

# Legal Experts Advisory Panel

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## FAIR TRIALS

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**ROADMAP PRACTITIONER TOOLS**

### **INTERPRETATION AND TRANSLATION DIRECTIVE**

**ASSESSMENT OF INTERPRETATION NEEDS**

**QUALITY OF POLICE STATION INTERPRETATION**

**THE 'THIRD LANGUAGE' ISSUE**

**TRANSLATION OF ESSENTIAL DOCUMENTS**

## About Fair Trials

Fair Trials Europe (“Fair Trials”) is a non-governmental organisation that works for fair trials according to internationally recognised standards of justice. Our vision is a world where every person's right to a fair trial is respected, whatever their nationality, wherever they are accused.

Fair Trials helps people to understand and defend their fair trial rights; addresses the root causes of injustice through its law reform work; and undertakes targeted training and networking activities to support lawyers and other human rights defenders in their work to protect fair trial rights.

Working with the Legal Experts Advisory Panel (‘LEAP’) – a network of over 140 criminal justice and human rights experts including defence practitioners, NGOs and academics from 28 EU Member States – Fair Trials has contributed to the negotiations surrounding the adoption of the first three directives under the Roadmap for strengthening procedural rights.

LEAP, supported by Fair Trials, is now working to ensure effective implementation of the Directives, further to its February 2015 strategy [Towards an EU Defence Rights Movement](#), including through practitioner training and litigation before the national courts and Court of Justice of the EU.

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**C L I F F O R D  
C H A N C E**

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# INTRODUCTION

## A. INTRODUCTION

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### 1. Background & other Fair Trials / LEAP training materials

In the last decade, the EU Member States have been cooperating closely on cross-border issues, principally through the European Arrest Warrant. Such systems rely on mutual confidence between judicial authorities that each will respect the rights of those concerned, in particular as guaranteed by the European Convention on Human Rights ('ECHR').

However, cooperation has been undermined by the fact that judicial authorities called upon to cooperate with one another do not, in reality, have full confidence in each other's compliance with these standards. In order to strengthen the system, the EU has begun imposing minimum standards to regulate certain aspects of criminal procedure through a programme called the 'Roadmap'.<sup>1</sup>

Whilst these measures have their origin in ensuring mutual trust, the result is a set of directives binding national authorities in all cases, including those which have no cross-border element. These cover the right to interpretation and translation,<sup>2</sup> the right to information,<sup>3</sup> and the right of access to lawyer<sup>4</sup> (collectively, the 'Directives').

This toolkit discusses Directive 2010/64/EU on the Right to interpretation and translation in criminal proceedings<sup>5</sup> (the 'Directive'), which should have been transposed into domestic law by 27 October 2013. It governs suspected and accused persons' right to interpretation in police interviews, hearings and in meetings with their lawyer, and their right to translation of essential documents. This toolkit should be read together with the online training video produced by Fair Trials.<sup>6</sup>

This is a central measure as increasing mobility comes increased presence of suspects who do not speak the local language, and who depend upon effective language assistance in order to be able to exercise other rights, such as that to participate in their own trial, confer with their lawyer etc.

In order for the Directive to achieve its purpose, the Directive must be invoked by lawyers in individual cases to ensure courts uphold its standards. This Toolkit is designed to give you practical advice as to how to use the Directive in practice. It should be read together with the 'Using EU Law in Criminal Practice' Toolkit and the online training video on the Court of Justice of the EU.<sup>7</sup>

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<sup>1</sup> Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings ([OJ 2009 C 295, p.1](#)).

<sup>2</sup> 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 2010 L 280, p. 1](#)).

<sup>3</sup> 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 2012 L 142, p. 1](#)).

<sup>4</sup> 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 2013 L 290, p. 1](#)).

<sup>5</sup> Note 2 above.

<sup>6</sup> Available at <http://www.fairtrials.org/fair-trials-defenders/legal-training/online-training/>.

<sup>7</sup> Available at <http://www.fairtrials.org/fair-trials-defenders/legal-training/>.

## 2. Scope of this Toolkit

This Toolkit is not exhaustive. It covers certain issues which have been highlighted to us by members of the LEAP network as posing a particular challenge to the conduct of criminal defence. These include: (I) Assessment of interpretation needs; (II) Quality of police station interpretation; and (III) Translation of essential documents. We have not covered the aspects relating to the European Arrest Warrant, as this concerns a much narrower range of cases.

Many other issues may also arise. For instance, at the time of writing a reference<sup>8</sup> is pending before the CJEU asking whether a rule of national law requiring appeal documents to be filed in the forum language must be set aside to give effect to the Directive. There are myriad other potential questions so we encourage you to treat this Toolkit as a starting point only.

## 3. How to use this Toolkit

### a. How the content is organised

Much of the content of the Directive is derived from the case-law of the European Court of Human Rights ('ECtHR'), and there is no doubt that one of the major functions of the Directive is to articulate those standards as codified norms, and build upon them. Accordingly, for each thematic area, the Toolkit reviews the ECtHR case-law to set out the principles the Directive articulates.

We then consider the provisions of the Directive itself. Most provisions of the Directives leave considerable room for interpretation, and at the time of writing<sup>9</sup> there are not yet any rulings of the Court of Justice of the EU ('CJEU') on any of the Directives. Accordingly, we try to make clear – by the use of bullet points in the body of the text – if we are making any assumptions about their meaning.

Based upon our understanding of the Directive, we then make concrete suggestions about how to use it in a given case. These involve both practical steps (e.g. documenting and challenging violations at the pre-trial stage) and legal steps (e.g. invoking the Directive before a court). In order to distinguish clearly between these different levels of analysis:

*Provisions of the European Convention on Human Rights and citations from case-law of the European Court of Human Rights appear in yellow shading, with a single border, to represent their nature as an irreducible minimum. They are presented in italics.*

Provisions of European Union law or citations from the case-law of the Court of Justice of the European Union appear in green shading, with a double border, to represent their nature as complementary, possibly more extensive protection.

Suggestions by Fair Trials on using the Directive in practice appear in blue shading, with a triple border, to represent your use of the Directives in the local legal context. We try to be up front about when we are making a suggestion with the symbol '→'.

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<sup>8</sup> Request for a preliminary ruling from the Amtsgericht Laufen (Germany) lodged on 30 April 2014 — *Criminal proceedings against Gavril Covaci* ([OJ 2014 C 253, p. 22](#)).

<sup>9</sup> This Toolkit is published in March 2015.

## **b. The ‘Using EU Law in Practice’ Toolkit**

This Toolkit should be used alongside the ‘Using EU Law in Practice’ Toolkit which contains explanations of the assumptions made about the legal effects of the Directives. It also contains a general introduction to the concept of ‘invoking the Directive’ through reliance upon remedial mechanisms such as invalidity of procedural acts, exclusion / disregarding of evidence and so on.

When make a ‘Fair Trials’ advice’ suggestion in a triple-bordered blue-shaded box, we are relying upon this approach to the Directives in general so you are encouraged to cross-refer to the ‘Using EU Law in Practice’ Toolkit in that regard. There are, however, some specific points about how to rely on this Directive in particular. They concern, notably the issue of challenging the poor quality of interpretation before the courts in accordance with the principle of ‘exercising control when put on notice’ derived from the case-law of the ECtHR.

## **c. ‘Interpretation’ and ‘translation’**

In this Toolkit, when we refer to ‘**interpretation**’, we are talking about oral interpretation of oral communication. When we refer to ‘**translation**’, we are talking about written translation of written documents. The Directive draws a clear distinction between the two, and we will follow this. We will also use the term ‘language assistance’, a generic term referring to assistance (both interpretation and translation) provided to someone who does not speak or understand the language of the proceedings.

The distinction between interpretation and translation is not insignificant given that, in the case-law of the ECtHR, the two are largely conflated as Article 6(3)(e) of the European Convention on Human Rights (‘ECHR’) refers only to ‘interpretation’ and, although the ECtHR has tried its best to establish a requirement for translations of certain documents (notably the indictment) in its case-law, the principles are hard to pin down so the distinction operated by the Directive is a useful one to follow.

## **d. A word of caution**

This Toolkit is drafted based on certain assumptions. As mentioned above, we have endeavoured to identify these clearly in the body of the text. This is both in acknowledgment of the fact that there may be other points of view, and in order to ensure you are aware that these are inferences which you will need to be happy to stand by if you are going to rely on them in court.

The Toolkit is also drafted with lawyers from all EU Member States in mind. Necessarily, it cannot cater for all individual variations in criminal procedure in the different EU Member States (though it does use occasional national-level examples to put matters in context). In addition, it cannot take account of existing professional traditions and deontological (ethics) rules established by national or regional bars. So you will need to adapt our suggestions to work within your own local context.

## **e. Keep in touch**

With those qualifications, we encourage you to follow the steps in this Toolkit, try out the arguments we propose and to let us know how you get on by contacting us via the contacts in the preface. We expect there to be a learning process in the first year or two following the implementation deadlines of the Directives, and will be keen to hear from you about your experience and share lessons.

## B. BEFORE THE DIRECTIVE: REVIEW OF ECHR PRINCIPLES

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The Directive is based upon an area of ECtHR case-law which is not very voluminous, but from which some key principles nevertheless emerge. The case-law on the right to interpretation (and, to some extent, translation) generally arises under Article 6(3)(a) and (e), which provides:

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

*(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*

...

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

Interpreting these provisions, the ECtHR has developed the following 'core statement', recently reiterated in *Hacioglu v. Romania*:<sup>10</sup>

*'88. The Court reiterates that paragraph 3 (e) of Article 6 states that every defendant has the right to the free assistance of an interpreter. That right applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings. This means 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 or to have rendered into the court's language in order to have the benefit of a fair trial [...] The said provision does not go so far as to require a written translation of all items of written evidence or official documents in the procedure. In that connection, it should be noted that the text of the relevant provisions refers to an "interpreter", not a "translator". This suggests that oral linguistic assistance may satisfy the requirements of the Convention [...] 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, notably by being able to put before the court his version of the events [...] In view of the need for that right 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.'*<sup>11</sup>

One significant addition to this case-law came in 2010, when in the case of *Diallo v. Sweden*<sup>12</sup> the Third Section of the ECtHR drew a parallel between the right of access to a lawyer at the police station and the right of access to an interpreter for those who do not speak the language of the criminal proceedings, stating:

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<sup>10</sup> Case of [Hacioglu v. Romania](#), App. no. 2573/03 (Judgment of 11 January 2011).

<sup>11</sup> Paragraph 88.

<sup>12</sup> Case of [Diallo v. Sweden](#), App. no. 13205/07 (Judgment of 5 January 2010).

*'In the same line of reasoning, the assistance of an interpreter should be provided during the investigating stage unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.'*<sup>13</sup>

This established that, under the ECHR, the right to an interpreter at the police station is a basic guarantee of criminal procedure, akin to the assistance of a lawyer. This right, and many of the concepts evoked in the core statement, are now reflected in the main provisions of the Directive.

## C. OVERVIEW OF THE DIRECTIVE

### 1. At a glance

Provision	What it covers	Particular aspects
Article 1	Subject matter / scope	<ul style="list-style-type: none"> <li>• Applies to criminal proceedings and proceedings for execution of a European Arrest Warrant (EAW)</li> <li>• Applies from the time person is 'made aware by the competent authorities ... by official notification or otherwise, that they are suspected or accused of having committed a criminal offence until the conclusion of proceedings'</li> <li>• Where minor offences sanctioned administratively and only the appeal is before a court, the Directive applies only to the court.</li> <li>• Does not affect laws concerning access to a lawyer or access to documents</li> </ul>
Article 2	Right to interpretation	<ul style="list-style-type: none"> <li>• Entitles suspected or accused persons 'who do not speak or understand the language' to interpretation without delay before judicial authorities and during police questioning,</li> <li>• Interpretation for communication between suspected and accused persons and legal counsel in direct connection with any questioning, hearing or appeal, where necessary to safeguard the fairness of proceedings</li> <li>• Appropriate assistance for persons with hearing or speech impediments</li> <li>• 'Procedure or mechanism' to ascertain whether interpretation needed</li> <li>• Right to challenge a decision finding that there is no need for interpretation / possibility to complain about quality of interpretation provided</li> <li>• Use of technology permitted</li> </ul>

<sup>13</sup> Paragraphs. 24-25.

		<ul style="list-style-type: none"> <li>• Interpretation in proceedings for execution of an EAW</li> <li>• Interpretation must be 'of a quality sufficient to safeguard the fairness of proceedings'</li> </ul>
Article 3	Right to translation of essential documents	<ul style="list-style-type: none"> <li>• Right for persons who do not speak or understand the language of the criminal proceedings to 'written translation of all documents which are essential to ensure they are able to exercise their right of defence and safeguard fairness of proceedings'.</li> <li>• Essential documents include: decision depriving a person of his liberty, any charge / indictment, any judgment.</li> <li>• Competent authorities to decide, in a given case, whether any other document essential. Suspect or accused person or their lawyer is able to submit a reasoned request.</li> <li>• No requirement to translate passages of essential documents which are not relevant for enabling suspect or accused to have knowledge of the case against them.</li> <li>• Right to challenge a decision finding no need for translation of documents or passages thereof / possibility to complain that quality of translation not sufficient to safeguard fairness of proceedings.</li> <li>• Possibility of providing an 'oral translation or oral summary' instead of written translation.</li> <li>• Waiver only on condition of prior legal advice / otherwise gained full knowledge of consequences of waiver, which must be unequivocal and given voluntarily.</li> </ul>
Article 4	Costs	<ul style="list-style-type: none"> <li>• Member States bear the cost of interpretation, irrespective of the outcome of proceedings</li> </ul>
Article 5	Quality	<ul style="list-style-type: none"> <li>• Member States to take 'concrete measures' to ensure interpretation / translation meets the standard required</li> <li>• Member States to 'endeavour' to establish (a) register(s) of appropriately qualified independent translators / interpreters.</li> <li>• Obligation to ensure interpreters / translators required to observe confidentiality</li> </ul>
Article 6	Training	<ul style="list-style-type: none"> <li>• Requirement to provide for training of 'judges, prosecutors and judicial staff' as to working with interpreters</li> </ul>
Article 7	Record-keeping	<ul style="list-style-type: none"> <li>• Obligation to keep a record when interpretation provided in questioning or hearings, when an oral translation / summary is</li> </ul>

		provided, or if translation waived.
Article 8	Non-regression	<ul style="list-style-type: none"> <li>• Directive does not limit safeguards arising under international or national law offering higher level of protection.</li> </ul>

## 2. Purpose and objectives

As explained below, the Directive builds upon the standards already established in the ECtHR’s case-law. This is reflected in the recitals to the Directive. Recitals do not establish obligations in themselves, but contain important information as to the background of a legislative instrument and provide guidance as to its interpretation. In the case of the Directive, it appears that its main purpose is to enshrine existing ECHR standards as clear law.

‘(14) The right to interpretation and translation for those who do not speak or understand the language of the proceedings is enshrined in Article 6 of the ECHR, as interpreted in the case-law of the European Court of Human Rights. This Directive facilitates the application of that right in practice. To that end, the aim of this Directive is to ensure the right of suspected or accused persons to interpretation and translation in criminal proceedings with a view to ensuring their right to a fair trial.’

‘(33) 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, as interpreted in the relevant case-law of the European Court of Human Rights (...).’

These recitals make clear that the Directive is intended to facilitate the application of rights which already exist under the ECHR. This means that, when you are making legal arguments, you can, if you wish to, refer to ECtHR case-law to suggest how the provision of the Directive should be interpreted. For this reason, where we consider this helpful, we have included occasional references to ECtHR case-law in this Toolkit (in particular in relation to the concept of ‘exercising control when put on notice’). However, as mentioned above, compared to the ECtHR case-law, the Directive is clearer and it may also provide more robust protection than the ECtHR so we encourage you to base your arguments on the Directive itself as a rule. Indeed, the recitals introduce new ‘EU’ language:

‘(17) This Directive should ensure that there is free and adequate linguistic assistance, allowing suspected or accused persons who do not speak or understand the language of the criminal proceedings fully to exercise their right of defence and safeguarding the fairness of proceedings.’

‘(22) Interpretation and translation under this Directive should be provided in the native language of the suspected or accused persons or in any other language that they speak or understand in order to allow them fully to exercise their right of defence, and in order to safeguard the fairness of proceedings.’

These concepts of enabling the suspect or accused to ‘fully to exercise their right of defence’ and of ‘safeguarding the fairness of proceedings’ re-appear throughout the Directive and the other measures adopted under the Roadmap. Their meaning is undefined and open to interpretation.

### 3. Right to interpretation and translation

Article 1 establishes what appears to be a general right to interpretation and translation applicable throughout criminal proceedings:

Article 1 – subject matter and scope

‘1. This Directive lays down rules concerning the right to interpretation and translation in criminal proceedings (...).

2. The right referred to in paragraph 1 shall apply to persons from the time that they 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 [...]

We would refer back to the ‘Using EU Law in Practice’ Toolkit and suggest that this provision provides initial evidence that what is intended with the Directives is to give individuals specific ‘rights’ which can be invoked at the national level. We would also refer you to Part IV of the Toolkit on the Right to Information Directive, where we have covered the question of the application of that Directive to persons other than those formally made aware of their status as suspects. The same considerations apply here: if a person is, objectively, a suspect, they are entitled to the rights the Directive confers even if under national law they have not formally been placed under investigation. Beyond this, we refer you to the relevant parts of this Toolkit for discussion of the substantive provisions of the Directive.

## D. PREPARATORY WORK FOR USING THE DIRECTIVE

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Before considering the practical situations in which you might want to rely on the Directive, it is advisable for you to do some background work to ensure you have the right legal and other materials in mind when approaching questions under the Directive.

### 1. Examine national law and practice in light of the Directive

The process of interpretation and translation in your jurisdiction may be second nature to you as a practising lawyer. However, it is worth taking a step back and examining the legislative and practical picture again in light of the Directive. There may have been new amendments made recently to implement the Directive, and it will be helpful to look at the relevant provisions from the perspective of the Directive’s requirements as this will help you form an initial view as to where issues of compliance may arise.

Use any systems available in your national system for identifying the relevant provisions. From the EU perspective, there is a systematic (but imperfect) way to identify the relevant legislation through the ‘Eur-Lex’ database which stores or links to all EU legislation and case-law, and increasingly national law and case-law too. Here is a brief indication of how to use this system to find legislation considered by the government of your Member State to ensure compliance with the Directive:

- ➔ Identify the relevant national legislation
- Go to <http://eur-lex.europa.eu> and choose your language;
- In the section 'search by document reference' (or the equivalent in your language) type '2010' in the 'Year' field and '64' in the 'Number' field, and click the 'Directive' box (searching for Directive 2010/64/EU);
- This will return a link with the full title of the Directive. Click on this;
- In the display, you will see the text of the directive and a table with links to several language versions. Above this, there are tabs, one of which is called 'Linked documents' (or the equivalent in your language). Click on this;
- Further down the page you will see an option saying 'Display the national implementing measures: NIM', a link to the implementing laws of each country. Click on this;
- Scroll through the list of results until you see the name of your Member State appear as the 'author', with the title of the legislation in question. The results will include new implementing measures and references to old laws covering the relevant topic. Scroll down and find the entries which are relevant to your country.

We suggest that you review your national legislation, bearing in mind your understanding of how it operates in practice, to establish how the Directive is being applied on the ground in your jurisdiction. The key questions, we would suggest, are these:

- ➔ Examine national law and procedure in light of the Directive
- Interpretation**
- What mechanism is there in place for ascertaining whether a suspect/ accused needs interpretation and what factors are taken into account?
  - Which are the authorities competent for making that assessment at the different stages of criminal proceedings?
  - What governs the selection of an interpreter? Is there a register or official guidance?
  - If the suspect / accused objects to a decision concerning interpretation, what mechanism is available to challenge it?
- Translation**
- What documents are required to be translated?
  - Are documents translated in full and in writing, or is recourse had to oral explanations of documents or the translation of only parts of the documents? What criteria apply?
  - If the suspect / accused objects to a decision concerning translation of documents, what mechanism is available to challenge it?
- Quality requirements**
- What systems in place for measuring the quality of interpretation and translation?
  - What system is available for raising a complaint as to quality?

## 2. Investigate the local context

### a. Find out about national interpreting standards

There may also be professional bodies with shared standards, codes of ethics and/or best practices and these may provide a useful benchmark for you to bear in mind when handling specific situations at the police station and in courts.

- ➔ Find out about national standards and best practices
- Is there an organisation (governmental or otherwise) which represents interpreters?
- Contact them and ask for copies of guidelines concerning the minimum qualifications required for police station interpreting, best practices etc.
- Familiarise yourself with all the relevant material so you are ready to bring it to people's attention at the police station if necessary.

### b. Speak with colleagues / bar associations

It seems likely that the Directive, and possibly national implementing measures, will not immediately become known to all concerned. Yet, if more lawyers are aware of the measures and seek to rely on them, police and courts will notice recurrent arguments. This will make the issue harder to ignore and enhance the credibility of arguments based on the Directive. We suggest:

- ➔ Spread the word:
- Ask the Bar Association whether it has informed its membership of the new laws.
- Circulate this Toolkit among legal networks and through Bar Associations.

The discussion surrounding the Directives and how to use them is new and a key part of the implementation strategy developed by LEAP. In that context, LEAP Advisory Board member for Portugal, Vania Costa Ramos, has written about using the Directive in Portuguese criminal practice and we would encourage you to read the English translation we have made available.<sup>14</sup> If you have written something which you think could help colleagues in other Member States, please contact us.

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<sup>14</sup> Vania Costa Ramos, 'The use of European law in criminal practice', English translation provided by Fair Trials, available at <http://www.fairtrials.org/publications/article-the-use-of-european-law-in-criminal-proceedings/>.

# I – ASSESSMENT OF INTERPRETATION NEEDS

## A. THE ISSUE

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Any case in which a possible issue surrounding language assistance arises begins with a key question: is the suspect or accused person in need of such assistance? Fair Trials' discussions with practitioners in the LEAP network have revealed a number of concerns about the manner in which such assessments are carried out, particularly at the police station when police are operating under time constraints. The following points arose:

- The absence of any formalised system for assessing interpretation needs, with the result that instead informal mechanisms are adopted such as police asking questions such as 'do you understand Italian?' and proceeding on that basis;
- The absence of systems for identifying a person's real mother tongue; and
- The absence of mechanisms for ensuring availability of interpretation for lawyer/client consultations, particularly when the client was being held in a police cell.

The problem is the absence of adequate systems for assessing and responding to the precise interpretation need: what language does the person actually speak? Do they understand the interlocutor in the specific context? do they understand the language of the proceedings to the extent required in the context (e.g. in order to be able to answer detailed factual questions)? This is the subject of this section.

## B. THE ECHR BASELINE

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There is limited case-law concerning this question, but the ECtHR has, nevertheless, made some statements which provide guidance, in broad terms, on how such assessments should be carried out:

### 1. A presumption in favour of interpretation if requested

In *Brozicek v. Italy*,<sup>15</sup> the ECtHR considered whether the failure to provide language assistance when it was requested had violated Article 6(3)(e). In finding that it did, the ECtHR stated:

**'41. (...) On receipt of this request, the Italian judicial authorities should have taken steps to comply with it so as to ensure observance of the requirements of [Article 6(3)(a)], unless they were in a position to establish that the applicant in fact had sufficient knowledge of Italian (...) (emphasis added).<sup>16</sup>**

Fair Trials reads this case as establishing a (quite natural) presumption in favour of interpretation which must be rebutted by the authorities of the state. However, since a person may not be aware of their right to interpretation and translation, a request is only a starting point. Further case-law describes factors which will normally be relevant for the purpose of assessing interpretation needs.

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<sup>15</sup> *Brozicek v. Italy*, App. no. 10964/84 (Judgment of 19 December 1989).

<sup>16</sup> Paragraph. 41.

## 2. Parameters for assessing interpretation needs

The ECtHR has also made some useful statements in cases where it is alleged that the failure to provide interpretation violated Article 6 ECHR. In *Hermi v. Italy*,<sup>17</sup> the ECtHR said:

*' (...) the issue of the defendant's linguistic knowledge is vital and that [the Court] must also examine the nature of the offence with which the defendant is charged and any communications addressed to him by the domestic authorities, in order to assess whether they are sufficiently complex to require a detailed knowledge of the language used in court'<sup>18</sup> (emphasis added).*

One thing can be drawn from this statement: that the issue whether someone needs language assistance is something assessed by reference to the specific linguistic ability of the person in light of the specifics of the subject matter. The factors that appear in the case-law are these:

- *The person not being a native speaker of the forum language;*<sup>19</sup>
- *The distinction between being able to express oneself and being able to read documents if this is required;*<sup>20</sup>
- *The financial, social and cultural situation of the person, including the length of time spent in the country;*<sup>21</sup> and
- *The person being illiterate.*<sup>22</sup>

It should also be noted that there is a particular focus on the relevance of this analysis at the investigative stage. As mentioned above, the ECtHR has established the right to interpretation as akin to the right of access to a lawyer as an important protection at the early stages of criminal proceedings. This has led the ECtHR to place special emphasis on linguistic ability at this stage:

*'Taking into account the importance of the investigation stage as reiterated above, the Court is not convinced that the applicant had a sufficient understanding of the questions she was being asked or that she was able to express herself adequately in Turkish, and certainly not to a level which would justify reliance on her statements as evidence against her at the trial (...) Without the help of an interpreter, she could not reasonably have appreciated the consequences of accepting to be questioned without the assistance of a lawyer in a criminal case concerning the investigation of particularly grave criminal offences'<sup>23</sup>*

The ECtHR is clearly mindful that the process during the initial phase has a significant impact upon the conduct of the defence, and that the failure to provide interpretation risks impacting on the way the suspect makes decisions in a context when their statements are likely to be used in the proceedings. A careful assessment of whether they need interpretation at that stage is all the more vital.

<sup>17</sup> Case of [Hermi v. Italy](#), App. no. 18114/02 (Judgment of 18 October 2006)

<sup>18</sup> Paragraph. 71.

<sup>19</sup> Case of [Amer v. Turkey](#), App. no 25720/02 (Judgment of 13 January 2009), para. 82.

<sup>20</sup> Ibid.

<sup>21</sup> Case of [Katritsch v. France](#) App. no 22575/08 (Judgment of 4 November 2011), para. 45.

<sup>22</sup> Case of [Saman v. Turkey](#), App No 35292/05 (Judgment of 5 April 2011), paragraph 31.

<sup>23</sup> Paragraphs. 31 and 35.

### C. RELEVANT PROVISIONS OF THE DIRECTIVE

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The assessment of interpretation needs is linked to the scope *ratione personae* of the Directive, i.e. those persons who are entitled to the interpretation required by the Directive. Article 2(1), establishing the right to interpretation in criminal proceedings, provides:

'1. Member States shall ensure that **suspected or accused persons who do not speak or understand the language of the criminal proceedings** concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings' (emphasis added).

The Directive continues, in Article 2(4) and (5):

'4. Member States shall ensure that a procedure or mechanism is in place to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter.'

5. Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for interpretation (...)'

The recitals also provide some more guidance:

'(21) (...) Such procedure or mechanism implies that competent authorities verify in any appropriate manner, including by consulting the suspected or accused persons concerned, whether they speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter.'

We will discuss these provisions more fully below when considering how to rely upon them. However, we clarify at this point what we think are some basic assumptions:

- The Directive confers a right to interpretation upon people who do not speak or understand the language of the criminal proceedings. The question whether someone meets this definition must, necessarily, depend upon objective factors which will vary from case to case.
- This is confirmed by the presence of an obligation in Article 2(4) to have a mechanism in place for identifying such persons, the reference in Recital 21 to the consultation of suspected or accused persons, which must necessarily be done on a case-by-case basis, and the existence of a right of challenge under Article 2(5) which implies an individual decision.
- However, there is no guidance provided as to what, substantively, should govern the assessment required. In so far as this whole Directive aims to facilitate the application of rights derived from the ECHR, and as protected by the Charter, the factors identified by the ECtHR as detailed above are undoubtedly relevant. However, it will be for the CJEU to provide further guidance.

## D. USING THE DIRECTIVE IN PRACTICE

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Tackling the problem should begin with a preventive approach, seeking to rely upon the Directive in order to ensure that violations do not occur in the first place. By disputing the alleged violation at the early stages, you will also create a record which may be used later in the proceedings.

### 1. Making your point at the police station (if you are there)

Fair Trials suggests that, bearing in mind the above, you should make a number of points when actually physically at the point where the first decision is made:

- ➔ Explain why interpretation is needed:
  - Ensure police are made aware in unequivocal manner that interpretation is needed.
  - Tell the authority that it is incumbent upon them to justify their decision not to provide interpretation, ask them to enumerate their reasons for concluding that the person speaks and understands the language and record the same in writing.
  - If the client can speak the language to some extent, discuss the case a little with them to check whether they are comfortable with the relevant terminology, taking note of issues which cause difficulty.
  - In any case, however, you should not accept a decision not to provide an interpreter if it has been requested. You need to challenge this decision.

### 2. Challenging the decision finding that there is no need for interpretation

If the initial decision at the police station is to proceed without an interpreter, you obviously need to protest if you think an interpreter is in fact needed. This would involve refusing to proceed with the questioning until the matter has been referred to a higher authority, if there is one.

- ➔ Interpretation has been refused: what to do?
  - Complain to a higher authority, if there is one.
  - Is there a superior police officer / prosecutor to whom the issue can be taken?
  - Set out the basis for your objection and record it / ensure that it is recorded by authorities in writing.

What if there is no separate system provided for an objection to the police's decision? This is not necessarily contrary to the Directive: bear in mind Recital 25 ('That right does not entail the obligation for Member States to provide for a separate mechanism or complaint procedure in which such finding may be challenged'). However, in this case, there should be protection elsewhere.

In this regard, it is helpful to consider the decision of the CJEU in the *Samba Diouf* case. An asylum application had been processed in accordance with an accelerated procedure, as permitted by the relevant directive. The decision to treat the case as an accelerated one was not, itself, subject to challenge, but the decision on the merits was. The Court found that the general principle of effective judicial protection did not require a separate challenge of the decision to accelerate,

'provided that the reasons which led that authority to examine the merits of the application under such a procedure can in fact be subject to judicial review in the action which may be brought against the final decision rejecting the application.'<sup>24</sup>

In short, judicial review of preliminary procedural decisions, if it does not exist independently, is ensured in the context of judicial review of the final decision. This hints at the sort of answer you may be looking for here: if there is no specific 'challenge' available, you have to find judicial protection elsewhere, in particular by relying on the court seised of the criminal proceedings to ensure the effectiveness of the right to interpretation provided by the Directive, and to 'safeguard the fairness of the proceedings' as required by the Directive; in Fair Trials' view, this includes being able to scrutinise the reasons for a decision not to provide interpretation and take appropriate remedial action if it was not in accordance with the Directive. To summarise:

- ➔ There is no separate complaint mechanism: what to do?
- Ensure a record is created at the time the decision is taken, including the basis for the decision finding there is no need for interpretation; if the detail is not recorded in the minutes / protocol of the proceedings;
- Use this later on when making arguments to the courts, in the context of any pre-trial hearings, discussions about the admissibility of evidence, or the discussion as to whether any regard can be had to or weight attached to the evidence in question.
- Argue: the principle of effective judicial protection means that the court making a decision on criminal proceedings must be able to review the grounds on which the decision not to provide interpretation was based, and take remedial action in order to safeguard the fairness of the proceedings if the decision was not in accordance with the Directive (see, by analogy, the decision *Samba Diouf*). In substance, there is a presumption that interpretation is needed if requested (cf. the ECtHR's decision in *Brozicek v. Italy*) and regard must be had to the specific suspect's ability to speak and understand the language to the level required in light of the specifics of the case. The police decision not to provide interpretation did not demonstrate that the suspect could speak the language on this basis and was not, therefore, in accordance with the Directive. The court must, accordingly, ensure the effectiveness of the Directive by ensuring its own decision is not contaminated by this infringement of the Directive. It should use means at its disposal such as issuing an order to repeat pre-trial actions done in the absence of interpretation or pronounce their invalidity, refuse to rely on their results etc.

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<sup>24</sup> Case C-69/10 *Samba Diouf* [ECLI:EU:C:2011:524](https://eur-lex.europa.eu/eli/cu/2011/524), paragraph 56.

## PART II – QUALITY OF POLICE STATION INTERPRETATION

### A. THE ISSUE

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What happens at the police station is crucial to criminal proceedings. As the ECtHR stated in *Salduz v. Turkey*, ‘the investigation stage has crucial importance for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered’.<sup>25</sup> In particular, decisions will be taken by the suspect about their defence, and statements they make in this context may be used as a basis for further investigative acts and/or to found a conviction later on.

If the suspect needs to communicate through interpretation, and the interpretation does not enable effective communication, a risk of unfairness arises. The suspect may misunderstand questions, and answer incorrectly. His own answers may be misinterpreted. Statements may be made which appear incriminatory due to bad interpretation, and factual inconsistencies may arise vis-à-vis later statements, damaging the person’s credibility and their prospects of defence.

In the context of meetings with criminal justice experts from the LEAP network, participants described a number of recurrent problems with interpretation at the police station. For instance, we were told that, in some countries:

- There are no requirements for certification or specific qualification in order to act as an interpreter, with the result that interpreters are selected on the basis of fluency in the relevant language and often lack training;
- The independence of interpreters is often questionable, owing to the fact that they have commercial relationships with the police, who often turn to the same few interpreters. The failure to enforce ethics codes contributes to this;
- There are doubts about the quality of interpretation, particularly where specialist legal or technical terms are used, or when minority languages or dialects are involved;
- Lawyers are usually unable to identify any issues relating to interpretation, unless they happen to speak the language;
- There is recognition that legal interpretation requires particular skill and, particularly with cuts to justice budgets, interpreters active in police stations / courts do not all possess this skill.

### B. THE ECHR BASELINE

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As mentioned above, the ECtHR has, beginning with the admissibility decision in *Diallo v. Sweden*, likened the need for interpretation at the initial phase of criminal proceedings to the right of access to a lawyer. It has recently stated that:

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<sup>25</sup> Case of [Salduz v. Turkey](#), App. no. 36391/02 (Judgment of 27 November 2008), paragraphs 54-55.

*The arrested person has a number of rights, such as the right to remain silent or to have the assistance of a lawyer. The decision to invoke or renounce these rights can be taken only if the person entitled to those rights understands clearly the facts which are held against him in order to assess the potential consequences of the proceedings and consider the wisdom of renouncing those rights.*<sup>26</sup>

Whilst the ECtHR is here aiming more at the situation where interpretation is not provided for someone with only a limited understanding of the forum language (as in the case in question), it applies equally when interpretation is of poor quality, as this may similarly give rise to misunderstandings.

Most relevant, though, is the approach of the ECtHR to adequacy of interpretation actually provided. The key statement is the following, found in all the relevant cases:

*'Interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events'.*<sup>27</sup>

The ECtHR thus links adequacy of interpretation to the exercise of other rights, in particular that of being informed of the case against one (Article 6(3)(a)) and being able to defend oneself (Article 6(3)(b)). The case-law further establishes that the authorities are required to respond to possible signs that this standard is not being met:

*'In view of the need for the right guaranteed by [Article 6(3)(e)] 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' (paragraph 74).*<sup>28</sup>

Examples of what constitutes exercising 'control' when 'put on notice' is the subject of precious little case-law, but there are two examples:

- *Violation of Article 6(3)(e) due to the failure to ensure adequate interpretation when it was known the defendant in a sentencing hearing had difficulty communicating, the court instead relying on the 'untested language skills' of a family member who happened to be in court;*<sup>29</sup>
- *No violation of Article 6(3)(e) in respect of an interview conducted in French by a Swedish customs officer, in that the officer had taken careful measures to check communication was effective and the courts had, subsequently, assured itself that it was safe to rely upon the evidence based on those checks.*<sup>30</sup>

The difficulty with these decisions is that the ECtHR is, in most of them, reaching its own determination as to whether there has been a violation of Article 6(3)(e) or not. The findings are

<sup>26</sup> Case of [Baytar v. Turkey](#) App. no 45440/04 (Judgment of 14 October 2014), para. 53 (free translation).

<sup>27</sup> [Kamasinski v. Austria](#) App. no 9783/82 (Judgment of 19 December 1989) paragraph 74.

<sup>28</sup> Ibid

<sup>29</sup> [Cuscani v. United Kingdom](#) App. no 32771/96 (Judgment of 24 December 2002).

<sup>30</sup> [Diallo v. Sweden](#), cited above note 1212.

therefore very fact-specific and depending on what evidence there happens to be in the file before the ECtHR. The ‘adequacy’ standard and the requirements of ‘exercising control when put on notice’ are therefore not particularly clear standards. It is hoped the Directive, interpreted by the CJEU, may offer some clearer guidance.

## C. RELEVANT PROVISIONS OF THE DIRECTIVE

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### 1. The right to interpretation (of sufficient quality)

Within the main provision relating to the right to interpretation, the relevant parts are Article 2(1), and, in particular, (8) of the Directive, specifying:

‘1. Member States shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings.

(...)

8. Interpretation provided under this Article shall be of a quality sufficient 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.’

The points we would make about these are:

- There is a clear parallel between the quality requirement in Article 2(8) and the ECtHR’s consistent requirement, discussed above, that interpretation should be ‘such as to enable the defendant to have knowledge of the case against him and to defend himself’.
- The quality requirement in Article 2(8) applies to all interpretation applicable under that article, and in accordance with Article 2(1) there is just one right, applicable from the outset until the conclusion of the criminal proceedings. Thus, the quality standard applies in the same manner at the police station and at the court.

### 2. Provisions relating to quality control

#### a. Case-specific response to quality issues

The Directive also contains a number of provisions apparently pointing towards concrete mechanisms for controlling compliance with this standard. In particular, the Directive provides in Article 2(5) provides for the possibility of the individual complaining about quality:

‘5. Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for interpretation and, when interpretation has been provided, the possibility to complain that the quality of the interpretation is not sufficient to safeguard the fairness of the proceedings.’

Nothing is provided in this provision regarding the nature of the authority to whom such a complaint can be made, on what grounds, and so on. We will make our own suggestions below. However, there is some more detail in Recitals 24 and 26:

‘(24) Member States should ensure that control can be exercised over the adequacy of the interpretation and translation provided when the competent authorities have been put on notice in a given case’.

‘(26) When the quality of the interpretation is considered insufficient to ensure the right to a fair trial, the competent authorities should be able to replace the appointed interpreter.’

We would make some limited remarks about these provisions:

- Article 2(5) provides for a ‘possibility to complain’ which is apparently distinct from the ‘right to challenge’. It is utterly unclear what is meant by this but it clearly points to a requirement for oversight of interpretation quality in the specific case.
- The reference in Recital 24 to ‘exercising control when put on notice’ is a clear, if implicit, reference to the concept arising in the case-law of the ECtHR.
- Recital 26 envisages a response whereby the interpreter is replaced when it is discovered that the quality is insufficient. This can arguably be seen as an example of exercising control when put on notice as envisaged by Recital 24.
- However, this may not always be a sufficient response (e.g. if the issue is not discovered on time or the replacement is not provided despite being requested, and incriminating evidence has already been collected through substandard interpretation). At this point, the possibility to complain only makes sense when considered as a *retroactive* complaint.

## **b. General quality control requirements**

The Directive also includes some general quality control requirements in Article 5:

‘1. Member States shall take concrete measures to ensure that the interpretation and translation provided meets the quality required under Article 2(8) and Article 3(9).

2. In order to promote the adequacy of interpretation and translation and efficient access thereto, Member States shall endeavour to establish a register or registers of independent translators and interpreters who are appropriately qualified. Once established, such register or registers shall, where appropriate, be made available to legal counsel and relevant authorities.

3. Member States shall ensure that interpreters and translators be required to observe confidentiality regarding interpretation and translation provided under this Directive.’

Our observations on these provisions are these:

- These appear to be ‘systemic’ type obligations (i.e. not ones intended to confer rights upon the individual but requiring the Member States to take systemic measures).
- The requirement in Article 5(2) for Member States to ‘endeavour’ to establish registers of appropriately qualified interpreters is not accompanied by any requirement to use such interpreters in criminal proceedings. It does, however, suggest that professional status is

relevant in assessing quality. This is also – surprisingly – the only provision in the Directive which refers to ‘independence’ of interpreters in relation to quality. Nothing is said as to what appropriate qualifications will be, however.

## **D. USING THE DIRECTIVE IN PRACTICE**

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### **1. Preliminary point**

This section contains advice about controlling quality of interpretation at the police station, which overlaps partly with general advice on working with interpreters, which is essentially a technical question, rather than a legal one. We thought this helpful: in advance of a recent in-person training on the Directives, 82% of participants, from five jurisdictions, said they had never received training on working with interpreters in criminal cases. Fair Trials is a legal organisation, not an interpreters organisation, but has consulted with some interpreters within our LEAP network to produce this Toolkit. We refer back to the section on preparatory work and emphasise the value of talking with professional interpreters. Guidance issued by EULITA,<sup>31</sup> for instance, includes a number of practical tips for lawyers working with interpreters, which can help you avoid contributing to quality issues.

### **2. Action to take at the pre-trial stage**

Equipped with all the necessary information from your preparatory work (see Part I), you need to be ready to take action when you get to the police station to represent a person who does not speak or understand the language of the criminal proceedings. As noted above, the requirement for there to be adequate interpretation applies as from the police interrogation and, where necessary for safeguarding the fairness of proceedings, between client and counsel. Accordingly, your action with a view to ensuring compliance with the Directive should begin at the police station.

It is, of course, necessary to bear in mind that the police are not likely to be particularly receptive to legal arguments concerning the Directive, still less broader principles of EU law, during the short time-frame available for conducting an interview before the suspect is brought before a judge.

However, you should still take action at the police station. For one thing, the police may respond to your complaints (particularly, as noted above, if your complaint is part of a pattern), and this may help address the issue of quality. And, equally importantly, it is necessary to raise the issues as to quality during the proceedings at the police station in order to ensure that there is a basis on which to ask the courts, later on, to address the evidence differently. The following paragraphs contain some suggestions as to how to act in respect of specific situations.

#### **a. Before the questioning begins**

##### ***i. Pre-questioning consultation with the client***

In Fair Trials’ knowledge, there are different practices as to whether (i) an interpreter is provided for the consultation between lawyer and clients and (ii) whether this is the same interpreter who then assists with the police questioning. See Part I in relation to the decision whether to appoint an

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<sup>31</sup> EULITA / European Criminal Bar Association, *Vademecum: guidelines for a more effective communication with legal interpreters and translators*, available (in English) at <http://www.eulita.eu/fr/documents-pertinents>.

interpreter for this purpose or not. If one is appointed, this is your first opportunity to assess the quality of the interpretation and its impact on the reliability of the evidence obtained. See the section 'general approach for questioning', below, which applies *mutatis mutandis* for your own consultations with the client.

## **ii. Initial steps**

It is possible to begin making informed judgments about the quality of interpretation provided before the questioning begins, by finding out about the person who is going to be delivering the service. The key thing is to:

- ➔ Find out about the interpreter and his competence:
  - Ask the police / interpreter about the latter's qualifications and experience: professional qualifications and memberships, length of experience etc.
  - Check whether the interpreter speaks the same language (and dialect, where relevant) as that required by your client, or something similar to it (eg Russian, Ukrainian, or Kazakh are related and more or less close, but not identical).
  - Check what the interpreter's 'A', 'B' and 'C' languages are. Many interpreters use this system to identify the languages they are most proficient in (A being their strongest, C their least strong). Ask the interpreter the question; if they do not know what you are talking about, make a note of this.
  - Ask the police to explain the basis on which they chose this interpreter (eg fluency in the language, member of the local expat community, use in past cases etc.).

The information you manage to uncover about the interpreter will be important not only because it will help you decide how to act next, but it could also become relevant later on before the trial court or on appeal. Accordingly, you should:

- ➔ Ensure a record is kept of the details concerning the interpreter
  - Take your own note of the information you acquire.
  - Ask the interpreter to sign it and provide copies of their credentials.
  - Ask for the information to be recorded on the police protocol / detention record (if there is no such thing, ask for it to be noted at the beginning of the interview).

## **iii. If the interpreter is unqualified**

If you are not satisfied that the interpreter is suitably qualified, it may be necessary for you to demand the appointment of a qualified interpreter prior to the commencement of the interview. If your enquiries have, for instance, revealed that the interpreter is simply a member of the local expatriate community who speaks the language of the suspect, there is no basis for you to assume their competence to do the job. Accordingly, you should:

- ➔ Demand the replacement of the unqualified interpreter by a professional
  - Bring to the attention of the police any national documentation (guidelines etc.) and explain why the interpreter does not meet them.
  - Ensure that this demand is recorded in the police records.
  - If it is refused, the reasons for refusal are placed on record.

It is possible, or even likely, that such a request will not be acceded to. If the police are in the habit of using a certain interpreter, or there is simply no other interpreter available locally to provide the service in the language in question. To the extent that refusing to proceed with an interview may delay the investigation, possibly affecting the client's chances of being released at this stage, you will have to bear in mind your deontological / ethical obligations to your client. However, the objective should be to ensure that no questioning takes place through substandard interpretation; if it is decided to go ahead regardless, whether you advise the client to stay silent or otherwise, it is essential to ensure a record is kept of your objection.

## **b. General approach for questioning**

### ***i. Brief the client on interpretation issues***

Subject always to deontological rules, it may be advisable to notify the suspect that there is a risk of them being misunderstood if they speak for too long, which may lead the interpreter to summarise and paraphrase. It would seem unobjectionable, ethically speaking, to ensure the client has a fair chance of being properly understood. So:

#### **→ Prepare the client:**

- Let them know there is a benefit in not going too fast, and pausing between sentences to allow the interpreter to interpret each sentence. This will help reduce the possibility of error.
- This should not, of course, be confused in any way with your advice to the client as to what questions they should or should not answer.

### ***ii. Record-keeping***

Records of police questioning may be kept in different ways. In some jurisdictions, such as the UK, questioning is tape-recorded systematically. In others, the practice is to compile a record of what was said during questioning and to ask the suspect to sign it. It is important for you to ensure that as good a record as possible is kept of any issues relating to interpretation. We would propose:

#### **→ Record-keeping suggestions:**

- Ask whether you can record the interview on a handheld device.
- If this is not allowed, ask for the refusal to be noted in the interview record.
- Take your own notes of issues which arise during the interview.
- Ask for a copy of this note to be added to the file, if this is possible.

Ensuring that there is contemporaneous evidence of any issues arising during the questioning will prove useful later if you are required to substantiate an argument relating to the failure to ensure compliance with the Directive by the police authorities.

### ***iii. What to look for – in general***

Of course, lawyers cannot pick up 'errors' unless they happen to speak both languages fluently. But it may be possible to identify issues and areas of doubt, which you may argue subsequently should be resolved in favour of your client in the absence of a positive record (such as a recording).

When looking out for issues relating to the quality of interpretation, it is worth bearing in mind the standard established by Article 2(8) of the Directive ('ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence'). The key questions would therefore appear to be whether the person is able to understand what they are being accused of and able to exercise their right of defence. In the context of pre-trial questioning at the police station, assuming no decision is taken to remain silent, the key consideration in terms of exercising rights of defence is understanding what is being asked and the ability to explain oneself. Indeed, as noted earlier, the ECtHR standard refers to the suspect being able to 'put their version of events'. Thus:

- Keep these questions in mind:
- Is the suspect able to understand precisely what is being asked of him?
- Is the suspect able to give his version of events accurately?
- Is a risk of unfairness arising because of the interpretation?

#### *iv. What to look for – specific issues*

The extent to which this standard is met will depend on a number of concrete, practical aspects of the interpretation provided on the day. The following headings cover some key areas most likely to give rise to interpretation issues.

##### ▪ *Control questions*

It is good practice for the questioner to ask, through the interpreter, a series of questions at the beginning of the interview to determine whether the person is able to understand what is said.

- Take a note of the control questions and the responses given.
- If control questions are not asked, suggest that they be asked.

##### ▪ *Incriminating statements*

The function of interpretation is to convert into the target language the statements made by the suspect. If this is not done correctly, an exculpatory statement might be misunderstood and be recorded as an incriminating statement.

For instance, if a suspect says he 'panicked' and hit someone, and this is interpreted as him saying he 'lost his temper' and hit someone, this would be inaccurate. The former statement is essentially exculpatory, suggesting self-defence, the latter essentially incriminatory, suggesting violent reaction. Or, if the suspect states that a friend gave him money so that he could buy drugs for both of them, this might be wrongly interpreted as his having bought a total amount with the intention of selling half to a friend. The former statement would imply simple possession of drugs, whilst the latter could be understood as suggesting an intention to supply, a more serious offence.

- Clarify potentially ambiguous or incriminating statements.
- Did the interpreter use a literal translation or an expression?
- What were the exact words translated?

- If you do not consider this to be potentially prejudicial to your client's interests, consider asking (or asking the police to ask) the suspect further questions to clarify potential ambiguities during the questioning.
- Alternatively, ask for an opportunity to consult the record of the interview, once this is typed up, privately with your client, before he signs it. This may, of course, have to be with the same interpreter.

▪ *Issues with consecutive interpretation*

Interpretation at a police station is unlikely to be 'simultaneous', as there will rarely be equipment available. It is more likely that each question will be asked and translated by the interpreter for the suspect. The suspect's answers will then be translated by the interpreter for the investigator. This is known as 'consecutive interpretation'

There are different techniques: sometimes an interpreter will wait for the speaker to provide part of their answer, ask them to wait, translate that part, and then allow them to proceed, repeating the process over and over. Alternatively, an interpreter may take a note of what is being said by the speaker, and then retell the evidence to the listener.

Professional interpreters are trained to render faithfully into the target language exactly what the person says, without synthesising the answer into their own words. However, this is a difficult skill and, as our experts have reported to Fair Trials, many of those providing interpretation at police stations in the EU are not qualified professional interpreters.

In addition, whilst police officers may be trained in interrogation techniques and asking clear, focused questions, the suspect, who may be at a police station for the first time, may feel nervous or frightened. There is a possibility that their answers will be confused, verbose, or badly articulated, which may present challenges for even the most experienced legal interpreter.

There is thus a possibility that an interpreter will convey essentially their own understanding of what was said by the suspect, essentially explaining to the investigator what the suspect has said. Clearly, this impinges upon the suspect's ability to put forth 'his version of events'.

- Flag up apparent failures to interpret faithfully:
  - Point out when the length of the interpreted statement differs significantly from the length of the person's statement.
  - If you hear a word repeated several times by the client during one statement, and do not hear it the same number of times in interpretation, point this out.

▪ *Lexicon*

In some contexts, police questioning may relate to areas of professional, scientific or technical expertise. Clearly, in this context, the ability of the interpreter to understand the terms used by the speaker in the first place will depend on the extent of their vocabulary in both languages. Even in relatively simple business contexts, terms like 'income' and 'revenue' may result in more or less incriminating statements depending on how they are translated. However, even in simple contexts, if the interpreter is not sufficiently competent, they may struggle with basic terms.

- ➔ Look out for signs the interpreter does not know the words being used.
- Is the interpreter pausing a long time to translate one way or the other?
- Is the interpreter asking the suspect for clarification of what he is saying?
- What are the reactions of the suspect to the interpreting?

- ***First person interpretation***

An interpreter interpreting faithfully will use the form of speech adopted by the speaker. It follows that the interpreter should, in a police interview, respond in the first person, so 'I have never seen this person before', not 's/he says that he has never seen this person before'.

- ➔ Point out to police, and ensure a note is taken, if the interpreter is using the third person instead of the first.

- ***The interpreter 'advising' the client***

Practitioners occasionally report that interpreters converse with clients during interviews, both to clarify their statements but also to advise them on what to say. Clearly, if this is happening, it raises an issue as to whether the information being recorded is truly the suspect's own.

- ➔ Ask the interpreter to clarify conversations going on with the client.
- ➔ Take a note.

### **c. Complaining about interpretation quality**

If, for whatever reason, you are not satisfied that the interpreter is succeeding in delivering interpretation of a sufficient quality, you need to complain about the poor quality. Remember that Article 2(5) establishes that suspects need the 'possibility to complain' regarding quality.

#### ***i. During the interview***

You will need to have identified beforehand whether there is any legal regime established to allow a complaint to be made during the course of police investigations. However, you should if recourse is available, complain directly to the questioning officer carrying or a higher authority. So:

- ➔ Take action
  - Inform the questioning officer of your concerns regarding interpretation.
  - Ask for the interpreter to be replaced.
  - Ensure a note of the complaint is retained.
  - Ask for the interview to be started from the beginning again with a new interpreter, with the previous interview disregarded.

#### ***ii. After the interview:***

You need to 'complain' to the competent authority designated for the purpose in your national laws. It is not necessarily the case that this is the criminal court itself. However, it is important to exercise such avenues as are available to you. This may ensure that a better service is provided at subsequent questioning, if there is any. In addition, the failure to raise a complaint at this point could foreclose the possibility to raise arguments later, i.e. when asking a court to disregard / annul the questioning.

- ➔ Identify the competent authority and complain.
- Provide a copy of the records you have taken.
- Identify the specific issues leading you to believe there are quality issues.
- Explain why you believe these are going to cause unfairness. For instance, if you believe that the client was not able to put their version of events, or did not fully understand the questions put to him, say so.

The outcome of such a complaint could be important evidence. If, for instance, the only avenue is to complain to the interpreting service, but they agree that there has been an issue and ensure a different interpreter attends subsequently, this will go a long way to showing that the interpreting was substandard when you come to address a court on how to work with the evidence.

### 3. Making arguments before the courts

#### a. The court's own duty to ensure adequate interpretation

As we saw in the overview of the Directive, the right to adequate interpretation applies equally at court. It is abundantly clear that the court must ensure that the interpretation in its own proceedings is of a quality sufficient to safeguard the fairness of the proceedings. All of the suggestions made above in relation to the police station apply equally: be watchful of the standard of interpretation and seek replacement of the interpreter where possible.

#### b. The court's duty in respect of inadequate police station interpretation: 'Exercising control' when 'put on notice'

The more important question here is what the courts, including the trial court, must do in relation to issues surrounding the inadequacy of the interpretation during the pre-trial stage. The Directive does not explicitly address this. The right laid down in the Directive is a right to 'adequate' interpretation and its purpose, as we have seen, is to 'safeguard the fairness of proceedings'.

Logically, if inadequate interpretation is provided at the police station, but the resulting record is nevertheless used to convict the person, and it causes unfairness, the objective is not met. It follows that if a violation occurs, the court must provide a remedy (see the 'Using EU Law in Practice' Toolkit). National courts may already be under a duty, under national law, to have regard to issues with interpreting during questioning when assessing the evidence, or considering nullity requests.

However, there is arguably a remedial principle inherent to the Directive. As mentioned above, the Directive aims to facilitate the application of right to language assistance arising in the ECtHR case-law, and is to be implemented and applied consistently with the latter. The case-law points to an approach whereby courts must 'exercise control' when 'put on notice' as to an interpretation issue.

#### iii. The embryonic 'retroactive control' principle in *Diallo v. Sweden*

*Diallo v. Sweden*, as we saw earlier, was the case which established the right to an interpreter at the police station. The customs authorities of Sweden arrested a French national, who did not speak Swedish, for importing heroin. An interview was initially conducted without an interpreter, with the customs officer ('AS') conducting the discussion in French. The suspect stated that packages of which she was in possession contained a substance for washing money. A subsequent interview was

conducted, this time with an authorised interpreter assisting by telephone, in which the statement was repeated. At subsequent interviews and at court she said she did not know what the parcels contained. The appeal court relied on this inconsistency to find she was not credible. In so doing, it noted that the French-speaking interviewer had asked several control questions, and that there was simply no possibility that she could have misunderstood the initial statement. The ECtHR said:

23. (...) 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.

(...)

29. The Court also finds that the Appeal Court did exercise a sufficient degree of control of the adequacy of AS's interpretation skills.

30. Furthermore, the Court observes that the applicant's disputed statement "that the packages contained a product to wash money" was far from the only evidence in the criminal proceedings against her and that there is nothing to indicate that it was decisive to the outcome of the case.

31. In these circumstances, the Court considers that the applicant received sufficient linguistic assistance during the first interview with the Swedish Customs.<sup>32</sup>

This is the only ECtHR decision explicitly to suggest that 'exercising control of the adequacy of interpretation', as mentioned in *Hacioglu v. Romania* (cited above) and Recital 24 to the Directive, means that a court deciding on the substance of the case, if put on notice as to the quality of interpretation delivered *at the pre-trial stage*, must have regard – retroactively – to the adequacy of that interpretation (paragraph 29, *Diallo*) when assessing the evidence. The specific case was dismissed as inadmissible, but this legal reasoning is noteworthy.

#### **iv. Establishing a retroactive control obligation under the Directive**

As mentioned in the 'Using EU Law in Practice' Toolkit, the fact that the Directive is silent on the issue of remedies is not the end of the analysis. Interpretation at the police station is governed by EU law, so this issue is within the scope of EU law, which entails the applicability of fundamental rights guaranteed by the Charter. These include defence rights protected by Article 48 of the Charter, based on Article 6(3) ECHR and should be interpreted accordingly. The tentative, but clear indication in the ECtHR case-law is that control must be exercised retroactively by the trial court to check the reliability of evidence before relying on it. So the argument we propose is this:

→ Argue: The decision in *Diallo v. Sweden* shows that in order to 'exercise control over the adequacy of interpretation', as required by Recital 24 of the Directive and the Charter, the trial court must, in reaching a decision on the substance, have regard to the quality of interpretation provided during police questioning. Accordingly, this approach should also be followed under the Directive.

<sup>32</sup> *Diallo v. Sweden*, cited above note 12, paragraphs 23, 29-31.

Of course, if it is found that there is a violation of the quality requirement, then the court must do everything within its jurisdiction to put matters right (disregarding the evidence, attaching less or no weight to it, or declaring the whole questioning invalid for failure to comply with the Directive).

### **c. Framing arguments**

#### ***i. Use your notes from the police station***

If you convince the court that an obligation exists for it to have regard to failures earlier in the proceedings when considering evidence obtained through an interpreter during police questioning, all of the evidence you obtained at the police station (records etc.) will become relevant.

→ Supply the evidence / notes you have collected at the police station, explaining how this shows a failure to meet the Directive's quality requirement.

This will be particularly helpful if, as seems possible, the Member State has failed to put in place a system for verifying whether interpretation in a specific case is of a satisfactory standard.

#### ***ii. Rely on the failure to take 'concrete measures'***

We saw earlier that Article 5(1) requires the Member States to take 'concrete measures' in order to ensure adequate interpretation. This appears to leave Member States broad discretion as to what to do. However, it does require them to do *something*. It is worth recalling that the quality requirement in Article 2(8) is that the interpretation should be 'of sufficient quality to safeguard the fairness of *the proceedings*'. Clearly, 'the proceedings' can only refer to a given case in which interpretation is provided. So even if general measures are taken (e.g. establishing entry requirements for the profession of interpreter), there should also be something in place to ensure quality in specific cases (this might include, in particular, audio-visual recording of interviews). You can rely upon the failure to take such measures. This should have particular force if, as explained above, your argument is supported by material showing that things really went wrong with interpretation at the police station.

→ Argue: where an issue is raised as to interpretation, regard should be had to the extent to which the Member State has taken 'concrete measures' to ensure that interpretation meets the required standard. The failure to have in place a system capable of ensuring adequacy of interpretation in the specific proceedings in question means there is no guarantee of the adequacy of the interpretation. The court should take this into account when reaching its decision.

#### ***iii. Different standards at police stations and court***

The Directive, as has been stated above, provides a single right to adequate interpretation which applies throughout the criminal proceedings from police questioning to final appeals. In some countries, pre-trial institutions and courts all use the same services but, based on our information, some countries have different systems for police and courts. It is usually reported that the police station system is much more informal and with fewer guarantees of quality. If this is the case in your country, you can try to draw attention to the distinction.

- Argue: the differences between the police and courts systems of interpretation means that the quality standard is not being met at the police level, referring to:
- The legislation governing each system (or the absence of specific legislation if this is the case);
  - The different structures for the two systems (professional bodies, disciplinary and quality control systems etc.);
  - The standards of access to each system, in terms of professional qualifications.

You may thus be able to persuade a court that it should take remedial action in respect of the police proceedings, on the basis that it is not of the same standard as that provided before the courts, in breach of the Directive.

## III – THE ‘THIRD LANGUAGE’ ISSUE

### A. THE ISSUE

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In this section, we propose to review briefly the issue surrounding the provision of interpretation in a language other than the suspect’s own native language (a ‘third language’). By way of example, practitioners report that Kazakhs are provided with Russian interpretation, for instance. This causes all the same problems as poor interpretation: possible misunderstandings, which may prejudice trial fairness.

### B. THE ECHR BASELINE

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This issue has not been considered in detail by the ECtHR to date. In the pending case *Vizgirda v. Slovenia*,<sup>33</sup> a Lithuanian national was provided with interpretation in Russian, not his mother tongue. Fair Trials has intervened<sup>34</sup> in the case to make the following points:

- The position of the suspect or accused person who receives interpretation in a language other than his native tongue is comparable to the position of the suspect who speaks the forum language to a low level as a second language.
- Thus, all the factors ordinarily relevant to determining whether someone needs interpretation are relevant for the purpose of determining whether interpretation in a third language is an adequate solution: does the person have the necessary linguistic ability in that language, having regard to the seriousness of the offence, for this to represent a solution?
- The provision of interpretation in a third language should automatically ‘put the authorities on notice’, triggering their obligation to ‘exercise subsequent control’. This will involve taking action to verify the quality of the interpretation, or retroactive action to check the reliability of any statements obtained early in the proceedings.

### C. RELEVANT PROVISIONS OF THE DIRECTIVE

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Only one provision of the Directive, Recital 22, provides any mention of the point:

‘Interpretation and translation under this Directive should be provided in the native language of the suspected or accused persons or in any other language that they speak or understand in order to allow them fully to exercise their right of defence, and in order to safeguard the fairness of the proceedings.’

### D. USING THE DIRECTIVE IN PRACTICE

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We encourage you to treat the provision of interpretation in a third language as the same thing as not providing interpretation at all to someone who does not speak the forum language as their first

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<sup>33</sup> *Vizgirda v. Slovenia*, App. no 59868/08, communicated 16 June 2014.

<sup>34</sup> Read the intervention [here](#).

language. Accordingly, everything said in the context of Parts I and II above applies, *mutatis mutandis*, to the provision of language assistance in a third language.

## 1. Challenging a decision to provide third-language interpretation

- ➔ Refer to Fair Trials' intervention in *Vizgirda v. Slovenia* and Part I above.
- ➔ Try to figure out (even by using a mobile device) whether the languages are similar and to what extent, e.g. do they even share the same alphabet?
- ➔ Explain, at the point when the assessment is being made and the decision taken:
  - The native language of the suspect is not the proposed language of interpretation and an assessment should be made of the extent to which the suspect is able to understand questions and answer them in the proposed third language, by reference to the specific facts of the case. Explain that, in line with the *Brozicek v. Italy*<sup>35</sup> ECtHR judgment, it is incumbent on the authorities to establish that he speaks it sufficiently to be able to use this third language.
  - The use of this third language will force the suspect to communicate in an imperfect means and this will prejudice his ability to express himself clearly on the key issues. Ensure this objection is noted in the record / take your own note.

## 2. Challenging inadequate interpretation

### a. At the initial questioning

- ➔ Refer to Part II above. All the same considerations are relevant.
- ➔ In addition, ask your client, through the interpreter, to let you know if he has any difficulty communicating with the interpreter due to the use of the third language. A professional interpreter should have no problem with this. Take a note.
- ➔ Take a note of any key words which appear during the interview, and use Google translate later on to compare these in the different languages, in case you are able to identify any specific differences.

### b. Before the court

- ➔ Refer to Fair Trials' intervention in *Vizgirda v. Slovenia* and Part II above.
- ➔ Argue: Recital 22 of the Directive reflects the common sense assumption that interpretation should be provided in the suspect or accused person's native tongue. If this is not done, the authorities must be careful to control quality. The failure to do this has caused prejudice (referring to examples of specific things that appear to go wrong in the questioning due to the use of the third language, relying on any notes you have taken). The court must therefore take particular care when considering this evidence and, in order to safeguard the fairness of the proceedings, should decline to rely upon it unless it can be demonstrated (e.g. through analysis of tape recordings) that the interpretation fully enabled the suspect to defend himself.

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<sup>35</sup> *Brozicek v. Italy*, cited above note 15.

## IV –TRANSLATION OF ESSENTIAL DOCUMENTS

### A. THE ISSUE

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A suspect or accused person needs to know the case against him in order to exercise his rights of defence. A person deprived of their liberty needs to be informed promptly of the reasons for their arrest so they can challenge their detention. If the suspect or accused person does not know the language spoken in the relevant country, they need to be told in their own language. Outside specifically oral phases of the criminal process, such as police questioning and court hearings, the information will often be in the form of a document, which will need translating.

In practice, LEAP members have reported to us a number of issues regarding access to translated documents in criminal proceedings. In some countries:

- Translations are provided of only a limited list of documents, and there is often no right to appeal this or to request additional documents; and
- It is common for oral, rather than written, translations to be provided, especially where the defendant has a lawyer (this issue was reported in many countries).

There is no doubt that a written translation will often be more useful to the suspect or accused person than an oral explanation of a written document such as an indictment, judgment or detention decision. Having a written version of the document allows the suspect or accused to examine it in his own time, which will help him prepare his defence.<sup>36</sup> For a person detained, having a written decision will allow him to understand the reasons for his detention and respond to these, which he may often have to do without the assistance of a lawyer.

However, the issues described above correspond to areas of flexibility in the ECtHR case-law, which recognises that (i) there is no general right to translation of every document in the case file,<sup>37</sup> and (ii) ‘translation’ need not necessarily be in written form, with oral linguistic assistance considered satisfactory.<sup>38</sup> As we will see below, the Directive establishes a clear right to translation of ‘essential’ documents, specifying certain documents in particular and leaving it to the Member States to examine which other ones need to be translated on a case-by-case basis. However, like the ECtHR case-law, it recognises that Member States can provide an oral translation or summary instead. Below we consider ways in which the Directive can be used to challenge the issues discussed above.

### B. THE ECHR BASELINE

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The ECtHR case-law on translations is not particularly helpful. The Directive will break new ground, with its definition of ‘essential documents’ and clearer provisions on oral summaries and redacted translations a much more prescriptive normative framework. However, we review the basics as regards the ECtHR case-law as these help us to understand the derogations in the Directive.

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<sup>36</sup> See, in this regard, Maybe paragraph 79 of *Kamasinski v. Austria*, cited above note 27, paragraph 79 (discussed below).

<sup>37</sup> *Hermi v. Italy*, cited above note 17, paragraph 70.

<sup>38</sup> Case of *Husain v. Italy*, App no. 18913/03 (Judgment of 24 February 2005); *Hermi v. Italy*, cited above note 17, paragraph 70 *Hacioglu v. Romania*, cited above note 10, paragraph 88.

The starting point is that Article 6(3)(e), which refers to the assistance of an ‘interpreter’, has been interpreted as covering written translations but only to a limited extent. The ECtHR states:

*‘[Article 6(3)(e)] states that every defendant has the right to the free assistance of an interpreter. That right applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings. This means 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 or to have rendered into the court’s language in order to have the benefit of a fair trial (...) However, [Article 6(3)(e)] does not go so far as to require a written translation of all items of written evidence or official documents in the procedure. In that connection, it should be noted that the text of the relevant provisions refers to an “interpreter”, not a “translator”. This suggests that oral linguistic assistance may satisfy the requirements of the Convention<sup>39</sup>*

The ECtHR has, however, recognised that a written translation is preferable:

*‘[a] defendant not conversant with the court’s language may in fact be put at a disadvantage if he is not also provided with a written translation of the indictment in a language he understands<sup>40</sup>*

Beyond this, though, there is little to be gained from the ECtHR case-law on this topic. The provisions of the Directive are more prescriptive and provide a stronger basis for obtaining written translations.

## C. RELEVANT PROVISIONS OF THE DIRECTIVE

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### 1. The right to translation of essential documents

#### a. The general right

The right to translation of essential documents is provided at Article 3(1), which provides:

*‘1. Member States shall ensure that suspected or accused persons who do not understand the language of the criminal proceedings are, within a reasonable period of time, provided with a **written translation** of all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings (emphasis added).’*

We would make the following two points about this general provision:

- This provision creates the general rule in favour of *written translation*. It was remarked at a conference organised by EULITA that the term ‘*traduction*’ in French already means a written translation, and the Directive has still specified a ‘*traduction écrite*’, apparently in a deliberate effort at superabundance. This emphasis on written documents is itself stronger than the tentative suggestion that written translations may be required in the ECtHR case-law.

<sup>39</sup> Case of *Hermi v. Italy*, App. no. 18114/02 (Judgment of 18 October 2006), para. 70.

<sup>40</sup> *Kamasinski v. Austria*, cited above note 27, para. 70

- We take the view that the Directive governs only the translation of documents to which the defence has ‘access’ in the original language in the first place. In relation to gaining access to the document in the first place, see our Toolkit on Directive 2012/13/EU.

## **b. Documents which are always essential / other documents**

Article 3 continues by prescribing some documents which are always considered essential, with an obligation on authorities to identify whether other documents are essential:

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

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

We would make the following observations about these provisions:

- The reference to ‘a given case’ in Article 3(3) confirms that the question whether a document is essential depends upon the specifics of the case. It is not possible to establish whether a given piece of evidence (e.g. a witness statement) is always non-essential.
- The definition of an essential document for the purposes of arguing that a particular document should be translated in a specific case is found in Article 3(1), which states that ‘all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings’.

## **2. Partial translation**

Article 3(4) of the Directive provides:

‘4. There shall be no requirement to translate 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.’

These are our thoughts on this provision:

- Certain parts of a translation may be omitted if they are not ‘relevant’. The reference to ‘the case against’ the suspected or accused person suggests that the provision may have in mind the translation of incriminatory parts of a document.
- However, other parts of a document may be relevant to safeguarding the fairness of the proceedings. Other parts of a witness statement may, for instance, reveal falsehoods which the suspect could identify if he were in possession of a translation. The lawyer can take responsibility for reviewing other parts of the document but may also not know, without assistance from the client, if certain other passages are relevant.
- Accordingly, though this is not expressed as an ‘exception’, we would suggest that the application of this provision should be approached on a precautionary basis, as it is limiting the suspect’s ability to familiarise himself with a document which has been found to be essential to his exercise of the rights of defence.

### 3. The ‘oral translation / summary’ exception

Article 3(7) provides:

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

Our remarks on this provision are these:

- As discussed above, Article 3(7) establishes a clear rule in favour of ‘written’ translations.
- By this provision, the Directive allows Member States to give an oral translation or summary of an essential document instead of providing a written translation. However, this is expressly phrased as an ‘exception to the general rule’. It therefore falls to be interpreted restrictively.

### 4. The right to request translations and the right to challenge the refusal to provide them

We reproduce again Article 3(3), as well as Article 3(5):

‘3. The competent authorities shall, in a given case, decide whether any other document is essential. **Suspected or accused persons may submit a reasoned request to that effect** (emphasis added).

(...)

5. Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for the translation of documents or passages thereof (...)’.

Again, these provisions leave much unanswered:

- There is no indication as to the person to whom the ‘reasoned request’ should be addressed.
- Nor is there any indication of the nature of the authority competent to hear ‘challenge’ against the decision finding that there is no need for the translation of documents or passages thereof.
- These matters are therefore for the Member States to organise, but in accordance with Article 47 of the Charter and the general principle of effective judicial protection, it must be assumed that the refusal of translations must be subject to effective judicial oversight.
- It follows logically from the requirement to submit a ‘reasoned request’ and the opportunity to challenge a negative decision that the refusing authority should also provide reasons for its refusal. This follows from the tradition of defence rights in EU law, which requires the provision of reasons upon which a decision is taken to enable the affected person to defend his rights.<sup>41</sup>

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<sup>41</sup> See Joined Cases C-584/10 P etc., *Commission and Others. v. Kadi* [ECLI:EU:C:213:518], para. 100.

## D. USING THE DIRECTIVE IN PRACTICE

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### 1. Identifying the documents of which you want translations

In Section 2 below we will look at some of the legal argumentation that you can make to argue that the Directive entitles you to a translation of a document. However, before this you need to decide which documents you *want*, and then worry about arguing that the Directive entitles you to them. You may need translations for specific reasons (e.g. if it contains key parts of the accusation or if it is a key witness statement which the client needs time to consider and to check its content). But for other documents, the challenge is that you may not know, without consulting the client, whether the document or a part of it contains key information. The client, however, cannot assist if no translation (of one kind or another) is provided. That, we suggest, is the relevant test to apply: if you cannot determine the value of a document without the client's input, you should seek a translation.

→ Identify the documents you want:

- Is it a key document such as the notification of suspicion given upon arrest, a detention order, indictment or judgment?
- Is it a witness statement that contradicts your client's version of events and which he needs to see in order to tell you what is wrong?
- Is the client in detention? Does this mean that there is not sufficient time for you to consult with your client as to the contents of the relevant document?

### 2. Making a request

Once you have decided which documents you want, you need to make a request for them. Here, you are relying on Article 3(3) of the Directive entitling you to submit a 'reasoned request'. As is clear from the text of the Directive, there is no specific requirement as to who should be responsible for deciding which documents are essential, hearing requests or challenges. This is essentially a matter for the Member States to organise. You will have identified in your preparatory work (see the Introduction) which authority is competent.

It is possible that, under your national law, there is no authority specifically designated for requesting a translation. If no steps have been taken to implement the Directive, this could be a problem and you may need to persuade an authority that they must consider the request. This is the first point dealt with below.

#### a. Basics

There is no indication in the text of the Directive as to whether you should be able to submit a request in writing or orally and this will be governed by the relevant rules in your criminal procedure. Equally, the matters to be covered by the request will be partly determined by the national law position, but it is possible to make some basic suggestions:

- Make a reasoned request in writing.
- State explicitly that you are making the request under Article 3(3) of the Directive, which entitles you to make the request for essential documents, as well as any relevant national provisions.

- State that, if the authority refuses to provide a translation, you request a reasoned decision (this will be helpful if you have to challenge the decision).
- State why the documents you request are essential.
- State why oral translation would be insufficient.

## **b. Content of the request**

### ***i. I am entitled to make this request***

Obviously, if there is a procedure provided in national law, you do not need to persuade the authority that it must hear the request. If there is nothing explicitly provided in national law for making a request for translations other than those mandatorily prescribed by law, you need to remind the authorities of their obligations under the Directive. You need to explain to the authorities that, regardless of what is provided in national law, they must hear your request:

- Argue: Article 3(3) of the Directive obliges national authorities to consider on a case-by-case basis whether the document is essential, and entitles the suspect or accused to make a reasoned request for an essential document. This request must therefore be considered.

You may need to make this request to several different people (e.g. prosecutor, investigating judge, police). If these authorities refuse to consider your request, this is of itself a violation of the Directive and should itself be the subject of a judicial challenge (see the ‘challenging adverse decisions’ section below). For the time being we will assume either that there is a procedure available to request further documents, or that the authority has accepted to consider your request. You now need to argue why you are entitled to the document.

### ***ii. Mandatory documents***

In order to claim a right under the Directive, you need to establish that the document is an ‘essential document’ within the meaning of Article 3(1). In the case of charges, indictments, judgments and decisions depriving of liberty, this is straightforward:

‘2. Essential documents shall include any decision depriving a person of his liberty, any charge or indictment, any judgment.’

If the document you do not have a translation of is one of these, you need to insist on a translation:

- Argue: Article 3(2) entitles the suspect to a translation of any decision depriving a person of his liberty, any charge or indictment, and any judgment. One such document, namely [...], has not been provided. Regardless of what is said in national law, the suspect is entitled to this document.

If the authority refuses on the basis that it has no power to order the translation, you should challenge the decision. See the ‘challenging adverse decisions’ section below).

### *iii. Other essential documents*

For documents which are not covered by Article 3(2) of the Directive, you need to establish that they are 'essential'. The full definition is provided by Article 3(1):

'(...) documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings'

As mentioned above there is no particular emphasis on written documents in the ECtHR case-law so we do not, in this section, propose any arguments based on any specific cases. We suggest you focus your analysis on the practical point of whether the absence of the translation prevents your client from exercising rights of defence effectively, based on the nature and value of the document.

#### *▪ Transcripts / records from police questioning*

Arguably one of the key documents of which the client needs a translation is the transcript or record of what he said during police questioning. This information will be used, and may be of central importance, at both the pre-trial and the trial stage. You as the lawyer do not know whether it contains inaccuracies vis-à-vis what was actually said, and it may have only been summarised by an interpreter at the time.

- Argue: The suspect needs a translation of the record of what he said in interview, particularly if it is alleged that he made incriminatory statements or that his statements are contradicted by what other witnesses say.

#### *▪ Key supporting evidence*

Equally, the suspect or accused needs to be able to read translations of key evidence used to support certain of the documents which must be translated under Article 3(2). For instance, if a pre-trial detention decision is based largely on one or two witness statements, the suspect's ability to challenge detention may depend on their ability to read these supporting documents. Equally, key evidence on which an indictment is based may have to be translated in order for the person to comment on it effectively.

- Argue: In order effectively to exercise defence rights, the suspect needs access to key supporting evidence on which the documents listed in Article 3(2) of the Directive are based. This might cover witness statements and/or expertises on which reliance is placed in a detention decision or indictment.

### **3. Challenging adverse decisions**

If the decision is refused, you need to challenge it, as foreseen by Article 3(5) of the Directive. As noted above, there is nothing specified as to what sort of authority this challenge should be brought. Different issues may arise according to the way the system is organised in your country.

Before looking at each possibility it is worth recalling the principle of 'effective judicial protection' expressed in **Article 47 of the Charter of Fundamental Rights of the EU**, which provides that:

‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a **tribunal ...**’

Essentially, the idea here is that the ‘challenge’ you are entitled to make under Article 3(5) of the Directive needs to be before a court. There is much more to say about effective judicial protection and you should [contact us](#) if you would like further assistance with this in a particular case.

### a. Insist upon judicial review

In this situation, even if the criminal procedure code does not provide for a right of challenge against a prosecutor’s decision, you should challenge this before the most appropriate court of general jurisdiction (e.g. administrative court, investigating judge, etc.) claiming a right to do so under the Directive. Their refusal of jurisdiction might be appealable and that might allow you to raise the issue before a higher court which would be more receptive to arguments about EU law.

- Try any means available to bring a challenge:
- Is there a general remedy such as administrative challenge available?
  - Even if there is no mechanism available, make the application to the criminal court / investigating judge responsible for the case.

### b. Grounds of challenge

#### i. *Unreasoned refusals are not acceptable*

Practitioners often report to us that procedural decisions, in all areas (e.g. pre-trial detention), lack adequate reasoning. If this manifests itself in this context, you should make an issue of it:

- Either contact the same authority which made its decision or challenge it directly.
- Argue: the authority is implicitly required by the Directive to give reasons. The suspect has submitted a ‘reasoned request’ under Article 3(3) and in order to ‘challenge’ this decision as provided for by Article 3(5), he needs to have the reasons for it. The authority must therefore reconsider its decisions.<sup>42</sup>

#### ii. *The decision relies on the possibility of ‘oral translation’*

This seems likely to be one of the major grounds on which written translations are refused: the argument is that the function of the translation is to enable the person to understand the case against them, and that this can be achieved through an oral explanation. Arguments about this will fall within the scope of Article 3(7) of the Directive, which, as explained above, establishes an exception to the rule in favour of written translations. Bear in mind also the provisions of Article 52 of the Charter:

‘Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to respect rights and freedoms of others’.

<sup>42</sup> See, in this regard, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Kadi v Commission* [ECLI:EU:C:2013:518](#).

Bearing mind that the right expressed in Article 3(7) of the Directive to ‘written translations’ is a component of the right to a fair trial protected by Article 47 of the Charter, the ‘exception’ whereby an ‘oral translation or oral summary’ may be provided should be treated as such: an exceptional power which should be applied only to the extent necessary (the objective of general interest will, of course, be the effective administration of justice). We would suggest an argument along these lines:

→ Argue: Article 3(1) of the Directive entitles the suspect or accused to a ‘written translation’ of essential documents. The power in Article 3(7) is an exception to this rule, and constitutes a restriction on the right to a fair trial guaranteed by Article 47 of the Charter which should be applied restrictively and proportionately and not as a general rule.

This approach entails several other arguments:

- Argue: A *general rule* of national law according to which oral translations are always provided is contrary to the Directive and a written translation must be provided unless the Article 3(7) exception is legitimately invoked.
- Argue: Reasons of public interest (the administration of justice) militating against translation must be balanced against the interests of the defendant. This means regard should be had to the length of the document and to the possibility of translating at least certain passages of the document in writing, as provided for by Article 3(4).

Beyond this, we would suggest that the analysis depends upon the criterion in Article 3(7) that an oral translation or summary can be provided –

‘on condition that such oral translation or oral summary does not prejudice the fairness of proceedings’.

So, make arguments as to how the specific document, if not provided in writing, will risk prejudicing the fairness of the proceedings:

- Highlight the reasons why the suspect needs the document himself, and the opportunity to consider it himself, in order to prepare an effective defence, e.g.:
  - It is a key witness statement and the suspect needs to be able to review the content in order to instruct you as to inconsistencies or falsehoods in it.

## CONCLUSION

The case-law of the ECtHR on this subject is somewhat limited, and suffers from the limited amount of evidence that the ECtHR usually has at its disposal when reaching decisions as to whether or not the right to language assistance had been upheld and enjoyed. The Directive, in imposing common standards in the area of interpretation and translation, provides a more structured normative framework within which local decision-making will have to be taken and judicially controlled.

Fair Trials is cautiously hopeful that this Directive could really help criminal defence. The non-resident citizen is EU law's historical beneficiary – as in the case of *Bickel and Franz*, where EU Treaty provisions were used to prevent discrimination against non-residents in the provision of interpretation in court proceedings. We hope that now the EU has decided to provide EU law protection to non-native speaking criminal defendants, the latter will enjoy robust protection.

Pending interpretation of the Directive by the CJEU, throughout this Toolkit, we have sought to make clear when we are taking a view on the Directive, and have tried to say explicitly where our legal approach has come from. However, we fully accept that there may be other views. Please do not hesitate to give us feedback on this Toolkit: tell us if you found it useful, if you disagree, and why.

We also encourage you to engage with Fair Trials and the networks we coordinate:

- Contact us to let us know how of your experience invoking the Directive.
- Let us know if courts issue positive decisions applying the Directives.
- If questions of interpretation arise, consider the CJEU route: see the Using EU law toolkit, our 2014 paper on strategic approaches to the CJEU<sup>43</sup> and our online training video on the preliminary ruling procedure in criminal practice.<sup>44</sup>
- Visit our website [www.fairtrials.org](http://www.fairtrials.org) regularly for updates on key developments relating to the Directives, and news about in-person trainings.
- Come to us if you don't get anywhere with the courts, because we can explore other options like taking complaints to the European Commission.
- Get involved with pushing the issues in the domestic context: see our paper *Towards an EU Defence Rights Movement*<sup>45</sup> for concrete ideas on articles, litigation, conferences etc.

**Fair Trials Europe**

**Legal Experts Advisory Panel**

**March 2015**

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<sup>43</sup> Fair Trials, *Strategic approaches to litigation before the CJEU on the Roadmap Directives and EAW*, 2014, available at <http://www.fairtrials.org/wp-content/uploads/140818-CJEU-meeting-report.pdf>.

<sup>44</sup> Available at <http://www.fairtrials.org/fair-trials-defenders/legal-training/online-training/>.

<sup>45</sup> LEAP, *Strategies for implementation of the Roadmap Directives: Towards an EU Defence Rights Movement*, February 2015, available at: <http://www.fairtrials.org/wp-content/uploads/5A-IMPLEMENTATION-MOVEMENT-PAPER.pdf>.



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