

Rights of the Accused in Criminal Proceedings under UE Directives

Right to interpretation and translation

Directive 2010/64/EU

ECtHR case-law

The Italian way

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The Directive on the right to interpretation and translation in criminal proceedings marks a significant step in the process of strengthening the procedural rights of suspected and accused persons in the European Union.

Particular attention to:

- the European Convention on Human Rights and Fundamental Freedoms (ECHR) and the case law of the European Court of Human Rights in Strasbourg (ECtHR).
- the Charter of Fundamental Rights of the European Union 2007, which gained binding force through the Lisbon Treaty.

European Convention on Human Rights (1950), Article 6(3)(e)

Everyone charged with a criminal offence has the following minimum rights: ...

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Charter of Fundamental Rights of the European Union 2007

Article 47 – Right to an effective remedy and to a fair trial

1. Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

2. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Article 48 - Presumption of innocence and right of defence

Par.2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

Directive 2010/64/UE

- **Recital 32** provides that the level of protection of the Directive should never fall below the standards stipulated by the ECHR and by the Charter. Indeed, the Directive is supposed to be “Strasbourg- and Charter-proof” and should be interpreted and applied in such a way;
- **Recital 33** provides that the provisions of this Directive that correspond to rights guaranteed by the ECHR or the Charter should be interpreted and implemented consistently with those rights. Although this provision is to be commended for its attempt to ensure consistency between the various procedural rights instruments, it is hoped that it will not keep the national courts and, notably, the European Court of Justice, from providing a more progressive interpretation of the Directive;
- **Art. 8** contains an important non-regression clause: nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the ECHR, the Charter, other relevant provisions of international law, or the law of any Member State that provides a higher level of protection.

Main Elements of the Directive

1. Scope (Art. 1)

Art. 1 of the Directive deals with the scope of application of the instrument, both from the objective point of view (types of proceedings covered) and from the temporal point of view (moment in time from which the rights apply).

a) Objective scope

Art. 1(1): the Directive applies to criminal proceedings as well as to proceedings for the execution of a European arrest warrant (EAW).

Since the Directive does not contain the definition of criminal proceedings, the legal notion should be interpreted in the light of the case law of the ECtHR with respect to the field of application of Art. 6 ECHR.

art. 1(3): «where the law of a Member State provides for the imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed to such a court, this Directive shall apply only to the proceedings before that court following such an appeal».

The Directive n. 64 refers exclusively to the person suspected or accused of having committed a criminal offence, and does not regulate the right to interpretation and translation in favor of the victim of the crime – enshrined, however, by art. 7 of Directive 2012/29 / EU

b) Temporal scope

The rights provided for under the Directive shall apply from the time that the persons concerned “are made aware” by the competent authorities of a Member State, “by official notification or otherwise”, that they are suspected or accused of having committed a criminal offence, “until the conclusion of the proceedings”, which means that that the right to translation and interpretation, according to this Directive, does not apply to the execution phase of criminal proceedings.

The Directive takes into account the case law elaborated by the European Court of Strasbourg for the application of Art. 6 ECHR:

- . “criminal charge” is meant as the knowledge of an ongoing investigation
- . art. 6(3) ECHR rights do not apply per se to procedures, even contentious court procedures, which might take place after final determination of a criminal charge and during the enforcement of a penalty.

2. Right to Interpretation (Art. 2)

The right of the suspected or accused person to benefit from the services of an interpreter is set out in Art. 6(3) letter e) ECHR and is known, in one form or another, in the legislation of all EU Member States.

During the negotiation, various studies have shown a dramatic divergence among the Member States in the legal and practical implementation of this principle.

Client-lawyer communication.

Balance: effective possibility to communicate with the lawyer/avoid excessive costs and the abuse of public money

The compromise reached led to the paragraph 2(2) of the Directive:

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

Art. 2(6) provides the possibility of “remote interpretation”.

«Where appropriate, communication technology such as videoconferencing, telephone or the Internet may be used, unless the physical presence of the interpreter is required in order to safeguard the fairness of the proceedings.».

3. Right to Translation (Art. 3)

Art. 3(1) of the Directive states that suspected or accused persons who do not understand the language of the criminal proceedings shall be provided with a written translation of “all” documents that are “essential” to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings.

«Essential documents shall include any decision depriving a person of his liberty, any charge or indictment, and any judgment.».

This right is not expressly included in the text of Art. 6 ECHR, but it has been derived by way of interpretation by the ECtHR as a corollary of the various fair trials rights laid out in Art. 6(1) and (3) ECHR.

Documents to be translated

Two important indications:

- a) the reference to the “suspected person” clarifies that the right to translation of documents extends to the pre-trial phase
- b) the reference to the ability of persons to “exercise their right of defence” sheds light on the nature of the documents that must be translated.

In this context, it should be observed that paragraph 2 of Art. 3 indicates three types of essential documents that must always be translated, namely, “any decision depriving a person of his liberty, any charge or indictment, and any judgment”.

What about “essential documentary evidence”? : this must be translated as well, since it is more “essential” than any other material in order to allow suspected and accused persons to exercise the right of defence.

Two provisions provide for a limitation:

a) Art. 3(4) excludes from the scope of the right to translation “passages of essential documents which are not relevant for the purposes of enabling suspected or accused persons to have knowledge of the case against them”.

b) Art. 3(7) allows “an oral translation or oral summary” of essential documents.

«3. The competent authorities shall, in any given case, decide whether any other document is essential. Suspected or accused persons or their legal counsel may submit a reasoned request to that effect.».

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

Art. 3(8) The waiver of the right

«8. Any waiver of the right to translation of documents referred to in this Article shall be subject to the requirements that suspected or accused persons have received prior legal advice or have otherwise obtained full knowledge of the consequences of such a waiver, and that the waiver was unequivocal and given voluntarily.»

The right is independent form the outcome of the proceedings (art. 4)

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

The quality of the translation and interpretation (effectiveness of the right)

The level of adequacy of the translation and interpretation has been made the object of specific provisions.

Arts. 2(8) and 3(9) require a “quality sufficient” to ensure “that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence”.

Furthermore, the quality of the service provided may be the object of a specific review procedure according to Arts. 2(5) and 3(5).

The Directive also addresses the question of practical availability of qualified legal interpreters and translators. Art. 5(2) invites Member States to set up “a register of independent translators and interpreters who are appropriately qualified”, which, where appropriate, should be made available to legal counsel and relevant authorities.

International Covenant on Civil and Political Rights, 1966, (articles 14, 28)

the free assistance of an interpreter is a right that is «**of basic importance in cases in which ignorance of the language used by a court or difficulty in understanding may constitute a major obstacle to the right of defence**» and it is moreover a right that «**is independent of the outcome of the proceedings and applies to aliens as well as to nationals**».

However, the services of an interpreter must be available only «**if the accused or the defence witnesses have difficulties in understanding, or in expressing themselves in the court language**».

More specifically, it is not a violation of International Covenant on Civil and Political Rights (article 14) that the States parties make provision for the use of only one official court language, and the requirement of a fair hearing does not “**mandate States parties to make available to a citizen whose mother tongue differs from the official court language, the services of an interpreter, if this citizen is capable of expressing himself adequately in the official language**”.



ECtHR CASE LAW:

In the interpretation and application of the ECHR, the ECtHR plays a key role

Art. 32 of the ECHR provides:

The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols

The Court decides on a case by case basis, as it ascertains whether or not in the specific case there has been a violation of the Convention.

FREE linguistic assistance

Article 6(3)(e) of the European Convention: the term “free” denotes not a conditional remission or a temporary exemption but **“once and for all exemption or exoneration”**.

The right to a fair trial as guaranteed by article 6(1) «signifies that an accused who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand in order to have the benefit of a fair trial». Luedicke, Belkacem and Koç v. Germany, 28/11/1978, para. 40, 48, 49, 50)

The Court found the violation of the art. 6 in a case where the State had attributed the costs of interpretation to the applicants and stated:

«An accused person not able to speak and understand the language used by the authorities in the course of the criminal proceedings against him or her has the right to free interpretation and translation of all documents in these proceedings. This right is independent of the final outcome of the trial.».

The obligation to provide “free” assistance is not dependent upon the accused’s means; the services of an interpreter for the accused are instead a part of the facilities required of a State in organising its system of criminal justice.

The costs of interpretation cannot be subsequently claimed back from the accused (Luedicke, Belkacem and Koç v. Germany, § 46). To read Article 6 § 3 (e) as allowing the domestic courts to make a convicted person bear these costs would amount to limiting in time the benefit of the Article (ibid., § 42; Işyar v. Bulgaria, § 45; Öztürk v. Germany, § 58).

However, an accused may be charged for an interpreter provided for him at a hearing that he fails to attend (Fedele v. Germany (dec .9/12/1987))

- It is important that the suspect be aware of the right to interpretation, which means that one must be notified of such a right when “charged with a criminal offence”. The Court held that when criminal arrestees do not have a command of the language, States have the obligation to provide free translation assistance at the beginning of the investigation proceedings (in that case was during the police custody phase). (case Baytar v. Turkey, 4 October 2014)
- An accused who understands the language of the proceedings cannot insist upon the services of interpreter to allow him to conduct his defence in another language, including a language of an ethnic minority of which he is a member (Bideault v. France, Commission decision; Lagerblom v. Sweden, § 62). The fact that a defendant has basic command of the language of the proceedings or, as may be the case, a third language into which interpretation is readily available, should not by itself bar that individual from benefiting from interpretation into a language he or she understands sufficiently well to fully exercise his or her right to defence (Vizgirda v. Slovenia, § 83).

- Where the accused is represented by a lawyer, it will generally not be sufficient that the accused's lawyer, but not the accused, knows the language used in court. Interpretation of the proceedings is required as the right to a fair trial, which includes the right to participate in the hearing, requires that the accused be able to understand the proceedings and to inform his lawyer of any point that should be made in his defence (*Kamasinski v. Austria*, § 74; *Cuscani v. the United Kingdom*, § 38). 547.
- Article 6 § 3 (e) does not cover the relations between the accused and his counsel but only applies to the relations between the accused and the judge (*X. v. Austria*, Commission decision). However, impossibility of an applicant to communicate with his or her lawyer due to linguistic limitations may give rise to an issue under Article 6 §§ 3 (c) and (e) of the Convention (*Lagerblom v. Sweden*, §§ 61-64; *Pugžlys v. Poland*, §§ 85-92).
- The right to an interpreter may be waived, but this must be a decision of the accused, not of his lawyer (*Kamasinski v. Austria*, § 80).

- The right guaranteed by Article 6 § 3(e) has to be practical and effective: the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided. Thus, a failure of the domestic courts to examine the allegations of inadequate services of an interpreter may lead to a violation of Article 6 § 3 (e) of the Convention (Knox v. Italy, §§ 182-187, Kamasinski v. Austria, § 74; Hermi v. Italy [GC], § 70; Protopapa v. Turkey, § 80).
- Nevertheless it is not appropriate to lay down any detailed conditions under Article 6 § 3 (e) concerning the method by which interpreters may be provided to assist accused persons. An interpreter is not part of the court or tribunal within the meaning of Article 6 § 1 and there is no formal requirement of independence or impartiality as such. The services of the interpreter must provide the accused with effective assistance in conducting his defence and the interpreter's conduct must not be of such a nature as to impinge on the fairness of the proceedings (Ucak v. the United Kingdom (dec.)).

- The verification of the applicant's need for interpretation facilities is a matter for the national judge to determine in consultation with the applicant, especially if he has been alerted to counsel's difficulties in communicating with the applicant. The judge has to reassure himself that the absence of an interpreter would not prejudice the applicant's full involvement in a matter of crucial importance for him (*Cuscani v. the United Kingdom*, § 38).
- While it is true that the conduct of the defence is essentially a matter between the defendant and his counsel (*Kamasinski v. Austria*, § 65; *Stanford v. the United Kingdom*, § 28), the ultimate guardians of the fairness of the proceedings – encompassing, among other aspects, the possible absence of translation or interpretation for a non-national defendant – are the domestic courts (*Cuscani v. the United Kingdom*, § 39; *Hermi v. Italy [GC]*, § 72; *Katritsch v. France*, § 44).
- The right is not conditioned by the explicit request for interpretation from the defendant. The Court has held that in view of the prominent place the right to a fair trial holds in a democratic society, the obligation arises whenever there are reasons to suspect that the defendant is not proficient enough in the language of the proceedings, for example if he or she is neither a national nor a resident of the country in which the proceedings are being conducted (*Vizgirda v. Slovenia*, § 81).

**The implementation of
the Directive 2010/64/EU**

by Italy

The following legislative reforms were necessary:

- **clarifying the free language assistance service guaranteed to the foreigner under investigation or trial in our country without knowing the Italian language, regardless the final outcome of the proceedings;**
- **distinguishing the right to an interpreter and the right to translation during the criminal trial;**
- **expressly providing for the right to a written translation of certain procedural documents;**
- **introducing the right to linguistic assistance also for communication with the lawyer, not only when the defendant is restricted in his freedom (in custody, arrest or detention) but also when he is in liberty before the examination, or the submission of a request or any procedural application;**
- **ensuring the sufficient quality of the linguistic assistance to protect the fairness of the procedure**

The Law expressly indicates the procedural documents for which is guaranteed the written translation:

- notice of inquiry,
- notice on the rights of defence,
- decision imposing personal pre-trial measures (not only those depriving the person of liberty)
- notice of the conclusion of preliminary investigations,
- decrees providing for the preliminary hearing
- court summons
- judgements

Nevertheless, the Law recognizes the right to free translation (not necessarily in writing and in full) of further procedural documents that are considered essential by the judge, as they contain the charges against.

The decision taken by the judge on the necessity or not of the translation must be motivated and shall be challenged with the judgement.

There is no provision in derogation of the complete written translation of the “essential acts” and the possibility of conscious and voluntary waiver of the right by the suspected or accused, circumstances expressly provided for the Directive.

The costs for the interpretation and translation service has a significant impact on the total amount of the court costs.

2020

total amount:

633,000,000

costs for interpreters
and translators:

119,000,000

Principles of Law drawn from the Case law of the Court of Cassation

**The function of uniform and consistent
interpretation of the Law**

With regard to court summons, the obligation to translate the documents in favour of foreign-language accused, exists - under penalty of nullity pursuant to art. 178, lett. c), cod. proc. pen. - even if he has an address for service at the defender, the latter having only the obligation to receive the documents intended for his client, but not also to proceed with their translation.

BUT

The obligation to translate procedural documents in favour of the accused or sentenced who does not understand the Italian language, is excluded when the subject is fugitive or untraceable. In these cases, the law establishes that the notification of the documents is legally made by delivery to the defender.

The right to the assistance of an interpreter does not automatically derive from the "status" as a foreigner or stateless person but requires the further unfailing prerequisite of the ascertained inability to understand the Italian language.

There is no violation of the right of defence if, during the trial, the accused of foreign language is assisted by the interpreter of the language that he himself declares to speak and understand, even if it is not the mother tongue, as the provision of law it is intended to ensure to the accused - not the right to have the documents translated into the mother tongue - but the assistance of the interpreter in a language that allows him / her full understanding of the acts and fundamental points of the trial.

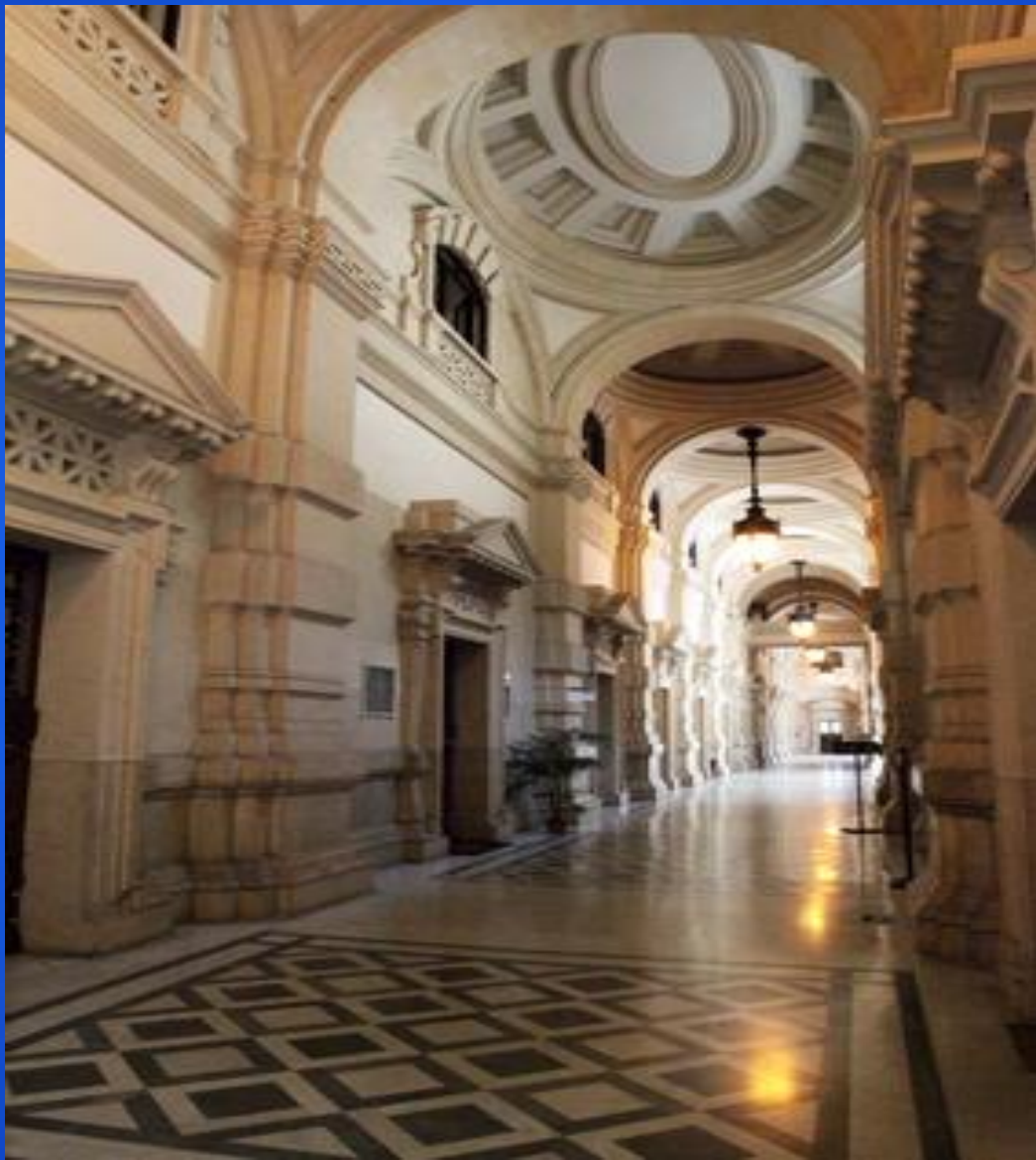
The assessment of the accused's knowledge of the Italian language constitutes a specific assessment of merit that cannot be challenged before the Court of cassation in point of law if the judge gave a correct and exhaustive reasoning.

This assessment can also be carried out on the basis of the elements resulting from the judicial police acts (in this case, the election of domicile) and in the absence of data objective indicative of the lack of knowledge, without prejudice to the right of the judge to carry out further checks if these elements are not conclusive.

The failure to translate an order of pre-trial measure or a sentence into the language known to the foreign suspect, who does not know the Italian language, does not determine the invalidity of these provisions but entails that the terms for any appeal run from the moment in which the suspect had actual knowledge of the content of the act.

Thank you very much for
your kind attention!





The stoats

