# The Directive on Interpretation and Translation in Criminal Proceedings

## Genesis and Description

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## ABSTRACT

The article traces the genesis and content of Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings – the first criminal law measure adopted under the Lisbon Treaty and the initial step in the Council's Roadmap on procedural rights. It outlines the background of failed earlier initiatives, the political dynamics between the Commission, Member States, and the European Parliament, and the negotiations that led to the final text. The Directive sets common minimum standards for interpretation and translation, including communication between defendants and their lawyers, translation of essential documents, and quality assurance. It represents a landmark in strengthening fair trial rights and an early test case for post-Lisbon EU criminal law legislation.

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# I. Introduction

On 20 October 2010, the European Parliament and the Council adopted Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings.[1] The Directive is the first legislative instrument in the field of criminal law that has been adopted under the rules of the Lisbon Treaty, and it is the first measure of the Council's "Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings."[2]

The adoption of the Directive provides interesting insight into the concrete application of the Lisbon Treaty, and it marks a significant step in the process of strengthening the procedural rights of suspected and accused persons. This article describes the genesis of the Directive and provides a description of its main elements.

# II. Genesis of the Directive

## 1. Background

In the past two decades, the European Union has established various legislative instruments in the field of criminal law. Often, the aim of these instruments is to facilitate the prosecution of crime and the execution of sentences, notably by promoting cooperation between judicial authorities in the Member States. Since the European Council of Tampere (1999), such cooperation is based on the principle of mutual recognition. The Framework Decision on the European arrest warrant[3] is probably the most well known of these instruments.

While substantial progress had been made as a result of these instruments, with the aim of combating crime, no such progress had been made, at least until recently, regarding measures that aim at protecting the procedural rights of suspected and accused persons in criminal proceedings. In order to address this imbalance, the European Commission submitted a proposal for a Framework Decision in 2004 on certain procedural rights in criminal proceedings throughout the European Union.[4] This proposal aimed at introducing a comprehensive set of procedural rights by establishing common minimum standards.[5] However, due to opposition by six Member States,[6] the Council was unable to reach unanimous agreement on this proposal, as required under the rules of the Amsterdam Treaty. In 2007, the work on the proposal was abandoned.[7]

Eager to relaunch work on the issue of procedural rights, the Swedish Presidency, which held office in the second term of 2009, decided to take a step-by-step approach.[8] Having ensured the support of the United Kingdom,[9] which was the biggest opponent of the 2004 Commission proposal, it proposed a "roadmap" on 1 July 2009, with a view to fostering the protection of suspected and accused persons in criminal proceedings.[10] Contrary to the 2004 Commission proposal, which envisaged creating a comprehensive set of rights, the proposed roadmap took the view that action should be addressed one area at a time. The underlying idea was that it would be easier to reach agreement on various "small" measures on a step-by-step basis, instead of trying to reach agreement on one "big" measure containing various rights. The step-by-step method would also allow focused attention to be paid to each individual measure, and it would avoid tradeoffs between different procedural rights in negotiations.

The roadmap contains a non-exhaustive list of five measures that the Commission is invited to submit proposals on: (a) translation and interpretation; (b) information on the rights for suspected and accused persons in criminal proceedings and information about the charges; (c) legal advice and legal aid; (d) communication with relatives, employers, and consular authorities; (e) special safeguards for suspected or accused persons who are vulnerable owing, for example, to age, mental, or physical condition. The Commis-

sion is also invited to consider presenting a green paper on pre-trial detention. The order of the measures, which is indicative, has been chosen in such a way that the measures on which it is likely that agreement could be reached "easily" are set out at the beginning. When agreement is reached on an "easy" measure, the work on the other measures will be made easier as well (power of precedents).

The proposal for a roadmap did not encounter much opposition in the Council, which can be explained by the non-binding nature of the instrument (which ultimately got the form of a resolution). In fact, the roadmap merely calls for action in some fields, without setting itself binding rules. Despite its non-binding nature, the roadmap constitutes a real landmark, since, for the first time in history, the 27 Member States unanimously agreed that action should be taken at the level of the European Union in order to strengthen the rights of suspected and accused persons in criminal proceedings and that the roadmap should constitute the basis for such action. The Council formally adopted the roadmap on 30 November 2009, the day before the entry into force of the Lisbon Treaty.

In the Stockholm programme of December 2009,[11] the European Council welcomed the adoption of the roadmap and made it part of the Stockholm programme.[12] The European Council invited the Commission to put forward the proposals foreseen in the roadmap for swift implementation. It also invited the Commission to examine further elements of minimum procedural rights for suspected and accused persons and to assess whether other issues, for instance the presumption of innocence,[13] need to be addressed.

## 2. The Commission Proposal on Interpretation and Translation

The first measure identified in the roadmap relates to translation and interpretation.[14] The Commission, which had been involved in the preparation of the roadmap, submitted a proposal for a Council Framework Decision on 9 July 2009 on the right to interpretation and translation in criminal proceedings.[15] The Council dealt with this proposal in a quick way, reaching unanimous agreement in the form of a "general approach" on 23 October 2009. However, because of the obligatory consultation of the European Parliament and the customary finalisation work (by the jurists-linguists), it turned out to be impossible to adopt the Framework Decision before entry into force of the Lisbon Treaty on 1 December 2009. In view of the new rules set out in the Treaty on the Functioning of the European Union (TFEU), notably in Art. 82(2) under b), it therefore became necessary to restart the decision making procedure by replacing the proposal for a Framework Decision with a new draft Directive to be adopted under the ordinary legislative procedure of Art. 294 TFEU (co-decision with the European Parliament, qualified majority voting in the Council).

## 3. The Member States' Initiative

The question arose as to who should submit such a new draft Directive: the Commission or the Member States, acting respectively in accordance with Art. 76(a) and (b) TFEU. One could argue that it was primarily for the Commission to submit a new proposal for a Directive, since such a new proposal had to replace the original Commission proposal of July 2009. Also, the roadmap calls on the Commission to submit proposals regarding the measures set out in the roadmap in the first place, although it is generally acknowledged that this cannot replace the possibility provided in the Treaty for Member States to table legislative initiatives.

However, the Commission that was in office at the end of 2009 only had a "caretaker" task; the term of the Barroso-1 Commission had expired, and the Barroso-2 Commission had not yet been appointed (it did not take office until 9 February 2010). In particular, in November 2009, it was not yet known who the new responsible Commissioner for this portfolio would be. Hence, it was not known if and when the new Commission would submit a new legislative proposal for a Directive on the right to interpretation and translation in criminal proceedings.

Under these circumstances, the Swedish Presidency, eager to keep up the momentum after the positive results of 23 October 2009, decided to explore the possibility of submitting a Member States' initiative. The reaction to this call was positive, and, on 8 December 2009, a total of 13 Member States submitted an initiative for a Directive on the right to interpretation and translation in criminal proceedings.[16]

The text of the initiative was a copy-paste of the text of the "general approach," which was unanimously agreed upon by the 27 Member States in October 2009 in respect of the Commission proposal of July 2009. The initiative was communicated to the European Parliament and to the Commission within the framework of the ordinary legislative procedure of Art. 294 TFEU. The initiative was also communicated to the national parliaments, so as to allow them to appraise compliance of the proposed Directive with the principle of subsidiarity, in accordance with Protocols No 1 and 2 annexed to the Lisbon Treaty.

## 4. The "Competing" Commission Proposal

After having taken office in February 2010, Commissioner Viviane Reding decided that the Commission should also present a proposal for a Directive on the right to interpretation and translation in criminal proceedings. When it became known that the Commission was preparing such a proposal, the Spanish Presidency, which held office in the first term of 2010, and several Member States voiced concerns, e.g., through the Permanent Representatives Committee (Coreper) and at the JHA Council of 26 February 2010. It was argued that presentation of a proposal by the Commission, which would "compete" with the Member States' initiative, would create confusion, that it could slow down the decision making process, and that the existence of two proposals on the same subject matter would give an odd impression to the rest of the world, including the national Parliaments that would be asked to assess the compliance of two similar texts according to the principle of subsidiarity.

Commissioner Reding, however, pressed ahead with her proposal, which was finally presented on 9 March 2010.[17] The text of this proposal for a Directive extensively copied the text of the original Commission proposal for a Framework Decision of July 2009. The Council, not amused, immediately sent a letter to the Commissioner, stating that it regretted the adoption by the Commission of this new proposal.[18] According to the Council, the citizens in the European Union would be better served by continuation of the work on the Directive on the basis of the Member States' initiative.

It is understandable that the Commission wanted to present its own proposal, not only for reasons of "image building" (by issuing press releases, such as "*European Commission acts to ensure fair trial rights in the EU*"), but also since the rules of the game vary, depending on the author of the proposal or initiative. If the Commission presents a proposal, the Council has to act unanimously regarding amendments by the European Parliament on which the Commission has delivered a negative opinion.[19] In case of a Member State initiative, there is no such requirement.[20] Nevertheless, and although there is no express provision in the Treaty opposing presentation of a proposal by the Commission regarding a matter on which a Member States' initiative already exists (and vice versa), one could argue that such a practice is precluded by the principle of sincere cooperation between the EU institutions and the Member States, as laid down in Art. 4 of the Treaty on European Union. Indeed, where a Member States' initiative already exists, it seems that the Commission can merely submit one or more opinions on the basis of Art. 294(15) TFEU, with (substantive) drafting solutions where appropriate, and not an entirely new proposal.

## 5. Choice of the European Parliament

In the European Parliament, the file was attributed to the Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee); Baroness Sarah Ludford (Alliance of Liberals and Democrats for Europe, ALDE),

who had also been involved in the work on the 2004 Commission proposal, was appointed first responsible member ("rapporteur"). She was confronted with the fact that two draft texts for a Directive on the right to interpretation and translation in criminal proceedings existed: one in the form of an initiative by Member States and one in the form of a proposal from the Commission. Both the Member States and the Commission invited the rapporteur and other LIBE members to work on their own text.

The ensuing fight over competences pointed out a matter of principle: the Council wanted to preserve the right of Member States to present legislative initiatives, as laid down in the TFEU, while the Commission wanted to make the statement that, under the Lisbon Treaty, it should be the institution that plays the leading role in formulating European Union policy in the field of criminal law.

At this stage of the procedure, the LIBE Committee of the European Parliament became the master of the game. In accordance with Art. 44(4) of the European Parliament's rules of procedure, the Committee was in fact required to deal with both proposals in a single report, but it had to choose either the Member States' initiative or the Commission proposal as the basis for its amendments.[21]

Upon the suggestion of rapporteur Ludford, the LIBE Committee decided to choose the Member States' initiative as the basis for its work. The main reason for this choice was that it would save time, and that both the United Kingdom and Ireland had decided to opt-in regarding the adoption of the Directive on the basis of the Member States' initiative;[22] it was not clear whether these Member States would also opt-in with regard to the work on the Commission proposal. It was also appealing for Parliament to work on the Member States' initiative, since the Council had expressed a clear preference to work on the basis of that text: this could lead to a quick agreement between the two institutions.

As regards the contents of the text, Parliament felt clearly drawn to the Commission proposal, which set higher standards of protection than those in the Member States' initiative. Although this could have been a reason the LIBE Committee decided to work on the basis of the Commission proposal, it was also attractive for the Committee to work on the basis of the Member States' initiative, which provided lower standards of protection, thus making it easier for the European Parliament to provide added value to the text.

## 6. Work in the Council Bodies and Negotiations with the European Parliament and the Commission

Having made the choice to carry out the work on the basis of the Member States' initiative, the LIBE Committee adopted its amendments on 8 April 2010 in an orientation vote. This provisional vote provided the negotiating team of the European Parliament – consisting of the rapporteur and representatives of other political parties ("shadow rapporteurs") – with a mandate for conducting negotiations with the Council.

On 16 April 2010, Coreper instructed the Spanish Presidency to conduct negotiations on behalf of the Council and provided guidelines for such negotiations.

Subsequently, the European Parliament, Council, and Commission met during three tripartite meetings ("trilogues") in Strasbourg and Brussels. There was also some informal exchange of ideas. Between the trilogues, the Spanish Presidency kept the representatives of the Member States up-to-date, and the negotiating guidelines were regularly refined.

The Commission was present at all trilogues, participating actively in the discussions. Although the negotiations were conducted on the basis of the Member States' initiative, reference was sometimes made to the Commission proposal for a Directive, in particular by the Members of the European Parliament, for whom the

Commission proposal appeared to be a helpful instrument in shaping their thinking. On some points, this proposal provided inspiration for a solution to outstanding problems.

With regard to the contents of the negotiations, the European Parliament, supported by the Commission, took a more idealistic approach by aiming at higher standards of protection, whereas the Council had a more pragmatic approach by looking at the practical consequences of the implementation of the Directive, including costs. The perspective of qualified majority voting in the Council and the involvement of the European Parliament, which had an excellent negotiator in the person of Sarah Ludford, led to compromise solutions between these two approaches.

At the last trilogue on 17/18 May 2010, the negotiating parties reached a provisional agreement on the text of the Directive. On 26 May 2010, Coreper approved this agreement by qualified majority,[23] subject to an amendment regarding the period of implementation, which was prolonged by 12 months to 36 months. The Council confirmed this position at its meeting on 3/4 June 2010.

The LIBE Committee voted on amendments in line with the (modified) agreement on 10 June 2010, and the plenary of the European Parliament adopted these amendments on 16 June 2010. After revision by the jurists-linguists, the Council adopted the text without discussion at its meeting on 7 October 2010. The Directive was signed in Strasbourg on 20 October 2010 and published in the Official Journal on 26 October 2010.

## 7. Particular Attention to the European Convention

During the negotiations for the adoption of the Directive, particular attention was paid 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). Indeed, it was generally felt that the Directive should be "Strasbourg-proof" in its final form, meaning that the text should, as a minimum, meet the standards of the ECHR, as interpreted in the case law of the ECtHR.

In the light of this objective, the Presidency of the Council invited the Secretariat of the Council of Europe to present observations on the conformity of the text of the Member States' initiative with the ECHR, as interpreted according to the case law of the ECtHR. Similar demands had been made in respect of the 2004 and 2009 proposals of the Commission. The Secretariat of the Council of Europe presented the requested observations in January 2010, [24] and they were regularly referred to during the negotiations. It did not, however, always appear easy to take full account of these observations and, more generally, of the case law of the ECtHR: its casuistic character sometimes made it difficult to extract general rules.

## 8. Resolution on Best Practice

In July 2009, when the Commission presented its proposal for a Framework Decision on translation and interpretation, the Swedish Presidency presented an accompanying draft Resolution on "best practice."[25] This Resolution fell within the scope of the roadmap, according to which action to strengthen the rights of suspected and accused persons could comprise legislation "*as well as other measures*." The proposed Resolution encouraged the Member States to actively promote some measures, notably relating to representation of professionals, qualification of interpreters and translators, training, registration of qualified interpreters and translators, remote access to interpretation, and codes of conduct and guidelines on best practice. Since not all aspects of the Resolution, such as training, were explicitly covered by the scope of the Amsterdam Treaty, it was agreed that the instrument should be adopted not only by the Council, but also by the "Governments of the Member States meeting within the Council." On 23 October 2009, unanimous agreement was

reached on the text.[26] The Resolution was not formally adopted, however, since it was linked to the draft Framework Decision, which had to be "abandoned" after the entry into force of the Lisbon Treaty.

When the LIBE Committee of the European Parliament presented its amendments in respect of the draft Directive, which had replaced the draft Framework Decision, it requested incorporation of substantial parts of the text of the Resolution into the text of the Directive, so as to give it (more) binding force. With regard to some requests, agreement with the Council was reached – usually after redrafting of the text concerned – and therefore the Directive now contains wording that was formerly contained in the Resolution in some points.

After agreement was reached on the Directive, the Council preparatory bodies held a discussion on "what to do" with the remainder of the Resolution. According to various Member States, the text still contained some useful elements and would continue to provide added value to the Directive. In order to avoid a new debate on competencies, it was decided to invite the Commission to submit a proposal for a recommendation (which seemed to be the most appropriate instrument for this objective under the TFEU).[27] Up to now, however, the Commission has regretfully not come forward with such a proposal; perhaps the possibility of launching a Member States initiative will soon be explored again.

# III. Short Description of the 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). Both aspects have undergone developments in the course of the negotiations.

### a) Objective scope

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

The Directive does not give a definition of "criminal proceedings:" it is understood that this 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 [28]. Taking this into account, the addition of the reference to the EAW proceedings was necessary in view of the fact that extradition procedures do not fall within the scope of application of this Convention provision.[29]

In the course of the negotiations within the Council, certain Member States[30] observed that the Directive should not constitute a disproportionate procedural aggravation in situations in which sanctions are imposed for relatively minor offences by an authority other than a court having jurisdiction in criminal matters. This could be the case, for example, for offences that are committed on a large scale and that are immediately responded to, e.g. traffic offences following roadside checks, where (provisional) sanctions are imposed "on the spot" by police authorities on behalf of a prosecutor. In such a situation, it would be unreasonable to require full-fledged application of the Directive, notably implying that interpreters should be available at such roadside checks. In order to address this concern, Art. 1(3) of the Directive provides that "*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*." This provision has been further explained in recital 16.

### b) Temporal scope

The question of the temporal scope of the Directive has been the subject of lengthy debate in the Council.

The original Commission proposal provided in Art. 1(2) that the rights should apply "*to any person from the time that person is informed by the competent authorities of a Member State that he is suspected of having committed a criminal offence until the conclusion of the proceedings*."

In the course of the negotiations, a number of Member States pointed out that this formulation (containing the words "*is informed*") did not meet the standards set out by the jurisprudence of the ECtHR. The Secretariat of the Council of Europe voiced the same opinion. Indeed, the case law of the Court of Strasbourg has elaborated a temporal parameter for the application of Art. 6 rights to a suspected person: it does not depend upon the proceeding authorities officially notifying or informing the suspected person of the fact that a criminal investigation is launched against him. On the contrary, the definition of "criminal charge" within the meaning of Art. 6(2) and (3) ECHR has been construed in a substantive, rather than in a formal manner. Consequently, the knowledge of an ongoing investigation can implicitly result from acts of the procedure, such as the arrest of the person, a house search, a seizure or even, the closure of a business pending investigation, according to a leading case in such matters,[31].

As a consequence, in the text of the Member States' initiative, the wording of the Commission proposal had been considerably redrafted. In the adopted Directive, the wording has been refined even more, and it now reads that 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 is understood to mean the final determination of the question whether they have committed the offence, including, where applicable, sentencing and the resolution of any appeal*."

This latter reference ("*until the conclusion of the proceedings ...*") implies that the right to translation and interpretation, according to this Directive, does not apply to the execution phase of criminal proceedings. In this respect, it is interesting to point out that several amendments proposed by the European Parliament aimed at ensuring translation of prison rules or, generically, to the exercise of rights under the various prison rules of Member States. This suggestion was not taken up by the Council: the more restricted scope was correctly motivated with respect to the fact that 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.[32]

## 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 common, in one form or another, in the legislation of all EU Member States. However, various studies have shown a dramatic divergence among the Member States in the legal and practical implementation of this principle.

The greatest divergence relates to client-lawyer communication. Whereas in some Member States, interpretation of such communication is provided almost without limitation, in other Member States, such communication is not interpreted at all or only with substantial restrictions.[33]

The challenge, therefore, was to find a compromise. The starting point of the negotiations was Art. 2(1) of the original Commission proposal, which stated that there should be free interpretation of "*all necessary meetings between the suspect and his lawyer*." This proposal met with strong opposition from a number of Member States, which maintained that this obligation entailed excessive costs for Member States and that such a right could be subject to abuse, since the condition laid out in the provision ("*all necessary meetings*") was exceedingly vague.

Some Member States, on the contrary, defended this proposal as one of the truly progressive aspects of the instrument. In their opinion, while it is true that, until today, the ECtHR has not expressly ruled that there exists a right to free interpretation of client-lawyer communication, such a principle comes directly from an effective application of the right to defence, and particularly the right to be assisted by a lawyer. Indeed, how could this right be ensured if the suspected or accused person and his lawyer are unable to understand each other?

Member States opposing the extension of the right to interpretation objected that the suspected or accused person could bear the costs for interpretation himself; at most, they could concede to providing interpretation free of charge to those suspected or accused persons that could benefit from legal aid under their national laws. Member States in favour of a broader scope of the right to interpretation countered by replying that this would introduce discrimination based on nationality: a national of the Member State where the proceedings take place would be in a better position than a non-national since the latter„while possibly having (just) enough money to pay his own lawyer, would often be obliged to pay for an interpreter as well in order to be able to communicate with his lawyer.

A compromise between these two conflicting views was reached in the Council's general approach to the Framework Decision of October 2009. In this text, interpretation of communication between the suspected or accused person and his legal counsel should be provided during official acts of the investigation or court procedure and might (optionally) be provided "*in other situations*."[34] The unanimity rule under which these negotiations were conducted did not allow for a broader scope. The agreed compromise text was inserted into the text of the Member States' initiative for a Directive.

The battle was relaunched in the context of the negotiations on the Directive, following an amendment proposed by the European Parliament, which requested the introduction in the text of a right to interpretation of client-lawyer communication "*throughout the proceedings*," including outside official acts of the procedure.

The new institutional framework within which the negotiations proceeded, based on qualified majority voting, helped overcome the opposition of those Member States that continued to advocate a restricted scope of the right to interpretation. A new compromise was reached in which these situations were made the object of a specific provision (see Art. 2(2) of the Directive).

According to this paragraph, "*where necessary for the purpose of safeguarding the fairness of the proceedings*," Member States shall provide free interpretation of client-lawyer communication. In order to address the concerns of Member States regarding possible abuses of this right, the condition was made that the communication should be "*in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural application*."

This final text calls for three observations. Firstly, starting from the last part of the mentioned paragraph, it is clear that the competent authorities are in a position to refuse free interpretation for purely prolonged or inflationary meetings between the lawyer and the suspected or accused person. Secondly, the reference to the necessity of safeguarding the fairness of the proceedings implies that the decision on whether to grant free interpretation lies exclusively with the competent authorities (investigative authorities or judicial

authorities, depending on the phase of the procedure). According to the constant case law of the ECtHR, they are the only authorities ultimately responsible for the protection of the rights of suspected or accused persons under the ECHR. Thirdly, it will be interesting to note how the term "*other procedural application*" will be applied in practice. In the absence of clear agreement on this point between the negotiating parties, this term has been left vague; recital 20 refers, however, to the example of an "*application for bail*." As for other terms in Art. 2, such as "*direct connection*," it is likely that lawyers will seek to explore the scope of the term and that national judges and, in particular, the European Court of Justice, will be asked for clarification.

Lastly, regarding the issue of interpretation, it is worth noting that Art. 2(6) provides the possibility of "*remote interpretation*." In order to allow for the prompt assistance of an interpreter in situations where there is no interpreter at hand at short notice, interpretation can be facilitated via videoconference, telephone, or Internet. This possibility, which is already being successfully employed in several Member States, could prove extremely useful, e.g., in cases of rare languages if an available interpreter cannot – for reasons of time or distance – be brought to the location of the proceedings.[35] The possibility may, however, only be employed if the physical presence of the interpreter is not required *"to safeguard the fairness of the proceedings*."

## 3. Right to Translation (Art. 3)

Art. 3 provides for the right to translation of essential documents. This right is not expressly included in the text of Art. 6 ECHR. However, 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. These rights, in order to have an effective and not merely formal meaning, imply that the suspected or accused person is able to understand the content of the trial, even if it does not take place in a language with which he is familiar.[36]

Art. 3(1) of the adopted 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*" towards ensuring that they are able to exercise their right of defence and to safeguard the fairness of the proceedings.

As general as this draft may appear, two important indications may be derived from it. Firstly, the reference to the "suspected" person clarifies that the right to translation of documents extends to the pre-trial phase. As mentioned above, this is a logical consequence of the fact that certain aspects of the right of defence provided for in Art. 6(3) ECHR also apply prior to the charge/indictment: the person against whom the case is being investigated must be put in a condition to understand the acts and materials of the case. It should be noted, however, that when applying Art. 1(4), second part, the right to translation only applies to those documents contained in the case file that, under national law, are already available to the suspected or accused person, or to his lawyer.

Secondly, 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*." During negotiations within the Council, the reference to "*essential documentary evidence*," was lost, although it had been contained in the original Commission proposal. The latter point was not included in the Member States' initiative, since it met with the firm opposition of a number of national delegations who were concerned about the financial impact of the need to proceed with translation of such material, which can be rather voluminous. In the co-decision process, the point was again strongly supported by the European Parliament, but, in the negotiations with the Council, it was excluded from the final text of the Directive.

Despite its exclusion from paragraph 2, however, one could argue that "*essential documentary evidence*" must always be translated, since it is more "*essential*" than any other material in order to allow suspected and accused persons to exercise the right of defence. This conclusion indeed seems to impose itself if the right to translation is taken seriously and is linked to an effective – and not abstract – implementation of the right to be informed about the "*nature and cause of the accusation*" or implementation of the right to "*have adequate time and facilities for the preparation of [the] defence*" (see Art. 6(3) a) and b) ECHR). With respect to these rights, it seems that it is first and foremost the evidentiary material upon which the case rests that are essential to safeguarding the right to a fair trial as enshrined in Art. 6 ECHR [37].

Two provisions provide for a limitation of the right to translation of essential documents, even those explicitly listed in Art. 3(2).

Firstly, 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*." This provision could prove particularly useful in cutting down the obligation to translate voluminous documents, such as judgments involving multiple parties: the passages of the judgment relating to persons other than the person concerned in the case at hand do not have to be translated. Indeed, such passages are not "*essential*" in order to ensure that the latter is able to exercise his right of defence and to safeguard the fairness of the proceedings.

Secondly, Art. 3(7) allows "*an oral translation or oral summary*" of essential documents. Various Member States argued that inserting this possibility in the text would be very important for daily (court) practice: often, suspected and accused persons would be better served with an oral translation "on the spot," than with a written translation that could require several days to produce. More importantly, however, providing this possibility in the text would enable a considerable reduction in translation costs. In support of their position, the Member States concerned relied on case law of the ECtHR,[38] which allows an oral translation or oral summary to be provided instead of a written translation. The Commission, however, contested this interpretation of the case law and pointed to the conditions that were made by the Court of Strasbourg.[39] The debate on this point in the Council's preparatory bodies was very lively and led to some brilliant exchanges.

Although the European Parliament was reluctant to insert the possibility of oral translations in the text, fearing that it could undermine the very principle of the right to translation, it finally accepted this insertion, subject to two conditions: the oral translation or oral summary should not prejudice the fairness of the proceedings, and it should be an "*exception*" to the general rule of providing a written translation. Again, it will be interesting to see how national courts, and in particular the European Court of Justice, will interpret this provision.

The "*competent authorities*" of the Member States will be responsible for applying the above provisions. According to Art. 3(3), it is for them to decide which documents are to be considered essential (apart from those listed in paragraph 2) as well as which documents may be translated in part (paragraph 4) or orally (paragraph 7). Although rather self-evident, the Directive also provides for the right of the suspected or accused person and his lawyer to submit reasoned requests in this sense.

Lastly, Art. 3(7) concerns the possibility that a suspected or accused person waives the right to translation. The European Parliament insisted that this could only be allowed under strict conditions. The agreed text of the Directive states that the persons concerned must "*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*." It is clear from this provision, which has been inspired by the case law of the ECtHR,[40] that a waiver is also possible when the suspected or accused person does not have a legal counsel but has otherwise

obtained full knowledge of the consequences of the waiver, for example when the competent authorities themselves have informed him about any consequences.

## 4. Other Provisions: A Selection

### a) Quality of translation and interpretation

With respect to the text of the Member States' initiative, the European Parliament requested stricter provisions addressing the need to ensure proper quality of the translation or interpretation provided to the suspected or accused person. Indeed, the Member States' initiative only contained a general provision (Art. 5) requesting Member States to "*take concrete measures*" to ensure that the interpretation and translation provided would be of "*adequate quality*" in order to allow that the suspected or accused person be "*fully able to exercise his rights*."

The final text has been greatly improved in this respect. The level of adequacy of the translation and interpretation has been made the object of specific provisions in Arts. 2(8) and 3(9), which 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.[41] This provision was "imported" from the former Resolution at the initiative of the European Parliament.

### b) Links with the ECHR and the Charter of Fundamental Rights

Although recognising the importance of the Directive in the process of strengthening procedural rights, the Member States were anxious not to diminish the role of the ECHR in any way whatsoever. For its part, the European Parliament placed great emphasis on the role of the Charter of Fundamental Rights of the European Union, which gained binding force through the Lisbon Treaty. As a consequence, the importance of the Convention and of the Charter, and of the relevant case law of the ECtHR and the European Court of Justice, were underlined in various sections in the text:

- 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.

### c) Transposition

In conformity with Art. 9(1), Member States have to transpose the Directive in their internal legal orders by 27 October 2013. Since the Directive was adopted after 1 December 2009, it does not fall within the transitory regime provided for by Art. 10 of Protocol 36 to the Treaty of Lisbon.[42] Therefore, when the period for implementation expires, Member States that have failed to adapt their national laws and regulations to the provisions of the Directive could be subject to an infringement procedure by the Commission under Art. 258 TFEU, including the possible imposition of executive measures and penalties by the European Court of Justice under Art. 260 TFEU.

## IV. Conclusion

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. Qualified majority voting in the Council and the involvement of the European Parliament has led to higher standards of protection, which is promising for the future of European criminal law. The genesis of the Directive is also an interesting example of the application of the Lisbon Treaty, in respect of which the institutions and Member States are testing their competencies and marking their territory.

In the light of the subject matter of the Directive, and given that some elements are open to more than one interpretation, it is likely that the Directive will lead to extensive litigation. In view of the generalised post-Lisbon jurisdiction of the Court of Justice in respect of this instrument – as opposed to the limited jurisdiction that the Court had under the Treaty of Amsterdam – this Directive will most likely be the "proving ground" for the interpretative activity of national and European judges with respect to this area of EU law. It will be highly interesting to follow future developments related to this Directive.

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1. OJ L 280, 26.10.2010, 1.↩
2. Resolution of the Council of 30 November 2009, OJ C 295,4.12.2009, p. 1. For details on this topic, see Prof. Dr. Mar Jimeno-Bulnes, 'The EU Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings', eucrim 4/2009, p. 157.↩
3. 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.↩
4. COM(2004) 328 final. Council doc 9318/04, inter-institutional file no 2004/0113 (CNS).↩
5. These rights included the right to free legal advice, the right to free interpretation, the right to free translation of relevant documents, the right of vulnerable persons to specific attention, the right to communicate (with relatives, consular authorities), and the duty to inform a suspected person of his rights in writing (letter of rights).↩
6. Six Member States opposed the adoption of the Framework Decision: United Kingdom, Ireland, Cyprus, Malta, Slovakia and the Czech Republic.↩
7. For a historic overview, see Daniel Flore, 'Droit pénal européen', Larcier 2010, pp. 297-305.↩
8. For details on this topic, see the article by Prof. Dr. Mar Jimeno-Bulnes, op. cit.↩
9. It appears that a personal switch in the United Kingdom administration has contributed to a U-turn in the policy of this Member State concerning procedural rights.↩
10. Council doc 11457/09.↩
11. OJ C 115, 4.5.2010, p. 1.↩
12. Unfortunately, the Stockholm programme does not quote the measures set out in the roadmap, nor does it make a reference to the place where the roadmap can be found.↩
13. The explicit reference in the text of the Stockholm programme to the "presumption of innocence" is a nice victory for the Member State that pleaded to have this measure inserted in the roadmap, but could not get the approval of the other Member States, see e.g. 12531/09.↩
14. In respect of this measure A, the roadmap provides the following short explanation: "*The suspected or accused person must be able to understand what is happening and to make him/herself understood. A suspected or accused person who does not speak or understand the language that is used in the proceedings will need an interpreter and translation of essential procedural documents. Particular attention should also be paid to the needs of suspected or accused persons with hearing impediments.*"↩
15. COM(2009) 338 final; Council doc 11917/09.↩
16. The initiative was made "official" in January 2010 and was published in OJ C 69, 18.3.2010, p.1; inter-institutional file no 2010/0801 (COD).↩
17. COM(2010) 82 final.↩
18. Council doc 7598/10.↩
19. Article 294 (9) TFEU.↩

20. Article 294 (9) and (15) TFEU. In practice, the difference is not very substantial, because the Commission can usually accept amendments presented by the European Parliament and by the Council. In such cases, the Commission presents a modified proposal.↩
21. Article 44(4) of the rules of procedure of the European Parliament reads as follows: "*When two or more proposals originating from the Commission and/or the Member States with the same legislative objective have been submitted to Parliament simultaneously or within a short period of time, Parliament shall deal with them in a single report. In its report, the committee responsible shall indicate to which text it has proposed amendments and it shall refer to all other texts in the legislative resolution.*"↩
22. Application of Article 3 of Protocol No 21 to the Lisbon Treaty.↩
23. In Coreper on 26 May 2010 and at the JHA Council on 3/4 June 2010, all Member States indicated that they would vote in favour, except the Czech Republic, which stated that it would abstain from voting (which has the same effect as a negative vote). However, on the occasion of the adoption of the Directive in the Council on 7 October 2010, the Czech Republic also voted in favour.↩
24. Council doc. 5928/10.↩
25. Council doc. 12116/09.↩
26. Council doc. 14793/09.↩
27. Council doc. 11471/10.↩
28. See e.g. Engel and others v. the Netherlands, 8 June 1976, par. 70-81; Öztürk v. Germany, 21 February 1984, par. 53; Campbell and Fell v. the United Kingdom, 28 June 1984, par. 70; Garyfallou AEBE v. Greece, 24 September 1997, par. 33.↩
29. See e.g. H. v. Spain, 15 December 1983.↩
30. Notably, Finland and Sweden.↩
31. De Weer v. Belgium, Commission decision of 10 March 1977.↩
32. See e.g. Ganci v. Italy, 30 October 2003, par. 22.↩
33. There may be various reasons for such restrictions: the most important reason is a reduction in costs, but the restrictions may also be put in place, for example, in order to keep the defence from using the interpretation facilities to slow down the proceedings. In some Member States, the interpreters are at the service of the court and not at the service of the suspected or accused person, implying that the object of translation is exclusively the content of direct communication between the court and that person.↩
34. This provision of the general approach of 23 October 2009 was accompanied by recital 10, which was inserted in order to satisfy the Member States' calls for a broad scope of the right to interpretation and which contained wording taken almost literally from the ECtHR judgment in Timergaliyev v. Russia, 14 October 2008, par. 51: "*The suspected or accused person should be able, inter alia, to explain to his/her legal counsel his/her version of the events, point out any statements to which he/she disagrees and make his/her legal counsel aware of any facts that should be put forward in his/her defence.*"↩
35. See also recital 28.↩
36. See Kamasinki v. Austria, 19 December 1989, in particular par. 74.↩
37. The conclusion appears to be supported by the case law of the ECtHR (Kamasinski v. Austria, cit., par. 74), notably the words "*Article 6(3) e) does not go so far as to require a written translation of all item of written evidence or official documents of the procedure*," interpreted *a contrario*.↩
38. Member States relied notably on Hermi v. Italy, 18 October 2006, par. 70, notably the words "*This suggests that oral linguistic assistance may satisfy the requirements of the Convention.*"↩
39. Hermi v. Italy, cit., par. 70, the passage following the words cited in the previous footnote: "*The fact remains, however, that the interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself.*"↩
40. See e.g. Poitrimol v. France, 23 November 1993, par. 31; Hermi v. Italy, cit., par. 73; Scoppola v. Italy (No. 2) (Grand Chamber), 17 September 2009, par. 135.↩
41. See also recital 31, which encourages Member States to provide wider access to the registers by exploiting the future potentialities of the e-Justice portal.↩
42. According to Article 10 of Protocol 36 to the Treaty of Lisbon, the Commission's powers under Article 258 TFEU with respect to legal acts approved under the former Title VI of the TEU (police cooperation and judicial cooperation in criminal matters) shall not be applicable for a 5-year period following the entry into force of the Treaty of Lisbon. The same provision applies to the European Court of Justice's jurisdiction on the same acts.↩

## * Authors statement

The authors are affiliated with the General Secretariat of the Council of the European Union. This article solely reflects the opinions of the authors and not those of the Council.

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