

BRIEF ANALYSIS ON THE RIGHT TO THE TRANSLATION OF KEY EVIDENCE UNDER DIRECTIVE 2010/64/EU

I. Introduction

Directive 2010/64/EU of the European Parliament and of the Council of 20 of October 2010 (“the Directive”) sets out EU-wide minimum standards concerning the right to interpretation and translation in criminal proceedings. It was the first of several measures adopted under the so-called 2009 Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. Yet, the implementation of these minimum standards by the Member States has revealed persistent shortcomings.

This article focuses on the right to the translation of essential documents, including key evidence, under Article 3 of Directive 2010/64/EU, within the legal framework and judicial practice in Portugal.

II. The legal framework in Portugal

While the Directive was due to be transposed by all Member States by 27 October 2013, Portugal only completed this process on 28 August 2023, almost 10 years later, through an amendment to the Portuguese Code of Criminal Procedure (“CCP”). This amendment followed the Court of Justice of the European Union’s (“CJEU”) decision on case C-242/22 PPU, in which the court ruled on the (non-)conformity of Portuguese law with Articles 1 to 3 of Directive 2010/64/EU.¹

Until then, the CCP simply established the right to an interpreter in criminal proceedings, whereas the right to the translation of documents remained without express provision in national legislation. It was only with the 2023 CCP amendment that several provisions regarding the right to the translation of documents were introduced and the transposition of Directive 2010/64/EU was completed.

The new Article 92 (3) of the CCP establishes that the authorities presiding to a procedural act “*shall provide the accused who does not know or is not fluent in the Portuguese language, within a reasonable period of time, with a written translation of the documents*

¹ CJEU, C-242/22 PPU, Judgment of 1 August 2022, ECLI:EU:C:2022:611, available at: <https://eur-lex.europa.eu/legal-content/EN/TEXT/PDF/?uri=CELEX:62022CJ0242>; Vânia Costa Ramos and Dirce Rente, “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”, Fair Trials Legal Analysis, 25 November 2022, available at https://www.fairtrials.org/app/uploads/2022/11/BriefNote_CJEUPortugal.pdf.

referred to in paragraph 10 of Article 113 and of others that the entity deems essential for the exercise of the defence.”. The documents referred in Article 113 (10) of the CCP include the indictment, the final decision of the pre-trial stage (“decisão intrutória”)², the notification to present the defence, the decision setting the date for the trial, the judgment, decisions relating to the application of coercive measures and financial guarantees, and civil compensation claims. Article 92 (6) of the CCP further provides that the accused “may submit a reasoned request for the translation of case documents which he or she considers essential to the exercise of the right of defence”.

III. The judicial practice in Portugal

Notwithstanding the changes in national law, judicial practice in Portugal has consistently remained formalistic. Prior to the 2023 amendment, the CCP did not distinguish between interpretation and translation. The provisions regarding the appointment of an interpreter for an accused person who does not know or is not fluent in Portuguese, set out in the former Article 92, were interpreted as also including the translation of documents into a language understood by the accused, particularly the translation of documents that must be personally notified to the accused according to Article 113 (10) of the CCP, in light of Article 3 (1) and (3) of the Directive, which was considered applicable through its direct effect. Based on this interpretation, the Public Prosecutor’s Office (the “PPO”) and the national courts would often only translate the documents listed in Article 113 (10) upon the accused’s request.³

The transposition of Article 3 of the Directive with the 2023 CCP amendment, made it clear to national authorities that there is an obligation to translate the essential documents expressly listed therein on their own motion.⁴ However, the formalistic approach of

² This is an optional screening judicial stage which can be triggered either by the accused or the victim in order to obtain an investigative judge’s control of the Public Prosecutor’s decision to issue an indictment or close the case, respectively.

³ Lisbon Court of Appeal, Case no. 324/14.0TELSB-ET.L1-3, Judgment of 17 November 2021, available at: <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/d744780219db4de78025879c003e0463?OpenDocument>.

⁴ Évora Court of Appeal, Case no. 228/24.8PCFAR.E1, Judgement of 11 March 2025, available at: <https://www.dgsi.pt/jtre.nsf/134973db04f39bf2802579bf005f080b/7aab4acd75fbc98280258c52003dab33?OpenDocument&Highlight=0,Diretiva,2010%2F64%2FUE>; Évora Court of Appeal, Case no. 399/22.8GESLV.E1, Judgement of 21 May 2024, available at: <https://www.dgsi.pt/jtre.nsf/134973db04f39bf2802579bf005f080b/7159b68a51a91df380258b2b003b613a?OpenDocument&Highlight=0,Diretiva,2010%2F64%2FUE>; Évora Court of Appeal, Case no. 428/21.2GESLV.E1, Judgement of 20 February 2024, available at: <https://www.dgsi.pt/jtre.nsf/134973db04f39bf2802579bf005f080b/1837f4d61f614f9280258ad2004efdfd?OpenDocument&Highlight=0,Diretiva,2010%2F64%2FUE>; Lisbon Court of Appeal, Case no. 351/11.9GALNH-A.L1.5, Judgment of 14.11.2023, available at:

national authorities remained and has revealed several shortcomings to the full implementation of the Directive in Portugal.

Firstly, it's settled in the case-law of national courts that decisions from higher courts do not have to be personally notified to the accused, provided that they are notified to the defence lawyer. In practice, this means that, in criminal proceedings involving accused persons who do not understand or are not fluent in Portuguese, only the first-instance decisions are translated into a language understood by the accused, whereas the decisions of higher courts are not, which has further consequences for the procedural time-limits to lodge an appeal.⁵ This approach inherently undermines the effective exercise of defence rights and the right to the translation of essential documents enshrined in Directive 2010/64/EU.

Secondly, national courts have established that where the defendant who does not understand or is not fluent in Portuguese requests to be absent and does not attend the reading of the judgment, he or she may be formally notified through their lawyers and, in such cases, there is no requirement to provide a written translation of the judgment to the accused.⁶ This interpretation directly contradicts the wording of Article 3 (2) of the Directive and Articles 113 (10) and 92 (3) of the CCP.

Furthermore, national authorities are typically not willing to translate essential documents other than those expressly considered as such by Article 3 (2) of the Directive and Articles 113 (10) and 92 (3) of the CCP, and do not engage in a case-by-case assessment, on their own motion, to determine which other documents could be considered essential to ensure the effective exercise of the right of defence and safeguard the fairness of the proceedings. Moreover, where the translation of other documents is requested by the accused under Article 3 (1) and (3) of the Directive and Article 92 (2) and (6) of the CCP, national

<https://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/06cc0217c375833680258a740036f7e9?OpenDocument&Highlight=0,Diretiva,2010%2F64>.

⁵ Supreme Court of Justice, Case no 320/23.6YRPRT.S1, Judgement of 18 January 2024, available at: <https://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/e04593a73cb9cfcf80258aa9002d025b?OpenDocument&Highlight=0,Diretiva,2010%2F64%2FEU>.

⁶ Guimarães Court of Appeal, Case no. 161/23.0GAMTR.G1, Judgment of 2 July 2024, available at: <https://www.dgsi.pt/jtrg.nsf/86c25a698e4e7cb7802579ec004d3832/9ceb7fb07c3e71bf80258b5d0050b9d9?OpenDocument&Highlight=0,Diretiva,2010%2F64%2FEU>;

authorities are usually reluctant to order their translation, albeit there are some decisions that have recognised the need to translate other essential documents upon request⁷.

The case recently decided by the Coimbra Court of Appeal illustrates the view of national courts regarding the translation of other essential documents besides those listed in Article 3 (2) of the Directive. The accused, a Polish national who does not speak Portuguese, was charged with drug trafficking. He was notified and received the indictment in Polish, his native language. However, none of the key evidence on which the prosecution based the indictment and intended to rely at trial was translated. This evidence included: (i) expert reports, such as laboratory analyses of the seized substances and forensic analyses of the data from the accused's mobile phone; (ii) police documentation, including the arrest report, reports on searches and seizures, weighing records of the seized substances, reports concerning the accused's banking information, and the police conclusions on the basis of the aforementioned reports; (iii) transcripts of intercepted communications from the accused's mobile phone; and (iv) records of witness interviews.

Upon receiving the indictment, the accused submitted a request to the court seeking the translation of the evidence on which the indictment was grounded into a language he understands, as such evidence was essential for understanding the charges against him and for ensuring his right of defence and the fairness of the proceedings. The court refused the translation of such evidence and determined that documents not listed in Article 92 (3) and 113 (10) CCP do not require translation and that it is therefore upon the accused to obtain the translation of such documents at their own expense. The accused lodged an appeal before the Court of Appeal and argued that such interpretation is contrary to Directive 2010/64/EU and that the order was not sufficiently substantiated as it did not engage in a case-by-case assessment of the essential nature of the evidence to ensure the right of defence.

⁷ The Judicial Court of Lisbon recognised that the concept of “essential documents” under Article 3 (3) of the Directive must be understood as referring to all documents that are decisive for “ensuring the right of defence” and for “safeguarding the fairness of the proceedings” on a case-by-case assessment. In that context, the court ruled that the essential nature of the documents cannot be assessed from the perspective of the PPO or the court, but rather from the defence's perspective. In light of that, the court order all documents requested by the accused to be translated.

The Coimbra Court of Appeal concluded that the translation of the documents, on the sole ground that their essential nature lies in the fact that they support the prosecution's case, is not mandatory and does not infringe the rights of the defence.⁸

In our view, the interpretation adopted in this case is too narrow and formalistic, in light of both the wording and the purpose of Directive 2010/64/EU.

IV. The right to translation of key evidence under Directive 2010/64/EU

The wording of Article 3 (1) of the Directive is clear in respect to the right to translation of “essential documents”. All documents, whether those expressly considered as essential documents under Article 3 (2) or others deemed essential to ensure the exercise of the right of defence and the fairness of the proceedings, must be translated and the respective costs bore by the Member States (see Article 4). The CJEU has also ruled that the list of essential documents that must be translated are not restricted to those specified in Article 3 (2) of the Directive and that is therefore to the national authorities to determine if the translation of any other documents, on a case-by-case basis, is necessary to ensure the right of defence.⁹

The right to the translation of essential documents is directly intertwined with the ability of the accused persons to understand the charges against them. It follows from Article 3 (4) of the Directive that the purpose of the right to translation is to enable the suspected or accused persons to have knowledge of the charges against them. Recital 14 also provides that the aim of the Directive is to facilitate the application of Article 6 of the European Convention of Human Rights (“ECHR”), as interpreted by the European Court of Human Rights (“ECtHR”).

Article 6 (3) (a) ECHR establishes that everyone charged with a criminal offence has the right “*to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him*”. The ECtHR has also stated 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*

⁸ Coimbra Court of Appeal, Case no. 104/24.4JELSB-B.C1, Judgement of 29 April 2026, available at: <https://www.dgsi.pt/jtrc.nsf/c3fb530030ea1c61802568d9005cd5bb/723c7d7ae5f009bf80258def0054bdb1?OpenDocument&Highlight=0,Diretiva,2010%2F64%2FEU>.

⁹ C-242/22 PPU, cited above (fn. 1); CJEU, C-278/16, *Sleutjes*, Judgment of 12 October 2017, ECLI:EU:C:2017:75, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016CJ0278>.

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."¹⁰

Thus, all documents in addition to those explicitly considered as "essential documents" under the non-exhaustive list of Article 3 (2) of the Directive shall be translated if they are essential for the accused persons to understand the charges against them and to ensure the exercise their right of defence and to safeguard the fairness of the proceedings.

In our view this includes, *inter alia*, the evidence on which the prosecution rests its indictment on or intends to rely upon at trial. In order to understand the charges against them and to exercise their right of defence in respect thereof, it is essential that accused persons are able to understand the evidence presented, evaluate their credibility and accuracy, provide instructions to their defence lawyer and effectively defend themselves against those charges.

For instance, the translation of expert reports often contains decisive evidence in drug trafficking cases. The accused persons must be able to understand these reports in order to assess their credibility, the methodology used, the data analysed, the results obtained, instruct a counter-expert if needed and prepare cross-examination, particularly in cases involving specific substances less known or studied.

Similarly, police reports are equally important, since these documents explain how the evidence was gathered, the chain of custody, the interpretation of the financial activity of the accused, and the interpretation of aforementioned reports. These documents are thus essential for the accused to understand and challenge the factual and legal conditions under which the evidence was obtained, and the interpretation made by the police.

In this regard, it shall be recalled that the concept of "charges" adopted in the Directive is a broad concept that goes beyond the formal indictment. Under the ECtHR's case-law, a person is considered to be "charged" from the moment their procedural position is "substantially affected" by investigative acts¹¹, which includes the investigations carried out by the police, as they are likely to affect the course of the criminal proceedings and

¹⁰ ECtHR, *Hacioglu v. Romania*, App. no. 2573/03, Judgment of 11 January 2011, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-102629%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-102629%22]}).

¹¹ ECtHR, *Alexander Zaichenko v. Russia*, App. No. 39660/02, Judgment of 18 February 2010, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-97346%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-97346%22]}).

even determine the application of coercive measures on the applicant. Therefore, police reports fall within the notion of “charges” and may also be considered as essential documents listed under Article 3 (2) of Directive 2010/64/EU.

Furthermore, the central role that the content of wiretap transcripts usually plays as evidence in criminal proceedings also makes it essential that they be translated into a language that the accused understands. Otherwise, the accused will not be able to assess the accuracy, meaning or context of what was transcribed, to establish whether the transcriptions or summaries prepared by the police are inaccurate or misleading, and to request the transcription of other passages that may also be relevant to prepare the defence.

Equally, it is necessary that the accused understands the content of the witness statements in order to identify any inconsistencies or inaccuracies that such statements may contain and to prepare the examination and cross-examination of witnesses.

Furthermore, the access to the translation of this type of evidence is essential not only for the accused to understand the nature and cause of the charges against them, but also to ensure effective communication between them and their defence lawyers. This is a particularly sensitive issue in cases where the accused is in pre-trial detention. In such circumstances, the communication between the accused and their defence lawyers is limited by prison visiting hours. Moreover, if the accused relies on legal aid and has an *ex officio* lawyer, the number of visits to the prison that the lawyer will be paid for is limited to a maximum of three visits, under Portuguese law. Furthermore, in such situations, the accused do not have access to external sources to translate the documents by themselves, for example through automated translations. Finally, the access to an appointed interpreter for meetings with their defence lawyers in prison are limited and cannot be considered as an effective and sufficient alternative to ensure the rights of the defence in Portugal.

In light of the above, the understanding of the key evidence relied upon by the prosecution in such cases should be, in principle, considered essential to ensure the right to the defence and, consequently, be translated into a language that the accused understands if requested by the applicant under Article 3 (1) and (3) of the Directive.

Moreover, the decision by which the court assesses such requests must be sufficiently substantiated and entail a case-by-case analysis of the essential nature (or not) of the

written translation of such key evidence. Therefore, these requests cannot simply be denied without an adequate reasoning. The Directive requires national authorities to provide a reasoned decision when they refuse to order the requested translations.

The adoption of a different view would not only be contrary to what is established by the wording and purpose of the Directive, but also to the right to a fair trial, the rights of the defence and the principle of equality of arms, enshrined in Article 47 and 48 of the EU Charter of Fundamental Rights (the “Charter”) and Article 6 of the ECHR.

V. Outset

The concept of “essential documents” under Directive 2010/64/EU should be interpreted as including all documents necessary to ensure that suspected or accused person are able to understand the charges against them, to effectively exercise their right of defence, and to safeguard the fairness of the proceedings.

The key evidence on which the prosecution based its indictment and intends to rely upon at trial must, in principle, be regarded as “essential documents” where it plays a role in substantiating the charges. In our experience, there have been cases where the national courts accepted to translate at least part of the evidence. Nonetheless, this is not a consistent practice, as shown by the example above. We sustain that the highly formalistic approach adopted by the Portuguese national authorities, which limits the concept of “essential documents” to a predefined list of procedural acts and excludes the translation of other documents, including key evidence, is incompatible with the minimum safeguards provided by Directive 2010/64/EU interpreted in conformity with the Charter and the ECHR.

Some may argue that this interpretation would exceed the obligations expressly imposed by the Directive and go beyond the legislator’s intent. In the absence of clear guidance from the Court of Justice of the European Union on the translation of the key evidence used in support of the indictment or any other charges, a preliminary reference to the Court of Justice is urgent to ensure a uniform interpretation and implementation of Directive 2010/64/EU by all the Member States, and to safeguard the minimum rights established therein.

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