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| Subject: | <b><u>EVALUATION REPORT ON THE FOURTH ROUND OF MUTUAL<br/>EVALUATIONS "THE PRACTICAL APPLICATION OF THE EUROPEAN<br/>ARREST WARRANT AND CORRESPONDING SURRENDER<br/>PROCEDURES BETWEEN MEMBER STATES"</u></b><br><b>REPORT ON PORTUGAL</b> |
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Delegations will find attached the declassified version of the above document.

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Brussels, 20 March 2007

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**EVALUATION REPORT ON THE**  
**FOURTH ROUND OF MUTUAL EVALUATIONS**  
**"THE PRACTICAL APPLICATION OF THE EUROPEAN ARREST WARRANT AND**  
**CORRESPONDING SURRENDER PROCEDURES BETWEEN MEMBER STATES"**

**REPORT ON PORTUGAL**

# RESTREINT UE

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## 1. INTRODUCTION

- 1.1. Following the adoption of the Joint Action of 5 December 1997, a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime was established.
- 1.2. Following the discussion of a proposal introduced by the Luxembourg Presidency concerning the topic of the fourth round of mutual evaluations<sup>1</sup>, the MDG of 11 July 2005 adopted the topic as proposed, namely "the practical application of the European Arrest Warrant and corresponding surrender procedures between Member States". It was also agreed at the MDG of 11 July that the evaluation questionnaire was to be prepared by the UK Presidency.
- 1.3. Experts with substantial practical knowledge of the European Arrest Warrant were nominated by Member States pursuant to a written request to delegations made by the Chairman of the MDG on 9 September 2005<sup>2</sup>.
- 1.4. At its meeting on 28 October 2005 the MDG approved the evaluation questionnaire for the fourth round of mutual evaluations. The objectives of the evaluation exercise and the questionnaire itself are set out in document ST 14272/05 CRIMORG 131 COPEN 175 EJM 57 EUROJUST 77.
- 1.5. Also at its meeting on 28 October 2005 the MDG discussed and approved document 13824/05, the revised sequence for the mutual evaluation visits. Portugal is the sixth Member State to be evaluated during the fourth round of evaluation.
- 1.6. The experts charged with undertaking this evaluation were: Ms Riitta KIISKI (District judge, Finland), Ms Isabel GUAJARDO PÉREZ (Prosecutor, Spain) and Dr. Stefan BENNER (Prosecutor, Austria). Two observers were also present: Ms Anne DELAHAIE (Eurojust) and Mrs Isabelle PERIGNON (Commission), together with the General Secretariat of the Council.

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<sup>1</sup> Document 9602/05 - Orientation debate on a proposed Mutual Evaluation exercise.

<sup>2</sup> Document 6206/1/06 REV1 - Timetable for 2006 and designation of experts.



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- 1.7. This report was prepared by the expert team, with the assistance of the Council Secretariat, based upon their findings arising from the evaluation visit of 25-27 October 2006, and upon Portugal's detailed and helpful responses to the evaluation questionnaire and a written request for further information.
- 1.8. The report makes reference to differing processes in respect of arrest and prosecution cases only insofar as there is a divergence of practice between the two procedures.
- 1.9. The expert team's overarching purpose was to evaluate the distinct practical processes operated and encountered by Portugal both in its role as issuing and executing Member State, to assess relevant training provisions and the views of the defence, before moving on to conclude and to make such recommendations as they felt were appropriate to enhance the means by which the EAW and its corresponding surrender provisions may be further streamlined and improved.

## 2. THE AUTHORITIES AND THE LEGAL BASIS

### 2.1 THE AUTHORITIES

- Judicial Authorities (JAs) - issuing Member State function

Portuguese EAWs may be issued by any judicial body competent to order the arrest of the requested person<sup>1</sup>. Three authorities may therefore issue EAWs depending on the status of the domestic criminal process:

- The Public Prosecutors (approximately 1000 in number) or investigating magistrates (approximately 1500 in number) - During the investigative phase<sup>2</sup>,
- The investigating magistrates - During the preliminary trial phase,
- The trial judges (approximately 233 in number) - During the substantive criminal process.

- Judicial Authorities (JAs) - executing Member State function

Portugal has designated its second instance courts, the Courts of Appeal, as its executing Judicial Authorities ("executing JAs"). There are five such courts throughout Portugal's four Judicial Districts; these are located in Lisbon, Oporto, Guimarães, Coimbra, Évora and Faro.

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<sup>1</sup> Article 36, Law 65/2003.

<sup>2</sup> The Public Prosecutors are responsible for the issue of the majority of Portugal's EAWs.

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The specific court responsible for executing an EAW will be the Court of Appeal for the area in which the wanted person is resident or, failing that, for the area in which the person is present on the date of issue of the warrant<sup>1</sup>.

- Bureau for International, European and Cooperation Affairs - Ministry of Justice ("GRIEC")

The GRIEC is the service responsible for the coordination and cooperation of external affairs in the field of justice. It helps the Minister of Justice to define and execute policies within the European Union and has roles to play in respect of international justice organisation, the negotiation of conventions and international bilateral and multilateral agreements. The Bureau also co-ordinates the representation of the Portuguese State in meetings, conferences or organisations conducted in the area of justice in the international arena.

- The Office of the Attorney General ("The CA")

Portugal has designated this Office, the highest body of the Public Prosecution Service, as its CA in EAW matters<sup>2</sup>. The Attorney General's Office comprises the Attorney General, the Superior Council of the Public Prosecution Service, the Consultative Council of the Attorney General's Office, the Legal Auditors the Bureau for Documentation and Comparative Law and the Technical and Administrative Support Services. The CA's mandate in respect of the EAW is restricted to those functions outlined in Article 7(2) of the FD, namely to assist its competent JAs where necessary.

The Office has specific EAW roles in respect of:

- Notifying Eurojust of breaches of time limits<sup>3</sup>,
- Requesting executing MSs consent to waiver of specialty or subsequent surrender<sup>4</sup>,
- Notifying issuing MSs of detention periods<sup>5</sup>,
- Receiving and sending transit requests<sup>6</sup>, and
- Receipt of copies of all EAWs issued by Portugal<sup>7</sup>.

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<sup>1</sup> Article 15 (1), Law 65/2003.

<sup>2</sup> Article 9, Law 65/2003.

<sup>3</sup> Article 26(5), Law 65/2003.

<sup>4</sup> Articles 7(5) and 8(7), Law 65/2003.

<sup>5</sup> Article 10(2), Law 65/2003.

<sup>6</sup> Article 38(6), Law 65/2003.

<sup>7</sup> Attorney General's guidelines 4/2004.

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- The Supreme Court

Portugal's implementing Law provides<sup>1</sup> that a written appeal as of right may be lodged in respect of the decision to maintain the detention (or replace it with coercive measures) or in respect of the final surrender decision. In respect of appeals against the surrender itself the written grounds must be submitted within 5 days of the judgement being handed down, thereafter the JA will have 5 further days to draft its response, at which time the appeal file is transmitted to the Supreme Court of Justice for determination. Other than the lodgement requirements set out above no statutory time limits exist for the final consideration of an EAW appeal.

- The Constitutional Court

No ordinary EAW appeal may be made to the Constitutional Court; however, in appropriate cases an appeal may be brought on the basis of an alleged breach or infringement of a requested person's constitutional or fundamental rights.

- The SIRENE Office<sup>2</sup>

SIRENE is responsible for cross-border co-operation with other police forces and for exchanging information with the other SIRENE offices located in Schengen MSs. In Portugal it works with the Foreign Nationals and Borders Service, a security service under the Ministry of Home Affairs. It has administrative autonomy and is part of the country's internal security policy; its fundamental objectives within the internal security policy include border control of persons and the activities of foreigners in Portugal, as well as examining, promoting, co-ordinating and executing measures and actions related to these activities and to migratory movements. The SIRENE personnel responsible for Portugal's EAW activities comprise 24 police officers drawn Portugal's criminal police service ; in addition, the office has its own on-site legal and translation services<sup>3</sup>. The legal service of SIRENE applies a non-statutory quality control review to outgoing EAWs. It is domestically competent to request that issuing JAs remedy any EAWs issued other than in full compliance with Portugal's domestic legislation.

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<sup>1</sup> Article 24, Law 65/2003.

<sup>2</sup> Supplementary Information Request at the National Entry.

<sup>3</sup> Respectively comprised of 2 lawyers and one linguist.

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- The National Central Bureau of Interpol ("NCB")

Portuguese Interpol is established through Polícia Judiciária, the Portuguese criminal police under the Ministry of Justice. In respect of communication with MSs not connected to the SIS, the NCB is responsible for entering diffusions, requests for Red Notices or undertaking direct transmission or receipt of EAWs depending on the facts of the case or the requirements of the recipient MS. It has exclusive competence for all logistical aspects of the risk assessment and physical surrender of requested persons and evidence.

- The Centre for Judicial Studies

Portugal has established a body accountable to the Ministry of Justice to be responsible for the initial, supplementary and ongoing training of judges, Public Prosecutors and assessors for the Court of Appeal and Courts of First Instance. This Centre is also responsible for supporting judicial training initiatives for lawyers, solicitors and agents from other sectors; developing legal studies and judicial research and delivering professional training to qualified and trainee judges and prosecutors from other countries (particularly in countries where Portuguese is the official language).

- The informal working group on the EAW

This permanent working group draws upon the experience of legal and law enforcement professionals working in the area of the EAW throughout the territory of Portugal. Its members include Public Prosecutors in the Courts of Appeal, SIRENE and NCB officers, a member of the judges' training school, members of the CA (including its European Judicial Network contact point) in addition to ad hoc attendees as may be appropriate. The expert team were advised that consideration is being given to inviting executing JAs to contribute to future meetings<sup>1</sup>. Notwithstanding this diverse composition it seeks to meet every three months with the purpose of identifying and promoting EAW best practices. Via its numerous contacts the working group seeks to maintain a statistical database of EAWs issued and received by Portugal. Although not 100% infallible in terms of its coverage, this database is a valued resource for the study of trends and time limit compliances and breaches.

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<sup>1</sup> During a separate interview the team were advised by Portugal's executing JA that such an invitation would be considered favourably.

## 2.2 THE LEGAL BASIS

- The Portuguese Constitution

Portugal's written Constitution impacts upon various aspects of the EAW surrender process, most specifically in relation to the rules concerning the surrender of own nationals, the definition of political offences and the death penalty or other inhuman or degrading sentences. The expert team notes that changes have been made to the Portuguese Constitution<sup>1</sup> to facilitate the surrender of nationals and specific regimes for life imprisonment cases.

- Law no. 65/2003 of 23 August

Portugal's implementing EAW legislation.

- The Code of Criminal Procedure

Portugal's CCP sets out Portugal's pre-existing rules concerning the regulation of domestic criminal procedures. These regulations remain relevant within the context of the EAW specifically in respect of the rules concerning preventative detention (remands in custody), the right to legal advice, time limits for the ratification of detention decisions and procedures relating to preliminary hearings and the rules governing the granting of habeas corpus.

- Attorney-General guidelines numbered 04/2004 and 15/2004

To facilitate the implementation and consistent application of the EAW system the AG issued the above circulars to govern practical aspects of the issue and conduct of EAW requests. The guidelines are binding on the public prosecution service rather than the judiciary but are generally accepted to be indicative of best domestic practices.

- Law no. 144/1999 of 31 August

Concerns judicial cooperation in criminal matters. It establishes, inter alia, the legal basis for an arrest on the basis of an Interpol Notice/diffusion and sets out the overarching rules governing temporary/conditional surrenders.

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<sup>1</sup> Effective 12 December 2001.

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- The EAW Handbook

Is a substantive practical guide created as a result of a broad collaboration between the Prosecutor General and each of the contributing bodies comprised within the informal EAW working group. This work has been published<sup>1</sup> on paper and in CD ROM format and has also been posted on the website of the Prosecutor General. The stated aim of the handbook is to provide guidelines for the adoption of good practices in the light of experiences gained to date. It seeks to supply competent judges and prosecutors with specific information and worked examples of how EAW forms should be completed and processed in accordance with the law. It helpfully sets out a sequential descriptive analysis of each element of the Portuguese EAW process.

- HABILUS

The HABILUS is an electronic information and search tool controlled and updated by the GRIEC and accessible by Portugal's court clerks. Consideration is being given to extending access to this system to the issuing JAs themselves, thereby providing them with direct access to a further source of the EAW form. The expert team noted that the electronic version of the EAW handbook had not been posted on this information system.

- Portugal's "Fiche Française"

Member States may also refer for assistance to Portugal's "Fiche Française" which sets out those practices which issuing Member States are to adopt when seeking the surrender of requested persons from Portugal.

### 3. ORGANISATION AND PRACTICES - ISSUING MEMBER STATE ROLE

The expert team was advised that, during the calendar year ending in October 2006, the appropriate JAs of Portugal had issued 419 EAWs, in respect of which 118 arrests had been made and 110 surrenders undertaken. Portugal reported that 8 surrenders had been refused.

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<sup>1</sup> September 2006.



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## 3.1. THE DECISION TO ISSUE

The competent issuing JA in Portugal is dependant upon the stage reached in the domestic criminal process. In all cases the competent authority will be the authority empowered to order the arrest or detention of the requested person under domestic legal provisions<sup>1</sup>, namely:

- During the investigation phase - the EAW may be created by the Public Prosecutors<sup>2</sup> or by the examining Magistrate,
- During the (optional) examination stage - the examining Magistrate is competent,
- During the pre and post-trial stages - the judge is the designated JA.

No procedures or guidelines have been created specifically in respect of reaching a decision as to whether to apply for an EAW, and as such Portugal's issuing JAs will adopt a case-by-case approach.

Notwithstanding this broad discretion, the recently published EAW Handbook created and circulated under the direction of the Office of the Attorney General seeks to draw together Portugal's EAW experiences and best practices to date. The expert team noted that the generic domestic guidance for EAWs sets out that the instrument should be deployed in an effective and proportionate manner and in respect of more serious and/or damaging crimes. Over and above the bare statutory requirements, issuing JAs are therefore required to be mindful of the principle of proportionality of action.

The expert team was advised that the domestic criminal rules set down by the Portuguese Code of Criminal Procedure required the attendance of a suspect to obtain his signature on a document known as a "TIR"<sup>3</sup>. This TIR<sup>4</sup> is a compulsory mechanism by which an individual is advised of the allegations against him (by being "named as a defendant"); it also places upon him legal obligations such as the condition of residence. A person may not be judged unless and until this procedural requirement has been discharged<sup>5</sup>.

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<sup>1</sup> Article 36, Law 65/2003.

<sup>2</sup> The expert team was advised that Public Prosecutors issue the greatest number of Portuguese EAWs.

<sup>3</sup> Termo De Identidade e Residencia.

<sup>4</sup> Which is deemed to be served 3 days after transmission by normal post.

<sup>5</sup> After obtaining the signature of the defendant on the TIR that individual may, in designated circumstances, be judged and sentenced in absentia.

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The expert team noted that certain MSs refuse to use MLA procedures, under either the 1959 or 2000 conventions, to obtain the signature of a suspect on a TIR<sup>1</sup> and as such they were concerned that EAWs could be utilised to fulfil this domestic requirement, which enables the possibility of the judgement in absentia being recorded<sup>2</sup> (a use not foreseen by Portugal's implementing law<sup>3</sup>). They sought clarification therefore as to the competence of issuing JAs to issue EAWs to compel the attendance of a requested person merely so that a TIR may be completed. The expert team was advised that there is clear Supreme Court jurisprudence prohibiting the use of (domestic) coercive measures for this purpose; it is therefore considered that EAWs must in all cases be a proportionate response to the criminality.

In addition to the EAW handbook and training supplied by the Centre for Judicial Studies, the AG has issued guidance to prosecutors<sup>4</sup> (when acting as issuing JAs) which sets out basic procedural requirements for the completion of the EAW and steps in the process<sup>5</sup>, including highlighting the designated routes to obtain, for example, electronic EAW template forms.

Portuguese authorities reported that they had regular experience of dealing with MSs which had limited the application of the EAW in the light of Article 32 of the FD<sup>6</sup>. In such instances pre-existing extradition protocols are triggered with the official request being drafted and actioned by the Ministry of Justice.

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<sup>1</sup> Those MSs taking the view that the imposition of legal conditions necessitates a corresponding duty to monitor compliance with those conditions.

<sup>2</sup> EAW form box (d) 1.

<sup>3</sup> Article 2, Law 65/2003.

<sup>4</sup> AG's references are binding on all Public Prosecutors but may also be taken into consideration by Portugal's independent judiciary if they deem that to be appropriate to the case at issue.

<sup>5</sup> AG's reference 04/2004 advises the national EJM contact points to be used in cases of uncertainty as to foreign MS practice but is silent as to the role of Eurojust. Reference 15/2004 corrects this omission and highlights the statutory role of Eurojust in the EAW process.

<sup>6</sup> Member States who will apply the extradition regime in respect of offences committed before 1 November 1993 (France), 7 August 2002 (Austria and Italy).



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## 3.2. VERIFYING THE POSSIBLE EXISTENCE OF MULTIPLE REQUESTS

At the time at which the EAW itself is issued, no mandatory or systematic checks are made to discover whether or not Portugal has outstanding request(s) in circulation. Consequently, more than one EAW may be issued by Portuguese issuing JAs in respect of the same individual. The expert team noted that Portugal follows the practice of issuing one EAW per case (i.e. more than one offence may be entered in the form).

Once the EAW has been issued, however, all JAs are required to transmit a copy to the SIRENE Bureau and NCB in all cases<sup>1</sup>. Should multiple EAWs have been issued, this will therefore be detected by the relevant police organisation. The team was advised that it was the practice of the SIRENE office to notify all subsequent applicants that their EAW(s) would not be entered onto the SIS (although this supplementary information is recorded on the system<sup>2</sup>) so that the court files could be noted accordingly.

Consideration is currently being given to granting Public Prosecutors access to the SIS at an appropriate level; once such linkages have been established, prosecutors will have access to the current status of requested persons and the ability to coordinate EAWs and internal criminal matters more effectively.

## 3.3. THE COMPLETION OF THE FORMS/COURT PAPERS

Issuing JAs are required to complete the EAW form in "a scrupulous and detailed manner, using all fields."<sup>3</sup>

In addition to newly-qualified issuing JAs (both prosecutors and judges) being provided with well-regulated classroom and workplace-based training in this and other judicial areas, as part of the cyclical training provided by the Centre for Judicial Studies<sup>4</sup>, they have access to the newly-created EAW handbook and their own primary legislation<sup>5</sup> which mirrors the provisions of FD Article 8 in terms of the necessary content of the form.

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<sup>1</sup> Including cases of direct transmission or targeted diffusion.

<sup>2</sup> In the result of a hit SIS will advise both courts.

<sup>3</sup> AGs reference 4/2004, paragraph 9.

<sup>4</sup> See section 5 for further detail.

<sup>5</sup> Article 3, Law 65/2003.

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During their discussions with Portugal's issuing JAs, the expert team noted the clear desire for the creation of an EU-wide best practice guide directed towards the completion of the EAW form. The view was expressed that particular guidance needed to be targeted towards clarity in the completion of boxes b ("decision on which the warrant is based"), e ("offences" - description of circumstances) and f ("other circumstances relevant to the case"). It was also felt that measures should be taken to urgently address non-statutory issue criteria, specifically the proportionality of the use of EAWs.

The expert team noted that at the time of the issue of AG's reference 4/2004 Portugal had approximately 400 unexecuted international arrest warrants registered within the SIS. In accordance with the rules of the system, SIS Alerts are reviewed by national authorities on a 3-yearly cycle<sup>1</sup>. The Portuguese SIRENE bureau used that opportunity as the vehicle to consider the merits of each case and, if continued circulation of the requested person is considered to be appropriate, the SIRENE bureau takes steps to transmit the file to the Public Prosecutor so that an EAW form may be completed and the matter converted to the current system.

### 3.4. THE APPLICATION, PARTIES AND PROCESS

Given the nature of Portugal's designated issuing JAs there is no requirement for a formalised application process. EAWs for surrender offences and lesser accessory offences would be issued by the designated JA on a case-by-case basis.

EAWs issued will be transmitted to the SIRENE bureau and Interpol where they will be reviewed for statutory compliance before being entered into the respective systems. The expert team noted that the two bodies used different levels of formality in this regard, but as the checks were undertaken in parallel no consequent issues arose.

SIRENE receives EAWs by post in standard cases and via fax in urgent matters. On receipt, EAWs are passed to their legal advisors where a formalised verification procedure is undertaken to ensure compliance with Portugal's legal and formal requirements. The expert team was advised that in the region of 25% of non-urgent EAWs are returned to the issuing JA for errors to be corrected or further information to be appended.

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<sup>1</sup> Article 112, Schengen Convention.

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Once the legal advisors receive the completed documentation from the issuing JA they pass the file to the translation section where it is translated into English, A and M forms are created and the matter is passed to the operational group of the criminal police for input into the system. SIRENE maintain a paper copy file in all cases; the expert team was able to examine these paper archives, which were systematically and meticulously organised.

EAWs received by the NCB were reviewed informally. This process could generate further requests to the issuing Portuguese JA in appropriate circumstances.

### 3.5. TRANSLATION OF THE EAW

Where the location of the requested person is known and direct transmission of the EAW is elected by the issuing JA, the formal EAW will be translated by an external agency. In cases of emergency the Prosecutor General's Office can itself provide a translation into English, French or German within, the team were advised, a matter of hours in standard cases.

Following such a direct transmission (and in all cases of non-targeted circulation) the Portuguese EAW will, as noted, be translated into English by the SIRENE bureau prior to input into the SIS.

Should a subsequent arrest be made on the basis of an Interpol Red Notice/diffusion or an Article 95 Alert, the translation of the EAW into the designated executing MS language will be put in place by the issuing JA itself so that the original EAW can be submitted within the prescribed time limit of the executing MS. The expert team noted that the Portuguese authorities had experience of one 2004 case in which a translation into Spanish had not been undertaken in accordance with the stated deadline and as a result of which the requested person had been released.

Despite this being the only such instance of surrender failure by virtue of breach of a translation deadline, the expert team was advised that Portugal considered that the highly divergent time-limits are themselves perceived by issuing JAs as an unhelpful complication in the otherwise efficient operation of the EAW system.

## 3.6. TRANSMISSION OF THE EAW

Although a statutory requirement<sup>1</sup>, the overarching practical purpose of entering all Portuguese EAWs into SIS and Interpol was stated to be to frustrate the movement of requested persons.

Portuguese issuing authorities are advised to use the informal working party, EJM contact points (themselves located within the CA), the EAW Atlas or Eurojust where relevant authorities are in doubt. The chair of the working party confirmed that, on a daily basis, the working party proved to be the avenue most frequently utilised by issuing JAs which required assistance in this regard.

The expert team noted that in general terms, whereas the operation of the SIS functioned as envisaged, the Portuguese NCB Interpol desk had been forced to significantly adapt its procedures to reflect the specific requirements of the UK and Ireland.

- UK - In all cases<sup>2</sup> the Portuguese authorities prepare a further signed and sealed "original" EAW and transmit it to the London Interpol desk by standard post. In cases concerning EAWs issued for the service of a custodial sentence, this second "original" must additionally bear a declaration (itself devoid of legal meaning within the Portuguese criminal law system) - namely, that the requested person is "*a fugitive from justice*"<sup>3</sup>. The team were advised that, without the provision of this further "original" or, in cases of conviction, the separate declaration set out above, the UK authorities would not undertake database investigations into the whereabouts of the requested person<sup>4</sup>. The expert team consider that it is appropriate to recount that in a separate interview with a issuing JA based in Porto, the genuine belief was expressed that the UK authorities were permitted to "use a different form for the EAW".

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<sup>1</sup> Article 4(1), Law 65/2003 - Issuing Authorities may directly transmit EAWs or issue a SIS Alert (Article 4(2)) or an Interpol Red Notice or diffusion (Article 5(2)).

<sup>2</sup> Targeted transmission or general diffusion.

<sup>3</sup> Or similar formulation.

<sup>4</sup> An EAW not bearing this declaration does not comply with the UKs domestic EAW legislation and as such would not be certified or further progressed.

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- IE - In consequence of a request relayed by Ireland's own CA, the Portuguese NCB transmitted a circular to the Prosecutor General stating inter alia; *"Concerning the diffusion to Ireland, we take this opportunity to inform you that after having sent several EAWs to our Irish counterpart, Interpol Dublin have informed us that EAWs should only be transmitted to Ireland where they concern Irish addresses or, where there is a suspicion that the requested person is located in Ireland."* In consequence of this requirement, no EAWs have been issued to Ireland by Portugal<sup>1</sup>.

These practices prompted a senior Interpol official to make the following telling declaration during one interview with the team of experts: *"... we have one rule for the 10 (new) MSs, a special rule for the UK and no rules for Ireland..."*. The experts agree with this succinctly expressed sentiment.

## 3.7. ISSUES RAISED BY OR REQUESTS FOR INFORMATION FROM THE EXECUTING MEMBER STATES AND THE COMMUNICATION CHANNELS RELIED UPON

The Portuguese authorities reiterated the general principle that standard EAW communications between SIRENE Bureaux would be conducted in English. Similarly, English was the normal route selected in respect of information requests routed via Interpol.

The expert team was advised that Portugal had received the following requests for further information from the UK authorities (through Interpol Channels)<sup>2</sup>:

- A requirement that "not applicable" entries be recorded rather than a mere omission to complete a box on the EAW form<sup>3</sup>,
- A requirement that the passage of time between the offence and the issue of the EAW be explained ( expressed as the "appropriateness" of the EAW),
- A requirement that, notwithstanding the completion of the first option in box (d) of the EAW form<sup>4</sup>, further information that the facts and circumstances of the offence be provided.

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<sup>1</sup> The Portuguese authorities considered that addresses of requested persons are available in just 3-4% of EAW requests.

<sup>2</sup> The team were advised that in the majority of cases these requests could, in due course, be satisfied and therefore did not result in refusals to surrender.

<sup>3</sup> Portugal has now adopted this as standard practice in all cases.

<sup>4</sup> "The person concerned has been summoned in person or otherwise informed of the date and place of the hearing which led to the decision being rendered in absentia."

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- A general requirement that these and other issues be remedied by the issue of a subsequent EAW rather than, as Portugal would prefer, the provision of a supplementary judicial statement.

The view was expressed by Portugal that the above requests received from the UK originated not from the designated executing JA itself but from an authority<sup>1</sup> which "filters EAWs and redirects them to the internal executing JA only if it considers that they comply with the law". The expert team was advised that, should the UK consider that the information provided (normally in the form of an amended EAW) was insufficient for its purposes, the EAW would not be forwarded through internal channels for execution, and consequently the requested person would not be apprehended.

Portuguese issuing JAs reported that in other cases they would also expect to receive requests for further information through their CA (via the European Judicial Network) or, less frequently, from Eurojust. Although described as "fairly frequent", these requests were difficult for Portugal to categorise by virtue of their highly diverse nature. E-mail and telephone communication were the normal means relied upon in such cases.

Given the brevity of the majority of such requests, the CA itself has in many instances translated the contents to assist its JA.

## 3.8. THE RETURN OF OWN NATIONALS FOR THE ENFORCEMENT OF A SENTENCE

In respect of foreign MS own nationals convicted following an EAW surrender, the Portuguese JA is empowered to order the return of the requested person (i.e. to the executing MS). Such return is permissible by virtue of Portugal's reliance on the Transfer of Sentenced Persons regime<sup>2</sup>.

Portugal's legislation does not however permit its authorities to provide all of the guarantees envisaged in Article 5(1) of the FD. Specifically, domestic law requires that a person tried in absentia be notified of the sentence at the time of his arrest and further that he be guaranteed the right to lodge an appeal against that in absentia conviction; no provision is made for the alternative possibility of a retrial<sup>3</sup>.

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<sup>1</sup> The Serious Organised Crime Agency ("SOCA").

<sup>2</sup> Or such legal means as have been agreed between issuing and executing MSs.

<sup>3</sup> Unless ordered by the court pursuant to the appeal.



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The Portuguese authorities discovered this problem as a result of a specific request issued to the NL. Investigation of the issue revealed that this position appears to have arisen as a result of a linguistic discrepancy between the Portuguese version of the FD, in which the opportunity for the twin remedies of appeal and retrial are provided for in the alternative, and the other official versions of the FD, in which both remedies are to remain available.

## 3.9. YOUTH SURRENDERS AND CORRESPONDING GUARANTEES

The age of criminal responsibility in Portugal is 16. That limit is absolute with no derogations being possible.

As an issuing MS Portugal seeks to apply the rule of specialty in accordance with the rules and exemptions laid down in Article 27 of the FD; however, the expert team noted with concern that the legal drafting of the corresponding domestic legal provisions<sup>1</sup> was characterised by a lack of clarity<sup>2</sup>.

## 3.10. EVOLVING BEST PRACTICES

To address the specific issues encountered with EAWs issued to the UK, a bilateral meeting between the competent authorities of the two Member States was conducted on 29 March 2006. This meeting is reported to have resulted in a greater understanding of the systems of each MS, although the expert team considers that the issues identified have not been overcome.

The expert team was unanimous in its view that creation of the permanent informal working party was itself a positive development as regards identifying and distilling best practice. The professionals involved cover all aspects of the EAW process and the working party impressed the expert team with its knowledge base and enthusiasm for the subject.

Portugal wished to commend the practices adopted by France and by Spain in creating "letters of surrender" which were transmitted at the time of the surrender of the requested person<sup>3</sup>. These letters were said to contain very clear and accurate information pertaining to the amount of time an individual had been detained during the whole of the EAW surrender process.

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<sup>1</sup> Article 7, Law 65/2003.

<sup>2</sup> See section 7.3.1.3 for further detail.

<sup>3</sup> Article 26 paragraph 2 FD.



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## 3.11. GENERAL COMMUNICATIONS WITH THE EXECUTING MEMBER STATE

Portugal's issuing JAs are able to use such communication channels as best suit the requirements of the case. In general terms, communications will be by e-mail or telephone, save for the provision of official documentation or duplicate EAWs which are required to be transmitted by post.

Should an arrest be made pursuant to a Schengen Alert, the SIRENE bureau will receive a G form in accordance with standard practices. In the case of an Interpol-based arrest, the NCB will receive a notice of arrest.

## 3.12. THE MECHANICS OF THE SURRENDER (INCLUDING TEMPORARY SURRENDER) OF REQUESTED PERSONS/PROPERTY

Surrender notifications should in all cases be transmitted to NCB Portugal by the executing MSs Interpol bureau. Direct police-to-police notifications or receipts to SIRENE will be redirected accordingly.

The NCB is the domestic body charged with the coordination of the physical surrender process. It deals with the appointment of the escort team and liaises with the executing MS over the detail of the travel plan. In all instances the surrender notifications will be routed via the NCB to the issuing JA, which will prepare the domestic criminal process which will be launched once the surrender has been undertaken.

The Portuguese NCB reported that for its part it was content with the mechanics of surrender of persons or property<sup>1</sup> in EAW matters.

## 3.13. CONFLICT OF EAWS/EXTRADITION REQUESTS/ONWARD SURRENDER

The expert team was advised that at the time of the evaluation visit no such conflicts had arisen and as such Portugal was unable to comment on the means of resolution deployed by executing MSs.

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<sup>1</sup> Article 32, Law 65/2003.

## 3.14. EXPENSES

As an issuing MS, Portugal reported that all of its dealings with executing MSs had been conducted in accordance with the letter and spirit of Article 30 of the FD.

## 4. ORGANISATION AND PRACTICES - EXECUTING MEMBER STATE ROLE

The expert team was advised that, for the calendar year ending in October 2006, a total of 177 EAWs had been received in respect of 177 requested persons. Of this total, Portugal has undertaken 155 arrests, with 129 persons having been surrendered and 4 surrenders having been refused. Portugal reported that the balance of live cases<sup>1</sup> were those in which a decision was pending or had been made but the surrender postponed.

### 4.1. RECEIPT PROCEDURES

A variety of transmission routes are open to issuing MS depending on the practical facts of the case; in all instances Portugal will permit the receipt of an EAW by any secure means of transmission which is capable of producing written records under conditions which would allow Portugal to establish its authenticity. The range of options available to an issuing MS were said to be:

- Where the location of the requested person is known, transmission of the EAW directly to the executing JA, together with a translation into Portuguese<sup>2</sup>, is the usual course of action. Portugal has designated its 5 Courts of Appeal as the executing JAs in respect of EAW requests<sup>3</sup>. The JA will conduct a cursory review of the EAW before directing that the file be handed to the prosecution service so that the logistics of the arrest and initial preventative detention can be undertaken. The prosecutor will then transmit the file to the appropriate police unit to implement the arrest. Where no arrest is made in this situation, NCB would be advised that the requisite details should be entered in the national Interpol database,

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<sup>1</sup> i.e. those not withdrawn.

<sup>2</sup> Consideration is being given to a bilateral cooperation with Spain, whereby each MS will accept EAWs in the language of the other.

<sup>3</sup> Portugal's Courts of Appeal operate only on weekdays.

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- Where the location of the requested person is not established, Portugal's implementing legislation provides<sup>1</sup> that a properly constituted SIS Alert (i.e. containing all of the data specified in Article 8 of the FD<sup>2</sup>) is equivalent to an original EAW. The expert team was advised that database searches seeking to ascertain the location of the subjects of all Article 95 Alerts<sup>3</sup> are undertaken by the SIRENE bureau,
- Where the location of the requested person is not established and the issuing MS does not have access to the SIS, Interpol transmissions in the form of a Red Notice or a diffusion will also suffice as the basis of a provisional arrest<sup>4</sup>. General zone 2 diffusions (Europe) would result in the EAW being inserted in the national Interpol database (which is visible to subsequent police searches) but would not trigger database searching; such action would be initiated only if the notice was linked to Portugal (Interpol Lisbon),
- Portuguese NCB reported that it considered that diffusions from the UK fall into the targeted diffusion category of request<sup>5</sup>. In such cases therefore a request was treated as if that information was accurate and Interpol would undertake an immediate translation and forward the file to the appropriate local police unit for further investigations to be undertaken. A failure to arrest in such a case results in the matter remaining in the national Interpol database,
- It is also open to issuing MSs to use the European Judicial Network to effect transmission if they so desire, although the expert team was advised that this mode of transmission was rarely utilised.

In practical terms the Portuguese authorities reported that they ultimately received the majority of EAWs via faxed transmission.

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<sup>1</sup> Article 4(4), Law 65/2003.

<sup>2</sup> Article 3(1), Law 65/2003.

<sup>3</sup> Not merely those Alerts that link the requested person to Portugal.

<sup>4</sup> Article 39, Law 144/99 (Law of International Judicial Cooperation in Criminal Matters).

<sup>5</sup> The practice of the UK was understood to be that an EAW would not be issued unless intelligence or information highlighted a specific MS to be of relevance.

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## 4.2. THE FORM OF THE WARRANT, REVIEW PROCEDURES.

It is the practice of Portugal's SIRENE bureau not to issue validity flags pending the provision of further information which may be required on the basis of incomplete SIS Alerts. The expert team noted however that in practice it was possible that, rather than issue a flagged Alert, the SIRENE bureau considered that it was useful to postpone the entry of the Notice pending receipt of information that the desk officers felt was necessary to input the data accurately.

The expert team was advised that Portugal has not implemented a distinct review phase in its EAW practice, but Interpol and SIRENE officers reported to the expert team that potential key issues (i.e. those apparent on the face of the EAW or an Alert or Notice) would be highlighted to the prosecutors when the file is submitted to them.

The designated prosecutor will then consider the matter and form a view as to whether it is worth drawing the specific attention of the executing JA to the potential deficiency. In all cases it will be for the executing authority to consider the merits of formulating and transmitting a request that further information be provided by the issuing JA. The expert team posed examples of foreseeable defects (missing date for the offence, etc) and were advised that SIS, being a non-operational unit, complies with strict procedural criteria. Its officers are required to enter the Alert on the basis of which the domestic police are obliged to arrest and produce to court; they were of the firm view that the executing JA was the competent body to action any requests for further information<sup>1</sup>.

The most frequent of such requests were stated to relate to:

- Discrepancies between the SIS Alert and a subsequent EAW,
- More details concerning the identity of the requested person,
- The provision of guarantees concerning Portuguese nationals,
- Formal/drafting errors or omissions (penalties, factual details in non-list requests etc).

The expert team noted that, in an effort to bring consistency to EAW processes within Portugal, helpful summaries of substantive surrender decisions and of the pleadings of the Public Prosecutors were both posted on the website of the Lisbon District Prosecutor's Office for information and guidance in this area.

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<sup>1</sup> The Portuguese SIRENE bureau considered that there was a distinction between "necessary data" and "additional data" in respect of incoming Notices.

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## 4.3. REQUESTS AND RESPONSES TO REQUESTS FOR FURTHER INFORMATION/CLARIFICATION

The Portuguese authorities confine themselves to ensuring that the issues referred to in Article 8 of the FD<sup>1</sup> are sufficiently specified. The expert team was advised that no consideration is given to the proportionality of the EAW (the team examined one Interpol diffusion concerning the supply of 0.54g of herbal cannabis which was being progressed without regard to the scale of the alleged criminality), nor to the facts in Article 2 paragraph 2 list cases.

Incomplete submission of forms A and M, that is to say non-submission of form M, would also cause a delay in inputting a case into the SIS, but such a delay would be a direct practical consequence of such an oversight rather than a concrete decision to require an issuing MS to provide further data.

## 4.4. ARREST PROCEDURES/FIRST HEARING

All arrests made pursuant to EAWs<sup>2</sup> are undertaken using standard domestic arrest powers deployed by Portugal's law enforcement services<sup>3</sup>. All such arrests are deemed to be provisional and, in keeping with Portugal's domestic arrest and detention procedures, must be validated within a 48-hour period by the executing JA<sup>4</sup>.

In all cases the requested person is immediately brought before a Public Prosecutor at the appropriate appeal court for a personal hearing to be undertaken<sup>5</sup>. The prosecutor will summarily hear and advise the requested person of the right to legal assistance in respect of that element of the process. The prosecutor is subsequently required to bring the requested person before the appropriate executing JA within a period of no more than 48 hours from the arrest so that judicial questioning may be undertaken. At this hearing the judge will:

- Validate the arrest and consider whether the requested person should remain in detention or be subjected to other coercive measures,

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<sup>1</sup> And reiterated by Article 3, Law 65/2003.

<sup>2</sup> Arrests via Interpol, SIS Alerts and /or direct transmission.

<sup>3</sup> All of whom are competent to arrest a requested person.

<sup>4</sup> Article 19, Law 65/2003 - where this is not possible a first instance criminal court may validate the arrest and continue the detention until a JA becomes available.

<sup>5</sup> Article 64, Code of Criminal Procedure and Article 18(2), Law 65/2003.

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- If the requested person does not elect a defence representative the judge is required to assign one<sup>1</sup>. In all cases the cost of provision of legal and interpretive<sup>2</sup> advice and assistance is borne by the State<sup>3</sup>,
- Identify the requested person, advise him of the contents of the EAW and the possibility of consenting to surrender and renouncing specialty<sup>4</sup>. The judicial decision approving such a consent is, in practical terms, considered to be the final surrender decision<sup>5</sup>. The team noted that a requested person who withheld consent may reconsider his position and consent at a subsequent time however in such a case a further hearing before the JA would be necessary to ensure that such belated consent was genuine.

The expert team was advised that requested persons may apply for a release from custody at any stage of the EAW process; however, the clear practice was that the majority of such applications will be refused so as to ensure the best conditions for surrender to take place. This stance of the executing JA towards release of the requested person from custody has been the subject of legal challenge, but the majority practice has been confirmed in express terms by the Supreme Court as follows:

"... the appropriateness, proportionality and necessity of the pre-trial detention of the accused cannot be seen only from the seriousness of the crimes with which he is charged but also from the need for him to answer for those crimes and the need for a positive response to the international arrest warrant. No other coercive measure proves suitable for the purpose, namely surrender of the accused, as validly and lawfully requested, under the arrangements laid down in Law 65/2003. The principle prohibiting excessive action has thus been satisfied, and the judgement appealed against must also be upheld in this aspect."

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<sup>1</sup> Article 18(4), Law 65/2003.

<sup>2</sup> The expert team was advised that interpretation between Portuguese and the Slavic languages has on occasion proved to be problematic.

<sup>3</sup> Legal advice was the subject of means testing.

<sup>4</sup> Once verified by the court and signed by the requested person and his counsel such consent is irrevocable.

<sup>5</sup> Article 20(3), Law 65/2003.



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Notwithstanding this practice, the expert team noted that the drafting of Articles 16(6) and 18(3) of Portugal's implementing law could be seen as linking the detention of the requested person in custody to the issue of double criminality<sup>1</sup>. However coincidental this drafting may have been, the team noted that it introduces unnecessary scope for argument in a very small number of cases, although they accept that this point has not been taken to date.

## 4.5. THE SURRENDER DECISION

The expert team was advised that, in cases of consent, the average time from arrest to surrender is recorded as being 22 days, and in cases of opposition 47 days.

Should consent not be given at the validation hearing, the requested person may, through his counsel, make representations as to mistaken identity<sup>2</sup> or other such refusal grounds as are provided for by the law<sup>3 4</sup>.

The defence may be given time to evidence the representations made and in all cases the prosecutor will be permitted to respond to the opposition case and, in accordance with standard adversarial principles, the requested person may respond in kind. The executing JAs of Portugal estimated that such opposition hearings were conducted over a 1 1/2 - 2 hour period.

Subject to a slip rule<sup>5</sup> which allows the JA to make such further enquiries as may be necessary of the issuing MS, the surrender decision will be taken (by a JA other than the one who considered the earlier detention decision) within 5 days of the validation hearing.

## 4.6. REFUSALS TO SURRENDER

In respect of the totality of Portugal's EAW receipts, surrender has been refused on 13 occasions.

Those cases may be categorised as follows:

- Double jeopardy - 3 instances

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<sup>1</sup> "...shall be governed by the requirements stipulated by the code of criminal procedure for the detention of suspects".

<sup>2</sup> Article 21(2), Law 65/2003.

<sup>3</sup> Closed lists of mandatory and prescriptive refusal grounds being set out in Articles 11 and 12 of Law 65/2003.

<sup>4</sup> The A and M forms or the EAW itself in direct transmission cases will be available to the court.

<sup>5</sup> Article 22(2), Law 65/2003.



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- Mistaken identity - 1 instance
- Lack of double criminality - 1 instance
- Miscellaneous cases (e.g. death, time-bar, withdrawal of EAW) - 8 instances.

The expert team was advised that the Portuguese executing JAs did not seek to re-introduce the principle of reciprocity following the decision of the German Constitutional Court to void ab initio Germany's EAW implementing legislation. This pragmatic stance was adopted by virtue of the fact that the Portuguese JAs had confidence in Germany's ability to reintroduce comparable legislation.

## 4.7. APPEALS PROCEDURES AND THEIR IMPACT ON TIME LIMITS

The time limit in which to lodge an appeal is 5 days<sup>1</sup> from the day on which the surrender decision is handed down. Legal advice is also compulsory<sup>2</sup> at the appellate stages of proceedings.

The notice of appeal must state all the grounds to be relied on and the prosecutor is provided with 5 further days in which to provide a written reply. On receipt of that reply, or - failing that - on the expiry of the 5-day time limit, the appeal file is transmitted to the Supreme Court of Justice for consideration.

On receipt, the judge-rapporteur also has 5 days to submit a draft ruling for consideration to the appeal tribunal, which shall hear the matter at the first available session following its consideration of the draft ruling.

The appeal process takes place in the context of the maximum permissible time limits for the detention of the requested person, namely 60 days from the day of arrest<sup>3</sup> although there is no statutory limit for the handing down of the decision.

## 4.8. OWN NATIONAL, YOUTH ARREST AND SURRENDER ISSUES

The expert team noted that, in order to facilitate the ratification of Law No 65/2003, Portugal undertook Constitutional reform to set aside, inter alia, the pre-existing prohibition on the surrender of own nationals.

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<sup>1</sup> Article 24(2), Law 65/2003.

<sup>2</sup> Article 64(1)(d), Code of Criminal Procedure.

<sup>3</sup> Article 26(2), Law 65/2003.

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Portugal's EAW legislation provides<sup>1</sup> that ultimate surrender may be dependant on the condition that the Portuguese national will be repatriated for the service of any consequent sentence. No statutory provision is made for the procedures to be adopted in respect of these guarantees or of the level of specificity required to satisfy the requirement. The return however will be governed by the European Convention on the Transfer of Sentenced Persons<sup>2</sup>.

The expert team was advised that incomplete or insufficiently detailed undertakings have been a source of delay in effecting the surrender of Portuguese nationals in some instances.

The Portuguese authorities advised the expert team that at this time no surrenders had been refused in consequence of such (initially) inadequate undertakings. The Supreme Court has however recently delivered a judgement in respect of a French EAW<sup>3</sup> and confirmed that Portuguese executing JAs should consider the "purpose of enforcing the sentence and the requested person's circumstances in order to ascertain whether there were good grounds to refuse to execute the EAW, as it would be better for the sentence to be served in Portugal, under domestic legislation."

This ruling seems to mandate that the Portuguese executing JA should refuse to execute the EAW on the basis of Article 12(1)(g), Law 65/2003 (Article 4(6) of the FD), namely where the requested person:

- Is staying in the national territory,
- Has Portuguese nationality, or
- Lives in Portugal (and the Portuguese State has undertaken to execute the sentence in accordance with Portuguese law).

Instead, the JA should order domestic "execution" of the EAW in accordance with Portuguese law. This course of action effectively ends Portugal's duty as an executing MS by taking the view that the EAW was a sufficient legal basis for the French judgement to be enforced without prior review or confirmation.

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<sup>1</sup> Article 13(c), Law 65/2003.

<sup>2</sup> Pursuant to which Portugal will if necessary adjust sentences so as to reduce them to the maximum length permissible under Portuguese law or convert them to their Portuguese Law equivalents.

<sup>3</sup> In respect of robbery, forgery and alteration of cheques.

## 4.9. ACCESSORY OFFENCES

At this time Portugal has received no EAW requests concerning accessory offences. However, the executing JAs consider accessory surrender to be a matter of procedural economy.

The basis for this practice arose from Article 2(2) of the European Convention on Extradition<sup>1</sup>. The Portuguese authorities consider such surrenders permissible within the context of EAW proceedings.

## 4.10. ONWARD SURRENDER/EXTRADITION

Although no experiences in this regard were reported to the expert team, Portugal's EAW legislation does not prejudice its obligations in respect of a requested person detained and protected by specialty provisions<sup>2</sup>. Subject to those safeguards it remains a matter to be resolved by consent of the original executing country and the subsequent requesting authority.

## 4.11. AD HOC ISSUES SURROUNDING UNDERTAKINGS

Other than as outlined in this report Portugal has made no representations concerning further undertakings required of issuing MSs.

## 4.12. ARTICLE 32 EXPERIENCES

Portugal has no record of having received extradition requests from MSs which have made declarations pursuant to Article 32; however, the authorities interviewed did feel that progressing a matter in accordance with extradition rules in those specific circumstances would not be problematic.

## 4.13. TEMPORARY/CONDITIONAL SURRENDER

The temporary surrender provisions outlined in Portugal's implementing law<sup>3</sup> were implemented in one UK case that did not proceed as envisaged<sup>4</sup>.

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<sup>1</sup> Article 31(3), Law 144/99.

<sup>2</sup> Article 14, Law 144/99.

<sup>3</sup> Article 31(3), Law 65/2003.

<sup>4</sup> See sections 4.16 and 7.3.1.4.

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However, as a matter of principle the decision to attach conditions to the surrender remains a decision of the executing JA which will be mindful of guarantees from the issuing MS pertaining to:

- Detentions in custody,
- Conditions of return.

## 4.14. THE MECHANICS OF SURRENDER (INCLUDING CONDITIONAL SURRENDER) OF REQUESTED PERSONS AND PROPERTY

The Portuguese authorities recounted six instances in which the Article 17 FD time limits had been exceeded<sup>1</sup>. Case data was available in each instance demonstrating that each file was under active consideration and that a variety of operational factors had contributed to the delay (inter alia: awaiting the provision of further information as to identity, the appropriate mechanism for surrender and the resolution of translation issues). In each case notification had been made to Eurojust as required.

Responsibility for the transmission of data concerning the detention periods relevant to the requested person rests with the CA<sup>2</sup>. The expert team noted that, although the CA was responsible for the transmission to the issuing MS of information concerning the duration of time spent in detention, the process of gathering this data from the court may take some weeks.

Provision is made in Portugal's implementing legislation<sup>3</sup> for the judicial postponement of surrender (following the handing down of the final decision). At the time of the evaluation visit, however, no practical experience of this had been accrued.

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<sup>1</sup> The Portuguese authorities expressed the view that in certain circumstances the delay caused in further coordination was of greater benefit to the proper administration of justice than strict adherence to the prescribed time-limits.

<sup>2</sup> Article 10(2), Law 65/2003.

<sup>3</sup> Article 31(3), Law 65/2003.

## 4.15. CONFLICT OF EAWS/EXTRADITION REQUESTS

Portugal has no experience of conflicting requests concerning requested persons; however, the expert team considers that the Article of Portugal's EAW law which sets down the rules by which such conflicts are to be resolved<sup>1</sup> makes it clear that the ultimate arbiter will be the JA rather than an executive body.

The legislation also provides for recourse to Eurojust if further advice or guidance is required.

## 4.16. EXPENSES

The NCB reported one case in which Portugal had, on receipt of the necessary undertaking that he be returned for the execution of his sentence, surrendered a Portuguese national to the UK. No terms had however been prescribed as to who would bear the costs of the subsequent return flight.

Following the conviction of the requested person the two MSs could not agree on the question of funding, and while the discussions between the administrators continued the requested person was released by the UK prison service on the basis that his sentence had been served<sup>2</sup>.

## 5. TRAINING PROVISION

The Centre for Judicial Studies is responsible for the initial and ongoing training of judges and Public Prosecutors. Although it has no legal authority to issue instructions for the mode of execution of EAWs, it seeks to provide training in relation to the legal basis and practical application of this and other instruments.

Judicial training is structured in cycles, the first 6 months of which is delivered in the classroom<sup>3 4</sup>, thereafter 6 months of supervised placement in the courts or prosecutors' offices as the case may be, followed by a final 3-month period of classroom education. The expert team formed the view that this compulsory training of newly qualified legal professionals was exceptionally well-structured and methodical in its approach.

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<sup>1</sup> Article 23, Law 144/99.

<sup>2</sup> The service of the sentence having been served in the UK in breach of the undertaking to return the Portuguese national for that purpose.

<sup>3</sup> Each training sessions comprising 90 - 150 persons.

<sup>4</sup> 2005/6 - Twenty sessions of 90 minutes each. 2006/7 - Ten sessions of 3 hours each.

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The Portuguese authorities also took advantage of interchanges with the Centre for Legal Studies in Madrid and the French National Magistrates' College to broaden their own national knowledge base. The EAW aspect of the initial training module (which was entirely separate from the module on extradition) was comprised of the following sections:

- The main principles of the FD,
- Grounds for refusal,
- The specialty rule,
- Issuing role,
- Executing role and
- Practical remarks.

The practical aspects of this training were devised by the deputy director following consultation with the Magistrates' Council. The training includes work on anonymous historical case files, and high priority has been accorded to ensuring the realistic nature of experiences likely to be faced in participants' future roles as practitioners. The programmes, which are more practical than theoretical, are presented to the Pedagogical Council, which in turn approves them and designates participants.

Further, the view was expressed that the knowledge and classroom practice<sup>1</sup> of newly qualified prosecutors and judges, with regard to the EAW (and other recent legal instruments), was cascaded to their more established colleagues once they returned to the field, thereby propagating specialised and recently acquired knowledge without (further) formal centralised training being put in place.

In addition to being provided with schedules of the annual training cycles<sup>2</sup>, the expert team was provided with the following range of training and seminar programmes dealing with the EAW:

- 6 February 2004 - The European Arrest Warrant.
- 7 and 8 May 2004 - International Legal Cooperation in Criminal Matters (with a full day being dedicated to the EAW).
- 12 and 13 May 2005 - Portuguese-Spanish seminar on International Legal Cooperation in Criminal Matters (with a full day being dedicated to the EAW).

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<sup>1</sup> With practical issues such as proportionality of EAW issue being reviewed.

<sup>2</sup> Particularising, inter alia, substantive modules on the EAW.



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- 4 and 5 May 2006 - International Legal Cooperation in Criminal Matters (with a full day being dedicated to the EAW).

Training was delivered by a range of training and legal professionals<sup>1</sup> and the programmes were created following consultations between the Centre for Judicial Studies, the informal working group on the EAW and the Office of the AG.

The expert team was advised that, during the initial six-month training rotation at the Centre for Judicial Studies, all trainee magistrates receive 1.5 hours of compulsory training in either the French or English languages each week.

## 6. DEFENCE PERSPECTIVES

The evaluation team was given an opportunity to interview the President of the Portuguese Bar Association, together with a legal advisor and one trainee in respect of their views and experiences of the EAW system.

The Bar Association is a public body<sup>2</sup> independent from the State. It seeks to represent legal professionals employed or working as lawyers<sup>3</sup> in Portugal. In addition to regulating the profession, its stated role is to seek to uphold the rule of law and citizens' rights, freedom and guarantees, and to assist in the administration of justice.

The Bar is responsible for maintaining lists of on-call lawyers in each of Portugal's four judicial districts. At this time the list does not contain details of the differing experiences of the lawyers available for on-call work, nor does it distinguish between qualified and trainee lawyers.

Consequently, the requested person has no means of distinguishing between a lawyer who is familiar with EAW work and a lawyer/trainee who is new to the field. The expert team noted that this practice is entirely in keeping with the facilities provided to individuals facing domestic criminal proceedings.

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<sup>1</sup> Portugal also made use of its Eurojust national member in this capacity.

<sup>2</sup> Established in 1926.

<sup>3</sup> There are 25,000 qualified and active lawyers in Portugal.

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The view of the bar was that their role was to ensure full compliance with Law No 65/2003. It was accepted that they were not entitled to challenge the evidence in respect of list offences (that being a matter for the criminal tribunal in the issuing MS in due course), but considered that the lists of grounds for refusal contained in Articles 11 and 12 of Portugal's implementing legislation were not closed lists and as such felt that they were entirely at liberty to argue appropriate aspects of the Domestic Criminal Code and Constitutional issues as they saw fit.

The defence bar confirmed that it was their view that even in relatively minor matters requested persons would not as a matter of practice be likely to be released from protective custody during the EAW proceedings. Although this was an area of concern, they were aware that the current Portuguese Supreme Court jurisprudence supported the stance of the executing JAs in this regard.

The defence bar expressed a neutral view of the EAW regime introduced by Law No 65/2003 as compared to the pre-existing extradition system.

## 7. CONCLUSIONS

### 7.1. General Conclusions

7.1.1. The expert team wish to thank the Portuguese authorities for the open and willing manner in which the evaluation visit was planned and conducted. Each of the agencies interviewed contributed to the peer review in a frank and objective manner with all of the diverse questions raised receiving candid and reasoned responses targeted towards identifying ways in which practice could be improved.

7.1.2. The experts also acknowledge the considerable efforts made by all of the key EAW stakeholders<sup>1</sup> in the creation of the substantive and well-structured EAW guide published shortly before the evaluation visit<sup>2</sup>. The team observed that the inter-agency coordination exhibited in the drafting of that guide reflected the well-coordinated approach which the Portuguese authorities applied to their EAW procedures.

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<sup>1</sup> Public Prosecutors, the CA, EJN, SIRENE, NCB and the Centre for Judicial Studies.

<sup>2</sup> September 2006.

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7.1.3. The expert team felt that there was merit in reiterating the concern expressed by Portugal's issuing JAs that the sheer diversity of executing MSs' requirements in respect of the provision of language-compliant EAWs<sup>1</sup> makes it more likely for errors to arise on the part of issuing MSs. Portugal accepted that at the time of the evaluation visit it had not experienced an EAW refusal as a result of these divergent rules but, the logic of attempting to move towards a standardised regime was one that the expert team felt was worthy of note.

## 7.2 Conclusions in respect of Portugal's activities as an issuing Member State

### 7.2.1. Issues

#### 7.2.1.1. Provision of EAW statistics to the designated authorities

Portuguese JAs are required to transmit<sup>2</sup> copies of all EAWs issued to their CA for statistical purposes. This reporting obligation is extended to the provision of copy EAWs to the Portuguese national member of Eurojust<sup>3 4.5</sup> The expert team noted, however, that notwithstanding these mandatory provisions (breach of which might result in disciplinary proceedings), regular bilateral meetings and the recently published EAW manual, these notifications - in particular to Eurojust - were still absent in a significant number of cases. Consequently, they considered that statistical data was more difficult to access than would otherwise be the case and that no centralised analysis of drafting standards was possible.

#### 7.2.1.2. Linguistic issue arising from the Portuguese text of the FD

A translation error in Article 5 paragraph 1 of the Portuguese text of the FD impacts directly on Portugal's ability to provide guarantees in respect of persons sought by it in respect of in absentia conviction requests. Portuguese undertakings can only be provided in the context of its own legislation and as such they can only guarantee that either appeal or retrial will be available as alternative remedies, rather than allowing for both options to remain open. This error came to light in respect of a concrete EAW request issued to the NL and as such is a matter that the expert team consider should be addressed as a matter of some urgency.

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<sup>1</sup> Ranging from provision of language compliant EAWs prior to arrest, to the its provision up to 40 days thereafter.

<sup>2</sup> Paragraph 7 of AGs reference 4/2004.

<sup>3</sup> In addition to statutory notification of breaches of EAW time limits.

<sup>4</sup> Order 1 of AGs reference 15/2004.

<sup>5</sup> This notification to the national member of Eurojust is over and above the requirements of the FD.

## 7.2.1.3. Early requests for the submission of original EAWs

Portuguese issuing JAs are required to issue "duplicate original" EAWs and transmit them by post to ensure that persons sought pursuant to EAWs are actively searched for by the UK authorities. The expert team was advised by Portugal's issuing JAs that the UK's requirements in this regard are strict and that no tracing or arrest activity would be possible in the event of non-compliance.

## 7.2.1.4. Ad hoc requirements of certain MSs

In addition to the request for the early provision of original EAWs as outlined above, Portugal reported that two specific practices existed which the expert team felt to be at odds with the surrender process introduced by the FD:

- UK - The UK's requirement that EAWs issued for the execution of a custodial sentence incorporate a form of words not envisaged by the FD and without legal meaning in Portugal (namely that the requested person is declared to be a "fugitive from justice<sup>1</sup>"). One Portuguese prosecutor enquired how it had come to pass that the UK required the use of a form different to that of all of the other MSs. The expert team considered that this mandatory requirement placed upon all issuing MSs by the UK had no foundation in the text of the FD.
- IE - The expert team was shown a pro-forma letter created by the NCB to Portuguese issuing JAs in consequence of an express direction from the Irish authorities. It stated in express terms that Interpol Red Notices/diffusions should not be transmitted to Ireland unless the requested person was physically located there<sup>2</sup>. The experts found this limiting requirement to be contrary to the efforts undertaken by Portugal, and the general principles of the instrument, to utilise all legal means to inhibit the free movement of requested persons throughout the EU.

## 7.2.1.5. Diversity of requests for further information

The Portuguese issuing JAs reported that they received a wide variety of requests for further information. Ultimate provision of the required information by Portugal was in general terms not overly problematic but the wide divergence in practices meant that it was difficult to standardise the level of detail appropriate for any given response. The expert team was also advised that some MSs were content with the provision of bare data whereas others required EAWs to be reissued (with the original EAW being withdrawn), thus increasing costs and bureaucracy and impacting statistical record-keeping.

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<sup>1</sup> Or language to that effect.

<sup>2</sup> Portuguese authorities advised the expert team that addresses were ascertained in respect of approximately 3-4% of EAWs issued.

## RESTREINT UE

In consequence of this finding the expert team considered that there was merit in the idea formulated by Portugal that an EU-wide drafting guide be considered to assist with the standardisation of agreed practices for the completion of the EAW form. The experts note that the original idea behind the form was that it would of itself be sufficient to allow a reliable and fast surrender process to take place.

### 7.2.1.6. Connection of the Public Prosecutors to SIS

The expert team was advised that procedural measures are already in place to provide Public Prosecutors with access to the SIS. The decision had been reached domestically that access to this tool, at an appropriate level, would facilitate a better flow of information and therefore benefit the efficiency of the EAW surrender process. The expert team was however advised that the actual connections had not been put in place because of residual technical issues and a degree of logistical confusion surrounding the validity of the list of names provided by the Public Prosecution service to the SIRENE bureau<sup>1</sup>. It seemed to the expert team that the benefits in efficiency already identified by Portugal in this regard merited immediate steps being taken to resolve this impasse.

### 7.2.1.7. Notification of the existence of pre-existing EAWs

The expert team was impressed by the efficiency of the Portuguese SIRENE bureau and its strict adherence to the principle that the EAW is an instrument of mutual judicial recognition. They considered also that the (SIRENE) practice of notifying second or subsequent Portuguese issuing JAs of the existence of an initial EAW was one that added coordination and therefore value. They found it peculiar therefore that no effort would be made to advise the initial issuing JA of the existence of any subsequent requests so that they too could express a view, at that pre-arrest stage, as to the priority or management of the ultimate criminal proceedings.

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<sup>1</sup> Access to SIS is to be restricted to prosecutors working on criminal files.

## 7.2.2. Good practices

### 7.2.2.1. Training

The expert team was impressed by the range, structure and depth of training delivered by the Centre for Judicial Studies, both in terms of the balance between legal comprehension and practical application (within the compulsory EAW modules of the pre-qualification cycles) and the manner in which the Centre had drawn on the experience of Portugal's EAW partner MSs<sup>1</sup> as well as all national stakeholders to create the requisite programmes which had been drawn together in the form of the EAW handbook and published in paper and electronic forms (although the expert team noted that further electronic dissemination via the court clerks' HABILUS system had not yet been put in place). The experts also noted that comparable training was offered to established prosecutors and judges.

### 7.2.2.2 The application of legal scrutiny to EAWs prior to circulation

The expert team noted that the two lawyers based within the SIRENE bureau conducted a formulaic review of all non-urgent EAWs prior to them being input into the SIS. The fact that 25% of the EAWs received had to be referred back to the issuing JAs for rectification of the form made it clear that this was a helpful addition to Portugal's practice.

### 7.2.2.3. Willingness to host bilateral meetings to improve best practice

Notwithstanding the low volumes of EAW requests between Portugal and the UK, the relevant authorities in the two MSs recognised that divergent practices were interfering with the effective operation of the surrender of requested persons. In consequence a bilateral meeting was held in March 2006 at which respective procedures and requirements were outlined so that practical solutions could be sought between the two Member States. The experts note with concern however that the follow-up to that meeting seems to have been inconclusive.

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<sup>1</sup> Spain and France.



## 7.2.2.4. Progressive conversion of pre-existing Article 95 Alerts

So as to ensure that arrests made on the basis of SIS Alerts issued prior to the implementation of the EAW system did not result in the release of requested persons on the basis of non-compliance with the completion, translation or transmission of EAWs, Portugal has implemented a systematic procedure whereby relevant Article 95 Alerts and case files are forwarded to the Public Prosecutors<sup>1</sup> for conversion into EAWs. This system makes use of the 3-yearly assessment of SIS Alerts conducted by the SIRENE bureau to ensure relevance. It is therefore methodical and comprehensive while not requiring increased resources.

## 7.3 Conclusions in respect of Portugal's activities as an executing Member State

### 7.3.1. Issues

#### 7.3.1.1. Implementing Legislation

The expert team discussed aspects of Portugal's implementing legislation with its issuing and executing JAs and, whereas the parties accepted that the system functioned well on macro level, concern was expressed in respect of two categories of deficiencies, namely:

Legislation contrary to the FD:

#### - Mandatory non-execution grounds

Article 11(d) where the EAW offence is punishable "by the death penalty of any other penalty causing irreversible injury to a person's physical integrity" the surrender must be refused. The expert team found this express refusal ground to be superfluous in light of Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Article 11(e) similarly where the EAW was issued "on account of political reasons" the surrender must also be refused. The expert team found this express refusal ground to be unnecessary in light of Article 6 of the Treaty of European Union.

#### - Decision in respect of competing EAWs and extradition requests

Article 23(3) the expert team noted that whereas Portuguese legislation designates that "the court" shall make the determination of priority in cases where conflicting EAWs are received, it is silent as to which authority is competent to decide cases where there is a clash between an EAW and an extradition request.

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<sup>1</sup> Issuing JAs.

# RESTREINT UE

Legislation lacking in clarity:

- Temporary surrender

Articles 6(3)(5) the terms "issuing Member State" and "executing Member State" have been confused, creating a situation in which roles and obligations of the determination hearing appear to have been reversed.

- Specialty rules

Article 7(4) similarly confuses the roles of issuing and executing Member States in respect of decision making powers.

- Optional non-execution grounds

Article 12(1)(c) provides that the Public Prosecution office may decide not to prosecute or to halt proceedings but contains no reference to the overarching requirement that a jurisdictional locus is an essential precursor.

Article 12(1)(f) in cases in which there has been a final judgement in a third State the requirements of that State and of Portugal have been confused, namely that ... "the sentence may no longer be executed under the Portuguese Law" rather than the law of the requesting third State.

- Competing international obligations - Article 14(4)
- Time limits for the final surrender decision - Article 26(4)
- Privileges and Immunities - Article 27(4)

Assert that, pending resolution of decisions awaited, ... "it shall be assured that the material conditions necessary for effective surrender (of the requested person) remain fulfilled." Portugal's executing JAs are of the clear view that such vague mandatory requirements are contrary to their Constitutional obligations.

- Opposition of the request

Article 21(2) asserts that opposition may be founded "on mistaken identification of the arrested person or on a reason for refusing to execute the EAW". It was unclear to the expert team if this additional identification ground was intended to be the only exception to the refusal grounds particularised in Articles 11 and 12 of the domestic law.

## - Appeal

Article 24 does not prescribe a time limit in which the appeal decision should be made.

### 7.3.1.2. Proportionality

Portugal's executing experience indicated to the expert team that certain MSs seemed not to apply any threshold-based decision-making in their determination of which criminal cases would cause them to issue an EAW. Whereas this was a matter for issuing MSs Portugal had experienced a wide divergence of practice in this regard. During their visit to the NCB the expert team asked to see a selection of diffusion notices received during the preceding days. One of the notices reviewed at that time was a request issued by Poland for the surrender of a requested person for the supply of 0.54 g of herbal cannabis. The expert team accept, as did the Portuguese authorities, that this list offence matter would be progressed without enquiry into the facts - however they wondered whether the initiator or the issuing JA had considered the financial and resource implications that would necessarily be incurred by the (ultimate) executing MS in tracing, arresting, processing and ultimately surrendering that requested person.

The expert team was further advised that in one instance, following the handing down of a surrender decision in a German case, Portugal had been advised that the executing MS had reconsidered the cost benefit of the surrender and had declined to finalise the process.

### 7.3.1.3. Liaison between the designated Public Prosecutor and the SIRENE bureau

A prosecutor has been designated by the Lisbon Public Prosecutors office to assist the SIRENE bureau with its EAW caseload. The expert team understands that the idea behind this proposal is that the individual would be available to attend the offices of SIRENE and review files to enable difficult cases to be progressed with the benefit of on-site specialist legal advice. Although this scheme is, in concept, a helpful development, the expert team was advised that in reality only 3 or 4 such field visits take place each year. The experts felt that there was merit in the Portuguese authorities reviewing the frequency of the provision of this specialist legal advice whilst ensuring that the scope of such advice was within the scope of this instrument of mutual judicial recognition.

## 7.3.1.4. Detailing the terms of conditional surrenders

The expert team was concerned to note that one requested person surrendered by Portugal to the UK, on the basis of an express undertaking that he be returned for the service of sentence, was detained in custody pending subsequent negotiations between the two Member States as to who should fund the agreed return. It seems clear to the expert team that the cost of such repatriation would be insignificant in comparison with the financial cost of continued incarceration and the potential damage to reputation occasioned by a breach of undertaking.

This situation was further exacerbated by the fact that, unbeknownst to the negotiating parties, the requested person had been released by HM Prison Service prior to the return being agreed (by virtue of his sentence having been served during the period of the costs dispute).

## 7.3.2. Good practices

### 7.3.2.1. Strict application of the principle of mutual judicial recognition

The expert team was advised that EAWs received via Interpol or the SIS are entered directly in the appropriate national databases so that the surrender requests can be processed in a timely manner and in accordance with the core principles of mutual recognition of judicial decisions. The team felt that the declared practice of the Portuguese SIRENE bureau *not to issue validity flags in any circumstances* (except where the requested persons were under the age of criminal responsibility in Portugal)<sup>1</sup> was one to be commended. In cases in which the provision of items of further information was considered necessary by Portugal's receiving authorities, that omission or requirement would be noted on the file so that the executing JA could identify the potential issue and consider whether it was in fact necessary in the case in question.

The expert team recognised that certain low-volume communication requests between Interpol and SIRENE desks took place but considered that the Portuguese authorities had taken positive action to ensure that the vast majority of requests for further information would not be transmitted without prior judicial scrutiny.

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<sup>1</sup> Age 16 years.

## 7.3.2.2. Proposed linguistic flexibility

The expert team was advised that, notwithstanding Portugal's stipulation that EAWs must be received only in Portuguese<sup>1</sup>, it was proposed that in accordance with the provisions of the FD<sup>2</sup> consideration is being given to entering into bilateral cooperation with Spain<sup>3</sup>, whereby each MS will accept EAWs in the language of the other. Should this agreement take effect, the burden of translating the incoming EAW into an acceptable language would pass from the issuing to the executing authorities and should ensure that the risk of refusals on the grounds of breach of time limits is much diminished.

## 7.3.2.3. The EAW informal working group

To better understand the scope and powers of this working group, the expert team was provided with detailed translated minutes of one of their meetings<sup>4</sup>. They noted that the issues discussed in depth on that occasion covered a broad variety of practical topics including:

- Requests for surrender while (domestic) criminal proceedings are pending,
- The surrender of nationals,
- Experience of in absentia cases,
- Conclusions to be drawn in respect of Portugal's first 12 months of operating the EAW.

Although impressed by the scope of that discussion, the experts felt that it would be more useful to disseminate the minutes more widely, e.g. by posting them on the websites of the Prosecutors General or of the informal working party itself.

The experts noted that many of the key stakeholders interviewed in their own right during the evaluation visit were also active contributors to the working group. They were impressed by the levels of expertise that were available to Portugal as a result of this coordinated approach and noted the key role played by the group in the drafting the EAW handbook. The expert team was advised during an interview at the Portuguese Court of Appeal that the executing JAs themselves considered that they would look favourably on the proposed future invitation that they contribute to the activities of the working group.

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<sup>1</sup> Article 8 paragraph 2 FD.

<sup>2</sup> Article 31 paragraph 2.

<sup>3</sup> Spain being Portugal's principal EAW partner.

<sup>4</sup> 5 April 2005.

## 8. RECOMMENDATIONS

### 8.1. RECOMMENDATIONS TO PORTUGAL

#### 8.1.1. As issuing Member State

Recommendation 1 - To take steps to ensure greater compliance with the requirements set out in the Attorney-General's references to provide copies of all EAWs issued by Portugal to the CA and to the national member of Eurojust. (See 7.2.1.1.).

Recommendation 2 - To formulate a written request to the General Secretariat of the Council of the EU seeking rectification of the Official Journal in respect of the linguistic error contained within the Portuguese text of Article 5 paragraph 1 of the FD. (See 7.2.1.2.).

Recommendation 3 - To undertake such residual measures as may be necessary to complete the process of providing Public Prosecutors with appropriate and direct access to the SIS (See 7.2.1.6.).

Recommendation 4 - To put guidance in place to ensure that the Portuguese SIRENE bureau notifies all of Portugal's relevant issuing JAs in cases where additional EAWs arise in respect of the same requested person. (See 7.2.1.7.).

Recommendation 5 – To ensure that the EAW handbook is published electronically on the HABILUS case management system utilised by Portugal's Court Clerks. (See 7.2.2.1.).

#### 8.1.2. As executing Member State

Recommendation 6 - That a review of Portugal's implementing legislation be undertaken so that those Articles which have been implemented contrary to the FD, or which are lacking in legal certainty, may be reconsidered and redrafted accordingly. (See 7.3.1.1.).

Recommendation 7 - That consideration be given to creating a rota of Public Prosecutors to enable greater provision of appropriate on-site legal advice within the SIRENE bureau. (7.3.1.3.).

Recommendation 8 – That an invitation be issued to Portugal's executing JA requesting that it contribute, in a manner deemed appropriate, to the permanent informal working party on the EAW. (See 7.3.2.3.).



## 8.2. RECOMMENDATIONS TO CERTAIN OTHER MEMBER STATES

Recommendation 9 - To consider the benefits of moving towards a standardised timetable regime in respect of the provision and receipt of language-compliant EAWs. (See. 7.1.3. and recommendation 14).

Recommendation 10 - To consider the benefits of creating an EU practitioner guide to assist with best practice indicators for the proportionate and consistent application of this instrument, the proper completion of the EAW form, and to provide indicative examples of FD-compliant requests for further information. (See 7.2.1.5., 7.3.1.2. and recommendation 15).

Recommendation 11: That those MSs which require receipt of original EAWs prior to commencing substantive tracing work in respect of requested persons reconsider those demands in the light of the difficulties caused to issuing MSs which rely upon standard SIS and Interpol procedures as their primary transmission options. (See 7.2.1.3 and 7.2.1.4.).

Recommendation 12 - That Member States ensure that agreements to return requested persons conditionally surrendered set out in detail all of the logistical and financial obligations of the parties.<sup>1</sup> (See. 7.3.1.4.).

Recommendation 13 - To consider whether bilateral agreements concerning the acceptance of foreign language EAWs might be put in place between those Member States with which a significant amount of EAW business is transacted. (See 7.3.2.2.).

## 8.3. RECOMMENDATIONS TO THE EUROPEAN UNION

Recommendation 14 - To consider the benefits of moving towards a standardised timetable regime in respect of the provision and receipt of language compliant EAWs. (See. 7.1.3. and recommendation 9).

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<sup>1</sup> The expert team recognise that at the time of the evaluation visit progress was being made in the discussion of the draft Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

## RESTREINT UE

Recommendation 15 - To consider the benefits of creating an EU practioner guide to assist with best practice indicators for the proportionate and consistent application of this instrument, the proper completion of the EAW form, and to provide indicative examples of FD-compliant requests for further information. (See 7.2.1.5, 7.3.1.2. and recommendation 11).

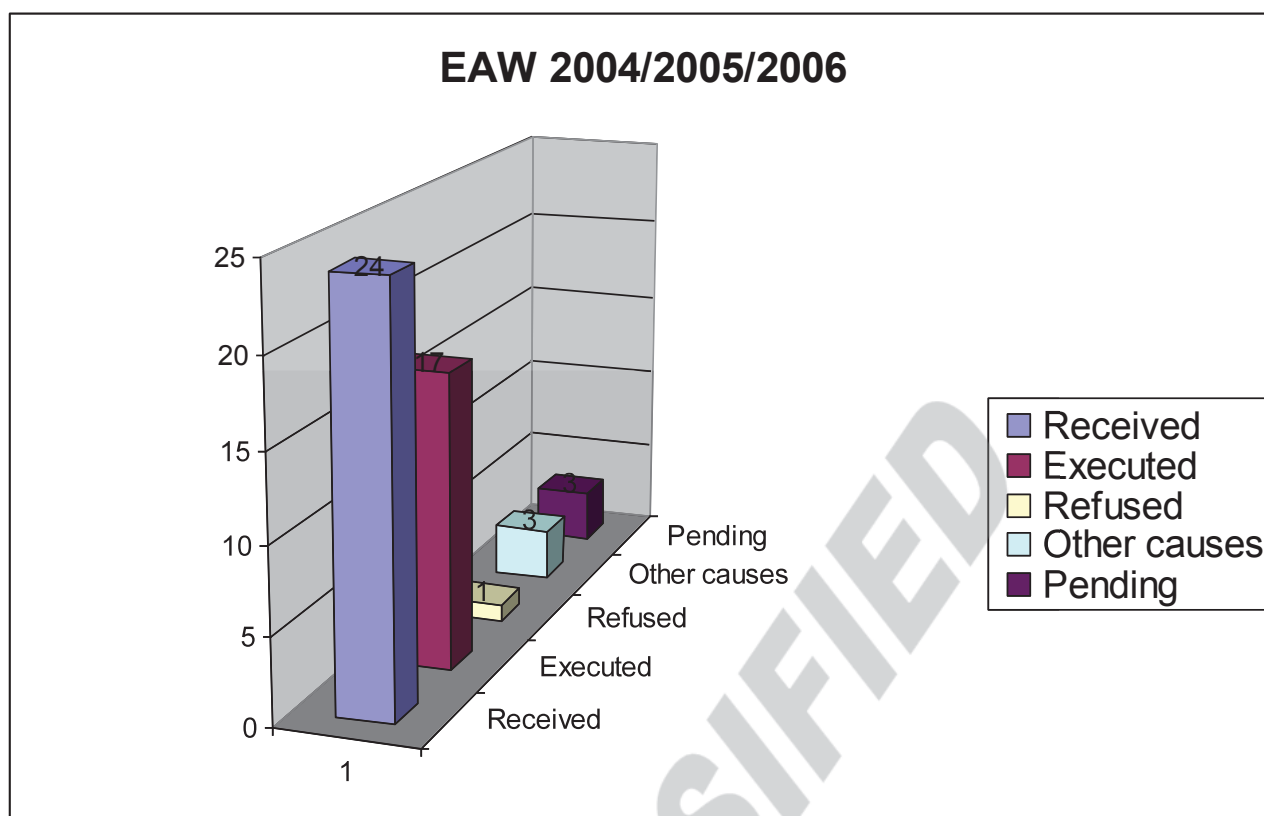
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# RESTREINT UE

ANNEX A

Statistics provided pursuant to the evaluation exercise



| ANOS         | 2004 | 2005 | 2006 | TOTAL |
|--------------|------|------|------|-------|
| Received     | 7    | 12   | 5    | 24    |
| Executed     | 6    | 9    | 2    | 17    |
| Refused      | 1    | 0    | 0    | 1     |
| Other Causes | 0    | 3    | 0    | 3     |
| Pending      | 0    | 0    | 3    | 3     |
|              |      |      |      |       |

\* Notes:

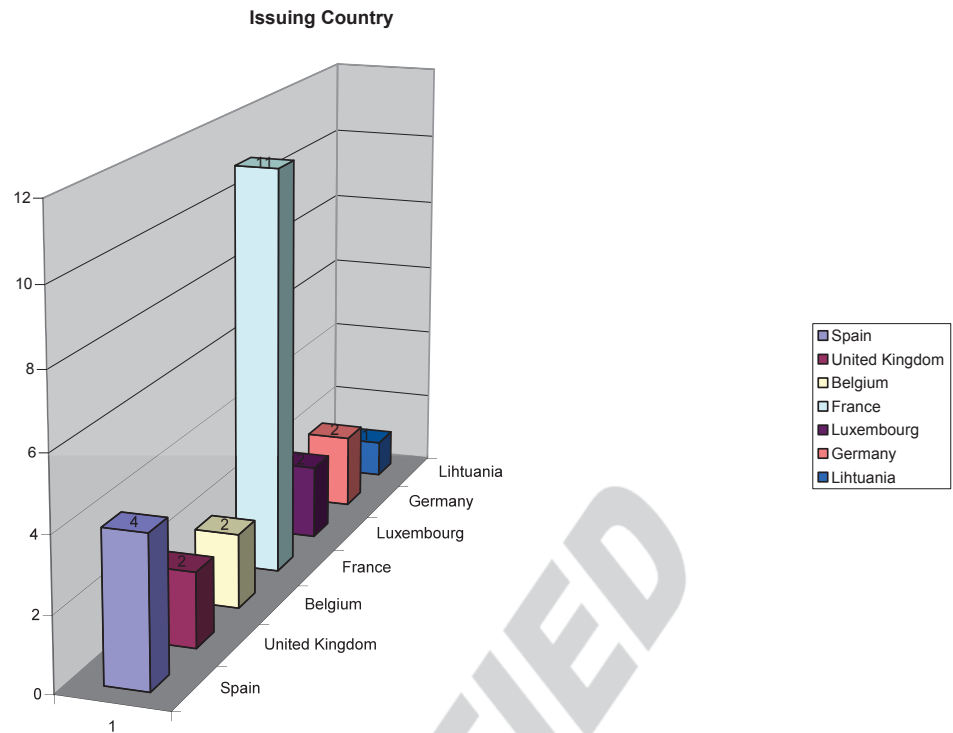
1. Refused because under Portuguese law the requested person is not held criminally responsible for the acts on which the European arrest warrant is based

1. The release was ordered due to the withdrawal of the complaint in Germany

1. The proceedings were declared void because the requested person had already been extradited in another process

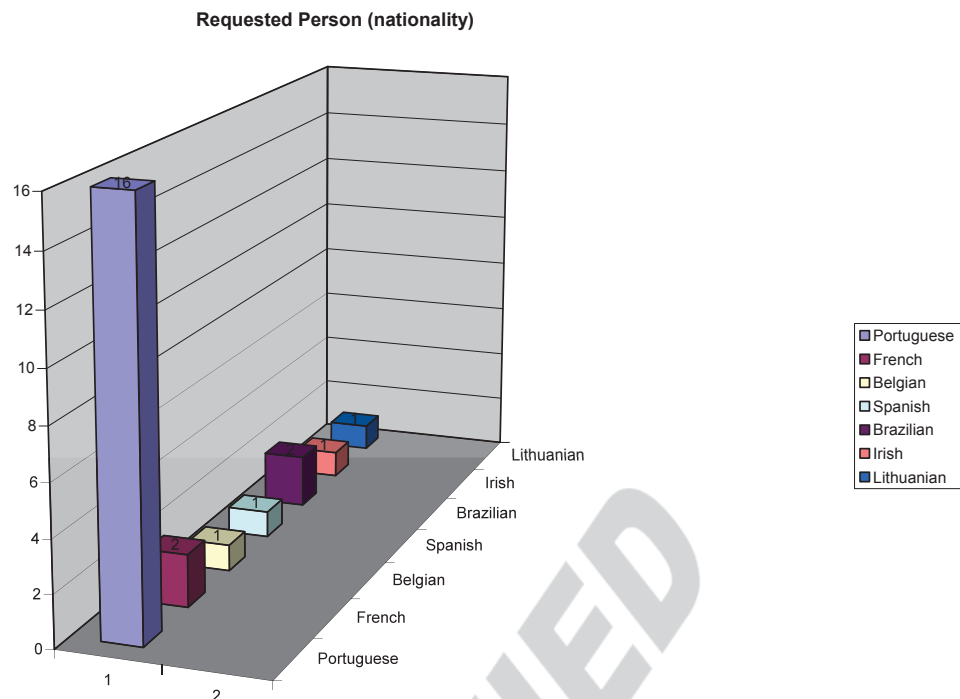
1. The release was ordered because the issuing State (Luxembourg) did not apply the EAW regime to the case, nor was the extradition regime applicable because the requested person was Portuguese.

# RESTREINT UE



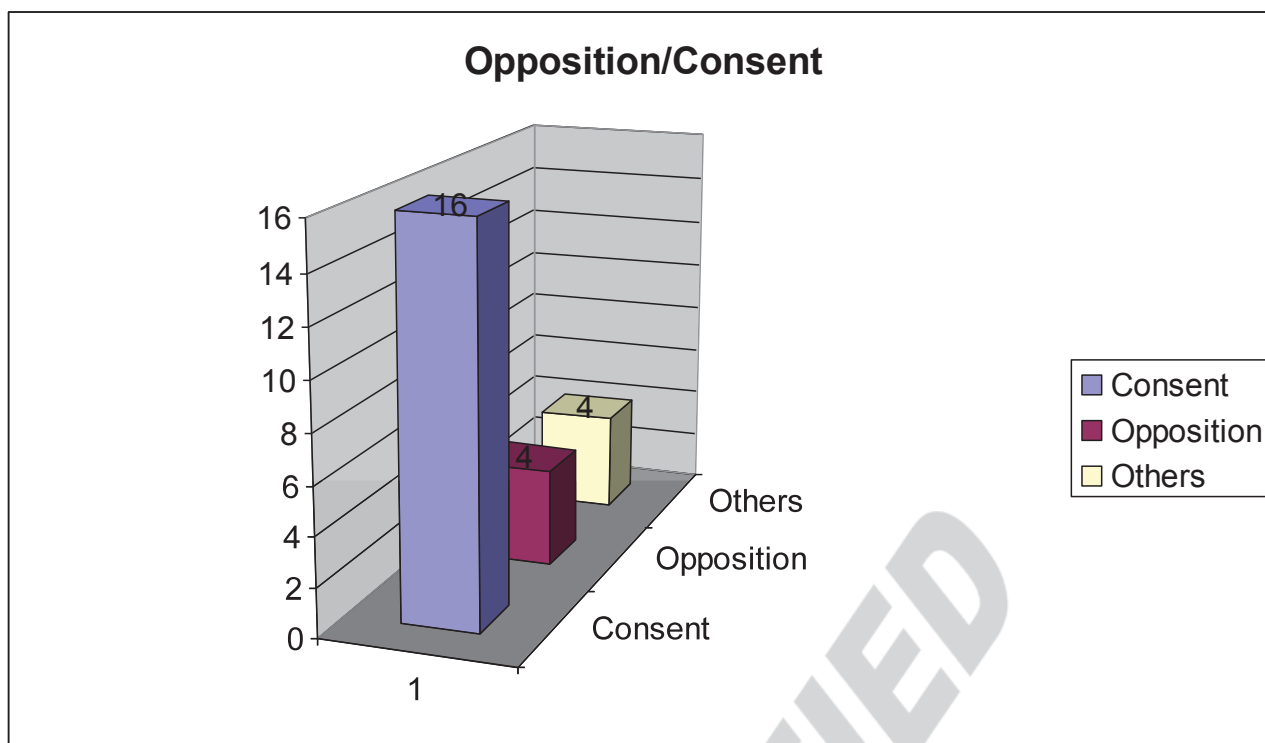
| Year                 |  | 2004 | 2005 | 2006 | TOTAL |
|----------------------|--|------|------|------|-------|
|                      |  |      |      |      |       |
| <b>Issuing State</b> |  |      |      |      |       |
|                      |  |      |      |      |       |
| Spain                |  | 2    | 1    | 1    | 4     |
| United Kingdom       |  | 1    | 0    | 1    | 2     |
| Belgium              |  | 2    | 0    | 0    | 2     |
| France               |  | 2    | 7    | 2    | 11    |
| Luxembourg           |  | 0    | 2    | 0    | 2     |
| Germany              |  | 0    | 2    | 0    | 2     |
| Lithuania            |  | 0    | 0    | 1    | 1     |
|                      |  |      |      |      |       |
|                      |  |      |      |      |       |
| TOTAL                |  | 7    | 12   | 5    | 24    |

# RESTREINT UE



| Year             |  | 2004 | 2005 | 2006 | TOTAL |
|------------------|--|------|------|------|-------|
|                  |  |      |      |      |       |
|                  |  |      |      |      |       |
| Requested Person |  |      |      |      |       |
| Nationality      |  |      |      |      |       |
|                  |  |      |      |      |       |
|                  |  |      |      |      |       |
| Portuguese       |  | 5    | 9    | 2    | 16    |
| French           |  | 1    | 0    | 1    | 2     |
| Belgian          |  | 1    | 0    | 0    | 1     |
| Spanish          |  | 0    | 1    | 0    | 1     |
| Brazilian        |  | 0    | 2    | 0    | 2     |
| Irish            |  | 0    | 0    | 1    | 1     |
| Lithuanian       |  | 0    | 0    | 1    | 1     |
|                  |  |      |      |      |       |
|                  |  |      |      |      |       |
| Total            |  | 7    | 12   | 5    | 24    |

## RESTREINT UE

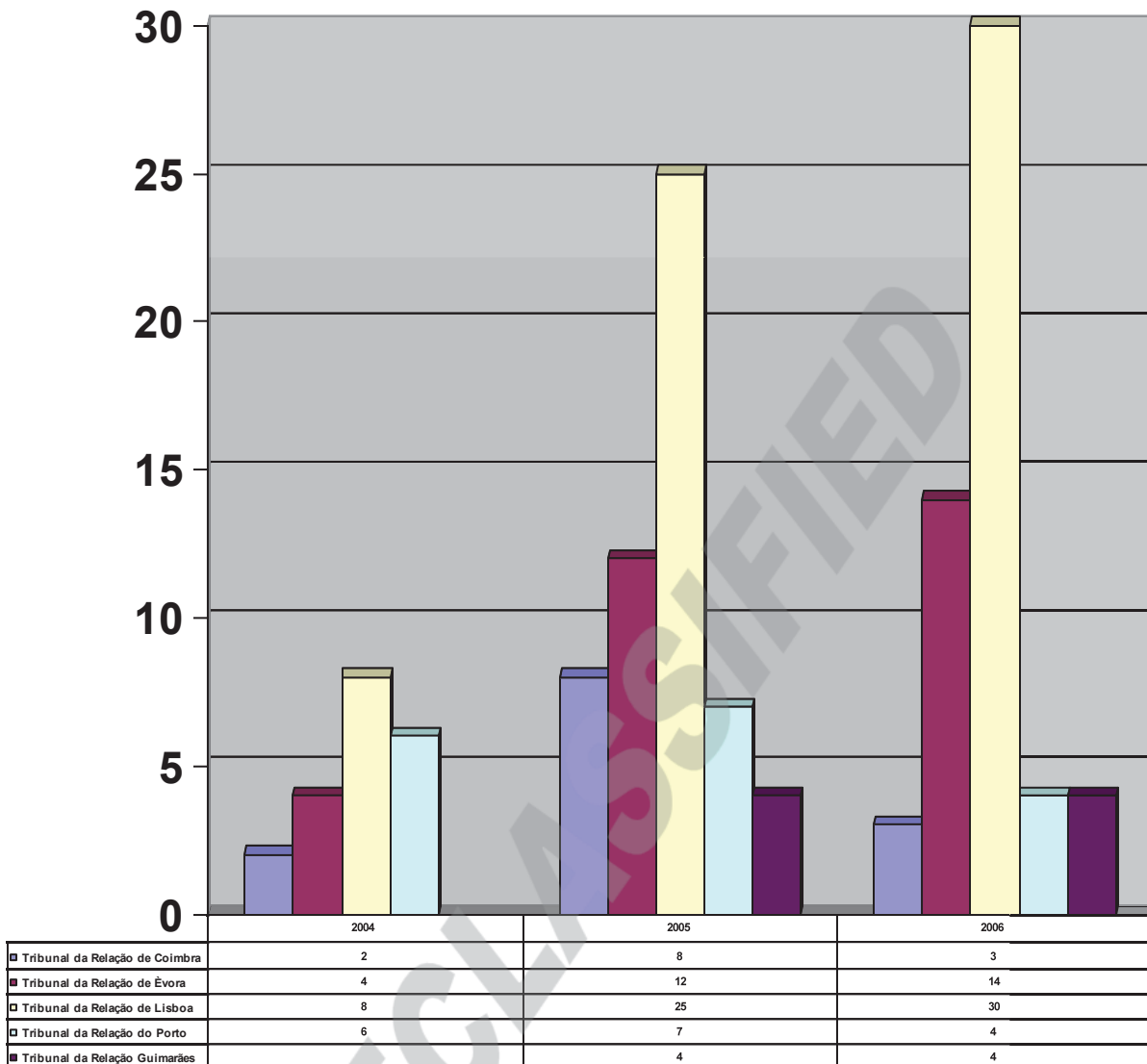


|            | 2004 | 2005 | 2006 |  | TOTAL |
|------------|------|------|------|--|-------|
| Consent    | 6    | 7    | 3    |  | 16    |
| Opposition | 0    | 2    | 2    |  | 4     |
| Others     | 1    | 3    | 0    |  | 4     |
| TOTAL      |      |      |      |  | 24    |



# RESTREINT UE

## DETENTION / SURRENDER

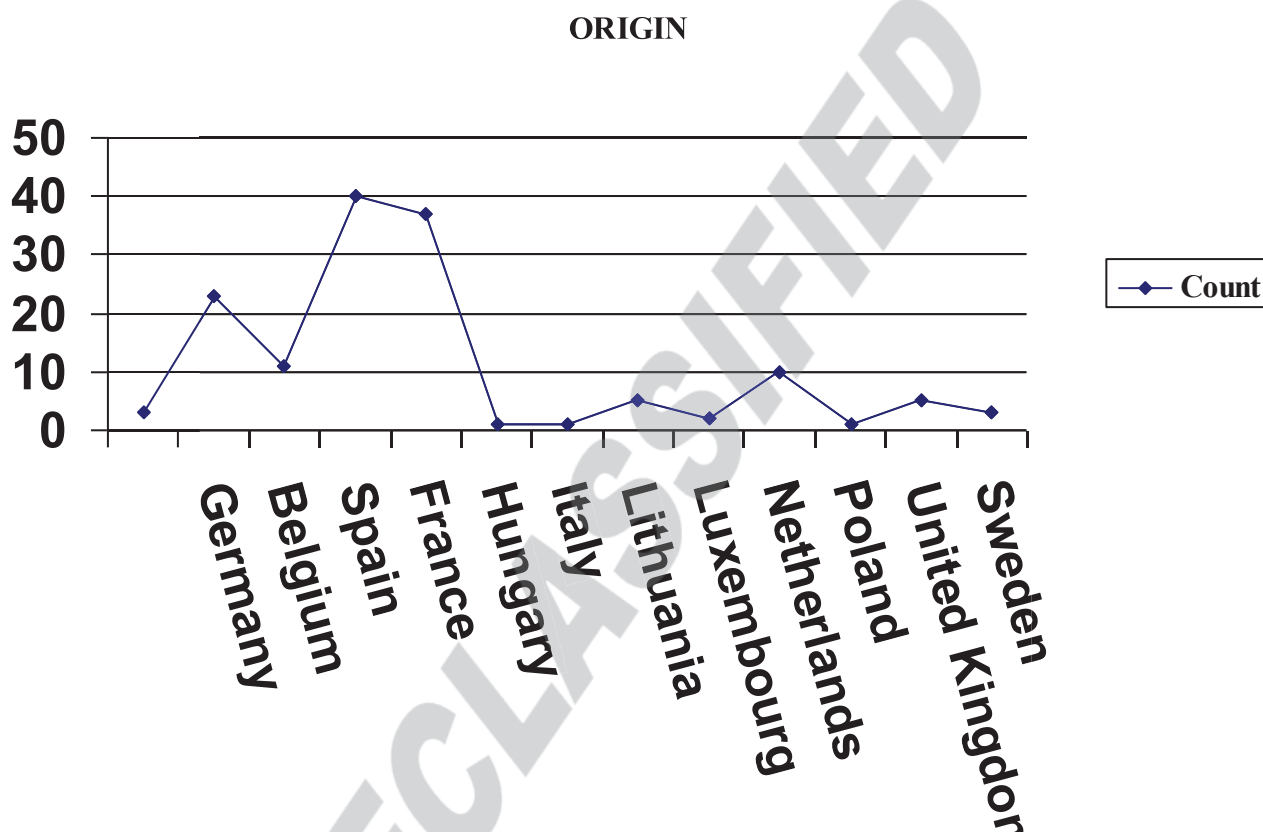


# RESTREINT UE

## PORTUGAL EXECUTING STATE

### Graphs relating to execution

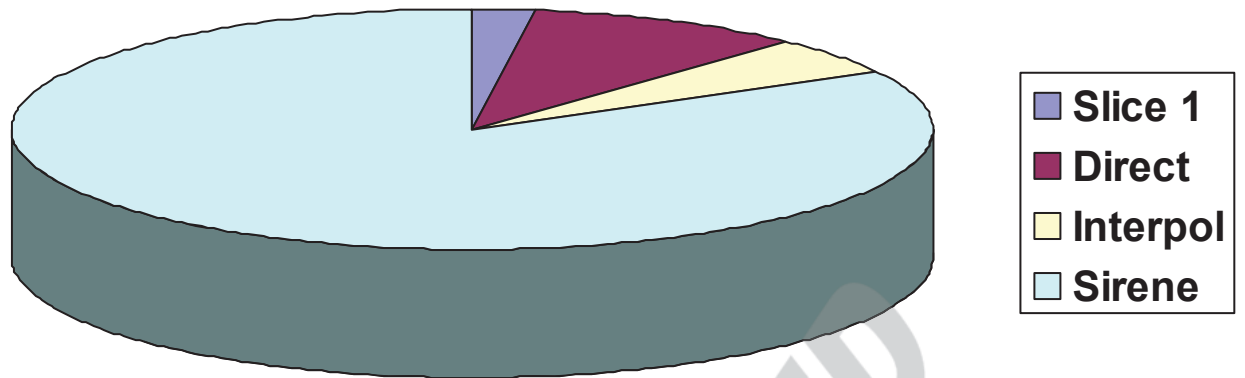
#### 1. State of origin.



#### 2. Transmission channel.

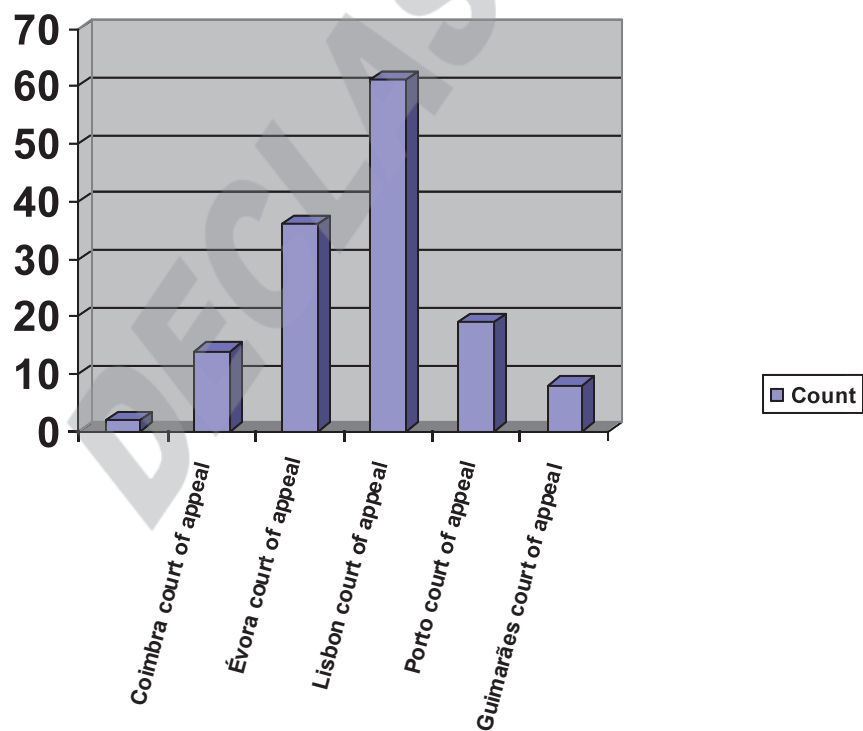
# RESTREINT UE

Transmission path



## 3. Authorities with regional jurisdiction.

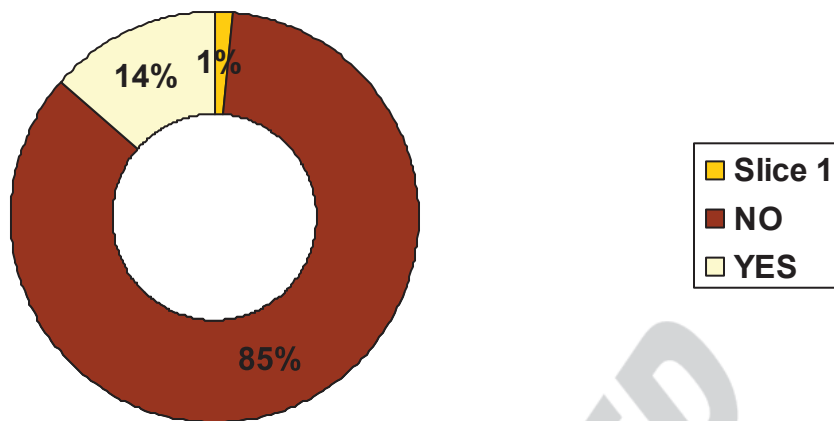
Court of appeal with jurisdiction



## 4. Intervention (EJN and EUROJUST).

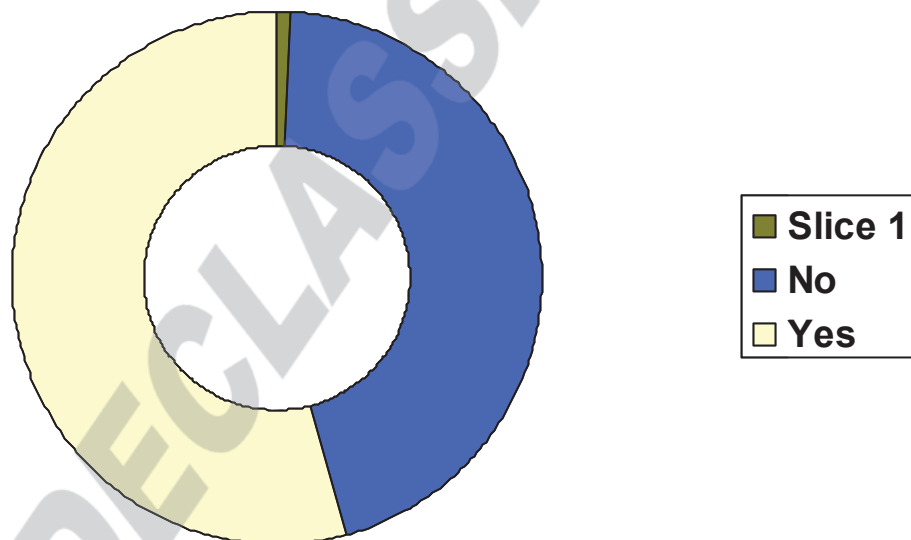
# RESTREINT UE

## MEDIATION



## 5. Consent.

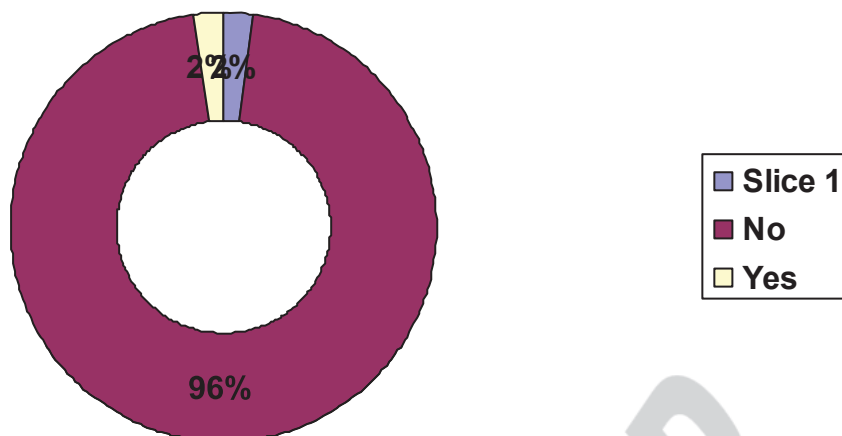
### Concordance



## 6. Decisions appealed: percentage.

# RESTREINT UE

## APPEALS



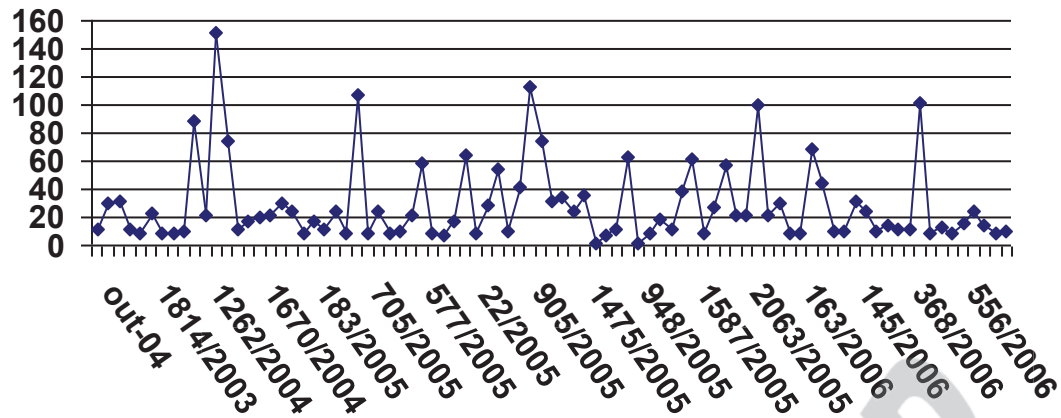
### 7. EAWs executed with surrender.



### 8. Surrender time limits.

# RESTREINT UE

## Surrender time limit

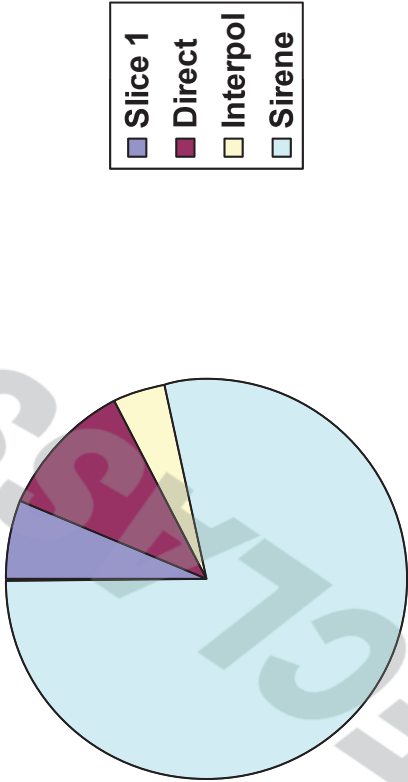


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**RESTREINT UE**  
**PORTUGAL ISSUING STATE**

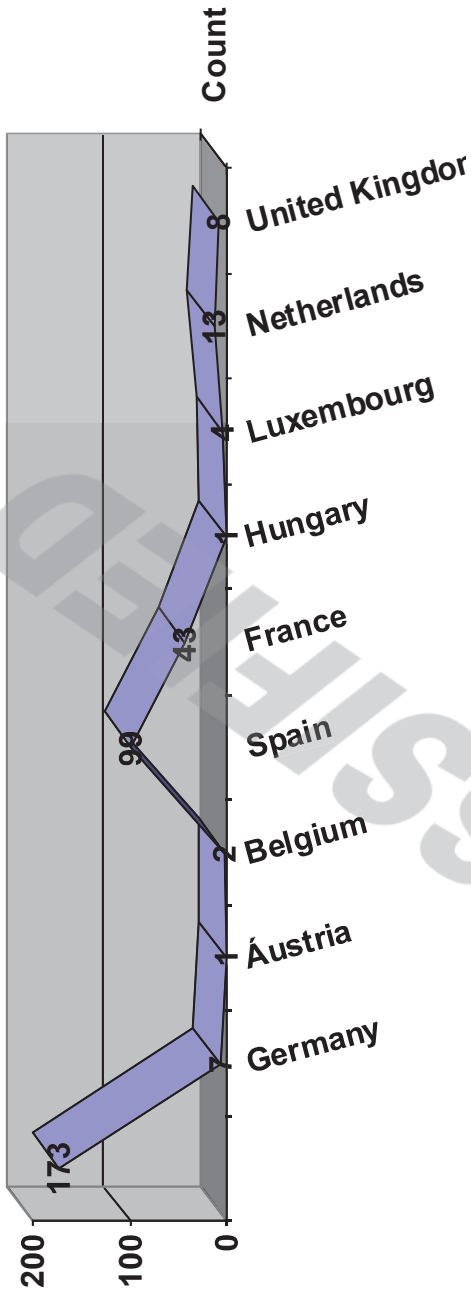
**1. Transmission channel used.**

**TRANSMISSION PATH**



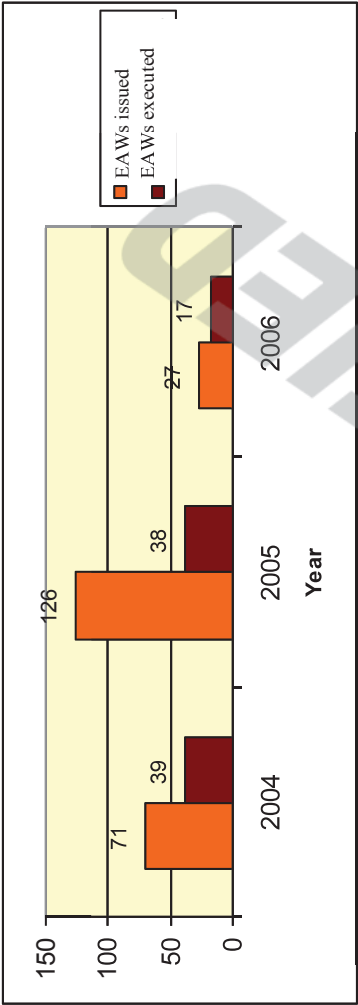


Place of execution



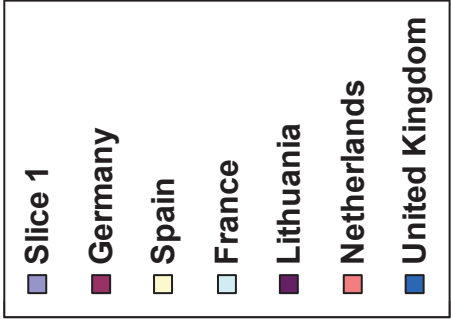
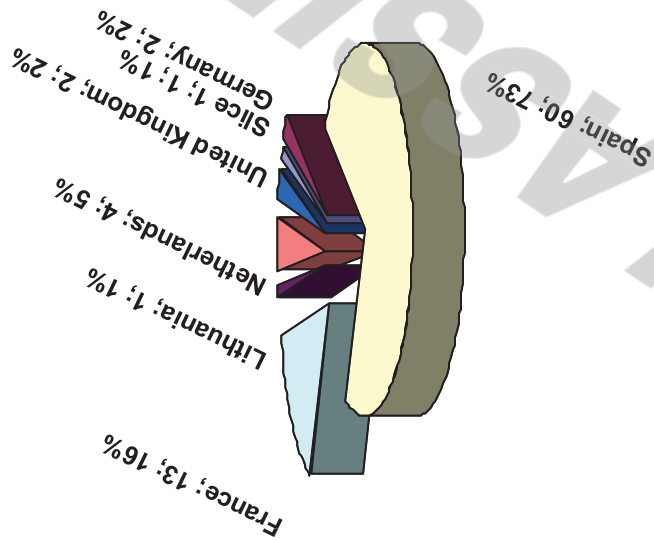
2. Place of execution.

3. Graph showing EAWs issued and executed.



4.

4. Surrender by state (percentage).



## PROHIBITIONS ON SURRENDER

| Statutory Reference          | Précis                                                                                                                                                                                                                          | Corresponding FD Article              |
|------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------|
| Article 11(a)                | Pardon granted pursuant to Portuguese law where jurisdiction is shared.                                                                                                                                                         | Article 3.1                           |
| Article 11(b)                | Finally judged by a MS.                                                                                                                                                                                                         | Article 4.3                           |
| Article 11(c)                | Age of criminal responsibility.                                                                                                                                                                                                 | Article 3.3                           |
| Article 11(d)                | Offence punishable by the death penalty.                                                                                                                                                                                        | FD Recital 13                         |
| Article 11(e)                | Where EAW issued on account of political reasons.                                                                                                                                                                               | FD Recital 12                         |
| Article 12(1)(a)             | Lack of double criminality in respect of non list offences.                                                                                                                                                                     | Article 2.4                           |
| Article 12(1)(b)             | Domestic prosecution undertaken based on the same facts.                                                                                                                                                                        | Article 4.2                           |
| Article 12(1)(c)             | Domestic prosecution not undertaken (or halted) based on the same facts.                                                                                                                                                        | Article 4.3                           |
| Article 12(1)(d)             | Final judgement passed .                                                                                                                                                                                                        | Article 3.2                           |
| Article 12(1)(e)             | Where the criminal prosecution or punishment is statute barred where jurisdiction is shared.                                                                                                                                    | Article 4.4                           |
| Article 12(1)(f)             | Requested person judged in a third Member State based on the same facts.                                                                                                                                                        | Article 4.5                           |
| Article 12(1)(g)             | Conviction EAW issued for own national or resident surrender                                                                                                                                                                    | Article 4.6 and Article 5.3 Guarantee |
| Article 12(1)(h)(i) and (ii) | Offences committed in the territory of Portugal or committed outside of the territory of the issuing Member State provided Portuguese law is not applicable to the same offences when committed outside of Portuguese territory | Article 4.7(a)(b)                     |
| Article 21(2)                | Mistaken identity.                                                                                                                                                                                                              | N/A                                   |

## PROGRAMME OF VISIT

### Wednesday, 25 October

10.00 - GRIEC -Gabinete Relações Internacionais Europeias e de Cooperação (Bureau for International, European and Cooperation Affairs - Ministry of Justice)

*General presentation on the implementation of the FWD, the competent authorities and procedure, comments on the questionnaire.*

11.30 – 12.30 - Centro de Estudos dos Judiciários (Centre for Judicial Studies)

*General presentation on the training of magistrates with regard to the European Arrest Warrant .*

13.00 – 14.30 - Lunch

14.30- 17.00 – Procuradoria Geral da República (Attorney's General Office)

*- Interview with the representative of the Central Authority.*

*- Interview with the members of the informal Working group created within the Central Authority (General Attorney's Office), established to follow up on the implementation of the EAW (Central Authority, prosecutors from the executing authorities, Sirene Office, Interpol National Office, Ministry of Justice – GRIEC).*

17.15- 19.00 – Tribunal Relação Lisboa (Lisboa appeal Court - executing authority)

### Thursday, 26 October

07.00 – Departure to Oporto by bus.

10.30 –12H30 Tribunal Relação Porto (Oporto Appeal Court - executing authority)

*Interview with judges and prosecutors from one of the executing authorities*

12.45 – Lunch

15.00 – 17H00 - Tribunal de Matosinhos (issuing authority)

*Interview with an issuing competent authority*

18.15 – Departure to Lisbon by bus

### Friday, 27 October

8.30 - Departure from hotel

9.00 - Visit to the Sirene Office

11.30 - Visit to the National Central Bureau of Interpol

14.00 – Lunch

15.30 - Visit to the Portuguese Bar Association

*Interview with defence lawyers*

## LIST OF PERSONS INTERVIEWED

### **Bureau for International, European and Cooperation Affairs:**

Mariana Sotto Maior  
Rosa Rocha

### **Center for Judicial Studies:**

Luís Pereira  
Joana Ferreira  
Jorge Costa

### **Attorney General's Office**

Joana Ferreira  
Teresa Alves Martins  
Maria José Morgado  
Paulo Antunes  
Rui Bastos  
Delfim Neves  
Luís Pereira  
Ana Mafalda Duarte  
Rui Simões  
Rosa Rocha

### **Lisbon Appeal Court**

#### Judges:

Filomena Lima  
Carlos Almeida  
Conceição Gomes  
João Carrola  
Margarida Blasco

### **Oporto Appeal Court**

#### Deputy Attorney General:

Valério Pinto

#### Judges:

Hélia São Pedro  
António Gama

# RESTREINT UE

## First Instance Court of Matosinhos

### Public prosecutors:

José Ponte  
Rui Botelho  
Adília Cândido  
Carmem Coutinho  
Carla Barros  
Marta Ferreira da Silva

### Judges:

Helder Claro  
Paula Paz Dias  
Ana Carina  
Rui Moreira

### Sirene Office

Rui Simões  
Josélia Barranho

### National Central Bureau of Interpol

Ana Mafalda Duarte

### Portuguese Bar Association

Rogério Alves  
Nuno Lucas  
Adriana Barreiros

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## LIST OF ABBREVIATION/GLOSSARY OF TERMS

| ACRONYM<br>ABBREVIATION<br>TERM | ENGLISH EXPLANATION                                                                 |
|---------------------------------|-------------------------------------------------------------------------------------|
| CA                              | Central Authority                                                                   |
| EJN                             | European Judicial Network                                                           |
| FD                              | Framework Decision                                                                  |
| GRIEC                           | Ministry of Justice - Bureau for International,<br>European and Cooperation Affairs |
| JA                              | Judicial Authorities                                                                |
| MS                              | Member State                                                                        |
| NCB                             | National Central Bureau of Interpol                                                 |
| SIS                             | Schengen Information System                                                         |
| SOCA                            | Serious Organised Crime Agency                                                      |
| TIR                             | Signature on a document by the suspect                                              |

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