TRANSLATION[*]

Original: Portuguese

Summary: Of the mandatory obligation to write a record of identification, to make a report and to communicate it to the public prosecutor, as well as the material grounds for the transport of a citizen to a precinct for identification

RECOMMENDATION IG – 1/2015

Development:

By constitutional requirement, the Portuguese criminal procedure is in accordance with the principle of official acts given that, in accordance with art. 219 of the Constitution of the Portuguese Republic, it is incumbent upon the public prosecutor's office the exercise of criminal action. The constitutional imperative is based on the public nature of the powers of initiative and promotion of the criminal procedure, which make mandatory the intervention of a judicial body – the public prosecutor's office -, regardless of the rights accorded to the victims by reason of criminal offences.

The ownership of the criminal action by the public prosecutor's office imposes necessarily the attribution of the legitimacy to perform acts to mould the existence of the procedure and its purpose, as well as the intervention in all acts that may influence

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the final meaning of its decision and the imposition of the penalties ordered by the courts of law. As a matter of fact, the ownership of the criminal action is only understood and gains a pragmatic content if the procedural statute of the corresponding owner is accompanied by a set of procedural faculties and obligations that make possible the existence and the definition, both objective and subjective, of the corresponding action, the maintenance of the accusation before the judicial body during the subsequent phases of the procedure, the control of the judicial decisions and the promotion of the effectiveness of the sanctions.

So, we understand that the procedural law considers that the intervention of the criminal police bodies, in the scope of the criminal procedure, has the nature of mere assistance given to the judicial authorities, namely in this case, to the public prosecutor's office (see art. 55 of the Code of Criminal Procedure).

Thus, the large majority of the intervention powers of the criminal police bodies in the criminal procedure derive from the delegation of powers by the judicial authorities (see, for instance, art. 270 of the Code of Criminal Procedure), since the ascribed powers of the criminal police bodies are reduced to a pragmatic criterion of necessity moulded by needs of proximity and swiftness.

The public prosecutor's office – a body of magistrates performing functions in the courts of law – does not have elements that seek actively the notice of an offence and preserve the corresponding evidence. That task is ascribed to the criminal police bodies.

Considering their characteristics of organisation (number of elements, coverage of the territory, in a way to cover it all, and the proximity to the population), as well as legal (observance of the principles of legality and loyalty), the criminal police bodies gather the necessary material and legal conditions that are necessary to the performance of

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their function to assist the public prosecutor's office in what concerns the detection of situations that may indicate that an offence has been committed and safeguard the corresponding evidence.

So, the Code of Criminal Procedure, in its arts. 248 and following, ascribes to the criminal police bodies the competence to collect and communicate to the public prosecutor's office the awareness of an offence, as well as the performance, by their own initiative, of functionally oriented demarches in order to obtain and preserve evidence, namely cautionary and police measures.

On their turn, these cautionary and police measures are acts of a pre-procedural nature, whose operational legitimacy derives from the mere impossibility of the presence of the judicial authorities ascribing, thus, the duty of communication to the criminal police bodies.

As a matter of fact, art. 253, pars. 1 and 2, of the Code of Criminal Procedure imposes that the criminal police bodies that perform some cautionary and police measures must write a report in which they shall describe, in brief, the way the investigation took place, the description of the established facts and the evidence collected. That report shall be sent to the competent judicial authority to assess the validity of the demarche.

Quid juris in what concerns the grounds for the demarche?

The demarche of coactive identification allows that the criminal police bodies identify any person who:

a) Is in a public place, a space open to the public or under police surveillance;

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b) Is the object of grounded suspicion that he/she committed an offence, is the object of an extradition or forced return procedure, has illegally entered or stayed in the national territory or is the object of a warrant of arrest.

There are, thus, two material requirements that allow the identification: one of an objective nature, regarding the place where the person is found by the criminal police body, and another of a subjective nature, regarding the existence of grounded suspicion towards the person to be identified.

If the person to be identified has no identification document nor is able to obtain such a document or be recognised and identified by another person identified by a document, the criminal police body may take that person to the precinct to execute the adequate demarches that allow the identification of the suspect.

However, these cases of deprivation of liberty – even if temporary and precarious – must, considering the seriousness and the consequences for the life of those concerned, be always known to and closely followed by the corresponding senior officers who must intervene whenever any irregularity takes place.

This is the only way to ensure the effectiveness of police action and, at the same time, safeguard the rights of the citizens.

Conclusions:

1 - The public prosecutor's office is the owner of the criminal procedure, having a statute that comprises powers of initiative and of promotion of the criminal procedure, according to art. 219 of the Constitution of the Portuguese Republic.

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2 - By constitutional requirement (see art. 219 of the Constitution of the Portuguese Republic), the public prosecutor's office is the owner of the criminal action, having a statute that integrates the powers of initiative and promotion of the criminal procedure.

3 - The public prosecutor's office has legitimacy to perform acts to mould the existence of the procedure and its purpose, as well as intervention in all acts that may influence the final meaning of its decision and the imposition of the penalties ordered by the courts of law.

4 - The criminal procedural law imposes to the criminal police bodies the assistance to the judicial authorities, namely in this case, to the public prosecutor's office (see art. 55 of the Code of Criminal Procedure).

5 - The large majority of the intervention powers of the criminal police bodies in the criminal procedure derive from the delegation of powers by the judicial authorities (see, for instance, art. 270 of the Code of Criminal Procedure), since the ascribed powers of the criminal police bodies are reduced to a pragmatic criterion of necessity moulded by needs of proximity and swiftness.

6 - Considering their characteristics of organisation (number of elements, coverage of the territory, in a way to cover it all, and the proximity to the population), as well as legal (observance of the principles of legality and loyalty), the criminal police bodies gather the necessary material and legal conditions that are necessary to the performance of their function to assist the public prosecutor's office in what concerns the detection of situations that may indicate that an offence has been committed and safeguard the corresponding evidence.

7 - The Code of Criminal Procedure, in its arts. 248 and following, ascribes to the criminal police bodies the competence to execute, by their own initiative, cautionary and police measures, which are acts of a pre-procedural nature, whose operational legitimacy derives from the mere impossibility of the presence of the judicial authorities ascribing, thus, the duty of communication to the criminal police bodies.

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8 - Art. 253, pars. 1 and 2, of the Code of Criminal Procedure imposes that the criminal police bodies that perform some of the cautionary and police measures must write a report and send it to the competent judicial authority to assess the validity of the demarche.

9 - The reason for the elaboration of the report is based on the need of the public prosecutor's office and/or the investigating judge to know the exact performance of the police action oriented to the criminal procedure and the control of its legality. The identification record fulfils that purpose insofar as it must necessarily contain the investigations carried out, the description of the established facts and the evidence collected, which allows the knowledge and control of the cautionary and police measures.

10 - There are two material requirements that allow the coactive identification of persons: one of an objective nature, regarding the place where the person is found by the criminal police body, and another of a subjective nature, regarding the existence of grounded suspicion towards the person to be identified.

11 - If the person to be identified has no identification document nor is able to obtain such a document or be recognised and identified by another person identified by a document, the criminal police body may take that person to the precinct to execute the adequate demarches that allow the identification of the suspect.

12 - These cases of deprivation of liberty – even if temporary and precarious – must, considering their seriousness, be always closely followed by the corresponding senior officers.

13 - This recommendation aims to ensure the efficacy of police action when implementing the appropriate practices that assure the compliance with the criminal procedural law, avoiding situations in which the fundamental rights of the citizen may be put at risk

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Make the necessary communications and record.

Lisbon, January 5, 2015.

Margarida Blasco

Senior Judge

Inspector General of Home Affairs

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