THE EUROPEAN SUPERVISION ORDER
From discrimination to equality

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§1. The international cooperation in criminal matters

The European Union (hereinafter “EU”), which had its origin focused on the creation of a common market, a customs union and the development of common policies, is actually supported by ideals that surpass the economic and financial matters, and which already reach a wide range of common interests, namely social, cultural, security and justice.

The Maastricht Treaty, or the EU Treaty, established the European policy based on three pillars: the Pillar I, relating to the Economic Policy (Community Pillar); the Pillar II, relating to the Common Foreign and Security Policy (Intergovernmental Pillar) and Pillar III, relating to the Justice and Internal Affairs (Intergovernmental Pillar). This third pillar had the purpose of combating criminal offences and contributing to the free movement of persons, being exactly here that the issue of the International Cooperation in criminal matters was inserted.

The Amsterdam Treaty, dated of 1997, complemented the Maastricht Treaty, improving the judicial and police cooperation policies initiated therein and, in accordance with the free movement principle, established as the EU purpose the creation of a freedom, security and justice area.

In the view of this intention, the Tampere European Council of October 15th and 16th, 1999 agreed on a number of measures to implement the freedom, security and justice area.

In this context, the principle of mutual recognition, being built on the idea of reciprocal trust that should guide the relation between Member States, in order to an automatic and more direct acceptance of judicial decisions rendered in other countries, including herewith judgments and judicial or police orders, within the context of the various legal systems which compose the EU. Thus, the principle of mutual recognition,

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1 The pillars structure was abandoned with the Lisbon Treaty, which contemplates the single legal personality for the Union, which led to the communitarisation of the treatment of the issue concerning Justice and Internal Affairs.

2 Regarding this matter, MARIA ÁNGELES PÉREZ MARÍN, La Lucha Contra La Criminalidad en La Unión Europea – El Camino Hacia Una Jurisdicción Penal Común, Atelier, 2013, p. 43, which refers, with particular interest that, “The States, on an individual basis, could not face the involving reality and, ultimately, the citizens’ rights to freedom, security and justice – the referred Europe of citizens – could be affected” (loose translation).
considered the cornerstone of international criminal cooperation, requires that under an idea of trust between judicial systems, a foreign judgment is recognized as if it was issued by a national entity.

In the Lisbon Treaty, the States demonstrated a strong determination to ensure a high level of security, through the implementation of measures to prevent crime, coordination and cooperation measures between police and judicial authorities or other relevant authorities, through the mutual recognition of judicial decisions and, if necessary, through the harmonization of criminal law, in order to ensure the establishment of the freedom, security and justice area (article 67 of the Treaty on the Functioning of the European Union, hereinafter “TFEU”).

From the Maastricht Treaty, through the revolutionary Tampere European Council, to the Lisbon Treaty, it is possible to unveil a gradual consolidation of a set of principles that allow a dynamic, strengthened and operational judicial cooperation in criminal matters. Indeed, the EU, aware that crime knows no nationalities or borders, waived some of their sovereignty for a common project. Only this amendment allowed the further adoption of relevant legislation within judicial cooperation in criminal matters, such as Council Framework Decision 2009/829/JHA, of October 23rd, 2009, on the application, between Member States of the EU, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (hereinafter “ESO”).

In this respect, during the internal transposition phase of ESO, the Green Paper on the application of EU criminal legislation was published, which intended to explain and launch relevant issues in the public discussion regarding their adoption and implementation, in order to strengthen the mutual trust in the European judicial area and where the Commission encouraged the use of measures as an alternative to provisional detention, exemplifying the possibility of applying electronic surveillance in order to

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3 In this respect, the following Framework Decisions shall be mentioned: Council Framework Decision 2002/584/JHA, of 13/06/2002, which approves the European arrest warrant; Council Framework Decision 2008/909/JHA, of 27/11/2008, regarding the application of the mutual recognition principle to the judgments in criminal matters that impose custodial sentences or measures involving deprivation of liberty for the enforcement purposes of those judgments in the EU; Council Framework Decision 2008/947/JHA, of 17/11/2008, regarding the application of the mutual recognition principle to the judgments and decisions related to the probation for monitoring purposes of the surveillance measures and alternative sanctions, also known as “Probation”.
ensure the correct and effective implementation of ESO and the reduction of provisional detention periods⁴.

After more than four years since the transposition of ESO’s provisions, Belgium and Ireland have not yet done so⁵. Therefore, in their relations with those States, the Member States that transposed ESO cannot benefit from the respective provisions in matters of cooperation. As referred to in the Commission’s Report on the implementation by the Member States of ESO, “the mutual recognition principle, which constitutes the cornerstone of the European judicial area, requires a mutual transposition and it cannot operate if the instruments are not properly applied in both Member States. Consequently, in case of cooperation with a Member State that did not proceed with the transposition in the established deadline, the Member States that have done so should continue to implement the correspondent conventions of the European Council whenever they transfer detainees or condemnations of EU for another Member States”⁶.

In this cooperation context, we shall recall the principles and fundamental rights shared by the EU Member States including those contained in the Charter of Fundamental Rights of the European Union (“Charter”) and the European Convention on Human Rights (“ECHR”). ESO assumes itself as a fundamental instrument for the protection of these rights, namely the dignity of the human person (article 1 of the Charter), the right to liberty and security (article 6 of the Charter and article 5 of the ECHR), the right to be presumed innocent (article 48, par. 1 of the Charter) and the principles of equality and non-discrimination (articles 20 and 21 of the Charter and articles 14 and 1 of Protocol 12 to the ECHR).

Thus, considering the importance of the matter and its recent implementation by the Member States, we propose an analysis of ESO, in its various features, hoping that this results in an effective dialogue.

⁵ https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=39
⁶ Considering this situation, there are two different solutions: (i) the interpretation in conformity with EU law of the Constitution or the legal provision that contradicts ESO, leading to its non-application; or (ii) an infringement procedure for the States that have not transposed the Decision in accordance with article 258 of TFEU.
§2. From discrimination: The period prior to ESO’s approval

In the period prior to ESO’s approval, there were no regulatory instruments providing for international mutual recognition of decisions on supervision measures matter and allowing the enforcement of measures applied in a State other than the State which ordered them.

This raised a several difficulties when a crime committed by a person resident in another State was involved, considering that no measure would have any effect in the State of his/her residence. It is easily understood that it would not make sense to apply a measure of weekly appearance before a Portuguese criminal police entity to a defendant if he/she has his/her residence in Bulgaria. On the other hand, and considering the non-recognition of decisions in this matter, that obligation could never be complied with by a Bulgarian body, since it would not recognize any validity to that obligation.

Moreover, it would make little sense to forbid the defendant from leaving the country where he had committed the criminal offense because he/she would not have any connection with that country, as residence or a job. So, that situation would leave the defendant in an excessively burdensome situation and would increase the likelihood of default of the obligation.

As a result, in these situations, there were only two possible solutions to be considered by judicial bodies: the provisional detention of the non-resident or the total lack of monitoring of his/her movements.

Considering this, any situation that represented any sort of seriousness and that could not be settled with the total lack of monitoring of movements, would lead to the defendant’s provisional detention, exclusively based on the fact that the defendant had his/her residence in another Member State.

This measure would be disproportional and would represent a discrimination based on the residence and eventually on the nationality of the defendant\(^7\), which would constitute an inadmissible solution according to the EU law\(^8\).

Non-discrimination is, since the beginning, an EU concern. In effect, the EU construction is based on the ever-closer cooperation between the Member States, which, in addition to the need of deepening the integration, has drawn the attention to the need

\(^7\) According to ECtHR’s case law, to discriminate is to treat differently, except objective and reasonable justification. In this regard, please see judgments Willis against United Kingdom, of 06 of November of 2002 and Okpisz against Germany, of 25 of October of 2005.
of taking into consideration the prohibition of discrimination, namely, based on the residence and nationality, seeking a progressive equal treatment of all European citizens, regardless of their nationality and domicile.

On the other hand, the EU was founded on the respect for democracy and the principle of the Rule of Law, based on the values of human dignity, freedom, equality, solidarity, democratic pluralism and in the deep respect for human rights. Hence it is possible to find references to the prohibition of discrimination in different legislative latitudes, in particular in the Charter and in the ECHR.

One of the most important rights granted to European citizens is the right to freely move within the territory of the Member States (article 21 TFEU). This right has been extended throughout the process of European integration, considering that initially only individuals who owned the nationality of one Member State but provided an economic activity in another Member State could freely travel within the European area. However, with the introduction of European citizenship status, the right of free movement became more widely understood, including the right to enter, leave and remain freely in any Member State, as well as the right to be treated on a non-discriminatory basis when compared to a citizen of another Member State. This means that European citizens can challenge the provisions of the State of their nationality which discriminate them due to the fact that they have been circulating in Europe. In these terms, the Court has already ruled in several judgments, such as, Tas-Hagen and Tas and Morgan and Morgan, Dominic Wolzenburg and Collins.

9 The Charter is legally binding pursuant to article 6, paragraph 1 of TEU, in the wording resulting from the Lisbon Treaty.
10 Article 21 of Charter establishes the following: “1. Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited”.
11 According to article 2, paragraph 1, “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.
12 This provision produces direct effect, which has been defended by CJ in Judgment Baumbast, of 17.09.2002, proceedings C-413/99.
13 CJ Judgment of 26.10.2006, proceedings C-192/05.
14 CJ Judgment of 23.10.2007, proceedings C-11/06 and C-12/06.
15 In this respect, please refer to SOFIA OLIVEIRA PAIS, «Todos os cidadãos da União Europeia têm direito de circular e residir no território dos Estados-Membros, mas uns têm mais direitos do que outros…», Scientia Ivridica, p. 477.
16 CJ Judgment of 06.10.2009, proceedings C- 123/08.
17 CJ Judgment of 23.03.2004, proceedings C- 138/02.
The right to circulate in the EU area is nowadays granted not only to the European employees (article 45 of TFEU) and their family, but also to any European citizen, according to articles 20 and 21 of TFEU.

In this context, the introduction of the concept of European citizenship\(^{18}\) represented a fundamental step in the European integration process. The main purpose was the approach of the peoples of Europe, the strengthening of the national citizens’ rights and the contribution to the EU legitimacy “[t]he European citizenship (...) and the creative and integrative case-law of the Court of Justice have contributed decisively to deepen, expand and crystallize the rights of the nationals of the Member States in the European area, being the binding element the prohibition of discrimination of European citizens based on their nationality”\(^{19}\).

If, during a first moment, the non-discrimination principle aroused based on the economic objectives of integration, i.e., the creation of a common market and free competition, being a fundamental instrument of its completion\(^{20}\), such principle became autonomous and based on the dignity of the human person\(^{21}\).

As referred by Maria Luísa Duarte “when exercising the rights of free movement, the citizen of a Member State benefits of the community protection that ensures him/her the right to a legal non-discriminatory treatment, both in the Member State of the residence and in the Member State of the nationality”\(^{22}\).

In the densification of the outlines of the non-discrimination principle the CJ\(^{23}\) has been particularly relevant, seeking to provide operational criteria capable of giving

\(^{18}\) The concept was created with the Amsterdam Treaty of 1992. The idea had already been announced by Tindemans in 1975 as a mechanism to strengthen the rights of the nationals of the Member States and, at the same time, to approximate peoples of Europe, creating a sense of belonging to an EU arising from a common identity.

\(^{19}\) Constança Urbano de Sousa, «Discriminação e Nacionalidade», Revista de Direito Público, no. 9, 2013, p. 8.

\(^{20}\) Initially, the EU had merely economic purposes, which were not consistent with the existence of discrimination based on nationality, since the completion of the common market ultimately depended on the free movement of goods, persons, services, capital, without distinction as to the nationality of the person or the origin of the goods or capital.

\(^{21}\) Ana Guerra Martins, A igualdade...ob. cit., p. 24.


\(^{23}\) Judgment of the CJ, Case C-6/64, Costa v. ENEL in the sense that “The provisions of Article 37 (2) of the EEC Treaty have as their object the prohibition of any new measure contrary to the principles of Article 37 (1), that is any measure having as its object or effect a new discrimination between nationals of Member States regarding the conditions in which goods are procured and marketed, by means of monopolies or bodies which must, first, have as their object transactions regarding a commercial product capable of being the subject of competition and trade between Member States, and secondly must play an
greater practicality to the principle, arguing for the need for double control. Firstly, by comparing the situations under discussion. Secondly, through the analysis of possible grounds for the difference in treatment. By applying to the defendant the measure of provisional detention, given the existence of a danger of escape merely based on his/her residence in another Member State, the courts breach the non-discrimination principle, firstly with grounds on the residence and, secondly, with grounds on nationality, what is legally inadmissible and ends up reducing in an unacceptable way the scope of the right of free movement.

According to recital 5, ESO sought to remove discrimination based on the criterion of residence. In any case, we cannot overlook the fact that most of the times the non-resident is also a non-national citizen of the State in which the criminal proceedings are taking place, and therefore these issues – residence and nationality – are interconnected.

The ESO was approved within this context.

§3. To equality: ESO

§3.1. ESO’s subject matter

Eight years after ESO’s adoption, it is certain that the dogmatic analysis and the assessment by national and European case law on this subject still leave much to be desired, which is in counter-cycle with the relevance that it has in the fight against transnational criminal offences and the need for non-discriminatory and proportional treatment of persons suspect of having committed a crime in a State different from the State of their habitual residence.

ESO allows the implementation of European supervision measures that can be configured as an enforcement decision rendered by a certain authority of a Member State in such trade”. Also in a Judgment of the CJ, dated of 06.10.2009, on the Case C-123/08, on the European Arrest Warrant of Dominic Wolzenburg it is referred that “with regard to whether a requirement for residence for a continuous period of five years, as laid down in the national legislation at issue in the main proceedings, is contrary to the principle of non-discrimination based on nationality, it must be borne in mind that that principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see, inter alia, Case C-303/05 Advocaten voor de Wereld [2007] ECR I-3633, paragraph 56)”.


25 Therefore the Council expressly admits that the principle of non-discrimination with grounds on the residence is being breached whenever a judgment applying a coercive measure is rendered solely laid on the fact of the residence of the person of interest.
State, in accordance with its national law, against a suspect who has his/her residence in another Member State, which will be supervised by the relevant authority of the defendant’s State of residence or by another appointed by the least, since there is a prior consent of the national authority\textsuperscript{26}/\textsuperscript{27}.

With ESO’s adoption it was intended to establish the features of a legal regulation, common to all the Member States, and based on the principles related to the recognition of decisions in criminal matters by other States, without delay and without the intermediation of excessive formalities. This allows the implementation of coercive measures in criminal proceedings to a resident in another Member State, with the supervision of that measure and, in case of non-compliance of the measure applied, the surrender of the suspect under the European Arrest Warrant\textsuperscript{28} (hereinafter “EAW”), to the Issuing State without the need to comply with special formalities\textsuperscript{29}.

The recognition refers to a decision on supervision measures, which are understood as the ones undertaken in the course of criminal proceedings by a competent authority of the Issuing State (article 4, par. a)). However, it is not required that it be a judicial decision, but rather a decision issued by the body which is internally competent to do so. Thus, the recognition may possibly have on its basis judgments issued by the judge, the Public Prosecutor’s Office or the Police\textsuperscript{30}.


\textsuperscript{27} Article 1 of ESO defines its subject matter and refers that these control measures are applied “as an alternative to provisional detention”. This wording raises a relevant issue relating to the possibility of applying control measures within ESO only as an alternative to provisional detention. In this regard, we understand that it cannot be interpreted in this way. In effect, such an interpretation would excessively compress the ESO’s scope, which would become limited to the implementation of a control measure exclusively as an alternative to provisional detention. A similar issue could be raised in regard to Law 36/2015, of 4 of May, whose wording is similar to the Framework Decision. Indeed, the issue has already been raised by the Superior Council for the Public Prosecution, in the opinion issued in respect of the draft law 272/XII (Please refer to Opinion of the Superior Council for the Public Prosecution issued in respect of the draft law 272/XII/4-1) (Gov), p. 3).

\textsuperscript{28} As we see below, the surrender procedure was discussed within other parameters, which were not expressed in the Framework Decision.

\textsuperscript{29} In these terms, please refer to Jorge Costa, «Decisão Quadro 2009/829/JAI, do Conselho, de 23 de outubro de 2009, relativa à aplicação, entre os estados-membros da União Europeia, do princípio do reconhecimento mútuo às decisões sobre medidas de controlo, em alternativa à prisão preventiva», Julgar, No. 7, Ano 2012, pp. 177 and 178.

\textsuperscript{30} In the Portuguese legal system, the authority for the implementation of supervision measures is the examining judge, understood as the judge of rights, freedoms and guarantees (with the exception of the statement of identity and residence that can be determined by the Public Prosecutor’s Office or by the Police). Nevertheless, when Portugal is the Executing State it cannot refuse to recognize a decision in which the coercive measure has been applied by the Police.
In article 8, the control measures that can be applied and, therefore, subject to supervision by the Executing State are defined. The State may also define other measures that it is in a position to implement, giving as an example, the prohibition to carry out certain activities related to the alleged offenses committed, which may include a particular profession or professional sector; the inhibition of driving a vehicle; the obligation to deposit a certain sum of money or provide another type of guarantee, which can be done in a specified number of instalments or immediately in a single instalment; the obligation to undergo medical-therapeutic treatment or treatment of dependency and the obligation to avoid contact with certain objects related to the alleged offenses.

As for us, it is worth mentioning the supervision measure “obligation to remain at a specified place during specified times”. Once recital 11 of ESO provides for the possibility of electronic surveillance, we believe that a very useful content that can be extracted, when combined with the measure of article 8, par. 1, subpar. c) is that the ESO legally foresees the possibility of applying the supervision measure of house arrest. Such a conclusion is wholly compatible with the principle of preferential application of house arrest as an alternative to provisional detention, and also with ESO’s objectives.

Such measures may be adapted by the Executing State, but never more severely than initially determined. The Issuing State is thus able to, in the event of disagreement with the adaptation, withdraw the certificate as long as monitoring in the Executing State has not yet begun (article 13). Furthermore, the Executing State shall, without delay, inform the Issuing State by any means which leaves a written record, the maximum length of time during which the supervision measures can be monitored in the Executing State, in case the law of the Executing State provides such a maximum (article 20, par. 2, subpar. b)). This is due to the fact that various national legal systems provide for different time periods for maintaining supervision measures. These time periods may be longer or shorter and there are even cases where maximum time limits have not been set, and in the absence of legislative harmonization, the Executing State

Pursuant to article 8 of ESO it shall apply to the following supervision measures: (a) an obligation for the person to inform the competent authority in the Executing State of any change of residence, in particular for the purpose of receiving a summons to attend a hearing or a trial in the course of criminal proceedings; (b) an obligation not to enter certain localities, places or defined areas in the issuing or Executing State; (c) an obligation to remain at a specified place, where applicable during specified times; (d) an obligation containing limitations on leaving the territory of the Executing State; (e) an obligation to report at specified times to a specific authority; (f) an obligation to avoid contact with specific persons in relation with the offence(s) allegedly committed.
undertakes the obligation to do so during the period legally defined in its legal framework, and only during that time period. This shall be without prejudice to the possibility of extension of the monitoring of the measure, following a request by the Issuing State, which shall be assessed by the Executing State in accordance with its national law (article 17).

ESO is applicable to all types of crimes but establishes a catalog for which there is no verification of the double criminality of the act\(^{32}\) (article 14, par.1). This catalog does not fail to raise some questions, since it presents legal types of crimes that, for example, are not legally foreseen in the Portuguese legal order.

According to article 9, par. 1 of ESO a decision on supervision measures may be forwarded to the competent authority of the Member State in which the person is lawfully and ordinarily residing, in cases where the person, having been informed about the measures concerned, consents to return to that State. Pursuant to article 9, par.2, the defendant may request the enforcement of control measures in a State in which he/she is not legally and habitually resident, provided that the same State consents to the defendant. It usually is required that some degree of connection with the Executing State exists, in order to guarantee that it will be able to fulfill the supervision objectives that it proposes to and also because it will bear the inherent costs (article 25). At the same time, such a requirement seeks to ensure that the respondent does not have the overriding objective of creating difficulties in the execution of the measure, failing to comply with it or, in the future, not attending judgment.

Finally, the law applicable to the supervision of measures is that of the Executing State, but it is the Issuing State who undertakes the subsequent decisions, including renewal, review and withdrawal of the decision on supervision measures, modification of measures and issuance of arrest warrants or any other enforceable judicial decision having the same effect (articles 16 and 18).

§3.2. Objectives of international supervision measures

ESO was adopted in a context of international judicial cooperation and under which a deepening of the legislative integration of the Member States is sought. Its

\(^{32}\) On the principle of double criminality the CJ has already rendered several judgments. With relevance to this subject please refer to the Opinion of the Attorney-General Michal Bobek delivered on 28 July 2016, on Case C-289/15.
study and analysis cannot be separated from these realities, because it is in this light that the legislative solutions that emerge thereof are understood and justified.

ESO’s approval has met a need to protect the defendant’s rights while ensuring a high level of criminal justice and protection of civil society as a whole. In fact, through ESO it became possible to carry out the transnational control of the movements of a defendant who is suspected of having committed a crime in a State other than that of his/her residence, without the latter having to be constrained to the borders of that State.

It is, if we understand correctly, this symbiosis of objectives - which can be perceived as antagonistic and irreconcilable - that lead ARANGUENA FANEGO to state that ESO is “a paradigmatic example of the fact that freedom and security can be harmoniously treated in the same European instrument, since it allows at the same time to reinforce the status of the defendant and to provide adequate protection to society with special consideration, naturally for the victim”.33

At the same time, and in accordance with article 2, par. 1, subpar. b), ESO promotes the use, in the course of criminal proceedings, of non-custodial measures for persons who are not resident in the Member State where the proceedings take place protecting, as it did not happen until then, the freedom of movement of a defendant and his/her presumption of innocence.

More significantly, ESO intends to ensure a reduction in the application of provisional detention to non-residents, simply as a consequence of this condition. ESO sought to strengthen the rights of persons subject to criminal proceedings, including the right to freedom and the presumption of innocence, by applying non-custodial supervision measures as an alternative to provisional detention whilst a defendant is awaiting the delivery of a judgment in criminal proceedings.

Given the importance of this question in (the refusal to) the application of ESO, it seems to us that it deserves autonomous treatment.

§3.3. The non-resident: Between the risk of escape and the compliance of ESO

The legitimation of a freedom-depriving precautionary measures imposed on an individual who is presumed innocent has always raised questions about the borders that

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33 CORAL ARANGUENA FANEGO, «Reconocimiento mutuo de resoluciones sobre medidas (de vigilancia) alternativas a la prisión provisional», p. 2.
the Criminal Law can dare to overturn. However, it is a well-known fact that the principle of presumption of innocence does not have the greatest weight when choosing a coercive measure, when compared to the precautionary needs specific to criminal procedures.

Thus, courts may apply custodial measures when they consider that any of the dangers that may jeopardize the purposes of criminal proceedings are detected and that deprivation of liberty is the only way to protect them.

In Portugal, the decisions of the High Courts have forwarded a set of circumstances in relation to which the suspect is found to be at risk of escape and that, consequently, justify provisional detention, and which relate to the characterization of the defendant as an individual of a foreign nationality or resident abroad and who has temporarily moved to another Member State and is suspected of committing a crime thereof.

In this regard, it is illustrative to refer the Judgment of a Portuguese Court of Appeal dated of February 4th, 2014\(^{34}\), which decided to uphold provisional detention, taking into account that the defendant did not have a current connection with Portugal since he resided and worked abroad, he was not a national citizen, and also given the fact that the case was linked to a transnational and transcontinental criminal activity. For those reasons the Portuguese court considered that there was no certainty that, if in freedom, the defendant would remain at the disposal of criminal proceedings, appearing before the court whenever necessary. Such suspicion was grounded, essentially on facts related to the foreign nationality of the defendant and on the fact that he had no domicile in Portugal.

The question that must be placed upon the judgments of the Portuguese courts is if the judgment would be the same if the court was before someone residing in Portugal? Has there been discrimination solely based on the residence of the person breaching the Charter and ECHR? Does this issue not conflict with the right of European citizens to freedom of movement\(^{35}\)?

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\(^{35}\) In the judgment of CJ, Case C-123/08, Dominic Wolzenburg, the Court already stated that, "in this case, it must be held that a situation such as that of Mr. Wolzenburg is covered by the right of citizens of the Union to move and reside freely in the Member States and therefore falls within the scope of the EC Treaty. By taking up residence in the Netherlands, Mr. Wolzenburg exercised the right conferred by
It is precisely in response to these issues that ESO Recital 5 expressly states that “As regards the detention of persons subject to criminal proceedings, there is a risk of different treatment between those who are resident in the trial state and those who are not: a non-resident risks being remanded in custody pending trial even where, in similar circumstances, a resident would not. In a common European area of justice without internal borders, it is necessary to take action to ensure that a person subject to criminal proceedings who is not resident in the trial state is not treated any differently from a person subject to criminal proceedings who is so resident”.

The right to an equal treatment may be subject to certain exceptions whenever justified by legitimate reasons. In this respect the CJ has already held\(^\text{36}\) that such conditioning can be justified, not breaching the principle of non-discrimination, on the basis of objective considerations, independent of the nationality of the persons concerned and inasmuch as they are proportionate to the objective pursued by national law.

In this light, in the Case Wolzenburg, the CJ held that it is not discriminatory to require a non-national which resides in a Member State for about a year, for the purpose of refusing to execute an EAW, that he/she has been resident in that country for at least 5 years. The Court held that the residence requirement for an uninterrupted period of five years in respect of the execution of the EAW – as provided for under Dutch national legislation – is not an excessive requirement, taking into account, namely the requirements to meet the needs of integration of non-nationals in the Member State of enforcement.

Carrying the interpretation of the CJ to the situations of provisional detention on the grounds of lack of connection of the concerned person with the country in which the criminal proceeding is pending, due to his/her non-residence, as a basis for the assumption of the risk of escape, we are forced to conclude that there are no objective and proportionate reasons for such a coercive measure.

Thus, since there is an European area of freedom of movement and there is a link between criminal systems for the control of persons subject to criminal proceedings, the

\(^{36}\) The CJ in the Case C-138/02, Collins, the Court has considered justified a situation in which the national legislation subjected the awarding of benefits to job applicants depending on their residence.
idea that there are objective and proportionate reasons at this level for restricting the rights of free movement of European citizens cannot be admitted.

Moreover, the application of a provisional detention on grounds of non-residence also constitutes an intolerable breach of the principle of non-discrimination. ESO, by introducing cross-border supervision measures on persons subject to criminal proceedings, objectively withdraws the need to impose a deprivation of liberty on account of the risk of escape of a non-resident, reason for which there cannot be no proportional and reasonable limitation to the principles of free movement of persons and non-discrimination.

In this regard the Opinion of the Advocate General in the Case Heinz Huber v Bundesrepublik Deutschland is of the utmost relevance: “the starting point in discrimination cases should be that Union citizens are entitled to the same treatment as nationals subject to express exceptions. (14) The prohibition of discrimination on the basis of nationality is no longer merely an instrument at the service of freedom of movement; it is at the heart of the concept of European citizenship and of the extent to which the latter imposes on Member States the obligation to treat Union citizens as national citizens. Though the Union does not aim to substitute a ‘European people’ for the national peoples, it does require its Member States no longer to think and act only in terms of the best interests of their nationals but also, in so far as possible, in terms of the interests of all EU citizens”37.

Thus, by being required a connection of the person concerned with the country in which he/she is suspect of having committed a crime, then he/she is being objectively discriminated with grounds on residence and, indirectly, with grounds on nationality, once the vast majority of the non-residents are foreigners, being said difference in treatment disproportionate in light of the means of cross-border monitoring that ESO has granted the Member States.

By requiring the existence of a connection through the defendant’s residence to the country where he/she is charged with a crime, he/she is being objectively a target of a direct discrimination on the basis of the residence of the European citizen and indirectly on the grounds of nationality, once the vast majority of non-residents are foreign nationals.

37 Opinion of Advocate General Poiares Maduro, delivered on 3 April 2008, Case C-524/06, Heinz Huber v Bundesrepublik Deutschland, paragraph 18.
In fact, the principle of non-discrimination on the grounds of residence and nationality establishes that all necessary measures should be undertaken to promote the blurring of situations of inequality between citizens. It was in this sense that ESO provided the Member States with means of monitoring the defendant in the State he/she resides in or is a national of, thereby avoiding discrimination on grounds of residence and nationality in the application of coercive measures, as its main objective, and as a secondary aim, the verification of the non-discrimination according to nationality for the reasons already explained.

Therefore, it is precisely, in this field that ESO reinforces the interests of individuals subject to criminal proceedings by providing for a set of supervision measures to be applied in another Member State, thereby strengthening the right to freedom and the presumption of innocence, and promoting, where appropriate, the use of non-custodial measures as an alternative to provisional detention.

As it is stated by Graça Fonseca “The greater probability of applying provisional detention to foreign defendants has at its origin an interaction between certain social and economic circumstances with the legal and jurisdictional criteria for the application of provisional detention. Circumstances such as less work and residential stability or lack of family support structure, more frequent in immigration communities, especially the more recent ones, interact with the legal requirement of the risk of escape, central in criminal legislation of most countries, in its application it tends to discriminate against foreigners, even those residing in the host countries”\textsuperscript{38}.

In addition to avoiding discrimination on grounds of residence and nationality, the possibility of carrying out a supervision measure in the Member State where the defendant is a national or a resident will, primarily, enable him to continue his/hers daily social, family and professional life while awaiting for the outcome of the criminal proceedings. Problems will be avoided in the employability of the defendant and consequently negative effects of loss of income for the defendant and his/her household. Furthermore, it will also prevent the defendant from suffering a rupture in his family and other social ties. Consequently, it will be possible to mitigate the negative effects that a criminal proceeding has on an individual, making possible the maintenance of their social, family, economic and cultural stability. On the other hand,

\textsuperscript{38} Please refer to Graça Fonseca, Percursos Estrangeiros no Sistema de Justiça Penal, Observatório da Imigração, Novembre 2010.
there are also advantages to the Issuing State by reducing the costs associated with subjecting an individual to a custodial measure when there are no other factors that require intervention.

Obviously, this only means that the application of an alternative measure to provisional detention should only be determined in cases where subjecting the defendant to the most serious measure is solely based on the fact that in the case in question there is a concrete danger of escape, arising from the fact that he/she is a citizen not resident in the State where the criminal proceeding is pending. As stated in article 2, par. 2 of ESO, “This Framework Decision does not confer any right on a person to the use, in the course of criminal proceedings, of a non-custodial measure as an alternative to custody”.

In view of the foregoing, it must be concluded that, with the adoption of ESO, it is no longer possible to invoke the risk of the person escaping because of his or her residence as a criteria justifying the application of provisional detention as such a finding would be contrary to the principle of non-discrimination, since the only element which would allow to derogate the principle of non-discrimination would be the lack of an effective connection with the Member State where the criminal proceedings are pending, in particular the absence of residence. Nevertheless, this element is now safeguarded through the existence of cross-border supervision measures - ESO and EAW - which make it in any circumstance, disproportionate and contrary to European Union law, the application of provisional detention with the sole grounds lying on danger of escape, only resulting from the lack of connection of the defendant with the territory of that State.

Moreover, the adoption of a provisional detention, which is not based on a specific danger of escape, but on a purely abstract criteria based on the person’s non-residence, constitutes an unlawful deprivation of liberty under article 5 of the ECHR.

§4. Grounds for non-recognition

The Executing State may refuse to recognise the decision on supervision measures, with the grounds established in article 15. Among these hypotheses, we will not fail to indicate some, such as those listed in subparagraph c), d), g) and h) of paragraph 1, of the aforementioned legal provision.

Pursuant to article 15, par. 1, subpar. c, the Executing State may refuse to recognize a measure where this would be contrary to the ne bis in idem principle, which
is also assumed at the EU level\(^{39}\), and as it is stated in the judgment of the CJ Zoran Spasic, in case C-129/14 PPU, “The source of the ne bis in idem principle at the transnational level is the risk that, if an offence relates in some way to several legal systems, each will assert its own jurisdiction, thus creating the possibility of cumulation of state punishment”\(^{40}\).

The situation where the reported facts are not a crime in the Executing State is also a ground for refusal, whenever the latter has stated that the implementation of the measure depends on the concrete verification of the principle of double criminality (articles 15, par. 1, subpar. d) and 14).

The verification of immunities in the Executing State may prevent it from monitoring supervision measures, as well as when the person cannot, by reason of his age, be held criminally responsible (article 15, par. 1, subpar. f) and g)).

Article 15, par. 1, subpar. h) defines as a ground for refusal the situation where, in the event of a breach of the measure by the person, the State has to refuse to surrender the person concerned under the provisions of the EAW, notwithstanding being enabled to inform the Issuing State of its willingness to recognize and monitor the supervision measures applied (article 15, par. 3). That situation does not in fact constitute a refusal to recognize the decision implementing the supervision measure, but falls within the scope of the failure to comply with the measure and its consequences.

§5. The breach and review of supervision measures

The effectiveness of the model advocated by ESO depends on the existence of effective supervision by the Executing State of the control measure that has been applied. To this end, it is essential to have a permanently open channel of communication between Central Authorities so that the objectives of ESO implementation are not jeopardized by the negligence of Issuing and Executing States. In this sense, pursuant to article 19, par. 3 of ESO, the Executing State shall immediately notify the competent authority of the Issuing State of any breach of a supervision measure and of any other finding which could result in the renewal, review or withdrawal of the decision on supervision measures; the Modification of supervision

\(^{39}\) Article 4, of Protocol no 7 of ECRH and article 50 of the CFREU.

\(^{40}\) View of Advocate General Jääskinen, delivered on 2 May 2014, Case C-129/14 PPU, Zoran Spasic, paragraph 35.
measures; Or the issuance of an arrest warrant or any other enforceable judicial decision with the same effects.

Thus, the Issuing State may act immediately through a possible change of supervision measures, through its modification, reinforcement of supervision, or in more serious cases, and subsidiarily, by issuing an EWA for immediate and coercive return of the suspect to that State, if provisional detention is deemed necessary. Moreover, ESO reinforced this last possibility because it provides that under article 21, the Issuing State may issue an arrest warrant, ordering the surrender of the person to that country, regardless of the requirements of that warrant regarding the sanction. In fact, article 2, par. 1 of Framework Decision 2002/584/JHA on the EAW states that it may only be issued for acts punishable by the law of the Issuing State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.

Therefore ESO envisages to reinforce the response to a breach by the suspect of the supervision measure imposed as an alternative to provisional detention, allowing international means to be enforced for the immediate replacement of the suspect in the jurisdiction of the Issuing State, in order to ensure the appearance of the person on trial.

It is therefore clear that this provision, by mitigating the specific requirements of the EAW, is clearly intended to demonstrate to Member States that non-compliance with international supervision measures is sanctioned and, thus, acts as a positive reinforcement of the system with regard to the applicability of this legal framework.

Having said that, if ESO has had a residual practical application, this is certainly not due to the vast possibilities for coordinated action between Member States’ courts, since it has provided them with a system of cooperation capable of being effective for implementing interstate supervision measures.

On the other hand, the practical failure of ESO is due to lack of knowledge of ESO itself and its virtues, and to a distancing from national courts of international instruments and consequent lack of mutual trust between judicial systems. The words of BRUNO MIN in this regard are worth mentioning: “[t]he failure of the ESO so far can be blamed on the fact that, as demonstrated by the cases of injustice caused by the misuse of the European Arrest Warrant, the reliance on mutual trust between EU Member States is often misplaced and misguided. The level of confidence required by courts to
give up control over the accused under the supervision of another Member State simply does not seem to be in place"\footnote{Please refer to BRUNO MIN, «The European Supervision Order for transfer of defendants: why hasn’t it worked?» in https://www.penalreform.org/blog/the-european-supervision-order-for-transfer-of-defendants/}.

National magistrates as the first instance applying EU law have a duty to use the instruments of criminal cooperation at their disposal to promote a uniform application of the law. In fact, “[a]ssuming the member states implement the ESO in national law, magistrates and judges throughout the EU will then have an important role to play. The presumption in favour of liberty at common law and under the European Convention on Human Rights means careful consideration must be given to the use of an ESO in each individual case involving a defendant resident in another EU state”\footnote{Please refer to ALEX TINSLEY, “A missed opportunity”, https://www.fairtrials.org/wp-content/uploads/European-Supervision-Order-Article.pdf.}

§6. Conclusion

The evolution of European integration in criminal matters can only be fully achieved through the effectiveness of the principle of mutual recognition with the necessary and underlying legislative harmonization between States, both substantively and procedurally. “The achievement of a functioning ‘euro-bail’ system will depend on the competent national authorities developing confidence in each others ability to ensure defendants attend trial. Since the ESO is a framework decision, the European Commission currently has no power to enforce it by bringing infringement proceedings. It is up to the member states to make it work”\footnote{Please refer to ALEX TINSLEY, “A missed opportunity”, https://www.fairtrials.org/wp-content/uploads/European-Supervision-Order-Article.pdf.}

Although the punitive power of the State has always been understood as its ultimate stronghold of sovereignty, reality has shown that matters relating to organized crime, terrorism and drug trafficking could only be addressed through the adoption of effective cooperation mechanisms in the fight against cross-border crime. Thus, it has been recognized the need to harmonize substantive and procedural criminal systems, not only in order to ensure that crime is dealt with, but also to protect the principle of non-discrimination between European citizens\footnote{Articles 18 and 20 TFEU.}.

In fact, it would not be coherent that an area of freedom was established, with the recognition of an European citizenship, which proclaims (unjustified) non-
discrimination between citizens with grounds on residence and nationality, and then allow those same European citizens to be treated differently, depending on having committed crimes in one or another Member State\textsuperscript{45}. In fact, if we envisage to move towards a true Union of European Law, it will not be comprehensible that a foreign citizen or a non-resident in a given country has different treatment with regard to nationals and residents.

Let us not forget, however, that Member States, although having similar value systems, do not share them in a totally harmonious and aligned way. In the case of Criminal Law, which seeks to protect legal interests considered essential to the community and which underlie its ethical foundation, the more we understand the difficulties of harmonization. While it is acknowledged that significant procedural steps have been taken in legislative approximation, through the enactment of several Framework Decisions referring to proof, protection of the accused and of the victim\textsuperscript{46}, it is certain that this integration has not yet reached the level of consolidation that is needed.

\textsuperscript{45} ILIAS ANAGNOSTOPOULOS, Era Forum, volume 15, 2014, “The statistics in the Annexes of the Green Paper, as well as recent studies on pre-trial detention show that in some EU countries, detention before trial is not always used as an exceptional measure where no other alternative would be available, but also as a coercive measure or anticipated punishment against accused persons.”, p. 22.