

## **FIDE 2012 Questionnaire**

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

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##### **Background and aim**

The evolution of the European Union into an Area of Freedom, Security and Justice (AFSJ) has been one of the most far-reaching constitutional developments in EU law. EU legislative action in the field (in particular action in the field of criminal law and justice) poses significant challenges to the legal orders of Member States: it has a profound impact both in terms of the protection of fundamental rights (and the relationship between the individual and the state) as well as in terms of state sovereignty (and the relationship between the European Union and its Member States). At the same time, the growth of EU legislative action in the field under the old third pillar has not been accompanied by constitutional safeguards ensuring the full implementation of EU law by Member States. The purpose of the questionnaire is to generate responses which will evaluate the impact of EU law in the field of the AFSJ on the legal and constitutional orders of Member States, as well as the impact on the individual and the protection of fundamental rights. In this context, questions will address:

- the legislative implementation of EU measures in Member States;
- the interpretation of these measures by courts in Member States; and
- the impact of EU law demands on the domestic legal orders and on the protection of fundamental rights.

EU legislative action in the field of the AFSJ is multifaceted and covers a wide range of areas. For the purposes of this questionnaire, the choice was made to focus primarily on the enforcement policies and law of the European Union and on measures which may have significant consequences for the protection of fundamental rights. In this light, the questionnaire will focus on four principal aspects of the development of the EU as an AFSJ:

- the harmonisation of substantive criminal law;
- judicial cooperation in criminal matters via mutual recognition;
- the collection and exchange of personal data, and privacy and data protection in this context; and
- constitutional developments and the impact of the Lisbon Treaty

## **QUESTIONS**

### **PART I: Harmonisation of substantive criminal law**

#### **Terrorism**

1. What has been the impact of EU law (Framework Decisions 2002/475/JHA [2002] OJ L164/3 and 2008/919/JHA [2008] OJ L330/21) on the criminalisation of terrorism in your jurisdiction?

*Rapporteurs* are invited to consider:

- the legislative implementation of the Framework Decisions;
- the interpretation of domestic implementing law by the courts; and
- the challenges of EU law and implementing law for the domestic legal order and the protection of fundamental rights

## **Cybercrime**

2. What has been the impact of EU law (Framework Decision 2005/222/JHA [2005] OJ L69/67) on the criminalisation of attacks against information systems in your jurisdiction?

*Rapporteurs* are invited to consider:

- the legislative implementation of the Framework Decision;
- the interpretation of domestic implementing law by the courts; and
- the challenges of EU law and implementing law for the domestic legal order and the protection of fundamental rights

3. To what extent is there a need for new EU legislation to address gaps in legal responses to cybercrime? To what extent does the Commission proposal for a new Directive on cybercrime (COM (2010) 517 final) address such gaps?

## **Organised crime**

4. What has been the impact of EU law (Framework Decision 2008/841/JHA [2008] OJ L300/42) on the criminalisation of participation in a criminal organisation in your jurisdiction?

*Rapporteurs* are invited to consider:

- the legislative implementation of the Framework Decision;
- the interpretation of domestic implementing law by the courts; and
- the challenges of EU law and implementing law for the domestic legal order and the protection of fundamental rights

## **Racism and xenophobia**

5. What has been the impact of EU law (Framework Decision 2008/913/JHA [2008] OJ L328/55) on the criminalisation of racism and xenophobia in your jurisdiction?

*Rapporteurs* are invited to consider:

- the legislative implementation of the Framework Decision;
- the interpretation of domestic implementing law by the courts; and
- the challenges of EU law and implementing law for the domestic legal order and the protection of fundamental rights

## **PART II: Judicial cooperation in criminal matters via mutual recognition**

6. What have been the main challenges for the legal systems of EU Member States in implementing the EU *acquis* in the field of mutual recognition in criminal matters?

7. What are the limits of mutual trust in the execution of European Arrest Warrants?

*Rapporteurs* are invited to consider:

- the grounds for refusal to execute a European Arrest Warrant (EAW) in domestic implementing legislation as compared with the grounds for refusal in the EAW Framework Decision (Framework Decision 2002/584/JHA [2002] OJ L190/1);
- the use of grounds for refusal by domestic courts (in particular refusals to execute on the grounds of fundamental rights or proportionality concerns);
- the use by both the legislator and the courts of the territoriality clauses in Article 4(6) and (7) of the EAW Framework Decision.

8. To what extent are there gaps in the protection of fundamental rights in Member States of an AFSJ based on the mutual recognition of judicial decisions in criminal matters?

9. To what extent is it necessary for the EU to adopt minimum standards on the rights of the defendant in order to accompany the operation of the European Arrest Warrant system?

*Rapporteurs* are invited to consider:

- whether the adoption of EU measures on defence rights as outlined in the Council Roadmap for strengthening procedural rights ([2009] OJ C295/1) would address gaps in the protection of fundamental rights;
- what are the main challenges for the domestic legal systems in implementing the recently adopted Directive on the right to interpretation and translation in criminal proceedings Directive 2010/64/EU [2010] OJ L280/1).

## **PART III: Data collection and exchange and data protection**

### **Data Retention**

10. What has been the impact of the EC data retention Directive (Directive 2006/24/EC [2006] OJ L105/54) on the legal orders of EU Member States?

*Rapporteurs* are invited to consider:

- the legislative implementation of the Directive;
- the interpretation of domestic implementing law by the courts; and
- the challenges of EU law and implementing law for the domestic constitutional order and the protection of fundamental rights

## **Exchange of Information between National Authorities**

11. What has been the impact of EU measures facilitating the exchange of personal data between national police and judicial authorities on the legal orders of EU Member States?

*Rapporteurs* are invited to consider:

- the challenges that the above mechanisms of data sharing pose to fundamental rights;
- the national implementation of the 'Prüm' Decision (Decision 2008/615/JHA [2008] L210/1); and
- the national implementation of the exchange of criminal records and the European Criminal Records Information System (ECRIS) (Decisions 2005/876/JHA [2005] L322/33 and 2009/316/JHA [2009] L93/33 respectively).

## **Passenger Name Records**

12. To what extent is the collection and transfer of passenger name records (PNR) compatible with the protection of the rights to private life and the protection of personal data?

*Rapporteurs* are invited to consider in particular:

- the EU-US Agreement on the transfer of PNR data ([2007] OJ L204/18);
- the Commission's recent proposal for an EU PNR Directive (COM (2011) 32 final).

## **Data Protection**

13. To what extent does EU law and its implementation currently provide sufficient safeguards to ensure that the right to private life (as enshrined in the ECHR and the Charter of Fundamental Rights) and the right to data protection (as enshrined in the Charter) is fully protected in the development of the EU as an AFSJ?

*Rapporteurs* are invited to consider:

- the scope of application of the Framework Decision on data protection and its implementation in Member States (Framework Decision 2008/977/JHA [2008] OJ L350/60);
- the extent to which the 1995 data protection Directive has been used in domestic legal orders to regulate matters falling under the third pillar (Directive 95/46/EC [1995] OJ L281/31);
- the use of data protection legislation by domestic courts;
- the need to address gaps in data protection in future EU legislation.

## **PART IV: Constitutional aspects**

14. To what extent have domestic courts used general principles of EU law (in particular indirect effect in the light of *Pupino*) when interpreting national legislation implementing EU criminal law?

15. To what extent does the entry into force of the Lisbon Treaty address deficits in the implementation of Union law and the protection of fundamental rights in the development of the EU as an AFSJ?