



PRACTITIONERS' TOOLS ON EU LAW

INTERPRETATION AND TRANSLATION DIRECTIVE

FREE ASSISTANCE

ASSESSMENT OF INTERPRETATION NEEDS

QUALITY OF INTERPRETATION

CLIENT-LAWYER COMMUNICATION

THE 'THIRD LANGUAGE' ISSUE

TRANSLATION OF ESSENTIAL DOCUMENTS

About Fair Trials

Fair Trials is a global criminal justice watchdog with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards.

Fair Trials' work is premised on the belief that fair trials are one of the cornerstones of a just society: they prevent lives from being ruined by miscarriages of justice and make societies safer by contributing to transparent and reliable justice systems that maintain public trust. Although universally recognised in principle, in practice the basic human right to a fair trial is being routinely abused.

Our work combines: (a) helping suspects to understand and exercise their rights; (b) building an engaged and informed network of fair trial defenders (including NGOs, lawyers and academics); and (c) fighting the underlying causes of unfair trials through research, litigation, political advocacy and campaigns.

In Europe, we coordinate the Legal Experts Advisory Panel – the leading criminal justice network in Europe consisting of over 200 criminal defence law firms, academic institutions and civil society organizations. More information about this network and its work on the right to a fair trial in Europe can be found at: <https://www.fairtrials.org/legal-experts-advisory-panel>

This toolkit is created as a part of the project “Litigating to Advance Defence Rights in Europe” funded by the European Union. The Project acknowledges the enormous potential defence lawyers have to drive the use of EU law to challenge fundamental rights abuses. They operate on the front-line of the justice system, deciding which legal arguments to make and whether to apply EU law. The project aims to strengthen the ability of defence lawyers to effectively engage in litigation at domestic and EU levels where rights have been violated, and use EU law to tackle abuse of fundamental rights in criminal justice systems across the EU.



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¹ See notably, Fair Trials, [The Quality of Interpretation in Criminal Proceedings: LEAP Survey Report](#), March 2016 ('LEAP Survey Report').

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INTRODUCTION

A. INTRODUCTION

1. Background

The EU Member States began cooperating closely in the field of criminal justice, principally through the European Arrest Warrant ('EAW'). Such systems rely on mutual confidence between judicial authorities that each will respect the rights of those concerned, in particular as guaranteed by the European Convention on Human Rights ('ECHR' or 'the Convention').

However, cooperation was progressively undermined by the fact that judicial authorities called upon to cooperate with one another do not, in reality, have full confidence in each other's compliance with these standards. In order to strengthen the system, the EU started in 2009 setting minimum standards for the procedural safeguards of suspects and accused persons to regulate certain aspects of criminal procedure through a programme called the '**Stockholm Roadmap**'.²

Whilst the original objective of these measures is ensuring mutual trust, the result is a set of directives binding national authorities, courts and tribunals in all criminal proceedings, including those which have no cross-border element. These cover the right to interpretation and translation,³ the right to information,⁴ and the right of access to a lawyer⁵, procedural safeguards for children⁶, the right to the presumption of innocence and to be present at trial⁷ and the right to legal aid⁸ (collectively, the '**Roadmap Directives**').

This toolkit discusses Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings⁹ (the '**Directive**'), which became directly applicable as from the end of the transposition deadline on 27 October 2013. It governs suspected and accused persons' right to interpretation in police interviews, hearings and in meetings with their lawyer, and their right to translation of essential documents. These rights are fundamental as increasing mobility comes with increased

² Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings ([OJ 2009 C 295, p. 1](#)).

³ Directive 2010/64/EU of the European parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, ([OJ 2010 L 280, p. 1](#)).

⁴ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings ([OJ 2012 L 142, p. 1](#)).

⁵ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty ([OJ 2013 L 290, p. 1](#)).

⁶ Directive 2016/800 of the European parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects and accused in criminal proceedings ([OJ L 132, 21.5.2016, p. 1](#)).

⁷ Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings ([OJ L 65, 11.3.2016, p. 1](#)).

⁸ Directive 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings ([OJ L 297, 4.11.2016 p. 1](#); [corrigendum OJ L91 5.4.2017, p. 40](#)).

⁹ Note 2 above.

presence of suspects who do not speak the local language, and who depend upon effective language assistance in order to be able to exercise other rights, such as that to participate in their own trial or to confer with their lawyer.

2. Purpose of this toolkit

This toolkit is designed to give practical advice, mainly to defence practitioners, on how to use the Directive in criminal proceedings. It is produced as part of Fair Trials' 'Litigating to Advance Defence Rights in Europe' Project (the '**EU Litigation Project**'), which aims to build upon the work of the LEAP network to date in the field of EU criminal law, to strengthen the knowledge and ability of defence practitioners to engage effectively in litigation at the national and European level, and to improve access to justice and enforcement of rights under EU law.

The toolkit is intended to provide practical assistance and to serve as a source of references on the interpretation and application of the key provisions of the Directive. The toolkit compiles the latest relevant developments in the jurisprudence of Court of Justice of the European Union ('**CJEU**') and the European Court of Human Rights ('**ECTHR**') and identifies the key problems as regards the implementation of the Directive across the EU Member States. This toolkit also suggests arguments that can be used by lawyers in domestic criminal proceedings where national law or practice falls short of the standards set by the Directive.

Please refer to the [Using EU law in Criminal Practice Toolkit](#) for a general introduction on how to use EU law in national proceedings. A short overview of the basic principles of EU law is given in Section B of this introduction.

Where questions of EU law are raised in national proceedings, lawyers can ask the national court to make a reference for a preliminary ruling to the CJEU. For further information, please refer to the [CJEU Preliminary Reference Toolkit](#).

Please also feel free to refer to the other materials on EU law produced by Fair Trials, notably:

- The [toolkit on the Access to a Lawyer Directive](#);
- The [toolkit on the Right to Information Directive](#);
- The [toolkit on the Legal Aid Directive](#);
- The [toolkit on the Presumption of Innocence Directive](#);
- The [toolkit on the Charter of Fundamental Rights of the European Union](#);
- The online [legal training on pre-trial detention](#).¹⁰

3. Scope of this toolkit

This toolkit only covers specific issues related to the Directive of particular interest to defence practitioners. These include: (I) free assistance, (II) assessment of interpretation needs, (III) quality of

¹⁰ Follow our website on [EU law materials](#) for the upcoming and updated toolkits.

interpretation, (IV) client-lawyer communication, (V) the ‘third language’ issue, and (VI) translation of essential documents.

Many other challenges may also arise, such as the independence of interpreters and their participation throughout the different stages of the proceedings, the timeframe for providing interpretation or translation,¹¹ or the use of video/remote interpretation.¹² We encourage the reader to treat this toolkit as a starting point only.

4. How to use this toolkit

a. Organisation of the content

Each part of this toolkit starts with a presentation of the main issues (Section A). It then details the relevant provisions of the Directive and the related legal arguments (Section B) before providing specific guidance on how to use them in practice (Section C).

As most of the provisions of the Directive leave considerable room for interpretation, we include other legal arguments when presenting the provisions of the Directive. Where possible, we highlight the interpretation given by the Court of Justice of the European Union (‘CJEU’). However, there are currently a limited number of CJEU judgments interpreting the Directive.¹³ Therefore, where necessary, we fill in the gaps with additional sources.

In particular, we include relevant references to the Charter of Fundamental Rights of the European Union (‘the **Charter**’),¹⁴ and in particular Article 47 (right to an effective remedy and to a fair trial) and Article 48 (presumption of innocence and right of defence) of the Charter.¹⁵

We also review the relevant case-law of the European Court of Human Rights (‘ECtHR’)¹⁶ regarding Article 6(3)(e) of the European Convention on Human Rights (‘ECHR’)¹⁷:

¹¹ On this issue, see notably European Union Agency for Fundamental Rights report, [Rights of suspected and accused persons across the EU: translation, interpretation and information](#), 2016 (‘FRA Report’), pp. 33-35.

¹² On this issue, see notably [AVIDICUS 3 Handbook of Bilingual Videoconferencing](#) (June 2016), providing practical guidelines on the use of videoconference in legal proceedings conducted with the assistance of an interpreter; [NETPRALAT recommendations](#) on lawyer-client communication with remote interpreter.

¹³ The CJEU has so far interpreted the Directive on three occasions: CJEU, [Covaci](#), C-216/14, Judgment of 15 October 2015, ECLI:EU:C:2015:686; CJEU, [Balogh](#), C-25/15, Judgment of 9 June 2016, ECLI:EU:C:2016:423; CJEU, [Sleutjes](#), C-278/16, Judgment of 12 October 2017, ECLI:EU:C:2017:757.

For latest update on these cases see also, Fair Trials’ [Mapping CJEU Case Law on EU Criminal Justice Measures](#) tool.

¹⁴ Council of Europe, [European Convention for the Protection of Human Rights and Fundamental Freedoms](#), as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

¹⁵ For further information on how to use the Charter, see Fair Trials’ [Toolkit on Charter of Fundamental Rights of the European Union](#).

¹⁶ For compilation of relevant ECtHR case law, see ECtHR, [Guide on Article 6 of ECHR: Right to a fair trial \(criminal limb\)](#), Section on ‘Interpretation: Article 6§3(e)’: the Guide is regularly updated by the Court and currently available in 16 languages; James Brannan, [Case-law of the European Court of Human Rights on the right to language assistance in criminal proceedings](#), May 2016.

*3. Everyone charged with a criminal offence has the following minimum rights:
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

One of the aims of the Directive was to articulate ECtHR standards, as they stood at the time of drafting of the Directive,¹⁷ as standards of EU law binding upon all EU Member States. ECtHR jurisprudence continues to be a relevant source of guidance for the interpretation of the Directive, but only in so far as ECtHR standards do not fall below the scope of rights and limits of derogations set in the Directive.

Much of the law laid down by the Directive still remains open to interpretation; therefore, this toolkit inevitably involves our own reading of the Directive standards. Based upon our understanding of the Directive, we make concrete suggestions about how to use its provisions in a given case. These involve both practical steps (e.g. documenting and challenging violations at the pre-trial stage) and legal steps (e.g. invoking the Directive before a court).

In order to distinguish clearly between these different levels of analysis:

Provisions of European Union law or citations from the case-law of the Court of Justice of the European Union appear in green shading, with a double border.

Provisions of the European Convention on Human Rights and citations from case-law of the European Court of Human Rights appear in yellow shading, with a single border. They are presented in italics.

Suggestions by Fair Trials on using the Directive in practice appear in blue shading, with a triple border, to represent your use of the Directives in the local legal context. We try to be up front about when we are making a suggestion with the symbol '→' or marking it with the title '**Litigation strategy**'.

b. Terminology

This toolkit uses '**interpretation**' for oral interpretation of oral communication and '**translation**' for written translation of written documents. This follows the clear distinction drawn by the Directive. We also use '**language assistance**' as a generic term referring to assistance (both interpretation and translation) provided to someone who does not speak or understand the language of the proceedings.

The distinction between interpretation and translation operated by the Directive is welcome. Article 6(3)(e) of the European Convention on Human Rights ('ECHR') refers only to 'interpretation'. The ECtHR tried its best to establish a requirement for translations of certain documents (notably the indictment) in its case-law but the principles remain hard to pin down.

¹⁷ The European Parliament, the Council and the Commission, Charter of Fundamental Rights of the European Union, (OJ C 326, 26.10.2012, p. 391).

¹⁸ See Section C.1. 'Purpose and objectives', *infra*.

We use **‘lawyer’** to refer to any legal professional that is entitled in accordance with national law to provide legal assistance and represent suspects or accused persons at any stage of criminal proceedings; this may have the same meaning as **‘defence attorney’** or **‘legal counsel’** in some jurisdictions.

A **‘suspect’** in the context of this toolkit refers not only to persons who have been recognised as such in accordance with formal procedures under national law, but also covers persons who have not been formally declared suspects but whose **‘situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him’**.¹⁹

c. A word of caution

This toolkit is drafted based on certain assumptions. As mentioned above, we have endeavoured to identify these clearly in the body of the text. This is both in acknowledgment of the fact that there may be other points of view, and in order to ensure you are aware that these are inferences which you will need to be happy to stand by if you are going to rely on them in court.

The toolkit is also drafted with lawyers from all EU Member States in mind. Necessarily, it cannot cater for all individual variations in national criminal procedure in the different EU Member States. It cannot take account of existing professional traditions and deontological rules established by national or regional bars. So, you will need to adapt our suggestions to work within your own local context.

d. Keep in touch

With those qualifications, we encourage you to follow the steps in this toolkit, try out the arguments we propose and to let us know how you get on by contacting us via the contacts in the preface.

We are keen to hear from you about your experience and to share lessons learned from others. We may also be able to offer support and assistance in individual cases.

B. SHORT OVERVIEW OF BASIC PRINCIPLES OF EU LAW

1. Supremacy of EU law

The starting point of using EU law in practice is to understand its place in the national legal system: EU law stands higher in the hierarchy of legislative acts than domestic law. This is called the ‘principle of supremacy’ and it means that in case of contradiction between national law and EU law, the latter takes precedence and under certain conditions can be invoked directly by individuals to claim their rights against the state.

¹⁹ See ECtHR, [Simeonovi v. Bulgaria](#), App. No.21980/04, Judgment of 12 May 2017, para. 110.

2. Direct effect of EU law

EU law works through a system of ‘decentralised’ enforcement where the national court is the primary driver of compliance. This system has been the *modus operandi* of EU law ever since the seminal judgment *Van Gend en Loos*,²⁰ in which the European Court of Justice (now the CJEU) established the principle of ‘direct effect’. The idea is that when obligations upon Member States are there to provide rights to individuals, the best way of ensuring compliance is to give the individual the ability to invoke the right directly. This principle was originally recognised for primary law (Treaties) when the obligation in question was ‘precise, clear and unconditional’ and ‘does not call for additional measures’ by Member States or the EU. It was then extended to regulations, and subsequently to directives.

3. Direct effect of directives

Directives set objectives for Member States, who can decide by what means to reach them. Therefore, Member States need to give effect to directives by adopting national legislation that transposes the directives into national law. However, provisions of directives can have direct effect too, as was originally established by the CJEU in the *Van Duyn*²¹ and *Ratti*²² cases and more recently in *Difesa*:

‘(...) [W]herever the provisions of a directive appear (...) to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State (...) A [n EU law] provision is unconditional where it is not subject, in its implementation or effects, to the taking of any measure either by the institutions of the [EU] or by the Member States (...) Moreover, a provision is sufficiently precise to be relied on by an individual and applied by the court where the obligation which it imposes is set out in unequivocal terms (...)’.²³

Accordingly, a provision of a directive has direct effect and may be invoked in national courts if:

- 1) the transposition deadline of the directive has passed but the directive has not been implemented or has been implemented incorrectly, or the national measures implementing the directive are not being correctly applied;²⁴
- 2) it is invoked against a state;
- 3) it gives rights to an individual; and

²⁰ CJEU, [Case 26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration](#), Judgment of 5 February 1963, ECLI:EU:C:1963:1.

²¹ CJEU, [Case 41/74 Van Duyn](#), Judgment of 4 December 1974, ECLI:EU:C:1974:133.

²² CJEU, [Case 148/78 Ratti](#), Judgment of 5 April 1979, ECLI:EU:C:1979:110.

²³ CJEU, [Case C-236/92 Difesa](#), Judgment of 23 February 1994, ECLI:EU:C:1994:60, paras. 8-10.

²⁴ CJEU, [Case C-62/00 Marks & Spencer plc v. Commissioners of Customs & Excise](#), Judgment of 11 July 2002, ECLI:EU:C:2002:435, para. 27.

- 4) it is **unconditional and sufficiently precise**, i.e. it does not require further implementation measures by the EU or the Member State and it is set out in unequivocal terms.

Article 1 of the Directive expressly recognises that the Directive “lays down rules concerning the *right* to interpretation and translation in criminal proceedings”. Article 2 The Directive confers a right to interpretation upon people who do not speak or understand the language of the criminal proceedings.

Even if a provision is arguably not ‘unconditional and sufficiently precise’ because it is spelled out in general terms and may require some interpretation, this does not necessarily prevent you from relying on it in national court. The CJEU has recognised that:

- The fact that a provision needs interpreting does not prevent it having direct effect: its meaning and exact scope may be clarified by national courts or the CJEU.²⁵
- The fact that a provision allows for exceptions or derogations from a given obligation in specific circumstances does not make the obligation conditional.²⁶
- A provision which ‘limits the discretionary power’²⁷ of the Member State or impose Member States to ‘pursue a particular course of conduct’²⁸ may also be invoked in national courts. An individual may invoke such a provision to argue that the national authorities, in choosing the methods of implementation, have overstepped the limits of their discretion.²⁹

For instance, Article 3 of the Directive sets out the right to translation of essential documents. This right may be invoked in national courts even if the notion of ‘essential documents’ may need to be clarified by the CJEU.

4. Duty of conforming interpretation

Regardless of whether a provision has direct effect, national courts must interpret national law as far as possible in the light of the wording and the purpose of a directive in order to ensure its full effectiveness.

‘The principle that national law must be interpreted in conformity with EU law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration (...), with a view to ensuring that the directive

²⁵ CJEU, [Case 41/74 Van Duyn](#), Judgment of 4 December 1974, ECLI:EU:C:1974:133, para. 14.

²⁶ Ibid., para. 7.

²⁷ Ibid., para. 13.

²⁸ CJEU, [Case 51/76 Verbond van Nederlandse Ondernemingen](#), Judgment of 1 February 1977, ECLI:EU:C:1977:12, para. 23.

²⁹ Ibid., para. 24.

in question is fully effective and achieving an outcome consistent with the objective pursued by it.’³⁰

In this toolkit we occasionally refer to the preamble of the Directive, called the “**recitals**”, as an interpretative source. Recitals of directives have no legal binding force. They do not in themselves contain any enforceable rights or obligations and cannot alter the content of substantive provisions.³¹ However, they explain the background and the objectives of each directive. They are therefore important for understanding the directive and can be used as an interpretative source.

C. OVERVIEW OF THE DIRECTIVE

1. Purpose and objectives

The Directive aims to ensure the right to a fair trial as protected in Article 6 of the ECHR and Article 47 the Charter. As reflected in the recitals, the Directive builds upon the standards already established in the ECHR and the case-law of the ECtHR:

‘(14) The right to interpretation and translation for those who do not speak or understand the language of the proceedings is enshrined in Article 6 of the ECHR, as interpreted in the case-law of the European Court of Human Rights. This Directive facilitates the application of that right in practice. To that end, the aim of this Directive is to ensure the right of suspected or accused persons to interpretation and translation in criminal proceedings with a view to ensuring their right to a fair trial.’

‘(33) The provisions of this Directive that correspond to rights guaranteed by the ECHR or the Charter should be interpreted and implemented consistently with those rights, as interpreted in the relevant case-law of the European Court of Human Rights (...)’.

These recitals make clear that the Directive is intended to facilitate the application of rights which already exist under the ECHR. This means that, when making legal arguments, you can refer to ECtHR case-law to suggest how the provision of the Directive should be interpreted. This is why, in this toolkit, in addition to the interpretation provided by the CJEU, we also highlight the relevant principles of ECtHR case-law.

However, compared to the ECtHR case-law, the Directive is clearer and it also provides more robust protection than the ECtHR.³² We therefore we encourage you to base your arguments on the Directive itself as a rule.

³⁰ CJEU, [Case C-69/10 Samba Diouf](#), Judgment of 28 July 2011, ECLI:EU:C:2011:54, para. 60.

³¹ The CJEU ruled that the preamble to an EU act has no binding legal force and cannot be validly relied on as a ground for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner clearly contrary to their wording. CJEU, [Case C-134/08 Hauptzollamt Bremen v. J.E. Tyson Parketthandel GmbH hanse j.](#), Judgment of 2 April 2009, ECLI:EU:C:2009:229, para. 16.

³² For a comparison between ECtHR standards and the Directive, see FRA Report, n11, pp.26-27.

The recitals also refer to the Charter. The Charter has the same legal strength as the Treaties. This means that it is directly applicable as it does not need to be transposed into national law. It cannot be used on its own to invoke rights, but it may be used to support interpretation and application of other EU law such as the Directive. Articles 47 and 48 of the Charter (right to a fair trial and rights of the defence) will be particularly useful to refer to in arguments based on the Directive before national authorities. For more information on how to use the Charter to support your arguments, see Fair Trials' [Toolkit on Charter of Fundamental Rights](#).

2. Key principles of the Directive

The Directive recognises that the provision of free interpretation and translation in criminal proceedings is necessary to ensure the suspected or accused persons' right to fair trial. The Directive:

- protects **the right to interpretation of oral statements** (Article 2);
- protects **the right to translation of essential documents** (Article 3);
- establishes that interpretation and translation should be provided **free of charge** (Article 4);
- establishes the minimum rules in relation to the **quality of interpretation and translation** (Article 5); and
- requires that countries provide criminal justice professionals (i.e. judges, prosecutors etc.) with necessary **training** as to working with interpreters (Article 6) and establishes minimum rules in relation to the keeping of **necessary records** (Article 7).

3. Scope of application of the Directive

a. Suspects or accused persons

According to Article 1(2) of the Directive, it applies as soon as a person is made aware that they are **suspected or accused** of having committed a crime (regardless of whether they are deprived of liberty):

2. The right referred to in paragraph 1 shall **apply to persons** from the time that they are made aware by the competent authorities of a Member State, by official notification or otherwise, that **they are suspected or accused** of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether they have committed the offence, including, where applicable, sentencing and the resolution of any appeal.

In the *Case C-278/16 – Sleutjes*, the Advocate General made clear that the rights provided in the Directive are **universal** and there is no additional limitation.

'That right is **universal**, as Directive 2010/64 **does not limit the scope ratione personae of the persons** who may qualify for the protection it confers. The only requirement which must be met in order to trigger that protection is that they have been **made aware that they are suspected or accused of having committed a criminal offence**.³³

This notion of "suspect" is not clarified in the Directive. Recital 32 of the Directive specifies that the level of protection under the Directive cannot fall below the ECtHR standards. According to the ECtHR, fair trial guarantees apply to a person "**charged with a criminal offence**". The ECtHR case law developed an autonomous notion and looks beyond the formal status of the person, in particular:

'A 'criminal charge' exists from the moment that an individual is **officially notified** by the competent authority of an allegation that he has committed a criminal offence, **or** from the point at which his situation has been **substantially affected by actions taken by the authorities** as a result of a suspicion against him.³⁴

b. Minor offences

According to Article 1(3) of the Directive, for **minor offences**, for example traffic offences committed on a large scale, where sanction may be imposed by an authority other than a criminal court and such a sanction may be appealed, the Directive will only apply to the criminal proceedings before the court following the appeal.

3. Where the law of a Member State provides for the imposition of a sanction regarding **minor offences** by an authority other than a court having jurisdiction in **criminal matters**, and the imposition of such a sanction may be appealed to such a court, this Directive shall apply **only to the proceedings before that court following such an appeal**.

4. Overview of the Directive's provisions

Provision	What it covers	Particular aspects
Article 1	Subject matter and scope	<ul style="list-style-type: none"> The Directive applies to criminal proceedings and proceedings for execution of a European Arrest Warrant (EAW). The Directive applies from the time person is 'made aware by the competent authorities ... by official notification or otherwise, that they are suspected or accused of having committed a criminal offence until the conclusion of proceedings'.

³³ CJEU, [C-278/16, Sleutjes](#), Opinion of Advocate General Wahl, 11 May 2017, para. 39.

³⁴ ECtHR, [Simeonovi v. Bulgaria](#), App. No.21980/04, =judgment of 12 May 2017, para. 110:

	<ul style="list-style-type: none"> • In case of minor offences where sanction may be imposed by an authority other than a court (e.g. administrative sanction) and such a sanction may be appealed before a court, the Directive applies only to the proceedings before the court. • The Directive does not affect laws concerning access to a lawyer or access to documents.
<p>Article 2 Right to interpretation</p>	<ul style="list-style-type: none"> • Right to interpretation ‘without delay’ for suspected or accused persons ‘who do not speak or understand the language of the criminal proceedings’ during police questioning and before judicial authorities. • Right to interpretation for communication between suspected and accused persons and their legal counsel in direct connection with any questioning, hearing or appeal, where necessary to safeguard the fairness of proceedings. • Right to interpretation includes appropriate assistance for persons with hearing or speech impediments. • Obligation to establish a ‘procedure or mechanism’ to assess interpretation need. • Right to challenge a decision finding that there is no need for interpretation / possibility to complain about quality of interpretation provided. • Use of technology such as videoconferencing permitted unless the fairness of the proceedings requires the physical presence of the interpreter. • Right to interpretation applies in proceedings for execution of an EAW. • Interpretation must be ‘of a quality sufficient to safeguard the fairness of proceedings’.
<p>Article 3 Right to translation of essential documents</p>	<ul style="list-style-type: none"> • Right for persons ‘who do not speak or understand the language of the criminal proceedings’ to ‘written translation of all documents which are essential to ensure they are able to exercise their right of defence and safeguard fairness of proceedings’. • Essential documents include any decision depriving a person of his liberty, any charge / indictment and any judgment. • Competent authorities to decide, in a given case, whether any other document essential. Suspect or accused person or their lawyer is able to submit a reasoned request. • No requirement to translate passages of essential documents

		<p>which are not relevant for enabling suspect or accused to have knowledge of the case against them.</p> <ul style="list-style-type: none"> • Right to challenge a decision finding no need for translation of documents or passages thereof / possibility to complain that quality of translation not sufficient to safeguard fairness of proceedings. • Possibility of providing an 'oral translation or oral summary' instead of written translation. • Waiver only on condition of prior legal advice / otherwise gained full knowledge of consequences of waiver, which must be unequivocal and given voluntarily.
Article 4	Costs	<ul style="list-style-type: none"> • Member States bear the cost of interpretation, irrespective of the outcome of proceedings.
Article 5	Quality	<ul style="list-style-type: none"> • Obligation to take 'concrete measures' to ensure interpretation / translation meets the standard required. • Obligation to 'endeavour' to establish (a) register(s) of appropriately qualified independent translators / interpreters. • Obligation to ensure interpreters / translators required to observe confidentiality.
Article 6	Training	<ul style="list-style-type: none"> • Obligation to provide for training of 'judges, prosecutors and judicial staff' as to working with interpreters.
Article 7	Record-keeping	<ul style="list-style-type: none"> • Obligation to keep a record when interpretation is provided in questioning or hearings, when an oral translation / summary is provided, or if translation waived.
Article 8	Non-regression	<ul style="list-style-type: none"> • The Directive does not limit safeguards arising under international or national law offering higher level of protection.

I – FREE ASSISTANCE

A. THE ISSUE

Practitioners report that not all costs of interpretation are borne by the national authorities. For instance, interpretation for lawyer-client consultations is only free in cases where legal assistance is mandatory. In some Member States, the authorities require the defence to pay those costs which are considered to exceed the legal minimum requirement. Translations requested by the suspect risk not being reimbursed.³⁵

B. RELEVANT PROVISIONS OF THE DIRECTIVE

Article 4 of the Directive requires Member States to bear the costs of interpretation and translation for persons who do not speak or understand the language of the proceedings.

‘Member States shall meet the costs of interpretation and translation resulting from the application of Articles 2 and 3, irrespective of the outcome of the proceedings.’

It is important to stress that the Directive goes further than simply enforcing the right to legal aid: the obligation to provide free interpretation services is not dependent upon the accused’s means.

Article 6(3)(e) of the ECHR also guarantees the right to the *free* assistance of an interpreter. The ECtHR also stressed that this is larger than legal aid:

*‘In Fedele v. Germany, the Court ruled that the obligation to provide “free” assistance is not dependent upon the accused’s means; the services of an interpreter for the accused are instead a part of the facilities required of a State in organising its system of criminal justice. However, suspects and accused persons may be charged for an interpreter provided for them at a hearing that they fail to attend’.*³⁶

*‘The Court concludes that the right protected by Article 6 para. 3 (e) (art. 6-3-e) entails, **for anyone who cannot speak or understand the language used in court, the right to receive the free assistance of an interpreter, without subsequently having claimed back from him payment of the costs thereby incurred.***³⁷ (emphasis added).

³⁵ Council of Bars and Law Societies of Europe (CCBE), European Lawyers’ Foundation (ELF), [TRAINAC – Assessment, good practices and recommendations on the right to interpretation and translation, the right to information and the right of access to a lawyer in criminal proceedings](#), 2016, pp. 23-25 (‘TRAINAC Report’); JUSTICIA Network, [Inside Police Custody 2](#), December 2018, p. 21 and p. 25

³⁶ ECtHR, [Fedele v. Germany](#), App. no. 11311/84 (Commission decision of 9 December 1987).

³⁷ ECtHR, [Luedicke, Belkacem and Koç v. Germany](#), App. no. 6210/73; 6877/75; 7132/75,, Judgment of 28 November 1978) paras. 42 and 46; [Isyar v. Bulgaria](#), App. no. 391/03, Judgment of 20 November 2008, para. 45; [Öztürk v. Germany](#), App. no. 8544/79, Judgment of 21 February 1984, para. 58.

As argued by EU Fundamental Rights Agency, Article 6 of the ECHR and Article 48(2) of the EU Charter already require that where a person is entitled to legal aid,³⁸ such legal aid covers the costs of interpretation services.³⁹ The ECtHR ruled that:

'Free legal aid may be extended to include the service of an interpreter'.⁴⁰

In 2018, at the time of the European Commission's report on the implementation of the Directive ('**Implementation Report**'),⁴¹ three Member States had not yet transposed correctly this obligation – the situation may have evolved since. Among the Member States that implemented the obligation, some continue to impose restrictions.⁴² In **Greece** and **the Czech Republic** for instance, suspects and accused persons must cover the costs of interpretation services which do not take place before the law enforcement authorities, such as communication with their lawyer. Some Member States, like the **Netherlands**, cover the interpretation costs of client-lawyer communication only if the client is granted legal aid.⁴³

C. USING THE DIRECTIVE IN PRACTICE

The reasoning here is straightforward.

- Argue that the interpretation or translation was provided based on Article 2 and 3 of the Directive (see Part II of this toolkit for arguments on the need for interpretation, Part IV for arguments on the need of interpretation for client-lawyer relations and Part VI for translation of essential documents).
- Request the costs of interpretation to be covered by the State – irrespective of the outcome of the proceedings – based on Article 4 of the Directive.

If you have any doubt about the extent to which costs should be covered, consider making a request for a preliminary ruling to the CJEU. For further information, please refer to Fair Trials' [CJEU Preliminary Reference Toolkit](#).

³⁸ For more information, see Fair Trials' [Toolkit on the Right to Legal Aid Directive](#).

³⁹ FRA Report, n11, p. 42.

⁴⁰ ECtHR, *X. v. Austria*, App. no. 6185/73, (Commission decision of 29 May 1975).

⁴¹ [Report from the Commission to the European Parliament and the Council on the implementation of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings](#), 18 December 2018 ('Implementation Report').

⁴² *Ibid.* p. 11.

⁴³ TRAINAC Report, n35, pp. 23-25.

II – ASSESSMENT OF INTERPRETATION NEEDS

A. THE ISSUE

Any issue surrounding language assistance begins with a key question: is the suspect or accused person in need of such assistance?

Practitioners identify a number of concerns about the manner in which such assessments are carried out, particularly at the police station when police officers are operating under time constraints. They deplore the absence of any formalised procedure and clear criteria for assessing and responding to interpretation needs: what language does the person actually speak? What is their real mother tongue? Do they understand the interlocutor in the specific context? Do they understand the language of the proceedings to the extent required in the context (e.g. in order to be able to answer detailed factual questions)? As a result, informal mechanisms are adopted such as police asking questions such as ‘do you understand language X?’ and proceeding on that basis. In some Member States, language assistance is provided to non-citizens only or those who clearly have little or no knowledge of the language of the proceedings – leaving persons with basic or conversational knowledge of the language without assistance unless specifically requested by their lawyer.⁴⁴

B. RELEVANT PROVISIONS OF THE DIRECTIVE

The following paragraphs present the main provisions of the Directive and related legal arguments. Please refer to section C for further indications on how to use them in practice.

1. A mechanism to assess the interpretation needs

Article 2(4) requires Member States to establish a mechanism to assess the need for interpretation.

‘4. Member States shall 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 need the assistance of an interpreter.’

The Implementation Report notes that, as at 2018, only two Member States had set up a specific mechanism.⁴⁵ The vast majority of Member States assess the need for interpretation by asking the suspect or accused person questions or even just the question, ‘do you understand language X?’ – to determine their ability to understand the language of the proceedings.⁴⁶

⁴⁴ LEAP Survey Report, n1; TRAINAC Report, n35, p. 13; FRA Report, n11, pp. 32-33; JUSTICIA Network, [Inside Police Custody 2](#), December 2018, pp. 21-23; Fair Trials, [Where's my lawyer? Making legal assistance in pre-trial detention effective – Report](#), October 2019, p. 23.

⁴⁵ Implementation Report, n 41, p. 6.

⁴⁶ FRA Report, n11, p. 32.

2. When to determine interpretation needs

a. At the first police interrogation

The Directive imposes the obligation to provide interpretation and, accordingly, to assess the need for interpretation at **every stage of the proceedings**, including during the investigative stage. Article 2(1), establishing the right to interpretation in criminal proceedings, provides:

‘1. Member States shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, **without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning**, all court hearings and any necessary interim hearings.’ (emphasis added)

As indicated in the 2018 Implementation report, most Member States ensure interpretation at all stages of criminal proceedings and lay down the obligation to assess the need for interpretation at every stage of the proceedings.⁴⁷

But ECtHR case law stresses how vital it is to assess the person’s need for interpretation at the early stages of the proceedings, i.e. **at the first police interrogation**. The initial phase has a significant impact upon the conduct of the defence, and failure to provide interpretation risks impacting on the way the suspect makes statements which are likely to be used in the proceedings. The ECtHR specifically recognises the right to interpretation as an important protection during the investigative phase, drawing a parallel with the right of access to a lawyer:

‘24. The Court notes that the investigation stage has crucial importance for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered. Moreover, in order to safeguard against ill-treatment and to avoid incriminating statements made during police interrogation without access to a lawyer being used for a conviction, as a rule, access to a lawyer should be provided as **from the first interrogation of a suspect by the police**, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right (see, *inter alia*, *Salduz v. Turkey* [GC], no. 36391/02, §§ 54-55, 27 November 2008).

25. In the same line of reasoning, the assistance of an interpreter should be provided during the investigating stage unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.’⁴⁸ (emphasis added)

The Court repeatedly found that failure to provide interpretation at the police station may **undermine the fairness of the proceedings as a whole**, in particular if the evidence gathered during the interrogation is subsequently used to prosecute the suspected person:

⁴⁷ Implementation Report, n 41, pp. 4-5.

⁴⁸ ECtHR, [Diallo v. Sweden](#), App. no. 13205/07, Judgment of 5 January 2010, paras. 24-25.

*'The verification of the applicant's need for interpretation facilities at the time of his questioning by the police should have been a matter for the domestic court to adequately examine with a view to reassuring themselves that the absence of an interpreter [when the applicant was] in police custody would not have prejudiced the applicant's right to a fair trial.'*⁴⁹

The early failure to provide interpretation may impact the fairness of the proceedings **even if** the person was granted access to **interpretation in the subsequent stages of the proceedings**.

'54. The Court takes the view that, as the applicant was not able to have the questions put to her translated and was not made aware as precisely as possible of the charges against her, she was not placed in a position where she could fully assess the consequences of her alleged waiver of her right to remain silent or her right to be assisted by a lawyer and thus to benefit from the comprehensive range of services that can be performed by counsel. Accordingly, it is questionable whether the choices made by the applicant without the assistance of an interpreter were totally informed.

55. The Court finds that this initial defect thus had repercussions for other rights [...] and undermined the fairness of the proceedings as a whole.

*56. While it is true that the applicant enjoyed the assistance of an interpreter when she was brought before a judge following her police custody, the Court is of the opinion that this fact was not such as to cure the defect which had vitiated the proceedings at their initial stage.'*⁵⁰

b. Scope of the assessment obligation

The Directive imposes the obligation to assess the need for interpretation **in any circumstances, i.e. for any suspected or accused persons**. Indeed, the obligation applies to any suspect or accused person and is not limited, for instance, to persons who specifically request interpretation services or expressly state that they do not understand or speak the language of the proceedings.

In this respect, the Directive is much more robust than ECtHR case law. Past judgements seemed to limit the authorities' obligation to verify whether language assistance was needed to cases where the issue of language comprehension had been brought to their attention.⁵¹ Building on the Directive, the ECtHR recently clarified the duty to verify interpreting needs in *Vizgirda v. Slovenia*:

*' (...) it is incumbent on the authorities involved in the proceedings, in particular the domestic courts, to **ascertain whether the fairness of the trial requires, or has required, the appointment of an interpreter** to assist the defendant. In the Court's*

⁴⁹ ECtHR, [Amer v. Turkey](#), App. no 25720/02, Judgment of 13 January 2009, para. 83.

⁵⁰ ECtHR, [Baytar v. Turkey](#), App. no. 45440/04, Judgment of 14 October 2014, paras. 54-56. See also ECtHR, [Saman v. Turkey](#), App No 35292/05, Judgment of 5 April 2011, paras. 31 and 35.

⁵¹ See the dissenting opinion of Judges Kucsko-Stadlmayer and Bošnjak in [Vizgirda v. Slovenia](#), App. no. 59868/08, Judgment of 28 November 2018).

*opinion, this duty is **not confined to situations where the foreign defendant makes an explicit request for interpreting.** In view of the prominent place held in a democratic society by the right to a fair trial (see *Hermi*, cited above, § 76, and *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37), it arises **whenever there are reasons to suspect that the defendant is not proficient enough** in the language of the proceedings, for example if he or she is neither a national nor a resident of the country in which the proceedings are being conducted.⁵² (emphasis added)*

In other words, for the ECtHR, the competent authorities should assess the interpretation needs of a suspect or accused person:

- when the person explicitly requests it;⁵³ or
- whenever there are reasons to suspect that the defendant is not proficient enough.

The ECtHR considers that the following elements should lead the competent authorities to verify the defendant's interpreting needs:

- *the person is neither a national nor a resident of the country in which the proceedings are being conducted;*⁵⁴
- *the person is not a native speaker of the forum language;*⁵⁵
- *the person is illiterate;*⁵⁶
- *the person has difficulties in communicating with their counsel;*⁵⁷ or
- *the person is not able to read documents, for instance the statements drafted by the police.*⁵⁸

On the contrary, the following elements may demonstrate sufficient knowledge of the language:

- *The financial, social and cultural situation of the person, including the length of time spent in the country.*⁵⁹

Despite the ruling in *Vizgirda v. Slovenia*, the ECHR standard remains lower than the obligation established by the Directive. We strongly encourage you to rely on the Directive if you need to plead that the authorities should have assessed the interpretation needs of the suspect.

3. Who is responsible for determining interpretation needs

The Directive leaves it to the Member States to determine who has the responsibility for determining the need for interpretation. Recital 21 only refers to 'the competent authorities'. In

⁵² ECtHR, *Vizgirda v. Slovenia*, App. no. 59868/08, Judgment of 28 November 2018, para. 81.

⁵³ See also ECtHR, *Brožicek v. Italy*, App. no. 10964/84, Judgment of 19 December 1989, para. 41.

⁵⁴ ECtHR, *Vizgirda v. Slovenia*, App. no. 59868/08, Judgment of 28 November 2018, para. 81.

⁵⁵ ECtHR, *Amer v. Turkey*, App. no. 25720/02, Judgment of 13 January 2009, para. 82.

⁵⁶ ECtHR, *Saman v. Turkey*, App. No 35292/05, Judgment of 5 April 2011, para. 31.

⁵⁷ ECtHR, *Cuscani v. United Kingdom*, App. no. 32771/96, Judgment of 24 December 2002, para. 38.

⁵⁸ ECtHR, *Amer v. Turkey*, App. no. 25720/02, Judgment of 13 January 2009, para. 82.

⁵⁹ ECtHR, *Katritsch v. France*, App. no. 22575/08, Judgment of 4 November 2011, para. 45.

practice, police officers, prosecutors or judges are typically responsible for establishing the need for interpretation or translation.⁶⁰

However, ECtHR case-law makes it clear that **judges are the ultimate guardians of the fairness of the proceedings**. The court must assess the impact of the absence of language assistance on the whole proceedings, **even if the lawyer failed to raise the issue**:

*'The onus was thus on the judge to reassure himself that the absence of an interpreter [...] would not prejudice the applicant's full involvement in a matter of crucial importance for him. [...] the ultimate guardian of the fairness of the proceedings was the trial judge who had been clearly apprised of the real difficulties which the absence of interpretation might create for the applicant.'*⁶¹ (emphasis added)

*(...) it is incumbent on the authorities involved in the proceedings, in particular the domestic courts, to ascertain whether the fairness of the trial **requires, or has required**, the appointment of an interpreter to assist the defendant.'*⁶² (emphasis added)

*'As regards the lack of complaints by the applicant's counsel, the Court reiterates that although the conduct of the defence is essentially a matter between the defendant and his or her counsel, whether counsel has been appointed under a legal-aid scheme or privately financed, **the ultimate guardians of the fairness of the proceedings** – encompassing, among other aspects, the possible absence of translation or interpretation for a non national defendant – are **the domestic courts** (see *Hermi*, cited above, § 72, and *Cuscani*, cited above, § 39). **The failure by the applicant's legal representative to raise the issue of interpretation did not therefore relieve the domestic court of its responsibility** under Article 6 of the Convention.'*⁶³ (emphasis added)

4. How to determine interpretation needs

a. An individualised assessment

The Directive leaves it to the Member States to choose a procedure or mechanism to assess the interpretation needs. Article 2(4) calls for an **individualised assessment** and Recital 21 suggests that this may include a **direct consultation** with the person.

(21) ... Such procedure or mechanism implies that competent authorities verify in any appropriate manner, including by consulting the suspected or accused persons

⁶⁰ FRA Report, n11, p. 32.

⁶¹ ECtHR, [Cuscani v. United Kingdom](#), App. no 32771/96, Judgment of 24 December 2002, paras. 38-39. See also ECtHR, [Hermi v. Italy](#), App. no. 18114/02, Judgment of 18 October 2006, para. 72; ECtHR, [Katritsch v. France](#), App. no 22575/08, Judgment of 4 November 2011, para. 44.

⁶² ECtHR, [Vizgirda v. Slovenia](#), App. no. 59868/08, Judgment of 28 November 2018, para. 81.

⁶³ Ibid. para. 101.

concerned, whether they speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter.

The fact the Directive requires a 'procedure or a mechanism' implies that **similar criteria** must be used in reaching the decision in each case.

b. Of the person's ability to effectively conduct their defence in that language

The level of understanding the person must have to receive language assistance is determined in light of the aim of this assistance, which is to ensure that the person has the ability to **'fully' exercise their defence's rights and to safeguard the fairness of the proceedings:**

'(17) This Directive should ensure that there is free and adequate linguistic assistance, allowing suspected or accused persons who do not speak or understand the language of the criminal proceedings fully to exercise their right of defence and safeguarding the fairness of proceedings.'

'(22) Interpretation and translation under this Directive should be provided in the native language of the suspected or accused persons or in any other language that they speak or understand in order to allow them fully to exercise their right of defence, and in order to safeguard the fairness of proceedings.'

This echoes longstanding jurisprudence of the ECtHR:

'Interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events'.⁶⁴

This means that the authorities should assess whether **the person's proficiency in a specific language is sufficient to safeguard the fairness of the proceedings**, i.e. whether the person is able to conduct their defence effectively in that language. In *Vizgirda v. Slovenia*, the ECtHR held that:

*'91. (...) the Court cannot find any indication that the applicant was ever consulted as to whether he understood the interpreting and written translation into Russian **well enough to conduct his defence effectively in that language.***

95. (...) the few rather basic statements the applicant made during the hearing (...) cannot be regarded as sufficient to show that he was in fact able to conduct his defence effectively in that language.

97. In conclusion, although the applicant appeared to have been able to speak and understand some Russian, a fact which he has not denied (see paragraph 67 above),

⁶⁴ ECtHR, [Kamasinski v. Austria](#) App. no. 9783/82, Judgment of 19 December 1989) para. 74; [Güngör v. Germany](#), App. no. 31540/96, Decision of 17 May 2001, para. 1; [Hermi v. Italy](#), App. no. 18114/02, Judgment of 18 October 2006, para. 70; [Protopapa v. Turkey](#), App. no. 16084/90, Judgment of 24 February 2009, para. 80; [Vizgirda v. Slovenia](#), App. no. 59868/08, Judgment of 28 November 2018, para. 79.

*the Court does not find it established that **his proficiency in that language was sufficient to safeguard the fairness of the proceedings.***⁶⁵ (emphasis added)

In other words, if a person is not able to ‘fully’ understand and follow the criminal proceedings against them and exercise their defence rights, language assistance should be provided.

c. Based on the linguistic knowledge of the person and the complexity of the case

To determine if a person is able to conduct their defence effectively in the language of the proceedings, the ECtHR repeatedly held that the authorities should consider **the linguistic ability of the person in light of the specifics of the case**, and in particular the complexity of both the offence and the communications addressed to the person:

*‘ (...) the issue of the **defendant’s linguistic knowledge** is vital and that [the Court] must also examine the **nature of the offence** with which the defendant is charged and any **communications** addressed to him by the domestic authorities, in order to assess whether they are sufficiently complex to require a detailed knowledge of the language used in court.*⁶⁶ (emphasis added)

*Depending on different factors, such as the nature of the offence and the communications addressed to the defendant by the domestic authorities (see *Hermi*, cited above, § 71), a **number of open-ended questions** might be sufficient to establish the defendant’s language needs.*⁶⁷ (emphasis added)

Regarding the defendant’s linguistic knowledge, we mentioned earlier several factors considered by the ECtHR, such as the person’s ability to read documents in that language or the financial, social and cultural situation of the person, including the length of time spent in the country.⁶⁸

ECtHR case law provides further clarification:

- *‘The fact that the defendant has a **basic command of the language of the proceedings** or, as may be the case, a **third language** into which interpreting is readily available, should not by itself bar that individual from benefiting from interpreting into a language he or she understands well enough to fully exercise his or her defence rights.*⁶⁹ (emphasis added)
- *It is generally **not considered sufficient that the accused’s lawyer knows the language** used in court but not the accused. Interpretation of the proceedings is required as the right to a fair trial, which includes the right to participate in the*

⁶⁵ ECtHR, [Vizgirda v. Slovenia](#), App. no. 59868/08, Judgment of 28 November 2018, paras. 91, 95 and 97.

⁶⁶ ECtHR, [Hermi v. Italy](#), App. no. 18114/02, Judgment of 18 October 2006, para. 71; see also [Katritsch v. France](#), App. no. 22575/08, Judgment of 4 November 2011, para. 43; [Saman v. Turkey](#), App. No 35292/05, Judgment of 5 April 2011, para. 30; [Amer v. Turkey](#), App. no. 25720/02, Judgment of 13 January 2009, para. 78; [Güngör v. Germany](#), App. no. 31540/96, Decision of 17 May 2001, para 1.

⁶⁷ ECtHR, [Vizgirda v. Slovenia](#), App. no. 59868/08, Judgment of 28 November 2018, para. 84.

⁶⁸ See above Section B.2.b.

⁶⁹ ECtHR, [Vizgirda v. Slovenia](#), App. no. 59868/08, Judgment of 28 November 2018, para. 83.

hearing, requires that the accused be able to understand the proceedings and to inform his lawyer of any point that should be made in his defence.⁷⁰

- Suspects or accused persons who understand the language used in Court cannot insist upon the services of an interpreter to allow them to conduct their defence in another language, including a language of an ethnic minority of which they are members.⁷¹

It is interesting to mention here a ruling from the High Court of Ireland where the judge stressed the importance of verifying the ability of the person to understand the complexity and the nuance of legal and factual considerations:

*'The fact that a person answered the majority of question in an interview in English without the assistance of translation may not of itself indicate sufficient proficiency in the English language to understand the English language to understand the nuances of what was being asked. It is important to assess the complexity of the questions asked and also the content of the replies so that one can be sure that the questions were understood correctly and that the person had the ability to answer them fully. For example, many people may understand basic question of name, date of birth, address, family occupation in the language of the place they reside. They may even understand simple question (or instructions) given to them in that language. **Such basic fluency would not necessarily mean that they can conduct an interview in that second language** which requires either complex or nuanced legal and factual considerations. These must all be assessed by the trial judge.'*⁷²

In practice, according to the Implementation Report, as at 2018, only a couple of Member States set clear written procedure to assess the needs for interpretation. In the **Netherlands**, a directive from the Public Prosecution Service specifies the criteria to determine whether a person has sufficient knowledge of Dutch, in particular whether the suspect understands the questions put to them, is able to give their own reading of the events and to nuance it. If, for example, the person is only able to answer questions with 'yes' or 'no', the directive concludes that the suspect does not have sufficient knowledge. If any doubt exists, the directive requires calling for an interpreter, at least initially.⁷³ In **Poland**, the Prosecutor General guidelines notes that an interview should assess whether non-Polish citizens have been able to develop knowledge of the Polish language due to family or personal relationships, or through other circumstances. However, the guidelines impose the proficiency check for non-Polish citizens only.⁷⁴

In the absence of national mechanism, courts have started to develop guidelines on this issue. In **Hungary**, the Supreme Court ruled in 2014 that it is not enough to ask a person whether they

⁷⁰ ECtHR, [Kamasinski v. Austria](#) App. no 9783/82, Judgment of 19 December 1989, para. 74; [Cuscani v. the United Kingdom](#), App. no. 32771/96, Judgment of 24 December 2002, paragraph 38.

⁷¹ ECtHR, [Bideault v. France](#), App. no. 11261/84, Commission decision of 1 October 1986; ECtHR, [Lagerblom v. Sweden](#), App. no. 26891/95, Judgment of 14 January 2003, para. 62.

⁷² High Court of Ireland, [The Director of Public Prosecution \(at the suit of Detective Garda Patrick Fahy\) v. Darius Savickis](#), Judgement of 16 July 2019 by Ms. Justice Donnelly, para. 67.

⁷³ Netherlands Public Prosecution Service, [Aanwijzing bijstand van tolken en vertalers in het opsporingsonderzoek in strafzaken](#), 1 January 2014.

⁷⁴ FRA Report, n11, p. 33.

understand the language of the proceedings. The competent authority must specifically ask whether the person prefers to use their native language during the proceedings – the person does not need to demonstrate whether they speak or understand Hungarian.⁷⁵ The new code of criminal procedure indicates that an interpreter should be provided ‘*if a person participating in criminal proceedings wishes to use his or her non-Hungarian mother tongue, national mother tongue or other mother tongue specified in an international treaty promulgated by law*’ unless it would be disproportionately difficult and the suspect or the accused know another third language.⁷⁶ In **Italy**, the Judicial and Appellate Court of Milan advised the competent authorities to take in to account elements such as the time spent in Italy, the possession of Italian documents or the performance of work activities in Italy.⁷⁷

5. Justification of the decision not to provide interpretation

As a matter of principle, EU law requires the provision of reasons upon which a decision is taken to enable the affected person to defend their rights.⁷⁸

ECtHR case law specifically obliges **the authorities to justify any decision not to provide interpretation**. In other words, the **burden of proof is on the judicial authorities** to prove that the person sufficiently understands the language of the court, and not for the person to prove they did not:⁷⁹

‘(...) On receipt of this request [to provide language assistance], the Italian judicial authorities should have taken steps to comply with it so as to ensure observance of the requirements of [Article 6(3)(a)], unless they were in a position to establish that the applicant in fact had sufficient knowledge of Italian (...) (emphasis added)’⁸⁰

‘(...) the assistance of an interpreter should be provided during the investigating stage unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.’⁸¹

⁷⁵ Judicial Decision 203/2014 of the Criminal Department of the Supreme Court of Hungary (203/2014 számú Büntető határozat) cited in FRA Report, n11, p. 32

⁷⁶ Section 78 of [Hungarian Act XC of 2017 on criminal proceedings](#) which entered into force on 1 July 2018 (unofficial translation).

⁷⁷ Corte di Appello di Milano, [D. Lgs. 4 marzo 2014 n. 32 in materia di interpretazione e traduzione nei procedimenti penali; prassi applicative](#), 4 March 2014.

⁷⁸ See CJEU, Joined Cases C-584/10 P etc., *Commission and Others. v. Kadi* [ECLI:EU:C:213:518], para. 100.

⁷⁹ See also James Brannan, [ECHR case-law on the right to language assistance in criminal proceedings and the Europe response](#), October 2010, p. 5.

⁸⁰ ECtHR, [Brožicek v. Italy](#), App. no. 10964/84, Judgment of 19 December 1989, para. 41.

⁸¹ ECtHR, [Diallo v. Sweden](#), App. no. 13205/07, Judgment of 5 January 2010, paras. 24-25 ; [Saman v. Turkey](#), App No 35292/05, Judgment of 5 April 2011, para. 30; [Baytar v. Turkey](#), App. no. 45440/04, Judgment of 14 October 2014, paras 50 ff.; [Knox v. Italy](#), App. no 76577/13, Judgment of 24 January 2019, para. 183.

6. Record-keeping

Article 7 of the Directive which establishes the obligation to keep records does not include the assessment of the interpreting needs. However, Article 2(5) guarantees the right to challenge a decision finding that there is no need for interpretation. Thereby, the Directive implicitly recognises the existence of a decision which should be recorded.

ECtHR case-law is clearer and recommends noting both the procedure used and the decision taken regarding the assessment of interpretation needs:

*'Lastly, the Court draws attention to the importance of noting in the record **any procedure used and decision taken with regard to the verification of interpreting needs, any notification of the right to an interpreter** (see paragraphs 86 and 87 below) **and any assistance provided by the interpreter**, such as oral translation or oral summary of documents, so as to avoid any doubts in this regard that may be raised later in the proceedings (see, mutatis mutandis, *Martin v. Estonia*, no. 35985/09, § 90, 30 May 2013, and paragraphs 57 and 60 above).⁸²*

7. The right to challenge refusals to provide interpretation

Article 2(5) of the Directive guarantees the right to challenge any decision finding the suspect or accused person has no interpretation needs:

'5. Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for interpretation (...).'

Recitals 25 specifies that Member States can decide how to secure that right, i.e. by using existing systems for remedies or by establishing a separate mechanism for lodging and examining complaints.

'(25) The suspected or accused persons or the persons subject to proceedings for the execution of a European arrest warrant should have the right to challenge the finding that there is no need for interpretation, in accordance with procedures in national law. That right does not entail the obligation for Member States to provide for a separate mechanism or complaint procedure in which such finding may be challenged and should not prejudice the time limits applicable to the execution of a European arrest warrant.'

⁸² ECtHR, *Vizqirda v. Slovenia*, App. no. 59868/08, Judgment of 28 November 2018, para. 85. For more information on the notification of the right to an interpreter, refer to Fair Trials' [Toolkit on the Right to Information Directive](#), p. 25.

The Directive doesn't indicate the type of authority responsible for hearing these complaints, but Article 47 of the EU Charter on the right to effective remedy for violation of EU law requires such complaints to be subject to effective **judicial oversight**.⁸³

This is also echoed in the jurisprudence of the ECtHR. As mentioned earlier, the ECtHR recognised that the judge, as the ultimate guardian of the fairness of the proceedings, should consider whether the fairness of the trial required the appointment of an interpreter at the time of questioning by the police.⁸⁴

If the judge finds that the police decision violated the right to interpretation as guaranteed by the Directive, they should take remedial action in order to safeguard the fairness of the proceedings, e.g. issuing an order to repeat pre-trial actions done in the absence of interpretation or pronounce their invalidity, refusing to rely on their results etc.⁸⁵

The 2018 Implementation Report notes that 10 Member States – including, **Bulgaria, Greece, Luxembourg, Slovenia** and the **UK**⁸⁶ – introduced new procedures, the remaining Member States – such as **Austria, Czech Republic** or **Latvia**⁸⁷ – chose to rely on existing general procedure for appealing against any investigating or court decisions.⁸⁸ However, in some of these States, such complaints are only admitted at the conclusion of the proceedings. For instance, in **Belgium, Croatia, Germany, Ireland, Italy** and **Poland**, the absence of interpretation or translation would only constitute grounds for appeal.⁸⁹

C. USING THE DIRECTIVE IN PRACTICE

We invite you to rely upon the Directive preventively to ensure that violations do not occur in the first place. By disputing the alleged violation at the early stages, you will also create a record which may be used later in the proceedings.

1. Request interpretation at the police station (if you are there)

Bearing in mind the above, you should request and explain why interpretation is needed before the first interrogation of your client starts:

- Ensure police are made aware in an unequivocal manner that interpretation is needed.

⁸³ See Fair Trials' [Toolkit on Charter of Fundamental Rights of the European Union](#), Part III Section 1 on the right to an effective remedy (Article 47(1)).

⁸⁴ See above Sections B.2.a. and B.3., and notably ECtHR, [Amer v. Turkey](#), App. no 25720/02, Judgment of 13 January 2009, para. 83.

⁸⁵ See ECtHR case-law mentioned in Section B.2.a.

⁸⁶ FRA Report, n11, p. 56.

⁸⁷ FRA Report, n11, p. 57.

⁸⁸ Implementation Report, n 41, pp. 6-7.

⁸⁹ FRA Report, n11, p. 57.

- Tell the police that they have the obligation to assess the interpretation needs (Article 2(4) and Recital 21 of the Directive. Stress any factors in favour of interpretation being granted (e.g. your client is neither a national nor a resident of the country in which the proceedings are being conducted, etc. – see ECtHR case law).
- If your client can speak the language to some extent, underline why you believe they have not sufficient knowledge in light of the specifics of the case (Recitals 17 and 22 of the Directive and ECtHR case law): discuss the case a little with them to check whether they understand the questions put to them, are able to give their own reading of the events and to nuance it. Take note of any issues which cause difficulty.
- Tell the police that they must justify their decision not to provide interpretation (ECtHR case law), ask them to enumerate their reasons for concluding that the person speaks and understands the language well enough to conduct their defence effectively in that language.
- Ensure the procedure used to assess the interpretation needs (if any), the decision taken and its reasons, as well as the basis of your objection, are recorded in writing (Article 2(5) of the Directive).

2. Challenge the decision finding that there is no need for interpretation

If the initial decision at the police station is to proceed without an interpreter, you obviously need to argue if you think an interpreter is needed.

- Refuse to proceed with the questioning and complain to the authority specifically designated by the law implementing the Directive if your State opted to set a specific complaint procedure (Article 2(5) of the Directive).
- If there is no specific challenge mechanism available, complain to a higher authority (e.g. superior police officer, prosecutor), if there is one.
- In any case, ensure a record is created at the time the decision is taken, including the procedure used to assess the interpretation needs (if any), the decision taken and the reasons for finding there is no need for interpretation (Article 2(5) of the Directive).
- Set out the basis of your objection, namely that in light of the specifics of the case, in particular the complexity of the offence, your client does not understand the language of the questioning – well enough – to conduct their defence effectively in that language (Recitals 17 and 22 of the Directive and ECtHR case law). Ensure that your objection and arguments are recorded by authorities in writing.
- Use these records later on when making your argument to the court, in the context of any pre-trial hearings, discussions about the admissibility of evidence, or the discussion as to whether any weight can be attached to the evidence collected during the police questioning.

- Stress that the court, as the ultimate guardian of the fairness of the proceedings, needs to consider whether the fairness of the trial required the appointment of an interpreter at the time of questioning by the police (ECtHR case law).
- Call on the court to take remedial action in order to safeguard the fairness of the proceedings (Article 47 of the Charter and ECtHR case law), e.g. issuing an order to repeat pre-trial actions done in the absence of interpretation or pronounce their invalidity, refusing to rely on their results.

III – QUALITY OF INTERPRETATION

A. THE ISSUE

If the suspect needs interpretation, and the interpretation does not enable effective communication, a risk of unfairness arises. The suspect may misunderstand questions from police or the judge and answer incorrectly. His own answers may be misinterpreted. Statements may be made which appear incriminatory due to bad interpretation, and factual inconsistencies may arise vis-à-vis later statements, damaging the person's credibility and their prospects of defence.

Lawyers across Europe describe a number of recurrent problems with the quality of interpretation, in particular at the police station:

- There are not always clear requirements for **certification or specific qualification** in order to act as a legal interpreter.⁹⁰ Sometimes there are no requirements or these are very minimal. As a result, interpreters are sometimes selected on the basis of fluency in the relevant language. Interpreters often lack training and the specific skills for legal interpretation and translation. There are doubts about the quality of interpretation where specialist legal or technical terms are used, or when minority languages or dialects are involved. Some interpreters routinely volunteer their services for languages in which they are not expert.
- **Registers**, when they exist, are not always mandatory. They may also contain a lot of outdated or unpractical information such as postal addresses. The situation is particularly problematic at the police station where the urgency to find an interpreter 'without delay' leads the police officer to use interpreters or translators which are not registered or certified, at the expense of quality safeguards. In some Member States, police may simply call any person who is believed to speak the required foreign language – be it another police officer or just a relative of the person interrogated. This is particularly seen when rare languages are needed or for cost efficiency reasons.
- Some countries use **different systems to select interpreters for police questioning and court hearings**. It is usually reported that the police station system is much more informal, with fewer guarantees of quality.
- The issues of **independence** and **confidentiality** are also matters of concerns, especially in police station. Interpreters have commercial relationships with the police, who often turn to the same few interpreters. Police officers themselves act as interpreters. Besides, unregistered or uncertified interpreters are not governed by ethics codes.
- **Lawyers** are usually unable to identify any issues relating to interpretation, unless they happen to speak the language. They often lack training on working with interpreters in criminal cases.

⁹⁰ For an overview of the required qualifications for legal interpreters or translators to be included in national registers in EU Member States, see FRA Report, n11, p. 48 (note however that this table dates from 2016).

- **Remedies for poor quality interpretation are limited.** Sometimes such concerns only lead to the replacement of the current interpreter without assessing properly the impact the substandard interpretation has had on the fairness of the proceedings. The lack of objective evidence, such as audio-visual recordings, make it difficult to challenge poor quality interpretation.⁹¹

B. RELEVANT PROVISIONS OF THE DIRECTIVE

The following paragraphs present the main provisions of the Directive and related legal arguments. Please refer to section C for further indications on how to use them in practice.

1. The right to interpretation of sufficient quality

Article 2(1) and Article 2(8) of the Directive specify:

'1. Member States shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings.

(...)

8. Interpretation provided under this Article shall **be of a quality sufficient to safeguard the fairness of the proceedings**, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence.' (emphasis added)

Neither the Directive nor the ECtHR distinguish whether interpretation is provided at the police station or at the court. This means that the quality required is the same throughout the whole proceedings.

The Directive provisions on quality echo longstanding case-law of the ECtHR which sets out that:

*'Interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events'.*⁹²

⁹¹ LEAP Survey Report, n1, pp. 22-27; TRAINAC Report, n35, p. 13 and pp. 19-22 and 25-30, FRA Report, n11, pp. 44-56; JUSTICIA Network, [Inside Police Custody 2](#), December 2018, pp. 26-28; Fair Trials, [Where's my lawyer? Making legal assistance in pre-trial detention effective – Report](#), October 2019, pp. 23-24. For additional challenges raised by remote interpretation, see Nigel Fielding, Sabine Braun and Graham Hieke, [Video Enabled Justice Evaluation](#), Final Report Version 11, March 2020, Sections 8.2. and 8.3.

⁹² ECtHR, [Kamasinski v. Austria](#) App. no 9783/82, Judgment of 19 December 1989) para. 74; [Güngör v. Germany](#), App. no. 31540/96, Decision of 17 May 2001, para. 1; [Hermi v. Italy](#), App. no. 18114/02, Judgment of

The ECtHR thus links adequacy of interpretation to the effective exercise of other rights, in particular that of being informed of the case against one (Article 6(3)(a)) and being able to defend oneself (Article 6(3)(b)). In this respect, the ECtHR recently noted that the interpretation must not simply enable the accused to partially understand but to “**actively participate**” in the proceedings:

‘It has not been established in the present case that the applicant received language assistance which would have allowed him to actively participate in the trial against him. This, in the Court’s view, is sufficient to render the trial as a whole unfair. There has accordingly been a violation of Article 6 §§ 1 and 3 of the Convention’⁹³

Adequate interpretation ensures that the right to interpretation is ‘concrete and effective’.⁹⁴

2. States’ obligation to adopt measures to ensure quality

Article 5 of the Directive includes some general requirements to ensure the quality of the interpretation:

‘1. Member States shall take **concrete measures** to ensure that the interpretation and translation provided **meets the quality** required under Article 2(8) and Article 3(9).
2. In order to promote the adequacy of interpretation and translation and efficient access thereto, Member States shall **endeavour to establish a register** or registers of **independent** translators and interpreters who are **appropriately qualified**. Once established, such register or registers shall, where appropriate, be made available to legal counsel and relevant authorities.
3. Member States shall ensure that interpreters and translators be required to observe **confidentiality** regarding interpretation and translation provided under this Directive.’
(emphasis added)

Article 5(1) requires Member States to adopt **concrete measures** to ensure interpretation services are of a quality “*sufficient to safeguard the fairness of the proceedings*” (Articles 2(8) and 3(9)). We argue that ‘*the proceedings*’ here refer to a given case, meaning that States must adopt measures to ensure the quality of interpretation in each case, for instance by requesting audio-visual record of the interviews.

According to Article 5(2), Member States may, but are not required to, establish a **register** of appropriately qualified and independent interpreters, nor are they obliged to make them mandatory if they opt for one. Nothing is said either as to what is considered an appropriate qualification. Article 5(2) does however suggest that professional status is relevant in assessing

18 October 2006, para. 70; [Protopapa v. Turkey](#), App. no. 16084/90, Judgment of 24 February 2009, para. 80; [Vizgirda v. Slovenia](#), App. no. 59868/08, Judgment of 28 November 2018, para. 79.

⁹³ ECtHR, [Vizgirda v. Slovenia](#), App. no. 59868/08, Judgment of 28 November 2018, paras. 102-103.

⁹⁴ ECtHR, [Knox v. Italy](#), App. no. 76577/13, Judgment of 24 January 2019, para. 182.

quality. This is also – surprisingly – the only provision in the Directive which refers to the ‘**independence**’ of the interpreters in relation to quality.

Our understanding is that these provisions impose **systemic obligations** upon Member States. They are not intended to confer direct rights upon individuals. However, as mentioned earlier, the CJEU recognises that a provision which requires Member States to ‘pursue a particular course of conduct’ may be invoked in national courts by individuals if the national authorities have overstepped the limits of their discretion.⁹⁵

In this case, Article 5 of the Directive leaves Member States broad discretion as to what to do but it does require them to do *something*. An individual could therefore invoke such provisions to argue that the national authorities have failed to adopt *any* measure to ensure the interpretation of sufficient quality.

➔ Where an issue is raised as to interpretation, argue that regard should be had to the extent to which the Member State has taken ‘concrete measures’ to ensure that interpretation in this particular case meets the required standard. The failure to have in place a system capable of ensuring adequacy of interpretation in the proceedings in question means there is no guarantee of the adequacy of the interpretation. The court should take this into account when reaching its decision.

A request for a preliminary ruling invites the CJEU to clarify these obligations and, in particular, whether States have the obligation to adopt alternative measures if they fail to create a register. The request is still pending at the moment:

‘Must Article 6(1) TEU and Article 5(2) of Directive 2010/64/EU¹ be interpreted as meaning that, in order to guarantee the right to a fair trial for defendants who do not speak the language of the proceedings, a Member State must create a register of properly qualified independent translators and interpreters or — failing that — ensure by some other means that it is possible to control the quality of language interpretation in court proceedings?’⁹⁶

It is important to stress that the Directive goes **much further than ECtHR case law** since the latter does not require any specific qualifications to serve as an interpreter, nor is there a formal requirement of independence or impartiality.

*‘The Court considers that it is not appropriate under Article 6 § 3(e) to lay down any detailed conditions concerning the method by which interpreters may be provided to assist accused persons. An interpreter is not part of the court or tribunal within the meaning of Article 6 § 1 and there is **no formal requirement of independence or impartiality as such**. The services of the interpreter must provide the accused with effective assistance in conducting his defence and the interpreter’s conduct must not be of such a nature as to impinge on the fairness of the proceedings. The fact that the*

⁹⁵ CJEU, Case 51/76 *Verbond van Nederlandse Ondernemingen* [ECLI:EU:C:1977:12](#), para. 23.

⁹⁶ CJEU, [Case C-564/19](#), Request for a preliminary ruling from the Pesti Központi Kerületi Bíróság (Hungary) lodged on 24 July 2019 — Criminal proceedings against IS.

interpreter was called by the police to the police station to interpret for the applicant during police interview does not in the Court's view disclose any irregularity or oppression.' (emphasis added)

For the ECtHR, the key question is whether the suspect or accused person can understand and make themselves understood sufficiently to be actively involved in the proceedings. It does not matter whether the interpretation is done by a police officer or a relative of the suspect if the assistance satisfies the requirements of Article 6 of ECHR, i.e. it is 'effective' and 'not of such nature as to impinge on the fairness of the proceedings'.⁹⁷ We therefore encourage you to rely on the Directive if you need to plead that an interpreter lacks the necessary qualifications.

In practice, as at 2018, at least 18 Member States – Austria, Belgium, Bulgaria, Cyprus, Croatia, the Czech Republic, Estonia, Finland, France, Germany, Greece, Luxembourg, the Netherlands, Poland, Romania, Slovakia, Slovenia, and Sweden (Denmark, although not bound by the directive, has one as well) – have established a **register**. Some of these States chose a central register system maintained by the Ministry of Justice or other public agencies. Others opted for multiples registers maintained by the courts. So far, at least nine Member States – **Austria, the Czech Republic, Greece, Croatia, the Netherlands, Romania, Slovakia, Slovenia**⁹⁸ and more recently **Belgium**⁹⁹ – explicitly oblige criminal justice stakeholders to use this register when choosing a legal interpreter or translator. As mentioned at the start of this section, even when they are mandatory, some registers contain outdated information, lack practical contact details, or are simply disregarded in practice as unregistered interpreters tend to be available more quickly. Besides, the required qualifications for legal interpreters or translators to be included in these registers vary broadly among Member States, and are, in some cases, very lenient.¹⁰⁰

Some Member States have also adopted initiatives to improve the quality of interpreters and translators. Poland, for instance, adopted a set of national **recommendations**, including raising the wages of listed interpreters, ensuring interpreters receive basic information concerning the case, training interpreters on legal procedure, updating the list of interpreters, and providing a Ministry of Justice's glossary of the names of the institutions, legislation and legal concepts.¹⁰¹ A report from European bar associations also formulates similar recommendations. It notably calls for the **audio/video recordings** of all interviews to check interpreting needs in the absence of interpretation and to monitor the quality of interpretation if provided.¹⁰² The EU Agency for Fundamental Rights recommends the use of remote interpretation and cross-border cooperation to access foreign qualified interpreters when there is no qualified interpreter available locally.¹⁰³ While the use of

⁹⁷ ECtHR, *Ucak v. the United Kingdom*, App. no. 44234/98 (Decision of 24 January 2002); James Brannan, [ECHR case-law on the right to language assistance in criminal proceedings and the Europe response](#), October 2010, pp. 8-10.

⁹⁸ FRA Report, n11, p. 47.

⁹⁹ SPF Justice, [Nouvelles mesures légales \(depuis le 29 décembre 2019\)](#), 29 December 2019.

¹⁰⁰ FRA Report, n11, pp. 45-50.

¹⁰¹ TRAINAC Report, n35, pp. 21-22.

¹⁰² TRAINAC Report, n35, pp. 6-7.

¹⁰³ FRA Report, n11, p.11-12 and 56.

communication technology is specifically authorised by Article 2(7) of the Directive, it also raises some risks which should be fully considered.¹⁰⁴

Article 2(7). ‘Where appropriate, communication technology such as videoconferencing, telephone or the Internet may be used, unless the physical presence of the interpreter is required in order to safeguard the fairness of the proceedings.

We invite you to consult the e-justice portal of the European Commission which includes [a page to find legal interpreters and interpreters in each EU Member States](#). You should be able to obtain more detail information on issues such as the body hosting the relevant national register (if any), the rules applying for recourse to translators and interpreters, training/qualifications of translators and interpreters and the costs. Unfortunately, not all the pages are updated but they usually direct you to the relevant national page.

3. Record-keeping

Article 7 of the Directive requires the authorities to record the fact that an interpreter was present.

Member States shall ensure that when a suspected or accused person has been subject to questioning or hearings by an investigative or judicial authority with the assistance of an interpreter pursuant to Article 2 (...) it will be noted that these events have occurred, using the recording procedure in accordance with the law of the Member State concerned.

As at 2018, all Member States but one impose the obligation to hold a record that interpretation was provided and in which form. Most of them include this in reports or minutes. Some also provide for audio or video recordings of police interrogations and court hearing– notably **Austria, Croatia, Finland, Hungary, Lithuania, Portugal and Spain**.¹⁰⁵ Such recordings may provide crucial evidence to challenge the quality of interpretation services provided.

4. Quality issues

The following sections detail the provisions of the Directive regarding complaints about, and control of, the adequacy of the interpretation. For further guidance on how to use them in practice, please

¹⁰⁴ Research on video-mediated interpreting in legal setting identified several difficulties, see notably [AVIDICUS \(Assessment of Videoconference Interpreting in the Criminal Justice Service\) Projects](#) webpage and in particular [AVIDICUS 3 Handbook of Bilingual Videoconferencing](#) (June 2016), providing practical guidelines on the use of videoconference in legal proceedings conducted with the assistance of an interpreter. See also Nigel Fielding, Sabine Braun and Graham Hieke, [Video Enabled Justice Evaluation](#), Final Report Version 11, March 2020, Sections 8.2. and 8.3; [NETPRALAT recommendations](#) on lawyer-client communication with remote interpreter.

¹⁰⁵ FRA Report, n11, p. 58; Implementation Report, n 41, p. 12.

refer to section C ‘Using the Directive in practice’. Section C also includes general advice on working with interpreters to prevent quality issues from occurring.

a. Right to complain

The Member States’ obligation to ensure the quality of interpretation is strengthened by the right to complain about the quality of the interpretation provided in Article 2(5) of the Directive:

‘5. Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for interpretation and, when interpretation has been provided, the **possibility to complain** that the quality of the interpretation is not sufficient to safeguard the fairness of the proceedings.’ (emphasis added)

While Article 2(5) uses a different terminology for complaints about refusals to provide interpretation (‘the right to challenge’) and those about the quality of the interpretation (‘possibility to complain’), Member States do not seem to rely on this distinction in practice.¹⁰⁶ For both types of complaints, the Directive leaves it to the Member States to decide how to secure that right, i.e. by using existing systems for remedies or establishing a separate mechanism for lodging and examining complaints.¹⁰⁷

The Directive doesn’t indicate the type of authority responsible for hearing these complaints, but Article 47 of the EU Charter on the right to effective remedy for violation of EU law requires such complaints to be subject to effective **judicial oversight**.¹⁰⁸

The 2018 Implementation Report notes that 15 Member States – including, **Bulgaria, Greece, Luxembourg, Slovenia** and the **UK**¹⁰⁹ – introduced a new procedure to complain, but the remaining Member States – such as **Austria, Czech Republic** or **Latvia**¹¹⁰ – chose to rely on the existing general procedure for appealing any investigating or court decisions.¹¹¹ However, in some countries, such complaints are only admitted at the conclusion of the proceedings. For instance, in **Belgium, Croatia, Germany, Ireland, Italy** and **Poland**, the inadequate interpretation or translation would only constitute grounds for appeal.¹¹²

b. Retroactive judicial control ‘when put on notice’

In line with the opportunity to complain, Recital 24, rephrasing the jurisprudence of the ECtHR, provides for a control of the adequacy of the interpretation by the competent authorities.

¹⁰⁶ Implementation Report, n41, pp. 6-7; FRA Report, n11, pp. 56-59. Interestingly, more Member States have established specific complaint procedures to challenge the quality of interpretation than for refusals to provide interpretation.

¹⁰⁷ See Recitals 25 of the Directive clarifying this for complaints about the absence of interpretation.

¹⁰⁸ See Fair Trials’ [Toolkit on Charter of Fundamental Rights of the European Union](#), Part III Section 1 on the right to an effective remedy (Article 47(1)).

¹⁰⁹ FRA Report, n11, p. 56.

¹¹⁰ FRA Report, n11, p. 57.

¹¹¹ Implementation Report, n 41, pp. 6-7.

¹¹² FRA Report, n11, p. 57.

‘(24) Member States should ensure that **control** can be exercised over the adequacy of the interpretation and translation provided **when the competent authorities have been put on notice** in a given case’. (emphasis added)

*‘In view of the need for the right guaranteed by [Article 6(3)(e)] to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided’.*¹¹³

Recital 24 indicates that the authorities should be able to exercise this retroactive control **when ‘put on notice’**. As apparent from ECtHR case law, we argue that the authorities should exercise a retroactive control over the adequacy of interpretation not only when the issue is **specifically raised by the defence** but also when **other factual situations** arising in the context of the national proceedings alert the courts of a possible issue with the adequacy of interpretation.¹¹⁴ Examples in the ECtHR’s case-law include:

- *the sentencing court becoming aware of difficulties experienced by the lawyer in communicating with his client in the language of the court;*¹¹⁵
- *the fact that the interpreter was simply a member of the accused person’s family present in the corridor;*¹¹⁶ and
- *the fact that the interpreter was another police officer who went beyond the functions of interpreter by trying to forge a human and emotional relationship with the suspect, taking on the role of mediator and acquiring a maternal attitude.*¹¹⁷

This list is certainly not exhaustive. For instance, in *Vizgirda v. Slovenia*, Fair Trials made a third party intervention arguing that ‘when interpretation is provided in a language other than the native language of the accused, this should automatically put the authorities on notice and trigger their obligation to verify the adequacy of the interpretation’.¹¹⁸ This case was specific, however, as the authorities had failed to make any assessment of the defendant ability to conduct his defence in the third language. The ECtHR did not directly address Fair Trials’ argument but stressed that a lack of

¹¹³ ECtHR, *Kamasinski v. Austria* App. no 9783/82, Judgment of 19 December 1989) para.74; *Güngör v. Germany*, App. no. 31540/96 (Decision of 17 May 2001); *Cuscani v. United Kingdom* App. no 32771/96, Judgment of 24 December 2002, para. 39; *Hermi v. Italy*, App. no. 18114/02, Judgment of 18 October 2006, para. 70; *Protopapa v. Turkey*, App. no. 16084/90, Judgment of 24 February 2009, para. 80; *Diallo v. Sweden*, App. no. 13205/07, Judgment of 5 January 2010, para. 23; *Hacıoglu v. Romania*, App. no. 2573/03, Judgment of 11 January 2011) para 88; *Vizgirda v. Slovenia*, App. no. 59868/08, Judgment of 28 November 2018, paras. 75-79; *Knox v. Italy*, App. no 76577/13, Judgment of 24 January 2019, para. 182.

¹¹⁴ See *Fair Trials’ third party intervention* in ECtHR, *Vizgirda v. Slovenia*, App. no. 59868/08, Judgment of 28 November 2018, para. 72.

¹¹⁵ ECtHR, *Cuscani v. United Kingdom* App. no 32771/96, Judgment of 24 December 2002, para. 38.

¹¹⁶ ECtHR, *Baytar v. Turkey*, App. No 45440/04, Judgment of 14 October 2014, paragraph 57.

¹¹⁷ ECtHR, *Knox v. Italy*, App. no 76577/13, Judgment of 24 January 2019, para. 185.

¹¹⁸ *Fair Trials’ third party intervention* in ECtHR, *Vizgirda v. Slovenia*, App. no. 59868/08, Judgment of 28 November 2018) (also summarised at para. 72).

any request for a different interpreter or complaint in this regard until later in the proceedings should by no means be regarded as determinative:

*‘As regards the lack of complaints by the applicant’s counsel [to replace the interpreter], the Court reiterates that although the conduct of the defence is essentially a matter between the defendant and his or her counsel, whether counsel has been appointed under a legal-aid scheme or privately financed, **the ultimate guardians of the fairness of the proceedings** – encompassing, among other aspects, the possible absence of translation or interpretation for a non national defendant – are **the domestic courts** (see *Hermi*, cited above, § 72, and *Cuscani*, cited above, § 39). **The failure by the applicant’s legal representative to raise the issue of interpretation did not therefore relieve the domestic court of its responsibility** under Article 6 of the Convention.¹¹⁹ (emphasis added)*

ECtHR case law makes it clear that **judges are the ultimate guardians of the fairness of the proceedings**.¹²⁰

c. Replacement and *ad hoc* remedial actions

If the judge finds that the interpretation provided was **not of sufficient quality** to enable the suspect or accused person to actively participate in the proceedings, they should take **remedial action** in order to safeguard the fairness of the proceedings, in accordance with Article 47 of the Charter.

Recital 26 of the Directive considers the possibility to **replace the appointed interpreter**.

‘(26) When the quality of the interpretation is considered insufficient to ensure the right to a fair trial, the competent authorities should be able to replace the appointed interpreter.’

This possibility is provided in most Member States.¹²¹ However, this may not always be a sufficient response, for instance if incriminating evidence has already been collected through substandard interpretation because the issue was not discovered on time or because the replacement was not provided despite being requested.

No other guidance is given by the Directive on the remedies that should apply in the event of poor quality interpretation. ECtHR case-law indicates that relying on evidence obtained through inadequate interpretation may affect the exercise of other defence rights and **prejudice the fairness of the proceedings as a whole**.

- *Violation of Article 6(3)(e) due to the failure to ensure adequate interpretation when it was known the defendant in a sentencing hearing had difficulty*

¹¹⁹ ECtHR, *Vizgirda v. Slovenia*, App. no. 59868/08, Judgment of 28 November 2018, para. 101. In doing so, the Court followed the argument set in *Fair Trials’ third party intervention* in ECtHR, *Vizgirda v. Slovenia*, App. no. 59868/08, Judgment of 28 November 2018) (also summarised at para. 72).

¹²⁰ See on the lack of interpretation: ECtHR, *Cuscani v. United Kingdom*, App. no. 32771/96, Judgment of 24 December 2002, paras. 38-39. See also ECtHR, *Hermi v. Italy*, App. no. 18114/02, Judgment of 18 October 2006, para. 72; ECtHR, *Katritsch v. France*, App. no. 22575/08, Judgment of 4 November 2011, para. 44.

¹²¹ Implementation Report, n 41, p. 7; FRA Report, n11, p. 58.

communicating, the court instead relying on the ‘untested language skills’ of a family member who happened to be in court;¹²²

- *No violation of Article 6(3)(e) in respect of an interview conducted in French by a Swedish customs officer, in that the officer had taken careful measures to check communication was effective and the court had, subsequently, assured itself that it was safe to rely upon the evidence based on those checks. ECtHR found that the national Court did exercise a sufficient degree of control of the adequacy of interpretation and stressed that the disputed statement was far from the only evidence in the criminal proceedings and that there was nothing to indicate that it was decisive to the outcome of the case.¹²³*
- *Violation of the right to a fair trial (Article 6 §1 ECHR) and the right to interpretation (Article 6 §3(e) ECHR) due to the failure of the domestic courts to examine the allegations of inadequate services of an interpreter during police interrogation. ECtHR found that this initial defect had repercussions for other rights and undermined the fairness of the proceedings as a whole.¹²⁴*

As it emerges from ECtHR findings, the judge should assess **the adequacy of the interpretation before relying on the evidence. However, the impact of inadequate interpretation is very fact-specific** and depends on what evidence there happens to be in the file before the court as well as the degree of control already exercised by the domestic courts. The ECtHR often found that the domestic authorities sufficiently addressed complaints about quality.¹²⁵ It is hoped the CJEU may offer some further guidance on the ‘adequacy’ standard and the requirements of ‘exercising control when put on notice’.¹²⁶

Accordingly, the **remedies available** to the judge to ensure that the right to a fair trial is not compromised by the lack of adequate interpretation **will depend on the circumstances** of each case. To secure the fairness of the proceedings, the judge may disregard the contested evidence, attach less or no weight to it, declare the whole police interrogation invalid or dismiss the entire case – as was the case in *Knox v. Italy* quoted above since the authorities failed to take any action when they were put on notice as to an issue with interpretation.¹²⁷

In **Italy**, the poor quality of interpretation can be used as a ground to challenge a court judgment and invalidate the proceeding as a whole.¹²⁸ The High Court of **Ireland** ruled that the fairness of the proceedings obliged the judge to review the audio recording of an interview to assess whether the accused had been able to participate properly in it following a complaint about inadequate

¹²² ECtHR, [Cuscani v. United Kingdom](#) App. no 32771/96, Judgment of 24 December 2002, paras. 38-40.

¹²³ ECtHR, [Diallo v. Sweden](#), App. no. 13205/07, Judgment of 5 January 2010, paras. 23-31.

¹²⁴ ECtHR, [Knox v. Italy](#), App. no 76577/13, Judgment of 24 January 2019, paras. 182-187.

¹²⁵ James Brannan, [ECHR case-law on the right to language assistance in criminal proceedings and the Europe response](#), October 2010, p. 11.

¹²⁶ For further information on a preliminary reference to the CJEU, refer to Fair Trials’ [CJEU Preliminary Reference Toolkit](#).

¹²⁷ See along the same lines Fair Trials’ intervention in ECtHR, [Vizgirda v. Slovenia](#), App. no. 59868/08, Judgment of 28 November 2018, para. 74.

¹²⁸ FRA Report, n11, p. 57.

interpretation and a statement that the interview contained incomprehensible speech due to the lack of proficiency of the accused.¹²⁹

C. USING THE DIRECTIVE IN PRACTICE

1. Preliminary note

This section contains advice about controlling quality of interpretation, in particular at the police station, as well as general advice on working with interpreters.¹³⁰ As stressed by EULITA, the European Legal Interpreters and Translators Association, the way lawyers work with interpreters can help avoid contributing to quality issues.¹³¹

Before considering any litigation strategy, we suggest you examine how the Directive is being applied in your country (this is all the more relevant as the Directive leaves it to Member States to decide on a number of issues). We also invite you to read existing recommendations on how to ensure effective communication with interpreters¹³² and to familiarise yourself with the work of professional interpreters in your country and possible national interpreting standards:

➔ **Examine national law**

- What governs the selection of an interpreter? Is there a register or official guidance?
- Is there any system in place for measuring the quality of interpretation and translation?
- What system is available for raising a complaint as to quality?

➔ **Find out about interpreting standards**

- Read recommendations on how to best communicate with interpreters.
- Check if there is an organisation which represents interpreters in your country.
- Contact them and ask what are the qualifications required to act as legal interpreters, if there are any best practices or guidelines for legal interpretation in criminal proceedings, etc.?

¹²⁹ High Court of Ireland, [The Director of Public Prosecution \(at the suit of Detective Garda Patrick Fahy\) v. Darius Savickis](#), Judgement of 16 July 2019 by Ms. Justice Donnelly, para. 69.

¹³⁰ Thanks to consultation with interpreters within our LEAP network.

¹³¹ EULITA / European Criminal Bar Association, [Vademecum: guidelines for a more effective communication with legal interpreters and translators](#), 2010 (available in English, German, Hungarian, Italian, Polish, Portuguese, Czech and Greek).

¹³² Find some recommendations here: TransLaw, [Improving legal and interpreting service paths of persons suspected or accused of crime - Deliverable 2.3 Recommendations for legal professionals](#), June 2019; EULITA / European Criminal Bar Association, [Vademecum: guidelines for a more effective communication with legal interpreters and translators](#), 2010 (available in English, German, Hungarian, Italian, Polish, Portuguese, Czech and Greek).

2. Practical tips to avoid and identify quality issues

As noted in the introduction, it is crucial that you ensure compliance with the right to adequate interpretation from the moment of the first police interrogation. The police may not be particularly receptive to legal arguments concerning the Directive, still less broader principles of EU law, during the short time-frame available for conducting an interview before the suspect is brought before a judge. This should not prevent you from making your claim: the police may address your concerns and your objections may serve as a basis for judicial control later on.

a. Before the questioning begins

If you need an interpreter for your consultation with your client,¹³³ this will be your first opportunity to assess the quality of the interpretation and its impact on the reliability of the evidence obtained. The following sections will apply *mutatis mutandis* to your own consultations with the client.

Before the questioning begins, you should find out more about the interpreter and their competence. The information might already provide indications that the interpreter is unqualified. It could also become relevant before the court to substantiate an argument relating to inadequate interpretation.

→ Find out about the interpreter and their competence:

- Ask the police/interpreter about the interpreter's qualifications and experience: professional qualifications and memberships, length of experience etc.
- Ask the interpreters for a copy of their credentials.
- Check whether the interpreter speaks the same language (dialect, where relevant) as your client, or instead a similar language (e.g. Russian, Ukrainian, or Kazakh are related but not identical).
- Ask the interpreter their proficiency in that language. Many interpreters classify their working language in three categories: A is the interpreter's mother tongue, B is an active language which the interpreter perfectly speaks, and C is a passive language which the interpreter perfectly understands.¹³⁴ Make a note if the interpreter is not familiar with this classification.
- Ask the police to explain the basis on which they chose the interpreter (e.g. official register, fluency in the language, member of the local expat community, use in past cases etc.).
- Ensure a record is kept of all the details concerning the interpreter in the police protocol/detention record or at the beginning of the interview.
- Take your own note of the information you acquire and ask the interpreter to sign it.

¹³³ See Part IV 'Lawyer-Client communication' of this guide.

¹³⁴ Find out more about this classification here: AIIC - The International Association of Conference Interpreters, [Working languages](#), 2 December 2015.

If you are not satisfied that the interpreter is suitably qualified (e.g. because the interpreter is simply a member of the local expatriate community who speaks the language of the suspect), you should:

➔ **Demand the replacement of the unqualified interpreter by a professional**

- Inform the questioning officer of your concerns regarding the qualification of the interpreter.
- Present relevant national documentation (guidelines etc.) and explain why the interpreter does not meet them. Explain why this risks causing unfairness, for instance because your client will not fully understand the questions put to them or will not be able to present their version of the events.
- Ask for the interpreter to be replaced (Recital 26 of the Directive).
- Ensure that your complaint and demand is recorded in the police records.
- If it is refused, ensure that the reasons for refusal and your objections are placed on record. If relevant, recommend using communication technology such as videoconferencing to access a qualified interpreter.

It is possible that such a request will not be acceded to if the police are in the habit of using a certain interpreter or if there is simply no other interpreter available locally. To the extent that refusing to proceed with an interview may delay the investigation, possibly affecting the client's chances of being released at this stage, you will have to bear in mind your deontological/ethical obligations towards your client. However, the objective should be to ensure that no questioning takes place through substandard interpretation. If it is decided to go ahead regardless, whether you advise the client to stay silent or otherwise, it is essential to ensure a record is kept of your objection.

➔ **Brief your client on possible interpretation issues:**

- Advise your client to avoid speaking too fast and to pause between sentences to allow the interpreter to interpret each sentence. This will avoid the interpreter summarising or paraphrasing their statement and help reduce the possibility of error.
- Advise your client to intervene only when the interpreter has finished in order to avoid interrupting the logical course of the interpretation.
- Inform your client that the interpreter is a neutral person who has the task of translating all questions and statements conscientiously and completely.
- Advise your client to let you know if they have any difficulty communicating with the interpreter. A professional interpreter should have no problem with this request.

This should not, of course, be confused in any way with your legal advice to the client as to what questions they should or should not answer.

It is important for you to ensure that as good a record as possible is kept of any issues relating to interpretation. This evidence could become relevant before the court to substantiate an argument relating to inadequate interpretation.

➔ **Ask to record the interpretation**

- Ask for the interview to be recorded in audio or video if this is available.
- If not, ask whether you can record the interview on a handheld device.

- If this is not allowed, ask for the refusal to be noted in the interview record.
- Take your own notes of all the issues which arise during the interview.
- Ask for a copy of this note to be added to the file, if this is possible.

b. During the questioning

When looking out for issues relating to the quality of interpretation, the key question is whether the person is able to understand what they are being accused of and able to exercise their right of defence (Article 2(8) of the Directive), or, as stated by the ECtHR, whether they are able to present their version of the events:

→ Check your client's ability to exercise defence rights

- Is the suspect able to understand precisely what is being asked of them?
- Is the suspect able to give their version of events accurately?
- Is a risk of unfairness arising because of the interpretation?

Of course, lawyers cannot pick up 'errors' unless they happen to speak both languages fluently. But it may be possible to identify issues and areas of doubt, which you may argue subsequently as having to be resolved in favour of your client (in the absence of an accurate record such as a recording). The extent to which this standard is met will depend on a number of concrete, practical aspects of the interpretation provided on the day. The following paragraphs address the most likely areas to give rise to interpretation issues.

It is good practice for the interviewer to ask, through the interpreter, a series of questions at the beginning of the interview to determine whether the person is able to understand what is said.

→ Ask control questions

- Take a note of the control questions and the responses given.
- If control questions are not asked, suggest that they be asked.

Due to inadequate interpretation, an exculpatory statement might be misunderstood and be recorded as an incriminating statement. For instance, if a suspect says he 'panicked' and hit someone, and this is interpreted as him saying he 'lost his temper' and hit someone, this would be inaccurate. The former statement is essentially exculpatory, suggesting self-defence, the latter essentially incriminatory, suggesting violent reaction. Or, if the suspect states that a friend gave him money so that he could buy drugs for both of them, this might be wrongly interpreted as his having bought a total amount with the intention of selling half to a friend. The former statement would imply simple possession of drugs, whilst the latter could be understood as suggesting an intention to supply, a more serious offence.

→ Clarify potentially ambiguous or incriminating statements:

- Note if the interpreter uses a literal translation or an expression and what were the exact words translated.
- If you do not consider this to be potentially prejudicial to your client's interests, consider asking (or asking the police to ask) the suspect further questions to clarify potential ambiguities during the questioning.

- Alternatively, once the record of the interview is typed up, ask for an opportunity to consult privately with your client before they sign it. This consultation may, of course, have to be with the same interpreter.

Interpretation can be ‘simultaneous’ or ‘consecutive’: in simultaneous interpretation, the interpreter works in real-time, speaking without any pauses, while in consecutive interpretation, the interpreter speaks after the suspect has paused or finished speaking. In this case, the interpreter may ask the speaker to wait and translate the first part of their speech or the interpreter may take a note of what is being said by the speaker, and then go over the evidence in the other language.

Professional interpreters are trained to render faithfully into the target language exactly what the person says, without synthesising the answer into their own words. EULITA’s Code of Professional Ethics stresses that ‘[t]he source-language message shall be faithfully rendered in the target language by conserving all elements of the original message while accommodating the syntactic and semantic patterns of the target language. The register, style and tone of the source language shall be conserved. Errors, hesitations and repetitions should be conveyed.’¹³⁵

However, this is a difficult skill and, as our experts have reported to Fair Trials, many of those providing interpretation at police stations in the EU are not qualified professional interpreters.

In addition, whilst police officers may be trained in interrogation techniques and asking clear, focused questions, the suspect, who may be undergoing police interrogation for the first time, may feel nervous or frightened. There is a possibility that their answers will be confused, verbose, or badly articulated, which may be challenging for even the most experienced interpreter.

There is thus a risk that an interpreter will convey their own understanding of what was said by the suspect, essentially explaining to the investigator what the suspect has said. Clearly, this impinges upon the suspect’s ability to put forth ‘*their* version of events’.

➔ **Flag up apparent failures to interpret faithfully:**

- Look out for signs the interpreter is not accurately rendering the language of your client: is the interpreter using the same tone and conveying the hesitations of your client?
- Point out when the length of the interpreted statement differs significantly from the length of the person’s statement.
- If you hear a word repeated several times by the client during one statement, and do not hear it the same number of times in interpretation, point this out.

In some contexts, police questioning may relate to areas of professional, scientific or technical expertise. Clearly, in this context, the ability of the interpreter to understand the terms used by the speaker in the first place will depend on the extent of their vocabulary in both languages. However, even in a relatively simple context, an interpreter who is not sufficiently competent may struggle with basic terms. For instance, terms like ‘income’ and ‘revenue’ may result in more or less incriminating statements depending on how they are translated.

¹³⁵ EULITA, [Code of Professional Ethics](#), adopted by the EULITA General Assembly in London, 6 April 2013.

➔ **Look out for signs the interpreter does not know the words being used:**

- Is the interpreter pausing a long time to translate one way or the other?
- Is the interpreter asking the suspect for clarification of what they are saying?
- What are the reactions of the suspect to the interpreting?
- Take note of any issues.

EULITA's Code of Professional Ethics imposes on legal interpreters an obligation to use 'the same grammatical person as the speaker or sign-language user. Should it become necessary for them to assume a primary role in the communication, they must make it clear that they are speaking for themselves, by using for instance the third person (i.e.: "The interpreter needs to seek clarification ...").'¹³⁶

Accordingly, the interpreter should, in a police or court interview, respond in the first person, i.e. 'I have never seen this person before', not 's/he says that s/he has never seen this person before'.

➔ **Look of for inappropriate use of third person:**

- Point out to police, and ensure a note is taken, if the interpreter is using the third person instead of the first.

Practitioners occasionally report that interpreters converse with clients during interviews, both to clarify their statements but sometimes to advise them on what to say. The latter breaches interpreters' code of ethics¹³⁷ and clearly raises an issue as to whether the information being recorded is truly the suspect's own.

➔ **Look out for inappropriate demeanour:**

- Ask the interpreter to clarify conversations going on with the client.
- Take a note.

3. Complain about interpretation quality

If, for whatever reason, you are not satisfied that the interpreter is succeeding in delivering interpretation of a sufficient quality, you need to complain about the poor quality based on Article 2(5) of the Directive. You will need to have identified beforehand the competent authority designated for this purpose in your national law.

a. During the police interview: to the questioning officer or a higher authority

If possible, you should first complain directly to the interviewing officer or a higher authority during the course of police interrogation.

¹³⁶ EULITA, [Code of Professional Ethics](#), adopted by the EULITA General Assembly in London, 6 April 2013.

¹³⁷ Ibid.

➔ **Demand the replacement of the interpreter**

- Inform the questioning officer or a higher authority of your concerns regarding inadequate interpretation.
- Identify the specific issues leading you to believe there are quality issues.
- Explain why these are going to cause unfairness, for instance because your client did not fully understand the questions put to them or was not able to put their version of the events. Refer, if necessary, to the national documentation (code of ethics, best practices etc.).
- Ask for the interpreter to be replaced (Recital 26 of the Directive) and for the interview to be started from the beginning again with a new interpreter, with the previous interview disregarded.
- Ensure that your complaint and demand is recorded in the police records.
- If it is refused, ensure that the reasons for refusal and your objections are placed on record. If relevant, recommend using communication technology such as videoconferencing to access qualified interpreter.

b. After the interview: to the competent authority

If you have not been able to complain during the interview or if this was refused, you need to complain to the competent authority designated for this purpose in your national laws, for instance the prosecutor in charge of the case or a higher court. This may ensure that a better service is provided at subsequent questioning, if there is any. This would also ensure that you do not foreclose the possibility of raising the arguments later, i.e. when asking a court to disregard / annul the questioning.

➔ **Demand the replacement of the interpreter to the competent authority.**

- [Refer to the action points mentioned in the previous section – Recital 26 of the Directive].
- In addition, provide a copy of the records you have taken during the interview.

c. Make your arguments before the court

As provided in Recital 24 of the Directive and ECtHR case law, the judge must exercise a degree of subsequent control over the adequacy of the interpretation, if put on notice of any related issue.

If the judge finds that the interpretation provided at the police station or during subsequent hearing was not of sufficient quality to enable the suspect or accused person to actively participate in the proceedings, they should take remedial action in order to safeguard the fairness of the proceedings. Recital 26 of the Directive envisages the possibility of replacing the appointed interpreter.

If this is not possible or sufficient, ECtHR case-law indicates that the judge should assess the reliability of the relevant evidence before relying upon it, to ensure that the right to a fair trial is not compromised by the lack of adequate interpretation. Accordingly, the judge may disregard the

contested evidence, attach less or no weight to it, declare the whole police interrogation invalid or dismiss the entire case (see *above* section B.4.c).

➔ **Challenge interpretation of insufficient quality before the court**

- Set out the basis for your objection, namely that in light of the specifics of the case, in particular the complexity of the offence, your client did not understand the language of the questioning – well enough – to conduct their defence effectively in that language/did not receive adequate interpretation of sufficient quality (Article 2 (1) and article 2(8) of the Directive and ECtHR case law). Ensure that it is also recorded by authorities in writing.
- Supply the evidence / notes you have collected at the police station.
- Explain how this shows a failure to meet the Directive’s quality requirement and a risk of unfairness, for instance because your client did not fully understand the questions put to them or was not able to present their version of the events during the police interrogation.
- If relevant, argue that the State failed to put in place a system for ensuring that interpretation in a *specific* case is of a satisfactory standard. Indicate how this impacted the conduct of the police interrogation (Article 5(1) of the Directive).
- If relevant, argue that differences between the police and court systems of interpretation mean that the quality standard is not being met at the police level, referring to the legislation governing each system (or the absence of specific legislation if this is the case), the different structures for the two systems (professional bodies, disciplinary and quality control systems etc.) and the standards of access to each system (in terms of professional qualifications).
- Stress that the court, as the ultimate guardian of the fairness of the proceedings, needs to consider the impact of inadequate interpretation on the fairness of the proceedings (Recital 24 of the Directive and ECtHR case law).
- Call on the court to take remedial action in order to safeguard the fairness of the proceedings, e.g. disregarding the contested evidence, attaching less or no weight to it, declaring the whole police interrogation invalid or dismissing the entire case (Recital 26 of the Directive, Article 47 of the Charter and ECtHR case law).

IV – CLIENT-LAWYER COMMUNICATION

A. THE ISSUE

It is essential that suspects and accused persons are able to effectively communicate with their legal counsel in order to prepare their defence and participate effectively in the proceedings against them. This means having access to interpretation services when the suspect or accused person doesn't speak the language of their legal counsel.

Legal practitioners report a number of issues regarding access to interpretation for client-lawyer communications. In some countries:

- Interpretation services are limited in time or only for specific types of investigative acts/procedural actions. Sometimes, interpretation for lawyer-client communication requires court authorisation or a validation hearing, preventing access to interpretation to prepare the hearing.
- There is no mechanism to ensure the availability of an interpreter for lawyer-client consultations, particularly when the client is being held by the police prior to the first interview.
- The same state-appointed interpreters are used to interpret both police interrogations and communications between a defendant and their lawyer, leading to possible conflicts with the principle of confidentiality of client-counsel communications if no additional safeguards are put in place.
- Interpretation is limited to suspects and accused persons entitled to legal aid.
- The costs of such interpretation are borne by the State only where interpreters are appointed by state authorities.
- There is a lack of awareness on this right, both from lawyers who may not request it and from the police who are not likely to provide it.¹³⁸

B. RELEVANT PROVISIONS OF THE DIRECTIVE

The following paragraphs present the main provisions of the Directive and related legal arguments. Please refer to section C for further indications on how to use them in practice.

¹³⁸ Implementation Report, n 41, pp. 5-6 and 10-11; FRA Report, n11, pp. 41-44; TRAINAC Report, n35, p. 12; JUSTICIA Network, [Inside Police Custody 2](#), December 2018, pp. 24-25; Fair Trials, [Where's my lawyer? Making legal assistance in pre-trial detention effective – Report](#), October 2019, p. 23.

1. Right to interpretation of client-lawyer communication

Article 2(2) of the Directive establishes the right to interpretation for communications between suspects or accused persons and their legal counsel.

‘2. Member States shall ensure that, where necessary for the purpose of safeguarding the fairness of the proceedings, **interpretation** is available for **communication** between suspected or accused persons and their legal **counsel in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications.**’ (emphasis added)

Providing interpretation services for communications with a person’s legal counsel is one **key achievement of the Directive**. The ECtHR initially considered that Article 6 § 3 (e) ECHR – the right to interpretation – did not cover the communications between the accused and their counsel but only applied to the communications between the accused and the judge. However, the ECtHR added that “free legal aid may be extended to include the service of an interpreter”.¹³⁹ More recent case law suggests, however, that the impossibility of suspects or accused persons communicating with their lawyer due to linguistic barriers may give rise to an issue under Article 6 §§ 3 (c) – the right to legal assistance – and (e) of the Convention.¹⁴⁰

In practice, as at 2018, most Member States had transposed this right in their national legislation. However, in some countries, including **Sweden**, it is only referred to indirectly in legal practice, commentaries of national acts or case-law and provisions ensuring the general right to interpretation. In some other countries, the law is clearly not compliant with the Directive. In **France** and **Spain**, the right to free interpretation for the purpose of lawyer-client communications is conditional on a specific request by the suspect or accused person, or alternatively by their legal counsel. In **Romania**, the right is dependent on the provision of legal aid. In **Latvia** and some courts in **Germany**, communications are limited in time.¹⁴¹

2. For the preparation of the defence

Article 2(2) of the Directive establishes the obligation for any communication “**in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications**”.

Recitals 19 and 20 provide further guidance as to why and when interpretation must be secured.

¹³⁹ ECtHR, [X. v. Austria](#), App. no. 6185/73, (Commission decision of 29 May 1975).

¹⁴⁰ See the following cases where the Court considered the ability of the applicants to communicate with their counsel but found that the applicants had received adequate interpretation assistance and were able to participate effectively in their trial so that the criminal proceedings could not be regarded as unfair. ECtHR, [Lagerblom v. Sweden](#), App. no. 26891/95, Judgement of 14 January 2003, paras. 61-64; [Pugžlys v. Poland](#), App. no. 446/10, Judgement of 14 June 2016, paras. 85-92. See also James Brannan, [ECHR case-law on the right to language assistance in criminal proceedings and the Europe response](#), October 2010, pp. 5-6.

¹⁴¹ Implementation Report, n 41, p. 6; FRA Report, n11, p. 41 ; TRAINAC Report, n35, p. 12; JUSTICIA Network, [Inside Police Custody 2](#), December 2018, pp. 24-25.

(19) Communication between suspected or accused persons and their legal counsel should be **interpreted in accordance with this Directive**. Suspected or accused persons should be able, inter alia, **to explain their version of the events** to their legal counsel, point out any statements with which they disagree and make their legal counsel aware of any facts that should be put forward in their defence.

(20) **For the purposes of the preparation of the defence, communication** between suspected or accused persons and their legal counsel in direct connection with any questioning or hearing during the proceedings, or with the lodging of an appeal or other procedural applications, such as an application for bail, **should be interpreted where necessary in order to safeguard the fairness of the proceedings.**' (emphasis added)

The Directive makes it clear that interpretation should be provided not only during questioning or other investigative or judicial actions themselves, but more generally in relation to these actions, where this is necessary to ensure that persons can effectively carry out their right to defence.

However, the way in which this right is implemented greatly varies among Member States. For instance, in **Latvia** and **Germany** interpretation services for client-counsel communication are limited to several hours. In **Lithuania**, interpretation is only provided during hearings and pre-trial interviews but not during other meetings, unless the person was granted legal aid. Similarly, in **Belgium** interpretation is usually provided in detention or for questioning that could result in a suspect's detention but not during other meetings with a defence counsel, unless the person was granted legal aid (and even then, it is limited to three hours).¹⁴²

3. Right to translation of written client-lawyer communication

Article 2(2) of the Directive only refers to 'interpretation' of communications between suspects and accused persons and their legal counsel. The written translation of documents relating to legal advice (such as client instructions, legal notes) is not expressly covered in the Directive and most Member States do not regulate this question. As a result, lawyers may decide to request an **oral translation** of written legal advice based on Article 2(2) of the Directive. This method is notably used in **Greece** and **Hungary**.¹⁴³

In addition, Article 3(1) of the Directive enshrines the right to **translation of essentials documents**.¹⁴⁴ In some countries, it is up to the courts to decide on a case-by-case basis whether a document may be considered essential and therefore has to be translated. Lawyers may resort to this ground to request the translation of relevant documents, for instance detailed written instructions given by the

¹⁴² FRA Report, n11, p. 42.

¹⁴³ FRA Report, n11, p. 43.

¹⁴⁴ See Part VI of this toolkit 'Translation of essentials documents'.

accused to their legal counsel.¹⁴⁵ This is the practice in **Germany** but also in **Portugal, Spain** and **Sweden**.¹⁴⁶

The translation of written communications with legal counsel may also be covered by legal aid granted to the accused for the person. This is notably the case in the **Czech Republic** and **France**.¹⁴⁷

4. Quality requirements

As for the interpretation of police interrogations and court hearings, Article 2(8) of the Directive requires that the interpretation of communications between suspects or accused persons and their lawyer be of a quality “sufficient **to safeguard the fairness of the proceedings**, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence”.

Neither the Directive nor the ECtHR distinguish whether interpretation is provided at the police station or for client-lawyer communication. This means that the quality required is the same and lawyers should not be satisfied with substandard interpretation. We invite you to refer to Part III of this toolkit for further guidance on the quality standard imposed by the Directive.

Article 5(2) of the Directive stresses that when the state establishes a register of translators and interpreters, it should also be available to lawyers.

‘2. In order to promote the adequacy of interpretation and translation and efficient access thereto, Member States shall endeavour to establish a register or registers of independent translators and interpreters who are appropriately qualified. Once established, such register or registers shall, where appropriate, be made **available to legal counsel** and relevant authorities.’ (emphasis added)

The Directive leaves it to the Member States to decide whether the interpreter should be appointed by the authorities or whether the state should reimburse the defence for a privately contracted interpreter. If the first option is preferred, it is essential that specific quality safeguards are put in place to guarantee the confidentiality of the communications between lawyers and their client, as required by Article 5(3) of the Directive.

‘3. Member States shall ensure that interpreters and translators be required to observe confidentiality regarding interpretation and translation provided under this Directive.’

The practice varies from country to country. For instance, in **Ireland**, the same interpreter is used for police interrogations / court hearing and for private consultations between the lawyer and their client, without any adequate confidentiality guarantee. Some of the States that use officially appointed interpreters offer the possibility for the defence to request a different interpreter. This is

¹⁴⁵ FRA Report, n11, p. 43.

¹⁴⁶ FRA Report, n11, p. 43.

¹⁴⁷ FRA Report, n11, p. 44.

the case in **Portugal**. In **England and Wales**, the defence may arrange the service of an alternative interpreter, but they would have to cover the costs.¹⁴⁸

We invite you to refer to Part III of this toolkit for further guidance on the quality standard imposed by the Directive as well as the procedure to complain about interpretation of insufficient quality.

5. The right to challenge refusals to provide interpretation

Article 2(5) of the Directive, which provides for the right to challenge any decision finding that the suspect or accused person does not have interpretation needs, also applies to decisions refusing to grant interpretation for lawyer-client communication:

'5. Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for interpretation (...).'

Recitals 25 specifies that Member States can decide how to secure that right, i.e. by using existing systems for remedies or establishing a separate mechanism for lodging and examining complaints.

'(25) The suspected or accused persons or the persons subject to proceedings for the execution of a European arrest warrant should have the right to challenge the finding that there is no need for interpretation, in accordance with procedures in national law. That right does not entail the obligation for Member States to provide for a separate mechanism or complaint procedure in which such finding may be challenged and should not prejudice the time limits applicable to the execution of a European arrest warrant.'

The Directive doesn't indicate the type of authority responsible for hearing these complaints, but Article 47 of the EU Charter on the right to effective remedy for violation of EU law requires such complaints to be subject to effective **judicial oversight**.¹⁴⁹

This is also echoed in the jurisprudence of the ECtHR. As mentioned earlier,¹⁵⁰ the ECtHR recognised that the judge, as the ultimate guardian of the fairness of the proceedings, should consider whether the fairness of the trial required the appointment of an interpreter.¹⁵¹

If the judge finds that the police decision violated the right to interpretation as guaranteed by the Directive, they should take remedial action in order to safeguard the fairness of the proceedings, e.g.

¹⁴⁸ FRA Report, n11, p. 44.

¹⁴⁹ See Fair Trials [Toolkit on Charter of Fundamental Rights of the European Union](#), Part III Section 1 on the right to an effective remedy (Article 47(1)).

¹⁵⁰ See above Part II of this toolkit 'Assessment of interpretation needs', and in particular section B.3 'Who is responsible for determine interpretation needs'.

¹⁵¹ See notably ECtHR, [Amer v. Turkey](#), App. no 25720/02, Judgment of 13 January 2009, para. 83.

issuing an order to repeat pre-trial actions done in the absence of interpretation or pronounce their invalidity, refusing to rely on their results etc.¹⁵²

C. USING THE DIRECTIVE IN PRACTICE

The examples mentioned in the previous section clearly illustrate breaches of the Directive or practices which may unduly restrict the right to interpretation and the right to a fair trial. We invite you to rely on the Directive to ensure the effective application of its rights. This section focusses on issues specific to client-lawyer communication. The issues addressed in other parts of the toolkit are equally relevant for client-lawyer communication and we invite you to refer to these parts for legal arguments on these questions, including those related to free assistance, interpretation needs and the quality of interpretation.

1. Request interpretation for lawyer-client communication

- Ensure police/a higher authority/the court are made aware in unequivocal manner that interpretation is needed for your communication with your client.
- ➔ **Request the authority to assess the interpretation needs** (see Part II of the toolkit)
- ➔ **Argue that interpretation is needed for the preparation of the defence**
 - Explain why interpretation is needed for your communications with your client (Article 2(2) of the Directive), i.e. because they relate to a particular hearing or procedural applications and more generally are necessary to effectively organise the defence of your client.
 - Explain why not providing interpretation is going to cause unfairness, for instance because your client does not fully understand the questions you ask them or is not able to explain to you their version of the events (Recitals 19 and 20 of the Directive).
 - Ensure your request is recorded in the police/court records.
 - If it is refused, ensure that the reasons for refusal and your objections are placed on record.
- ➔ **Challenge the refusal to grant interpretation before the Court**
 - Using the records, explain why interpretation was needed for your communication with your client (Article 2(2) of the Directive, Recitals 19 and 20 of the Directive).
 - Stress that the court, as the ultimate guardian of the fairness of the proceedings, need to consider whether the fairness of the trial has required the appointment of an interpreter (Article 2(5) of the Directive and ECtHR case-law).

¹⁵² See ECtHR case-law mentioned in Part II, Section B.2.a.

- Call on the court to take remedial action in order to safeguard the fairness of the proceedings (Article 2(5) of the Directive, Article 47 of the Charter and ECtHR case-law), e.g. provision of interpretation services if still relevant. Argue that the court cannot speculate as to how the lack of interpretation for (specific) client-lawyer communications may have affected the rights of the defence, meaning that the court has no option but to find that the right to a fair trial has been violated.¹⁵³

2. Request the use of different interpreters for police interrogation and lawyer communication

- Refuse to proceed with the questioning and explain why using (consecutively) the same interpreter for pre-consulting discussions with your client and later for police interrogation may infringe the right of the defence and the right to a fair trial.
- If relevant, argue that the State has failed to put in place a system for ensuring that interpretation in a *specific* case is of sufficient quality (Article 5(1) of the Directive).
- Ensure that your objections are recorded by authorities in writing.
- Request that, in the absence of specific safeguards to ensure the fairness of the proceedings, an alternative interpreter be used for each purpose (Recital 26 of the Directive).
- If relevant, recommend using communication technology such as videoconferencing to access a qualified interpreter (Article 2(7) of the Directive).

3. Request the States to cover the cost of interpretation for client-lawyer communication

- Submit a request to the police/the court that the authorities should bear the cost of interpretation for client-lawyer communication (Article 4 of the Directive).
- Stress that neither the Directive nor ECtHR case-law make the free assistance of an interpreter conditional on the provision of legal aid.
- [See further details in Part I of this toolkit]

¹⁵³ See [Fair Trials' third party intervention](#) in ECtHR, [Vizjirda v. Slovenia](#), App. no. 59868/08, Judgment of 28 November 2018, para. 72.

V – THE ‘THIRD LANGUAGE’ ISSUE

A. THE ISSUE

The provision of interpretation in a language other than the suspect’s own native language (a ‘third language’) is often used for rare languages or when registered legal interpreters or translators are unavailable.¹⁵⁴ For instance, practitioners report that Kazakhs are provided with Russian interpretation. In Hungary, lawyers reported that where suspects speak a less commonly encountered language, the police try to persuade them to accept interpretation in English. Sometimes, investigation authorities will use a common third language with the suspect or accused person without properly assessing the person’s linguistic ability to defend themselves effectively in that language.¹⁵⁵

Resorting to a ‘third language’ raises the same problems as poor interpretation: possible misunderstandings, which may prejudice trial fairness.

B. RELEVANT PROVISIONS OF THE DIRECTIVE

Recital 22 of the Directive explicitly considers the use of a third language:

‘Interpretation and translation under this Directive should be provided in the native language of the suspected or accused persons or **in any other language that they speak or understand** in order to allow them **fully to exercise their right of defence, and in order to safeguard the fairness of the proceedings.**’ (emphasis added)

The Directive and the ECtHR impose **the same standard for ‘third language interpretation’ as for ‘native language interpretation’**, i.e. the ability for the suspect or accused person ‘to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events’.¹⁵⁶ The person must be able to “actively participate” in the proceedings.¹⁵⁷

In *Vizgirda v. Slovenia*, the ECtHR specifically referred to Recital 22 of the Directive and stressed that:

‘The fact that the defendant has a basic command of the language of the proceedings or, as may be the case, a third language into which interpreting is readily available,

¹⁵⁴ FRA Report, n11, p. 50.

¹⁵⁵ TRAINAC Report, n35, p. 11; LEAP Survey Report, n1, p. 25; JUSTICIA Network, [Inside Police Custody 2](#), December 2018, p. 23 and 25.

¹⁵⁶ ECtHR, [Kamasinski v. Austria](#) App. no 9783/82, Judgment of 19 December 1989) para. 74; [Güngör v. Germany](#), App. no. 31540/96, Decision of 17 May 2001, para. 1; [Hermi v. Italy](#), App. no. 18114/02, Judgment of 18 October 2006, para. 70; [Protopapa v. Turkey](#), App. no. 16084/90, Judgment of 24 February 2009, para. 80; [Vizgirda v. Slovenia](#), App. no. 59868/08, Judgment of 28 November 2018, para. 79.

¹⁵⁷ [Vizgirda v. Slovenia](#), App. no. 59868/08, Judgment of 28 November 2018, paras. 102-103.

*should not by itself bar that individual from benefiting from interpreting into a language he or she **understands well enough to fully exercise his or her defence rights.***¹⁵⁸ (emphasis added)

As mentioned in Part I of this toolkit, ECtHR case law requires the authorities to justify any decision not to provide interpretation. In other words, the **burden of proof is on the judicial authorities** to prove that the person sufficiently understands the language of the court, and not for the person to prove they do not.¹⁵⁹

As the Directive applies the same standards to third language interpretation as any other interpretation, the factors ordinarily relevant to **determining whether someone needs interpretation** in their native language are also relevant for the purpose of determining whether interpretation in a third language is an adequate solution, i.e. does the person have the necessary linguistic ability in that language, having regard to the complexity of the case?

*'It is incumbent on the authorities involved in the proceedings, in particular the domestic courts, to **ascertain whether the fairness of the trial requires, or has required, the appointment of an interpreter** to assist the defendant. In the Court's opinion, this duty is not confined to situations where the foreign defendant makes an explicit request for interpreting. In view of the prominent place held in a democratic society by the right to a fair trial (see *Hermi*, cited above, § 76, and *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37), it arises whenever there are reasons to suspect that the defendant is not proficient enough in the language of the proceedings, for example if he or she is neither a national nor a resident of the country in which the proceedings are being conducted. **A similar duty arises when a third language is envisaged to be used for the interpreting.** In such circumstances, the defendant's proficiency in the third language should be ascertained before the decision is taken to use it for the purposes of interpreting.'*¹⁶⁰ (emphasis added)

We therefore invite you to refer to the analysis already provided in Part II and Part III of this toolkit for further details on:

- How to assess the interpreting needs of a person (i.e. the ability of the person of effectively conduct their defence in that language based on their linguistic ability and the complexity of the case)? (Part II)
- What is considered an interpretation of sufficient quality and how to exercise retroactive judicial control when interpretation in the third language was inadequate? (Part IV)

¹⁵⁸ ECtHR, [Vizgirda v. Slovenia](#), App. no. 59868/08, Judgment of 28 November 2018, para. 83.

¹⁵⁹ ECtHR, [Brozicek v. Italy](#), App. no. 10964/84, Judgment of 19 December 1989, para. 41; [Diallo v. Sweden](#), App. no. 13205/07, Judgment of 5 January 2010, paras. 24-25 ; [Saman v. Turkey](#), App No 35292/05, Judgment of 5 April 2011, para. 30; [Baytar v. Turkey](#), App. no. 45440/04, Judgment of 14 October 2014, paras 50 ff.; [Knox v. Italy](#), App. no 76577/13, Judgment of 24 January 2019, para. 183.

¹⁶⁰ ECtHR, [Vizgirda v. Slovenia](#), App. no. 59868/08, Judgment of 28 November 2018, para. 81.

C. USING THE DIRECTIVE IN PRACTICE

The analysis and the arguments made in Parts I and II of the toolkit apply, *mutatis mutandis*, to the provision of language assistance in a third language. We invite you to refer to those sections for specific guidance on these questions. We have made little additions where necessary to adapt to the case of third language interpretation.

1. Challenging a decision to provide third-language interpretation

If you believe that providing third-language interpretation is not adequate for the person you defend because of their limited ability in that language, you should challenge the decision. Your argumentation will mostly follow the arguments for challenging a decision not to provide interpretation to someone who does not speak or understand the language of the proceedings.

- Argue that in light of the specifics of the case, in particular the complexity of the offence, your client does not understand the language of the questioning – well enough – to conduct their defence effectively in that language (Recital 22 of the Directive and ECtHR case-law). The use of this third language forces the suspect to communicate in an imperfect manner and this will prejudice their ability to express themselves clearly on the key issues. In case of similar languages, stress the difference between the two languages. Ensure that your objection and arguments are recorded by authorities in writing.
- For additional steps see Part II, Section “Challenge the decision finding that there is no need for interpretation”.

2. Challenging inadequate interpretation

a. During the initial questioning

- Identify the specific issues leading you to believe the interpretation in a third language is inadequate. Take a note of any key words which appear during the interview, and use Google translate later on to compare these in the different languages, in case you are able to identify any specific differences.
- If necessary, demand the replacement of the interpreter (Recital 26 of the Directive).
- For additional steps see Part III, Section “Complain about interpretation quality”.

b. Before the court

- Set out the basis for your objection, namely that in light of the specifics of the case, in particular the complexity of the offence, your client did not understand the

language of the questioning – well enough – to conduct their defence effectively in that language. Ensure that it is also recorded by authorities in writing.

- For additional steps see Part III, Section “Complain about interpretation quality”.

VI – TRANSLATION OF ESSENTIAL DOCUMENTS

A. THE ISSUE

A suspect or accused person needs to understand the case against them to exercise their rights of defence. If the person does not know the language of the proceedings, they need to be able to review the documents of the case in their own language.¹⁶¹

Practitioners report a number of issues regarding access to translated documents in criminal proceedings:

- In some countries, translations are only provided in relation to **a limited list of documents**, and there is often no right to appeal this or to request additional documents. Sometimes, even essential documents are only translated upon request. Time and budget constraints are the main driving factors for reducing the number of documents translated.
- Lengthy documents are sometimes reduced to the translation of a few sentences. Lawyers also complain about the delays before receiving translated documents.
- In a large number of countries, **oral, rather than written, translations** have become the rule, especially where the defendant has a lawyer. However, a written translation of documents such as indictments, judgments or detention decisions will often be more useful to the suspect or accused person than an oral explanation of the document. Having a written version of the document allows the person to examine it in their own time, which will help them prepare the defence. This is especially the case for a person detained: having a written decision will allow them to understand the reasons for their detention and respond to these, which they may often have to do without the assistance of a lawyer.
- Oral **translations** are sometimes done **by** the suspect or accused person's **lawyer**.¹⁶²

B. RELEVANT PROVISIONS OF THE DIRECTIVE

The following paragraphs present the main provisions of the Directive and related legal arguments. Please refer to section C for further indications on how to use them in practice.

¹⁶¹ This question is also related to the right to information and the right to access the case file. See Fair Trials' [Toolkit on the Right to Information Directive](#).

¹⁶² Discussion with LEAP Network ; FRA Report, n11, pp. 36-41; TRAINAC Report, n35, pp. 14-18; JUSTICIA Network, [Inside Police Custody 2](#), December 2018, p. 26.

1. The right to translation of ‘essential documents’

Article 3(1) of the Directive provides for the right to translation of essential documents.

‘1. Member States shall ensure that suspected or accused persons who do not understand the language of the criminal proceedings are, within a reasonable period of time, 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**.

The ECtHR interpreted Article 6(3)(e) ECHR, which refers to the free assistance of an ‘interpreter’, as covering written translations but only to a limited extent.

*‘[Article 6(3)(e)] states that every defendant has the right to the free assistance of an interpreter. That right applies not only to oral statements made at the **trial hearing** but also to documentary material and the **pre-trial proceedings**. This means that an accused who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for **the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand or to have rendered into the court’s language in order to have the benefit of a fair trial (...)**.’¹⁶³*

*‘Interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events’.*¹⁶⁴

*‘However, [Article 6(3)(e)] does **not** go so far as to require a **written translation of all items of written evidence or official documents in the procedure**.’¹⁶⁵*

The Directive provides a more prescriptive framework and a stronger basis for obtaining written translation than the former case law of the ECtHR. We therefore invite you to refer to the Directive for this question.

¹⁶³ ECtHR, [Hermi v. Italy](#), App. no. 18114/02, Judgment of 18 October 2006, para. 69. See also [Luedicke, Belkacem and Koç v. Germany](#), App. no. 6210/73; 6877/75; 7132/75, Judgment of 28 November 1978, para. 48; [Kamasinski v. Austria](#) App. no 9783/82, Judgment of 19 December 1989) para. 74; [Ucak v. the United Kingdom](#), App. no. 44234/98 (Decision of 24 January 2002); [Lagerblom v. Sweden](#), App. no. 26891/95, Judgment of 14 January 2003, para. 61; [Baytar v. Turkey](#), App. no. 45440/04, Judgment of 14 October 2014, para. 49.

¹⁶⁴ ECtHR, [Kamasinski v. Austria](#) App. no 9783/82, Judgment of 19 December 1989) para. 74; [Güngör v. Germany](#), App. no. 31540/96, Decision of 17 May 2001, para. 1; [Hermi v. Italy](#), App. no. 18114/02, Judgment of 18 October 2006, para. 70; [Protopapa v. Turkey](#), App. no. 16084/90, Judgment of 24 February 2009, para. 80; [Baytar v. Turkey](#), App. no. 45440/04, Judgment of 14 October 2014, para. 49; [Vizgirda v. Slovenia](#), App. no. 59868/08, Judgment of 28 November 2018, para. 79.

¹⁶⁵ ECtHR, [Kamasinski v. Austria](#) App. no 9783/82, Judgment of 19 December 1989) para. 74; [Hermi v. Italy](#), App. no. 18114/02, Judgment of 18 October 2006, para. 70.

2. The notion of ‘essential documents’ and the right to request translation

Article 3(2) of the Directive defines ‘essential documents’ as including:

‘2. Essential documents shall include **any decision depriving a person of his liberty, any charge or indictment, any judgment.**’ (emphasis added)

The list being not exclusive, Member States may decide to extend the notion of ‘essential documents’ in their national legislation.

According to Article 3(3) of the Directive, other documents may also be considered essential on a case-by-case basis. Suspected or accused persons may request to receive the translation of documents essential in order to exercise their right of defence and to safeguard the fairness of the proceedings, as indicated in Article 3(1).

‘3. The competent authorities shall, **in a given case**, decide whether any other document is essential. **Suspected or accused persons may submit a reasoned request to that effect.**’ (emphasis added)

The reference to ‘a given case’ in Article 3(3) stresses that the question of whether additional documents are essential **depends upon the specifics of the case**. It may not be possible to establish whether a given piece of evidence (e.g. a witness statement) is always non-essential.

As indicated by Article 3(4) of the Directive, the purpose of the right to translation is to ‘[enable] suspected or accused persons to have knowledge of the case against them’. The authorities should therefore assess whether a specific document is essential and accordingly needs to be translated for the suspect or accused person to have knowledge of the case against them and to exercise their right of defence.

Again, the Directive leaves it to the Member State to decide the authority to which the ‘reasoned request’ should be addressed and the procedure to follow.

The CJEU provided further guidance on the notion of ‘essential document’. It ruled that:

- A **penal order imposing sanctions for minor offences** (e.g. a traffic offence), delivered by a judge under a simplified unilateral procedure, constitutes both an ‘indictment’ and a ‘judgment’ within the meaning of Article 3(2). It constitutes a ‘document which is essential’, within the meaning of Article 3(1) of that directive, of which a written translation must be provided.¹⁶⁶
- The right to interpretation and translation under Article 1(1) does not apply to a special procedure which recognises a conviction handed down in another member state.¹⁶⁷
- Article 3 of Directive 2010/64 concerns, in principle, only the written translation into the language understood by the person concerned of certain documents

¹⁶⁶ CJEU, [Sluutjes](#), C-278/16, Judgement of 12 October 2017, ECLI:EU:C:2017:757, para. 34.

¹⁶⁷ CJEU, [Balogh](#), C-25/15, Judgment of 9 June 2016, ECLI:EU:C:2016:423.

drawn up in the language of the proceedings by the competent authorities. Article 3(1) and (2) of Directive 2010/64 does not include, in principle, the written translation into the language of the proceedings of a document such as an objection lodged against a penalty order written in the language of the person concerned. However, a national court may decide that the **objection lodged in writing against a penalty order** should be considered to be an essential document, the translation of which is necessary.¹⁶⁸

This list is certainly not exhaustive. For instance, we would argue that the following documents may be considered as essential documents in specific circumstances:

- **Transcripts / records from police questioning:** Lawyers do not know whether the interview record contains inaccuracies vis-à-vis what their client actually said and might therefore need the help of their client to spot them. Translation of the interview record would be particularly useful if the suspect or accused person made incriminatory statements or if their statements are contradicted by other witnesses' statements.
- **Key supporting evidence:** In order to exercise defence rights effectively, suspected or accused persons may need access to key supporting evidence on which the documents listed in Article 3(2) of the Directive are based. This might cover witness statements and/or expertise relied on in a detention decision or indictment. For instance, if a pre-trial detention decision is based largely on one or two witness statements, the suspect's ability to challenge detention may depend on their ability to read these supporting documents. Equally, key evidence on which an indictment is based may have to be translated in order for the person to comment on it effectively.

As indicated in the 2018 Implementation report, the majority of Member States explicitly list what constitute 'essential' documents in their national legislation, but others leave it to the authorities to decide on a case-by-case basis which documents have to be translated.¹⁶⁹ In a few Member States, the list of documents to be translated does not comply with the documents listed in the Directive.¹⁷⁰ For instance, **Romania** does not include decision depriving a person of their liberty.¹⁷¹ In **Lithuania**, not all documents on measures of deprivation of liberty are to be translated.¹⁷²

Besides, in six Member States, the legislation does not recognise explicitly the possibility to request the translation of additional documents essential for the suspect or accused person.¹⁷³ In contrast, **Croatia**, the **Czech Republic**, **Portugal** and **Slovenia** go further than the Directive by listing additional documents as essential, such as the order on evidence collection or decisions on legal remedies. The

¹⁶⁸ CJEU, [Covaci](#), C-216/14, Judgment of 15 October 2015, ECLI:EU:C:2015:686, paras. 43-51.

¹⁶⁹ FRA Report, n11, pp. 36-38 ; Implementation Report, n 41, p. 8.

¹⁷⁰ Implementation Report, n 41, p. 8 ; FRA Report, n11, pp. 36-38.

¹⁷¹ FRA Report, n11, p. 38.

¹⁷² FRA Report, n11, p. 36.

¹⁷³ Implementation Report, n 41, p. 8.

United Kingdom also includes additional documents for the pre-trial phase, (e.g. the written interview records) but fails to list essential documents for the trial phase of the proceedings.¹⁷⁴

3. Partial translation

According to Article 3(4) of the Directive, irrelevant passages may be omitted from translation:

‘4. There shall be no requirement to translate passages of essential documents **which are not relevant** for the purposes of enabling suspected or accused persons to **have knowledge of the case against them.**’

We argue that the relevant passages of an essential document are **not limited to the incriminatory part** since other passages may be relevant to safeguarding the fairness of the proceedings. Non-incriminatory parts of a witness statement may, for instance, reveal falsehoods which the suspect could identify if he were in possession of a translation. Besides, a lawyer may not always know, without assistance from the client, if certain passages are relevant. Accordingly, we suggest that this provision be applied with precaution, as it is limiting the suspect’s ability to familiarise themselves with a document which has been found to be essential to their exercise of the rights of defence.

Few Member States go beyond this minimum by providing that essential documents must always be translated in full, even though this is not always respected in practice.¹⁷⁵

4. The ‘oral translation / summary’ exception

Article 3(7) of the Directive authorises the use of oral translation or oral summary in **exceptional circumstances**:

‘7. As an exception to the general rules established in paragraphs 1, 2, 3 and 6, an oral translation or oral summary of an essential document may be provided instead of a written translation **on condition that such oral translation or oral summary does not prejudice the fairness of proceedings (...).**’

Article 3(7) makes it clear that the general rule is ‘written’ translations. The provision expressly notes that providing an oral translation or summary of an essential document instead of providing a written translation is an **exception**. Accordingly, it must be **interpreted restrictively**.

As stressed by the provision, oral translation/summary may not be provided if there is a risk of prejudicing **the fairness of the proceedings**. This also expressed in more general terms in Article 8 of the Directive: this exception may not be interpreted in a way that would limit the right to a fair trial as secured by the ECHR and the Charter:

¹⁷⁴ FRA Report, n11, pp. 36-38.

¹⁷⁵ Implementation Report, n 41, p. 9; FRA Report, n11, pp. 39-41.

‘Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union, other relevant provisions of international law or the law of any Member State which provides a higher level of protection.’

This is also the approach taken by the ECtHR: oral translation may be provided but the fairness of the proceedings might require written translation:

*‘In that connection, it should be noted that the text of the relevant provisions refers to an “interpreter”, not a “translator”. This suggests that **oral linguistic assistance may satisfy the requirements** of the Convention’¹⁷⁶*

*‘The Court agrees with the Commission that the absence of a written translation of the judgment does not in itself entail violation of Article 6 § 3 (e) (art. 6-3-e). (...) it is clear that, as a result of the **oral explanations** given to him, Mr Kamasinski sufficiently understood the judgment and its reasoning to be able to lodge (...) an appeal against sentence (...).’¹⁷⁷(emphasis added)*

*‘[A] defendant not conversant with the court’s language may in fact be put at a **disadvantage if he is not also provided with a written translation** of the indictment in a language he understands’¹⁷⁸*

As a result, any general legislation according to which translation will always be provided by oral translations/summary would be contrary to the Directive.

Further, Article 3(4) explicitly provides the possibility of translating only certain passages of a document in writing, should the document in question be particularly long.

In any case, the oral translation / summary should enable the suspect or accused persons to have knowledge of the case against them and to exercise effectively their defence rights.

In practice, as at 2018, few Member States failed to mention that oral translations are ‘**an exception** to written translations and it is sometimes unclear in practice whether this is the case, as it seems that oral translations may be the rule’¹⁷⁹. Even in States where the legislation limits oral translations or summaries, this is not necessarily the case in practice and the notion of ‘exceptional cases’ is interpreted very broadly. This is notably the case in **Cyprus, Greece, Sweden and Finland**.¹⁸⁰

In clear contradiction with the Directive, **Austria, Bulgaria, Germany and Malta** adopted as the main criterion for allowing oral translation of essential documents whether or not a legal person has a legal counsel. German law states expressly that it can be assumed that oral translation may be

¹⁷⁶ ECtHR, [Husain v. Italy](#), App no. 18913/03, (Decision of 24 February 2005); [Hermi v. Italy](#), App. no. 18114/02, Judgment of 18 October 2006, para. 70; [Hacıoglu v. Romania](#), App. no. 2573/03, Judgment of 11 January 2011, para. 88.

¹⁷⁷ ECtHR, [Kamasinski v. Austria](#) App. no 9783/82, Judgment of 19 December 1989) para. 85.

¹⁷⁸ ECtHR, [Kamasinski v. Austria](#) App. no 9783/82, Judgment of 19 December 1989) para. 70.

¹⁷⁹ Implementation Report, n 41, p. 10.

¹⁸⁰ FRA Report, n11, pp. 39-41.

provided if the rights of the accused are safeguarded, which can be assumed if the accused has a defence counsel.¹⁸¹

5. The right to challenge failure to translate and complain about the quality

Article 3(5) of the Directive provides that:

'5. Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the **right to challenge** a decision finding that there **is no need for the translation** of documents or passages thereof and, when a translation has been provided, the possibility to **complain that the quality** of the translation is not sufficient to safeguard the fairness of the proceedings.' (emphasis added)

Again, the Directive leaves it to the Member State to decide the authority to which the 'reasoned request' or the complaints should be addressed and the procedure to follow. In accordance with Article 47 of the Charter and the general principle of effective judicial protection, the refusal to provide translation or to allow complaints about the quality of the translation¹⁸² must be subject to effective **judicial oversight**.¹⁸³

It follows from the right to submit a 'reasoned request' to translate additional documents (Article 3(3) of the Directive) and the right to challenge a negative decision that the refusing authority should also provide **reasons for its refusal**. Indeed, EU law requires the provision of reasons upon which a decision is taken to enable the affected person to defend their rights.¹⁸⁴

In practice, eight Member States introduced specific procedures to challenge a decision finding there is no need for translation of an essential document. The others rely on existing general procedures for appealing against decisions of investigating and court authorities.¹⁸⁵

National courts have recognised the serious consequences on the right to a fair trial for failing to translate essential documents. The Supreme Court in the **Netherlands** invalidated a judgement against a Romanian national who received a summons in Dutch only.¹⁸⁶ In **Italy**, the Court of Cassation held that judgments that are not immediately translated extend the applicable appeal

¹⁸¹ FRA Report, n11, pp. 39-40.

¹⁸² See Part III of this toolkit on the notion of interpretation of sufficient quality. Note that while the standards are the same, that Part focusses on interpretation of oral statement (not translation of written documents).

¹⁸³ See Fair Trials [Toolkit on Charter of Fundamental Rights of the European Union](#), Part III Section 1 on the right to an effective remedy (Article 47(1)).

¹⁸⁴ See CJEU, Joined Cases C-584/10 P etc., *Commission and Others. v. Kadi* [[ECLI:EU:C:213:518](#)], para. 100.

¹⁸⁵ Implementation Report, n 41, p. 9.

¹⁸⁶ Supreme Court of the Netherlands (Hoge Raad der Nederlanden), [Case No. 14/00030](#), Judgment of 3 February 2015.

period, which does not begin to run until the person concerned takes delivery of the translated decision.¹⁸⁷

C. USING THE DIRECTIVE IN PRACTICE

1. Identifying the essential documents that need to be translated

You may need translation of a document for specific reasons – for instance if it contains key parts of the accusation or if it is a key witness statement which your client needs to assess. However, if you cannot determine the value of a document without your client’s input, you should always seek a translation.

➔ **Identify the essential documents that need to be translated:**

- Is it a key document such as the notification of suspicion given upon arrest, a detention order, indictment or judgment?
- Is it a witness statement that contradicts your client’s version of events and which they need to assess in order to tell you what is wrong?
- Are you unable to determine the value of the document without your client’s input?
- Is the client in detention? Does this mean that there is insufficient time for you to consult with your client as to the contents of the relevant documents?

2. Making a request

Based on Article 3(3) of the Directive, you are entitled to submit a ‘reasoned request’ to receive the translation of the document you have identified as essential.

➔ **Request the translation of the document**

- Make a reasoned request in writing to the authority specifically designated by the national law implementing the Directive based on Article 3(3) of the Directive.
- If there is no specific authority designated, make a request to the relevant authority - e.g. prosecutor, investigating judge, police. State explicitly that you are making the request under Article 3(3) of the Directive, which entitles you to make a specific request for essential documents, as well as any relevant national provisions.
- If these authorities refuse to consider your request, this is a violation of the Directive and should be the subject of a judicial challenge (see the ‘challenging adverse decisions’ section below).

➔ **Explain why you are entitled to the translation of the document**

- State why the documents you request are essential.

¹⁸⁷ Court of Cassation of Italy, [Judgment of the Court of Cassation, Sixth Penal Section, No. 45457](#) of 29 September 2015.

- **Mandatory documents:** If the document you request is a charge/indictment/judgement/decision depriving liberty, explain that these are as a matter of principle considered as essential by Article 3(2) of the Directive. Regardless of what is provided in national law, the suspect is entitled to this document. If the authority refuses on the basis that it has no power to order the translation, you should challenge the decision (see the ‘challenging adverse decisions’ section below).
 - **Additional documents:** If the document is not listed in Article 3(2) of the Directive, explain why the absence of the translation prevents your client from exercising their rights of defence effectively, based on the nature and value of the document (Articles 3(2) and 3(4) of the Directive).
- ➔ **Request full written translation**
- State why oral translation would be insufficient for your client to effectively exercise their defence rights and to have knowledge of the case against them (Article 3(4) of the Directive *a contrario*).
 - State that, if the authority refuses to provide a translation, you request a reasoned decision (this will be helpful if you have to challenge the decision).

3. Challenging a refusal to provide written translation

If your request is refused, you need to challenge it, as foreseen by Article 3(5) of the Directive.

a. Insist upon judicial review

As noted above, your State might have introduced specific procedures to challenge a decision finding there is no need for translation of document. The others rely on existing general procedures for appealing against decisions of investigating and court authorities.

- Based on Article 47 of the Charter, you must insist upon judicial review before the most appropriate court of general jurisdiction (e.g. administrative court, investigating judge, etc.) claiming a right to do so under the Directive. Their refusal of jurisdiction might be appealable and that might allow you to raise the issue before a higher court which would be more receptive to arguments about EU law.

b. Unreasoned refusals are not acceptable

Practitioners often report that procedural decisions, in all areas (e.g. pre-trial detention), lack adequate reasoning. If this manifests itself in this context, you should make an issue of it:

- Challenge the decision of the authority which made the decision or complain to the authority identified in the national law implementing the Directive (Article 3(5) of the Directive).
- Argue that the authority is required by the Directive to give reasons for refusing to provide translation: the suspect has submitted a ‘reasoned request’ under Article

3(3) and in order to ‘challenge’ this decision as provided for by Article 3(5), they need to have the reasons for it (CJEU case law).

- Call on the authority to reconsider the decision.¹⁸⁸

c. The decision relies on the possibility of ‘oral translation’

One of the major grounds on which written translations are refused is that the function of the translation is to enable the person to understand the case against them, and that this can be achieved through an oral explanation. Such arguments fall within the scope of Article 3(7) of the Directive, which, as explained above, establishes an exception to the rule in favour of written translations.

- Explain that Article 3(1) of the Directive entitles the suspect or accused person to a ‘written translation’ of essential documents. The possibility offered by Article 3(7) is an exception to this rule which, as such, must be strictly interpreted.
- Explain why the requested translation, if not provided in writing, will risk prejudicing the fairness of the proceedings. Highlight the reasons why the suspect needs to be able to review the document themselves, in order to prepare an effective defence, for instance, because it is a key witness statement and the suspect needs to be able to review the content in order to instruct you as to inconsistencies or falsehoods in it.
- If relevant, argue that interpreters are not equipped to summarise essential documents when asked to give an oral translation. The decision on which passages are to be omitted is beyond an interpreter’s responsibility.
- If relevant, invite the authority to consider the possibility to translate at least certain passages of the document in writing, as provided for by Article 3(4).

¹⁸⁸ See, in this regard, CJEU, [Kadi v Commission](#), Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, Judgment of 18 July 2013, ECLI:EU:C:2013:518.

FINAL REMARKS

The right to interpretation and translation is an essential safeguard in criminal proceedings, which enables the exercise of other fair trial rights. As with access to a lawyer, access to interpretation services at the initial stages of the criminal proceedings is crucial to help prevent prejudice to the suspect's defence. The Directive establishes the right to interpretation in police interviews, hearings and in meetings with their lawyer, and their right to translation of essential documents. In many respects the Directive sets a higher standard than that currently established by the ECtHR jurisprudence. ECtHR case-law suffers from the limited amount of evidence that the Court usually has at its disposal when reaching decisions as to whether or not the right to language assistance had been upheld and enjoyed.

The transposition of the Directive in the law of Member States has broadly been completed. However, as shown by [Fair Trials' research](#), the [Implementation report](#) and [FRA's report on rights in practice](#), there are still many outstanding issues that undermine the effectiveness of the rights guaranteed by the Directive. Some of these issues relate to the very core of the right to interpretation and translation, such as the failure to properly assess the interpreting needs of the suspect or accused person, the insufficient quality of legal interpretation, the failure to provide interpretation services for client-lawyer communication, and the broad use of oral translations.

It is the role of practitioners to use the Directive and make sure it is enforced by domestic courts across the EU. We hope that this toolkit will support the efforts of lawyers across Europe, all of whom are invited to:

- [Contact us](#) for assistance, support and comparative best practice on the Directive.
- Let us know if courts (be they apex or first-instance) issue positive decisions applying the Directive. These can be of use to people in other countries.
- If questions of interpretation arise, consider the CJEU route: see the [Using EU law Toolkit](#), our [Preliminary reference Toolkit](#) and our online training [video on the preliminary ruling procedure in criminal practice](#).
- Visit our website www.fairtrials.org regularly for updates on key developments relating to the Directives, and news about in-person training and [updates on relevant case-law](#).
- Come to us if you don't get anywhere with the courts, because we can explore other options like taking complaints to the European Commission.
- Get involved with pushing the issues in the domestic context: see our paper "[Towards an EU Defence Rights Movement](#)" for concrete ideas on articles, litigation, conferences etc.