National Report for Portugal

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Abbreviations and acronyms

CA	Consortium Agreement
D	Deliverable
DoA	Description of Action
EC	European Commission
EU	European Union
GA	Grant Agreement
G.A	General Assembly
GDPR	General Data Protection Regulation
IPRs	Intellectual Property Rights
KO	Kick-off
LEAs	Law Enforcement Agencies
M	Month
PC	Project Coordinator
PO	Project Officer
R&D	Research and Development
RFI	Request For Information
RP	Reporting Period
T	Task
TOC	Table of Content
TRL	Technology Readiness Levels
WP	Work Package
WPL	Work Package Leader

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Executive summary

Portugal did not initially enact new legislation with a view to implementing Directives 2012/13/EU, on the right to information, 2013/48/EU, on the right of access to a lawyer and communication with third parties, and 2016/1919/EU, on legal aid for suspects and accused persons. Pre-existing legislation was deemed to ensure full compliance. As a consequence, the Directives received little attention in national legal literature[1] and case law. The latter only seldom referred explicitly to the Directives – and often only to assert that their norms were already covered by existing national norms –, and even more seldom did it engage in actual reflection on the correspondence of the former with the latter or on the interplay between EU law and national law more generally. It was only after expiry of the term for implementing the Directives that the Portuguese legislator proceeded to further amendments, particularly through Law no. 52/2023, of 28 August,[2] a process which appears to have been largely motivated by CJEU's case law on this legal system[3] and by infringement proceedings initiated by the Commission against Portugal.[4-5] Even so, some implementation issues remain.

In this section we present the main findings obtained through desk research carried out on each of those Directives, which are then analysed in further detail in subsequent chapters. Apart from Directive (EU) 2016/1919, on legal aid, implementation problems are identified in relation to all Directives. The implementation deficit is in some cases only partial, while in other cases there are provisions lacking implementation entirely.

Regarding case law, there is a visible increase in the reference to the Directives since 2019, and even more so since 2022, following the CJEU's ruling in *TL* (C-242/22 PPU);

[1] One of the few comprehensive works on 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] For brief comments on this statute see Dirce Rente / Vânia Costa Ramos, "Lei n.º 52/2023, de 28 de agosto – Breve nota", available at < www.forumpenal.pt >, and João Rodrigues Brito / Tiago da Costa Andrade, "Legal Alert: Lei n.º 52/2023, de 28 de agosto – Completa a Transposição de Diretivas Relativas ao Processo Penal e ao Mandado De Detenção Europeu", available at < www.mlgts.pt >.

[3] Sc., the judgment of the CJEU in TL (C-242/22 PPU) of 1 August 2022, ECLI:EU:C:2022:611 (addressed below, § 6.2).

[4] See < https://ec.europa.eu/commission/presscorner/detail/pt/inf_21_4681>, last accessed 9 May 2025.

[5] Most such implementation problems had been identified in a previous version of this report.

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the enactment of Law no. 52/2023 also contributed to draw the attention of the courts to the Directives. In the same vein, the volume of cases before the Constitutional Court where the EU Directives on procedural rights were invoked has also increased visibly since 2019 (particularly, for what is of concern here, Directive 2012/13/EU), although generally the Court did not rule on the merits because it found that the procedural requirements for such an intervention were not met,[6] or it did rule on the merits but the relevance of the Directives for such an assessment was residual or null.[7]

1. Directive 2012/13/EU

Regarding this Directive, our view is that many of its norms did have sufficient backing in previous legislation. With the amendments carried out by Law no. 53/2023, of 28 August, the implementation problems that still remain are but very few and of narrow significance. They relate to Article 4 (2) (a), (c) and (d) and Article 4 (4), in conjunction with Annex I, concerning the Letter of Rights to be provided upon arrest.

Initially, the case law explicitly referring to this Directive normally held that national law already provided for the relevant rights. As with the Directive 2010/64/EU, on the right to translation and interpretation – and in consequence of their intertwinement –, the divergence in national case law as to its direct effect was overcome by virtue of the intervention of the High Court of Évora and the subsequent ruling by the CJEU (*TL*, C-242/22 PPU, 01-08-2022),[8] which gave depth to the right to information in criminal proceedings in the Portuguese legal system. Also in the image of Directive 2010/64/EU, Directive 2012/13/EU has visibly gained more expression in national case law over the last 5 years. It is often invoked by defendants, especially insofar as concerns the right of access to the file. However, it is less consequential than the Directive 2010/64/EU, in the sense that it is seldom crucial to the decision of the case in favour of the defendant – except in the cases (in fact many) where it applies in connection with Directive 2010/64/EU.

[6] See *v.g.* the rulings nos. 447/2019, 91/2020, 195/2022, 220/2022, 430/2022, 39/2023, 519/2023, 316/2024, 411/2023, 836/2023, 603/2024, 759/2024, 799/2024 and 325/2025.

[7] See *v.g.* the ruling no. 492/2024.

[8] Note that the CJEU, in *Staatsanwaltschaft Offenburg*, C-615/18, EU:C:2020:376, § 72, had upheld that "Article 6 of Directive 2012/13 must be regarded as having direct effect" – as noted for a different purpose in a joint opinion attached to the ruling of the Portuguese Constitutional Court no. 268/2022.

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2. Directive 2013/48/EU

Not all the norms of this Directive have been implemented either. This was, initially, one of the Directives with the poorest implementation levels and regarding which the need of legislative intervention was the highest, even though many of the implementation problems were arguably not very intense, in that only some normative dimensions of the relevant provisions lack(ed) implementation. However, they were – and remain – 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 (therefore, "based exclusively on the type or the seriousness of the alleged offence"), 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. Some problems were however removed with the enactment of Law no. 52/2023, which addressed the issue of dual representation in EAW proceedings. While this is a welcome development, further legislative intervention is needed to overcome those other problems.

Fewer relevant rulings were identified on this Directive than on Directives 2010/64/EU and 2012/13/EU. The scarce references made therein to the Directive are generally aimed at asserting that national law already provided for the rights at issue here, which is particularly questionable in this case, as there are several provisions implementation of which is – even after the amendments brought by Law no. 52/2023 – either lacking or at least dubious. There is a tendency of increase in the relevance of this Directive in more recent case law, but it is clearly more tenuous than with the Directive 2010/64/EU and the Directive 2012/13/EU.

3. 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) originated in the (defective implementation of) Directive 2013/48/EU, on access to a lawyer, to which this Directive is closely related, but these have in any case been solved through the Law no. 52/2023. 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.

Very few rulings 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. On the positive side, the Constitutional Court has been called upon to assess the constitutionality of certain norms of the legal aid system and has held some of them unconstitutional, which reflects the importance of the right to legal aid.

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.

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Consortium

IPS_Innovative Prison Systems	Portugal
Polish Platform for Homeland Security	Poland
Alma Mater Studiorum - Universita Di Bologna	Italy
Bulgarian Helsinki Committee Association	Bulgaria
Academia De Politie Alexandru Ioan Cuza	Romania
Peace Institute	Slovenia
Academy of the Police Force in Bratislava	Slovakia

1. FULL-PROOF Scope

FULL-PROOF "Ensuring the due course of criminal proceedings via strengthened respect for the procedural rights of the suspect and the accused" (Grant Agreement nº 101160524), is a 2-year (October 2024 – September 2026) project co-funded by the European Union, via the Justice Programme (JUST-2023-JACC-EJUSTICE) call for proposals for action grants to promote judicial cooperation in civil and criminal matters. FULL-PROOF's main objective is to raise awareness and knowledge on Directives 2012/13/EU, 2013/48/EU, and 2016/1919/EU to better approach and work with suspects and accused. The partnership will analyse the most prominent and common breaches in the practical implementation of these Directives, building upon identified best practices and develop a framework for their replicability, streamline the use of new and existing tools and materials to assist professionals in their daily work and promote international communication.

2. Introduction

2.1. Constitutional and Criminal Justice System

2.1.1. Key constitutional provisions

The first provision in the Portuguese Constitution[9] 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.[10] Moreover it guarantees the right to legal information and legal counselling, including a right to be accompanied by an attorney before any public authority.[11]

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,[12] a person may only be deprived of liberty in result of a judicial decision determining him/her to be either criminally liable or dangerous.[13] 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

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

[10] 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, 2021, p. 271 f., followed closely in this section.

[11] 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, 5th ed., 2023, p. 22 f., 46 ff.; 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.

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

[13] 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.

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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,[14] although it may be stated that there has been a tendency of expansion over recent years.[15] 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.[16] Moreover, Article 32 establishes the right not to be tried *in absentia* (although this right is subject to meaningful exceptions as well)[17] 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*),[18] 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,

[14] 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.

[15] See *e.g.*, the rulings of the Constitutional Court no. 429/2016 and no. 31/2020, and the Law no. 94/2021, of 21 December, which narrowed the cases set out in Art. 400 CCP where decisions taken on appeal by a High Court cannot be further appealed to the Supreme Court of Justice.

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

[17] See *e.g.*, the ruling of the Constitutional Court no. 366/2018, indicated below, in § 4.2.6.

[18] 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.

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inter alia, that they can only be ordered by a court.[19] 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 special types of criminal proceedings. The Constitutional Court tends to equate extradition to criminal proceedings,[20] 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. In August 2022, through the ruling no. 540/2022 – the first occasion in which the Constitutional Court ruled on the merits on the constitutionality of a national norm implementing the EAW Framework Decision –, it confirmed the applicability of Art. 32 (1), insofar as it provides for the right to appeal, to EAW proceedings.[21] The Court held that the norm at issue, contained in Art. 24 (1) of the national implementation statute, breached that constitutional provision, as it carried an undue restriction of the right to appeal, preventing the requested individual from challenging the sufficiency of the guarantees provided by the issuing Member State after he had consented to being surrendered. For reaching that conclusion the Court explicitly mobilised the evolution of the EAW system brought by the Directives on procedural rights, and the increased relevance thereby given to fundamental individual interests.[22]

[19] 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.

[20] 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.

[21] On this ruling see PEDRO CAEIRO / RAQUEL CARDOSO, "Country Research Brief [on the application of the FD-EAW by Portuguese courts]: Portugal", 2023 < https://stream-eaw.eu/country-reports/ > p. 17 f.; MARGARIDA SANTOS, "As Garantias do Detido na Execução de um Mandado de Detenção Europeu – Comentário ao Acórdão do Tribunal Constitucional n.º 540/2022", *Portuguese Review of Constitutional Law* 2 (2022), pp. 153 ff.

[22] To that effect the Court cited *inter alia* (at § 2.4) the findings of the *CrossJustice* project: MIGUEL JOÃO COSTA / PEDRO CAEIRO, "Portugal – The Implementation of the Directives on Procedural Rights in Law and Practice", in Giuseppe Contissa / Giulia Lasagni / Michele Caianiello / Giovanni Sartor (eds.), *Effective Protection of the Rights of the Accused in the EU Directives: A Computable Approach to Criminal Procedure Law*, Leiden: Brill | Nijhoff (2022), < https://doi.org/10.1163/9789004513396_012 >, pp. 170 ff.

2.1.2. 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)[23] 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;[24] or (d) A police report has been drawn up identifying 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 defendant is acquired with the communication to the concerned person, either orally or in writing, by a judicial authority or criminal police body[25] 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."*

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

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

[24] 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, 2012, p. 550 f.

[25] 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 (4) 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.

advice mentioned in Article 58 (2) CCP.[26] 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.[27] 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[28] 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:[29] (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,[30] 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; (j) to translation and interpretation, as provided for in Arts. 92 and 93; and (k) to appeal the decisions that personally affect him/her.

b) The following *duties* befall specifically upon *arguidos*:[31] (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

[26] See Article 59 (1) CCP.
[27] See Article 59 (2) CCP.
[28] See Article 60 CCP.
[29] Article 61 (1) CCP – which, as noted, to a large extent only concretises constitutional guarantees.
[30] On the pre-trial phases of Portuguese criminal procedure see further below.
[31] Article 61 (6) CCP.

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

2.1.3. 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.[32] A standard criminal procedure has two pre-trial phases: inquiry (*inquérito*)[33] and instruction (*instrução*).[34] 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,[35] 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.

2.2. Constitutional and Criminal Justice System

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*).

32 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.
33 Articles 262 ff. CCP.
34 Articles 286 ff. CCP.
35 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*).

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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.[36] 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,[37] 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,[38] the Supreme Court of Justice[39] or the Constitutional Court, when the constitutional validity of norms relevant to the case is challenged).

As stated, the criminal police[40] 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 offenders *in flagrante delicto*, and carry out urgent evidence gathering measures.[41] 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 –,[42] which often carries the police to have a very central role in the

[36] Article 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.

[37] Articles 268 and 269 CCP.

[38] 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.

[39] The Supreme Court (*Supremo Tribunal de Justiça*) is the highest judicial court in the country, and is located in Lisbon.

[40] 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 Código de Processo Penal*, Coimbra : Almedina 1988, p. 70.

[41] See Articles 55 and 248 ff. 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.

[42] 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

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.[43]

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.[44] 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.[45] 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.[46] 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.[47]

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.[48] 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.

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or *post factum* validation is required.

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

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

[45] 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. 41 f., 80 f.

[46] Currently, Law no. 51/2023, of 28 August, which applies to the biennial 2023-2025.

[47] 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.

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

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

3.1. Legislation

3.1.1. General issues

No specific legal instrument was initially enacted to implement this Directive either, as existing legislation was deemed to cover it.[49] This was in our view a correct assessment for the larger part, but not for all the norms in the Directive. Prompted by infringement proceedings initiated by the Commission, the legislator later enacted Law no. 53/2023, of 28 August, so as to complete the transposition of this Directive. The implementation problems that do still remain are few and of narrow significance.

The right to obtain information in criminal proceedings is attributed to different procedural subjects, but it is particularly intense insofar as concerns the defendant, and it is therefore one of those rights that emerges immediately upon the designation of that person as an *arguido*.[50] 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*]",

[49] See document with CELEX 72012L0013PRT_218061.
[50] Recall the concept *supra*, at the Introduction.

which include, *inter alia*, the right to remain silent (Article 61 (1) (d));[51] 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));[52] and the right to an interpreter or translator (Articles 61 (1) (j) and 92 f. CCP). This secures implementation of Articles 1, 2 and 3 (1) of the Directive.

3.1.2. 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*".

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*),[53] 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*".[54]

And yet by Article 58 (5) and (6) CCP, according to which:

> "(5) *The status of arguido implies the delivery to the concerned person, if possible in the same procedural act and in any case without unjustified delay, of a document identifying the case file*

[51] See also the other provisions mentioned in respect of the Directive 2016/343.
[52] See also the other provisions mentioned in respect of the Directive 2013/48.
[53] 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.
[54] 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, 2020, p. 390.

and the defence attorney, if one has already been appointed, and such a document must also indicate the rights and duties that the person is thenceforth entitled to pursuant to Article 61.[55]
(6) If the defendant does not know or command Portuguese language, and if the document mentioned in the previous paragraph is not available in a language that the defendant understands, the information is conveyed orally, if necessary with the intervention of an interpreter, but the defendant must still be later provided, without unjustified delay, a written document in a language they understand."

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)*", namely 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.

3.1.3. 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.[56]

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[55] Recall *supra*, at the Introduction.
[56] 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*

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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.[57]

Article 4 (3) of the Directive is covered by the already mentioned Article 58 (5) CCP in articulation with Article 61 (1) (k) CCP, which confers on defendants the right to appeal the decisions that personally affect them; and Article 4 (5) of the Directive is also covered by the same 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 of Annex I: since the national provisions (mentioned above) that implement Article 4 (1) of the Directive do not contain all the information required by Article 4 (2) of the Directive and reflected in the Model Letter of Rights, Article 4 (4) and Annex I of the Directive must be considered as only partially implemented.

As for Article 4 (5) of the Directive, it has been explicitly implemented by the Law no. 52/2023, by virtue of which Article 58 (6) CCP currently reads:

> "*If the defendant does not know or command Portuguese language, and if the document mentioned in the previous paragraph is not available in a language that the defendant understands, the information is conveyed orally, if necessary with the intervention of an interpreter,*

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 (5) (see above), and Article 61 (1), which lists the several rights springing from the designation as *arguido*.

[57] 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. See also the Decree-Law no. 70/2019, of 24 May, on the security measure of internment.

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but the defendant must still be later provided, without unjustified delay, a written document in a language they understand."

Since the amendment of the LEAW by the Law no. 52/2023, all the rights contemplated in Article 5 of the Directive and in the model letter of rights in EAW proceedings of Annex II are duly reflected in the LEAW,[58] and information must be provided to the person concerned that he is entitled to those rights.[59] Therefore, those provisions should at present be deemed as fully implemented.

3.1.4. 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 (5) CCP – in conjunction with Article 58 (7) 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*

[58] See, notably: Article 17 (1), according to which, upon being arrested, the person must be informed of the existence and the content of the European arrest warrant, as well as of the possibility to consent or not to consent to being surrendered to the issuing judicial authority; and the new version of Articles 17 (2) and 18 (4), according to which the person arrested has the right to be assisted by a lawyer and to be informed about the right to appoint a lawyer in the issuing Member State in order to assist the chosen or officially appointed lawyer in Portugal, and the judge in charge of the case file must appoint a lawyer to the him/her prior to the hearing if he/she has not appointed one, as well as inform him/her about the right to appoint a lawyer in the issuing Member State in order to assist the chosen or officially appointed lawyer in Portugal.

[59] See Article 17 (4) LEAW, which 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*".

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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*."

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 circumstances of relevance for the penalty to be especially mitigated or for an exemption of penalty to be applied* (d) *The indication of the applicable legal provisions; (e) A list with up to 20 witnesses, and their identification (...)*; (f) *The indication of the experts and technical advisors that should be heard at trial, and their identification*; (g) *The indication of other evidence to be produced or requested*; (h) *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*; (i) *Date and signature*."[60]

Also from Article 287 (2), according to which, when the optional phase of instruction has been requested,[61] the request that triggers this phase

[60] 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.

[61] Recall the phases of Portuguese criminal procedure *supra*, at the Introduction.

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> "*(…) 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 (d) [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 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."[62]

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*."

[62] 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 (...).*"

3.1.5. 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 on disclosure of proceedings and legal secrecy is 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*.
> (14) *If the foregoing public information confirms that the person who has been publicly implicated in the case takes on the quality of suspect, then this person has the right to be heard in the procedure, at his/her request, within a reasonable deadline that should not exceed three months, with the interests of the investigation being secured.*"

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, either in hard or digital format, 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.*

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(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.*"[63]

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.

3.1.6. 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.[64]

[63] In turn, Ordinance no. 280/2013, on the electronic processing of judicial procedures, provides in Article 12-A that the secretary of the court may refuse to digitalize certain documents, *v.g.* if they could be damaged by the digitalization process, considering *inter alia* their state of conservation; it further sets out that documents which are not in digital format are consulted at the secretary of the court where the procedure is running. Article 27 (1), in turn, prescribes that: (1) Where admitted by law or by a court order, the consultation of the files by lawyers (*lato sensu*) takes place: (a) As for procedural information which is in digital format (including the elements and documents of the file), through the information system supporting the activity of the courts; or, otherwise, (b) At the secretary of the court.

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

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3.1.7. Training

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

3.1.8. Conclusion

In conclusion, as with the Directive on the right to interpretation and translation, most provisions of this Directive did have sufficient resonance in legislation already in force in Portugal.[65] After the amendments carried out by the Law no. 52/2023, the level of compliance is truly elevated, the only provisions still lacking perfect implementation being namely Article 4 (2) (a), (c) and (d) and Article 4 (4), in conjunction with Annex I.

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.

3.2. Case-law

An increasing volume of rulings can be identified making explicit reference to Directive 2012/13/EU. The following are, in our view, the most relevant decisions.

[65] 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 is more unreserved than ours, as we believe that some provisions in the Directive lacked adequate legislative action.

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3.2.1. 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.

3.2.2. 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.

3.2.3. 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.

3.2.4. 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.

3.2.5. 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.

3.2.6. 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.

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

This ruling is relevant mainly for the Directive 2010/64/EU, but it is also of great interest in respect of the Directive 2012/13/EU.

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.

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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.[66] 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.[67] The Letter of Rights

[66] This is a reference to the possibility of trying the defendant *in absentia*.

[67] Which, as noted above, lists the (main) rights of the defendant. As also noted, this provision was later amended (through the Law no. 52/2023), such that at present it does explicitly contain (in para. (1) (j)) the right to interpretation and translation – and, as a consequence, the right (as per para. (1) (h)) to be informed that he/she is entitled to those 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 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. These views of the High Court of Évora would be later reprised in case 53/19.8GACUB-B.E1 (see *infra*), where a request for a preliminary ruling was lodged to the CJEU, leading to the ruling in *TL* (C-242/22 PPU).

3.2.8. 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

As in the previous item, this ruling is relevant mainly for the Directive 2010/64/EU, but it is also of great interest in respect of the Directive 2012/13/EU, as it makes explicit reference to the Directive 2012/13/EU.

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.

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

The Constitutional 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.

3.2.10. 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.

3.2.11. 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; already addressed *supra*.

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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.[68] This would be useless and would in no way contribute to a more effective exercise of the defence rights of the former defendants.

3.2.12. 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.[69] 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

[68] See also the ruling of the Court of First Instance of Setúbal of 19-02-2020, case 243/17.8BEALM (in a civil action aimed at establishing the tort liability of the Portuguese State for damages emerging from actions or omissions in the exercise of the judicial function), holding that the Directives 2010/64/EU and 2012/13/EU do not require – as the defendant in this case claimed – the translation of the *entirety* of the file.

[69] In the same vein, see also, *v.g.*, the ruling of the High Court of Évora of 10-09-2024, case 90/23.8JAFAR.E1, and the ruling of the High Court of Lisbon of 06-02-2024, case 335/22.1JELSB.L1-5.

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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.

3.2.13. High Court of Lisbon, 21-10-2021, process 6/02.5TBSNT-A.L1-9 – Right of access to the file

In this case, the defendant claimed that he/she was entitled to be provided with a full copy of the file in digital format with a view to preparing the appeal of the sentence proffered at the first instance. The criminal procedure at issue was initiated as far back as in 2002, and only procedural acts that took place as of 2008 (and even so not all of them) had been documented in digital format.[70] The Court dismissed the claim, and in essence held that this would not hamper upon the right to information nor upon the right to defence more broadly, as the elements of the file that were not recorded in digital format could in any case be consulted in person at the premises of the court.

[70] In the same vein, recall the ruling of the Court of First Instance of Setúbal of 19-02-2020, 243/17.8BEALM, holding that the Directives 2010/64/EU and 2012/13/EU do not require – as the defendant in this case claimed – the *translation* of the entirety of the file.

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3.2.14. High Court of Évora, 08-03-2022, case 53/19.8GACUB-B.E1 (I) – Request for a preliminary ruling by the CJEU

This ruling is another instance of intertwinement between Directives 2010/64/EU and 2012/13/EU.

On 10 July 2019, a Moldavian citizen (TL) who does not command Portuguese language was placed under judicial investigation in Portugal for the offences of resisting and coercing an official, reckless driving of a road vehicle and driving without a valid licence. The formal record of placement under investigation was translated into Romanian (the official language of Moldova). On the same day he was subject to the statement of identity and residence (DIR)[71] without an appointed interpreter and without that document being translated into Romanian. By judgment of 11 July 2019, which became final on 26 September 2019 he was sentenced (inter alia) to 3 years of imprisonment, suspended for the same period with probation. During the trial he was assisted by a lawyer and an interpreter. In order to implement the probation scheme, the authorities tried unsuccessfully to contact TL at the address stated in the DIR. He was then summoned to appear by an order of the District Court of Beja (Portugal) of 7 January 2021, notified on 12 January 2021 to the address indicated in the DIR, so as to be heard about his failure to comply with the conditions of the probation scheme. On 6 April 2021, a further notification of that order was made at the same address. Both of these notifications were made in Portuguese. Since TL did not appear on the date indicated, that court, by order of 9 June 2021, revoked the suspension of the prison sentence. That order was notified on 25 June 2021 in Portuguese to TL at the address indicated in the DIR and to his lawyer, and it became final on 20 September 2021. On 30 September 2021, as a consequence of TL's failure to comply with the probation scheme, he was arrested at his new address for the purpose of enforcing the sentence of imprisonment, and he was imprisoned when the High Court requested the preliminary ruling by the CJEU and when the CJEU took stock of the case. On 11 October 2021, TL appointed a new lawyer and, on 18 November 2021, he brought an action seeking a declaration of the nullity of, inter alia, the DIR, the order of 7 January 2021 summoning him to appear and the order of 9 June 2021

[71] See shortly below what this procedural measure entails.

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revoking the suspension of the prison sentence, claiming that, because of a change of residence after the DIR was drawn up, he could not have been contacted at the address indicated in the DIR and, consequently, he *could not have received the notifications of those orders*. He submitted that he had not disclosed that change of residence because he had not been aware of the obligation to do so or of the consequences of a failure to comply with that obligation, since the DIR, in which that obligation and those consequences were set out, had not been translated into Romanian. In addition, he had not been assisted by an interpreter either on that occasion or when the formal record of his placement under investigation was being drawn up. Lastly, neither the order of 7 January 2021 summoning him to appear following the failure to comply with the conditions of the probation scheme nor the order of 9 June 2021 revoking the suspension of the prison sentence had been translated into a language which he speaks or understands. At first instance, the District Court of Beja dismissed the action on the ground that, although the procedural defects invoked by TL were established, they had been rectified, since TL had not invoked them within the periods laid down in Article 120 (3) of the CCP (according to which the defect at issue should have been pleaded before that procedural act has been finalized, as it was an act at which the person concerned was present). The High Court of Évora, hearing an appeal against that decision by the first instance, had doubts as to whether that national provision is compatible with Directives 2010/64 and 2012/13, read in conjunction with Article 6 ECHR. First, that High Court noted that those Directives have not yet been transposed into Portuguese law, even though the time limits for transposition had already expired. It considered, however, that the relevant provisions of those Directives had direct effect and hence applied directly to the dispute, as they are unconditional, sufficiently clear and precise, and confer on individuals a right to interpretation, translation and information in criminal proceedings. Secondly, the referring court considered that the acts at issue in the main proceedings – namely the DIR, the order of 7 January 2021 summoning TL to appear and the order of 9 June 2021 revoking the suspension of the prison sentence – constitute 'essential documents' for the purposes of Article 3(1) and (2) of Directive 2010/64, given the importance of such acts for the rights of defence. In that context, it emphasised in particular that the DIR is the means by the which the person concerned is informed of the information relating to his/her residence obligations and the obligation to inform the authorities of any change of address. The High Court of Évora thus questioned the CJEU: "Is it possible to interpret Articles 1 to 3 of [Directive 2010/64] and Article 3 of [Directive 2012/13], alone or in conjunction with Article 6 of the ECHR, as meaning that they do not preclude a provision of national law which imposes a penalty of relative nullity, which must be pleaded, for failure to appoint an interpreter and to translate essential procedural documents for an accused person who does not understand the language of the proceedings, and which permits the rectification of that type of nullity owing to the passage of time?"

In its judgment of 1 August 2022 (C-242/22 PPU), the CJEU held that: Article 2 (1) and Article 3 (1) of Directive 2010/64/EU and Article 3 (1) (d) of Directive 2012/13/EU, read in the light of Article 47 and Article 48 (2) of the CFREU and the principle of effectiveness, must be interpreted as precluding national legislation under which the infringement of the rights provided for by those provisions of those directives must be invoked by the beneficiary of those rights within a prescribed period, failing which that challenge will be time-barred, where that period begins to run before the person concerned has been informed, in a language which he/she speaks or understands, first, of the existence and scope of his or her right to interpretation and translation and, secondly, of the existence and content of the essential document in question and the effects thereof.

3.2.15. High Court of Évora, 02-08-2022, case 53/19.8GACUB-B.E1 (II) – Application of the judgment proffered by the CJEU

Idem.

The very next day after the CJEU issued its ruling in *TL*, the High Court of Évora gave application to the understanding adopted therein, by declaring null and devoid of any effect all the procedural acts challenged by the defendant – namely the DIR, the order of 7 January 2021 summoning TL to appear and the order of 9 June 2021 revoking the suspension of the prison sentence –, for lack of translation or appointment of an interpreter, as well as of all other procedural acts that took place subsequently; and it ordered the immediate release of the defendant.[72]

In turn, in application of this ruling by the High Court of Évora, the District Court of Beja, on 22-09-2022 (process 53/19.8GACUB, reference 32923906), ordered that all the notifications made to TL, as well as all the documents attached thereto, be translated into Romanian. It requested the criminal police to repeat the DIR, in Romanian. And advised the social rehabilitation and prison services to summon again the defendant, in Romanian, so that he would fulfil the probation scheme he had been applied, and the interviews to be carried out to that effect should take place with an interpreter.

3.2.16. Supreme Court of Justice, 15-09-2022, case 5553/19.7T8LSB.L1.S1 – Access by the defendant to illegally obtained evidence

In a decision by the High Court of Lisbon (which could not be accessed) from which an appeal was lodged to the Supreme Court, in a drug trafficking case, the defendant claimed that the Directive 2012/13 would entitle him/her to be given access to any evidence illegally gathered by the authorities. While it is not fully clear what the context of the claim is – not least of all because no such illegally obtained evidence appears to have been gathered or used in the case –, the Supreme Court apparently validated (in *obiter dictum*) the part of the ruling of the High Court of Lisbon where this court held that the claim of the defendant could not, at any rate, proceed, since that Directive

[72] Subsequent case law trailed the same line, *v.g.* High Court of Évora 25-10-2022, case 128/22.6GDFAR.E1; High Court of Lisbon, 14-11-2023, case 351/11.9GALNH-A.L1-5 (although here the court concluded that the defendant had sufficient command of the Portuguese language and thus denied his claim); High Court of Lisbon, 06-03-2025, 39/24.0XHLSB.L1-9; High Court of Évora, 25-05-2023, case 8/23.8GBABT-A.E1 (in the context of an arrest in *flagrante delicto* for driving under the influence), High Court of Évora, 23-04-2024, case 1485/23.2GBABF.E1 (also in the context of an arrest in *flagrante delicto* for driving under the influence); High Court of Évora, 20-02-2024, case 428/21.2GESLV.E1; High Court of Évora, 21-05-2024, case 399/22.8GESLV.E1; High Court of Évora, 11-03-2025, case 228/24.8PCFAR.E1. Also somewhat in line with this case law is the ruling of the High Court of Lisbon of 24-10-2024, case 353/23.2POLSB.L1-9, which however held that, having been appointed an interpreter to the defendant in his mother tongue who was present in all the sessions of the trial, and not having been invoked in those acts any irregularity (either by the defendant or his attorney) to the effect that the provided interpretation was deficient, it should be presumed that the interpretation was correct and thus no irregularity occurs for the purposes of Article 123 CCP. The High Court of Lisbon, 23-05-2023, case 370/17.1IDLSB.L1-5, rejected the claim of the defendant, because in the case he did challenge the lack of translation / interpretation, only this claim was denied because it was not established that the defendant did not understand or command the Portuguese language; and later the defendant failed to react against such a decision within the legally set deadline. In the same vein, see the ruling of the High Court of Évora of 07-05-2024, case 276/17.4GAVRS-A.E1, holding that a nullity, even if incurable, becomes impossible to invoke when the final decision of the case has become *res judicata*.

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entails no such right of access to *illegally gathered evidence*, but rather – in Article 7 (2) – to material evidence in the possession of the competent authorities, *whether for or against* the defendant. The understanding implied here is that the right of access to the materials of the case is conceived of for materials which can in fact be used in the criminal procedure.

3.2.17. High Court of Lisbon, 27-01-2023, case 298/22.3YUSTR.L1-PICRS – Applicability of Directives 2010/64/EU and 2012/13/EU to administrative punitive proceedings

This ruling concerned an administrative offence (*Ordnungswidrigkeit*). The defendant, a legal person, was notified by registered mail to its headquarters in Germany of a decision of a Portuguese administrative authority applying an administrative sanction (*Geldbuße*). The question of interest for these purposes was the computation of the term for the defendant to appeal such a decision. The defendant claimed that, as the notification was sent to its headquarters in Germany, it was only conveyed to its legal representative a few days lapsed upon the signing of the registered mail, and claimed that not to apply the extension provided for in Article 88 of the Code of Administrative Proceedings[73] would breach the right of access to the law and the courts, as well as the principles of good faith and of legal certainty. The public prosecution took the same stance as the defendant. The Court thus undertook to determine whether not applying an extended deadline in such cases would represent undue differentiation of defendants residing in Portugal and defendants residing abroad in the exercise of their right to prepare their defence in administrative punitive proceedings. The Court, however, concluded in the negative. It held Directives 2010/64/EU and 2012/13/EU to be applicable to the judicial phase of administrative criminal proceedings, invoking to that effect the ruling of the CJEU in *UY* (C-615/18), of 14 May 2020 (which is our view is not an accurate view).[74] However, in the case, the High Court found no breach of these Directives. Since Articles 3 and 5 (1), (3) and (4) of the 2000 EU Convention on Mutual Assistance have not been revoked by Article 34 (1) (c) DEIO, they apply in the case, which allows notifications to be made to defendants in the terms set out above.

[73] Decree-Law no. 4/2015, of 7 January.

[74] Indeed, that ruling concerns *criminal* proceedings. Arguably, when the Directives mention "imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters", a *minor offence* for such purposes is still a *criminal* offence; in contrast, *administrative* punitive proceedings are not intended to be covered by that regime.

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The key date is that in which the registered mail was delivered in the headquarters of the defendant. The date in which the notification was internally conveyed to the legal representative (to whom in fact it had been addressed) was found to be immaterial. And in this light the defendant did benefit from the legally prescribed 20-day term for preparing its defence.[75] In view of the mentioned judgment of the CJEU in *UY*, the treatment of a defendant is to be deemed equal to that of a defendant residing in Portugal without it being necessary to grant any extension of the term for preparing defence, as under EU law it suffices that national law ensures that defendants residing elsewhere in the Union benefit from the same term (in its entirety) as defendants residing in the Member State where the procedure runs its course.

3.2.18. High Court of Évora, 07-05-2024, case 276/17.4GAVRS-A.E1 – Invoking a procedural nullity after the final decision of the procedure has become *res judicata*

In this case, where the defendant had invoked the breach of their right to information as guaranteed by Directive 2012/13/EU (more specifically of the right of access to the file), the High Court of Évora held that – without detriment to the ruling taken by the same court in 02-08-2022, following the ruling of the CJEU in *TL* –, a procedural nullity, even if incurable, becomes impossible to invoke when the final decision of the case has become *res judicata*.

3.2.19. Supreme Court of Justice, 17-04-2024, case 266/22.5SGLSB.L1.S1 – Supervening change of the legal qualification of the facts and the right to information

The defendants invoked a breach of their right to information guaranteed in Article 6 of the Directive 2012/13/EU. During the trial phase a modification took place in the legal qualification of the acts imputed to the defendants vis-à-vis the qualification that had initially been made in the bill of prosecution. Such modification did not entail the applicability of a different penalty: the original charges already were for qualified homicide; only the grounds for the qualification were changed. The Portuguese legal

[75] But see Vânia Costa Ramos, "Meios processuais de impugnação da Decisão Europeia de Investigação – subsídios para a interpretação do artigo 14.º da Directiva com uma perspectiva portuguesa", *Anatomia do Crime* 7 (2018), p. 151, arguing that – also for reasons of national law – a more extended deadline should be attributed to the defendant.

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system admits this type of modification in the course of the procedure, and it was communicated to the defendants, who chose not to request additional time to prepare their defence. The Court thus dismissed outright the claim that Article 6 of the Directive 2012/13/EU could in any way have been breached.

3.2.20. Supreme Court of Justice, 13-08-2024, case 197/20.3JAPTM-N.S1 – Extension of the maximum term of pre-trial custody

In this case – in *habeas corpus* proceedings –, the defendants had invoked the breach of their rights to translation and to information as guaranteed by Directives 2010/64/EU and 2012/13/EU. They claimed that they were being held in pre-trial custody beyond the maximum term admitted by law, since the bill of prosecution (the issuing of which extends that maximum term, pursuant to Article 215 CCP) was notified to them without being translated into a language that they understood after the expiry of the term for which they could have been held in pre-trial custody without a prosecution having been issued. The Supreme Court dismissed the claim. Based on stable, erstwhile case law, the Court noted that – notwithstanding the defendants' rights to translation and information (which in the case was satisfied, as the translation of the bill of prosecution has been rather promptly ordered and conveyed to the defendants, and even before that they were aware that a prosecution had been issued against them, which would entail the extension of the maximum term for which they could be held under pre-trial custody – what matters for the purposes of determining the validity of that extension is the date in which the bill of prosecution was issued, not that in which its translation is notified to the defendants.

3.2.21. High Court of Lisbon, 22-05-2025, case 273/21.5TELSB-D.L1-9 – The concept of suspect and *arguido*, the scope of application of the Directive 2012/13/EU and its direct applicability

Unlike Portuguese legislation, Directive 2012/13/EU does not distinguish 'suspect' from '*arguido*', which means that Art. 7 of the Directive is clear and admits of no reasonable doubt, thus dispelling the need to lodge a request for a preliminary ruling to the CJEU. In view of Arts. 2 and 7 of the Directive – which are directly applicable –, the judge of instruction must reassess the applicants' request of access to the file (even if in a limited manner, given the other interests at stake), notably to the elements that are essential to understand the provisional measure of seizing of their funds deposited in the bank, which affected and continue to affect them as 4 years and 11 months have lapsed since the application of the measure to them. The fact that these suspects have not yet been designated as formal subjects of the procedure (viz., as '*arguidos*') – which, the Court adds, is incomprehensible after such an extended period has lapsed –, with the set of procedural rights that this entails in the Portuguese legal system, is immaterial. Even in a capacity of mere suspects, the rights granted by Directive already apply to them. Under the CCP, a person must be assigned the status of '*arguido*' if there is a founded suspicion that he/she has committed the crime under investigation, which is why in our view that status covers both the concepts of 'suspect' and 'accused' used in the Directives. The problem in the case at issue here thus appears to stem more from a failure by the authorities to designate the concerned persons as '*arguidos*' than from an incapacity of this concept to implement the concept of 'suspect' of the Directives. On the other hand, the procedural measure at issue here may be applied to a person regarding whom there is not even (or no longer) a suspicion of having committed an offence, and in a situation where a criminal procedure is not even (or no longer) taking place, in which case the Directives are arguably of no avail. Nevertheless, it is still critical to endow persons affected by freezing or confiscation orders with a set of procedural rights, and to that effect a Draft Project on confiscation – publicised in 05-05-2025 and already approved by the Council of Ministers – contemplates the creation of a new procedural subject in the CPP (Articles 67-A ff. *et passim*), namely that of "affected person", in transposition of Directive 2024/1260 of 24 April 2024 on asset recovery and confiscation (see *v.g.* Article 3 (10) thereto)[76].

3.2.22. Critical appraisal

Similar considerations as those provided on Directive 2010/64/EU are valid for Directive 2012/13/EU: initially, it has received some attention in Portuguese case law, generally with a view to asserting that national law already provided for the rights at issue. The ruling of the High Court of Évora of 20-12-2018 pointed elsewhere, but the High Court

[76] See Ministério da Justiça, "Grupo de Trabalho Perda de Bens – Relatório", 31 March 2025, and "Grupo de Trabalho Perda de Bens – Anteprojecto", 31 March 2025, both of which available at https://www.consultalex.gov.pt/Portal_Consultas_Publicas_UI/ConsultaPublica_Detail.aspx?Consulta_Id=372.

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of Lisbon subsequently delivered case law (notably the ruling of 23-04-2020, *supra*) that held these Directives not to have a 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, was a doubtful distinction all along, and in any event it is rather surprising that the Court should not consider Directives as binding acts to that effect. Thus, our view has always been that, while the position of the High Court of Évora was somewhat exaggerated in concluding for a blatant implementation deficit of Directives 2010/64/EU and 2012/13/EU into the Portuguese legal system, the view of the High Court of Lisbon was also overconfident in holding Portuguese law fully compliant with such Directives. The ruling of the High Court of Évora of 08-03-2022, the ensuing ruling by the CJEU (*TL*, C-242/22 PPU, 01-08-2022), and the ruling of the High Court of Évora of 02-08-2022 that applied *TL* (as well as the subsequent national case law that trailed the same line) lend strength to this view and give depth to the right to information in criminal proceedings in the Portuguese legal system. In the same vein, the very recent ruling of the High Court of Lisbon of 22-05-2025, case 273/21.5TELSB-D.L1-9, held the Directive 2012/13/EU directly applicable and, in consequence, ruled that the distinction between a mere 'suspect' and an '*arguido*' (recall *supra*, at the introduction), which in the Portuguese legal system is highly relevant, as most procedural rights spring only with the suspect's designation as an *arguido*, is immaterial, as this Directive – and, in fact, all the other EU Directives on procedural rights – make no such distinction and entail the fruition of the rights enshrined therein to mere suspects.

As with Directive 2010/64/EU, Directive 2012/13/EU has visibly gained more expression in national case law over the last 5 years. It is often invoked by defendants, especially insofar as concerns the right of access to the file. However, Directive 2012/13/EU is less consequential than the Directive 2010/64/EU, in the sense of it seldom being crucial to the decision of the case in favour of the defendant – except in the cases (in fact many) where it applies in connection with Directive 2010/64/EU.

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

4.1. Legislation

4.1.1. General issues

No specific statute was enacted in Portugal to implement Directive 2013/48/EU either. Existing legislation was deemed to cover it.[77] In our view, not all the Directive's norms had sufficient backing in the legislation in force, and in fact this is one of the Directives where implementation levels were poorer, and need for legislative intervention higher. At a later stage, the legislator introduced relevant amendments to the CPP, through Law no. 52/2023, of 28 August, but some implementation issues remain, as expounded subsequently.

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 and to be informed about the right to appoint a lawyer in the issuing Member State in order to assist the chosen or officially appointed lawyer in Portugal, 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, and inform him/her about the right to appoint a lawyer in the issuing Member State in order to assist the chosen or officially appointed lawyer in Portugal. Additionally, Art. 10-A provides that,

[77] See document with CELEX 72013L0048PRT_237749.

whenever the executing Member State informs that the arrested person intends to exercise the right to appoint a lawyer in the issuing Member State, the executing Member State must be conveyed, without unjustified delayed, information that helps the arrest person in exercising such a right. And Art. 17 (8) that, whenever, pursuant to para. (4) mentioned above, the arrested person declares the intention to exercise the right to appoint a lawyer in the issuing Member State, the competent authority in that Member State is promptly informed. 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.[78]

4.1.2. 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, 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;*[79] *(g) At the trial hearing held in*

[78] 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.

[79] 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 trial, under specific conditions, with the possibility of using their declarations as direct

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. (5) [concerning legal persons]"

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 where 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 (which seems an apposite conclusion as things stand, since this issue has not been flagged by the Commission as problematic); if, on the contrary, it were construed as establishing cases of *mandatory assistance by a lawyer*, then only some in cases (notably in those covered by Article 64 CPP) would the Directive be implemented,[80] in which case we would have the following situation:

a) Article 3 (2) (a) would be implemented only regarding interrogations by judicial authorities; not by the police. In any event, it should be noted that one of the reasons why national 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.[81]

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*).

[80] As defended in Miguel João Costa, "Comentário à Proposta de Directiva…", *op. cit.*, p. 61 f.

[81] See Article 357 (1) (b) CCP. In fact, the Directive requiring mandatory presence in police interrogations could be seen by the national legislator as an invitation to admit those statements as evidence, which ironically would be detrimental to the defendant, whereas the Directive's aim is obviously the opposite.

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b) 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.[82] The same applies to confrontations (Article 146 CCP) and reconstructions of the scene of a crime (Article 150 CCP).

c) Article 3 (2) (c) would raise 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*",[83] 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*".[84]

d) Likewise, Article 3 (2) (d) would still be implemented by Article 64 (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*".[85]

[82] 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.
[83] Bear in mind that an arrested person must be brought to the presence of a judge within 48 hours.
[84] See also 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.
[85] 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,*

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. These are added by Articles 311-A (2) (c) and 313 (1) CCP: the former provides that, at the beginning of the phase of trial, the court order for the defendant to present his/her contestation "*contains, or otherwise it will be null: (…) The appointment of a lawyer to the defendant, in case he/she has not yet appointed one*"; the latter that "*[t]he court order designating the date of the trial hearing is notified to the public prosecution, as well as to the defendant and his/her lawyer (...), at least 20 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:[86]

> *"(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-gathering acts, although this presence is not mandatory. Unlike the provisions above, Article 3 (3) (c) is clear in 'only' requiring that the defendants be ensured a 'right' for their lawyer to attend these acts, such that, in this case, there is no doubt that Portuguese law is fully compliant with the Directive.

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."

[86] 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. On the recording procedure, the provisions of relevance are Articles 99, 363 and 94 (1).

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As for Article 3 (4), considering the provisions mentioned throughout this assessment, it seems safe to conclude that general information is made sufficiently available to facilitate the obtaining of a lawyer by suspects or accused persons, as well as to ensure that those deprived of liberty are in a position to exercise effectively their right of access to a lawyer. Moreover, in the cases where the presence of a lawyer in a given procedural act is mandatory (Article 64 CCP), 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.

4.1.3. 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 its Article 32 (8), 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*".[87] Also relevant are Article 61 (1) (f) CCP, transcribed above, Articles 61 (2), 126 (3), 187 (5),[88] 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".*[89]

[87] See also Article 34 Constitution.

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

[89] Do however note that, unlike evidence obtained through torture, coercion or harm to physical / moral integrity (Article 126 (1) and (2) CCP) –, evidence gathered through intrusion in private life etc. may be consented to by the person (*ex ante*), and if so the nullity will be cured. Moreover, while 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 in the CCP (in Articles 171 f.) and in other special legal instruments of criminal procedure.

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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."[90]

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 (...). (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 statutes 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,[91] the General Regulation of Prison Facilities,[92] and the Code of Enforcement of Penalties and Measures involving Deprivation of Liberty.[93]

In sum, the confidentiality of client-attorney communications is sufficiently protected in Portuguese law, and is therefore compliant with Article 4 of the Directive.

[90] In this case, however, 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 goods proceed), which applies also to any form of control of attorney-client correspondence (Article 179 (2)).
[91] See mainly Articles 30.
[92] See Articles 8, 102, 207 (1) and 210.
[93] 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.

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4.1.4. Right to have a third person informed of the deprivation of liberty

Articles 5 (1) and 6 (1) of the Directive are implemented, first, 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."*[94]

And by the Code of Enforcement of Penalties and Measures of 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."*

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 2016/800, on juvenile defendants, namely Articles 58 (7), 64 (1) (d) and 61 (1) (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.

[94] 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.

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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.

4.1.5. 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 of 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, adding to the provisions immediately above, Article 207 (1) of the General Regulation of Prison Facilities is relevant. It 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, 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.

4.1.6. Temporary derogations

Let us now address the issue of temporary derogation of rights regulated in Articles 3 (3) (a), 5 (3) and (4), 6 (2), and 8 of the Directive. The problem at the national level 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 that the case concerns terrorism or violent / highly organised crime. A Report by the Portuguese Parliament's Commission on Constitutional Issues, Rights and Guarantees, on the proposal that would eventually result in Directive 2013/48/EU, remarks that the Directive's approach is "*excessive*", as "*the special gravity of such cases and the complexity of their investigation may justify a restriction of the rights of the arrested person*".[95] Be that as it may, Portuguese law does not comply with the Directive on this particular point.

4.1.7. 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. 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 assistance is mandatory irrespective of the defendant's will. However, by regulating in detail the waiver of this right, the Directive reinforces it even further, in a way that has no reflection in national law. Article 9 thus currently lacks implementation.

4.1.8. Right of access to a lawyer in EAW proceedings

As far as concerns the EAW (Article 10 of the Directive), full implementation has now been accomplished, after the 2023 amendments. Any person arrested pursuant to an EAW has the right to be assisted by a lawyer (Article 17 (2) LEAW), and the arrest abides by the requirements provided in the CCP for suspects in criminal proceedings (Article 16 (6) LEAW); moreover, Articles 57 to 67 CCP apply to EAWs, and the sought person, when arrested, must be provided with a document his/her rights (Article 17 (4) LEAW).

[95] 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.

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This was already complemented by several other norms in the LEAW that gave depth to the right of access to a lawyer in EAW proceedings[96].

However, Article 10 (4) and (5) of the Directive was at best only partially implemented, as there was no 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, nor to inform the authority in the issuing Member State. Law no. 52/2023 solved these problems by amending and adding provisions to the LEAW, currently providing the following regime:

> *Article 10-A: "Whenever the executing Member State informs that the arrested person intends to exercise the right to appoint a lawyer in the issuing Member State, the executing Member State must be conveyed, without unjustified delayed, information that helps the arrest person in exercising such a right."*

> *Article 17: "(1) Upon being arrested, the person is informed of the existence and the content of the European arrest warrant, as well as of the possibility to consent or not to consent to being surrendered to the issuing judicial authority. (2) The person arrested [pursuant to an EAW] has the right to be assisted by a lawyer and to be informed about the right to appoint a lawyer in the issuing Member State in order to assist the chosen or officially appointed lawyer in Portugal. (…)"*

> *Article 18: "(4) The judge in charge of the case file appoints a lawyer to the arrested person prior to the hearing if he/she has not appointed one, and informs him/her about the right to appoint a lawyer in the issuing Member State in order to assist the chosen or officially appointed lawyer in Portugal. (…) (7) Whenever, pursuant to paragraph (4), the arrested person declares the intention to exercise the right to appoint a lawyer in the issuing Member State, the competent authority in that Member State is promptly informed."*

4.1.9. Remedies

As for Article 12 of the Directive, on remedies, implementation is ensured by the same provisions as for Article 10 of Directive 2016/343 (see *infra*). As for Article 12 (2) more specifically, the provisions indicated in this section, notably for Article 4 of the Directive, and in the section on the Directive 2016/343 on presumption of innocence, ensure that the rights of the defence and the fairness of the proceedings are respected.

[96] Namely Articles 7 (3), 8 (2) (c), 18 (4) and 21 (1), as well as by Article 34 LEAW, which provides that the CCP applies in a subsidiary manner to the procedure of execution of an EAW, meaning that many of the provisions referred throughout this report in respect of criminal procedure also apply to EAWs.

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This positive implementation assessment holds valid in view of the CJEU's judgment of 8 May 2025 in *Barało* (C-530/23), where it held (with relevance for this point) that:

> *"Article 12 of Directive 2013/48 and Article 8 of Directive 2016/1919 must be interpreted as requiring that decisions concerning, first, the assessment of the potential vulnerability of a suspect or an accused person and, second, the refusal to grant legal aid to a vulnerable person and to choose to question that person in the absence of the lawyer, are reasoned and may be the subject of an effective remedy. By contrast, those provisions do not preclude national legislation which, in criminal proceedings, do not allow for a court to declare inadmissible incriminating evidence contained in statements made by a vulnerable person during questioning by the police, by another law enforcement authority or by a judicial authority in breach of the rights laid down by Directive 2013/48 or 2016/1919, provided, however, that, in criminal proceedings, that court is in a position, first, to verify that those rights, read in the light of Article 47 and Article 48 (2) of the Charter of Fundamental Rights of the European Union, have been respected and, second, to draw all the inferences from that breach, in particular as regards the probative value of the evidence obtained in those circumstances."*

Indeed, based on Article 119 (c) CCP, the absence of a lawyer in a procedural act for which the law requires his/her presence – and this presence, as noted, is required in nearly all procedural acts in case of vulnerable defendants (Article 64 (1) (d) CCP) – constitutes an incurable nullity which should be declared ex *officio* at any stage of the criminal procedure. And, based on Article 122 (1) CCP, a nullity renders invalid the procedural act in which they occurred, as well as any other procedural acts that are connected to it and that may be affected by it.

4.1.10. Conclusion

In sum, this Directive was one of the Directives regarding which more deficiencies in implementation could be identified. Most of them were arguably not very serious in terms of their intensity, but they were numerous. Law no. 52/2023 solve the part of those problems that concerned the access to a lawyer in the issuing Member State, in the context of the EAW system, which is a welcome development. However, problems do remain concerning temporary derogation and waiver of rights established in this Directive – namely concerning Articles 3 (2) (a) and (b), 3 (3) (a), 5 (3) and (4), 7 (2), 8 (1) (c) and 9. Consequently, in our view, further legislative intervention is needed.

4.2. Case-law

Regarding Directive 2013/48/EU, fewer meaningful rulings were identified during this research than for Directives 2010/64/EU and 2012/13/EU. The following are, in our view, the most relevant decisions.[97] Two other elements issued by non-judicial entities which showed relevant for ascertaining the scope of certain rights provided for in Directive 2013/48/EU are also provided below.

4.2.1. 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."

4.2.2. 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

[97] Some decisions addressed in previous sections are also relevant here, v.g.: High Court of Évora, 20-12-2018 and 08-03-2022, on direct effect and conforming interpretation; High Court of Évora, 07-05-2019 (see also the further case law mentioned in the relevant section), on the temporal scope of the Directive, direct applicability, and the right to assistance by an attorney; Supreme Court of Justice, 26-06-2019; High Court of Évora, 25-05-2023, on the right to translation and information of the right of access to a lawyer.

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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.

4.2.3. 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*.[98-99]

4.2.4. 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 evidence

[98] As noted before, 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.
[99] The Court adopted a similar understanding in relation to identity parades, in ruling no. 532/2006.

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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.

4.2.5. Constitutional Court, no. 501/2021 – Dismissal of State-appointed attorney and lapse of the term to lodge an appeal of decision convicting the defendant

With this ruling the Court held *not* unconstitutional the interpretation of Articles 39 (1) and 42 (1) and (3) of Law no. 34/2004, of 29 July (legal regime of access to the law and to the courts), together with Articles 66 (2) and (4) and 411 (1) (a) CCP, according to which the lodging by the defendant of a request to dismiss the attorney appointed by the State does not interrupt the term to appeal the conviction. The defendant had invoked the breach not only of the Constitution but also of Article 3 (1) of the Directive 2013/48/EU. On this issue the Court took the stance that the non-conformity of national law with EU law cannot be assessed by the Court.[100] At any rate, the Court held the arguments raised by the defendant to be ill-founded: the request for the dismissal of the State-appointed attorney is not detrimental to the defendant's defence rights, since the nature of the client-attorney relationship and the duties of representation that spring therefrom require the attorney to continue to exert his/her duties towards the client (in the case, the duty to submit an appeal). This separates this constitutionality question from that which has been assessed and held *unconstitutional* in ruling no. 159/2004, as in the latter ruling the attorney had *refused* to perform those duties, thus setting in jeopardy the defendant's right to an effective defence – which justified that the term to lodge the appeal be interrupted.

[100] In the same vein as in the ruling of the Constitutional Court no. 651/2022 (*supra*, § 3.2.13).

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4.2.6. High Court of Lisbon, 06-02-2024, case 335/22.1JELSB.L1-5 – Presence of an attorney in a search (abord a vessel)

This ruling follows the same approach as the ruling of the High Court of Lisbon of 23-04-2020 (mentioned *supra*, on Directive 2012/13/EU), insofar as it holds that the absence of an attorney in a search – in the case, carried out in a vessel – does not constitute a nullity, since the presence of a lawyer in such a procedural act is not required by either the CCP or the Directive 2013/48/EU.[101] The fact that Law no. 52/2023 introduced into Article 58 (5) CCP the requirement that, upon the formal designation of a suspect as a defendant, he/she shall be delivered, "if possible in the same procedural act *and in any case without unjustified delay*", a document identifying the file and the defence attorney, if one has already been appointed, and indicating the rights and duties that the person is thenceforth entitled to pursuant to Article 61 (including the right of access to a lawyer), does not mean that it must be provided *immediately*, even if the context of the search the concerned individual is arrested.

4.2.7. High Court of Lisbon, 16-01-2025, case 64/15.2GTALQ.L3-9 – Self-representation in criminal proceedings[102]

It is a well-established understanding in Portuguese case law and legal literature that, even if the defendant is a lawyer, he/she cannot represent him/her-self in the criminal procedure, notably in the cases where the law requires the mandatory presence of a lawyer (sc., the cases of Article 64 CPP). This is regarded as an essential condition for an effective defence (Article 32 of the Constitution) and a due process. Such a condition has been recurrently held to be in conformity with the Constitution (namely in rulings nos. 578/2001, 461/2004, 196/2007), as well as with the ECHR (notably as per the ruling of the ECtHR in *Correia de Matos v. Portugal*, of 4 April 2018). It does not conflict with Directive 2013/48 either: although this Directive allows for a waiver of the right to a lawyer, it does so under the explicit caveat "[w]ithout prejudice to national law requiring the mandatory presence or assistance of a lawyer (…)".

[101] In the same vein as *v.g.*, the ruling of the High Court of Évora of 10-09-2024, case 90/23.8JAFAR.E1.
[102] See also the ruling of the High Court of Guimarães, 17-10-2023, case 3465/19.3T9VCT.G1, and the ruling of the High Court of Porto, 07-12-2022, case 15914/17.0T9PRT.P1.

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4.2.8. Critical appraisal

Similar considerations as those adduced on the Directives 2010/64/EU and 2012/13/EU apply to the Directive 2013/48/EU. Initially, this Directive 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. While it may be said that an increase is also occurring in the relevance of this Directive in more recent case law, such an increase is clearly more modest than that concerning both Directive 2010/64/EU and Directive 2012/13/EU.

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5. Directive (EU) 2016/1919: Legal aid

5.1. Legislation

5.1.1. General issues

No specific legal instrument was enacted in Portugal with a view to implementing this Directive.[103] 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,[104] 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 that was upheld by the Portuguese Parliament's Commission on Constitutional Issues, Rights and Guarantees concerning the proposal that would later result in the Directive 2013/48/UE.[105]

Regarding Article 3, which establishes 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*; the latter in turn comprises (i)

[103] 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 adapted in order to implement Directive (EU) 2016/1919, such that the situation here is no different from that of Directives 2010/64/EU, 2012/13/EU, 2013/48/EU, and (EU) 2016/343.

[104] 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.

[105] 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.

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legal consultation and (ii) *legal aid*. 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."*

5.1.2. 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 does not appoint a lawyer and is ultimately acquitted;[106] 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,[107] which is then concretised in the Law on Access to the Law and to the Courts:

[106] See Article 64 (4) CCP.

[107] 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.*"

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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,[108] *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."[109]

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 on Articles 1 and 2 of the Directive apply: when the

[108] On this concept, see mainly *supra*, at the Introduction, and further *infra*, on the Directive (EU) 343/2016, on presumption of innocence.

[109] 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.

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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."*

5.1.3. 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, the 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. Since the amendment carried out by Law no. 52/2023, Article 10 of Directive 2013/48/EU (on the right to dual representation in EAW proceedings) is fully implemented, which concurs to the full implementation of this provision on legal aid.

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).

5.1.4. 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."

5.1.5. 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."[110]

[110] 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*

As for paragraph (2), since the administrative decision is taken by the social security services, which have specialised qualification to handle these issues, this provision should also be considered 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 aware of the challenges of this profession, and which does provide training on several of them. No specific training could be identified on the challenges of providing services within a public system, but the Bar provides wide information on this system, its particularities and possible difficulties.[111]

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

> *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]."*

These provisions allow for the conclusion that Portuguese law complies fully 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, for many years now, is that not enough funding is provided, and that many individuals cannot obtain legal aid although they face significant economic difficulties.

5.1.6. Remedies

Article 8 is fully implemented. The same provisions and remarks indicated for 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.[112]

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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*".

[111] *V.g.* in "Elucidário do Acesso ao Direito", of December 2015, in https://www.oa.pt/upl/%7B5774e842-8b45-498c-8a9e-297c133fe678%7D.pdf, last accessed 10 June 2025.

[112] 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*

5.1.7. 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 establishes that it is mandatory to appoint a lawyer to certain persons who are vulnerable, which in turn will trigger the provisions on legal aid mentioned throughout this Section. Implementation is therefore secured. This positive assessment holds valid in view of the CJEU's judgment of 8 May 2025 in *Barało* (C-530/23), already mentioned, where it held (with relevance for this point) that:

> *Articles 2 (1) (b), 4 (5) and 9 of Directive (EU) 2016/1919 on legal aid, read in conjunction with Articles 3 (2) (a) to (c) and 3 (3) of Directive 2013/48/EU on the right of access to a lawyer, must be interpreted as meaning that MSs are "under an obligation, first, to ensure that the vulnerability of an accused person or of a suspect is ascertained and acknowledged before that person or suspect is questioned in the context of criminal proceedings or before specific investigative or evidence-gathering measures have been carried out in relation to that person or suspect and, second, to ensure that such persons or suspects have access to a lawyer with the benefit of legal aid for the purposes of those proceedings without undue delay and, at the latest, before questioning by the police or by another law enforcement authority or by a judicial authority, or before the investigative or evidence-gathering act in respect of which that person or suspect is required or permitted to attend is carried out".*

5.1.8. Conclusion

Unlike all other Directives, the Directive on legal aid is fully implemented, and in fact it arguably goes 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

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 (…).*"

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situation of financial hardship, where he/she does not appoint a lawyer and comes to be acquitted.

In a strictly *normative* perspective, the sole implementation issue concerned Article 5 (legal aid in the EAW context), but the problem related, not the Directive on legal aid itself, but to the Directive on access to a lawyer, to which it is closely related – and in any case that problem has been solved through Law no. 52/2023.

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 insufficient funding is allocated to this system. In consequence, not all individuals who do face economic difficulties can obtain legal aid. Thus, the positive (normative) assessment of implementation of this Directive does not embody a positive assessment of the *functioning* of the national system of access to the law and to the courts globally considered.

5.2. Case-law

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

5.2.1. 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 of 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 health-related expenses incurred by the spouse.

5.2.2. 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 State-appointed lawyers not 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. The issue addressed in this ruling related to that assessed by the Constitutional Court in ruling no. 501/2021 and further case law indicated therein (see *supra*, § 5.2.5).

5.2.3. 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 (even if it would later be reimbursed, in case of a successful challenge). This norm was in breach of the right of access to the courts and to effective legal protection (Article 20 (1) Constitution).

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

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 denies legal protection (including legal aid) to for-profit legal persons without consideration for their actual economic situation.

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

See *supra*, § 3.2.3.

5.2.6. 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.

FULL PROOF

6. Conclusions

6.1. Comparative analysis

Initially none of the 6 Directives except Directive (EU) 2016/800, on juvenile defendants, was the object of **dedicated transposition** into the Portuguese legal system, because existing legislation, notably the CCP, was deemed to meet the standards envisaged by the EU Agenda on Procedural Rights. The lack of specific implementation projected naturally in a significant number of implementation problems in all Directives, save for Directive (EU) 2016/1919 on legal aid. They ranged from actual implementation gaps (either complete or partial) to doubts as to whether certain provisions had been implemented (allowing for different interpretations, producing uncertainty). It was only after the expiry of the term for implementing the Directives that the national legislator proceeded to further amendments, particularly through Law no. 52/2023, of 28 August, a process that was motivated by CJEU's case law on this legal system – namely in *TL* (C-242/22 PPU) of 1 August 2022 – and by infringement proceedings initiated by the Commission concerning Directives 2010/64 and 2012/13, in September 2021. Despite these amendments, implementation problems continue to exist in relation to all the Directives except for Directive (EU) 2016/1919.

Their volume and intensity vary, allowing for a classification – insofar as concerns the 3 Directives in focus in this project – into two different types: (i) relatively few and not particularly serious problems (Directive 2012/13/EU on the right to information); (ii) numerous and some of them serious problems (Directive 2013/48/EU on the right of access to a lawyer and to have a third party informed).

Implementation problems can thus be ranked as follows, from less to more serious (again, restricting the analysis to the 3 Directives in focus in this project):

1. Directive (EU) 2016/1919 on legal aid:

No specific legal instrument was enacted in Portugal with a view to implementing this Directive. Yet, unlike all other Directives, the Directive on legal aid may be deemed to be fully implemented. In fact, it arguably goes 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 does not appoint a lawyer but is eventually acquitted. Initially, and speaking in purely *normative* perspective, the sole implementation issue concerned Article 5 (legal aid in the EAW context), but the problem related, not the Directive on legal aid itself, but rather to the Directive on access to a lawyer, to which it is closely related – and in any case that problem has been solved through Law no. 52/2023. 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 insufficient funding is allocated to this system. In consequence, not all individuals who do face economic difficulties can obtain legal aid. Thus, the positive (normative) assessment of implementation of this Directive does not embody a positive assessment of the *functioning* of the national system of access to the law and to the courts globally considered.

2. Directive 2012/13/EU on the right to information:

Most provisions of this Directive were already covered by existing legislation, and with the amendments carried out through Law no. 52/2023 the level of compliance is now truly elevated. The only provisions still lacking perfect implementation are Articles 4 (2) (a), (c) and (d), and 4 (4) in conjunction with Annex I. The problem with Article 4 (2) is that national law does not require authorities to proactively 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.

3. Directive 2013/48/EU on the right of access to a lawyer and to have a third party informed:

No statute was initially enacted in Portugal to implement Directive 2013/48/EU either. Existing legislation, however, was insufficient, and in fact this was one of the Directives where implementation levels were poorer. The legislator later introduced amendments to the CPP, through Law no. 52/2023, of 28 August, but several implementation issues do remain. Law no. 52/2023 solved a part of those problems by providing explicitly for the right of access to a lawyer in the issuing Member State in EAW proceedings, but there are still issues concerning temporary derogation and waiver of rights established in the Directive (Articles 3 (2) (a) and (b), 3 (3) (a), 5 (3) and (4), 7 (2), 8 (1) (c) and 9). Thus, further legislative intervention is needed.

Conclusion

Those implementation problems notwithstanding, there is arguably not a serious deficit of procedural rights in Portugal. As noted throughout the report, most of the norms of the Directives were indeed accommodated by pre-existing legislation – which may help to explain why the Portuguese legislator saw practically no need to adopt new rules –, and some other norms were implemented. Nevertheless, further attention must be paid to the details. The fact that national procedural rights standards may be satisfactory should not prevent the national legislator from complying with the more ambitious standards that in several aspects are required by the EU Directives.

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Regarding **case law**, the relevance of the Directives was initially very limited (which is consistent with the legislator's assessment that they added little to the norms already in force). Still, in 2019 a trend began to emerge which suggested increasing judicial attention towards the Directives. This was confirmed by subsequent case law: a visible increase has taken place in the reference to the Directives since 2019, and even more so since 2022, following the CJEU's ruling in *TL* (C-242/22 PPU). The enactment of Law no. 52/2023 is also likely to have contributed to draw the attention of the courts to the Directives. The volume of cases before the Constitutional Court where the EU Directives on procedural rights were invoked – particularly Directives 2010/64/EU, 2012/13/EU and 2016/343/EU – has also increased visibly since 2019, although generally the Court did not rule on the merits because it found that the procedural requirements for such an intervention were not met, or it did rule on the merits but the relevance of the Directives for such an assessment was residual.

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, while at the other end of the spectrum lie the issues covered by Directive (EU) 2016/800, on juvenile defendants, and by the Directive (EU) 2016/1919, on legal aid. Directives 2012/13/EU and 2013/48/EU lie in between.

Below, a summary of relevant case law by Directive is provided, insofar as concerns the 3 Directives in focus in this project:

1. Directive 2012/13/EU on the right to information:

Similar considerations are valid for Directive 2012/13/EU, as the *TL* ruling involves this Directive as well. In the image of Directive 2010/64/EU, Directive 2012/13/EU has also notoriously gained more expression in national case law over the last 5 years. It is often invoked by defendants, especially insofar as concerns the right of access to the file. However, Directive 2012/13/EU has been less consequential than Directive 2010/64/EU, in the sense that it is seldom crucial to deciding the case in favour of the defendant – except in the cases (in fact not so few) where it applies in connection with Directive 2010/64/EU.

2. Directive 2013/48/EU on the right of access to a lawyer and to have a third party informed:

Directive 2013/48/EU initially received even less explicit reference in national case law than the former tow, which is particularly questionable, because there are numerous implementation issues with this Directive. Further critical case law is therefore essential for drawing attention to this implementation deficit. It does seem possible to affirm that an increase is also taking place in the relevance of this Directive in more recent case law, but by no means is it comparable to that of Directives 2010/64/EU and 2012/13/EU.

3. Directive (EU) 2016/1919 on legal aid:

The scarcity of case law referring to this Directive is concerning. It concurs to the view, defended in this report, that the Portuguese legal aid system, while normatively sound, in practice lacks the desired effectiveness. 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) – does in any case reflect the importance credited to the right to legal aid in the Portuguese legal system.

6.2. Quantitative and qualitative outcome of the research

The traditional view in national legal literature is that Portugal pursues a humanistic approach to penal matters. As a matter of fact, 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. Adopted in an atmosphere of rupture with the former regime, the 1987 CCP was heavily concerned with individual rights and did not yet reflect the trend visible in other European countries of enhancing State capacity against terrorism and organised crime.[113] 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 increasing populism which propounds an enhancement of State punitive power and a correlative constriction of individual liberties –, the CCP remains a body of norms which provides for ample individual rights and guarantees.

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, is a very plausible explanation as to why the Portuguese legislator, the courts and even legal scholarship (normally more critical than the former) apparently do not 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. Even when enacting Law no. 52/2023, which as explained above sought to complete the implementation of several of the EU Directives on procedural rights, the legislator, rather paradoxically, was still claiming that "national law already ensures the minimum standards of each of those Directives", and that all that still needed to be attained was "full conformity".[114]

Indeed, there does not seem to exist in Portugal an attitude of meaningful resistance to EU legislation in general. Not in criminal matters at least, and certainly not on mutual recognition legal instruments.[115] However, while implementing these legal instruments

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[113] See Pedro Caeiro / Miguel João Costa, "The Portuguese System", in Katalin Ligeti (ed.), *op. cit.*, p. 540-541.

[114] See the Draft Law no. 76/XV/1.ª, available at < www.parlamento.pt > (here), last accessed 9 May 2025.

[115] See Miguel João Costa / Pedro Caeiro, "Portugal – The Implementation of the Directives on Procedural Rights in Law and Practice", in Giuseppe Contissa / Giulia Lasagni / Michele Caianiello / Giovanni Sartor (eds.), *op. cit.*, pp. 171 f.; see also Miguel João Costa, *Extradition Law: Reviewing Grounds for*

generally requires enacting an autonomous statute, which necessarily originates case law on 'European' law, harmonisation produces an impact upon national rules that were developed and intended to apply at the strictly internal level, and, therefore, in this case, implementation tends to require modifying long-standing legal instruments, such as the CCP, developed internally in an unconstrained manner. This serves to acknowledge that some difference in attitude regarding mutual recognition and harmonisation legal instruments is understandable and indeed normal. However, in the Portuguese legal system this dichotomy is somewhat overstated,[116] which may help to explain the inertia of the national legislator in the face of the EU Directives on procedural rights. Legal literature too appears to be (with exceptions, naturally) less critical than normally when the parameter of control is heteronomous – i.e., when the movement towards higher standards of individual protection does not originate at the internal level, as an exercise of self-improvement, but is instead commanded by an external entity, in the case the EU legislator.

Coherently, the impulse for the Portuguese State to improve the levels of compliance of its legal system with the Directives was also largely heteronomous: to a great extent, it stemmed from infringement proceedings initiated by the Commission for deficient implementation of Directives 2010/64 and 2012/13, in September 2021 (leading to the enactment of Law no. 52/2023), and more recently of Directive 2016/343, in February 2025 (not yet reflected in any legislative intervention). Nevertheless, the legislator did undertake, in that same statute – and, as it seems, at its own initiative –, to improve the implementation of Directive 2013/48, insofar as concerns the access to a lawyer in the context of the EAW system, which is a welcome sign of proactivity by the Portuguese legislator. And it was heteronomous in that it resulted as well from the case law of the

Refusal from the Classic Paradigm to Mutual Recognition and Beyond, Leiden: Brill | Nijhoff, 2019, p. 180 f., and MIGUEL JOÃO COSTA / RAQUEL CARDOSO / ANTÓNIO VAZ DE CASTRO / PEDRO CAEIRO, "Portugal: Recognition of European Warrants and Cooperation Orders in Law and Practice", in Giulia Lasagni / Giuseppe Contissa / Michele Caianiello (eds.), *Facilitating Judicial Cooperation in the EU: A Computable Approach to Mutual Recognition in Criminal Matters* Leiden: Brill, 2025, pp. 303 ff.

[116] 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: 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.

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CJEU, notably in *TL*, in 2022. This impulse, however, originated in a referral by a national court for a preliminary ruling, and thus it may also be read as a symptom of a shift in attitude in this field. In fact, since 2019, the relevance of the Directives in national case law has grown very significantly and on many occasions it has been important for the outcome of the case.

In spite of the evolution described above, further discussion on the implementation of the Directives remains necessary, as many implementation issues can still be identified. As far as it was possible to determine, no legislative reforms or particularly meaningful cases pending on matters of relevance for the EU agenda on procedural rights are at present ongoing. It is therefore worth reiterating that, while the situation in Portugal is not one of serious deficit of procedural rights, more attention should be given and to the standards set by the EU in this realm.

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