QUESTIONNAIRE

*Protection of lawyers in the free and independent exercise of the legal profession*

REPLY FROM PORTUGAL

The reply to this questionnaire received inputs from the Bar Association (*Ordem dos Advogados*), the Directorate-General for the Administration of Justice (DGAJ) and the Institute of National Registry (IRN).

**1 - Taking into consideration the guarantees for the functioning of lawyers, contained in principles 16-22 of the Basic Principles on the Role of Lawyers, please describe the constitutional, legal, administrative and policy measures adopted in your country to enable lawyers to exercise their professional activities in favor of their clients in a free and independent manner.**

According to the Constitution of the Portuguese Republic, the State has the duty to guarantee the fundamental rights and freedoms of citizens and the respect for the principles of the democratic rule of law (article 9, paragraph b)).

 In this sense, everyone has the right to legal information and consultation, to legal representation and to be accompanied by a Lawyer (*Advogado*) before any authority (article 20, no. 2).

In the specific area of criminal proceedings, the accused is guaranteed a lawyer to assist him/her in all acts of the proceedings.

In the context of the constitutional revision of 1997, article 207 was added, stating that "the law shall ensure lawyers the immunities necessary for the exercise of their mandate and shall regulate legal representation as an essential element of the administration of justice".

The law confirmed this principle by stating that "lawyers are essential to the administration of justice" (article 88, no. 1 of the Statute of the Bar Association) and conferred upon them a set of rights and duties without which they would be helpless in the exercise of such an important duty.

Pursuant to paragraph 3 of article 66 of the Statute of the *Ordem dos Advogados* (Bar Association), approved by Law 145/2015 of September 9, a Lawyer (*Advogado*) cannot be prevented to act before any jurisdiction, authority or entity, public or private, while defending rights, acting as a representative in any disputed legal relationship, any composition of interests or any investigation procedure, even before administrative instances, unofficial or of any other nature.

Article 69 also determines that “lawyers and trainee lawyers with active register cannot be prevented, by any public or private authority, from practicing any legal acts” and that, under the terms of paragraph 1 of article 72.º “magistrates, law enforcement officers and employees in public functions must ensure that lawyers, when exercising their profession, receive treatment compatible with the dignity of law practice and adequate conditions for the full performance of their mandate.”.

The aforementioned legal provisions enshrine the instrumental rights of Lawyers, when exercising their profession, configuring as such a functional attribution of prerogatives within the scope of the practice of law – to defend the values and principles of the rule of law and to defend the communities – these privileges are exclusive to the profession but they are held in favour of others, for Justice.

This is of utmost importance nowadays – professional privileges stand for the parties’ rights to face unfair charges or illegal investigations. In addition to this professional right to act, either through legal advice or through representation of parties, pure legal practice is covered by professional secrecy and independence (either from the State or from their clients).

Lawyers have the right to communicate with their represented parties even if they are detained or under custody in a common or military facility (article 78) and they also have the right to access non confidential documents, books or registers, verbally or by writing as well as obtaining any copies, regardless of having power of attorney or not.

Under article 75, every search performed in law offices needs to be ordered by a court and overseen by a local Bar representative, since all documents are covered by said secrecy (article 76).

While in session, during court or other diligence, lawyers have the right to intervene, at any moment they find adequate and convenient for the defence (article 80).

**2 - Please describe the entities and/or mechanisms that are in place to prevent and/or punish interferences with the free and independent exercise of the legal profession, whatever the source of the interference.**

To sustain this independence and prevent interference, a Lawyer (*Advogado*) has an incompatibility regime to ensure exemption (article 81); hence, the lawyer has to suspend activity if he/she is elected for Government or Town Hall functions, for instance. This regime of incompatibilities with the profession is based on activities that hinder exemption and independence such as public functions in city halls, courts, ombudsman, public registry, public notary, public administration, military forces, auction agencies and real estate agencies.

A Lawyer (*Advogado*) has the right to plead intervention from the Bar Association (article 71) whenever professional aspects are somehow hindered.

Professional secrecy is a cornerstone of all practice, waived only in exceptional situations by the President of the Bar Association’s Regional Council (with appeal to the Bar’s President, *Bastonário*).

The professional duties to defend the community and comply with preventive measures derive from the Statute and professional regulations.

**3 - Please describe the role of the national bar association(s) in protecting lawyers and free exercise of the legal profession. Is the bar association *de jure* and *de facto* independent from the State?**

The Bar Association (*Ordem dos Advogados*) is a public law entity, which pursues the public interest, is independent from the State and autonomous and free in its attributions (article 1 paragraph two).

It is a professional public Association as laid in article 227 and article 45 of Law 2/2013 of January 10, but, though independent, there’s a legality supervision from the Ministry of Justice regarding some regulation over membership fees and access to the profession.

It has exclusive regulatory powers and disciplinary supervision of professional conduct.

*Ordem dos Advogados* was established 95 years ago and maintains exclusive authority over the legal practice: authority implies counter balance of discipline, regulation and support but also defence of professional prerogatives. The Parliament and the courts, according to the law, must hear the Bar whenever legal practice is at stake, such as conflicts rising from lawyers’ fees (to which the High Council of the Bar Association issues a “laudo”).

**4 – Please provide information on the number of lawyers that have been subjected to criminal, administrative or disciplinary proceedings in the last five years for alleged violations of standards of professional conduct. How many of them were found guilty?**

The Bar’s jurisdiction currently holds more than 32.000 active registers, in seven Disciplinary Councils, that assess the professional conduct in first instance (with appeal to the Bar’s High Council) – exclusively for professional misconduct. Disciplinary decisions are taken autonomously by the Bar Association, without interference from any other entities. Procedures may be reviewed before administrative courts. Disciplinary sanctions applied after assessment and that become definite, vary from admonishment, fine, suspension (from 6 months to 10 years) to expulsion. Fee’s refund may also be applied.

Unsuitability for the exercise of the profession is duly verified as a special procedure and gives way to cancellation of membership.

Criminal investigation carried by the police or authorities against members, needs to be notified to the Bar Association at some point, which shall carry disciplinary assessment/verification of suitability for the profession. Information or statistics regarding criminal charges are not available.

Statistics regarding disciplinary decisions from the Bar Association (drawn from the Bar Association’s annual activity reports) are the following:

2016 Total convictions – 294 (4 expulsions)

2017 Total convictions – 282 (2 expulsions)

2018 Total convictions – 261 (1 expulsion)

2019 Total convictions – 217 (2 expulsions)

2020 Total convictions – 224 (1 expulsion)

2021 Totals (not available yet) (3 expulsions)

**5 – Please provide information on any case where lawyers in your country have been subject to intimidation, hindrance, harassment or improper interference, whether from State authorities or non-State actors, for action taken in accordance with their recognized professional duties. Please also describe the measures that state authorities have taken to investigate and bring perpetrators to justice.**

In general, the Bar Association has a good cooperation with the State and non-State actors.

The main concern is the illegal representation of clients acting on behalf of third parties, representing clients with no authorization from the Bar, carrying out legal acts that are exclusive of legal professionals, which constitutes a criminal offense under Law 49/2004 of August 24. Every year *Ordem dos Advogados* files a significant number of complaints regarding these situations. *Ordem dos Advogados* also notes that registers and officials need to be more attentive, to prevent consumers and citizens to be mislead.

**6 – To what extent has the legislation and/or measures adopted in your country because of Covid-19 pandemic affected the exercise of the legal profession or security of lawyers? Please explain.**

The Bar reports that during lockdown and the State of Emergency (total of 218 days), many activities received social benefits for basic income but it was not the case of Lawyers, based on the fact that they had an independent and separate benefit trust discount (which did not exempt the beneficiaries that were not working). Many practitioners faced difficulties, in particular those working in single practice, for companies and working for the Legal Aid system. The majority of the law firms maintained remote services whenever possible.

It also reports cases of unsafe Lawyers’ Rooms in courts throughout the territory either by lack of physical security or by insufficient COVID safety measures. According to information provided by the Bar, cases of disrespect of professional prerogatives and COVID safety measures were reported in the courts of Guimarães, Leiria and Aveiro. There was also reported cases of disrespect of professional prerogatives in access to Tax, Civil, Motor Vehicle, Commercial and Real Estate register services (IRN), such as no availability for booking, long waiting, no compliance with priority rules for the legal profession.

The Directorate-General of Administration of Justice (DGAJ/Ministry of Justice) informed that at the start of the pandemic (April 2020), and with the joint efforts of the High Councils of the judges and public prosecutors, the General Prosecutor's Office, the DGAJ and the Directorate General of Health (DGS), a set of measures to prevent the spread of COVID-19 was adopted to be applied by Courts and Public Prosecution Services, namely cleaning and disinfection, social distancing and ventilation of work spaces, face-to-face service and reception spaces.

In articulation with the courts, the DGAJ conducted an overall assessment of all spaces (courtrooms, proceedings rooms, witness rooms, central and procedural units of the registries and circulation spaces) in the 365 buildings distributed throughout the national territory, implementing space reorganization measures deemed appropriate, in order to ensure the safety of all users and in accordance with the guidelines approved by the DGS.

The cleaning and disinfection services of the facilities were also reinforced and, as an additional measure, highly specialized cleaning and disinfection teams were made available to respond following the verification of positive cases of Covid-19.

The continuous supply of masks, hand and surface disinfectants was guaranteed, as well as the purchase of visors, acrylics and aseptic containers.

The Registry Service (IRN) also informed that it has always sought to adapt and guarantee access to its services, both for legal professionals (Lawyers, Notaries and Solicitors) and clients, and has also set up alternative channels to face-to-face service, in addition to the online service channel that has long been implemented.

In effect, considering that face-to-face appointments were, for several months, subject to the rule of prior scheduling, in order to guarantee the continuity of services (especially those that could not be requested online), and to minimize the inherent increases in average scheduling and attendance times of the services of this Institute, the IRN tried, within the framework of the recommendations of the Government and the DGS, to adopt proportional and balanced measures between the public interest of citizens obtaining an answer from the registration services and the needs of public health (which required taking measures that were capable of avoiding contagion and the spread of the Covid-19 disease, as well as safeguarding the health and life of users and workers of the registration services).

Within this framework and concerning the access of the lawyers to the services the IRN notes that practically all registration acts, in all functional areas in which the IRN operates (especially land registration acts, commercial registration, including the incorporation of companies online, motor vehicle registration, and more recently, civil registration) have for many years (since the reform initiated in 2005) been accessible through the online service channel.

Therefore, and with minor exceptions (such as some registration acts required by the courts, namely lawsuits and court rulings, as well as services which, due to their nature, cannot be carried out remotely, in particular the services related to the on the spot commercial registry, which must be done in person, the civil registry processes, the certificate of inheritance and wills and the fast-track home buying scheme) all acts and processes which fall within the competence of the registry services are available to be requested and/or started online.

Nevertheless, and taking into account the need to observe the principle of proportionality and thus ensure the referred balance of interests, the following measures were introduced by IRN, such as:

i) Make available, in a first phase, the scheduling channel of face-to-face service through the telephone and email of the registration services, which, under the terms of the Order of the Directive Council of IRN no. 15/CD/2020, of 3 May, would have to allocate "the number of employees considered adequate, taking into account the average amount of service that, under normal conditions, is required in person" to service by telephone and email, while conditions were prepared to, in a second phase, make available the online scheduling of services that were not available on the online platform <https://justica.gov.pt/Servicos/Agendamentos> );

ii) Strengthen the telephone support line "Linha Registos";

iii) Display of posters at the doors of the services, indicating the alternative channels to face-to-face service with the respective means of contact/access;

iv) Use of the electronic mail of the registration services as an alternative service channel (cf. articles 4 to 13 of Decree-Law no. 16/2020, of 15 April). The IRN has also created a bank reference generator for the requests received by this means so that the interested parties could comfortably pay the emoluments due for the registrations, through the reference generated, in order to comply with the provisions of article 5 of the aforementioned Decree-Law, as well as, giving the possibility of making the death declaration by email. This possibility is still in force until 30 June 2022, due to the extension made by Decree-Law 119-A/2021, of 22 December;

v) Registers of company incorporation, capital increases, capital reductions and appointment of managers were granted an "urgent" nature, without any additional cost for interested parties, and this prerogative was maintained until 31 December 2021 - cf. article 7 of Decree-Law 16/2020, of 15 April and article 9 of Decree-Law 106-A/2020, of 30 December

vi) Lastly, and more recently, the expansion, in January 2022, of the single centralized scheduling solution through the SIGä application, which enables better organization of the service to be provided, as well as a more efficient and effective management, thus contributing to providing a faster and better service not only for legal professionals, but also for all citizens and companies.

**7 – Please describe the measures and policies you would suggest to better protect and guarantee the free exercise of the legal profession.**

Ordem dos Advogados mentions concerns over a draft law amending the rules on access to the profession and training, as well as the possibility to have non-professionals overseeing the disciplinary jurisdiction and regulating the legal practice. In its opinion this may enable those aspects that hinder both professional secrecy and independence, blurring privileges, which as explained, are actual tools to defend and uphold the rule of law.

Ordem dos Advogados sustains that the European Commission started a procedure against the Portuguese Government, in October 2021, to further explain proportionality breaches in this regard – professional regulations well placed should not be revoked hindering the purpose of the Directive.

The Portuguese Ministry of Justice, however, is not aware of such procedure since the “yellow card procedure”, also known as the subsidiarity control mechanism, applies to EU Commission legislative initiatives in areas where the EU does not have exclusive competence to legislate. Therefore, in cases where national Parliaments consider that draft legislative acts from the Commission do not comply with subsidiarity, they can send a reasoned opinion to the Commission. Under certain circumstances the Commission can decide whether to maintain, change or withdraw its proposal (<https://ec.europa.eu/info/law/law-making-process/adopting-eu-law/relations-national-parliaments/subsidiarity-control-mechanism_en>).

Ordem dos Advogados is also fiercely against the violation of professional secrecy and proportionality that (DAC 6) AML Directive’s transposition brought upon the legal profession, considering it unnecessary for the rule of law´s sake.

After several diligences from Ordem dos Advogados, the Portuguese Ombudsman (Provedoria de Justiça) has accepted its views and in September 2021, presented a Constitutional Review request before the Constitutional Court, over the rulings put in place by this Directive (Law n. º 26/2020 of 21 July).

The introduction of multidisciplinary professionals in law firms raises concern to the Ordem dos Advogados as possible conflict of interests and professional secrecy compliance may rise.

The Ordem also defends that, in order to carry the public defence of consumers and citizens financially depleted, the Lawyers (Advogados) working for the Legal aid systems should have their fees updated with dignity. The Bar considers that these fees are currently extremely low (average 389 euros per case, which may last several years).