Right of appeal by the accused in criminal matters in European Public Prosecutor's Office (EPPO) Cases: no access to the Court of Justice of the European Union (CJEU) = no effective remedies for breaches of EU Law.

The right of the accused to appeal in criminal matters is an essential component of the right to a fair trial and of the guarantees of the defence and is recognised as such in the Portuguese Constitution (Article 32, paragraph 1, of the Portuguese Constitution).

Thus, in those cases in which the Court *a quo* does not admit an appeal, a mechanism has been established in Portugal that allows for challenging such an order by lodging a complaint to the Court with jurisdiction to hear the appeal. This mechanism aims to ensure that the exercise of that right is not illegitimately impeded by the Court whose decision is itself the object of disagreement, which may open up scope for arbitrariness.

The institute of the *complaint* ("*reclamação*") is provided for in Article 405 of the Portuguese Code of Criminal Procedure[1] and it is the appropriate means of challenging the order of non-admission of the appeal, even in cases where complex issues are raised (see Judgment of the Constitutional Court no. 413/2002). The formal complaint is addressed to the President of the higher Court with jurisdiction to hear the appeal, within 10 days from the service of the order that refused to admit the appeal, or from the date on which the appellant became aware of the retention[2] of his or her appeal. The decision of the President of the appellate Court is final if the Court maintains the order of rejection. Otherwise, the proceedings will be allocated to a competent panel of appellate judges that is not bound by the decision about the admissibility of the appeal.

The *complaint* is to be assessed separately from the main proceedings, which means that its lodging has no effect on the progress of the procedure. The separate complaint file, must also be put together with the elements of the main case files indicated by the complainant. The President of the appellate Court may arrange to hear the Judge of the Court of 1st instance, who may, prior to the sending of the complaint case files to the

[1] There is a similar mechanism in the Code of Civil Procedure (art, 641, para. 6) and in the Code of Procedure before the Administrative Courts (art. 145, para. 3).
[2] The retention happens when a Court *a quo* admits an appeal, but orders that it will only be sent to the higher Court once the final decision is rendered.

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appellate Court, issue an order confirming that he or she maintains the decision that is subjected to the *complaint*.

The same mechanism also exists in relation to constitutional appeals[3]. The Organic Law of the Constitutional Court (hereinafter OLCC), in Article 76, paragraph 4, establishes that the order of the ordinary Court rejecting the petition for an appeal, or ordering its retention, may be subject of a complaint to the Constitutional Court. The decision in the complaint is taken by a panel of judges, the "conference" (*"conferência"*) (see Article 78-A, paragraph 3, of the OLCC), which is composed of the President or Vice-President of the Constitutional Court, the rapporteur and another judge of the respective section (appointed by the full Court at the beginning of each judicial year). Similarly to the regime of the Portuguese Code of Criminal Procedure, and as provided for in Article 78-A, paragraph 4, *ex vi* 77, paragraph 1, both of the OLCC, the decision taken by the conference is not subject to challenges and, if it reverses the order rejecting the admission of the appeal, it becomes a final decision as to the admissibility of the appeal (Article 77, paragraph 4 of the OLCC). The decision must be taken by unanimity of the conference (if there is no unanimity it must be taken by a panel comprised of all the Judges in the section).

The Charter of Fundamental Rights of the European Union, in particular Articles 47 and 48, also enshrines the rights to effective judicial protection and to a remedy as fundamental rights.

It should be highlighted that paragraph 1 of Article 47 is based on Article 13 of the ECHR, but its protection is more extensive in that it guarantees a right to an effective remedy before a Court. The Court of Justice established this right as a general principle of EU law in its judgment of 15 May 1986 (Case 222/84, Johnston)[4]. Article 47, paragraph 2, corresponds to Article 6, paragraph 1, of the ECHR. In turn, Article 48 corresponds to Article 6, paragraph 2 and 3, of the ECHR. Hence these provisions are to be interpreted as ensuring, as a minimum, the same degree of protection as the corresponding ECHR provisions (see Article 52, para. 3, CFREU).

[3] In Portugal, constitutional appeals are limited to matters relating to the unconstitutionality of legal provisions which have been raised during the main proceedings.
[4] See annotations of *Praesidium,* ECHR, Article 47 - https://eur-lex.europa.eu/legal-content/PT-EN/TXT/?qid=1568158248091&uri=CELEX:32007X1214(01)&from=PT. See also Judgments of 15 October 1987, Case 222/86, Heylens, and 3 December 1992, Case C-97/91, Borelli.

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In the European Union, the CJEU is the competent Court for the interpretation of EU law (Article 19 of the Treaty on European Union). However, by virtue of the decentralised enforcement system which is the rule in EU law, it is for the national courts to apply this law by acting functionally as Courts of the Union. Even the European Public Prosecutor's Office, although it is a body of the Union (according to Article 3, paragraph 1, of the Regulation), is hybrid in its composition, acting through a structure that combines a central and a decentralised level (see recital 21). As a rule, judicial protection is carried out before the national courts[5], with the exception of the decision to close a case[6].

Thus, although the CJEU is the Court with jurisdiction for the interpretation of Union law, the only way for an accused in a criminal case to access that Court is by way of a preliminary reference (Article 267 of the Treaty on the Functioning of the European Union)[7]. The obligation to refer a matter to the CJEU is, however, not enforceable. In those cases in which a national court refuses an application of the accused to make a reference for a preliminary ruling there is no means of effective judicial protection.

Making a preliminary reference is not even an enforceable obligation under the Regulation on the European Public Prosecutor's Office. If the issue is already open to criticism in general, when we move on to criminal matters, in which freedom is at stake, and even more so when we are dealing with proceedings led by an EU body, it is unacceptable in view of the rights to effective judicial protection and to a fair trial that there is no direct means of appeal *stricto sensu* before the CJEU. More seriously, the refusal by national courts to make use of the only available means of access to the CJEU, the preliminary reference (see Article 267 of the of the Treaty on the Functioning of the

[5] Cf. recital 88 and Article 42, paragraphs 1 e 2, of the Regulation on the European Public Prosecutor's Office - https://eur-lex.europa.eu/legal-content/PT-EN/TXT/?uri=CELEX:32017R1939&from=PT

[6] Article 42, paragraph 3, of the Regulation on the European Public Prosecutor's Office. It remains to be seen whether the provisions on the protection of personal data, under which the CJEU has, under Article 42, paragraph 8, of the Regulation on the European Public Prosecutor's Office, jurisdiction to review decisions of the European Public Prosecutor's Office other than procedural acts, under Article 263, paragraph 4, TFEU, may or may not have implications for the assessment of the legality of procedural acts or investigations of the European Public Prosecutor's Office.

[7] Other possibilities are the following: initiating infringement proceedings under Article 258 TFEU, for which the accused has no standing; launching an action based on extracontractual liability for violation of EU Law; or making a complaint to the ECtHR on the ground of a violation of Article 6, claiming that the reasons to refuse the referral to the CJEU are arbitrary. In this regard, see Judgment of the European Court of Human Rights 17.06.2021, *Quintanel et autres c. France,* App no 12528/17 et al, with further references.

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European Union), is not subject to challenge before the CJEU itself, opening the way for national courts to arbitrarily refuse access to that jurisdiction.

The only way for the accused to react in a European Public Prosecutor's Office case against such a decision to refuse a preliminary ruling is by lodging a "*complaint*" with the European Commission. The Commission may consider opening infringement proceedings. But the person concerned has no right to have such proceedings brought. In any event, infringement proceedings are considered by some inappropriate for enforcing the obligation to make a preliminary reference, given the independence of the Courts[8] (this point could however be resolved by a domestic legal provision allowing the case to be reopened as a consequence of the Judgment in the infringement proceedings).

Hence it is not possible to speak of a genuine means of effective remedy or appeal to the CJEU in European Public Prosecutor's Office cases, since referrals to the CJEU for a preliminary ruling are not in fact an appeal *stricto sensu*, nor are do they grant a genuine right to effective judicial protection in EU criminal law matters, since access to the competent Court is denied without any means of challenging such a decision.

The current regime could, in itself, be considered a violation of the right to effective judicial protection, since the current regime allows for violations of the principle of the "natural judge" or the "legal judge" to occur, without granting the accused an effective legal remedy to challenge such violations, before a EU Court[9].

In our opinion, a right to appeal to the Court of Justice of the European Union against decisions taken by national courts (at least last instance Courts) or by the European Public Prosecutor's Office, in European Public Prosecutor's Office cases, must be established. Or, at the very least, given its hybrid nature and the partially decentralised implementation of EU law by the European Public Prosecutor's Office, there should be an effective right to make a complaint to the CJEU against decisions of the Courts of last resort refusing to make a preliminary ruling. On this point, the Portuguese example could serve as a positive example that allows challenging decisions refusing access to a higher

[8] See Lenaerts/Maselis/Gutman, EU Procedural Law, 2015, §§3.56-3.58.
[9] The German Constitutional Court has found that the refusal to make a preliminary ruling, if the requisites for a reference are met, is a violation of the corresponding right in the German Federal Constituion - https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/12/rs20171219_2bvr042417en.html;jsessionid=840578633B85518ADB1EEA18C0C27FC8.1_cid394).

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Court with jurisdiction to hear an appeal before that same Court, without causing major procedural obstacles.

We believe that the introduction of means of judicial protection before the CJEU is not in any way a disproportionate demand, not least because Union law already provides in the EPPO Regulation (Article 42(3)) for the possibility of appealing against a decision to close a case under Article 263(4) of the Treaty on the Functioning of the European Union where such appeal is based exclusively on Union law. It is therefore surprising that the only means of appeal created was a means of appeal *against* the accused.

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