The right to interpretation and translation in Criminal Proceedings: the situation in Portugal

Sandra Silva *

Abstract. *The 2010/64/EU Directive is the first step towards the provision of common minimum standards as to procedural safeguards within the European Union, as described on the 'Roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings'.*
Rather than explain the genesis of the directive or describe its main elements, this article focuses on the national legislation regarding the right to interpretation and translation. From this point of view, it analyses the existing regulations in order to assess if they comply with the criteria set out in the Directive and to discuss what changes have to be made to completely integrate its regulations into the internal legal order.
The main conclusion drawn from this study is that, despite some omissions, the Portuguese legislation accomplishes the minimum standards outlined in the Directive. The article ends with some recommendations to remedy the diagnosed lacks and improve the effective application of the right to interpretation and translation.

Keywords: Right to interpretation, Right to translation, 2010/64/EU Directive, National standards, Portuguese Law.

The need for interpretation and translation

We live in the era of globalization and free movement: people easily move around the globe and the world is within reach at the distance of a low-cost flight. The growing phenomenon of globalization and migrations is responsible for the continuous presence of international and foreign elements in the procedure. This new reality causes significant problems in a multilingual society such as the European Union – a geographic and linguistic puzzle with 23 official languages[1] and a wide variety of local dialects, not to mention the 'foreign' languages also frequently spoken within its doors.

*Faculdade de Direito, Universidade do Porto

The European Union presents itself as an area of freedom, security and justice, a territory with no borders to the free circulation of goods, persons, services and capital. Unfortunately, within Europe there are also no barriers to crime.

To effectively investigate and prosecute ever-increasing cross-border crimes, the European Union institutions have made a significant effort, over the last two decades, to set out various legislative instruments in the field of criminal law. The aim of these instruments is to combat severe criminality effectively, notably by promoting *judicial cooperation* between the national authorities of the Member States[2]. Since the European Council of Tampere (1999), the cornerstone of such cooperation is based on the principle of *mutual recognition* of judgments and other decisions. Naturally, the implementation of such a principle presupposes that Member States *trust* each other's criminal justice systems. The extent of mutual recognition is thus very much dependent on a number of parameters, which include the establishment of common *minimum standards* as to procedural safeguards within the European Union[3]. The 2010/64/EU Directive on the Right to Interpretation and Translation in Criminal Proceedings is the first step towards the provision of those common minimum standards. Further steps are described on a '*Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*', a resolution adopted by the Council on 30 November 2009[4].

Rather than explain the genesis of the Directive or describe its main elements, this article focuses on the national legislation regarding the right to interpretation and translation. From this point of view, it analyses the existing Portuguese regulations in order to assess if they comply with the minimum standards set out in the EU Directive and to discuss what changes have to be made to completely integrate its regulations into the internal legal order[5].

National Standards – do the Portuguese legal regulations accomplish the demands of the Directive 64/2010/EU?

The Portuguese Constitution (CRP)

The right to interpretation and translation is not expressly guaranteed under the Portuguese Constitution. However, it can be established as a corollary of the various fair trial rights laid out in a set of constitutional rules, e.g. the principle of equality (Art. 13), the right to a 'fair trial' (Art. 20, 4), the right of defence (Art. 32, 1) and, regarding the criminal procedure, the guarantee of an accusatory structure and the right to 'material' confrontation (Art. 32, 5). In order to have an effective and not merely formal meaning, these guarantees imply that litigants are able to understand the content of the proceedings (especially the trial), even if it does not take place in a language with which they are familiar.[6]

'A system of justice that allows a litigant to move through the courts without a complete understanding of the proceedings because of a language barrier is', as one may agree, 'an affront to the concepts of due process and equal protection.[7] This is particularly obvious in severe criminal cases, because 'no defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment'.[8]

A defendant who does not speak or understand the language of the proceedings is clearly at a disadvantage. The law must therefore provide for the right to interpretation and translation to remedy this vulnerable situation and ensure an equal treatment (Art. 13).

Moreover, the fundamental fairness required by the 'fair trial or 'due process clause' (Art. 20, 4) – an important dimension of the guarantee to an 'effective protection of judges and courts' (Art. 20, 1) – also entails the state's obligation to provide interpretation and translation when necessary to establish adequate communication between the court and the persons involved in the proceedings. The right to a 'fair trial' regarding criminal matters demands a procedure with 'full defence guarantees' (Art. 32, 1) in a wide sense (technical and material). The right to *technical defence*, i.e. the right to have a counsel (either appointed or chosen), obviously includes the right to freely and meaningfully communicate with one's lawyer. But interpretation is also important to safeguard *material defence*, which means the defendants' right to actively and effectively participate in the proceedings, presenting evidence and challenging the evidence produced against them.

The above rights are an essential feature of the accusatory structure (Art. 32, 5) – a system where the defendant has the status of a procedural 'party' (and not that of an object) and thereby is entitled to some minimum procedural guarantees. One of those guarantees is the 'right of confrontation' (Art. 32, 5 (2)), which is interpreted not in the sense of face-to-face (physical) confrontation but as the requirement that the defendants be given an adequate and proper opportunity to challenge and question the witnesses against them in order to assess their reliability and trustworthiness[9]. No defendant can actually 'confront' witnesses against them without understanding what they are saying in court.

The Code of Criminal Procedure (CCP)

The Portuguese Code of Criminal Procedure also ensures defendants a comprehensive set of procedural rights (art. 61, 1): to be present and to participate actively in the proceedings, to be informed on the charge, to be heard by the court or the judge, to have the assistance of a counsel and to communicate with them, etc.

None of these procedural rights can be effectively safeguarded without the right to interpretation and translation, ruled in Art. 92.

The right to interpretation and translation in the Portuguese Criminal Procedure

Preliminaries

Conceptualization: interpretation v. translation

Despite the lack of distinction in the Portuguese law, interpretation and translation are not identical intellectual operations. Translations are written, as opposed to interpretations, which are oral.

A court interpreter is a 'language mediator' or 'language conduit' whose presence allows a person who does not speak or understand Portuguese to meaningfully participate in the judicial proceedings.[10] The proper role of an interpreter is to place the non-Portuguese-speaker, as closely as is linguistically possible, in the same situation as the Portuguese speaker in a legal setting.[11]

A translator uses different skills than a court interpreter. A translator converts a written document or audiotape recording from the source language (SL) into a written document in the target language (TL). However, the court interpreter performs in some

situations as a translator – e.g. when he or she *sight translates* documents presented during the hearing.[12]

The Costs of interpretation and translation

The Code of Criminal Procedure foresees that, where the right to interpretation and translation applies, it must be provided without costs to the person involved, even when this person is the accused and he or she is convicted at the end of the proceedings (Art. 92, 2 and 3).[13]

Thus, interpretation in criminal proceedings is free of charge to all persons and not only to those who could benefit from legal aid under national laws. A different solution would introduce a (constitutionally prohibited) discrimination based on nationality: Portuguese defendants would be in a better position than non-nationals (since the latter, while having the financial means to afford their own defence, would be obliged as well to pay for an interpreter).[14]

The Portuguese rule accomplishes, thereby, the provisions of the European Convention on Human Rights [= ECHR][15], the European Court on Human Rights [= ECtHR] jurisprudence (see *Lüdicke, Belkacem and Koç v. Germany* (1978) and *Öztürk v. Germany* (1984)[16]) and the 64/2010/EU Directive (Art. 4).[17]

The right to INTERPRETATION

WHO is entitled to the right to interpretation?

The Portuguese Code of Criminal Procedure guarantees the right to interpretation to any procedural participant (defendant, accused, suspect, victim, witness, expert, etc.) whose primary language is not Portuguese and who has a limited ability to read, speak, write or understand Portuguese (whom we may refer to as 'limited Portuguese proficient' or 'LPP' individuals). This right is applicable even when judges, prosecutor and lawyers understand the foreign language spoken by the limited Portuguese proficient person (Art. 92, 2). That is so because the ground for interpretation is not only to enable the court to understand and properly evaluate the testimonies produced, but also to allow the person to understand the statements of the judge, prosecutor and counsels, to hear the testimony of witnesses and to assist in his or her own defence.

Procedural participants with hearing or speech impairments, irrespective of their position in the procedure, are also entitled to interpretation. This type of interpretation presents different problems and is specially ruled in the Code of Criminal Procedure, Art. 93 (thus, accomplishing the 64/2010/EU Directive, Art. 2 (3)).

Nothing is established in the Portuguese law regarding how to assess the necessity of an interpreter. However, there is no doubt that the judicial authorities are competent to decide upon informed discretion whether to appoint an interpreter.

The ECtHR held that the judicial authorities are required to take an active approach in determining the need for interpretation and translation (*Cuscani v. United Kingdom* (2002), § 38 and 39[18]). An attorney's assurance that there is no 'language problem' is thus not sufficient. The competent judicial authority should instead conduct a direct conversation with the defendant to personally determine the extent of his language ability, i.e. how fluent the individual is in the proceeding's language.[19]

The Directive takes this demand a step further, requiring the Member States to 'ensure that a procedure or mechanism is in place to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they have the necessity of an interpreter' (Art. 2 (4)). Furthermore, a suspected and accused person must have the right to challenge a decision that finds there is no need for interpretation or translation (Art. 2 (5) and 3 (5)).

Despite the wording of the Directive, there is apparently no need for a complex autonomous verification proceeding inside the criminal procedure (with its inherent additional costs and procedural delay). A brief '*voir dire*' of the individual needing the interpreter would generally be enough. The examination should include not only questions about biographical information, but also open-ended questions such that a non-Portuguese speaker could not anticipate an answer. The following model may be useful for that purpose:

Model voir dire for determining the need for an interpreter

In general: Avoid any question that can be answered with 'yes – no' replies.

Identification questions:
'Ms. _____, please tell the court your name and address.'
'Please also tell us your birthday, how old you are, and where you were born.'

Questions using active vocabulary in vernacular English:
'How did you come to court today?'
'What kind of work do you do?'
'What was the highest grade you completed in school?'
'Where did you go to school?'
'What have you eaten today?'
'Please describe for me some of the things (or people) you see in the courtroom.'
'Please tell me a little about how comfortable you feel speaking and understanding English.'

Source: National Center for State Courts, *Court Interpretation: Model Guides for Policy and Practice in the State Courts* (quoted by Kahaner (2009:227).

When exercising their discretion, judges should always presume a *bona fide* need for an interpreter when a representation is made by an attorney that a defendant or witness has limited proficiency in Portuguese, and requests an interpreter. The 'burden of proof' regarding the ability of the defendant to understand the court's language lies with the judicial authorities, not with the defendant – says the ECtHR (*Brozieck v. Italy* (1989)).

WHAT should be interpreted?

Theoretically, an interpreter may perform three separate functions in criminal proceedings. First, he or she may translate questions posed to, and answers provided by, a non-Portuguese-speaking person during examination by judges, prosecutor and counsels – this function is often called '*witness interpreting*'. The interpreter may also translate communications between the counsel and a party during trial – this service is known as '*party interpreting*' or, since such services are most commonly needed by the defendant, '*defence interpreting*'. Finally, the interpreter (the same or another) may interpret for the defendant, or another party, statements made by the judge, opposing counsel or others during the proceedings – this function is usually referred as '*proceedings interpreting*'.

a) 'Witness interpreting'

The interpreter must, naturally, interpret the communication between the court and the defendant or other LPP individual (witness, codefendant, victim and expert), permitting judges, prosecutor and counsels to question those individuals, to understand their answers and to record their testimony as evidence.

This mode of interpreting privileges the assessment of evidence in the procedure: its purpose is to ensure that a testifying witness or defendant understands and answers the propounded questions, as well as to guarantee that judges understand the persons and the evidence that comes before them. From this perspective, interpretation is mainly an instrument to enable the court to communicate with people who do not speak the court's language, avoiding misinterpretation of testimonies, and thus allowing judges to assess evidence in a foreign language in an accurate and effective manner.

While providing this service, the interpreter uses mainly so called *consecutive interpretation*: he or she listens and speaks in a sequential manner after the speaker has completed a thought. This allows judges, prosecutor and lawyers to pay full attention to the paralinguistic elements of the discourse, including all the pauses, hedges, self-corrections, inflections, and hesitations, tone of voice, demeanor, and body language. Even if the court is unable to speak or understand the defendant's or witness' language, it may still draw inferences regarding these non-verbal elements.[20]

b) 'Party interpreting' or 'defence interpreting'

The Portuguese law recognises, apparently without restrictions, the defendants' right to benefit, without any costs, from the services of another *interpreter* of their choice to mediate the communication between them and their counsel (Art. 92, 3)[21]. These interpreters are subjected to "professional and procedural secrecy", which prohibits them from revealing the content of the communications between the defendants and their counsels (Art. 92, 4). The evidence obtained through violation of those secrecy obligations is obviously rendered inadmissible in court (Art. 92, 5).

There are at least two reasons to allow the presence of a 'party interpreter'.

First, the presence of second interpreter in the proceedings is useful to prevent and detect interpretation errors, when none of the judiciary actors knows the language of the LPP individual.

Second, and most important, the existence of a party interpreter preserves the confidence of the defendants in the justice system and in their lawyers, while guaranteeing the complete confidentiality of the defence strategy and protecting the privileged communication with the defense counsel.[22] Moreover, it prevents the court interpreter, through long association with the defendant, from becoming biased.

Finally, one could add that if court interpreters are interpreting the witnesses' testimonies, the defendants would not be able to communicate with their counsels in order to assist them in the cross-examination. However, in Portugal defendants sit in the center of the courtroom and not side by side with their legal counsel (as happens, for example, in Germany). Thus, they are only able to assist their lawyers before or after (and not also during) the witnesses' examination.

Which conversations must be interpreted?

There is no express ruling in the Portuguese legislation regarding the extent of the interpretation of client-lawyer communications, but probably no court would allow the

presence of a state appointed free interpreter in all meetings between the defendant and his lawyer. This obligation would entail excessive costs for the States and such a right could be subject to abuse (with the defence using the interpretation facilities to slow down the proceedings).

The Directive states that 'free' interpretation shall be available 'where necessary for the purpose of safeguarding the fairness of the proceedings', for communications 'in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications' (Art. 2 (2)).

This text calls for two observations.

On the one hand, it is clear that the competent authorities are in a position to refuse 'free' interpretation not only for meetings between the lawyer and the defendant which solely serve dilatory purposes (to prolong the proceedings), but also for those communications that are not immediately connected with official acts of the procedure (for 'not necessary' communications the defendant should bear the costs of interpretation).

On the other hand, the reference to the purpose of safeguarding the fairness of the procedure and the openness to 'other procedural application' allows the jurisprudential expansion of this right through national courts and the European Court of Justice.[23] For example, the preparation of an 'application for bail' (recital 20 of the Directive) or of a requirement to 'instruction' (an intermediate and facultative procedural stage between the investigative phase and trial) can fall under the protection of this rule.

c) 'Proceedings interpreting'?

The Portuguese legislation does not set out other interpretation facilities than the appointing of a 'witness' interpreter and eventually of a defence interpreter. Is it enough, from the point of view of a guarantee of a fair trial, to allow defendants to communicate with the court (and previously with their lawyers), enabling them only to understand the questions directed to them?

Considerations of fairness and the potency of the accusatory system of justice forbid the state from prosecuting defendants who are in effect not present at their own trial.[24] The right to interpretation shall also 'ensure that defendants in a criminal case are put into an equal position to the persons who speak the court's language'[25], enabling them to be linguistically and cognitively present in the hearing and to actively participate in the proceedings. This will balance the vulnerable position of those who do not understand the court's language, ensuring that those persons have access to an effective defence and to a 'fair trial' under the same conditions as any other citizen, i.e. allowing them to be heard and to participate in a meaningful way.

That is not certainly the case when defendants are unable to understand either what is said in the courtroom, because they cannot follow the witnesses' cross-examination, or even what the defense counsel says on their behalf (pleadings). Therefore, it is also necessary that the defendant should be allowed to understand the entire hearing through a proceedings interpreter, who may be seated next to (or behind) the defendant and *simultaneously interpret* the statements of witnesses and everything said by judges, prosecutor and lawyers. That can be done using the 'whispering interpreting mode' or, to avoid any acoustic disturbance, with the help of electronic equipment.

Although the most important dimension of the right to interpretation refers to the defendant, identical considerations could in some extent apply to other procedural participants, specially the victim.

WHO should interpret?

a) The interpreter as an expert witness?

Portuguese law subjects interpreters to an expert's activity rules (Art. 92, 8, making applicable Arts. 153 and 162). The interpreter must therefore be 'sworn', i.e. he or she must solemnly promise the judicial authorities (judge or prosecutor) to make a faithful, accurate and impartial interpretation (Art. 91, 2).

b) Who cannot be an interpreter?

In Portugal interpreters have the same impediments as judges (Art. 47, 1). Consequently, the defendant's (or victim's) wife or husband and other relatives (parents, children, brothers and sisters) are forbidden to be interpreters in the criminal case (Art. 39, 1 (a) and (b)). Others who are forbidden to perform as interpreters are those who have formerly participated in the proceedings as prosecutors, judges, policemen, lawyers, witnesses, etc. (Art. 39, 1 (c) and (d)).

Regarding this point, Portuguese law seems to go even further than the case law of the ECtHR.

For example, in *Berisha and Haljiti v. 'the former Yoguslav Republic of Macedonia'* (2007), the ECtHR considered inadmissible the complaint of an Albanian applicant, who did not have an interpreter in a court hearing and relied on the codefendant's language assistance. In the court's opinion the fact that one of the applicants served as interpreter for the other did not invalidate proceedings, about which they had not complained at the time.

In another case, in the paradigmatic and often quoted *Cuscani v. United Kingdom* (2002) the ECtHR found a violation of Art. 6 § 1 in conjunction with 6 § 3 (e). The trial judge, instead of adjourning the hearing of the Italian defendant (because no interpreter was present), relied on the 'untested language skills' of the applicant's brother to interpret if needed, without consulting the defendant, and did so in a case that led to a four-year prison sentence and a ten-year disqualification as company director.

c) The choice of the interpreter?

Unfortunately, in Portugal there is neither an official certification for interpreters nor a mechanism to easily assess the quality of the interpreter's performance. Furthermore, the law is unclear as to which qualifications a court interpreter must possess and how those qualifications should be obtained (formal educational training, life experience, etc.); It is only necessary that the interpreter is somehow able to render accurate translations. The consequence is that in Portuguese courts almost anyone can be an interpreter: a lawyer present at trial, a bilingual court clerk or even a neighborhood Chinese grocer.

However, it is important to mention that court interpretation is a highly specialized and particularly demanding activity. 'Court proceedings not only involve interactions at a significantly higher level of difficulty than conversational language, but also require a familiarity with legal terminology and procedures and with the cultural context im-

pacting the parties in the court proceedings'.[26] The court interpreter must be able to completely understand and convey the speaker's words and presentation style in the courtroom setting, without editing, adding meaning, omitting or changing colloquial expressions or tone.[27] To be fully competent, an interpreter should therefore possess strong language skills in both Portuguese and the foreign language, 'including knowledge of legal terminology and idiomatic expressions and slang in both the source and target languages, as well as an understanding of geographic differences in meaning and dialect'. But it is also of utmost importance to 'understand the ethical and professional standards and how to apply those standards in a courtroom setting'.[28]

To assume that the mere ability to speak two languages automatically qualify an individual to interpret is, as an Jon A. Leeth noted, analogous to assuming that all people with two hands can automatically become concert pianists.[29]

d) A register of certified or qualified interpreters?

The approach of the ECtHR is that the mere appointment of an interpreter does not absolve the authorities from further responsibility. States are required to exercise a degree of control over the adequacy of the interpretation or translation (*Kamasinski v. Austria* (1989) and *Hermy v. Italy* (2006)), and judicial authorities also bear some responsibility since they are the ultimate guardians of the fairness of the proceedings (*Hermi v. Italy* (2006) and *Cuscani v. United Kingdom* (2002)).

With regard specifically to the quality of interpretation and translation, the ECtHR states that through interpreters and translators the accused or suspected persons must simply be put in position to understand the case against them and to defend themselves, in particular by putting their version of events before the court (*Hermi v. Italy* (2006)). 'Even if the Court has no information on which to assess the quality of the interpretation provided', the ECtHR claims that enough protection is guaranteed when it becomes 'apparent from the applicant's own version of the events that she understood the charges against her and the statements made by the witnesses at the trial' (*Asproftas v. Turkey* (2010)).

Regarding the choice of the interpreter, the ECtHR refuses to adjudicate on the national systems of registered interpreters as such, as it is solely called upon to refer 'on the issue whether the interpretation assistance (…) satisfied the requirements of Article 6', for which it is enough that the interpretation allows defendants to understand the evidence being given against them or to have witnesses examined on their behalf (*Kamasinski v. Austria* (1989)). In these cases, even non-official interpreters are adequate if they have a 'sufficient degree of reliability as to knowledge of the language interpreted' (*Coban v. Spain* (2003)). As for the rest, the ECtHR stated in *Sandel v. 'the former Yugoslav Republic of Macedonia'* (2010) that the court shall not unreasonably delay the proceedings while trying to find a suitable authorized interpreter in the defendant's mother tongue, when an interpreter in another language is sufficient to allow him to understand in essence the proceedings.[30]

The 2010/64/EU Directive is based on the same minimum standards[31] and also places the primary responsibility for quality on Member States, requiring them to take concrete measures to ensure that interpretation and translation is 'of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that the suspect or

accused persons have knowledge of the case against them and are able to exercise their right of defence' (Art. 2 (8), and Art. 3 (9)).

This obligation 'to promote the adequacy of interpretation and translation and efficient access thereto' is bolstered by a requirement that Member States 'endeavour to establish a register or registers of independent translators and interpreters who are appropriately qualified' (Art. 5 (2)). What the national regulations establish as a prerequisite to this kind of 'registration' or 'certification' is a question that I would rather leave open.[32]

The right to TRANSLATION

The scope of the Portuguese Code of Criminal Procedure, Art. 92, is not limited to interpretation of oral statements made at the trial hearing, but also covers the translation of relevant documentary material.

With regard to translation, the CCP refers solely to the necessity to convey into Portuguese documents which are written in a foreign language and not officially translated (Art. 92, 6). According to the Code, this translation facility appears to be simply a way to allow courts the assessment of documental evidence in an accurate and effective manner and not a right of the defence.

However, the Directive 2010/64/EU states that suspected or accused persons who do not understand the language of the criminal proceedings shall be provided with a 'written translation of "all" documents which are "essential" to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings' (Art. 3 (1)).

For this purpose, 'essential documents shall include any decision depriving a person of his liberty, any charge or indictment, and any judgment' (Art. 3 (2)), which comprises the charge, the verdict, the decision imposing preventive arrest, but also a house search warrant. Other documents in the file shall only be translated if the competent authorities consider them essential for exercise of the right of defence or a reasoned request from the defendant or his or her lawyer is made to that effect (Art. 3 (3)). If this request is denied the defendant must have the possibility to challenge the decision (Art. 3 (4)).

The reference to the ability to exercise the 'right of defence' and to the 'safeguard of the fairness of proceedings' sheds light on the nature of which 'other' documents must be translated.

Firstly, it can be argued that the evidentiary material upon which the case effectively rests is always essential to safeguard the right to a 'fair trial' and, despite the exclusion of the reference to 'essential documentary evidence' during the negotiations[33], it must be translated. For example, the written reports with the testimonies of witnesses heard in 'deposition' (Arts. 271 and 294 CPP) should always be translated, since those statements can be used as evidence in trial (Art. 356, 2, a), CPP). This conclusion indeed seems to impose itself if the right to translation is taken seriously and is linked to an effective – and not abstract – implementation of the right to be informed about the 'nature and cause of the accusation' or to 'have adequate time and facilities for the preparation of [the] defence' (art. 6 § 3 (a) and (b) ECHR).[34]

Secondly, it should be noted that, although applicable to the pre-trial phase (as the reference to the 'suspected person' clarifies), the right to translation only extends 'to those documents contained in the case file that, under national law, are already available

to the suspected or accused person, or to his lawyer'[35], because only those are meant to be necessary, at that stage, to the exercise of the defence rights.

In the context of the 64/2010/EU Directive, the translation of essential documents must, as a matter of principle, be provided in written form. In that case, the deadlines for the exercise of procedural rights (e.g. appeal) run from the translation and not from the act itself (e.g. judgment).[36]

Exceptionally, 'an oral translation or oral summary of essential documents may be provided instead of a written translation' when such translation (normally a 'sight translation') does not prejudice 'the fairness of the proceedings' (Art. 3, (7)).

This possibility was inserted in the text because various Member States insisted that admitting oral translations would be very important for daily (court) practice. In less complex cases, the accused would be better served with an oral translation 'on the spot', than with a written translation that could require several days to produce. Additionally, providing this possibility enables a considerable reduction in translation costs.

In support of their position, the concerned Member States relied on case law of the ECtHR, which considered it sufficient for the exercise of their procedural rights (e.g. appeal) to provide the accused with oral information about the content of the indictment or oral explanation of the judgment with the assistance of a lawyer, instead of providing a written translation of those acts (*Kamasinski v. Austria* (1989)[37]). This understanding has been followed by the Portuguese Constitutional Court (decision no. 547/98).

The option for an oral or a written translation must, at least, take account of the complexity of the case. It will be interesting to see how national courts and in the European Court of Justice interpret this provision.

Conclusions

The above analysis allows one to conclude that, despite some omissions, Portuguese procedural legislation accomplishes the minimum standards set out in the 64/2010/EU Directive on the right to interpretation and translation in criminal proceedings.

The Code of Criminal Procedure actually rules on the right to interpretation and translation to all persons (defendant, witnesses, experts) who cannot speak or understand the language of the proceedings because their first (or only) language is other than Portuguese (Art. 92) or they have a speech or hearing impediment (Art. 93). As to the defendant, the right to interpretation and translation appears as a corollary from an effective application of the constitutional fair trial guarantees, particularly the right of defence and the right to be assisted by a lawyer.

It should be nevertheless noted that the exercise of those rights is without any costs to those persons, irrespective their procedural role and the outcome of the proceedings.

The Portuguese legislation is furthermore truly progressive relating to client-counsel communications, since it (theoretically) provides interpretation of such conversations without limitations or restrictions. In this matter, the national rule goes far beyond what is established in the EU Directive.

However, it must be noticed that the law establishes no legal standard by which judges can properly assess the necessity of interpretation, something that is of utmost importance to prevent unknowing violations of the defendant's constitutional rights.[38]

Additionally, in Portugal there is neither an official certification or registration for interpreters nor a mechanism to easily assess the quality of the interpreter's performance. Because those aspects are totally neglected in the Portuguese legislation, some courts routinely allow untrained, non-professional bilingual individuals, without any demonstrated competence, to act as interpreters (including neighborhood grocers).

Moreover, the extent of the right to translation of documents, and the consequences of the lack of a written translation as to the exercise of procedural rights (e. g. the deadline of an appeal) is not clear.

But the major barrier to the effective application of the right to interpretation and translation is still the apparent lack of awareness of language problems and specially a lack of cultural-linguistic sensitivity among some judges, court staff and even defence lawyers.[39]

Under these circumstances, the following recommendations for effective application of the right to interpretation and translation should be attended:

- To clarify the extent of the right to a written translation of some documents and its implications;
- To provide a minimum linguistic training for judges in order to improve their awareness of linguistic difficulties and to enable them to distinguish between litigants who understand rudimentary Portuguese and those who are truly proficient in the language, as well as to meaningfully screen and assess the interpreter's skills;
- To establish official training and certification programs, at least in the most frequently spoken languages, focusing on vocabulary, legal terminology, court procedure, and professional ethics;
- To discuss with interpreters' associations, judges, lawyers and other judicial actors the possibility to enact a Model Code of Professional Responsibility for Interpreters in the Judiciary[40];
- To agree with other Member States the establishment of pools of interpreters, particularly for less-frequently-used languages, that participating States would support through shared resources and coordinated testing and administration[41];
- (In relation to this last case) to promote the use of videoconference and remote interpreting, when a court interpreter is not present and his or her physical presence is not required in order to safeguard the fairness of the proceedings (Art. 2 (6) of the Directive).[42] Although possible, the use of telephonic interpreting has limitations and therefore is not recommended, due to the fact that the lack of visual cues diminishes the capacity of the interpreter to understand the context of the spoken words in the proceeding (including the paralinguistic elements of the discourse).

Despite problems and limitations, one may share an optimistic opinion about the national interpretation and translation panorama – it may be said that in Portugal the matter is 'open to interpretation', much more than 'lost in translation'.

Notes

[1]Those languages are: Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish and Swedish.

[2]As Cras and de Matteis (2010: 153) suggest, the Framework Decision on the European Arrest Warrant (2002) is probably the most well known of these instruments.

[3]See Recital 3 of the 2010/64/EU Directive of 20 October 2010 on the Right to Interpretation and Translation in Criminal Proceedings, published in the Official Journal of the European Union L 280, 26.10.2010.

[4]The 'Roadmap' is part of the Stockholm programme (Official Journal of the European Union C 115, 4.5.2010, p. 1) and calls for the adoption of measures regarding the following rights: the right to translation and interpretation (measure A), the right to information on rights and information about the charges (measure B), the right to legal advice and legal aid (measure C), the right to communication with relatives, employers and consular authorities (measure D), special safeguards for suspected and accused persons who are vulnerable (measure E) and a Green Paper on Pre-Trial Detention (measure F). The first two steps are now accomplished with the adoption of Directives 2010/64/EU of 20 October 2010 on the Right to Interpretation and Translation in Criminal Proceedings and 2012/13/EU of 22 March 2012 on the Right to Information in Criminal Proceedings. Furthermore, on 7 October 2013 the Council adopted the Directive on the Right of Access to a Lawyer in Criminal Proceedings.

[5]In conformity with its Article 9 (1), Member States have until 27 October 2013 to adapt their national laws and regulations to the Directive 2010/64/EU provisions. Since the transitory regime provided for by the Treaty of Lisbon (Article 10 of Protocol 36) is not applicable to this situation, when the period of implementation expires, Member States which fail to transpose the Directive can be subjected to an infringement procedure by the Commission under Article 258 TFEU, including the possible imposition of executive measures and penalties by the European Court of Justice under Article 260 TFEU.

[6]See also the case-law of the ECtHR, *Kamasinki v. Austria* (1989), § 74.

[7]Conclusions of the New York City Bar Association's Committee on Legal Needs of the Poor, quoted by Cardenas (2001: 25).

[8]*United States v. Carrion*, 488, F.2d 12 (1st Cir. 1973).

[9]See also *Van Mechelen and Others v. Netherlands* (1997), § 51.

[10]See Kahaner (2009: 226).

[11]See Cardenas (2001: 27).

[12]*Sight translation* is a hybrid task by which an interpreter reads a document written in one language while rendering it orally into another language.

[13]Unfortunately, the right to interpretation and translation is not part of the 'Letter of Rights' of Article 61, therefore it is not part of the information which has to be read by the police in the present of the suspect (as happens, for example, in Spain).

[14]See Cras and de Matteis (2010: 158).

[15]Article 6 (3) (e) of the ECHR provides that everyone charged with a criminal offence has the right 'to have the free assistance of an interpreter if they cannot understand or speak the language used in court'.

[16]In both procedures, as Germany tried to obtain the reimbursement of interpreting costs from the applicants after their conviction (as then provided for by domestic law), the ECtHR made clear that the term 'free' implies a 'once and for all exemption or exoneration'. Recently, the Court also found a violation of the same provision in the cases *Işyar v. Bulgaria* (2008) and *Hovanesian v. Bulgaria* (2010), where the applicants had been charged for interpretation costs.

[17]Article 4 of the Directive 2010/64/EU states: 'Member states shall meet the costs of interpretation resulting from the application of Articles 2 and 3, irrespective the outcome of the proceedings'.

[18]In this case, the defendant suffered from a hearing impairment.

[19]In criminal matters, where fundamental liberty interests are at stake, a full comprehension of the proceedings is critical. Therefore it is not unreasonable to provide an interpreter at trial for an individual who speaks Portuguese as a second language, even when no interpreter is needed for ordinary conversation purposes. It is quite clear that the knowledge of conversional Portuguese is not enough to understand the level of language that is typically spoken in a courtroom.

[20]Kahaner (2009: 227).

[21]The interpretation of client-lawyer communications appears to be an important corollary of the effective application of the right to counsel's assistance: indeed, how could this right be ensured if the defendant and his or her lawyer were unable to understand each other?

[22]If the same interpreter is used, he or she may eventually and without noticing reveal, when interpreting what the defendant says at trial, something heard before from the accused during the interview with his/her counsel and that should remain confidential.

[23]See Cras and de Matteis (2010: 159).

[24]See Kahaner (2009: 226).

[25]Ramos (2012: 3).

[26]Kahaner (2009: 227).

[27]For example, when the defendant or a witness uses code words, as it happens frequently in drug traffic cases to confuse or conceal information, the interpreter must find a dynamic equivalent in the target language – if the witness uses the term 'soap', which in Portugal is used as a slang term for hashish, the interpreter should find a word which causes the same impact on the audience as the original, instead of translating 'soap' as 'hashish'.

[28]Kahaner (2009: 227–8).

[29]Cardenas (2001: 26).

[30]The authorities have wasted two and a half years trying to find a national Hebrew speaking interpreter (it was prohibited to recruit an interpreter from a foreign country), when it was clear from the outset that an English, Serbian or Bulgarian speaking interpreter would have been sufficient at that stage of the proceedings. This understanding was also affirmed in a case against Portugal (*Panasenko v. Portugal* (2008)). The applicant, a Ukrainian national (on trial for murder of a taxi driver), complained that his interpreter worked into Russian (not Ukrainian) and that even in Russian he was incompetent. During the trial he tried to express his complaints through the interpreter but the presiding judge told both of them not to engage in a discussion. On the basis of a recording supplied by the applicant, the interpreting was admittedly not perfect, but the ECtHR found no violation of Art. 6, § 3, (e) because 'the applicant failed to indicate how the interpreting problems had affected the fairness of the proceedings as a whole' and 'the material in the case file show[ed] that he was able to understand the oral proceedings in essence and present his version of the facts'.

[31]Art. 8 of the Directive includes a 'Non-regression clause', prohibiting any limitation or derogation from any rights and procedural safeguards that are ensured under the ECHR, the Charter of Fundamental Rights of the European Union, relevant provisions of international law and national laws which provide a higher level of protection. Recital 32 of the Directive also explains that the level of protection ensured under its provisions should never fall below the above standards, meaning that the Directive is supposed to be "Strasbourg- and Charter-proof" and should be interpreted and applied in such a way.

[32]As said before, the Portuguese judicial authorities do not demand any specific formal 'qualification' to be a court interpreter. For the most frequently spoken languages, embassies, universities and private agencies are often asked to appoint a qualified interpreter. But any other 'known in court' bilingual individual, more or less qualified, can be called to perform as interpreter. Sometimes, those individuals are simply the Chinese or Indian grocer next-door. In the USA there is a distinction between certified, professionally qualified and language skilled interpreters. Interpreters earn their certification by passing a series of rigorous written and oral exams administered by the Administrative Office of the U.S. Courts and by some States (California, New Jersey, Washington, New Mexico, New York and Massachusetts). The Administrative Office of Courts has developed such exams for Spanish, Navajo, and Haitian-Creole, although only the Spanish exam is currently administered (it is the most common spoken foreign language in USA). Apart from certified interpreters, the Administrative Office classifies two additional categories of interpreters: the *professionally qualified interpreters*, who should previously have been employed as conference or seminar interpreters with any United States agency, with the United Nations or a similar entity, and the *language skilled interpreters*, who are not certified or considered professionally qualified but can demonstrate to the satisfaction of the court their ability to effectively interpret. See Kahaner (2009: 229).

[33]This reference, contained in the original Commission proposal, was not included in the Member –State's initiative, since it met with the firm opposition of a number of national delegations who were

concerned about the financial impact of the need to proceed with translation of such (sometimes rather voluminous) material.

[34]Cras and de Matteis (2010: 159).

[35]Cras and de Matteis (2010: 159).

[36]For example, in *Panasenko v. Portugal* (2008) the ECtHR found a violation of Article 6 §§ 1 and 3 (c), since the defendant missed the appeal deadline partly because the time-limit ran from the service of the judgment in Portuguese and not from the translation.

[37]In *Kamasinki v. Austria* (1989), the ECtHR held that when a translation is necessary not every document has to be conveyed in written form. Oral (sight) translation provided by an interpreter or by the defence lawyer will be sufficient, as long as the defendant understands the relevant documents and its implications. For example, the fact that the verdict is not translated is not in itself incompatible with ECHR Article 6, provided that the defendant sufficiently understands the verdict and the reasoning thereof. The Court determined as well, in *Erdem v. Germany* (1999), that there is no general right of the accused to have the court files translated, since the various fair trial rights are attributed to the defence in general and not to the accused considered separately. 'It therefore suffices that the files are in a language that the accused or his lawyer understands'. Consequently, the applicant had no right to obtain the free written translation into Turkish of the investigation files and a 900-page judgment which, according to the defendant, was 'the accusation against him'. See more about this jurisprudence in Cape and Namoradze (2012: 83–4).

[38]For example, these unknowing violations can happen when a judicial officer fails to take into account the low proficiency of a defendant in trial, by simply believing that he must speak Portuguese because he has lived for a long time in Portugal.

[39]The following example is taken out of an American article, but the scene could easily occur in Portugal: 'The judge sat on the bench. He proceeded to read the sentence into the microphone in front of him in a barely audible, monotone voice. I interrupted, "Excuse me, Your Honor, the interpreter cannot hear you. Can you please check the microphone?" He replied, "You don't have to hear, just interpret!" In shock and disbelief, I interpreted whatever I was able to hear. I occasionally turned to look at the defendant's attorney, but he just sat there silent and motionless. As soon as the criminal sentence was read into the record, I gathered the case information I had not heard. I then shouted out pertinent dates and numbers to the Spanish-speaker man in custody as he was led away by the bailiffs' (retrieved from Cardenas (2001: 24)).

[40]As existing in the USA.

[41]Suggested also by Kahaner (2009: 230).

[42]About the use of these technological resources, see Broun and Taylor (2011).

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