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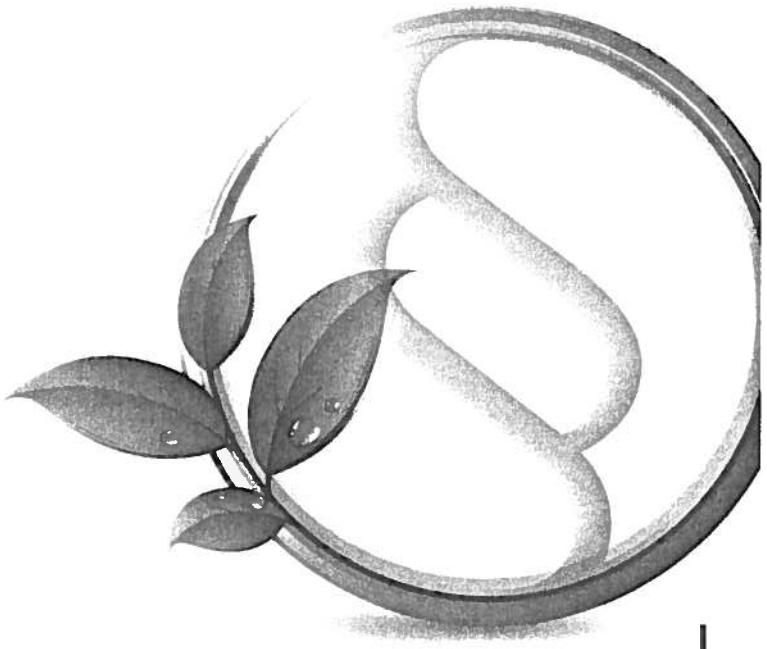

FIDE

XXV CONGRESS

TALLINN 2012

REPORTS OF THE XXV FIDE CONGRESS TALLINN 2012

Bulgaria

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PART I: Harmonisation of substantive criminal law

A. Terrorism

Q1. What has been the impact of EU law (Framework Decisions 2002/475/JHA [2002] OJL164/3 and 2008/919/JHA [2008] OJ L330/21) on the criminalisation of terrorism in your jurisdiction?

The amendments to Articles 3 and 4 of the Framework Decision 2002/475/JHA introduced by Framework Decision 2008/919/JHA were enacted into Bulgarian legislation through amendments to the Criminal Code of the Republic of Bulgaria, in force from 27.05.2011, published in OJ. 33/2011. The latter introduced additions to the catalog of crimes which can justify the crime of terrorism – art. 108a para. 1, criminalization of training or recruitment of persons to carry out terrorism – art. 109, par. 3, coercion to terrorism – art. 143, par. 2 para. 3, intimidation with terrorist act – art. 144, par. 3, making documentary crime in order to facilitate the commission of terrorist – art. 308, par. 3 and increase the amount of penalty for apparently inciting terrorism – art. 320, par. 2 – from two to ten years imprisonment.

The case of qualified theft, referred to in Art. 3, par. 2 letter ‚d' of the Framework Decision, according to Bulgarian law, covers the crime of "preparation for the crime under art. 108a para. 1", under the form of collecting or providing financial or other means.

Art. 4, par. 1 of the Framework Decision, concerning the provision of penalty for attempt to commit a terrorist crime and complicity, does not require special action for transposition in Bulgaria. According to Bulgarian legislation, attempt to commit a premeditated crime, including terrorist crimes, is to be punished in any case with the punishment stipulated for the crime, taking into account the degree of fulfillment of the intention and the reasons why crime has remained unfinished. According to the Bulgarian Criminal Code, all accomplices are criminally liable for acts done by

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them, as each of them deliberately contributed to the crime or intentionally participated in its implementation. In Art. 21, para. 1 Criminal Code contains a general rule of punishability of complicity. All accomplices shall be punished with the punishment provided for the offense – the relevant provision of the Special Part of the Bulgarian criminal law, for sentencing court take into account the nature and extent of involvement of the accomplice in the crime. Therefore, punishment of attempts and complicity never created problems in the Bulgarian practice of criminal courts. It's not expected the transposition of FD 2008/919/JHA to create practical problems for the future.

According to the Bulgarian criminal justice system entities bear administrative responsibility; they are not criminally liable. Art. 83a of the Law on Administrative Violations and Penalties provides for administrative penal sanctions against legal entities and sole traders, where certain crimes are committed, which is in the spirit of the Framework Decision. The list of the aforementioned article 83 is supplemented to the maximum extent, consistent with the requirements of Art. 5 and 6 FD 2008/919/JHA. It's not required as well special action by the Bulgarian authorities for the implementation of Article 10 of the FD, concerning the protection of victims of terrorist acts. According to Art. 191 of the Criminal Procedure Code, offenses referred to in the Framework Decision are indictable offenses, i.e. these proceedings must be instituted and the crime is pursued by the prosecutor, regardless of the will of the victim. Afforded to each Member State the obligation to take all possible measures to ensure appropriate assistance to the families of victims of terrorist acts in Bulgaria is ensured by the existence of the Act to support and financial compensation to victims of crimes, applicable in the Republic of Bulgaria from 01.01.2007.

The introduction of 2008/919 FD in the national legislation is related to minor changes in substantive criminal law, but not with general institutions of law – substantive and procedural. Bulgaria has not witnessed a particular growth in those crimes, the fight against them and their possible detection and investigation should not create problems, either with regard to the procedural rules, concerning the procedural investigative activities, nor to protect the fundamental rights of citizens.

B. Cybercrime

Q2. What has been the impact of EU law (Framework Decision 2005/222/JHA [2005] OJL69/67) on the criminalisation of attacks against information systems in your jurisdiction?

Framework Decision is transposed in Bulgaria mainly through amendments in the Criminal Code by Amending CC OJ issue 38/2007, which are applicable provisions from 15.05.2007. A new Chapter Nine "A" from Special Part of the Criminal Code – "Computer Crime" was created. It provided features of computer crimes to the requirements of the FD to criminalize certain activities irregular: Article 2 of the Framework Decision, binding on Member States to proclaim a crime of illegal access to information system, is introduced in the formulation of the crime under art. 319a of the Criminal Code. Articles 3 and 4, requiring the criminalization of unlawful interference with computer systems or data, are transposed through the creation of the special offenses from 319b to 319E. There are also aggravated circumstances in cases of repeated, of causing substantial damage or the occurrence of serious consequences. Requirement is met and of article 6 of FD, as the penalties for offenses meet the criteria to be imprisonment of one to three years, in a qualified circumstances eight years, and cumulatively to a fine. In the general part of the CC are introduced to the definitions given in Article 1 of the FD – "computer system" and "computer data" / Article 93 p.21 and p.22 /.

Administrative liability for legal entities is provided in Art. 83a of the Law on Administrative Violations and Penalties.

Q3. To what extent is there a need for new EU legislation to address gaps in legal responses to cybercrime? To what extent does the Commission proposal for a new Directive on cybercrime (COM (2010) 517 final) address such gaps?

Cybercrime is growing very rapidly through new technologies and ways of their execution. It is extremely complicated from a technical standpoint criminality, which is also hard to prove. In most cases this requires cooperation between the countries covered by the cross-border crime, more so in many cases the computer system may be in one state and the person who commits an act with it – in another / e.g. "Botnet" /. Therefore there is necessity that the provisions of FD 2005/222 to be developed in anticipation of new crimes for which the laws of the Member States should be harmonized in terms of penalties and features.

C. *Organised crime*

Q4. What has been the impact of EU law (Framework Decision 2008/841/JHA [2008] OJL300/42) on the criminalisation of participation in a criminal organisation in your jurisdiction?

FD has been transposed in Bulgaria by making changes in existing legislation – the Criminal Code, with amendments to the Criminal Code OJ No. 27/2009, in force since April 14, 2009. In respect of Article 1 of the FD Bulgarian legislature adopted the definition contained in it, with some changes it reproduced in art. 93, item 20 of the Criminal Code: the expression "more than two people" is perceived as "three / or more / entities." According to Bulgarian law adopted by the legislative technique, the crimes for which criminal group has been established should be punishable by imprisonment "for more than three years." With regard to the objective – "to acquire direct or indirect financial or other material benefit" – is not reflected in the definition of art. 93, item 20 of the Criminal Code of the Republic of Bulgaria, as it expanded the scope of the definition. This corresponds with recital 4 of the Framework Decision, that "the obligations deriving from Art. 2 lett. a) should not affect the freedom of Member States to classify other groups of persons as criminal organizations, as groups whose purpose is not financial or other material gain". The existence of mercenary motives, with which was established organized crime group, is displayed as a qualified case in the provision of Art 321, par. 3 of the Criminal Code, which covers qualifying cases of organized crime group.

In connection with the fight against organized crime and in accordance with Art. 3, par 2 of the Framework Decision, a number of offenses in the Particular part of the Criminal Code of the Republic of Bulgaria as a qualifying circumstance hypothesis is provided when the offense is committed by a person acting on behalf or in pursuance of the decision of an organized crime group – art. 116, section 10 (aggravated murder), art. 131, par. 1, section 8 (injuries), Art. 142, par. 2, section 8 (abduction and unlawful imprisonment), Art. 155, para 5, item 1 (incitement to prostitution), Art. 156; art. 159g (trafficking); art. 199 (robbery); art. 242, par. 1 lett. "G" (smuggling), Art. 330 (arson) and others.

According to the Bulgarian criminal justice system, legal entities can not be held criminally liable. In the Framework Decision is allowed the opportunity to provide such criminal responsibility, which Bulgaria has not materialized. In Art. 83a of the Law on Administrative Violations and

Penalties are provided administrative penal sanctions against legal entities and sole traders, where certain crimes are committed, which is in the spirit of the Framework Decision.

In Art. 208 of the Criminal Procedure Code specifically are regulated legal reasons for initiating an investigation of a crime. In addition to message to the bodies of preliminary investigation for a committed crime, are provided also direct discovery by the bodies of preliminary investigation of signs of crime, the perpetrator's personal appearance before the authorities of the trial with recognition of the crime and information about a crime, distributed through the media. With this rule was introduced the requirement of Article 8 of the FD and it is guaranteed that the initiation of criminal prosecution is not just message or accusation made by a person who is a victim.

The transposition of FD 2008/841/JHA in 2009 and the application of rules of domestic law from 2009 until now has not caused problems in practice in interpreting and applying the law. There is no contradictory or incorrect practice of the courts. Rights of defendants and victims of these crimes are guaranteed by the general rules of criminal procedure. No special rules concerning the rights of the parties in criminal proceedings. Since the beginning of 2012 Bulgaria will start to operate a specialized court and special prosecutor. Within their competence will be examining the cases of crimes committed by organized criminal groups. These crimes are expressly laid down in the Criminal Procedure Code – Art. 411a. Procedural rules by which will happen the examination of cases of these crimes are provided in chapter thirty-first "A" of the CPC. They do not differ significantly from the general rules of the CPC with the exception of the fact that significantly reduce the time in which the prosecutor and the court must pronounce as well as creating a priority payment of participants in the process to appear in court regardless of summoning them before other courts or bodies of preliminary proceedings. Guarantee for the proper and uniform law enforcement by the specialized courts is that their decisions will be subject to control cassation before the Supreme Court, which is the only supreme authority for all criminal cases.

D. Racism and xenophobia

Q5. What has been the impact of EU law (Framework Decision 2008/913/JHA [2008] OJL328/55) on the criminalisation of racism and xenophobia in your jurisdiction?

Requirements of the Framework Decision 2008/913/JHA are introduced into Bulgarian legislation through the Law amending the Criminal Code, published in "Official Journal" issue. 33 of 26.04.2011, in force of 27.05.2011.

Under Bulgarian law theory and practice, instigating is a psychological impact on one or more persons that is of the nature and aims to motivate recipients to unlawful hostile actions against one or more persons of another race or nationality. Motives are always taken into account by the court in determining the type and amount of punishment. Therefore, before the amendment of the Criminal Code by introducing a special qualifying features for the crimes committed by racist or xenophobic motives, courts consider these motives of the perpetrator at the individualization of punishment, as long as they are clearly established. The considerations for this has been reflected in the grounds of judicial acts.

The introduction of Article 1 of the FD is done by amending the existing texts of the crimes under Art. 162 – Crimes against national and racial equality and art. 164 of the Criminal Code – Offences against the religion, as well as the creation of a new version of the crime – art. 419a of the Criminal Code, incriminating condoning, denying or grossly trivializing the crime against peace and humanity and creating a hazard to exercise violence or creating hatred against individuals or groups of people united by race, color, religion, origin , national or ethnic appurtenance.

According to the Bulgarian Criminal Code, all accomplices are criminally liable for acts done by them, as each of them deliberately contributed to the crime or intentionally participated in its implementation. Art. 21, para 1. the Criminal Code contains a general rule of punishability of complicity. All accomplices shall be punished with the punishment provided for the offense – the relevant provision of the Special Part of the Bulgarian criminal law, for sentencing court take into account the nature and extent of involvement of the accomplice in the crime.

Penalties laid down in the Criminal Code for the abovementioned crimes are effective, proportionate and in accordance with Art. 3, par. 1 and 2 of the Framework Decision as the size of penalties under Art. 162, par. 1 and 2, Art. 163 and Art. 419a is a maximum of 3 years.

Racist and xenophobic motives in all cases will be considered as an aggravating circumstance for sentencing in cases where they are not constituent element of that crime. Only on the crimes against Person Bulgarian legislature has recognized the existence of special incentives as a qualified features of the offense.

According to the Bulgarian criminal justice system entities bear administrative responsibility. In Art. 83a of the Law on Administrative Violations and Penalties are provided for administrative penal sanctions against legal entities and sole traders, where certain crimes are committed. The list of art. Penalties of 83 is supplemented to take the maximum extent consistent with the requirements of Art. 5 and 6 of the Framework Decision.

PART II: Judicial cooperation in criminal matters via mutual recognition

Q6. What have been the main challenges for the legal systems of EU Member States in implementing the EU *acquis* in the field of mutual recognition in criminal matters?

The principle of mutual recognition in criminal matters apply to Bulgarian judicial authorities of 01.01.2007, since Bulgaria is a member of the European Union. Notwithstanding the relatively short five years of its implementation, among the Bulgarian authorities has already been built a certain understanding of the content of the principle and the way for its implementation in practice.

Problems associated with implementation of EU law relating to judicial cooperation in criminal matters can be divided into two stages: up to 01.01.2007 and are associated with the implementation of EU law into national law in order to align with the EU acquis with a view to future membership of Bulgaria in the EU and after 01.01.2007 when the Republic of Bulgaria has effectively participate in the process of adopting EU legislation, based on the principle of mutual recognition of judicial decisions.

In transposing the acts, relating to the mutual recognition, have not been encountered problems of a political nature. This is because before the accession of Bulgaria to the EU were provided amendments to the Constitution / 2005 / allowing the transmission of Bulgarian citizens to another country for prosecution under certain conditions – namely, if provided by an international agreement ratified, promulgated and entered into force for Bulgaria.

Transposition of the Framework Decision on the EAW did not raise as well legal problems regarding the requirement that the decision to implement the EAW shall be taken only by a court. This is because in 1997 Bulgaria introduced a judicial decision on extradition. Since that time the Ministry of Justice does not participate in any manner in deciding on the admission or denial of admission of extradition.

Problems encountered in implementing the Framework Decision on the EAW were predominantly of legal and technical nature. First, some problems arose regarding with the list of crimes which do not require dual criminality. Due to the fact that some crimes from it did not exist in Bulgarian legislation, while others are broadly formulated, and the fact that the abolition of the principle of double criminality was a novelty at that time, the transposing the Framework Decision draft law was originally referred to an analogue of the offenses of Bulgarian Penal Code. Subsequently, in the adoption of the bill this problem was resolved as in the text of the law was included literal translation of the Framework Decision crime.

Legal problems were encountered in the implementation of the grounds for refusal of enforcement, which demonstrated the need for anticipating legislative changes to eliminate them. As an example in this direction may be given a literal implementation of optional grounds for refusal under Art. 4 (6) of Framework Decision on EAW. Rules of domestic law transposing Art. 4 (6) FD does not give clear indications on which body decides that the sentence will be carried out in Bulgaria, nor in what order. The latter created problems for the application of this ground for refusal, as if he refuses the implementation of the EAW, the court is not aware of what procedures should proceed to bring the penalty in performance. This necessitated amending the provision in 2008 when it introduced a special procedure for this.

With the introduction of the Framework Decision on execution in the European Union of orders freezing property or evidence have been encountered many difficulties. First, there was a problem of the nature of the normative act, by which should be introduced decision. Generally, before Bulgaria's membership in EU, international criminal cooperation is governed by its codification in the CPC. In Bulgaria, before its preparation for EU membership, was no separate law on international legal assistance. By transposing the EAW FD in a separate law – the Law on Extradition and European Arrest Warrant / 2005 / settled, however, only this form of

international cooperation. Therefore, the implementation of this Framework Decision in own law uniquely not followed in practice.

There were certain problems in connection with the settlement of the procedure by which evidence can be secured. Institute of securing evidence is specific for the Framework Decision. The Bulgarian criminal trial does not have equivalent rules for providing evidence. After some hesitation, when adopting the law was decided upon execution of a warrant to secure evidence to be made in accordance with the rules of taking evidence, applicable to international legal assistance.

With the introduction of framework decisions, based on the principle of mutual recognition, in Bulgaria is not been placed to discuss the issue of reciprocity. It is not a problem in Bulgaria's relations with other Member states. In judicial practice, reciprocity is also not becoming a problem for the implementation of the EAW. Law enforcement in Bulgaria strongly supported the principle of mutual recognition in criminal matters.

One cannot ignore the existing differences also to the present moment in the legal systems of Member States / especially in such a matter, such as criminal justice /. Nihilism would be to deny it, but it is important to be recognized and accepted by the countries. This means to have an agreement to implement a foreign judicial act even when for the offense, for which extradition is requested of a person, national law provides a lower penalty than the law of the issuing country. This performance, however in this case is subject to conviction that judicial act of the issuing State has been issued in full compliance with the rights of the individual.

Yet it can not be denied that any difficulties that exist at present in judicial cooperation in criminal matters derive from lack of trust between the authorities cooperating. Obviously, it is not always reached this high level, allowing unconditional mutual recognition / probably the result of different historical moments of the accession of new Member States to the EU /. On the other hand, mutual recognition suggests and approximation of laws in criminal matters, which is not always available. It is the harmonization of the laws of Member States in favor of mutual trust. The very concept of mutual recognition incorporates the idea of the possibility of differences in the laws of the Member States, but these differences should not be an obstacle to mutual recognition.

Q7. What are the limits of mutual trust in the execution of European Arrest Warrants?

Applying the principle of mutual recognition of the EAW is not absolute. This principle has suffered a number of constraints in the form of absolute and relative grounds for refusal of recognition and execution of the EAW.

Bulgaria's position is that the grounds for refusal must be interpreted restrictively. In transposing of the various instruments of mutual recognition, experts ensure proper implementation of all provisions of the framework decisions / directives / to no additional grounds for refusal, and not change their very nature-from optional to mandatory.

When transposing of the FD 2002/584 Bulgaria strictly followed its provisions, as in its national legislation / LEEAW / is intended as binding only these grounds for refusal even Framework Decision itself provides in Article 3, but as optional – only those referred to in Art. 4 FD.

7.1. Mandatory grounds for refusal.

7.1.1. Offense for which the EAW was issued, is covered by amnesty in the Republic of Bulgaria and falls under its jurisdiction. This basis is provided in Art. 39 item 1 of LEEAW and corresponds to Art. 3 item 1 of FD on the EAW.

According to it, even for a crime, respectively the described in the EAW, to be amnesty occurred in Bulgaria, only this fact is still not enough to refuse the execution of the EAW. Cumulatively, the second condition is that offense to be under the penal jurisdiction of the Bulgarian state, i.e. laid down legal grounds the Bulgarian state can claim that it also has jurisdiction to prosecute and punish the person for this crime. When this is possible is determined by rules of art. 3, 4, 5 and 6 of the Criminal Code. If in any of these hypotheses Bulgarian state can base its claim on its criminal jurisdiction over the crime described in the EAW, only then the judicial authority may investigate whether or not amnesty occurred under Bulgarian law for this crime.

7.1.2. Rule non bis in idem, enshrined as an absolute ground for refusal in the art. 3 section 2 of FD is transposed into art. 39 item 2 of LEEAW. This ground for refusal exists when executing authority is notified that the requested person has been convicted for the same offense for which the warrant is, with an effective sentence of the Bulgarian court or court of a third

Member State and is serving or has served the sentence, or sentence can not be put into effect under the laws of the State, in which he was convicted.

Infringement of the principle non bis in idem is an obstacle for the performance of the EAW, only In case that where competing jurisdiction the person being pursued has already been convicted in the eforcing or another Member State by a final sentence for the offense described in the EAW. In all other cases the order should be executed. Bulgaria closely followed the text of the FD and is introduced as an absolute ground for refusing the principle non bis in idem only in relations between Member States. The same principle in its relations with other countries is optional / optional / ground, in which deciding court may allow execution of the EAW / Article 40 item 3 /.

In practice, the Bulgarian courts often raises the question: when there is a "same offense" for there is a reason for this refusal? Magistrates strictly adhere to the interpretation that the ECJ gave regarding application of the principle non bis in idem in relations between Member States. / S-261/09, S-388/09, etc. S-288/2005/.

7.1.3. Infancy of the person under Bulgarian law – Art. 39 item 3 LEEAW.

This ground for statutory refusal is the result of transposition into Bulgarian law as stated in Article 3 paragraph 3 of the FD on the EAW grounds "because of their age if the person to whom it was issued the EAW, is not criminally responsible for the acts , on which underlies the order warrant, by the law of the eforcing state. "

Under Bulgarian law – art. 32 of the Criminal Code, minors / under 14 years old / are not criminally responsible and they can not be subjects of crime. *Therefore, the act done by such persons did not constitute a crime under the law of the executing State because that has always held refusal to carry the EAW. Although this grounds has always refused to implement the order with the absence of the prerequisites of Art. 2 of 36 sentence 1 LEEAW, dual criminality of the offense, it is stated as an explicit basis that serves and where the verification of double criminality of the crime is excluded from the jurisdiction of the executing authority article 36 paragraph 3 of the Act .*

7.2. Optional grounds for refusal.

Provided in Art. 4 of the EAW FD facultative grounds for refusal to carry the EAW are regulated by art. 40 of the bulgarian law, which strictly followed the text of the Framework Decision.

7.2.1. Prosecution against the person in Bulgaria for the same offense for which the EAW was issued – article 40 item 1 of LEEAW.

According to Art. 40 item 1 of LEEAW, Bulgarian court may decide to refuse the implementation of the EAW, when "before receiving the order for the offense for which it was issued, the person is involved as an accused person in Bulgaria." Benchmarking the norms of Article 4 par.2 of FD and art. 40 item 1 of LEEAW indicates that the Bulgarian provision has a more narrow scope, because it provides not only the conduct of prosecution as grounds for possible rejection, but at least the attraction of the person being charged or shall to be defendant. This means that the mere fact of existence of criminal proceedings is not ground for refusal.

7.2.2. Termination in Republic of Bulgaria of criminal proceedings for the offense for which the warrant is issued, prior to its receiving.

This text of Art. 40 Paragraph 1 item 1a of LEEAW requires an "same offense" in the EAW in national criminal proceedings. In order to be applicable this ground for refusal concerning this crime, which is the same as described in the order, in Bulgaria should have been criminal proceedings and it should be terminated. Without any legal relevance are the grounds, on which the termination was made, but it must have happened before receiving the the EAW in Bulgaria, but not thereafter. The rationale rests on the understanding that once a country / the enforcing or the requested / determines that according to the law should not continue the prosecution of a crime, then its decision-making body should be free to decide whether to allow another country, under whose laws have not occurred winding grounds, to carry out prosecution against the person for the same crime, or to give greater weight in its criminal jurisdiction in the case and to refuse to surrender of the person.

The provision of Article 40 paragraph 1 of item 1a LEEAW is applicable only in cases of termination of criminal proceedings, but not in cases of refusal of the prosecutor to institute such proceedings. This follows both from a literal interpretation of the norm, and from its comparative interpretation with that of Article 4 paragraph 3 of the FD on the EAW. In the latter expressly provides that the optional ground for refusal can occur when "the judicial authorities in the executing Member State have decided not to conduct proceedings for the offense on which the EAW is based." It is apparent from the norm that basis is an alternative to "the ruling to stop proceedings", which means that these are two separate grounds. Bulgarian

legislation, however, considered that would not benefit from the refusal of the Bulgarian judicial authority to institute criminal proceedings for the same offense as grounds for refusal under Article 40 of LEEAW, so even if you found such a circumstance, it can't be a ground to refuse to surrender the person.

The Bulgarian law is introduced as a ground for refusal and an opportunity provided in Art. 4 par.3 third alternative: "If a Member State has given final judicial decision on the person sought for the same offense, which prevents further prosecution." Not taking the first and third alternatives of article 4 paragraph 3 of the FD on the EAW into national law means that Bulgarian law does not treat them as grounds for refusal and their presence will not allow the authorities to refuse to execute the EAW. This is not a legal disadvantage as it comes to the optional grounds for refusal, which each State may consider whether to introduce into their national legislation or not. Not taking them essentially extends the feasibility of surrender by the Bulgarian court, which is in favor of judicial cooperation between Member States based on mutual trust.

7.2.3. Limitation for prosecution or execution of sentence.

This ground under Article 40 paragraph 1 item 2 of LEEAW literally transposes the provisions of Art. 4 par.4 from FD on the EAW. Both applicable is limitation period for prosecution, and the limitation period for execution of a sentence, which means that it will apply those rules of national law which are relevant according to the purpose of the request for surrender – to judge or to serve the already imposed penalty verdict.

7.2.4. The principle of non bis in idem with regard to the punishment imposed in a country outside European Union.

The wording of this ground for refusal under Article 40 paragraph 1 item 3 LEEAW repeats verbatim that of Article 4 from par.5 FD on the EAW.

The law uses a similar grounds in art. 39 item 2, where the rule non bis in idem, however, is mandatory ground for refusal to carry out the arrest warrant. The difference between the two rules consist solely in the fact that in item 2 of Art. 39 LEEAW principle non bis in idem applies only in case of conviction for the same offense, but given in a Member State of the EU, while Art. 40 para 1 item 3 this Act generally applies to a conviction for the same crime, but in a non-member country.

All other prerequisites for applying this ground for refusal fully coincide with those laid down in Art. 39 Item 2 of the Law.

7.2.5. Nationality or residence of the person in Bulgaria as a basis for refusal to surrender.

According to the regulation of such in the art. 40 para 1 item 4 in LEEAW, court may refuse to execute an EAW if "the person sought resides or is resident in the Republic of Bulgaria or a Bulgarian citizen and Bulgarian court agrees to enforce the sentence by the prosecutor "imprisonment" or detention of the person imposed by the court of the issuing Member State."

This ground for refusal is applicable only in one of the hypotheses of the EAW issue – if it is to serve their sentence in the issuing Member State, so it has ordered an effective sentence to be enforced.

The grounds, on which a person has Bulgarian citizenship, is without any significance for the application on that ground – whether by birth or naturalization. It is assessed at the time of receipt of the EAW.

The quality of a person "resident in Bulgaria" is determined by national law – Article 25 of the Foreigners Act in Bulgaria.

The third category of persons who can benefit from this ground for refusal are "those living" in Bulgaria. These are all people who do not fall within the previous two categories but still have some residence in the country. This category is always a question of specific factual assessment of the deciding court. In assessing, the Bulgarian courts benefit from the interpretation made by the the ECJ decision in "Szymon Kozlowski" – C-66/08.

In the way of bringing the punishment of "imprisonment" or detention of a person in pursuance of the foreign sentence, the Bulgarian law has provided a special procedure laid down in Article 44 paragraphs 8–12 from LEEAW.

According to them, considering that will benefit from optional ground for refusal under Article 40 paragraph 1 item 4 of LEEAW, with its decision the court agrees to enforce the punishment of "imprisonment" or detention of the person. Once the decision on refusal to carry the EAW came into force, a copy thereof shall be sent to the Regional Prosecutor's Office at the location of the person, from which a prosecutor must submit a proposal to the appropriate district court to enforce the sentence of "imprisonment"

or another measure requiring the detention of the person. This proposal is considered by the court pursuant to art. 457 para 2–5 of the CPC.

7.2.6. Territorial application clause.

The provision of Article 40 paragraph 1 item 5 of LEEAW provides two situations in which it is possible to refuse execution of the EAW.

The first concerns cases in which the offense, for which EAW was issued, is committed wholly or partly within the territory of Bulgaria. Obviously, in case it comes to competing jurisdiction between the issuing and executing States. The latest claims jurisdiction over the territorial principle, as the issuing would base its jurisdiction on any ground under its domestic law. It is not necessary the enforcing State to has taken any concrete action to implement its jurisdiction. It is enough that it is potentially possible. Where some elements of the offense took place on the territory of the executing state, and another – in the issuing, will be within the discretion of the executing judicial authority where they will be most effective investigation of crime and therefore may decide to prioritize criminal jurisdiction of the issuing country.

The second hypothesis provides the possibility of executing State to refuse to execute EAW if the offense for which the warrant is issued, was committed outside the territory of the issuing Member State and the Bulgarian legislation does not allow prosecution for such offenses committed outside the territory of Bulgaria.

In general, most judges believe that the clause is incompatible with the territoriality principle of mutual recognition. The envisaged option to refuse because the offense is committed wholly or partly within the territory of Bulgaria, is unjustified. Thus allowing people to abuse by their own signal that their criminal activity is carried out in Bulgaria. Therefore, in the event of a conflict of interest between two Member States is necessary the exercise of jurisdiction to be coordinated by direct contact between the authorities and thus can be avoided controversy, and the offender to go unpunished. Coordination could be carried out by Eurojust, as well as by EJN.

Both cases of refusal to carry the EAW provided within this ground are very seldom applied in practice by the Bulgarian courts.

7.2.7. Recently a substantial change in the grounds for refusal to carry the EAW was made. It was introduced with LEEAW Amending /, OJ. 55/ 19.07.2011 on /, and in force since 23.07.2011. In practice was created a new

optional ground for refusal in the provision of Art. para 2 from 40 LEEAW – in absentia conviction of the person. This, according to Art. 5 FD on the EAW and art. 41 para 1 of LEEAW, recently represented the guarantee, which had to be required and correspodingly given in the performance of EAW, on which was rendered in absentia conviction of the person whose surrender is sought. 2009/299/JHA Framework Decision of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA with thereby enhancing the procedural rights of persons and fostering the principle of mutual recognition of decisions rendered in the absence of the person during the trial, however, required a change in national law under which in cases of conviction in absentia is no longer necessary to require a guarantee for a retrial in the issuing state, but it will be optional ground for refusal. Article 2 of this Framework Decision Member States shall take the necessary measures to comply with its provisions to 28.03.2011. Bulgaria do so with some delay, but change is now in force and conviction in absentia of the person does not impose a requirement of guarantees from the issuing country and on general grounds is reason for refusal to carry the EAW.

Q8. To what extent are there gaps in the protection of fundamental rights in Member States of an AFSJ based on the mutual recognition of judicial decisions in criminal matters?

The reference to fundamental rights in the instruments of mutual recognition should not be construed as enabling the executing authority to monitor compliance with human rights in the proceedings in the issuing Member State and as a confirmation of these values in the legal instruments EU cooperation in criminal matters.

The fact that all EU member states are parties to the European Convention on Human Rights that are bound by art. 6 of the TEU, fixing the basic principles of law and the Charter of Fundamental Rights of Citizens in the EU, contributes to the establishment of common minimum standards to protect the legitimate rights of participants in criminal proceedings. The issuing authority must ensure the possibility of exercising these rights of the person concerned, in accordance with all national and supranational instruments attached.

Compliance with the rights of the accused or defendant in accordance with differences in national legislation should not impede the achievement of cooperation in criminal matters. Existing trust in the legal systems of the

Member – States exclude the possibility observance of fundamental rights to be ground for refusing recognition and enforcement of a judicial decision given in another Member State. However, there are though fewer cases where a refusal of Bulgarian judicial decision, usually EAW, on the ground that the procedural rights of the person in Bulgaria will not be guaranteed. Bulgarian judicial authority is not used until now such ground for refusing mutual cooperation with other judicial authority of a Member State.

The presence of such reasoning in the judicial acts indicates of still existing in some cases, incomplete build trust between judicial authorities of the Member States, which is obviously an obstacle to mutual recognition. This requires the adoption of accompanying measures to support and facilitate mutual recognition. In this connection, it should focus on training of magistrates to improve and update knowledge of European lawas well as to explore the different legal systems within the EU.

Q9. To what extent is it necessary for the EU to adopt minimum standards on the rights of the defendant in order to accompany the operation of the European Arrest Warrant system?

Mutual trust is based on trust between Member States, that decisions, which have to be recognized and enforced, always be ordered in accordance with the principles of legality, subsidiarity and proportionality, and the ensure compliance with basic human rights. Only with such confidence, based of trust between the issuing and executing authorities, the latter would accept the stipulated act as their own and the would take action on its implementation. In order to be achieved this, it is obvious that confidence is still under construction, where there is a general provision for all Member States. In this regard it is necessary to continue operations and to undertake new programs to establish uniform minimum standards for the rights of the accused / defendant /, in all EU countries. Despite the presence of enumeration of such rights in various supranational legal instruments – the ECHR, the Charter of Fundamental Rights in the EU, it is obvious that a single consolidated instrument would establish criteria and limits of assurance of fundamental rights. Therefore the European Commission proposal for a Framework Decision on certain procedural rules, as a means to facilitate mutual recognition within the EU in 2004, should be further developed and implemented. This will be a significant step forward made in respect of the rights of defendants in criminal proceedings, which will inevitably reflect on the execution of a EAW and other forms of cooperation

in criminal justice. It would be good to settle the following basic rights of the accused: the right to legal assistance prior to the trial and during the trial, the right to interpretation for persons who do not speak the language of the proceedings, which is free for them, protect and special care for persons who can not understand the meaning of proceedings – people with physical or mental disabilities, as well as immature age, who because of their physical, psychological or mental condition are not on an equal footing with others, which requires caution in respect for their rights, special communications to non-residents of litigation – liaising with the consular office of the state whose citizens they are, in the case of reluctance on their part about that, to help him in carrying out contacts with humanitarian organizations, compiling a list of rights-short but comprehensive catalog rights, common to the defendants in all Member States to be served on the defendant understands his language.

Bulgaria has transposed the Directive 2010/64/ES on the right of interpretation and translation in criminal proceedings, the deadline for transposition into national law of Member States to 27/10/2013 . It's provided a new paragraph to Art. 55 of the Criminal Procedure Code governing the fundamental rights of the accused in criminal proceedings, expressly provides that where the accused does not speak Bulgarian, to him is given a translation of the decree for constitution of the accused, the rulings of the court to impose detention on indictment, the sentencing and the decision of the appellate court on understandable to him language. This provision is effective from 04/28/2011

Providing interpretation in criminal proceedings and the procedures, securing international cooperation, has not created any practical problems before the amendment of the law, while not be expected to occur thereafter. It is undisputed in the Bulgarian criminal trial, that the involvement of an interpreter is always necessary if the person, against whom the trial has been taken, does not speak Bulgarian, which is the official language of the proceedings under the Constitution. The court is the one who must monitor not only the appointment of an interpreter, but also the quality of translation – actually provides adequate quality and the procedural aspects of translation, to ensure compliance with all rights of the person. It is not controversial in any doctrine or practice that the translation is free for the person / law of the ECHR art. 6 par.3 lett. "F" /. The amendment to the law transposing Directive 2010/64, just make a statement of such acts, whose translation is required.

PART III: Data collection and exchange and data protection

E. Data Retention

Q10. What has been the impact of the EC data retention Directive (Directive 2006/24/EC [2006] OJ L105/54) on the legal orders of EU Member States?

***Rapporteurs* are invited to consider:**

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

The Directive 2006/24/EC has been transposed into the Bulgarian legal framework in January 2008 by the Regulation for the Categories of Data and the Procedure for their Keeping and Transfer from Enterprises Providing Electronic Communication Networks and/or Services for the needs of National Security and Detection of Crimes, published in State Gazette No 9 of 29 January 2008 (data retention regulation). The regulation was adopted by the Minister of Interior and the President of the State Agency for Information Technologies and Communication on the basis of Art. 251, para.2 of the Electronic Communications Act. Article 3 of the data retention regulation defined the categories of traffic data subject to retention, while Article 5 provided access to the data for the law enforcement authorities and secret services. Paragraph 1 of this provision determined that direct technical access to the data is provided to a special unit in the Ministry of Interior for the purposes of the operational research. This access was realized in the manner of a "passive access through a computer terminal". According to paragraphs 2 and 3 of Art. 5 of the regulation the law enforcement authorities and security services were enabled to obtain access to the data after the submission of written request. In all these cases there was no requirement to obtain a court warrant for the access to traffic data.

The direct access to traffic data enabled by the data retention regulation raised concern among the society. NGOs, civic groups and blogers organized protests. The NGO Access to Information Program (AIP) launched a case before the Supreme Administrative Court (SAC), claiming that Art. 5 of the regulation violates Art. 32 and 34 of the Constitution guaranteeing the right to privacy and the freedom of correspondence, and Art. 8 of the European Convention of Human Rights (http://aip-bg.org/pdf/naredba_40_jalba_pdi.pdf). While the three-member court panel rejected the claim, the case was

reconsidered by a five-member panel of SAC on cassation appeal submitted by AIP (http://www.aip-bg.org/documents/data_retention_campaign_eng.htm). With its decision as of 11 December, 2008, the five-member panel of the SAC repealed both the decision of the lower instance court and the provision of Art. 5 of the challenged Regulation (http://aip-bg.org/pdf/reshenie%2013627_december%2008.pdf).

The court ruled that the provision did not set any limitations with regard to the data access by a computer terminal and does not provide for any guarantees for the protection of the right to privacy stipulated by Art. 32, Para. 1 of the Bulgarian Constitution. No mechanism was established for the respect of the constitutionally granted right of protection against unlawful interference in his private or family affairs and against encroachments on his honor, dignity and reputation.

The court also found that the text of the Art. 5 of the Regulation, providing that the investigative bodies, prosecutor's office and the court shall be granted access to retained data "for the needs of the criminal process", the security services – "for the needs of the national security", does not provide limits against violations of constitutionally granted rights of the citizens. Reference to specialized laws – such as Penal Procedure Code, Special Surveillance Means Act, Personal Data Protection Act, which specify conditions under which access to personal data shall be granted, was not provided either.

Furthermore, according to the court, Art. 5 of the Regulation contradicts the provision of Art. 8 of the European Convention on Human Rights, according to which everybody has the right to respect for his private and family life, his home and his correspondence and the interference of the state in such matters is unacceptable. The exemptions from that principle are exhaustively listed by Art. 8, Para. 2 of the Convention requiring that they are: "in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The court emphasized that national legal norms shall comply with that established principle and shall introduce comprehensible and well formulated grounds for both access to the personal data of citizens and the procedures for their retention. Article 5 of the Regulation lacked clarity in terms of protection of the right of private and family life which contradicted the provision of Art. 8 of the ECHR, the texts of the Directive 2006/24/EC, and Art. 32 and 34 of the Bulgarian Constitution (http://www.aip-bg.org/documents/data_retention_campaign_11122008eng.htm).

A number of initiatives to restore the direct access without a court permission were undertaken after the December 2008 SAC Decision. Legislative amendments in the Electronic Communications Act (ECA) were introduced in the Parliament which subsequently rejected them few times in 2009 and 2010. The procedures were accompanied with a strong public debate, protests and active participation of civil society groups and NGOs in the parliamentary committees' discussions (http://www.aip-bg.org/bulletin/72/01.htm). Finally in 2010 the Parliament abandoned the idea of "access through a computer terminal" and imposed strict obligations on telecommunication companies and internet providers for timely supply of traffic data under request. The amendments in ECA were published in State Gazette No 17 of 2010 and came in force on 10 May 2010. According to Art. 250a, para.1 of ECA data should be kept by the companies providing public e-communication networks and services for a period of 12 months and should be destroyed after its expiration (Art. 250a, para.4). Access to the data retained could be requested only by the authorities listed in Art. 250b, para.1 of ECA after permission by the president of the respective district court or a judge authorized by him (Art. 250c, para.1). According to Art. 250a, para.2 retention and access to the data is permitted for the purpose of the detection and investigation of grave crimes and computer crimes (Art. 319a–319e of the Criminal Code), and for the detection of individuals.

The companies providing public e-communication networks and services should be prepared to receive requests by the competent authorities seven days a week, 24 hours a day. They should provide access to the data requested promptly, within a period no longer than 72 hours (Art. 250d, para.2). The Commission on Personal Data Protection supervises the implementation of the obligation to retain and provide access to data. It collects information on yearly basis from the companies providing public e-communication networks and services and provides statistics to both the European Commission and the National Parliament. According to Art. 261b a Parliamentary committee is responsible for control and monitoring on the processes of access permission and access provided as well as on the protection of the rights and freedoms of the citizens in the course of the traffic data access. The current Parliament appointed in 2010 a sub-committee to the Parliamentary Legal Issues Committee to deal with the matter. It is empowered to collect and request information from public authorities and

to do inspections. It can enter the premises of both the public authorities and companies providing public e-communication networks and services. If violations of the law are established, the sub-committee informs the public prosecutor's office and the heads of the authorities and companies involved (Art. 261b, para.4), as well as the citizens affected in the cases of unlawful access to their data (Art. 261b, para.5).

In January 2011 the press reported about internal guidelines issued by the Prosecutor General in summer 2010, which interpret ECA as not requiring permission by judge in cases when data retained are requested for the purposes of criminal investigation (http://www.dnevnik.bg/bulgaria/2011/01/20/1028582_sledeneto_na_telefoni_i_internet_bez_sudeben_kontrol_e/). The provision of Art. 250b, para.4 of ECA supports such understanding, but the latter opens the door for massive police use of traffic data without a court warrant. Indeed, the 2011 report of the responsible Parliamentary sub-committee shows that 18,934 requests submitted to the companies were subject to court warrant and 29,688 were not as related to criminal investigation. This statistics reveals huge disproportionality between the regimes of access dependent on the purposes of access to traffic data. In fact, in the majority of cases these are the same authorities who request access and there is not a rational reason to have court permission only in part of the cases and to lack it in another part of them.

The Bulgarian case shows that the data retention Directive is often used at national level to enable easy and unwarranted access of law enforcement authorities to traffic data. This raises concern under Art. 8 of the European Convention of Human Rights. Indeed, the society and courts in Bulgaria demonstrated activeness and diligence respectively to the issues, but still the positive and negative impact of the data retention is to be assessed and analyzed in the future.

F. *Exchange of Information between National Authorities*

Q11. What has been the impact of EU measures facilitating the exchange of personal data between national police and judicial authorities on the legal orders of EU Member States?

***Rapporteurs* are invited to consider:**

- the challenges that the above mechanisms of data sharing pose to fundamental rights;

- the national implementation of the 'Prьm' Decision (Decision 2008/615/JHA [2008] L210/1); and
- the national implementation of the exchange of criminal records and the European Criminal Records Information System (ECRIS) (Decisions 2005/876/JHA [2005] L322/33 and 2009/316/JHA [2009] L93/33 respectively).

According to Art. 385, para.1 of the Judicial Power Act (JPA), published in State Gazette No 64 of 7 August 2007 the information exchange of the judiciary activities is to be provided by the Supreme Judicial Council, who cooperates on that matter with the Ministry of Finance, Ministry of Regional Development and Urban Planning as relates access to the central citizens' register, National Statistics institute and Bulgarian Standardization Institute. The manner of data providing could be also by electronic means where the requirements and condition of the Personal data Protection Act should be complied with.

The provision of Art. 385, para.1 of the JPA delegates to the Minister of Justice and the Minister of Regional Development and Urban Planning the power to adopt a regulation on the issue of access to the citizens' register. Following this obligation they adopted Regulation No 14 of 18 November 2009 regarding the procedure and manner of judiciary authorities' access to the national data base containing data of the population (the citizens' register), published in State Gazette No 94 of 27 November 2009. The provision of Art. 5, para.3 of the regulation defines broadly the purposes of access as related to the performance of the judiciary authorities' official duties. The access is provided also in electronic manner through a computer interface (Art. 3, para.3). The access should be provided only for persons authorized by the administrative head of the respective judicial authority (Art. 5, para.2). However, it turned that the system of access is not well secured as the PDP Commission issued a decision in 2011 where it found the Prosecution Office violated the requirements of the Personal Data Protection Act.

In the course of the efforts to join the Schengen system Bulgarian Parliament amended the Ministry of Interior Act (MIA). Two new sections were included in Chapter 13 of MIA, the first of them entitled Information of Data Exchange with competent authorities of states that are members of the European Union with the Purpose of Prevention, Detection and Investigation of Crimes. The second new section sets the national Schengen information system. The law explicitly refers to the application of the Personal Data Protection Act.

In conclusion, the new provisions in the legislation related to personal data exchange lead to new challenges of the system and its resistance to disproportionate data processing and abuses. The personal data protection standards are applicable at least on paper, but it is still to be monitored how they are implemented in practice.

G. *Passenger Name Records*

Q12. To what extent is the collection and transfer of passenger name records (PNR) compatible with the protection of the rights to private life and the protection of personal data?

***Rapporteurs* are invited to consider in particular:**

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

The Bulgarian legislation and in particular the Civil Air crafting Act does not provide PNR systems and there are not any official data confirming that such systems and data bases exist. Of course, PNR data collected and held in the carrier's reservation and passenger control systems could be used in a non-systematic manner for the purposes of concrete crime investigations. The legal basis for this is Art. 159 or Art. 160 of the Criminal Procedure Code.

According to the personal data protection legislation in force, PNR data could be systematically collected, kept and processed only on the basis of law, provided that it prescribes the purposes for processing and the procedure for collection and access (see mutatis mutandis the SAC decision from 11 December 2008 on the data retention regulation case, described above). According to the Directive 95/46/EC, Convention 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data and the Personal Data Protection Act any personal data processing should be with specified purpose and proportional to the achievement of that goal. It is dubious however whether systematic collection and processing of these data would be proportionate to the aim to do analysis and criteria assessment as suggested in the proposal for PNR Directive.

H. *Data Protection*

Q13. To what extent does EU law and its implementation currently provide sufficient safeguards to ensure that the right to private life (as enshrined in the ECHR and the Charter of Fundamental Rights) and the right to data protection (as enshrined in the Charter) is fully protected in the development of the EU as an AFSJ?

***Rapporteurs* are invited to consider:**

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

Apart from the obligation for personal data protection flowing from the EU law Bulgaria is a party to the two Council of Europe binding instruments related to the matter, the European Convention of Human Rights (ratified on 31 July 1992, in force since 7 September 1992, published in State Gazette No 80 of 2 October 1992) and the Convention No 108 of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data (ratified on 29 May 2002, in force since 1 January 2003, published in State Gazette No 26 of 21 March 2003). According to Art. 5, para. 4 of the Bulgarian Constitution the international treaties ratified, published and in force are considered part of the national legislation and are take precedence to the domestic laws that contradict them (available at: http://www.parliament.bg/en/const).

Apart from the direct application of Convention No 108 of 28 January 1981 and Art. 8 of the European Convention of Human Rights in the national legal framework, the EU law on data protection is further implemented by the Personal Data Protection Act (PDPA), published in State Gazette No 1 of 4 January 2002, in force since 1 January 2002, last amendment published in State Gazette No 39 of 20 May 2011 (text available in English at: http://www.aip-bg.org/pdf/pdpa.pdf). According to Art. 2, para. 1 of PDPA personal data is defined as any information pertaining to a natural person, who is identified or identifiable directly or indirectly by personal identification number or one or more specific factors. Data controllers are

required to register kept with the Commission on Personal Data Protection (PDP Commission). In 30 June 2011 there are 113,012 registered data controllers (PDP Commission newsletter No 4 of July 2011 available at: http://www.cpdp.bg/?p=element&aid=342). The "fair data principles" related to the quality of data as contained in Art. 6 of Directive 95/46/EC and Art. 5 of Convention No 108 are reflected in Art. 4 of the PDPA. The processing of special categories of data, such as data related to race origin, political opinions or religious or other beliefs, data concerning health or sexual life and others is subjected to a stricter regime (Art. 5, para.1 of PDPA). Thus Art. 6 of Convention No 108 is safeguarded. The PDP Commission supervises the implementation of the law. It has also some functions under other laws involving personal data protection issues. It considers signals and complaints and takes decisions with instructions or imposes penalties. Its decisions are subject to judicial review before the Supreme Administrative Court.

PDPA applies also to data processed for the purposes of defense, national security and public order as well as for the purposes of criminal investigation except in cases where a special law is applicable (Art. 1, para.5 of PDPA). Thus the law represents also an instrument for the implementation of the Framework Decision on data protection. PDPA applies also to data processed under the obligations stemming from the Schengen Treaty. All the fundamental rights of data subjects are exercisable also with respect to that kind of information, including the right to enforce them before the courts. Information addressed to citizens is published on the PDP Commission website (http://www.cpdp.bg/?p=element&aid=297).

Since its adoption in 2002 the PDPA has been improved. Personal data protection was a new piece of legislation that time for Bulgaria and the first version of the law contained contradictory and even controversial and inconsistent provisions. For example, the first definition of "personal data" included individuals' "public identity" and data related to their membership in management or supervisory board of companies. The right balance between privacy and publicity was stroke in 2005, when these provisions were removed. Nowadays special laws provide more publicity of some categories of data related to public officials such as information about their income and assets etc.

The PDP Commission works actively to implement its duties. There are thousands of registered data controllers and the register is public online. The commission deals with cases and undertakes inspections for compliance

with the law. A number of decisions and statements have been delivered on different questions related to data protection. There is practice on video surveillance, employment data collection, information of criminal convictions or minor offences committing, medical data, telecommunication data issues, processing of data for the purposes of law enforcement, tax collection, direct marketing etc. The Commission publishes its practice online (http://www.cpdp.bg/index.php?p=rubric&aid=3). In 2010 it delivered more than a hundred decisions on individual complaints.

It turns to be more difficult to set balance between the personal data protection and national security. For example, in 2003 the Ministry of Interior denied a former officer access to information kept about him on grounds of national security (http://www.aip-bg.org/library/dela/yonchev.htm). The case is not one of a kind. The denial was challenged in the Supreme Administrative Court and after years of litigation the denial was finally confirmed by SAC. An application is submitted to the European Court of Human Rights. In another case involving video surveillance during protests, the Ministry of Interior registered as video surveillance controller in 2009 only after a media publication and PDP Commission instruction. In 2011 media found that certain security services have not registered as data controllers using video surveillance even in 2011.

One of the biggest concerns in the Bulgarian society within the last decade is related to the overlapping of communications for the purposes of national security and investigation of crimes. Both the great number of interceptions permitted and the quality of the Special Surveillance Means Act (SSMA), published in State Gazette No 95 of 21 October 1997 turned to be problematic. The European Court of Human Rights (ECtHR) found the law itself in its quality does not meet the standards set forth in Art. 8 of the European Convention of Human Rights and the practice of the European Court of Human Rights. A number of findings in this respect were made in Decision of 28 June 2007 on the case of Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria, which became final 30 January 2008 (application No 62540/00) and in Decision of 22 May 2008 on the case of Kirov v. Bulgaria, which became final 22 August 2008.

In particular, the ECtHR found in the case of Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria that SSMA did not provide for any review of the implementation of secret surveillance measures by an independent body or official (§ 85), no independent body verified the compliance with the warrants to use surveillance means,

whether they faithfully reproduce the original data in the written record and whether the original data was destroyed. The lack of clear procedures regulating the manner of screening of the intelligence obtained, the lack of obligation to inform the judge of the results of the use of special means, the lack of regular report of the Minister of Interior to an independent body (§ 88), the lack of notification of persons subjected to secret surveillance at any time and under any circumstances are the main problems among others which the ECtHR found in this decision. In Kirov decision the ECtHR put more emphasis on the issue of informing the citizens.

Responding to the ECtHR practice the Parliament amended SSMA, State Gazette No 109 of 23 December 2008. However, in the beginning of 2011 statistics was made public that 15,864 intercepts were permitted and used in 2010. The number was confirmed several months later by the responsible Parliamentary sub-committee. The information raised concern in the society as the number reported was considerably bigger than the number for the years 1999–2001 which was already noted as problematic in the Decision on the case of Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria. Active public discussion was held in the first half of 2011 including a public hearing in the Parliament in February, without clear results (http://www.parliament.bg/bg/parliamentarycommittees/members/336/documents).

In conclusion, the processing of personal data and the use of special surveillance means in Bulgaria is still to be put under better control and supervision by the national authorities exercising independent oversight.

PART IV: Constitutional aspects

Q14. To what extent have domestic courts used general principles of EU law (in particular indirect effect in the light of *Pupino*) when interpreting national legislation implementing EU criminal law?

Taking into account that relations in the field of criminal judicial cooperation until recently were regulated mainly by framework decisions, and in the future – by means of directives, it is essential to their implementation is therefore the principle of interpretation / interpretation conformal /. This principle requires national authorities to interpret national rules relating to the application of an act of EU law in the light of in the act. set permissions In Bulgaria did not have far to resort to this method of interpretation, unless it is found in the transposition of EU acts is to cause discrepancies or gaps

in national legislation. Generally, however, are acceptable all interpretive methods and conformal interpretation, if necessary, would be one of them. The courts, however, know and apply the practice of CEC in the field of judicial cooperation in criminal matters and apply it to solve cases. The National Institute of Justice conduct both an initial and ongoing training in EU law, as one of the modules is a "Judicial cooperation in criminal matters." In this area are conducted both centralized and regional training and for three years – and distance education. Has been developed a section on the website of the National Institute of Justice, dedicated to the judicial cooperation in criminal matters with subsection, dedicated to the EAW, which is constantly updated, and where is published as CEC decisions concerning area of freedom, security and justice as well as of national courts in the field of judicial cooperation in criminal matters.

Q15. To what extent does the entry into force of the Lisbon Treaty address deficits in theimplementation of Union law and the protection of fundamental rights in the development of the EU as an AFSJ?

Account that the harmonization of elements of Criminal proceeding's law or features of certain criminal acts continue to be implemented through directives, special emphasis should be placed on the consequences arising from the application of the principles of EU law through this instrument.

Putting the third pillar under the general formula control, exercised by the Court of Justice, will provide an opportunity for the Court to rule on compliance with EU law of the acts and actions of national authorities in proceedings for infringement of art. 258–260 TFEU in which the Court to review whether an act or action of a Member State shall respect the principle of proportionality. Regardless of the suspensory five-year transitional period established by Art. 10 Protocol № 36 of the Treaty of Lisbon, in the near future that jurisdiction will fully unfold. This implies great accuracy in advance by the competent national authorities in the transposition of directives in the area of freedom, security and justice, which must be not only promptly, but also adequate and proper. Compliance with these requirements by all Member States to avoid driving of the mechanism under Art. 258–260 TFEU against any of them, is a guarantee for the harmonization of substantive and procedural criminal law and accelerating cooperation in this field.

As a result of the unfolding of the Court's jurisdiction, significantly expands the ability to protect the rights and interests of individuals in

different situations of adoption and application of acts of EU law in the criminal matter. On the one hand, the future individuals will be able to attack European acts in the field of criminal cooperation on the general procedure of art. 263, par. 4 TFEU. On the other, with elimination of the possibility for Member States to restrict the jurisdiction of national courts to submit questions for preliminary rulings in matters of criminal and criminal procedural law, either as generally exclude this possibility, or as making it limited to courts, tribunals in the last instance, shall be increased the possibility of direct cooperation between national courts and the CEC.

In connection with the transitional period of five years provided by the Lisbon Treaty and the fact that until now the Republic of Bulgaria has made a declaration under Art. 35 of the Treaty on European Union, is appropriate Bulgaria to accept the jurisdiction of the Court of Justice to give preliminary conclusions on the acts concerning freedom, security and justice. The government is willing to make a declaration under Art. 35, paragraphs 2 and 3, lett. "b", exactly to assume that any court in Bulgaria may ask the Court of Justice to give preliminary rulings on the issue in the field of police and judicial cooperation in criminal matters.