Translation of the article by Vania Costa Ramos:

THE USE OF EUROPEAN LAW IN CRIMINAL PROCEEDINGS

European criminal law has undergone unprecedented changes. However many will ask: **can I use these new normative instruments in actions in Portugal? The answer is yes,** as we will see in the example of **Directive 2010/64/EU,** of the European Parliament (EP) and of the Council, of 20.10, relating to the **right to interpretation and translation** in criminal proceedings.

A. How can I invoke a Directive?

Our legislator did not approve any legislative amendments as a result of the Directive. **But as the transposition period has expired** (on 27.10.2013), it **has already come into force in the European Union (EU) and Portugal**; as a result the following obligations arise:

1) **Obligation to interpret national law in conformity with internal regulations** – it is obligatory, when interpreting an internal regulation, to apply the interpretation that gives effect to the obligations contained in the Directive[1];

2) **Direct application –** if it is not possible to interpret a national law in conformity with a Community law, the Directive must be applied directly, as long as the respective assumptions are met[2]:

   i. Expiry of the transposition period;

   ii. The regulation in question granting rights and the content of the regulation being sufficiently clear, precise, and unconditional, and the performance of any act of transposition being unnecessary;

3) **Reference for a preliminary ruling**[3] to the European Court of Justice (ECJ), whenever:

   i. If a question is raised in relation to the interpretation of the Directive;

   ii. This question is essential and imperative for the decision, i.e., its interpretation has a significant impact on the Portuguese case.

   iii. The interpretation is not evident.

B. Directive 2010/64/EU

1. The right to Interpretation

In relation to **Directive 2010/64/EU**, this firstly **establishes the right of defendants or accused persons "who do not speak or understand the language of the criminal proceedings**[4]**"** to have the benefit "of **interpretation during the criminal procedure**" in all of its phases (art. 2, no. 1) and in the proceedings for the execution of a European arrest warrant (EAW, art. 2, no. 7), which may include the provision of an interpreter for the conversations between the defendant and his/her legal counsel (art. 2, no. 2). The **Directive provides a *standard* of quality**: the interpretation "*must be of sufficient quality to safeguard*

[1] Cf. arts 4, No 3 of the TUE (Tratado da União Europeia [Treaty of the European Union]), and 288 of the TFUE (Tratado sobre o Funcionamento da União Europeia [Treaty regarding the Functioning of the European Union]), and the *MARLEASING*[1] *decision;* cf. also the *Pupino* decision of 16.06.2005 (case C-105/03, available at http://curia.europa.eu)

[2] Cf. Art. 288 of the TFUE and the following decisions: *Van Gend en Loos*, of 6.10.1970 (case 26/62, available at http://eur-lex.europa.eu) and Van Duyn, of 04.12.1974 (case 41/74, available at http://curia.europa.eu)

[3] The reference is obligatory for final appeal courts and discretionary for all others. On this subject, cf. http://www.cej.mj.pt/cej/recursos/ebooks/GuiaReenvioPrejudicial/guia.pratico.reenvio.prejudicial.pdf.

[4] The right also applies to people with hearing or speech impediments – art. 2, no. 3.

the fairness of the proceedings, in particular by ensuring that suspected or accused persons are aware of the allegations and evidence brought against them and are able to exercise their right of defence".

2. The interpretation of the CPP (Código de Processo Penal [Criminal Procedure Code]) and the obligations of the Directive

Our Criminal Procedure Code (CPP) dedicates only one article to the issue of interpretation – article 92 – in which at subsection no. 2 it states "*When a person has to intervene in proceedings, but that person does not understand or is not fluent in Portuguese, a reputable interpreter is appointed at no charge to that person*[...]*"*.

The interpretation in accordance with the Directive is that the right to interpretation is a right which **aims to guarantee defendants equal treatment in the proceedings, allowing them to understand the allegations and evidence against them, so as to guarantee their right to defence (art. 2, no. 8).** The assistance received from the interpreter aims to put the defendant on equal footing with the other parties involved in the proceedings. In other words, the involvement of the interpreter is an instrument that neutralises the *handicap* of a foreign defendant who, not understanding the language of the proceedings, finds himself/herself in a disadvantaged position.

The question of quality, above all, causes problems in regard to the law, and should be raised in court by the defence (art. 2, no. 8 and art. 5 of the Directive).

On the one hand, **the quality of the appointed interpreter** – there being no licensing of interpreters (art. 5, no. 2 provides for the creation of a register but it has not yet been created), the defence attorney must ensure that the proceedings contain information on the interpreter's qualifications and, potentially, the attorney must demand that the interpreter be replaced (art. 2, no. 8 of the Directive and arts. 47, no. 1 and 153 nos.2 and 3 of the CPP).

On the other hand, **the scope of the interpretation also determines its quality.** For the accused to defend himself/herself effectively, he/she must be aware of the allegations *and the evidence* against him/her. It is for this reason that the interpretation must at least cover *all the evidence produced* during the proceedings in which the accused participates (in a hearing, for example).

Finally, **the type of interpretation.** The interpretation may be consecutive or simultaneous. It is clear that the latter is preferable as it allows uninterrupted exchanges. In at least one high-profile case a simultaneous interpretation cabin was set up in Lisbon. The defence lawyers should therefore request at least a "whispered" simultaneous translation in which the interpreter sits very close to the defendant. If there are any doubts in relation to the importance of this full translation, the film "*Red Corner*"[5] is recommended viewing.

Since the Directive does not explicitly define the quality requirements for interpretation, but since the States have an obligation to take concrete measures to comply with this quality, **and since there are doubts in the *issues mentioned* above, the court could (and should) remit the question to the ECJ by reference for preliminary ruling, to question whether the norms in arts. 2, no. 8 and 5, no. 1 of the Directive, impose, for example, the interpretation of all evidence in a trial hearing, and art. 92, no. 2 of the CPP, must be interpreted such that the appointment of the interpreter must have that scope**.

One last issue that is not covered by any domestic law is the **procedure to ensure that the defendant understands the language** of the proceedings (art. 2, no. 4). If there is no domestic procedure, it should be presumed that anyone who is not Portuguese is not fluent in the language and will benefit from having the assistance of an interpreter (for example through short test questions that are not related to the issue of the proceedings).

[5] http://www.imdb.com/title/tt0119994/.

Failure **to appoint an interpreter will void the proceedings; as a rule, this issue must be raised at the time of the legal action** (art. 120, no. 2, c, and no. 3 of the CPP). **The problems related to the quality of the interpretation, in the absence of any other provision, must also be addressed at the time of the legal action,** because if they do not constitute a nullity, they may be considered an irregularity (art. 123 of the CPP). In any event, it is always possible to argue that it is an irregularity that affects the value of the legal action, as it cannot produce the effects which are the aim of a procedural action which does not allow the accused, contrary to the provision in art. 92 of the CPP and art. 2, no. 8 of the Directive, to understand the content of the allegations, of the questions that are put to him/her, or of the evidence that is being produced against him/her, or in which he or she cannot properly make themselves understood by the court.

3. The right to have essential documents translated

The Directive also provides the accused the right to **obtain, within a reasonable period of time, a translation of all essential documents for the exercise of his or her right to ample defence** (art. 3, no. 1), defining as essential at least those **decisions which "impose a measure that restricts liberty, the accusation or indictment, and the judgements**". **Other documents can be considered essential** (art. 3, no. 2), including also the translation of the EAW by the executing State (art. 3, no. 6).

The translation must, **as a rule, be in writing**, and can be substituted by an oral translation or summary of the documents (art. 3, nos. 4 and 7). **As opposed to the right to interpretation**, **the right to a translation can be waived**, when duly registered (art. 7), but only after **having received prior legal advice from the defence attorney or upon proving that the defendant has unequivocally, consciously and voluntarily waived this right**. As in the law regarding interpretation, in art. 3 no. 9 the Directive provides **requirements for translation quality that are aimed at the same purpose of guaranteeing a fair hearing**.

4. The translation of documents under the CPP and the obligations under the Directive

The CPP contains only one regulation regarding the translation of documents; a regulation on the translation of documents into Portuguese (art. 92 no. 6). However, **as the CPP does not differentiate between the concepts of interpreter and a translator, the appointment of an interpreter under art. 92, nos. 2 and 3, should be interpreted to mean that their role includes translating documents into the defendant's language, including the documents listed as essential under art. 3, nos. 1-3 of the Directive**. Otherwise, the Directive should be directly invoked to request the translation of these documents.

5. Which "essential documents" (art. 3, no. 2)?

The Directive provides for three types of "essential documents". In the Portuguese version: **i) decisions that impose restrictions on liberty, ii) the accusation or indictment, and iii) judgements**.

Among the **first** are: decisions that **apply a measure of forced restriction on liberty**; **orders that determine a defendant's detention; decisions that impose a penalty or custodial sentence**; **decisions that revoke a suspended sentence or conditional discharge**[6].

In the**second group** the Directive provides for the accusation and indictment. However, in all of the other linguistic versions this group includes any and all **decisions through which it can be imputed that an individual is a crime suspect**[7]. In this sense, the regulation in question imposes an obligation, right from the start, to translate decisions which, at an earlier stage, attributed involvement in a crime to the suspect (for example, the

[6] In criminal proceedings, or by EAW, in all groups of documents.
[7] In French "toutes charges ou tout acte d'accusation"; in English "*charge or indictment*".

order that determines or puts into effect an arrest for first hearing, explaining the crimes alleged and the evidence that are the bases of the allegation).

The **third group** includes the judgements, **regardless of their content or the hierarchy of the court that issued them.**

The need to translate an acquittal judgement to safeguard the right to ample defence could be questioned, but as these judgements are appealable in Portugal, they should be translated.

The provision in question is extremely important when counting the time limits for filing an appeal: if the translation of the convicting judgement is necessary for the defendant to exercise his/her right to ample defence, the period for filing the appeal can also begin once it is made available. In fact, in the past Portugal has been found to be in breach of the ECHR for interpreting this differently[8]. If, for Portuguese defendants, the period begins at the moment the judgement is published, as it is from then that the judgement is available to those who wish to analyse it in writing, for foreign defendants this possibility only arises once the translation is made available.

The interpretation of the regulation in art. 92, nos. 2 and 3, and of the CPP regulations that apply in relation to the notification of relevant decisions in conformity with the Directive (art. 3, nos. 1 and 2) uphold the translation of the *above-mentioned* documents. If there are any issues, or if the translation has been refused, the defence attorney should make a claim of nullity/irregularity as mentioned *above* and request that the issue be forwarded to the ECJ, so that it can determine whether the decision in question falls within the concept of "*accusation or indictment*" or of "*judgement*".

6. Other "essential documents" (art. 3, no. 3)?

Art. 3, no. 3 allows the defence to request the translation of other essential documents, under the terms of no. 1, to safeguard the exercise of the right to ample defence and right to a fair hearing, for which we will now give an example.

Firstly, documents for which personal notice is obligatory under the terms of our own Criminal Proceedings Code, which thereby establishes it as essential for the defence that the defendant take personal knowledge of them. **The regulations that provide for personal notice to the defendant of procedural acts that are not included in art. 3, no. 2 of the Directive must be interpreted in accordance with art. 3, nos. 1 and 3 of the Directive, when dealing with other essential documents that must be translated** (see art. 113, no. 10 of the CPP – which is the case with notices relating to non-custodial measures of coercion or property guarantees, in the order which sets the day for the trial hearing, of the civil damages claim. The **translation of these documents, provided for in art. 113, no. 10 of the CPP, should be comprehensive** for two reasons: i) the law does not provide for the translation of excerpts; ii) equality among defendants.

Other documents that could be included are **the evidence that form the basis of the allegation**, as these fall within the Directive's objective and are also considered by the CPP to be essential to defence; reference to which must be included in the allegation, under penalty of nullity (art. 283, no. 3 *d)* to *f)*, of the CPP).

Finally, one should also take into account that **Directive 2012/13/EU**, for which the transposition period has also expired (02.06.2014) provides in art. 4, no. 5 **provision** to the defendants or accused in criminal proceedings **of the "Bill of Rights"** there stated – in Portugal corresponding to the TIR – **in a language that they understand**".

The **effect of a lack of a translation of documents is not expressly provided for in the CPP**. Therefore, one can either argue that the lack of a translation is equivalent to the

[8] *Panasenko v. Portugal*, 2008, 10418/03.

"omission in appointing an interpreter" in a case in which the law considers this to be obligatory, leading to the nullity provided for in art. 120, no. 2 (c), and no. 3 of the CPP, or this omission will merely be considered an irregularity (art. 123 of the CPP), which must be pleaded at the time of the legal act itself. In any event, in most of the cases that we mention, we are dealing with an irregularity that affects the value of the act, because it concerns acts that cannot produce effects unless the recipient understands their content.

As the ECJ has yet to decide on this matter, should the issue arise in Portuguese proceedings, the tribunal should resubmit – and the defence should request the submission of – the issue for a preliminary ruling. In urgent proceedings, the urgent preliminary proceedings mechanism can be used as decisions can be obtained within a short period of time[9].

D. Conclusion

It is therefore up to the defence to request the assistance of an interpreter and the translation of documents, in the cases expressly provided for and in those for which it is also considered to be imperative for the effective exercise of their client's ample defence, **claiming, in a timely manner, the repercussions arising from its omission and, if necessary, requesting that the issue be remitted to the ECJ for a decision**, which will mean that, in the next few months, the extent of the obligations under the Directive will be made clear.

The requests in the case should be addressed to the person responsible for the respective procedural phase, a claim which may, during the enquiry phase, be submitted to the investigative judge under the terms of art. 268, no. 1 *f)* of the CPP, and 32, no. 4 of the CRP. Judicial decisions regarding interpretation and translation can be appealed to the competent Court of Appeal with territorial jurisdiction. Should the *above-mentioned* requirements be met, the remittance for a preliminary ruling on the issue of the interpretation of Directive 2010/64/EU to the ECJ is binding on the Court of Appeal.

It would obviously be preferable if the legislator were to amend the CPP in order to clarify the obligations arising from the Directive in relation to the right to interpretation and translation, failing which, the issue will be brought up in a growing number of cases, thus wasting the time and resources of the legal system.

[9] In 2013, decisions in these cases took an average of 2.2 months – Cf. Annual report 2013, p. 10 http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-06/qdag14001ptc.pdf .