FORUM PENAL
Associação de Advogados Penalistas

COMMENTARY ON DIRECTIVE 2016/343/EU[i]

on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings

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Published on the 11th of March 2016, Directive 2016/343/EU of the European Parliament and of the Council is aimed at enhancing the *right to a fair trial in criminal proceedings*, by laying down common minimum rules concerning certain aspects (i) *of the presumption of innocence* and (ii) *of the right to be present at the trial*.[ii] By establishing such rules, this Directive has the objective of strengthening the trust of Member States (MS) in each other´s criminal justice systems, thereby facilitating the mutual recognition of decisions in criminal matters and removing obstacles to the free movement of citizens throughout the territory of the MS[iii].

The scope of application

This Directive should apply only to criminal proceedings as interpreted by the Court of Justice of the European Union[iv]. In this regard, it is extremely important to consider the judgment in the *Åkerberg Fransson* case [v].

Being a legal framework of common minimum rules, the Directive expressly ensures that **its provisions shall not be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the Charter, the European Convention of Human Rights (ECHR), or the law of any Member State which provides a higher level of protection** (art. 13). Moreover, it is stated in Recital 48 that "*the level of protection provided for by Member States should never fall below the standards provided for by the Charter or by the ECHR, as interpreted by the Court of Justice and by the European Court of Human Rights*."

The legal framework established by the Directive applies to natural persons who are suspected or accused of having committed a criminal offence and it should also apply at all stages of criminal proceedings (until the decision on the final determination on the defendant´s guilt has become definitive)[vi].

The Directive however does not apply to legal persons. It was considered that "*at the current stage […] it is premature to legislate at Union level on the presumption of innocence with regard to legal persons*", and it was stipulated that this right should be ensured "*by the existing legislative safeguards and case-law*"[vii].

The presumption of innocence

According to this piece of legislation, MS shall ensure that suspects and accused persons are presumed innocent until proven guilty, pursuant to the law (art. 3).

Conforming to the Directive, compliance with the *principle of the presumption of innocence* presupposes: (i) the existence of the right of the suspect or accused *of not being referred to as guilty in public statements* made by public authorities or *through the use of measures of physical restraint*, (ii) that the *burden of proof* for establishing the guilt of suspects and accused persons *lies on the prosecution*, and lastly (iii) that *the accused has the right to remain silent and the right not to incriminate himself/herself*.

Public references to guilt

Article 4 of the Directive states that **MS shall take appropriate measures to ensure that public statements made by public authorities or judicial decisions do not refer to suspects or accused persons as being guilty, for as long as guilt has not been proven** according to the law. This provision also establishes that, in the event of a breach, MS shall ensure that appropriate measures are available in order to safeguard such right. Given the fact that public authorities are not prevented from publicly disseminating information on criminal proceedings, the Directive limits such dissemination to situations in which it is "*strictly necessary for reasons relating to the criminal investigation or to the public interest*."

It is important to observe that the Portuguese legal system already enshrines the duty of judges and public prosecutors to refrain from providing biased opinions during the statements made by the accused at trial and the general duty of the authorities involved both at the investigative and trial stage to refrain from giving statements or from making public comments on ongoing cases (the said duty limits public statements or public comments concerning the proceedings to situations which are exceptional and duly authorised). **Notwithstanding this, the effective compliance**

with the duties arising from such European norm will most likely lead to legislative adjustments in order to accommodate the explicit prohibition to refer to suspects or accused persons as being guilty, both in the proceedings and in any public statement made by the mentioned authorities.

The presentation of accused persons in court or in public

In order to avoid that suspects or accused persons are presented as being guilty, the Directive also requires that, prior to the delivery of the final judgment, MS shall take **appropriate measures to ensure that** they **are not presented in public through the use of measures of physical restraint, and to refrain from presenting them in court or in public while wearing prison clothes (Art. 5)**[viii]**.**

The burden of proof

The Directive envisages the obligation of MS to ensure that the burden of proof for establishing the guilt of suspects and accused persons lies on the prosecution (art. 6(1))[ix]. Pursuant to the text of the Directive, this obligation is compatible with the investigative powers held by the competent court (the judge) which may, on its own motion, seek for both inculpatory and exculpatory evidence[x].

Additionally, the Directive enshrines the *in dubio pro reo* principle by setting forth the duty of MS to ensure that "any doubt as to the question of guilt is to benefit the suspect or accused person, including where the court assesses whether the person concerned should be acquitted" (art. 6(2)).

A closer look at the Portuguese legal framework reveals that it does not embed rules concerning the shift of the burden of proof in criminal proceedings. According to some scholars, there are even doubts as to whether one can talk about the concept of reversal of the burden of proof, in its strict sense, in criminal procedure.

In fact, since the Public Prosecutor´s office is statutorily bound by the duty to discover the truth and to promote the Law in an objective and impartial manner, it can be difficult to ascertain that the Public Prosecutor has a conflicting interest with the accused or that the inability to adduce evidence leads to disadvantages for the Public Prosecutor, arising out of the burden of proof.

Nevertheless, the Constitutional Court has consistently held that the principle of the presumption of innocence, as laid down in article 32(2) of the Constitution, implies the above-mentioned procedural safeguards, as a result of its content. In other words, on the one hand it involves the "prohibition of the reversal of the burden of proof to the detriment of the accused person"[xi]. On the other hand, it entails the "*in*

dubio pro reo principle, which might lead to an acquittal in case the judge has doubts on the guilt of the accused person"[xii].

As a result, the Portuguese constitutional jurisprudence essentially provides that the constitutional status of the accused already imposes on the legislator that "the criminal law provisions shall not enshrine a presumption of guilt and that criminal responsibility shall not be based on alleged facts only". Thus, it is required that "a conviction in criminal matters rests on a positive demonstration of the accused´s guilt and that it is not obtained at the expense of the three-pronged guarantee, constituted by the presumption of innocence, the '*in dubio pro reo'* principle *and the* '*nemo tenetur se ipsum accusare'* principle"[xiii].

The court´s jurisprudence also asserts that *in dubio pro reo* constitutes a general principle of criminal procedural law, whose violation gives rise to a question of law on which the Supreme Court of Justice has jurisdiction[xiv].

In view of the above, it can be affirmed that the Portuguese legal framework already complies, in essence, with the minimum guarantees enshrined in art. 6 of the Directive.

Finally, it must be observed that the text of art. 6 of the Directive significantly evolved throughout the legislative process (understanding such evolution may certainly serve as a valuable interpretative tool).

In particular, article 6(2) of the Initial Draft of the Directive stated that MS should have ensured that the presumptions reversing the burden of proof (by shifting it on the accused), apart from being rebuttable, were also "of sufficient importance" to justify such shift. It is clear that such formulation regarding the conditions in which the shift of the burden of proof would have been admissible in criminal proceedings, was influenced by the jurisprudence of the European Court of Human Rights (ECtHR)[xv].

Moreover, the said provision of the Initial Draft of the Directive added that, in order for the presumption to be rebutted (which reversed the burden of proof), it was sufficient that the Defence provided enough evidence to create a reasonable doubt on the accused´s guilt.

However, in the light of a proposal of the European Parliament (EP), the mentioned provision was removed. The proposal for its removal was submitted by the EP with the following justification: "since it is difficult to accept the reversal of the burden of proof in criminal proceedings, this matter needs further elaboration"[xvi]. Although any references to presumptions reversing the burden of proof in criminal proceedings were effectively removed from the final version of art. 6 of the Directive,

they were nevertheless retained in the final version of Recital 22. This latter in fact clarifies that the possibility of using presumptions of fact or law in matters of criminal responsibility requires that the presumptions in question are (i) rebuttable, (ii) reasonable, taking into account the importance of the interests at stake and (iii) only used when the rights of the Defence are respected.

It is our view that the text of Recital 22 should be interpreted cautiously, by taking into account namely, (i) the constitutional jurisprudence illustrated above (ii) the above-mentioned jurisprudence of the ECtHR and (iii) the history of the legislative process which led to the final wording of article 6 of the Directive.

The right against self-incrimination

The Directive establishes the obligation of MS to ensure that suspects and accused persons have the **right (i) to remain silent and (ii) not to incriminate themselves** in relation to the criminal offence they are suspected or accused of having committed, stating that the exercise of any of these rights cannot be used against them (art. 7).

The content of these rights is tackled more in-depth in Recitals 24, 32 and 45 which provide in particular, that "***suspects or accused persons should not be forced to produce evidence or documents or to provide information which may lead to self-incrimination***", that "*regard should be had to the case-law of the European Court of Human Rights, according to which the admission of statements obtained as a result of torture or of other ill-treatment in breach of Article 3 ECHR as evidence to establish the relevant facts in criminal proceedings would render the proceedings as a whole unfair*" and that compliance with such rights is monitored in the light of "*the interpretation of the right to a fair trial, as stated in the ECHR, by the European Court of Human Rights*".

According to the Directive, the *right to remain silent and the right not to incriminate oneself* shall not prevent from gathering evidence, which may be lawfully obtained through the use of legal powers and whose existence is independent of the will of the suspects or accused persons, such as blood samples, urine and bodily tissue for the purpose of DNA testing, all of which are obtained pursuant to a warrant. Such provision directly stems from an *obiter dictum* pronounced by the European Court of Human Rights in the case *Saunders v. the United Kingdom*[xvii].

The national criminal procedural provisions aimed at guaranteeing the right to remain silent, namely artt. 58(2), 61(1)(d), 132(2), 141(4)(a) and 345 (1) of the Code of Criminal Procedure (CCP), do not embed an explicit provision concerning the *right against self-incrimination*. Notwithstanding the fact that the jurisprudence in particular

that of the Constitutional Court considers this right as an implicit constitutional right, the lack of an explicit regulation leads to a situation in which some jurisprudence provides safeguards that fall short of those contained in the Directive. As a consequence, the CCP will have to address the *right against self-incrimination* in accordance with the Directive, and not just the right to remain silent.

Despite no consequences are foreseen in the Directive for violations of the right against self-incrimination[xviii], the very nature of the right at stake provides that evidence gathered in breach of this latter cannot be used. The prevailing understanding in Portugal is that violating the right against self-incrimination amounts to a breach of the rights of the defence and of a person´s right to moral integrity. These latter are guaranteed by art. 32(1) and (8) of the Constitution, which provide that all evidence obtained through the means enumerated in art. 126(1) and (2)(a) and (d) CCP as well as the derivative evidence thereof is null and void. The specific provisions contained in art. 58(5) CCP also forbid the use of evidence obtained in violation of such right.

The right to be present at the trial in criminal proceedings and the trial in the absence of the accused

The right to be present at the trial is a fundamental right of the defence. Conducting the trial in the absence of the accused person prevents him/her from explaining to the Court his/her version of the events or from requesting that evidence is produced or gathered. This will also lead to a scenario in which a conviction is handed down without subjecting the allegations and the evidence brought by the prosecution to an effective cross-examination.

This fundamental breach of the rights of the defence cannot be remedied by the legal assistance provided by a lawyer, as this latter cannot replace the accused in his/her statements. Furthermore, the lawyer does not have access to his/her client´s version of the events nor to the evidence that he/she might have adduced, since no prior contact between them was established. As a result, the lawyer is unable to guarantee in any way an efficient cross-examination and an effective defence of his/her client´s rights, but he/she can only provide a merely technical defence.

The Constitution of the Republic of Portugal acknowledges the fundamental nature of such right, which is included in the rights of the defence (art. 32(1) and (6)). Given that the presence of the accused person is essential for the existence of a fair and equitable trial, as stated in art. 6(1) and (3)(c) ECHR, **the ECtHR only allows for a judgment to be handed down when the accused expressly waived such right**: such

waiver however, is **only valid if established in an unequivocal manner and if made voluntarily, knowingly and intelligently**[xix].

The ECtHR also **establishes that when a trial in the absence of the accused person has been carried out improperly, he/she will have the right to request a new trial or to appeal**, which includes **the possibility of a fresh determination of the merits of the case, as well as the submission of new evidence**[xx].

One of the most relevant features of the Directive gears towards the harmonisation of the conditions under which it is possible to hold a trial in the absence of the accused person (in other words, conditions under which it can be assumed that there has been a valid waiver of such right), as well as the accused´s right to request a new trial, in case the conditions set out above are not fulfilled.

The Directive allows for **the possibility to hold the trial of a citizen in his/her absence**, provided that:

- the person has been **informed, in due time, of the trial and of the consequences of non-appearance; or**

- having been **informed of the trial, that person has given a mandate to a lawyer** that was appointed by that person or by the State.

These conditions were inspired by the jurisprudence of the ECtHR.

In the Portuguese legislative framework, in case the accused person fills in the Statement of Identity and Residence (TIR) and has not indicated a change of address via registered letter during the proceedings, all subsequent notifications will be sent to the stated address with a simple proof of deposit, which includes the notification setting the date for the trial[xxi].

Currently, the mentioned notification sent by means of simple postal delivery, does not enable in any case to verify whether the accused was informed of the trial, since it does not prove whether that person was effectively aware of it. In the light of this, it cannot be inferred *per se* whether the accused waived his/her right to be present at the trial in an unequivocal, voluntary, knowing and intelligent manner or whether that person deliberately sought to evade justice. Indeed, when the TIR is filled in during the investigation phase, such notification does not even ensure that the accused person is aware of the existence of any indictment against him/her.

Accordingly, **when there is no proof that the accused person was effectively aware of the trial, holding the trial in his/her absence on the basis of the notification sent to the accused, by means of simple postal delivery, to the address mentioned in the TIR, does not satisfy the conditions set forth in art. 8(2) of the Directive**.

Indeed, in line with the jurisprudence of the ECtHR, MS must exercise a duty of care which obliges them to adequately seek for the whereabouts of the accused before they can conduct the trial in his/her absence. A simple notification, which would in any case only demonstrate the awareness of the trial, but not the waiver of the right to be present, is not sufficient. This is even more evident in case the correspondence has not been deposited at all or, having been deposited, it is returned with an indication that the accused is not residing at the address in question, or when there is information in the case-file revealing that the accused might not have been aware of such notification (in particular, for individuals living abroad)[xxii].

In any case, holding the trial in the accused´s absence as a penalty for having violated the obligation stemming from the TIR to provide the new address in case of its modification, seems a consequence which is disproportionate to the seriousness of the breach in question, particularly when there is the possibility that the accused will receive a high prison sentence[xxiii].

In fact, **our criminal procedural system allows for the possibility to hold the trial in those circumstances in which the accused person was not aware of the trial** and, for this reason, it requires that the notification of the judgment or conviction takes place by means of personal contact with the accused, pursuant to art. 333(5) and (6) CCP.

Our criminal procedural system would not be incompatible with the Directive if it would grant the right of the accused to request a new trial or to the right to file an appeal on questions of fact which would allow for a fresh determination of the merits of the case, alongside the possibility to present his/her defence at this procedural stage and **to request and produce new evidence**, as prescribed in artt. 8(4) and 9 of the Directive.

Actually this was the case under Law 59/98 of the 25th of August and more precisely its art. 380-A. This latter conferred the right to a new trial to persons accused of having committed offences that were punishable with a sentence of more than 5 years; in the remaining cases, the said right was granted only if the accused wished to submit new evidence[xxiv].

In the current framework however the existing legal remedy does not allow for the presentation of new means of evidence and is strictly limited to a review of the decision of the court of first instance and of the errors of fact and law that this latter might have made. **There is not a new instance before which the entirety of the evidence is adduced *ex novo*, or which at least admits the submission of new evidence provided by the defence**.

It is thus **necessary to reform the existing criminal procedural framework**.

If the criminal procedural law remains unchanged after the deadline for implementing the Directive has elapsed, on 01.04.2018, **then the national provisions contrary to artt. 8 and 9 of the Directive must be set aside and art. 9 can be directly invoked to establish the right to request a new trial**[xxv]. In case of doubts concerning the interpretation or validity of the Directive, there will also be **an obligation to refer for a preliminary ruling** to the Court of Justice of the European Union[xxvi].

Until then, the publication of the Directive imposes the obligation to interpret the national law in conformity with the norms laid down in the Directive[xxvii].

[i] The Directive can be retrieved at http://eur-lex.europa.eu/legal-content/PT/TXT/?uri=uriserv%3AOJ.L_.2016.065.01.0001.01.POR&toc=OJ%3AL%3A2016%3A065%3ATOC.
[ii] Recital 9 and art. 1.
[iii] Recital 10.
[iv] Recital 11.
[v] Case C-617/10, ECJ judgment of 26.02.2013.
[vi] Recital 12 and art.2.
[vii] Recitals 13, 14 and 15.
[viii] Art. 5, Recitals 20 and 21.
[ix] *Barberá, Messegué and Jabardo v. Spain*, 06.12.1998, proc. no.10590/83, text available at http://hudoc.echr.coe.int/eng?i=001-57429#{"itemid":["001-57429"]}; *Telfner v. Austria*, 20.03.2001 text available at http://hudoc.echr.coe.int
[x] The principle of investigation or that of the material truth are enshrined in art. 340 CCP.
[xi] Decision of the Constitutional Court no. 179/2012.
[xii] Decision of the Constitutional Court no. 179/2012.
[xiii] Decision of the Constitutional Court no. 179/2012. With regard to the impossibility of criminal provisions to be formulated in such a way that it may presumed that a crime has been committed, see the following decisions of the Constitutional Court no. 270/87, 426/91, 135/92, 252/92, 246/96, 604/97, 609/99 and 377/2015.
[xiv] Ac. do STJ de 06.04.1994, BMJ, 436, 248; Ac. do STJ de 02.05.1996, CJ, Acs. do STJ, IV, 2, 177; Ac. do STJ de 04.11.1998, CJ, Acs. do STJ, VI, 3, 201; Ac. do STJ de 21.10.2004, CJ, Acs. do STJ, XII, 3, 198; Ac. do STJ, de 16.05.2007, CJ, Acs. do STJ, XV, 2, 182.
[xv] *Salabiaku v. France*, of 07.10.1988, proc. no. 10519/83: "*Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law*". Text available at http://hudoc.echr.coe.int/eng?i=001-57570#{"itemid":["001-57570"]}. See also *Radio France v. France*, of 30.03.2004, proc. no. 53984/00 and *Pham Hoang v. France,* of 25.09.1992, proc. no. 13191/87, both available at http://hudoc.echr.coe.int.
[xvi] Text available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FTEXT%2BREPORT%2BA8-2015-0133%2B0%2BDOC%2BXML%2BV0%2F%2FEN&language=EN#title2
[xvii] *Saunders v. United Kingdom*, 17.12.1996 [GC], proc. no. 19187/91, § 69, http://hudoc.echr.coe.int/eng?i=001-58009.
[xviii] According to art. 10, the accused person should be provided with an effective remedy against the violation of his/her rights which, according to Recital 44 "should, as far as possible, have the effect of placing the suspects or accused persons in the same position in which they would have found themselves had the breach not occurred, with a view to protecting the right to a fair trial and the rights of the defence". Art. 10 also provides that "whilst assessing the statements made by suspects or accused persons or the evidence obtained in breach of the right to remain silent or the right not to incriminate oneself, the rights of the defence and the fairness of the proceedings should be respected" – which is another way of saying that such evidence cannot be used, as stated in the jurisprudence of the ECtHR, if it forms the basis of a conviction or when, even if this is not the case, it is associated with a violation of article 3 of the ECHR, according to Recital 45.
[xix] *Pishchalnikov v. Russia*, 24.09.2009, proc. no. 7025/04, §77, http://hudoc.echr.coe.int/eng?i=001-94293. With regard to the waiver of the right to be present, see *Colozza v. Italy*, 12.02.1985, § 28, http://hudoc.echr.coe.int/eng?i=001-57462.
[xx] See *Sejdovic v. Italy,* 01.03.2006 [GC], proc. no. 56581/00, §§81ss, http://hudoc.echr.coe.int/eng?i=001-72629.
[xxi] Artt. 113(1)(c), (3) and (10), 196 and 313 CCP. In the summary procedure, which constitutes an exception to the general rule, the notification to be present at the trial always occurs by means of personal contact.
[xxii] According to art. 8 (4) of the Directive, in these cases it should be mandatory to seek for the whereabouts of the accused abroad, especially when he/she is located in the territory of the EU – the obligation to interpret the national rules in compliance with the Directive imposes that a trial held *in absentia* based on TIR should only take place when the suspect or the accused person cannot be located "despite reasonable efforts having been made", in view to art. 8(4).
[xxiii] This was held by the ECtHR, for example in the case *F.C.B. v. Italy,* 28.08.1991, proc. no. 12151/86, §§34-35, http://hudoc.echr.coe.int/eng?i=001-57679.
[xxiv] Text available at http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?ficha=301&artigo_id=&nid=199&pagina=4&tabela=lei_velhas&nversao=9&so_miolo=.
[xxv] See Art. 288 TFEU and the judgments in *Van Gend en Loos*, of 6.10.1970 (case 26/62, available at http://eur-lex.europa.eu) and in *Van Duyn*, de 04.12.1974 (caso 41/74, available at http://curia.europa.eu)
[xxvi] The reference for a preliminary ruling is mandatory for the court of last instance and optional for the remaining ones. Concerning this issue, see: http://www.cej.mj.pt/cej/recursos/ebooks/GuiaReenvioPrejudicial/guia.pratico.reenvio.prejudicial.pdf.
[xxvii] See artt. 4(3) TEU, 288 TFEU and the judgment in *MARLEASING*[xxvii]*;* see also the judgment in *Pupino*, of 16.06.2005 (case C-105/03, available at http://curia.europa.eu)

This Commentary has been kindly translated from Portuguese into English by Elisabeth Valérie Pirotta.