.

[47] In the same sense, writing before Law 65/2003 was passed, Anabela Miranda Rodrigues has argued that conferring this competence upon the courts would result in the application of "hardly justifiable" criteria of "convenience": see A. Miranda Rodrigues, "O mandado...", *op. cit.* [fn. 33], p. 40, footnote 45.

[48] In this sense, see also L. Silva Pereira, *op. cit.* [fn. 21], p. 60.

It also has held that domestic norms on the EAW should be interpreted taking into consideration the duties arising from mutual recognition, as well as the persistence of some elements of State sovereignty in criminal matters[49].

2. At a more concrete level, the Supreme Court has relied on the principle of mutual recognition (which "allows for an almost automatic execution of the decisions taken by the judicial authorities of the other States") to justify the inapplicability of the requirement for reciprocity[50]. The Court has also ruled that reciprocity is not required by the Constitution in respect of judicial cooperation in the EU, even when the surrender of Portuguese nationals is at stake[51].

In another judgment, the Supreme Court has held that, in cases where Portugal executes a conviction handed down by another MS, the principle of mutual recognition demands the acceptance and the respect of the foreign decision in its precise terms, which means that the national courts cannot suspend a prison sentence handed down by a court of another MS, even where such suspension would be permissible under Portuguese law[52].

Concerning the rights of the defence, the Supreme Court has ruled that "the full exercise of the right of defence against the accusation must take place in the courts of the issuing State, because the EAW is based on the principles of judicial cooperation between MS, mutual recognition of their respective legal systems and trust between the said States"[53].

Finally, the Appeal Court of Evora has relied partly on the principle of mutual recognition to justify a certain interpretation of the national rules concerning grounds for "mandatory" and "optional" non-execution[54].

B. Case-law on other issues raised by the EAW

1. Pending proceedings and non bis in idem

The existence of pending proceedings in Portugal against the requested person and the possible application of Art. 12°, no. 1, al. b) PTL EAW (= Art. 4(2) FD) seems to be one of the most relevant issues in the case-law of Portuguese superior courts.

a) Case A: an EAW was issued by the judicial authority of another MS in order to obtain the surrender of a person investigated for drug trafficking. Some – *but not all* – of the acts that gave rise to the EAW were also subject to a criminal investigation by the Portuguese authorities under the territoriality principle.

[49] Supremo Tribunal de Justiça, *Acórdão*, 27 April 2006, Case no. 06P1429, available at www.dgsi.pt; Supremo Tribunal de Justiça, *Acórdão*, 4 January 2007, Case no. 06P4707, available at www.dgsi.pt.

[50] Supremo Tribunal de Justiça (3ª Secção), *Acórdão*, 3 March 2005, Case no. 773/05, available at www.pgdlisboa.pt.

[51] Supremo Tribunal de Justiça, *Acórdão*, 13 January 2005, Case no. 04P4738, available at www.dgsi.pt.

[52] Supremo Tribunal de Justiça (3ª Secção), *Acórdão*, 21 February 2007, Case no. 250/07, available at www.pgdlisboa.pt.

[53] Supremo Tribunal de Justiça, *Acórdão*, 29 May 2008, Case no. 08P1891, available at www.dgsi.pt.

[54] In detail, see *infra*, B, 3, b.

The Appeal Court of Lisbon held that the existence of pending proceedings in Portugal for facts constituting part of the conduct that underlies the EAW does not bar the surrender of the defendant. The Court applied Art. 31°, no. 1 PTL EAW (= Art. 24(1) FD) and postponed the surrender, so that domestic proceedings could continue, while stressing that the issuing State is bound by provisions on *non bis in idem* and, therefore, obliged to respect the decision to be eventually handed down by the Portuguese courts regarding the acts committed in Portugal[55].

On appeal, the Supreme Court confirmed the decision and ruled further that, in the face of the documents available, the acts were not the "same acts" in the sense meant by Art. 12, no. 1, al. b) PTL EAW. According to the Court, the ascertainment of whether the acts committed in Portugal could be merged with other acts committed abroad, integrating in only *one crime*, was a question on the merits, not to be decided by the executing judicial authority. Therefore, the Court correctly decided that there was no ground for discussing the optional non execution of the EAW[56].

b) Case B: in another case, where the acts underlying the EAW were probably the same as those that were being investigated by the Portuguese authorities, the Appeal Court of Evora highlighted the distinction between mandatory refusal of surrender based on a final decision and optional refusal of surrender based on the existence of pending proceedings[57]. The Court further held that the transfer of the proceedings may overcome the issue raised by the existence of pending proceedings, enabling the investigation of all the facts in the same procedure by the foreign authority. In this context, when deciding on the application of Art. 12°, no. 1, al. b) PTL EAW (= Art. 4(2) FD EAW), the Court concluded that the continuation of the proceedings initiated in the executing State may be delegated to the issuing State if the latter accepts it, thus avoiding the shortcomings resulting from article 12° PTL EAW.

2. Territoriality

a) Case A: in a case of armed robbery and kidnapping allegedly committed by a Portuguese citizen, where the armed robbery had been perpetrated in another MS and the kidnapping had begun in that MS but had continued (and finished) in Portugal, the Supreme Court of Justice decided to execute the European Arrest Warrant concerning the robbery. The surrender, however, was subject to the condition that the person would be returned to Portugal in order either to continue the pending proceedings for kidnapping or to serve the possible sentence handed down in the issuing MS[58].

b) Case B: an EAW was issued by another MS against one of its citizens, who resided in Portugal, for attempted fraud. The offence allegedly consisted of the said person having given instructions to her lawyer so that he would claim in the courts of

[55] Tribunal da Relação de Lisboa, *Acórdão*, 16 May 2006, Case no. 9715/2005-5, available at www.dgsi.pt.

[56] Supremo Tribunal de Justiça, *Acórdão*, 22 June 2006, Case no. 06P2326, available at www.dgsi.pt.

[57] Tribunal da Relação de Evora, *Acórdão*, 3 May 2005, Case no. 29/05-1, available at www.dgsi.pt.

[58] Supremo Tribunal de Justiça, *Acórdão*, 18 April 2007, Case no. 07P1432, available at www.dgsi.pt.

that MS, using false documents, a certain amount of money, which he did. The issuing authority explicitly stated that it was not known whether those instructions had been given to the lawyer at distance, from Portuguese territory (as the requested person claimed), or personally, in the territory of the issuing State. Indeed, it was a relevant question for the possible application of Art. 12°, no. 1, al h), (i) (optional grounds for non-execution by virtue of territoriality).

Actually, Art. 4° of the Portuguese Penal Code (CP) provides that Portuguese penal law is applicable to all the acts committed in Portuguese territory, irrespective of the nationality of the offender, and Art. 7°, no. 1 CP states that the crime is deemed to have been committed both in the place where the criminal action has been perpetrated, wholly or *in part*, as well as in the place where consummation has occurred. Art. 7°, no. 2 CP provides further that attempted offences are *also* deemed to have been committed in the place where the criminal "result" (consequence, or effect) should take place, according to the plan of the offender. Thus, if the attempt would have taken place in Portugal, even if only in part, the "territoriality clause" could apply, as a ground for optional non-execution.

However, the Supreme Court dismissed the issue by interpreting Art. 7°, no. 2 CP in the sense that attempted offences are deemed to have been committed (solely) in the place where consummation (the criminal "result") should occur according to the plan of the offender. Consequently, as the fraud was intended to materialise in the territory of the issuing MS, the act should not be seen as having been perpetrated in Portugal, and there was no place for discussing the possible application of the territoriality clause[59].

This interpretation of Art. 7°, no. 2 CP cannot be accepted: the purpose of the provision is to *extend*, for attempted offences, the criteria set in no. 1, not to *narrow* their scope. Such purpose is made clear by the use of the adverb "also" ("*igualmente*"), which means that Art. 7°, no. 2 CP does not affect the ambit of applicability of the former[60].

Thus, due to the mistaken interpretation of the rules on the applicability of Portuguese criminal law, the Supreme Court was unable to rule on an important issue: it would have been an excellent occasion to determine whether or not the executing judicial authority has the power (or indeed the duty) to allow for the presentation of evidence concerning the facts upon which the execution of the EAW can depend, even when such facts are part of the criminal conduct[61]. It is submitted that a positive

[59] Supremo Tribunal de Justiça, *Acórdão*, 2 January 2008, Case no. 07P4850, available at www.dgsi.pt.

[60] "*No caso de tentativa, o facto considera-se* igualmente *praticado no lugar em que, de acordo com a representação do agente, o resultado se deveria ter produzido*" (emphasis added).

[61] In a case where the EAW had been issued for the purpose of executing a custodial sentence in the issuing State, the Supreme Court ruled that the executing court must ascertain whether the situation of the requested person makes it advisable to refuse the surrender and determine that the execution takes place in Portugal; otherwise, the judgment is null and void, according to Art. 379°, no. 1, al. c) of the Code of Penal Procedure: Supremo Tribunal de Justiça, *Acórdão*, 27 April 2006, Case no. 06P1429, available at www.dgsi.pt.

answer should be given to that question, although it is clear that the executing judicial authority is not bound to allow for the presentation of such evidence when the facts at stake (*e. g.*, some of the criminal acts having allegedly been committed in Portugal), even if proved, would *not* lead to a (optional) non-execution of the warrant (*e. g.*, because the crime has produced much more serious effects in the issuing State).

3. Double criminality

a) Double criminality and the offences listed in Art. 2(2) FD

In its Judgment of 4 January 2007[62], the Supreme Court held that the abolition of the double criminality test presupposes that the executing authority verifies, in accordance with the principles of trust and mutual recognition, whether the acts underlying the European Arrest Warrant, as qualified by the issuing authority, do integrate the "material domains of criminality" defined in Art. 2(2) FD, or are rather "manifestly beyond them". Any disparity has, however, to be "patent", resulting directly and immediately from the formulation of the warrant and from the formal, systematic and material framework of the law of the issuing State.

The case concerned the "abduction" of a child by one of her parents, thus depriving the other from the visits established by a judicial decision, and was qualified under the list of Art. 2(2) FD as "kidnapping". According to the Portuguese law then in force, not only the offence could not be qualified as such, but also the acts did not constitute a criminal offence at all, in that they were committed by one of the parents holding – exclusively or jointly – the parental authority, as well as the custody of the child.

The Supreme Court ruled that, in spite of the qualification made by the issuing authority, the acts did not integrate the domain of criminality defined as "kidnapping", making clear that it was not applying Portuguese law, but rather interpreting the concepts used in the FD, in the light of a "reasonable and common material assessment"[63]. Therefore, the Portuguese judicial authority might refuse to execute the EAW, under Art. 12°, no. 1, al. a) PTL EAW (= Art. 4(1) FD EAW), since Portuguese law did not punish those acts.

b) The absence of double criminality as a ground for "mandatory" versus "optional" non-execution

In spite of the contradiction between Art. 2°, no. 3, and 12°, no. 1, al. a) PTL EAW, already analysed *supra*[64], many of the judicial decisions that deal with the lack of double criminality as a ground for non-execution do not delve deep into the matter.

In most cases, it is simply assumed that it constitutes a ground for "optional" non-execution, in the sense that it is for the executing judicial authority to decide

[62] Supremo Tribunal de Justiça, *Acórdão*, 4 January 2007, Case no. 06P4707, available at www.dgsi.pt.

[63] Some of the interviewees argued that new measures on the EAW should be focused on increasing mutual trust by ensuring the accuracy control in the issuing State. In this regard, the setting up of general criteria on how to proceed at EU level could also be envisaged.

[64] *Supra*, 2, B, 6.

whether or not the warrant should be executed, no reference being made to the former provision[65].

To the authors' knowledge, there is only one decision where the issue has been explicitly dealt with. In a case where the EAW was based on one offence of conspiracy, the Appeal Court of Evora found, in its Judgment of 3 July 2007[66], that such crime was not part of the common list; consequently, the execution of the warrant was subject to the mentioned contradictory norms. At this point, the Court, relying on the *Pupino* case, put forward that the "doubts" on the interpretation of national law should be "solved" with recourse to the "spirit" of the FD EAW, which would consist, in its view, of "mutual recognition, trust, abolition of autonomous requirements for extradition (double criminality), freedom, security, justice, celerity and simplicity in the Union area". Then, asserting that "optional grounds for non-execution cannot be changed into mandatory ones", the Court held that Art. 2°, no. 3 PTL EAW provides for mandatory non-execution *only* where the warrants are based on non-listed offences that are not punishable under Portuguese law *and* that are punishable by the law of the issuing State with deprivation of liberty for a maximum period of less than three years. The execution of the warrants based on the remaining (non-listed) offences (namely, those which are not punishable under Portuguese law *but* are punishable by the law of the issuing State with deprivation of liberty for a period of three years or more) would be subject to judicial discretion, under Art. 12°, no. 1, al. a).

As said above[67], it is submitted that European law does not play a role in the clarification of national law, especially where the possible solutions are equally compatible with the European instrument. Moreover, the Court based its Judgment on a misconception of what the terms "optional" and "mandatory" mean in the context of the FD EAW. Therefore, and contrary to what the Court decided, the execution of the warrant should have been refused, on the strength of Art. 2°, no. 3 PTL EAW.

The stance taken by the Portuguese courts regarding "optional" non-execution in the absence of double criminality led them to admit, unsurprisingly, that the legislator did not provide for criteria on which the decision whether or not to execute can be based. Hence, the Supreme Court has held that this "*lacuna*" should be fulfilled with recourse to the general criteria set in Art. 10° of the Portuguese Civil Code, or to "similar cases", or to "the principles embedded in the unity of the legal system"[68].

In a more concrete manner, the Appeal Court of Evora, in the Judgment cited above[69], ruled that the warrant should be executed in view of the "undisputable gravity" of the acts underlying the warrant (an offence of conspiracy), given the "applicable penalties", the "nature of the acts" and the "personality of the offender".

[65] Supremo Tribunal de Justiça, *Acórdão*, 4 January 2007, Case no. 06P4707, available at www.dgsi.pt; Supremo Tribunal de Justiça, *Acórdão*, 18 April 2007, Case no. 07P1432, available at www.dgsi.pt.

[66] Tribunal da Relação de Évora, *Acórdão*, 3 July 2007, Case no. 1317/07-1, available at www.dgsi.pt.

[67] *Supra*, 2, B, 6.

[68] Supremo Tribunal de Justiça, *Acórdão*, 4 January 2007, Case no. 06P4707, available at www.dgsi.pt

[69] *Supra*, *op. cit.*[fn. 66].

Indeed, it is hard to imagine what criteria other than the gravity of the acts and/or the dangerousness of the offender can advise the detention and surrender of a person for an act that is neither punishable under national law, nor subject to the consensus embodied in Art. 2(2) FD EAW. However, it is submitted that this kind of reasoning is based on an insoluble contradiction: how can a national court assert the "high gravity" of a given act (or the dangerousness of the person who committed it) when its own law does not consider such act as a crime at all, nor exempt the warrants based on that act from the double criminality test?

It may even be legitimate for a State to abolish double criminality *in general*, especially within the EU, where MS are bonded by particular ties at many levels, thus serving the penal systems of other States. Nevertheless, that option is to be made by the legislator, because the interests at stake are not susceptible of being balanced with the interests underlying a concrete case.

4. *Recognition versus confirmation of foreign sentences to the effects of Art. 4(6) FD*

Art. 12°, no. 1, al. g) PTL EAW (=Art. 4(6) FD) provides that the execution of an EAW may be refused "if the arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in the national territory, is a Portuguese national or lives in Portugal and the Portuguese State undertakes to execute the sentence or detention order in accordance with Portuguese law". The FD does not provide for specific rules on the recognition of foreign sentences for their execution, and Art. 234°, no. 1 of the Portuguese Code of Criminal Procedure (CCP) requires the review and confirmation of foreign sentences for their enforcement in Portugal, by the means of a special procedure regulated in articles 234° and f.

The Appeal Court of Coimbra, in its Judgement of 7 February 2007[70], ruled that the Portuguese State cannot undertake to execute the foreign sentence before it has been reviewed and confirmed through the said procedure. As a consequence, in the absence of a formal and separate decision of confirmation, the courts cannot apply Art. 12°, no. 1, al. g) PTL EAW and the warrant should be executed. Recently, a decision of the Supreme Court has followed the same reasoning[71].

However, the Supreme Court had already decided in the opposite sense, in its Judgment of 23 November 2006[72]. The decision stressed that the purpose of the EAW is to implement the principle of mutual recognition, which is based on mutual trust between MS, and that the EAW intends to replace the extradition between MS, which was based on the idea of "mistrust" and "doubt". The Court observed that the PTL EAW does not establish any procedure for review and confirmation of sentences because this would contradict the very purpose of the EAW. According to the Supreme Court, if the Portuguese court finds it more convenient to have the foreign conviction executed in Portugal rather than to surrender the requested person, then it should accept and respect its terms, under the principle of mutual recognition, without review or confirmation. Thus, the decision not to execute the warrant means, at the same time, that the Portuguese State *undertakes* to enforce the foreign sentence and, in that case, the court should order its immediate execution. Therefore, the Supreme Court concluded that the expression "Portuguese law" in accordance with which the sentence must be executed (Art. 12°, no. 1, al. g) PTL EAW) does not refer to the procedure of review and confirmation of foreign sentences established in the CCP, but rather to the law that regulates the execution of imprisonment and other measures involving deprivation of liberty[73].

It is submitted that the reasoning followed by the Supreme Court in the latter decision is sound and more consistent with the purposes of the EAW. The fact that the FD EAW does not provide for specific rules on the recognition of sentences in those cases does not prevent the MS from creating a special set of rules on that matter. Nevertheless, as the law is unclear and the courts' opinions are divergent, a legislative clarification of the regime is strongly recommended.

4. Conclusion

In Portugal, the EAW is viewed as a mechanism springing from mutual recognition, both at a *legislative level* and at a *judicial level*.

Although there are a few aspects where national law seems to deviate from the FD EAW or raises some interpretative issues, it can be said that, in general, Portuguese law complies with the European instrument. For their part, Portuguese courts often use mutual recognition, based on mutual trust, as a topic to justify some decisions concerning the EAW. Indeed, some shortcomings and inconsistencies in the implementation of the EAW are inherent to the fact that the contents and limits of mutual recognition are still not totally clear themselves[74].

As suggested by some interviewees[75], the functioning of the EAW could be improved by taking additional measures, both at the legislative level (*e. g.*, regulating the prevention and settlement of conflicts of jurisdiction) as well as at a practical level (*e. g.*, providing specific training for judges, prosecutors and lawyers). In any case, Portuguese policymakers and practitioners seem to have internalised the main feature of the EAW: foreign judicial decisions shall be, in principle, executed, grounds for non-execution shall be exceptional.

[70] Tribunal da Relação de Coimbra, *Acórdão*, 7 February 2007, in *Colectânea de Jurisprudência*, Ano XXXII, Tomo I, 2007, p. 54.

[71] Supremo Tribunal de Justiça, *Acórdão*, 9 January 2008, Case no. 07P4856, available at www.dgsi.pt. In the same sense, L. Silva Pereira, "Contributo para uma interpretação dos artigos 12°, no. 1 al. g) e 13°. al. c) da Lei no. 65/2003, de 23 de Agosto", *Revista do CEJ*, 7, 2007, p. 265 and f., 277 and f.

[72] Supremo Tribunal de Justiça, *Acórdão*, 23 November 2006, Case no. 06P4352, available at www.dgsi.pt.

[73] *Decreto-lei* no. 265/79, of 1 August 1979 (*Diário da República*, no. 176, Suplemento, Série I, 1 August 1979), modified by *Decreto-lei 49/80*, of 22 March 1980 (*Diário da República*, no. 69, Série I, 22 March 1980), and *Decreto-lei 414/85*, 18 October 1985 (*Diário da República*, no. 240, Série I, 18 October 1985). The Portuguese Government has already approved a new draft law (*Proposta de Lei*) on the enforcement of measures involving deprivation of liberty, which will be submitted to Parliament soon.

[74] See A. Klip, *European Criminal Law*, Antwerp, Intersentia, 2009, p. 23 and f.

[75] See S. Fidalgo, *op. cit.* [fn. 1], p. 31 and f.