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Portuguese Report

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4 Main findings/Executive summary

To the exception of the Directive (EU) 2016/800, on juvenile defendants, Portugal did not enact new legislation with a view to implementing the Directives on procedural rights, since existing legislation was deemed to ensure full compliance. This, in turn, seems to project itself on two levels. On the one hand, and in contrast with EU instruments that have been explicitly implemented (notably, on mutual recognition), the Directives received very scarce attention in legal literature.[1] Likewise, case law only seldom makes explicit reference to the Directives – and often only to evince the view that their norms were already covered by pre-existing national norms – and even more seldom do they engage in actual reflection on the correspondence between the former and the latter, or on the interplay between EU law and national law more generally.[2] Consequently, the assessment presented in this report reflects to a large extent the perspectives of its authors and their own interpretation of the relevant legislation.

In this section we present the main findings obtained through the desk research that was carried out, extracting and summarising the main findings on each of the Directives, which are analysed in further detail in subsequent chapters. Apart from the Directive (EU) 2016/1919, on legal aid, implementation problems have been identified in relation to all the Directives. The implementation deficit is, in some cases, merely partial. In other cases, we find provisions that lack implementation entirely.

4.1 Directive 2010/64/EU

The majority of the norms of this Directive are sufficiently covered by previous legislation, but this is not true for all of them, notably those concerned with the quality of interpretation and translation, and with the control of such quality, more specifically, Articles 2 (6), 3 (8), 5 (2) and 6.

This is one of the Directives regarding which more case law has been identified as relevant, with 23 rulings. However, only seldom is the Directive explicitly mentioned in this case law – and even so it is perhaps the Directive that received more explicit references. In any case, they generally serve only to evince the view that Portuguese law already provided for the rights at issue. Diverging case law has however been issued by the High Court of Évora. In our view, some of the opinions put forward there may be deemed as an overstatement, but they contribute to lighting the debate about whether or not the standards of Portuguese law on translation and interpretation comply with the ambitious standards set by the Directive, a discussion that has no equivalence regarding the other Directives.

[1] One of the few or indeed the sole work integrally devoted to the EU agenda on procedural rights is Pedro Caeiro (org.), *A Agenda da União Europeia sobre os Direitos e Garantias da Defesa em Processo Penal: A 'Segunda Vaga' e o seu Previsível Impacto sobre o Direito Português / The European Union Agenda on Procedural Safeguards for Suspects or Accused Persons: the "second wave" and its predictable impact on Portuguese law*, Coimbra : UCILeR, 2015.

[2] In the course of this study, 80 decisions were assessed, which were proffered by the Constitutional Court, the Supreme Court of Justice, or one of the five High Courts. The latter intervene in criminal matters as a second jurisdiction (that is, as a first appeal court), which means that virtually all relevant issues are brought to discussion before them. In one of those decisions the most relevant aspects lie in a Dissenting Opinion attached thereto, rather than in the decision itself. On the other hand, one of the decisions was uttered by an Administrative Court. Finally, there is a Recommendation by the Ombudsman that also seemed relevant. Only 14 of those 80 decisions make explicit reference to the Directives, but 9 of them were proffered in 2019 or later, which may suggest increasing judicial attention towards the Directives.

4.2 Directive 2012/13/EU

As for this Directive, our view is, again, that most, but not all of its norms has sufficient backing in previous legislation. The identified problems relate to Article 4 (2) (a), (c) and (d), Article 4 (4) in conjunction with Annex I, and Article 5 (2) in conjunction with Annex II. These provisions concern the Letter of Rights to be provided upon arrest and in the context of EAW proceedings.

18 rulings were identified as relevant for this Directive, but only rarely is it explicitly referred to, and often only to state that national law already provided for the relevant rights. The High Court of Évora held that the Directives can have direct effect in the Portuguese legal system, but the High Court of Lisbon has subsequently delivered case law that vehemently points in the opposite direction.

4.3 Directive 2013/48/EU

Not all of its norms of this Directive have sufficient backing in existing legislation either. In fact, this is, in our view, the Directive with the poorest implementation levels and regarding which the need of legislative intervention is the highest. Many such deficiencies are arguably not very intense, in that only some normative dimensions of the relevant provisions lack implementation. However, they are numerous: Article 3 (2) (a) and (b), on the procedural moments and acts in or as of which the person concerned should be provided with access to a lawyer; Article 3 (3) (a), Article 5 (3) and (4), Article 8 (1) (c), on the issue of temporary derogation of rights, which seems to conflict with the national provision according to which, in cases of terrorism and violent or highly organised criminality, the arrested person, prior to the first judicial interrogation, may be prevented from communicating with anyone, save for the lawyer; Article 7 (2), on the right to be visited by consular authorities, to converse and correspond with them and to have legal representation arranged for by them; Article 9, concerning waiver of rights; and Article 10 (4) and (5), on the duty of the executing Member State (MS) in EAW proceedings to inform requested persons that they have the right to appoint a lawyer in the issuing MS, and to inform the issuing MS when requested persons wish to exercise the right to appoint a lawyer in the issuing MS and do not already have such a lawyer.

21 meaningful rulings were identified, but they contain even less explicit references to this Directive than regarding the former two. And, again, those scarce references are generally aimed at establishing that national law already provided for the rights at issue here, which is particularly questionable in this case, because there are several cases where implementation is lacking, or, at least, dubious.

4.4 Directive (EU) 2016/800

This was the only Directive that gave rise to the enactment of new legislation in Portugal, namely an amendment of the CCP. Even so, it is not fully implemented. There are issues, namely, with: Article 2 (3), on the situation where the defendant reaches the age of 18 during the course of the proceedings; Article 5 (3), on information to be provided to the holder of parental responsibility; Article 7 (4) (a), which commands authorities to determine whether any specific measure should be taken to the benefit of the minor; Article 8 (2) and (5), which command that the results of the medical examination be taken into account when determining the capacity of the child to be subject to questioning and other procedural measures, and that Member States (MSs) shall ensure that another medical examination be carried out where the circumstances so require; Article 10, on limitation of deprivation of liberty; Article 11, on alternative measures; Article 12 (1), which requires detained children to be, in principle,

held separately from adults; Article 14 (2), which requires MSs to either provide that court hearings involving children be usually held in the absence of public, or allow courts or judges to decide to hold such hearings in the absence of public; Article 15 (3), on the right of the child to be accompanied by the holder of parental responsibility during the remaining court hearings in certain circumstances; Article 16 (2), on the right to a retrial in case of a trial *in absentia*; and Article 20, on the training to be provided to the staff of law enforcement agencies and of detention facilities.

Only 7 rulings were identified as meaningful during this research, a manifestly low number, and none of them is particularly useful for clarifying the doubts as to the implementation of the Directive.

4.5 Directive (EU) 2016/1919

This Directive is, in our view, the sole Directive of the agenda that can be considered to have been fully implemented. The very few problems that were detected (notably in relation to Article 5, on legal aid in EAW proceedings) originate in the (defective implementation of) Directive 2013/48/EU, on access to a lawyer, to which this Directive is closely related. Therefore, access to a lawyer is the context where such problems should be primarily addressed. Apart from that, the problems with the Portuguese system of access to the law and to the courts are not normative, but practical, namely that not sufficient funding is allocated to this system.

As with the Directive (EU) 2016/800, very few rulings (only 6) were identified as meaningful for the Directive (EU) 2016/1919 during this research. This scarcity concurs to substantiating the view that the Portuguese legal aid system, while sound in theory, may be lacking the desired effectiveness in practice.

4.6 Directive (EU) 2016/343

Finally, regarding this Directive, our view once again is that important norms do not have sufficient backing in existing legislation. That is the case of Article 4 (1) and (2), on public references to guilt; of Article 5 (1), on the presentation of suspects and accused persons; and, especially, of Articles 8 (2) (a) and (4), and 9. The former concerns the right to be present at the trial, the latter the right to a new trial in case of a trial *in absentia*. There is significant debate as to the compatibility of national rules with the Directive in this regard, which contrasts with the other Directives. This is probably due to the fact that there was already wide debate as to the sufficiency of the guarantees established in the law for these cases regardless of the enactment of the Directive.

Regarding this Directive, 26 meaningful rulings were identified, the largest number for all Directives. Again, only seldom do they make explicit reference to the Directive, but a trend seems to be emerging in that direction. Still, as with the other Directives, these few references were generally aimed at reiterating the stance that had been taken by the legislator, that national law already provided for the rights at issue here; that Portuguese criminal procedure does not fall short of the standards set by the Directive.

4.7 Note on the translation

Unless stated otherwise, the translation of the excerpts of case law and provisions of the Portuguese legal system contained in this report is unofficial; the responsibility for its accurateness lies with the authors of this report.

5 Introduction

5.1 Constitutional and Criminal Justice System

5.1.1 Key constitutional provisions

The first provision in the Portuguese Constitution[3] that should be indicated when addressing the protection of fundamental procedural rights is Article 20, which provides that everyone has a right to access the law and the courts with a view to obtaining protection of their rights and legally protected interests, and that fruition of this right may not be hindered by lack of economic means.[4] Moreover it guarantees the right to legal information and legal counselling, including a right to be accompanied by an attorney before any public authority.[5]

Regarding criminal proceedings specifically, the central constitutional norms stem from the following provisions. In the first place from Article 27, according to which, as a principle,[6] a person may only be deprived of liberty in result of a judicial decision determining him/her to be either criminally liable or dangerous.[7] Secondly, from Article 28, which sets the conditions in which a person may be placed in pre-trial custodial detention. Thirdly, from Article 31, on *habeas corpus*, a measure which enables any individual in the exercise of their political rights to request the Supreme Court of Justice to order, within 8 days, the release of a person who is being illegally deprived of liberty. And, foremost, from Article 32, par excellence the constitutional provision on criminal procedural rights.

Article 32 establishes that criminal proceedings must comply with defence rights, including the right to appeal unfavourable decisions to a higher court. Defence rights in general receive ample protection in the Constitution, but the right to appeal has been traditionally enclosed within somewhat narrow confines,[8] although it may be stated that there has been a tendency of expansion over recent years.[9] Article 32 also enshrines the presumption of innocence, together with such other key principles as *in dubio pro reo* and *nemo tenetur se ipsum accusare*. The latter – which comprises the right to remain silent – was also subject to expansion recently in the case law of the Constitutional Court.[10] Moreover,

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[3] Enacted through the Decree of 10 April 1976.

[4] An analysis of the Portuguese criminal procedure from a transnational angle is provided in Miguel João Costa / Pedro Caeiro, "Country Report Portugal", in Martin Böse / Maria Bröcker / Anne Schneider (eds.), *Judicial Protection in Transnational Criminal Proceedings*, Cham : Springer, p. 271 f., followed closely in this § 5.1.1.

[5] On this provision, see: (i) from a constitutional standpoint, J. J. Gomes Canotilho / Vital Moreira, *Constituição da República Portuguesa Anotada – Vol. I*, 4th ed. revista. Coimbra : Coimbra Editora, 2007, Artigo 20.º; (ii) from a criminal procedure standpoint, Maria João Antunes, *Direito Processual Penal*, Coimbra : Almedina, 2017, p. 36 f.; on the impact of EU law on national criminal procedure, Miguel João Costa, "Comentário à Proposta de Directiva do Parlamento Europeu e do Conselho relativa ao Apoio Judiciário Provisório para Suspeitos ou Arguidos Privados de Liberdade e ao Apoio Judiciário em Processos de Execução de Mandados de Detenção Europeus, in Pedro Caeiro (org.), *A Agenda da União Europeia sobre os Direitos e Garantias da Defesa em Processo Penal: A 'Segunda Vaga' e o seu Previsível Impacto sobre o Direito Português*, Instituto Jurídico, 2015, p. 61 f.

[6] This rule is subject to some exceptions, which include the extradition procedure (Article 27 (3) (c) of the Constitution).

[7] A criminal penalty cannot be applied in the absence of guilt/blameworthiness, but the perpetration of a criminal act together with the criminal dangerousness of the offender may lead to the application of a security measure.

[8] See notably Article 400 of the CCP, and, *e.g.*, the rulings of the Constitutional Court no. 186/2013, of 4 April, and no. 101/2018, of 21 February; on the topic, see Miguel Ângelo Manero de Lemos, "O direito ao recurso da decisão condenatória enquanto direito constitucional e direito humano fundamental", in Manuel da Costa Andrade *et al.* (eds.), *Estudos em Homenagem ao Prof. Doutor Jorge de Figueiredo Dias*, Vol 3. Coimbra : Coimbra Editora, 2010, p. 923 f.

[9] See *e.g.*, the rulings of the Constitutional Court no. 429/2016 and no. 31/2020.

[10] Namely regarding the intersection between tax and criminal investigations: see the ruling of the Constitutional Court no. 298/2019, indicated below, § 11.2.2.

Article 32 establishes the right not to be tried *in absentia* (although this right is subject to meaningful exceptions as well)[11] and the right to challenge inculpatory allegations. It also entitles defendants to be assisted by an attorney of their choice, and it commands the law to specify the procedural acts and procedural phases in which that assistance is mandatory. Lastly, Article 32 lays down the principle that criminal cases cannot be tried by a court other than that which according to the law in force when the acts were committed was the competent court for trying those acts (*juge naturel*),[12] and that investigative measures of impact to fundamental rights must be ordered or at least authorised by a judge.

Regarding transnational mechanisms, the provisions which apply more directly are Article 20, as a general provision on the right of access to the law and to the courts, and Article 33, which addresses extradition and expulsion specifically, and establishes, *inter alia*, that they can only be ordered by a court.[13] Nevertheless, Article 32, albeit explicitly directed at criminal proceedings only, does have some reverberation in these transnational mechanisms, because they are considered as something of a special type of criminal proceedings. The Constitutional Court tends to equate extradition and criminal proceedings,[14] save for the protection of the rights and the application of the principles that are rather specific to the ascertainment of criminal liability, such as the principle of presumption of innocence.

5.1.2 The concept of '*arguido*' (defendant)

In order to understand individual rights in criminal proceedings in the Portuguese legal system, it is crucial to explain the concept of '*arguido*'. In this legal system, the suspect as such has few specific procedural rights or duties – these emerge only with the formal designation as '*arguido*', which is, therefore, a procedural act of utmost relevance for the individual.

Articles 57 and 58 of the Code of Criminal Procedure (CPP)[15] establish the procedural acts and moments in which a person must be formally designated as an *arguido*. According to Article 57 (1), if this has not yet occurred, a person must be designated as an *arguido* as soon as he/she is prosecuted or the optional phase of instruction (at the end of which he/she may still come to be indicted) has been requested. As for Article 58, it establishes that:

> (1) *[The] designation of a person as an* arguido *is mandatory as soon as: (a) A person makes statements before any judicial authority or criminal police body during an inquiry initiated against him/her, where there are grounds to suspect that such person has committed a criminal offence; (b) A coercive or patrimonial guarantee measure must be imposed on him/her; (c) A suspect is arrested under the terms and for the purposes of Articles 254 to 261 of this Code;*[16] *or (d) A police report has been drawn up identifying*

[11] See *e.g.*, the ruling of the Constitutional Court no. 366/2018, indicated below, in § 7.2.1.5.

[12] See Articles 29 (3) and 32 (9) of the Constitution. The prohibition of *ad hoc* courts extends neither to military courts – these are allowed in times of war (see Articles 209 (4) and 219) of the Constitution – nor, obviously, international tribunals such as those created by UN Security Council resolutions or the ICC.

[13] On this rule, see J. J. GOMES CANOTILHO, *Direito Constitucional e Teoria da Constituição*, 6th ed., Coimbra : Almedina, 2002, p. 658 and 662; and MIGUEL JOÃO COSTA, *Dedere Aut Judicare? A Decisão de Extraditar ou Julgar à Luz do Direito Português*, Europeu e Internacional, Coimbra : UCILeR, 2014, p. 20 f.

[14] See *e.g.* the ruling of the Constitutional Court no. 54/87, of 10 February. This understanding has support in legal literature, *e.g.* in JORGE DE FIGUEIREDO DIAS, "Algumas questões em tema de extradição e de sede do crime [anotação], *Revista de Legislação e Jurisprudência* 117 (1985), p. 340 f., and 118 (1985), p 14 f.; see also Article 3 (2) Law no. 144/99, of 31 August (LICCM), and Articles 16 (6), 17 (4) and 34 PT-EAW.

[15] Enacted by the Decree-Law no. 78/87, of 17 February.

[16] In more detail on arrest and pre-trial custodial detention, see PEDRO CAEIRO / MIGUEL JOÃO COSTA, "Portugal", in Katalin Ligeti (ed.), *Toward a Prosecutor for the European Union – Volume 1: A Comparative Analysis*, Oxford : Hart Publishing, p. 550 f.

a person as an alleged offender and that person has been informed on the contents thereof, unless the report is clearly unfounded.

(2) *The status of arguido is acquired through the communication to the concerned person, either orally or in writing, by a judicial authority or criminal police body,*[17] *that, as of that moment, he/she has the status of arguido, and, if necessary, by an explanation of the procedural rights and duties of defendants laid down in Article 61, to which he/she is thenceforth bound."*

Moreover, if a founded suspicion emerges during the course of an interrogation that the person at issue has committed an offence, the authority performing such an interrogation shall suspend it immediately and make the communication and the advice mentioned in Article 58 (2) CCP.[18] By the same token, the concerned person him/herself may request to be designated as an *arguido*, if an investigation is being carried out with a view to establishing his/her criminal liability and measures are being carried out which personally affect him/her.[19] In conclusion, a person must be – and can even request to be – formally designated as an *arguido* in a rather wide number of circumstances that meet those required by the Directive. This will carry the immediate emergence of some duties, but it will carry mainly the emergence of a wide set of rights[20] which constitute a specification of the fundamental right of defence granted by Article 32 (1) of the Constitution.

a) Adding to other general *rights*, an *arguido* is specifically entitled:[21] (a) to be present in all procedural acts of direct concern to him/her; (b) to be heard; (c) to be informed of the acts which are imputed to him/her; (d) to remain silent; (e) to appoint a lawyer or request that one be appointed to him/her; (f) to be assisted by a defence lawyer in every procedural act in which he/she takes part, and, if arrested, to communicate with him/her in private; (g) to intervene in the investigation phases of the procedure,[22] e.g. by providing evidence or requesting that investigative measures be conducted; (h) to be informed of the rights springing from this status; (i) if he/she is a minor (under 18 years old), to be accompanied in any procedural act that he/she is to attend by the persons who exercise parental responsibilities over him/her, by his/her legal representative or a person who holds his/her factual guardianship, or yet, if the former cannot be reached or special circumstances concerning his/her best interest so require, by another adequate person indicated by him/her and agreed to by the judicial authority; and (j) to appeal the decisions that personally affect him/her.

b) The following *duties* befall specifically upon *arguidos*:[23] (a) to be present before a judge, a public prosecutor or a police officer, where imposed by law and upon being regularly convened to do so; (b) to be truthful on his/her identity; (c) to be subjected to investigative measures aimed at gathering evidence, and to coercive measures and patrimonial warrants aimed, *inter alia*, at securing his/her presence at trial; and (d) to be subjected to a peculiar coercive measure named 'statement of identity and residence' (*termo de identidade e residência*), which involves a duty not to change residence and

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[17] The reason why this key procedural act may be carried out by the Public Prosecution and even by the criminal police, rather than necessarily by a judge, is that it triggers a wide set of rights to which the concerned person is not otherwise entitled, such that protracting this act in order to secure the intervention of a judge would be detrimental to the person. Nevertheless, according to paragraph (3) of Article 58, if the act is carried out by the criminal police, it must be communicated to a judicial authority within 10 days, so that this authority may, within another 10-day term, examine and decide whether or not the act is to be considered valid.

[18] See Article 59 (1) CCP.

[19] See Article 59 (2) CCP.

[20] See Article 60 CCP.

[21] Article 61 (1) CCP – which, as noted, to a large extent only concretises constitutional guarantees.

[22] On the pre-trial phases of Portuguese criminal procedure see further below.

[23] Article 61 (6) CCP.

not to absent oneself for more than five days without notifying the authorities, failure to comply with which may legitimise a trial *in absentia*.

5.1.3 Phases of the criminal procedure (brief outline)

Finally, proper analysis of procedural rights in the Portuguese legal system requires an outline of the different phases of the criminal procedure.[24] A standard criminal procedure has two pre-trial phases: inquiry (*inquérito*)[25] and instruction (*instrução*).[26] The former is the phase where the investigation is conducted and it ends with a decision by the public prosecution as to whether or not to prosecute. A person should be prosecuted if evidence has been gathered which suggests that, on the balance of probabilities, the person is more likely criminally liable than innocent. The latter phase consists of a judicial evaluation by the judge of instruction (*juiz de instrução*) of the decision to prosecute or not to prosecute taken at the end of the inquiry. It is an optional phase that will only take place upon request (notably by the *arguido*). If the judge decides that the procedure shall continue, then the phase of trial (*julgamento*) will follow,[27] and after that the phase of appeal (*recurso*), if the defence and/or the prosecution or the victim wish to react against the decision taken at the end of the trial.

5.2 Institutional framework

The authorities involved in criminal proceedings are mainly the criminal police (*órgãos de polícia criminal*), the public prosecution (*Ministério Público*) and judges (*juízes*) or courts (*tribunais*).

The public prosecution directs the inquiry, with the assistance of the police. The latter act under the direct supervision and functional (but not hierarchical) dependence of the former. The judge of instruction leads the phase of instruction, also with the assistance of the criminal police acting under his/her direct supervision and functional dependence.[28] But the judge of instruction also plays a central role during the (preceding) phase of inquiry, as he/she is competent for executing and at least ordering or authorising the investigative measures that are more intrusive to fundamental rights,[29] and therefore acts as a '*juge des libertés*'. The trial runs its course before the trial court (which may be a single-judge court, a three-judge court or a jury court), and the appeal before a court of appeal (which may be either a High Court,[30] the Supreme Court of Justice[31] or the Constitutional Court, when the constitutional validity of norms relevant to the case is challenged).

As stated, the criminal police[32] assist judicial authorities (the public prosecution or the judge/court). They obtain notice of crimes and seek to prevent their consequences, identify perpetrators and arrest

[24] For a detailed depiction, in English, of the Portuguese pre-trial criminal procedure, see PEDRO CAEIRO / MIGUEL JOÃO COSTA, "The Portuguese System", in Katalin Ligeti (ed.), *op. cit.*, p. 540 f.
[25] Articles 262 f. CCP.
[26] Articles 286 f. CCP.
[27] Unless certain exceptional cases in which the judge presiding over the trial phase decides otherwise upon receiving the file (see Article 311 CCP: *saneamento do processo*).
[28] Art 8 (7) Law no. 49/2008, of 27 August 2008, on the organisation of criminal investigation (LOCI) prescribes the continuity between the phases of inquiry and 'bringing to judgment'; accordingly, the police bodies competent for assisting the investigative judge in the latter shall be the same that assisted the PP in the former.
[29] Arts 268 and 269 CCP.
[30] There are 5 High Courts (*Tribunais da Relação*) in the country: Guimarães, Porto, Coimbra, Lisboa and Évora. On Portuguese judicial organisation, see the Law no. 3/99, of 13 January.
[31] The Supreme Court (*Supremo Tribunal de Justiça*) is the highest judicial court in the country, and is located in Lisbon.
[32] The CCP does not define 'criminal police bodies'. According to a functional definition, it can be said that *criminal* police bodies are any of the several existing police bodies while exercising such activity: see ANABELA MIRANDA RODRIGUES, "O Inquérito no novo Código de Processo Penal", in Centro de Estudos Judiciários (ed.), *Jornadas de Direito Processual Penal: O Novo*

offenders *in flagrante delicto*, and carry out urgent evidence gathering measures.[33] To these ends they enjoy technical and tactical autonomy, notwithstanding their functional dependence from the judicial authorities. The public prosecution and the judge of instruction can delegate on the criminal police a wide number of procedural acts – in fact any act delegation of which is not explicitly forbidden –,[34] which often carries the police to have a very central role in the investigation, with public prosecution taking over the inquiry only once the former consider it complete and transfer the gathered elements to the latter, who then decides whether or not to prosecute.[35]

The activity of the Public Prosecution is based on a principle of objectivity (‘*à charge et à décharge*’), meaning that it shall only initiate an investigation and prosecute a person when it is persuaded that there is legal ground for that.[36] On the other hand, based on the procedural principle of legality, public prosecution shall investigate and prosecute *whenever* it is persuaded that such a legal ground is met.[37] Accordingly, the Public Prosecution has institutional and functional autonomy vis-à-vis the executive branch, namely the Minister of Justice. This means that it cannot be instructed to act or not to act in a certain manner. Its priorities are defined only by the law, namely by the statutes that set the criminal policy program for a given timespan.[38] The principles of objectivity and autonomy by which the Public Prosecution abides justify its classification as a ‘judicial authority’, placing it closer to the judicial function *stricto sensu* than to the administrative function.[39]

The courts are the main bearers of the responsibility to provide judicial protection. As noted above, the Constitution itself requires that the measures which touch directly upon fundamental rights be ordered or at least authorised by a judge.[40] These decisions can still be appealed before a higher court except where the law provides otherwise. In the cases where a different authority is entitled to order, authorise or validate a procedural measure – notably the Public Prosecution during the inquiry –, there is no *direct* judicial review of the measure, since the Public Prosecution has autonomy to direct and to supervise this procedural phase. However, the validity of those measures can be challenged before a judge, whether during the phase of instruction or later at trial.

Código de Processo Penal, Coimbra : Almedina 1988, p. 70.

[33] See Articles 55 and 248 f. CCP, regulating the communication of the notice of the crime, the taking of precautionary measures concerning evidence, the identification of suspects and the gathering of information, the carrying out of body searches and of premise searches, the interception of postal communications and cellular location.

[34] See Articles 270 and 290 (2) CCP. As a principle, when a certain investigative measure is to be executed by the criminal police and the judicial authority did not delegate such a competence, authorisation or *post factum* validation is required.

[35] See GERMANO MARQUES DA SILVA, *Curso de Processo Penal. Vol 1*, 5th ed., Lisbon : Verbo, 2008, p. 78.

[36] See Law no. 68/2019, of 27 August, which establishes the Statute of the Public Prosecutions Office.

[37] The procedural principle of legality constitutes a manifestation of the general principle of equality enshrined in Article 13 of the Constitution, but it has explicit constitutional seat in Article 219 (1). See MARIA JOÃO ANTUNES, *op. cit.*, p. 35 f., 60 f.

[38] Currently, Law no. 55/2020, of 27 August, which applies to the biennial 2020-2022.

[39] See JORGE DE FIGUEIREDO DIAS, “Nótulas sobre temas de direito judiciário (penal), *Revista de Legislação e Jurisprudência* 127 (1995), p. 354 f., and 128 (1995), and 8 f.

[40] See Article 32 (4) of the Constitution and Articles 268 and 269 CCP.

6 Directive 2010/64/EU: Right to interpretation and translation in criminal proceedings

6.1 Legislation

6.1.1 General issues

As with most Directives assessed in this report, no specific legal instrument was enacted in Portugal with a view to implementing Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings. Existing legislation, notably the Code of Criminal Procedure, was deemed to accommodate in full the norms established in this Directive.[41] In our view, the majority of the norms of the Directive are in effect sufficiently covered by previous legislation, although this might not be true for all of them, as expounded over the following paragraphs.

Existing legislation secures the implementation of Article 1 (2) of the Directive, which delineates its scope of application. The right to interpretation and translation is not even one of those rights to which only an *arguido* is entitled,[42] but rather it applies to any other individual intervening in the criminal procedure. In any case, a person will be aware that he/she is entitled to the right to interpretation and to translation when he/she is designated as an *arguido* (and, thus, in the moments required by the Directive 2010/64/EU).

The domestic provision whence the right to interpretation and translation stems is Article 92 CCP:

> "(1) *Portuguese is the language that must be used in all procedural acts, written as well as oral, or otherwise the act will be null.* (2) *If a person must intervene in the criminal procedure who does not know or is not fluent in Portuguese, he/she is appointed a suitable interpreter, free of charge, even if the authority presiding over the act or any of the subjects of the procedure happen to know the language at issue.* (3) *Defendants can choose, free of charge, to be assisted by an interpreter other than the one who was appointed to them, for the purposes of translating conversations held with their attorneys.* (4) *Interpreters are obliged to secrecy [both 'secrecy of justice', which protects the contents of the procedure (when applicable), and to 'professional secrecy'] and may not reveal the conversations held between the defendant and his/her attorney, whatever the phase is in which the procedure is at, or otherwise the interpreter will be breaching professional secrecy.* (5) *Failure to comply with the provisions of paragraphs 3 and 4 carries that any evidence thereby obtained [notably, the statements made by the defendant] is null and cannot be used.* (6) *An interpreter is also appointed when it is necessary to translate a document which is written in a foreign language and has not been subject to authenticated translation.* (7) *Interpreters are appointed by a judicial authority [a public prosecutor or a judge] or by a criminal police authority*."

Several national provisions confirm or extend the right to interpretation and translation to individuals who are deprived of liberty, either provisionally or in the execution of a penalty proper.[43]

Article 1 (3) requires no implementation, as in Portugal no criminal offence is tried "*by an authority other than a court having jurisdiction in criminal matters*". The same stands for Article 1 (4), as no

[41] See the document CELEX 72010L0064PRT_210393.
[42] See *supra*, § 5.1.2.
[43] See, notably: Article 9 (1) to (3) of the General Regulation of Prison Facilities (Decree-Law no. 51/2011, of 11 April); Articles 4 (4) and 16 (2) of the Code of Enforcement of Penalties and Measures involving Deprivation of Liberty (Law no. 115/2009, of 12 October); and, finally, Article 4 (4) of the Regulation of the Detention Conditions in the Premises of the Judiciary Police and in Courts and Public Prosecution Services (Dispatch no. 12786/2009, of 29 May).

national provision on the rights to interpretation and translation affect in any way the defendant's right to have his/her attorney present at any stage of the procedure or to access documents.

6.1.2 Right to interpretation

Implementation of Article 2 (1) of the Directive is secured by Article 92 CCP – more specifically by its paragraph (2), mentioned above –, in conjunction with Article 362 (1) (d) CCP, which commands that the minute of the trial hearing contains "*[t]he identification of the witnesses, experts, technical advisors and interpreters, as well as the indication of all the evidence produced or examined at the hearing*". It is also Article 92 – more specifically its paragraphs (2) and (3), also mentioned above – that secures implementation of Article 2 (2) of the Directive.

Article 2 (3) of the Directive is, in turn, implemented by Article 93 CCP. According to this provision:

> "(1) *When a person who has a hearing or speech impediment [*"um surdo, um deficiente auditivo ou um mudo"*] is to make statements in the procedure, the following rules shall be complied with:* (a) *In case of a hearing impediment, the person is appointed a suitable interpreter of sign language, lip-reading or written expression, depending on which is more adequate to the situation of the concerned person;* (b) *In case of a speech impediment, if he/she can write, he/she is questioned orally and replies in writing; otherwise, if he/she so requests, a suitable interpreter is appointed.* (2) *Absence of an interpreter carries the act to be postponed.* (3) *The provisions of the previous paragraphs apply at every stage of the procedure and regardless of the status therewith held by the person in question.* (4) *Article 92 (3) to (5) apply accordingly.*"

It is more doubtful that Article 2 (4) of the Directive is duly implemented, since no specific formal procedure or mechanism as the one mentioned in this provision is in place in the Portuguese legal system. Nevertheless, we believe that Article 61 (1) (g) CPP allows to conclude in the affirmative, as it entitles defendants to submit requests to the authorities at all stages of the procedure, which includes requests for an interpreter to be appointed, should authorities not have done so at their own initiative.[44] Likewise, no specific right is in place either for challenging a decision finding that there is no need for interpretation, or, when interpretation has been provided, to complain about its quality (Article 2 (5) of the Directive). However, if a defendant makes a request based on the mentioned Article 61 (1) (g) CPP and it is refused by the authorities, then the defendant may invoke Article 120 (2) (c), which provides that failure to appoint an interpreter in a case where the law commands such an appointment carries nullity. Moreover, the court's decisions in this respect are open to be appealed based on Article 399 CPP, which establishes that, as a general principle, judicial decisions delivered in criminal proceedings can be appealed before a higher court.[45]

There are also norms concerned with the quality and impartiality of the interpretation or translation. That is the case of Article 153 (3) CCP, according to which the judicial authority which appointed the interpreter may order his/her replacement (and this decision may not be appealed) when he/she is "*performing in a careless manner the duties that have been assigned to him/her*".[46] In turn Article 47 (1) CCP prohibits certain individuals from participating in procedural acts based on the existence of meaningful doubts as to their impartiality. This increases the reliability of the interpretation services.

[44] See also Article 98 (1) CCP.

[45] As stated above, there are exceptions to this principle, notably those contained in Article 400 CPP. However, these do not apply here, as the decision not to appoint an interpreter cannot be construed either as a "*simple administrative decision*" (Article 400 (1) (a)) or as a "*decision for which the court enjoys discretion*" (Article 400 (1) (b)).

[46] These provisions refer to expert witnesses, but apply to interpreters *ex vi* Article 92 (8) CCP. As for complains by the defendant on the quality of the interpretation provided, it is possible to proceed along the same lines mentioned above, on the basis of Articles 61 (1) (g), 120 (2) (c) and 399 CCP.

Moreover, based on Article 91 (2) CCP, interpreters must swear an oath that they will faithfully carry out the assigned functions (although this does not apply to interpreters who are civil servants and intervene in the procedure in the exercise of their duties). These provisions raise the quality of the activity of the interpreter or translator, but they seem insufficient to meet the *mechanisms* envisioned in the Directive for controlling the need for, and the quality of the interpretation or translation.

Article 2 (6) of the Directive seems to have no correspondence in Portuguese law. The rule in Portugal is that interpretation is carried out in person.[47] It is conceivable that an analogy may be established between interpreters and experts or other subjects who are allowed to intervene through video-link,[48] but this is by no means certain, especially where the physical presence of the defendant in the procedural act in question is mandatory: in this case, it would seem that the physical presence of the interpreter is an inevitable consequence of the requirement that the defendant be physically present.

Regarding Article 2 (7) of the Directive, its implementation results from the Law transposing the EAW (LEAW), in articulation with the CCP. Notably, from Article 17 (3) LEAW, which provides that "*[i]f the arrested person does not adequately understand or speak Portuguese, a suitable interpreter shall be provided free of charge*", and from Article 17 (4) LEAW, according to which the rules of the CPP on the designation of a person as an arguido and on the emerging rights and duties (Articles 57 to 67 of the CCP) *"apply as appropriate, and the person sought on account of a EAW, when arrested, should be provided with a document informing him/her of [his/her] rights*." In turn Article 34 LEAW states that the CCP applies in a subsidiary manner to EAW proceedings, in consequence of which all other provisions conferring the right to interpretation and translation on defendants in actual criminal proceedings (notably the abovementioned Article 92 of the CCP) apply also to individuals sought pursuant to an EAW.

Article 2 (8) of the Directive is also to be regarded as already implemented. The concept of "*quality sufficient to safeguard the fairness of the proceedings*" is of a normative nature and has no explicit or direct equivalent in Portuguese law, but all the provisions indicated above which confer on defendants or persons sought pursuant to an EAW the right to an interpreter (notably Articles 92 CCP and 17 (3) LEAW) explicitly require the appointed interpreter to be "*suitable*", which in this context should be read as 'properly qualified'. Moreover, as also mentioned, there are other provisions aimed at securing the quality (notably Article 153 (3) CCP) and the impartiality (notably Articles 47 (1) and 91 CCP) of the interpretation / translation. Furthermore, Article 64 (1) (d) CCP prescribes that "*[a]ssistance by an attorney is mandatory: (...) in any procedural act, save for the formal designation of the person as a defendant, whenever the person is [*inter alia*] unfamiliar with the Portuguese language*". The fact that assistance by a lawyer is mandatory in each and every procedural act in the case of defendants unfamiliar with the Portuguese language contributes to the quality of the interpretation / translation, in that it is justified to assume that the lawyer will contribute to ensuring that proper interpretation / translation is being provided to his/her client.

Therefore, and in sum, while it may be debated whether Article 2 (4) and (5) are covered by previous legislation – in that there is no specific procedure or mechanism aimed at ascertaining whether the person is in need of assistance by an interpreter, nor, accordingly, a specific remedy for challenging such a decision or for complaining about the quality of the interpretation –, it seems that the more

[47] See notably Articles 96, 158 (1) (b), 317 (1), 318, 328-A, 332 to 334, 343, 350 (3), 355 to 357, and 360 to 361 CCP.
[48] Pursuant to Articles 158 (2), 317 (1) and 350 (3) CPP.

general provision of Article 2 (8) is fully implemented, as several norms are in force which do seek to ensure a high level of reliability of interpretation services.[49]

6.1.3 Right to translation

Regarding the provisions on *translation* enshrined in Article 3 of the Directive, the key provision in national law is Article 92 (6) CCP, according to which an interpreter must be appointed when this is "*necessary to translate a document which is written in a foreign language and has not been subject to authenticated translation*."

Portuguese law makes no differentiation between essential and non-essential documents. Article 92 (6), therefore, applies to *all* documents. This dichotomy has in any case some equivalence in the one between documents translation of which is "necessary" or "unnecessary". If a document is deemed necessary by the defendant but its translation is not officially ordered, the defendant may request so. If the request is denied, he/she may appeal under the general right to appeal enshrined in Article 399 CCP. In the context of the EAW, the law does not explicitly require the warrant to be translated into a language that the sought person understands, but this solution is commanded by Article 92 (6) CCP.

Article 3 (7) to (9) require some explanation. As for para. (7), no (optional) exception of that sort is provided for in Portuguese law. Some procedural acts are to be recorded in an abridged manner,[50] in which case a defendant who wishes to obtain a translation of the act's official record will only be able to receive a translation of this abridged record. However, the most important procedural acts must be recorded in full. As for paragraph (8), Portuguese law does not provide for the possibility to waive the right to interpretation or translation in the cases where they are mandatory, meaning that this provision of the Directive lacks object. Regarding paragraph (9), in similar terms as those expounded on Article 2 (8) of the Directive, Portuguese law does not make use of a normative criterion whereby the quality of the translation must be "*sufficient to safeguard the fairness of the proceedings*". However, all the provisions indicated above which confer the right to an interpreter (notably Articles 92 CCP and 17 (3) LEAW) explicitly require the appointed interpreter to be "*suitable*".[51]

Article 4 of the Directive, on the costs of interpretation and translation, is covered by Article 92 (2) and (3) CCP, already transcribed above, in para. 6.1.1.

Articles 5 and 6 of the Directive, on the quality of interpretation and translation, and on training of judges, prosecutors and judicial staff, require some considerations too: the register(s) of independent translators / interpreters prescribed in Article 5 (2), and, as far as was possible to establish, the training prescribed in Article 6, have not been implemented. This raises legitimate doubts as to the quality of interpretation and translation being provided in Portugal at present, as well as to whether any "*special attention*" is given to the "*particularities*" of the cases that involve interpretation. Also, interpretation and translation in judicial proceedings may be considered as not well-paid,[52] which certainly does not contribute to increasing quality, and no differentiation is even made depending on the language.

[49] Again, the general right to make a request to the authorities (Articles 61 (1) (g) and 98 (1) CCP) enables the person to make that complaint; and, if it is not granted, the person may still appeal the decision under the general rule on appeal (Article 399 CCP).
[50] See Article 100 (2) CCP.
[51] The explanations provided above in this respect apply here, *mutatis mutandis*.
[52] According to Article 17 (2) of the Regulation of Justice Fees (Decree-Law no. 34/2008, of 26 February) and Table IV attached thereto, translators are paid 1/3777 justice fee units per translated word, and interpreters shall be paid between 1 and 2 justice fee units per service. Each justice fee unit currently amounts to circa € 100.

Article 5 (3) of the Directive is covered by Article 92 (4) CCP, mentioned previously, in para. 6.1.1.[53] In turn, Article 92 (5) CCP establishes the sanctions for the failure to comply with those provisions: any evidence obtained in breach of secrecy – notably, the statements made by the defendant – is null and cannot be used in the criminal procedure.

Finally, Article 7 of the Directive, on record-keeping, is covered by the following provisions in the CPP. In the first place, by Article 99 CPP, according to which:

> "(1) *The procedural acts that the law requires to be recorded, as well as statements, requests, promotions and decisions orally uttered, must be recorded in a written document called 'auto' [hereinafter 'official record'].* (...) (3) *An official record contains, in addition to those required for written acts, the following elements:* (a) *The identification of the persons who took part in the procedural act;* (...) (c) *A detailed description of the operations carried out, of the intervention of each procedural participant, of the statements made, and of the manner and circumstances in which they were made, including the indication of the beginning and end of each statement, when an audio or audiovisual recording is to be made, of the documents that have been presented or received and of the results obtained, so as to guarantee a genuine record of the procedural act;* (d) *Any occurrence which shows relevant for assessing the evidence or the lawfulness of the procedural act.* (4) *Article 169 applies accordingly*.[54]"

This provision should then be articulated with Article 94 (1) CCP, which requires the procedural acts that must be practised in writing to be drafted "*in a perfectly intelligible manner*," and by Article 141 (7), which provides that, as a rule, the interrogation of an arrested defendant should be carried out under audio or audio-visual recording, and that other means of recording (stenographical, stenotypical or other means capable of ensuring full reproduction or recording of the act), may be used "*only where the former means are unavailable, which must be recorded in the official act*".

6.1.4 Conclusion

In conclusion, most provisions of the Directive do have sufficient resonance in legislation previously in force in the Portuguese legal system, but some still lack implementation, notably those concerned with the quality of interpretation and translation, with the control of such quality and with the training of staff – more specifically Articles 2 (6), 5 (2) and 6. This implementation deficit is particularly worrying and unfounded inasmuch as EAW proceedings are concerned, as these are already regulated in a specific statute the amendment of which would not raise the same systemic considerations as the amendment of a well-established instrument like the Code of Criminal Procedure.

6.2 Case-law

This is one of the Directives where more case law has been identified as relevant during this research (23 rulings), although explicit mentions to the Directive are scarce.

6.2.1 Constitutional Court, no. 547/1998 – Translation of the bill of prosecution

In this case the Court reasoned as follows: Article 92 (2) CCP requires the assistance of an interpreter when a given procedural act is to be notified to the defendant, but the law is not explicit as to whether this requires a complete interpretation (or, rather, whether it may be only partial), nor whether it must be written (or, rather, whether it may be verbal). Knowledge of the bill of prosecution is fundamental for devising a defence strategy and for taking several very important decisions. On the other hand,

[53] Breach of secrecy of justice and breach of profession secrecy are punishable under Articles 195 f., 371 and 383 f. Penal Code.

[54] Article 169 CCP provides that the facts reported in an authentic or authenticated document are considered proven insofar as the veracity of the document or of the information contained therein is not justifiably brought into question.

Article 15 (1) Constitution enshrines the principle of equivalence between foreigners and Portuguese citizens insofar as concerns fundamental rights. However, defence guarantees must not be concretised in the exact same terms, as long as they attain the purpose of the guarantee in question and enable an effective defence to all categories of individuals. In this sense, it appears that the oral translation of the prosecution by an interpreter does not compromise the guarantees of defence enshrined in Article 32 (1). It allows for the defendant to take (written) notes as he/she deemed fit, to ask for clarifications or to request the repetition of the parts of the prosecution that may be more complex, all of which leads to a complete, detailed and comprehensive understanding of the bill of prosecution. On this basis he/she may then devise the subsequent defence strategy. This understanding is aligned with the case law of the ECtHR, namely *Kamasinski* (ruling of 19-12-89). In this case, although the Court has drawn attention to the extreme importance of the notification of the prosecution and the terms in which it is to be made, the Court did recognise that the prosecution need not be translated in writing.

6.2.2 Supreme Court of Justice, 20-09-2017, case 33/17.8ZFLSB-B.S1 – Lack of translation of the bill of prosecution as a ground for habeas corpus proceedings

The Supreme Court addressed the contentious issue whether non-notification of the bill of prosecution with a written translation, when the defendant does not know the Portuguese language, is tantamount to non-notification *tout court* (which impacts *v.g.* on the maximum possible term of pre-trial custodial detention). The defendant has the right to obtain the text of the bill translated into a language he/she understands, so as to guarantee an effective exercise of his/her defence rights. In this respect the Court explicitly referred Article 6 of the ECHR, as interpreted by the ECtHR, and the Directive 2010/64/EU. Nevertheless, in the case, the Court noted that what is relevant for establishing the term of pre-trial custodial detention is not the date in which the bill of prosecution is notified to the defendant, but that in which the Public Prosecution issues the bill of prosecution – a procedural act in which Portuguese language must be used, or otherwise the act is null (as per Articles 92 (1), 97 (3) and 283 CCP). Thus, the question as to whether the defendant must be notified of the bill in a language he/she understands must be raised in the main proceedings, rather than in the context of *habeas corpus* proceedings. It is therefore unknown what the decision would have been had the question been so raised.

6.2.3 High Court of Évora, 20-12-2018, case 55/2017.9GBLGS.E1 – Direct effect and conforming interpretation

In a criminal procedure conducted in the legal district of Faro, a German citizen was prosecuted and convicted to a fine of €240 for driving under the influence of alcohol (Article 292 Penal Code). Ruling on appeal, the Court held that Directive 2010/64/EU has direct application in Portugal since 28-10-2013, and Directive 2012/13/EU since 02-06-2014. While it is clear that, in principle, Directives only produce effects after being implemented, the case law of the CJEU indicates that a Directive which has not been implemented or has been wrongly implemented may produce certain effects directly. Most notably, the Court held that Portuguese law *blatantly fails to secure the standards imposed by those Directives*: Article 92 CCP is a poor provision which commands the appointment of an interpreter to the defendant and little more than this. This led the Court to conclude that the Portuguese State was over-confident to find that no implementation was required.

On the other hand, the court held that it would be incorrect to make use of the principle of conforming interpretation (also referred to as indirect vertical effect) under the *Pupino* ruling by the CJEU, given the immediate applicability of the minima imposed by the Directives. Conforming interpretation is to be used only in the interpretation of national law, not of EU law. Directive 2010/64/UE enshrines two

conceptually distinct rights stemming from one same intention: the right to interpretation and the right to translation. The Directive imposes on Portuguese courts positive obligations to act or do (*facere*), from the obligation to appoint an interpreter/translator to the obligation to control the quality of the interpretation/translation. Even before this Directive, the ECtHR, in *Cuscani v. UK* (no. 32771/96), of 24-09-2002, had already held that such obligations are incumbent upon the judge who presides over the trial, as the "*ultimate guardian of the fairness of the proceedings*". The new Directive is clear in establishing a catalogue of acts which must be translated, defined as minimum rights. Its Article 3 (1) is very clear in requiring written translation of all essential documents. The Court continued to elaborate in the following terms.

The Directive uses two methods to specify the concept of essential documents: the definition of the minimum set of cases that require translation, and the formulation of a general clause, a definition of 'essential document' in which other documents may fit. This follows from Articles 3 (1) *in fine* and 3 (2), respectively. That catalogue does not prevent Portuguese law from being more generous. Yet, there is a *complete absence of an explicit norm in the CCP* providing for one such catalogue and in fact not even the minimum situations required by the Directive are provided for, leading to a situation where in practice translation is in most cases *systematically excluded*. Thus, the Court concluded that the Directive is directly applicable, and that, consequently, Portuguese courts must conclude that as a general rule translation must be made of "*any decision depriving a person of his liberty, any charge or indictment, and any judgment*", added by the cases mentioned in Article 3 (3) of the Directive.

Moving on, the Court noted that, since MSs may provide for a wider catalogue, it would be necessary to consider that (as already ruled in 01-04-2008, case 331/08-1), Article 113 (10) CCP, combined with Article 6 (3) (a) ECHR, requires that, in the case of a defendant who does not understand Portuguese, a translation be made of the notifications concerning prosecution, indictment, designation of the date of the trial hearing and sentence, as well as of those on coercive measures, measures of patrimonial guarantee, and the claim of damages. In the Portuguese system, the 'statement of identity and residence' (*termo de identidade e residência*) has acquired great significance, perhaps overly so, especially after the amendments effected by Law no. 20/2013, of 21 February, which carried the possibility to do away with the right of defence.[55] Thus, the signing of that statement by the defendant, a German citizen who the authorities were unsure understood Portuguese and did not care to confirm so, is an invalid procedural act. Directive 2012/13/EU establishes in Article 3 that the defendant has the right to be informed of the right to interpretation and translation – a right which is not contained in Article 61 CCP.[56] The Letter of Rights on arrest (Article 4 of the Directive) *simply does not exist in Portugal*. And as of the moment in which a norm (in the case, a norm of a Directive) or a ruling establishes an obligation of *facere* impending on a court (in the case, of ensuring the intelligibility of procedural acts by a defendant who does not know the language of the proceedings), it is unacceptable to argue that the defendant would have to invoke the falsity of an act which claimed that he/she did understand Portuguese. Rather, it is necessary to *actively* ascertain whether or not that is true. In case of doubt as to whether or not the defendant understands Portuguese, it is mandatory for the Court, the Public Prosecution and the police to appoint an interpreter. The same must be said of the other invalidities met in this case. Positive obligations imposed on those authorities carry the revocation of any norms of national law – present or future – which are contrary to what is provided for in Directives

[55] This is a reference to the possibility of trying the defendant *in absentia*.
[56] Which, as noted above, lists the (main) rights of the defendant.

establishing an imperative common regime. This includes a system of invocation of invalidities aimed at correcting the failure of the State. Thus, in this case we are not in the presence of a mere irregularity or curable nullity, and Article 120 (2) (c) CCP must be deemed to have been revoked.

6.2.4 High Court of Lisbon, 22-02-2019, case 806/17.1PWLSB.L1-3 – Language of the translation

In this ruling the court held that, although Article 92 (2) CCP requires the designation of an adequate interpreter / translator, this does not mean that they must translate into the *mother tongue* of the person at issue. Recital 22 of this Directive admits that interpretation and translation be provided "*in any other language that [the defendants] speak or understand*". In the case, the defendant had at all time during judicial interrogation shown to understand English well, and thus the notification of the bill of prosecution to this defendant in this language is not null – not in the light of Article 120 (2) (c) CCP nor of any other provision.

6.2.5 High Court of Évora, 26-02-2019, case 3/17.6 GASLV.E1 (Dissenting Opinion) – Interpretation during house searches

In this case, concerning defendants who spoke English but did not speak or understand Portuguese, a number of house searches was carried out and the exchange of words between the suspects/defendants and the Military agents who were performing the investigative measures (for suspected trafficking in narcotics) took place in English language. In his dissenting opinion, Justice José Proença da Costa reasoned that, since the suspects/defendants did not understand Portuguese, they should mandatorily have been appointed an interpreter in order for the search to be carried out. This follows unequivocally from Article 92 CPP and 6 ECHR. But even if one were to disagree with that, no doubts could remain after taking into consideration the Directive 2010/64 (namely its Recitals 21 to 23 and Articles 2 (1) to (4)), which clearly require a suspect to be appointed an interpreter for the carrying out of a house search, as well as provided with a translation of the search warrant. Under Portuguese law, a person is only entitled to translation and interpretation upon being formally designated as an *arguido*, but after the understanding adopted in the ruling of this High Court of 20-12-2018 (*supra*), the legal sanction of failing to comply with those norms must be the non-existence of the act (*viz.* the house search), with the consequence that the evidence gathered is not possible to use.

6.2.6 High Court of Évora, 07-05-2019, case 22/13.1GBPTM.E1 – Temporal scope of the Directive 2010/64/EU and direct applicability; Assistance by an attorney

On the 1st of August 2013, certain procedural acts of great significance had been practised by police authorities – including the designation of the person as *arguido* and his/her consequent subjection to the statement of identity and residence –, all of them in Portuguese language. The court held that the Directives 2010/64/EU and 2012/13/UE could not be directly applied, since the former only became directly applicable in 28-10-2013, and the latter in 02-07-2014. The provision in force at that moment, concerning the invalidity of the act, was Article 120 (2) (c) CCP, which established a curable nullity.

On a different topic, the Court held the following: Article 64 (d) CCP provides that, where the person is unfamiliar with the Portuguese language, assistance by an attorney is mandatory in any procedural act, save for the formal designation of that person as a defendant (*arguido*). In the case, since the defendant was unfamiliar with the Portuguese language, the police should have seen to it that he be appointed a lawyer.

6.2.7 High Court of Lisbon, 10-09-2019, case 100/19.3TELSB-A.L1-5 – Obligation to lodge a preliminary ruling; Extent of translation of the bill of prosecution

In this case the Court ruled that it is not mandatory to lodge a request for a preliminary ruling to the CJEU, nor is it necessary if – as was the case here – there is a consensus between the participants to the procedure that defendants must be given knowledge of the bill of prosecution in a language they understand. The Court moreover held that if – as was also the case – all the information that is relevant for two Spanish defendants (a natural person and a legal person) is contained in a specific part of the bill, and if this part has been translated and notified to them, then it is not necessary to translate the remaining part, which concerned exclusively Portuguese defendants. This would be useless and would in no way contribute to a more effective exercise of the defence rights of the former defendants.

6.2.8 High Court of Lisbon, 01-10-2019, case 2123/18.0TXLSB-C.L1-5 – Objective and subjective scope of the right to interpretation; Enforcement of the penalty and conditional release

The Court held that, in order for a translator or interpreter to be appointed, it is not sufficient that the person intervening the procedure is a foreigner. It is also necessary that he/she does not know or does not command the Portuguese language. Even assuming that an interpreter should have been appointed in the procedural act at issue (a court hearing aimed at ascertaining whether or not the inmate should be conditionally released), this nullity should have been invoked by the inmate during the mentioned procedural act, or otherwise it will be cured (curable nullity), based on Article 120 (2) (c) CCP. The inmate invokes Directive 2010/64/ EU, which has already been implemented into the Portuguese legal system,[57] namely its Article 2 (1), but the phase of execution of the penalty is not among the procedural stages in which the Directive applies. And even if one were to interpret the Directive extensively, it would make no difference in this case, as Portuguese criminal procedure already provides that, "*[i]f a person must intervene in the criminal procedure who does not know or is not fluent in Portuguese, he/she is appointed a suitable interpreter, free of charge, even if the authority presiding over the act or any of the subjects of the procedure happen to know the language at issue*" (Article 92 (2) CCP), and it establishes a (curable) nullity of the act for the breach of such duty (Article 120 (2) (c) CCP).[58] As for the fact that the decision refusing conditional release was not translated into Bulgarian, the court held that this issue could not be appraised within this appeal: the translation would have to have been requested to the court of first instance, and only then, and provided that the request were denied, could the person challenge the decision before a Court of Appeal.

6.2.9 High Court of Oporto, 22-01-2020, case 921/19.7JAPRT-A.P1 – Coercive measures and interpretation / translation

The right of access to the content of the decision that applied a coercive measure to a defendant is not sufficiently ensured through the mere oral communication of the result of that decision, even if the communication is made through an adequate interpreter appointed on the basis of Article 92 CCP. On the contrary, the right to interpretation in criminal proceedings includes the fundamental rights of access to the law and the courts and to a due process, as commanded by Article 20 of the Constitution and Articles 5 (2) and (4), 6 (3) (a) and (e), ECHR, read in conjunction with the national rules on the

[57] Since no specific legal instrument has been enacted with a view to implementing this Directive, we believe that the Court actually meant that the deadline for implementation had already been reached.

[58] It seems to us that this understanding stands in conflict with the one adopted in the ruling of the High Court of Évora of 20-12-2018, process 55/2017.9GBLGS.E1, mentioned above.

subject, which in turn must be interpreted in harmony with Directive 2010/64, namely its Articles 2 (8) and 3 (1) and (2). In the light of the above, the Court held that the notification mentioned in Article 113 (1) CCP only took place effectively – in such a way as to enable the defendant to exercise his/her defence rights, including the right to appeal –, in the moment in which the decision that applied the coercive measures was communicated to him/her in writing, duly translated, as only then could the defendant have actual and adequate knowledge of the reasons that led to the application of those measures.

6.2.10 Critical appraisal

Directive 2010/64/EU is perhaps the Directive that has received more explicit references in Portuguese case law. Often, they serve only to state that Portuguese law already provided for the rights set out in the Directive. However, the High Court of Évora has voiced very forcefully the view that this is not true. For the reasons expounded above, during our analysis of existing legislation, the view upheld by this High Court may be inflated. Indeed, many of the rights contained in the Directive follow from pre-existing rules, notably from Articles 92 and 93 of the CPP. On the other hand, while it is true that Portuguese law makes no differentiation between essential and non-essential documents, it establishes a dichotomy which carries largely equivalent effects, namely between documents whose translation is necessary / unnecessary. Accordingly, if the translation of a document is deemed to be necessary, it should be officially ordered – and if it is not, the defendant may request so and appeal a decision that refuses to order the translation. It does therefore seem rather exaggerated to conclude that the situation in Portugal is one whereby "*translation is in most cases systematically excluded*".

On the other hand, the position adopted in this ruling by the High Court of Évora also seems to be a rather isolated view in Portuguese judicial practice. Nevertheless, it may serve to draw attention to the fact that the standards of Portuguese law on translation / interpretation fall short of the ambitious ones set by the Directive, and that official implementation would avoid ambiguities which now rest entirely with the courts to solve.[59] At the very least, it has the merit of discussing openly the implementation of the Directive into the Portuguese legal system, a discussion which has no equivalence regarding the other Directives.

[59] The latter aspect is emphasised by JÚLIO BARBOSA E SILVA, "A Directiva 2010/64/UE do Parlamento Europeu e do Conselho, de 20 de Outubro de 2010, relativa ao direito à interpretação e tradução em processo penal", *Julgar Online*, Março de 2018, esp. p. 48 f., in http://julgar.pt/a-directiva-201064ue-do-parlamento-europeu-e-do-conselho-de-20-de-outubro-de-2010-relativa-ao-direito-a-interpretacao-e-traducao-em-processo-penal/. The author notes that absence of a transposition act is, in this case, particularly regrettable, considering that Portugal was one of the MSs that promoted the adoption of this Directive. Also SANDRA SILVA, "The right to interpretation and translation in Criminal Proceedings: the situation in Portugal", in Rui Sousa-Silva / Rita Faria / Núria Gavaldà / Belinda Maia (eds.), *Bridging the Gap(s) between Language and the Law – Proceedings of the 3rd European Conference of the International Association of Forensic Linguists*, Porto : Faculdade de Letras da Universidade do Porto, 2012, p. 96 f., in https://ler.letras.up.pt/uploads/ficheiros/13605.pdf. The author claims that "despite some omissions, the Portuguese legislation accomplishes the minimum standards outlined in the Directive".

7 Directive 2012/13/EU: Right to information in criminal proceedings

7.1 Legislation

7.1.1 General issues

No specific legal instrument was enacted in Portugal with a view to implementing this Directive, as existing legislation was deemed to cover it.[60] Our view is again that the most norms do indeed have sufficient backing in previous legislation, but also that this is not true for all of them.

The right to obtain information in criminal proceedings is a right that different procedural subjects are entitled to, but which is particularly intense insofar as the person targeted by the procedure is concerned, and it is therefore one of those rights that emerges immediately upon the designation of one that person as an *arguido*.[61] The Constitution provides in Article 20 (2) that "*everyone has the right to legal information and advice, to legal counsel and to be accompanied by a lawyer before any authority*" – a general provision that applies to all types of legal procedures. As for criminal procedure specifically, Article 32 (1) establishes that it "*ensures all guarantees of defence*", of which the right to information is an integral part. This right to information is enhanced when deprivation of liberty is involved, with Article 27 (4) of the Constitution establishing that "*any person who is deprived of liberty must be immediately informed in an understandable manner of the reasons of his/her arrest, imprisonment or detention, as well as his/her rights*".

In turn, Article 61 (1) (c) CCP establishes that defendants have at all stages of the procedure the right "*to be informed of the acts which are imputed to them*", and Article 61 (1) (h) CCP establishes that defendants have at all stages of the procedure the right "*to be informed by the judicial or police authority before which they are to present themselves of the rights springing from their status as defendants* [*arguidos*]", which include, *inter alia*, the right to remain silent (Article 61 (1) (d));[62] the right to appoint a lawyer or request that a lawyer be appointed to them (Article 61 (1) (e)); the right to be assisted by a lawyer in every procedural act in which he/she takes part, and, when arrested, to communicate with him/her in private (Article 61 (1) (f));[63] and the right to an interpreter or translator (Article 92 *et al.* CCP). This secures implementation of Articles 1, 2 and 3 (1) of the Directive.

7.1.2 Right to information about rights

Regarding Article 3 (2) of the Directive, its implementation is secured, firstly, by Article 58 (2) CCP:

> "*The status of defendant is acquired with the communication to the concerned person, either orally or in writing, by a judicial authority or criminal police body that, as of that moment, he/she has the status of defendant in criminal proceedings and, if necessary, by the explanation of procedural rights and duties of defendants laid down in Article 61, which he/she is thenceforth bound to observe*".

[60] See document with CELEX 72012L0013PRT_218061.
[61] Recall the concept *supra*, § 5.1.2.
[62] See also the other provisions mentioned in respect of the Directive 2016/343.
[63] See also the other provisions mentioned in respect of the Directive 2013/48.

This provision should be read in conjunction with Article 64 (1) (d) CCP, according to which the assistance of the attorney is mandatory in any procedural act, save for the formal designation of the person as a defendant (*arguido*),[64] whenever the person is:

> *"(...) blind, deaf, speechless, illiterate, unfamiliar with the Portuguese language, a person under 21 years old, or the question has been raised as to whether he/she may lack criminal liability [owing to a mental disorder] or not fully imputable*".[65]

And yet by Article 58 (4) CCP, according to which:

> "*The status of defendant implies the handing over to the concerned person, if possible simultaneously, of a document specifying the particulars of the case and those of his/her attorney, should the latter have been appointed. The document must also indicate the procedural rights and duties of the defendant, as listed in Article 61.*[66]"

On the other hand, Article 61 (3) CCP states that, in case the defendant is a minor, "*the information mentioned in paragraph (1) (h) is also communicated to the persons mentioned in paragraph (1) (i)*". The persons mentioned in paragraph (1) (i) are those who exercise parental responsibilities over the defendant, his/her legal representative or de facto guardian, or yet, if the former cannot be reached or special circumstances concerning his/her best interest so require, another adequate person indicated by him/her and agreed to by the competent judicial authority.

7.1.3 Letters of Rights

In contrast, Article 4 of the Directive cannot be deemed to be fully implemented. No problems seem to exist with the implementation of paragraph (1), as it is covered by the several national provisions.[67]

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[64] Because, as noted above, despite the negative symbolism of being formally appointed as a defendant, that appointment also has favourable consequences, in that it grants the addressee a wide set of specific rights.

[65] The cases where the person is not fully imputable concern the so-called situation of "diminished liability", where an offence is perpetrated by individuals who, albeit criminally liable, (i) suffer from a permanent and serious mental illness the effects of which they cannot control; (ii) which diminishes significantly their ability to understand the unlawful nature of their acts or to behave accordingly; and (iii) who cannot be blamed for such lack of control. See further in PEDRO CAEIRO / MIGUEL JOÃO COSTA, "Country Report Portugal", in Helmut Satzger (ed.), *Harmonisierung strafrechtlicher Sanktionen in der Europäischen Union / Harmonisation of Criminal Sanctions in the European Union*, Baden-Baden : Nomos Verlag, p. 390.

[66] Recall *supra*, § 5.1.2.

[67] In the first place, by Article 4 (4) of the Regulation of Detention Conditions in the Premises of the Judiciary Police and in Courts and Public Prosecution Services (Dispatch no. 12786/2009, of 29 May): "*The information mentioned in the previous paragraph [concerning the right to appoint a lawyer and to communicate with a family member, a person of his/her trust or the embassy or consulate, as well as the delivery of the booklet of rights] is provided to the arrested person in a language that he/she understands, and the presence of an interpreter is requested whenever it is necessary*". Secondly, by Article 9 of the General Regulation of Prison Facilities (Decree-Law no. 51/2011, of 11 April): "*(1) Inmates are informed of their rights and duties, and, if necessary, they are explained to them and translated. (2) Inmates are provided with a booklet indicating their rights and duties, the norms relevant to the enforcement of the penalty or security measures to which they have been convicted, and the information necessary to their good integration in the prison facility, namely the services and activities which are available to them and the respective opening and closing hours, as well as the place where they may find the legislation and regulations relevant for the execution of said penalty or security measure. (3) Prison facilities provide the booklet mentioned in the previous paragraph to the inmates in Portuguese language as well as in the languages spoken by most inmates*". Thirdly, by the Code of Enforcement of Penalties and Measures involving Deprivation of Liberty (Law no. 115/2009, of 12 October): by Article 4 (4): "*The enforcement of penalties and measures involving deprivation of liberty applied to inmates who are foreigners or belong to ethnic or linguistic minorities should, as much as possible, enable them to express their cultural values, to mitigate difficulties they might face in terms of social integration or command of the Portuguese language, namely by providing contact with consular or diplomatic authorities or organisations aimed at supporting immigrants, courses of Portuguese language, translation of documents or intervention of interpreters*"; and by Article 16 (2): "*The inmate is immediately informed of his/her rights and duties, duly explained and if necessary translated, and he/she is guaranteed the right to contact a family member or a person of his/her trust, as well as his/her lawyer*". In the CCP, mention is again due to Article 58 (4) (see above), and Article 61 (1), which lists the several rights springing from the designation as *arguido*.

The problem lies in paragraph (2) of Article 4. As noted above, a defendant must be informed of the rights to which he/she is entitled. However, the only rights that authorities are proactively required to provide information about are those listed in Article 61 CCP or in other specific provisions, and these do *not* include the information mentioned in Article 4 (2) (a) of the Directive (the right of access to the materials of the case) and in Article 4 (2) (d) of the Directive (the maximum number of hours or days for which suspects or accused persons may be deprived of liberty before being brought to a judicial authority). The same applies to Article 4 (2) (c) of the Directive (information about the right of access to urgent medical assistance), although there are numerous provisions concerned with providing medical care to defendants, arrested persons and inmates.[68]

Article 4 (3) of the Directive is covered by the already mentioned Article 58 (4) CCP, articulated with Article 61 (1) (j) CCP, which confers on defendants the right to appeal the decisions which personally affect them; and Article 4 (5) of the Directive is also covered by the provisions that implement Article 4 (1), mentioned above.

However, there is again a problem with Article 4 (4) of the Directive and the indicative model Letter of Rights set out in Annex I. The national provisions which implement Article 4 (1) of the Directive, mentioned above, do to a large extent match the norms of Article 4 (4) and of Annex I of the Directive, but they do not constitute an actual, faithful implementation of the indicative Model Letter of Rights envisaged by the Directive, as they do not contain all the information of the Model Letter of Rights. Thus, we would regard Article 4 (4) and Annex I of the Directive as *not implemented*. And the exact same considerations apply to the letter of rights in EAW proceedings: Article 5 (1) raises no concerns, but Article 5 (2) and Annex II of the Directive cannot be deemed to be implemented.[69]

7.1.4 Right to information about the accusation

Moving on to Article 6 of the Directive, it is fully implemented:

Implementation of paragraph (1) follows from provisions that have already been mentioned – namely from Article 27 (4) of the Constitution, and Articles 61 (1) (c), 58 (2) and 58 (4) CCP – in conjunction with Article 58 (5) CCP, according to which the non-compliance with, or breach of legally prescribed formalities prevents the use as evidence of any statements made by the concerned person.

Paragraph (2) is implemented by Article 27 (4) of the Constitution, together with Article 141 (4) CCP, according to which, at the first judicial hearing of an arrested person, the judge must inform him/her:

> "(a) *Of the rights mentioned in Article 61 (1) [which include the right to be informed of the facts which are imputed to him/her], if necessary explaining them to him/her;* (...) (c) *Of the reasons for his/her arrest; (d) Of the facts which are concretely imputed to him/her, including, when they are known, the circumstances of time, place and manner in which they occurred; and* (e) *The elements of the file which constitute evidence of the imputed facts, where this does not jeopardise the investigation, render difficult the ascertainment of the truth of the facts or creates danger for the life, the physical or mental integrity or the liberty of the procedural participants or victims of the crime; all of which [save for (a),* supra*] are recorded in the official record of the hearing*."

[68] Namely Article 22 of the Regulation of the Detention Conditions in the Premises of the Judiciary Police and in Courts and Public Prosecution Services; and Articles 3 (1) (f), Article 10, Article 19 and 53 of the General Regulation of Prison Facilities.

[69] The situation here is indeed entirely parallel to that concerning persons arrested for purposes other than the execution of an EAW, as Article 17 (4) LEAW establishes that "*Articles 57 to 67 CCP apply accordingly, and the person sought, when arrested, must be provided with a document containing the rights mentioned in the previous paragraphs*".

In the second place, by Article 258 (1) (c) CCP, which states that:

> "*Arrest warrants are issued in triplicate and they must contain, or otherwise they will be null: (...) The indication of the facts that motivated the arrest and the circumstances which make it legally justified*".

Finally, by Article 3 (1) of the Regulation of the Detention Conditions in the Premises of the Judiciary Police and in Courts and Public Prosecution Services, which provides that:

> "*Any person who is deprived of his/her liberty must be informed immediately and in an understandable manner of the reasons for his/her arrest and of his/her rights, which he/she may exercise as of the moment in which he/she if factually deprived of liberty*."

Implementation of paragraph (3) follows from the following provisions of the CCP. In the first place, from Article 283 (3), according to which the bill of accusation must contain, or else will be null:

> "(a) *The indications concerning the identification of the defendant*; (b) *An account, if only summary, of the facts that justify the application to the defendant of a criminal sanction, including, if possible, the place, time and motivation of the act, the degree of participation of the defendant and any circumstances relevant for the determination of the sanction*; (c) *The indication of the applicable legal provisions; (d) A list with up to 20 witnesses, and their identification (...)*; (e) *The indication of the experts and technical advisors that should be heard at trial, and their identification*; (f) *The indication of other evidence to be produced or requested*; (g) *The indication of the social report or of information of the social service, when the defendant is a minor, save where this is not yet available and it is deemed unnecessary in the light of the best interest of the minor*; (h) *Date and signature*."[70]

Also from Article 287 (2), according to which, when the optional phase of instruction has been requested,[71] the request that triggers this phase

> "*(...) is not subject to particular formalities, but must contain a summary of the reasons, of fact and law, why the applicant disagrees with the decision whether or not to prosecute the defendant [a decision taken at the end of the phase of inquiry], as well as an indication of the acts of instruction that the applicant wishes be carried out, the evidence that was not considered during the inquiry and the facts expected to be proven thereby; the request of the phase of instruction by the victim moreover abides by Article 283 (3) (b) and (c) [transcribed above]*".

Yet, from Article 308 (2), based on which Article 283 (2), (3) and (4) applies to the decision whether or not to indict the defendant, taken at the end of the phase of instruction. And, finally, from Article 311 (2), which prescribes:

> "*If the procedure has proceeded to trial without the phase of instruction having taken place, the presiding judge shall decide:* (a) *To reject the prosecution, if it is deemed to be manifestly unfounded*; (...) (3) *For the purposes of paragraph (3) above, the prosecution is deemed to be manifestly unfounded*: (a) *When it does not contain the identification of the defendant*; (b) *When it does not contain an account of the facts*; (c) *If it does not indicate the applicable legal provisions or the evidence substantiating the prosecution*; *or* (d) *If the facts do not constitute a crime*".

On the other hand, implementation of paragraph (4), the final norm in Article 6 of the Directive, on the information of changes in the relevant information, is ensured by Article 1 (f) of the CCP, which defines a "*substantial change of the facts*" as one "*which carries the imputation to the defendant of a*

[70] Based on Articles 284 and 285 CCP, these requirements apply also to prosecutions made by the victim (*assistente*), in the case of the so-called private crimes – *sc.*, cases where the criminal procedure may only be initiated after a complaint by the victim and proceed to the trial phase after a prosecution by the victim. In further detail on these concepts, see PEDRO CAEIRO / MIGUEL JOÃO COSTA, "The Portuguese System", in Katalin Ligeti (ed.), *op. cit.*, p. 544 f.

[71] Recall the phases of Portuguese criminal procedure *supra*, § 5.1.3.

different offence or the aggravation of the maximum limits of the sanctions applicable to him/her". In turn, Article 303 CPP regulates the effects triggered by one such substantial change of the facts:

> "(1) *If from the act of instruction, or from the debate that takes place in that procedural stage, it emerges a non-substantial change of the facts described in the bill of prosecution by the Public Prosecution or by the victim, or described in the request to open the phase of instruction, the judge, either at his/her own initiative or at the request [of a procedural subject], shall communicate such change to the lawyer of the defendant, interrogate the defendant about the change whenever this is possible, and grants to the defendant, if this is requested, a term of up to 8 (eight) days to prepare his/her defence, with the consequence that, if necessary, the debate be adjourned.* (...) (3) *A substantial change of the facts described in the bill of prosecution or in the request to open the phase of instruction cannot be taken into account by the court for the purposes of indicting the defendant in the ongoing procedure, nor does it carry the extinction of the case.* (4) *The communication of the substantial change of the facts to the Public Prosecution serves as a denunciation so that it takes action concerning the new facts, if these can be addressed in an autonomous manner in relation to ensemble of facts that form the object of the procedure.* (5) *Paragraph (1) applies accordingly to the case where the judge changes the legal classification of the facts described in the bill of prosecution or in the request to open the phase of instruction*."[72]

As for "*substantial change of the facts*" during the phase of trial, the relevant provisions are Articles 358 and 359 of the CCP:

> Article 358: (1) "*If during the trial hearing it emerges a non-substantial change of the facts described in the bill of prosecution or, if the phase of instruction took place, in the bill of indictment, and this is relevant for the decision of the cause, the presiding judge grants the defendant, if he/she so requests, the time that shows strictly necessary for him/her to prepare his/her defence.* (2) *The previous paragraph does not apply if the change resulted from facts invoked by the defence.* (3) *Paragraph (1) applies accordingly to the case where the court changes the legal classification of the facts described in the bill of prosecution or in the bill of indictment.*"

> Article 359: "(1) *A substantial change of the facts described in the bill of prosecution or in the bill of indictment cannot be taken into account by the court for the purposes of convicting the defendant in the ongoing procedure, nor does it carry the extinction of the case*. (2) *The communication of the substantial change of the facts to the Public Prosecution serves as a denunciation so that it takes action concerning the new facts, if these can be addressed in an autonomous manner in relation to ensemble of facts that form the object of the procedure.* (3) *The previous paragraphs do not apply if the Public Prosecution, the defendant and the victim agree to the continuation of the trial for the new facts, insofar as these do not carry the court not to be competent for trying the case.* (4) *In the cases mentioned in the previous paragraph, the presiding judge grants the defendant, if he/she so requests, a term of up to 10 (ten) days to prepare his/her defence, with the consequence that, if necessary, the hearing be adjourned*."

Finally, regarding the phase of appeal, the central provision is Article 424:

> "(1) *Once the [appeal] hearing is closed, the court meets to deliberate*. (...) (3) *Whenever there is a non-substantial change of the facts described in the appealed decision or their legal classification which is not known by the defendant, he/she is notified to pronounce him/herself, if he/she so wishes, within 10 (ten) days*."

[72] This provision is complemented by Article 309 (1): "*The decision taken at the end of the phase of instruction is null in the part where it indicts the defendant for facts that constitute a substantial change of the facts described in the bill of prosecution or in the request to open the phase of instruction*"; and by Article 311 (2) (b): "*If the procedure has proceeded to trial without the phase of instruction having taken place, the presiding judge shall decide: (...) Not to accept the prosecution by the victim or by the public prosecution services in the part which amounts to a substantial change of the facts (...).*"

7.1.5 Right of access to the materials of the case

Article 7 of the Directive is also covered by pre-existing norms. Traditionally, in Portuguese criminal procedure, the phase of inquiry was a secret phase. Change was brought by Law no. 48/2007, of 29 August, which effected a broad reform of the CCP. As far as this specific issue is concerned, it set publicity as the rule of the procedure as a whole: both at the internal level (is-a-vis the procedural subjects or participants) and at the external level (vis-a-vis the general public and the media). Thus, at present, proceedings are as a principle public. However, exceptions are admissible, and, in practice, the decision is often taken to bring the proceedings under secrecy of justice.

The general provision regulating disclosure of proceedings and legal secrecy is Article 86 CCP, which must be transcribed in order for other provisions (relevant for the particular purposes of this Directive) to be properly understood. According to Article 86 CCP:

> "(1) *To the exception of the cases where the law provides differently, criminal proceedings are public, or otherwise they will be null.* (2) *At the request of the defendant, (...), the judge of instruction, after hearing the Public Prosecutor, may determine that the proceedings be subject to legal secrecy during the inquiry, if he/she believes that their disclosure would affect the rights of procedural subjects or participants; this decision cannot be challenged on appeal.* (3) *Where the Public Prosecutor believes that, for the sake of the investigation or of the rights of procedural subjects, proceedings should be secret, he/she may determine that, during the inquiry, the proceedings be subject to legal secrecy. Such a decision must be validated by the judge of instruction within a maximum term of 72 hours.* (4) *Where proceedings are subject to legal secrecy pursuant to paragraph 3 above, the Public Prosecutor, at his/her own initiative or upon the request of the defendant (...), may determine that secrecy be lifted at any stage of the inquiry.* (5) *Where the defendant (...) requests legal secrecy to be lifted but the Public Prosecutor does not do so, the file is transmitted to the judge of instruction, so that he/she decides whether or not secrecy should be lifted; this decision cannot be challenged on appeal.* (6) *Disclosure of proceedings implies (...) the following rights:* (a) *The right of the public in general to attend the preliminary hearing and the undertaking of procedural acts at the phase of trial;* (b) *The right of the media to report or reproduce procedural acts;* (c) *The right to access the file and to obtain copies, extracts, or certified copies of the relevant documents.* (7) *Disclosure does not cover any data connected to privacy when these are not valid as evidence. The judicial authority shall determine, either ex officio or upon request, which data are covered by legal secrecy and, if necessary, shall determine their destruction or delivery to the concerned person.* (8) *Legal secrecy binds all procedural subjects and participants, as well as those who, for any given reason, have obtained knowledge of the proceedings or elements contained therein, and it implies the prohibition to:* (a) *Attend the undertaking or be informed about the content of procedural acts to which the person is not allowed or supposed to attend;* (b) *Provide information, regardless of the purpose, on the occurrence of procedural acts or the terms in which they occur.* (9) *The judicial authority may, in a reasoned decision, provide information or allow or order information to be provided to specific persons as to the content of an act or document under legal secrecy, insofar as this does not affect the investigation and the information is:* (a) *Useful for clarifying the truth; or* (b) *Indispensable for the interested parties to exercise their rights.* (10) *The persons mentioned in the previous paragraph 9 are identified in the files, together with an indication of the act or document the content of which they were informed of, and they are in any case bound to legal secrecy.* (11) *The judicial authority may allow the issuing of a certificate giving account of the content of the act or document under legal secrecy, as long as its disclosure is necessary for criminal or disciplinary proceedings of a public character, or for a request for civil compensation.* (12) *If the case concerns an accident caused by a land vehicle, the judicial authority shall allow the issuing of certified copies:* (a) *Disclosing the act or document under legal secrecy, for the purposes mentioned in the last part of the preceding paragraph, subject to an application grounded on Article 72 (1) (a);* (b) *Of a police record on a traffic accident for the purposes of extra-judicial settlement of a dispute where one party is an Insurance Company to which civil liability has been transferred.* (13) *Legal secrecy does not prevent the supply of public information by the judicial authority, when this is necessary for clarifying the truth and does not affect the investigation:* (a) *At the request of persons who have been publicly implicated in the case, or* (b) *In order to safeguard the security of persons and assets, or the public order*."

It is ultimately Article 89 CCP that secures implementation of Article 7 (1), (2), (3), and (4) of the Directive. This provision of the CCP prescribes:

> "(1) *During the inquiry, the defendant (...) may consult, upon request, the file or some of its elements, as well as obtain extracts, copies, or certified copies, save where the Public Prosecution opposes to it, due to considering, in a reasoned manner, that it may be detrimental to the investigation or the rights of the procedural participants or the victims.* (2) *If the Public Prosecution opposes to the consultation or obtaining of the elements mentioned in the previous paragraph, the request is brought to a judge, who decides whether or not it should be granted; this decision cannot be challenged on appeal.* (3) *For the purposes of the previous paragraphs, the file or the parts of it that may be accessed by the defendant (...) are deposited at the secretary, in detached photocopies, without detriment to the development of the proceedings. All remain bound to secrecy of justice.* (4) *When, based on Article 86 (1), (4) and (5), the procedure becomes public, those mentioned in paragraph (1) above may request the competent judicial authority the examination of the file outside of the secretary, free of expenses. The order granting such a request should set a deadline for that effect.* (...) (6) *Upon expiry of the terms set in Article 276 [i.e., the maximum terms of duration of the phase of inquiry], the defendant (...) may consult all the elements of a procedure which is under secrecy of justice, save where the investigating judge determines, at the request of the Public Prosecution, that the access to the file should be adjourned for up to 3 (three) months, liable to one prorogation if the case concerns the types of criminality mentioned in Article 1 (i) and (m) [terrorism or highly organised criminality], and for a term objectively indispensable for concluding the investigation.*"

Regarding Article 7 (5) of the Directive, in Portugal, access to the file at the secretary of the court is free of charge – which in our view secures compliance with the Directive. However, if the defendant wishes to obtain copies or certified copies, he/she must pay for them – which in our view is also acceptable from a proportionality standpoint –, unless he/she is entitled to legal aid, which covers these expenses.

7.1.6 Verification and remedies

Article 8 of the Directive is implemented by the same provisions mentioned in relation to Articles 3 to 6 of the Directive, complemented by Article 94 (1), which provides that the procedural acts which are to be practised in writing must be "*drafted in a perfectly intelligible manner*", and by Article 99, already transcribed above, in the context of Directive 2010/64.[73]

7.1.7 Training

As far as we could establish, judicial and police authorities are trained to comply properly with their obligation to provide information to defendants, but no specific provisions or other type of elements could be identified which attest to this. This, however, does not in our view prevent implementation of this provision of the Directive, as it directed at the practice of those authorities.

7.1.8 Conclusion

In conclusion, as with the Directive on the right to interpretation and translation, most provisions of this Directive have sufficient resonance in legislation that was already in force in Portugal,[74] but, in in our view, some provisions do still lack implementation, namely Article 4 (2) (a), (c) and (d), Article 4 (4) in conjunction with Annex I, and Article 5 (2) in conjunction with Annex II.

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[73] As for paragraph (2), see also the provisions and remarks made to Article 10 of Directive 2016/343, which apply squarely here.

[74] See also JÚLIO BARBOSA E SILVA, "A Directiva 2012/13/UE do Parlamento Europeu e do Conselho de 22 de Maio de 2012 relativa ao direito à informação em processo penal (Perspectivas portuguesas)", *Julgar Online*, Novembro de 2017, p. 50, in http://julgar.pt/a-directiva-201213ue-do-parlamento-europeu-e-do-conselho-de-22-de-maio-de-2012-relativa-ao-direito-a-informacao-em-processo-penal/. The conclusion of the author seems to be somewhat more unreserved than ours, as we believe that some provisions in the Directive lack adequate legislative action by the Portuguese State, as noted subsequently in the text.

The problem with Article 4 (2) is, quite simply, that national authorities are not proactively required to provide information on all the rights contemplated in that provision of the Directive, namely on the right of access to the materials of the case, on the maximum number of hours / days of deprivation of liberty before being brought to a judicial authority, and on the right of access to urgent medical assistance. These should be added to the list of rights that must be communicated to the defendant or arrested person, as well to persons requested pursuant to an EAW, if Portuguese law is to comply in full with the requirements of this Directive.

7.2 Case-law

Regarding Directive 2012/13/EU, 18 meaningful rulings were identified, although only rarely do they make explicit reference to the Directive. The following are, in our view, the most relevant decisions.

7.2.1 Constitutional Court, no. 121/97 – Access to the file during the inquiry

In this case, the Court found that Articles 86 (1) and 89 (2) CCP are unconstitutional when interpreted in the sense that the investigating judge cannot, in any circumstances and apart from the cases listed in the latter norm, authorise the lawyer of the defendant to consult the file during the stage of inquiry in order to appeal against the application of the coercive measure of pre-trial custody. In the view of the Court, such an interpretation would breach Articles 20 (1) and 32 (1) and (5) Constitution, all of which have been mentioned above.

7.2.2 Constitutional Court, no. 416/2003 – Information on the imputed facts

In this instance the Court ruled that Article 141 (4) CCP is unconstitutional, for breach of Articles 28 (1) and 32 (1) Constitution, when interpreted in the sense that, during the interrogation of an arrested defendant, the indication of the facts imputed to him/her may consist of the formulation of general and abstract questions, without specifying the circumstances, time, place and manner in which the facts reportedly occurred nor the evidence supporting the charges, without ascertaining whether that would carry serious inconvenience to the criminal procedure.

7.2.3 Constitutional Court, no. 417/2003 – Appeal against refusal of access to the file

Here the Court found that Article 407 (2) CCP is unconstitutional, for breach of Articles 32 (1) and 20 (5) Constitution, when interpreted in the sense that an appeal lodged against a decision denying access to elements contained in the file, with a view to contesting a decision subjecting the defendant to the coercive measure of pre-trial custody, should be assessed by the court of appeal only when the final decision of the case is proffered and becomes open to appeal.

7.2.4 High Court of Coimbra, 05-02-2014, case 174/13.0GAVZL-A.C2 – Access to the file *vs.* Protection of other interests

In this case, the High Court of Coimbra held that, during an inquiry which is under secrecy of justice, the special regime on consultation of the elements of the file provided for in Article 194 (8) CCP is subject to the constraints provided for in Article 89 (1) and (2) CCP. Therefore, during the term for which a defendant has the possibility to appeal against a decision placing him in pre-trial custody, the investigation judge may – although it may *only* –, based on Article 194 CCP, deny access to certain elements of the file (even if they have served to justify the decision to apply pre-trial custody) when this consultation could carry any of the risks mentioned in Article 194 (6) (b) CCP – that is, where it would put the investigation seriously in jeopardy, or make it impossible to discover the truth, or create

a risk to the life, the physical or mental integrity or the freedom of any procedural participant or of the victim.

The defendant had invoked Directive 2012/13/EU. The Court held that, regardless of implementation into the national legal system, the Directive admits in Recital 32 and in Article 7 (4) that access to the material evidence in the possession of the authorities be restricted where it may carry "*serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, including in cases where access could prejudice an ongoing investigation or seriously harm the national security of the Member State in which the criminal proceedings are instituted*". Thus, Articles 141 (4) and 194 (6) (b) and (8) CCP, as interpreted in this instance, are fully compliant with the Directive.

7.2.5 Constitutional Court, no. 333/2016 – Access to the file outside of the court

In turn, in this case the Court did *not* consider unconstitutional Articles 89 (4) and 86 (1), (4) and (5) CCP, interpreted in the sense that it is not mandatory to grant the defendant access to the original file in order to consult it outside of the premises of the court.

7.2.6 Constitutional Court, no. 366/2018 – Trial *in absentia*, notification of the sentence and time-bars

The Court did *not* hold unconstitutional Article 120 (1) (d) Penal Code, when interpreted in the sense that the terms of statutory limitation of the criminal procedure are suspended, indeterminately if that is the case, pending the period during which a defendant tried *in absentia* cannot be notified of the sentence for reasons imputable to him/her. The Court reasoned that, although there is a constitutional principle (derived from the general principle of proportionality) according to which criminal proceedings should be subject to time-bars, that principle does not extend so far as to prevent the legislator from establishing hypotheses where computation of the time-bar is suspended, even without maximum temporal limits.

7.2.7 High Court of Évora, 20-12-2018, case 55/2017.9GBLGS.E1 – Direct effect and conforming interpretation

This ruling was already explained in detail above in the context of the Directive 2010/64/EU, but it is also very relevant in respect of the Directive 2012/13/EU.

7.2.8 High Court of Évora, 07-05-2019, case 22/13.1GBPTM.E1 – Temporal scope of the Directive 2010/64/EU and direct applicability; Assistance by an attorney

This ruling was also mentioned above and is also worthy of reference here, as it makes explicit reference to the Directive 2012/13/EU.

7.2.9 Constitutional Court, no. 689/2019 – Access to the elements basing the decision to declare the exceptional complexity of the proceedings

Finally, the Court saw *no* unconstitutionality either in Article 215 (3) and (4) CCP, interpreted in the sense that, when the Public Prosecution requests the judge to declare a procedure that is under secrecy of justice as a 'procedure of exceptional complexity' (a declaration which carries various procedural consequences, such as the extension of certain deadlines), the defendant cannot access the evidentiary elements on which the request by the Public Prosecution is based.

7.2.10 Supreme Court of Justice, 26-06-2019, case 94/18.2YRPRT.S3 – Right to information in EAW proceedings

Article 48 CFREU, which corresponds to Article 6 (2) and (3) ECHR, ensures the right to information, to contradict the charges (*audi alteram partem*) and the right to a duly reasoned decision, as integral parts of the right to a due process. Those rights are to be respected by both the issuing and the executing authority of an EAW, notably when the sought individual has opposed to being surrendered and it is necessary to ascertain whether certain grounds for non-execution are met in the case. The Directive 2013/48/EU – which is to be applied taking into account the Directive 2012/13/EU –, is particularly relevant insofar as concerns the right to a due process and the right of defence in the context of EAW proceedings, enshrined in Articles 47 and 48 CFREU and Article 6 ECHR.

7.2.11 High Court of Lisbon, 10-09-2019, case 100/19.3TELSB-A.L1-5 – Obligation to lodge a preliminary ruling; Extent of translation of the bill of prosecution

This is yet another ruling where there is an intertwinement between rights enshrined in the Directive 2010/64/EU and in the Directive 2012/13/EU. It has already been addressed *supra*, § 6.2.2.6.

7.2.12 High Court of Lisbon, 23-04-2020, case 18/20.7JELSB-B.L1-9 – Direct effect and conforming interpretation; Obligation to lodge a preliminary ruling

In this recent decision, the Lisbon Court held that the absence of an attorney in a search [in the case, one carried out in a vessel] whereby the individuals concerned were not formal defendants (*arguidos*), but mere suspects, does not constitute a nullity. Moreover, Directive 2013/48/EU was not – the Court held – implemented [explicitly] into the Portuguese legal system, as Portugal did not find it necessary, and it lacks direct effect in national legal systems. Consequently, Portuguese courts are not, literally speaking, bound to obey this Directive. The same stands for Article 7 (1) of the Directive 2012/13. This is because only acts that have a binding character, such as Regulations and Decisions (but not those that do not, such as Directives, Recommendations and Opinions) have direct effect.

Nevertheless – the Court did add –, the latter instruments do have *indirect effects*. That is to say: they are subject to the principle of harmonious interpretation (as ruled by the CJEU in 10-04-1984, *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, and numerous other subsequently). This applies to Directives that: (i) have not been transposed but should have; (ii) have been deficiently implemented; or (iii) have not been explicitly transposed because national law already provided for the rights at issue. In the case, the CCP, in articulation with Article 7 of the Directive 2012/13, already provides for a right to access essential elements, this being a very wide concept that includes several documents: not only documents in the strictest sense of term (such as complaints, inquiries, expert reports), but anything which is in the file and is relevant for the defence (or the prosecution), whether incriminating or exculpatory (such as photographs, audio or video records, objects). And all those elements must be provided to suspects, accused persons, attorneys (whether appointed by the State or by the concerned person), at the latest before a competent judicial authority is called upon to decide on the legality of the arrest or imprisonment (under Article 5 (4) ECHR), and in due time, so as to allow for the effective exercise of the right to judicial review of the arrest or imprisonment.

On the other hand, the intervention of the CJEU for ascertaining, in a preliminary ruling, the validity and the interpretation of acts adopted by the EU should or must only be required with respect to acts which have a binding character, such as Regulations and Decisions. Not to acts which do not, such as Directives, Recommendations and Opinions. Thus, the Court decided not make use of the mechanism.

7.2.13 Critical appraisal

Similar considerations as those adduced on the Directive 2010/64/EU apply to Directive 2012/13/EU. It has received some explicit reference in Portuguese case law, but generally aimed at establishing that national law already provided for the rights at issue here. The ruling of the High Court of Évora of 20-12-2018 points elsewhere, but the High Court of Lisbon has subsequently delivered case law – such as the ruling of 23-04-2020 – immediately above, which holds that these Directives do not have direct effect in the Portuguese legal system.

In our view, the distinction established by the High Court of Lisbon, according to which the power / duty to refer a matter to the CJEU for a preliminary ruling concerning the validity or interpretation of EU legal instruments applies only to acts of a binding nature, is a doubtful distinction. And, in any event, it is rather surprising that the Court does not consider Directives as binding acts to that effect. Thus, although – as noted earlier (§ 6.2.10) – the position of the High Court of Évora may be deemed exaggerated in concluding for a very high level of implementation deficit of Directives 2010/64/EU and 2012/13/EU into the Portuguese legal system, the position of the High Court of Lisbon also seems to be overconfident in holding Portuguese law fully compliant with such Directives.

8 Directive 2013/48/EU: Right of access to a lawyer and to have a third party informed

8.1 Legislation

8.1.1 General issues

Once again, no specific legal instrument was enacted in Portugal for the implementation of Directive 2013/48/EU. Existing legislation was deemed to cover it.[75] In our view, all the norms of the Directive have *not* sufficient backing in the legislation in force, and in fact this is one of the Directives where implementation levels are poorer, and there is a clear need for legislative intervention here.

Regarding the scope of the Directive, Article 2 (1) and (3) are implemented by several provisions that were already mentioned (namely Articles 20 (2) and 32 (1) of the Constitution, concretised in Articles 58, 59, 60, and 61 (e) and (f) CCP), added by Article 32 (3) of the Constitution, which emphatically commands:

> "*Accused persons have the right to choose an attorney and to be assisted by him/her in any procedural act. The law shall specify the cases and phases of procedure in which the assistance of a lawyer is mandatory.*"

The implementation Article 2 (2) is secured by Article 17 (2) LEAW, according to which individuals arrested pursuant to an EAW have the right to be assisted by an attorney, as well as by Article 18 (4) LEAW, according to which, when a person who has been arrested pursuant to an EAW, this person should be brought before a judge within 48 hours and, before hearing the person, the judge in charge of the case must appoint an attorney to him/her, if he/she has not yet appointed one by own initiative. The LEAW further requires the assistance of an attorney in other procedural acts, *v.g.* when the person consents to waiving the specialty rule, to being re-surrendered to a different MS after the execution of an EAW, or to being surrendered to the issuing MS (Articles 7 (3) (c), 8 (2) (c), and 21).

Article 2 (4) of the Directive is implemented, since in Portugal, apart from the possibility of penal mediation, even minor penalties must be applied by a court endowed with jurisdiction in criminal matters; and the regime of penal mediation still confers on the defendant the right to be assisted by an attorney at all stages of the proceedings.[76]

8.1.2 Right of access to a lawyer in criminal proceedings

Article 3 of the Directive, however, raises *implementation problems*. The provisions that implement Article 2 (1) and (3) of the Directive are also important here, as is Article 64 CCP, according to which:

> "(1) *Assistance by an attorney is mandatory:* (a) *In interrogations of an arrested or imprisoned defendant;* (b) *In interrogations conducted by judicial authorities [a judge or a public prosecutor];* (c) *In the debate that takes place at the end of the phase of instruction and in the trial hearing;* (d) *In any procedural act, save for the formal designation of the person as a defendant, whenever the person is blind, deaf, speechless,*

[75] See document with CELEX 72013L0048PRT_237749.

[76] See, notably, Article 8 of Law no. 21/2007, of 12 June (Penal Mediation Law). Regarding the sanction, Article 6 (2) of this Law establishes that the mediation agreement cannot include any penalty involving deprivation of liberty or any duty which hampers upon the dignity of the defendant or the fulfilment of which is to be carried out beyond 6 months. This concurs to accomplishing the goals of Article 3 (4) of the Directive, as do other provisions which are better addressed under Articles 5 (2) and 7 (6) of Directive 2016/343, on presumption of innocence.

illiterate, unfamiliar with the Portuguese language, a person under 21 years old, or the question has been raised whether he/she may lack criminal liability [owing to a mental disorder] or is not completely imputable; (e) *In any appeal, ordinary as well as extraordinary;* (f) *In the cases mentioned in Articles 271 and 294;*[77] (g) *At the trial hearing held in the absence of the defendant;* (h) *In any other case provided for by the law.* (2) *Apart from the cases mentioned in the previous paragraph, the defendant may be appointed a lawyer, either at the request of the court or the defendant him/herself, whenever the circumstances of the case reveal a need for or convenience in having the defendant be assisted by a lawyer.* (3) *Without detriment to the previous paragraphs, if the defendant does not yet have a lawyer, he/she must be appointed one when he/she is prosecuted, and this lawyer must be indicated in the order that puts an end to the phase of inquiry.* (4) *In the case mentioned in the previous paragraph, the defendant is informed, in the bill of prosecution, that, should he/she be convicted, he/she will be obliged to pay for the services of the lawyer that has been appointed to him/her, unless he/she is granted legal aid, and that he/she may substitute such a lawyer by another lawyer of his/her choice*."

What follows from these provisions is that Portuguese law entitles defendants to a *right* of access to a lawyer in all cases listed in Article 3 (2) of the Directive, and that in many of these cases assistance by a lawyer is *mandatory*. However, not all the cases listed in Article 3 (2) of the Directive are cases in which Portuguese law imposes the assistance of a lawyer, and Article 3 (2) of the Directive (in contrast with its Article 3 (1)) may plausibly be interpreted as requiring the defendant, not simply to be given a *right* of access to a lawyer, but to be *actively provided with* "*access to a lawyer*" by the State. If Article 3 (2) of the Directive is to be construed as establishing a mere *right* to lawyer, then Portuguese law is fully compliant; if, on the contrary, it establishes cases of *mandatory assistance by a lawyer*, then only some cases (notably those covered by Article 64 CPP) respond to the command of the Directive,[78] in which case we would have the following situation:

Article 3 (2) (a) would be implemented only regarding interrogations by judicial authorities, but not by the police. In any event, it should be noted that one of the reasons why Portuguese procedural law does not require the presence of a lawyer in interrogations before the police is that such statements may virtually never serve as evidence later in trial.[79] In fact, the Directive requiring the mandatory presence of a lawyer in interrogations carried out by the police could be regarded by the Portuguese legislator as an invitation to admit those statements as evidence. This would ironically represent a compression of fundamental rights, whereas the aim of the Directive is obviously the opposite.

Article 3 (2) (b) too would only partially be implemented. The key national provision is Article 250 (9) CPP: if the police is to proceed to the identification of a suspect, this person is always given the possibility to contact a person of his/her trust, but the presence of the lawyer is not in fact required. Moreover, that provision is conceived as a cautionary or police measure, not as an actual investigative measure aimed at obtaining evidence to be used in trial. Actual identity parades are instead regulated in Articles 147 f. CCP, which do not even mention the possibility to contact a person of his/her trust.[80]

[77] Articles 271 and 294 CCP refer to the so-called 'taking of statements for future memory' (*declarações para memória futura*): when it is probable that a witness cannot be present in trial, owing for instance to an illness, the judge may question this person (as well as victims of human trafficking and of sexual offences) before the trial, under specific conditions, with the exceptional possibility of using their declarations as direct evidence later in the trial – and, thus, in deviation from the principles of orality and immediacy. In those cases, the presence of the lawyer of the defendant is essential, because that procedural act is the crucial moment for exerting the right to contradict the testimony (*audi alteram partem*).

[78] It is the interpretation defended in MIGUEL JOÃO COSTA, "Commentary on the Proposal for a Directive of the European Parliament and of the Council on Provisional Legal Aid for Suspects or Accused Persons Deprived of Liberty and Legal Aid in European Arrest Warrant Proceedings", in Pedro Caeiro (org.), *A Agenda… op. cit.*, p. 61 f.

[79] See Article 357 (1) (b) CCP.

[80] Although a person does have the right to be assisted by a lawyer if he/she was formally designated as a defendant, and a person regarding whom investigation measures are being conducted can always request him/herself to be designated as a defendant.

The same applies to confrontations (Article 146 CCP) and reconstructions of the scene of a crime (Article 150 CCP).

Article 3 (2) (c) raises no problems, as it is implemented by Article 64 (1) (a) CCP, based on which assistance by an attorney is mandatory in "*interrogations of an arrested or imprisoned defendant*",[81] by Article 141 (2) CCP, based on which the first judicial interrogation of an arrested defendant "*is performed exclusively by the judge, in the presence of the public prosecution and of the lawyer of the defendant*", and by Article 144 (3), based on which "*interrogations [judicial or otherwise] of defendants who are arrested are always carried out in the presence of his lawyer*".[82]

Likewise, Article 3 (2) (d) is implemented by Article 61 (1) (b), (c), (e) and (g) CCP, according to which assistance by an attorney is mandatory "*in interrogations conducted by judicial authorities*" (*viz*., a judge or a public prosecutor), "*in the debate that takes place at the end of the phase of instruction and in the trial hearing*", "*in any appeal, ordinary as well as extraordinary*", and "*at the trial hearing held in the absence of the defendant*".[83]

Article 3 (3) of the Directive, on the *implications of the right to a lawyer*, also raises problems:

As for Article 3 (3) (a) there is a problem with the *temporary derogation* of the right to meet in private and communicate with the lawyer in certain cases including terrorism – which, for the sake of clarity, will be addressed separately below –, but this provision is largely implemented by Articles 61 (1) (e) and (f) and 64 (1) (a), (b), (c) and (g) CCP, already mentioned, added by Article 313 (1) (c) and (2):

> "*(1) The order of the court designating a date for the trial hearing to take place contains, or otherwise it will be null: (c) The appointment of a lawyer to the defendant, in case he/she has not yet appointed one. (2) Such an order, together with a copy of the bill of prosecution or of indictment, is notified to the public prosecution, as well as to the defendant and his/her lawyer (...), at least 30 days before the designated date*."

Article 3 (3) (b) is implemented essentially by Article 63 CCP, in consequence of which the array of rights conferred on the defendant, described above, may be exercised by his/her attorney:[84]

> "*(1) The lawyer exercises all the rights that the law confers upon the defendant, save for those that are personally reserved to the latter. (2) The defendant may revoke the act performed by his/her attorney on his/her behalf, so long as this is made by an explicit statement prior to the decision to be taken with respect to such an act.*"

Regarding Article 3 (3) (c), as noted earlier – in relation to Articles 2 (1) and 3 (2) (b) of the Directive –, the defendant always has the right to have his/her lawyer present at these investigating or evidence-

[81] Please bear in mind that a person who has been arrested must be brought to the presence of a judge within 48 hours.

[82] In addition, one should consider Article 5 (1) of the Regulation of Detention Conditions in Premises of the Judiciary Police and in Courts and Public Prosecution Services, and Article 8 of the General Regulation of Prison Facilities.

[83] Additionally, by Article 272 (4) CCP, according to which, "*[i]f the defendant already has a lawyer and is to be interrogated by the public prosecution during the phase of inquiry, the lawyer must be notified of the interrogation at least 24 hours beforehand, save in the case provided for in (b) of the previous paragraph* [which concerns the case where the defendant is not arrested or imprisoned, and the cases of extreme urgency: in these cases, the notification does not have to be made if there is founded reason to fear that delaying the interrogation could hinder preservation of evidence, or if the defendant him/herself waives the right to have the notification made to his/her lawyer]". Finally, by Article 287 (4) and (5) CCP: "*(4) In the judicial order declaring the opening of the phase of instruction, the judge presiding over this phase appoints a lawyer to the defendant if he/she has not yet appointed or been appointed one.* (5) *The judicial order declaring the opening of the phase of instruction is notified to the public prosecution, the victim, the defendant and his/her lawyer.*"

[84] Still, on specific occasions the law further confirms that the lawyer has the right to participate effectively in the procedure: see, *v.g.*, Articles 289, 301 (2), 302 (2), (4) and (5), 339 (2), 343 (5), 345 (1), and 360 CCP. Regarding the recording procedure, the provisions of relevance are Article 99; Article 363; and Article 94 (1).

gathering acts, although this presence is not mandatory. But unlike the provisions above, Article 3 (3) (c) 'only' requires that the defendants be ensured a 'right' for their lawyer to attend these acts, such that, in this case, Portuguese law should be considered as fully compliant with the Directive.

As for Article 3 (4), considering the provisions mentioned throughout this transposition assessment, it seems safe to conclude that Portuguese law makes sufficiently available general information to facilitate the obtaining of a lawyer by suspects or accused persons, as well as to ensure that suspects or accused persons who are deprived of liberty are in a position to exercise effectively their right of access to a lawyer. Moreover, in the case where the presence of a lawyer in a given procedural act is mandatory (notably in the cases mentioned in Article 64 of the CCP, above), the defendant is not even entitled to waive this presence (but see further below, regarding Article 9 of this Directive).

Finally, regarding Article 3 (5) and (6), no such exceptions are admitted in the Portuguese legal system, such that these provisions of the Directive should be considered as fully implemented.

8.1.3 Confidentiality

Regarding Article 4 of the Directive, the relevant national provisions are Articles 20 (2) and 32 (3) of the Constitution, transcribed above, as well as Article 32 (8) of the Constitution, which provides that "*all evidence obtained with torture, coercion, violation of physical or moral integrity, or improper intromission into personal life, the home, correspondence or telecommunications is null and void*".[85]

Also relevant are Article 61 (1) (f) CCP, already transcribed above, Articles 61 (2), 126 (3), 187 (5),[86] 135, 182 and 177 (5):

> Article 61 (2): "*The communication mentioned in paragraph (1) (f) takes place in plain sight when this is necessary for security reasons. However, conditions must be provided so that the person in charge of overseeing the communication does not hear it*".
>
> Article 126 (3): "*To the exception of the cases where the law provides otherwise, evidence obtained through intrusion, without the consent of the person concerned, in his/her private life, domicile, mail or telecommunications is also null*".[87]
>
> Article 187 (5): "*The interception and recording of conversations or communications between the defendant and his/her lawyer is prohibited, except when the judge has good reason to believe that those conversations constitute, themselves, the object or an element of a criminal offence*."[88]
>
> Article 135: "(1) *The ministers of any religion, physicians, lawyers, journalists, members and employees of credit institutions and other people who have the right or duty to keep professional secrecy over certain facts may refuse to testify on facts covered by that right or duty.* (...) (3) *[However,] these persons can be obliged to testify, if a high court decides that, in the case, the relevance of the testimony overcomes the obligation to keep the secrecy, considering, among other, the indispensability of the testimony for ascertaining the truth of the facts, the gravity of the crime and the necessity to protect legal interests (...).*

[85] See also Article 34 Constitution.

[86] Which applies to all forms of communication (telephone, e-mail and other forms of transmission of data): Article 189 CCP.

[87] Do however note that – differently than evidence obtained through torture, coercion or harm to physical / moral integrity (Article 126 (1) and (2) CCP) –, evidence gathering through intrusion in private life, domicile, mail or telecommunications may be consented to by the concerned person, either *ex ante* or *ex post facto*, and if so the nullity will be cured. Moreover, whereas the nullity established by Articles 126 (1) and (2) bears no exceptions, Article 126 (3) excepts the cases "where the law provides otherwise", which refers to the intrusive investigative measures allowed for and regulated in the CCP (in Articles 171 f.) and in other special legal instruments of criminal procedure.

[88] In this case, however, the execution of the measure is restricted to that specific offence (*v.g.* receiving stolen goods), and not to the offence that was being investigated (*v.g.* the theft whence the stolen goods proceed). The same applies to the apprehension and any form of control of the correspondence between the defendant and his/her lawyer (Article 179 (2)).

(4) *The decision mentioned above is taken after consulting the entity that represents the profession at stake, in the terms and with the effects established in the legislation applicable to such an entity.* (5) *Such an exception does not apply in any circumstances to religious secrecy.*"

Article 182: "(1) *The persons mentioned in Articles 135 to 137 shall provide the judicial authority with the requested documents or objects which are in their possession and which ought to be seizes, save where they invoke, in writing, professional secrecy (...).* (2) *In the case of professional secrecy (...), Article 135 (2) and (3) and Article 136 (2) apply accordingly*. (...)"

Article 177 (5): "*Searches of offices of lawyers or physicians must, or otherwise it will be null, be personally presided over by a judge, who must previously communicate the measure to the president of the local council of the Bar Association or of the Association of Medical Doctors, respectively, in order for him/her or a delegate of his/hers to be present at its execution*."

Confidentiality is furthered by other legal instruments specifically concerned with cases where the person is arrested or otherwise deprived of liberty, namely the Regulation of the Detention Conditions in the Premises of the Judiciary Police and in Courts and Public Prosecution Services,[89] the General Regulation of Prison Facilities,[90] and the Code of Enforcement of Penalties and Measures involving Deprivation of Liberty.[91]

In sum, the confidentiality of client-attorney communications receives sufficiently ample protection in Portuguese law to comply with Article 4 of the Directive.

8.1.4 Right to have a third person informed of the deprivation of liberty

Article 5 (1) and 6 (1) of the Directive are implemented by the Regulation of the Detention Conditions in the Premises of the Judiciary Police and in Courts and Public Prosecution Services:

Article 3 (1): "*Any person who is deprived of liberty must be informed immediately and in a comprehensible manner of the reasons of his/her arrest and of his/her rights, and he/she may exercise them as of the moment of his/her material arrest.*"

Article 5 (2): "*The arrested person has the right to inform immediately a family member or a person of his/her trust of his/her situation.* (…) (4): "*In order for the rights mentioned in the previous paragraphs to be exercised, the arrested person shall be provided the possibility to use the telephone of the service responsible for his/her detention, if a public telephone is unavailable*."

Also by the General Regulation of Prison Facilities:

Article 8: "(1) *[Upon his/her bringing into a prison facility,] The inmate has the right to make a phone call, free of charge, to a family member or a person of his/her trust, as well as to his/her lawyer.* (2) *The phone call is overseen by the element of the surveillance and security services of the prison that brought the person into the prison facility, but the confidentiality of the conversation is guaranteed.*"[92]

And by the Code of Enforcement of Penalties and Measures involving Deprivation of Liberty:

Article 16 (2): "*The inmate is immediately informed of his/her rights and duties, duly explained and if necessary translated, and he/she is guaranteed the right to contact a family member or a person of his/her trust, as well as his/her lawyer*."

[89] See mainly Articles 30.
[90] See Articles 8, 102, 207 (1) and 210.
[91] See Article 61, on the right of the inmate to receive visits from his/her lawyer, and Articles 63 f., further regulating the conditions of the visits to the inmate, and Articles 70 f.
[92] On the other hand, based on Article 4 (1) (g), the persons by whom the inmate wishes to be visited are recorded in the prison information system. These visits are regulated in further detail in Articles 107 f. of the same legal instrument.

Article 5 (2) of the Directive, in our view, should be deemed as implemented, albeit in a somewhat indirect manner, based on provisions that will be explained further below in respect of Directive (EU) 2016/800, on procedural safeguards for juvenile defendants, namely Articles 58 (7), 61 (1), (d) and (i), (4) and (5) CCP. Note that a person below 18 years old is a minor under Portuguese law, so there is perfect harmony with the Directive.

However, there are problems again with Article 5 (3) and (4) and Article 6 (2) of the Directive. They will be addressed below with reference to Article 8 of the Directive, as they all concern the issue of temporary derogation of rights.

8.1.5 Right to communicate with consular authorities

Regarding Article 7 (1) of the Directive, there is no explicit provision in Portuguese law concerning the case where the person has two or more nationalities, but the following legal instruments enable the person to choose which consular authorities are to be informed.

Regulation of the Detention Conditions in the Premises of the Judiciary Police and in Courts and Public Prosecution Services:

> Article 4 (3): "*The information on the right to appoint a lawyer and to communicate with a family member, a person of one's trust, the embassy or the consulate, as well as the delievery of the booklet mentioned in the previous paragraph, shall be recorded in a document which should be signed by the concerned person. His/her refusal to sign shall also be recorded.* (4) *The information mentioned in the previous paragraph is provided to the arrested person in a language that he/she understands, and the presence of an interpreted is requested whenever it is necessary.*"

> Article 5 (3): "*Foreign individuals who are arrested have the right to contact immediately the consular authorities of his country.* (4) *In order for the rights mentioned in the previous paragraphs to be exercised, the arrested person shall be provided the possibility to use the telephone of the service responsible for his/her detention, if a public telephone is unavailable.*"

Code of Enforcement of Penalties and Measures involving Deprivation of Liberty:

> Article 4 (4): "*The enforcement of penalties and measures involving deprivation of liberty applied to inmates who are foreigners or belong to ethnic or linguistic minorities should, as much as possible, enable them to express their cultural values, to mitigate difficulties they might face in terms of social integration or command of the Portuguese language, namely by providing contact with consular or diplomatic authorities or organisations aimed at supporting immigrants, courses of Portuguese language, translation of documents or intervention of interpreters.*"

General Regulation of Prison Facilities:

> Article 230 (1): "*Upon entry into the prison facility, the foreign or stateless inmate is informed of the possibility to give knowledge of his/her situation to the respective diplomatic or consular authority, or to the entity that represents his/her interests. A record is taken of what the inmate wishes be done.* (2) *Foreign or stateless inmates who have expressed their wish to contact the respective diplomatic or consular authority or the entity that represents their interests, are given the possibility to telephone that authority or entity free of charge, without detriment to the other telephone calls allowed for in Article 8.*"

> Article 231: "*When knowledge of the situation of the inmate has been given [to the authorities or entities mentioned in the previous Article], such authorities or entities are also given knowledge of the decisions and information concerning the inmate, without detriment to the other communications which are to be made base on other provisions of this legal instrument.*"

Regarding Article 7 (2) of the Directive, in addition to the provisions immediately above, it is necessary to consider Article 207 (1) of the General Regulation of Prison Facilities, which prescribes that "*communication with (...) diplomatic or consular authorities in the exercise of their functions is carried out in a reserved space which guarantees the confidentiality of the communication and its oversight, without a separating glass*", as well as Article 232:

> "(1) *The visits of diplomatic or consular authorities are not dependent on authorisation and they take place in business days, during the timeframe set by the director of the prison facility, within its normal working hours.* (2) *An authority wishing to visit the inmate shall inform the director of the prison facility 24 hours beforehand, in order to obtain the consent of the inmate to being visited. (3) Articles 102 to 104, on communication between the inmate and his/her lawyer, apply with the necessary adaptations*."

However, there is no provision in the Regulation of the Detention Conditions in the Premises of the Judiciary Police and in Courts and Public Prosecution Services explicitly and specifically establishing that suspects or accused persons who are arrested have the right to be visited by their consular authorities, the right to converse and correspond with them. Such a provision is in our view necessary to ensure full implementation.

As for the right to have legal representation arranged for by consular authorities, no such provision exists either, but such a right is in our view possible to draw from other provisions, namely from the general right of defendants to appoint a lawyer of their choice. Thus, implementation of this right is secured.

8.1.6 Temporary derogations

Let us now address the issue of temporary derogation of rights regulated in the Directive, namely in Articles 3 (3) (a), 5 (3) and (4), 6 (2), and 8. The problem lies in Article 143 (4) CCP, which provides:

> "*In cases of terrorism and violent or highly organised criminality, the public prosecution may order that the arrested person, prior to his/her first judicial interrogation, does not communicate with anyone, except for his/her lawyer*".

This provision requires no further condition than the fact that the case concerns terrorism or violent / highly organised crime. A Report by the Commission of the Portuguese Parliament on Constitutional Issues, Rights and Guarantees, concerning the proposal that would eventually result in the Directive 2013/48/UE, remarks that the provision of the Directive may be seen as "*excessive*", considering that "*the special gravity of such cases and the complexity of their investigation may justify a restriction of the rights of the arrested person*".[93] Be that as it may, the fact is that Portuguese law does not, at present, comply with the Directive on this particular point.

8.1.7 Waiver of rights

Neither does Portuguese law comply with Article 9 of the Directive. Portuguese law does not really contain any rules aimed at regulating the case where the defendant does not intend to exercise his/her right to a lawyer. It is clear to us that national legislation should be adopted to accommodate this provision of the Directive. As acknowledged before, Portuguese law does confer on the defendant a wide right to assistance by a lawyer, several provisions aimed at promoting the exercise of such a right, and even cases where such an assistance is mandatory irrespective of the will of the defendant.

[93] Ofício n.º 30/XII/1ª CACDLG/2014, sobre a Proposta relativa ao apoio judiciário (COM(2013) 824 final, in www.parlamento.pt, p. 6.

However, by regulating in detail the waiver of this right, the Directive reinforces it even further, in a way that is qualitatively different from any of the ways in which Portuguese law protects such a right. This leads us to the conclusion that Article 9 currently lacks implementation in Portuguese law.

8.1.8 Right of access to a lawyer in EAW proceedings

As far as concerns the EAW (Article 10 of the Directive), full implementation has not taken place either. Of course, any person arrested pursuant to an EAW has the right to be assisted by a lawyer (Article 17 (2) LEAW), and the arrest of a person due to an EAW abides by the same requirements provided in the CCP for suspects in criminal proceedings (Article 16 (4) LEAW). The LEAW further prescribes that Articles 57 to 67 CCP apply to EAWs, and that the sought person, when arrested, must be provided with a document containing the rights mentioned in the previous paragraphs (Article 17 (4) LEAW). This is complemented by several other norms in the LEAW which give depth to the right of access to a lawyer in EAW proceedings:

> Article 18 (4): "*Before hearing the person sought pursuant to an EAW the judge appoints a lawyer to him/her, if he/she has not yet appointed one*".
>
> Article 8 (2) (c): "*The consent mentioned in (b) of the previous paragraph [sc. the consent to being re-surrendered to another Member State following the execution of an EAW] must: (...) Be provided with the assistance of a lawyer*".
>
> Article 21: "(1) *If the sought person does not consent to being surrendered to the issuing Member State, the floor is given to his/her lawyer, so that he/she may present the opposition to the surrender.* (...) (5) *After the production of evidence, the floor is given to the public prosecution and the lawyer of the concerned person, so that they may adduce oral allegations.*"
>
> Article 7 (3): "*If Portugal is the issuing Member State, the waiver [to the specialty rule] mentioned in paragraph (2) (f) of this provision must: (...) Be provided with the assistance of a lawyer.*"[94]

Nevertheless, Article 10 (4) of the Directive is, at best, only partially implemented, for there is no explicit provision imposing on Portuguese authorities, as executing authorities, a duty to, without undue delay after deprivation of liberty, inform requested persons that they have the right to appoint a lawyer in the issuing MS. This might be achieved with an extensive interpretation of Article 61 (1) (e) and (h) CCP, applicable to EAW proceedings *ex vi* Articles 17 (4) and 34 LEAW (transcribed above), but this is by no means clear. If a lawyer does come to be appointed in the issuing MS, then his/her role will naturally include assistance, information and advice to the lawyer in the executing MS, but there is no explicit provision on this either.

Regarding Article 10 (5) of the Directive, no implementation has taken place.

8.1.9 Remedies

As for Article 12 of the Directive, on remedies, implementation is ensured by the same provisions as in Article 10 of Directive 2016/343, on presumption of innocence, which will be better explained at that point. Regarding Article 12 (2) more specifically, our view is that the provisions indicated throughout this implementation assessment, notably those mentioned with reference to Article 4 of the Directive, as well as those mentioned throughout the Directive on presumption of innocence, suffice to ensure that the rights of the defence and the fairness of the proceedings are respected.

[94] And yet, Article 34 LEAW provides that the CCP applies in a subsidiary manner to the procedure of execution of an EAW, which means that many of the provisions referred throughout this report in respect of criminal procedure also apply to EAWs.

8.1.10 Conclusion

In sum, this Directive is one of the Directives regarding which more deficiencies in implementation could be identified. Most of them are arguably not very serious deficiencies in terms of their intensity, but they are numerous, namely concerning Articles 3 (2) (a) and (b), 3 (3) (a), 5 (3) and (4), 7 (2), 8 (1) (c), 9, and 10 (4) and (5). In our view, legislative intervention is needed.

8.2 Case-law

Regarding Directive 2013/48/EU, 21 meaningful rulings were identified during this research, added by 2 elements issued by non-judicial decisions but which showed relevant for ascertaining the actual scope, in the Portuguese legal system, of certain rights that are provided for in Directive 2013/48/EU. The following are, in our view, the most relevant decisions.[95]

8.2.1 Constitutional Court, no. 7/87 – Right to communicate with the lawyer

The Court held that the right conferred by Article 32 (3) of the Constitution on the defendant to be "*assisted*" by a lawyer in all acts of the procedure encompasses, not only the physical presence of the lawyer in the acts of the procedure, but also the right to communicate with him/her. Thus, insofar as it applied to the lawyer, Article 143 (4) CCP was unconstitutional. This ruling was issued in a context of preventive constitutionality control (prior to the enactment of the 1987 CPP, the one which is still in force), which is why this provision would come to read: "*In cases of terrorism and violent or highly organised criminality, public prosecution may order that the detained individual, prior to his/her first judicial interrogation, does not communicate with anyone,* except for his/her lawyer."

8.2.2 Constitutional Court, no. 413/2004 – Presence of the lawyer in interrogation by the police

The Court did not rule unconstitutional Article 64 (1) (a) CCP interpreted as allowing for interrogating defendants without the mandatory presence of their lawyer, in the premises of any police authority. Article 32 (3) of the Constitution forwards to the legislator the definition of the cases where assistance by the lawyer is mandatory. And while the Constitution requires this definition to be substantially appropriate to the relevance of the different procedural acts and stages, the Court saw no reason for such mandatory assistance to be imposed at the first *non-judicial* hearing of the defendant who is *not under arrest*.[96-97]

8.2.3 Supreme Court of Justice, 18-06-2020, case 342.16.3GBPSR.E1.S1 – Taking of statements for future memory

In this case the Supreme Court held that, in Portuguese criminal procedure, based on the principles of orality and immediacy, only elements assessed at the trial hearing may be used as evidence, but there are some exceptions to this rule, one of which is the so-called taking of statements for future memory, whereby certain subjects (*v.g.* a witness or a victim) may, in certain circumstances (*v.g.* of serious illness), produce statements before a judge at the pre-trial stage, and these may be used as

[95] Some decisions addressed in previous sections are also relevant here, namely: High Court of Évora, 20-12-2018, on direct effect and conforming interpretation (but see also the diverging stance adopted by the High Court of Lisbon in the ruling of 23-04-2020); High Court of Évora, 07-05-2019, on the temporal scope of the Directive, direct applicability, and the right to assistance by an attorney; and Supreme Court of Justice, 26-06-2019.

[96] Note that, in Portuguese criminal procedure, the statements made by a person before a non-judicial authority in the preliminary stages of the procedure cannot serve as inculpatory evidence against that person at the trial stage.

[97] The Court adopted a similar understanding in relation to identity parades, in ruling no. 532/2006.

evidence later at the trial. This possibility is exceptional and is subject to rather stringent conditions, including the mandatory presence of the defendant's attorney. The defendant must also be notified to attend the act. In the case at hand, the defendant claimed that the statements made by the victims could not be used as evidence because the defendant was not present when they were provided. The defendant's claim, however, was not valid, because he had freely and consciously declared that he did not wish to be present at the act.

8.2.4 Consultative Council of the Attorney-General's Office, Opinion of 13-07-2000, case no PGRP00001168 – Right of the defendant to communicate with family member or a person of his/her trust

Following a recommendation (no. 15/B/99) by the Ombudsman, the Minister of Justice requested the Attorney-General's Office's Opinion as to whether legislative intervention was required. In response, the Attorney-General's Office issued the following conclusions:

(1) The arrest provided for in Article 254 CCP is a cautionary and precarious measure that is directly aimed at attaining the finalities explicitly mentioned in the law.

(2) The arrest must be effected in the conditions provided for in Articles 259 and 260 CCP, with due respect for the right of the person being arrested to communicate with a family member or a person of his/her trust, and with due respect for the principles of adequacy and proportionality.

(3) The conditions for the execution of arrests provided for in the law are sufficiently flexible to reconcile the finalities of the arrest with the immediate needs of the person being arrested, ascertained on criteria of reasonableness and proportionality.

(4) Thus, there is no legal gap regarding situations where the arrested individual needs to provide assistance to persons in need, such as minors, handicapped or elderly persons.

(5) The doubts manifested in the Ombudsman's Recommendation do however justify that instructions be issued to law enforcement officers charged with carrying out arrests, providing them with guidance in the concretisation of the general principles enshrined in the law.

8.2.5 Critical appraisal

Similar considerations as those adduced on the Directives 2010/64/EU and 2012/13/EU apply to the Directive 2013/48/EU. In fact, the latter has received even less explicit reference in Portuguese case law than the former, which is particularly questionable in this case, because, as noted above, there are numerous implementation problems concerning this Directive. Further critical case law is in our view pivotal for drawing attention to this situation of implementation deficit which is currently in place.

9 Directive (EU) 2016/800: Procedural safeguards for juvenile defendants

9.1 Legislation

9.1.1 General issues

Unlike all other Directives, this Directive was explicitly implemented through an amendment (the 33rd) of the CCP, by the Law no. 33/2019, of 22 May (shortly before the implementation term: 11 June 2019).[98] Even so, not every provision in the Directive can be deemed to have been perfectly implemented. The most important amendment introduced by this statute was carried out in Article 61 (1), the key provision that lists the fundamental rights of defendants. The statute added one provision (i) – which will be referred to throughout this Section –, according to which:

> "*Unless the law provides otherwise, the defendant has, at all stages of the criminal procedure, the right: (...) If he/she is a minor [under 18 years old], to be accompanied in any procedural act by the persons who exercise parental responsibilities over him/her, by his/her legal representative or by a person who holds his/her factual guardianship, or yet, if the former cannot be reached or when and insofar as special circumstances concerning his/her best interest so command, by another adequate person indicated by him/her and agreed to by the competent judicial authority*".

The key constitutional provisions of relevance for this Directive are Article 69 (childhood), paragraph (1) of the Constitution, and Article 70 (youth).

Regarding the scope of application of the Directive (Article 2), the same provisions mentioned in relation to the scope of application of Directive 2013/48 are relevant. They include, notably, Articles 57 (2) and 58 CCP. One should moreover mention the Regime Applicable to Young Adults (Decree-Law no. 401/82, of 23 September), which establishes more lenient rules for youngsters from 16 to 21 years old:[99]

> Article 4: "*If imprisonment is to be applied, the judge shall mitigate the penalty in the terms prescribed in Articles 73 and 74 of the Penal Code, where there is serious reason to believe that this mitigation favours the rehabilitation of the young convict.*"
>
> Article 5 (1): "*When a penalty lower than 2 years of imprisonment is applicable to a minor, the judge may, taking into consideration the personality of the youngster and the circumstances of the facts, apply [certain correctional measures, rather than the penalty of imprisonment]*".
>
> Article 6: "*(1) When the circumstances of the case and the personality of the youngster between 18 and 21 years old suggest that a penalty of up to 2 years of imprisonment is neither necessary nor convenient to his/her rehabilitation, the judge may apply instead correctional measures. (2) For the purposes of the previous paragraph, only the following qualify as correctional measures: (a) Admonition; (b) Imposition of certain obligations; (c) Fine; (d) Internment in detention centres [for young offenders].*"

The problems start with Article 2 (3) of the Directive, which has only been implemented in part: there is no explicit provision in Portugal stating that the rights and guarantees established for minors shall still apply if they subsequently reach the age of 18, and the application of such rights and guarantees is appropriate in the light of all the circumstances of the case, including the maturity and vulnerability

[98] See document with CELEX 72016L0800PRT_273095.
[99] See Article 1 (1) and (2) of Decree-Law no. 401/82, of 23 September, and Article 9 of the Penal Code.

of the person concerned. There are only some provisions that abide by a similar concept. That is for instance the case with Article 61 (5) CCP, according to which, "*a person is presumed to be a minor if, after all due diligence has been carried out with a view to identifying the defendant, his/her age remains uncertain and there is reason to believe that he/she is a minor.*" This is also the view underlying the abovementioned penal regime for youngsters from 16 to 21 years old. However, these norms do not provide a protection as extensive as that envisaged in Article 2 (3) of the Directive.

Article 2 (4) of the Directive may be considered covered by Article 59 (1) CCP, as this provision establishes that "*[i]f, during the course of an interrogation of a person who is not a defendant, a founded suspicion emerges that this person has committed an offence, the authority carrying out the interrogation shall suspend it immediately and effect the communication and the advice mentioned in Article 58 (2) CCP*." This will then carry the emergence of the full set of rights that a defendant is entitled to, already explained above.

Regarding Article 2 (6) – which *allows* for some 'exceptions' to the application of the rights enshrined in the Directive in respect of minor offences –, no such exceptions exist in Portugal.

As for Article 3 of the Directive, which defines key terms for the purposes of the Directive, it can be deemed to find sufficient equivalence in the Portuguese legal system, notably in Articles 58 (7), 61 (1) (i) and 61 (5) CCP; and in Articles 122, 130, 1776-A and 1877 to 1920-C of the Civil Code.

9.1.2 Right to information

Regarding Article 4 of the Directive, the right to be promptly informed, provided for in paragraph (1) (a), follows from the general provisions mentioned in relation to Directive 2012/13, which apply *a fortiori* to the cases where the suspect or defendant is a child. The other provisions of Article 4 of the Directive will be addressed further below.

9.1.3 Right of the child to have the holder of parental responsibility informed

Article 5 is implemented by Article 58 (7) CCP, already mentioned, and Article 61 (3), which commands that, where "*the defendant is a minor, the information mentioned in paragraph (1) (h) is also communicated to the persons mentioned in paragraph (1) (i)*". The persons mentioned in paragraph (1) (i) are the persons who exercise parental responsibilities over the defendant, his/her legal representative or a person who holds his/her factual guardianship, or yet, if the former cannot be reached or when and insofar as special circumstances concerning his/her best interest so command, by another adequate person indicated by him/her and agreed to by the competent judicial authority. Articles 194 (11) and 61 (4) CCP also relevant here:

> Articles 194 (11): "*If the defendant is a minor, the decision mentioned in paragraph (1) above [*sc., *the judicial decision to apply a coercive measure (other than the Statement of Identity and Residence) such as pre-trial custodial detention] must be immediately communicated to the holders of parental responsibility, to his/her legal representatives, or to the person who actually is his/her guardian.*"

> Article 61 (4) CCP: "*If the minor did not name a different person to accompany him/her, or the person that he/she has named based on paragraph (1) (i) above is not accepted by the judicial authority, this authority shall appoint, to that effect, an official specialised for this type of assistance.*"

However, in our view, there is no provision implementing Article 5 (3) of the Directive.

9.1.4 Assistance by a lawyer

Article 6 of the Directive, is implemented fundamentally by Article 64 (1) (d) CCP:

> "*Assistance by an attorney is mandatory: (...) In any procedural act, save for the formal designation of the person as a defendant, whenever the person is blind, deaf, speechless, illiterate, unfamiliar with the Portuguese language, a person under 21 years old, or the question has been raised whether he/she may lack criminal liability [owing to a mental disorder] or not completely imputable*".

Again, this provision should be understood in the light of, and in conjunction with several provisions and comments made in relation to the Directive 2013/48, on the right to a lawyer. In any case, Article 6 (8) *in fine* of the Directive has no equivalence in Portuguese law, which admits no such exception.

9.1.5 Right to an individual assessment

Regarding Article 7 of the Directive, it is again possible to discern some implementation issues: this provision was only partially implemented, or, at least, it is doubtful that it has been fully implemented.

Article 7 (1) raises no problems:

General Regulation of Prison Facilities:

> Article 72 (1): "*The services responsible for accompanying the enforcement of the penalty shall provide information on the educational offer available to inmates and shall motivate them into taking such an offer, especially young inmates, illiterate inmates, and other inmates with specific needs.*"

> Article 91 (1) (c): "*Prison facilities shall develop specific programs taking into account the profile and the characteristics of the inmates, with a view to, among other: (...) Controlling the aggressiveness and violent behaviour in different groups of inmates, including young inmates.*"

> Article 69 (5): "*[When elaborating the individual programme of rehabilitation,] If the inmate is a minor, the parents, the legal representative or another person who holds his/her guardianship may also be heard, if this is deemed beneficial for his/her rehabilitation*".

Code of Enforcement of Penalties and Measures involving Deprivation of Liberty:

> Article 4 (1): "*The enforcement of penalties and measures involving deprivation of liberty applied to youngsters under 21 years old shall especially favour their rehabilitation and stimulate their sense of responsibility through the development of specific activities and programs of education, guidance and professional training, as well as the obtaining of personal and social competences and the treatment of addictive behaviours.*"

> Article 21 (6): "*If the inmate is a minor, the individual programme of rehabilitation is drafted also with the participation of the parents, legal representative or another person who holds his/her guardianship, if this is deemed beneficial for his/her rehabilitation*".

> Article 9 (2) (c): "*[T]here shall be special prison facilities for the enforcement of sanctions or measures involving deprivation of liberty applied to: (...) Youngsters up to 21 years old or, whenever this is beneficial for their prison treatment, up to 25 years old.*"

> Article 38 (2): "*The minimum mandatory education level is ensured as a priority to young and illiterate inmates.*"

> Article 40 (3): "*When organising professional training, special consideration is given to the specific needs of young inmates and inmates with special educational issues*". And yet by Article 283 (g) CCP, according to which: "*The bill of prosecution must contain, or otherwise it will be null: (...) The indication of the social report or of information of services of social reintegration, when the defendant is a minor, save where this is not yet available and it is deemed unnecessary in the light of the best interest of the minor.*"

In turn, paragraph (2) of Article 7 of the Directive is implemented by Article 61 (4), 61 (5), and 283 (g) CCP, all of which have already been mentioned shortly above.

As for paragraph (3) of Article 7 of the Directive, no such specification can be found in Portuguese law, but it may be considered to be implicitly implemented..

Regarding paragraph (4) of Article 7, it has generally been implemented. Two key provisions in the CCP are Articles 1 (g) and (h), defining "social report" and "information of the rehabilitation services":

> Social report: "*the information on the family, social and professional situation of the defendant, and, possibly, of the victim, elaborated by the rehabilitation services with the purpose of aiding the court or the judge to know the personality of the defendant, for the purposes and the cases provided for in this law.*"
>
> Information of the rehabilitation services: "*the response to concrete requests about the situation of the defendant and, possibly, the victim, insofar as concerns their personal, family, school, professional or social situation, elaborated by the rehabilitation services with the purpose mentioned [above], for the purposes and the cases provided for in this law.*"

However, there seems to be an implementation problem with Article 7 (4) (a), given the lack of a general provision in Portuguese law whereby the authorities could determine whether any specific measure whatsoever should be taken to the benefit of the minor.

Article 7 (4) (b) is implemented by Article 213 (4) CCP, although this provision is not specific for children, as it applies to any defendant:

> "*In order to decide in a reasoned manner whether or not to maintain, replace or revoke pre-trial custodial detention or the obligation to remain at the domicile [these are the only two coercive measures in the Portuguese legal system which involve deprivation of liberty], the judge may, on his/her own initiative or upon request by the Public Prosecution or the defendant, request an expertise on the personality of the defendant, or a social report or an information by the rehabilitation services, as long as the defendant consents to that.*"

Regarding Article 7 (4) (c), it does not seem possible to conclude that such an individual assessment must be taken into consideration by Portuguese authorities when taking any decision or course of action whatsoever in the criminal procedure. However, such an assessment is relevant in several key moments of such procedure (in addition to those already mentioned in relation to paragraphs (a) and (b), immediately above), such that, in our view, this provision should be deemed fully implemented by the following provisions of the CCP (in addition to Article 283 (g), already mentioned):

> Article 328 (4) (d): "*The adjournment of the trial hearing is only admissible (...) if (...) [t]his is necessary in order for the social report or the information of the social reintegration services to be elaborated, in the terms established in Article 370 (1).*"
>
> Article 369 (1): "*If it emerges from the deliberations and voting mentioned in the previous Article that the defendant should be subject to a criminal sanction, the presiding judge shall read or order be read all documents of the file concerning the criminal record of the defendant, the expertise on his/her personality and the social report.*"
>
> Article 370, especially paragraph (2): "*If the defendant is a minor, and no social report or information from the rehabilitation services has already been issued in the procedure, this must take place within 30 days, unless the judge decides in a reasoned manner that it is not necessary in view of the circumstances of the case and that it is not required to protect the best interest of the minor.*"
>
> Article 371 (2): "*[At the trial hearing, if the court determines that additional evidence is to be produced,] The necessary evidence is produced, after hearing, whenever this is possible, the criminologist expert,*

rehabilitation officer and any other person who may provide relevant testimony on the personality and the living conditions of the defendant."

> Article 375 (1): "*The sentence that convicts the defendant must specify the reasons that underpin the choice and the measure of the sanction that has been applied, and if that is the case it shall indicate, among other, the beginning and the term for its enforcement, other duties imposed on the convict and their duration, as well as his/her individual programme of rehabilitation.*"

Moreover, those provisions are complemented by Articles 4 to 6 of the Penal Regime for Young Adults, which have already been mentioned shortly above.

The domestic provisions cited in the analysis of the implementation of the other paragraphs of Article 7 of the Directive also implement its paragraphs (5) to (8). In the case of paragraph (7), the provisions mentioned in relation to Article 5 of the Directive are also relevant; and in the case of paragraph (8) special mention is due to Article 370 CCP, transcribed shortly above. Finally, paragraph (9) of Article 7 of the Directive finds correspondence in the concept underpinning the Portuguese system: a social report or an information from the rehabilitation services may not be issued if this is not required by the best interests of the minor. This is reflected in numerous provisions mentioned above, particularly in Article 283 (g) CCP.

9.1.6 Right to a medical examination

Article 8 of the Directive, is only partially implemented. Note that most of the provisions indicated below apply to any defendant (they are not specifically conceived for minors), and many of them (*sc*. those of the General Regulation of Prison Facilities and of the Code of Enforcement of Penalties and Measures involving Deprivation of Liberty) apply only to pre-trial custody and to the enforcement of sanctions involving deprivation of liberty (not necessarily to pre-trial arrest, *e.g.* for interrogation).

Paragraph (1) is implemented, in the first place, by Article 22 (1), (2) and (3) of the Regulation of the Detention Conditions in the Premises of the Judiciary Police, Courts and Public Prosecution Services:

> "(1) *Without detriment to the right to consult a physician of their choice, at their own expenses, arrested persons shall, as soon as this is possible and required by the circumstances (...), be submitted to medical examination in order to make a diagnosis of illnesses or physical or mental issues which require special immediate measures.* (2) *An arrested person who is in need of specialised medical care shall be transferred to an adequate health facility or previously prescribed medication shall be provided to him/her; all measures must be taken in order to protect the life and health of the arrested person.* (3) *The medical examination of an arrested person shall be carried out in a reserved place, unless otherwise indicated by the very physician, without detriment to the adoption of measures of security required by the circumstances.*"[100]

However, paragraph (2) has not been implemented, as no provision can be found in national law that requires the results of the medical examination to be taken into account when determining the capacity of the child to be subject to questioning, other investigative / evidence-gathering acts, or any measures taken or envisaged against the child.

Regarding paragraph (3), the national provisions mentioned in relation to paragraph (1) of this Article are envisaged to be applied by the authorities on their own initiative, but they can also be triggered by any of the subjects indicated in Article 8 (3) (a) to (c), based on the Articles mentioned in relation

[100] Other relevant provisions are found in the General Regulation of Prison Facilities, notably Article 3 (1) (f), 10, 19 (2) and (3), and 53which is then regulated in further detail in Articles 54 ff.. Similar provisions are found also in the Code of Enforcement of Penalties and Measures involving Deprivation of Liberty: Articles 4 (2) and (3), 7 (1) (a) and (i), 7 (3), 19, 21 (3), and 32 ff.

to Article 5 above (on the right of the child to have the holder of parental responsibility informed), in articulation with the general right of the defence to submit requests. Thus, full implemented is secured.

As for paragraph (4), the aforementioned provisions presuppose that the examinations will be recorded in a file, as per Article 53 General Regulation of Prison Facilities, which is further regulated in Article 56 (1) and (2) of the same legal instrument, on "*individual medical files*".

Finally, regarding paragraph (5), Article 53 of the General Regulation of Prison Facilities regulates the "*initial clinical evaluation*", but other provisions are concerned with subsequent evaluations, as is for instance the case with Article 58 of the same legal instrument. However, there is no obligation to assess whether a re-evaluation is needed. Thus, the Directive's requirement that another medical examination be carried out where the circumstances so require has not been fully implemented.

9.1.7 Audiovisual recording of questioning

Article 9 is fully implemented. Regarding paragraph (2), by Articles 99 and 94 (1) CCP, mentioned above[101]. As for paragraph (1), by Article 141 (7) CCP, according to which:

> "*The interrogation of an arrested defendant is, as a rule, carried out through audio or audiovisual recording. Other means of recording, including stenographical or stenotypical or other means capable of ensuring a full reproduction or recording of the act, are only to be used where the former means are unavailable, which must be recorded in the official act.*"

9.1.8 Limitation of deprivation of liberty

Moving on to Article 10, it is very also doubtful whether it has been implemented. Here too national law offers no specific provisions for children. Pre-trial custody ("*prisão preventiva*") and arrest are always conceived as measures of last resort and should be kept to a minimum, but there is no provision requiring these principles to be applied even more stringently when the defendant is a minor.

The relevant national provisions concerning paragraph (1) are found in the CCP, namely in:

> Article 254, according to which the arrest cannot exceed 48 hours.
>
> Article 257 (1): "*Apart from situations where the person has been caught* in flagrante delicto*, the arrest can only be effected pursuant to a judicial warrant, or in the cases where pre-trial custodial detention is admissible, [a number of conditions is met]*."
>
> Article 212 (1) (b): "*Coercive measures [including pre-trial custodial detention] are immediately revoked when it is concluded that: (...) The reasons that justified their application have ceased to exist*."

As for paragraph (2), the Constitution lays down important rules in Articles 27 and 28, which are then densified in ordinary law, notably in Article 215 CCP. Appeal again the application of these measures is possible pursuant to Article 219 ff. CCP (which include *habeas corpus*). Other relevant norms stem from the Penal Regime Applicable to Young Adults, namely from Articles 4 to 6, already mentioned.

9.1.9 Alternative measures

Regarding Article 11, in the same terms mentioned in respect of the Article 10, it is doubtful whether it has been implemented. The same provisions and comments also apply here, *mutatis mutandis*.

[101] § 6.1.3.

9.1.10 Specific treatment in the case of deprivation of liberty

Article 12 raises problems too, as all of its norms are not covered by national law.

That is the case, to begin with, of paragraphs (1) and (2). It is implemented by the following provisions – but only partially, because, while they do dispense specific treatment to children while deprived of liberty, they do not go so far as require them to be "*held separately from adults, unless it is considered to be in the child's best interests not to do so*".

> Article 12 (3) Regulation of the Detention Conditions in the Premises of the Judiciary Police, Courts and Public Prosecution Services: "*If that is feasible, youngsters (...) should be kept in plain sight, for instance when they are staying in a cell with individuals arrested awaiting for transportation to the prison facility*."

> Article 9 (2) (c) Code of Enforcement of Penalties and Measures involving Deprivation of Liberty: "*There shall be prison facilities or units especially aimed at the enforcement of penalties and measures involving deprivation of liberty which are applied to: (...) Youngsters up to 21 years old or, whenever this is beneficial to their prison treatment, up to 25 years old*".

Paragraph (3) and (4) are implemented, as Portuguese law treats persons up to 21 years old as young adults, and for these purposes even extends such treatment to persons up to 25 years old.

Paragraph (5) is fully implemented. In any case, paragraph (5) (a) must be understood in the light of Article 8, paragraph (5) (b) in the light of Article 7, and paragraph (5) (c) in the light of Article 12 (6).[102] In turn, paragraph (5) (d) is implemented mainly by the General Regulation of Prison Facilities, Articles 71 to 76, on education and professional training, Articles 77 to 90, on work and occupational activity, and Article 91 (1), which prescribes:

> "*Prison facilities shall develop specific programs taking into account the profile and the characteristics of the inmates, with a view to, among other: (a) Acquiring, promoting or reinforcing personal, emotional and social competences; (b) Promoting changes in attitude and behaviour; (c) Controlling the aggressiveness and violent behaviour in different groups of inmates, including young inmates; (d) Promoting empathy towards the victim and awareness of the harm caused, for instance through the involvement of the inmates in mediation and restorative justice programs; (e) Preventing recidivism and relapse, for instance in sexual offences, domestic violence, or offences involving the driving of vehicles under the influence or without permit*".[103]

Other national provisions relevant for the implementation of paragraph (5) (d) are found in the Code of Enforcement of Penalties and Measures involving Deprivation of Liberty, namely in:

[102] Although in the case of (c) it should be moreover noted that several provisions are in force which seek to foster the continuation, as much as this is possible, of family life: Regulation of the Detention Conditions in the Premises of the Judiciary Police and in Courts and Public Prosecution Services, Article 15 (4): "*The arrested person must be immediately authorised to inform the family about his/her situation and reasonable conditions must be provided to him/her for that effect (...).*" See also Articles 15 (2), 17 (2), 19 to 22. General Regulation of Prison Facilities, Article 3 (5) (i): "*Ingress proceedings imply (...): Taking account of necessities of support in the resolution of urgent personal, family and professional questions.*" See also *v.g.* Articles 8 (telephone contacts), 13 (support towards solving urgent personal, family and professional questions), 19 (1) (b) (*idem*), 22 ff. (on the transfer to other prison facilities), 34 (1), 67, 80, 107 ff. (on visits), 134, 217 (3), 225 (2) and 250. Code of Enforcement of Penalties and Measures involving Deprivation of Liberty, Article 7 (1): "*The enforcement of penalties and measures involving deprivation of liberty shall guarantee to the inmate, inter alia, the right: (...) To protection of private and family life* (...)." See also *v.g.* Articles 9 (3), 16 (2), 19 (1) (c) (2) and (3), 20 (1) (d), 22 (1), 26 (2), 52 (2), 54 (2) and (3) (a), 55 (1) (b), 58 ff. (on visits), 67 ff. (on correspondence), 76 ff. (on leaves from the prison facility), 107 (3), 126 (1), 128 (1) (b) and (5), 169 (1), 174 (9), 188 (4), 220 (b), 243 ff. (on inmates with sons who are minors). At the constitutional level, reference is due to Articles 26, 36 and 67.

[103] See also Article 92, further regulating the conditions of these programs, Articles 93 to 96, on social, cultural and sports activities, and Articles 97 to 101, on social and economic support (including voluntary service).

Article 3 (6): "*The enforcement promotes the sense of responsibility of the inmate, stimulating him/her into participating in the planning and carrying out of his/her penitentiary treatment and his/her rehabilitation, including through education, training, work and programs*"; Article 4 (1): "*The enforcement of penalties and measures involving deprivation of liberty applied to youngsters under 21 years old shall especially favour their rehabilitation and stimulate their sense of responsibility through the development of specific activities and programs of education, guidance and professional training, as well as the obtaining of personal and social competences and the treatment of addictive behaviours*."[104]

As for paragraph (5) (e), it is implemented by the following provisions:

Article 11 (2) Regulation of the Detention Conditions in the Premises of the Judiciary Police and in Courts and Public Prosecution Services: "*The arrested person must be treated with humanity and respect for his / her dignity, with no discrimination, namely considering his/her ancestry, gender, race, language, territory of origin, religion, ideological or political convictions, instruction, economic situation, social condition or sexual orientation.*"

Article 4 General Regulation of Prison Facilities: "(…) (2) *[Upon ingress in the prison facility,] The inmate who, for religious, philosophical or health reasons, wishes to follow a specific diet [further regulated in Article 45], must explicitly declare so*. (3) *The inmate declares, in the moment of his/her ingress, whether he/she wishes spiritual and religious assistance [further regulated in Article 101], although he/she may still request it at a later stage.*"[105]

Code of Enforcement of Penalties and Measures involving Deprivation of Liberty: Article 3 (3): "*The enforcement is impartial and may not privilege, benefit, impair, deprive of any right or exempt from any duty any inmate, for instance due to his/her sex, race, language, territory of origin, nationality, ethnic origin, religion, political or ideological beliefs, instruction, economic situation, social condition or sexual orientation*"; and Article 7 (1) (c): "*The enforcement [of penalties and measures] guarantees to the inmate, among other, the right: (...) To freedom of religion and cult*".[106]

The final passages of paragraph (5) find accommodation basically in the principle of proportionality enshrined in Article 18 (2) of the Constitution, in articulation with the above norms.

Finally, paragraph (6) is fundamentally implemented in the CCP:

Article 58 (7): "*Without detriment to the continuation of the proceedings, the formal designation of a minor as a defendant is immediately communicated to the persons who hold parental responsibilities over him/her, to his/her legal representative, or to the person who holds his/her guardianship.*"

Article 61 (3): "*If the defendant is a minor, the information mentioned in paragraph (1) (h) is also communicated to the persons mentioned in paragraph (1) (i)*".[107]

Other key provisions are:

Article 5 (2) Regulation of the Detention Conditions in the Premises of the Judiciary Police and in Courts and Public Prosecution Services: "*The arrested person has the right to inform immediately a family member or a person of his/her trust of his/her situation.*"

Article 8 (1) General Regulation of Prison Facilities: "*[Upon his/her bringing into a prison facility,] The inmate has the right to make a phone call, free of charge, to a family member or a person of his/her trust, as well as to his/her lawyer.*"

[104] See also *v.g.* Articles 5 (2), 7 (1) (h), 9 (1) (c), 10 (4), 12 (3) (b), 19 (5), 20 (1) (e); Articles 38 to 51 (on education, professional training, work, programs and activities); and yet Articles 53 (3), 81 (1) (a) and 128.

[105] See also *v.g.* Articles 37 (3) (f) (allowing inmates to possess religious books and objects), 45, 81, 101, 112 (1), 198 (2) (f) and 204 (5).

[106] See also *v.g.* Articles 7 (1) (h), 29 (1), 31 (1), 56 ff. (specifically dedicated to religious assistance), 107 (2), 108 (2), 113 (5).

[107] On the persons mentioned in paragraph (1) (i), see *supra*, § 9.1.3. See also Article 61 (4), *idem*.

> Article 16 (2) Code of Enforcement of Penalties and Measures involving Deprivation of Liberty: "*The inmate is immediately informed of his/her rights and duties, duly explained and if necessary translated, and he/she is guaranteed the right to contact a family member or a person of his/her trust, as well as his/her lawyer.*"

9.1.11 Timely and diligent treatment of cases

Moving on to Article 13, paragraph (1) is implemented by Article 103 (1) and (2) (b) CCP:

> "(1) *Procedural acts are carried out in working days, during the business hours of the justice services and out of the period of judicial holidays*. (2) *The following constitute exceptions to the previous paragraph:* (...) (b) *The procedural acts that concern proceedings involving defendants who are minors, even if they are not arrested*".

Regarding paragraph (2), no such provision exists in the Portuguese legal system, but in view of the national provisions mentioned throughout this Section, and considering that this provision of the Directive is quite generic, we believe that it should be considered as implemented.

9.1.12 right to protection of privacy

In turn, Article 14 again raises issues: it is at least doubtful that it has been fully implemented. The problem lies not in paragraphs (1) to (3). These are secured by Article 26 (1) and (2) Constitution and the CCP, namely by Articles 86 and 89 (already expounded *supra*, § 7.1), added by:

> Article 90: "(1) *Any person who has a legitimate interest in doing so may request to consult the file of a procedure which is not under secrecy of justice and to be provided, at his/her own expense, a copy, extract or certified copy of such a file or parts of it. The request is decided on by the judicial authority presiding over the procedural phase in question or that has proffered the last decision in this procedure.* (2) *The previous paragraph does not apply to the records of hearings or of other procedural acts or measures in which a minor has intervened.* (...)".

> Article 87 (3): "*If the procedure refers to an offence of trafficking in human beings or against sexual freedom and self-determination, or involves defendants who are minors, procedural acts shall as a rule be carried out in a non-public manner.*"

The doubts concern Article 14 (4). Some national norms offer a regulatory framework for the activity media,[108] but is unclear whether they suffice "*to achieve the objectives*" of the Directive on the issue of privacy protection.

9.1.13 Right of the child to be accompanied by the holder of parental responsibility

Article 15 too has only been partially implemented. Paragraphs (1), (2) and (4) are implemented by Articles 26 (1) and (2), 36 (5) and (6) and 67 of the Constitution, together with Article 69 (5) of the General Regulation of Prison Facilities, Article 21 (6) of the Code of Enforcement of Penalties and Measures involving Deprivation of Liberty, and Articles 61 (1) (i) and 61 (4) CCP, all of which have already been expounded in this Section.

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[108] The Statute of the Journalist (Law no. 1/99, of 1 January) states, in Article 14 (2) (g), that: "*Journalists moreover have the duty: (...) Not to identify, whether directly or indirectly, the victims of crimes against sexual freedom and self-determination, against honour and against privacy, until the trial hearing, and beyond that if the victim is a minor under 16 years old or a minor who has been applied sanctions specific for minors*". And the Deontological Code of the Journalist provides in Article 8 that: "*Journalists shall preserve the presumption of innocence of defendants until a sentence convicting them becomes res judicata. Journalists shall not identify, whether directly or indirectly, the victims of sexual offences. Journalists shall not identify, whether directly or indirectly, minors, be them sources or witnesses of facts that are relevant to the media, be them victims or perpetrators of criminal offences. Journalists shall refrain from humiliating people or disturb them while suffering.*" However, the latter is not even an actual legal instrument.

However, no national provision is in place explicitly securing implementation of paragraph (3), which requires that, in case of modification of circumstances, the child be given the right to be accompanied by the holder of parental responsibility during the remaining court hearings. This might follow from the previous provisions, but explicit implementation would be desirable to clarify the situation.

9.1.14 Right of children to appear in person at, and participate in, their trial

Article 16 (1) is implemented in the same terms as for any defendant, in the same conditions addressed *infra*, in the context of the Directive 2016/343 on presumption of innocence. However, Article 16 (2) is only implemented in part, because in Portugal there is no right to an actual retrial (also *infra*, *idem*).

9.1.15 European Arrest Warrant proceedings

Articles 2 (2) and 17 of the Directive may be deemed fully implemented: to the extent that such rights are provided for defendants in criminal proceedings, they apply to persons sought pursuant to EAWs, based on Articles 16 (4), 17 (4) and 34 of the LEAW, transcribed earlier.

9.1.16 Right to legal aid and Remedies

Article 18 is fully implemented in the same terms as for any defendant, in the conditions and based on the provisions mentioned in the context of the Directive 2016/1919, on legal aid.

So is Article 19, based on the provisions mentioned in relation to Article 10 of the Directive 2016/343 on presumption of innocence, which apply squarely here.

9.1.17 Training

Finally, regarding Article 20, as far as it was possible to establish, these training measures have no clear resonance in the Portuguese legal system.[109]

9.1.18 Conclusion

Despite the fact that new legislation was enacted to implement this Directive (unlike any of the other Directives), several deficiencies could still be identified,[110] namely regarding Articles 2 (3), 5 (3), 7 (4) (a), 8 (2) and (5), 10, 11, 12 (1), 14 (2), 15 (3), 16 (2) and 20 – as expounded in further detail in the above paragraphs. It is apparent that these are numerous provisions and in our view this requires further intervention from the Portuguese legislator.

9.2 Case-law

Only 7 rulings were identified as meaningful regarding this Directive, which is manifestly narrow. Moreover, none of them is particularly useful for clarifying doubts as to the extent of implementation.

9.2.1 High Court of Lisbon, 14-01-2016, case 360/15.9PBLRS-A.L1-9 – Consent for a house search and assistance of a lawyer

In this case, the Court ruled that, since the defendant is a minor under 21 years old, his consent for a house search to be carried out should have been given in the presence of a lawyer, carrying an incurable nullity (Article 119 (c) CCP).

[109] In this sense, see also ANA RITA ALFAIATE (com a colaboração de Helena Moniz), "Proposta de Directiva do Parlamento Europeu e do Conselho Relativa a Garantias Processuais para os Menores Suspeitos ou Arguidos em Processo Penal (Com(2013) 822 Final)", in Pedro Caeiro (org.), *A Agenda... op. cit.*, p. 55.

[110] See also *ibid*, p. 47 f., writing prior to the enactment of the Directive.

9.2.2 Supreme Court of Justice, 14-05-2008, case 08P1417 – Extraordinary appeal

The extraordinary appeal of review (*revisão*) shall be allowed if, after conviction, it is discovered that the defendant was a minor under 16 years old (in the case, 13) when the offence was committed.

9.2.3 Supreme Court of Justice, 08-03-2006, case 06P885 – Minors below 16 years old

A minor between 12-16 years old who is applied a specific sanction for minors who are not criminally liable[111] may still request *habeas corpus* (Article 222 CCP) even though that is not a criminal sanction.

9.2.4 Supreme Court of Justice, 03-02-1994, case 045780 – Report on the personality

In this case, the Court held that the report on the personality of the defendant (which is mandatory in case of imprisonment or a security measure for more than 3 years) does not constitute expert evidence and is therefore not binding on the court: the facts shall still be appraised freely by the court, according to its conviction and the rules of experience, based on the principle of free assessment of the evidence.

9.2.5 Supreme Court of Justice, 21-04-1993, case 043876 – Social report and new trial

Here the Court held that, when the defendant is a minor below 21 years old, it is mandatory to request the social report mentioned in Article 370 (2) CCP, drafted by the rehabilitation services, if those conditions are met. If the report is not drafted, the proven facts are deemed insufficient to convict the defendant, and the case must be sent back to the lower court, so that a new trial takes place.

9.2.6 Supreme Court of Justice, 13-11-1991, case 042147 – Special mitigation and suspension of the penalty

Article 4 Penal Regime Applicable to Young Adults provides that, if imprisonment is to be applied, the penalty shall be mitigated as per Articles 73 and 74 Penal Code, if there is serious reason to believe that this is favourable from a perspective of rehabilitation of the young convict. However, the sentence will only be suspended if the court finds that a mere reproach and threat of imprisonment are sufficient to push the youngster away from criminality and attain the preventative goals of the criminal justice system. Moreover, the sheer fact that the defendant shows regret at having committed the crime is insufficient for the court to apply the special mitigation mentioned above.

9.2.7 High Court of Lisbon, 28-03-1990, case 0258943 – Assistance of a lawyer

Finally, in this case the Court held that the mandatory intervention of the lawyer when the defendant is a minor under 21 years old does not extend to each and every act carried out during the criminal procedure at issue, but only to the procedural acts in which the minor him / herself participates.

9.2.8 Critical appraisal

The scarcity of case law on issues concerning young offenders is somewhat worrying, in that it may express some disregard for the specificities of this class of subjects. However, it is also conceivable that this is due to few criminal procedures being carried out against young offenders, whether because (in proportion) they commit less offences or because they are less often prosecuted – both of which would be positive explanations. In any event, this Directive has been enacted more recently than the Directives analysed before, and it is likely that we will see a rise in the number of decisions addressing issues concerning young offenders.

[111] '*Medidas tutelares educativas*', regulated in Law no. 166/99 of 14 September.

10 Directive (EU) 2016/1919: Legal aid

10.1 Legislation

10.1.1 General issues

No specific legal instrument was enacted in Portugal with a view to implementing this Directive.[112] In fact, the vast majority of the norms of this Directive has sufficient backing in previously existing legislation. The very few implementation problems originate in the Directive 2013/48/EU. The close relation between the two Directives is immediately clear in Articles 1 and 2 of the latter, on its subject matter and scope: the same provisions and remarks expounded on Articles 1 and 2 of the former Directive apply here, as the provisions on legal aid apply to persons who are entitled to a lawyer.

The main legal instruments of relevance for the Directive on legal aid more specifically are the Law no. 34/2004, of 29 July, on Access to the Law and to the Courts,[113] and the Ordinance no. 10/2008, which concretises the above Law. Regarding the EAW, although the Law on Access to the Law and to the Courts does not explicitly apply to such proceedings, it should be construed as such, a position which has been defended by the Commission of the Portuguese Parliament on Constitutional Issues, Rights and Guarantees, concerning the proposal that would later result in the Directive 2013/48/UE.[114]

Regarding Article 3, which establishes the relevant definitions for this Directive's purposes, it should be noted that the national system of access to the law and to the courts comprises (a) legal information and (b) legal protection, which in turn comprises (i) legal consultation and (ii) legal aid, the former being the modality which relates more closely to the scope of this Directive. The following provisions of the Law on Access to the Law and to the Courts are important to mention here:

> Article 1: "(1) *The system of access to the law and to the courts is aimed at ensuring that nobody be dissuaded or prevented, based on social or cultural condition or on insufficiency of economic means, the knowledge, exercise or defence of their rights*. (2) *In order to concretise the above objectives, actions and systematic mechanisms of legal information and legal protection will be developed.*"

> Article 2: "(1) *Access to the law and to the courts is a responsibility of the State, to be promoted through, among other, mechanisms of cooperation with the institutions that represent forensic professions.* (2) *Access to the law encompasses legal information and legal protection.*"

> Article 3 (1): "*The system of access to the law and to the courts shall function in such a way as to ensure that the services provided to its beneficiaries be qualified and effective.*"

> Article 6 (1): "*Legal protection encompasses the modalities of legal consultation and legal aid*."

[112] In this case, instead of the indication that transposition was deemed "unnecessary", Portugal indicated 4 legal instruments: (i) the LEAW (CELEX 72016L1919PRT_262075); (ii) the Law no. 34/2004, of 29 July (CELEX 72016L1919PRT_262073); (iii) the Law no. 47/2007, of 28 August (CELEX 72016L1919PRT_262074), the first law amending Law no. 34/2004, indicated in (ii); and (iv) the Law no. 35/2015, of 4 May (CELEX 72016L1919PRT_262076), the first law amending LEAW, indicated above under (i). However, none of these legal instruments were really adopted in order to implement Directive (EU) 2016/1919, such that the situation here is not different from that of Directives 2010/64/EU, 2012/13/EU, 2013/48/EU, and (EU) 2016/343.

[113] See especially Article 41 (1): "*The appointment of a lawyer to the defendant in order for him / her to be subject to the first judicial interrogation when arrested, to be tried under highly summary proceedings or for other urgent procedural acts provided for in the Code of Criminal procedure is regulated in Article 39 of this Law and a prevention scale of lawyers and intern lawyers must be organised to that effect (...).*" This provision is further concretised by Article 3 of Ordinance no. 10/2008.

[114] Ofício n.º 30/XII/1ª (CACDLG/2014), in www.parlamento.pt, p. 11-12. But see further below, on Article 5 of this Directive.

10.1.2 Legal aid in criminal proceedings

Regarding Article 4 of the Directive, in addition to the definitions provided immediately above, it is important to note that, in Portugal, legal aid may be provided by the State even if the person is not in a situation of economic insufficiency. The legal framework on legal aid engrains two fundamental ideas: on the one hand, the State should bear the costs of legal assistance not only when the defendant is in a situation of financial hardship, but also when, regardless of hardship, he/she chose to be assisted by a lawyer appointed by the State and is ultimately acquitted;[115] on the other hand, a defendant who seeks this support without being eligible shall be penalised for such a behaviour.

The Constitution provides for a right to legal aid,[116] which is concretised in the Law on Access to the Law and to the Courts reads:

> Article 39: "(...) (3) *If the defendant does not appoint a lawyer, he/she must, in the moment when he/she is subject to a Statement of Identity and Residence,*[117] *provide a declaration on his/her income, property and permanent expenditure of his/her household.* (4) *The secretary of the court shall assess the economic insufficiency of the defendant based on that declaration and the criteria defined in this Law.* (5) *If the secretary concludes that there is economic insufficiency, the defendant must be appointed a lawyer (...).* (6) *The appointment of a lawyer in the terms prescribed in the previous paragraph is provisional and depends on the granting of legal aid by the social security services.* (...)"

> Article 8 (1): "[A person is deemed to be in a situation of economic insufficiency] *when he/she lacks the conditions which are objectively necessary to fully support the costs of a procedure, in the terms defined in [Article 8-A]*".

> Article 8-A: "(1) *For the purposes of this law, the assessment of economic insufficiency of a person is made taking into account the average monthly income of that person and his/her household* (...). (2) *The objective conditions on the basis of which said assessment is performed are considered by reference to the index of social support ['*indexante dos apoios sociais*']* (…). (6) *If the person or a member of his/her household has amounts deposited in a bank account, or assets liable to negotiation in regulated markets, and their value is 24 times higher than the value of the mentioned index of social support, the person is deemed not to be in a situation of economic insufficiency, regardless of the income [mentioned in paragraph (1)].* (7) *Exceptionally and for justified reasons, as well in the case of a dispute with one or more of the members of his/her household, the assessment of economic insufficiency takes into account only his/her average monthly income, alone or together with that of some of the members of his/her household, as long as he/she so requests.* (8) *If, in a given case, the highest official of the social security services competent for deciding on the granting of legal aid considers that the application of the above criteria leads to a situation of blatant denial of access to the law and to the courts, he/she may, by reasoned order issued by him/herself, take a decision other than that which would follow from the application of said criteria*."[118]

Some paragraphs of Article 4 require some notes. Paragraph (4) leaves open an option whether or not to make the granting of legal aid dependent of a merits test, and thus it may be deemed implemented, in spite of the fact that the conditions set in this provision do not have any equivalent in the Portuguese legal system. Regarding paragraph (5), the comments made on Articles 1 and 2 of the Directive apply:

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[115] See Article 64 (4) CCP.

[116] Article 20 Constitution: "(1) *Everyone is guaranteed access to the law and the courts in order to defend his/her legally protected rights and interests, and justice may not be denied to anyone due to lack of sufficient financial means.* (2) *Subject to the terms of the law, everyone has the right to legal information and advice, to legal counsel and to be accompanied by a lawyer before any authority.*" Article 32 (3): "*Accused persons have the right to choose an attorney and to be assisted by him/her in any procedural act. The law shall specify the cases and phases of procedure in which the assistance of a lawyer is mandatory.*"

[117] On this concept, see mainly *supra*, §§ 5.1.2 and 6.2.2.2, and further *infra*, on the Directive (EU) 343/2016, on presumption of innocence.

[118] Article 8-B then regulates the means through which the situation of economic insufficiency may be proved. Moreover, as an Annex to this legal instrument, a formula is provided for calculating the income.

when the person has the right to be appointed a lawyer or it is mandatory to appoint him/her a lawyer, then this will trigger the right to legal aid, and the national provisions indicated in relation to Article 4 (1) to (4) of the Directive apply accordingly. Finally, paragraph (6) is covered, as Portuguese law confers a right to legal aid on persons other than defendants, namely in Article 18 (1) Law on Access to the Law and to the Courts:

> "*Legal aid is granted regardless of the procedural position of the person and regardless of the fact that the opposite party to the dispute has been granted legal aid.*"

10.1.3 Legal aid in European arrest warrant proceedings

Moving on to Article 5 of the Directive, as stated above, although the Law on Access to the Law and to the Courts does not bear an explicit mention to EAW proceedings, this common understanding in literature and case law is that it does.

Paragraph (1) is implemented by the provisions mentioned in respect of the Directive on the right to a lawyer, namely Articles 16 (4), 17 (2), 17 (4) and 34 LEAW, which in turn call for the application of numerous guarantees provided for in the CCP.

Paragraph (2) is fully implemented as well: (i) When Portugal is the executing MS, the rules on access to a lawyer and legal aid apply, albeit not explicitly. (ii) When Portugal is the issuing MS, this means that a criminal procedure has already been initiated in Portugal, which in turns means that the person is necessarily and explicitly entitled to legal representation and legal aid as a defendant in this criminal procedure. However, Article 10 of Directive 2013/48/EU has only been partially implemented: (i) As for Article 10 (4), there is no explicit norm imposing on Portuguese authorities, as executing authorities, a duty to, without undue delay after deprivation of liberty, inform requested persons that they have a right to appoint a lawyer in the issuing MS. This can be achieved through an extensive interpretation of Article 61 (1) (e) and (h) CCP, which is applicable to EAW proceedings *ex vi* Articles 17 (4) and 34 LEAW, but this is by no means certain. If a lawyer is appointed in the issuing MS, then his/her role will naturally include assistance to the lawyer in the executing MS by providing this lawyer with information and advice, but there is no explicit provision on this either. (ii) As for Article 10 (5), no implementation at all has been made of this provision.

Paragraph (3) states that the right to legal aid "may be subject to a means test". In Portugal it is, based on the provisions already mentioned in relation to Article 4 (3).

10.1.4 Decisions regarding the granting of legal aid

Article 6 is also implemented by the Law on Access to the Law and to the Courts:

> Article 25: "(1) *The decision on the request for legal protection shall be taken in 30 days, counted continuously, including during judicial holidays* (…). (2) *Upon expiry of the above deadline without a decision having been issued, the request should be considered as tacitly granted*. (...)"

> Article 26 (1): "*The final decision on the request for legal protection is notified to the person who made the request and, if the request involved the appointment of a lawyer, such a decision should also be notified to the Bar Association.*"

> Article 28 (4): "*Once the judicial review [of an administrative decision not to grant legal protection] has been received by the court, it is immediately distributed to the judge who is to conduct the review, and this judge shall, through a concisely reasoned order, decide whether or not to grant the legal protection, based on extemporaneity or manifest invalidity*."

10.1.5 Quality of legal aid services and training

Regarding Article 7 of the Directive, the following national provisions address these issues, especially the Law on Access to the Law and to the Courts:

> Article 3 (1): "*The system of access to the law and to the courts shall function in such a way as to ensure that the services provided to its beneficiaries be qualified and effective.*"
>
> Article 49: "*The costs emerging from this law which are to be spent by the social security services are paid by the State Budget, by transferring the corresponding amount to the budget of the social security services*".
>
> Article 41 (1) (which is further concretised by Article 3 of Ordinance no. 10/2008): "*The appointment of a lawyer to the defendant in order for him/her to be subject to the first judicial interrogation when arrested, to be tried under highly summary proceedings or for other urgent procedural acts provided for in the Code of Criminal procedure is regulated in Article 39 of this Law, and a list of lawyers and intern lawyers must be organised to stay on call to that effect (...)*".
>
> Article 45 (1) (a): "*The selection of forensic professionals shall ensure the quality of the services provided to those who are granted legal protection within the system of access to the law.*"
>
> Article 45 (1) (d): "*If the same fact gives rise to several proceedings, the system shall ensure that preferably the same lawyer is appointed to the person for all those proceedings*".
>
> Article 10 (3) Ordinance no. 10/2008: "*The selection [of forensic professionals] shall strive for ensuring the quality of the services provided to those who are granted legal protection within the system of access to the law.*"[119]

As for paragraph (2), since the administrative decision is taken by the social security services, which have specialised qualification to handle these issues, we would also hold this provision implemented.

As for paragraph (3), the appointment of lawyers to participate in the system of access to the law and to the courts is a responsibility of the Bar Association, which may be presumed to be acutely aware of the challenges of this profession, and which does provide training on several of them. No specific training could be identified for the specific challenges of providing services within a public system, but the Bar provides wide information on this system, its particularities and possible difficulties.[120]

Finally, regarding paragraph (4), the Law on Access to the Law and to the Courts provides that:

> Article 31 (1): "*The beneficiary of legal aid may, in any proceedings, request in a reasoned manner the Bar Association to replace the lawyer that has been appointed to him/her.*"
>
> Article 39 (2): "*The appointment of a lawyer to the defendant [pursuant to the system of access to the law and to the courts] is preceded by information to the defendant that he/she has the right to appoint a lawyer of his/her choice [but at his/her own expense].*"

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[119] The following also contribute to the fairness of proceedings and the independence of the legal professionals intervening in this context: Law on Access to the Law and the Courts, Article 3: "(2) *The State guarantees adequate compensation to the forensic professionals who participate in the system of access to the law and to the courts*. (3) *Forensic professionals who provide services in the system of access to the law and to the courts may not earn, in the context of their participation in this system, remuneration other than that to which they are entitled based on the present law and on the Ordinance mentioned in Article 45 (2) [*i.e.*, Ordinance no. 10/2008, regulating the Law on Access to the Law and to the Courts]*". Article 45 (1) (g): "*The forensic professionals who do not comply with the rules governing the exercise of legal representation may be excluded from the system of access to the law*". Article 2 (1) Ordinance no. 10/2008: "*[T]he appointment of a lawyer is carried out by the Bar Association, and it may be fully automatic, through an electronic system managed by this entity*".

[120] Notably in a document named "Elucidário do Acesso ao Direito" (which can be roughly translated as "Understanding the System of Access to the Law"], of December 2015, in https://www.oa.pt/upl/%7B5774e842-8b45-498c-8a9e-297c133fe678%7D.pdf, last accessed 21 April 2021.

The provisions mentioned above allow for the conclusion that Portuguese law complies in full with Article 7. Nevertheless, the actual *enforcement* of this provision depends on the amount of funding made available by the Government, each year, to this system, and the widespread perception at present is that not enough funding is provided, such that this system tends to protect only persons who clearly cannot bear the costs of their involvement in a criminal procedure, meaning that there is a number of individuals who face significant economic difficulties but are not entitled to legal aid.

10.1.6 Remedies

Article 8 is fully implemented. The same provisions and remarks indicated in connection with Article 10 of the Directive 2016/343 on presumption of innocence apply here, added by some more specific provisions of the Law on Access to the Law and to the Courts.[121]

10.1.7 Vulnerable persons

Article 9 bids MSs to "*ensure that the particular needs of vulnerable suspects, accused persons and requested persons are taken into account in the implementation of this Directive*". There is no explicit equivalent in the Portuguese legal, but Article 64 (1) (d) CCP, already addressed, establishes that it is mandatory to appoint a lawyer to certain persons who are vulnerable, which in turn will trigger the many provisions on legal aid mentioned throughout this Section. Implementation is therefore secured.

10.1.8 Conclusion

Unlike all other, the Directive on legal aid is fully implemented into Portuguese law, which seems to in fact go further than the Directive in one aspect, namely in that it holds the State responsible for bearing the costs of legal assistance even if the defendant is not in a situation of financial hardship, where he / she chooses to be assisted by a State-appointed lawyer and is eventually acquitted.

The very few implementation issues worthy of mention (notably in relation to Article 5) originate in the Directive on access to a lawyer, to which the Directive on legal aid is closely related – and, thus, access to a lawyer is the context where such problems should be primarily addressed. Apart from that, the problems with the Portuguese system of access to the law and to the courts are not *normative*, but *pragmatic*, namely that not sufficient funding is allocated to this system, with the consequence that some individuals who do face significant economic difficulties are not entitled to legal aid. Thus, the positive assessment of the implementation of the Directive on legal aid does not concomitantly embody a positive assessment of the *functioning* of the Portuguese system of access to the law and to the courts globally considered.

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[121] Namely Article 26 (2): "*The decision on the granting of legal protection may not be appealed to a superior of the administrative entity that takes such a decision, but it can be appealed before a court, in the terms prescribed in Articles 27 and 28*". Article 27: "(1) *The judicial review can be lodged directly by the interested person (...) within 15 days of the notification of the administrative decision not to grant legal protection*. (2) *The request for judicial review must be written, but not necessarily in articles; only documental evidence is admitted, and this evidence may be requested by the court.* (3) *Once the request for judicial review is received, the social security service has 10 days to revoke the decision to deny legal protection or, if it decides to maintain the decision, to submit it, together with an authenticated copy of the administrative file, to the competent court.*" Article 28: "(1) *The court competent for the judicial review is that of the legal district of the social security service that ruled on the request for legal protection or, if the request was lodged already during the course of judicial proceedings, of the court before which it is pending.* (…) (4) *Once the judicial review has been received by the court, it is immediately distributed to the judge who is to conduct the review, and this judge shall, through a concisely reasoned order, decide whether or not to grant the legal protection, based on extemporaneity or manifest invalidity.* (5) *The decision mentioned in the previous paragraph cannot be appealed.*" And Article 23 (1): "*If an [administrative] decision not to grant legal protection is to be issued, the person at issue must be given the possibility to present his/her claim, in writing, before the decision is actually taken (...).*"

10.2 Case-law

As with the Directive (EU) 2016/800, very few rulings (only 6) were identified as meaningful for the Directive (EU) 2016/1919 during this research.

10.2.1 Constitutional Court, no. 242/2018 – Legal aid to legal persons

In this case the Court ruled unconstitutional, with effects *erga omnes*, due to breaching Article 20 (1) of the Constitution on the right of access to the law and to the courts, Article 7 (3) Law on Access to the Law and to the Courts, as amended by Law no. 47/2007, of 28 August, insofar as it refuses legal protection (including legal aid) to for-profit legal persons, regardless of their actual economic situation.

10.2.2 High Court of Évora, 20-12-2018, case 55/2017.9GBLGS.E1– Direct effect and conforming interpretation

See *supra*, § 6.2.3.

10.2.3 Constitutional Court, no. 353/2017 – Advanced payment of justice fees

The Court declared unconstitutional, with effects *erga omnes*, Article 29 (5) (c) Law on Access to the Law and to the Courts, according to which the initial justice fee must be paid within 10 days from the date in which the person requesting legal aid is notified that the social security services have refused his/her request (if it would later be reimbursement, in case of a successful challenge). This norm was in breach of the right of access to the courts to effective legal protection (Article 20 (1) Constitution).

10.2.4 High Court of Lisbon, 21-06-2011, case 4615/06.5TDLSB.L1-5 – Request for legal aid, replacement of a State-appointed lawyer, and their effects on the criminal procedure

The Court held that, due to Article 39 (4) Law on Access to the Law and to the Courts, requests for legal aid have no influence on the course of a criminal procedure. On the other hand, in the same way as any lawyer remains in functions unless replaced (Article 66 (4) CCP), so too do not State-appointed lawyers cease their functions based on a simple request by the defendant for the State to appoint him / her a different lawyer. Finally, the Court held that, if the defendant is being represented by a lawyer, then the request for the appointment of a new lawyer does not interrupt the terms of the procedure.

10.2.5 Constitutional Court, no. 265/2010 – Relevant income for granting legal aid

The Court did not hold unconstitutional the norms of the Annex to the Law on Access to the Law and to the Courts, together with Articles 6 and 10 Ordinance no. 1085-A/2004, as amended by Ordinance no. 288/2005, of 21 March, insofar as they establish that the income relevant for granting legal aid includes the earnings of the spouse, in the case of a marriage with full communion of assets. The Court did however hold the same norms to be unconstitutional if interpreted in the sense that no consideration must be given to the health-related expenses incurred by the spouse.

10.2.6 Critical appraisal

The scarcity of case law referring to this Directive is concerning. It concurs to the view, held above, that the Portuguese legal aid system, while normatively sound, might in practice be lacking the desired effectiveness. This case law is manifestly narrow and does not really allow for meaningful critical analysis, although the fact that the Constitutional Court has been called upon to assess the conformity of certain norms with the Constitution – and the fact that it has held some of them unconstitutional (thus curtailing their application by other courts) – do reflect the importance of the right to legal aid.

11 Directive (EU) 2016/343: Presumption of innocence and right to be present at the trial

11.1 Legislation

11.1.1 General issues

No legal instrument was enacted in order to implement this Directive. Once again, existing legislation, notably the CCP, was deemed sufficient to secure implementation.[122] However, our view yet again is that important norms of the Directive do not in effect have sufficient backing in previous legislation.

Regarding the scope of the Directive (Article 2), please bear in mind the concept of '*arguido*' – the formal suspect of a criminal procedure in the Portuguese legal system –[123] and the essential provisions that regulate it: Articles 57 to 59 CPP, as well as Article 1 (e) CCP, which defines "suspect" as "*any person regarding whom there is sign that he/she has committed or is preparing to commit an offence, or has participated or is preparing to participate in an offence*".

The principle of presumption of innocence enshrined in Article 3 of the Directive has constitutional rank (Article 32 (2) Constitution):

> "*Every defendant is presumed innocent until a sentence convicting him/her has become definitive, and must be tried as swiftly as compatible with defence guarantees*".[124]

11.1.2 Public references to guilt

Article 4 of the Directive, aimed at impeding public references to guilt, is only partially implemented. Regarding paragraph (1), one should start by mentioning Article 18 (1) of the Constitution:

> "*Constitutional provisions on rights, freedoms and guarantees are directly applicable and binding on public and private entities*".

In this context, "direct applicability" means that those rights, freedoms and guarantees (which include presumption of innocence) apply even in the absence of any concretisation in the law and prevail over conflicting legal norms. In turn, "binding" means that any public or private entity is obliged to respect them even if no particular legal norm provides for specific obligations. Thus, the consequences of the principle of presumption of innocence are not limited to a specific (or even to an ascertainable) set of procedural moments, but rather they are no less than transversal to the procedural system, including the organisation and functioning of the courts and rules on remand. Ultimately, it is the presumption of innocence that explains the wide array of defence rights which is attributed to a defendant. Article 18 (1) of the Constitution is key for assessing the implementation of this Directive into the Portuguese legal system, because sometimes it is the only (or, at least, the main) normative basis accommodating the provisions of the Directive.

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[122] According to https://eur-lex.europa.eu/, last consulted in 7 December 2020, Portugal did not submit any information regarding implementation of this Directive.

[123] Recall, notably, § 5.1.2. of the introduction, *supra*.

[124] A sentence becomes definitive when it is no longer open to ordinary appeal. Nevertheless, it may still be appealed from through an extraordinary or exceptional form of appeal, namely: (1) Appeals aimed at *settling conflicting jurisprudence* (see Articles 437 f. CCP); and (2) Appeals of *review* (Articles 449 f. CCP).

That is precisely the case with Article 4 (1). Indeed, apart from Article 343 (2) CCP – which provides that, at the trial hearing, the court shall hear the defendant "*without expressing any opinion or making any comment that allow for inferring a judgement on his/her guilt*" –,[125] no provision in the law clearly prohibits authorities from issuing public statements referring to a defendant as being guilty or requires specific measures to be carried out in order to avoid or sanction such an action. It is true that several norms establish a general duty on judges, prosecutors and different police bodies not to make public statements or comments concerning criminal proceedings in which they intervene.[126] There are also substantive and procedural norms aimed at preventing public disclosure of information concerning ongoing investigations.[127] However, they are more concerned with the *public interest* in maintaining the functioning of the justice system secret up to a given procedural moment than with the *individual right* to be presumed innocent (even if the latter does to collaterally benefit from the former). That is why, in our view, Article 4 (1) is not fully implemented: this would require further guarantees.

Similar considerations apply to Article 4 (2). Although there are several legal provisions establishing a duty on public authorities not to make public statements about criminal proceedings in which they intervene,[128] such duties are more concerned with public interests than with safeguarding fundamental individual rights.[129]

Article 4 (3) is fully implemented by Article 86 CPP (see *supra*, § 7.1), especially paragraphs (1), (2), (3), (6) and (13), and by Article 88 CPP:

> "(1) *Within the limits of the law, the media may provide detailed account of the content of procedural acts which are not covered by secrecy of justice or which are open to attendance by the general public*. (2) *However, the following is not authorised and may entail committing an offence of disobedience:* (a) *The reproduction of procedural documents or of documents somehow incorporated in the proceedings before the sentence of the court of first instance is proffered, unless the documents have been obtained through the request of an official certificate stating the envisaged purpose, or under explicit authorisation by the competent authority presiding over the phase of the criminal procedure ongoing at the time of the publication;* (b) *The transmission or recording of images or sound relating to the undertaking of any procedural act, including the trial hearing, unless the judicial authority referred to in the preceding paragraph so allows; however, this authority may not authorise the transmission or recording of images or sound relating to a person against his/her will;* (c) *The disclosure by any means of the identity of the victims of a crime of human trafficking, or of a crime against sexual freedom and self-determination, honour*

[125] Other relevant norms in the CCP are Article 283, on the decision whether or not to prosecute at the end of the phase of inquiry, and Article 308 (1) (on the decision whether or not to indict at the end of the phase of instruction), both of which revolve around the concept of 'sufficient evidence', and Article 202 (1) (a) to (e), on the application of pre-trial custody, which requires 'strong evidence. In all these cases the authorities make an assessment on the likelihood that a penalty may be applied to the defendant, but it is a solid premise in the Portuguese legal system that this assessment is autonomous in relation to the ulterior, hypothetical, decision as to whether or not the defendant is indeed guilty of a crime and deserving of a penalty: see MARIA JOÃO ANTUNES, *Direito Processual Penal*, *op. cit.*, p. 143 *et passim*. Thus, these provisions are not detrimental to Article 4 (1) of the Directive.

[126] See Article 12 (1) of Law no. 21/85 (on judges), Article 84 (1) of Law no. 47/86 (on public prosecutors), Article 13 (2) of Law no. 37/2008 (on the Judiciary Police), Article 12 of Decree-Law no. 297/2009 (on the National Republican Guard), and Article 14 (1) and (2) of Decree-Law no. 243/2015 (on the Public Security Police).

[127] See, notably, Articles 86 f. CCP, and Article 371 of the Penal Code.

[128] Other relevant but insufficient provisions include, *v.g.*, Article 43 (1) CCP: "*The intervention of a judge in the criminal procedure can be refused where there is a risk that it may be regarded as suspicious owing to a serious reason capable of generating mistrust as to his/her impartiality.*" This provision encompasses situations whereby a judge has made public statements suggesting his/her belief that the defendant is guilty. Some provisions in the Media Law (Law no. 2/99, of 13 January) are also worth mentioning, namely Articles 24 f., and 30 (1).

[129] Still, such a duty does have a protective side-effect on presumption of innocence and its breach entails disciplinary (professional) liability by the judge, prosecutor or police officer at issue: see Article 82 of Law no. 21/85 (on judges) and Article 163 of Law no. 47/86 (on public prosecutors); Article 4 of Decree-Law 196/94 (on the Judiciary Police), Article 4 (1) of Law no. 145/99 (on the National Republican Guard), and Article 2 of Law no. 37/2019 (on the Public Security Police).

> *or privacy, unless the victim explicitly consents to such a disclosure or the crime is committed through the media*. (3) *Until a decision is taken determining the publicity of the hearing, it is prohibited, and it may entail committing an offence of disobedience, to provide an account of procedural acts that have taken place prior to said hearing, if the judge, at his/her own initiative or upon request, has prohibited such an account based on the facts or circumstances mentioned in Article 87 (2)*.[130] (4) *It is prohibited, and it may entail committing an offence of disobedience, to publish, by any means, conversations or communications intercepted in the course of proceedings, unless they are not subject to secrecy of justice and the parties explicitly consent to their publication*."

11.1.3 Presentation of suspects and accused persons

Article 5 is only partially implemented, as there is an implementation deficit with paragraph (1): while defendants, even if detained or imprisoned, normally attend the court as free persons (Article 325 (1) CCP), and although the deployment of coercive methods in order to bring the defendant to court is exceptional,[131] the fact is that no national provisions are in place which specifically aim at preventing defendants from being "*presented as being guilty*" in "*public*".[132]

Article 5 (2) of the Directive is fully implemented by different provisions in the CCP. By Article 325, already mentioned, and Article 204, according to which:

> "*To the exception of the measure provided for in Article 196 [the 'Statement of Identity and Residence'], no coercive measure may be applied to a defendant if, in the moment of deciding whether or not to apply it, the following requirements are not met:* (a) *the defendant has escaped or there is a risk that he/she will escape*; (b) *there is a risk that the defendant will disturb the investigation, namely the gathering of evidence or its veracity (by destroying or misrepresenting evidence)*; or (c) *there is a risk that the defendant will continue his/her criminal activity or severely disturb the public order and peace*."[133]

11.1.4 Burden of proof

Article 6 is fully implemented. While Article 32 (2) of the Constitution does not explicitly mention the principle *in dubio pro reo*, it is undisputed that it has constitutional rank as a concretisation of the principle of presumption of innocence enshrined in that provision.[134] Relevant here is also Article 32 (5) of the Constitution:

> "*Criminal procedure has accusatorial structure, and the trial hearing and, where required by the law, indictment-related acts abide by the adversarial principle*."

The accusatorial principle means that the prosecuting entity (a public prosecutor) is not the same that takes the decision on the criminal liability of the defendant (a court). On the other hand, Portuguese

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[130] *Sc.*, facts or circumstances which allow for the assumption that publicity would cause severe damage to the dignity of concerned individuals, to public morals or to the regular undertaking of a procedural act, and it must be revoked as soon as the reasons on which it was based cease to be met.

[131] See further below, the comments on Article 5 (2) of the Directive, immediately below.

[132] Do however see, in addition to Article 325 CCP, Article 27 of the General Regulation of Prison Facilities: "(1) *The transportation of the prisoner is a responsibility of the prison services and it is carried out in a cellular vehicle, except where the transportation is not to take place in the ground and in the cases provided for in paragraph 5 [concerning cases where the prisoner as a health condition or other relevant limitations]*. (2) *Based on reasons of order and security, the Director-General of prison facility may determine, by reasoned order, the assignment of an escort.* (3) *The prisoner remains handcuffed during the journey, but the Director of the prison facility may, by reasoned order, dispense with the use of handcuffs.* (4) *The reasons of order and security basing the assignment of an escorts and the dispensation of the use of handcuffs are communicated beforehand to the services which carry out the transportation of the prisoner.* (...)"

[133] See also the provisions of the CCP on arrest (Articles 254 (1) and 257 (1)), and, again, Article 27 of the General Regulation of Prison Facilities (in the previous fn.).

[134] The principle *in dubio pro reo* applies only to doubts concerning *factual issues*. Doubts concerning legal issues should be decided according to the interpretation that the judge deems to be the most accurate (although legal literature does submit that, in some cases, even legal issues should be solved by adopting the most favourable solution to the individual: '*in dubio pro libertate*').

criminal procedure is not a "procedure of parties": on the one hand, because the Public Prosecution must abide by a principle of objectivity; on the other hand, because the court has the power to take the measures deemed necessary to ascertain the truth of the facts, irrespective of the contributions of the prosecution and of the defence;[135] finally, because the defence is not burdened with proving the circumstances that may constitute defences. In the law, the key norms are, in the first place, Article 127 CCP, which enshrines the so-called "principle of free assessment of evidence":

> "*Apart from the cases where the law provides otherwise, evidence is assessed according to the rules of experience and the conviction of the competent authority*".

Again, although this provision does not explicitly state so, the principle *in dubio pro reo* is clearly embedded in the Portuguese legal system. This provision does however enable the use of so-called 'indirect evidence', whereby from proven facts the court infers – based on logics and/or experience – the verification of other facts.[136]

That was mainly concerning paragraph (1) of Article 6. Concerning paragraph (2), the key provisions are again Article 127 CCP, added by:

> Article 368 (2) CCP: "*[In the deliberation after the trial,] the presiding judge shall draw and submit to deliberation and vote a specified and detailed list of the facts alleged by the prosecution and by the defence, as well as of those arising from the discussion held at the trial, that show relevant for ascertaining whether:* (a) *the elements of the offence are met*; (b) *the defendant committed or participated in the crime*; (c) *the defendant acted with guilt*; (d) *any circumstance is met which justifies the act or excuses the defendant; (...).*"

> Article 374 CCP: "(1) *The sentence begins with a report containing:* (...). (2) *The report contains the reasoning of the court, including a list of proven and unproved facts, as well as a full, if concise statement of the factual and legal reasons on which the decision relies, and an indication and explanation of the evidence supporting the verdict reached by the court.*"

11.1.5 Right to remain silent and right not to incriminate oneself

Moving on to Article 7, similar considerations apply: Article 32 (2) Constitution does not explicitly mention the principle *nemo tenetur se detegere* or the right to remain silent, but it is undisputed that they have constitutional protection as concretisations of the principle of presumption of innocence. Relevant is also Article 32 (8) of the Constitution:

> "*Any evidence obtained through torture, coercion, infringement of physical or moral integrity or improper intrusion into personal life, domicile, correspondence or telecommunications is null and void*."

In contrast with *in dubio pro reo*, however, the right to remain silent is explicitly provided for, namely in Articles 61 (1) (d), 58 (5) and 126 (see *supra*) and reinstated in yet other provisions of the CCP.[137]

As for Article 7 (2) one should again stress that *nemo tenetur* has constitutional rank as a corollary of the presumption of innocence, as assertively upheld by the Constitutional Court on several occasions,[138] such that the provisions mentioned above (notably on Article 6 (1) of the Directive) apply here. Note, however, that the CCP does not establish an absolute prohibition of self-incrimination either: it does

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[135] See notably Article 340 CCP.

[136] This method has been examined by the Constitutional Court on several occasions and has been ruled not to be unconstitutional (see *v.g.* the rulings no. 391/2015 and no. 521/2018).

[137] Namely Articles 343 (1), 345 (1) and 140 CCP. See yet Article 132 (2) CCP, according to which prescribes that a "*[w]itness is not obliged to answer a question when he/she claims that the answer entails his/her criminal liability*".

[138] *V.g.* in the rulings no. 695/95, no. 304/2004, no. 181/2005, no. 155/2007, no. 340/2013, and, quite recently, in ruling no. 298/2019 (addressed *infra*, in the case law section).

not impose a ‘patronising' protection of the defendant against him/herself, but rather it admits his/her confession, although under demanding conditions and with limited effects.[139]

The caveat of Article 7 (3) has resonance in the Portuguese legal system. Article 61 (6) (d) CCP states that defendants have “*a special duty to submit to evidentiary measures, as well as to coercive measures and measures of patrimonial guarantee, as specified by law and as ordered and implemented by a competent authority*”. Article 171 (1) CCP provides for the measure of examination of persons, places and objects, and Article 172 (1) provides that a person who intends to refrain from undergoing, or to prevent the carrying out of an examination, or to refrain from providing an object that should be examined, this person “*may be compelled to do so by decision of the competent judicial authority*”. And according to Article 125 CCP, any evidence which is not prohibited by the law is admissible.[140] It is also crucial to mention here the Law establishing a Database of ADN Profiles for purposes of Civil and Criminal Identification (Law no. 5/2008, of 12 February), which in Article 8 prescribes:

> “(1) *The gathering of a sample from a defendant in an ongoing criminal procedure (...) is carried out at the request or with the consent of the defendant, or ordered by the judge at his/her own initiative or upon request, after weighing the need of gathering the sample and the concerned person's rights to personal integrity and privacy*. (2) *The gathering of a sample from a person convicted for a crime committed with intent and sentenced with imprisonment for 3 years or more, even if it has been replaced by a substitutive penalty, as well as the insertion of the respective profile in the DNA database, are always ordered in the sentence.*”[141]

As for Article 7 (4), Portuguese law does not contain such institutes as plea bargaining, guilty plea or rewarded denunciation, but there are several provisions which unequivocally confer on the trial judge the power and duty to take into account, favourably to the defendant, his/her cooperative behaviour.[142]

Article 7 (5) is implemented by the CPP in Articles 343 (1) and 345 (1) (*supra*), and by Article 355:

> “(1) *It is not admissible at the trial, notably in order for the court to deliberate on the liability of the defendant, evidence which has not been produced or examined at the trial hearing.* (2) *As an exception to the former paragraph, evidence may be admitted which was gathered through procedural acts whose narration, visualisation or audition at the trial hearing is permitted by the following provisions*.”

In Portuguese criminal procedure, the evidentiary relevance of the statements made by the defendant during the pre-trial stages is very limited: such statements may be used to substantiate the decision (by the public prosecution, at the end of the inquiry) whether or not to prosecute him/her, as well as the decision (by the investigative judge, at the end of the phase of instruction) whether or not to indict him/her. As for the final decision whether to convict or acquit the defendant, the principle of immediacy is overriding.[143]

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[139] See Articles 141 (5) and 344 CCP.

[140] In case law, see the ruling no. 14/2014 of the Supreme Court of Justice, further below.

[141] In case law, see the ruling no. 155/2007 of the Constitutional Court, further below.

[142] *Sc.*, Articles 72 (1) (e) and (2) (c) of the Criminal Code and Article 344 CCP.

[143] Insofar as specifically concerns statements made by the defendant, the few existing exceptions are provided for in Article 357 CCP: “(1) *The reproduction or narration of declarations made by the defendant during the [pre-trial stages of the] criminal procedure is admitted only*: (a) *if he/she so requests, regardless of the authority before which they were made*; or (b) *when the statements have been made before a judicial authority [a judge or a public prosecutor], in the mandatory presence of his/her attorney, and he/she has been provided the information mentioned in Article 141 (4) (b) CCP*.” Article 141 (4) (b) prescribes that, at the first judicial hearing of the defendant, the judge informs the defendant that, “*[i]f he/she does not exercise his/her right to remain silent, his/her statements may be used in the criminal procedure and subject to the free assessment of the court, even if he/she is tried in absentia or does not make any statements at the trial hearing*”.

As for Article 7 (6), Portuguese law does not provide for the possibility, with regard to minor offences, to conduct proceedings, or certain stages thereof, in writing or without questioning the defendant. The so-called 'highly summary proceedings' (*processo sumaríssimo*)[144] does take place in writing, but even here the defendant must be heard and, if he/she brings forward any objection to the prosecution, the procedure cannot continue through this simplified procedural form. Thus this provision is implemented. And the same applies to Article 8 (6) of the Directive, *mutatis mutandis*.

11.1.6 Right to be present at the trial and right to a new trial

The implementation of Article 8 is arguably the most contentious issue regarding this Directive. Article 32 (6) of the Constitution provides:

> "*The law shall establish the cases where, provided that defence rights are safeguarded, the presence of the defendant in procedural acts, including the trial hearing, may be dispensed with.*"

By providing that the presence of the defendant can only be dispensed with if the defendant's rights are duly safeguarded, the Constitution may be considered to enshrine a general right of the defendant to be present at his/her trial. Moreover, the Constitutional Court has delivered case law that entails a restriction of legislative discretion in allowing for defendants to be tried *in absentia*.[145] This follows also from Articles 61 (1) (a) and 61 (6) (a) CCP, already expounded, as well as from Article 332 (1), according to which, in principle, "*[t]he presence of the defendant at the trial hearing is mandatory*", or otherwise this procedural act will be null (Article 119 (c) CCP). This allows for the conclusion that paragraph (1) of Article 8 is implemented.

As for Article 8 (2) (a), it is not certain whether it should be deemed fully implemented. As noted, the defendant has a specific to provide the authorities with truthful information about his/her identity and place of residence ('statement of identity and residence': Articles 61 (6) (c) and 196 CCP). The residence that the defendant must provide is the one to which all notifications will be sent during the course of the procedure, and the defendant is explicitly informed that he/she has a duty not to change residence without reporting such a change to the authorities, that notifications will be sent by regular mail to that address, and that failure to comply with such a duty may entail being tried *in absentia*. At the outset of the phase of trial, the judge notifies the defendant and his/her attorney of the date of the hearing, and also designates an alternative date, in case the hearing (as scheduled for the first date) has to be postponed (Article 312 (1) and (2) CCP). This notification is effected through regular mail to the said address (Article 313(3) CCP), and it is not necessary for the defendant to sign a reception form confirming that he/she was indeed notified: the notification is *presumed* to have been received on the 5th day following that in which it was deposited in the defendant's mailbox (Article 113 (3) CCP). Such a solution envisages to obviate the cases in which the defendant would refuse to sign the reception form in order to avoid being properly notified. If a defendant who has been duly notified to be present at trial, in the preceding terms, does not attend it at the time appointed for the hearing to commence, the hearing will only be adjourned if the court considers that the presence of the defendant at the beginning of the hearing is absolutely indispensable for ascertaining the truth of the facts (Article 333 (1) CCP). Otherwise, the defendant may be tried *in absentia*. Thus, the sole condition for a defendant to be tried *in absentia* is that he/she was *notified of the date of the trial by regular mail*.

[144] See Articles 392 f. CCP.
[145] See *v.g.* the rulings no. 465/2004 and no. 206/2006.

Absence from trial may be justified based on Articles 333 (2) and 117 (2) to (4) CCP (for instance, due to an illness), and this will carry the postponement of the hearing, and if the defendant is unable to attend the hearing due. *e.g*., to his/her age, to a serious illness or to the fact that he/she resides abroad, he/she may request that, or consent to, the hearing being held in his/her absence (Article 333 (4) CCP, which cross-refers to Article 334 (2) CCP). The fact is that Portuguese law does not require the defendant to sign a reception form confirming that the he/she was actually notified of the date of the trial, which makes it possible that a defendant is unaware that his/her trial is going to take place or even that it has already taken place. This might fall short of the standard envisaged in the Directive, but it does still allow for the assertion that a defendant may only be tried *in absentia* once he/she "*has been informed, in due time, of the trial and of the consequences of non-appearance*". The debate as to whether or not the domestic regime complies with the Directive boils down to the interpretation of the expression "*has been informed*": if it is construed in the sense that the defendant must get actual knowledge of the date of the trial, then it seems that national law falls short of the European standard; if, on the contrary, that expression is construed in a normative sense (as a sort of implicit presumption), then the Directive can be deemed as implemented, at least in part.[146] As a matter of fact, the model of notification of the defendant through regular mail, described above, was adopted in reaction to what was perceived as a serious problem of delay in the completion of criminal procedures due to difficulties in notifying defendants, and in our view it is not proscribed by the Directive, but the Directive does require the defendant to be at least given the possibility to rebut the presumption that he/she was informed of the date of the trial and prove that the non-receipt of the notification was not imputable to him/her.[147]

Article 8 (2) (b) is implemented by the following provisions in the CCP: Article 313 (1) (c), according to which the "*court order designating the date of the main hearing must contain, or otherwise it will be null:* (...) *The appointment of an attorney for the defendant, if he/she has not yet appointed one*"; Article 333 (7), which calls for the application of Articles 116 (1) and (2), 254 and 334 (4) and (5), all of which have already been expounded; and Article 334 (4), which prescribes that, "*[w]hen the trial hearing is to take place in the absence of the defendant, he/she is represented for all possible purposes by his/her attorney.*"

Article 8 (3) states that "*[a] decision which has been taken in accordance with paragraph 2 may be enforced against the person concerned*". Portuguese law does not contain any such explicit provision, but it is clear that sentences passed against individuals who have been tried *in absentia* bear the same strength and enforceability as any other sentence.

[146] Strong doubts were also voiced by MARIA JOÃO ANTUNES / JOANA FERNANDES COSTA, "Proposta de Directiva do Parlamento Europeu e do Conselho Relativa ao Reforço de Certos Aspectos da Presunção de Inocência e do Direito de Comparecer em Tribunal em Processo Penal (Com(2013) 821 Final)", in Pedro Caeiro (org.), *A Agenda... op. cit.*, p. 42. However, this analysis was based on a Proposal, which differed meaningfully from the version that came ultimately to be enacted. The 2013 Proposal by the Commission (CELEX:52013PC0821) admitted a trial *in absentia* only where the defendant or accused "was summoned in person and thereby informed of the scheduled date and place of the trial, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial (…)". Taking as a reference the Directive itself, a positive implementation assessment is defended *v.g.* by JOÃO MIGUEL CABRAL, "Da validação dos julgamentos *in absentia* em face do mandado de detenção europeu", *Revista Portuguesa de Ciência Criminal* 30 (2020), p. 97 f. In contrast, BÁRBARA CHURRO, *Julgamento na Ausência – Contributo para uma revisão do regime do Código de Processo Penal à luz da Directiva (UE) 2016/343*, Coimbra: Almedina, 2020, p. 134 *et passim*, upholds that the Portuguese legal system does not comply in full with the requirements of the Directive.

[147] This view is therefore close to that defended by BÁRBARA CHURRO, *op. cit*., p. 134.

As for Article 8 (4), it cannot, in our view, be considered as fully implemented either. Article 334 (6) and (7) CCP prescribe that:

> "(6) *Apart from the cases mentioned in paragraphs (1) and (2) of this Article, the sentence is notified to the defendant who has been tried in absentia as soon as he/she is arrested or voluntarily presents him/herself. The deadline for submitting an appeal is counted from the moment of notification of the sentence*. (7) *The notification mentioned in the previous paragraph explicitly informs the defendant of his/her right to appeal the sentence and the deadline up to which may be done.*"

The problem is that Portuguese law does not provide for a right to a new trial as envisaged by Article 9 of the Directive. Portuguese criminal procedure does enable defendants who have been tried *in absentia* (as any other defendants) to appeal against the decisions convicting them, but it does not enable them to seek a completely "*fresh determination of the merits of the case*, *including examination of new evidence*". Those appeals consist of a review of the decision taken by a court of first instance by a High Court, namely an evaluation of possible mistakes. Such a re-evaluation may focus on legal as well as factual issues (Article 410 CCP), but by no means does it amount to a retrial.[148] In order for Portuguese law to comply with the Directive, appeals before the High Courts would, in our view, have to admit significantly wider possibilities to produce new evidence.

Article 8 (5) contains a caveat that a defendant may be temporarily excluded from the trial where this is necessary for securing the proper conduct of the proceedings, provided that the rights of the defence are complied with, which is accommodated by the several provisions in the CCP.[149]

11.1.7 Remedies

Apart from the rights that have not been implemented into the Portuguese legal system – which dy definition have no associated legal remedy –, the breach of the rights provided in the Directive is, in our opinion, subject to "*effective remedies*" as envisaged in Article 10 of the Directive, even though such remedies are not always the same: (i) If the breach resulted from a judicial decision, the remedy will generally consist of an appeal before a higher judicial body. (ii) If it resulted from a decision of a criminal police body or a public prosecutor in the context of a criminal procedure, the remedy may consist either of judicial review by a judge or of a complain to the respective hierarchical superior.[150] (iii) If the breach resulted from another type of action or omission by a public authority, the remedy may consist of initiating a case before an administrative court or of a complaint to the Ombudsman (*Provedoria de Justiça*). The provisions that implement this Article[151] are relevant also for the right to an effective remedy enshrined in the other Directives assessed in this report.[152]

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[148] This is patent in the fact that the High Court may only ground its assessment on evidence that has already been produced and hear the recordings of the trial hearing conducted at the court of first instance. The law enables the court of appeal to have the court of first instance 'renew the evidence' that has already been produced (Article 430 CCP), but such a possibility is exceptional, and the decision whether or not to order it discretionary. Apart from that, there is an extraordinary type of appeal that does come somewhat close to a fully-fledged re-evaluation of the case – the 'appeal of review' (*recurso de revisão*) regulated in Articles 449 f. of the CCP –, but this type of appeal is not concerned with the case where a person has been tried *in absentia*, and, as already noted, it is only possible in a very narrow set of circumstances (see *supra*, on the concept of *res judicata*). And similar considerations apply to the possibility of 'resending the file for a new trial' (*reenvio do processo para novo julgamento*), regulated in Articles 426 and 426-A CCP.

[149] Namely Articles 324, and 325 (3) to (7), and 85 (3).

[150] See Article 97 of the Statute of the Public Prosecution (Law no. 68/2019, of 27 August), and Article 278 CCP.

[151] Regarding paragraph (2) of Article 10, its implementation is secured by the same provisions mentioned above regarding Article 7 of the Directive, on the rights to remain silent and not to incriminate oneself. See also, further above, the comments to Article 3 of the Directive, more specifically regarding Article 32 (2) of the Constitution.

[152] See Articles of the 20, 23 (1) and 52 of the Constitution, and Articles 61 (1) (j), 286 (1), 269, 399, and 400 CCP.

11.1.8 Conclusion

Unlike the case with most other Directives assessed in this research, the number of implementation deficiencies identified in relation to this Directive cannot be said to be large: they concern only Article 4 (1) and (2), Article 5 (1), Article 8 (2) (a) and (4), and Article 9. However, some of the deficiencies identified can be said to be serious. In fact, they concern issues that were already subject to extensive debate in Portuguese legal practice and scholarship before the enactment of Directive 2016/343. That is notably the case with the rules that establish the cases where trials *in absentia* are admissible, and with the rules that define the powers of high courts when ruling on appeal following trials *in absentia* (and, for that matter, following any other trials, but this is not an issue that concerns this Directive).

11.2 Case-law

Regarding this Directive, 26 meaningful rulings were identified, the largest number of all Directives, but only rarely do they make explicit reference to the Directive. The following are the most relevant.

11.2.1 Supreme Court of Justice, no. 14/2014, 28-05-2014

The duty imposed on a defendant to produce a sample of his/her own writing is not incompatible with his/her right not to incriminate him/herself, and if a defendant refuses to produce such a sample he/she will be committing an offence of disobedience.

11.2.2 Central Administrative Court of the North, 07-04-2017, case 02482/16.0BEPRT

The Court did not hold invalid a decision of the Director of the Services of Training and Certification of the Institute of Mobility and Transportation ordering the applicant to undergo a driving exam, taken after receiving information by the Public Prosecution in a criminal procedure where the applicant was prosecuted for active corruption towards obtaining a driving licence. The court saw no sign that the principles of presumption of innocence and *in dubio pro reo* had been breached, as the public institute in question, by ordering the driving exam, was not passing judgement on the guilt of the person. What was at stake here – the court held – was not a judicially established certainty that the applicant had committed a criminal offence, but an uncertainty or mistrust by the State that he had lawfully obtained his driving license, which raised founded doubts as to his capacity to drive safely.

11.2.3 Constitutional Court, no. 366/2018 – Trial *in absentia*, notification of the sentence and time-bars

See *supra*, § 7.2.6.

11.2.4 Constitutional Court, no. 298/2019 – *Nemo tenetur*, tax and criminal proceedings

The documents obtained from a taxpayer during a tax inspection pursuant to his/her general duty to cooperate with tax authorities cannot be used as evidence against this person in an ongoing criminal procedure (in the phase of inquiry) for a tax offence without previous knowledge or decision by the competent judicial authority, as this would breach the privilege against self-incrimination.

11.2.5 High Court of Oporto, 10-12-2019, case 195/18.7PTPRT.P1 – *Nemo tenetur* and blood alcohol tests

There are several criteria for distinguishing the cases in which the privilege against self-incrimination should prevail. One of them is that which has been upheld by the ECtHR and adopted in the Directive 2016/343, which provides that "*[t]he exercise of the right not to incriminate oneself shall not prevent*

the competent authorities from gathering evidence which may be lawfully obtained through the use of legal powers of compulsion and which has an existence independent of the will of the suspects or accused persons". Among the duties incumbent on defendants is that to undergo evidentiary measures provided for in the law and ordered by a competent authority, a hypothesis which includes the blood alcohol test. Articles 152 (1) (a) and (3) of the Code of Enforcement of Penalties, and Article 348 (1) (a) of the Penal Code [which establishes the offence of disobedience], by imposing on a person a duty to undergo a blood alcohol test through the analysis of exhaled air, under the warning that the person will otherwise be incurring in a penalty of imprisonment, when this person does not wish to undergo such a test, does not breach any constitutional norm.

11.2.6 High Court of Évora 07-01-2020, case 488/19.6T9STR.E1 – Natural and legal persons

In this case, the point of interest is that the Court explicitly referred to the Directive 2016/343 in order to rule out its relevance in the case: it only applies "*to natural persons who are suspects or accused persons in criminal proceedings*", and thus its applicability to legal persons is excluded.

11.2.7 Supreme Court of Justice, 09-07-2020, case 3/18.9GAETZ.S1 – *In dubio pro reo*: scope and possibility to appeal form a breach of this principle

Not to assess an alleged breach of the principle *in dubio pro reo* and of the principle of free assessment of the evidence would equate to resurrecting the outdated understanding according to which this issue was excluded from the powers of the Supreme Court, based on the argument that *in dubio pro reo* applies only to doubts concerning factual (not legal) matters, whereas the Supreme Court may only assess legal matters. While it is certainly true that the principle *in dubio pro reo* applies only to factual matters, the breach of this principle – like the breach of *any* principle – is, in itself, a legal matter. It therefore falls within the competence of the Supreme Court, insofar as this Court is not required to meddle into the facts of the case, but may instead perform its assessment based on the facts listed as proven and not proven in the decision which is being appealed.

11.2.8 Critical appraisal

Similar considerations as those adduced on the Directives 2010/64/EU, 2012/13/EU and 2013/48/EU apply to this Directive. Explicit reference to the Directive is still rare, but a trend seems to be emerging. Still, as with those Directives, the little reference that the Directive (EU) 2016/343 did receive served basically to establish that national law already provides for these rights, that there is no conflict with the norms of the Directive, that Portuguese law does not fall short of the standards set by the Directive.

12 Concluding remarks

12.1 Comparative analysis

As mentioned before, none of the Directives except Directive (EU) 2016/800, on juvenile defendants, was the object of a dedicated transposition into the national legal system, because existing legislation, notably the CCP, was deemed to meet the standards envisaged by the European Agenda on Procedural Rights. Since practically no specific implementation endeavours were carried out, it is only natural that a significant number of deficiencies exists. Such deficiencies can be identified in all Directives, save for Directive (EU) 2016/1919 on legal aid. They take the shape either of actual implementation gaps (in some cases complete, in other only partial) or, in the best case, of serious doubts as to whether a given provision has been implemented (allowing for different interpretations, producing uncertainty).

While implementation problems can be identified in almost all the Directives, their number and their intensity vary. According to these variables, the Directives where implementation problems have been detected can be divided mainly into four different types. (i) One is that where there are relatively few and not particularly serious problems, which would be the case of Directive 2012/13/EU on the right to information. (ii) Another is that where the detected problems are relatively large in number but not particularly serious. This would be the case of the Directive (EU) 2016/800 on juvenile defendants. The fact that the problems detected in relation to this Directive are not very serious can be explained precisely by the fact that specific legislation was enacted (although one would also have expected this to lead to a narrower number of problems). (iii) Then, the situation where the problems detected are relatively few but serious, which would be the case of the Directive (EU) 2016/343 on presumption of innocence and on the right to be present at the trial: there are doubts as to whether the law currently in force in Portugal fully complies with the Directive insofar as concerns the right to be present at the trial and the right to a retrial. It would also be the case of the Directive 2010/64/EU on the right to interpretation and translation, as there are strong doubts on the quality of the interpretation and translation provided in the Portuguese legal system, and with the control of such quality. (iv) To conclude, the situation where there are numerous implementation problems and some of them relate to important issues. It would be the case of the Directive 2013/48/EU on the right of access to a lawyer and to have a third party informed, notably insofar as concerns the extent of the right of access to a lawyer enshrined in Article 3, but also the issues of temporary derogation of rights (Article 3 (3) (a), Article 5 (3) and (4), and Article 8 (1) (c)), and waiver of rights (Article 9) enshrined in the Directive, including of the very right of access to a lawyer.

All things considered, we could perhaps rank implementation problems, by Directive, in the following terms, from less to more serious:

- Directive (EU) 2016/1919 on legal aid;
- Directive 2012/13/EU, on the right to information;
- Directive (EU) 2016/800, on juvenile defendants;
- Directive (EU) 2016/343, on presumption of innocence and on the right to be present at the trial;
- Directive 2010/64/EU, on the right to interpretation and translation;
- Directive 2013/48/EU, on the right of access to a lawyer and to have a third party informed.

That said, we would however emphasise that the fact that there are problems of implementation with nearly all Directives, and that some of them may even be deemed serious, does not necessarily mean that there is a serious deficit of procedural rights in Portugal. As we noted often throughout the report, most of the norms of the Directives are indeed accommodated by already existing national legislation – which may help to explain why the Portuguese legislator saw practically no need to adopt new rules.[153] Nevertheless, further attention must be paid to the details. The fact that national criminal procedure may be considered satisfactory or even good should not obfuscate that more ambitious standards are being required by the EU Directives.

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Regarding case law, as noted before, 80 rulings were assessed during this research. These are mainly rulings issued by the Constitutional Court, the Supreme Court of Justice, or one of the five High Courts (Guimarães, Oporto, Coimbra, Lisboa and Évora), added by a ruling of an Administrative Court and a Recommendation by the Ombudsman. Of those rulings, only 14 refer explicitly to the Directives, and they tend to simply evince the view that they were already covered by national norms, rather than critically ascertain whether that is indeed the case. Nevertheless, of those 14 decisions, 9 were issued in 2019 or later, which suggests increasing judicial attention towards the Directives.

The right to interpretation and translation is among the procedural rights regarding which more case law has been identified as relevant, and the Directive 2010/64/EU is probably the one that has received more explicit reference by the courts. This should be due, in part, to the fact that it is the oldest of the six Directives. Another explanation might be that the cases where those rights are called into play are, inherently, cases with an international element: the defendant is not Portuguese and is often a citizen of another MS. This may increase the courts' willingness to refer to European legislation. Similar considerations apply to some issues regulated in the Directive (EU) 2016/343, notably the right to be present at the trial, when the defendant has fled to another country.

At the other end of the spectrum are the issues covered by the Directive (EU) 2016/800, on juvenile defendants, and by the Directive (EU) 2016/1919, on legal aid. As noted in the respective section, the scarcity of case law on issues concerning young offenders may be seen to express some disregard for the specificities of this class of subjects, which would be concerning, but it is also plausible that this is due to few criminal procedures being carried out against young offenders, which would be positive. As for legal aid, the scarcity of case law is consistent with the view upheld in this report, that national rules on legal aid are theoretically sound – although this does not translate into practical effectivity, largely as a consequence of shortage of funds.

12.2 Quantitative and qualitative outcome of the research

The traditional view in national legal literature is that Portugal pursues a humanistic approach to penal matters, having been among the first countries to abolish the death penalty and life-imprisonment. On the other hand, Portuguese criminal procedure, in its fundamental traits, was forged in antagonism towards the criminal procedure of the dictatorship that governed the country from 1926 to 1974. The authoritarian nature of the State was poured into the 1929 CCP, which established an inquisitorial procedure; few decisions of impact on fundamental rights in the pre-trial stages were reserved to independent authorities (judges); political crimes were subject to special rules that engrained evident

[153] But see further below, § 12.2.

violations of basic individual freedoms.[154] In the 1987 CCP, an accusatorial system was established, ample defence rights recognised to defendants, and the power to order or validate intrusive measures entrusted to judges. Adopted in an atmosphere of rupture with the former regime, the new CCP, heavily concerned with individual rights, did not yet reflect the trend – which was already in course in other European countries – of enhancing State capacity against terrorism and organised crime.[155] It was only in the 1990s and onwards that this trend reached the Portuguese legal system, in reaction to excessively lengthy criminal proceedings that many perceived as the result of excessive individual guarantees. Nevertheless – and in spite of an increasing populist stance which propounds the further enhancement of State punitive power, with a correlative constriction of individual liberties –, the CCP, in its current shape, is still a body of norms that are greatly concerned (and perceived to be greatly concerned) with individual guarantees. Faithful, therefore, to the original version of 1987 and the worldview it sought to implant.

We think that this – rather than a concern about the efficiency of the criminal justice system, or some other type of resistance to the increase of individual rights – goes a long way to explaining why the Portuguese legislator, the courts and even legal scholarship (normally more critical than the former) tend not to adhere lightly to the idea that national standards fall short of those that are being considered ideal by supra-national organisations in which Portugal is integrated. Indeed, there does not exist in Portugal an attitude of resistance to EU legislation in general – not in criminal matters at least. There is, for instance, no resistance to the implementation and application of EU legislation based on mutual recognition. The statute implementing FD-EAW implemented all grounds for non-execution provided for in this FD (the mandatory ones as mandatory, the optional ones as discretionary), which suggests that no evaluation whatsoever was carried out by the national legislator as to whether all the optional grounds were actually necessary or desirable in the light of the Portuguese legal tradition and factual interests.[156] That is, it suggests that the implementation of the FD-EAW was nearly automatic, acritical even. Likewise, judicial decisions refusing to execute an EAW are rare: grounds for non-execution are only relatively seldom deemed applicable by the courts, and EAWs usually executed in the name of mutual trust.[157]

There are, of course, differences of many sorts between harmonisation and mutual recognition legal instruments. The latter apply vis-à-vis other MSs, whereas the former affect national legal systems rather transversally. Mutual recognition is generally an alternative to a classic international law device, and hence its implementation generally requires the enactment of an autonomous statute, which necessarily originates case law on 'European' law. In contrast, harmonisation impacts on rules developed and intended to apply at the strictly internal level. Its implementation thus tends to require the modification of long-standing legal instruments developed internally in an unconstrained manner. This serves to state that some difference in attitude regarding mutual recognition and harmonisation legal instruments is understandable and in fact normal. However, in the Portuguese legal system this dichotomy is overstated. The difference in commitment to mutual recognition and to harmonisation is particularly surprising when we consider that the latter is preordained to reinforcing the former.[158] The exception are the cases where a Directive touches upon issues regarding which there already was

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[154] In further detail, PEDRO CAEIRO / MIGUEL JOÃO COSTA, "The Portuguese System", in Katalin Ligeti (ed.), *op. cit.*, p. 540-541.
[155] See *ibid*.
[156] See further in MIGUEL JOÃO COSTA, *Extradition Law: Reviewing Grounds for Refusal from the Classic Paradigm to Mutual Recognition and Beyond*, Leiden: Brill | Nijhoff, 2019, p. 180 f., and ulterior references.
[157] See *ibid*.
[158] Article 82 (2) (b) TFUE states that the rights of individuals in criminal procedure may be harmonised by the European Parliament and the Council "*[t]o the extent necessary to facilitate mutual recognition*"; see also PEDRO CAEIRO, "Introduction (Or: Every Criminal Procedure Starts with a Bill of Rights)", in Pedro Caeiro (org.), *The European Union Agenda… op. cit.*, p. 13 f.

debate at the internal level as to whether or not existing rules were adequate, as it is notably the case with the rules on trials *in absentia*. This suggests that there is critical mass concerned with enhancing procedural rights and resisting against rising penal populism; but somehow this critical mass seems to be less energetic when the parameter of control is heteronomous – i.e., when the movement towards higher standards of individual protection does not originate internally, as an exercise of self-improvement, but is instead commanded by an external entity, in the case the European legislator.

Sometimes, the insufficiency of national standards results simply, or at least mainly, from the lack of funds to back what may be considered normatively sound approaches. This is fundamentally the case with the quality of interpretation and translation services, as well as with the system of access to the law and to the courts.

As far as we could ascertain, there are no undergoing legislative reforms or particularly meaningful cases pending on matters of relevance for the agenda on procedural rights. Further discussion on the implementation of the Directives is necessary. We reiterate that there does not exist a serious deficit of procedural rights in Portugal, but there is no reason not to pay further attention and to remain open to the ambitious goals set by the EU in this realm. Considering the nature of the causes that we have tentatively identified for this reluctance, we would conclude by convening legal literature to take the lead here and be more active in exerting the critical function that is expected of it.