

## **BRIEF NOTE ON THE JUDGMENT OF THE COURT OF JUSTICE IN CASE NO. C-242/22 PPU CONCERNING THE RIGHTS OF SUSPECTED AND ACCUSED PERSONS**

The Directive 2010/64/EU of the European Parliament and of the Council of 20.10.2010 ("Directive 2010/64") sets out minimum rules concerning the right to interpretation and translation in criminal proceedings and in European Arrest Warrant proceedings and was the first of several measures adopted in implementation of the so-called "2009 Roadmap" (Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings). It should have been transposed by all Member States by 07.10.2013. Directive 2012/13/EU of the European Parliament and of the Council of 22.05.2012 ("Directive 2012/13") establishes minimum rules concerning the right to information in criminal proceedings and was the second of the measures adopted in this context. It should have been transposed by 02.06.2014.

Portugal has indicated to the Commission that it does not consider it necessary to take measures to transpose the Directives - as it considers that its national legislation already meets the requirements of the Directives. The Commission has initiated two infringement proceedings against Portugal to verify whether the Directives are actually being complied with. According to the information available on the [European Commission's website](#), no decision has yet been rendered in either cases (INFR(2021)2104 and INFR(2021)2101). However, Directive 2012/13, the Commission considered that the response to the letter of formal notice calling for action to remedy the identified deficiencies concerning the right to information on certain rights, as well as the Letter of Rights and the Letter of Rights in European Arrest Warrant proceedings, is insufficient. It therefore sent a [reasoned opinion](#) on 29.09.2022. Portugal now has 2 months to reply and if it does not provide a satisfactory response, the Commission may decide to refer the case to the CJEU.

However, the Court of Justice of the European Union (CJEU), in its judgment of 01.08.2022 in case C-242/22 PPU, has already ruled on the (non-)conformity of Portuguese national law regarding the assistance by an interpreter in criminal proceedings and the translation of certain procedural documents with the provisions, in particular, of Articles 1 to 3 Directive 2010/64 and of Article 3 Directive 2012/13.

Following a request for a preliminary ruling by the Évora Court of Appeal, the CJEU ruled that *"Article 2(1) and Article 3(1) 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 and Article 3(1)(d) of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, read in the light of Article 47 and Article 48(2) of the Charter of Fundamental Rights of the European Union and the principle of effectiveness, must be interpreted as precluding national legislation under which the infringement of the rights provided for by those provisions of those directives must be invoked by the beneficiary of those rights within a prescribed period, failing which that challenge will be time-barred, where that period begins to run before*

*the person concerned has been informed, in a language which he or she speaks or understands, first, of the existence and scope of his or her right to interpretation and translation and, secondly, of the existence and content of the essential document in question and the effects thereof."*

It is recalled that Article 2 Directive 2010/64 provides that a suspected or accused person has the right to interpretation "during criminal proceedings before investigative and judicial authorities, including during police questioning, at court hearings and any necessary interim hearings" and with regard to communications with their lawyer, while Article 3 provides for the "right to translation of documents essential" to the exercise of the "right of defense and to guarantee the fairness of the proceedings" - such as decisions depriving a person of his liberty, any charge or indictment, and any judgment. Article 3(1)(d) of Directive 2012/13 aims to ensure that suspected or accused persons are informed of their procedural rights, including the right to interpretation and translation.

In this case, the accused, who was not fluent in Portuguese, was sentenced to three years of imprisonment, suspended for the same period and subject to probation. It was never possible to reach the accused at the address indicated in the Statement of Identity and Residence ("SIR") in order to implement the probation plan. As a result, the accused was summoned by the court twice, to the same address, to be heard for failure to comply with his obligations under the probation regime. The accused never appeared in court and the suspension of execution of the prison sentence was revoked. The accused was eventually arrested at his new address to serve his prison sentence and has been in prison ever since.

After the arrest, the accused appointed a new defence lawyer and filed a request arguing the nullity of the SIR, the court orders that summoned him to appear in court and the decision that revoked the suspended sentence. Among others, he stated that he was unaware of the obligation to inform the authorities of his change of residence, as well as of the consequences of non-compliance with this obligation, since the SIR was written in Portuguese, and had not been translated and that he had never benefited from the assistance of an interpreter. Nor were the court decisions rendered translated into a language he spoke or understood.

The first instance court in Portugal dismissed the nullity claim as untimely, in accordance with the provisions of article 120(3) of the Code of Criminal Procedure, which provides that nullities concerning the investigation must be raised before the end of the judicial investigation stage ("*instrução*" – an optional procedural phase which may be triggered by both the victim or the accused in order to challenge the closure of the case or the indictment) or, if no such stage takes place, within five days after notification of the order closing the inquiry. The Court of Appeal decided to make a preliminary ruling reference to the CJEU, which in a nutshell ruled:

- the Directives in question have direct effect, since they prescribe the content and scope of the rights to interpretation and translation of essential documents and the right to be informed of the former two rights in a precise and unconditional manner, so that any person enjoying these rights (suspected or accused persons) may invoke them directly before national courts;

- the SIR and the three court decisions (conviction, decision for hearing on non-compliance with the suspended sentence conditions, and decision to revoke the suspended sentence) are included in the concept of "essential documents", given their importance to the exercise of the accused's procedural rights, hence their written translation should have been provided to the accused;
- the Directives apply to all procedural acts that are part of the criminal proceedings, even if they are *solely* ancillary to the conviction, such as the orders concerning the non-compliance with conditions of a suspended sentence. Therefore, the rights contained therein apply from the moment a person is informed by the competent authorities that they are suspected or accused of having committed a criminal offence until the end of the criminal proceedings, i.e. until a final decision is made on the question whether the suspected or accused person has committed the criminal offence with which they are charged (including any appeal stages);
- the time limit to claim an infringement of the rights conferred by the Directives cannot begin to run until the person concerned is informed, in a language that they speak or understand (i) of the existence and scope of their right to interpretation and translation and (ii) of the existence and content of the essential document in question and the effects associated with it (to the contrary of what would follow, *in casu*, from the literal application of the provisions of Article 120 of the CPP).

This decision confirms what has long been argued by advocates<sup>1</sup>, magistrates<sup>2</sup> and academics<sup>3</sup> : Portuguese domestic law is clearly inadequate with regard to the right to translation and interpretation and should be amended to ensure compliance with the Directive and the protection of citizens' rights.

There is an urgent need for the legislator to act and correct the shortcomings of the law, in a transparent and public manner, in consultation with the relevant stakeholders during the process, to ensure the adoption of rules that not only remedy the deficiencies identified in the judgment, but also other deficiencies already identified by practitioners and scholars, such as (without being exhaustive):

- 1) amendment of Article 61 to fully include the right to interpretation and translation;
- 2) introduction of a new article establishing a non-exhaustive list of documents for which translation is mandatory, in particular:

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<sup>1</sup> V.g. Ramos, Vânia Costa, [https://carlospintodeabreu.com/public/files/direito\\_europeu\\_pratica\\_processual.pdf](https://carlospintodeabreu.com/public/files/direito_europeu_pratica_processual.pdf); translation available at <https://www.fairtrials.org/articles/news/using-european-law-in-criminal-practice/>; <https://elearning.cej.mj.pt/mod/resource/view.php?id=41634>.

<sup>2</sup> V.g. Sousa, João Gomes, <http://julgar.pt/wp-content/uploads/2019/03/20190312-ARTIGO-JULGAR-Traduzir-interpretar-e-informar-Inc%C3%B3modos-da-modernidade-Jo%C3%A3o-Gomes-de-Sousa-v2.pdf>; Oliveira, Alexandre Au-Yong, <http://www.dgsi.pt/bpil.nsf/585dea57ef154656802569030064d624/a09463a83919992480258346003f09e5?OpenDocument>; Silva, Júlio Barbosa e, Silva, <http://julgar.pt/wp-content/uploads/2018/03/20180316-ARTIGO-JULGAR-Direito-a-interpretar-e-tradu%C3%A7%C3%A3o-J%C3%BAlio-Barbosa.pdf>;

<sup>3</sup> V.g. Jerónimo, Patrícia, <http://repositorium.sdum.uminho.pt/handle/1822/27488>; Sandra Oliveira and, <https://repositorio-aberto.up.pt/bitstream/10216/83289/2/125702.pdf>.

- those identified in the Directive (decisions imposing a coercive measure restricting freedom; decisions ordering the detention of a suspect; decisions imposing a sentence or security measure; charging decisions: decision ordering or requesting detention for first interrogation; informing the accused of the charge before giving evidence; police report used as indictment; decisions of first and subsequent instances; decisions of conviction and acquittal)

- those identified in the judgment now rendered by the CJEU: the formal act declaring the person as an accused, SIR, notification of an order for hearing the accused with a view to revoking the suspended sentence; decision to revoke the suspended sentence;

- as well as others deemed essential (for example, all which must be served personally to the accused).

3) clarification of the time limit for arguing the lack of translation of essential documents, which must be counted from the personal knowledge of the defect by the accused themselves. A defect which, in our opinion, would always constitute an irregularity that affects the intrinsic value of the act and as such could be invoked at any time; (however, given the divergences in jurisprudence, this matter should be clarified).

We remain at the legislator's disposal to make the necessary contribution to the much-needed legislative reform.

Vânia Costa Ramos | Dirce Rente

Advocates in Portugal