GENERAL REPORT

The Area of Freedom, Security and Justice from Amsterdam to Lisbon.
Challenges of Implementation, Constitutionality and Fundamental Rights

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1. Introduction

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 informing the National Reports upon which this General Report is based has been to generate responses which 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 have addressed:

- the legislative implementation of EU measures in Member States;
- the interpretation of these measures by national courts;
- the impact of EU law on domestic legal systems and the relationship between the national and the supranational level; and
- the impact of EU law 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 the 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 focused 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

The structure of the questionnaire was followed by national *rapporteurs* and will be replicated in the General Report.[1] Each of the parts will consist of a general, overview sectionfollowed by a detailed synthesis of the national reports.

2. **Harmonisation of substantive criminal law**

I. Overview

The European Union has used the broad Treaty powers conferred to it under the third pillar to legislate extensively in the field of substantive criminal law.[2] The European Union has used its powers to respond to perceived global security threats such as organised crime, cyber-crime and terrorism. Union criminal law competence has also been used to sanction behaviour deemed contrary to European values, such as racism and xenophobia. Criminalisation in all the areas mentioned above raises a number of questions on the justification, necessity and use of criminal law in democratic societies. Extensive criminalisation raises the question of whether reactions to perceived security threats have led to disproportionate responses, including overcriminalisation,[3] and the question of the impact of such criminalisation on fundamental rights. At the level of the European Union, an additional question arises: what is the necessity, and added value of *EU* action in the field and of the harmonisation of substantive criminal law?[4] These questions become even more pertinent in the light of the constant evolution of the EU *acquis* with regard to the harmonisation of substantive criminal law in the four areas examined in the questionnaire.[5]

The two Framework Decisions aiming to harmonise substantive criminal law on **terrorism** is deemed to have been largely implemented in Member States. While in a number of Member States national law preceded the adoption of the Framework Decisions, in other Member States EU law served to introduce brand new criminal offences in the domestic legal order. For some Member States, international law (the Council of Europe Convention on the Prevention of Terrorism) was also influential in implementing provisions similar to the ones included in the 2008 Framework Decision. On a number of occasions, national *rapporteurs* have noted that the trend as regards implementation has been to criminalise more broadly than the EU Framework Decisions and to introduce harsher criminal sanctions. National case-law, although not extensively analysed in all national reports, appears to be varied with fundamental rights concerns arising on a number of occasions. EU criminal law on ***cybercrime*** **(attacks against information systems)** has been largely implemented and national *rapporteurs* welcome new Commission initiatives in the field. International law (the

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[1] I would like to acknowledge the invaluable research assistance of Ms Niovi Vavoula (LLM, Queen Mary) in the preparation of the General Report.

[2] For an overview see V. Mitsilegas, *EU Criminal Law*, Hart, 2009, chapter 2; S. Peers, *EU Justice and Home Affairs Law*, 3rd edition, OUP, chapter 10.

[3] On the concept of overcriminalisation from a US perspective, see D. Husak, *Overcriminalization. The Limits of the Criminal Law*, OUP, 2009.

[4] For a discussion of the purpose of criminalisation at EU level see A. Weyembergh, *L'Harmonisation des Législations: Condition de l'Espace Pénal Européen et Révélateur de ses tensions*, Editions de l'Université de Bruxelles, 2004.

[5] On the evolution of EU substantive criminal law see V. Mitsilegas, 'The Third Wave of Third Pillar Law: Which Direction for EU Criminal Justice?', in *European Law Review*, vol.34, 2009, pp.523-560.

Council of Europe Cybercrime Convention) has been a catalyst for the criminalisation of attacks against information systems in a great number of Member States. However, such criminalisation comes hand in hand with fundamental rights concerns, especially as regards challenges to the protection of freedom of expression. In the field of ***organised crime***, a number of national reports indicate that Member States comply with EU requirements without having expressly implemented the 2008 Framework Decision- with pre-existing criminal association/conspiracy provisions in the general part of criminal law deemed to be sufficient to satisfy the requirements of EU law. While Member States like Italy are deemed by national *rapporteurs* to provide the model upon which EU law on organised crime is based, in a number of other cases the implementation of international law (the UN (Palermo) Convention on Transnational Organised Crime) has been very influential in leading to the criminalisation of organised crime offences in the domestic legal order. The situation is much more nuanced in the case of criminal law on ***racism and xenophobia***. Implementation has been uneven to say the least, with a number of Member States not having implemented the relevant EU Framework Decision, while on a number of other occasions *rapporteurs* refer to pre-existing or general criminal law provisions addressing EU requirements. The difficulties in implementation are linked to a great extent with the serious fundamental rights concerns arising from the criminalisation of racism and xenophobia, most notably as regards the impact of such criminalisation on freedom of expression.

It transpires that EU substantive criminal law aimed at countering global security threats has been largely implemented by Member States. The influence of international law (in particular in the cases of organised crime and cybercrime) in ensuring the introduction of criminal law at the domestic level has been decisive and the synergy between the European Union and international *fora* in producing substantive criminal law should not be underestimated.[6] The method of implementation differs from instrument to instrument and from Member State to Member State. In the cases of terrorism and cybercrime, express implementation of EU requirements is common. This is less common in the cases of the criminalisation of organised crime and racism and xenophobia, where general criminal law provisions are deemed sufficient. However, the actual need for EU harmonisation, and the added value of extending criminalisation has not been clearly highlighted in national reports. Moreover, a number of national legal orders are grappling with the serious human rights implications of criminalisation (or, for some, overcriminalisation). This is in particular the case with criminalising racism and xenophobia and the 'second generation', glorification-style terrorist offences. Criminalisation here may have a significant impact on the position of individuals in both domestic criminal proceedings as well as cases involving judicial cooperation in criminal matters (with all offences covered in the report being included in the list of categories of offences for which the verification of dual criminality has been abolished in the operation of mutual recognition measures including the Framework Decision on the European Arrest Warrant).

II.Synthesis

[6] On the interconnections between EU and international law see V. Mitsilegas, 'The EU and the Rest of the World: Criminal Law and Policy Interconnections', in M. Evans and P. Koutrakos (eds.), *Beyond the Established Orders. Policy Interconnections between the EU and the Rest of the World*, Hart, 2011, pp.149-178.

QUESTION 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?

A) The Framework Decisions

Malta and Slovenia refer to the Framework Decisions (henceforth FD or FDs) jointly. In Malta, the FDs were incorporated by the Acts VI of 2005 and Act XI of 2009. The Slovenian Penal Code has been amended twice (2009 and October of 2011) in order to incorporate the provisions of the two FDs. The punishable offences in Slovenia are: terrorism, financing of terrorist activities, incitement and public glorification of terrorist activities, conscripting and training for terrorist activities.[7] No problems in the implementation have been reported.

The Hungarian Rapporteur submits that two acts have been adopted since the 2002 FD; Act II of 2003 and Act XXVII of 2007 incorporating the first FD as well as Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.[8] Committing the crime, volunteering to undertake conspiracy, ensuring the conditions to commit or to facilitate it, joining a terrorist group and assisting a terrorist organisation are punishable acts. A special feature in the implementation is that for a realisation of a terrorist group, three individuals are required and not two, as prescribed in the FD (On the other hand, in Greece, even one single person can commit terrorist acts).

The remaining *Rapporteurs* refer to the implementation of each FD separately:

i) The 2002 Framework Decision:

The 2002 FD has been incorporated in all national States reporting.

In the UK, conformity with the EU legislation is achieved by making use of the existing Common Law offences in combination with the broad definition of terrorism in s1 Terrorism Act 2000. This has been criticised by the Commission, to which the Minister of State for Security, Counter-Terrorism, Crime and Policing has replied that the provisions of the 2002 FD are already part of the UK legislation.[9] Though Art. 1 and 2 of the FD are implemented, it is questionable whether the same applies to Art. 4 of the 2002 FD. However, in view of the implementation of Art. 1 of the FD, it seems highly plausible to state that Art. 4 also applies to UK via the pre-existing criminal offences of accessorial liability and inchoate liability. Also, for the sentencing provisions, implementation is achieved by the new sentencing policy: the judges are obliged to impose sentences in the upper range of serious factors. This does not refer specifically to the terrorist offences; however, it involves all major crimes and terrorism is certainly considered to be one of those. Furthermore, Art. 7 and 8 are not incorporated via the establishment of new offences: there is only the option of a civil claim for damages. Lastly, the classification of an act against an international organisation as a criminal offence has been done by the s34 Terrorism Act 2006, thus filling the previous gap between UK and EU law.

In Spain, the lack of incorporation of the 2002 FD did not create any problems with the Commission; the Spanish legislation is considered quite exhaustive and worded broadly enough.

In Ireland, the 2002 FD has been implemented by Part 2 of the Criminal Justice (Terrorist Offences) Act 2005. The definitions of "terrorist activity", "terrorist linked activity" and "terrorist group" have been included by reference to offences which are committed in or outside the State with the intend of seriously intimidating a population,

[7] Articles 108-111 of the Penal Code respectively.
[8] OJ L309/15.
[9] Explanatory Memorandum, 29th of November 2007.

unduly compelling a Government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, economic or social structures of a state or an international organisation. No new legislative provision for terrorist groups is included; the conformity with EU Law is achieved by applying the already existing provisions of the Offences Against the State Acts of 1939 and 1998. Also, no problems with regard to the implementation are known to authors.

According to the Croatian report (Croatia is in process of accessing the EU), at the end of 2008, the Croatian Criminal Code was amended and the definition of a terrorist act has been taken over the FD almost *verbatim.* The definition has gone even beyond that, as it is not necessary that one of the enumerated acts should seriously damage a country or an international organisation. Therefore, even minor incidents, if committed with terrorist aim, suffice.

According to the Danish *Rapporteur,* two packages of anti-terrorism legislation have been adopted in Denmark in 2002 and 2005 respectively. Denmark is a close ally to the USA and a participant in the invasions of Iraq and Afghanistan. Furthermore, the political climate is utterly tainted by xenophobic and anti-Muslim sentiments which reasons the extensive case-law on this field (see below pp. 7-10). With regard to the implementation of the 2002 FD, just like Croatia, a *verbatim* taking over of the definition of a terrorist act has been done, as well as a widening of the scope in order to include various activities, more or less remote from actual or attempted terrorism (such as funding, facilitation, incitement, training, or recruitment). The general maximum penalty, provided in §114 of the Danish Penal Code, is imprisonment for life, leaving the judiciary with vast discretionary powers. Furthermore, it is noteworthy that any form of assistance to an individual or a group is criminalised. The reason for such a broad wording was to target anyone who provides professional and general advice to terrorists, such lawyers or accountants. Recruitment, training and public provocation (the amendments under the 2008 FD) are also included. Interestingly, the two anti-terrorism packages also penalise indirectly the public approval of a crime against the State (§116 of the Penal Code).

This broader scope in the national provisions can be tracked to the Netherlands as well; Instead of the phrase "seriously intimidating a population", we read "a population or part of the population". According to the National *Rapporteur*, the aim was to include certain forms of violent political activism, like the animal liberation movement.

Furthermore, in Portugal, the transposition of the 2002 FD resulted in the enlargement of the concept of terrorist group. Specifically, the previous legal regime punished only actions carried out by terrorist groups that were against the independence or integrity of the Portuguese State, the Portuguese institutions and authorities or human lives. The current Law[10] states that these actions can also aim at other States. Furthermore, research and development of chemical and biological weapons as well as the use of nuclear, chemical or biological weapons and explosives are also criminalised. However, the investigation and development of nuclear weapons and explosives is not foreseen.

In Poland, the Act of the 16th of April 2004 implemented the 2002 FD by introducing a definition for terrorist acts and imposing the penalty of at least five (5) years (less than what is indicated in Art. 5(3) of the FD). The Act also provided for the involvement with armed militant groups acting to commit terrorist crimes, a crimes punishable by imprisonment from six (6) months to eight (8) years. Lastly, setting up or leading such an organisation is subject to at least three (3) years of imprisonment.

In Italy, until the implementation of the 2002 FD by Law of the 31st July 2005 n. 55, no express definition of "international terrorism" existed. The transposing Law also

[10] Law No. 52/2003 of the 22nd of August.

introduced Articles 270-*quater* and 270-*quinquies* on the recruitment and training for internal and international terrorism, which can be considered, at least partially, in compliance with the respective provisions of the 2008 FD.

In Greece, the 2002 FD was implemented via paras. 40-42 of Law 3251/2004 which amended Art. 187A of Criminal Code. According to the latter, terrorism can be committed by either a group or a single person, thus it has a broader scope than the FD. However, additional conditions need to exist in order for an act to be considered as prone to seriously harm the country. These conditions arise from the existence of a structure/an organisation which would support the committal of terrorist acts. A significant characteristic of the Greek legislation is the vagueness of the provisions. This is because it is necessary to have an intention to commit an act of terrorism and it is not always clear if a single act may be regarded as being committed in such a manner, to such an extent or under such circumstances, as to seriously damage a country or an international organisation. Further uncertainty is caused by the fact that a behaviour which manifests itself as an attempt to establish or preserve democracy, as an act in favour of freedom or as an act intended to exercise fundamental, individual or trade union rights though normally does not constitute a terrorist act, however, the Minister of Justice did not exclude the possibility that some of the aforementioned actions could potentially exceed the thresholds for the exercise of the corresponding freedom.

Other acts punished under the Greek Law are: threat of committing a terrorist crime, participation in an organisation with the aim of committing it, management of such an organisation, providing information to or financing the organisation, committing acts (theft, extortion, forgery etc.) in order to prepare for a terrorist crime and attempt to cover up the above mentioned crimes through illegal violence or bribery of the judiciary, public officials and witnesses. The vagueness of terrorist crime is dissipated in these actions. The most serious problem appears in preparatory acts where the increased demerit attached to theft, forgery or extortion with the aim of buying weapons, in order to commit terrorist crime (Art. 187A, par. 7), is not linked to the acts themselves, but exclusively to the future plans of the offender, being contrary to Art. 7(1) of the Greek Constitution, which presupposes a criminal act for the implementation of the penalty.

ii) The 2008 Framework Decision:

As regards the amending FD, there have been **different strands of action**;
Finland did not need to implement the amending FD, since recruitment and training were already implemented via the Council of Europe Convention on the Prevention of Terrorism in 2007. No information on public provocation is supplied. The UK had already included public provocation among the criminal offences via the Terrorism Act 2006 (s1 – encouragement of terrorism) and recruitment for terrorism is implemented partly via the offence of soliciting and partly via the offence of training for terrorism. As it has already been mentioned, Denmark also contains the reforms via the two anti-terrorism packages.

Some Member States implemented it only partially in order to include some of the new categories of acts. For example, Poland only penalised the distribution or public presentation of content which may facilitate the commitment of the offence or terrorist nature with the intent that this offence was committed[11] claiming that the other amendments were covered by already existing rules of the Polish Penal Code.[12] In the Netherlands, the dissemination of materials encouraging persons to commit terrorist attacks and the removal of persons from their profession for a fixed period, when they have been abusing their position by inciting hatred and violence, insulting a group or recruiting for an armed struggle are now

[11] Act of 29th of July 2011.
[12] Public provocation: Art. 255§1; training for terrorism: Art. 18§3 and 258; recruitment for terrorism: 18§2 and 255§1 and 2.

included in the national legislation. Pre-trial detention and the capability of the authorities to investigate or prosecute suspects were also legislated.

Some Member States implemented the amending FD in order to include all the reforms (public provocation, recruitment and training for terrorism). Such examples are Portugal, Croatia and Bulgaria (minor changes). However, in Croatia, aggravated theft, extortion and drawing up false administrative documents are only punishable as ordinary crimes.

Spain, according to most scholars, did not need to implement the 2008 FD. The legal definition of acts of collaboration with a terrorist organisation (Art. 576 CC) embraced recruiting and training for terrorism. As for inchoate offences, not only was the district felony of *apologie* or justification of terrorism provided by Art. 578, but provocation, conspiracy and solicitation to commit a concrete terrorist offence were punished as well. However, some reforms were set forth by OA 5/2010. These reforms are considered important for the following reasons: 1) a new definition of a terrorist group is introduced in order to cover better decentralised jihadist terrorism, while retaining the element of intentionality; 2) the minimum-maximum penalty is increased to fifteen (15) years and the liability of legal persons is provisioned; and 3) the rules incriminating terrorist felonies are toughened. For example, Art. 576 now explicitly equates to acts of collaboration "any activity to recruit, indoctrinate, train or instruct, aimed at having others join a terrorist organisation or group, or at committing any offence" and Art. 576 *bis* criminalises financing terrorists directly or indirectly. Furthermore, following the wording of 2008 FD (on public provocation), Art. 579 incriminates distribution or public diffusion by any means of messages or slogans aimed at provoking, encouraging or favouring commission of any of the felonies of terrorism, generating or increasing the risk of them being effectively committed. These reforms have been severely criticised for creating many technical legal problems and might even be tainted of unconstitutionality.

A noteworthy aspect of the implementation process relates to Estonia. Since the latter became a Member-State of the EU only in 2004, the national legislation, which took effect on the 15th of March 2007, was amended by including not only the 2002 FD, but also the proposed reforms to the FD, which were later introduced in the 2008 FD.

The deadline for the transposition ended in December 2010. At the time when the reports were drafted, Greece, Italy, Ireland and Czech Republic still had to implement the second FD. The last two States are in the process of implementing it. Especially in Czech Republic national authorities wish to include the public provocation to commit a terrorist offence. In Greece, concerns have been drawn regarding the compatibility of the amendments with the Greek Criminal Law. For public provocation, it is not necessary neither that an actual terrorist act takes place, nor that a mere decision has been made. It is a mere intellectual expression, a criminalisation of which creates an unacceptable uncertainty for the rule of law. Lastly, in Italy it is stated that the current legislation already provides for most of the reforms introduced by the 2008 FD. The crime of public provocation is not punished, while no penalties against a person recruited for terrorism are included, sanctioning only the individual who recruits. However, 270-*quinquies* punishes both the individuals who trains and is trained for terrorism. Besides, the Italian Rapporteurs state that their Criminal Code provides for the punishment of terrorist act committed by explosives and lethal weapons, the possession of and the drawing up of false identification documents, which can be considered as complying with Art. 1(2)(f) of the 2008 FD, marking that a Member State must take the necessary measures to ensure that offences linked to terrorism are provided for.

A complex issue for some States has been the **criminal liability of legal persons**. Criminal liability for legal persons is not inherent in some legal systems. For instance, in Czech Republic, the legislative authorities are in the process to enact an entirely new and

horizontal law on the criminal liability of legal persons and on proceedings against them. The new legislation will be applicable to terrorist offences as well. In Bulgaria and Italy, the liability of legal persons has been dealt by invoking administrative penalties.

B) Constitutional and fundamental rights issues

Czech Republic, Italy and Finland have raised **constitutional and fundamental right issues** regarding the implementation of the amending FD. In specific, with regard to the public provocation, the Czech report raises the issue of the freedom of expression, while acknowledging that this is a theoretical speculation and there are numerous EU safeguards to avoid over-criminalisation.

Furthermore, the Finnish report refers to two challenges; First of all, the maximum penalty as encompassed in the FD is fifteen (15) years of imprisonment while in Finland the maximum imprisonment for a fixed period is twelve (12) years. In order to by-pass these impediments, the Finnish authorities punish terrorism with joint imprisonment for both the direction of a terrorist group and for an offence committed with criminal intend. Secondly, there was a problem with the precise definition of the inchoate offences. The demand of foreseeability and preciseness resulted in the discussion of the government bill on terrorist offences also in the Constitutional Law Committee of the Finnish Parliament and certain fundamental rights aspects were raised. The fundamental rights protection was secured since the Prosecutor General of the State is in charge of the prosecution with regard t the terrorist offences.

The Italian report focuses on a different matter; the difficulty of proving the terrorist purposes of an association.[13] It is said that means of proof such as: 1) the inclusion of the association in the black lists of the UN Security Council or the EU, 2) the use by the Court of the "known facts" and 3) the use of information from foreign intelligence personnel or other Governmental Authorities of a foreign country are not sufficient, thus the Italian Courts keep their distance from these means. On the other hand, foreign final judgments could serve as a valuable evidence but fundamental rights issues arise, due to the difference in the legal systems, especially in case of judgments from African or Asian Courts.

Evidence problems are also reported by the Danish Rapporteur. First of all, it is noted that no case actually involves a completed terrorist act (only the preparation and the facilitation of terrorism). The verdicts have been mostly based on information stemming from the surveillance of groups of people over considerable time periods. The variety of the languages spoken is an additional problem and it makes it difficult to determine the terrorist aim. This has given rise to evidence being presented on whether the accused's attitude to society is characterised by an ideological or religious "radicalisation". In cases of funding terrorism, it has been relevant to obtain information about conditions in distant countries, and this has posed particular difficulties in relation to obtaining reliable information from independent sources. Thus, the acquittal rate has so far been relatively high. Lastly, much uncertainty as to the validity of the conviction and acquittals exists, especially when jurors and judges have reached different conclusions.

C) Relevant case-law

Few *rapporteurs* have provided data related to case-law on terrorist offences.

- In Portugal, one case involved an ETA member captured in Portuguese territory, but after Spain issued an EAW, the Portuguese Supreme Court accepted it[14] and the person was

[13] Also, see also the Greek Report.

[14] Decision of the Portuguese Supreme Court of Justice, 23.03.2010, Case 76/10.2YRLSB.S1, available at www.dgsi.pt.

surrendered to the Spanish authorities.

- The Dutch report refers to two cases, where the members of the groups were ultimately convicted as terrorists. In specific, with regard to the "Hofstad" group, in January 2008, the Appeals Court in the Hague acquitted the seven members holding that there was no lasting and structured form of cooperation, nor a commonly shared ideology.[15] In February 2010, the Supreme Court annulled this verdict and referred this case for retrial to the Appeals Court of Amsterdam which convicted the seven member of the group as terrorists.[16] Furthermore, in October 2008, the four members of the "Piranha" group were held terrorists by the Appeals Court in the Hague.[17] The decision was appealed in the Supreme Court but it was later withdrawn.
- The Italian report marks the interesting case of Abu Omar and the practice of the so-called "extraordinary renditions".[18] Abu Omar was abducted in Milan on February 2003. The Italian judge[19] ordered the release of 5 members of SISMI (the Italian Military Intelligence Agency) following the Judgement n. 106/2009 of the Constitutional Court asserting that the criminal prosecution against them for their participation in the kidnapping of Abu Omar could not continue because a State secret was excepted by the Italian Government.
- In Hungary, it is reported that no acts of terrorism has been committed. Some final judgments have been issued in connection to the threat of committing an act of terrorism. The offenders were usually mentally injured or drunk individuals, who - mainly via phone - appointed a big building with huge traffic for their scene to explode. The Courts imposed on them -during a relative quick procedure- imprisonment between one (1) to three (3) years, and parallel disqualification from public affairs between two (2) to four (4) years as a secondary punishment.[20]
- The Danish *rapporteur* submitted a comprehensive analysis of domestic case-law related to a number of terrorist offences. Of the many cases analysed in the Danish national Report, here it is worth highlighting the *Glostrup* case, where a young Muslim T and two co-defendants had been planning a trip to Bosnia in order to procure weapons and explosives to use in a terrorist act. Indeed, the co-defendants took the trip, acquired explosives and weapons but they were prevented by the Bosnian Police and subsequently convicted to imprisonment. Initially, T was supposed to travel with the others, but he was prevented from doing so by his father. Based on that and on the fact that he had just turned sixteen, the Supreme Court found him guilty of attempted terrorism and sentenced him to seven (7) years of imprisonment. At the retrial, this defendant was acquitted by the jury despite the presiding judge favouring a guilty verdict in his summing-up previous to the jury's deliberations. The case gave rise to discussion about admittance of character witness evidence regarding the defendants' religious beliefs and possible radicalisation, including testimony by one of the defendants' former teachers. The Western High Court ruling, 21 June 2011 (Axe attack on 'Mohammad' cartoonist) is also noteworthy: A 28-year-old Somalian man was convicted, *inter alia*, of attempted terrorism by endeavouring to assassinate the newspaper cartoonist Kurt Westergaard. He was sentenced to ten (10) years imprisonment and to permanent expulsion from Denmark. The perpetrator broke into the cartoonist's house on 01/01/2010. The cartoonist went to his bathroom (which was a panic room) and the police arrived minutes

[15] LJN: BC2576, Gerechtshof's-Gravenhave, 2200189706, 23 January 2008.
[16] LJN: B)8032, Gerechtshof Amsterdam, 2300074710, 17 December 2010.
[17] LJN: BF3987, Gerechtshof's-Gravenhage, 2200734906, 2 October 2008.
[18] This expression refers to the situations when the USA and the UK have transferred suspected terrorists to other countries in order to torture them beyond the legal protection of the first country.
[19] Tribunale di Milano, Judgment of the 4th of November of 2009.
[20] Court of the Capital City, judgement 14.B.1103/2009/16., Court of the Capital City, judgement 7.B. 855/2009/33., Court of the Capital City, judgement 21.B. 812/2009/2.

after he pushed the emergency button. In the High Court three jurors voted to acquit the defendant of the count regarding attempted terrorism, while the judges and the other three jurors voted to uphold the ruling of the municipal court. A request filed by the defence for admission of the case for a third instance review before the Supreme Court has been granted.

QUESTION 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?

A) The Framework Decision

With the exception of Greece and Ireland, the 2005 FD has been implemented in all States reporting. In Greece, two bills have been drafted by a special Committee, but so far they have not been passed by the Hellenic Parliament. In Ireland, there is a longstanding commitment to adopt legislation on this matter and according to the current Government Legislative Programme, publication of a Criminal Justice (Cybercrime) Bill is expected in early 2012.

Denmark reports that only a few amendments were considered necessary, which involved the enhancement of the maximum sentences (lenient sentencing latitudes for ordinary perpetrations to up to six (6) years of imprisonment for more systematic and organised acts).

Few amendments were necessary also in Estonia since most of the crimes were already regulated. The amendments added the corporate liability, criminalised the preparation of the computer-related crimes, some regulations were improved, (namely interference with computer data, hindering of operation of computer system, dissemination of spyware, malware or computer viruses, computer-related fraud, preparation of computer-related crime and unlawful use of computer system) and additional penalties were added for those computer systems that are part of a critical sector.

In the UK, the Computer Misuse Act of 1990 was amended by Part 5 of the Police and Justice Act of 2006. Sections 35-38 of the latter implemented the FD. Specifically, s.35 criminalises the unauthorised access to computer material; s.36 criminalises unauthorised acts with intend to impair the operation of computer; and s.37 establishes the criminal offence of making, supplying, or obtaining articles for use in computer misuse offences.

An interesting example of a State with implementation problems is Italy. Law 48/2008 (18th March) implemented the 2001 Cybercrime Convention and according to the Italian Rapporteurs it can be considered as implementing the FD as well. However, the European Commission in its Report in 2008 it stated that Italy had not implemented correctly the FD, as far as Art. 11 on the Exchange of Information is concerned. It is noteworthy, that the Italian legislation on this issue, which is scattered in many different legal instruments, goes in many ways beyond the provisions of the Cybercrime Convention and the FD. Such an example are the provisions on damaging data and information systems which attracted criticism. In specific, there appears to be a distinction between damaging data and damaging information systems and also between damaging private data and information systems from those used by public utility purposes, whereas a provision of aggravating circumstance in connection with this last categories would suffice. Besides the aforementioned example, which shows a broader scope in the Italian legislation, the penalties provided are higher than the threshold stated in the FD and more effective rules on child pornography are provided.

Bulgaria and Croatia underline the incorporation of the definitions “information system” and “computer data”. Portugal mentions that the definition of “information system”

has been introduced (which is more comprehensive than the previous equivalent concept and technologically more neutral). On the other hand, Croatia marks that the phrase "without right' was not implemented and it will be interpreted in practice following the principles and theory of Criminal Law. In Malta, amendments to the Law of 2001 were adopted in 2010 to comply with the FD. Finally, the Hungarian Rapporteur states that the amendments in April 2002 on Art. 300/C.§ Subsection (1-2) of the Criminal Code contained all the reforms introduced by the FD.

With regard to the **illegal access to information system**, (A 2(1) of the FD) the Polish rapporteur gives us an interesting feedback on the Polish amendments. Art. 267 of the Polish Penal Code on the unauthorised acquirement of information is the relevant legislation. The Polish have extended the scope of penalisation in three ways; by modifying the phrase "illegal access to information" to "unauthorised acquirement of information"; by replacing the expression "connecting to a wire that transmits information" by the expression "connecting to a telecommunication network", with a view to cover wireless systems; and as far as the description of illegal access is concerned, the legislator added after the word "breaching" the phrase "or omitting" protection for that information. Art. 267(2) implements Art. 2 of the FD and it penalises the acts of authorised access to the whole or any part of an information system. The Article concerns an access (even without breaching any security systems, which means that the Polish have not used the optional clause of Article 2(2)) not to obtain information but control over a computer. This is a novelty for the Polish CC and it has raised concerns on whether the scope of application is too broad, as it may contain even hazardous access.

In Spain, OA 5/2010 introduces the crime of the unauthorised access to an information system as one subtype of the felony of discovery and revelation of secrets (Art. 197 Section 3 CC). Committing the crime within a criminal organisation qualifies as an aggravating circumstance. It is noteworthy that the placement of the crime inside the Chapter dedicated to crimes against privacy, the right to personal dignity and the inviolability of the dwelling, legal-technical problems and proportionality issues are expected to arise.

Furthermore, even though the Polish have not taken advantage of the **optional clause** enshrined in Article 2(2), we observe that a number of States (such as Croatia, Spain and Czech Republic) have done so in order to criminalise illegal access only where the offence is committed by infringing a security measure. To this regard, the Dutch report provides us with interesting information; the national legislation made illegal access punishable in two situations: either when a security measure was violated, or when a technical interference had taken place by using a false identity. Both requirements were dropped with the Act for Computer Crime II. The reason for this was that the Dutch government assumed that illegal access in the sense of the 2005 FD includes both situations referred to under the Dutch legislation.

As far as the **illegal interference with computer systems** is concerned, we can observe the following:

Finland reports that before the implementation of the 2005 FD, although it had quite comprehensive legislation in the field, the crime of interference in the computer systems was not included. Thus, this crime and the aggravated interference in a computer system were introduced with the implementation.

The Croatian report refers to the broad meaning given in the Criminal Code, broader than the one given in the FD. Specifically, Art. 223(2) incriminates hindering or interruption of the functioning not only of an information system, but also of its use, as well as hindering or interruption of the functioning or use of computer data, programs and computer communication as such. Also, it does not specify the conduct through which interruption or hindering may be done, as does Art. 3 of the FD.

In Spain, the amended Article 264 CC reproduces almost *verbatim* the FD phrasing. The Article is placed among the crimes against damages, which according to the Rapporteur could create problems in complying with the FD. For example, it is stated that a problem could be how to determine the criteria for evaluating the damages to computer data and programs.[21]

With reference to Art. 3 of the FD Poland states that the word "impediment" was added stating that it covers the ideas of Art. 3 of the FD and it is coherent with the Polish Penal Code.

Moreover, regarding Art. 5 on the **inchoate offences** we observe that Finland and Croatia had to include a special provision on the attempt of these crimes (the first had to include a provision on the attempt of several of these offences, while Croatia introduced Article 223(8) on the attempt of all the above mentioned offences). Croatia also marks that instigation, aiding and abetting are punishable under the general provisions.

Art. 7 of the FD on the **aggravated circumstances** appears to be treated in different ways by the States. Article 7(1) requires the Member States to increase the maximum penalty (at least between two (2) and five (5) years) when committed within the framework of a criminal organisation. Croatia has not transposed it, even though it is not an optional clause. The report marks though that seminal effect can be achieved by applying the rule on concurrence of offences (cybercrime offence plus associating for the purpose of committing a criminal offence). As for the optional clause, envisaged in Art. 7(2), Croatia has taken advantage of it and has increased the maximum penalty to up to five (5) years of imprisonment when the offence has caused serious damages or has affected essential interests. (It is striking that the mandatory clause has not been implemented while the optional has). Finally, Finland has included a provision of aggravated computer brake-in.

With regard to the **liability of legal persons**, the Czech Rapporteur reiterates that a new law on the liability of legal persons is currently under adoption, while Bulgaria also refers to the administrative penalties provided.

Lastly, the Portuguese report places its focus not on the changes in the substantial Criminal Law, but rather on the **procedural issues** that occurred. Specifically, the national rapporteur underlines that the most important substantial changes on cybercrime are not based on the FD but on the Convention on Cybercrime. The introduction of "identity theft" which does not have direct correspondence to the FD but the latter is one of its sources. The procedural changes involve the extension of the Portuguese jurisdiction and applicability of the Portuguese rule of law with a view to include: a) crimes committed by one of its nationals or for the benefit of a legal person which has its head office in Portugal; b) when the person is based on the Portuguese territory but the crime is against an information system outside the territory and c) when the perpetrator commits a crime against an information system located in Portugal, though he is not physically there. If more than one Member States have jurisdiction over a case, then the Portuguese Law allows cooperation between mechanisms and bodies within the EU. This is an innovative solution pursuant to Article 10(4) of the FD.

B) Case-law and challenges

Czech Republic, Slovenia and Finland report few **cases** in the field. Czech Republic states that these cases are not dealing with EU aspects and Finland underlines that the cases are not from the Supreme Court of Finland. The Slovenian Rapporteurs state that in Slovenia,

[21] In Spain, it appears that the damage threshold of 400 euros is still unclear whether it applies. Below that amount of money, the crime could be classifies as a misdemeanor and not a felony. It is up to the Courts interpretation to discern when the aggravating circumstance (Article 7(2)) of causing serious damage applies given that the mere offence already requires a serious result.

by 2010 only one person was convicted for having attacked an information marking that both legislation and case-law await development.

In Italy, case-law has been divided between the broad interpretation of the already known in traditional Criminal Law to facts realized by electronic means and the need to draw a distinction between classical crimes like forgery or fraud and offences committed with the use of information technology. With regard to computer fraud, the Corte di Cassazione in its Decision n. 17748/2011 stated that even though it is classified among crimes against property, it aims to protect other values, such as the regular functioning of computer systems, data protection and certainty and speediness of legal traffic.

In Hungary, estimation of actions had caused problems in the near past, when the perpetrator cancels, changes, or transmits unauthorised data on computer in order to gain profit undue. In some of these cases fraud can be determined, which is against §138 CC, if the intervention serves only simply to mislead, where the computer is only the device for perpetration. In the same way, preparation of cybercrimes can not be carried out, if a computer which can mislead the alarm system of other vehicles is found in the possession of individuals who steal cars.

More details on case-law are provided by the Dutch *Rapporteur* who refers to a case of February 2011, when the Supreme Court ruled that taking advantage of security gaps in an information system is punishable as illegal access in conformity with the FD, even though the term "security measure" was dropped with the adoption of the Act on Computer Crime II. The Dutch *rapporteur* also mentions the case of the author of a book on security issues in the banking sector who has illegally accessed the information system of banks to demonstrate his points. Does the prosecution for this crime constitute a violation of Article 10 ECHR? The Supreme Court[22] held that criminalisation is necessary in a democratic society to prevent similar crimes and protect the rights of others. Thus, no breach of the Article 10 ECHR was found.

Furthermore, the implementation of the FD in Italy has posed significant challenges due to bad drafting of the provisions. In specific, Art. 615-*quinquies* on the Diffusion of computer programs aimed at hindering or breaking off an information system, by anticipating punishable conducts in respect to damaging offences, it does not clarify which conduct can be held illegal and which one instead is legally performed. Indeed, the wording appears not to be in line with the Cybercrime Convention which mentions that the devices have to be conceived or adapted with the specific purpose of committing a cybercrime. The ambiguous wording generates the risk of punishing even commercial operators and private sectors who legally create and experiment computer programs aiming at clashing virus-programs.

As for the protection of fundamental rights, the Hungarian Rapporteur draws the attention to the so-called "digital secret house search" during which the data stored on the suspected offender's computer is copied with spyware to another computer without knowledge on behalf of the suspected person. This method is currently illegal, however, it poses the question of whether sensitive data such as health, banking records or photographs which are irrelevant to the case can be held by the authorities.

Finally, in Switzerland, unauthorised intrusion into a computer system and unauthorized data collection are penalised too. In 2004, a Swiss Reporting and Analysis Centre for Information Assurance (MELANI) was created which gathers and evaluates information from Internet attacks to support critical infrastructure.

[22] LJN AY8343, Hoge Raad, 02811/05, 5 December 2010.

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

The national reports infer different views regarding this question. Some States like Denmark and Slovenia do not report any gaps in legal responses to cybercrime.

Some States, such as Bulgaria, the Czech Republic, the Netherlands and Portugal focus on the transnational and evolving character of these crimes and the need for **cooperation** between the Member States. In specific, the Czech rapporteur refers to the international cooperation as the main challenge while providing examples of actions to be done collectively, such as to delete and/or block websites and pages with criminal content and prosecute and punish those responsible. It is also mentioned that the divergence between the national Criminal Laws hinder cooperation. Furthermore, in the Dutch report it is stated that action at EU level is to be preferred, while Portugal refers to cooperation between the banks in order to identify the offenders of such crimes.

The **Proposal for a new Directive** on cybercrime has been commented by several States. Overall, it is well received by the Netherlands, Italy, Malta, Estonia and Portugal, but Czech Republic, Greece and the UK are more critical. **On the positive side**, the Dutch report welcomes especially the provisions on the minimum and the maximum penalties and the information requests. Portugal marks that the provisions of the Directive are more comprehensive that the ones in the FD and more effective since many States haven't ratified the Cybercrime Convention. The Maltese Rapporteur states that the current legislation is very limited in scope, so a modern legislative framework encompassing new technologies such as the "botnets" is welcome.

In Estonia, the Draft Directive is generally regarded as positive. First of all, because this is a step towards the Cybercrime Convention, which according to the Estonian Rapporteur is the best recognised standard at the moment. Secondly, because the proposed legislation supports the operative cooperation, however not as strongly as it was initially foreseen. The current wording requires a Member State to inform the other State within a maximum of eight hours at least whether the request for help will be answered. The initial proposal stipulated that a Member State has to respond to urgent requests already in eight hours.

On the negative side, the Czech report states that the proposal focuses on the *stricto sensu* cybercrimes and it is unfortunate that cybercrimes while committing identity thefts were not accepted by the JHA Council 2011. Some added value is added by the inclusion of higher penalties especially in relation to grievous large-scale cyber attacks (specifically when causing large damages to critical infrastructure) and strengthened cooperation mechanisms between the competent authorities. However, technical expertise and the ability of specialised police or other competent authorities to keep pace with the hackers are needed. Finally, Finland, which has admittedly underdeveloped legislation in this field, is opponent to a one-by-one fill in the gaps in the cybercrime legislation and a more comprehensive approach of the matter.

Furthermore, Greek legal theory has criticised heavily the new Proposal. In specific, it is argued that it does not meet the *lex certa* requirement, insofar as it does not sufficiently define notions such as "interception" and "minor cases" which can be excluded from criminal punishment. Also, the principle of proportionality is undermined when preparatory acts and regular offences are punished by the same maximum sentence and where the maximum sentence is doubled when devices that can cause serious harm are employed, regardless whether the harm has occurred. Finally, Art. 13 of the Proposal requiring Member States to establish jurisdiction *inter alia* in cases where the offence was committed by one of their

nationals or a person with habitual residence in the territory of the Member State without respecting the double criminality rule, has raised serious concerns as it may lead to criminalization of acts committed outside the EU.

Moreover, the Rapporteurs from the UK refer to what the responsible Minister has stated. In specific, he has stated that the Draft Directive is unlikely to have any significant effect on those areas of public interest because the Directive is concerned with tackling criminal activity. Although the new Directive does not seek to change the balance if EU and UK competence, it is agreed that EU action is justified on grounds of subsidiarity. The Draft Directive is also accused of lack of clarity with the Minister stating that he intends to ensure more precise wording during negotiations.

A more general analysis is provided by the Spanish *Rapporteur* who analyses cybercrime from a criminological point of view. The detailed Spanish Report indicates that the transnational nature of cybercrime poses not only a fundamental challenge to the principle of territoriality, but more significantly takes advantage of its fragmentary and dissimilar criminalisation worldwide. This makes by definition an international legal response more appropriate than a European one. Moreover, as to the specific cybercriminal offences, he mentions that there does not seem to be a huge difference between the Proposal and the offences set forth in other regulations. Thus, although some technicalities might arise concerning the aggravating circumstances foreseen in Art. 10, the Proposal addresses necessary changes in the current legal framework. Finally, he notes that the new technologies require an adaptation in the national legislations and even though EU Criminal Law is already aware of this dimension, as the widening of possession in the new proposal for a Directive against child pornography could illustrate, this is a rather complicated legislative roadmap which will be dealt mostly within the national Courts and Laws.

Croatia and Poland have focused on how the proposed legislation already fits in their national legislation. Specifically, Croatia already complies with most of the targeted updates (e.g. penalisation of unauthorized production, sale, procurement for use, import, distribution or otherwise making available of devices and tools for the purpose of committing any of therein defined cybercrime offences). Computer programs designed or adapted primarily for the purpose of committing respective offences are included in the notion “devices and tools”. Illegal interception is also a crime. Croatia is missing an explicit reference to large-scale aspects of the attacks (botnets or similar tools) and to situations in which offences were committed by concealing the real identity of the perpetrator and causing prejudice to the rightful identity of the owner. However, Courts could subsume these under the notion “serious damages”.

Furthermore, according to the Polish report, the crime of illegal interception (Article 6 of the Proposal) is not covered by the current Polish Criminal Law. As regards the aggravating circumstances provided in Art. 10(2), meaning the large-scale aspect of attacks, the Polish Criminal Law partly covers the matter in the case of illegal data interference. Art. 268(2) states that when there is significant loss of property then the deprivation of liberty is from three (3) months to five (5) years. Also Art. 165 provides that when danger to the life or health of many persons or property of considerable value is caused, then the imprisonment is from six (6) months to eight (8) years, Moreover, if the consequence of the act is the death of a person, or serious harm to many people, then the prison time is between two (2) to twelve (12) years. Lastly, the other aggravating circumstance provided in Art. 10(3), when such attacks are committed by concealing the real identity of the perpetrator and causing prejudice to the rightful identity owner, no relevant provision is contained in the national CC.

The Hungarian *Rapporteur* emphasises on the difficulties the national legislation will face, since terms such us “botnet” and “zombie computers” currently do not constitute part of

it, just as there is no legislation on the illicit data acquisition when the offender attains illegally data with appropriate technical means.

Finally, the Swiss *Rapporteurs* state that the State meets the requirements of the Convention on Cybercrime with regard to penalties. It is submitted that since the objective of the Convention is the simplification of mutual legal assistance in computer crime, normalisation of the new legal aid instruments is also necessary. An important aspect is the rapid freezing of potentially vulnerable data for purposes of evidence by the requested State. Furthermore, the Swiss Federal Parliament decided in 2011, the Mutual Assistance Act (IRSG) should be amended so that Swiss electronic traffic data can be given out prior to the completion of the legal assistance process. However, such an approach must be in compliance with Article 13 ECHR. Therefore, release of personal information before adopting a final order is actionable after an overall balancing of interests. Until now, the law enforcement authorities have only occasionally taken action against providers who brokered illegal content. Finally. the Federal Council (executive branch) has spoken out against the adoption of provisions on criminal liability of Internet service providers thus, the legal situation on the criminalisation of Internet service providers remains unclear.

QUESTION 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?

A) The Framework Decision

The 2008 Framework Decision on the fight against organised crime was to be implemented by the Member States by the 11th of May 2010. It is noteworthy that, with few exceptions (such as Bulgaria, Estonia and Slovenia), many States supplying information have not transposed the FD by amending their legislation since they considered the implementation unnecessary due to the very broad terms of the FD and the sufficiency of their national Laws. Estonia and Slovenia have incorporated the FD before its adoption. Also, in Greece the formal transposition of the FD is pending. The Committee for the implementation into national Law, appointed by the Minister of Justice has already delivered the relevant bill but it is not officially adopted.

According to the Maltese report, Malta is generally in line with the provisions of the FD since in a number of criminal offences it is provided that if they committed by two or more people together the punishments is increased (noting the example of Art. 83A which states that any person who promotes, constitutes, organises or finances an organisation of two or more people with a view to commit criminal offences is guilty if a criminal offence). To this end, the Hungarian *Rapporteur* states that the Hungarian Criminal Code complies with the FD, considering its spirituality and most of its provisions, even though some rules differ. One of the major differences is that not two but three persons are required in order to form a criminal organisation whose purpose is to commit crimes punishable by imprisonment of not four (4) but five (5) years Also, the Hungarian Law does not require expressly the element of "obtaining directly or indirectly, a financial or other material benefit". The participation in a criminal organisation is a *sui generis* criminal offence in Hungary (Article 263/A.§.). If the action is reported to the authorities prior to the act, then, there is an exemption clause of impunity. Finally, the definition of "criminal conspiracy" is recognised, when two or three people commit crimes, or attempt to do, or agree to do, but the legal requirements of a criminal organisation are not fulfilled.

Furthermore, the Italian Government had been authorised to implement the FD by Art. 53 of Law n. 88/2009 but it did not exercise its powers. However, due to the mafia

related phenomena, there appears to be vast experience in the field. Articles 416 on "Association to commit a crime", 416-*bis* on "Mafia Association" and 418 on "Assistance to Members" can be considered as implementing the FD. It is noteworthy that according to the Italian *Rapporteurs* the Italian legislation is considered as a model for the development and definition which the EU institutions and Member States took over.

To the same direction, the Danish *Rapporteur* states that the very broad general provisions on criminal attempts in CC and on criminal participation are sufficient and a criminal sentence can be increased in case of particularly planned or extensive criminal activity. So, no amendments were done to the national legislation and there is no criminalisation of participation in criminal organisation.

No implementation was needed in Finland and the Netherlands as well. In Finland, these provisions were added with the Joint Action 98/733/JHA and with the national implementation of the Palermo Convention. The view of the Finnish Minister that there was no need of implementation of the FD was challenged in legal literature. However, the Finnish *Rapporteur* underlines that the case-law seems to be in slight contradiction with the FD, since the Government Bill which implemented the Joint Action contains restrictive views on the interpretation of a criminal organisation.

No express implementation of the 2008 FD was initiated in the UK. Compliance is succeeded on the basis that pre-existing UK provisions already implement it adequately. The Common Law offences of complicity and incitement are used. In particular, Art. 1 of the FD provides for the criminalisation of participation in a criminal organisation or, alternatively, conspiracy to commit any of the offences listed. This alternative approach is an attempt to harmonise Criminal Laws of the Member States and to achieve a compromise amongst the Common v Civil Law divide. However, it is to be noted that the Serious Organised Crime and Police Act of 2005 does not contain an agreed legal definition of organised crime.

In Ireland, the Criminal Justice Act of 2009 criminalises directing or participating in a criminal organisation and provides for penalties of up to fifteen (15) years for the participation and up to life imprisonment for directing an organised group. This legislation was required in order to implement the Palermo Convention and no additional amendments were considered necessary by the FD.

Although Portuguese law does not follow the same structure as the FD, it has been submitted that the definition of a criminal organization therein is close to the definition of the EU instrument. The penalties are within the imprisonment limits foreseen in Art. 3. The special crime of participating in a criminal association for drug trafficking (envisaged in Decree-Law No. 15/93) requires harsher punishment than the one for other offences and, in general, is more in line with the FD. A new aggravating circumstance "the gang" which is different from the criminal organisation is also provided. Another special crime relates to a criminal association for tax crimes and the respective Law (No. 5/2002) provides for a special regime for gathering evidence.

In Spain, the national legislation on this issue, OA 5/2010, does not refer specifically to the FD as one of the instruments implementing. Nevertheless, the *Rapporteur* purports that the Spanish Law implements the FD due to the enormous leeway left to Member States. To some extend, the Spanish Law goes beyond the FD demands by referring not only to the serious offences, but also to the repeated committing of misdemeanours. Directing and participating in both criminals organisations and criminal groups are punishable and the penalty is determined according to the type of crime perpetrated and the means available to the organisation. With regard to the definition of a criminal organisation, the following elements are required: three or more people, temporal stability, distribution of roles, bringing the definition closer to the FD definition of a structured association and even to the Common Law conspiracy. However, the Spanish Law does not contain the element of the purpose of

obtaining financial or other material benefit. Moreover, Art. 3(2) of the FD is partially implemented since the Spanish Law has maintained some previously established aggravated offences when committed within the framework of a criminal organisation, such as child pornography or receiving stolen goods and money laundering. Finally, the principle of territoriality is assumed in very broad terms following the Supreme Court case-law.

In the Czech Republic, the relevant provisions of the Criminal Code are Sections 107 (offender committing a crime in favour of an organised criminal group), Sections 108 (imposition of a penalty for the aforementioned offender) and 361 (participation in an organised criminal group). These provisions are broader and stricter than the ones foreseen in the FD. For example, the range of activities within the group is not limited to the offences punishable by imprisonment of at least four (4) years, but stretches to the systematic commission of any intentional criminal activities, even those with a lower penalty. Also, the requirement of financial or material benefit is absent.

Moreover, in Croatia, earlier definitions of criminal organisations have been abandoned and now the definition of an organised criminal group is in line with the FD. This definition is expanded by additionally classifying as criminal organizations groups whose purpose is not primarily financial or other material gain. The notion of a ”structured association” is not specifically elaborated. However, the Croatian Courts should interpret these terms in conformity with the FD. The penalties for participation in a criminal organisation is up to five (5) years of imprisonment, thus in accordance with Art. 3(1)(a) of the FD. This offence presupposes that the member of the criminal organisation acts with intent and knowledge of the aim and general activities of the criminal organisation and that he/she acts with the intent of taking part in them. Nevertheless, it does not specify the modalities of such participation, as does Art. 2(a) of the FD. The latter is broader in a sense that it incriminates conduct of persons who are not necessarily members of the criminal organisation, but contribute to the activities. Art. 2(b) of the FD is implemented by Art. 332 of the CC, which penalises agreement of one person with another to commit a serious criminal offence for which imprisonment of at least three (3) years may be imposed. Such conduct is punishable even if the person does not take part in the actual execution of the activity. Finally, to some extent, Croatia has exercised the option given in Art. 4 of the FD, as a member of the criminal organisation that uncovers the latter prior to committing a criminal offence as a member of it, or for it will be exempted from the penalty.[23]

As mentioned above, in Estonia, when the national Law was amended in order to implement the UN Convention against Transnational Organized Crime (in 2007), the wording of the Proposal of the FD was taken into account. Thus, the Estonian Law is in compliance with the FD. A similar situation is reported by Slovenia, where the Slovenian Penal Code was amended just before the adoption of the FD by improving the criminalisation of participation in a criminal organisation, hence adjusting *ex ante* with the FD.

In Bulgaria, the phrase “more than two people” is perceived as “three or more entities”. Furthermore, the objective “to acquire direct or indirect financial or other material benefit” as prescribed in the FD is not reflected, since the scope of the definition has been expanded, pursuant to recital 4 of the FD (however, we don’t have information on how it’s expanded). In the national Criminal Code a number of crimes contain aggravating circumstances related to organised crime (aggravated murder, arson, trafficking, smuggling). It is worth noting that in the beginning of 2012 a specialised Court with specialised Prosecution will start operating and within its competence it will be examining the crimes committed by organised criminal groups.

[23] Art. 335(5) of the Criminal Code.

B) Case-law and fundamental rights challenges

With regard to **case-law** on this issue, a recent decision of the Supreme Court of Finland (though not directly related to these offences) does not seem to be in conformity with Article 4(2) of the FD. The Court appears to be of the opinion that Art. 4(2) does not entail indirect effect with regard to various offences.

In Estonia, from 2006 to 2010, there were twenty-eight convictions regarding criminal organisations and eight cases of formation of criminal organisations. The reason behind these rates is the fact that organised criminal groups are changing to project based units which come together for just one occasion, to commit the crime and then move on. This new trend was pointed out at the Justice and Home Affairs Council of the EU on the 9th of June 2011.

As for constitutional concerns, the Finnish practitioner notes that the criminalisation of organised crime has been problematic due to a minimalistic view adopted, partly because it has not been a major problem. The most fundamental problem has been the impreciseness of the definition, which was made significantly more precise by the Parliament.

The Greek report draws our attention to Art. 3(2) of the FD which requires the Member States to ensure that offences committed within the framework of a criminal organisation may be regarded as an aggravating circumstance, while Art. 3(1) provides that Member States shall take the necessary measures to to ensure that conducts related to the participation in criminal organisation are separately punishable. Greek legal theory has expressed serious concerns as to whether the double penalisation of offences violates the principle of proportionality. Furthermore, the choice of the EU legislator to include offences which are punishable by imprisonment of a maximum of at least four (4) years was also criticised as it does not only relate to severe offence, but it also includes misdemeanours.

As far as Switzerland is concerned, as a part of a package of measures to combat money laundering in 1994 the offence of criminal organisation was introduced in the Criminal Code. Anyone who participates in an organisation with the purpose of committing violent crimes or to enrich themselves by criminal means shall be punished with imprisonment up to five years or a fine. Criminally liable is also anyone who supports such an organisation. So far, only a few sentences have been handed down pursuant to this provision. Since the enactment in 1994 until late 2007, thirty eight convictions with twenty five judgments were delivered in the cantons and only one sentence has been precipitated by the Federal Criminal Court. Furthermore, the Courts have the power to collect all assets that are at disposal of a criminal organisation. Finally, since the responsibility for assessment and prosecution of the offence and under certain conditions of those crimes that originate from a criminal organisation falls within the authorities of the Federal State, not the cantons.

QUESTION 5: What has been the impact of EU law (Framework Decision 2008/913/JHA [2008] OJ L 328/55) on the criminalisation of racism and xenophobia in your jurisdiction?

A) The Framework Decision

With regard to racism and xenophobia the reports show different trends: many States have proceeded to amendments (major or minor) in their national legislation, while others have done no amendments to their national legislation since they considered as already being in conformity with their EU law obligations. The UK and Ireland have opted in without amending the national legislation and some countries (e.g. Czech Republic, Estonia, Greece) are still in the process of the transposition.

Hungary has replied extensively on this question. Before the FD, the Hungarian Code contained three (3) crimes related to racism and xenophobia; “agitation against the

community" (CC §269), which sanctions the incitement of hatred against national, ethnic, racial, religious or individual groups of the population; "use of totalitarian symbols" (CC §269/B) and the "public denial of the felonies of national socialist and communist systems" (CC §269/C). It is noteworthy that all these crimes need to be committed in large public, which, besides the *verbatim* meaning of the phrase, it also contains the perpetration by press, other means of mass media, by copying and electronic communications network. It appears that the protection for sensitive groups of people is wider than the one provided in the FD - especially for disabled people or homosexuals. Furthermore, if a legal person commits the aforementioned crimes, an official action is allowed which can cause the termination of the legal person. Another important element of the Hungarian legislation is the need for definite determination that the crimes have been committed for a racist reason. If this cannot be determined, the offender can only be accused of a minor classified crime.

Minor amendments in the national legislation were introduced in Finland. The FD was implemented together with the Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems. The provision on ethnic agitation together with some other provisions was seen as fulfilling set forth by the FD but some amendments were done in order to comply with the Additional Protocol.

In interesting aspect of implementation is the case of Poland. Art. 256 of the Polish Penal Code on the promotion of fascism and totalitarian symbols was amended in 2009 to prohibit the production, conservation, import, acquisition, storage, possession and presentation with the intent to distribute items inciting hatred on the grounds of nationality, ethnicity, religion as well as propagating fascism or other totalitarian regimes. However, the Constitutional Court in the Judgment of the 19th of July 2011 found the amendments unconstitutional in respect to items propagating totalitarian regimes. Currently, the only amendment in the national legislation relates to the liability of the legal persons.

In Slovenia, the FD has been implemented by Art. 297 of the Penal Code. The punishment for the offenders is a custodial sentence of up to two (2) years (Art. 297/1). The same sentence is provided for those who publicly disseminate ideas of supremacy of one race over another or provide aid in any manner for racist activity or deny, diminish the significance of, approve, disregard, make fun of, or advocate genocide, holocaust, crimes against humanity, war crimes, aggression or other criminal offences against humanity. (Art. 297/2). Furthermore, if the crime is committed by publication in the mass media, the legislator calls for punishment not only of the offender but also of the editor, unless the crimes was committed in a live broadcast program and it was impossible to predict (Art. 297/3). Art. 297/4 provides that if the crimes are committed by coercion, maltreatment, endangering of security, desecration of national, ethnic or religious symbols, damaging the movable property of another, desecration of monuments or memorial stones or graves, the perpetrator shall be punished by imprisonment of up to three (3) years. Lastly, Art. 297 provides for punishment of an official who commits the aforementioned crimes and calls for the confiscation of material and other objects bearing messages or devices intended for their manufacture, multiplication and distribution. The Ministry of Justice proposed an amendment of Art. 297 to fully implement the FD. The amended Article, still pending, now reads: whoever publicly provokes or stirs up hatred, strife or intolerance based on national, racial, religious, ethnic, gender or political affiliation or on any other personal circumstance, so that

a crime is committed by way of possible threat or disturbance of public order, or with a use of threat and insults, shall be punished by imprisonment of up to two years.[24]

Act XI of 2009 implemented the FD in Malta by introducing a new Art. 83B in the Criminal Code which increases the punishment for offences motivated by reasons of religion, racism or xenophobia.

In Bulgaria, the FD has been implemented by amending the Criminal Code (Art. 162 and 164). The penalties are effective, proportionate and in accordance with Article 3 of the FD. Racist and xenophobic motives are taken into account in determining the punishment and are considered as an aggravating circumstance, but only in crimes against a person Bulgarian legislation has recognised the existence of special incentives as a qualified feature of the offence.

Portugal states that the CC foresees the crime of racial, religious and sexual discrimination, including publicly inciting to violence or hatred (Article 240). These crimes are punishable with imprisonment sanctions harsher than the time limits foreseen in FD. An ancillary sanction of the loss of electoral capacity is also provided and legal persons may be held responsible for these crimes. Since these crimes are "public", investigation or prosecution is not dependent on a report or an accusation by a victim, as established in Art. 8 of the FD. As for genocide, the Portuguese legislation foresees specific incrimination of genocide, crimes against humanity and war crimes[25] with sanctions more severe than those in the FD. Although racist and xenophobic motivation (Art. 4 FD) is not considered a general aggravating circumstance, it may be taken into consideration by the Courts in the determination of the penalties. However, the racist and xenophobic motivation is an aggravating circumstance for the crimes of homicide and physical integrity offence.

On the contrary, the Croatian legislation is significantly lagging behind the FD. Although Croatia has legislation that separately incriminates racial and other forms of discrimination (Art. 174), this provision does not fully comply with the requirements of the FD. On the one hand, it can be said that it broadens protection to other vulnerable groups, in addition to those mentioned in the FD. Besides, Croatian CC is in compliance with Art. 2 of the FD to the extent that the acts to which FD's provisions on aiding and abetting and inciting refer are punishable according to the CC and Art. 3 on criminal penalties. Finally, in determining the penalties, nothing prevents the Court to take into consideration (as an aggravated circumstance) racist and xenophobic motivation of the perpetrator. Such motivation, however, is not specifically mentioned in the CC. On the other hand, there are several serious drawbacks. Firstly, Croatia incriminates only public incitement to hatred and not to violence against a group (member). Secondly, Croatian CC defines the manner in which public incitement must be done (through spreading the ideas on superiority or subordination), unduly narrowing the frame of criminal liability and, thus, pointing to incomplete implementation. Also, Art. 1(1)(b) of the FD requires punishment of incitement when committed through public dissemination or distribution of tracts, pictures or other material. To an extent, this provision is covered through the wording 'states or disseminates' as it is generally interpreted that something can be stated or disseminated orally, in writing, through symbols, gestures or technical apparatus. In addition, dissemination made through computer system or public distribution of materials in other manner is covered by Art. 174(4) of the CC, but only in relation to the materials which deny, grossly trivialise, approve or justify criminal offence of genocide or crimes against humanity. This article at the same time

[24] Ministry of Justice, Draft of the Amendment to the Penal Code', available at: <www.mp.gov.si/fileadmin/mp.gov.si/pageuploads/2005/PDF/zakonodaja/090326_KZ-1A.pdf>, 11/10/2011.

[25] Law No. 31/2004 (22/07/2004). Former Art. 239 CC foresaw the crime of genocide.

corresponds to Art. 1(1)(c) and (d) of the FD, but only partially, as it does not refer to all the offences stated therein. It furthermore restricts the modalities of *actus reus* to public distribution of materials contrary to the FD which refers to acts done publicly.

No express implementation: Spain did not amend its legislation to incorporate the FD since the all the core obligations were already prescribed. A general aggravating circumstance is provided but no liability of legal persons is included. Also, in Denmark, the official position is that the FD does not oblige the State to criminalise public speech by which a group of individuals are threatened, mocked or degraded because of race, skin colour, national or ethnic origin, faith or sexual orientation. Thus, display of Nazi symbols and or holocaust denial is not a criminal offence under Danish Law. On the other hand, in the Netherlands, originally the impact of the FD was limited since the national legislation already complied with the FD and the Dutch Senate was willing to agree in changes provided that the denial of genocide was not criminalised in all circumstances. Currently, new legislation is discussed in the Second Chamber with a view to criminalise the denial of genocide in all cases. In Ireland, the Prohibition of Incitement to Hatred Act 1989 and public order legislation is considered as complying with the FD. According to the *Rapporteurs*, the existence of different limitations and options offered by the FD as regards the criminalisation of hate speech explains why many States argued that implementation was already achieved by existing legislation.

Along to the aforementioned States, the UK also achieved compliance with the FD by reference to existing legislation. The main legislation lies within the Public Order Act 1986 (s. 17-19), the Racial and Religious Hatred Act 2006 and the Racially Motivated Crimes-Racially Aggravated Sentencing Crime and Disorder Act 1998. The first one introduces the crimes of racism and xenophobia (s.17). There seems to be limited judicial certainty regarding the definition of hatred resulting in small number of convictions for this offence. S.18 of the Act, criminalising the use of offensive words or display of offensive material, and s.19 on the publication and distribution of offensive material, seems to include the offence of Art. 1(a) and 1(b) of the FD respectively. S.19 has been criticised by the ECRI is being potentially in conflict with the Human Rights Act 1998. Furthermore, s18 was initially considered to potentially violate the freedom of expression and right to privacy provided in the Human Rights Act 1998. However, the statute excludes words, behaviour or displays which incur insider a dwelling and are not seen/heard except by other persons in that or another dwelling. Thus, it also includes telephone conversations. The second Act, fills the gap created by not considering Muslims as a separate race with distinct racial foundations. As for the third piece of legislation, it uses the existing offences under Criminal Law and adds the aggravating factor. In terms of the substantive racially aggravated offences, s.29 criminalises racially aggravated assault: the elements of the offence are the *actus reus* and *mens rea* of malicious wounding, Grievous Bodily Harm (GBH), Actual Bodily Harm (ABH), or common assault and the racially aggravated factor. Similarly, the offence of racially aggravated criminal damage (s.30) criminalises damage of property. Most importantly, s.31 includes the offence of racially aggravated public order which seems to complete the full coverage of all the offences of Art. 1 of the FD. Finally, s.82 of this Act provides that, where a Court is considering the seriousness of an offence and the offence is racially aggravated, the Court must treat that as an aggravating factor, and state in open Court that the offence was so aggravated.

No implementation yet: In Czech Republic, the legislator at the time of drafting the national report was in the process of making the necessary amendments to ensure compliance with the FD. The criminalisation of denial, questioning, approval and justification of crimes against humanity will be stretched beyond those crimes committed by the Nazis and communists to cover also criminalisation of such behaviour in relation to all other crimes

against humanity and newly to war crimes. Furthermore, the criminal offence of violence against a group of people or an individual was expanded to cover also respective conduct committed by press, film, radio, television, or publicly accessible computer network or other similarly effective way.

Estonia and Greece are also in the process of transposing the FD. In Greece, the bill for its enactment has been prepared and the public consultation which was launched ended on the 3rd March 2011. The new bill introduces the provision of religion as forbidden reference for incitement to violence or hatred.

Italy, which has not implemented the FD as well, reports that the reason behind the non-transposition is the reluctance to introduce the crime of negationism (*reato di neazionismo*), since it is regarded as being in conflict with the freedom of expression (Art. 21 of the Italian Constitution).[26] Nevertheless, Italian legislation complies to some extend with the FD. Article 3 of law n. 205/1993 prescribes an aggravated circumstance applied to all crimes carrying a penalty different from life imprisonment, committed for purposes of discrimination or ethnic, national, racial or religious hatred, or committed to facilitate the activities of organisations, associations, movements or groups that have the same purposes. On the other hand, the legislation is not in line with the FD as regards the penalties. Instead of imprisonment for at least between one (1) to three (3) years, a penalty of imprisonment up to one (1) year and six (6) months or a fine up to 6000 Euros is provided.

B) Case-law and fundamental rights challenges

With regard to **case-law**, in Spain the issue of genocide is of major importance. According to the national Constitutional Court (2007), incriminating the denial of genocide is unconstitutional and against the constitutional freedoms of ideology and expression. Furthermore, diffusion of ideas or doctrines justifying genocide cannot be punished unless it involves an indirect incitement to commit genocide or it aims at provoking any sort of hatred based on race, colour, religion or national or ethnic reasons so that it could represent a real danger of creating an atmosphere of violence and hostility.[27] A recent Supreme Court judgement has applied this strict case-law in acquitting some of the members of two Nazi associations, including a bookseller, an editor and two writers, because the marginal diffusion of their ideas was unable to create a real danger.[28] Whilst it is unclear under which FD provision, the case will find justification (Art. 1or 7), it is certain that condoning, grossly trivialising or justifying international crimes, other than genocides, is not criminalized in Spain. New legislation for this offence is urgently demanded in order to counteract its criminality.

In Hungary, the crime of "Agitation against the Community" was intended to be reformed in 2003. However, the national Constitutional Court[29] prohibited the change of the phrase from "incitement to hatred" to "agitate to hatred". According to the report, the Court's reasoning relied to Article 7 of the FD which calls for the respect of the basic constitutional rights, particularly the **freedom of expression**. In specific, the Court ruled that the content of the opinion can not be restricted but its diction can disturb the public peace, if the intensity and the wording cause a "clear and present danger". Therefore, public is disturbed only when

[26] For this reason, Italy has not ratified the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature through computer systems.

27 STC 235/2007, 7.11.2007, FJ 9º. An English translation of the Judgment is available at the CC website (http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/JCC2352007en.aspx).

[28] STS 3386/2011, 11.04.2011. The Supreme Court also ruled that despite the aspirations and rhetoric, any of those associations could not be deemed as a real paramilitary organisation of the kind proscribed under the felony of unlawful association.

[29] 18/2004 (V.25.) Constitutional Court Decision.

the opinion including extreme content is expressed in such a way that it reaches a level where the "passion can be flared in such a high degree for larger mass of people, through that hatred developing and arising can disturb the social order and peace". Thus, a change in the wording from "incitement" to "agitation" would reduce the threshold of criminal capacity to an unreasonable degree.

The Italian Courts sometimes fluctuate in recognising the existence of an aggravating circumstance with reference to two different cases that could be considered identical in terms of facts (public injuries against individuals, because of the skin colour). Nevertheless, the Courts implement strictly the anti-racism legislation. It is noteworthy that the Italian Corte di Cassazione decided the re-opening of cases, notwithstanding they had been closed, affirming their continuation under an official prosecution, because the charges involved racial injuries against immigrants, thereby recognising the existence of the aggravating circumstance set forth in Art. 3 of Law no. 205/1993 to the crime of injury. Attention is also given by the Court to discriminatory acts against Roma people and gypsies.

Several cases are provided by the UK. In specific, according to *Brutus v Cozens30,* "insulting words" is to be given its ordinary meaning; the conduct of the perpetrator needs to be taken into account and assessed regardless of whether somebody was actually resulted.31 In *Materson v Holden,32* the judge stated that the reasonableness test is to apply in order to examine whether words are "insulting". Furthermore, in *R v Rogers,*33 a racial group is defined by reference to race, colour, nationality or ethnic or national origins. The focus is more on the racist motivation of the attacker and less on the racial or ethnic identity of the victim. Thus, the definition is broad: it extends beyond groups defined by colour, race or ethnic origin. In *Attorney General's Reference No 4 of 2004 (Attorney General v D)*34 the example of an immigrant is used to illustrate this broad interpretation: an immigrant is a person who is not British, a characteristic which suffices to render the description of the person specific enough to warrant the constitution of a racial group. With regard to the aggravated circumstances, in the case of *R v Kelly and Donnelly*35 the Court ruled that the sentencing decision should be given in two stages: initially without the racial aggravation and then with the aggravating factor included. However, while the Panel were quite prescriptive on the amount by which each sentence should be increased, the Court of Appeal declined to accept this particular recommendation, preferring to leave it to the discretion of each Court to determine the amount by which the sentence should be increased due to the aggravating factor.

Furthermore, a judgement of the Greek Supreme Court (3/2010) discharged in the last resort the writer of an anti-Semitic book including such references. Moreover, in Portugal, not many cases are reported. There has been on paramount case commissioned by a group of "Skinheads" against citizens in an African origin community in Lisbon. There have are also cases of racism against the Portuguese Roma community, usually more related to discrimination than homicide or physical offences.

As for **fundamental rights challenges**, the freedom of expression is mentioned by several Member States. In Finland, such concerns resulted in non-criminalisation of the pettiest offences related to those obligations. In Greece, the bill currently under adoption is considered as posing many challenges to the legal order, since the criminalisation of prejudiced speech may eventually contravene the constitutional right to freedom of speech

[30] [1973] AC 854.
[31] *R v Parkin and Norman* [1983] QB 92.
[32] [1986] 3 All ER 39.
[33] [2007] UKHL 8.
[34] [2005] EWCA Crim 889.
[35] [2001] 2 Cr App R (S) 341.

(Article 14(1) of the Greek Constitution) the freedoms of expression, of art and of science (Article 16(1)) and the principle of the rule of law. Furthermore, Articles 9(2) and 10(2) of the ECHR on freedom of expression and thought are equally violated. Moreover, the imposition of severe restrictions on the freedom of expression infringes the principle of proportionality (Article 25(1)) while the broad and vague definitions violate the principle of *nullum crimen nulla poena sine lege certa*. Lastly, Article 6 of the bill imposes permanent disqualification from the practice of commercial activities to legal persons who commit such offences. Therefore, the only way for a legal person to continue its activities is to confine itself to a politically correct stance on ethno-racial diversity. Thus, this provision could be regarded as disproportionate, contrary to the right to free development of personality (Art. 5(1) of the Constitution).

The Irish report focuses on the negative impact on the freedom of expression caused by the criminalisation of denial of genocide stating that, for example, Member States may choose to only punish genocide denial when the conduct is carried out in a manner likely to incite to violence or hatred against a particular group or a member of such a group. The denial of genocide appears to be an issue in some other States too. As mentioned above, the Spanish Constitutional Court ruled against the constitutionality of such a provision, while Portugal and the Czech Republic are examples of States which have incriminated the denial of genocide.

Finally, Switzerland has ratified the 1994 UN Convention on Racial Discrimination and has created a new provision[36] prohibiting, *inter alia*, offending a person or group of persons because of race, ethnicity or religion in a way which undermines human dignity. The denial of genocide is imprisonable offence. The Swiss Federal Court has clarified this provision in a number of judgments, taking into account also the freedom of expression. It has been firmly maintained that it should be possible in a democracy, to criticise, as long as the overall objective remains critical and is based on objective reasons.

3. Mutual recognition

I.Overview

No analysis of the evolution of the Area of Freedom, Security and Justice can be complete without a detailed examination of the application of the principle of mutual recognition in the field of criminal justice. Perceived as an antidote to uniform criminal law in Europe, the principle of mutual recognition in the criminal law sphere entails the recognition and execution of national judicial decisions issued throughout the criminal process (from the pre-trial to the post-trial stage) by national authorities in the requested (executing) Member State. Mutual recognition entails thus the construction of an EU-wide system aiming at facilitating the interaction of *national* legal systems and their outcomes, with the authority in the executing Member State being required in principle to recognise and execute a foreign judgment (the outcome of the legal order of another State) without asking too many questions and being able to evoke only limited grounds for refusal- as I have pointed out elsewhere, recognition under these premises constitutes for the executing authority 'a journey into the unknown', entailing the acceptance of a judgment in another legal order as well as its consequences.[37]

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[36] Art. 261Bis StGb.

[37] V. Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU', in *Common Market Law Review*, vol.43, 2006, pp. 1277-1311.

Setting up system of mutual recognition on such terms in an Area of Freedom, Security and Justice characterised by limited harmonisation of criminal justice standards in Member States, inevitably brings up the central question of the extent to which such a system can function on the basis of automaticity, leaving executing authorities with very limited powers to check the legality, detail and human rights implications of the judicial decision sent to them by the issuing authority or (even less so) with powers to check and comment upon the legal system of the issuing Member State. Mutual recognition as originally conceived (and with the Framework Decision on the European Arrest Warrant being its emblematic example) was based on a high degree of automaticity, pre-supposing a high level of trust between authorities in Member States, and containing very few exceptions (grounds of refusal) to recognition and execution, non-compliance with fundamental rights not being one of them. The system has been devised largely with the interests of the State in mind (facilitation of judicial cooperation), with the position of the affected individuals taken into account only incidentally in mutual recognition instruments under the assumption that all EU Member States provide adequate human rights protection.[38]

However, the above conception of mutual recognition has not been able to diffuse tensions between the need to facilitate judicial cooperation in criminal matters on the basis of automaticity and trust on the one hand, and the need to take into account the position of the individual and the protection of fundamental rights on the other. These tensions have arisen repeatedly in the implementation of mutual recognition instruments, and in particular the only such instrument which has been fully implemented, the European Arrest Warrant Framework Decision.[39] The purpose of the questionnaire has been to cast further light on these tensions and how they have been addressed and/or resolved at national level. Key question in this context are: what is the position of fundamental rights in the mutual recognition system? To what extent should executing authorities check the fundamental rights implications of their decision to recognise and execute a foreign judicial decision? To what extent does this check inevitably extend to an assessment of the legal system of the issuing Member State? And, in a system allegedly based on mutual trust, to what extent is the operation of mutual recognition in criminal matters feasible without parallel harmonisation of national criminal procedure rules?

The answers to the questionnaire (which focused largely on the implementation of the Framework Decision on the European Arrest Warrant) do indicate that the protection of fundamental rights has been a key issue in both the implementation of the Framework Decision in national law and the examination of EAW requests by executing authorities of Member States. As regards the first element, a number of Member States have in effect limited automaticity in mutual recognition by introducing in their implementing law an additional ground for refusal to execute a EAW if such execution would lead to a breach of fundamental rights. On the level of judicial interpretation it transpires that judicial authorities have attempted to balance the need to give effect to the requirements of the Framework Decision (by finding, on a number of occasions, that general statements of incompatibility

[38] For a detailed overview of the negotiations of the European Arrest Warrant Framework Decision see H. Nilsson, ''Mutual Trust or Mutual Mistrust?', in G. de Kerchove and A. Weyembergh (eds.), *La Confiance Mutuelle dans l'Espace Pénal Européen/Mutual Trust in the European Criminal Area,* Editions de l'Université de Bruxelles, 2005, pp.29-33.

[39] On the state of play with regard to the implementation of EU mutual recognition instruments see G. van Tiggelen, A. Weyembergh and L. Surano (eds.), *The Future of Mutual Recognition in Criminal Matters*, Éditions de l'Université de Bruxelles, 2009, pp.175-188.

with fundamental rights are not sufficient to justify refusals to surrender) with the need to take seriously into account the position of the individual. Executing authorities *do* examine claims of incompatibility with fundamental rights and have, on a number of occasions, refused to execute European Arrest Warrants on the grounds of incompatibility with fundamental rights, in particular Article 3 ECHR. This approach by executing authorities- limiting automaticity by examining the compatibility of EAWs with fundamental rights and refusing to execute in cases of serious violations (at least as regards Article 3 ECHR)- has been confirmed by the recent judgment of the Court of Justice in *NS*.[40] While the case involved the application of the Dublin Regulation, its key finding that there is no conclusive presumption that fundamental rights are respected in Member States does apply throughout the Area of Freedom, Security and Justice and to the operation of mutual recognition in criminal matters in particular.

On the question of whether some degree of harmonisation is necessary for the efficient operation of mutual recognition, responses can be categorised on two levels. On the general level, there is widespread support for the adoption by the European Union of minimum standards on the rights of the defendant in criminal proceedings- with a number of *Rapporteurs* welcoming the adoption and aims of the Roadmap on procedural rights in criminal proceedings. However, responses appear to be more nuanced when one looks at the detail of the proposed measures. While some Reports state that Member States have already began transposing the Directive on the right to interpretation and translation in criminal proceedings (measure number 1 on the Roadmap), other Reports indicate that national law is already fully compliant with this right. It also appears that agreement on the very important draft Directive on the right to access to a lawyer in criminal proceedings will be far from a straightforward task. The adoption of EU measures in the field may enhance the protection of the individual – especially in the light of the future development and interpretation of these standards by the Court of Justice- but a lot will still depend (as indicated by the *NS* ruling in the field of asylum) on their real, on the ground implementation in Member States.

II.Synthesis

QUESTION 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?

The challenges for the legal systems in implementing the EU *acquis* in the field of mutual recognition are the following:

1) **Protection of fundamental rights**: Gaps in the protection of fundamental rights are stated as a significant problem in many national reports (such as Portugal, Greece, Finland, Ireland, Spain, Croatia and the UK). Many specifics are analysed though with reference to Question 8. However, the Portuguese *Rapporteurs* note the absence of a ground of refusal due to disrespect of human rights by stating that it is settled case-law of the ECtHR that the fact that a State is a party to the ECHR does not preclude the possibility of that State violating human rights in some situations. In Ireland, major concerns are raised with regard to fundamental rights. In particular, on whether the Irish Courts should be prepared for the

[40] Joined cases C-411/10 and C-493/10, *N. S. v Secretary of State for the Home Department and M.E. et al. v Refugee Applications Commission and Minister of Justice, Equality and Law Reform,* judgment of 21.12.2011.

possibility that the process which takes place in Ireland, although impeccable itself may give rise to an infringement of fundamental rights at a later date and in a different jurisdiction. A further question is the extend to which it should be considered whether fundamental rights have already been infringed, perhaps in the making of the foreign judicial decision. Lastly, on a practical level, difficulties of proof arise for Irish Courts when assessing the likelihood that an infringement or rights either has happened or will happen in another Member State. In Greece, with a view to address the fundamental rights concerns, specific procedural rights of the requested person are provided, such as the right to be heard before the President of the Court of Appeals (Art. 17(3) of Law 3251/2004), the Council of the Court of Appeals (Art. 18(2) of the same Law) or the right to be heard before the Supreme Court (Art. 22(1)). Also, in the UK, after the adoption of the Human Rights Act 1998, the UK seeks independent monitoring and evaluation of compliance of the EU acquis with the ECHR and other international human rights instruments. However, Baroness Ashton has underlined that despite the obvious necessity for impartial assessment, there are no concrete proposals.

2) **Differences in the legal systems which creates lack in mutual trust**: Another important challenge in implementing the EU *acquis,* remarked in many reports (such as Bulgaria, Portugal, Czech Republic, the UK, Malta, Ireland and Spain) is the disparity in laws in the Member States. The Czech report notes the almost automatic character of the executions, whereby executing authorities are supposed to recognise and execute foreign judgements and other judicial decisions (in case of financial penalties) while trusting that the underlying foreign procedures and decisions observed the protection of fundamental rights and fulfilled particularly the fair trial requirements. Also, the Finnish report refers to the lack of sufficient information on the system and legislation of the other Member States which can weaken mutual trust. However, the Bulgarian Rapporteurs state that the differences in the legal systems should not be a hindrance in implementing a foreign judicial act, even when for the offence for which extradition of a person is requested, national law provides a lower penalty. That is of course only if full compliance with the rights of the individual is guaranteed. The same position is also supported by the Irish Supreme Court.[41]

Related to Question 9, the Bulgarian, Spanish, Portuguese and Maltese Rapporteurs submit that, in order to enhance mutual trust, further approximation of laws is necessary via harmonisation. To this regard, the Maltese Rapporteurs purport that the harmonisation is necessary at three levels: harmonisation of offences in order to address the abolition of dual criminality; harmonisation of the law giving rise to judgements whose mutual recognition is required; and harmonisation of procedural standards governing the legal situation once a judgement has been recognised and executed. However, the UK supports quite the opposite view; the necessity to adopt minimum standards rather than harmonise the national legislations.

3) **The challenges of the EAW:** The first EU instrument in mutual recognition receives much criticism, mainly due to the **abolition of dual criminality**. Specifically, implementing the FD on the EAW created problems to Bulgaria with regard to the list of crimes for which dual criminality is abolished and the grounds of refusal of a EAW. Some of the crimes did not exist in the Bulgarian legislation while others are broadly formulated, hence a draft implementing law referred to an analogue of the offences of the Bulgarian Penal Code. Subsequently, this problem was resolved as in the text of the law a literal translation of the FD crime was included. An example of the problems encountered with the grounds for refusal was the literal implementation of optional grounds under Article 4(6). The Bulgarian rules did not indicate which body decides that a sentence is carried out in Bulgaria, nor in

41 *Minister for Justice, Equality and Law Reform v. Brennan* [2007] 3 IR 732.

what order. The latter created problems in the application of this ground for refusal, as if he refuses the implementation of the EAW, the Court is not aware of what procedures should initiate to bring the penalty in performance. Amendments were considered as necessary in 2008 and a special procedure was introduced.

Furthermore, the abolition of dual criminality has been contested from the perspective of infringing the legality principle (*nullum crimen, nulla poena sine lege),* especially in relation to offences that have not been harmonised in the EU. This view is shared by Greece, Spain and Finland. In specific, the Finnish report states that the role of this principle and the principle of foreseeability is unclear within the field of mutual recognition and this is evident after the Advocaten voor de Welden decision. If the compliance with the principle is totally left to the Member States, the principles are given a narrow scope. However, the Czech *Rapporteurs* mention that these contests could be, in principle, refused, while pointing to the fact that such instruments which form in the whole EU and each Member State a source of law, shall only provide for the full judicial cooperation and enable the issuing states to effectively enforce their own decisions in relation to the specific offences which must be and surely are well defined in the issuing state. It is also admitted that there might occur rarely situations where the "blind" recognition and execution could be highly problematic and it might be necessary to take advantage of the possibilities in the respective EU legislation and implement properly also for instance the optional grounds for refusal, especially those which refer to the principle of legal certainty.

Moreover, the Portuguese *Rapporteurs* state that the abolition of dual criminality, which is the essence of mutual trust, may foster a repressive "European criminal space" and it may poise practical difficulties to the judicial authorities, since, when executing an EAW, the executing judicial authority is bound to the facts as defined by the issuing judicial authority as well as to the elements of the crime as defined in the issuing Member State legislation.

A thorny issue related to the EAW appears to be the extradition of own nationals. In specific, in Poland, the judgment of the 27th April 2005[42] ruled against the constitutionality of Article 607t § 1, insofar as it permits the surrender of a Polish national to a Member State of the EU. On the 8th September 2006, Article 55 of the Polish Constitution was amended, by adding exceptions to the prohibition. Unfortunately, the new provision sets new barriers to the EAW; the principle of territoriality (only if the act is committed outside the territory of Poland) and the requirement of double criminality. In Slovenia, the constitutional provision prohibiting the extradition of Slovenian nationals to other states was amended prior to the EU accession. The amended text has introduced a concept of surrender as a separate notion, thereby permitting the surrender of Slovenian citizens. In substance, this means that there still exists in principle the constitutional ban on extradition or surrender of own nationals, with the exceptions provided for in an international treaty. The decision of the High Court of Koper[43], which permitted the surrender of a Slovenian citizen to an EU Member State although a criminal procedure against him had been initiated in Slovenia too, is a clear illustration of how the new regulation is applied.[44]

Another important aspect relates to the judicial authorities which must issue the EAW. In Bulgaria, it is stated that this requirement did not create any legal difficulties. This is because in 1997 Bulgaria introduced a judicial decision on extradition and since that time the Ministry of Justice does not participate in any manner in deciding on the admission or denial of admission of extradition. However, in Denmark the designation of the Minister of Justice has been criticised by the Commission as not being in the spirit of the FD. The Danish

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[42] No P 1/05, OTK ZU No. 4/A/2005, item 42. Full text in English available at: http://www.trybunal.gov.pl/eng/summaries/summaries_assets/documents/P_1_05_full_GB.pdf.

[43] Decision 269/2006, 07/06/2006.

[44] See also Question 7 (e.g. the policy of Denmark on this matter).

report explains that according to the FD, it is for the individual Member State to decide who will issue and execute EAW and no conflict with the wording of the FD exists, since the relevant Ministry is a judicial authority under national law.

Additionally, the execution of judgements from other Member States providing for penalties unknown to the Polish Criminal Law is also a problem. In the case of: 1) an EAW issued to execute the penalty of deprivation of liberty against a Polish citizen when he/she did not consent for a surrender and 2) a surrender made on the basis of the EAW issued to prosecute a Polish national under the condition that that person would be returned to Poland after the conclusion of the proceedings the penalty shall be executed pursuant to the Polish law. Originally, Art. 607s § 4 Code of Criminal Procedure stated that the Polish Court which decided on the execution of the penalty or measure imposed by a judicial authority of the issuing State indicated the legal qualification of the act according to Polish law. Yet the length of the penalty imposed should be binding on the court. The case of Jakub T., a Polish citizen, who in 2008 was condemned for double life sentence from the Exeter Crown Court for brutal rape and assault of a 48-year-old woman is of relevance. According to the reservation made in the EAW, he was transferred to Poland to serve the sentence since in Poland the maximal penalty for rape is twelve (12) years and for assault ten (10) years of imprisonment. The Polish legislator decided to amend the Code of Criminal Procedure on the 20th of January 2011 (after the Supreme Court rejected a request of Jakub T. to adjust the punishment) and the new Art. 607s§4 absolved the Court executing the EAW from the necessity to respect the length of the penalty imposed by the court of the other Member State. Now if the penalty exceeds upper limits of threat to the offence in question, the Court determines the penalty according to Polish law, as the maximum penalty available for that offence.

4) **The challenges of European Evidence Warrant:** The FD on the European Evidence Warrant raised many difficulties in Bulgaria. First of all, there was the problem of the nature of the act by which the FD would be transposed. Before Bulgaria's membership in the EU, international criminal cooperation was regulated by the Criminal Procedure Code and no separate laws existed. The implementation of the FD on the EAW in a separate law created only this form of cooperation, thus creating the problem of whether this FD should be implemented uniquely as well. Furthermore, the settlement of the procedure by which the evidence can be secured was also problematic, since the Bulgarian legislation on criminal trials did not have equivalent rules with the ones in the FD. After some hesitation, it was decided that execution of a warrant to secure evidence would be made in accordance with the rules of taking evidence, applicable to international legal assistance. Furthermore, in the UK the EU *acquis* on the admissibility of evidence seems to have raised many objections; the European Scrutiny Committee has discussed the issue of admissibility as falling under the principle of subsidiarity and thus should be dealt with caution.

5) **Other challenges:** Additionally, the Italian Rapporteurs refer to the **ambiguous drafting** (also noted by the Dutch Rapporteurs)**,** the **lack of concrete obligations of the Framework Decisions** and the **limited expertise of Member States' national Legislators,** challenges which have been acknowledged by the Commission.[45] Despite the lack of trust between the Member States themselves, the report states that the poor performance of the EU instruments in Italy is caused by the lack of trust towards EU Criminal Law.

Furthermore, the UK Rapporteurs underline that the most considerable problem for the UK is the fragmented participation in selected aspects of EU criminal policy. In cases C-

[45] Commission staff working paper, *Situation in the different sectors. Accompanying the document Report from the Commission 28th annual report on monitoring the application of EU law (2010)*, SEC(2011) 1093 final, 462.

176/03 and C-44/05 the Court has held that the UK can opt out only if Article 83(2) supersedes the Common Law power established by these judgements.

Also, the Estonian report refers to the **speed of the execution of the requests** and the **expectation that "in general" the request will be executed without any additional requests for information** on the case. The Slovenian Rapporteurs focus on the **lack of uniform regulation of admissibility of evidence**, especially regarding the privilege against self incrimination and encroachment upon the right to privacy. They also mention as a hindrance the **different perceptions of the function of a public prosecutor** in criminal proceedings, noticeable in the official translations of Art. 82 TFEU. While the Slovenian and German translations contain the words "judgements and judicial decisions", which exclude the public prosecutor, other translations do not. In Slovenia (and in other Member States), the public prosecutor is a party in the proceedings and not a quasi-judicial agency. This raises the issue of how a Member State, which treats a public prosecutor as a party to the proceedings, can automatically accept measures ordered by a public prosecutor with greater competence from another Member State. Interpretation issues are reported in Czech Republic too, such as while applying and interpreting the term or phrase: *"opportunity to have a case tried by a court having jurisdiction in particular in criminal matters"* from the FD on the application of the principle of mutual recognition to financial penalties. The concerns on the issue may lead to preliminary ruling before the CJEU (case of recognition and enforcement of an Austrian fine imposed for a traffic offence). Lastly, the Croatian *Rapporteurs* mention terminological insufficiencies as far as the list of offences is concerned. The inadequate translation is evident since the list contains the offence of fraud *(prijevara)* twice, as translation for fraud and swindling. The examples of mistaken terminology is the use of term "punishable act" *(kažnija djela)* for "criminal offence" and the term "instrument" for the issuing judicial authority decision.

The Czech report also refers to the possibility of the national Courts to intervene in case the legislator fails in the proper implementation. In such cases, the national Courts should be able to intervene (as a last resort) and perhaps strike down the respective national legislation or come up with a proper reading in conformity with the constitutional and European legislation.

Moreover, the Dutch report provides further challenges for the Member States in the implementation of the EU *acquis* on mutual recognition. The **sheer number of the Framework Decisions** (nine decisions adopted from 2002 to 2009) and **the method of implementation** create considerable problems as the Framework Decisions leave room for (more) flexibility. Another challenge relates to the fact that not only implementation, but also **organisational and training measures** are required. For example, with regard to the EAW, the Dutch authorities had to design a surrender procedure within the time limits of Article 17 of the FD. Under the previous regime, an extradition procedure could last up to nine months, but in order to comply with Article 17, only one hearing of the case was allowed, only one Court was held competent, the District Court of Amsterdam and a special appeal procedure at the Supreme Court was introduced. In the Netherlands, another issue was the **balance between legalistic techniques and practical needs**. For instance, the FD 2005/214 on financial penalties was implemented in a separate act and all other acts would be included in this act. This solution created problems in the implementation of the FD 2006/783 on confiscation orders. Thus, FD 2008/909 on custodial sanctions and FD 2008/947 on alternative sanctions were regulated in a separate act. Lastly, the **lack of transitional provisions** in the EU legal instruments is also a thorny issue, especially when a Member State has implemented an EU FD, but another has not. In the Netherlands, the problem has been overcome, by including transitional provisions in the Surrender Act.

Finally, the Hungarian Report focuses on the *ne bis in idem* principle when the legal authorities are practised in parallel in the Member States. The CJEU does not usually distinguish in that respect that the case has been terminated with a final arbitral decision due to reasons of substantive legal or procedural obstacles, unless the content of the decision is contrary to the objectives of the EU Treaty. Thus, if later criminal proceedings are initiated in another Member State against an accused who has been acquitted due to the absence of evidence, if the *ne bis in idem principle* is not respected, he can be charged at a later date.

QUESTION 7: What are the limits of mutual trust in the execution of EAWs?

With the exception of Finland, where the national Rapporteur stated that the lack of information and knowledge of other Member States' legal systems is the main deficit, the national reports have answered the question by referring to the mandatory and optional grounds of refusal of a European Arrest Warrant and their use by the national Courts.

A) The grounds for refusal

In Bulgaria the mandatory grounds for refusal are the exact mentioned in the FD with the same elements.[46] With regard to the *ne bis in idem* principle, it is stated that the Magistrates, in order to answer the question "when there is a same offence?", follow the interpretation of the CJEU. Also, the age under which a EAW shall not be executed is the age of fourteen (14) years old. The optional grounds for refusal are the following: 1) prosecution of a person in Bulgaria for the same act (Article 4(2)): the scope of this ground is narrower than the one prescribed in the FD since the mere fact of existence of criminal proceedings is not enough to justify the refusal of extradition (the person must be accused and charged); 2) termination of criminal proceedings for the offence for which the EAW is issued, prior to its receiving: This optional ground implements the second alternative of Article 4(3) of the FD ("to halt proceedings"). It does not apply in cases of refusal of the prosecutor to institute criminal proceedings as the Bulgarian legislator considered that he should not benefit from the refusal of the Bulgarian judicial authority to initiate criminal proceedings for the same offence; 3) limitation of prosecution or execution of sentence (Article 4(4)); 4) the *ne bis in idem* principle with regard to a judgment from a third country (Article 4(5)); 5) nationality and residence as a ground for refusal. The Koslowski judgment was useful for the interpretation of "those living" in Bulgaria; 6) territoriality clauses: these grounds are implementing the respective ones in the FD. They have been applied very seldom by the Bulgarian Courts. In general, most judges believe that the clauses are incompatible with the territoriality principle of mutual recognition and unjustified, allowing people to abuse their own signal that their crime was carried out in Bulgaria. A direct contact between the authorities and coordination carried out perhaps by Eurojust or EJN is considered as necessary in order to avoid controversy.; 7) A new law LLEAW Amending OJ.55/19.07.2011, in force on the 23th July 2011 added another optional ground related to trials *in absentia*. 2009/299/JHA FD required a change in national laws under which in cases of conviction in absentia it is no longer necessary to require a guarantee for retrial, it is rather an optional ground for refusal.

In Croatia, where no discretion in implementation existed due to the accession process of the State, the mandatory and the optional grounds for refusal were taken over almost *verbatim* and no additional grounds for refusal exist, such as grounds related to breach of fundamental rights (human rights or public order clauses).

[46] Art. 39 items 1-3 of LEEAW.

In the Czech Republic, amnesty, the *ne bis in idem* principle and the limitation period (Article 4(4) of the FD) are stated namely as mandatory grounds for refusal. Furthermore, it is mentioned that the *lis pendens* (pending lawsuit) also consists a mandatory ground. Is is important to note that the Czech Constitutional Court in its judgment on the conformity of the legislation implementing the EAW FD has provided some guidelines regarding the limits of mutual trust. The Court emphasised that Section 377 of the Criminal Procedure Code, which shall be understood as a kind of safeguard protecting the Czech citizens from any violation of their fundamental rights, might serve as the basis for a refusal of execution of a EAW, even though there is no express refusal ground related to the fundamental rights. With regard to the territoriality clauses, the Court ruled that there should be a possibility to refuse the execution of a EAW for offences committed within the territory of the Czech Republic and in case of "distance" crimes there might also be such an obligation, if such acts, committed within the Czech territory, are not criminal in the Czech Republic or even enjoy the constitutional protection. Further to the aforementioned ground for refusal created by case-law, the Czech Courts shall refuse to execute a EAW when the double criminality requirement is not fulfilled for not listed offences, fulfilling the criteria of the length of the sentence. Finally, Article 5(3) of the FD according to which citizens of a Member State or the permanent residents, shall not be surrendered without their consent to another Member State for the purpose of serving the sentence imposed on them (and those surrendered for the purpose of criminal proceedings shall be guaranteed the right to return back to execute their sentence at home) is also a mandatory ground for refusal. Moreover, in relation to the Czech citizens, the rule of reciprocity shall apply within the surrender procedure. However, such a rule, seemingly going beyond the EAW FD, shall be abandoned in a new law on an international judicial cooperation in criminal matters. Finally, there are no cases of refusal of execution of EAW on the grounds of fundamental rights or proportionality known to the author of this report.

In Denmark, for any offence not listed in the FD, the double criminality principle remains a requirement. However, in accordance with the European 1957 Convention on Extradition, the maximum punishment may now be as low as one (1) year of imprisonment under the law of the issuing State, a threshold Danish negotiators were reluctant to accept. Also, there is no longer a punishment threshold in domestic law. Furthermore, the extradition of own nationals was not possible until 2002 (however, it was not a constitutional ban). As part of the anti-terrorism bill, now it is possible to surrender a Danish citizen outside the Nordic countries, although a condition regarding re-transferral for serving the sentence in Denmark may be stipulated. With regard to political crimes, in the past extradition was not permitted. However, many amendments have been introduced over the years. At first, the restriction was limited to Danish nationals. After the EU 1996 Convention, offences covered by the 1977 Convention on terrorism were removed from the remit of the political offence exception. The two anti-terrorism packages of 2002 introduced further modifications. Also, extradition shall be refused if the conduct is a lawful exercise of rights or freedoms under Danish Law. The executing authority has, thus, sufficient discretionary power and may refuse to execute a EAW by reference to fundamental rights, if a case merely refers to passive participation in a criminal organisation, a crime not prescribed in such general terms in Denmark. Besides, if an individual runs the risk of being subjected to torture or to other inhuman or degrading treatment, then extradition shall be refused. Finally, other humanitarian reasons do not have any more a prominent position and now they may only postpone temporarily the extradition.

In Estonia, the mandatory grounds for refusal match the ones in the FD. However, the optional ground according to which, if an EAW has been issued against an Estonian citizen for the execution of imprisonment and the person applies for an enforcement of the punishment in Estonia, then the EAW shall be refused, is added to the mandatory grounds for

refusal. No grounds referring to fundamental rights or proportionality are foreseen and no use of territoriality clauses in practice has occurred.

In Greece, the mandatory grounds for refusal have been transposed faithfully in the Greek legislation.[47] In addition, some of the optional grounds for refusal have been converted into mandatory ones. Therefore, an EAW shall be refused if the criminal prosecution or punishment of the requested person is statute-barred and the act falls within the jurisdiction of Greece under Greek Law (Article 4(4)).[48] Furthermore, if the EAW has been issued for the purposes of execution of a custodial sentence or detention order against a Greek national and Greece undertakes the responsibility to execute the sentence or detention, then the EAW shall be also refused (Art. 4(6)). The question of whether the act should be punishable according to the Greek legislation is highly controversial due to the fact that the enforcement of sentences for acts which are not punishable according to the Greek Law infringes the Greek public order. However, this interpretation seems to reintroduce the double criminality requirement and therefore, it cannot be acceptable with respect to those offences to which the double criminality test does not apply. Moreover, Article 4(7) is also classified as a mandatory ground. Although the FD does not seem to limit the meaning of an "offence" only to acts which are considered as offences in the executing Member State, the Greek legal theory, considering the constitutional implications of the abolition of the dual criminality requirement, makes a narrow interpretation of this Article so as to exclude any acts which are not considered to be offences according to the Greek legislation. Other views argue that in any case the dual criminality requirement should be applied to acts committed in whole or partly in Greece. Also, another mandatory ground refers to a case where a Greek national[49] is prosecuted in Greece for the same act on which the EAW is based. In the event that the subject of the EAW is not prosecuted in Greece, then surrender is subject to the condition that the person, after being heard, is returned to Greece in order to serve there the custodial sentence or detention order. This ground combines Article 4(2) and Article 5(3) of the FD. The exact meaning of "prosecution" is disputed in Greece. Thus, Greek jurisprudence applies the provisions of the Greek Code on Criminal Procedure in order to interpret the term "prosecution" and complaints and preliminary investigations are not included, hence the Greek judicial authorities may not refuse to execute an EAW. However, taking into account that the Greek legislator wishes to allow the surrender of Greek citizens only in exceptional cases, it has been argued that these situations also fall under the term "prosecution". Finally, Recital 12 of the FD referring to individuals against whom a EAW has been issued for the purpose of prosecuting or punishing a person on the grounds of their sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation is also a mandatory ground for refusal. It is noteworthy that the implementing Article 11(e) of Law 3251/2004 goes beyond the Recital by extending protection to persons being prosecuted for "actions to defend liberty" in order to conform with the Constitution. Nevertheless, the phrase "that person's position may be prejudiced for any of these reasons" is not included.

In Hungary, for the listed crimes the execution of a EAW shall not be refused and the exceptions are defined in a very narrow circle which hardly occurs in practice. If the legal assistance violates public order or fundamental rights, the fulfilment of legal assistance is possible only with the permission of the Hungarian Republic. In cases of military or political offences the extradition takes place, provided that the statements of facts contains the wilful homicide. Furthermore, Article 5(3) of the FD is again classified as a mandatory ground for refusal. If the guarantee that the Hungarian citizen or permanent resident will return to serve his sentence in Hungary is not offered, the EAW shall be refused.

[47] Art. 11 of Law 3251/2004.
[48] Art. 11(d) of the aforementioned Law.
[49] Not just any citizen of the EU as envisaged in the FD.

The Irish European Arrest Warrant Act 2003 includes all the mandatory and optional grounds for refusal except for the ground provided in Article 4(6) of the FD. However, the Irish Courts may refuse to execute a EAW on grounds other than the ones mentioned in the FD. As an example, it is mentioned that surrender will not be ordered where same would contravene a provision of the Irish Constitution or would be incompatible with Ireland's obligations under the Convention. The 2003 Act contains an explicit mandatory ground for refusal referring to the breach of fundamental rights. Nevertheless, the effect of this provision is diluted by the application of mutual trust and the express presumptions provided by the Act. The Irish Supreme Court has taken the view that an anticipated breach of the due process rights guaranteed by the Irish Constitution in the course of such a trial does not *per se* mandate a refusal to surrender, as trial procedures differ amongst the Member States. In this context, the Supreme Court has emphasised the distinction between due process in the course of proceedings in the Irish courts and in the course of any trial which might take place in the Issuing State. A requested person is entitled to the procedural rights guaranteed by the Irish Constitution in the case of the former, but not in the case of the latter. However, the Irish Courts show their concern for the fundamental rights: although the procedure in such a trial will not be required to correspond exactly to Irish trial procedure, "egregious circumstances, such as a clearly established and fundamental defect in the system of justice of a requesting state" [50] will preclude surrender. However, the Supreme Court takes the view that the principle of mutual trust "encompasses the system of trial in the issuing Member State".[51] Accordingly, matters giving rise to concern for the requested person's right to a fair trial are generally to be dealt with by the trial court in the Issuing State, and it will be presumed that the right to a fair trial will be vindicated by the criminal justice system of that state. Thus, objections to surrender based on issues such as delay, adverse pre-trial publicity, and discrimination within the Issuing State's criminal justice system have generally been given short shrift by the Irish courts. Requested persons have found it difficult to demonstrate that they will not face a fair trial. With regard to inhuman or degrading treatment the 2003 Act provides for an absolute bar to surrender and no examination of proportionality will be appropriate. The issue of proportionality has been raised in a number of cases with respect to minor offences. However, so long as the minimum gravity requirements of the Framework Decision and the 2003 Act are satisfied, triviality *per se* cannot be a ground for refusal, and so proportionality cannot come into play in this context. However, this issue does play a part in the consideration of fundamental rights, such as those arising under Art. 8 ECHR, where proportionality will be an important factor. A requested person faces considerable difficulties in convincing the courts that surrender in their case would be disproportionate. This is particularly so because an analogy can be drawn with domestic criminal prosecutions, which of course result in considerable interference with fundamental rights, but are nonetheless almost always justified by the exigencies of the common good. However, the High Court refused to surrender in *Minister for Justice, Equality and Law Reform v. Gorman*[52] expressly on the basis that to surrender the requested person would result in a disproportionate interference with his right to respect for his family life under Art. 8 ECHR. Although the issue has been raised in several cases in the wake of the Gorman decision, no other requested person has successfully resisted surrender on proportionality grounds since then.

Article 4(6) of the FD has not been implemented in Ireland and thus this is not a possibility for a requested person in Ireland. Article 4(7)(a) has also not been given effect. Section 44 of the 2003 Act corresponds with Article 4(7)(b) and it requires reciprocity where an offence has been committed outside the territory of the Issuing State: in such

[50] *Minister for Justice, Equality and Law Reform v. Brennan* [2007] 3 IR 732, at 744, per Murray CJ.
[51] *Minister for Justice, Equality and Law Reform v. Stapleton* [2008] 1 IR 669, at 689, per Fennelly J.
[52] [2010] 3 IR 583.

circumstances, the offence must be one which, if committed outside of Ireland, would nonetheless be punishable in Ireland. A very unusual set of circumstances arose in *Minister for Justice, Equality and Law Reform v. Bailey*[53], where the French authorities were seeking from Ireland the surrender of a British citizen for prosecution in relation to the murder of a French citizen, where the said murder took place in Ireland. The Irish prosecuting authorities had already investigated the murder and had decided not to prosecute the requested person. The requested person relied on the extraterritoriality provisions of Section 44 of the 2003 Act in resisting his surrender, submitting that an equivalent prosecution could only take place in Ireland if the accused was an Irish citizen, and thus that the reciprocity requirement was not satisfied. The High Court rejected this argument, finding that Section 44 only applied where the offence was committed in a third country (i.e. neither the Issuing nor the Executing State). Although Section 44 was not clear in this regard, the legislature's choice not to transpose Article 4(7)(a) into Irish law clearly implied that Section 44 should not apply where the offence was committed in Ireland.

The Italian legislation, apart from the three mandatory grounds for refusal (amnesty, minors, *ne bis in idem*) contains several other cases in which the execution of a EAW shall or may be denied. In particular, a) fundamental rights concerns include, for instance, the risk of death penalty or inhuman and degrading treatment in the issuing State, contrast to any form of discrimination, the protection of freedom of association and thought; b) criminal procedure issues entail the right to fair trial, to know the grounds on which the detention order is based and the presence of a clear deadline for precautionary custody; c) subjective grounds, meaning the individual sphere of the person the EAW is addressed to such as pregnant women, mothers of children up to three (3) years old, non-chargeable persons, citizens and foreign residents, when a custodial order or a security measure has to be executed; d) substantive law rules: these grounds refer to the prescription of the offence, *force majeure,* necessity, duress, consent, exercise of a right and fulfilment of a duty, political offences. Furthermore, the implementing Law n. 69/2005 (Article 18 v) provides for a safeguard clause, according to which the Court of Appeal denies the execution if the request to surrender a person breaches fundamental principles of the Italian legal order.

The Italian *Rapporteurs* mention that not all the grounds for refusal are applied by the Courts. For example, consent, *force majeure*, necessity, duress, immunities, amnesty, prescription, freedom of association and thought, inhuman and degrading treatment and the pre-existence of a final decision in another Member State have been raised in numerous cases before the Court of Appeal, but have never discussed before the Supreme Court. Surrender has been denied to protect maternity, but this was challenged before the Constitutional Court because this favourable regime did not apply to fathers as well. Nonetheless, the Supreme Court affirmed its compatibility with the Constitution mentioning that this difference is justified by the objective peculiarity of the child-mother relationship.[54] On the contrary, the non-discrimination clause of Article 18 *a*) has been narrowly interpreted. The Courts usually require objective evidence of the prejudice suffered while the Supreme Court interprets strictly the notion of political offence, thereby assuming crimes as non-political unless there is clear adverse evidence[55]. As to fundamental rights, the Italian Courts constantly take into consideration Art. 6 ECHR, as interpreted by the ECtHR. In particular, the Supreme Court stated that the arrest warrant has to be executed when the requesting Member State respects the right to a fair trial, even if the degree of such protection is lower than the level ensured in the Italian legal order.[56] This principle was applied in a significant number of cases of *in*

[53] [2011] IEHC 177.
[54] Corte Cass., Sez. *F, Zvenca*, n. 35286/2998; Sez. VI, *Meskaoui,* n. 23727/2008.
[55] Supreme Court, Sez. VI, *Seven*, n. 23727/2008.
[56] Corte Cass., Sez. VI, *Melina*, n. 17632/2007.

absentia decisions. Italian Courts execute the EAW as far as the requesting State offers adequate judicial remedies to the lack of discussion and cross-examination, such as the possibility to appeal[57], to ask for revision of the Judgement[58] or to start a new phase of the proceedings[59]. Another important case-law regards the absence of limits to the duration of precautionary detention, provided for by Article 18 letter *e*) L. n. 69/2005. The Supreme Court has been often satisfied with the other Member States' procedural rules, whether they opted for fixed maximum deadlines or more complex systems of subsequent intermediate periods, allowing for extensions under jurisdictional scrutiny. As for the right to a reasoned judicial decision, the Supreme Court usually considers the concept of motivation traditionally accepted in the Member State. Therefore, the mere allegation of specific factual grounds is a sufficient basis for a surrender request.[60] On the other hand, the implementing law does not impose the Member State to indicate the specific urgent grounds legitimizing the precautionary detention order the EAW is based on.[61] Finally, proportionality concerns have sometimes been indirectly raised in relation to the surrender of Italian citizens or residents sentenced to custody or security measures. The refusal is expressly subordinated to the execution of the custodial order in Italy and to the existence of effective and deep roots in the national social environment. To this respect, it is mainly on the judicial authority to decide whether the sentence could be better served in Italy, having regard to the degree of integration or the re-socialization opportunities. Evidence of the individual's social connections, such as job or family, can be decisive, as well as the length of the residence period.[62]

As far as territoriality clauses are concerned, the Italian legislator has limited its applicability to cases where the requested person is an Italian national excluding it for non-nationals that reside or stay in Italy (Art. 18 letter *r* of Law n. 69/2005). On the 24th of June 2010[63], the Constitutional Court intervened on the matter, declaring its incompatibility with Art. 11 and 117 of the Constitution and with the principle of non-discrimination. The Court highlighted that using the criterion of nationality to determine the applicability of this ground of refusal was disproportionate and, ultimately, contrary to the *ratio* of Article 4(6) of the EAW FD. It is worth noting that the decision to raise the issue in front of the Constitutional Court came from the Supreme Court, which, until that moment, had repeatedly endorsed the legitimacy of the choice made by the Italian Legislator. Problems arose also with regard to the interpretation of the second part of the clause, specifically on the latitude of the discretionary power enjoyed by the Court of Appeal in making a decision. The Supreme Court ruled that the provision grants to the Court of Appeal only a limited discretionary space and that, before taking the decision to refuse the execution of the EAW, it has to obtain the consent of the interested person. As for Art. 4(7) problems have emerged regarding the determination of whether the offence has been committed in the Italian territory. In a decision adopted on the 15th of September 2011, the Supreme Court confirmed that the clause has to be interpreted in a restrictive manner and, hence, it can be applied only when at least part of the criminal act has taken place in Italy. Accordingly, the Supreme Court ruled out the possibility of denying the execution of the EAW concerning a person that had been accused

[57] Corte Cass., Sez. VI, *Tavano*, n. 7812/2008; Sez. VI, *Finotto*, n. 7813/2008.
[58] Corte Cass., Sez. VI, *Bolun*, n. 5909/2007, regarding Hungary, and Sez. VI, *Salkanovic*, n. 3927/2008, regarding France.
[59] Corte Cass., Sez. F, *D'Onorio*, n. 33327/2007, concerning Belgium.
[60] Corte Cass., Sez. VI, *Chaoui*, n. 45668/2010.
[61] Corte Cass., Sez. VI, *Liberati*, n. 22223/2010.
[62] Corte Cass., Sez. VI, *Foresta*, n. 10544/2007; Sez. F, *D'Onorio*, n. 33327/2007; Sez. VI, *Melina*, n. 17632/2007. Corte Cass., Sez. VI, n. 7813/2008.
[63] Corte Costituzionale, n. 227/2010.

of theft in Germany and that had committed only preparatory acts in Italy.[64] In the same vein, the Court clarified that it is only the offence for which the EAW has been issued that has to be taken into account in determining the application of the clause and not other related offences. In this regard, the Supreme Court excluded the applicability of the clause in the case of an EAW concerning the offence of recruitment of women into prostitution only because the requested person had been subsequently charged in Italy for the related offence of exploitation of prostitution[65.] Lastly, the Court affirmed that the clause can be applied only where there is sufficient evidence that the offence has been committed on the Italian territory, so that prosecuting authorities could already initiate an action against the requested person. Therefore, the mere possibility that those acts may represent an offence under Italian Criminal Law has not been considered as a valid ground for denying the execution of the EAW[66.]

Malta provides for the following grounds for refusal: 1) the *ne bis in idem* principle; 2) prescription or lapse of time; 3) the person's age; 4) speciality; 5) the person's earlier extradition to Malta from another schedule country; 6) the person's extradition to Malta from a country other than the schedule country; 7) amnesty and 8) death penalty. With regard to the time-barred prosecutions, it is stated that this is estimated according to both Laws, the issuing State's and the Maltese.

The Dutch Rapporteurs draw the attention to the following points: First of all, there is a ground for refusal based on human rights[67] and this provision has been criticised by the Commission in its report of 2007 as complicating surrender.[68] In six cases claims for breaches of fundamental rights have resulted in refusal of the requested surrender. However, claims about bad prison conditions though examined in depth, have not led to refusal of a requested surrender. Furthermore, Art. 26(4) of the Surrender Act obliges the Court (the District Court of Amsterdam is the competent Court) to examine a claim of innocence. If his innocence is irrefutably proven then the Court must refuse to execute the EAW. Only in two cases this situation has occurred.[69] Moreover, a balanced territoriality clause has been included as an optional ground. A refusal on the basis of territoriality is possible, however, the public prosecutor may ask the Court not to apply this ground. Where the public prosecutor makes such a request to the Court, the District Court shall review whether the request is unreasonable. This possibility for judicial review has been interpreted restrictively. The Court has held that it may not overrule the prosecutor's request on the basis of humanitarian grounds.[70] In the last six (6) years, surrender has been refused in seven cases on the ground of territoriality. In contrast, the Netherlands has surrendered 427 Dutch nationals, although in most cases the offences were partly committed in the Dutch territory, proving a flexible approach on territoriality. As for the principle of proportionality, after several years of application, it has become an issue whether surrender shall be applied in relation to minor offences like theft of a videotape or breaking a window. Another issue is whether a EAW should be issued for the sole purpose to hear the defendant in order to take a decision whether to prosecute him or not.

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[64] Corte Cass., Sez. F, *P.U. e V.C.*, n. 34352/2011.

65 Corte Cass., Sez. F*, G.D.O.*, n. 35285/2008.

66 Corte Cass., Sez. VI, *H.F.N.*, n. 7580/2011.

67 Art. 11 of the Surrender Act.

68 However, the report of 2011 emphasises on the obligation to respect human rights and refrain from surrender in cases where unacceptable detention conditions in the requesting Member State violate fundamental rights.

69 The necessity of this provision is proven in a Belgian case in which a person was surrendered to Italy, even though it was clear that this was a case of a mistaken identity. The person was released shortly after his surrender.

70 Supreme Court, 28/11/2006, NJ 2007, nrs. 487-9.

The Polish report provides us a thorough table of the grounds of refusal and the correspondence with the grounds on the FD. Therefore, Article 607p of the Polish Code of Criminal Procedure provides for the following mandatory grounds: a) the three mandatory grounds of the FD (the *ne bis in idem* principle concerns judgments from both a EU Member State and a third country, thus incorporating both the mandatory and the optional ground of the FD); b) the double criminality and territoriality clause of Article 4(7), which however apply only to Polish nationals; c) the rule of Article 4(6) of the FD which applies to Polish nationals or residents; d) the infringement of freedom, human and citizen rights, prescribed in the Recital 12 of the FD; e) the offence was committed without violence for political reasons, mentioned in the Preamble and f) an additional ground not in the FD, where in relation to the prosecuted person a final and valid decision on surrender to another EU Member State has been issued. The optional grounds are the following: a) the double criminality rule applies only to non-nationals (for Polish citizens it is an obligatory ground); b) Art. 4(2), 4(3) and 4(4) are included as optional grounds for refusal. However, in the implementation Art. 4(4) is narrowed, since the grounds are limited to the case of time limit; c) a territoriality clause of Art. 4(7)(a) for offences committed wholly or partially in the territory of the Republic of Poland or on board of a Polish ship or aircraft (but it only applies to non nationals, since for Polish nationals is an obligatory ground); d) an additional ground for cases where in the country of the EAW's issuance the offence is subject to the penalty of life imprisonment or other penal measure resulting in the deprivation of liberty without the possibility of applying for an earlier release and e) if the persona did not appear in person at the trial resulting in the decision (with the exception of Art. 4(2) and 4(3)). Interestingly, the main grounds for refusal used related to the territoriality clauses of Art. 4(6) and 4(7)(a), the violation of human rights and the existence of parallel prosecutions in Poland.

In Portugal, the mandatory grounds for refusal are the same as in the FD with the addition of two more: a) the offence is punishable by death penalty or any other penalty resulting in irreversible damage to physical integrity; b) the EAW was based on political motives/persecution. The optional grounds have been transposed faithfully in the Portuguese legislation. As for case-law, there are hardly any rulings rejecting extradition on the grounds of fundamental rights or proportionality concerns and the Portuguese Courts would seldom find the issuing Member States as not complying with the EU principles. Furthermore, there appears to be a confusion between fundamental rights and humanitarian reasons. The most frequently used ground is the territoriality clause (Article 4(6) predominantly in cases regarding Portuguese nationals.

In Slovenia, besides the mandatory grounds for refusal enshrined in Article 3 of the EAW FD, the optional grounds of Article 4 paras. 1,2,4 and 5 are upgraded to mandatory ones. With regard to the *ne bis in idem* principle, the Slovenian *Rapporteurs* note that as opposed to the FD which refers to “same acts”, the national legislation reads “criminal offence”. Furthermore, the ground according to which a EAW shall be refused if criminal proceedings have been initiated is slightly different than Article 4(2) of the FD, since there is a further requirement that the requested person has committed a criminal offence against the Republic of Slovenia or against a Slovenian national when there is no guarantee for enforcement of a civil party application in Criminal Court. Three other mandatory grounds for refusal are envisaged: 1) the issuing authority does not give guarantees; 2) there are reasonable grounds that the EAW was issued to prosecute a person on grounds of sex, race, religion, ethnic origin, citizenship, language, political conviction or sex orientation, or if his/her position would worsen substantially for these reasons (Recital 12 of the FD); 3) the criminal prosecution was suspended, or indictment was finally denied or a criminal complaint was dismissed by a public prosecutor on the grounds that the suspected person fulfilled the agreement in the settlement procedure or because the suspected person fulfilled obligations

determined by a public prosecutor to diminish or to abolish detrimental effects of a criminal conduct. Dismissal of a criminal complaint by a public prosecutor corresponds to the *ne bis in idem* principle on the EU level and the Gözütok and Brügge judgment. It can be argued that in other parts of this ground the Slovenian definition of the *ne bis in idem* principle is broader than a definition so far accepted by the CJEU. As for the optional grounds Article 4(2) of the FD is again implemented with a different wording; when the criminal proceedings are in progress (here the requirement for a crime against the State or a citizen is absent). Also, another optional ground refers to the case where the request for investigation was finally denied because a reasonable cause for suspicion that a requested person committed the criminal offence for which the EAW was issued, was not established and the public prosecutor declares a new proposal for the institution of criminal proceedings. The three last grounds relate to the territoriality clauses of Article 4(6) and (7). Slovenian legislation has added a new requirement: the declaration of a requested person that he/she would like to serve his/her sentence in Slovenia. Finally, no cases where the Courts have refused to execute a EAW exist.

In Spain, the FD on the EAW was speedily transposed and the wording was followed carefully introducing only minor changes (for example, the list of offences was kept the same, even though some of them do not match with the Spanish Criminal Law offences). No additional grounds for refusal were added and not even all three cases foreseen in Article 5 of the FD were implemented. The optional grounds fore refusal have been interpreted as entirely falling with the judicial discretion, even when the conditions are met. This approach is in some ways endorsed by the Constitutional Court which has rules that the criminal judges must thoroughly state the reasons why a claim has not been heard. The territoriality clauses have not applied significantly except for some cases of drug trafficking. It is noteworthy that the provision of Law 3/2003 implementing Article 4(6) of the FD mentions only Spanish citizens and does not include residents or individuals staying in Spain. Before the Wolzenburg Judgment the possibility for residents to refuse surrender and server their sentence in Spain was not clear.

Furthermore, the proportionality principle has been of major importance. First of all, the principle ought to prevent judicial authorities from issuing it in minor cases. Secondly, proportionality has been alleged with regard to the penalties imposed in the issuing State (Art. 49 of the Charter). Thus, this type of proportionality was considered by a German Court regarding a EAW issued by Spain for a drug offence although the claim was not actually heard. The National High Court, which is competent for these cases, has ruled out the possibility of comparing penalties in Spain.

Finally, the most controversial question relates to the sentences in absentia. In Spain, judgments in absentia for serious crimes is prohibited. Since the implementing Law was silent on this issue, the Constitutional Court in its judgment 177/2006 established that extradition of an individual sentenced in absentia for a serious offence if he/she is not able to contest the conviction is prohibited with regard to a EAW. The adoption of the 2009/299/JHA FD has led the Court to refer (Order 86/2011 of the 9th June 2011) three questions to the CJEU: a) whether Article 4a(1) of FD 2002/584 should be interpreted as precluding its practice of conditioning the surrender to the possibility of a retrial; b) whether Article 4a(1) is compatible with fundamental rights as enshrined in Articles 47 and 48 of the EU Charter, and c) whether Article 53 of the Charter would anyway allow the Constitutional Court to avoid that restrictive interpretation and to maintain its case-law. Finally, it is important to note that both the Constitutional Court and the National High Court have dismissed any claim of a fundamental rights violation against another Member State based on general remarks.

The UK report refers to Part 1 of the Extradition Act 2003. There is no distinction of mandatory and optional grounds in the UK legislation. The grounds for refusals corresponding to the cases mentioned in the FD are the following: the double criminality rule (Art. 4(1)), the time barred prosecution (Art. 4(4)) and the age of the requested person (Art. 3(3)). The ss. 16-19 include grounds of hostage-taking considerations speciality, the person's earlier extradition to the UK from another category 1 territory, the person's earlier extradition to the UK from a non-category 1 territory. Along the same lines are the FD articles 3(2), 4(3), 4(5) and 4(6). As in Greece and Slovenia, extraneous considerations (sex, political opinions e.t.c.) are also a ground for refusal. As far as the use of the grounds is concerned, the rights which are mainly invoked are Art. 6 (right to a fair trial in front of an independent and impartial tribunal) and Art. 8 (right to respect for private and family life). In *Symeou v Public Prosecutor's Office, Patras*[71] the Court held that a mistake carried out by the police authorities and not the prosecutorial services could constitute an abuse of process; however, there was no violation of Art. 6 and thus the EAW was not to be refused. In *Hunt v Court of First Instance*[72], a delay of eight years was considered to be a valid ground to refuse to execute the EAW. On the other hand, the case-law reveals that Courts have been less reluctant to refuse an EAW on grounds of potential conflict with article 8 of the ECHR. In *R (on the application of HH) v Westminster City Magistrates*[73], the Court considered an appeal of two spouses. It was held that the execution of the EAW regarding both parents would leave the children to be cared for by the social services. Although the best interests of the affected children are the primary consideration in extradition cases, generally such considerations cannot override the public interest in effective extradition procedures. In this case, the Court did not identify any pressing features which would justify the refusal of execution of the EAW issued for both parents.

As for the proportionality principle, contrary to what is submitted by the Spanish, Irish and Italian *Rapporteurs*, the UK Courts run no test. There is case-law which reveals that the EAW process is being abused by Member States in order to prosecute petty crimes. For example, the case of a retired schoolteacher and grandfather facing extradition to Poland for going over his overdraft limit more than 10 years ago. The entire debt was repaid to the bank but he is still being sought to face trial for "theft", although he has suffered three strokes and is in fragile health.

The Extradition Act 2003 covers issues of territorial jurisdiction by way of setting a test of what constitutes an extradition offence. The relevant section is s64 and in particular ss3, ss4 and ss5. In a recent case, the dual criminality requirement[74] was reaffirmed; in Sitek v Circuit Court in Swidnica, Poland[75] the offences concerned were said to be offences of acquiring or possessing criminal property. For two of them, the conduct alleged included matters that had not been capable of sustaining the necessary finding of knowledge or suspicion for the purposes of the relevant offence in English law[76]. In *Dabas v Spain*[77], the House of Lords approved excision of the conduct in question in order to limit the time period when assessing the extradition offence. In a similar case, in compliance with s.64(5) EA 2003, the judges concurred that a judge was entitled to limit the conduct alleging the offence to that which took place outside the UK[78]. However, in *King's Prosecutor (Brussels) v*

[71] [2009] EWHC 897, [2009] 1 WLR 2384.
[72] [2006] EWHC 165, [2006] 2 All E.R. 735.
[73] [2011] EWHC 1145.
[74] s64(3)(b) EA 2033.
[75] [2011] EWHC 1378 (Admin).
[76] Paras. 27, 31-32 and 37.
[77] [2007] UKHL 6, [2007] 2 A.C.
[78] *Osunta v Germany* [2007] EWHC 1562 (Admin).

Arma'79, the House of Lords considered s65. The issue that arose in this case was that part of the conduct of the appellant specified in the arrest warrant took place in the UK; under s65 (2), the EAW should have been refused, but under s65 (3) it did not matter that the conduct took place not only in Belgium but also in the UK.

Lastly, unlike the regime of the EAW, in Switzerland the requirement of double criminality remains intact. According to the jurisprudence of the Swiss Federal Court, the facts must reveal an at least a similar offense under Swiss law. This requirement entails implementation difficulties, if the description of the facts is incomplete. Refusal of assistance is allowed if the extradition request is based on fiscal offenses, because traditionally, Switzerland has no legal assistance designed to punish fiscal offenses. Only in cases of suspected tax fraud legal assistance the Federal Law provides for mutual assistance. However, due to the Schengen system, Switzerland is committed to other Schengen countries, even in cases of suspected evasion of indirect taxes, such as customs duties and value added taxes, to provide legal assistance. Also traditionally, Swiss nationals are not subject to extradition. According to Art. 25 para. 1 BV, they may only be shipped with their consent to a foreign authority. Finally, the Swiss authorities refuse to extradite a person in the requesting State if this could result in human rights violations. This barrier is based on the fundamental rights of the Soering case-law of the ECtHR, which the Federal Court has developed and has now been codified in Article 2 IMAC[80]. In a concrete danger of a violation of fundamental rights, the Federal Court always checks whether the risk can be reduced through stipulations and conditions to an acceptable minimum. In relation to other European countries, which are also parties to the ECHR, the Federal Court shall check on a milder scale basis.

Final Remarks: It is evident from the analysis above that the States have great disparity in the implementation of the optional grounds for refusal. The mandatory grounds set forth in Article 3 of the FD are more or less incorporated properly. However, according to each State's considerations the optional grounds have either been upgraded to mandatory or have remained optional clauses. In addition, other considerations, such as the protection of human rights, have been included as grounds for refusal. To this extend, Greece, Slovenia and the UK have made use of Recital 12 of the FD. Human and degrading treatment is also a reason for refusal of surrender in some States (e.g. Denmark and Ireland). On the other hand, States such as the Czech Republic, Estonia or Croatia do not have a specific ground for refusal based on fundamental rights concerns. The trial in absentia has been raised as an issue. To this extend, the States have different views, from Bulgaria, which has recently included it as an additional ground to Spain and Italy, where the execution or the refusal depends on the judicial remedies available. As for proportionality concerns, these are related to cases of minor offences. In these situations a more tolerant view is shared by the Courts, although the Irish position, according to which proportionality plays a more important role in the context of fundamental rights protection, is noteworthy.

QUESTION 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?

[79] [2005] UKHL 67; [2006] 2 A.C. 1; [2005] 3 W.L.R. 1079; appeal against [2004] EWHC 2019, [2005] 1 W.L.R. 1389.

[80] Mutual Assistance in Criminal Matters Act.

With the exception of Estonia, the rest of the reports recognise fundamental rights gaps. In specific, the British and Greek report refer to the fair trial principle stating that mutual recognition may create conflicts with it due to the lack of possibility to review evidence gathered abroad (UK) and the inability to assess how the EAW shall affect a person who resides in another Member State (Greece). According to the Greek *Rapporteurs*, it seems that mutual recognition may lead to the enforcement of the stricter system among the Member States without ensuring effective protection of human rights. Moreover, the UK reports the absence of specific grounds for refusal related to fundamental rights which creates friction between the Member States. Finally, the lack of minimum standards is an additional problem, considering that in the UK the nationals do not enjoy the same protection as the foreigners.

In Ireland, the Extradition Act 2003 amended in 2005 and 2009 provides that an EAW shall be refused "if...(b) his/her surrender would constitute a contravention of any provision of the Constitution...". The utility of this provision, which in essence is a blanket exception, is highly questionable as the Irish Supreme Court has roundly rejected most challenges on fundamental rights grounds. In principle, since all Member States are signatories to the ECHR, there are no gaps in the fundamental rights protection. However, the Supreme Court has acknowledged the possibility of refusal to surrender in "egregious circumstances", where a flagrant infringement of human rights is anticipated in the issuing Member State. In *Minister for Justice, Equality and Law Reform v. Rettinger*[81], the Court ruled that the fact that a State is a signatory to the ECHR cannot on its own serve as a proof that no risk of infringement of Art. 3 ECHR exists. The requested person must prove the existence of a real risk of being subjected to inhuman or degrading treatment or punishment in the issuing State. From one view, this judgment can be interpreted as showing a willingness to examine rigorously the risk of infringement of fundamental rights only in the context of Art. 3 ECHR and that for all other rights only "egregious circumstances" shall justify a refusal to execute the EAW. Nevertheless, these two views can be reconciled: the Supreme Court is likely to impose the same test in relation to all fundamental rights, but it will be a question of degree, both as to seriousness of the consequences of infringement and as to the strength of evidence[82].

The view that although the Member States are signatories of the ECHR this does not preclude that they could be potentially in breach of fundamental rights is also taken by the Czech *Rapporteurs*. In this respect, the Portuguese authors share the opinion that the gaps in the protection of fundamental rights may be overcome considering that the EU Member States have the highest standards of human rights protection and that, after the entry into force of the Lisbon Treaty, the jurisdiction of the CJEU fully covers the former third pillar matters. Furthermore, they have noted that the lack of respect for fundamental rights is a ground to refuse surrender under a EAW and that the Member States should not be prevented from applying their constitutional rules with regard to the right to a due process, freedom of association, freedom of press and freedom of expression in the media.

The Spanish *Rapporteur* raises an interesting point. A general fundamental rights exception when executing mutual recognition instruments should not be deemed as a gap in the system, but as a normal provision foreseen to deal with a concrete serious dysfunction that might have occurred within a national legal realm. Even though mutual recognition forbids general suspicion, it also does not demand blind confidence. Despite the political inconvenience it provokes, there is no other solution and this point has not been disputed, not even by the Commission.

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[81] [2010] 3 IR 783.

[82] This view has been supported in *Minister of Justice and Equality v. Siwy* [2011] IEHC 252, per Edwards J.

With regard to the gaps in fundamental rights protection, Croatia submits that the Criminal Procedural Act was amended in December 2008 (the new Act came into force on the 1st July 2009 for the offences connected to corruption and organised crime and for all other offences on the 1st September 2011). The changes have resulted in lowering to a great extend the existing standards of civil liberties and defence rights. The defendant and the defence lawyer have become weaker as many rights, such as the right to legal assistance, access to the file, the right to be heard etc. have been significantly restricted. To this end, some of the provisions are contrary to the ECHR. For example, there is no guarantee of the right to have a lawyer for every suspect interrogated in police custody and the state attorney may monitor the communication between the lawyer and the client, which is against Art. 6(3) ECHR. Also, contrary to Art. 5(4) ECHR, the investigating judge may prolong detention for offences of corruption or organised crime. Despite these reforms and the rigorous scrutiny by the Commission, the accession process was not hindered. As for the trial *in absentia,* it is stated that the requirements for execution of the EAW issued for the purpose of executing a custodial sentence following this type of trial according to the 2009 Amendment (Art. 4(a) of the FD) do not satisfy either the ECHR standards or the Croatian standards. It obliges the executing authority to surrender a person even in the case he/she was neither summoned in person nor he/she has right to retrial.

Furthermore, some Member States have stated that in order to address the fundamental rights gaps, minimum standards ought to be adopted (UK, Czech Republic). The Bulgarian report states that the fact that the Member States are signatories to the ECHR contributes to the establishment of minimum standards. To this extend, the Finnish and the Croatian reports draw our attention to the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. According to the Finnish Rapporteur, the Roadmap could be a promising beginning and should be followed.

The Dutch, Bulgarian and Polish reports refer to cases which show problems in the protection of fundamental rights. With regard to the Netherlands, first of all, it must be reminded in Question 7 it is mentioned that only in case of a grounded fear of a flagrant violation of human rights Articles 5 and 6 ECHR will apply, a view closely related to what the Irish Courts sustain. In addition, fundamental rights considerations have been apparent in cases which concern Member States like Latvia, Poland and Sweden and the District Court of Amsterdam has ruled that all Member States are signatories to the ECHR and therefore have a human rights protection system. However, in a recent case of an EAW from Sweden, the Court has indicated that the surrender must be in compliance with fundamental rights. A Dutch national was held in a strict regime in pretrial detention in Sweden for more than a year and returned to the Netherlands after being acquitted. The Swedish Appellate Court issued a EAW in order to secure his attendance in the appeal procedure, but in deciding on the request for surrender the Court ruled there was a real risk that Art. 3 ECHR would be violated. Therefore, the Court ordered the public prosecutor to ask the Swedish authorities about the expected length of the procedure and the nature of the pretrial detention the requested person would have to undergo. Moreover, the Bulgarian report notes that in few cases, there have been refusals of Bulgarian judicial decisions, usually EAW, on the ground that the procedural rights of the person in Bulgaria will not be guaranteed. The Bulgarian judicial authorities have not used such ground for refusing to execute a EAW issued by another State. As for the Polish report, the case of Jakub T. is mentioned to state that the most important problem relates to the different legal systems, especially in comparison to the UK system. The Polish national sentences in the UK may be imprisoned after in Poland with the compatriots who received lower penalties.

The Hungarian *Rapporteur* draws our attention to the executive degree of the jail sentence, an element which is not always included in the judgments. In such cases, the

Hungarian must define it, possibly creating an issue due to the different expected time for parole of conditional discharge in the implementation stages.

The Slovenian *Rapporteurs* state that since the FD does not impose any obligation to subject the surrender on a proportionality test -even when there are doubts about a potential breach of human rights- proves that the FD pays little attention to explicit standards of human rights protection.

QUESTION 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?

A) The need for minimum standards and the Roadmap in general

Further to what is already submitted by numerous States, the Slovenian report has raised the issue of whether the adoption of minimum standards is the correct path noting that many scholars have argued that in the near future at least some form of unification of basic human rights of the defendant is indispensable. Also, the Spanish *Rapporteur* acknowledges that some harmonisation would smooth the application of mutual recognition.

An interesting perspective is provided by the Dutch report. The Netherlands does not link the operation of the EAW system to minimum standards on the rights of the defendant. This linkage neglects the fact that the surrender procedure is not dealing with suspects, but persons wanted either for prosecution or execution of a sentence. Nevertheless, the Dutch surrender procedure itself contains safeguards, such as legal assistance and interpretation. It is recognised that the measures to strengthen procedural rights of defendants are often promoted in the Netherlands by the issue of strengthening mutual trust which could have a positive influence on the working of mutual recognition.

In general, the Roadmap for strengthening procedural rights is considered as a positive step (Ireland, Italy, Spain, Croatia, Portugal, UK). Hungary reports that no legislative constraints appear to exist with regard to the rights envisaged and that the only default of the Hungarian jurisdiction are the protracted procedures. In the case of Italy, concerns are raised with regard to the detention conditions, due to structural deficiencies. Another key issue is the recourse to pre-trial detention which, although considered as a last resort measure used only when, *inter alias*, there is substantial evidence of the concerned person's guilt.

However, the Greek *Rapporteurs* state that additional rights deriving directly from procedural principles common among the European jurisdictions ought to be included, mentioning namely the presumption of innocence and the principle of fair trial. To this end, the former principle along with the right to appeal are noted as missing from the Roadmap in the Spanish report. Furthermore, the Irish report mentions that although the Roadmap directly addresses procedural rights, it would be hoped that the general standards agreed to by Member States would also encompass procedures and facilities which have a direct effect on life on liberty but do not form part of the trial process, such as prison conditions and access to psychiatric health care for detainees.

Besides, the UK *Rapporteurs* take the view that due to lack of mutual trust and the imbalance in the protection of fundamental rights between British nationals residing or travelling abroad and foreigners residing or traveling in the UK, many practical problems will occur in the implementation process. For instance, financial difficulties may hinder the provision on legal aid. Furthermore, the concern of the Law Society that the Roadmap does not balance the victim's rights with the rights of defendant. (such concerns are also shared by the Estonian *Rapporteurs*).

B) The adoption of the other measures envisaged in the Roadmap

Measure B (access to information): The Maltese report mentions that EU action in this field is more than welcome as it would solidify the process and ensure that any elements of subjectivity on the part of the officers dealing with the suspected and accused are curtailed. In the Netherlands, however, many amendments will be needed due to the Proposal for a Directive, but the Dutch Government focuses on the necessity of all elements form a fundamental rights point of view.

Measure C (legal aid): With regard to the Commission's proposal for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, the Polish *Rapporteurs* state that the proposal is supported by the parliamentary Committee of EU Affairs and the Government. However, the Committee has also expressed major concerns on the following issues: a) the need to ensure that the statements made by the person in the absence of a lawyer may never be used as an evidence against him/her; b) the defendant's lawyer should have access to the detention location in order to check on the conditions of detention and c) the absolute character of confidentiality of the contacts between the lawyer and the client.[83]

Furthermore, in Malta it is sustained that recognising the right to a lawyer from the start of police investigations would hinder criminal investigations by slowing the process. Such a right is considered to give criminal suspects a more advantageous position in proceedings and would go beyond the rights currently recognised by the ECtHR. However, it is also suggested by Aditus, an NGO comprising of young lawyers, that it would be in the interest of the Maltese government to allow this right to criminal suspect. A lawyer present would result in "avoidance of mistrials, retrials and miscarriages of justice" and would provide protection to criminal suspects from the risk of ill-treatment.

In the Irish report it is submitted that the Proposal is opposed by not only Ireland, but also France, Belgium, the Netherlands and the UK. It is submitted that the Proposal would hamper the effective conduct of criminal investigations and proceedings, lacks clarity with the requirements of the ECHR, establishes minimum standards without taking into account the different ways in which Member States' systems secure the right to a fair trial and fails to set out rules on legal aid and the impact of the rules on such systems.

Measure F: As for pre-trial detention, the UK submits that JUSTICE has expressed the opinion that it is a tangible proposal, yet time-consuming and in the meantime it creates imbalance in the Member States.

C) The Directive on translation and interpretation

Measure A of the Roadmap has been transformed into Directive 2010/64/EU and it has been well received by the Member States. With the exception of Bulgaria, the rest of the Member States have not implemented this legal instrument whose transposition deadline is on the 27th October 2013. In Bulgaria, the implementation process ran smoothly and a new paragraph added to Art. 55 of the Criminal Procedure Code expressly provides that where the accused does not speak Bulgarian he should be given a (free) translation of the decree for constitution of the accused, the rulings of the court to impose detention on indictment, the sentencing and the decision of the Appellate Court. The Court must monitor the appointment of an interpreter as well as the quality of translation, which must be adequate to ensure compliance with the defendant's rights). The amendment merely makes a statement of the acts whose translation is required.

[83] The Polish law provides for derogations from this principle: in the first 14 days of pre-trial detention the prosecutor "in particularly justified cases" may require that a prosecutor or another person is present when the defendant meets his lawyer. Also, the defendant's correspondence is controlled.

Challenges addressed by the reports: The only challenge for the UK would be the clarification of the **relationship between the Directive and ECHR** as both regulate the same area. Apart from this issue, the UK believes that the implementation will be smooth and will help eliminate discrepancies between the way that Member States have implemented Articles 5 and 6 ECHR.

The Greek Code of Criminal Procedure contains a mandatory provision on the right to translation and interpretation (Art. 233). Few provisions of the Directive need to be incorporated, such as the establishment of a special procedure procedure to determine the need to assist the defendant by an interpreter, the provision of the option of interpretation services through video conference, telephone or the internet, as well as the introduction of a special legal device which will challenge the validity of the decision taken, in the context of criminal procedure which failed to provide the defendant with interpretation services of adequate quality.

The Portuguese Report is in the same direction. The right to translation and interpretation is explicitly foreseen in Articles 92 and 93 of the Criminal Procedural Code. However, in Portugal too, there is no **procedure to establish whether a person needs assistance** and the judicial authorities mostly intuitively decide on the matter, based on objective and subjective criteria , such as nationality, place of birth or via the Q and A method.

In Poland, the main problem with the interpretation and translation is the **lack of interpreter specialised in minor languages.**

Closely related to what the UK report mentions, the Slovenian Rapporteurs as well as the Croatian ones consider as the main challenges of the Directive the **expenses for the newly incurred tasks**.

Ireland submits that a challenge would be to ensure that **the interpretation and translation is of a sufficient quality** so as to satisfy Article 5(1) of the Directive. At present, most interpretation and translation services are supplied by third party companies and the standard which must be reached by interpretation and translation practitioners does not appear to be set by the State itself.

More importantly though, the Czech Republic poses a challenge related to **Article 2(2) of the Directive which sets as a prerequisite the necessity to guarantee the fairness of the proceedings**. It remains to see in practice how this limiting clause will be developed. However, there are indeed more of such limiting general clauses (e.g. Art. 3(7)), drafted in a rather vague way, which might serve as great challenges for the stakeholders. The more general and vague the provisions will be drafted, the more there will be a room for an *intra- and inter-country* specific national implementation, which might be divergent.

Moreover, the Dutch Rapporteurs focus on the **delay which will prolong the criminal procedure**. Requiring written translations in all cases goes beyond the ECHR requirements and could easily violate the fundamental right to have a trial without undue delay.

The positive effects of the new legislation, besides the reinforcement of the defendant's position, in Slovenia will be that the Directive will apply in cases of minor offences, especially in the area of road traffic offences, where the severity of sanctions has increased to a point at which the dividing line with Criminal law has been effectively blurred. In these cases, the procedural rights were not sufficiently taken into account, while the Constitutional Court had been deprived of jurisdiction in the area. Moreover, in Croatia the current legal framework gives a narrow interpretation of the rights and allows the defendant interpretation and translation assistance only from the moment of indictment. The suspect in pre-trial proceedings is excluded, thus, the Directive will reinforce the right of the suspect.

Lastly, the Italian report also mentions that there are **no obstacles** in the implementation since this right finds extensive protection in the Italian legal system, mainly due to the proactive stance adopted by national Courts. In 1993, the right, encompassed in Art. 143 of the Code for Criminal Procedural Law was given a constitutional status by the Constitutional Court. The Court noted that the provision should be interpreted extensively, ensuring the interpretation and translation of all the essential acts and documents within the criminal proceedings, so that the concerned person could fully exercise its right of defence. Over the years, the Courts have contributed to identify those acts and documents that are to be considered as "essential".

4. Data collection, exchange and protection

I.Overview

A key priority for EU Member States and a major component of the Area of Freedom, Security and Justice post-9/11 has been the proliferation of mechanisms of collection, analysis and exchange of personal data for law enforcement purposes. A multi-level web of data collection has been created at EU level involving boosting the collection and exchange of personal data between *national* law enforcement authorities (for instance under the *Prüm* mechanism), establishing *EU* databases (such as the European Criminal Record Information System), and maximising the collection and exchange of personal data by introducing requirements for *the private sector* to collect and transfer such data to State authorities (such as the collection and transfer of Passenger Name Record (PNR) data by airlines or the retention of personal data by mobile phone providers).[84] This proliferation of the collection and exchange of personal data (emanating on a number of occasions from every day, legitimate activities) raises profound challenges for the rights to private life and to data protection. These challenges become even more acute in the light of the limits and fragmentation of EU data protection standards under the third pillar.[85] The questionnaire aimed to address the implications of all three levels of the collection and exchange of personal data for domestic legal orders and for the individuals concerned. The questions focused therefore on the implementation and views on specific data collection and exchange measures as well as on the adequacy of data protection standards at national and EU level.

The requirements of EU law as regards data collection and exchange have proven to be highly problematic for Member States, presenting both broad implementation challenges and, more specifically, serious fundamental rights concerns. In the field of **data retention**, national Reports highlight considerable diversity in the implementation of the EU Directive, especially as regards the choice of retention periods by Member States. National Reports also highlight the serious fundamental rights concerns arising from the privatisation of data collection and exchange in this context (most notably as regards the right to private life), under a measure which was rushed through as a counter-terrorism measure after the London 7/7 attacks. Fundamental rights concerns have resulted in constitutional challenges in a number of Member States and in references to the Court of Justice. The finding by a number of national constitutional/supreme courts that the implementation of the data retention

[84] For an overview, see Mitsilegas, *EU Criminal Law*, chapter 5.

[85] On the fragmented EU data protection framework on the field see Mitsilegas *op. cit;* H. Hijmans and A. Scirocco, 'Shortcomings in EU Data Protection in the Third and the Second Pillars. Can the Lisbon Treaty be Expected to Help?', in *Common Market Law Review*, vol.46, 2009, pp.1485-1525.

Directive is unconstitutional by breaching fundamental rights is a clear indication of the serious impact of this measure on the individual and the need to re-examine the extent to which security considerations will prevail uncritically over the protection of fundamental rights and safeguarding the private sphere when individuals are engaging in ordinary every day transactions.[86]

Similar concerns with regard to the privatisation of data collection and transfer have arisen in relation to mechanisms enabling the transfer of **PNR data** to State authorities. A number of national Reports are critical of the EU-US PNR Agreement, focusing on the extensive categories of personal data collected and transferred and on the length of retention of such data by US authorities. The Commission proposal for an EU PNR system has also been widely criticised. In this case, a number of *Rapporteurs* point out that the need for the adoption of an EU measure in the field has not been justified and that the Commission proposals do not meet the principle of proportionality. As regards mechanisms for the collection and exchange of personal data by the State, envisaged by the **Prüm Decision and by ECRIS** (the European Criminal Record Information System), national Reports focused mainly on implementation. While ECRIS has been largely implemented by Member States, the implementation of the Prüm Decision appears to have been preceded by the need for Member States to comply with their public international law obligations arising under the Prüm Treaty (which was agreed outside the Union legal framework and formed the model for the EU Decision). The Prüm system raises a number of concerns as regards data protection, in particular as it requires essentially Member States to collect and exchange DNA data. However, details of the practical implementation or functioning of these measures in practice have not been included in national Reports. It is not clear whether this is because the system is not in use, or because the location of the system in the realm of law enforcement cooperation renders it more difficult to scrutinise.

The proliferation of data collection and exchange mechanism at EU level is not accompanied by a robust **data protection** framework. The fragmented third pillar data protection legal framework is accompanied by the uneven implementation of the main horizontal third pillar instrument in the field, the Framework Decision on data protection. In a large number of Member States, the Framework Decision has not been implemented. In Member States where the instrument has been implemented, *Rapporteurs* point out its limits (in particular its application only in cross-border cases). A significant number of Reports point out that data protection in the field of criminal justice has been dealt with at national level via the implementation of the 1995 EC data protection Directive. However, it must be pointed out that criminal law matters are excluded from the scope of the Directive. A number of *Rapporteurs* also mention that data protection is ensured by general provisions in domestic law, with the role of national data protection authorities in ensuring protection also being highlighted. The limits in the reach of the EU Framework Decision on data protection and the fragmentation of the current legal framework as regards judicial and police cooperation in criminal matters in the EU need to be addressed as a matter of urgency by the European law-makers.[87]

[86] In its Report on the evaluation of the data retention Directive, the Commission announced its intention to review the Directive- COM (2011) 225 final, Brussels, 18.4.2011.

[87] The Commission has recently tabled a proposal for a Directive on data protection in the field of criminal law- see COM (2012) 10 final, Brussels, 25.1.2012. Negotiations on this instrument- in particular as regards its scope and the substantive rights included therein- are predicted to be protracted and controversial.

II. Synthesis

QUESTION 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?

A) The Directive

The Data Retention Directive has been incorporated in all the States for which we have information, except for the Czech Republic (see below for the problems in the implementation process). A number of Member States (Netherlands,[88] Ireland,[89] Malta,[90] Italy,[91] Greece[92]) transposed it with some delay. It is important to note that, with the exception of the UK, the rest of the Member States that made a declaration pursuant to Article 15(3) of the Directive did not make any reference to this matter.

One of the most important aspects of the Directive is the time period for which the data shall be retained. Studying the national reports revealed that the Member States have great disparity in this matter. According to the information available by the national reports:

- Poland has chosen the longest retention period allowed by the Directive, two (2) years. Italy, also retains the data related to criminal offences for two (2) years, whereas electronic communications traffic data, except for the contents of communications, shall be retained for twelve (12) months and data for unsuccessful calls is preserved for thirty (30) days.
- In Slovenia, the Electronic Communications Act implementing the Directive was amended (due to vague and broad requirements) and the Amendment A provided for two years of data retention, while the Amendment B for fourteen (14) months for data regarding publicly available telephone services and eight (8) months for other data.
- Furthermore, in Malta, the telephone and mobile data is retained for a period of one (1) year, while the internet-related data for six (6) months.
- The UK, Greece, Denmark, Bulgaria, Portugal and Croatia opt for a 12-month period of retention.
- Also, Estonia retains the data for one (1) year from the date of communication, if such data were generated or processed in the process of providing communication services, while requests submitted and information given to surveillance agency and security authority shall be retained for two (2) years.
- The Netherlands, after a heavy debate in the Senate, the general retention period was reduced from eighteen (18) to twelve (12) months for all types of data. However, when the Act was adopted in the Senate, the Government promised to take legislative initiative to lower the retention period of internet data to six (6) months. This was achieved by Act of the 6th of July 2011.
- In Hungary, the data is retained for one (1) year. Unsuccessful calls in particular, are retained for six (6) months.

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[88] In fact, the Commission had brought a case before the CJEU for failure to implement the Directive. After the adoption of the Retention of Telecommunications Data Act, which amended the Dutch Telecommunication Act and entered into force on the 1st of September 2009, the case was withdrawn.

[89] In Ireland, the implementation of the Directive was concluded on the 26th of January 2011 via the communications Act 2011. Till then, the Criminal Justice Act 2005 was in force.

[90] The European Commission had formally written to Malta regarding the country's failure to transpose the Directive. Malta transposed the Directive under the Electronic Communications Regulations on the 29th of August 2008.

[91] D.L.gs. n. 109/2008 (Art. 132 is of relevance).

[92] Law 3917/2011.

In Portugal the implementing Law (No. 32/2008) was a positive step as it brought about some clarifications with regard to the definition of the obligations of the electronic communications companies, since it provides for specific categories of data to retain, certain time period of retention and rules regarding protection and destruction of such data. These rules ease the electronic communications providers' task and facilitate the enforcement authorities in prosecuting serious crime. From the point of view of privacy protection, before the implementing legislation the rules existed only with regard the data that was actually requested for a criminal investigation. The current framework not only establishes that the retention of data requested for a criminal investigation is still under the scrutiny of a judge (who will determine whether such data shall be retained or destroyed), but it also defines the retention period (one (1) year).

With regard to the reference in the Directive that the data shall be used for the purpose of investigation, detection and prosecution of "serious crimes", in the Netherlands serious crimes are defined as crimes for which custody may be imposed.

On the contrary, in Denmark, where a Ministerial Order implemented the Directive, the Danish provision is wider that the EU instrument as it is not restricted to "serious crimes". Furthermore, the initial and final packet of an internet sessions must also be retained, unless it is not technically possible. In these cases, the provider must retain the data for every 500rd packet that is included in the end users internet communications. The Danish rules on retaining data on internet sessions may not be in accordance with the provisions on the prohibition on retaining the content of electronic communications. Housing cooperatives, house-owners' associations, cable service providers and similar organisation or associations are not obligated to retain data.

The retained data can only be accessed if the following conditions are fulfilled: a) there are certain grounds for assuming that messages to or from a suspect are covered by the communication in question and the suspicion concerns an offence that has caused or may cause danger to human welfare or community property of substantial value; b) the interception of communications is assumed to be of decisive importance to the investigation and c) the offence is punished by a maximum penalty exceeding six (6) years or contravention of Parts 12 and 13 in the Danish Criminal Code. The principle of proportionality also applies; if the importance of the case and the outrage and inconvenience that the measure is assumed to cause will constitute a disproportionate intrusion, the interference, which requires a Court order, may not take place.

In Finland, the previous legal framework allowed to store the identification data only for purposes of telecommunication companies, mainly for invoicing purposes. Thus, the transposition of the Directive required several changes in the Act on the Protection of Privacy in Electronic Communications. Most significantly, a section (Section 14a) on the obligation to store data for the purposes of the authorities was added.

The Estonian *Rapporteurs*, in order to show the necessity of strict rules on when, for which purposes and by whom the collection of data can be proceeded, refer to the Code of Criminal Procedure. The latter stipulates that evidence may be collected by surveillance activities in criminal proceedings, if the collection of evidence by other procedural acts is precluded or especially complicated and the object of the criminal proceedings is a criminal offence in the first degree or an intentionally committed criminal offence in the second degree for which at least up to three years imprisonment is prescribed as punishment.

Lastly, in Poland, statistics demonstrate that about 2/3 of the requests for the retained data have taken place within three months since the data is recorded while requests for data aged more than one year are largely exceptional. Furthermore, it is mentioned that in no other EU country the data retained has been used as often as there for two reasons: the use of the

retained data is not restricted to specific crimes and there is no external oversight of the use of the data.

B) The national Courts

In Italy, a recent ruling by the Constitutional Court[93] has held that Article 132 does not conflict with the Constitution insofar as it imposes limitations and modalities of the acquisition of telephone traffic data during criminal investigations, considering such limitations and modalities justified by a reasonable balance between the individual right to privacy and the public interest in relation to particularly serious crimes.

An interesting aspect related to the national Courts is the challenge of the Criminal Justice Act 2005[94] before the Irish Constitutional Court.[95] Digital Rights Ireland, a non□profit group that campaigns for civil rights in the information technology context, has argued that the Act breaches rights guaranteed by the Irish Constitution, in that it: a) is an unjustifiable interference with the right to private life; b) is a breach of the rights to communicate and to the determination of civil rights and obligations in a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law; d) permits of surveillance without prior notice of the circumstances in which the Defendants may engage in same and generally are in breach of the principles of accessibility and foreseeability; e) is disproportionate; f) is incompatible with/unnecessary in a democratic society; g) is an unwarranted and unnecessary interference with the right to communicate; h) is not objectively justified; j) offends the principle of proportionality. The validity of the Directive has a direct bearing on the constitutionality of the measures challenged. Thus, the plaintiff has sought and been granted a preliminary reference to the Court of Justice, under Article 267 TFEU, to determine the validity of the Directive.

Grave concerns were raised in Bulgaria resulting in the repeal of the implementing regulation and the subsequent adoption of a new amendment. In specific, the NHO Access to Information Program (AIP) launched a case before the Supreme Administrative Court, claiming that the implementing Regulation (specifically Art. 5 providing for access to data for the law enforcement authorities) violates Articles 32 and 34 of the Constitution guaranteeing the right to privacy and the freedom of correspondence and Art. 8 of the ECHR. While the three-member Court panel rejected the claim, the case was reconsidered by a five-member panel cassation appeal. With its judgment (11/12/08), the Court repealed the decision of the lower instance court and Art. 5 of the challenged Regulation.

The Court ruled that the provision did not set any limitations with regard to data access by a computer terminal, did not provide for any guarantees for the protection of the right to privacy and no mechanism for the respect of the right of protection against unlawful interference in private and family affairs and against encroachments on honor, dignity and reputation was established. The Court also found that the text of the Art. 5 of the Regulation, providing that the investigative bodies, prosecutor's office and the court shall be granted access to retained data "for the needs of the criminal process" and "for the needs of the national security", did not provide limits against violations of rights of the citizens and no reference to other specialised laws was made either. Furthermore, Art. 5 was contrary to Art. 8 ECHR and in general lacked clarity in terms of protection of the right of private and family life.

After the judgment, a few legislative amendments which introduced were rejected in 2009 and 2010 before the adoption of an amendment which entered into force on the 10th May 2010. The idea of "access through a computer terminal" was abandoned and strict

[93] Corte Costituzionale n. 372/2006.
[94] The previous regime, see above, footnote 82.
[95] *Digital Rights Ireland Ltd v. Minister for Communications & Others* [2010] IEHC 221.

obligations on telecommunication companies and internet providers were imposed. Access to the data retained could be requested only by the enlisted authorities after permission by the President of the respective District Court or a judge authorised by him. Also, retention and access to the data is permitted for the purpose of the detection and investigation of grave crimes and computer crimes and for the detection of individuals. The Commission on Personal Data Protection supervises the implementation of the obligation to retain and provide access to data collecting information on a yearly basis from the companies providing public e-communication networks and services and providing statistics to the Commission and the National Parliament. Furthermore, a Parliamentary (sub-)committee is responsible for monitoring the processes of access permission as well as the protection of the citizens rights (empowered to request and collect information from public authorities, enter the premises of public authorities and companies providing public telecommunications and inform the public prosecutor's office and the heads of the authorities and companies involved as well as the citizens affected).

In January 2011, the press reported about internal guidelines issued by the Prosecutor General in summer 2010, which interpret the Court's judgment as not requiring permission by judge in cases when data retained are requested for the purposes of criminal investigation. Even though the Law supports such interpretation, it also opens to door for massive police use of traffic data without a warrant. Indeed, statistics reveals huge disproportionality between the regimes of access dependent on the purposes of access to traffic data. In fact, in the majority of cases the same authorities request access and there is no reason to require a court permission only in some cases and not in the others.

In the Czech Republic, the implementing Law was also annulled by the Constitutional Court (22/03/2011)[96]. The latter held that the right to privacy in the form of the right to informational self-determination was infringed. The Court was aware of the fact that the prescribed obligation to retain traffic and location data did not apply to the content of individual messages, but it still pointed out that the data were able to compile detailed information on social or political membership, personal interests, inclinations or weaknesses of individual persons. According to the Court, the following aspects of the Law were not well defined: a) the public authorities entitled to request data; b) the purposes for which there were provided; c) the conditions of the use of such data and the potential use for less serious crimes (with respect to the seriousness and extend of infringement of the right to privacy); d) the retention period; e) the security of retained data and f) the liability or possible sanctions for failure to comply with security and other duties.

Since the annulment, the Czech authorities are working on the new implementing Law. The current proposal opts for a retention period of six (6) months and data protection rules shall be also applicable to this act. A different amendment to the Criminal Procedure Code will be completed with a view that the respective data will be used only for investigations of a crime with a minimum sentence of three (3) years and for exhaustive list of crimes which are usually committed with the use of mobile or internet (such as stalking).

Interestingly, in Hungary it appears that a problem arisen in the judicial practice is the fast annihilation of the data collected. In a case, a service provider was sued by a citizen because the data go back only one (1) year and not three (3). The Supreme Court determined that currently the obligation is to retain data for a year.

C) The challenges on the domestic constitutional order and the protection of fundamental rights

[96] Pl. ÚS 24/10.

The Greek report analyses extensively the constitutional and fundamental rights challenges of the data retention framework. First of all, it is stated that the latter is not harmonised with Art. 8 ECHR and Articles 7, 8, 36, 38, 47 and 48 of the Charter of Fundamental Rights.[97] The following aspects are highly problematic: general "exploratory" monitoring of citizens who are not even suspected of any offence, broad period of data retention, possibility of extension of this period without prior approval, as well as non designated maximum allowable limit extension.

At constitutional level, the compliance of the Directive with the general principles of the data protection is highly doubtful. The mandatory data retention of everyone interconnected, regardless of their involvement in any criminal act, overturns at least two fundamental principles of data protection: the principle of the binding purpose of processing and the principle of proportionality, protected by Art. 9A of the Constitution. Furthermore, problems also arise in relation to Art. 19, provided that the external aspects of communication fall within the constitutional protection of privacy and confidentiality of communication. Bending the confidentiality is tolerable only on grounds of national security or in order to detect particularly serious crimes that have already been committed. In addition, the general preventive storage of data raises issues of accordance with the principle of the free development of personality (Art. 5(1)), since the person is restricted in communicating freely, knowing that his/her data is being recorded. Similar issues arise in relation to the protection of human dignity (Art. 2(1)), or the freedom of expression (Art. 14(2)).

The **duration of data retention** is a recurring problem mentioned also by the Slovenian *Rapporteurs* (especially comparing against the preceding Criminal Procedure Act). To this regard, the Italian report mentions that both the Directive and the Italian legislation appear respectful to the principles of necessity and proportionality, insofar as the forbid a wide spread access to retained data, impose a limited period of retention and specific modalities and security measures of their storage, access, treatment and transfer. However, the Hungarian report refers to quite the contrary. It is stated that in some ways the relatively short retention time is a problem because the authorities do not know in the beginning of their investigations which data they will later require. Nevertheless, some NGOs consider this legislation seriously unconstitutional. In the Hungarian author's opinion, provided that the State undertakes the costs completely and the information is stored safely, the duration of the retention could be longer than the time proposed in the Directive.

The Slovenian and Spanish *Rapporteurs* focus on the financial burdens of data retention. Moreover, the Slovenian report draws the attention to the accessibility of the data in all criminal offences or on the general grounds of national security or defence, especially in the context of Art. 1 of the Directive which prescribes data retention only for a "serious crime".

In the UK, there is the view that electronic communications are outside of the scope of the Directive and that Art. 8 ECHR is of relevance. However, the regime is justified under the exceptions of Art. 8(2) ECHR which refer mostly to the use and not the collection of the data.[98] During the debate of the 2009 Regulation[99] in the House of Lords, Lord West Spithead was concerned about two issues. First of all, the 2007 and 2009 Regulations are secondary legislation and no primary legislation setting out the Government powers exists. Another issue is the possibility of human rights violations. Under the Human rights Act 1998,

[97] Articles on the respect for private and family life, the protection of personal information, access to services of general interest, consumer protection, the right to effective judicial protection and the presumption to innocence respectively.

[98] This view was rejected by the EctHR in *S and Marper v UK*.

[99] Which implements the Directive and along with the 2007 Regulations constitutes the legal framework on this issue.

the UK courts have an obligation to interpret primary and subordinate legislation in a way that it is compatible with Convention rights. Also, if the Court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility but in this case there is no such case-law. With regard to human rights, Regulation 7, which requires that access should only be granted in specific cases and in circumstances in which disclosure of the data is permitted or required by law, these circumstances are not restricted to serious cases. Moreover, there is no restriction on 3rd parties who are seeking to access data in civil proceedings, thus potential conflicts with Art. 8 ECHR may arise.

Furthermore, the Portuguese report mentions that the main challenge in data retention sphere is to ensure all players (judicial authorities but, in particular, providers of publicly available electronic communications services or of public communications networks) are, in fact, complying with the law.

Moreover, the Finnish report states that a new provision was foreseen related to several constitutional rights. However, it was not seen as problematic. During the parliamentary proceedings of the bill, it was sent to the Constitutional Law Committee of the Parliament. The Committee held that although the identification data does not belong to the core of confidential communications the amendment was relevant to constitutional rights which were restricted. However, the Committee took the view that the amendment fulfilled the criteria for this restriction and was accurate and proportionate enough. According to the author's opinion, this view is quite narrow and the principled modification of the system and its implications on fundamental rights could have been examined more thoroughly.

Additionally, moderate debate on the privacy issues of the Directive appeared in the Netherlands as well. The privacy concerns relating to the measure were voiced most strongly in the Senate, hence the debate described above. This flexible nature of the data retention Directive has been criticised by the Evaluation report of the Commission published on 18th April 2011. [100] The evaluation process is closely followed by the Dutch parliament, specifically the Committee of the Senate on JHA. The latter criticised the input of the Dutch Government, stating that it did not point at the lack of differentiation between telephone and internet data and at the lack of certain details which allowed an assessment of the proportionality of the measure.

Finally, the Spanish report states that since a judicial warrant (issued after considering the principles of necessity and proportionality) is compulsory for the internet provider to disclose personal data to the enabled authorities, the Law does not appear challenging.[101] The only challenge is related to the scope of the data retention, since the implementing Law reproduces the wording of the Directive reserving the access to the investigation, detection and prosecution of serious crimes.

As for Switzerland, the data retention Directive is not part of the Schengen *acquis*, hence the States is not bound by it. Swiss Law provides for the obligation of retaining data on behalf of the telecommunications companies. The data must be retained for at least six (6) months, but the Federal Council wishes to extends this period to one (1) year. With regard to the Swiss Courts, there is a limited constitutional jurisdiction; the Federal Court may only check whether the underlying Federal Law is consistent with the Constitution.

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[100] Report from the Commission to the Council and the European Parliament of the 18th of April 2011, COM(2011) 225 final.

[101] Following the *Malone* ECtHR case-law, the Spanish CC rules that the communications secrecy reaches not only the content of the message, but also those external data such as length, interlocutors or place. Therefore, access to those data amount to an interference in the right to privacy and demands a judicial warrant.

QUESTION 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?

A) The challenges for fundamental rights

The Italian Rapporteurs underline the need of **huge economic and financial and organisational resources** for the correct processing of the vast data. Otherwise, the system runs the risk of inaccurate information, thus infringing the fundamental rights of the persons whose data are processed. It is submitted that Italy is not ready to sustain this challenge in all its implications. In fact, the Prüm Treaty is not operational due to difficulties in relation to the adoption of implementing regulations for the establishment of a role of penitentiary officers, experienced biologists, geneticists, computer scientists and the creation of a central laboratory at the Ministry of Justice. Specific economic difficulties concern the high costs of security access to data stored, such as the security and integrity of biological samples.

The Greek Rapporteurs state that the mechanisms pose serious challenges to the protection of the human rights related to data protection. To this regard, the Hellenic Data Protection Authority (HDPA) issued Opinion 2/2009 on the compatibility of the bill on DNA analysis and the creation of a database of DNA profiles with the EU and Greek legislation. The HDPA, considering *inter alia* Framework Decision 2008/615/JHA, recommended several amendments, providing safeguards and limitations, so as to be fully harmonised with the requirements of Art. 9A of the Constitution and Art. 8 ECHR. This opinion is revealing of the various issues raised regarding protection of human rights, especially because **it could be argued that in the Framework Decisions the principle of proportionality seems to have been replaced by the principle of mutual recognition of the equivalence of all authorities in the Member States having access to such personal data.**

According to the UK report, the mechanisms of exchange pose challenges to the protection of fundamental rights. The mechanisms provide that personal data can only b used for the purpose requested and only in way that serves the legitimate interests and ensures proportionality. It can be argued that the **principle of availability and the system of collection, retention and storage of data may violate Article 8 ECHR.** The Data Protection Act 1998 provides for the retention and process of personal data. However, the way in which the police handles them is not always in accordance with the Act (e.g. retention of data about minor offences or when the offenders were very young for a long period).[102] With regard to exchanging information among Member States, the main challenge is that **the UK has a lower threshold for retention and collection** of personal data than other Member States. However, the UK is not a signatory of the Prüm Treaty (see below).

Furthermore, the Estonian report states that the most important challenge is to ensure that the information exchanged is **securely handled** in accordance with the general principles of fundamental rights. To this regard, the Polish report refers to technical security issues and the sufficient control of access to data. Nevertheless, the Polish Rapporteur notes that for three reasons an optimistic assessment of the implementation is expected: a) the exchange of information is centralised; b) the exchange of data is conditional upon a confirmation of the data reliability, veracity and accuracy and c) the Data Protection Ombudsman oversees the exchange.

Moreover, the Czech Rapporteurs see as an important challenge the **possibility of incorrect, inaccurate, imprecise and/or not updated information and their adverse effects on individuals' freedoms.** However, they continue, if the respective EU rules are respected, such instances shall be avoided. Later in the report, they also mention that with

[102] See *S and Marper v UK* case (ECHR) on this matter.

regard to the Prüm implementation most challenges have been in the area of technology, resources and personnel, thus matching with what is stated in the Italian report.

The Portuguese Rapporteurs mention the main challenges to the fundamental rights are posed by two Laws; 74/2009 on the exchange of criminal data and information between law enforcement authorities[103] and 5/2008 on the creation of a DNA profile database.[104] The former Law poses the risk of undermining the protection of privacy in case the personal data is transferred to a Member State where the data protection odes not include crime investigation. Law 5/2008 strikes a better balance between security and freedom. There is one DNA profile database limited to certain purposes and certain group of citizens based on two grounds: consent or judicial decision.

Connected to the Portuguese approach, the Bulgarian Rapporteurs refer to the Judicial Power Act[105], which empowers the judicial authorities to access the citizens' register. Furthermore, they note that in order to join the Schengen system, the Bulgarian Parliament added two sections to the Ministry of Interior Act, the first of which is entitled Information on Data Exchange with Competent Authorities of EU Member States with the Purpose of Prevention, Detection and Investigation of Crimes and the second section sets the national Schengen Information System. The Law explicitly refers to the Data Protection Act. All in all, it is added that the legislation poses new challenges to the system and its resistance to disproportionate data process and abuses.

Lastly, Ireland and Hungary see no major problems in the way the system functions.

B) The Prüm Decision

As far as the Prüm Decision is concerned, many States have incorporated it, while others are still in the process.

The Dutch Government has been exchanging DNA data with a number of other Member States for some years now and this systems is considered as a success. Though the Prüm Treaty was quickly incorporated, the EU Decision had less priority. One of the main issues is the **automaticity** of the exchange in some States (among which is the Netherlands), without any specific request from the receiving Member State. However, there are more stringent, separate provisions for the transfer of DNA-related personal data (via e-mail or only via certain channels) which as a rule are not shared automatically.

In Ireland the Decision has been transposed in different Laws. The issue of the exchange of vehicle registration data is incorporated by Section 60 of the Finance Act 1993 (amended by Section 86 of the Finance Act 1994 and Section 57 of the Road Traffic Act 2010) and the Department of Transport is evaluating whether all the necessary legislative and operational elements are in place to facilitate commencement of this aspect of "Prüm". The automated exchange of DNA and dactyloscopic data will be regulated by the Criminal Justice Bill which will provide for the establishment of a DNA database for criminal investigation purposes and will be published in the first half of 2012.

The same methodology has been followed by the Danish authorities. The provision on fingerprints has been implemented in the Administration of Justice Act (section 116a.). According to this provision, law enforcement authorities in other Member States can compare fingerprints in an investigation with fingerprints collected by the Danish police. Furthermore, the provision on DNA, implemented in the Act on the Central DNA Register (section 5(2)), prescribes that Member States can compare DNA profiles with the ones in the Danish register. Finally, the provision on vehicles is transposed in the Act on Registration of Vehicles (section 18). According to the Danish authorities, this cooperation is merely

[103] DR I Series, 155, 12/08/2009.
[104] DR I Series, 30, 12/02/2008.
[105] State Gazette No 64, 07/08/2007.

intergovernmental, the foreign authorities do not access in the Danish registers alone and a search can be carried out with regard to a specific criminal case.

With regard to the international transfer of data, the Spanish Rapporteur submits that OA 15/2009 reproduces Convention No. 108 and EU Law about the prerequisites of authorisation and an adequate level of protection. However, two derogations exist: a) those prerequisites are not demanded when international transfer of personal data is the result of applying treaties or agreements to which Spain is a party. Consequently, the exchange of DNA profiles (OA 10/2007) is allowed. This embraces those cases laid down in the Prüm Treaty, including those not incorporated in the Prüm Decision provided that its rules on data protection are respected. Hence, sharing data has been severely criticised as allowing access to data which would not have been permitted under Spanish Law; b) international transfer of data is allowed when it serves the purpose of offering or requesting international judicial assistance, including information on criminal records. In any case, a general exception is granted to any Member State (and to any third country the Commission has declared) ensures an adequate level of protection and this exception serves as a *carte blanche.*

In Slovenia, the Prüm Treaty and Decision have been ratified by a Governmental Decree. The impact has been limited though and no major cases or controversies have arisen. The Government has stressed the importance of the Decision and has argued in favour of setting up a group of experts, the tasks of whom shall be specified taking into account the advantages and the costs entailed.

Poland has implemented the Prüm Decision by the Act of the 6th August 2010 amending the Act on Police and other Acts.[106] Along with this Decision other EU instruments were implemented as well.[107] This holistic implementation is reasoned, considering that it allows to determine comprehensively both the underlying institutional infrastructure, as well as data quality and processing standards.

Hungary, which joined the Prüm Treaty in 2007, made several modifications in 2007, 2009 and 2011, the last two after a government regulation adopted.

The UK as mentioned above is not a Treaty signatory, however the UK Government is considering joining the Treaty on the basis that they will be offered a special regime that would take into account the specific difficulties invoked by some of its provisions: the UK has a lower threshold for the collection and retention of DNA data in databases and the government is concerned that there will be implications if such exchanges were allowed under the existing standards. The deadline for implementation of the Decision has not expired and there is no evidence that the UK has implemented its provisions.

With regard specifically to DNA data, in Portugal, the Council Decision of the 19th July 2011 on the launch of the automated data exchange with regard to DNA data stated that the country has fully implemented the general provisions on data protection on Chapter 6 of Decision 2008/615/JHA and is therefore entitled to exchange DNA for that purpose. No further information is provided.

On the contrary, in Italy the Prüm Decision has not been implemented, only the Prüm Treaty has been incorporated by Law n. 85/2009. But even this is not operational due to organisational and economic difficulties (see above).

Also, the Estonian Rapporteurs mention that the implementation of the Prüm Decision would have been concluded by the 1st January 2012, so by the time of drafting the present report, Estonia most probably has concluded the transposition process. Few amendments were necessary in the national legislation, the delay was due to technical problems and the

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[106] Ustawa z dnia 6 sierpnia 2010 r.o zmianie ustawy o Policji oraz niektórych innych ustaw, Dz.U. 2010 nr 164, poz. 1108.

[107] These are: 1) the FD 2008/977/JHA, 2) the FD 2006/960/JHA, 3) the FD 2006/977/JHA and 4) the FD 2007/845/JHA.

measures are covered by the Personal Data Protection Act. In Czech Republic too, the implementation process is still ongoing.

Finally, Greece has not implemented any of the EU instruments in this area (although the Minister of Justice had appointed special legislative Committees for their implementation. It is analysed how the EU legislation has influenced the Greek legislation. Art. 7 of Law 3583/2007 appoints the Department of Criminal Record at the Central Unit of the Ministry of Justice as the central authority for the exchange of information concerning criminal record between the Hellenic Republic and other Member States. Rules on the exchange and keeping of personal data for the investigation of criminal offences are also provided for in the Code of Criminal Procedure (Art. 577 on the ability of foreign criminal authorities to obtain copies of criminal records and Art. 200A CCP on the obligation of law enforcement authorities to collect sample of DNA in order to determine the identity of the offender).

C) The ECRIS

In general, the Finnish Rapporteur notes that the foundation of ECRIS is a positive issue as it facilitates the purposes of the 2008/675/JHA FD on taking account of convictions in the EU Member States in the course of new proceedings. It has various positive effects in forming a genuinely European area of law and justice in the field of Criminal Law (e.g. it must borne in mind that prior convictions or criminal history in some situations might have a mitigating effect).

In Poland, the two FD have been incorporated by the Act of the 16th of September 2011. [108] The assessment of the implementation will be determined by the particular organisational and technical safeguards against illegitimate access and the errors occurred.

In Croatia, the 2005 FD has been incorporated by several Acts.[109] According to the legal framework, the Ministry of Justice (the central authority) shall, at least annually, inform the central authority of another Member State of all penal decisions and measures against citizens of this State, unless provided otherwise by an international treaty. Upon request, a copy of decisions and measures can be provided and and the Ministry of Justice shall consider the request for international legal assistance and its content confidential. Furthermore, Croatian CC provides that criminal records may be given only for the purpose of criminal proceedings and of discovering the perpetrator of a criminal offence, and to citizens upon their request, provided they prove they need such data for exercising their rights in a foreign state. Pursuant to the Criminal Procedure Act, personal data of the perpetrator shall be deleted from all automated records upon the expiry of the period specified by the Act.

The Czech Republic has implemented the 2005 FD but the 2009 FDs are still in the implementation process (and will be adopted along with FD 2008/675/JHA on taking into account other Member States convictions). The basic novelties are as summarised as follows: There should be an automatic entry of information about convictions of Czech citizens. A copy from the criminal register shall be included because this will prevent misinterpretation by the administrative authorities. As regards taking into account convictions of other EU Member States, an amendment to the Czech Criminal Code shall be concluded which shall state that the final conviction by a Court of another Member State in the criminal proceedings shall be considered as a conviction of a Czech court, provided that the double criminality

[108] Ustawa z dnia 16 września 2011 r.o zmianie ustawy o Krajowym Rejestrze Karnym, not yet published.

[109] The Act on International Legal Assistance in Criminal Matters, the Criminal Code, the Criminal Procedure Act and the Act on Ratification of the European Convention on Mutual Assistance in Criminal Matters of the 20th of April 1959 and the Additional Protocol on the European Convention on Mutual Assistance in Criminal Matters of the 17th of March 1978.

requirement fulfilled. However, two exceptions will apply in respect of overall penalty or joint penalty for continuation in criminal offence.

In Spain, the 2009/315/JHA has been put into action through administrative instructions.[110]

In the UK, the 2005 FD was to be implemented by the 21st May 2006. The UK met this deadline by appointing a Central Authority; the UK Central Authority for the exchange of criminal records (UKCA-ECR) was established under this FD. As for the ECRIS, the deadline for the implementation of the relevant FD has not expired yet.

In Hungary, the ECRIS system has already been realised at legislative level but it does not work actually and completely.

In the Netherlands, Portugal, Slovenia, Italy, Finland, Malta and Ireland no implementation of the ECRIS has been concluded. In the latter, the legislation to give effect to ECRIS has been drafted and will be enacted in 2012. In the former, an amendment of the Decision on Judicial Data is currently being prepared. However, the State participates in a pilot for a Network of Judicial Registers (along with Belgium, the Czech Republic, France, Germany, Spain, Italy, Luxenbourg, the Netherlands, Poland, Slovakia and the UK). To this regard, a case on child abuse in a kindergarten in Amsterdam led to a public discussion on the absence of an appropriate exchange of criminal registers.

QUESTION 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?

A) The EU-US PNR Agreement in general:

The EU-US PNR Agreement has been widely criticised for the protection it provides to ECHR rights.[111] The Slovenian Rapporteurs consider it as a "step backwards" in the field of data protection. They also refer to the EP which has criticised it as "substantially flawed" with "open and vague definitions and multiple possibilities of exception".

A challenge with the Agreement, mentioned in the UK, Finnish, Greek and Slovenian reports, concerns the **proportionality** of the measures taken to the purpose intended. The UK submits that it has been argued that the provisions of the Agreement aim at protecting the US borders instead of preventing terrorist attacks and criminal conduct. This is evident from the overreaching extent of the measures that cover both serious and minor offences. Thus, the proportionality in the light of Art. 8 ECHR is questionable. Even though, the Agreement engages Art. 8, it is submitted that the provisions are legitimate[112]. Therefore, the proportionality and necessity checks apply only on an *ad hoc* basis. Besides, according to the Slovenian report the **long retention period** indicates a violation of the principle of proportionality. The issue of the long retention period is stipulated in the Portuguese and Finnish reports as well. In the latter, it is added that a **possible profiling of passengers** would consist a violation to the right to private life. Similarly, the right to supplement, correct, block, erase and to object shall not be left to the US margin of appreciation. Furthermore, the Slovenian Rapporteurs note that the **principle of legality** is also violated since the Agreement fails to determine explicitly the institutions that have access to personal data. Moreover, the Portuguese report highlights that the PNR Agreement does not appear to be in line with

[110] Circular 1/2009 relativa a la nueva aplicación del Registro Central de Penados y Rebebles.

[111] For example, PNR has been criticised by the European Parliament (LIBE Commission), the Fundamental Rights Agency, the European Data Protection Supervisor and by several NGO's such as State Watch, the European Digital Rights (EDRI-gram).

[112] *EDPS criticises planned PNR measure* [2008] 233 EU Focus 7-8.

Directive 95/46/EC and FD 2008/977/JHA. Besides, the USA have not signed the Convention 108 on the Automatic Processing of Personal Data. Hence, there seems to be some lack of procedural safeguards, as there is no independent authority that effectively controls the way such data are processed.

To this regard, the Greek report analyses further how the PNR Agreement violates the right to privacy and data protection as well as the right to non discrimination by reference to the respective parts of it (apart from the doubts on the necessity and proportionality). In specific: a) the purposes for which PNR is used are too broad and unspecific and they cannot constitute a *de facto* restriction of processing; b) no definitions of terrorism-related crime and serious crimes are provided; c) it is not ensured that data transfers are possible only to third countries with adequate level of protection; d) after the retention period prescribed, it is not certain that the data will be deleted; e) the USA have different rules on privacy and data protection, but the US laws are the exclusive point of reference for the processing and transfer of data; f) no effective rights of redress exist -no right for the foreigners to initiate a judicial procedure before the US Courts; g) the presumption of innocence as a principle is negated.[113]

The Italian report refers to the Judgment on the PNR case of the CJEU which had a negative impact on the conclusion of the subsequent PNR agreements, since it excluded the safeguards and guarantees contained in the Directive 95/46 on behalf of EU citizens and residents wishing to fly to/from countries enacting PNR systems. Indeed the agreements concluded in 2006 and in 2007 with third countries (Australia and USA) cannot be considered as guaranteeing an adequate level of protection of the PNR data of EU citizens and residents flying to/from the USA.[114]

On the contrary, the Maltese Rapporteurs consider the PNR Agreement positively. It is pointed out that it sets out privacy-friendly rules on how and for how long PNR data may be stored and contains comprehensive safeguards for passengers' right to data protection. It also lays down very strict conditions for the use of sensitive data which might reveal, for example, the religion or sexual orientation of passengers.

This positive view is also shared by the Czech Republic. As regards the right to privacy, it is stated that it can only have a positive effect, bearing in mind that the transfer would happen even without the Agreement and without any conditions attached. It is admitted though, that the US and EU rules on privacy are different, but so are many other rules in different areas where common ground has to be sought.

Poland submits that a PNR assessment is equivocal. On the one hand, there are no reports of data abuses by recipient authorities, leakages or data errors. On the other hand, there is no evidence that PNR data have served their public interest objective. This issue is vital considering the major restrictions to fundamental rights. Hence, the most important reservation about the PNR is the **absence of evidence** (or at least no evidence available to the public), even though the evidence-based policy making should be perfectly viable.

Lastly, Bulgaria states that in the Civil Air Crafting Act there are no provisions on the PNR system and Denmark, pursuant to the opt-out rules, will not be part of new rules on an EU PNR Agreement. However, the latter states that nothing prevents the State from implementing a system constructed in accordance with the technical specifications in the future Directive on PNR.

B) The Proposal for a PNR Directive:

[113] The provisions on the EU-Canada and EU-Australia Agreement are less severe.
[114] Interestingly, the EU-Canada PNR Agreement is not questioned.

First of all, the UK Rapporteurs state that the Proposal has been put under scrutiny for its compliance with fundamental rights. The **long retention period** of data has been criticised for being far too long (five years) and, thus, disproportionate. Hungary states that as well. In fact, the International Department of the Office of the Commissioner for Data Protection, a consultant of the Ministry of Administration and Justice, remarked that a 3-4 year time frame would be acceptable and if the suspicion for a crimes arises, then the data shall be retained for a longer period. Criticism has been expressed by the Statewatch Director Tony Bunyan who has stated that the lack of judicial redress to data subjects or any guarantee of independent oversight pose significant challenges to Art. 8 ECHR. The FRA has also expressed its concerns for the way the new proposal **limits fundamental rights**. The need for an independent supervisory authority has been underlined several times; this impartial body will be acting in compliance with the right to protection of personal data safeguards. Another point raised is that under the Proposal, carriers will be able to transmit personal data that could potentially be used with prejudice. Since the draft Directive allows for intelligence surveillance of **all passengers**, a generalised surveillance operation is established. It is precisely this point that raises concern about the significant limitations on privacy and data protection rights.

Related to the UK perspective is the Dutch opinion. Necessity and proportionality with regard to Art. 8 ECHR have been the subject of numerous debates. Furthermore, on instigation of the Meijers Committee 115 , the Senate posed many questions to the Commission, mainly concerning fundamental rights. It is also noteworthy that PNR data are already used in the Netherlands, though on a limited scale, even though the negotiations are not yet concluded. All in all, the Dutch Government considers that a PNR scheme is necessary to combat serious crime provided that adequate safeguards are regulated.

Ireland, which wishes to opt in the new Directive, submits that the recent Proposal raises the same concerns with regard to Privacy and Data Protection as the current Agreement with the additional concern of invalidity due to **lack of proportionality**. Two issues prove that the Proposal violates the principle of proportionality as well as Article 52 of the Charter of Fundamental Rights; the unclear definition of "serious crimes" (also mentioned in the Greek report) and the possibility for the Member States to exclude minor offences (both issues are analysed below in comparison with the Estonia point of view). Overall, the poorly defined nature of the limitation of the rights contained in the Proposal amounts to an absence of adequate legal provision.

Furthermore, the Greek *Rapporteurs* note that the Proposal, establishing a decentralised system (Passenger Information Units – PIUs) is too generic, because **it does not provide precise information on PIUs, intermediaries and other authorities**. These dispositions could cause legal uncertainty and a heterogeneous enforcement of the PNR system in Member States. Other concerns arisen relate to Article 8 of the Proposal, where no reference that the third country must have adequate level of protection is made, and to the risk that sensitive data will be transmitted under the heading "general remarks". This last issue is also included in the Hungarian report.

Also, Italy points out that on the 18th of May 2011 the Commission's Legal Service sent a Note to the Director-General of DG Home Affairs stating that it does not consider the planned agreement as "compatible with fundamental rights". Also, member of the Italian Data Protection Authority considers highly doubtful the necessity and the proportionality of the measure concerned since evidence of concrete results in the fight against terrorism has been offered: this already clearly emerged from a study of the House of Lords. Besides, no

[115] The Standing Committee of Experts on International immigration, Refugee and Criminal Law, see Annual Report of 2010, available at http://www.commissie-meijers.nl, p. 9.

new evidence that something is changed has been adduced by the Commission in its impact evaluation of the Proposal. This issue is also mentioned in the Hungarian report.

The opposite view is taken by the Czech Republic which notes that it is possible to implement the new Directive in a manner which would be in compliance with all the constitutional requirements.

A positive opinion for the Proposal is also echoed by the Slovenian, Portuguese and Estonian *Rapporteurs*. The last two submit that the new Proposal is considered as offering several rules for the protection of personal data. The Estonia report regards as important that the Directive would also cover Intra-EU flights since flights outside the EU cover only 15% of the total amount of flights. The Estonian report further draws the attention to the provision allowing Member States to exclude those minor offences for which, taking into account their respective criminal justice system, processing of the PNR data pursuant to the Directive would not be in line with the principle of proportionality. According to the Ireland though, this provisions implies that the EU instrument, prior to any such exclusion by Member States, allows minor offences within its scope. The Estonian Rapporteurs also submit that the Proposal refers to the use of data for prevention, detection, investigation and prosecution in terrorist offences and serious crime cases. They take the view that there should not be any doubts regarding proportionality of using the PNR data for prevention, detection, investigation and prosecution for all crimes listed in the EAW FD. However, in the Irish report it is supported that the Proposal is wide in scope and that the EAW FD does not make any reference to serious crime, while the list is not purported to be exhaustive.

Lastly, in Malta a new Directive is unlikely to pose any problems as the Maltese Data Protection Law is heavily modelled on EU Law and Malta most likely will follow any EU developments.

Switzerland is not tied to the PNR Agreement between the EU and the USA. However, Switzerland has concluded in 2008 a similar treaty with the USA, according to which the US has committed to comply with data protection standards as in the EU-USA Agreement. The US authorities are allowed to keep the data retained more than fifteen (15) years. As for the new Proposal, Switzerland submits that the Commissioner associated with Schengen non-EU Member States invited the State to participate in the proposed rule. The State will need to examine whether an association is consistent with its policy to an appropriate data protection Law.

QUESTION 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?

A) The scope of application of Framework Decision 2008/977/JHA and its implementation by the Member States

From the Member States that have transposed the FD (either via existing legislation or by amending their national provisions) Denmark, the Czech Republic and Poland have restricted its scope to transfer of data between a national and a foreign authority, thus the impact is rather limited. In specific:

- Denmark has implemented the FD by amending the Danish Act on Processing of Personal Data (Ministerial Order, cf. Section 72a.).[116] The personal data must be

[116] Lov. nr. 188 af 18/03/2009 om ændring af lov om behandling af personoplysninger.

processed wholly or partly by automatic means or otherwise than by automatic means which form part of a filing system or are intended to form part of a filing system. Processing of special categories of data (racial or ethnic origin, political opinions etc.) must be prohibited unless the processing is strictly necessary. Personal data received or made available from a foreign authority may only be processed in accordance with a list of limited purposes other than those to which they were exchanged or made available.

- Furthermore, the Czech Republic has implemented the FD by the Act on Police (150/2011 Coll.) and by specific provisions in the Criminal Procedure Code or acts on military police or customs service as well as some provisions for the general Data Protection Law.
- Poland has also implemented the FD by the Act of the 16th September 2011 on exchange information with law enforcement authorities of the EU.[117]

On the other hand, the UK has implemented the FD by a combination of Data Protection Act 1998 provisions and principles and a number of administrative measures and safeguards[118] that apply to all public authorities and ensure compliance with Convention and Charter rights. Even though the FD is restricted in scope, it is thought that UK Law protects all types of personal data. As for Art. 5 on time limits for erasure and review, the Member States enjoy a lot of discretion and the UK has argued that its existing measures satisfy the FD provisions. For example, the Data Protection Act 1998 sets out data retention schedules and leaves data controllers to decide the period by taking into account the Data Protection Principles. Furthermore, the UK has put in place procedures (Privacy Impact Assessments – PIA) that ensure the protection of the right to private life and the right to data protection. PIA is used when a new measure is likely to involve the use/access to personal data. In case PIA highlights a risk, the Information Commissioner is notified and consulted by the competent authorities. Moreover, Art. 11 of the FD is considered to be met by the domestic legislation through the Data Protection Principles already. It must be noted that the strict requirement for transfers to Equivalent Authorities in third States or to international bodies is not included in the Data Protection Act. However, the Decision provides Member States with discretion on how they obtain consent; it is submitted that UK competent authorities are largely compliant through the terms of data sharing agreements regarding police and judicial authorities.

In Hungary the Act LXII. Of 1992 is the main legislation data protection. The present content complies with the 2008 FD. The scope of application of the FD is very wide and provisions can be found in the Act on Data Protection as well as certain sectoral legislation. Proportionality, legality and purpose limitations appear in the Police Act just as in the regulation of data management activity of other authorities.

Nevertheless, most States supplying information have not transposed the FD. Specifically:

With regard to the implementation process, Ireland provides the following information: a) The Data Protection Acts 1998 and 2003, which is the current legislation, dis-apply restrictions on the processing of personal data if the processing is required for the purpose of preventing, detecting or investigating offences and apprehending or prosecuting offenders but only "in any case in which the application of those restrictions would be likely to prejudice any of the matters aforesaid". b) The Data Protection Commissioner has agreed on a Code of Practice with An Garda Síochána (Ireland's national police and security service). c) Some time before November 2010, deadline of the transposition of the FD, the Commission signalled a review of EU data protection legislation with a view to bringing

[117] Ustawa z dnia września 2011, r. o wymianie informacji z organami ścigania państw członkowskich Unii Europejskiej.

[118] S6 Human Rights Act 1998.

forward a draft Directive under the Lisbon Treaty. In the view of the expected tabling of a draft Directive, Ireland informed the Commission that the measure is sufficiently implemented by the Data Protection Acts, the Code of Practice and by administrative authorities.

Portugal has not implemented the FD either. However, the Portuguese National Data Protection Authority (NDPA) has proposed equivalent solutions several times in its opinions as an adequate response in ensuring the right to private life and the right to data protection. As for the scope of application of the FD, according to the Rapporteurs the enforcement of data protection within the EU would gain if the legal instrument would apply to the processing operation of law enforcement authorities in general and not only to cross-border transfers of personal data. This may be expected now that the Lisbon Treaty has created an obligation on the Council to adopt a decision laying down the rules relating to the protection of individuals with regard to the processing of personal data and the rules relating to the free-movement of such data (Art. 39 TEU).

Besides, no implementation has been concluded in Italy, Estonia, Spain, Finland, Malta and the Netherlands. The Italian Data Protection Authority considers that a proper implementation of Section 57 of the Italian Personal Data Protection Code (PDP Code) would help complying with the FD. Estonia is currently analysing the need to amend the current legislation (Personal Data Protection Act) in order to fully implement the FD. The Spanish Rapporteur marks that the implementation is necessary despite its limited scope, vague commitments and broad deviations from traditional data principles and institutional controls. In Finland, the implementation of the FD ceased since the Finnish Parliament had no time to handling a Bill before parliamentary elections held in April 2011. Malta is in the process of implementation but no specific time frame is available. Lastly, in the Netherlands, a proposal for legislation implementing the FD is pending before the Dutch Parliament.

The 2008 FD builds on the Schengen *acquis*, thus Switzerland is bound by it. Compliance has been achieved by the Federal Act on Data Protection and numerous cantonal data protection Laws. The supervision of data protection is assigned to the Federal Data Protection and Information Commissioner (FDPIC) who has broad inspection rights. He can investigate on his own motion, or upon notification, situations where processing methods are likely to infringe privacy rights of a large number of people. He can make recommendations or if this is not allowed he can refer to the Federal Administrative Court. Besides, all cantons are equipped by a Data Protection Supervisor who monitors the operative police authorities. The Swiss *Rapporteurs* refer particularly on the requirement of informing the data subject on the collecting or processing of his/her data. According to the Federal Act on Data Protection, information must be provided not later than the store of the data. If information is not stored, then informing the data subject must take place with the first disclosure of the data to third parties. In the event that the parties concerned are not sufficiently informed, then the wording of the FD is not clear as to whether informing must take place by the transfer or can be done later. However, the timing of the announcement is considered as an important aspect ensuring respect to the right data protection.

B) The 1995 Data Protection Directive

In Italy, the PDP Code, implementing Directive 95/46/EC, is regularly used in order to deal with matters falling under the third pillar. In specific, although Section 53 of the Code excludes the application of several general principles from the processing of personal data that is carried out, either, by the Data Processing Centre at the Public Security Department or by the police, the general principles laid down in Section 3 and 11 of the PDP Code are in any case applicable to data processed by the police or the judiciary, thus assuring a

substantial protection of individuals' privacy rights. Moreover, Section 56 provides for safeguards of data subjects when their personal data are processed by police bodies.

Greece has implemented the Directive by virtue of Law 2472/1997, as subsequently amended, which constitutes the main legislation regarding data protection. The Hellenic Data Protection Authority (HDPA), equipped with constitutional status, is the body *par excellence* empowered to deal with data protection matters, while the Courts, are increasingly faced with related questions.

In the UK, the Directive has been implemented by the Data Protection Act 1998. However, the Commission considers that the UK has not transposed the Directive with respect to numerous Articles of it (Art. 2,3,8,10,11,12,13,22,23,25 and 28). In fact, the Commission is considering infringement proceedings on the basis that the implementation is flawed and narrows down the scope of the Directive.

The Dutch Government contains two Laws on this issue; on police and on judicial data.119 These laws apply to both cross-border exchange of data and domestic situations. They also ensure that the data protection obligations under Council of Europe Convention 108 were implemented in national law and that the main provisions of Directive 95/46 were also applicable.

Furthermore, the Spanish authorities adopted OA 15/99 in order to transpose the Directive. The scope is not restricted to private files but public administration databases are also covered. Art. 22 provides that collecting data without consent is permitted only when this is necessary for preventing a genuine threat to public safety or for the suppression of crime while the data must be stored and classified according to their degree of availability. Furthermore, the data must be erased when there are no longer necessary for the enquiry justifying their storage, taking into account the age of the data subject, the nature of data, the need to maintain the data until the conclusion of a specific investigation, a final judgment, particularly an acquittal, a pardon, rehabilitation or the expiry of reliability.

The Czech Republic implemented the Directive in 2000 and applies to law enforcement and judiciary as well as a general piece of legislation. Certain purposes (such defence, investigation, public order) enjoy exceptions.

The Polish legislator has transposed the Data Protection Directive by the Act of the 29th August 1997[120], which generally covers third pillar matters. Nevertheless, data protection is restricted in the following instances. Firstly, oversight mechanisms by the Data protection Ombudsman are seriously curtailed and practically ineffectual. Secondly, the general fair data processing safeguards provided in the Directive, based on the principle of transparency, are excluded in the specific acts governing particular law enforcement authorities and agencies disabling, due to the *lex specialis* implementation, the general protection.

In Slovenia, the field of personal data protection is regulated by the Zakon o varstvu osebnih podatkov (Personal Data Protection Act)121, which implements the Directive. This Directive has been indirectly relied upon in criminal proceedings by way of State Prosecutor Act's reference to the Personal Data Protection Act.[122]

In Estonia, the Directive on Data Protection is implemented by the Personal Data Protection Act, the main legal tool in this field. The Act is the main legal tool providing rules for data protection on Estonia regardless of the area of law. It could be said that currently Estonia implements the Directive in all areas, including ones falling under the third pillar

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[119] Act on Police Data and the Act on Judicial and Criminal Proceedings Data (*Wet justitiële en strafvorderlijke gegevens*), TK 32 554 nr A, 15 September 2011.

[120] Ustawa z dnia 29 sierpnia 1997 r. o ochronia danych osobowych, tekst jedn. Dz. U. 2002 Nr 101. poz. 926.

[121] Personal Data Protection Act, (OJ RS n. 86/2004, 113/2005 - ZInfP, 51/2007 - ZUstS-A, 67/2007).

[122] Art. 184/7 State Prosecutor Act.

with the exemptions provided in the Personal Data Protection Act and the Code of Criminal Procedure. These exemptions are mostly related to the regulation of publication of personal data in criminal procedure.

With reference to data protection, Bulgaria is bound by the ECHR, Council Convention 108 (28/01/1981) and by the Personal Data Protection Act which entered into force on the 1st January 2002.[123] The Act includes a stricter regime for processing of special categories of data, such race origin, political opinions, religious beliefs etc. It also applies to data processed for the purposes of defence, national security and public order, as well as for the purposes of criminal investigation, with the exception of cases where a special Law is applicable. Thus, the Act represents an instrument for the implementation of the 2008 FD too.

Croatia implemented the Directive by the Act on Personal Data Protection.124 The purpose of the Act is to protect the privacy of individuals, as well as other human rights and fundamental freedoms in the collection, processing and the use of personal data. Rules on the processing of personal data which are similar to other EU Member States are provided. The Act further establishes Croatian Personal Data Protection Agency, an independent body responsible for supervising the work of personal data processing. As of January 2011 the Agency has taken on a new task, acting as an independent body responsible for the protection of the right to access information. In the EU Common Position on Chapter 23 (Judiciary and fundamental rights) (29/06/2011), the EU stated that Croatia should strengthen it and ensure the relevant staff is able to rule on the merit of all cases, including those where information was classified.

Since Hungary complies with the 2008 FD, the earlier content of the main legislation implemented Directive 95/46/EC. Besides, the Hungarian Criminal Law criminalises misuse of personal data.

C) The use of data protection legislation by domestic courts

In Ireland, data protection considerations were pleaded in the matter of *Digital Rights Ireland Limited v The Minister for Communication & Others.* In the course of the initial application to the Court for a preliminary reference to the CJEU, the Plaintiff accepted that it did not have the same rights as a natural person and that it may not be capable, as a legal person, of availing of the rights provided for by the Data Protection Act. However, the Plaintiff also seeked to invoke the rights of its members as natural persons, in its standing as an *actio popularis* plaintiff. Additional Data Protection arguments might be available to the Plaintiff in the event of the transposition of FD 2008/977/JHA, but at present, litigants are restricted by *locus standi* rules, and, in the case of public interest groups, the application of Data Protection laws to natural rather than legal persons.

The Bulgarian report submits extended case-law of both the national Courts and the ECtHR revealing that more effective control and supervision by the oversight authorities is imperative. In particular, in 2003 the Ministry of Interior denied a former officer access to information kept about him on grounds of national security. The denial was challenged in the Supreme Administrative Court which confirmed the denial. This decision is challenged before the ECtHR. In another case involving video surveillance during protests, the Ministry of Interior registered a video surveillance controller only after a media publication and an instruction by the Personal Data Protection Commission. In 2011, the media found that certain security services have not registered as data controllers using video surveillance even in 2011.

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[123] State Gazette No 1 of 4th January 2002. Last amendment was published in State Gazette No 39 of the 20th May 2011.

[124] Official Gazette no. 103/03, 118/06 and 41/08.

Furthermore, one of the greatest concerns is related to the overlapping of communications for the purposes of national security and investigation of crimes. The relevant Law is the Special Surveillance Means Act (SSMA)[125] which was found by the ECtHR to not meet the standards of Art. 8 ECHR. Two cases are noteworthy. In the Decision of 28th June 2007 on the case of Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria, which became final 30th January 2008 (application No 62540/00), the Court found that the Law did not provide for any review of the implementation of secret surveillance measures by an independent body or official. Also, no independent body verified the compliance with the warrants to use surveillance means, whether they faithfully reproduce the original data in the written record and whether the original data was destroyed. The lack of clear procedures regulating the manner of screening of the intelligence obtained, the lack of obligation to inform the judge of the results of the use of special means, the lack of regular report of the Minister of Interior to an independent body and the lack of notification of persons subjected to secret surveillance at any time and under any circumstances are the main problems among others. In the Decision of 22nd of May 2008 on the case of Kirov v. Bulgaria, which became final on the 22nd of August, the ECtHR put more emphasis on the issue of informing the citizens. Responding to the EctHR case-law, the SSMA was amended on December 2008. However, when in 2011 statistics revealed 15.864 intercepts permitted and used in 2010, concerns were raised again since the number was considerably grown comparing with the 1999-2001 period. Active public discussion was held in the first half of 2011 including a public hearing in the Parliament in February, without clear results.

The Hungarian *Rapporteur* refers to decision of the Supreme of Justice on the 15th October 2007 which reads "If the offender realizes at the same time the abuse of authority and the misuse of personal data committed by a public official, the guilt can be determined only for the latter crime; the formal cumulation is only ostensible".[126]

In the UK, the Court of Appeal in *Durant v Financial Services Authority*[127] considered the meaning of the term "personal data". It held that it does not restrict to every document with the data subject's name on it, but the overriding test is whether the information in question affects a person's privacy (personal or family life, business or professional capacity). The Court also declared the UK implementing Law as complying with the Directive.

With regard to data subject's consent the Polish *Rapporteur* notes that the Courts have settled that data protection may not curtail Civil Law rights otherwise conferred on creditors. This is because in some cases, the debtors used to invoke the withdrawal of consent in order to block debt vindications by third parties to whom the debt would be transferred by the original creditor. Another issue that the judiciary should resolve deals with the ability of commercial actors operating in competitive markets (such as the Social Networking Sites) to render the availability of certain services conditional upon the consent of the service recipient to process the data for specific purposes by the service provider. The Data Protection Ombudsman takes the view that such a data processing requirement violates the free character of the consent and the data subject's right to withdraw it partially or entirely. A confirmation of this opinion by the Court would signify a shift of the authority to tailor products from service providers to recipients, which is contrary to the market efficiency requirement and unbearable on each market exposed to competition.

The Italian Courts and Italian Data Protection Authority, in the exercise of their respective competences, apply regularly the PDP Code in cases involving matters falling

[125] State Gazette No 95 of the 21st of October 1997.
[126] Supreme Court of Justice of Hungary, BJE 3/2007.
[127] [2003] EWCA Civ 1746 also referring to the Lindqvist Case C-101/01.

under the former third pillar. The same applies to Portuguese and Czech Courts. The latter apply data protection rules in three types of procedure: in infringements of Data Protection Law, in civil law suits and in constitutional review of acts by the Constitutional Court.

On the other hand, Denmark submits that the Danish Courts do not use data protection legislation. Since the passing of the Act on Processing of Personal Data there have only been a few cases by the Courts. This means that the decisions from the Danish Data Protection Agency have got high value. Also, in Slovenia, there have not been reported cases on transfer of personal data in the former third pillar matters.

D) The need to address gaps in data protection in future EU legislation

According to Italy, the actual EU legislation on data protection is **fragmentary.** Instead of a large scale IT systems Authority, which is under consideration at EU level, the Italian DPA supports the idea of turning Article 29 – WP in a centralised authority that would control all the existing systems of exchanges of informations not only between public authorities (such as SIS, VIS, ECRIS, PRUM system), but also the ones between public authorities and private operators, such as PNR Agreements or SWIFT.

In relation to PNR Agreements, the Italian DPA deems it necessary to give clear information about the use of PNR data by air carriers when passengers buy the tickets. It criticises the actual system of posting such informations in the privacy clause of the air carrier general conditions of contract. Another issue is that only one (AMADEUS) of several computer reservation systems (CRS) is subject to European Law on data protection for its location in the EU territory, while others such as SABRE, GALILEO and WORLDSPAN are located in the USA. Besides, the Italian DPA considers also necessary to insert effective redress clauses into PNR agreements with third countries, which would enable EU citizens to lodge their complaints before their national authorities.[128] The actual system provided for by the EU-USA PNR agreement does not ensure EU citizen's rights, for it only enables these latter to act for redress before US Courts. In so doing EU citizens are discriminated for the high costs of a future action in the USA and also because the American legislation on data protection does not present the same level of protection as the one assured by EU Law.

The Spanish *Rapporteur* characterises the state of data protection within the EU as **unsatisfactory and inadequate, especially with regard to the stronger position of fundamental rights after Lisbon and the enormous amount of data collection, flow and exchange that the EU carries out**, including (which is particularly disturbing) between third States. In the Estonian report it is noted that after Lisbon there should be more definite safeguards to ensure protection of data being exchanged, thus resolving the issue of insecurity of whether applying or receiving Member State's Law provides for sufficient data protection.

Furthermore, Portugal submits that on the one hand, the right balance between fight against crime and the right to privacy and data protection is difficult to attain while on the other hand, the EU has not reached yet complete harmonisation in order to establish an adequate minimum protection standard. All in all, the strengthening of EU Law enforcement authorities' powers in criminal matters should be accompanied by equal strengthening of fundamental rights. To this end, according to the Hungarian *Rapporteur*, future legislation should create rules which will allow the entitled person to trace his/her personal data. The data subject should receive digital feedback about who treats the data and have the option to prohibit this for the future. It would be good if this information would be provided with a certificate.

A different issue is raised in the Polish report. It is submitted that the Directive and the national acts implementing it have focused mainly on the commercial sector and the

[128] See above, Question 12; the Greek report refers to this matter as well.

police authorities are left outside the parameters of the protection system. Introducing an oversight into the international cooperation processes between law enforcement agencies, even though limited in scope, is considered as an appropriate development.

In Greece, the Hellenic Data Protection Authority has depicted gaps in the interpretation and enforcement of data protection legislation. Therefore, it issued directives to the legislator in enacting additional law provisions. Matters related to terrorism and organised crime – in particular the extent of video surveillance – and tax evasion (exposing personal financial data) are in the epicenter of the public debate.

On the contrary, in Slovenia, the Information Commissioner who supervises data protection, has praised the complementary character of EU Law and has particularly emphasised the positive contribution of FD 2008/977/JHA to the field. To this end, the Czech *Rapporteurs* note that no major gaps in EU legislation are depicted. The areas have intentionally been unregulated in correspondence to the subsidiarity principle. Even though there is no single instrument, this is not seen as a problem. However, the Directive needs modernisation to take account of technological developments and cross-border situations.

5.**The constitutional dimension**

I.Overview

The development of the Area of Freedom, Security and Justice does not operate in isolation from the broader constitutional development of the European Union. On the contrary, the adoption and implementation of AFSJ law raises questions of fundamental constitutional significance for EU law, potentially reconfiguring both the relationship between the individual and the State and the relationship between the national and the supranational level. The purpose of the closing part of the questionnaire has been to place the evolution of the AFSJ within the general framework of European Constitutional Law. This aim is achieved by examining in particular the reception of EU law by the judiciary in Member States: the specific question on the reception of *Pupino* has served as a basis to discuss the broader constitutional issues arising from the requirement to accommodate EU law in a field which is close to national sovereignty. It is also achieved by focusing on the constitutional possibilities opened up by the entry into force of the Treaty of Lisbon which provides for a renewed momentum towards the development of the Area of Freedom, Security and Justice.

The first constitutional aspect to be discussed here is not a direct outcome of the answers given by national *Rapporteurs* to the specific questions, but rather stems from the overall content and profile of the national reports. It is a reminder that an analysis of the legislative and jurisprudential evolution in the field cannot be complete without the examination of the **external dimension of the Area of Freedom, Security and Justice.** The Reports confirm both the multifaceted character of the external dimension of the Area of Freedom, Security and Justice and the interdependence between the internal and the external dimension.[129] A number of Reports on Member States which have recently joined the EU and the Report on Croatia confirm the great influence of **EU enlargement** and the accession process in ensuring the implementation of the internal EU *acquis*- indeed, on a number of occasions, detailed implementation of EU standards has taken place before accession. The Swiss Report further

[129] On the external dimension in this context, see V. Mitsilegas, 'The External Dimension of EU Action in Criminal Matters', in ***European Foreign Affairs Review***, vol.12, 2007, pp. 457-497.

confirms the impact of Swiss Schengen membership on the convergence between EU and Swiss standards in Schengen-related fields. The second noteworthy element is the **influence of international law on the implementation of EU law**, via the prior adoption of international law standards similar to those of the EU by Member States (a trend notable in particular as regards substantive criminal law and as has been the case with the provisions of the Prüm Treaty). A third aspect confirming the importance of the external dimension is **the internalisation by the EU of external standards.** A prime example of this trend is the tabling of proposals for an EU PNR system following the conclusion of the much criticised EU-US PNR Agreement (a similar move is currently taking place as regards the adoption of an EU Terrorist Finance Tracking Programme- TFTP).[130] The question of whether the internalisation of external action influenced by a highly securitised agenda is consistent with the protection of fundamental rights and the rule of law, values upon which the Union proclaims to be based, remains open.[131]

National Reports reveal an **engagement by national courts with the general principles of Union law** when interpreting legislation related to the Area of Freedom, Security and Justice. The important constitutional ruling of the Court of Justice in *Pupino*[132] was influential to national courts which have used it to determine the extent and limits of indirect effect in their domestic legal order, but also to determine the relationship of their domestic Constitutions with European Union law. In terms of **constitutionality** challenges, a noteworthy distinction emerges from national case-law. National courts have in general been accommodating to the requirement to respect European Union law and its implementation in cases where constitutional conflicts relate to specific provisions of their domestic Constitutions (the prime example in this context being the rulings of a number of constitutional courts on the compatibility of the prohibition of the extradition of own nationals with legislation implementing the Framework Decision on the European Arrest Warrant). On the contrary, national courts have proven to be less willing to ascertain the constitutionality of national law implementing EU AFSJ law in cases where legislation is deemed to have a significant negative impact on the protection of fundamental rights (see in particular the case-law concerning the implementation of the data retention Directive). The emphasis on the protection of fundamental rights is likely to become even more relevant for the Court of Justice and national courts after the CJEU ruling in *N.S.*

The significance of the protection of fundamental rights in the development of the Area of Freedom, Security and Justice has also been highlighted by national *Rapporteurs* in their assessment of the **impact of the entry into force of the Lisbon Treaty.** The positive impact of the binding character of the Charter of Fundamental Rights, the accession of the European Union to the ECHR and the enhancement of judicial protection in the light of the extension of the CJEU jurisdiction have been repeatedly highlighted in this context. National Reports also focused on the positive impact of the post-Lisbon enhanced role of the European Commission and the European Parliament in the development of EU criminal law. The power of the European Commission to institute infringement proceedings in cases of Member States' non-

[130] See the Commission Communication on A European Terrorist Finance Tracking System, COM (2011) 429 final, Brussels, 13.7.2011.

[131] On the question of compliance of EU external action with EU principles and values see V. Mitsilegas 'Transatlantic Counter-Terrorism Cooperation After Lisbon' in *EUCRIM- The European Criminal Law Associations' Forum*, Max Planck Institute for Foreign and International Law, no 3, 2010, pp.111-117.

[132] For a prescient analysis of the potential of *Pupino* see S. Prechal, 'Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union' in C. Barnard (ed)., *The Fundamentals of EU Law Revisited. Assessing the Impact of the Constitutional Debate*, OUP, 2007, pp.35-70.

compliance with EU criminal law has also been broadly welcomed in ensuring better implementation of EU law in the field. Important insights on the role of EU institutions in the development of the Area of Freedom, Security and Justice after Lisbon can be found in the extremely comprehensive EU Report prepared by Judge Perillo. The EU Report is forward-looking, focusing on the future development of the AFSJ on the basis of the lessons learnt since the entry into force of the Lisbon Treaty. Key issues in this context are the reconfiguration of the interinstitutional balance after the abolition of the third pillar,[133] the renewed discussion on the application of general principles of EU law on EU criminal law, and the contested determination of the competence of the European Union to legislate in criminal matters after Lisbon. The EU Report provides an excellent springboard for the initiation of a conversation on the future direction- both substantive and institutional- of the Area of Freedom, Security and Justice.

II.Synthesis

QUESTION 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?

So far, indirect effect in the light of Pupino has had some impact on domestic court practice. Some countries such as Bulgaria, Slovenia, the Netherlands, Malta[134] and Hungary have not reported any relevant case-law. In most countries with case-law the judgments underline the importance of boundaries of the principle as enshrined in the Pupino judgment. Besides, the restriction of a *contra legem* interpretation has also been invoked considerably. It is also noteworthy that the United Kingdom and Ireland seem rather reluctant to make use of this principle.

In Spain, Pupino has not changed much since it has been used by Spanish judges almost exclusively in order to include child sexual abuses among those cases where witness evidence must not be reproduced at trial pursuant to Articles 449, 777 and 797 of the Criminal Procedure Act[135] and to determine the cases in which the victim procedural expenses must be compensated.[136] , Such an application on behalf of the Spanish Courts implicitly admits that any conflict between third pillar and national law remains at the interpretative level, where the limits of interpretation *contra legem* and worsening the position of the individual apply. According to the Spanish rapporteur this suggests that integrity of the third pillar Law cannot be sustained when matters of fundamental rights arise and therefore constitutional, ECHR or even EC Law must take precedence. However, it also suggests that no other concern on the protection of fundamental rights is justified as long as that legal situation lasts.

The Portuguese report draws the attention to two judgments. First of all, the Quimarães Appeal Court decision of 9/11/2009 dealt with a situation similar to the Pupino

[133] On institutional competition after the entry into force of the Lisbon Treaty see V. Mitsilegas, 'European Criminal Law and Resistance to Communautarisation Post-Lisbon', in ***New Journal of European Criminal Law***, vol.1, 2010, pp.458-480.

[134] Until the coming into force of the Lisbon Treaty, Malta was one of the ten Member States that did not allow any preliminary reference at all under Art. 35 TEU. In fact, the Maltese Court did not refer to the CJEU case-law. The judgments at best assist local Courts in interpreting the law.

[135] STS 884/2010, 06/12/2010.

[136] (SAP de Sevilla 83/2010 – Seville Provincial High Court Judgment of 5/3/2010).

Case.[137] In specific, in this case the defendant invoked criminal procedural principles (the evidence shall be produced in front of a judge) in order to justify the non acceptance of the witness's statement, despite the Portuguese legislation establishing the possibility of minors to be heard in special circumstances (outside the court, case where the witness statements are fully documented by the use of sound and audiovisual equipment). The GCA remembered the Pupino case to reject the defendant's pretensions. Also, the judgment of Évora Appeal Court of 3/7/2007 clearly stated the principle of conforming interpretation when dealing with the interpretation of Law 65/2003 (implementing Framework Decision 2002/584/JHA).[138]

Italian Courts tend to interpret national Law consistently with EU Law in the light of the Pupino Case. In specific, in a judgment of 2010[139], the Supreme Court pointed out the obligation of consistent interpretation with regard to Art. 1 of FD 2004/68/JHA on child pornography.[140] On the basis of this principle, the Supreme Court excluded the crime of child pornography in case of pictures taken on the beach lacking an explicit sexual meaning. Another judgment of 2009[141] referred to FD 2005/212/JHA on confiscation of crime-related proceeds.[142] Here, the Court outlined the limits of this obligation. In particular, the Court referred to the general principles of legal certainty and non-retroactivity which prevent a *mala partem* interpretation of national Laws. For this reason, despite the broad definition of "proceeds" provided in the FD, the Court established that the confiscation, provided by the Italian rule for the crime of "financial embezzlement", should affect only the "price" and not also "the output" of the crime. A third case[143] concerned *contra legem* interpretation. In a trial related to drugs, the defendant requested a reduction of the sentence on the grounds of FD 2004/757/JHA on minimum provisions in the field of illicit drug trafficking.[144] The Supreme Court rejected the request as it would lead to a *contra legem* interpretation of the national rule. In other cases, the Supreme Court facing the impossibility of consistent interpretation asked the intervention of the Constitutional Court. Such an example is the implementing Law on the EAW which was declared illegitimate.

In Finland, the general knowledge of EU Law was not among the best in the courts with regard to criminal law issues but over the last decade this situation has changed. Five cases have been delivered by the Finnish Supreme Court which are directly related to EU Criminal Law and the principle of indirect effect has been particularly emphasised. It is stated that the general principles of EU law and specifically indirect effect are quite generally known among domestic Courts but additional work needs to be done.

In Estonia, there are not many criminal cases in which the question of interpretation of EU law has arisen. In some cases regarding competition offences the TEU and the relevant directives have been cited. To this respect, the most notable judgments are the Supreme Court Decision of 1/7/2011 in Case 3-1-1-10-11 and the Supreme Court Decision in Case 3-1-1-12-11. In these judgments the Court stated that provision of the TFEU must be implemented in the interpretation of the Penal Code (Article 400) to eliminate the possibility of creating two separate Competition law dimensions. The Pupino judgment itself was discussed in Case 3-1-1-25-06. The Supreme Court held that the courts wrongly implemented the statements of Pupino. The provisions of EU law may not be applied if such application is in conflict with

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[137] GCA of 9/11/2009 on case 371/07.8TAFAF.G1, available at www.dgsi.pt.
[138] ECA of 3/7/2007 on case 1317/07-1, available at www.dgsi.pt. See also, ECA of 19/8/2010 on Case 118/10.1YREVR, available at www.dgsi.pt.
[139] Corte Cass., Sez. III, *Ghazni Gol*, n. 10981/2010.
[140] OJ L 13/44.
[141] Corte Cass., SS.UU., Caruso, n. 38691/2009.
[142] OJ L 68/49.
[143] Corte Cass., Sez. III, *Giacomelli*, sentenza n. 28712/2010.
[144] OJ L 335/8.

basic principles of national Law, including general principles of national Criminal law and thus, creating a situation of *contra legem* interpretation of the national legislation.

The Polish *Rapporteur* refers to the judgment of the Constitutional Tribunal on the EAW. In this judgment, which was delivered before the Pupino judgment but after the AG had handed down his opinion, the Court ruled that the the principle of consistent interpretation "cannot be used in the case, because the obligation to apply pro-EU interpretation of the national law has its limits […] whenever its consequences would consist of deteriorating the situation of individuals and especially if it implies introduction or aggravation of penal liability". According to the Court "there is not doubt that the surrender of a person indicted on the basis of the EAW in order to conduct criminal proceedings against this person in connection with an act, which according to Polish law is not a crime, could lead to the aggravation of the situation of the indicted person".

The Czech report focuses on the EAW judgment of the Constitutional Court. In it judgment, the Court referred to the principle of cooperation enshrined in Art. 10 EC according to which national legal enactments, including the Constitution, should whenever possible be interpreted in harmony with EU law. It also emphasised that it might not be possible to do so, if the respective national law does not allow such an interpretation, while using fully the national interpretative methodology. However, it is possible that different opinions exist regarding what is still possible interpretation and which interpretation goes *contra legem*. To this regard, the Mantello case has also been analysed. There, the Court of First Instance took the view that even though the person at stake did not possess a status of permanent residence, which would entitle her not to be surrendered according to respective implementing legislation, it still could afford her such right not be surrendered while interpreting the residence status autonomously in line with Pupino and Kozlowski judgements. However, the Court of Appeal held that such an interpretation would be contrary to the Czech Law, especially in situation where the Czech legislator decided to implement only some of optional grounds for refusal, which are furthermore well defined and might have only one meaning in the Czech legal order, hence they do not offer the possibility of any alternative interpretation.

The Irish report is particularly interesting. Prior to the Lisbon Treaty, pursuant to ex Art. 35 EU, Ireland did not accept the CJEU's jurisdiction, hence no interpretative assistance could be asked. The Pupino case bridged this gap, since many significant decisions on procedural aspects of the EAW have been decided without express reference to the Pupino principle, albeit this is implicit in the jurisprudence. Such examples are the controversial decision of the Supreme Court on the question of "flight" and the application of Pupino in *Minister for Justice, Equality and Law Reform v Tobin*[145] or more generally *Minister for Justice, Equality and Law Reform v Desjatnikovs.*[146] No major conflict with regard to *contra legem* interpretation has been evident, i.e. that the asserted interpretation of the Act of 2003 in light of the FD would go beyond the actual scope or provisions of the FD wrongfully, *contra legem*, unlike in other last instance courts.

The Greek report refers to case-law with regard to refusal on behalf of the Greek authorities to execute a EAW when the Member State has not implemented Framework Decision 2002/584/JHA. This has happened with Germany, when the German Constitutional Court found the transposition of the FD invalid and the Greek Court held that an execution of the EAW would violate Art. 2(1) and 4(1) of the Greek Constitution on human dignity and equality respectively. Furthermore, Greek jurisprudence ruled that national Criminal Law shall be interpreted in conformity with EU Directives, even if the latter have not been

[145] [2008] IESC 3.
[146] [2008] IESC 53.

transposed in Greek Law. For example, in a case of life expulsion of an EU citizen the Court found that Art. 99(3) CC providing for the re-entry of person subject to the measure of expulsion should be interpreted under the light of EU Directive 2004/38/EC, the direct effect of which supersedes national law. Thus, an expulsion decision shall be taken on ground of public policy or public security and the host Member State shall take *inter alia* into account, how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration, etc.

In Slovenia, the principle of indirect effect has been applied several times before the national Constitutional Court[147] and other courts, particularly administrative courts, no case has offered so far the Constitutional Court an opportunity to rely on the Pupino doctrine. In Hungary, the report states that due to the advanced harmonisation there is not need generally to to direct apply the basic principles of EU law in the specific cases. The same applies to Bulgaria and the Netherlands. In the former, the principle of consistent interpretation is an acceptable interpretative method which has not been used so far by the national judges.

As for Switzerland which is not an EU Member State, it is submitted that it is not tied directly to the EU law principles developed. The Swiss Courts and authorities would not deviate unnecessarily from the case of the CJEU. The principles of EU Law on the application of domestic law are radiated in the provisions implementing its Schengen obligations. Such examples are the principle of proportionality or the *effet utile*. The introduction of the principles of availability and equal treatment of domestic and foreign police authorities in the Schengen legal for police assistance shows a shift from an international cooperation to a federal state like cooperation. Subsidiarity in Switzerland refers to the allocation of powers between the Confederation and the cantons in the field of internal security to the expression. Since Switzerland is bound by the Schengen system, Framework Decisions direct effect is also possible, provided that the criteria apply.

QUESTION 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?

With regard to the influence of the Lisbon Treaty in the implementation of EU Law and the protection of fundamental rights a plethora of arguments were provided.

As far as the **protection of fundamental rights** is concerned, the national reports focused mainly on two main improvements: The **binding force of the Charter of Fundamental Rights** and the **intended accession of the EU to the ECHR**. The Czech Republic regarded them as significant steps in strengthening the fundamental rights protection in the EU, adding the importance of the fact that the ECHR standards shall be considered as minimum standards which shall be fully respected and might be set only higher at EU level and the assurance that the level of protection both at international and constitutional level shall not be worsened in essential. The Portuguese report mentions that the binding nature of the Charter will enhance mutual trust among Member States and contribute to the development of the EU as AFSJ. The Netherlands mark that these innovations contain differences between them; whereas the ECHR is of general application, the provision of the Charter are applicable only on institutions, bodies and agencies of the EU, as well as on the Member States (however, only) when they are implementing EU law. Poland also underlines that the binding force of the Charter is weakened in this country

[147] For example, Constitutional Court Decision U-I-321/02, 27/5/2004, para. 23.

pursuant to Protocol 7.[148] Greece notes that with the accession the EU will reaffirm its core values of respect for its citizens and dignity.

As for the **implementation of EU law**, many reports refer to the **CJEU's jurisdiction** after Lisbon. First of all, the removal of the Court's jurisdiction limitations over EU Criminal Law signifies that the Commission will be able to initiate **infringement proceedings** against Member States before the Court in this policy area (under Articles 258-260 TFEU), thus controlling their compliance with the acts adopted within the AFSJ. This will necessarily result in all the more accuracy in the implementation by the Member States. Furthermore, the Court will be able to issue **preliminary rulings** on all acts adopted within the framework of AFSJ (under Article 267 TFEU) and the individuals will have the right to bring **direct challenges against the Member States** before the CJEU for having failed to fulfill their obligations under the rules of the AFSJ (under Article 263 par. 4 TFEU). The Bulgarian report stresses that with the elimination of the possibility for the Member States to restrict the jurisdiction of national Courts to submit preliminary questions in matters of Criminal and Criminal Procedural Law, either as generally excluding the possibility, or as making it limited to courts or tribunals of last instance, shall increase the possibility of direct cooperation between the national courts and the CJEU. To this end, in the Greek report it is mentioned that the growing judicialisation that is expected in areas such as immigration, asylum, criminal justice or police cooperation will indeed constitute a positive central component in ensuring a more consistent and accurate application of EU Criminal Law and in guaranteeing the protection and respect of the individual's freedoms and rights. However, the Spanish *Rapporteur* states the hard line that some Constitutional Courts have already adopted prevents any overly naive expectations. With reference to the maladjustments of the application of mutual recognition, especially those stemming from risky or premature legislative choices, he also notes that there will be, to a large extend, purged by the CJEU, in particular if it decides to opt for a hard and effective interpretation of EU Criminal Law and for a strong version of mutual trust. As for the protection of fundamental rights, he submits that the Court has powerful technical weapons to reach whatever balanced final result sees fit.

As for the **transitional period** of five years, Bulgaria and Poland refer to the declaration under Art. 35 TEU. Bulgaria is willing to make this declaration, with the view to assume that any court in Bulgaria may refer to the CJEU for a preliminary ruling of police and judicial cooperation in criminal matters. Interestingly, Poland marks that on the 10th of July 2008 the Parliament adopted an Act authorising the President to submit the declaration on the basis of Article 35 (entered into force on the 15th March 2009). The President asked the Polish Constitutional Court to exam the constitutionality of this declaration. The judgment of the 18th February 2009 declared that the declaration was in accordance with the Polish Constitution, but the President did not submit it until the entry into force of the Lisbon Treaty. According to the Polish academics, it is impossible to submit this declaration now because an appropriate legal basis is lacking, since amended Article 35 does not provide for such possibility.

As far as the **legislative procedure** is concerned, the EU now has the competence to legislate in the field under the **ordinary legislative procedure** (majority voting and co-decision) is a considerable improvement which, according to the Czech report will result to the clearer and not that vague rules – often running counter the principle of legality or legal certainty. The Italian *Rapporteurs* note that regulations are now available, as well as

[148] According to Art. 1(1) of Protocol 7 attached to the Charter, having been negotiated by Poland, the UK and later amended to include the Czech Republic, the domestic courts in Poland, the UK, the Czech Republic and the EU's courts from finding that "laws, regulations or administrative provisions, practices or action" in the countries to which it applies are inconsistent with the Charter. Furthermore, Art. 1(2) says that the Title IV of the Charter, which contains economic and social rights, does not create justiciable rights.

directives which may entail direct effect. The Czech *Rapporteur*, however, fears that the overall picture with the European Parliament on an equal footing with the Council could make the decision making a **more complex and complicated procedure**, meaning that the compromises, formerly done with the Council, will be found also within the ambitious European Parliament (hereinafter EP), jeopardising the clear wording of the adopted rules and perhaps resulting in implementing difficulties on behalf of the Member States. Regarding the EP's position, the Greek *Rapporteurs* state that the last ten years before Lisbon European cooperation on AFSJ has taken place in a background where the EP was merely consulted in areas having a deep impact on basic democratic principles and fundamental freedoms. A democratic deficit has also affected discussions on strategic agenda-setting, such as in the three multi-annual programmes on an AFSJ (Tampere, The Hague and Stockholm), which have been exclusively in the hands of the European Council and, with the exception of the Stockholm Programme, have developed through non-transparent methods. The rejection of the SWIFT Agreement between the EU and the UU is clear demonstration of the different conditions after Lisbon. The result is that, as the Finnish *Rapporteur* submits, the European Commission will enjoy "normal" supervisory powers in this field which will produce more coherence – although the role of effectiveness is accentuated in the Commission proposals. However, the **more extensive powers of the Commission (since it will have the right of initiative) may have an adverse effect with regard to the protection of fundamental rights** if effectiveness of the cooperation is regarded as the most important value of the Criminal Law cooperation. Finally, the Swiss *Rapporteurs* draw the attention to the additional powers for agreements with third countries, which for Switzerland signifies a new negotiation partner alongisde the Council and the Commission.

Besides the aforementioned reforms, the Dutch report refers to other improvements brought by the Lisbon Treaty. To be specific, the Dutch Rapporteur mentions the so-called **emergency procedure** concerning decision making. According to this procedure, a member of the Council who considers that a draft Directive concerning Criminal Law cooperation would affect fundamental aspects of its criminal justice system may request that it shall be referred to the European Council.[149] The idea is that the European Council within a period of four months refers the draft back to the Council, accompanied by its observations and instructions. It is stated that the main existence of this procedure can have positive effects on the implementation of decisions which ultimately will be adopted.

Another element mentioned in the Dutch report concerns the newly introduced provision according to which, in a situation whereby the approximation of criminal Laws and regulations of the Member States proves essential to ensure the effective implementation of a EU policy in an area which has been subject to harmonisation measures, Directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. This provision represents a consolidation of the doctrine of the CJEU developed in the cases C-176/03 and C-440/05.[150] Also in this case the emergency procedure may be invoked. It is clear that the introduction of the said definitions of criminal offences or sanctions can have a positive effect on the way EU law obligations are implemented and enforced at the national level.

Furthermore, regarding **the role of national parliaments**, it is stated that they will be informed about new legislative proposals and get involved in the application of the principles of subsidiary and proportionality. This improvement in the position of national Parliaments is also stated by the Italian and Greek *Rapporteurs*. Especially the yellow and orange card options combined with IPEX may influence the balance in decision making. Also, there are

[149] See Articles 82(3) and 83(3) TFEU.

[150] Case C-176/03, Commission v. Council ECR I-7879 and Case C-440/05, Commission v. Council ECR I-9097.

arrangements to be established by the Council on a proposal of the Commission where the Member States, in collaboration with the Commission, conduct an objective and impartial evaluation of the implementation of the Union policies, in particular to facilitate the full application of the principles of mutual recognition. Such arrangements, once established, may indeed facilitate the process of implementation of EU law obligations. National parliaments as well as the European Parliament will be informed about these developments.

The Hungarian *Rapporteur* replied by referring to the judgment of the 12th July 2010 by the Hungarian Constitutional Court on the constitutionality of the law promulgating the Lisbon Treaty (Act CLXVIII of 2007). It had been argued that some provisions of the TEU restrict the national sovereignty so much, that, by acknowledging their binding force, the Hungarian Republic could not be considered as an independent state founded on the rule of law. The Constitutional Court took the view that the Lisbon Treaty strengthened (confirmed) the protection of the basic rights in the Hungarian Republic as well with reference to the Charter of Fundamental Rights which ensures the civil rights for every European citizen equally.

Lastly, Ireland and the UK have answered the question by referring to their opt-out rights. Specifically, Ireland considers itself as fully excluded by the whole AFSJ, but the *Rapporteur* states that Ireland continuously makes use of the flexibility provisions, with respect to fundamental rights in particular. The UK Report estimates that the Government that it will only proceed with EU instruments that are already in compliance with existing legislation, or where compliance can be achieved painlessly.

6.**Conclusion.**
The Future After Lisbon: Placing the Individual at the Heart of Europe's Area of Freedom, Security and Justice

The evolution of the Area of Freedom, Security and Justice on the basis of the third pillar was characterised by an emphasis on security, with a number of enforcement measures extending considerably the power of the State having being adopted at times uncritically, without detailed democratic scrutiny and in the face of serious fundamental rights objections by the European Parliament, expert bodies such as the European Data Protection Supervisor and civil society. An analysis of the national Reports submitted for this year's FIDE Congress has demonstrated the shortcomings of such an approach. In all three substantive areas covered by the questionnaire (harmonisation of substantive criminal law, mutual recognition and data collection and exchange) there are many occasions where the need for the adoption of EU measures does not appear to be fully justified: some measures have not been implemented by a significant number of Member States; a number of EU measures appear to have been implemented but to then have been ignored as regards the practical operation of the law; and a number of measures (most notably in the field of data collection and exchange) have been subject to sustained criticism as regards their justification and proportionality. The uncritical focus on security has also led, in all three areas covered in the Reports, to significant concerns regarding the impact of EU AFSJ law on the protection of fundamental rights. Such concerns are compounded by the very limited EU intervention to adopt measures aimed at protecting the individual vis-à-vis the growing securitisation *acquis*. These fundamental rights concerns have emerged clearly in the implementation process, and resulted in the intervention of both the national legislator (for instance by adding human rights safeguards in the implementation process) and the national judge (by declaring the implementation of Union AFSJ law unconstitutional and incompatible with fundamental rights).

The entry into force of the Lisbon Treaty may go a long way towards addressing these fundamental rights concerns, by placing the individual at the heart of the development of the Area of Freedom, Security and Justice. Lisbon prioritises the position of the individual and the protection of fundamental rights in three ways: by strengthening the effects and extending the reach of general fundamental rights instruments (in particular by granting binding status to the Charter of Fundamental Rights and enabling the accession of the European Union to the ECHR)- the impact of the Charter on the Area of Freedom, Security and Justice has already been felt in the landmark *N. S.* ruling; by prioritising the adoption of secondary legislation related to the protection of fundamental rights (the Treaty of Lisbon includes an express- albeit functional- legal basis enabling the adoption of EU measures on the right of the defendant; similar measures on data protection are currently in the pipeline, with data protection being a key right reflected in various parts of the Treaty); and by creating a momentum for revisiting the existing third pillar enforcement measures. In revisiting the existing and developing the future security *acquis*, EU institutions cannot afford not to take into account the position of the individual and the protection of fundamental rights. EU good governance principles also dictate that any future proposal for enforcement measures in the Area of Freedom, Security and Justice is fully justified and scrutinised and that the current *acquis* is evaluated in the light of the issues arising from the implementation of EU law in Member States, both on paper and on the ground. The Area of Freedom, Security and Justice Reports for FIDE 2012 can be seen as a starting point for such evaluation and scrutiny.