

Portugal, The Attorney General's Directive no. 4/2020, of 25 November

Member State

 Portugal

Topic

Accountability, councils of the Judiciary/Courts' Presidents and Chief Prosecutors' Role

Deciding Court Original Language

Not applicable.

Deciding Court English translation

Not applicable.

Registration N

Not applicable.

Date Decision

2020

ECLI (if available)

Not applicable.

National Follow Up Of (when relevant)

Not applicable.

EU legal sources and CJEU jurisprudence

Not applicable.

ECtHR Jurisprudence

Not applicable.

Subject Matter

Independence of Public Prosecutors

Legal issue(s)

Can the Attorney General give concrete orders and instructions on procedural steps to the Public Prosecutors?

Request for expedited/PPU procedures

Not applicable.

Interim Relief

Not applicable.

National Law Sources

Articles 219 and 220 of the Portuguese Constitution.

Facts of the case

Heavy armory disappeared from a military site in Portugal. The Public Prosecutor's Office investigation concluded that soldiers simulated the theft of the weapons, with the knowledge of the then Portuguese Minister of Defense.

During the course of the investigation, the director of the Central Department of Investigation and Penal Action (DCIAP), instructed three prosecutors not to question political office holders, such as the President of the Republic and the Prime Minister. To justify the instruction, the Director of DCIAP invoked the "dignity" and "high function" of the positions to prevent the inquiry.

The text of the instruction also argued that the competence to conduct inquiries to the President and the Prime Minister belongs to the services of the Public Prosecutor's Office in the Supreme Court of Justice. In addition, it instructed that the 48 questions that had been identified as the ones that should be posed to the President and the Prime Minister should be altogether eliminated from the file.

This action was understood in the Public Prosecutor's Office as an interference in the work of prosecutors. The Attorney General subsequently decided to request the opinion of the Advisory Council.

Reasoning (role of the Charter or other EU, ECHR related legal basis)

The opinion of the Advisory Council (AC) was released on February 4. The AC argues that the Public Prosecutor's Office hierarchy can intervene in criminal proceedings, "modifying or revoking previous decisions".

The opinion states that the rules regarding hierarchical intervention in criminal proceedings "give the hierarchy the competence to practice criminal procedural acts, modifying or revoking previous decisions ". In practice, it means that, for example, the Attorney General can give an order to the director of the DCIAP to file a particular case.

Another controversial conclusion of the opinion is that the order does not have to be registered in writing in the process - "The issuing of a directive, an order or an instruction, even if directed at a specific concrete process, is exhausted within the hierarchical subordination relationship and does not constitute a criminal procedural act, and should not be included in the process". With this, defendants, assistants and public opinion are left without knowing the reasoning behind a decision to file an investigation.

The fact is that the Attorney General of the Republic considered the Advisory Council's opinion to be correct, and issued Directive no. 1/2020, of 4 February, accepting the opinion's understanding.

This directive provoked adverse reactions within the Public Prosecutor's Office, who understood that, based on this opinion, Public Prosecutors would lose their independence and autonomy, insofar as they would depend on the Attorney General's will – this, they understood, would go against articles 219 and 220 of the Portuguese Constitution. At the same time, they also argued that the opinion called into question criminal procedural legislation, as they would be unable to conduct investigations, as they have always done - in fact, if a prosecutor wants to interrogate a particular citizen, based on the Code of Criminal Procedure, he will never know if that will of his can be thwarted by a superior, outside the same Code.

Finally, they understood that the opinion was anti-democratic, as all parties in the process have the right to scrutinize the decisions that the Public Prosecutor's Office takes in the process and will no longer be able to do so if these are not public.

See the controversy here: <https://observador.pt/2020/02/05/ministerio-publico-em-guerra-com-diretiva-de-lucilia-gago-que-limita-autonomia-de-magistrados/>.

The controversy surrounding the opinion led the Attorney General to go public, through the form of a statement, to defend its internal directive, saying that "The opinion does not attribute to the Attorney General's powers increased powers of direct intervention in proceedings, maintaining the hierarchical powers that have always been conferred on him/her untouchable"

"The hierarchical relations between the Public Prosecution Service magistrates are maintained in the terms in which they were conceived and consolidated in the last decades", she stresses in the clarification, insisting that the Public Prosecutors "have a duty to refuse illegal orders and the faculty to refuse such compliance in cases of serious violation of their legal conscience".

The Attorney General also stated that "The file produced in the strict domain of hierarchical relations, which should not be included in the specific process, is subject to inspection, namely in the scope of inspections, to magistrates." It clarifies that the Public Prosecutor "can state that he is carrying out an order, mentioning, if justified, the existence of extra-procedural written support for such hierarchical commands".

Following public uproar in the media, the Attorney General decided to suspend the directive in question, calling upon the Advisory Council again, this time to comment on the regime of access to the written record of decisions handed down within the hierarchical subordination relationship.

The Advisory Council issued a new opinion and the Attorney General decided to approve a definitive directive - Directive no. 4/2020, of 25 November, which determined that any instructions should be included in the file in "preparation and follow-up dossiers", accessible by the parties.

??The new directive was poorly received and led the Union of Public Prosecutors to file a lawsuit with the Supreme Administrative Court. In recent statements, however, the Attorney General has stated that she has no intention of suspending the Directive.

This case demonstrates, therefore, a tension between, on the one hand, the Public Prosecutor's Office and the Attorney General. It is a recurring controversy that has led an Attorney General to claim that he had "the same powers as the Queen of England".

Relation of the case to the EU Charter

Not applicable.

Relation between the EU Charter and ECHR

Not applicable.

Use of Judicial Interaction technique(s)

Not applicable.

Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with

foreign courts)
Not applicable.

Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)
Not applicable.

Strategic use of judicial interaction technique (purpose aimed by the national court)
Not applicable.

Impact on Legislation / Policy

It should be noted that this controversy revolves around the Statute of the Public Prosecutor's Office, which was only approved in 2019 and entered into force in 2020. This was an important step, as this Statute, among other aspects, contains rules regarding the duties and incompatibilities of prosecutors and judges, thus contributing to an improvement in the integrity of the judicial system.

However, and regardless of this circumstance, the truth is that the above controversy led to the European Commission's 2021 Rule of Law Report on Portugal referencing this case with regard to the independence of the judiciary. The same Report states that the level of perceived judicial independence in Portugal is average to low, with no clear trend identified during the last five years [1]. This is in line with the 2020 EU Justice Scoreboard, where we can see that a large part of the Portuguese population and companies believe that the Portuguese justice system is not independent[2].

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[1] See European Commission's 2021 Rule of Law Report on Portugal, p. 2.

[2] See The 2020 EU Justice Scoreboard, pp. 41-43, available at:
https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en.

Notes on the national implementation of the preliminary ruling by the referring court
Not applicable.

Impact on national case law from the same Member State or other Member States
Not applicable.

Connected national caselaw / templates

Not applicable.

(Link to) full text

See the opinion of the Advisory Council here:

http://www.ministeriopublico.pt/sites/default/files/documentos/pdf/parecer_33-19.pdf

See the statement of the Attorney General here:

http://www.ministeriopublico.pt/sites/default/files/documentos/pdf/esclarecimento_parecer.pdf
