



Stream

Strengthening Trust in the
European Criminal Justice Area
through Mutual Recognition
and the Streamlined Application
of the European Arrest Warrant

Research Brief

Portugal

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This report was funded by the European Union's Justice Programme (2014-2020). It has been prepared in the context of the STREAM project (JUST AG 101007485). The content of this report represents the views of the author only and is his/her sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

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Introduction

The purpose of this STREAM Research Brief is to assess how Portuguese judicial authorities (acting as issuing and executing authorities) handle the issues of EU fundamental rights and rule of law in the context of EAW cases. For that reason, as mentioned in the Periodic Country Report for Portugal, the authors have chosen the topics that, in their view, bear a closer connection with individual rights and the subject matter of STREAM, together with other topics suggested by the coordination of the project: 'issuing authority and its independence, proportionality, detention, trials *in absentia*, right to translation and other procedural rights, refusal of surrender on the grounds of humanitarian concerns or the protection of human/fundamental rights, dual criminality and life sentences. The reasons for this choice are, in some cases, self-explanatory; in other cases, they arise from particular aspects of the transposition of the FD EAW into Portuguese law, which in turn reflect on the jurisprudence on the matter'.

To that purpose, the authors have collected and analysed all 323 judgments and judicial decisions on the European Arrest Warrant (EAW)² available on the official websites run by the State³ and selected all those that address the topics chosen. The relevant timeframe spans from the entry into force of the PT LEAW in 2003 and 31 May 2022.

All 45 decisions issued by the Constitutional Court relate to specific cases, on appeal against judgments issued by the common courts. It is worth noting that, until recently, all the decisions have ruled that the appeal was inadmissible on formal grounds. However, in August 2022, the Constitutional Court eventually ruled on the merits of a case where the constitutional validity of the PT LEAW was challenged.⁴ It is a decision of the utmost relevance in several aspects, and it mentions these authors' Periodic Country Report for Portugal. A brief description of the judgment is contained in Annex 2.

2 A total of 278 judgments/decisions from ordinary courts and 45 decisions of the Constitutional Court. These figures include 25 judgments/decisions that were issued after April 2021 and could not be taken into consideration in the Periodic Country Report. Some of them address the topics chosen for the report and will be shortly summarised in Annex 1 at the end of this brief. In contrast, the total figures do not include the summaries of some judgments of the Supreme Court, available at its website: in more detail, see *infra*.

3 See *infra*, Section III.

4 TC, 16.08.2022, Judgment 549/2022 (case no. 752/2022), available at <https://www.tribunalconstitucional.pt/tc/acordaos/20220540.html>

Section I – Fundamental rights: primarily a matter for the issuing state?

Effective judicial protection is granted at the issuing stage in Portugal.

From the outset, judicial protection is guaranteed through the *independence* of the issuing authorities: Portuguese prosecutors and judges enjoy the status of magistrates and are not subject to instructions or orders from political bodies. In this respect, it is also worth noting that, while acting in criminal matters, prosecutors are bound by a duty of objectivity and can take decisions aiming to protect the fundamental rights of the person concerned. For example, they have the power to decide not to issue an EAW (e.g., because the suspect lives and works abroad and it is more convenient to transfer the proceedings to that Member State), or to file motions against unlawful detention, or lodge appeals, in the concerned person's interest, against judicial decisions that have issued an EAW.⁵

As mentioned in the Periodic Country Report for Portugal, there are however only very few publicly available judicial decisions related to individual rights when Portugal is the issuing State because in those cases that part of the cooperation procedure taking place before the Portuguese authorities is not divisible from the main criminal procedure. Consequently, most rights of the sought person will be exercised within the main proceedings, according to ordinary procedural law. For the same reason, the protection of fundamental rights in the context of the issuance of an EAW conflates with the protection afforded in the ordinary criminal procedure (or the lack thereof). Unlike what happens with the *execution* of an EAW – where proper and specific proceedings are put in place abiding by specific rules – the issuance of an EAW is a mere procedural act which is part of existing criminal proceedings that are already in place. This explains why references to individual rights before the *issuing* Member State are so scarce in the Directives on individual rights in criminal and cooperation proceedings⁶ – basically, the right to appoint a lawyer in the issuing Member State and the right to get information to that purpose (Article 10(5)(6) of Directive 2013/48/EU), together with the right to legal aid (Article 5(1)(2) of Directive (EU) 2016/1919). Interestingly, it is not for the issuing State to provide a translation of the warrant, if need be, to a language the sought person can understand (Article 3(6) of Directive 2010/64/EU). So, apart from the proportionality issue, most topics are rather

5 All the appeals against judicial decisions issuing EAWs available in the databases (see infra 'Availability of EAW-related jurisprudence' in the section after the References) were brought by the prosecution, which shows that prosecutors also contribute to the protection of fundamental rights of the concerned individual: see cases TRC, 21.11.2007 [ECLI:PT:TRC:2007:210.00.0TBTVN.A.C1.9A]; TRC, 05.12.2007 [ECLI:PT:TRC:2007:49.03.1PATNV.A.C1.55]; TRC, 19.12.2007 [ECLI:PT:TRC:2007:266.00.6PATMV.A.20].

6 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010, p. 1–7; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012, p. 1–10; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 6.11.2013, p. 1–12; Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297, 4.11.2016, p. 1–8.

unspecific and could be debated also in a purely domestic setting (internal competence to issue a warrant; discount of time spent in detention abroad; etc.).

There are some specific rights that can arise in EAW proceedings and need special consideration though: besides the right to a lawyer and legal aid (in the context of the right to ‘dual legal representation’),⁷ the individual has the right to file motions with the issuing court,⁸ the right to request evidentiary measures, the right to be heard and to oral contradictory proceedings,⁹ as well as the right of defence¹⁰ and the right to appeal the decision to issue the EAW.

In a recent case where Portugal acted as the issuing State, the person concerned filed a motion of *habeas corpus* while he was already detained in a Portuguese prison (after having been surrendered). He argued that the existing detention conditions were degrading and inhumane and claimed that such conditions should have prevented the execution of the EAW in the first place. The Supreme Court found that any objections to the execution of an EAW stemming from deficiencies of the conditions of detention in Portugal should have been argued solely before the courts of the *executing* Member State. Moreover, it found that those deficiencies, even if proven, do not constitute a motive to grant a *habeas corpus* release under Portuguese law.¹¹

In this respect, there can be some lack of responsibility toward the protection of fundamental rights stemming from the very structure of the EAW. On the one hand, and notwithstanding the jurisprudence of the Court of Justice of the European Union (the Court of Justice) according to which the responsibility for the protection of the sought person’s rights rests primarily with

7 COSTA / CAEIRO (2021), p. 314. According to some authors, the right to be assisted by a lawyer in EAW procedures is granted by common Portuguese criminal procedure law, namely arts. 59(2) and 61(1)(e) CCP (COSTA (2015), p. 74 (fn. 80)). However, the rights afforded by criminal procedural law (including the right to have a lawyer appointed by the State) are granted only to individuals who have been formally designated as *arguidos* (extensively on this concept, see CAEIRO / COSTA (2012), p. 550 f.) and it can happen that the EAW is issued against a suspect who is not (yet) an *arguido* at that moment in time. Arguably, in those cases, he/she can request his/her designation as such (art. 59(2) CCP), in order to be able to enjoy them. This right has already been recognised by the Supreme Court, alongside the right to be informed of the existence and contents of the warrant (STJ, 27-07-2009, summary of case 986/09.OYRLSB.S1).

8 As was the case in the situation described in STJ, 02.12.2013: see the Periodic Country Report for Portugal, p. 5 (fn. 19 and corresponding text).

9 All of these rights are specifically mentioned in STJ, 10-04-2019, summary of case 202/17.OYREVR.S1.

10 The enforcement of this right requires that the EAW provides enough information (i) on the identification, nature and qualification of the criminal charge, (ii) on the description of the circumstances of its commission (including time, place and degree of participation), (iii) and on the penalty associated with it; the EAW shall also contain the translation of such information – STJ, 11-03-2010, summary of case 2031/09.6YRLSB.S1. There are, nonetheless, narrower interpretations of this right: in STJ, 20-10-2011, summary of case 761/11.1YRLSB.S1, the Supreme Court stated that, as far as the indication of the *locus delicti* is concerned, it suffices that the EAW points out the Member State where the offence was (allegedly) perpetrated, because it is not for the executing Member State to assess the particular facts of the case, but only to ascertain if the issuing authority has (territorial) jurisdiction over the acts in order to legitimately issue an EAW. It is also the right of defence that precludes that one EAW, issued for the execution of a sentence, might have its purpose changed (to conduct criminal prosecution) by the issuing Member State, by means of an informal communication, after the individual has been heard by the court of the executing Member State (STJ, 17-06-2020, summary of case 39/20.OYREVR.S1). All the judgments mentioned in this note were uttered in proceedings where Portugal was the *executing* Member State, but it seems clear that the contents of the rights at hand do not vary depending on the role played by Portuguese authorities in the procedure.

11 STJ, 23.09.2021 [ECLI:PT:STJ:2021:5553.19.7T8LSB.Q.S1.EA].

the issuing Member State,¹² the fact is that Member States will seldom acknowledge shortcomings in their own justice systems that are serious enough to prevent them from issuing an EAW. Just to give an example: what would have been the fate of hypothetical challenges against the issuance of a EAW in the *issuing* States in such cases as *Aranyosi and Caldaru, LM*, and so forth?¹³ On the other hand, when objections concerning fundamental rights are raised in the executing Member State, the presumption of compliance with fundamental rights across the EU seems quite difficult to rebut in the ambit of the two-step process.

Access to judicial remedies before the decision to surrender depends on who issues the EAW:

- If the EAW is issued by the *prosecutor* (which can happen only during the inquiry) to bring the person sought before the judge for the first judicial questioning, there is no right to judicial review of the decision.¹⁴ This is consistent with the domestic regime on arrest warrants.
- If the EAW is issued by a *judge*, the prosecutor can appeal the decision on the grounds that it is illegal (for instance, because the formal requirements for issuing an EAW have not been met), or disproportionate.¹⁵ The person sought, upon becoming aware that an EAW has been issued, can appeal pursuant to the general principle that it is possible to appeal any judicial decision unless the law provides otherwise.¹⁶ However, the appeal does not suspend the issuance of the warrant:¹⁷ if the appeal is successful, the warrant is recalled. In principle, other challenges to the execution of the EAW should be argued before the courts of the executing Member States, in the EAW proceedings.¹⁸

Post-surrender access to judicial remedies will follow the normal national procedure, according to the possibilities afforded by criminal procedural law.

12 Which was also explicitly recognised by the Supreme Court in STJ, 14-11-2019, summary of case 2298/19.1YRLSB.S1, citing the Court of Justice's case *Piotrowski*, C-367/16.

13 The implications of the Court of Justice's judgment in the *Gavanozov II*, C-852/19, for the issuance of an EAW remain to be seen.

14 See *COSTA / CAEIRO* (2021), p. 295 (the authors refer to the legal framework of the EIO, but the same applies to the EAW).

15 See the judgments TRC, 21.11.2007 [ECLI:PT:TRC:2007:210.00.0TBTVN.A.C1.9A]; TRC, 05.12.2007 [ECLI:PT:TRC:2007:49.03.1PATNV.A.C1.55]; TRC, 19.12.2007 [ECLI:PT:TRC:2007:266.00.6PATMV.A.20]; implicitly in the same direction, STJ, 26.10.2016 [ECLI:PT:STJ:2016:39.07.5TELSB.E.S1.29].

16 Art. 399^o CCP.

17 For a more detailed explanation on the suspensive effect of appeals in Portuguese law on international judicial cooperation (including the EAW), see *COSTA / CAEIRO* (2021), p. 308 f, 312 f.

18 See the already mentioned judgment STJ, 23.09.2021 [ECLI:PT:STJ:2021:5553.19.7T8LSB.Q.S1.EA] in note 10 and corresponding text. Nevertheless, in STJ, 02.12.2013 [ECLI:PT:STJ:2013:962.09.2TBABF.E1.S2.D3], where the EAW was cancelled at the request of the person sought, the challenge to the EAW seems to have been made directly in the criminal proceedings taking place in Portugal, even though the person was already detained in the executing Member State awaiting surrender.

Section II - Protecting fundamental rights in the executing state?

Cooperation between Member States' authorities under the EAW system with respect to fundamental rights has sometimes been difficult. This tension has been unnecessarily aggravated because of a misconception that mutual recognition requires maximum execution and therefore that fundamental rights are limits or sources of irritation to mutual recognition. However, there is no legal principle or cooperation system in the EU that can be conceived of as separate from or immune to fundamental rights. The specific difference here is that the standard of protection is not determined unilaterally by the executing state, but rather in a common way, an inherent, embedded feature of mutual recognition. Therefore, the refusal of surrender by an executing authority as a means of protecting fundamental rights is still an application of the general framework of mutual recognition, and not a limit to it, just like any other ground for refusal provided for by the EAW FD.¹⁹ In the same vein, the failure to protect fundamental rights in the context of the EAW cannot be written off on account of the principle of mutual recognition, because the conditions for *legal* surrender are not present. Maybe the reluctance of the national courts vis-à-vis the protection of fundamental rights in the context of the EAW could be mitigated if it was clearer to them that such protection is also an application rather than an infringement of EU law – and STREAM might contribute to that.

The Portuguese legislation transposing the EAW FD does not have a 'fundamental rights' clause.

In general, Portuguese authorities presume that fellow Member States comply with the protection of fundamental rights.²⁰

Fundamental rights are still considered in some cases, where concerned individuals have challenged the execution of the EAW on the basis that they would be violated if they were to be surrendered.

On the one hand, Portuguese courts have consistently ruled that a general claim of non-compliance with fundamental rights by the issuing authority/Member State is not sufficient to refuse cooperation.²¹ The concerned individual must prove that he/she would be concretely at risk in the issuing Member State. For instance: even if proven, allegations of general disrespect for the fundamental rights of suspects/convicts connected to a particular political group/terrorist organisation, corroborated by reports drafted by governmental or human rights organisations, do not suffice to refuse surrender: it is necessary to prove an actual risk for the sought individual.²² And, in cases where further information was provided by the concerned person for that purpose, cooperation was nevertheless granted. For instance, if the EAW is

19 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *OJ L 190*, 18.7.2002, p. 1.

20 Eg. case STJ, 20.06.2012 [ECLI:PT:STJ:2012:445.12.3YRLSB.S1.2F].

21 STJ, 5.05.2016 [ECLI:PT:STJ:2016:875.15.9YRLSB.S1.90].

22 Eg. case STJ, 25.03.2010 [ECLI:PT:STJ:2010:76.10.2YRLSB.S1.F6].

issued for the enforcement of a specific judicial measure that has already been found to be in breach of human rights by the European Convention on Human Rights (ECHR), the objection should be raised in the main proceedings in the issuing Member State, and not before the executing Portuguese courts in the EAW procedure.²³

On the other hand, challenges based on *proportionality* have led to decisions of non-execution. Although Portuguese courts do not assess, as executing authorities, the proportionality of the *decision* to issue an EAW,²⁴ namely when other cooperation mechanisms are available,²⁵ the proportionality of the *sentence* that is to be enforced can still play a role, as a complementary factor, in the decision to apply (or not) an optional ground for refusal (e.g., lack of dual criminality). However, the vagueness of the criterion opens the door to decisions that can be seen as inconsistent: a sentence of 10 years imprisonment for failing to fulfil a payment order (confiscation of drug money) was deemed disproportionate and led to a refusal to surrender,²⁶ whereas a potential penalty of 10 years imprisonment applicable to a registered sex offender for having failed to inform the authorities on two occasions that he was travelling abroad did not lead to the same conclusion – and the person in question was surrendered.²⁷

Regarding the right to a fair trial, there were cases where the concerned person had been tried *in absentia* and the EAW was refused because the remedies provided for by the law of the issuing Member State were found to be conditional.²⁸

There seem to be no cases where Portuguese courts had to assess the existence of ‘generalised and systemic deficiencies’ affecting either the right not to be subject to torture or mistreatment or the independence of the judiciary in the issuing Member State. Consequently, to date, Portuguese courts have not had to apply the two-step test established by the Court of Justice.²⁹

Finally, the independence of the authority issuing the EAW has seldom been questioned and Portuguese courts rightly found (relying on the jurisprudence of the Court of Justice³⁰) that prosecutors should be regarded as independent judicial authorities, not subject to orders or recommendations from the political bodies.³¹

23 Case STJ, 16.12.2010 [ECLI:PT:STJ:2010:176.10.9YREVR.S1.68]. It should be noted that in the mentioned case STJ, 23.09.2021 [ECLI:PT:STJ:2021:5553.19.7T8LSB.Q.S1.EA], where Portugal was the *issuing* Member State, the Supreme Court seems to have taken the opposite view: see supra note 17 and corresponding text.

24 See the Periodic Country Report for Portugal, p. 8, fn. 34 and 35, and corresponding text.

25 See TRE, 23.03.2021 [34/21.1YREVR] and STJ, 06.01.2011 [ECLI:PT:STJ:2011:1217.10.5YRLSB.S1.0A].

26 Case STJ, 14.02.2019 [ECLI:PT:STJ:2019:120.17.2YREVR.S1.40].

27 Case STJ, 10.01.2013 [ECLI:PT:STJ:2013:77.12.6YREVR.S1.07].

28 Eg. TRC, 03.07.2012 [ECLI:PT:TRC:2012:24.12.5YRCBR.03]; STJ, 22.03.2018 [ECLI:PT:STJ:2018:1.17.0YRLSB.S1.77].

29 Judgments of the Court of Justice, Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru* [ECLI:EU:C:2016:198]; and *Puig Gordi and Others*, C-158/21, ECLI:EU:C:2023:57.

30 Judgment of the Court of Justice, Joined Cases *JR and YC*, C-566/19 PPU and C-626/19 PPU, ECLI:EU:C:2019:1077.

31 STJ, 16.12.2020 [47/20.0YREVR.S1] (*).

Section III Protecting fundamental rights through horizontal and vertical cooperation?

The authors were not able to find hard data on cases where Portuguese authorities were asked for information when issuing a European Arrest Warrant. However, it is very likely that this has happened, especially if we bear in mind that Portuguese prisons were overcrowded not so long ago³² and that some fellow Member States have probably asked for guarantees that the sought persons, once surrendered, would be detained in proper facilities, to comply with the jurisprudence of the Court of Justice.

Nevertheless, there is an example of a Portuguese court requesting information from the executing authorities of another Member State on the precise features of the coercive measure that had been imposed on the suspect ('conditional bail'), to assess whether the time spent should be discounted from the sentence, but the response was unsatisfactory and belated.³³

Overall, the dialogue between Portuguese prosecutors and judges as executing authorities and their counterparts in the context of an EAW seems to take place without major issues, except for the delay in obtaining the requested elements.³⁴

There have been cases in which the information requested by Portuguese executing authorities from the issuing authorities of another Member State played a decisive role in the fate of the warrant. For example, in the field of trials *in absentia*, the information provided by the issuing authorities enabled Portuguese courts as executing authorities to assess whether the conditions set for surrender in such situations were satisfied. However, the provision of information does not guarantee consistency in the application of the law: cases where the surrender was refused on the basis that the law of the issuing State did not provide an actual and unconditional *right* to a fresh trial or appeal³⁵ contrast with others where it was granted on the grounds that the foreign law established a right to *request* a new trial or an appeal.³⁶

Surprisingly, in cases concerning the applicability of life sentences, Portuguese authorities seem to be easily satisfied with the information provided by issuing authorities regarding the non-

32 On 31 January 2018, the prison density in Portuguese prisons was 105,9 inmates per 100 places: see AEBI / TIAGO (2018), p. 65.

33 STJ, 03.01.2013 [ECLI:PT:STJ:2013:19996.97.1THLSB.K.S1.9C].

34 There was one case in which the High Court ruled that the proceedings should be terminated because the issuing authority did not provide the information requested within the deadline set by the former. However, on appeal, the Supreme Court quashed the decision and ordered that the High Court insisted with the requests for information, until it could be concluded that the issuing authority was no longer interested in the execution of the EAW (STJ, 03-05-2018 summary of case 879/17.7YRLSB.S1).

35 STJ, 22.03.2018 [ECLI:PT:STJ:2018:1.17.0YRLSB.S1.77], in a situation where the admissibility of the belated appeal would be left at the discretion of the courts of the issuing MS.

36 TRE, 07.06.2016 [47/16.5YREVR] (*) and STJ, 07.07.2016 [ECLI:PT:STJ:2016:47.16.5YREVR.S1.A7]; in this case, both the High Court of Évora and the Supreme Court were satisfied that the issuing authority had informed, in the EAW, that the defendant had the right to *request* a fresh trial, which, according to the information given by the Italian authorities, would be granted if he/she proved to Italian courts that he/she had no knowledge of the proceedings against him/her.

perpetual nature of some measures, even when it is challenged by the suspect.³⁷ Portuguese authorities do not seem very keen on asking for further information on how the conditions in which review of life sentences or measures of clemency apply.³⁸

As far as the authors could establish, there has *never* been a referral by a Portuguese court to the Court of Justice related to the application or interpretation of the law on the EAW. Apparently, Portuguese courts show some aversion to this mechanism. In some cases, refraining from referring the questions raised by the sought persons to the Court of Justice seems to have been the right decision,³⁹ but there were certainly other issues where a preliminary ruling would have been justified (for example, the problems raised by dual criminality, the sufficiency of guarantees, and so on).

There has been a recent request for a preliminary ruling concerning the compatibility of the Portuguese regime on remedies for procedural flaws with Directives 2010/64/EU and 2012/13/EU on the right to interpretation, translation and information in criminal proceedings. Although the issue does not directly concern the EAW regime, it can nonetheless impact it because those rules can be applied in EAW proceedings. As noted in the Periodic Country Report for Portugal, Portuguese law and courts provide a rather formalistic treatment to the right to translation: the lack of translation is regarded as a curable nullity, with scarce consideration of what it can mean for the right to defence.⁴⁰ In this context, the High Court of Évora referred the following question to the Court of Justice: ‘Is it possible to interpret Articles 1 to 3 of [Directive 2010/64] and Article 3 of [Directive 2012/13], alone or in conjunction with Article 6 of the ECHR, as meaning that they do not preclude a provision of national law which imposes a penalty of relative nullity, which must be pleaded, for failure to appoint an interpreter and to translate essential procedural documents for an accused person who does not understand the language of the proceedings, and which permits the rectification of that type of nullity owing to the passage of time?’⁴¹

The Court answered that ‘Article 2(1) and Article 3(1) of Directive 2010/64 and Article 3(1)(d) of Directive 2012/13, read in the light of Articles 47 and 48(2) of the Charter and the principle of effectiveness, must be interpreted as precluding national legislation under which the infringement of the rights provided for by those provisions of those directives must be invoked by the beneficiary of those rights within a prescribed period, failing which that challenge will be time-barred, where that period begins to run before the person concerned has been informed, in a language which he or she speaks or understands, first, of the existence and scope

37 TRP, 18.01.2006 [ECLI:PT:TRP:2006:0516310.67]; in the same vein, TRL, 15.07.2013 [750/13.1YRLSB.S1] (unpublished); STJ, 9.08.2013 [ECLI:PT:STJ:2013:750.13.1YRLSB.S1.DD]; STJ, 13.07.2016 [ECLI:PT:STJ:2016:797.16.6YRLSB.S1.CC].

38 TRL, 31.10.2006 [ECLI:PT:TRL:2006:9297.2006.5.6D].

39 STJ, 09.07.2020 [79/20.9YRGMR.S1].

40 See cases STJ, 09.01.2008, [ECLI:PT:STJ:2008:07P4856.F1] and STJ, 04.03.2009 [ECLI:PT:STJ:2009:09P0685.EF], Country Report for Portugal, p. 12, as well as the considerations on the violation of the right to translation in p. 22.

41 Judgment of the Court of Justice, *TL*, C-242/22 PPU, [ECLI:EU:C:2022:611], para. 29.

of his or her right to interpretation and translation and, secondly, of the existence and content of the essential document in question and the effects thereof'.⁴²

In light of this judgment, Portuguese law can no longer be interpreted as precluding the challenge of a decision after the prescribed term to invoke it has expired, when the content of that decision has not been translated into a language known by the defendant; the challenge regarding the lack of translation must also be permitted until the defendant is informed, in a language he/she understands, of the scope of his / her right to translation and of the existence and contents of the document to be translated.

⁴² Judgment of the Court of Justice, *TL*, C-242/22 PPU, [ECLI:EU:C:2022:611], para. 89.

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STJ, 10-04-2019, summary of case 202/17.0YREVR.S1
STJ, 14-11-2019, summary of case 2298/19.1YRLSB.S1
STJ, 17-06-2020, summary of case 39/20.0YREVR.S1)
STJ, 09.07.2020 [79/20.9YRGMR.S1]
STJ, 16.12.2020 [47/20.0YREVR.S1] (*)
TRE, 23.03.2021 [34/21.1YREVR]
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TRP, 23.06.2021 [ECLI:PT:TRP:2021:344.19.8YRPRT.1B]
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with third persons and with consular authorities while deprived of liberty, *OJ L 294*, 6.11.2013, p. 1–12

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Availability of EAW-related jurisprudence

In general, judgments and judicial decisions are publicly available in Portugal. However, not all of them are published in the official websites run by *Instituto de Gestão Financeira e Equipamentos da Justiça, I.P.*,⁴³ *Conselho Superior da Magistratura*⁴⁴ and *Tribunal Constitucional*.⁴⁵ The action programme of the XXIII Government, in place since early 2022, includes the creation of databases accessible by the public at large, where judicial decisions are published and processed.⁴⁶ An informal contact with a high-ranking official confirmed that the Government's goal is for the database to cover all judicial decisions and judgments.

The website of the Supreme Court of Justice also publishes annual summaries of judgments of the Supreme Court that are not available in the other databases.⁴⁷ Those summaries have hardly been used by the authors because they sometimes lack crucial information (for example, whether they relate to a case where Portugal acts as an issuing or executing authority) and can be unreliable, misleading or at least dubious: in some of the cases where the summary *and* the whole judgment are available, the former does not accurately sum up the contents of the latter.

It is thus clear that the decisions and judgments on the EAW that are actually published in the mentioned databases are only a sample of the total, which remains an unknown figure, since the governmental entities who manage judicial statistics do not have data on the subject.⁴⁸

Lack of sufficient data is more prominent when Portugal acts as the issuing Member State, because those decisions are never published as such: the databases only contain judgments handed down by the High Courts and the Supreme Court of Justice,⁴⁹ which means that the decision to issue an EAW can only be accessed, and in an indirect fashion, if it is appealed, or incidentally, in a judgment on a different matter (for example, *habeas corpus*, appeals from decisions taken in the main proceedings).

It should also be noted that the criteria used to select the judgments/decisions for publication in the mentioned websites do not seem to be publicly available.

43 www.dgsi.pt

44 <https://jurisprudencia.csm.org.pt>. References to judgments and decisions with an ECLI identifier were collected from this website; the sign (*) means that no ECLI identifier is available.

45 <https://www.tribunalconstitucional.pt>.

46 *Programa do XXIII Governo Constitucional, 2022-2026*, p. 69, available at <https://www.portugal.gov.pt/gc23/programa-do-governo-xviii/programa-do-governo-xviii-pdf.aspx?v=«mlkvi»=54f1146c-05ee-4f3a-be5c-b10f524d8cec>.

47 https://www.stj.pt/?page_id=4471.

48 Information provided by email (on file with the authors).

49 The ECLI database should also contain judgments by common courts, but there are no decisions on the issuance of the EAW.

The most obvious consequence is that it is not possible to determine the statistical significance of the stand taken by the Portuguese authorities on the several topics in the case-law that have been analysed in this Brief, which can impact the results of the research.

Annex 1: update of the case-law - brief survey

Some of the topics covered by the new decisions, published over the past year, fall within the scope of this brief:⁵⁰ trials *in absentia*;⁵¹ dual criminality;⁵² detention;⁵³ other procedural rights;⁵⁴ life sentences;⁵⁵ fundamental rights⁵⁶; and proportionality⁵⁷. However, the new judgments do not significantly innovate or deviate from previous case law.

⁵⁰ Other judgments relate to the non-execution of the warrant and enforcement of the penalty in Portugal, territorial competence of Portuguese authorities to prosecute and try the offence, and so forth.

⁵¹ TRL, 16.02.2022 [ECLI:PT:TRL:2022:2993.21.5YRLSB.3.CE]; TRP, 23.06.2021 [ECLI:PT:TRP:2021:344.19.8YRPRT.1B] and STJ, 07.04.2022 [ECLI:PT:STJ:2022:30.22.1YRPRT.S1.68]. In all three judgments, the courts found that the circumstances in which the trials *in absentia* had taken place did not prevent the execution of the warrant.

⁵² TRE, 20.10.2021 [ECLI:PT:TRE:2021:202.17.OYREVR.1A]: the authorities of the UK issued a EAW aiming at the enforcement of a 3-years imprisonment sentence imposed for the offence of failing to pay a confiscation order; cooperation refused for lack of dual criminality.

⁵³ TRG, 10.01.2022 [ECLI:PT:TRG:2022:850.02.3GAFAF.A.G1.E5], regarding UK's 'conditional bail': in this case it was again found that this measure did not amount to a deprivation of liberty similar to house arrest and thus could not be deducted from the sentence to serve. STJ, 08.07.2021 [ECLI:PT:STJ:2021:78.11.1GTALQ.A.S1.32]: when they act as issuing authorities, Portuguese courts cannot intervene in the choice of the measures applied to the sought person by the executing MS while surrender is pending.

⁵⁴ STJ, 27.05.2021 [ECLI:PT:STJ:2021:82.21.1YRPRT.S1.44]: regarding the right to produce oral argument in a dedicated hearing, additionally to the first judicial hearing. The Supreme Court ruled that the right to make oral argument after the first judicial hearing exists only when there has been the production of evidence relevant to the decision over the execution of the EAW – which is not the case of allegations of innocence in relation to the offence.

⁵⁵ STJ, 14.07.2021 [ECLI:PT:STJ:2021:926.21.8YRLSB.S1.B5]: the Supreme Court was satisfied with the “guarantees” provided in relation to the (potential) non-execution of a life sentence, given that the issuing authority mentioned in the EAW that Italian law allows for the revision of life sentences after 20 years and provides also for measures of clemency.

⁵⁶ STJ, 23.09.2021 [ECLI:PT:STJ:2021:5553.19.7T8LSB.Q.S1.EA]: bad prison conditions, even where they might qualify as degrading and inhumane, are not grounds for a petition of *habeas corpus* under Portuguese law; claims regarding such conditions should have been raised as objections to the execution of the EAW before the foreign executing authority in the EAW proceedings (Portugal was in this case the issuing MS; see supra note 21 in further detail).

⁵⁷ In cases STJ, 07.04.2022 [ECLI:PT:STJ:2022:30.22.1YRPRT.S1.68] and STJ, 03.02.2022 [ECLI:PT:STJ:2022:2865.21.3YRLSB.S1.23], where Portugal acted as executing MS, it was again argued that the execution of an EAW was disproportionate or inappropriate because there were other, less stringent options to provide the cooperation needed without surrendering the person. Once again, the Supreme Court declined to refuse the execution of the warrant on such grounds.

Annex 2: Judgment of the Constitutional Court 549/2022, of 16.08.2022

1. The case

A person (X) was arrested in Portugal under an EAW issued by the United Kingdom with a view to his prosecution. X agreed to the execution of the warrant and the High Court of Lisbon homologated the suspect's consent.⁵⁸ As three of the offences included in the EAW were punishable with life imprisonment under UK law, the High Court requested assurances from the issuing authority that such a penalty would not be applied. Once the guarantees were provided, the Court ordered X's surrender. However, the suspect deemed that the guarantees, which were provided *after* he had consented to his surrender, were not sufficient and he appealed the Court's decision.

The appeal was partly admitted by the Supreme Court, but was ultimately rejected because the consent of the person concerned 'is irrevocable and it brings about a waiver to the procedure of execution of the European Arrest Warrant'.⁵⁹ Thus, although the law explicitly rules that the homologation of the suspect's consent is 'equivalent' to the final decision (in ordinary proceedings), there could be no appeal because there was no final decision *to be* appealed, the Supreme Court ruled, since X had waived his right to the ordinary procedure by consenting to his surrender.

2. The appeal before the Constitutional Court

X appealed the Supreme Court's decision to the Constitutional Court, calling into question the constitutional conformity of: (i) Articles 20(3) and 26 PT LEAW when interpreted in the sense that consent is irrevocable and constitutes a waiver of the ordinary procedure; and (ii) Article 24 of PT LEAW when interpreted in the sense that the suspect who has consented to his/her surrender does not have the right to appeal the decision that homologates his/her consent and orders his/her surrender to the issuing authority when the guarantees requested by the Portuguese court are provided and validated after consent to surrender is given.

This two-pronged appeal relied on the following grounds: X argued that, when he gave his consent, he was not informed that it would be irrevocable or that it would have the effect of waiving the EAW procedure; and that in fact he had tried to revoke it before the judgment became final. He argued that he had a right to disagree with the High Court's decision to accept the assurances given by the UK and proceed with the surrender (and therefore a right to appeal that decision), given that he did not consider these assurances would effectively prevent the application of life sentences. By denying him the right to an appeal just because he gave his

⁵⁸ The original judgment of the High Court could not be found in the available legal databases.

⁵⁹ STJ, 01.06.2022 [ECLI:PT:STJ:2022:1252.22.OYRLSB.S1.D2].

consent to being surrendered, the High Court would be impairing his right of defence while correspondingly denying him a judicial debate about the quality of the assurances given.

In turn, the Public Prosecutor replied that it was not a matter of knowing whether or not consent could be revoked (because the law is clear in that respect), but of whether or not consent meant a waiver of the procedure, including the right to appeal. It deemed that an affirmative answer was correct, which did not violate the Constitution, because – unlike other cases where the waiver to an appeal might infringe upon Article 32 of the Constitution – the suspect is aware of what the decision of the Court will be, and consents to it according to his own free will.

3. The judgment of the Constitutional Court⁶⁰

As mentioned in the Country Report for Portugal, there had not been, up until now, any decisions of the Constitutional Court on the merits of issues raised by the EAW.

The Court found the first ground of appeal inadmissible (the irrevocability of consent), because it did not fulfil the formal requirement of having previously been argued in the proceedings, especially in the appeal to the Supreme Court; and it was not deemed to be the *ratio decidendi* of the case either. The scope of the appeal was thus bound to the second question: does Article 32(1) of the Constitution allow for a legal regime where consent to surrender implies waiving the right to appeal the final decision of the High Court, when the provision and validation of assurances occur after the suspect's consent?

The Constitutional Court found, in the first place, that the constitutional guarantees applicable to criminal procedure extend to extradition proceedings.⁶¹ The next step would then be to assess whether the same would apply to EAW procedures. The Court concluded that the answer could only be positive, given the affinity of the procedures at stake. Moreover – and this is particularly important for STREAM – the Court pointed out that, ‘should there be any difference between ordinary extradition and surrender under the EAW, it would lie in the *reinforcement of procedural guarantees* applicable to the latter’, because ‘the significant narrowing of the grounds for non-execution in the LEAW [...] does not necessarily entail a narrowing of the procedural rights it confers upon the individuals concerned’.⁶² In this regard, the Court mentions these authors’ Periodic Country Report and the ‘analysis of some procedural dimensions of the constitutional guarantees’ contained therein.

The Court ruled that the enshrinement of the right to appeal in the ambit of the EAW falls within the discretionary power of the MS upon transposition, quoting in this regard a judgment of the

⁶⁰ TC, 16.08.2022, Judgment 549/2022 (case no. 752/2022), available at <https://www.tribunalconstitucional.pt/tc/acordaos/20220540.html>.

⁶¹ In the same direction, see Miguel Costa and Pedro Caeiro, ‘The implementation of the directives on procedural rights in law and practice’, in G. Contissa, G. Lasagni, M. Caianiello and G. Sartor (eds.), *Effective Protection of the Rights of the Accused in the EU Directives – A Computable Approach to Criminal Procedure Law*, Brill, 2022, pp. 173-174.

⁶² TC, Judgment 549/2022, at point 2.4, p. 24 (original emphasis).

Court of Justice (C-168/13 PPU). The question of the *obligation* to grant an appeal should therefore be analysed only according to the national legal order.

Article 32 of the Portuguese Constitution grants the right to appeal in criminal proceedings. This right can be sometimes restricted to one appeal, but the Constitutional Court has recently determined, in a different case (unrelated to the EAW), that when the decision resulting from the appeal is innovative, a second appeal must be granted in order to ensure an effective right to discuss the new considerations contained therein. It also stated that, where prison sentences are concerned, the legislator has less freedom to restrict the right to appeal. Applying this reasoning to the case at hand, it concluded that there can be situations where, after consent is given, the right to defence can be impacted by new issues, the discussion of which cannot be reasonably deemed to be pre-empted by consent. This was precisely the case, as the assurances were provided only after X had consented to his surrender.

Thus, the waiver of the procedure encompasses only the acts concerning the opposition to surrender and not, simultaneously, the right to an appeal. In that case, a restriction of the right to an appeal would be unjustified, disproportionate, and not at all compatible with the EAW, since its regime tends to “(re)calibrate the position of the concerned person with stronger procedural rights”.

Hence, the Court has declared that article 24 of LEAW is unconstitutional when interpreted in the sense that the suspect who has consented to his/her surrender does not have the right to appeal the decision that homologates his/her consent and orders his/her surrender to the issuing authority if the guarantees requested by the Portuguese court are provided and validated after consent is given.

Consequently, X had the right to lodge an appeal with the Supreme Court following the decision of the High Court in order to challenge the sufficiency of the assurances provided with a view to preventing the actual application of life imprisonment.