IMMIGRATION, PERSONAL LIBERTY, FUNDAMENTAL RIGHTS

edited by
MARIA GRAZIA COPPETTA

with the assistance of
LORENZO BERNARDINI

Wolters Kluwer

CEDAM

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DIRECTIVE 2010/64/EU ON THE RIGHT TO INTERPRETATION AND TRANSLATION IN CRIMINAL PROCEEDINGS

Silvia Allegrezza - Lorenzo Bernardini

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1. A historical framework

One of the main objectives of the European Union (EU) is to maintain and develop an Area of Freedom, Security and Justice (AFSJ). The aim is to promote judicial and police cooperation between Member States while ensuring respect for the human rights and fundamental freedoms of EU citizens.

Since the conclusions of the Tampere European Council of 15 and 16 October 1999—which followed the one held in Cardiff the previous year [1]—the principle of mutual recognition has been the cornerstone of judicial cooperation in criminal matters. [2] At that time, the EU did not strive for harmonising domestic legislation, but rather to promote 'inter-governmental cooperation' between national authorities based on the principle of mutual recognition, the 'cornerstone' of criminal cooperation between EU Member States. [3] Notably, mutual

[1] Cardiff European Council, 15th-16th June 1998, *Presidency Conclusions*, at *www.europarl.europa.eu*, para. 39. More specifically, the Council's wish was to 'extend the mutual recognition of each other's court decisions'.

[2] Tampere European Council, 15-16 October 1999, *Presidency Conclusions*, in *www.europarl.europa.eu*, para. 33.

[3] See, among others, J. Hodgson, *Criminal procedure in Europe's Area of Freedom, Security and Justice: the rights of the suspects*, in V. Mitsilegas-M. Bergström-T. Konstantinides (Eds.), *EU Research Handbook of Criminal Law*, Edward Elgar, 2016, p. 169; S. Gless, *Mutual recognition, judicial inquiries, due process and fundamental rights*, in J.A.E. Vervaele (Ed.), *European Evidence Warrant: Transnational Judicial Inquiries in the EU*, Intersentia, 2005, p. 121-129; S. Allegrezza, *Cooperazione giudiziaria, mutuo riconoscimento e circolazione della*

recognition is rooted in the mutual trust that Member States should place in each other's criminal justice systems. However, this climate of trust involves not only the judicial authorities but also 'all those involved in criminal proceedings', to ensure that they 'consider the decisions of the judicial authorities of other Member States as equivalent to those of their own State and do not call into question their judicial competence and respect for their rights to guarantee a fair trial'.[4] Therefore, the effective application of the principle of mutual recognition should also be achieved by enhancing common minimum standards on the fundamental rights to be acknowledged *vis-à-vis* the person involved in the criminal proceedings.[5]

The political difficulties in reaching agreement between the Member States on the harmonisation of procedural rules did not, however, prevent the creation of legal instruments based on mutual recognition aimed at strengthening judicial cooperation. Thus, both the European Arrest Warrant[6] and an initial mechanism for 'taking account of convictions in the Member States of the European Union in the course of new criminal proceedings'[7] were introduced.

Nowadays, as then, the key argument for overcoming the *impasse* revolves around the fact that all EU Member States are also Parties to the European Convention on Human Rights ('ECHR'). Yet, the recognition of the fundamental rights enshrined in the ECHR did not—and still does not—in itself allow for a sufficient degree of

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prova penale nello Spazio giudiziario europeo, in T. RAFARACI (Ed.), *L'area di libertà, sicurezza e giustizia: alla ricerca di un equilibrio fra priorità repressive ed esigenze di garanzia*, Giuffrè, 2007, p. 691-719; L. BACHMAIER, *Mutual Recognition Instruments and the Role of the Cjeu: The Grounds for Non-Execution*, in *New J. of Eur. Crim. Law*, 2015(4), p. 505–526.

[4] *Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union*, 2004/0113 (CNS), COM (2004) 328 final, Recital 4.

[5] See the *Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters*, 2001/C 12/02 [OJ C 12, 15.1.2001, p. 10–22], where it is expressly set forth that mutual recognition 'is designed to strengthen cooperation between Member States but also to enhance the protection of individual rights'.

[6] Council Framework Decision 2002/584/JHA of 13 June 2002 *on the European Arrest Warrant and the surrender procedures between Member States* [OJ L 190, 18.7.2002, p. 1–20], as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 *amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial* [OJ L 81, 27.3.2009, p. 24–36].

[7] Council Framework Decision 2008/675/JHA of 24 July 2008 *on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings* [OJ L 220, 15.8.2008, p. 32–34].

confidence in the criminal justice systems of the other Member States to be considered achieved. [8]

In 2010, it was EU Justice Commissioner Viviane Reding who understood the importance of the necessary harmonisation of domestic legal frameworks as a precondition for the approval of new mutual recognition instruments. She came down hard on the Member States, declaring that she would no longer approve any mutual recognition instruments unless they first agreed on certain procedural guarantees for suspects and accused persons in criminal proceedings. This led to the idea of providing the EU with a framework of European guarantees for suspects and accused persons in the context of criminal proceedings. [9]

This was not the first time that the EU had attempted to legislate on the subject. Indeed, for the sake of completeness, it should be recalled that in 2004 the European Commission had already presented a proposal for a Framework Decision on the subject of safeguards in criminal proceedings, [10] but the project failed within a short time, ending in a deadlock due to a political *impasse* that was difficult to resolve. [11]

Against this background, Commissioner Viviane Reding had a ingenious intuition – to "unpack" the content of the proposal for a Framework Decision into six "conceptual segments", each of which embodied a "portion" of guarantees, so as to facilitate agreements among Member States on single topics, on a case-by-case basis. Thus, on 30 November 2009, the Council of the European Union

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[8] S. GLESS, *supra* note 3, p. 124, notes that 'the common presumption in the discussion on 'due process' and the 'principle of mutual recognition', however, is that there will be no serious conflict, because all Member States are bound by the ECHR and thus are supposed to provide comparable protection of individual rights. While the premise is correct – all EU Member States are bound by the ECHR – the conclusion is not, I fear'.

In 2004, the EU was well aware that 'Member States are not always confident about the criminal justice systems of other Member States and this despite the fact that they are all signatories to the ECHR' (see Recital 4 of the Proposal for a Council Framework Decision *on certain procedural rights in criminal proceedings throughout the European Union, supra* note 4.). See M. GIALUZ, *L'assistenza linguistica nel procedimento penale,* Wolters Kluwer-Cedam, 2018, p. 79 – the Author observed that 'mere participation' in ECHR did not constitute 'sufficient grounds for ensuring equal protection of fundamental rights'.

[9] For the sake of completeness, it should be recalled that a political consensus on the protection of victims in the context of criminal proceedings had already been reached, through the approval of Council Framework Decision 2001/220/JHA of 15 March 2001 *on the standing of victims in criminal proceedings* [OJ L 082, 22.3.2001, p. 1–4].

[10] See *supra* note 4.

[11] On this point see, *inter alia,* C. ARAGÜENA FANEGO (Ed.), *Garantías procesales en los procesos penales en la Unión Europea*, Lex Nova, 2007, *passim*.

adopted a Resolution containing the so-called 'Stockholm Roadmap', which, from that moment on, would definitively mark the action of the EU legislator with regard to the procedural rights of defendants and accused persons. [12]

It was the same Commission that, a few months earlier, had called for the strengthening of an 'area of freedom, security and justice at the service of the citizen', which would take the form of a criminal justice system capable of protecting the individuals by enhancing the rights of persons involved in criminal proceedings, since '[p]rogress is vital not only to uphold individuals' rights, but also to maintain mutual trust between Member States and public confidence in the EU'. [13]

It was an ambitious project, which later came to be known informally as the 'Stockholm Programme', referring to the Swedish presidency of the Council of the European Union in the second half of 2009. [14] The Resolution on the so-called Roadmap—which was fully part of this programme—was the first concrete step towards the realisation of a framework of minimum European guarantees on the rights of suspects/accused persons.

In May 2010, the Stockholm Programme was published in the Official Journal of the EU. [15] It stated, with some emphasis, that 'the protection of the rights of suspected and accused persons in criminal proceedings' was a 'founding value of the Union', 'essential' for strengthening mutual trust not only "horizontally" (between States) but also "vertically" (between citizens and the EU itself). [16] The so-called Roadmap officially became an integral part of the Stockholm Programme and the Commission was formally mandated to present the relevant proposals. [17]

Among the issues mentioned in the table, the topic of translation and interpretation was at the top ("Measure A"): it was recognised that 'the suspect or defendant must be able to understand what is

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[12] Resolution of the Council of 30 November 2009 *on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings* [OJ C 295, 4.12.2009, p. 1–3].

[13] Communication from the Commission to the European Parliament and the Council – *An area of freedom, security and justice serving the citizen*, COM(2009) 262 final, 10.6.2009, point 4.2.2.

[14] The programme was first discussed at an informal meeting in Stockholm in July 2009. The relevant documentation is still available on the archived website of the Swedish *pro tempore* presidency of the Council of the European Union, available at the following URL: *https://bit.ly/3ehVMne*.

[15] The Stockholm Programme – *An open and secure Europe serving and protecting citizens* [OJ C 115, 4.5.2010, p. 1–38].

[16] The Stockholm Programme, *supra* note 15, para. 2.4.

[17] Ibid..

happening and make him/herself understood', the 'need for an interpreter' was mentioned, and, finally, the need for 'translation of essential procedural documents' was supported.[18] This was not a random choice: the EU was based—and still is—on the well-known 'four freedoms', including the freedom of movement, and was founded on the protection of multilingualism. However, this richness could not translate into Kafkaesque scenarios, in which the monolingual individual would be swallowed up by the machinery of justice, unable to understand what was happening around him/her and therefore unable to defend him/herself.

Linguistic assistance, which makes it possible to understand and consciously participate in the proceedings, thus became the founding act of the European network of (criminal) procedural guarantees.

2. The main features of the Directive

The drafting of Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings[19] is the first attempt by the EU legislator to 'ensure minimum standards for language assistance in criminal proceedings'.[20]

The Directive transposes into EU law the principles developed *illo tempore* by the ECtHR's settled case-law and even extends its scope.[21] Indeed, in order to strengthen mutual trust between Member States, the EU legislator insists on the need for 'more consistent implementation of the rights and guarantees set out in Article 6 of the ECHR'[22]. The starting point consisted therefore in the relevant ECHR's provisions concerning a specific aspect of the right of defence, namely the right to interpretation and translation for those who do not speak or understand the language of the proceedings.[23] Accordingly, it was the 'paradigm' of the ECHR related to the 'rights of the defence'[24]

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[18] Ibid., Annex, Measure A.

[19] 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 L 280, 26.10.2010, p. 1–7].

[20] M. KOTZUREK, *Die Richtlinie 2010/64/EU zum Dolmetschen und Übersetzen in Strafverfahren: Neues Qualitätssiegel oder verpasste Chance?*, in *EUCRIM*, 2020(4), p. 314 ff.

[21] V. MITSILEGAS, *EU Criminal Law after Lisbon*, Bloomsbury, 2016, p. 161.

[22] Recital 7, Directive 2010/64/EU.

[23] Recital 14, Directive 2010/64/EU.

[24] L. SIRY, *The ABC's of the Interpretation and Translation Directive*, in S. ALLEGREZZA-V. COVOLO (Eds.), *Effective defence rights in criminal proceedings*, Wolters Kluwer-Cedam, 2018, p. 38.

that set the minimum standards followed by the EU legislature. But there is more: the so-called non-regression clause prevents Member States from reducing the procedural guarantees already in force in their own legal systems in the name of the Directive, and it is likewise imposed that '[n]othing 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'. [25] On the road to the guarantees, the Directive only intends to move forward.

That being said, the legal basis of the Directive is to be found in Article 82(2)(b) TFEU, which allows the European Parliament and the Council—by means of Directives and following the ordinary legislative procedure—to draw up minimum rules 'to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension', including 'the rights of individuals in criminal procedure'. Among these, the Commission has chosen to set minimum standards for linguistic assistance, taking due account, of course, of the multilingualism that has always characterised the structure of the EU. [26]

Notably, it should be noted that the provisions of Directive 2010/64/EU do not constitute European criminal procedure *stricto sensu*; they have become part of the criminal procedure of each Member State, since—and this is a fundamental aspect of the matter—the Union does not require a prior harmonisation of the basic substantive law or the mere presence of a transnational character as a "connecting factor". [27] Indeed, the scope of application of the prerogatives laid down in Directive 2010/64/EU does not depend on these grounds: it comes into play when a natural person—given the exclusion of legal persons—is suspected or accused in criminal proceedings, [28] even partially, i.e. even when only part of the

[25] Article 8, Directive 2010/64/EU.

[26] On this point, see, for all, M. GIALUZ, *supra* note 8, p. 19 ff.

[27] K. AMBOS, *European Criminal Law*, Cambridge University Press, 2018, p. 137. This is in spite of the wording of Article 82(2)(b) TFEU (see S. CRAS-L. DE MATTEIS, *The Directive on the Right to Information*, in *EUCRIM*, 2013(1), p. 23).

[28] Article 1(2), Directive 2010/64/EU. It applies, specifically, to individuals who have been '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', as well as to proceedings for the execution of a European Arrest Warrant (Article 1(1), Directive 2010/64/EU), in the context of the execution of a European Investigation Order and also to investigations conducted by the European Public Prosecutor's Office.

proceedings involving him/her take place before a criminal court.[29] Moreover, the Directive also applies to special proceedings, as the Court of Justice of the European Union (CJEU) has ruled in a well-known judgment (*Covaci*).[30]

What is the incredible effect of the outcome of this "Europeanisation" operation? All criminal proceedings carried out in the EU will become *ipso facto* European 'criminal matters' and therefore, as an application of EU law, any of them could be brought before the CJEU.[31]

With regard to the content of the Directive on linguistic assistance, it should be noted at once that while it is true that the "mercantilist spirit" that underlines the EU is still present and sometimes manifests itself in an extreme concreteness—clearly visible in the "crude", or at any rate unrefined, drafting of certain acts of secondary legislation, such as the one under consideration—, it must be deeply appreciated that the Directive has provided guarantees for the most vulnerable. This proves to be "real" justice. Much more than has been done over the years both by national legislators and, to some extent, by the ECtHR. It is the last, the weakest—those who, due to socio-economic conditions, have neither access to a lawyer who speaks their language nor the language skills to understand the criminal proceedings conducted against them—who benefit from the rights conferred by Directive 2010/64/EU. In this case, the extreme concreteness of the Union ends up offering concrete guarantees to the individual.

As mentioned above, those on language assistance are a *species* of the broader *genus* of the 'right of the defence'. Yet, the idea of 'defence' advocated by the EU, differs from that of the Member States.

An example could pave the way – one could think of the Italian Code of Criminal Procedure. It sets up a "zone defence": by identifying specific legal areas, it moves from a phase (preliminary investigations) which 'does not count and does not weigh'[32] to

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[29] Reference could be made to traffic offences, which are often hinged on an administrative phase, in the first instance, after which, in certain situations, a criminal phase may be triggered. This circumstance is regulated by Article 1(3), Directive 2010/64/EU, which confirms the applicability of the Directive at stake to proceedings possibly brought, in the second instance, before a criminal court. See also Recital 16 of the same Directive.

[30] Case C-216/14, *Criminal proceedings against Gavril Covaci*, ECLI:EU:C:2015:686 (hereinafter *Covaci*), para. 27.

[31] This is, of course, without prejudice to the opt-outs of Denmark and Ireland *vis-à-vis* the AFSJ.

[32] M. NOBILI, *Diritti per la fase che "non conta e non pesa"*, in ID., *Scenari e trasformazioni del processo penale*, in ID., *Scenari e trasformazioni del processo penale*, Cedam, 1998, p. 35 f.

another one (trial phase) which, on the contrary, "does count and weigh", as it is the privileged place for evidence formation. This "zone" methodology is clearly not applicable in Europe: there are too many differences between the legal systems of the Member States.[33] The EU legislator has therefore opted for a "man-to-man defence", i.e. based on the specific safeguard to be protected (as was the case with the adoption of Directive 2010/64/EU).

The content of the latter must therefore be analysed on the basis of a preliminary consideration: it is not merely a question of "minimum standards" but of a very advanced offer of defence—centred on the right to linguistic assistance—if one looks at the rules that existed before the adoption of the Directive at stake.

The latter, as well as the others envisaged in the Roadmap (namely, the right to information,[34] legal aid,[35] certain aspects of the presumption of innocence,[36] legal aid[37] and procedural guarantees for suspected or accused minors),[38] is organised along three conceptual lines. First, it outlines the content and scope of the procedural guarantees enshrined therein: what rights are to be protected and how they are to be protected. Then, the possible control mechanisms to be activated in the event of a breach of the prerogatives *in parte qua* are

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[33] In many countries (e.g. France, Belgium, the Netherlands, Luxembourg) the figure of the Investigating Judge still exists. The "zone" of preliminary investigations, in these systems cannot be considered analogous to that of the accusatory criminal justice systems, where the real *dominus* of the investigation phase is the Public Prosecutor and there is an *ad acta* judge (e.g. the Italian Judge for Preliminary Investigations) who supervises certain specific acts of the latter (when, for example, when it comes to activities involving deprivation of personal liberty).

[34] 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 L 142, 1.6.2012, p. 1–10].

[35] 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 L 294, 6.11.2013, p. 1–12].

[36] Directive 2016/343/EU 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. 1–11].

[37] Directive 2016/1919/EU 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. 1–8].

[38] Directive 2016/800/EU of the European Parliament and of the Council of 11 May 2016 *on procedural safeguards for children who are suspects or accused persons in criminal proceedings* [OJ L 132, 21.5.2016, p. 1–20].

provided for. And here it is noteworthy that the more boldly the first part is structured, the more timidly the second part is elaborated. Finally, the third dimension of protection, that of effective sanctions in the event of a breach of the guarantees provided for by the Directive, is almost entirely absent. The EU's approach on this point is pilatesque: common rules are abandoned and Member States are given more room for manoeuvre to set up a system of procedural sanctions.

The Directive has two main focuses. The first concerns the right to oral interpretation for the benefit of those who 'do not speak or understand the language of the criminal proceedings in question', who must be assisted by an interpreter 'without delay' before investigative and judicial authorities in a wide range of situations (including 'police questioning, and at all hearings, including necessary preliminary hearings'). [39] The second relates to the right to written translation of 'essential documents', to be ensured to those who 'do not speak or understand the language of the criminal proceedings' and 'within a reasonable period of time' according to a teleologically oriented approach: the aim is 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'. [40] Yet, the lack of common criteria for establishing the "non-knowledge" (or "non-understanding") of the language of the main proceedings seems questionable. In the absence of further indicators set at EU level, each Member State may choose more or less effective forms of verification of knowledge. Anyone who has had the slightest contact with the practice knows how superficial such assessment can be, especially in simplified or accelerated procedures. Moreover, the reluctance to invest resources in developing methodologies that can be considered scientifically sound and oriented towards an effective defence of the underlying right is well known.

However, the cornerstone of the Directive lies in its Article 4, which stipulates that Member States shall bear the costs of interpretation and translation 'regardless of the outcome of the proceedings'. Even more incisive in terms of effectiveness is the recognition of free linguistic assistance for all individuals concerned, in particular as regards communication between suspects/accused persons and the defence. [41]

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[39] Article 2(1), Directive 2010/64/EU. It is noteworthy that also in the context of communications between suspects/accused persons and lawyers, the right to an interpreter must be guaranteed 'where necessary in order to safeguard the fairness of the proceedings' (Article 2(2), Directive 2010/64/EU).

[40] Article 3(1), Directive 2010/64/EU.

[41] See *supra* note 39.

On the basis of the aforementioned two main focuses of the Directive, some collateral considerations can be unravelled.

Firstly, the right of the person concerned to challenge the decision declaring the interpretation superfluous or to appeal against the poor quality of the interpretation should be mentioned[42] . The Directive does not oblige Member States to provide for an *ad hoc* appeal mechanism. There is no duty to establish a system of review exclusively dedicated to it. On the basis of the wording of the Directive, it may be assumed that the control requirements can be fulfilled if the main judgement is challenged—whether by way of review, appeal or cassation—in the name of the procedural autonomy granted to the Member States in this area.[43]

Secondly, account must be taken of the difficult conceptual delimitation of the category of 'essential documents' the translation of which must be guaranteed and the identification of which is partly left to the Member States. These undoubtedly include 'decisions depriving a person of his liberty, acts containing charges and judgments'.[44] Full recognition of the procedural autonomy of the Member States is more than appropriate here, as it is not possible to offer a common list of essential documents. Hopefully, it would be appropriate for each State to clarify its own "list" so as to reduce the room for discretion of national courts.

Some guidance can be found in the CJEU's case-law. According to the latter, an *inaudito reo* penalty order (*decreto penale di condanna*) is an 'essential document',[45] without prejudice to the power of the national authorities to 'decide whether other documents are essential' and the right of the persons concerned or his or her defence counsel to 'submit a reasoned request to that effect'.[46] It is therefore entrusted to CJEU's case-law to pursue an *actio finium regundorum*

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[42] Article 2(5), Directive 2010/64/EU.

[43] It is important to highlight the difference between certain French-influenced systems—which provide for the possibility of a continuous and progressive series of appeals before the so-called *chambres du conseils* throughout the criminal proceedings—and other systems (including the Italian one), where this modality is unknown and the main means of appeal against the judgement can be adopted solely at the end of the first instance trial. Yet, by bringing "forward" the time limit for lodging an appeal, the possibility of obtaining compensation for the damage suffered necessarily entails a regression of the proceedings. On closer examination, this problem does not exist in legal systems with progressive appeals, since the damage can be repaired immediately.

[44] Article 3(2), Directive 2010/64/EU.

[45] Case C-278/16, *Criminal proceedings against Franck Sleutjes*, ECLI:EU:C:2017:757, paras. 25–34.

[46] Article 3(3), Directive 2010/64/EU.

precisely in order to draw the line between 'essential' documents and those which, on the contrary, do not belong to this category.

Thirdly, the implications of the situation (which arose in the *Covaci* case referred to above and which is likely to occur frequently in practice) where a person wishing to lodge an opposition to a penalty order, lodges that appeal in his or her mother tongue (contrary to the domestic provisions requiring the use of the language of the proceedings, on pain of inadmissibility of the appeal), have been clarified. Is the person concerned entitled to a free translation of the document in question? The CJEU referred the case back to the Member States on the following grounds: if, on the one hand, 'to require Member States [...] not only to enable the persons concerned to be informed, fully and in their language, of the facts alleged against them and to provide their own version of those facts, but also to take responsibility, as a matter of course, for the translation of every appeal brought by the persons concerned against a judicial decision which is addressed to them would go beyond the objectives pursued by Directive 2010/64 itself',[47] it must however be acknowledged that the Directive 'ensures [...] the benefit of the free assistance of an interpreter' where the person concerned 'orally lodges an objection against the penalty order of which he is the subject at the registry of the competent national court, so that that registry records that objection, or, if that person lodges an objection in writing, can obtain the assistance of legal counsel, who will take responsibility for the drafting of the appropriate document, in the language of the proceedings'.[48] This being said, it is left to the national authorities to decide whether or not to accept an appeal lodged in a language other than the language of the court,[49] without prejudice to the possibility for Member States' to consider the opposition lodged[50] as 'fundamental' and thus to provide for its translation.

3. Perspectives de iure condendo

The future of Directive 2010/64/EU hinges on three very recent rulings rendered by the CJEU.

The first of these is an indication of a possible extension of the scope of application of the Directive also to the so-called punitive

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[47] *Covaci*, *supra* note 30, para. 38.
[48] Ibid., para. 42.
[49] Ibid., para. 47.
[50] Ibid., para. 50.

or 'criminal-coloured' administrative law.[51] The case, which was discussed in October 2021,[52] concerned a fine imposed by the Dutch authorities on a Polish lorry driver. Dutch authorities subsequently sought recognition of the decision by which they had imposed that fine on the Polish authorities, on the basis of a 2005 Framework Decision.[53] The Court accepted that the executing State (Poland) may well refuse to enforce that decision, where the latter 'has been notified to the addressee thereof without a translation, into a language which he or she understands, of the elements of the decision which are essential in order to enable him or her to understand the charge against him or her and fully to exercise his or her rights of the defence, and without that addressee being afforded the opportunity to obtain such a translation on request'.[54]

The second decision to be mentioned was drafted in November 2021.[55] The person concerned, a Swedish citizen of Turkish origin, had been served with a summons, which he had not withdrawn, in the context of criminal proceedings—conducted in Bulgaria—for offences related to the illegal use and possession of firearms and ammunition.[56] The suspect had been previously arrested and questioned by investigators in the presence of a Swedish-speaking interpreter. However, according to the national court that heard that case, there was 'no information as to how the interpreter was selected, how that interpreter's competence was verified, or whether the interpreter and [the suspect] understood each other'.[57]

Therefore, the referring court wondered 'as to the consequences of a breach of the accused person's right to information where it cannot be established that he or she knew of the suspicions or accusation against him or her owing to a failure to provide adequate interpretation, for the conduct of criminal proceedings against him or

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[51] The expression is widely adopted by, among others, A. DI PIETRO-M. CAIANIELLO (Eds.), *Indagini penali e amministrative in materia di frodi IVA e doganali. L'impatto dell'*European Investigation Order *sulla cooperazione transnazionale*, Cacucci, 2016, *passim*. On this topic see G. LASAGNI, *Processo penale, diritto amministrativo punitivo e cooperazione nell'Unione europea*, in *Dir. pen. cont.*, 2016(2), p. 137 ff.

[52] Case C-338/20, *D.P.*, ECLI:EU:C:2021:805 (hereinafter *D.P.*).

[53] Council Framework Decision 2005/214/JHA of 24 February 200 *on the application of the principle of mutual recognition to financial penalties* [OJ L 76, 22.3.2005, p. 16–30].

[54] *D.P.*, *supra* note 52, para. 44.

[55] Case C-564/19, *Criminal proceedings against IS*, ECLI:EU:C:2021:949 (hereinafter *IS*).

[56] Ibid., paras. 25–28.

[57] Ibid., para. 27.

her in absentia'. [58] In other words, the question can be summarised as follows – is the Hungarian legislation which allows proceedings to be conducted *in absentia*—on the basis of a summons which has not been withdrawn by the person concerned—in a context where it is impossible to establish whether the accused person has been informed of the suspicion or accusation against him or her in keeping with Directive 2010/64/EU? The Court provides a peremptory interpretation: 'if [...] it were to prove impossible to ascertain the quality of the interpretation provided, such a circumstance would also preclude the criminal proceedings from being continued in absentia. Indeed, the fact that it is impossible to ascertain the quality of the interpretation provided means that it is impossible to establish whether the accused person was informed of the suspicions or accusation against him or her'. [59] Consequently, *in absentia* proceedings cannot take place, if the interpretation at stake is inadequate or—and this is the *novum* of the decision—if it is impossible to ascertain the quality of the interpretation provided and thus to establish that the accused person has been informed of the charges against him or her in a language he understands. [60]

Lastly, the third ruling of the CJEU, issued in August 2022, [61] adds a further piece to the development of the case-law on the content of the Directive under analysis.

The Portuguese authorities charged a Moldovan citizen (Mr. TL) with various offences, including resisting a public official and driving without a licence. The 'indictment report' was translated into Romanian, Moldova's official language, while the so-called DIR (declaration of identity and residence) was not. [62] The defendant was sentenced to three years' imprisonment, suspended for the same period with probation. In order to execute the latter, the competent authorities tried in vain to contact Mr. TL at the address indicated in

[58] *IS*, Opinion of Advocate General Pikamäe delivered on 15 April 2021, ECLI:EU:C:2021:292, para. 67.

[59] *IS, supra* note 55, para. 136.

[60] Ibid., para. 137.

[61] Case C-242/22, *Criminal proceedings against TL*, ECLI:EU:C:2022:611 (hereinafter *TL*).

[62] This is an official document, drawn up by the judicial authority or the competent judicial police body, provided for by Article 196(1) of the Portuguese Code of Criminal Procedure (CCP). During its drafting, the accused is asked to indicate 'his residence, his place of work or another domicile of his choice' (Article 196(2) CCP). The DIR also indicates a series of information and obligations that must be communicated to the defendant, including 'the obligation not to change residence or to be absent from it for more than five days without communicating his new address or the place where he can be found' (Article 196(3)(b) CCP).

the DIR. Subsequently, he was summoned by the competent court, for the execution of probation, but to no avail, as he did not appear for the hearing. As a result, the judge revoked the suspended sentence in a decision written in Portuguese, which then became final. The person concerned was finally arrested and then detained at his new address for the purpose of the execution of the sentence.

In his application to have the DIR declared null and void, Mr. TL claimed that he had ignored the obligation to notify his change of address, since the DIR had not been drafted in Romanian, and he had had not the opportunity to be assisted by an interpreter. The competent court, before which the case was brought, rejected the application for annulment 'on the ground that, although the procedural defects invoked by TL were established, they had been rectified, since TL had not invoked them within the periods laid down in Article 120(3) of the CCP'. [63]

The referring court therefore asked the CJEU to interpret Directives 2010/64/EU and 2012/13/EU in relation to the nullity of acts performed in breach of their provisions. [64]

In a nutshell, the CJEU accepted that the effectiveness of the right to interpretation and translation, [65] together with the 'right to information about rights', [66] is undermined where the inflexibility of the time limit for raising a breach of the right is such as to exclude an effective remedy, as was the case here, where the time limit had expired even before Mr. TL became aware of the measure. [67] This decision sheds light in the opaque world of procedural defects, characterised by rigid time scales that are often in conflict with the reading of the substantive effectiveness of the rights enshrined in the EU legal framework.

The latest approach of the CJEU ultimately allows the interpreter

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[63] *TL*, *supra* note 61, para. 24.

[64] *TL*, Opinion of Advocate General Campos Sánchez-Bordona delivered on 14 July 2022, ECLI:EU:C:2022:580, para. 3.

[65] See Article 2(1) and (3) Directive 2010/64/EU.

[66] See Article 3(1)(d), Directive 2012/13/EU.

[67] *TL*, *supra* note 61, para. 86: 'a person in a situation such as that of TL is deprived, *de facto*, of the possibility of pleading its nullity. Where that person, who does not know the language of the criminal proceedings, is unable to understand the meaning of the procedural act and its implications, he or she does not have sufficient information to assess the need for the assistance of an interpreter when it is drawn up or for a written translation of that document, which may appear to be a mere formality. Furthermore, the possibility of invoking the nullity of that act is subsequently prejudiced, first, by the lack of information as to the right to such a translation and to the assistance of an interpreter and, secondly, by the fact that the period for raising that nullity expires, in essence, instantaneously, solely on account of the finalisation of the act in question'.

to hope that the person involved in criminal proceedings—who does not speak or understand the 'language of the proceedings'—will in any case be guaranteed adequate and effective linguistic assistance, a prerogative which is 'of vital importance' not only for the person concerned,[68] but also for the Member States, which—as has been pointed out at the beginning of the chapter—must be able to have 'trust in each other's criminal justice systems'[69] given the undeniable fact that '[m]utual recognition of decisions in criminal matters can operate effectively only in a spirit of trust in which not only judicial authorities but all actors in the criminal process consider decisions of the judicial authorities of other Member States as equivalent to their own'.[70]

[68] L. SIRY, *supra* note 24, p. 48 f.
[69] Recital 3, Directive 2010/64/EU.
[70] Recital 4, Directive 2010/64/EU.