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3 List of Acronyms

AFSJ: Area of Freedom, Security and Justice

CCP: Code of Criminal Procedure (Decree-Law no. 78/87, of 17 February)

CFREU: Charter of Fundamental Rights of the European Union

CJEU: Court of Justice of the European Union

DEIO: Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters

EAW: European arrest warrant

ECHR: European Convention on Human Rights

ECtHR: European Court of Human Rights

EIO: European Investigation Order

EU: European Union

f.: following (one or more)

FD-EAW: Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States

FD: Framework Decision

MS(s): Member State(s)

p.: page or pages

PC: Penal Code (Decree-Law no. 48/95, of 15 March)

PT-EAW: Portuguese Statute on the European Arrest Warrant (Law no. 65/2003, of 23 August)

PT-EIO: Portuguese Statute on the European Investigation Order (Law no. 88/2017, of 21 August)

TEU: Treaty on European Union

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TFEU: Treaty on the Functioning of the European Union

4 Executive Summary

In contrast with secondary EU legislation that seeks to harmonise national legislation – such as the Directives on procedural rights, which impact on well-established legislation envisaged to apply at the internal level (notably, the Code of Criminal Procedure) –, legal instruments on mutual recognition or judicial cooperation in criminal matters within the EU generally meet very low resistance from the Portuguese legislator, courts and other domestic authorities. Thus, for instance, the national act that implemented the Framework Decision on the European Arrest Warrant (FD-EAW) – *sc.*, Law no. 65/2003, of 23 August (PT-EAW) – included all grounds for non-execution provided for in that FD: the mandatory ones as binding and the optional ones as discretionary[213]. This suggests that no assessment was carried out at all by the national legislator as to whether all optional grounds for non-execution were indeed necessary and / or desirable in the light of the Portuguese legal tradition. Although fewer grounds for refusal would mean more cooperation, such a lack of assessment may be seen to denote a general attitude of acritical acceptance of this type of EU legislation at face value. In the same vein, only seldom does one find judicial decisions refusing execution of EAWs; rather, these are normally executed in the name of mutual trust[214]. This should contribute to explaining why proportionally fewer implementation issues exist concerning the FD-EAW and the Directive on the European Investigation Order (DEIO) than concerning those other legal instruments – which *a fortiori* is valid for the articulation with Regulation 2018/1805.

Nevertheless, it is still possible to discern some implementation issues with the FD-EAW and the DEIO, as well as some coordination issues with the Regulation 2018/1805, as summarised in the paragraphs immediately below and further elaborated on subsequently in this report.

[213] See further infra, §§ 7.2.2 and 7.3.2.

[214] On the possible reasons for the (understandable, yet somewhat overstated) different attitude concerning the implementation of harmonisation and mutual recognition legal instruments in the Portuguese legal system, see MIGUEL JOÃO COSTA / PEDRO CAEIRO, "Portugal – The Implementation of the Directives on Procedural Rights in Law and Practice", in Giuseppe Contissa / Giulia Lasagni / Michele Caianiello / Giovanni Sartor (eds.), *Effective Protection of the Rights of the Accused in the EU Directives: A Computable Approach to Criminal Procedure Law*, Leiden: Brill | Nijhoff (2022), p. 170 f.

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4.1 Framework decision 2002/584

In general, the Portuguese law implementing the EAW[215] can be considered to be in compliance with the FD-EAW. There are minor aspects in the implementation that do not perfectly mirror the FD, but – as will be seen below – these do not represent a deviation from the obligations that arise therefrom.

One such aspect is the omission of any mention of fundamental rights within the EAW. However, this is not problematic, since the only mention in the FD is directed at establishing that it "shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union" (Article 1 (3)). This, in essence, means that fundamental rights within the EAW procedure will be protected according to the existing standards in the European Union, which encompasses the Treaties (including the Charter of Fundamental Rights), the European Convention on Human Rights, the common constitutional traditions, and the case-law of the CJEU, inasmuch as it is directed at interpreting limitations to fundamental rights by European rules. Thus, there is no need for an explicit provision with the same content in the implementation law.

In this regard, it may be said that the sought person is afforded a broad right to defence under Portuguese law, particularly after the amendment to PT-EAW carried out in 2023, through Law no. 52/2023, of 28 August – which clarified the right to appoint a lawyer in the issuing MS and reinforced the right to translation – and the judgment of the CJEU in *TL* [216], which analysed the consequences of omitting the translation of an essential document into a language that the accused can understand.

The lack of double criminality is regarded exclusively as a mandatory ground for refusal (following a period of time during which it was considered both a mandatory and an optional ground for refusal under the Portuguese implementation law). However, this falls within the margin of discretion allowed to the Member States when implementing the FD-EAW[217], meaning that choice of the Portuguese State is also in line with the European instrument.

[215] *Sc.*, Law no. 65/2003, of 23 August (PT-EAW).
[216] C-242/22 PPU, *TL,* ECLI:EU:C:2022:611.
[217] Even though some case-law of the CJEU seems to suggest otherwise, implying that, in case of an optional ground for refusal, the executing authority must always have some margin of discretion in order to consider the appropriateness of refusing or granting surrender – C-579/15, *Popławski*, ECLI:EU:C:2017:503, para. 21, and, especially, C-665/20 PPU, *Criminal proceedings against X*, ECLI:EU:C:2021:339, paras. 42-44.

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Article 12-A (4) PT-EAW (corresponding to Article 4a (3) FD-EAW), on trial *in absentia*, is only partially implemented, since PT-EAW does not mention two aspects that are addressed in the FD, concerning the case where the EAW is granted under the conditions of para. (1) (d)[218] and the person concerned has requested a retrial or appeal. In these cases, the detention of the person awaiting retrial or appeal, until these proceedings are finalised, be reviewed in accordance with the law of the issuing MS, either on a regular basis or upon request of the person concerned. The FD then further establishes that such a review "shall in particular include the possibility of suspension or interruption of the detention", and that "the retrial or appeal shall begin within due time after the surrender" – neither of these conditions being reflected in PT-EAW.

A potential concern could arise from the use of the term "guarantees" in the context of the EAW, since Article 13 PT-EAW, which transposes Article 5 FD-EAW, uses the word "guarantees" not only in the heading of the Article (as the FD does), but also within the Article itself (Article 13 (1) *in fine*), whereas the FD reads "conditions". The reason why this could be a problem is that 'guarantees' and 'conditions' are, technically speaking, rather different concepts. Nevertheless, no actual guarantees are requested from the issuing MS under PT-EAW[219]: Portuguese courts only ask for information, using the envisioned mechanisms of the FD-EAW to the effect, such that in practice there is no discrepancy between the FD and PT-EAW in this regard.

Further discrepancies between the FD-EAW and the PT-EAW include Articles 5, 26 and 18. Article 5 (1) PT-EAW (transposing Article 10 (1) FD-EAW) does not mention the obligation to make enquiries, including through the contact points of the European Judicial Network, when the issuing judicial authority does not know which authority is the

Commenting this aspect and arguing for the inapplicability of such a conclusion to every ground of refusal, PEDRO CAEIRO / MIGUEL JOÃO COSTA, "Extradition and Surrender. From a Bilateral Political Arrangement to a Triangular Legal Procedure", in Kai Ambos and Peter Rackow (Eds), *The Cambridge Companion to European Criminal Law*, Cambridge: Cambridge University Press, 2023, p. 267 f. See yet further infra, § 7.4.2, on a related issue concerning Regulation 2018/1805.

[218] *Sc.*: where the person was not personally served with the decision but "(i) will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed; and (ii) will be informed of the time frame within which he or she has to request such a retrial or appeal, as mentioned in the relevant European arrest warrant."

[219] For a full explanation see PEDRO CAEIRO / RAQUEL CARDOSO, "First Periodic Country Report [on the application of the FD EAW by Portuguese courts]: Portugal", 2022, < https://stream-eaw.eu/country-reports/ >, p. 3.

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competent executing judicial authority. Article 26 (5) PT-EAW, contrary to Article 17 (7) FD-EAW, does not mention the obligation to inform the Council in case there are repeated delays by another Member State in the execution of European arrest warrants. Article 18 (5) PT-EAW (corresponding to Article 19 (2) FD-EAW) provides for the rules regarding the hearing of the detainee, but does not mention the "conditions determined by mutual agreement between the issuing and executing judicial authorities".

Finally, the Portuguese legislator has decided not to transpose Articles 19 (3), 27 (1) and 28 (1) of the FD-EAW, which is conform to their optional nature.

After the 2023 amendment, which finally included the transposition of Article 23 (5) FD-EAW, thus dispensing some interpretative exercises that had to be made in order to comply with the FD, the Portuguese legislation can be considered in line with the European legislation.

4.2 Directive 2014/41

According to the Council's "Evaluation Report on the Tenth Round of Mutual Evaluations on the Implementation of the European Investigation Order (EIO) – Report on Portugal"[220], since the implementation of this Directive in Portugal was carried out through an explicit and separate legal instrument – *sc.*, Law no. 88/2017, of 21 August (PT-EIO)[221] – "which follows the Directive nearly verbatim", such an implementation "appears to be complete"[222]. The only issue identified in that Report lies in the fact that the Portuguese Statute "does not (...) differentiate between the procedure for issuing an EIO and the procedure for executing one". Yet, even this issue is offset by the observation that "practitioners have claimed that this raises no problems for the application of the Directive"[223].

Nevertheless, our analysis of the Portuguese implementation statute vis-à-vis the Directive does allow for the identification of some implementation issues and of cases where full implementation is at least doubtful. In our view, and notwithstanding the high

[220] General Secretariat of the Council, "Evaluation Report on the Tenth Round of Mutual Evaluations on the Implementation of the European Investigation Order – Report on Portugal", (OR. en) 10135/1/23 REV 1, Brussels, 28 June 2023, < https://www.parlament.gv.at/dokument/XXVII/EU/147049/imfname_11266202.pdf >.
[221] In line with the implementation in Portugal of most mutual recognition legal instruments.
[222] General Secretariat of the Council, "Evaluation Report…" *cit.*, p. 10.
[223] *Ibid.*

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level of conformity to the DEIO, some room for improvement does remain, as exemplified immediately below and expounded in further detail throughout § 7.3.

One implementation issue concerns the general duty enshrined in Article 9 (1) DEIO to recognise and execute EIOs. This provision requires the executing State to comply with the formalities and procedures expressly indicated by the issuing State unless otherwise provided in the Directive and provided that they are not contrary to the "fundamental principles of law of the executing State". In contrast, Article 18 (2) PT-EIO appears to be stricter than the DEIO, as it allows for non-compliance with such formalities and procedures if they do not respect the "requirements and conditions of national law on evidence in the context of similar national proceedings" – that is, even if these are not "fundamental" principles.

Another implementation issue concerns the (so to speak) 'expediency requirements' contained in certain provisions of the DEIO, which are not found in the corresponding provisions of the PT-EIO. An example concerns Article 11 DEIO, on grounds for non-execution, more specifically para. (5), first sentence, according to which, in the case mentioned in para. (1), and where the power to waive the privilege or immunity lies with an authority of the executing State, the executing authority shall request it to exercise that power "forthwith". Other examples include Article 12 (on time limits for recognition or execution), para. (4) DEIO ("without delay")[224], and Article 13 (on transfer of evidence), para. (1), first sentence, DEIO ("without undue delay")[225].

Yet another issue concerns Article 22 DEIO, on temporary transfer to the issuing State of persons held in custody for the purpose of carrying out an investigative measure, namely para. (4) thereto, on the transit of the person in custody through the territory of a third Member State (the Member State of transit). Article 32 (10) PT-EIO sets conditions to such a transit through Portugal which seem to conflict with the goals of the DEIO.

Another implementation issue concerns Article 19 DEIO, on confidentiality, namely its para. (3), as Article 16 PT-EIO appears to be less protective of confidentiality than the Directive's provision.

[224] *Sc.*: "Unless grounds for postponement under Article 15 exist or evidence mentioned in the investigative measure covered by the EIO is already in the possession of the executing State, the executing authority shall carry out the investigative measure *without delay* and without prejudice to paragraph 5, not later than 90 days following the taking of the decision referred to in paragraph 3."
[225] *Sc.*: "The executing authority shall, *without undue delay*, transfer the evidence obtained or already in the possession of the competent authorities of the executing State as a result of the execution of the EIO to the issuing State."

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Article 14 DEIO, on remedies, triggers some implementation concerns as well. In the first place, it is doubtful that para. (2) has been fully implemented, since PT-EIO does not explicitly feature the reference therein to fundamental rights. In the second place, Article 45 (5) PT-EIO does not require explicitly that information on legal remedies be provided "when these become applicable and in due time to ensure that they can be exercised effectively", as required by Article 14 (3) DEIO.

A recurring issue in the case law on the EIO concerns its interplay with the EAW system. The claim has been made before Portuguese courts that judicial authorities of the executing Member State in EAW proceedings should assess whether the purposes envisaged by the issuing Member State of the EAW could be attained through a different EU law measure which is less detrimental to individual rights than the EAW. The Supreme Court, however, has taken the stance that, even if in a given case it might be reasonable to use a measure other than an EAW, such a choice rests with the issuing authorities and cannot be disputed by the executing ones.

4.3 Regulation 2018/1805

Generally speaking, the Regulation does not bring about major innovations to preexisting national law, specifically to Laws no. 25/2009 and no. 88/2009, which implemented the Framework Decisions 2003/577/JHA of 22 July 2003 and 2006/783/JHA of 6 October, respectively. There is, in any case, one core problematic implication of the Regulation in national law: it concerns the application of the essential safeguards of criminal proceedings established in the Charter to all the freezing and confiscation proceedings covered by the Regulation which are not criminal proceedings.

Arguably in consequence of the inertia of the legislator, on the one hand, and of the great lack of clarity as to the legal nature of the various types of confiscation, on the other hand, Portuguese law does not define the principles and procedural rights applicable in confiscation proceedings. One source that could be of avail in determining which safeguards should be afforded in confiscation proceedings is the ECtHR's case law on confiscation. States under the jurisdiction of the ECtHR have repeatedly argued before this Court that their confiscation procedures are not criminal in nature, such that the rights arising from Articles 6 (2) and (3) and 7 of the ECHR should not be applied. With some exceptions, the

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Court has held that safeguards for criminal proceedings must not be applied, because the legal consequence in question is not criminal in nature[226].

When one looks at Recital 18 of the Regulation ("the essential safeguards for criminal proceedings set out in the Charter should apply to proceedings in criminal matters that are not criminal proceedings but which are covered by this Regulation"), one is led to the conclusion that the Regulation intends for States to follow an opposite approach to that of the ECtHR, which is likely to cause even greater uncertainty as to which procedural rights and guarantees are required in confiscation proceedings. From empirical experience one may expect resistance on the part of the Member States to applying the essential safeguards of criminal proceedings to non-criminal confiscation proceedings. A ruling by the CJEU on this issue will likely prove to be essential. In the meantime, it is not to be expected that Portugal will apply the essential safeguards of criminal proceedings to its non-criminal confiscation proceedings.

Portugal has not submitted any declaration regarding the requirement for the Issuing State to transmit the original freezing and confiscation order, or a certified copy, provided for in the Regulation in Articles 4 (2), 6 (3), 14 (2) and 17 (3).

4.4 Note on the translation

Unless stated otherwise, the translation of the excerpts of case law and provisions of the Portuguese legal system contained in this report is unofficial; the responsibility for its accurateness lies with the authors of this report.

5 The implementation of criminal mutual recognition instruments in Portugal

5.1 Introduction

5.1.1 Overview of the criminal procedural system

It seems apposite to begin by outlining the core aspects of the legal status of the defendant, as this is the person whose fundamental rights are more heavily jeopardised by

[226] See infra, within § 7.4, with further references.

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criminal proceedings. Most such rights are enshrined in the Constitution[227], and further developed in the Code of Criminal Procedure (CCP)[228]. It is important to bear in mind that in the Portuguese legal system the suspect as such has few specific procedural rights or duties: they emerge with his / her formal designation as a subject of the procedure (*viz.*, as an '*arguido*'), such a designation therefore being a procedural act of great relevance[229].

The first constitutional provision worth mentioning on the status of the defendant is Article 20. It provides that everyone has a right to access the law and the courts so as to obtain protection of their rights and legally protected interests, and that the exercise of this right may not be hindered due to insufficiency of economic means. Moreover, it guarantees the right to legal information and legal counselling, which includes the right to be accompanied by an attorney before any public authority. On criminal proceedings specifically, Article 27 of the Constitution provides that, as a principle[230], a person can only be deprived of liberty in result of a judicial decision determining him / her to be either criminally liable or dangerous[231]. Article 28 of the Constitution, in turn, sets the conditions in which a person may be placed in pre-trial custodial detention, and Article 31 of the Constitution contains the *habeas corpus* measure, which enables any person in the exercise of their political rights to request the Supreme Court of Justice to order within 8 days the release of a person being illegally deprived of liberty. Most relevantly, Article 32 of the Constitution contains a wide array of procedural rights, as expounded below.

In the first place, it provides that criminal proceedings must ensure all the guarantees of defence, including the right to appeal. The right to appeal has relatively broad limitations[232], but more recently it has expanded[233], and it is now wider under the CCP than constitutional case law would even require[234]. Article 32 of the Constitution also enshrines presumption of innocence, which contains other essential principles such as *in dubio pro*

[227] Enacted by the Decree of 10 April 1976.
[228] Enacted by the Decree-Law no. 78/87, of 17 February.
[229] Articles 57 f. CPP establish the procedural acts and moments in which a person must be formally designated as an *arguido*: see further in MIGUEL JOÃO COSTA / PEDRO CAEIRO, "Portuguese Report", *CrossJustice* project, 2021, § 5.1.2., < https://site.unibo.it/cross-justice/en/project-results/publications >.
[230] This rule is subject to some exceptions, which include the extradition procedure: see Article 27 (3) (c) of the Constitution.
[231] A criminal penalty cannot be applied in the absence of guilt/blameworthiness, but the perpetration of a criminal act together with the criminal dangerousness of the offender may lead to the application of a security measure.
[232] See notably Article 400 of the CCP.
[233] Through Law no. 94/2021, of 21 December.
[234] See e.g. the rulings of the Constitutional Court no. 523/2021, no. 524/2021 and no. 97/2023.

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reo and *nemo tenetur*, the latter of which in turn comprises, *inter alia*, the right to remain silent. Article 32 further provides for the right not to be tried *in absentia* (although this right too knows meaningful exceptions)[235] and for the right to challenge inculpatory allegations. It entitles defendants to be assisted by an attorney of their choice and requires the law to specify the acts and phases of the procedure where such an assistance is mandatory. Lastly, it lays down the principle that criminal cases cannot be tried by a court other than that which was competent according to the law in force at the time of the acts (*juge naturel*)[236], and the principle according to which investigative measures of impact to fundamental rights must be ordered or at least authorised by a judge. Regarding transnational legal mechanisms[237], the provisions that apply more directly are Article 20 of the Constitution, as a general provision, and Article 33, on extradition and expulsion. Nevertheless, the applicability of Article 32 is not limited to criminal proceedings *stricto sensu*; rather, it expands somewhat to transnational mechanisms, as these are considered to some extent as a special type of criminal proceedings[238]. This view is implicit also, v.g., in the fact that the CCP applies in a subsidiary manner to cooperation proceedings[239].

As for their form[240], in their standard modality criminal procedures encompass two pre-trial phases: the inquiry (*inquérito*)[241] and the instruction (*instrução*)[242]. The former is the investigation phase *par excellence*. It concludes with a decision whether or not to prosecute. Prosecution shall take place where evidence was gathered that suggests, on the balance of probabilities, that the person is more likely to be criminally liable than innocent. The instruction phase consists of a judicial evaluation by a judge of the decision taken at the

[235] See Articles 332 f. CCP.
[236] See Articles 29 (3) and 32 (9) of the Constitution. The prohibition of *ad hoc* courts obviously does not affect the cooperation with international tribunals such as those created by UN Security Council resolutions or the ICC.
[237] See further in MIGUEL JOÃO COSTA / PEDRO CAEIRO, "Country Report Portugal", in Martin Böse / Maria Bröcker / Anne Schneider (eds.), *Judicial Protection in Transnational Criminal Proceedings*, Cham: Springer, 2021, p. 271 f.
[238] The Constitutional Court tends for instance to equate extradition and criminal proceedings, save insofar as concerns the rights and principles that are rather specific to the ascertainment of criminal liability, such as the presumption of innocence: see e.g. the ruling of the Constitutional Court no. 54/87, of 10 February; see more recently, the ruling no 540/2022, of 16 August.
[239] See notably Article 3 (2) of Law no. 144/99 of 31 August, and Articles 16 (6), 17 (4) and 34 PT-EAW.
[240] See further in PEDRO CAEIRO / MIGUEL JOÃO COSTA, "The Portuguese System", in Katalin Ligeti (ed.), *Toward a Prosecutor for the European Union – Volume 1: A Comparative Analysis*, Oxford: Hart Publishing, 2012, p. 540 f.
[241] Articles 262 f. CCP.
[242] Articles 286 f. CCP.

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end of the inquiry. It is an optional phase which takes place only upon request. If the judge decides that the procedure is to be continued, then the phase of trial (*julgamento*)[243] will in principle ensue[244], after which a phase of appeal (*recurso*)[245] may yet take place, if the defence and/or the prosecution or the victim challenge the decision taken at the end of the trial – and, in some cases, the decision then taken on appeal is yet open to a further appeal before the Supreme Court.

At the institutional level, the authorities involved in criminal proceedings are mainly the criminal police (*órgãos de polícia criminal*)[246], the public prosecution office (*Ministério Público*) and judges / courts (*juízes* / *tribunais*). The inquiry is led by the public prosecution office, assisted by the criminal police, who act under the direct supervision and functional (but not hierarchical) dependence of the former. The judge of instruction directs the phase of instruction – also with the assistance of the criminal police, in similar terms[247] –, but also plays a key role during the preceding phase of inquiry, as it is the judge of instruction that is competent for executing or at least ordering or authorising the investigative measures that are more intrusive to fundamental rights[248], thus acting as '*juge des libertés*'. The trial runs its course before the trial court – which may be a single-judge court, a three-judge court or a court of jury –, and the appeal before a court of appeal – in principle a High Court[249], but in some cases the Supreme Court[250], and, if the constitutionality of norms relevant to the case is to be challenged, appeal to the Constitutional Court is yet possible.

The police obtain notice of crimes and seek to prevent their consequences, identify suspects, arrest offenders *in flagrante delicto*, and carry out urgent evidence gathering

[243] Articles 311 f. CCP.
[244] Save for certain exceptional cases where the judge presiding over the trial phase decides otherwise upon receiving the file: see Article 311 CCP (*saneamento do processo*).
[245] Articles 399 f. CCP.
[246] The CCP does not define the concept 'criminal police'. Based on a functional definition, it comprises any of the several police bodies while exercising such an activity: ANABELA MIRANDA RODRIGUES, "O Inquérito no novo Código de Processo Penal", in Centro de Estudos Judiciários (ed.), *Jornadas de Direito Processual Penal: O Novo Código de Processo Penal*, Coimbra: Almedina 1988, p. 70.
[247] Article 8 (7) of Law no. 49/2008, of 27 August 2008, on the organisation of criminal investigation, prescribes the continuity between the phases of inquiry and instruction. Accordingly, the police bodies competent for assisting the judge of instruction in the latter phase shall be the same that assisted the public prosecution in the former.
[248] Articles 268 and 269 CCP.
[249] There are 5 High Courts (*Tribunais da Relação*) in the country: Guimarães, Porto, Coimbra, Lisboa and Évora. On Portuguese judicial organisation, see Law no. 3/99, of 13 January.
[250] The Supreme Court (*Supremo Tribunal de Justiça*) is the highest judicial court in the country, and is located in Lisbon.

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measures[251]. Several procedural acts may be delegated by the public prosecution office and the judge of instruction on the police[252], which often carries it to have a central role in the investigation. The public prosecution office acts on the basis of a principle of objectivity ('*à charge et à décharge*')[253] and of the procedural principle of legality[254]. They enjoy both institutional and functional autonomy vis-à-vis the Executive, namely the Minister of Justice, which means that they cannot be instructed to act or not to act in a given manner, its priorities being set only by the law[255]. This places the public prosecution office closer to the judicial function *stricto sensu* than to the administrative function, and it warrants their classification as 'judicial authorities'[256]. Courts are the natural bearers of the duty to provide judicial protection. Where a different authority – notably, the public prosecution office, during the inquiry – is entitled to order, authorise or validate a procedural measure, such measure is not liable to *direct* judicial review, since the public prosecution office has autonomy to direct the inquiry, but the validity of such measure can be challenged before a judge during the phase of instruction or later at the trial.

The institutions involved in cooperation proceedings are the same as in criminal proceedings. Their competence differs slightly from one context to the other, but in essence they play similar roles. The criminal police may for instance be called upon to arrest an individual whose surrender was requested. The public prosecution office abides here too by a principle of objectivity, such that they are not bound to plead in favour of granting cooperation. All cooperation proceedings (classic or mutual recognition-based) are streamlined, with the Attorney-General's Office operating as a central authority[257]. Courts

[251] See Articles 55 and 248 f. CCP, on the notice of the crime, precautionary measures on evidence, identification of suspects and information gathering, body and premise searches, interception of postal communications and cellular location.
[252] See Articles 270 and 290 (2) CCP. As a principle, when a given investigative measure is to be executed by the police and the judicial authority did not delegate such a competence, authorisation or *post factum* validation is necessary.
[253] See Article 3 (2) of Law no. 68/2019, of 27 August, establishing the Statute of the Public Prosecution Office (SPPO).
[254] Explicitly enshrined in Article 219 (1) of the Portuguese Constitution and in the SPPO (in Article 3 (2) again), and concretised in the CCP, inter alia in Articles 262 (2) and 283 (1). On this principle, see MARIA JOÃO ANTUNES, *Direito Processual Penal*, 5th ed., Coimbra: Almedina, 2023, p. 41 f. and 85 f.
[255] Namely the statutes that define the criminal policy program for a given timespan in fulfilment of the criminal policy framework set in Law no. 17/2006, of 23 May: currently, Law no. 51/2023, of 28 August, for the biennial 2023-2025.
[256] See JORGE DE FIGUEIREDO DIAS, "Nótulas sobre temas de direito judiciário (penal), *Revista de Legislação e de Jurisprudência* 127 (1995), p. 354 f., and 128 (1995), and 8 f.
[257] See e.g. Articles 9 PT-EAW and 10 (1) and (2) PT-EIO; see https://en.ministeriopublico.pt/node/4083.

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remain the main holders of the duty to secure judicial protection. That certain cooperation measures be ordered by a court is in fact imposed by the Constitution itself. The courts that function as courts of first instance in extradition and EAW proceedings are those that in criminal proceedings function as courts of appeal (*sc.*, High Courts)[258], whereas the Supreme Court, which in criminal proceedings intervenes in a limited number of cases, in such proceedings is the first instance of appeal, and as such is normally called upon to intervene[259]. In the context of the EAW, common courts can issue warrants[260].

In cooperation proceedings, judicial protection often occurs only subsequently to the taking of a decision that affects individual rights. Nevertheless, in some cases such a protection takes place earlier: an example is the waiver of the specialty rule by the concerned person, which will only be valid if it is provided before a judge in the presence of an attorney [261]. Other procedural acts must be followed by judicial review shortly afterwards: an example is the arrest pursuant to an EAW – the arrested person must be brought before a judge to be heard within 48 hours, and the judge may decide to apply a non-custodial measure while the proceedings are pending[262]. Decisions to execute an EAW can be appealed[263]. In turn, the decision to grant mutual legal assistance (e.g., for evidence gathering) cannot be appealed. However, the procedural act to which such an assistance corresponds (e.g., the search of certain premises) will be open to appeal if this possibility would exist for that same act in a national criminal procedure[264].

5.1.2 Overview of the implementation roadmap

The Framework Decision on the European Arrest Warrant (FD-EAW) was implemented in the Portuguese legal order by Law no. 65/2003, of August 23 (PT-EAW), which came into force on the 1st of January 2004. From this date onwards, the simplified surrender procedure envisioned in that FD was applied to requests received after that date from Member States which had opted for its immediate application (Article 40). The

[258] See Articles 12 (3) (c) CCP, 46 (3) and 49 (1) of Law no. 144/99, of 31 August, and 15 PT-EAW.
[259] See Articles 49 (3) of Law no. 144/99, of 31 August, and 24 (5) PT-EAW.
[260] According to Article 36 PT-EAW, competence for issuing EAWs belongs to the authority competent for ordering the detention or the arrest of the person in the context of the national criminal proceedings that give rise to the EAW.
[261] See Article 7 (3) PT-EAW.
[262] Article 18 (3) PT-EAW.
[263] Article 24 (1) (b) PT-EAW.
[264] Articles 399 and 400 CCP; see further *infra*, § 7.3.5.

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transposition of this FD was only possible due to a prior constitutional amendment (in 2001), which added Article 33 (5). This provision created an exception to the common extradition regime in order to allow for simplified surrender within the European Union (EU). Specifically, it allows for the surrender of Portuguese citizens, and surrender in situations in which the issuing state may impose a life sentence or a sentence of indeterminate duration[265]. The Portuguese law implementing the EAW has been subject to three modifications over its life span: the first in 2015 (through Law no. 35/2015, of 4 May), the second in 2019 (through Law no. 115/2019, of 12 September), and the third in 2023 (through Law no. 52/2023, of 28 August, already mentioned). Overall, and despite the fact that Law no. 65/2003 could be considered to be in compliance with the FD in general, these legislative amendments were primarily aimed at addressing some issues of conformity between Portuguese law and the FD-EAW[266], and most recently, with the overall EU legal order (e.g., regarding the right to translation in criminal proceedings).

The Directive regarding the European Investigation Order (DEIO) was implemented by Law no. 88/2017, of 21 August (PT-EIO), which entered into force on the 22nd of August 2017. Thus far it has been amended only once, through Law no. 42/2023, of 10 August, which implemented the Directive (EU) 2022/211 and the Directive (EU) 2022/228, both of 16 February 2022, which in turn amended, respectively, the Framework Decision 2002/465/JHA and the Directive 2014/41/EU, as regards their alignment with Union rules on the protection of personal data.

[265] Other constitutional provisions on extradition/surrender remained untouched: non-extradition in case of political persecution, or where death sentences or sentences that result in irreversible harm to the integrity of the person are applicable; the judicial competence in surrender procedures; and the right to asylum. For an analysis, see PEDRO CAEIRO / SÓNIA FIDALGO, "O mandado de detenção europeu na experiência portuguesa: tópicos da primeira década", in Pedro Caeiro (coord.), *Temas de Extradição e Entrega*, Coimbra: Almedina, 2015, p. 161; see also PEDRO CAEIRO, "*Ut Puras Servaret Manus* – Alegações contra a assunção, pelo Estado Português, da obrigação de entrega ao Tribunal Penal Internacional de um cidadão que possa ter de cumprir uma pena de prisão perpétua", *Revista Portuguesa de Ciência Criminal* 11 (2001), p. 39 f.; LUÍS SILVA PEREIRA, "Alguns aspectos da implementação do regime relativo ao mandado de detenção europeu", *Revista do Ministério Público* 96 (2003), p. 39 f.; id., "Contributo para uma Interpretação dos Artigos 12 n.º 1 al. g) e 13.º al. c) da Lei n.º 65/ 2003, de 23 de Agosto", *Revista do Centro de Estudos Judiciários* 7 (2007), p. 265 f.; NUNO PIÇARRA, "A proibição constitucional de extraditar nacionais em face da União Europeia", *Revista do Centro de Estudos Judiciários* 7 (2007), p. 131 f.

[266] For an analysis prior to the alterations, see PEDRO CAEIRO / SÓNIA FIDALGO, "The Portuguese experience of mutual recognition in criminal matters: five years of European Arrest Warrant", in Gisele Vernimmen-van Tiggelen / Laura Surano / Anne Weyembergh (eds.), *The future of mutual recognition in criminal matters in the European Union*, Brussels: Editions de l'Université de Bruxelles, 2009, p. 447 f. For a recent analysis, see PEDRO CAEIRO / RAQUEL CARDOSO, "First Periodic Country Report…", *op. cit.*, p. 2-3.

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Portugal did not create any legislation to implement the Regulation (EU) 2018/1805 on the mutual recognition of freezing and confiscation orders, as it was unnecessary (Article 288 TFEU). Until the Regulation came into force, the issuing, recognition, and execution of freezing orders taken by a judicial authority of another Member State in the context of criminal proceedings was governed by Law no. 25/2009 of 5 June, the aim of which was to implement Framework Decision 2003/577/JHA, of 22 July 2003. The issuing, recognition and execution in Portugal of a decision to confiscate instruments and proceeds in criminal proceedings by judicial authorities in other EU Member States was governed by Law no. 88/2009, of 31 August, whose objective was to implement Framework Decision 2006/783/JHA, of 6 October, on the application of the principle of mutual recognition to confiscation orders, as amended by Framework Decision 2009/299/JHA, of 26 February. Laws nos. 25/2009 and 88/2009 still apply to situations in which the Regulation does not apply and the requirements for the application of these laws are met. This will be the case when it comes to judicial co-operation in these matters between Portugal and Denmark and Ireland, which have decided not to bind themselves to the Regulation.

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5.2 The implementation of Framework decision 2002/584

5.2.1 Scope

The EAW is a judicial decision issued by a Member State (MS) with a view to the arrest and surrender by another Member State of a requested person, which is executed on the basis of the principle of mutual recognition[267]. No relevant implementation issues can be discerned in Portugal concerning the issuing of the EAW. However, a conclusive assessment in this respect is hardly possible, since there are very few (at least publicly available) decisions with Portugal acting as issuing MS. At any rate, the main issue appears to be proportionality in the issuing of the EAW[268]. For instance, it has been held that it would be disproportionate to issue an EAW with the sole purpose – and without further reasoning – of putting an end to a situation of procedural default (*contumácia*), especially in a situation where it would be impossible to subject the person to pre-trial custody in Portugal[269].

According to Article 2 (1) PT-EAW (corresponding to 2 (1) FD-EAW), an EAW may be issued for two purposes: either to prosecute the individual, or to execute a custodial sentence or detention order against them. In order to limit the use of the EAW to more serious crimes, both purposes have additional criteria: for criminal proceedings, the acts must be punishable by the law of the issuing Member State with a custodial sentence or detention order of at least 12 months, while for enforcement purposes the sentences must be of at least four months.

While issuing an EAW for conducting a criminal procedure is possible regardless of the phase of the procedure (including the pre-trial phases), a careful assessment of

[267] Mutual recognition can also entail a beneficial decision for the individual, as it is growingly understood today: on the matter, see e.g. SÖREN SCHOMBURG / VÂNIA COSTA RAMOS / WILLIAM JULIÉ / AMÉLIE BEAUCHEMIN. / REBECCA NIBLOCK, "ECBA Statement on Mutual Recognition of Extradition Decisions of 21 June 2022", < https://ecba.org/extdocserv/publ/ECBA_STATEMENT_Mutualrecognitionextraditiondecisions_21June2022.pdf >.

[268] Another (albeit very secondary) issue that has surfaced in Portuguese case law concerns the determination of which domestic court is competent for issuing the EAW for an inmate who has escaped prison: while some judgments have attributed such a competence to the sentencing court (TRC, 03.10.2007 [ECLI:PT:TRC:2007:183.99.0TBVGS.A.C1.B8], others to the court that is responsible for supervising the execution of the sentence (*tribunal de execução de penas*) (TRC, 17.12.2008 [ECLI:PT:TRC:2008:10.06.4TXCBR.C1.61] and TRC, 28.01.2009 [ECLI:PT:TRC:2009: 220.05.1TXCBR.B.C1.B1]).

[269] See v.g. the ruling of the High Court of Porto of 18-03-2015 (ECLI:PT:TRP:2015:612.08.4GBOBR.A.P1.C6).

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proportionality must be conducted before using such a restrictive mechanism, also in the light of the fact that there are other judicial cooperation instruments available to States[270]. Changing the purpose of an EAW during the procedure is not allowed, as it would violate defence rights[271].

As a fully judicialized surrender procedure, the EAW must be issued by a judicial authority. Article 36 PT-EAW establishes that "the judicial authority competent to order the arrest or imprisonment of the person sought under Portuguese law is competent to issue the European Arrest Warrant". This means that, in Portugal, both prosecutors and judges are competent to issue an EAW, depending on the phase of the criminal procedure: (i) During the phase of inquiry, competence belongs to the prosecutor (Article 257 (1) CCP), when the purpose is to bring the person before the judge for the first hearing and interrogation; however, if the purpose is to subject the individual to pre-trial custody, then such a competence belongs to the judge of instruction (Article 268 (1) CCP), as the application of that coercive measure is an exclusive competence of judges. (ii) During the phase of instruction, the competence to issue an EAW will belong to the judge of instruction (Article 293 CCP). (iii) In all subsequent phases, the competence belongs to the courts.

With regard to the criteria used by the Court of Justice of the European Union (CJEU) to determine whether the issuing authority is a judicial authority within the meaning of the FD-EAW[272], both Portuguese prosecutors and judges meet these criteria. According to the Portuguese Constitution, the public prosecution office is an autonomous body with its own statute (Article 219 (2)), whose role is to represent the State and protect the interests determined by the law, which includes conducting criminal prosecutions based on the procedural principle of legality. Prosecutors are subordinate within the internal hierarchy, but they do not receive orders or instructions from any political or executive body. Judges are fully independent, in terms of their statute, recruitment, career advancement, transfer, retirement and disciplinary measures (Articles 215 to 217 of the Constitution).

[270] For an analysis of proportionality in Portugal, both as the issuing and executing MS, see PEDRO CAEIRO / RAQUEL CARDOSO, "First Periodic Country Report…", *op. cit.*, p. 4 and 7; and PEDRO CAEIRO / RAQUEL CARDOSO, "Country Research Brief [on the application of the FD-EAW by Portuguese courts]: Portugal", 2023 < https://stream-eaw.eu/country-reports/ >, p. 7.
[271] PEDRO CAEIRO / RAQUEL CARDOSO, "Country Research Brief…", *op. cit.*, fn. 10.
[272] See, among others and for further specificity, C-509/18, *PF* (2019), ECLI:EU:C:2019:457; C-508/18 and C-82/19 PPU, *OG and PI,* (2019), ECLI:EU:C:2019:456; C-489/19 PPU, *NJ*, (2019), ECLI:EU:C:2019:849; and C-556/198 PPU and C-626/19 PPU, *JR and YC*, (2019), ECLI:EU:C:2019:1077.

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An issue which is still relevant to the scope of the EAW concerns Article 2 (2) and (3) PT-EAW (corresponding to Article 2 (2) and (4) FD-EAW). Paragraph (2) establishes that surrender shall proceed without an assessment of dual criminality when the acts fall within the listed categories of criminality. However, this is only the first requirement: the acts must also be punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years. This provision requires the executing MS to first determine if the acts fall within the listed categories and secondly if they are punishable by a custodial sentence or detention order of at least a maximum period of three years. If any of those requirements is not met, an assessment of dual criminality is permissible[273].

Paragraph (3) makes use of the possibility provided for by the FD to establish that, where the acts do not fall under paragraph (2), surrender is only admissible if such acts are also considered a criminal offence under Portuguese law, irrespective of their constituent elements or qualification. This is, therefore, a mandatory ground for refusal under Portuguese law[274], which is in line with the margin of discretion granted to the MSs in transposing the FD into their legal orders (Article 2 (4) FD-EAW allows for this possibility).

5.2.2 Grounds for non-recognition and non-execution

There are multiple grounds that can lead to the refusal of execution of an EAW. We will indicate them in the order in which they appear in PT-EAW (which generally corresponds to the order in which they appear in the FD-EAW):

a) The first ground for non-recognition, although it is not explicitly stated as such in either the FD or the PT-EAW[275], is the fact that the issuing authority is not considered

[273] This can also have an impact on the formal aspects necessary for the execution of the EAW: in a case where an EAW had been issued for the purpose of executing a sentence of four months of imprisonment, which resulted from the joint sentence for several offences, the fact that one of these offences did not satisfy the dual criminality requirement led the court to conclude that it was impossible to know "the effect that the act, not punished with imprisonment in the Portuguese legal order, had in influencing the joint sentence of four months". The court held that such an offence should be removed from consideration, which would probably result in a sentence lower than four months, and the court thus refused the EAW on this ground – decision of the High Court of Porto, 07-03-2012, no. 32/12.6YRPRT < https://jurisprudencia.csm.org.pt/ecli/ECLI:PT:TRP:2012:32.12.6YRPRT.39/ >.

[274] For an analysis of the relevant provisions see PEDRO CAEIRO / SÓNIA FIDALGO, "The Portuguese experience of mutual recognition…", *op. cit.,* p. 452 f., and, for an assessment of Portuguese case law on the matter, PEDRO CAEIRO / RAQUEL CARDOSO, "First Periodic Country Report…", *op. cit.*, p. 16 f.

[275] However, it does stem from Article 1 (1) PT-EAW (corresponding to Article 1 (1) FD-EAW) that the EAW is a "judicial decision", and as such it must be issued by a judicial authority – see e.g. C-477/16 PPU, *Kovalkovas* (2016), ECLI:EU:C:2016:861.

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a judicial authority under the case-law of the CJEU. In order to qualify as a judicial authority, it must be independent in the sense that it does not receive orders or instructions from the executive with regard to the discharge of their duties in specific cases[276]. When this is not the case, the EAW cannot be executed, as it does not qualify as a "judicial decision"[277].

b) Article 2 (2)(3) PT-EAW (matching Article 2 (2)(4) FD-EAW) provides for the non-execution of an EAW when dual criminality is not met in the case, in the circumstances described above.

c) Another ground for non-recognition of the EAW is the absence of the elements mentioned in Article 3 PT-EAW (Article 8 FD-EAW). In such cases, more information can (and should) be requested from the issuing State (Article 16 (2)(3) and 22 (2) PT-EAW, corresponding to Article 15 (2) FD-EAW). Should this information not be received, execution may not proceed, as the court cannot make an informed decision on surrender. Regarding the translation of the warrant into the official language of the executing MS, the lack thereof is considered a mere irregularity under Portuguese law, which can be cured and therefore does not lead to the refusal of the EAW[278]. However, the judgment of the CJEU in *TL*[279] has made it more complicated to apply the entire Portuguese regime of irregularities, since it has determined the non-applicability of these national rules when they lead to the obligation, on the part of the beneficiary of the rights to translation and to information, to invoke these rights within a set time period, or otherwise such a claim becomes time-barred and the irregularity cured. This judgement has made it clear that the period of time within which the lack of translation of an essential document can be invoked will only begin once the person "has been informed, in a language which he or she speaks or understands, first, of the existence and scope of his or her right to interpretation and translation and, secondly, of the existence and

[276] Recall the relevant case law of the CJEU *supra*, § 7.2.1.
[277] To the best of our knowledge, there have been no cases in Portugal where an EAW was denied based on these grounds, even though the defence raised the question – see PEDRO CAEIRO / RAQUEL CARDOSO, "First Periodic Country Report…", *op. cit.*, p. 7.
[278] For further detail, see PEDRO CAEIRO / RAQUEL CARDOSO, "First Periodic Country Report…", *op. cit.*, p. 12
[279] C-242/22 PPU, *TL,* ECLI:EU:C:2022:611

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content of the essential document in question and the effects thereof".”[280]. When applied to the EAW, this means that if a translation is not provided, the procedural acts that occurred without a translation are considered null and void[281], and must be repeated once a translation is provided. This does not result in the non-execution of an EAW, but it can lead to the release of the person if the deadlines are exceeded in the meantime.

d) The most common grounds for non-execution are found in Articles 11 to 13 PT-EAW (equivalent to Articles 3 to 5 FD-EAW). Article 11 PT-EAW (equivalent to Article 3 FD-EAW) now only includes three grounds for mandatory non-execution: amnesty (a); *ne bis in idem* within the EU (b); and impossibility of holding the person sought criminally responsible in Portugal due to their age (c). These are all completely in line with the FD-EAW and do not require further explanation, as there are no longer any national specificities to consider[282].

e) Article 12 PT-EAW (corresponding to Article 4 FD-EAW) is now fully compliant with the FD. This Article establishes optional grounds for non-execution, in the sense that it is for the courts to determine whether to surrender or refuse cooperation in these cases. Before the 2019 amendment, subparagraph (a) of this provision established, as an optional ground for refusal, the fact that “the act giving rise to the issuing of the European arrest warrant does not constitute an offence punishable under

[280] C-242/22 PPU, *TL,* ECLI:EU:C:2022:611, para. 89. See also PEDRO CAEIRO / RAQUEL CARDOSO, “First Periodic Country Report…”, *op. cit.*, p. 9 on this case.

[281] This was the conclusion reached by the Portuguese High Court, which submitted the request for a preliminary ruling in the procedure that originated it. In this case, it meant that the entire criminal procedure had to be considered null and void, since the issue with translation was found in the very first procedural act – decision of the High Court of Évora, 02-08-2022, no. 53/19.8GACUB-B.E1, ECLI:PT:TRE:2022:53.19.8GACUB.B.E1.EE < https://www.dgsi.pt/jtre.nsf/134973db04f39bf2802579bf005f080b/2a0c99e8287c182a802588b80056aa2d?OpenDocument >.

[282] Before the legislative amendments to the PT-EAW, Article 11 included three additional grounds for mandatory non-execution: if the offence was punishable with the death penalty or any other penalty resulting in irreversible injury to the physical integrity; and if the issuing of the arrest warrant was determined by political motives. These are constitutional limits to cooperation that were incorporated into the PT-EAW, despite not being originally envisioned in the FD. They were revoked in the amendment of 2015. Subsequently, the amendment of 2019 added subparagraph (f), which stated that another ground for mandatory non-execution was the fact that “the act giving rise to the issuing of the European arrest warrant does not constitute an offence punishable under Portuguese law, provided that it is an offence not included in Article 2(2)”. This was arguably unnecessary, since such a consequence already resulted from Article 2 (3) PT-EAW, and it was revoked in the amendment of 2023.

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Portuguese law, provided that it is an offence not included in Article 2(2)". This created an obvious problem of internal coherence, as the same ground for refusal – lack of dual criminality – appeared as both mandatory and optional. In 2019 this subparagraph was revoked. The optional grounds for refusal now listed in this provision are: pending criminal proceedings in Portugal for the same acts (b); a prosecutorial decision not to prosecute or to terminate proceedings after analysing the acts (c); *ne bis in idem* within the EU outside of the cases covered by *ne bis in idem* as a mandatory ground for refusal (d); the procedure being statute-barred (e); *ne bis in idem* with regard to third States (f); the individual is staying in Portugal, is a resident or Portuguese citizen, if the Portuguese authorities undertake to execute the sentence when the EAW is issued for the purpose of executing a sentence (g)[283]; Portugal being competent to try the acts under the territoriality principle, or the offence having been committed outside the territory of the issuing Member State, provided that Portuguese criminal law is not applicable to the same offences when committed outside the national territory (h).

f) In Article 12 (2) PT-EAW (corresponding to Article 4 (1) FD-EAW) there is an exception to non-execution: "in relation to taxes and duties, customs and exchange, the execution of the European arrest warrant shall not be refused on the grounds referred to in paragraph (1), where the Portuguese law does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the issuing Member State". However, this provision makes much less sense after the multiple amendments to PT-EAW. Prior to the amendment of 2019, Article 12 (1) (a) established the lack of dual incrimination as an optional ground for non-execution; the meaning of paragraph (2) was, consequently, to provide an exception to that. Since 2019, however, there is no mention in Article 12 to dual criminality, so paragraph (2) should refer to the provision that assesses dual criminality, which is now only Article 2 (3) PT-EAW. Be that as it may, it is clear that PT-EAW is in compliance with the obligations established by the FD in this matter.

[283] This entails that the sentence of the issuing MS must first be declared enforceable in Portugal, upon request by the public prosecutor (Article 12 (3) PT-EAW), which can be made directly in the sentence that refuses the execution of the EAW based on this optional ground after its transmission has been requested (Article 12 (4)).

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g) Article 12-A PT-EAW (equivalent to Article 4a FD-EAW) establishes as an optional ground for non-execution, when the EAW is issued for the purpose of executing a sentence, the fact that the trial where the sentence was passed took place *in absentia*. The subsequent provisions aim to determine when a trial cannot be considered as having taken place *in absentia*. These include the situation where the individual: was personally informed of the trial or unequivocally had knowledge thereof (a); was legally represented by a counsellor in the trial (b); waives the right to a new trial or appeal after being informed of such rights, or does not request either option (c); and, although not personally notified, is immediately informed upon surrender to the issuing MS that he/she has the right to a new trial or to appeal (d). In the latter case, there are additional requirements: the individual can request a copy of the sentence before being surrendered to the issuing MS (paragraph (2)), and this copy must be made available to him/her (through the executing judicial authority) without causing any delay to the procedure or to the surrender (paragraph 3). With regard to detention, paragraph (4) (equivalent to Article 4a (3) FD-EAW) establishes that, if the individual requests a retrial or lodges an appeal, his/her detention must be reviewed according to the law of the issuing MS. However, this paragraph does not mention the remaining aspects contained in the FD, namely that "such a review shall in particular include the possibility of suspension or interruption of the detention", and "the retrial or appeal shall begin within due time after the surrender"[284]. Such an omission was probably due to the fact that the provision already stated that the standards for reviewing detention should be in accordance with the law of the issuing Member State. It is likely that every legal system has provisions allowing for the suspension or interruption of detention, as well as other coercive measures that can be applied to the person being surrendered. However, the fact that such a possibility is not reinforced in PT-EAW does not make it more likely that detention will be replaced by a less burdensome measure. This is because the FD-EAW does not create a right to have detention suspended or interrupted, but only to have the situation reviewed in the issuing Member State, in accordance with its own law, upon surrender. Regarding the beginning of the retrial or appeal within "due time" after surrender, this

[284] For an analysis of how some courts have dealt with this provision, see PEDRO CAEIRO / RAQUEL CARDOSO, "First Periodic Country Report…", *op. cit.*, p. 10.

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expression does not necessarily need to be incorporated into national legislation. Its purpose is simply to require the retrial or appeal to take place at a convenient time, in accordance with the availability of the national judicial system and the functioning of the national procedural law, which will likely have provisions regarding deadlines for such proceedings that should be respected. Importantly, this provision does not entail specific legal consequences as it does not establish a fixed deadline or specify the outcome of non-compliance.

h) Article 13 (implementing Article 5 FD-EAW) can be interpreted as including one mandatory and one optional ground for refusal. Despite mentioning "guarantees", this provision actually focuses on certain *conditions* that the issuing MS must fulfil in order to facilitate the execution of the EAW. As such, it envisages two situations. The first (a) applies when the offence that motivates the EAW is punishable by a life sentence in the issuing MS, in which case the execution of the warrant depends on the issuing Member State having in place in its legal system provisions enabling a review of the imposed penalty or the application of clemency measures. This is construed as a mandatory ground for refusal, as surrender is indeed dependent on the existence of such legal provisions[285]. The second (b) is equivalent to the ground for non-execution in Article 12 (1) (g) PT-EAW (see *supra*), when applied to EAWs issued for the purpose of conducting a criminal procedure: in this case, surrender can (optionally) be subject to the condition that the requested person, after being heard, is returned to Portugal in order to serve the custodial sentence or detention order.

i) Proportionality is not a ground for refusal, although the issuing of EAWs is repeatedly questioned in practice, particularly by the defence[286], given the existence of alternative procedural options that would achieve the same objective while being less restrictive for the individual. Portugal does not question the proportionality of the issuing of EAWs by other Member States, but this principle has already been

[285] Although it could be argued that such provisions will exist in virtually all MS, at least formally – see PEDRO CAEIRO / RAQUEL CARDOSO, "First Periodic Country Report…", *op. cit.*, p. 18 f.
[286] It is sometimes questioned by the public prosecutor as well, especially during the issuing phase – see *ibid.*, p. 4.

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used as a deciding factor when optional grounds for non-execution are met in the case[287].

5.2.3 Execution procedure

The competent judicial authority in Portugal for deciding on the execution of an EAW is the High Court of the area where the sought person resides or, if there is no residence, is found (Article 15 PT-EAW, corresponding to Article 6 (2) FD-EAW).

Upon receiving an EAW, the public prosecution office shall promote its execution within 48 hours (Article 16 (1) PT-EAW). The procedure is then assigned to a judge, who must preliminarily evaluate whether the information provided is sufficient to make a decision on surrender; if it is not, the necessary information shall be requested from the issuing MS. Once all the information is received and the EAW translated, it is transmitted to the public prosecution office, so that they can arrange for the detention of the individual (remaining paragraphs of Article 16 PT-EAW, corresponding to Article 15 FD-EAW).

During this procedure, the person has all the general rights granted to an accused person (Article 61 CCP), as well as those specifically mentioned in Article 17 PT-EAW (corresponding to Article 11 FD-EAW), namely the possibility to consent or refuse surrender, the right to be represented by a lawyer and to appoint a lawyer in the issuing MS[288], and the right to be assisted by an interpreter. Within 48 hours of detention the individual must be heard by a judge, who will decide on the validity of the detention and whether it should continue or be replaced by another coercive measure provided for in the CCP[289] (Article 18 (3) PT-EAW, corresponding to 12 FD-EAW). If the individual does not appoint a lawyer, the judge will appoint one and inform them of the right to appoint a lawyer in the issuing MS in order to assist the one in Portugal; if the person wishes to exercise that right, such information will be promptly transmitted to the competent authority of the issuing MS

[287] PEDRO CAEIRO / RAQUEL CARDOSO, "Country Research Brief…", *op. cit.*, p. 7.
[288] Paragraph (2) underwent some changes in August 2023: prior to that, it only stated that the arrested person had the right to be assisted by a legal counsellor. The changes were intended to clarify that there is also a right to appoint a lawyer in the issuing Member State.
[289] This includes the possibility to determine that detention is not deemed necessary in the case, or to replace it in cases where the maximum period of detention has been reached. If the time limits for detention are reached (stated in Article 30 PT-EAW: 60, 90, or 150 days), "detention may be replaced by one of the coercive measures provided for in the code of criminal procedure" (Article 30 (1)), in order to ensure the material conditions for surrender, should the courts decide that the EAW is to be executed. These measures include: statement of identity and residence; bail; obligation of periodic presentation; suspension of the exercise of profession, function, activity or rights; prohibition or imposition of conduct; house arrest; pre-trial custody (Articles 196 to 202 CCP).

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(Article 18 (4) and (7)). During this hearing, the judge must also inform the individual of the existence and content of the EAW, as well as the possibility to consent to surrender and the option to waive the protection of the specialty rule; their answers will be formally recorded in writing (Article 18 (5) and (6)).

If the individual consents to surrender, this consent is irrevocable and its consequence is the waiver of the remainder of the EAW procedure[290]. In such cases, the court must ensure that the consent was given voluntarily and that the person fully understands its consequences. The judicial decision that homologates the consent is equivalent, for this purpose, to the final decision on the EAW procedure (Article 20 (1) (2) (3) PT-EAW, corresponding to Article 13 (4) FD-EAW).

When the individual opposes surrender, the lawyer files an opposition in the procedure, which can be based on a mistake in the identity of the detainee or on the existence of grounds for refusal. Then, the public prosecution office is given the opportunity to respond. Both the opposition and the evidence are presented during the hearing of the detainee, unless the lawyer requests additional time, in which case the court will determine a period for this purpose, if such a period is necessary for preparing the defence or for presenting evidence, taking into account the need to comply with the deadlines established in Article 26 PT-EAW. Once the evidence has been presented, both the public prosecution office and the lawyer of the requested person are given the opportunity to make oral allegations, in the indicated order (Article 21 (1) to (5) PT-EAW).

Within 5 days counted from the day of oral allegations, the court must decide (by reasoned decision) on the execution of the EAW. If the information available to the court is insufficient to reach a conclusion, the necessary information will be requested from the issuing MS. The reception of this information may be subject to a deadline, considering the need to respect the deadlines established in Article 26 PT-EAW (Article 22 PT-EAW).

[290] Despite being irrevocable, the right to appeal may not be restricted when there are reasons that justify it, namely when the requested person disagrees with the Court regarding the sufficiency of the guarantees provided by the issuing Member State after consent has been given – for more information on this, see Constitutional Court case 540/22, of 16 august 2022 < https://www.tribunalconstitucional.pt/tc/acordaos/20220540.html > and the explanation of the case in PEDRO CAEIRO / RAQUEL CARDOSO, "Country Research Brief…", *op. cit.*, p. 17 f. Commenting on the Portuguese normative choice regarding the consent of the individual subject to surrender, ANTÓNIO MIGUEL VEIGA, "Da relevância da vontade do visado na extradição passiva e na execução do mandado de detenção europeu: a solução portuguesa", *Revista Portuguesa de Ciência Criminal* 22 (2012), p. 581-631.

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There might be multiple EAWs, or an EAW and an extradition request, for the same person. When there are multiple EAWs, Article 23 PT-EAW (corresponding to Article 16 FD-EAW) establishes that the court will decide which EAW should be executed by considering various factors, namely the relative seriousness of the offences, the place where the offences were committed, the dates of the EAWs, and whether these have been issued for prosecution or for enforcement purposes. The court may request an opinion from Eurojust. As for concurrent EAW and extradition requests, consideration must also be given to all the circumstances of the case, particularly those mentioned above, as well as those mentioned in the applicable convention[291].

The final decision on the execution of the EAW must be made within the time limits set out in Article 26 PT-EAW (corresponding to Article 17 (2) to (5) and (7) FD-EAW). If the requested person consents to surrender, the final decision on the execution of the EAW shall be taken within 10 days from the date when consent was given. In all other cases, a final decision must be taken within 60 days of the individual's detention. If, however, these deadlines cannot be met, they can be extended by 30 days, and the issuing authority must be informed of the delay and of its reasons. The material conditions for surrender must be ensured while the final decision is pending. If, in exceptional circumstances, time limits cannot be observed, the Attorney-General shall inform Eurojust, providing the reasons for the delay[292]. Once a final decision is made, the court must promptly notify the issuing authority (Article 28 PT-EAW, corresponding to Article 22 FD-EAW).

When the requested person benefits from a privilege or immunity, computation of the mentioned time limits will only start in the day when the privilege or immunity is lifted;

[291] Article 23 (3) PT-EAW (equivalent to Article 16 (3) FD-EAW) is no longer fully accurate, because in the light of *Petruhhin* (C-182/15, ECLI:EU:C:2016:630) preference must be given to the EAW when it is issued by the MS of nationality. Indeed, technically speaking, that ruling entails a partial derogation of Article 16 (3) FD-EAW: see MIGUEL JOÃO COSTA, "The Emerging EU Extradition Law: *Petruhhin* and Beyond", *New Journal of European Criminal Law* 8 (2017), p. 203; *id.*, *Extradition Law: Reviewing Grounds for Refusal from the Classic Paradigm to Mutual Recognition and Beyond*, Leiden: Brill, 2019, p. 132. The *Petruhhin* doctrine has found expression in Portuguese case law, namely in the ruling of the Supreme Court of 12 May 2022, ECLI:PT:STJ:2022:8.22.5YRCBR.6E (although in that case extradition was granted, as the Supreme Court did not find the conditions required by that case law to be met). Moreover, even in situations that strictly speaking are not covered by the *Petruhhin* line of case law, the solution to the concurrence of EAW and extradition requests under Article 16 (3) FD-EAW should arguably bring into consideration the set of norms that gave rise to that case law, notably the freedom of movement and the principle of equal treatment, with the consequence that in line of principle some prevalence is in general due to the EAW over extradition.

[292] This provision is only partially implemented, as it does not mention the obligation to inform the Council in case there are repeated delays by another MS in the execution of EAWs.

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it is also from this day that the material conditions for surrender must be ensured (Article 27 PT-EAW, corresponding to Article 20 FD-EAW).

If the EAW is to be executed, there are also established timelines for the act of surrender. Article 29 PT-EAW (corresponding to Article 23 (1) to (4) FD-EAW) states that surrender must occur as soon as possible, within the maximum timeframe of 10 days from the final decision granting surrender. If surrender cannot be accomplished within these time limits due to unforeseen circumstances beyond the control of any of the MSs involved, a new date must be agreed upon by the judicial authorities of both MSs, and surrender shall take place within 10 days from the newly agreed upon date. Even though a final decision granting surrender has been made, it is possible to postpone the surrender based on serious humanitarian reasons, v.g. if there are substantial grounds to believe that it would clearly endanger the life or health of the requested person. When the reasons that motivated the postponement cease to exist, the court shall immediately inform the issuing judicial authority, and a new surrender date shall be agreed upon, which shall take place (the surrender) within a period of 10 days from the newly agreed date.

Article 30 (4) PT-EAW (corresponding to Article 23 (5) FD-EAW) now establishes that, once these time limits are reached, the detention of the person must cease. The implementation of this provision is very recent: it was only in August 2023 that it was clearly stated that the consequence for the detained person of the failure to execute the EAW within this timeframe is their release. It was a much-welcomed amendment of Portuguese legislation, which followed the criticism of the lack of transposition of this provision of the FD-EAW[293]. However, even before this amendment, the understanding of Portuguese courts was that these time limits applied, based on the jurisprudence of the CJEU and the duty to interpret national law in conformity with European law[294]. The explicit mention in Article 1(2) PT-EAW of the execution of the EAW in accordance with the provisions of the respective FD also supported this interpretation and conclusion.

Given the duty to ensure the material conditions for surrender, the person subject to the EAW will typically remain in detention until a final decision is reached. Article 30 PT-EAW establishes the maximum duration of detention while awaiting surrender. If 60 days

[293] See PEDRO CAEIRO / SÓNIA FIDALGO, "The Portuguese experience of mutual recognition…", *op. cit.*, p. 449.
[294] Most recently, case 257/23.9YRLSB-A.S1 of 26 July 2023 of the Supreme Court of Justice, ECLI:PT:STJ:2023:257.23.9YRLSB.A.S1.3B. Already in 2013, the same conclusion had been reached by the Supreme Court – see PEDRO CAEIRO / RAQUEL CARDOSO, "First Periodic Country Report…", *op. cit.*, p. 9/10.

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elapse without a decision being delivered by the High Court, detention must cease, but another coercive measure of the CCP may be imposed[295]. If, however, an appeal is lodged against the High Court's decision, the time limits for detention increase to 90 days; if the appeal is lodged to the Constitutional Court, the maximum duration of detention becomes 150 days.

Compliance with all the aforementioned deadlines is facilitated by the urgent nature of the EAW procedure. Article 33 PT-EAW (corresponding to Article 17 (1) FD-EAW) states that the procedural acts of EAW proceedings shall be carried out even outside working days, normal working hours of the Justice Services, and judicial holidays. The deadlines related to the execution process of the EAW shall also run during holidays.

There is also the possibility of granting surrender, but postponing it in order to allow for prosecution or execution of a sentence in Portugal (Article 31 PT-EAW, corresponding to Article 24 FD-EAW). Once the reasons for the postponement cease, the issuing judicial authority shall be contacted and a new date agreed upon for the surrender, which shall take place within 10 days. Instead of postponing, Portugal may also decide to temporarily surrender the requested person to the issuing MS under mutually agreed conditions. This agreement shall be made in writing and the conditions shall be binding on all the authorities in the issuing Member State.

Finally, Article 32 PT-EAW (corresponding to Article 29 FD-EAW) governs the procedure for the seizure and handing over of property (evidence or products of the crime) when requested by the issuing judicial authority. These items shall be delivered to the issuing authority, even if surrender is not possible due to the death or escape of the individual. If the objects are relevant to a procedure in Portugal, they may be temporarily retained or handed over to the issuing MS, under the condition that they be returned. The rights acquired by the Portuguese State or third parties over the property in question shall be preserved; in such cases, the issuing Member State shall return the seized and handed-over property to Portugal without charge as soon as the criminal proceedings have been concluded.

5.2.4 Cooperation issues between executing and issuing authorities

From publicly available jurisprudence there appear to result no cooperation issues between Portugal and other MSs within the framework of the EAW. Theoretically, two main

[295] For a list of coercive measures provided by our CCP, see *supra* (fn 76).

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topics could arise: refusal based on a potential violation of fundamental rights in the issuing MS, and issues in communication between judicial authorities, particularly when additional information is requested.

With regard to the first topic, it should be noted that the Portuguese legislation implementing the FD-EAW does not include a 'fundamental rights' clause (corresponding to Article 1 (3) FD-EAW). It can be argued that transposing this provision is unnecessary, since it does not contain any actual obligation, but redundantly proclaims that the FD-EAW shall not modify the obligations impending on the MSs regarding fundamental rights. Such obligations thus stem from other legal instruments, namely the ECHR, the CFREU, and the Constitutions of the MSs. No cases could be found either regarding the application of the two-step test developed by the CJEU in and since *Aranyosi and Căldăraru*. The potential violation of fundamental rights in the issuing MS has been raised in some cases, but such claims were always deemed unsubstantiated. One of the cases that better illustrates the burden of proof necessary in such situations is that of an individual who was subject to an EAW and suspected of being a member of the terrorist organisation ETA. One of the arguments against surrender was the potential violation of her fundamental rights in Spain, based on reports indicating that such violations do occur in the Spanish region where the EAW was issued. These reports were drafted by reputable and unbiased NGOs focused on human and fundamental rights (such as Amnesty International). However, the Supreme Court found these allegations to be unsupported in terms of the actual risk of a violation in that case. The Court reasoned that it was important to differentiate between cases where repeated human rights violations were observed (similar to the first step of the CJEU's test) and isolated occurrences. Since these allegations were based solely on suspicions regarding the individual's membership in the terrorist group and international reports, the risk of a violation was not considered proven (lacking individual risk, or the second step, as later determined by the CJEU's test in *Aranyosi and Căldăraru*)[296]. Therefore, absent evidence to the contrary, Portuguese courts presume that the issuing MS complies with European standards of fundamental rights protection, based on the principle of mutual trust. Even where evidence is provided, it can be difficult to succeed in obviating surrender. In a case concerning the applicability of a measure that had already been found to be in breach of the ECHR by the ECtHR, the Portuguese Supreme Court concluded that this was not a

[296] Case of the Supreme Court, 25.03.2010, no. 76/10.2YRLSB.S1, ECLI:PT:STJ:2010:76.10.2YRLSB.S1.B3.

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question that should be evaluated by the executing authority, but should instead be addressed within the criminal procedure in the issuing MS[297].

Regarding the second topic, communication between judicial authorities does not appear to be hindered, except for some delay[298] in receiving the requested information. In several cases information was requested from the issuing MS and indeed received – usually in relation to the guarantees of Article 13 PT-EAW, when the necessary information is not already provided with the initial EAW[299].

5.2.5 Remedies

Remedies within the general framework of an EAW abide by different rules depending on whether the Portuguese judicial authorities are acting as issuing or as executing authorities.

When Portugal is the issuing authority, competence to issue an EAW belongs to the courts of first instance (whether to judges or to prosecutors in these courts, as explained *supra*). Therefore, and since the FD-EAW does not have specific provisions on remedies, the possibilities for appeal will be determined by the CCP. As such, remedies will differ according to the entity that issues the EAW in a specific case:

- If the EAW is issued by the prosecutor there is no right to appeal, either within the hierarchy of the public prosecution office or through judicial review[300]. Should a prosecutor issue an EAW that he/she was not legally authorised to issue[301], the only means of reaction is *habeas corpus* (Article 220 CCP), as the detention would have been ordered by someone

[297] Case of the Supreme Court, 16.12.2010, no. 176/10.9YREVR.S1, ECLI:PT:STJ:2010:176.10.9YREVR.S1.F3.
[298] In one case, the Supreme Court annulled the High Court's decision to terminate the EAW procedure due to the issuing authority's failure to provide the requested information within the specified deadlines. The Supreme Court found that the High Court should persist with the requests for information until it could conclude that the issuing authority was no longer interested in the execution of the EAW issued – case of the Supreme Court, 03-05-2018, no. 879/17.7YRLSB.S1 (only summary available) < https://www.stj.pt/wp-content/uploads/2019/06/criminal_sumarios_2018.pdf >.
[299] Regarding the content of the aforementioned information and its impact on the EAW procedure, see PEDRO CAEIRO / RAQUEL CARDOSO, "First Periodic Country Report…", *op. cit.*, p. 10-11 and 18-19.
[300] See MIGUEL JOÃO COSTA / PEDRO CAEIRO, "Country Report Portugal", *op. cit.*, p. 295.
[301] Art. 257 CCP: "Outside of *flagrante delito*, detention can only be carried out with a warrant from the judge or, in cases where pre-trial custody is admissible, from the public prosecutions office: a) When there are reasonable grounds to believe that the person in question would not voluntarily appear before the judicial authority within the time frame set for them; b) When one of the specific situations provided for in Article 204 occurs, which can only be addressed by detention; or c) If it is essential for the protection of the victim". Article 202 CCP establishes which crimes allow for pre-trial custody.

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lacking the competence to order it. However, even in these cases, an actual appeal would not be admissible: since the EAW is issued in Portugal but the physical act of detention takes place in another MS, the Portuguese Supreme Court considers it inadmissible to intervene, on the argument that the end result would consist of ordering another jurisdiction to execute a Portuguese procedural act in its territory[302]. In such cases, individuals (or executing authorities themselves, *ex officio*) will only be able to question the validity of the EAW if they consider that it was not issued by a judicial authority within the meaning of the CJEU's case-law, but this occurs within the normal EAW procedure and therefore does not constitute a true remedy to the very issuing of the EAW.

- If the EAW is issued by a judge, it can be appealed by the prosecutor if they consider such issuing to be illegal or disproportionate[303]. This appeal will have to be filed with the High Court[304] or directly with the Supreme Court, where this is permitted[305]. When contradictory decisions on the same legal question are taken in different proceedings, it is possible to appeal to the Supreme Court with a view to settling the divergence[306]. Arguably, the requested person also has the right to lodge appeals before an EAW is issued, but it may be difficult to do so, due to practical reasons, *viz.* because the person might not even know that an EAW has been issued[307]. If the appeal is successful, the warrant is recalled[308]; any other challenges to the execution of an EAW will have to be made within the EAW procedure in the executing MS.

After being surrendered to Portugal, the individual will enjoy the right to appeal afforded by the CCP, within the procedure that originated the issuing of the EAW.

[302] Such a situation was already assessed by the Supreme Court, 01.07.2020, no. 19/20.5JBLSB-A.S1, ECLI:PT:STJ:2020:19.20.5JBLSB.A.S1.C6 <https://jurisprudencia.csm.org.pt/ecli/ECLI:PT:STJ:2020:19.20.5JBLSB.A.S1.C6/ >.
[303] There have been instances where the prosecutor argued that issuing an EAW would be disproportionate – see PEDRO CAEIRO / RAQUEL CARDOSO, "Country Research Brief…", *op. cit.*, p. 5, fn 15.
[304] Art. 399 and 427 CCP.
[305] Art. 432 CCP.
[306] Art. 437 CCP.
[307] This appeal will not suspend the issuing of the EAW – on the suspensive effect of appeals in Portugal, see PEDRO CAEIRO / MIGUEL JOÃO COSTA, "Country Report Portugal…", *op. cit.*, p. 308-312.
[308] As in the situation that originated the case of the Supreme Court, 02.12.2013, no. 962/09.2TBABF.E1.S2, ECLI:PT:STJ:2013:962.09.2TBABF.E1.S2.0D, where the challenge to the EAW seems to have been made directly in the Portuguese procedure, rather than within the EAW procedure in the executing MS (although the person was already detained there), which finally led to the recall of the warrant.

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When Portugal is the executing State, since competence belongs to the High Courts, appeal will only be possible to the Supreme Court, or to the Constitutional Court if constitutionality issues are raised[309].

Article 24 PT-EAW establishes that there are two decisions subject to appeal within the EAW procedure: the final decision regarding the coercive measure applied in the case, and the final decision on the execution of the EAW. The appeal must be lodged within 5 days of the notification of the decision or of the day when such a decision is taken (if it is an oral decision). The appeal must be reasoned, or otherwise it will not be accepted, and both the request for an appeal and the reasoning that supports it are notified to the affected party so that they may respond within 5 days. Once the response to the appeal is received, or, if no response is received, once the deadline expires, the appeal will be sent to the Supreme Court.

It is possible to request *habeas corpus* directly to the Supreme Court, if one of the following occurs[310]: (a) The deadline for delivering the person to the judicial power has been exceeded; (b) Detention is being maintained outside of legally permitted locations; (c) Detention has been carried out or ordered by an incompetent entity; (d) Detention is motivated by a reason that is not admitted by the law; e) Detention is maintained beyond the deadlines set by the law or by judicial decision. No other grounds are accepted[311].

5.3 The implementation of Directive 2014/41

5.3.1 Scope

No issues arise concerning the scope of Law no. 88/2017, of 21 August (PT-EIO), implementing the Directive on the EIO (DEIO), as Articles 1 to 5 of the national statute

[309] Which, however, is subject to rather stringent conditions: see v.g. Article 70 of the Law of the Constitutional Court.
[310] Art. 220 and 222 CCP.
[311] This means that when Portugal is the executing MS, any other arguments should be made before the High Court within the regular EAW procedure, or before the Supreme Court, on appeal from the final decision on the execution of the EAW. When Portugal is the issuing authority, after being surrendered, a *habeas corpus* appeal will not be admitted if the person argues that the conditions of detention are degrading and inhumane; these reasons should be argued before the courts of the executing MS in order to prevent the execution of the EAW in the first place – this was the conclusion reached in the case considered by the Supreme Court, 23.09.2021, no. 5553/19.7T8LSB-Q.S1, ECLI:PT:STJ:2021:5553.19.7T8LSB.Q.S1.EA <https://jurisprudencia.csm.org.pt/ecli/ECLI:PT:STJ:2021:5553.19.7T8LSB.Q.S1.EA/ >.

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reflect (essentially) Articles 1 to 4 of the Directive. Some details are in any case worth mentioning.

Article 1 (3) DEIO is implemented by 12 (4) PT-EIO, which establishes that an EIO is issued at the initiative of the judicial authority or at the request of procedural subjects, in the same conditions in which these may request the gathering or production of evidence under national criminal procedural law. Procedural subjects include the defendant (*arguido*) and the defence lawyer. Article 61 (1) (g) CCP provides that defendants have the right to intervene in the inquiry and the instruction, namely by requesting any measures they deem necessary, and according to Article 63 (1) defence lawyers exercise all the rights assigned by law to the defendant, save for those which are personally reserved to the latter. While as noted before the concept of '*arguido*' is somewhat peculiar[312], it seems safe to assert that it covers the concepts of 'suspect' and 'accused person' used in this Directive, since on the one hand a person who is accused or indicted is necessarily designated as an *arguido*, and on the other hand this procedural status must also be assigned to any person regarding whom there is a founded suspicion of having committed the crime being investigated.

The right as such to request investigative measures knows no restrictions, but the authorities are not bound to grant the request either. Nevertheless, their decision is not discretionary. Rather, it must be taken according to legal criteria, and the defendant may in any case challenge a decision refusing to order the requested measures. If the request was made to the public prosecution office, the intervention of the judge of instruction might be impossible to trigger, since as suggested before this could be seen to conflict with the constitutional provision that confers on the public prosecution office the direction of the inquiry[313]. At any rate, the defendant may certainly request the hierarchical superior of the prosecutor who refused to order the measure to revoke the subordinate's decision and replace it with one that grants it[314]. If the measure was requested to the judge of instruction,

[312] See *supra*, § 7.1.
[313] See *ibid.*; and see also v.g. the ruling of the Constitutional Court no. 395/2004, of 2 June 2004. But see VÂNIA COSTA RAMOS, "Meios processuais de impugnação da Decisão Europeia de Investigação – subsídios para a interpretação do artigo 14.º da Directiva com uma perspectiva portuguesa", *Anatomia do Crime* 7 (2018), p. 146-149, claiming that, where the acts of the public prosecution office intrude on fundamental rights, it can be challenged before the judge of instruction based on Articles 268 (1) (f) and 32 (5) CPP combined, and the decision thereby taken by the judge will moreover be liable to appeal, under the general conditions provided for in the law; on this, see further *infra*, § 7.3.5.
[314] See, inter alia, Article 97 SPPO.

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the defendant can (only) lodge a complaint before that judge, and the decision then taken is not subject to review[315].

Yet regarding the issuing of an EIO, Article 6 (1) and (2) of the Directive is implemented by Article 11 (1) and (2) PT-EIO, according to which an EIO may only be issued or validated where (i) it is necessary, adequate and proportional, and (ii) the requested measure could have been ordered in the same conditions in a similar domestic case – both of these conditions being assessed by the issuing authority in each case. Article 11 (3) – pursuant to the *forum regit actum* type of approach admitted under Article 9 (2) DEIO[316] –, further establishes that, should that be the case, the EIO shall indicate the formalities and proceedings to be observed by the executing authority in order to secure the validity and efficacy of the evidence.

5.3.2 Grounds for non-recognition and non-execution

The general duty (enshrined in Article 9 (1) DEIO) to recognise and execute EIOs issued by fellow Member States is reflected in Article 18 (1) PT-EIO. However, there seems to be an implementation issue concerning Article 9 (2) DEIO. This provision requires the executing State to comply with the formalities and procedures expressly indicated by the issuing State unless otherwise provided in the Directive and provided that they are not contrary to the "fundamental principles of law of the executing State". In contrast, Article 18 (2) PT-EIO allows for non-compliance with such formalities and procedures if they do not respect the "requirements and conditions of national law on evidence in the context of similar national proceedings". PT-EIO thus appears to be stricter – in the sense of less favourable to cooperation – than the DEIO. The latter intended for non-compliance to be more exceptional, reserving it for situations where it would be necessary to avoid a breach of "fundamental" principles. The fact that the Portuguese statute admits non-compliance in broader circumstances can hardly be seen as unintended by the Portuguese legislator, as para. (4) of this very provision of the Directive (*i.e.*, Article 9) was implemented into article

[315] See Article 291 (2) CCP.
[316] To be accurate, it is a hybrid approach that seeks to combine different legal systems, with a view to appeasing the concerns of all involved parties, but which ultimately may be deemed to produce practical problems and hamper upon legal certainty: see VÂNIA COSTA RAMOS, "Meios processuais...", *op. cit.*, p. 124-125.

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27 (1) PT-EIO with mention to "fundamental principles", rather than to any "requirements and conditions of national law"[317].

Article 9 (3) DEIO – according to which, where an executing authority receives an EIO that has not been issued by an issuing authority as specified in Article 2 (c), it shall return the EIO to the issuing State – also raises an implementation issue, which, however, seems possible to overcome. While there is no provision in the PT-EIO explicitly implementing Article 9 (3) DEIO, Article 18 (1) PT-EIO, mentioned above, presupposes that the EIO was issued by "the competent issuing authority of another Member State", which under Article 3 (c) of the national statute must be an authority as specified in Article 2 (c) of the Directive. Thus, we would deem this provision to be de facto implemented. The fact remains that the "return of the EIO to the issuing State" on these grounds is not explicitly provided for, but arguably it can be carried out through an application by analogy of Article 20 (3) of the national statute, which enables for such a return in the event that the EIO has not been translated or fails to comply with other formalities set out in Article 6 PT-EIO (corresponding to Article 5 DEIO).

Regarding the recourse to a different type of investigative measure, Article 10 (1) DEIO admits it in certain circumstances – duly reflected in Article 21 (1) PT-EIO –, while Article 10 (2) provides that certain investigative measures must necessarily be available under the law of the executing State. Article 21 (2) PT-EIO does not indicate that these measures "always have to be available" under Portuguese law, but in fact they currently are, such that Article 10 (2) DEIO is fully implemented.

The set of grounds for non-recognition or non-execution laid out in Article 11 (1) of the Directive is implemented into Article 22 (1) PT-EIO. The latter does not contain the *caveat* "[w]ithout prejudice to Article 1 (4)", which in fact does not seem necessary[318],

[317] In practice, this provision is deemed to be generally applied narrowly, so as to cover fundamental principles only: see VÂNIA COSTA RAMOS, "Problemas da Obtenção de Prova em Contexto Transnacional – Introdução", *Revista Portuguesa de Ciência Criminal* 4 (2013), p. 555 f.; *id.*, "Admissibility of Evidence, Transnational E-Evidence and Fair Trial Rights in Portugal", in Lorena Bachmaier / Farsam Salimi (eds.), *Admissibility of Evidence in EU Cross-Border Criminal Proceedings: Electronic Evidence, Efficiency and Fair Trial Rights*, Oxford: Hart (forthcoming 2024), p. 127 f. Still, the provision of the implementation statute does leave room for an application broader than that envisaged by the Directive, which is why we propose that it be deemed as only partially implemented.

[318] But see VÂNIA COSTA RAMOS, "Meios processuais...", *op. cit.*, p. 138-139, and *id.*, "Decisão Europeia de Investigação", *Revista do Centro de Estudos Judiciários* II (2019), p. 99, criticising the lack of implementation of (inter alia) Article 1 (4) DEI itself into the national statute and apparently construing it as an actual implementation problem.

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considering that Article 11 (1) (f) DEIO, which corresponds to Article 22 (1) (g) PT-EIO, gives fundamental rights the standing of an actual ground for non-execution, as opposed to a mere proclamation of principle as that of recital 12 of the Framework Decision on the EAW – a natural post-*Aranyosi and Căldăraru* development.

Regarding the ground for non-execution of Article 11 (1) (a) DEIO, the equivalent provision in PT-EIO (Article 22 (1) (b)), mentions not only "immunity" and "privilege" but also "secret". However, this does not seem to extend the scope of this ground for non-execution, since 'privilege' arguably encompasses 'secrecy'.

Dual criminality (for conduct not concerning an offence within the categories set out in Annex D), which in Article 11 (1) DEIO is provided for in sub-paragraph (g), constitutes the opening provision of Article 22 (1) PT-EIO (at sub-para. (a)). This might be seen to symbolise the importance attached by the Portuguese legislator to this requirement.

The only actual implementation issue concerning Article 11 DEIO relates to para. (5), first sentence – according to which, in the case referred to in para. (1) (a) (mentioned above), and where the power to waive the privilege or immunity lies with an authority of the executing State, the executing authority shall request it to exercise that power "forthwith". This requirement of expediency is not made in the corresponding provision of PT-EIO (Article 22 (5)). Something similar occurs with other provisions in the Directive vis-à-vis the corresponding provisions in the national statute, notably in: Article 12 (4) DEIO ("without delay") vis-à-vis Article 26 (2) PT-EIO; Article 13 (1) DEIO ("without undue delay") vis-à-vis Article 23 (1) and (2) PT-EIO. Again, it seems implausible that this has been unintentional (although it was not possible either to ascertain why the Portuguese legislator chose to proceed in this manner), since other DEIO provisions containing requirements of the same kind – v.g., Articles 11 (4) ("without delay"), 12 (6) (*idem*), 15 (2) ("forthwith"), 16 (1) (without delay"), 16 (2) ("immediately", "without delay"), 16 (3) ("without delay"), 19 (2) (*idem*) and 31 (3) (*idem*) – have been transposed into the PT-EIO containing such requirements: see, respectively, Articles 22 (4), 26 (6), 24 (2), 25 (1), 25 (3) and (4), 25 (5), 30 (2) and 43 (3). Thus, however minor these issues might be, one should consider Articles 11 (5), 12 (4) and 13 (1) DEIO as only partially implemented, as they do not perfectly meet the mindset of swiftness that the Directive seeks to introduce.

Apart from that, the only aspect worth noting concerns the fact that all grounds for non-execution provided for in the Directive were implemented into PT-EIO. The DEIO establishes in Article 11 that the recognition or execution of an EIO "may be refused" on

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any of the grounds that are then listed in items (a) to (h), and PT-EIO (in Article 22) implemented all such grounds as optional. However, at least some of them are hardly compatible with a decision of an optional character, an example of which is the ground contained in item (b) – *sc.*, the case where "the execution of the EIO would harm essential national security interests", inter alia. If a risk of harm does exist, on the basis of which other criteria could an authority decide whether to cooperate (due to that risk) or to refuse to cooperate (in spite of that risk)? While some grounds for non-execution might be possible to reconcile with an optional character, for other grounds for non-execution this does not seem possible. This case is similar to that verified in the context of the FD-EAW, where the Portuguese legislator implemented as mandatory all the mandatory grounds for non-execution of the FD, and as optional all the grounds for non-execution that the FD allowed Members to implement or not to implement[319].

No implementation issue occurs with the grounds for postponement of recognition or execution provided for in Article 15 DEIO: see Article 24 PT-EIO.

5.3.2.1 Fundamental rights and proportionality issues

A recurring issue in the (not very extensive yet) case law on the EIO in the Portuguese legal order concerns the interplay between the issuing of an EAW and the use of the EIO system[320], as illustrated by the ruling of the Supreme Court of 3 June 2020[321]. It concerned the offences of participation in a criminal organisation and drug trafficking. As suggested above it relates mostly to the EAW, but incidentally also the EIO. The countries involved were Portugal, as the executing Member State of the EAW, and France, as the issuing one. The applicant claimed that the judicial authorities of the executing Member State in EAW proceedings have a duty to ascertain whether the purposes envisaged by the Member State that issued the EAW could and should be attained through a different EU Law measure that is less detrimental to individual rights than the EAW. The Supreme Court, in line with the stance taken by the High Court earlier in the case and invoking the principles of mutual trust and mutual recognition, held that, although the claim might be reasonable in a given case that an EAW is disproportional or inadequate in the light of existing alternatives such as the

[319] See *supra*, § 7.2.2.
[320] Draft Law no. 193/XIII/4 – which led to an amendment of PT-EAW (through Law no. 115/2019, of 12 September) – already mentioned 'some entropy' in the articulation between these two legal instruments: see https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=43589.
[321] ECLI:PT:STJ:2020:793.20.9YRLSB.S1.

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EIO – *v.g.*, in order to hear the concerned person by videoconference[322] – , the choice to make use of it rather than of other EU law mechanisms falls within the exclusive remit of the issuing authorities and cannot be disputed in the executing State, as it does not integrate any grounds for non-execution of the EAW[323].

5.3.3 Execution procedure

Regarding the implementation of the provisions on time limits for recognition or execution set out in Article 12 DEIO, a terminological observation is necessary: the PT-EIO (Article 26) seems to deploy the term 'recognition' in such a way as to encompass what that provision of the Directive refers to as 'recognition *or execution* of the EIO[324]; and it seems to equate the term 'execution' to what the Directive refers as 'carrying out the investigative measure' indicated in the EIO. If the national norm is construed in these terms, the mismatch in terminology between Articles 12 DEIO and 26 PT-EIO does not actually entail any implementation issues. That aside, the sole issue concerning time limits for recognition or execution is the one, already mentioned before[325], on the expediency requirement of Article 12 (4) DEIO ("without delay"). The same is true for Article 13, on transfer of evidence.

Regarding Chapter IV of the DEIO, on specific provisions for certain investigative measures, there is an implementation problem with Article 22 DEIO, on the temporary transfer to the issuing State of persons held in custody for the purpose of carrying out an investigative measure. More specifically the issue lies with para. (4) thereto, which reads: "transit of the person in custody through the territory of a third Member State ('the Member State of transit') shall be granted on application, accompanied by all necessary documents". Whereas Article 32 (10) PT-EIO reads: "In the context of the execution of an EIO, transit of the person in custody through the national territory or aerial space is

[322] See recital 26 DEIO, explicitly asserting that: "With a view to the proportionate use of an EAW, the issuing authority should consider whether an EIO would be an effective and proportionate means of pursuing criminal proceedings. The issuing authority should consider, in particular, whether issuing an EIO for the hearing of a suspected or accused person by videoconference could serve as an effective alternative."
[323] This ruling expresses a consistent position in Portuguese case law, as also illustrated v.g. by the rulings of the High Court of Lisbon of 5 May 2021 (ECLI:PT:TRL:2021:243.21.3YRLSB.3.7B, in a case concerning extradition, but where mention to the EIO is also made by way of *obiter dictum*), and of 9 March 2023 (ECLI:PT:TRL:2023:3519.22.9YRLSB.9.1D), as well as by the rulings of the High Court of Évora of 18 February 2020 (ECLI:PT:TRE:2020:103.19.8YREVR.87) and of 23 March 2021 (ECLI:PT:TRE:2021:34.21.1YREVR.79).
[324] In fact, Article 18 PT-EIO, mentioned in Article 26 (1) PT-EIO – and already addressed above in this report, within § 7.2.2 –, refers to 'recognition and execution'.
[325] *Supra*, § 7.3.2.

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authorised by the Minister of Justice, provided that it does not conflict with reasons of public order or State security. Article 43 of Law no. 144/99, of 31 August, applies mutatis mutandis." Article 43 of Law no. 144/99 – which is the national statute on international judicial cooperation in criminal matters – governs the transit of extraditees through Portuguese territory or aerial space. We find it highly doubtful that this offers adequate implementation to Article 22 (4) DEIO, as the conditions set in national law are quite restrictive of the transit. If any conditions are to apply, they should arguably be drawn, not from the legal regime of classic cooperation, but from norms on European cooperation specifically, namely from the national act implementing the FD-EAW: Law no. 65/2003, of 23 August (see Article 38, which implements Article 25 of the FD-EAW)[326].

Implementation of para. (7) of Article 22 DEIO requires reflection as well. According to this norm: "The period of custody in the territory of the issuing State shall be deducted from the period of detention which the person concerned is or will be obliged to undergo in the territory of the executing State." And Article 23 (2) establishes that this provision applies, *mutatis mutandis*, to temporary transfers. In implementing these provisions, Article 32 (5) PT-EIO establishes that: "The period of custody in the territory of the issuing State and of the State of transit does not suspend the maximum terms of pre-trial custody and it shall be deducted from the penalty or security measure applied in the issuing State, with the person being held in one of those situations, as the case may be, when Portugal is the executing State." The national provision has a broader reach than those provisions of the Directive, in more than one sense: (i) on the one hand, in that it establishes that the period of custody in the territory of the issuing State and of the State of transit does not suspend the maximum terms of pre-trial custody; (ii) on the other hand, concerning the deduction of time spent on remand from the penalty or security measure that has or may come to be applied, it includes the time of deprivation of liberty *in the State of transit*[327]. In spite of the differences vis-à-vis the Directive, this national provision does not, in our view, conflict with the individual-oriented rationale of this provision of the DEIO. On the contrary, it takes such a protection somewhat further without thereby generating any meaningful risk to the

[326] Obviously, for geographical reasons, Portugal will seldom be a State of transit, especially in the context of EU cooperation.
[327] Nevertheless, concerning sanctions applied by Portugal, this would already follow from the general rules of the Penal Code: see Articles 80 f., on which see MARIA JOÃO ANTUNES, *Penas e Medidas de Segurança*, 2nd ed., Coimbra: Almedina, 2022, p. 80 f.

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punitive interests of another Member State. For these reasons, we propose that this provision of the Directive be deemed as fully implemented.

In the same vein, Article 34 (1) PT-EIO is broader than that the provision is implements – *sc.*, para. (8) of Article 22 DEIO, on the specialty principle –, since the latter envisages only the issuing State. Nevertheless, again, we see no implementation issue here, for on the one hand all Member States should implement this provision, and on the other hand Portuguese law as such obviously could not impose a specialty principle provision on other Member States.

Article 23 DEIO, on temporary transfer to the executing State of persons held in custody for the purpose of carrying out an investigative measure, raises no implementation issues: see Article 33 PT-EIO.

In contrast, there is one issue with Article 24, on hearing by videoconference or other audiovisual transmission, namely with para. (7) thereto, which provides that: "Each Member State shall take the necessary measures to ensure that, where the person is being heard within its territory in accordance with this Article and refuses to testify when under an obligation to testify or does not testify the truth, its national law applies in the same way as if the hearing took place in a national procedure." The implementing provisions are, in the first place, Article 35 (6) PT-EIO, according to which: "The hearings of witnesses and experts carried out in national territory abide by the rules that would apply if the hearing were made in national proceedings, insofar as concerns the refusal to testify or to provide statements and their falsity." This provision does not match perfectly that of the Directive, and it should not, in our view, be construed in the sense that Portuguese rules alone determine the cases in which the witness or expert may refuse to testify, as the rules of the other Member State also apply. Rather, it should be construed in the sense that, *if* – based either on national rules or on rules of the other Member State – the person is under an obligation to testify and refuses to do so or does not testify the truth, then national law applies in the same way as if the hearing took place in a national procedure. This does not give rise to an actual implementation issue because Article 36 (1) (e) and (f) PT-EIO – in implementation of Article 24 (5) (e) DEIO – establish that, in hearings held by videoconference or other audiovisual means, "suspected or accused persons shall be informed in advance of the hearing of the procedural rights which would accrue to them, including the right not to testify, *under the law of the executing State or the issuing State*", and that "witnesses may claim the right not to testify and experts the right not to provide

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clarifications which would accrue to them *under the law of either the executing or the issuing State* and shall be informed about this right in advance of the hearing."

Article 26 DEIO, on information on bank and other financial accounts, causes no concerns, but one observation should be made in its regard. The provision (in the English version of the Directive) reads that the issuing authority shall indicate in the EIO the reasons why it considers that the requested information is likely to be "of *substantial value* for the purpose of the criminal proceedings (…)". The implementing provision (Article 38 (4) PT-EIO) used instead the expression "of *fundamental value* for the purpose of the criminal proceedings (…)". While at a first glance 'fundamental' seems more demanding than 'substantial', this is simply the wording found in the Portuguese version of the Directive. Whatever the precise scope of this concept is intended to be, it was intended to be the same in Portuguese law as in the Directive. It seems important to draw attention to this fact, so that the national provision does not come to be construed in the Portuguese legal system as more demanding than the DEIO.

No implementation problems could be detected with Article 27 DEIO, on information on banking and other financial operations (see Article 39 PT-EIO), or with Article 28 DEIO, on investigative measures implying the gathering of evidence in real time, continuously and over a certain period of time (see Article 40 PT-EIO), save for a minor defect concerning Article 28 (2) DEIO, as Article 40 (4) PT-EIO does not indicate "and wherever else necessary".

There are no issues either with Article 29 DEIO, on covert investigations, which is implemented by Article 41 PT-EIO and other national statutes mentioned therein, notably in para. (4), according to which covert investigations in national territory are carried out in accordance with the provisions of Law no. 101/2001, of 25 August (amended by Law no. 60/2013, of 23 August, and Law no 61/2005, of 24 July) and with Article 19 of Law no. 109/2009, of 15 September[328].

[328] Law no. 101/2001 of 25 August establishes the legal regime of covert investigations. Under this statute, the criminal police or third parties acting under the supervision of the Judiciary Police can carry out actions under undisclosed status and identity or a false identity, in order to prevent or investigate certain offences listed therein – a list which has steadily expanded over the time. This measure must be adequate to the purposes of prevention or investigation and proportional both to those purposes and to the gravity of the offence being investigated. It is performed at the request of the Judiciary Police or the public prosecution. Authorisation for investigative action (during the inquiry) is granted by the public prosecution, whereas authorisation for preventive action is granted by a judge of instruction, at the request of the Central Department for Investigation and Prosecution (a department within the public prosecution). It should be noted that this measure does not include the so-called *agent provocateur* (*viz.*, the agent who triggers the perpetration of an offence by another

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5.3.3.1 Issues for the rights of the suspect or accused person

A relevant issue surfacing in the case law on the EIO concerns the use of evidence obtained through this form of cooperation in national criminal proceedings. The following cases illustrate this.

In the first place, there is the ruling of the High Court of Lisbon of 11 April 2023[329], which concerned the offences of aggravated drug trafficking and criminal association for trafficking purposes. The Member States involved were mainly Portugal and France, albeit indirectly also the Netherlands. The case related to the applicability of pre-trial custody to a defendant in Portugal. The applicability of this coercive measure requires inter alia the existence of strong evidence (*fortes indícios*) that a defendant has committed a certain crime. In the case, most such evidentiary basis was obtained from the French authorities pursuant to an EIO issued by Portugal. The defendant claimed that, in order for it to be admissible for the purposes in question, he would have to be given access to the court orders issued in France for obtaining evidence, as well as the opportunity to contest them (*audi alteram partem*). That access was denied to him on the grounds that the elements in question had not yet been attached to the file. The evidence concerned personal (digital) data stored in a server. The Court began by framing the EIO within the context of mutual trust and mutual recognition. It then noted that the conditions for issuing an EIO are laid down in Article 11 PT-EIO, that the recognition and execution of an EIO is regulated in Article 18 PT-EIO, and the transfer of evidence in Article 23 PT-EIO. It further noted that Article 45 PT-EIO provides for remedies against the EIO and that the remedies against a decision to *issue* an EIO can only be raised in the issuing Member State and in the same terms as those that would apply in a similar domestic case. The Court then upheld that, in the case, the evidence at issue had not been obtained in the context of a criminal procedure running its course in Portugal, but rather in the context of a Joint Investigation Team (JIT) set up between France and the Netherlands. Since in the context of that JIT evidence emerged suggesting the existence of a criminal organization operating in Portuguese territory

person with a view to arresting him/her immediately and prevent consummation of the offence or at least actual harm to the protected legal interest). Those carrying out a covert investigation are not liable for committing in any form other than instigation (*Anstiftung*) or perpetration through another (*mittelbare Täterschaft*), preparatory acts or acts of execution of an offence (attempt), as long as their action is proportional to the aims of the measure. As for Law no. 109/2009, of 15 September, it concerns covert investigations in the field of cybercrime.

[329] ECLI:PT:TRL:2023:267.21.0JELSB.Q.L1.5.FF.

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(making use of encrypted communication equipment known as *Encrochat*), Portugal then issued an EIO to the French authorities. In fact – the Court held –, what is at issue here is a mere transfer of data that had already been collected and preserved by foreign authorities. As such, the applicability of (the rather demanding requirements set out in) Article 187 CCP (on the interception of telephone conversations), *ex vi* Article 189 CCP – which extends the application of the former to other telematic means of communication –, is excluded, and only Articles 12 to 17 of the Law on Cybercrime[330] are applicable. Since Article 125 CCP allows for any evidence which is not prohibited by the law, and since the mentioned Law on Cybercrime does not contain any prohibition on the use of evidence already obtained in another State, it follows that such evidence can be used. On the other hand, the validity of the gathering of that evidence cannot be called into question, considering the principle of mutual trust, and in any case there is no information allowing for the conclusion that access to the record of the procedure in France has been denied to the person concerned, a request to that effect being in fact pending at the time. The use of said evidence would be excluded only if there were any restrictions such as the lack of dual criminality in the cases where this requirement is not excluded (see Article 22 (1) (a) PT-EIO and Annex IV thereto) or concerning the concrete means for evidence gathering[331].

The second case is the ruling of the High Court of Coimbra of 7 June 2023[332], concerning the offence of aggravated rape. The defendant had been acquitted by the Court

[330] Law no. 109/2009 of 15 September.

[331] This ruling is related to that of the High Court of Lisbon of 29 September 2021, case no. 158/19.5JELSB.A.L1-3, available at https://www.direitoemdia.pt/search/show/84d9a703063178e71659ccb531508e723fc4d98e3595d960e08e78f1a4d9211f. In the same vein, see also the ruling of the High Court of Lisbon of 26 April 2023: ECLI:PT:TRL:2023:267.21.0JELSB.W.L1.5.3E. This case too concerned the offences of aggravated trafficking in drugs and criminal association for trafficking purposes. In this instance, the Member States involved were Portugal and France, the legal question at issue relating to the applicability of pre-trial custody to a defendant in Portugal – more specifically a decision whether or not to maintain a previously applied coercive measure of pre-trial custody. As noted above, this coercive measure requires inter alia strong indication that the defendant has committed a certain crime. In the case, some of the evidentiary basis was apparently obtained (or at least gathered on the basis of information obtained) from French authorities pursuant to EIOs issued by Portugal. The defendant claimed that such evidence, drawn by the French authorities from an encrypted communication system known as SKY ECC, was prohibited under Portuguese law, in view of the ruling of the Constitutional Court no. 268/2022. However, the Court maintained the coercive measure. It did not explicitly address the arguments of relevance for these purposes (concerning the EIO), but simply noted (paras. I.1.1, II.2 and II.3) that those arguments had already been invoked by the defendant in a previous occasion and had already been dismissed by a ruling of the High Court of Lisbon of 6 December 2022. Thus far, it has been impossible to access this ruling.

[332] Case no. 793/21.1JALRA.C1, available at:

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of First Instance: this Court did not find him guilty beyond reasonable doubt and therefore acquitted him on the strength of the principle of presumption of innocence, more specifically of *in dubio pro reo*. One of the arguments substantiating such a doubt lied in the fact that, during the pre-trial stages of the procedure, the statements of the victim had been taken through videoconference carried out from the residence of her father pursuant to an EIO, with whom she lived (presumably in France, but this does not result clearly from the ruling). Her father was standing next to her in that instance, which was deemed to have potentially affected the spontaneity and truthfulness of her statements[333]. Ruling on appeal, the High Court of Coimbra noted that the judge of instruction had authorised the father of the victim to accompany her during said procedural act, at which point the ruling mentions Article 36 (1) (b) PT-EIO – which is the provision implementing Article 24 DEIO (hearing by videoconference or other audiovisual transmission), namely para. (5), subpara. (b), thereto. The national provision reproduces verbatim the matching provision of the Directive, establishing: "Measures for the protection of the person to be heard shall be agreed, where necessary, between the competent authorities of the issuing State and the executing State". The High Court saw no plausible reason for suspecting that the presence of the victim's father (who had made the complaint in the case) could have affected the statements of the daughter: had that been the case – the Court noted –, the judge of instruction would presumably have suspended the questioning and called her to make the statements in presence, pursuant to Articles 271 (8) and 340 (1) CCP; moreover, the report of the psychologist attached to the case file indicated that no influence had been detected in the statements of the victim. Having also dispelled the other arguments on which the Court of First Instance had based its reasonable doubt, the High Court reversed the former's decision and convicted the defendant.

Another relevant issue discussed in Portuguese case law concerns the question as to whether the issuing of a EIO suspends the maximum terms of the procedural phase of inquiry, set out in Article 276 CCP. This issue was discussed in the ruling of the High Court

http://www.dgsi.pt/jtrc.nsf/c3fb530030ea1c61802568d9005cd5bb/99f55eca540d33fc802589d3004e8cf6?OpenDocument.

[333] Such statements were made pursuant to a procedural act called 'taking of statements for future memory' (*declarações para memória futura*: Article 271 CCP), which applies inter alia to victims of offences against sexual freedom / self-determination: the judge may question the victim before the trial, under specific formal conditions (namely the mandatory presence of the defendant's attorney), with the exceptional possibility of using his/her declarations as direct evidence later in the trial.

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of Oporto of 10 March 2021[334], which concerned the offence of money laundering and involved Portugal and Spain, the former being the issuing and the latter the executing Member State of the EIO. In the context of the same criminal proceedings, a rogatory letter was also issued by Portugal to Switzerland. Those maximum terms, as such, are merely indicative (or so they are normally taken to be in national case law and legal literature[335]), in the sense that the inquiry may extend beyond them, but they are indirectly relevant for the subsistence of certain procedural measures which are detrimental to fundamental individual rights: in the case, the temporary suspension of the execution of bank operations from a given bank account[336]. The aforementioned Article 276 CCP provides in para. (5) that the maximum terms of the inquiry are suspended (albeit only for up to half of the applicable maximum term) if a rogatory letter is issued; however, it does not mention the issuing of an EIO specifically. The legal question which arises therefrom is whether the reference to 'rogatory letter' could and should, at present, be construed in such a way as to encompass the issuing of an EIO, which did not yet exist when that norm of the CPP was enacted and last amended. Departing from the decision taken by a lower court earlier in this case, the High Court of Oporto ruled that it should *not*. In essence, the court offered the following arguments: (i) in spite of the similarity between the EIO and a rogatory letter, they have different scopes, characteristics and procedures, the EIO being much swifter; (ii) the CCP was amended several times after the entry into force of the statute implementing the EIO and even so the legislator did not add any reference to the EIO in Article 276 (5) CCP; (iii) this norm has an exceptional character and it produces not only procedural but also substantive effects of impact to fundamental individual rights. The court thus agreed to the argumentation used in the appeal lodged by the defendants. Ultimately, however, the decision was not entirely favourable to them, as the court found that the maximum terms of the criminal procedure had been suspended on grounds other than the issuing of the EIO,

[334] ECLI:PT:TRP:2021:109.19.7TELSB.C.P1.D8.

[335] With a different understanding, do however see CLÁUDIA CRUZ SANTOS, "O Controlo Judicial da Violação dos Prazos de Duração Máxima do Inquérito", *Julgar* 32 (2017), p. 233 f.

[336] Articles 48 f. (esp. Article 49 (2)) of Law no. 83/2017, of 18 August, which establishes measures aimed at tackling money laundering and the financing of terrorism and which transposes in part the Directive (EU) 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and the Directive (EU) 2016/2258 of 6 December 2016 amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities.

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namely on the strength of the exceptional legislation enacted during the Covid-19 pandemic suspending numerous terms in criminal proceedings[337].

5.3.4 Cooperation issues between executing and issuing authorities

There is a small implementation issue with Article 7 DEIO, on the transmission of the EIO, namely with its para. (5), concerning the event where the identity of the executing authority is unknown. While this provision states that, in such an event, the issuing authority "shall make all necessary inquiries (…)", Article 13 (5) PT-EIO simply establishes that "[a]ssistance may be requested to the central authority, the national member of EUROJUST or the contact points of the European Judicial Network (…)".

There is also an issue concerning the obligation to inform enshrined in Article 16 (1) DEIO. Article 25 PT-EIO effects only a partial implementation of that provision in the DEIO, as it does not comprise the prescription of its second sentence: "Where a central authority has been designated in accordance with Article 7 (3), this obligation is applicable both to the central authority and to the executing authority which receives the EIO from the central authority."

Articles 17 and 18 DEIO, on criminal and civil liability of officials from the issuing State acting in the executing State, have been duly implemented: see Articles 28 and 29 PT-EIO. So has Article 21, on costs: see Article 9 PT-EIO.

In contrast, there is an implementation issue with Article 19 DEIO, on confidentiality, namely with para. (3). According to Article 16 PT-EIO: "The issuing authority shall not disclose any evidence or information provided by the executing authority which are subject to the obligation of secrecy of confidentiality, except to the extent that its disclosure is authorised by its national law and does not contravene the indication by the executing authority." This provision does not state 'except to the extent that its disclosure is necessary for the investigations or proceedings described in the EIO'. It is unclear whether this poses an actual implementation problem but it appears to be at least a case of deficient implementation, the national provision being less protective of confidentiality than the corresponding provision in the Directive.

[337] This ruling follows the line of (and, insofar as concerns the topic of relevance for these purposes, is more detailed in its reasoning than) the ruling of the High Court of Porto of 27 January 2021 (ECLI:PT:TRP:2021:109.19.7TELSB.B.P1.44); and this case law was again reiterated in the ruling of the High Court of Porto of 3 May 2023 (ECLI:PT:TRP:2023:4941.21.3T9PRT.D.P1.42).

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Regarding Article 30 DEIO, on the interception of telecommunications with technical assistance of another Member State, the only aspect worth mentioning concerns para. (5) thereto. Article 42 (5) PT-EIO – the implementing provision – does not indicate that "[t]he executing State may make its consent subject to any conditions which would be observed in a similar domestic case", but in our view this interpretation is possible to achieve from the wording of the provision, in articulation with Article 18 (1) PT-EIO, which implements Article 9 (1) DEIO[338].

Similarly, some remarks should be made regarding Article 31 DEIO, on notification of the Member State where the subject of the interception is located from which no technical assistance is needed – which is implemented by Article 43 PT-EIO. One remark concerns Article 43 (1) (a) of the national act, which has implemented Article 31 (1) (a) DEIO poorly: the latter envisages that the competent authority of the intercepting Member State knows *at the time of ordering the interception* that the subject of the interception is or will be on the territory of the notified Member State; whereas the former reads "the competent authority of the intercepting Member State knows that the subject of the interception is or will be, *at the time of the interception*, on the territory of the notified Member State". However, in our view, the mismatch does not entail an actual implementation issue. The other remark concerns Article 31 (3) DEIO: the implementing provision, Article 43 (3) PT-EIO, requires the notified Member State to inform the intercepting Member State; whereas Article 31 (3) DEIO only confers such a possibility ("may"). Again, this appears not to entail an implementation issue: if anything, the national provision is more protective of fundamental rights, whilst not detrimental from a cooperation perspective.

Relevant case law has been delivered concerning the issue of confidentiality, notably the ruling of the Supreme Court of 31 October 2019[339], which concerned the offences of swindle (*burla*) and / or computer swindle (*burla informática e nas comunicações*), the Member States involved being Portugal and Poland. The latter issued an EIO with a view to obtaining certain information on the activity of the Portuguese affiliate of a Polish brokerage company. The Portuguese Market and Securities Commission (CMVM) refused to provide such information to the Portuguese authorities, invoking professional confidentiality. The public prosecution office requested the judge of instruction to rule for confidentiality to be broken (*quebra de sigilo*). The judge did not accede to the request, but

[338] See *supra*, § 7.3.2.
[339] ECLI:PT:STJ:2019:7078.18.9T9LSB.A.L1.S1.60.

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instead held valid the confidentiality claim of the CMVM. However, it submitted the case to the High Court of Lisbon, pursuant to Article 135 (3) CCP, so that it would evaluate whether or not the confidentiality should be broken, notably in the light of the principle of prevalence of the preponderant interest (*princípio da prevalência do interesse preponderante*). On 7 February 2019[340], the High Court of Lisbon, after weighing the conflicting interests[341], ruled for the breach of confidentiality[342]. The CMVM then lodged an appeal to the Supreme Court, which held the appeal inadmissible through a summary decision (taken by a single judge) of 11 July 2019, holding the decision of the High Court of Lisbon to be the final decision on the case. The CMVM lodged yet a complaint before a broader composition of judges within the Supreme Court, but the Court upheld the summary decision through the ruling of 31 October 2019, on the main argument that the CMVM was not a defendant or a concerned person/entity in the proceedings at issue (merely a third party), and as such it lacked an interest in – and, consequently, legitimacy/standing for – appealing, in the light of Article 401 (2) CPP. In conclusion, the outcome was the breach of confidentiality.

5.3.5 Remedies

There are some issues with the implementation of Article 14 DEIO, on legal remedies. In the first place, it is doubtful that paragraph (2) has been fully implemented, since PT-EIO does not explicitly feature the reference therein to fundamental rights ("without prejudice to the guarantees of fundamental rights in the executing State")[343]. In Portuguese legal literature, the stance has been advocated that, where fundamental rights are at stake, it is possible to challenge before a Portuguese court the lawfulness and proportionality – the two main components of the concept of "substantive reasons" – of an

[340] ECLI:PT:TRL:2019:7078.18.9T9LSB.A.L1.9.00.
[341] The Court held that such a weighing includes evaluating whether the information at issue is indispensable for uncovering the truth of the facts, as well as considering the gravity of the offence and the necessity to protect legal interests (*sc.* positive general prevention). In the case it found the information indispensable to that effect, and that the offence at issue was serious, as indicated by the considerably high amount of the damages that it caused. It moreover noted that the disclosure of the information would not, in the case, carry any damage (commercial or otherwise) to the company at issue.
[342] From this decision it is not possible to grasp that the case involved an EIO; this becomes apparent only from the ruling later proffered by the Supreme Court in the same case.
[343] Article 45 (2) and (3) simple prescribe, respectively, that "[t]he substantive reasons for issuing the EIO may be challenged only in an action brought in the issuing State"; and, "[w]hen Portugal is the issuing State, the decision ordering the investigation measure and, thus, the issuing of the EIO, are governed, in their admissibility and regime, by the rules of the CCP".

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EIO issued by another Member State, as well as to question whether it is based on a sufficient degree of suspicion, where the investigative measures are intrusive and it is not possible to dissociate the legality analysis from the proportionality analysis, including special requisites in respect of the intensity of the suspicion; and where there is no remedy available in the issuing State[344]. This stance relies on the national provisions implementing Article 14 (2) *in fine* DEIO (*sc.*, Article 34 (2) PT-EIO) and Article 11 (1) (f) DEIO (*sc.*, Article 22 (1) (g) PT-EIO), the latter of which enables the non-execution of an EIO where there are substantial grounds to believe that its execution would be incompatible with the obligations of the executing State under Article 6 TEU and under the CFREU. At the very least, the legislator should clarify this issue.

Secondly, Article 45 (5) PT-EIO does not establish that information on legal remedies should be provided "when these become applicable and in due time to ensure that they can be exercised effectively", as required by Article 14 (3) DEIO[345].

Apart from that, implementation has been accomplished: the general requirement of Article 14 (1) DEIO, that Member States shall provide for legal remedies equivalent to those available in a similar domestic case, is fully implemented by Article 45 (1), (3) and (4) PT-EIO[346]; the other paragraphs of Article 14 are also implemented in Article 45 PT-EIO. However, some clarifications are in order:

- One of them concerns Article 14 (4) DEIO. Article 45 (3) and (4) PT-EIO provide: "When Portugal is the issuing State, the decision ordering the investigation measure and, thus, the issuing of the EIO, are governed, in their admissibility and regime, by the rules of the CCP"; "When Portugal is the executing State, judicial decisions on the formalities and proceedings concerning the carrying out of the investigation measure can be appealed before Portuguese courts, in the terms provided for in the CCP on their admissibility and their regime." This leads to the following regime, in the case where Portugal is the executing

[344] VÂNIA COSTA RAMOS, "Meios processuais de impugnação…", *op. cit.*, p. 129 f. The author further submits that the same result may be achieved through Article 21 PT-EIO (implementing Article 10 DEIO), as this provision presupposes a proportionality assessment, whether made *ex ante* and in the abstract by the legislator, or in the case at hand by the competent executing authority.
[345] In the same sense, see *ibid.*, p. 150-152.
[346] *Sc.*: "(1) Legal remedies equivalent to those available in a similar domestic case are ensured. (…) (3) When Portugal is the issuing State, the decision ordering the investigation measure and, thus, the issuing of the EIO, are governed, in their admissibility and regime, by the rules of the Code of Criminal Procedure. (4) When Portugal is the executing State, judicial decisions on the formalities and proceedings concerning the carrying out of the investigation measure can be appealed before Portuguese courts, in the terms provided for in the Code of Criminal Procedure on their admissibility and their regime."

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MS[347]: (i) If the procedure is in the trial phase in the issuing Member State, the competence for executing the EIO belongs to a court of first instance[348], whose decisions may be challenged before the court itself[349] or before a High Court[350]. A decision of a High Court can only be appealed to the Supreme Court with a view to settling a jurisprudential conflict[351] or if it contravenes settled jurisprudence[352]. (ii) The same applies where the EIO is issued before the phase of trial and the competent executing authority is a judge of instruction[353]. Such decisions can then be appealed in the same terms mentioned above with regard to the trial phase. In contrast, where the competent executing authority is the public prosecution office, then it less clear whether there are normative bases to request the judicial review of the measure[354]. However, it has been convincingly argued that such a possibility should be admitted in order to guarantee respect for the constitutional principle *audi alteram partem*, in which case the ensuing judicial decision would yet be liable to appeal in the same terms mentioned for the trial phase[355]. Such a view underscores the particularities of criminal proceedings with transnational elements vis-à-vis 'ordinary' criminal proceedings, notably the fact that, in the case of the former, if Portugal is the executing State, there will be no possibility later in the proceedings to obtain a judicial assessment of the prosecutorial decision before a judge of instruction or a trial judge. (iii) If the execution of the EIO involves the intervention of the police – which have not been included in the PT-EIO as an executing or issuing authority, but which may provide collaboration to the judicial authorities that have –, their intervention may be challenged before the public prosecution office or a judge, depending on which of them is the 'executing authority' based on the above description. In turn, the decision of these authorities in response to this challenge will follow the conditions indicated above under (i) and (ii), respectively. The same applies to the case where Portugal is the issuing MS, with

[347] See MIGUEL JOÃO COSTA / PEDRO CAEIRO, "Country Report Portugal", *op. cit.*, p. 295 f.; VÂNIA COSTA RAMOS, "Meios processuais…" *op. cit.*, p. 145 f.
[348] Article 19 (3) and (6) PT-EIO.
[349] Articles 118 f. CCP.
[350] Articles 399 f., 427 and 432 CCP.
[351] Article 437 (2) CCP.
[352] Article 446 CCP.
[353] As it must per force be when the requested investigative measure is offensive to fundamental rights: Article 19 (1) PT-EIO and Articles 268 and 269 CCP.
[354] See *supra*, § 7.1.1.
[355] See VÂNIA COSTA RAMOS, "Meios processuais…" *op. cit.*, p. 146-149, noting that there is diverging case law on this issue and that a dominant interpretation is yet to emerge.

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the particularity that the acts practiced by the public prosecution office during the inquiry can be reviewed during the phase of instruction by the judge of instruction, whose decisions are yet open to complaint based on Article 291 (2) CCP[356].

- Another concerns Article 14 (6) DEIO, according to which a legal challenge shall not suspend the execution of the investigative measure, unless it is provided in similar domestic cases. The PT-EIO does not establish the effects (suspensive or otherwise) of appeals against decisions to execute an EIO, but it commands the application of the CCP, which sets out the following regime: based on Article 407 (1) CCP, appeals are immediately brought before the appeal court "where retaining them would render them absolutely useless"; in turn, based on Article 408 (3) CCP, these appeals will "suspend the procedure as a whole when the validity or efficacy of subsequent acts is dependent on them, and they suspend the decision being appealed from in the remaining cases"[357]. Thus, no implementation issue ultimately exists concerning this provision.

- Yet another concerns Article 14 (7) DEIO. Article 45 (7) PT-EIO provides that successful challenges shall be taken into account by the issuing authority in accordance with its own national law (which corresponds to the first sentence of Article 14 (7) DEIO. Its second sentence has not been explicitly implemented – *sc.*: "Without prejudice to national procedural rules Member States shall ensure that in criminal proceedings in the issuing State the rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained through the EIO". This, however, follows naturally from national rules on criminal procedure, since, in order for evidence obtained by means of international cooperation (European or otherwise) to be valid in a criminal procedure conducted in Portugal, it must comply with the Portuguese rules on evidence gathering[358], and no differentiation is made either, concerning defence rights and fairness of proceedings, depending on whether the evidence has been obtained in Portugal or abroad[359].

[356] See *ibid.*, p 148.
[357] For further elaboration on this issue, see *ibid.*, p. 152, 162-163 and 165.
[358] Notably the prohibition of evidence obtained through torture, coercion or, in general, through physical or psychological harm (Article 126 (1) and (2) CPP), as well as through abusive intrusion into private life, the domicile, correspondence or telecommunications (Article 126 (3) CCP). On this, see further in MIGUEL JOÃO COSTA / PEDRO CAEIRO, "Country Report Portugal", *op. cit.*, p. 283 f.; see also Article 11 (1) (b) PT-EIO.
[359] On this issue, see further in VÂNIA COSTA RAMOS, "Admissibility of evidence…" *op. cit*.

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One of the few rulings that could be identified of relevance on remedies is that of the High Court of Lisbon of 27 January 2023[360]. It concerned an administrative offence, and the involved Member States were Portugal and Germany. The defendant, a legal person, was notified by registered mail to its headquarters in Germany of a decision of a Portuguese administrative authority applying an administrative sanction. The question for these purposes was the computation of the term for the defendant to appeal such a decision. The defendant claimed that, since the notification was sent to its headquarters in Germany, it was only conveyed to its legal representative a few days lapsed upon the signing of the registered mail. It claimed that not to apply the extension provided for in Article 88 of the Code of Administrative Proceedings[361] would breach the right of access to the law and the courts, as well as the principles of good faith and of legal certainty. The public prosecution took the same stance as the defendant. The Court thus undertook to determine whether not applying an extended deadline in such cases would represent undue differentiation of defendants residing in Portugal and defendants residing abroad in the exercise of their right to prepare their defence in administrative punitive proceedings. The Court, however, concluded in the negative. It held that Articles 3 and 5 (1), (3) and (4) of the 2000 EU Convention on Mutual Assistance have not been revoked by Article 34 (1) (c) DEIO, and therefore apply in the case, enabling for notifications to be made to defendants in the terms mentioned above. The key date is that in which the registered mail was delivered in the headquarters of the defendant. The date in which the notification was internally conveyed to the legal representative (to whom in fact it had been addressed) was found to be immaterial. And in this light the defendant did benefit from the legally prescribed 20-day term for preparing its defence[362]. In view of the Judgment of the CJEU (Fifth Chamber) of 14 May 2020 in *UY v Staatsanwaltschaft Offenburg*, the treatment of the defendant is to be deemed equal to that of a defendant residing in Portugal without it being necessary to grant any extension of the term for preparing defence, as under EU law it suffices that national law ensures that defendants residing elsewhere in the Union benefit from the same term (in its entirety) as defendants residing in the Member State where the procedure runs its course[363].

[360] ECLI:PT:TRL:2023:298.22.3YUSTR.L1.PICRS.39.
[361] Decree-Law no. 4/2015, of 7 January.
[362] See, however, VÂNIA COSTA RAMOS, "Meios processuais…" *op. cit.*, p. 151, arguing that – also for reasons of national law – a more extended deadline should be attributed to the defendant.
[363] This ruling is in line with that (ECLI:PT:TRL:2022:204.22.5YUSTR.L1.PICRS.B5) of the High Court of

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5.4 The coordination with Regulation 2018/1805

It may be worth recalling that Portugal did not enact new legislation in connection to the Regulation (EU) 2018/1805, and that the Regulation has brought very narrow novelties to preexisting legislation – notably Law no. 25/2009 and Law no. 88/2009, which implemented, respectively, the Framework Decisions 2003/577/JHA of 22 July 2003 and 2006/783/JHA of 6 October. The subsequent analysis therefore focuses on the articulation between the Regulation and those legal instruments, as well as with other national norms of relevance to the subject-matters covered by the former[364].

5.4.1 Legal basis in the national system and scope

In Portugal there are three types of confiscation of instruments and proceeds of the (criminally) unlawful act: (i) classic confiscation of instruments (Article 109 (1) PC and Article 12-B (1) of Law 5/2002); (ii) classic confiscation of proceeds of the unlawful act (Article 110 (1) PC); and (iii) extended confiscation (Article 7 (1) of Law 5/2002).

Total confiscation is prohibited in Portugal on the strength of Article 2 of the Constitution (the general provision that enshrines the rule of law). This provision renders confiscation legitimate, but it also set limits thereto, the prohibition of total confiscation being the only intrinsic limit on confiscation, since all the other limits are common to all legal consequences that restrict fundamental rights (Article 18 (2) Constitution, on the principle of proportionality).

Before addressing each modality of confiscation, it is important to note that Portuguese law autonomises two concepts – 'products' (Article 110 (1) (a) PC) and 'proceeds' (Article 110 (1) (b) PC) –, although their regime is identical[365].

According to Article 110 (1) PC, "(1) The following shall be declared confiscated in favour of the State: (a) The proceeds of an unlawful act described in the criminal law,

Lisbon of 21-12-2022. It is also relevant insofar as concerns the scope of application of the Directives 2010/64/EU on the right to information and translation and 2012/13/EU on the right to information.

[364] Recall more specifically that before the Regulation the issuing, recognition, and execution of freezing orders was governed by Law no. 25/2009, and the issuing, recognition and execution of decisions to confiscate instruments and proceeds was governed by Law no. 88/2009, and these Laws still apply to situations to which the Regulation does not apply.

[365] For a critical analysis of this autonomy, see ANTÓNIO VAZ DE CASTRO, *A identificação da natureza penal de uma consequência jurídica no direito português – O confisco das vantagens do facto ilícito-típico como ponto de partida e ponto de chegada* (December 2021), p. 16-17 < https://estudogeral.uc.pt/bitstream/10316/105091/2/TESE%20FINAL%20TOTAL%20%286%29.pdf >.

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considering as such all objects that have been produced by its commission; and (b) The proceeds of an unlawful act described in the criminal law, considering as such all things, rights or proceeds that constitute an economic advantage, directly or indirectly resulting from that act, for the perpetrator or for others." Article 2 (1) of the Directive 2014/42/EU of 3 April 2014, on the freezing and confiscation of instrumentalities and proceeds of crime in the EU, defines "proceeds" as "any economic advantage derived directly or indirectly from a criminal offence; it may consist of any form of property and includes any subsequent reinvestment or transformation of direct proceeds and any valuable benefits". The European legislator does not separate the terms "product" and "proceed", and only products that constitute an economic advantage are relevant for the purposes of that Directive. It is relevant to refer to that Directive, because in implementing it the Portuguese legislator chose admittedly not to break away from its own tradition, but rather to continue to use the two terms *differently*. Aware that the Directive ran in another direction, the legislator explicitly provided reasons for its approach in the explanatory memorandum of the Draft Law 51/XIII (PL 201/2016) of 15 December 2016 (which would lead to an amendment of the Penal Code)[366]: "the definitions given by national and Community law to these concepts reveal the identity of scope that essentially exists between the two, such that maintaining the national terminology in no way jeopardises full compliance with the obligations arising from the Directive. Nevertheless, the opportunity has been taken to try to obviate practical difficulties that could result from the distinction between the rules applicable to the confiscation of each category, which Portuguese law had maintained until now. Considering that the two realities can often overlap, it has been decided to subject them to the same legal regime in terms of confiscation, thus preventing a mere difference in qualification from implying a substantive change" of the regime. Since the Portuguese systems of confiscation of products and proceeds are identical, the autonomy of the two concepts has no implications for the regular application of the Regulation.

The classic confiscation of instruments (Article 109 PC) has two main requirements: (i) the commission of a (criminally) unlawful act; (ii) the dangerousness of the instruments[367]. Regarding the first requirement, it should be emphasised that it is not

[366] This Draft Law is at the origin of Law no. 30/2017 of 30 May, implementing the Directive 2014/42/EU.
[367] Article 109 (1) PC: "Instruments used to commit an unlawful act described in the criminal law shall be confiscated in favour of the State when, due to their nature or the circumstances of the case, they endanger the safety of persons, public morals or public order, or offer a serious risk of being used to commit new unlawful acts described in the criminal law". The concept of instruments encompasses "all objects that have served or

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necessary that someone is criminally responsible for the unlawful act or, *a fortiori*, that there be a conviction (*actus reus* and *mens rea* – "verdict as to his guilt")[368]. In other words, the requirement is met "*perchè il fatto sussiste*" ('because the fact exists'), not *"perchè il fatto costituisce reato*" ('because the fact constitutes a crime)[369]. The second requirement is the dangerousness of the instruments. Objects that, "by their nature", are likely to be dangerous are confiscated. This applies to objects that are considered dangerous in and of themselves, pursuant to an objective or absolute perspective on dangerousness. However, the legislator also used a relative perspective, by providing for the confiscation of instruments that, "due to the circumstances of the case", are proven to be dangerous. Such a relativisation of the circumstances of the case may end up implying a reference to the agent him/herself, which is why this is considered to be a subjective perspective. For all these reasons, it seems that the references to "its nature" and to "the circumstances of the case" serve nothing more than to indicate that the judgement regarding the dangerousness of the object must be made in the abstract and in concrete terms, respectively. Article 12-B (1) of Law no. 5/2002, on the contrary, does not require that instruments are dangerous[370].

The confiscation of instruments, according to Article 109 (2) PC, is applicable even if "no specific person can be punished for the act, including in the event of the death of the perpetrator or when the perpetrator has been declared contumacious". Furthermore, when confiscation in kind is not possible, it can be replaced by the payment of the respective amount (Article 109 (3) PC)[371].

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were intended to serve for its commission" (ibid.).

[368] ECtHR *Varvara v Italy*, § 72: "In the present case, the criminal penalty which was imposed on the applicant despite the fact that the criminal offence had been time-barred and his criminal liability had not been established in a verdict as to his guilt, is incompatible with the principle that only the law can define a crime and prescribe a penalty, which the Court has recently clarified and which is an integral part of the legality principle laid down in Article 7 of the Convention. Consequently, the penalty in issue is not prescribed by law for the purposes of Article 7 of the Convention and is arbitrary".

[369] ECtHR *Sud Fondi s.r.l. and Others v. Italy*, § 65.

[370] See PEDRO CAEIRO "O Confisco numa Perspectiva de Política Criminal Europeia", in Maria Raquel Desterro Ferreira / Elina Lopes Cardoso / João Conde Correia (coord.), *O Novo Regime de Recuperação de Ativos à Luz da Diretiva 2014/42/EU e da Lei que a Transpôs*, Lisboa: Imprensa Nacional – Casa da Moeda, 2018, p. 31-32. This situation, according to the Author, presents itself as a "legal schizophrenia", an incomprehensible duality that results, ultimately, from the exact reproduction by national legal systems of EU instruments, which might be limited in scope (as it is the case with Directive 2014/42/EU), pursuant to the Treaty rules on EU competence in criminal matters. See also ANTÓNIO VAZ DE CASTRO, "O Novo Regime da Perda dos Instrumentos do 'Crime' ", *A Vida Judiciária* 203 (2017), p. 53.

[371] The draft version of Article 109 (3) (Draft Law 51/XIII (PL 201/2016), of 15 December 2016), subjected

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The confiscation of proceeds (Article 110 PC) is subject to two main requirements: (i) the commission of a (criminally) unlawful act[372]; (ii) the existence of proceeds generated by that act[373]. As with the classic confiscation of instruments, the classic confiscation of proceeds does not require criminal liability on the part of the person: it is sufficient to fulfil the requirement that the unlawful act has been committed (*actus reus*). This type of confiscation can therefore be applied even if the defendant is acquitted, if they die during the proceedings or if they are declared to be contumacious (Article 110 (5) PC) – provided, of course, that it is shown that "*il fatto sussiste*" ('the fact exists'). In this sense, this type of confiscation, like the classic confiscation of instruments, can be non-conviction-based[374]. If confiscation in kind is not possible, it is replaced by the payment of an amount matching the value of the proceeds. Finally, Article 110 (6) PC explicitly prescribes that this regime shall not jeopardise the rights of the victim.

Confiscation of instruments and proceeds belonging to third parties is regulated in Article 111 PC. Confiscation of property (or of its value – Article 111 (2) PC) belonging to third parties is admissible if: "(a) The holder has made an objectionable contribution to its use or production, or has benefited from it; (b) The instruments or proceeds are acquired by any means, after the commission of an unlawful act described in the criminal law, and the acquirer knows or should know their origin; or (c) The instruments and proceeds, or the

the impossibility of appropriation in kind to the condition that such impossibility had been deliberately caused by the perpetrator.

[372] With the approval of the PC of 1852, the general rule, still in force today, was born, according to which confiscation applies to all criminal offences and not just to those for which it is provided, as was the case in previous legislation. In 1995, the reform of the 1982 PC broadened that scope, replacing the concept of 'crime' for that of '(criminally) unlawful act' (*facto ilícito típico*). In 2017, with the enactment of Law no. 30/2017, of 30 May, a further extension took place allowing for the application of a partial confiscation modality "even if no specific person can be punished for the fact" (e.g. Article 110 (5) PC).

[373] A third requirement of the classic confiscation of proceeds can be drawn from this, which is the verification of a causal link between the act carried out and the proceeds.

[374] In our view, the structure of this type of confiscation is similar to that of the Italian *confisca urbanistica* (so much so that this type of confiscation was previously regulated by the general rule of confiscation set out in Article 240 of the Italian Penal Code). As such, the ECtHR's conclusions on the latter can be brought *mutatis mutandis* into the debate on the Portuguese classic confiscation of proceeds. To this effect it should be interesting to look at this form of confiscation in the light of *Sud Fondi*, *Varvara* and *G.I.E.M.* insofar as concerns the question of the possibility of *confisca senza condanna*. At the same time, one must emphasise that the whole reasoning of the ECtHR seems to have been contaminated by the idea of the disproportionality of the *confisca urbanistica*, more precisely by the fact that it also aims to confiscate land that has been object of a *lottizzazione abusiva*. Even so, it is interesting to see how the ECtHR deals with classic offence-based and non-conviction-based forms of confiscation of proceeds. For a joint analysis of S*ud Fondi*, *Varvara* and *G.I.E.M.*, see ANTÓNIO VAZ DE CASTRO, *A identificação da natureza penal… op. cit.,* p. 166-187.

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correspondent value, have been transferred to the third party by any means with the aim of avoiding confiscation under Articles 109 and 110, and such aim is or should be known to the third party."

Extended confiscation is enshrined in Articles 7 to 9 of Law no. 5/2002 (Law on the Fight against Organised and Crime Economic and Financial). The conditions for its application are set out in Article 7, and their cumulative fulfilment gives rise to a legal presumption which, if not rebutted, allows the Portuguese State to confiscate the value of a convict's unexplained property. The requirements are as follows: (i) a conviction for one of the offences listed in Article 1 (1) of that statute; (ii) disproportionate wealth (viz., "the difference between the value of the defendant's actual property and the one consistent with his/her lawful income")[375]. Unlike the case with classic confiscation of instruments and proceeds, in order for the first requirement ("conviction") to be met, it is not sufficient that an unlawful act (*actus reus*) has been committed, but rather it is also necessary that guilt be established (*actus reus* and *mens rea*) in relation to a catalogue of offences[376]. That is, the perpetrator must be criminally liable. The conviction must be final, and any other circumstances related to the penal consequence (e.g., suspension of execution of the sentence or its duration) are irrelevant for applying extended confiscation.

The requirement of "disproportionate wealth" consists of legal or factual control over property that is disproportionate with the persons' known lawful income.

The view has been submitted in legal literature that extended confiscation also depends on a third condition: the court would have to be persuaded of the convict's

[375] Article 7 (1) Law 5/2002 reads as follows: "In the event of a conviction for the crime referred to in article 1, and for the purposes of confiscation of assets in favour of the State, the difference between the value of the "arguido's" assets and that which is consistent with his lawful income shall be presumed to constitute a proceed of criminal activity."

[376] Article 1 (1) Law 5/2002 reads as follows: "This Law lays down a special regime on collection of evidence, breach of professional secrecy and confiscation of property regarding the following criminal offences: (a)illicit drug trafficking pursuant to articles 21 to 23 and 28 of the Decree-Law No. 15/93 of 22 January 1993; (b)terrorism, terrorist organisations, international terrorism and financing of terrorism; (c) illicit trafficking in weapons; (d)trading in influence (e)undue receiving of advantage 2 (f) active corruption (offering/granting) and passive corruption (soliciting/accepting); (g) embezzlement; (h) unlawful economic advantage in a transaction (i) money laundering; (j) criminal association; l) child pornography and incitement to child prostitution m)damage regarding computer programs or other computer data and computer sabotage pursuant to articles 4 and 5 of Law 109/2009 of 15 September 2009, as well as unlawful access to a computer system, where one of the results provided for in Article 6 (4) of the said Law has been produced or is attained with recourse to one of the said instruments or constitutes one of the conducts typified by paragraph 2 of the said article; n) trafficking in persons; o) counterfeiting of currency and of titles equivalent thereto; p) incitement to prostitution; q) smuggling; r) trafficking in, and tampering with, stolen vehicles."

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previous *criminal activity* (not necessarily *crimes*, in all their elements), of the kind included in the catalogue of Article 1[377]. However, the Supreme Court of Justice follows the view that criminal activity is not a third requirement that must be proven by the public prosecution office. In a ruling of 24 October 2006, in a case where the appellant had not provided positive proof of the allegedly lawful origin of the indicated assets, this Court held that: "It is true that the public prosecution office did not prove the allegedly illicit origin, but the doubt thus created about the origin of the frozen property is resolved by the presumption that [these] constitute proceeds of criminal activity, by virtue of Article 7 (1) of Law no. 5/2002"[378].

Article 7 (2) (a) (b) and (c) of Law no. 5/2002 provides that, for the purpose of establishing the value of the convict's property, the value of the following items are taken into account: (i) the assets held by the convict, de jure or de facto, when he/she is formally designated as *arguido/a*; (ii) assets that have been transferred to third parties free of charge or for a derisory counterpart, in the five years prior to the defendant's formal designation as *arguido/a*; (iii) assets received by the defendant in the five years prior to his/her formal designation as '*arguido*', even if the whereabouts or destination of such assets cannot be determined.

The presumption will be established unless the assets at issue were held by the individual for at least 5 years prior to being designated as a defendant or were acquired with income obtained in that period, and once established it will only be possible to rebut by proving that the assets "result from income of lawful activity" (Article 9 (3) (a)).

In Portugal, the freezing order provided for in Articles 178 f. CCP (*Apreensão*) aims at ensuring that the frozen object can be used as evidence, as well as guaranteeing that an eventual decision of confiscation (in kind) is successful: "Instruments, products or proceeds related to the commission of an illegal act classified as a crime are frozen, as well as any animals, things and objects that have been left by the perpetrator at the scene of the crime

[377] In this sense, see JOSÉ DAMIÃO DA CUNHA, *Perda de bens a favor do Estado. Arts. 7.º-12.º da Lei 5/2002, de 11 de Janeiro (Medidas de combate à Criminalidade Organizada e Económico-Financeira)*, Coimbra: Coimbra Editora, 2004, p. 11-17. PEDRO CAEIRO, "Sentido e função do instituto da perda de vantagens relacionadas com o crime no confronto com outros meios de prevenção da criminalidade reditícia (em especial os procedimentos *in rem* e a criminalização do enriquecimento «ilícito»)", *Revista Portuguesa de Ciência Criminal* 21 (2011), p. 314-316. Upholding the opposite view, see JOÃO CONDE CORREIA, *Da Proibição do Confisco à Perda Alargada*, Lisboa: Imprensa Nacional – Casa da Moeda, 2012, p. 110; ANTÓNIO VAZ DE CASTRO, *A identificação da natureza penal... op. cit.*, p. 20-26.
[378] See ruling of the Supreme Court of Justice, no. 06P3163, of 24 October 2006.

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or that may serve as evidence." According to Article 178 (3) CCP, freezing measures are authorised, ordered or validated by a judicial authority. In specific situations, the criminal police can also issue freezing orders, although these are subject to validation by the judicial authority within a maximum term of seventy-two hours (Article 178 (3), (4) and (5) CCP).

Yet another type of freezing orders is provided for in Article 228 (1) CCP (*Arresto preventivo*). Its function is distinct from that of "*apreensão*" of Article 178 CCP: it serves *inter alia* as a patrimonial guarantee of the execution of the judicial decision to confiscate the instruments and proceeds. In other words, as a patrimonial guarantee of the confiscation of a value, and not of specific objects. Therefore, if there is a concern that the assurances for the payment of the value of the instruments and proceeds of the unlawful act may be insufficient (as per Article 227 (1) (b) CCP), the judge, upon request by the public prosecution office or the victim, can issue an order to freeze assets (as outlined in Article 228 (1) CCP).

Article 10 of Law no. 5/2002 provides for a special freezing regime with the specific function of guaranteeing payment of the amount to be confiscated by way of extended confiscation (Article 7 of the same statute). According to Article 10 (2), "when there is concurrently a well-founded fear of diminishment of financial guarantees and strong indications of the commission of the crime, the public prosecution office may request the seizure of assets belonging to the defendant, corresponding to the amount determined as constituting the proceeds of criminal activity". According to Article 10 (3) of Law no. 5/2002, the freezing order is ordered by the judge if there are strong indications that the offence has been committed, even if the conditions referred to in Article 227 (1) CCP are not met[379]. In short, in Portuguese law, a "freezing order" can be a procedural guarantee of the confiscation of assets (Article 178 CCP) and also a procedural guarantee of the payment of the value of the instruments and proceeds (Articles 228 CCP and 10 of Law no. 5/2002), each one with its own specific regime.

Until the entry into force of Regulation 2018/1805, Portugal issued, recognised and executed on its territory decisions to *freeze* assets taken by judicial authorities of another Member State in the context of criminal proceedings in accordance with Law no. 25/2009. The issuing, recognition and execution in Portugal of decisions to *confiscate* instruments

[379] Article 227 (1) (b) CCP reads as follows: "The Public Prosecutor's Office requests the provision of an economic guarantee when there is a well-founded fear that the guarantees are lacking or substantially diminished: b) The loss of the instruments, products and proceeds of the unlawful act described as a criminal offence, or the payment of the corresponding amount."

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and proceeds issued in criminal proceedings by judicial authorities of other EU Member States was governed by Law no. 88/2009. The Regulation has unified in a single normative instrument the issuing, recognition and execution of freezing orders and the confiscation of instruments and proceeds of unlawful acts. However, those national statutes still apply vis-à-vis certain States. In this sense, the relationship between the Regulation and those statutes will be one of alternation, determined according to the specific State with which Portugal is cooperating and, naturally, subject to the fulfilment of the requirements for the application of each set of legislation.

One of the main questions that has arisen concerns the scope of application of the Regulation. It seems that the uncertainty concerning the ambit of the Regulation stems from the vagueness of the legal nature of the types of confiscation of the different States and, consequently, of the law that should apply to them. Article 1 (1) of the Regulation provides that its scope consists of "freezing orders and confiscation orders issued by another Member State within the framework of proceedings in criminal matters" ("*processos em matéria penal*", according to the Portuguese version). It is therefore crucial to determine what "proceedings in criminal matters" are for these purposes. It would fall beyond the scope of this report to provide a concrete and definitive answer to that question. Nevertheless, it is necessary to ascertain whether the Portuguese methods of confiscating the instrumentalities and proceeds of unlawful acts, as well as the Portuguese freezing orders, fulfil the requirements of Article 1 (1) of the Regulation, i.e. whether the Regulation applies to them.

For these specific purposes, the interpretation of Recital 13 of the Regulation seems sufficient. It reads inter alia that the term "covers all types of freezing orders and confiscation orders issued following proceedings in relation to a criminal offence (...). It also covers other types of order issued without a final conviction (...) Freezing orders and confiscation orders that are issued within the framework of proceedings in civil or administrative matters should be excluded from the scope of this Regulation." Through a positive and negative delimitation of the expression "proceedings in criminal matters" alone, it seems that the criterion for establishing the scope of the Regulation is the object that is confiscated or frozen. This is corroborated by the provisions of Article 2 (1) ("with a view to the confiscation thereof") and of Article 2 (2) ("in relation to a criminal offence"). In this light, it seems as though it does not matter how the confiscation is carried out or the specific terms of the freezing order in question, but rather whether it has the function of

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limiting the right of ownership or possession over the proceeds or instruments of the criminal offence.

According to Article 2 (4), 'proceeds' means "any economic advantage derived directly or indirectly from a criminal offence, consisting of any form of property and including any subsequent reinvestment or transformation of direct proceeds and any valuable benefits". And according to Article 2 (5), 'instrumentalities' means "any property used or intended to be used, in any manner, wholly or partially, to commit a criminal offence".

All things considered, it is possible to conclude that the scope of the Regulation ("proceedings in criminal matters") encompasses all the modalities of confiscation of proceeds and instruments of the criminally unlawful act. In other words, all the modalities of confiscation the basis for whose application is the existence of proceeds or instruments of the unlawful act. As far as freezing orders are concerned, the Regulation will naturally only apply to the freezing of proceeds or instruments of criminal offences, which excludes, for example, the confiscation of proceeds and instruments originating directly or indirectly from an administrative offence[380]. Should this indeed be the case, then all the Portuguese methods of confiscation of the proceeds and instrumentalities of the unlawful act – the classic confiscation of instruments (Article 109 (1) PC and Article 12-B (1) of Law no. 5/2002) and proceeds of an unlawful act (Article 110 (1) PC), as well as extended confiscation (Article 7 (1) of Law no. 5/2002) – fall within the scope of the Regulation.

Freezing of instruments or proceeds (Article 178 (1) CCP – *apreensão*) is also governed by the Regulation. It is less clear whether freezing property as a means of patrimonial guarantee (Article 228 (1) CCP and Article 10 (1) of Law no. 5/2002 – *arresto*) falls within the scope of the Regulation, since what is at stake here is guaranteeing the availability of a certain value with a view to enabling eventual confiscation, whereas Article 2 (1) of the Regulation clearly provides that the freezing order is a guarantee of confiscation in kind[381]. In our view, the "*arresto*" should also be deemed included in the scope of the Regulation, as its Article 3 (2) (a) and (b) allows for the confiscation or freezing of the value

[380] The opposite view is upheld by JOÃO CONDE CORREIA, "Reconhecimento mútuo de decisões de apreensão e de confisco: o Regulamento (EU) 2018/1805 do Parlamento Europeu e do Conselho de 14 de Novembro de 2018", *Julgar* 39 (2019), p. 197 f., who argues that the scope of application of the Regulation includes confiscation orders issued under administrative law.

[381] On the difference between "*apreensão*" (Article 178 CCP) and "*arresto*" (Article 228 CCP), see MARIA JOÃO ANTUNES, "Arresto preventivo e apreensão em processo penal e processo de insolvência", *Católica Law Review* IV (2020), p. 137 f.

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of proceeds and instruments. Furthermore, since restitution in favour of the victim is one of the aims of the Regulation (see Article 29 (1)), it seems that Article 2 (1) should be interpreted as meaning that a freezing order is a procedural guarantee of the confiscation of assets themselves and also a procedural guarantee of the payment of the value of the instruments and proceeds [382]. In short, all Portuguese types of confiscation of instrumentalities and proceeds of the offence, as well as freezing orders of instrumentalities and proceeds of an unlawful act fall within the scope of the Regulation.

Even if the expression "proceedings in criminal matters" was not to be interpreted as proposed above, Portuguese confiscation orders and all the mentioned freezing orders would arguably still fall within the scope of the Regulation, because these orders are applied following criminal proceedings and can be issued without a final conviction – and, as noted above, the content of Recital 13 expressly indicates that these cases fall within the concept of "proceedings in criminal matters": "The term therefore covers all types of freezing orders and confiscation orders issued following proceedings in relation to a criminal offence, not only orders covered by Directive 2014/42/EU. It also covers other types of order issued without a final conviction."

5.4.2 Grounds for non-recognition and non-execution

According to Article 8 (1) of Law no. 25/2009, Portugal should refuse to recognise and execute a freezing order when the requirements of one of the paragraphs of that provision are met. With the entry into force of the Regulation, the corresponding provision (Article 8 (1)) contains instead the expression "may decide". The same goes for Article 13 of Law no. 88/2009 when compared to Article 19 (1) of the Regulation, on the application of the principle of mutual recognition to confiscation orders. By establishing a mere option not to recognise or execute, the Regulation narrows the room for refusal and correlatively increases the room for cooperation. One should bear in mind, however, that some grounds for refusal, by their very nature, are not compatible with judicial discretion[383].

Article 8 (1) (a) of the Regulation, on *ne bis in idem*, enshrines a rule similar to that of Article 8 (1) (c) of Law no. 25/2009. The first part of Article 8 (1) (b) of the Regulation

[382] See JOÃO CONDE CORREIA, "Reconhecimento mútuo...", *op. cit.*, p. 198 f.
[383] Recall supra, § 6.1 (fn. 5), and the case law of the CJEU cited therein; see again PEDRO CAEIRO / MIGUEL JOÃO COSTA, "Extradition and Surrender…" *op. cit.*, p. 267 f., drawing attention to the conflation – which is visible also in official documents (v.g. in COM(2020) 270 final, 2.07.2020, p. 15, 17-18, et *passim* – between the optional character of a ground for refusal and the type of the assessment it requires from the courts.

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(privilege or immunity under the law of the executing State that would prevent the freezing of the property concerned) corresponds to the provision already contained in Article 8 (1) (b) of Law no. 25/2009. However, the second part of the former provision adds "*or* there are rules on the determination or limitation of criminal liability that relate to the freedom of the press or the freedom of expression in other media that prevent the execution of the freezing order" (emphasis added), and therefore it seems to broaden the corresponding ground for refusal in Law no. 25/2009.

In turn, Article 8 (2) (c) of the Regulation does not innovate vis-à-vis Portuguese law, since Article 8 (1) (a) of Law 25/2009 already contained a similar provision. The same applies to dual criminality as a ground for refusal. Article 8 (1) (d) (and apparently also Article 8 (2) of Law 25/2009) provide that: "The competent judicial authority shall refuse to recognise and execute a confiscation order when, in the cases referred to in Article 3 (2), the act on the basis of which the order was issued does not constitute an offence punishable under Portuguese law." This is in line with the Regulation (Article 8 (2) (e)). As for the second part of the rule, it matches Article 8 (4) of Law 25/2009.[384]

There is also a novelty with the creation of a new ground for refusal in Articles 8 (1) (d) and 19 (1) (d) of the Regulation, namely that the freezing orders and confiscation orders relate to conduct committed in whole or in part in the territory of the executing MS and not criminalised there: double criminality applies here even in relation to catalogue offences, and its association with territoriality arguably emerges as a manifestation of the principle of non-interference.[385] Conversely, regarding confiscation orders, the Regulation does not feature territoriality and extraterritorial jurisdiction in identical circumstances as grounds for refusal, but these are still provided for in Article 13 (2) (b) Law no. 88/2009.

Turning now to the grounds for refusal relating to confiscation orders set out in Article 19 (1) of the Regulation, subparagraph (a) (*ne bis in idem*) corresponds to Article 13 (1) (b) of Law 88/2009. The first part of the rule of Article 19 (1) (b) of the Regulation (privilege or immunity under the law of the executing State that would prevent the confiscation of the property concerned) corresponds to that which is already provided for

[384] Recall supra, §§ 1.2.3, 1.3.3, and again PEDRO CAEIRO / MIGUEL JOÃO COSTA, "Extradition and Surrender…" *op. cit.*, p. 267 f., drawing attention to the conflation – which is visible also in official documents (v.g. in COM(2020) 270 final, 2.07.2020, p. 15, 17 f., *et passim* – between the optional character of a ground for refusal and the type of the assessment that it requires from the courts.

[385] See PEDRO CAEIRO, *Fundamento, Conteúdo e Limites da Jurisdição Penal do Estado – O Caso Português*, Coimbra: Wolters Kluwer | Coimbra Editora, 2010, p. 355 f.

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in Article 13 (1) (e) of Law no. 88/2009. However, the second part of that provision broadens this scope, in similar terms as those mentioned shortly above for Article 8 (1) (b). The grounds for refusal set out in Article 19 (1) (c) fully correspond to those listed in Article 13 (1) (a) of Law 88/2009.

Article 19 (1) (e) of the Regulation is identical to Article 13 (1) (c) of Law no. 88/2009. Similarly, the first part of the rule concerning dual criminality as a ground for refusal (Article 19 (1) (f) of the Regulation) is identical to the one set out in Article 13 (2) (a) of Law no. 88/2009, and its second part (the exception to the ground for refusal) to Article 13 (4) of Law no. 88/2009. In the same vein, Article 13 (1) (d) of Law no. 88/2009 is similar to Article 19 (1) (g) of the Regulation, on judgments *in absentia*.

In contrast, the rule set out in Article 19 (1) (g) (i) of the Regulation might raise some cooperation problems for Portugal, especially as an issuing State. Based on Article 196 (2) CCP, the defendant, for the purpose of being notified by regular mail, in accordance with Article 113 (1) (c) CCP, indicates his residence, place of work or other address of his choice. The defendant has the duty not to change residence and not to absent him/herself for more than five days without notifying the authorities. The failure to comply with those duties may justify a trial in absentia (Article 196 (3) (d) CCP). Therefore, the law does not require that the defendant be summoned in person of the scheduled date and place of that trial, and it is doubtful that he/she must be given, by other means, official information in such a manner as to establish unequivocally that he/she was aware of the scheduled trial and was informed in due time that such a confiscation order could be handed down if he/she did not appear at the trial. A similar issue exists in the context of the Directive (EU) 2016/343 on the presumption of innocence and right to be present at the trial[386]. Consequently, in cases where the *arguido*, notified by regular mail of the date and place of the hearing, is tried *in absentia*, Portugal, as the issuing State, may face difficulties in having confiscation orders recognised and executed by the other Member States. However, the exception to the ground for refusal set out in Article 19 (1) (g) (ii) of the Regulation is likely to mitigate the problem.

As for the ground for refusal of freezing orders relating to fundamental rights, as a natural post-*Aranyosi and Căldăraru* development, the rule contained in Article 19 (1) (h)

[386] See MIGUEL JOÃO COSTA / PEDRO CAEIRO, "Portugal – The Implementation of the Directives on Procedural Rights in Law and Practice", *op. cit.*, p. 186 f.; and *ibid.*, "Portuguese Report", *CrossJustice*, *cit.*, § 11.1.6.

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of the Regulation is also a novelty, which represents a broadening of the grounds for refusal available in Portuguese law.

Finally, Article 13 (3) of Law 88/2009 partially corresponds to Article 19 (2) of the Regulation, insofar as the Portuguese rule is limited to "cases provided for in points (a) to (d) of paragraph (1) and (b) of the preceding paragraph."

5.4.2.1 Impossibility to execute the freezing or confiscation orders

Article 22 of the Regulation does not raise any particular issues. In essence, and more specifically insofar as concerns the rules set out in its paragraphs (1) to (3), there is correspondence with Article 13 (5) of Law no. 88/2009, although that is not the case of paragraphs (4) and (5).

5.4.2.2 Fundamental rights and proportionality issues

One of the effects of the Regulation covering all Portuguese confiscation and freezing modalities is that Portugal is obliged to apply the procedural safeguards provided for in Recital 18: "The procedural rights set out in Directives 2010/64/EU, 2012/13/EU, 2013/48/EU, (EU) 2016/343, (EU) 2016/800 and (EU) 2016/1919 of the European Parliament and of the Council should apply, within the scope of those Directives, to criminal proceedings covered by this Regulation as regards the Member States bound by those Directives. In any case, the safeguards under the Charter should apply to all proceedings covered by this Regulation. In particular, the essential safeguards for criminal proceedings set out in the Charter should apply to proceedings in criminal matters that are not criminal proceedings but which are covered by this Regulation."

It is important to acknowledge the unclarity of the concept of "essential safeguards". The CJEU's case law will be pivotal in this regard. It seems that this recital can impact the domestic laws of Member States regarding cases covered by the Regulation that are not criminal cases. The challenging aspect is that the Regulation requires the essential safeguards of criminal proceedings laid down in the Charter to apply to all confiscation and freezing proceedings covered by the Regulation that are not criminal proceedings. The history of the (non-)application of criminal procedural rights to confiscation procedures is the history of the application of the ECtHR's *Engel* criteria to the various confiscation procedures. Over the last few decades, the States under the jurisdiction of the ECtHR have argued before the Court that their confiscation methods – not so much those that are

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preconditioned by an unlawful act ("offence-based confiscation")[387], but mainly those that are not – are not criminal in nature, so that the rights arising from Articles 6 (2) and (3) and 7 ECHR would not apply to these confiscation methods, thus endowing national legislators with greater freedom and thereby enhancing the desired effectiveness. This was v.g. the case in: (classic confiscation of third parties) *Agosi*[388], *Air Canada*[389], *Yildirim*[390], *Dassa*[391]; (extended confiscation) *Welch*[392], *Phillips*[393], *Van Offeren*[394], *Geerings*[395]; (civil forfeiture) *Butler*[396], *Webb*[397], *Walsh*[398], *Gogitidze*[399]; ("*confisca preventiva*") *Marandino*[400], *Raimondo*[401], *Arcuri*[402], *Riela*[403]; ("*confisca urbanística*") *Sud Fondi*[404], *Varvara*[405], *G.I.E.M.*[406].

In all those cases, the ECtHR concluded that only the types of confiscation at issue in *Welch*, *Geerings*, *Sud Fondi*, *Varvara* and *G.I.E.M*. were criminal in nature. Consequently, only there were safeguards for criminal proceedings required. The dominant view in the ECtHR has therefore been that the safeguards for criminal proceedings contained in the ECHR do not necessarily apply to the various types of confiscation, because this legal consequence is not criminal in nature. Recital 18, however, by commanding the applicability of safeguards for criminal proceedings in all cases covered by the Regulation, even if they are not criminal cases, clashes with that seemingly consolidated case law. Regardless of

[387] PEDRO CAEIRO, "Offence-based confiscation: replacing criminal law with something better?", in Serena Quattrocolo / Sandra Oliveira e Silva / Ernestina Sacchetto (eds.), *Assets Confiscation and Prevention of Crime in Europe. An Overview upon the EU and Domestic Legislations*, CEDAM: Milano, 2022, p. 1-22.
[388] ECtHR *Agosi v. The United Kingdom*, no. 9118/80, 24.10.1980.
[389] ECtHR *Air Canada v. The United Kingdom*, no. 18465/91, 05.05.1995.
[390] ECtHR *Yildrim v. Italy*, no. 38602/02, 10.04.2003.
[391] ECtHR *Dassa Foundation and Others v. Liechtenstein*, no. 696/05, 10.09.2007.
[392] ECtHR *Welch v. The United Kingdom*, no. 17440/90, 09.02.1995.
[393] ECtHR *Phillips v. The United Kingdom*, no. 41087/98, 05.02.2001.
[394] ECtHR *Van Offeren v. The Netherlands*, no. 19581/04, 05.07.2005.
[395] ECtHR *Geerings v. The Netherlands*, no. 30810/03, 01.06.2007.
[396] ECtHR *Butler v. The United Kingdom*, no. 41661/98, 27.06.2002.
[397] ECtHR *Webb v. The United Kingdom*, no. 56054/00, 10.02.2004.
[398] ECtHR *Walsh v. The United Kingdom*, no. 43384/05, 21.11.2006.
[399] ECtHR *Gogitidze and Others v. Georgia*, no. 36862, 12.05.2005.
[400] Comission *Marandino*, no. 12386/86, 15.04.1991.
[401] ECtHR *Raimondo v. Italy*, no. 12954/87, 22.02.1994.
[402] ECtHR *Arcuri v. Italy*, no. 52024/99, 05.07.2001.
[403] ECtHR *Riela and Others v. Italy*, no. 52439/99, 04.09.2001.
[404] ECtHR *Sud Fondi s.r.l. and Others v. Italy*, no. 75909/01, 20.01.2009.
[405] ECtHR *Varvara v. Italy*, no. 17475/09, 29.10.2013.
[406] ECtHR *G.I.E.M. s.r.l. and Others v. Italy*, no. 1828/06, 34163/07, 19029/11, 28.06.2018.

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what safeguards are precisely envisaged in the Recital, the Regulation thus seems to open a door that the ECtHR has almost always kept closed.

In Portugal there is a lack of definition of the principles and procedural rights in confiscation proceedings. Firstly, the Portuguese legislator has not devised a specific procedure for the classic confiscation of proceeds and instruments. Classic confiscation is part of the regular criminal procedure, such that the final decision comprises the verdict on the criminal liability of the perpetrator (and the applicable penalty) and the verdict on confiscation. As for extended confiscation, the law establishes that any means of evidence valid in criminal proceedings are admissible (Article 9 (2) of Law no. 5/2002) but is silent on the applicable safeguards. In Portuguese legal literature there are several different views on the (non-)criminal nature of the several confiscation types[407].

The Constitutional Court has held that classic confiscation of proceeds is criminal in nature[408], although not much can be drawn from its case law as to precisely how the principles of criminal procedure apply to it. Regarding extended confiscation, the Constitutional Court has held it *not* to be criminal in nature, with the consequence that the mentioned legal presumption does not breach the presumption of innocence[409]. This understanding relies on the argument that such legal presumption serves not to assert the criminal responsibility of the defendant (as a pre-requisite for a penalty) but merely to

[407] On the criminal nature of the classic confiscation of proceeds, see JORGE DE FIGUEIREDO DIAS, *Direito Penal Português. Parte Geral, Tomo II. As Consequências Jurídicas do Crime*, Coimbra: Coimbra Editora, 1993, p. 638; JOSÉ DAMIÃO DA CUNHA, *op. cit*., p. 7; PEDRO CAEIRO, "Sentido e função...", *op. cit*., p. 97. In the opposite sense, see HÉLIO RODRIGUES, "O Confisco das Vantagens do Crime: Entre os Direitos dos Homens e os Deveres dos Estados – A Jurisprudência do Tribunal Europeu dos Direitos do Homem em Matéria de Confisco", in *O Novo Regime de recuperação de Ativos à Luz da Diretiva 2014/42/EU e da Lei que a Transpôs*, Lisboa: Imprensa Nacional – Casa da Moeda, 2018, p. 46-47 and 53; and ANTÓNIO VAZ DE CASTRO, *A identificação da natureza penal… op. cit.,* p. 378-398.
Upholding the criminal nature of extended confiscation, see AUGUSTO SILVA DIAS, "Criminalidade organizada e combate ao lucro ilícito", in Maria Fernanda Palma / Augusto Silva Dias / Paulo Sousa Mendes (coords.), *2.º Congresso de Investigação Criminal*, Coimbra: Almedina, 2010, p. 39; JORGE GODINHO, "Brandos costumes? O confisco penal com base na inversão do ónus da prova (Lei n.º 5/2002, de 11 de Janeiro, artigos 1.º e 7.º a 12.º)", in *Liber Discipulorum para Jorge de Figueiredo Dias*, Coimbra: Coimbra Editora, 2003, p. 1348. In the opposite sense, see JOSÉ DAMIÃO DA CUNHA, *op. cit*., p. 20; PEDRO CAEIRO, "Sentido e função...", *op. cit.*, p. 311; JOÃO CONDE CORREIA, *Da Proibição...*, *op. cit.*, p. 116; FRANCISCO BORGES, "Perda Alargada de Bens: Alguns Problemas de Constitucionalidade", in José de Faria Costa et al. (org.), *Estudos de Homenagem ao Prof. Doutor Manuel da Costa Andrade*, vol. I, Coimbra: Instituto Jurídico da Faculdade de Direito da Universidade de Coimbra, 2018, p. 222; and ANTÓNIO VAZ DE CASTRO, *A identificação da natureza penal… op. cit.,* p. 398-399;
[408] See the ruling no. 336/2006, of 18 May.
[409] See the ruling no. 101/2015, of 11 January.

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establish the unlawful provenance of his/her property, thereby restoring the patrimonial order in accordance with the law[410-411]. This view was later reiterated also in the rulings no. 476/2015, of 30 September, and no. 498/2019, of 26 September, making it a steady position by that Court. In the latter ruling, the Court stated that one of the implications of not assigning sanctioning nature to this form of confiscation is the non-application of the constitutional guarantees that are strictly related to sanctions law, such as the presumption of innocence and its manifold dimensions. Portuguese constitutional case law is therefore rather aligned with the dominant case law of the ECtHR. As noted, Recital 18 of the Regulation seems to conflict with both, although the precise extent of this conflict is yet to be determined.

In order to achieve the desired stabilisation, it is essential that the CJEU puts into practice what emerges from this Recital. Given the history of the creation and application of confiscation types, it is to be expected that the application of the essential safeguards of criminal proceedings to non-criminal confiscation proceedings will meet with great resistance from States. Furthermore, it is foreseeable that the case law of the CJEU and the ECtHR on confiscation will be difficult to reconcile.

5.4.3 Execution procedure

According to Article 7 (1) of the Regulation, in order to execute freezing orders the executing authority shall take the measures necessary for its execution in the same way as for a domestic freezing order, thus being in accordance with the provisions of Law 25/2009 (Article 12(3) to (7)).The time limits for the execution of freezing orders provided for in Article 9 of the Regulation have no correspondence in Law no. 25/2009 and are therefore new in Portuguese law.

Article 9 of Law no. 25/2009 is broadly similar to Article 10 of the Regulation, concerning the postponement of the execution of freezing orders. In the same vein, the rules on duration of freezing orders set out in Article 12 of the Regulation are similar to those of Article 13 of Law no. 25/2009.

Regarding the execution of confiscation orders, Article 12 (1) and (2) of Law no. 88/2009 is generally in line with the provisions of Article 18 of the Regulation. There is,

[410] See the ruling of the Constitutional Court no. 392/2015, of 12 August.
[411] On the rulings of the Constitucional Court no. 101/2015, no. 392/2015 and no. 476/2015, see JOÃO CONDE CORREIA, "Presunção de proveniência ilícita de bens para perda alargada: anotação aos acórdãos do Tribunal Constitucional n.ºs 101, 392 e 476/2015", *Revista do Ministério Público* 145 (2016), p. 207-221.

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however, an aspect worth mentioning: the Portuguese version seems to be inaccurate. Article 18 (5) of the Regulation reads: "Where the issuing authority has issued a confiscation order but has not issued a freezing order, the executing authority may, as part of the measures provided for in paragraph 1, decide to freeze the property concerned of its own motion in accordance with its national law (...)". It follows that it is the "executing authority" that may decide to freeze the property concerned of its own motion in accordance with its national law. However, the Portuguese version – in what is arguably a clear mistake[412] – reads 'the issuing authority'. Therefore, in Article 18 (5) of the Portuguese version of the Regulation, "issuing authority" should read as "executing authority".

As with the time limits for freezing orders, the time limits set by the Regulation for confiscation orders (Article 20) are not established in Law no. 88/2009 and are therefore also a novelty.

On the contrary, the regime of postponement of the execution of confiscation orders provided for in Article 21 of the Regulation corresponds to the regime provided for in Article 14 of Law no. 88/2009.

Law no. 25/2009 and Law no. 88/2009 do not enshrine rules of a similar nature to those enshrined in Article 23 of the Regulation.

Finally, regarding Article 27 of the Regulation, on the termination of the execution of a freezing order or confiscation order, paragraph (1) thereto has no correspondence in Law no. 88/2009, whereas paragraph (2) is met with a similar rule in Article 10 (2) of Law no. 88/2009. The first part of paragraph (3) ("The executing authority shall terminate the execution of the freezing order or confiscation order, in so far as the execution has not yet been completed, as soon as it has been informed by the issuing authority in accordance with paragraph 2") corresponds to that already provided for in Article 15 of Law 88/2009.

5.4.3.1 Issues for the rights of the suspect, accused and other parties

According to Article 32 (1) of the Regulation: "The information to be provided in accordance with paragraph 1 shall specify the name of the issuing authority and the legal remedies available under the law of the executing State. The information shall also specify, at least in a brief manner, the reasons for the order." Therefore, this rule "does not impose a duty to communicate to the person affected the legal remedies available in the issuing

[412] Compared also with, v.g., the French ("*autorité d'exécution*"), the Spanish ("*autoridad de ejecución*") and the German ("*Vollstreckungsbehörde*") versions.

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State to challenge the order; and it creates doubt as to the starting point of the period for challenging the order"[413].

Law no. 25/2009 and Law no. 88/2009 do not include any rules corresponding to those in Article 32 of the Regulation.

5.4.4 Cooperation issues between executing and issuing authorities

The confidentiality regime set out in Article 11 of the Regulation has no correspondence in Law no. 25/2009. Article 11 (2) of the Regulation provides that "the executing authority shall guarantee the confidentiality of the facts and substance of the freezing order in accordance with its national law." This could conflict with earlier versions of Articles 192 and 58 (1) (b) CCP, based on which the courts would require that the order for a preventive freezing of assets (*arresto*) be preceded by the formal designation of the defendant as a subject of the criminal procedure (*viz.*, as *arguido*)[414]. However, both of these provisions were later amended through the Law no. 30/2017 of 30 May, so as not to precondition the application of that measure to such a formal designation, thus enabling, inter alia, the confidentiality of the facts and substance of the freezing order to be guaranteed.

5.4.5 Remedies

Article 33 of the Regulation, on legal remedies in the executing State against the recognition and execution of a freezing order or confiscation order, is in essence reflected in Laws no. 25/2009 (Article 15) and no. 88/2009 (Article 17 (3) and (4)).

According to Articles 399 f. and 427 CCP, the decision to recognise and enforce freezing and confiscation orders can be appealed to the High Court. However, the decision then taken by this Court is not open to appeal. Portuguese criminal procedure does not provide for further possibility of reaction aimed at obtaining a re-examination of the decision by a higher court in cases of recognition and execution of a confiscation or freezing decision handed down by a foreign court. This limitation on the right to appeal follows from Article 400 (1) (c) CCP, which precludes appeals against judgements already handed down on appeal which do not definitely settle the object of the procedure. Such is the position the

[413] NUNO BRANDÃO, "The right of defence under Regulation (EU) 2018/1805 on the mutual recognition of freezing orders and confiscation orders", *New Journal of European Criminal Law* 13 (2022), p. 38.
[414] See *v.g.* the ruling of the High Court of Lisbon of 08-10-2015 (case 324/14.0TELSB-I.L1)

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Portuguese Supreme Court of Justice, v.g. in the ruling of 2 February 2022 (case 3519/16.8T8LLE.E1.S1)[415]. In turn, the Portuguese Constitutional Court has held that Article 400 (1) (c) CCP, interpreted in this sense, is not unconstitutional[416].

6 Conclusions

As noted in the introduction, there is no visible resistance whatsoever on the part of the legislator, the courts and other public authorities in Portugal towards mutual recognition legal instruments. The case is somewhat different concerning EU legislation which seeks to harmonise deeply-rooted national legal instruments such as the Code of Criminal Procedure. In the latter case, some inertia may be said to exist on the part of the legislator in implementing them, and little eagerness on the part of the courts to give practical application to them drawing on their direct effect. This attitude, however, arguably stems more from a certain perception – which is not altogether ill-founded, but is overstated and, above all, limiting of further improvement – that national law is already widely respectful of individual rights, as well as from sheer force of habit, than from any sort of enmity at the meddling of EU law with the national legal order[417].

Yet, meaningful developments have taken place even at that level. Pursuant to a request for a preliminary ruling lodged by a Portuguese court, the CJEU held on 1 August 2022 that Articles 2 (1) and 3 (1) of the Directive 2010/64/EU, on the right to interpretation and translation, and Article 3 (1) (d) of the Directive 2012/13/EU, on the right to information, read in light of Articles 47 and 48 (2) CFREU and the principle of effectiveness, must be interpreted as precluding national legislation under which the infringement of the

[415] "I - The confiscation of assets is not strictly civil in nature. II - Regardless of the position one takes on the precise legal nature of confiscation - accessory penalty, security measure, or even sanctioning measure similar in nature to a security measure - it is clear that the strictly civil plan must be ruled out. III - The decree is always based on the commission of a criminal offence, and this commission is a prerequisite for the decree of confiscation, 'which drags out the criminal nature of the solution'. IV - This being the case, it is clear that the civil appeal lodged by the defendant is inadmissible, since in terms of appeals, the Code of Criminal Procedure provides for and regulates the model and types of appeal autonomously and exhaustively. And if criminal procedural law contains an express rule prohibiting the double degree of appeal in a case such as the present one, it is unfeasible to lodge an appeal under Article 629 (2) (a) of the Code of Civil Procedure, a civil procedural rule that has no application in criminal proceedings, especially when the issue at hand is not exclusively civil in nature."

[416] Ruling no. 76/2023, of 14 March 2023.

[417] See again MIGUEL JOÃO COSTA / PEDRO CAEIRO, "Portugal – The Implementation of the Directives…", *op. cit.*, p. 170 f.

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rights enshrined in those provisions must be invoked by their beneficiary within a set period of time, failing which such a challenge becomes time-barred, where that period begins to run before the person concerned has been informed, in a language he or she speaks or understands, first, of the existence and scope of his or her right to interpretation and translation and, secondly, of the existence and content of the essential document in question and the effects thereof[418]. Which the referring court immediately reflected on its decision of 2 August 2022[419]. In the same vein, after a rather apathetic first reaction by the legislator to the Directives on Procedural Rights, the latest amendment of the Code of Criminal Procedure, carried out through the Law no. 52/2023, of 28 August, explicitly undertook to "complete the implementation" of the Directive 2010/64/EU, as well as of the Directive 2013/48/EU, on the right of access to a lawyer.

As for EU legislation on mutual recognition (or on judicial cooperation in criminal matters[420]), levels of compliance are elevated. Thus, few implementation problems can be identified concerning the FD-EAW and the DEIO, and the same is true of the articulation of Regulation 2018/1805 with preexisting legislation. The implementation of the FD-EAW, which has now been operating for over 20 years, may actually be said to be exhaustive, as the large majority of the issues that did exist were gradually eradicated through successive amendments of the national statute (Law no. 65/2003, of 23 August), including (after the amendment effected by the Law no. 52/2023, of 28 August) insofar as concerns the right to appoint a lawyer in the issuing MS, the right to translation, and the time limits for surrender[421]. The few implementation issues that do remain include Article 4a (3) FD-EAW, on trials *in absentia*, which is only partially implemented, as PT-EAW (Article 12-A (4)) does not encompass two aspects addressed in that provision of the FD: that the review mentioned therein shall in particular include the possibility of suspension or interruption of

[418] CJEU, *TL* (C-242/22 PPU), Judgment of 1 August 2022, ECLI:EU:C:2022:611.
[419] High Court of Évora, ruling of 2 August 2022 (53/19.8GACUB-B.E1).
[420] The caveat relates to the DEIO, which stays further away from the mutual recognition paradigm than most other EU law instruments of judicial cooperation in criminal matters, seeking instead to strike a balance between such a paradigm and the classic approach to mutual legal assistance that still presided over the 2000 Convention between the Member States: see v.g. LORENA BACHMAIER WINTER, "Transnational Evidence – Towards the Transposition of Directive 2014/41 Regarding the European Investigation Order in Criminal Matters", *eucrim* 2 (2015), p. 47.
[421] See *supra*, § 7.2.2.c).

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the detention, and that the retrial or appeal shall begin within due time after the surrender[422]. The remaining are but minor issues[423].

In the same vein, the statute implementing the DEIO (Law no. 88/2017, of 21 August) follows the Directive "nearly verbatim"[424], leaving scant room for divergence. The main causes for reflection lie, on the one hand, with Article 9 (2) DEIO: while this provision requires the executing Member State to comply with the formalities and procedures set by the issuing State unless they are contrary to the "fundamental principles of law of the executing State", the corresponding national provision (Article 18 (2)) apparently allows for non-compliance if it would contravene (any) "requirements and conditions of national law on evidence in the context of similar national proceedings"[425]. And, on the other hand, with the provisions on remedies contained in Article 14 DEIO, since PT-EIO does not explicitly feature the reference to fundamental rights of para. (2) thereto, nor does it explicitly require information on legal remedies to be provided "when these become applicable and in due time to ensure that they can be exercised effectively", as required by para. (3) of the same provision[426]. Other minor issues aside[427], PT-EIO, as noted, is highly aligned with the Directive, and, arguably, on occasion even strikes a fairer balance between conflicting interests, as with the issue of the deduction of the period of custody from the period of detention[428].

Finally, Regulation 2018/1805 brings about very few novelties to the Portuguese legal system, considering, notably, the regime already set out in Law no. 25/2009 of 5 July and in Law no. 88/2009 of 31 August, implementing Framework Decision 2003/577/JHA of 22 July 2003 and Framework Decision 2006/783/JHA of 6 October, respectively. The core difficulty concerns the applicability of essential safeguards of criminal proceedings to all freezing and confiscation proceedings covered by the Regulation which are not criminal proceedings[429].

[422] See *supra*, § 7.2.2.g).
[423] They concern Articles 10 (1), 17 (7) and 19 (2) FD-EAW (see *supra*, § 6.1).
[424] General Secretariat of the Council, "Evaluation Report on the Tenth Round of Mutual Evaluations on the Implementation of the European Investigation Order – Report on Portugal", *cit.*, p. 10.
[425] See *supra*, § 7.3.2. Yet even here practice suggests that the national norm is not being applied in unalignment to the Directive.
[426] See *supra*, § 7.3.5.
[427] *Sc.* regarding expediency requirements (v.g. "forthwith") found in certain provisions of the DEIO yet lacking correspondence in the PT-EIO (see *supra*, § 7.3.3), regarding temporary transfer (see *supra*, § 7.3.3), and regarding protection of confidentiality (see *supra*, § 7.3.4).
[428] See *supra*, § 7.3.3.
[429] See *supra*, § 7.4.2.2.

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Whereas the ECtHR, based on the view that the legal consequence applied in confiscation proceedings is not of a criminal character, generally upholds that these proceedings must not afford the same safeguards as criminal proceedings, the opposite view transpires from recital 18 of the Regulation. This discrepancy adds yet a further layer to the already complex debate about the legal nature of different types of confiscation, which may foster uncertainty as to which rights and guarantees must be observed in the proceedings where they are applied. This, however, is less a problem of articulation between the Regulation and national law than a problem of EU law as such – on which the CJEU may have to take a clarifying stance.

The foregoing assessment concerns essentially the conformity of Portuguese law as it stands *in the books*. And it is only natural that its actual application should reflect those high levels of conformity. Nevertheless, some critical remarks are in order. EU law is itself an evolving system of norms, which commands constant consideration at the national level. Its evolution takes place through the action not only of the EU's legislature but also of its judiciary, both of whom have over recent years openly shifted away from a heavy focus on security onto a more balanced approach where upholding individual rights becomes a primary objective – no longer just something of a necessary nuisance to an effective cooperation[430]. The shift has many different facets[431], but it should be uncontentious that *Aranyosi and Căldăraru* blazed the trail, setting 2016 as the turning point. Meanwhile, Portuguese courts appear to have remained stuck in the criminal policy ambience of the earlier days of the Area of Freedom, Security and Justice (AFSJ). Not that this offers conclusive evidence, but it should be illustrative that a decision applying the *Aranyosi and Căldăraru* tests is yet to be seen[432]. In fact, it is a relatively rare event to see an EAW refused on whichever grounds. To the contrary, EAWs are generally executed readily in the name of mutual trust, the importance of a swift surrender system being taken as self-explanatory in a shared area. By the same token, in the intersection between the EAW and the EIO, courts tend to dismiss promptly any claims to the effect that Portugal as an executing Member State should assess whether the goals envisaged by the EAW could be attained

[430] See PEDRO CAEIRO, "The 'licence to distrust' and the protection of individual rights in the execution of a European Arrest Warrant: a comment", *European Law Journal* 28 (2022), p. 238: "the protection of the targeted individual should not be seen as a hurdle, but rather as the purpose of *judicial* proceedings".
[431] See MIGUEL JOÃO COSTA, "The External Effects of *Ne Bis in Idem* in EU Law", in Araceli Turmo (ed.), *Le Droit Européen et l'Autorité des Jugements*, Brussels: Bruylant, 2024 (forthcoming).
[432] See *supra*, § 7.2.4.

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through other EU law measures that are less detrimental to individual rights[433]. This is so even where the primary goal of the warrant is seemingly to hear the suspected or accused person, which, as the DEIO in fact explicitly draws attention to in recital 26, can be achieved through the videoconference regulated in Article 24 thereto. Such a readiness to complying with the warrants issued by fellow MSs is, of course, quite consistent with the principles of mutual trust and mutual recognition that underpin this cooperation system. Yet, as noted, European criminal law has evolved and has renounced the creed which "equated mutual recognition with maximal execution"[434]. It is critical that national courts too embrace the notion that scrutinising compliance with human rights by other Member States is still a service to the AFSJ, and a responsibility that EU law itself presently expects them to exert.

7 References

Antunes, Maria João, "Arresto preventivo e apreensão em processo penal e processo de insolvência", *Católica Law Review* IV (2020)

Antunes, Maria João, *Direito Processual Penal*, 5th ed., Coimbra: Almedina, 2023

Antunes, Maria João, *Penas e Medidas de Segurança*, 2nd ed., Coimbra: Almedina, 2022

Bachmaier Winter, Lorena, "Transnational Evidence – Towards the Transposition of Directive 2014/41 Regarding the European Investigation Order in Criminal Matters", *eucrim* 2 (2015)

Borges, Francisco, "Perda Alargada de Bens: Alguns Problemas de Constitucionalidade", in José de Faria Costa et al. (org.), *Estudos de Homenagem ao Prof. Doutor Manuel da Costa Andrade*, vol. I, Coimbra: Instituto Jurídico da Faculdade de Direito da Universidade de Coimbra, 2018

Brandão, Nuno, "The right of defence under Regulation (EU) 2018/1805 on the mutual recognition of freezing orders and confiscation orders", *New Journal of European Criminal Law* 13 (2022)

[433] See *supra*, § 7.3.2.1.

[434] PEDRO CAEIRO, "«Scenes From a Marriage»: Trust, Distrust and (Re)Assurances in the Execution of a EAW", in Sergio Carrera, Deirdre Curtin and Andrew Geddes (eds.), *20 Years Anniversary of the Tampere Programme: Europeanisation Dynamics of the EU Area of Freedom, Security and Justice*, Florence: European University Institute, 2020, p. 240.

Caeiro, Pedro / Cardoso, Raquel, "Country Research Brief [on the application of the FD-EAW by Portuguese courts]: Portugal", 2023 < https://stream-eaw.eu/country-reports/ >

Caeiro, Pedro / Cardoso, Raquel, "First Periodic Country Report [on the application of the FD EAW by Portuguese courts]: Portugal", 2022 < https://stream-eaw.eu/country-reports/ >

Caeiro, Pedro / Costa, Miguel João, "Extradition and Surrender. From a Bilateral Political Arrangement to a Triangular Legal Procedure", in Kai Ambos / Peter Rackow (Eds), *The Cambridge Companion to European Criminal Law*, Cambridge: Cambridge University Press, 2023

Caeiro, Pedro / Costa, Miguel João, "The Portuguese System", in Katalin Ligeti (ed.), *Toward a Prosecutor for the European Union – Volume 1: A Comparative Analysis*, Oxford: Hart Publishing, 2012

Caeiro, Pedro / Fidalgo, Sónia, "O mandado de detenção europeu na experiência portuguesa: tópicos da primeira década", in Pedro Caeiro (Coord.), *Temas de Extradição e Entrega*, Coimbra: Almedina, 2015

Caeiro, Pedro / Fidalgo, Sónia, "The Portuguese experience of mutual recognition in criminal matters: five years of European Arrest Warrant", in Gisele Vernimmen-van Tiggelen / Laura Surano / Anne Weyembergh (eds.), *The future of mutual recognition in criminal matters in the European Union*, Brussels: Editions de l'Université de Bruxelles, 2009

Caeiro, Pedro, "The 'licence to distrust' and the protection of individual rights in the execution of a European Arrest Warrant: a comment", *European Law Journal* 28 (2022)

Caeiro, Pedro, "Offence-based confiscation: replacing criminal law with something better?", in Serena Quattrocolo / Sandra Oliveira e Silva / Ernestina Sacchetto (eds.), *Assets Confiscation and Prevention of Crime in Europe. An Overview upon the EU and Domestic Legislations*, Milan: CEDAM, 2022

Caeiro, Pedro, "«Scenes from a Marriage»: Trust, Distrust and (Re)Assurances in the Execution of a EAW", in Sergio Carrera, Deirdre Curtin and Andrew Geddes (eds.), *20 Years Anniversary of the Tampere Programme: Europeanisation Dynamics of the EU Area of Freedom, Security and Justice*, Florence: European University Institute, 2020

Caeiro, Pedro, "Sentido e função do instituto da perda de vantagens relacionadas com o crime no confronto com outros meios de prevenção da criminalidade reditícia (em especial os procedimentos *in rem* e a criminalização do enriquecimento «ilícito»)", *Revista Portuguesa de Ciência Criminal* 21 (2011)

Caeiro, Pedro, *Fundamento, Conteúdo e Limites da Jurisdição Penal do Estado – O Caso Português*, Coimbra: Wolters Kluwer | Coimbra Editora, 2010

Caeiro, Pedro, "*Ut Puras Servaret Manus* – Alegações contra a assunção, pelo Estado Português, da obrigação de entrega ao Tribunal Penal Internacional de um cidadão que possa ter de cumprir uma pena de prisão perpétua", *Revista Portuguesa de Ciência Criminal* 11 (2001)

Castro, António Vaz De, "O Novo Regime da Perda dos Instrumentos do 'Crime' ", *A Vida Judiciária* 203 (2017)

Castro, António Vaz de, *A identificação da natureza penal de uma consequência jurídica no direito português – O confisco das vantagens do facto ilícito-típico como ponto de partida e ponto de chegada* (December 2021) < https://estudogeral.uc.pt/bitstream/10316/105091/2/TESE%20FINAL%20TOTAL%20%286%29.pdf >

Correia, João Conde, "Presunção de proveniência ilícita de bens para perda alargada: anotação aos acórdãos do Tribunal Constitucional n.ºs 101, 392 e 476/2015", *Revista do Ministério Público* 145 (2016)

Correia, João Conde, "Reconhecimento mútuo de decisões de apreensão e de confisco: o Regulamento (EU) 2018/1805 do Parlamento Europeu e do Conselho de 14 de Novembro de 2018", *Julgar* 39 (2019)

Correia, João Conde, *Da Proibição do Confisco à Perda Alargada*, Lisboa: Imprensa Nacional – Casa da Moeda, 2012

Costa, Miguel João / Caeiro, Pedro, "Country Report Portugal", in Martin Böse / Maria Bröcker / Anne Schneider (eds.), *Judicial Protection in Transnational Criminal Proceedings*, Cham: Springer, 2021

Costa, Miguel João / Caeiro, Pedro, "Portugal – The Implementation of the Directives on Procedural Rights in Law and Practice", in Giuseppe Contissa / Giulia Lasagni / Michele Caianiello / Giovanni Sartor (eds.), *Effective Protection of the Rights of the Accused in the EU Directives: A Computable Approach to Criminal Procedure Law*, Leiden: Brill | Nijhoff, 2022

Costa, Miguel João / Caeiro, Pedro, "Portuguese Report", *CrossJustice* project, 2021 < https://site.unibo.it/cross-justice/en/project-results/publications >

Costa, Miguel João, "The Emerging EU Extradition Law: *Petruhhin* and Beyond", *New Journal of European Criminal Law* 8 (2017)

Costa, Miguel João, "The External Effects of *Ne Bis in Idem* in EU Law", in Araceli Turmo (ed.), *Le Droit Européen et l'Autorité des Jugements*, Brussels: Bruylant, 2024 (forthcoming)

Costa, Miguel João, *Extradition Law: Reviewing Grounds for Refusal from the Classic Paradigm to Mutual Recognition and Beyond*, Leiden: Brill | Nijhoff, 2019

Cunha, José Damião da, *Perda de bens a favor do Estado. Arts. 7.º-12.º da Lei 5/2002, de 11 de Janeiro (Medidas de combate à Criminalidade Organizada e Económico-Financeira)*, Coimbra: Coimbra Editora, 2004

Dias, Augusto Silva, "Criminalidade organizada e combate ao lucro ilícito", in Maria Fernanda Palma / Augusto Silva Dias / Paulo Sousa Mendes (coords.), *2.º Congresso de Investigação Criminal*, Coimbra: Almedina, 2010

Dias, Jorge de Figueiredo, "Nótulas sobre temas de direito judiciário (penal)", *Revista de Legislação e de Jurisprudência* 127 (1995)

Dias, Jorge De Figueiredo, *Direito Penal Português. Parte Geral, Tomo II. As Consequências Jurídicas do Crime*, Coimbra: Coimbra Editora, 1993

General Secretariat of the Council, "Evaluation Report on the Tenth Round of Mutual Evaluations on the Implementation of the European Investigation Order – Report on Portugal" (OR.en) 10135/1/23 REV 1, Brussels, 28 June 2023 < https://www.parlament.gv.at/dokument/XXVII/EU/147049/imfname_11266202.pdf >

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

Godinho, Jorge, "Brandos costumes? O confisco penal com base na inversão do ónus da prova (Lei n.º 5/2002, de 11 de Janeiro, artigos 1.º e 7.º a 12.º)", in *Liber Discipulorum para Jorge de Figueiredo Dias*, Coimbra: Coimbra Editora, 2003

Pereira, Luís Silva, "Alguns aspectos da implementação do regime relativo ao mandado de detenção europeu", *Revista do Ministério Público* 96 (2003)

Pereira, Luís Silva, "Contributo para uma Interpretação dos Artigos 12 n.º 1 al. g) e 13.º al. c) da Lei n.º 65/ 2003, de 23 de Agosto", *Revista do Centro de Estudos Judiciários* 7 (2007)

Piçarra, Nuno, "A proibição constitucional de extraditar nacionais em face da União Europeia", *Revista do Centro de Estudos Judiciários* 7 (2007)

Ramos, Vânia Costa, "Admissibility of Evidence, Transnational E-Evidence and Fair Trial Rights in Portugal", in Lorena Bachmaier / Farsam Salimi (eds.), *Admissibility of Evidence in EU Cross-Border Criminal Proceedings: Electronic Evidence, Efficiency and Fair Trial Rights*, Oxford: Hart (forthcoming 2024)

Ramos, Vânia Costa, "Decisão Europeia de Investigação", *Revista do Centro de Estudos Judiciários* II (2019)

Ramos, Vânia Costa, "Meios processuais de impugnação da Decisão Europeia de Investigação – subsídios para a interpretação do artigo 14.º da Directiva com uma perspectiva portuguesa", *Anatomia do Crime* 7 (2018)

Ramos, Vânia Costa, "Problemas da Obtenção de Prova em Contexto Transnacional – Introdução", *Revista Portuguesa de Ciência Criminal* 4 (2013)

Rodrigues, Anabela Miranda, "O Inquérito no novo Código de Processo Penal", in Centro de Estudos Judiciários (ed.), *Jornadas de Direito Processual Penal: O Novo Código de Processo Penal*, Coimbra: Almedina, 1988

Rodrigues, Hélio, "O Confisco das Vantagens do Crime: Entre os Direitos dos Homens e os Deveres dos Estados – A Jurisprudência do Tribunal Europeu dos Direitos do Homem em Matéria de Confisco", in Maria Raquel Desterro Ferreira / Elina Lopes Cardoso / João Conde Correia (coord.), *O Novo Regime de recuperação de Ativos à Luz da Diretiva 2014/42/EU e da Lei que a Transpôs*, Lisboa: Imprensa Nacional – Casa da Moeda, 2018

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

Santos, Cláudia Cruz, "O Controlo Judicial da Violação dos Prazos de Duração Máxima do Inquérito", *Julgar* 32 (2017)

Schomburg, Sören / Ramos, Vânia Costa / Julié, William / Beauchemin, Amélie / Niblock, Rebecca, "ECBA Statement on Mutual Recognition of Extradition Decisions of 21 June 2022", < https://ecba.org/extdocserv/publ/ECBA_STATEMENT_Mutualrecognitionextraditiondecisions_21June2022.pdf >

Veiga, António Miguel, "Da relevância da vontade do visado na extradição passiva e na execução do mandado de detenção europeu: a solução portuguesa", *Revista Portuguesa de Ciência Criminal* 22 (2012)