



Legal Translation and the Challenges of Overcoming Language Barriers in Court Practice: Evidence from Portuguese Courts

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Abstract

European legal standards on the right to interpretation and translation in criminal proceedings were significantly improved with the adoption of Directive 2010/64/EU, as evidenced by recent developments in the case law of the European Court of Human Rights and in the domestic legislation and case law of EU Member States. Portugal is a good illustration of these developments, while also providing nuance to the overall picture. After initially dismissing the need to introduce any changes to its legal framework, Portugal finally amended its Code of Criminal Procedure in 2023 to comply with the Directive, and its courts have seen an exponential rise in litigation related to linguistic assistance in recent years. There is, however, considerable disparity in the case law of different appellate courts, and there are also still some unresolved issues, such as the time frame to plead the nullity arising from the failure to appoint an interpreter, the measures to ensure the quality of the interpretation and translation provided, and the training of judges, prosecutors, and judicial staff on the particularities of communicating with the assistance of an interpreter and of working in multilingual settings more broadly. Analysing the case law and the views expressed by judges, prosecutors, attorneys, and legal interpreters/translators during group and individual interviews conducted between 2020 and 2022 in the context of a research project on equality and cultural diversity in the practice of Portuguese courts, this article examines the legal developments prompted by Directive 2010/64/EU at the international/supranational European level and in the Portuguese legal system, and discusses the persistence of linguistic obstacles to equal access to justice and an effective right to a fair trial in Portugal.

Keywords Legal translation · Directive 2010/64/EU · Access to justice · Language barriers · Portugal

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1 Introduction

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 was presented as aiming solely to ‘facilitate’ the practical application of the right to interpretation and translation enshrined in Article 6 of the European Convention on Human Rights (ECHR) for those suspected or accused of having committed a criminal offence who do not speak or understand the language of the proceedings (recital 14 of Directive 2010/64/EU). This modesty is misplaced, however. While it is true that the right to linguistic assistance in criminal proceedings has a long tradition in international human rights law, and it can be argued that the final text of the Directive fell short of what was initially envisioned by the European Commission and of what is considered necessary in the literature [11: 530–541], it seems undeniable that Directive 2010/64/EU represented a significant improvement to the legal landscape on procedural rights in Europe. Of note are, *inter alia*, explicit recognition of the rights to (a) be provided with interpretation during criminal proceedings before investigative authorities (including during police questioning) and in communications with legal counsel; (b) to challenge a decision finding that there is no need for interpretation; (c) to be provided, within a reasonable period of time, with a written translation of all essential documents (including any charge or indictment, and any judgment); and (d) to complain that the quality of the interpretation or translation is not sufficient to safeguard the fairness of the proceedings. Directive 2010/64/EU impacted not only the domestic legal systems of EU Member States, which were due to transpose it into their own legal systems by 27 October 2013, but also the case law of the European Court of Human Rights (ECtHR), as evidenced by the judgment in *Vizgirda v. Slovenia* (2018), where the ECtHR relied extensively on the regime set by Directive 2010/64/EU for its interpretation of Article 6 ECHR.¹

To say that equal access to justice and the right to a fair trial require that persons interacting with the justice system have the opportunity to understand the proceedings and not be hindered by language barriers would appear to be a truism that should apply across the board to all jurisdictions (criminal, civil, administrative), actors (defendants, witnesses, victims, etc.) and subject matters, including not only criminal law, but also immigration and asylum law, family law, labour law, etc. And indeed, there has been no shortage of calls for the recognition of the right to linguistic assistance in other areas of law as a means to ensure effective and non-discriminatory access to justice for everyone [e.g., 15: 2–3; 6: 22; 7: 43]. The minimum standards agreed at the international level, however, rarely go beyond the rights of suspects or accused persons in criminal proceedings (with a few notable exceptions, e.g., persons

¹ Judgment of 28 August 2018, application No. 59,868/08, §§ 52–57 and 82–85.

with disabilities,² asylum seekers,³ victims of crime,⁴ and non-EU immigrants subject to return decisions⁵).

While the need for linguistic assistance in judicial settings is on the rise – and, as noted above, has long been a feature in criminal proceedings, the linguistic assistance provided in domestic courts leaves much to be desired. A number of factors contribute to this state of affairs, including a shortage of qualified interpreters for legal interpretation in the required language combinations [e.g., 2: 109–111; 16: 89–90; 8: 143–144], misconceptions among interpreters, defendants, and judicial actors alike as to the role of interpreters in criminal proceedings (e.g., for whose benefit they are working, how complex their tasks are, how neutral they can be, and what type of expertise they are expected to provide), and lack of sensitivity on the part of judicial actors as to the specific demands of working with interpreters and the consequences that language barriers may have on defendants' exercise of their rights of defence [e.g., 15: 5; 20: 645–646; 14: 150–153].

These difficulties are amply documented and affect the judicial systems in all Western democracies [e.g., 15: 14, 26; 1: 201; 3: 208; 6; 10; 20; 17]. They featured prominently in the European Commission's proposals to strengthen suspected and accused persons' rights in the EU,⁶ which eventually led to the European Council's 2009 adoption of the Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings and to the subsequent adoption of several directives on procedural safeguards, including Directive 2010/64/EU and Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings, to which I will also be referring throughout this article.

In reviewing the case law of Portuguese courts on legal interpretation and translation in criminal proceedings over the years, and discussing the findings of interviews with judicial actors in Portugal about their experiences in multilingual cases, this article aims to contribute to ongoing debates on the linguistic obstacles to equal access to justice in Europe that persist in spite of Directive 2010/64/EU. The evolution of the domestic case law and the opinions voiced by judicial actors will be discussed against the background provided by the current international and supranational legal standards on suspects and accused persons' rights to linguistic assistance in criminal proceedings and their incorporation into Portuguese statutory law.

²Article 13 of the 2007 UN Convention on the Rights of Persons with Disabilities.

³Articles 10(5), 12(1)(b), 15(3)(c), and 17(3) of Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection.

⁴Articles 5 and 7 of Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

⁵Articles 12 and 13 of Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

⁶Notably in the Commission's Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union [COM(2003) 75 final, of 19 February 2003], and Proposal for a Council Framework Decision on Certain Procedural Rights in Criminal Proceedings throughout the European Union [COM(2004) 328 final, of 28 April 2004].

2 Suspects and Accused Persons' Rights to Linguistic Assistance in European International and Supranational Law

2.1 The Right to Be Informed of the Charges and of the Right to Linguistic Assistance in a Language Which They Understand

According to Article 6(3)(a) ECHR, persons charged with a criminal offence have the right to be informed promptly, in a language they understand and in detail, of the nature and cause of the accusation against them. While this wording might suggest that mere suspects (i.e., persons not yet formally indicted or accused) would not be able to avail themselves of this right, the ECtHR has found on multiple occasions that suspects who are questioned about their involvement in acts constituting criminal offences are also entitled to protection under this provision (e.g., *Aleksandr Zaichenko v. Russia*⁷). With Directives 2010/64/EU and 2012/13/EU there is no longer any margin for doubt, in any case, since they explicitly apply to suspected or accused persons from the time they are made aware by the competent authorities that they are suspected or accused of having committed a criminal offence.⁸

Directive 2012/13/EU requires Member States to ensure that suspects or accused persons are provided promptly with information concerning certain procedural rights, among which is the right to interpretation and translation, to allow for those rights to be exercised effectively. The information must be given in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons, but may be given orally or in writing [Article 3(1)(d) and (2)]. For suspects or accused persons who are arrested or detained, states must ensure that they are provided promptly with a written Letter of Rights, drafted in simple and accessible language, in a language that the persons understand. Where a Letter of Rights is not available in the appropriate language, they must be informed of their rights orally in a language that they understand and be given without undue delay a written Letter of Rights in a language that they understand [Article 4(1)(4)(5)].⁹

The importance of informing suspects or accused persons of their rights to interpretation and translation, in a language that they understand, was stressed by the ECtHR in the already mentioned *Vizgirda v. Slovenia* (§§ 86–87) and in *Wang v. France* (2022).¹⁰ The Court of Justice of the EU (CJEU) also stressed the point in *TL* (2022), a preliminary ruling requested by Portugal's Évora Court of Appeal in criminal proceedings against a Moldovan national. One of the issues at stake was whether

⁷ Judgment of 18 February 2010, application No. 39,660/02, §§ 41–43.

⁸ Article 1(2) of Directive 2010/64/EU and Article 2(1) of Directive 2012/13/EU.

⁹ An indicative model Letter of Rights is annexed to Directive 2012/13/EU. Under the heading 'Interpretation and translation' the Letter of Rights is required to read as follows: 'If you do not speak or understand the language spoken by the police or other competent authorities, you have the right to be assisted by an interpreter, free of charge. The interpreter may help you to talk to your lawyer and must keep the content of that communication confidential. You have the right to translation of at least the relevant passages of essential documents, including any order by a judge allowing your arrest or keeping you in custody, any charge or indictment and any judgment. You may in some circumstances be provided with an oral translation or summary'.

¹⁰ Judgment of 28 April 2022, application No. 83,700/17, §§ 73–78.

a provision – such as that in Article 120 of Portugal’s Code of Criminal Procedure, which requires that the nullity resulting from the failure to appoint an interpreter must be pleaded before the act is finalised if the person concerned is present at the act – complies with EU law. The CJEU held that it would be contrary to EU law to require the persons involved in criminal proceedings conducted in a language that they do not speak or understand to plead, within a prescribed period, that they have not been informed of their rights to interpretation and translation, failing which that challenge will be time-barred, as doing so would effectively render meaningless the right to be informed as guaranteed by Article 3(1)(d) of Directive 2012/13/EU.¹¹ The CJEU noted that, without being informed of their rights to interpretation and translation, the persons concerned could not know the existence and scope of those rights or demand that they be respected, with the result that they would not be able to exercise their rights of defence fully and have a fair trial. The CJEU concluded, therefore, that national legislation may not set a time period within which the infringement of the rights to interpretation and translation must be invoked, failing which that challenge will be time-barred.

2.2 The Right to be Assisted by an Interpreter Free of Charge

Article 6(3)(e) ECHR recognises the right of persons charged with a criminal offence to have the free assistance of an interpreter if they cannot understand or speak the language used in court. In its pre-Directive 2010/64/EU case law, the ECtHR clarified, *inter alia*, that the assistance of an interpreter should be provided from the investigation stage, unless there are compelling reasons to restrict this right (*Diallo v. Sweden*¹²); the costs with the interpretation and translation of the charges are always borne by the state, irrespective of the defendants’ financial means, so the state is not at liberty to demand reimbursement for the interpretation costs (*Luedicke, Belkacem and Koç v. Germany*¹³); the defendant’s counsel’s knowledge of the language used in court is not, in general, sufficient to dispense with the appointment of an interpreter, since the defendant must have conditions to understand the proceedings and be able to inform his or her counsel of aspects to include in the defence (*Kamasinski v. Austria*¹⁴); and the verification of the defendant’s need for interpretation facilities is a matter for the trial judge to determine in consultation with the defendant (*Cuscani v. United Kingdom*¹⁵).

Directive 2010/64/EU requires that Member States ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings¹⁶ are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, in all court hearings and any necessary interim hearings [Article 2(1)], with no caveat for possi-

¹¹ Judgment of 1 August 2022, C-242/22 PPU, §§ 78–79.

¹² Decision of 5 January 2010, application No. 13,205/07, § 25.

¹³ Judgment of 28 November 1978, applications Nos. 6210/73, 6877/75 and 7132/75, §§ 45, 46 and 48.

¹⁴ Judgment of 19 December 1989, application No. 9783/82, § 74.

¹⁵ Judgment of 24 September 2002, application No. 32,771/96, §§ 38–39.

¹⁶ As well as those with hearing or speech impediments, per Article 2(3).

ble compelling reasons to restrict the right. Where necessary for the purpose of safeguarding the fairness of the proceedings, Member States are furthermore required to ensure that interpretation is available for communication between suspected or accused persons and their legal counsel in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications [Article 2(2)].¹⁷ It is up to the Member States to establish a procedure or mechanism to ascertain whether suspected or accused persons need the assistance of an interpreter, but they must ensure that these persons have the right to challenge a decision finding that there is no need for interpretation [Article 2(4)(5)]. The costs of interpretation are borne by the states, irrespective of the outcome of the proceedings (Article 4).¹⁸ Member States are required to keep a record of all the situations where a suspected or accused person has been subjected to questioning or hearings by an investigative or judicial authority with the assistance of an interpreter (Article 7).

In *Vizgirda v. Slovenia*, the ECtHR stressed the importance of noting in the record any procedure used and decision taken with regard to the verification of interpreting needs, any notification of the right to an interpreter and any assistance provided by the interpreter, such as oral translation or oral summary of documents, so as to foreclose any doubts that may be raised in this regard later in the proceedings (§ 85). The ECtHR stated, furthermore, that it is not necessary for the defendant to make an explicit request for interpretation, since it is incumbent on the authorities involved in the proceedings, in particular the domestic courts, to ascertain whether the fairness of the trial requires (or has required) the appointment of an interpreter to assist the defendant, whenever there are reasons to suspect that the defendant is not proficient enough in the language of the proceedings, for example, if he or she is neither a national nor a resident of the country in which the proceedings are being conducted (§ 81). The ECtHR added in this regard that the fact that the defendant has a basic command of the language of the proceedings (or of a third language into which interpreting is readily available) should not by itself bar that individual from benefiting from interpreting into a language he or she understands well enough to fully exercise his or her defence rights (§ 83).¹⁹ The ECtHR did not, however, detail the precise measures that should be taken by domestic authorities to verify the linguistic knowledge of a defendant who is not sufficiently proficient in the language of the proceedings, allowing only that, in some cases, depending on factors such as the nature of the offence and the communications addressed to the defendant by the domestic authorities, a number of open-ended questions might be sufficient to establish the defendant's language needs (§ 84).

¹⁷According to the European Commission's 2018 report on the implementation of Directive 2010/64/EU, compliance with this obligation was still subpar. COM (2018) 857 final, of 18 December 2018, p. 3.

¹⁸Another aspect where compliance from Member States had not yet been fully achieved as of 2018, according to the Commission's report.

¹⁹Gone are the days when the ECtHR made the assistance by interpreter dependant on the complexity of the criminal offence at bar, as was the case in, e.g., *Güngör v. Germany*, decision of 17 May 2001, application No. 31,540/96, and *Hermi v. Italy*, judgment of 18 October 2006, application No. 18,114/02, § 71.

2.3 The Right to be Provided with a Written Translation of Essential Documents Free of Charge

The right to the free assistance of an interpreter recognised by Article 6(3)(e) ECHR has long been understood to also cover the translation of the documents in the proceedings, which is necessary for the defendant to have the benefit of a fair trial (*Luedicke, Belkacem and Koç v. Germany*, § 48). However, the reference to an ‘interpreter’ and not to a ‘translator’ suggests that oral linguistic assistance may satisfy the requirements of the Convention (*Hermi v. Italy*, § 70), and the ECtHR has allowed that the absence of a written translation of a judgment does not in itself entail a violation of Article 6(3)(e) ECHR, provided that the defendant is given oral explanations that allow him or her to sufficiently understand the judgment (*Kamasinski v. Austria*, § 85).

Here, Directive 2010/64/EU represents a clear qualitative leap, as it requires Member States to 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 that are essential to ensure that they are able to exercise their right of defence, and explicitly lists as examples of essential documents any decision depriving a person of his or her liberty, any charge or indictment, and any judgment [Article 3(1)(2)].²⁰ The competent authorities may decide whether any other document is essential, and suspected or accused persons or their legal counsel may submit a reasoned request to that effect [Article 3(3)]. The replacement of the written translation by an oral translation or oral summary of essential documents is allowed only in exceptional circumstances and on condition that it does not prejudice the fairness of the proceedings [Article 3(7)]. Member States are required to ensure that 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 [Article 3(5)], and any waiver by them of their right to translation of documents must be unequivocal, given voluntarily, and preceded by legal advice [Article 3(8)]. The costs of translation are borne by the states, irrespective of the outcome of the proceedings (Article 4). Member States are required to keep a record of all the situations where an oral translation or oral summary of essential documents has been provided in the presence of an investigative or judicial authority, or when a person has waived the right to translation (Article 7).

However, in *Covaci* (2015), the CJEU held that to require Member States to take responsibility, as a matter of course, for the translation of every appeal brought by the persons concerned against a judicial decision that is addressed to them would go beyond the objectives pursued by Directive 2010/64/EU, and cited *Kamasinski v. Austria* in support of the idea that a fair trial does not necessitate a written translation of all items of written evidence or official documents in the procedure.²¹ The situation

²⁰ This does not mean, however, that states are required to provide the translation of passages of essential documents that are not relevant for the purposes of enabling suspected or accused persons to have knowledge of the case against them [Article 3(4)]. In any case, the European Commission’s 2018 report on the implementation of Directive 2010/64/EU indicates that compliance with the obligation to provide written translation of essential documents has proven challenging.

²¹ Judgment of 15 October 2015, C-216/14, §§ 38–39.

at issue in the main proceedings concerned a penalty order adopted on the basis of a *sui generis* procedure, according to which the only possibility the accused person had of obtaining a trial in which he could fully exercise his right to be heard would be to lodge an objection against that order. Such an objection must be lodged within a particularly short period of time, but may be lodged orally, by the accused person himself, and does not have to state reasons; if lodged in writing, it must be written in the language of the proceedings (in the case at hand, German). The CJEU noted that Article 3 of Directive 2010/64/EU concerns, in principle, only the written translation into the language understood by the persons concerned of certain documents drawn up in the language of the proceedings by the competent authorities. It concluded therefore that Article 3 does not preclude national legislation which does not permit the individual against whom a penalty order has been made to lodge an objection in writing in a language other than that of the proceedings, provided that the competent authorities do not consider that, in light of the proceedings concerned and the circumstances of the case, such an objection constitutes an essential document (§§ 44–51).

On the other hand, in *Sleutjes* (2017), the CJEU clarified that a penalty order provided for in national law for imposing sanctions in relation to minor offences and delivered by a judge following a simplified unilateral procedure constitutes an essential document and must therefore be translated in writing.²² Moreover, in *TL*, mentioned earlier, the CJEU considered as essential documents the ‘declaration of identity and residence’ (DIR), the order summoning the defendant to appear in court following the failure to comply with the probation conditions, and the order revoking the suspension of the prison sentence, since these procedural acts are an integral part of the procedure which established the defendant’s criminal liability (§§ 53 and 59).²³ In *Prokuratura Rejonowa Łódź-Bałuty* (2021), the CJEU held furthermore that, under Article 20(3) of Council Framework Decision 2005/214/JHA (24 February 2005) on the application of the principle of mutual recognition to financial penalties, the authority of the executing Member State is allowed to refuse to execute a decision imposing a financial penalty for a road traffic offence, where that decision has been notified to the addressee thereof without a translation, into a language which he or she understands, of the elements of the decision which are essential in order to enable him or her to understand the charge, and without that addressee being afforded the opportunity to obtain such a translation on request.²⁴

²² Considering that, under German law, the penalty order represents the first opportunity for the accused person to be informed of the accusation against him, it is both an indictment and a judgment within the meaning of Article 3(2) of Directive 2010/64/EU. Judgment of 12 October 2017, C-278/16, §§ 30–31 and 34.

²³ The DIR is considered essential because under Portuguese law it constitutes a preliminary coercive measure which sets out a series of obligations for the persons concerned and the procedural consequences in the event of non-compliance (notably, their obligation not to change their place of residence without communicating their new address to the competent authorities), and the orders because they constitute procedural acts which are ancillary to the sentencing of the persons concerned (§§ 60–66).

²⁴ Judgment of 6 October 2021, C-338/20, § 44.

2.4 Quality Safeguards

Concern over the quality of the interpretation and translation provided to defendants in criminal proceedings, which was at the core of the European Commission's initiative leading up to Directive 2010/64/EU, is not new and has made the occasional appearance in the case law of the ECtHR over the years. In *Kamasinski v. Austria*, the ECtHR noted that it was not called on to adjudicate on the Austrian system of registered interpreters, but held that, for the right to linguistic assistance to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter, and, 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 (§§ 73–74). On the other hand, in *Uçak v. United Kingdom* (2002), the ECtHR dismissed as manifestly ill-founded the applicant's complaints of lack of impartiality and ability on the part of the interpreter, noting, *inter alia*, that it is not appropriate for the Court to lay down any detailed conditions concerning the method by which interpreters may be provided to assist accused persons. Moreover, since interpreters are not part of the court or tribunal, the Court determined that there is no formal requirement of independence or impartiality as such, and that it is sufficient if the services of the interpreter provide the accused with effective assistance in conducting his or her defence and if the interpreter's conduct is not of such a nature as to impinge on the fairness of the proceedings.²⁵

Directive 2010/64/EU requires that the interpretation and translation provided must be of a quality sufficient to ensure that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence [Articles 2(8) and 3(9)], and that Member States must ensure, in accordance with procedures in national law, that suspected or accused persons have the possibility to complain that the quality of the interpretation or translation provided is not sufficient to safeguard the fairness of the proceedings [Articles 2(5) and 3(5)]. In *IS* (2021), the CJEU stressed that Member States have to take concrete measures to ensure that the quality of the interpretation and translation provided is sufficient and that it can be reviewed by the national courts, adding that accused persons may not be tried *in absentia* when, on account of inadequate interpretation, they have not been informed, in a language which they understand, of the accusation against them or where it is impossible to ascertain the quality of the interpretation provided and therefore to establish that they have been informed of the accusation against them.²⁶ It cited, *inter alia*, *Knox v. Italy* (2019), where the ECtHR had held that a failure of the domestic

²⁵ Decision of 24 January 2002, application No. 44,234/98. According to the ECtHR, the fact that the interpreter was called by the police to the police station to interpret for the applicant during the police interview does not suggest any irregularity or oppression, much as the fact that the interpreter was listed as a witness by the prosecution did not indicate that she was associated with the prosecution. The ECtHR noted, *inter alia*, that the applicant's solicitor had agreed with the evidence given by the interpreter and had not raised any complaint about the interpreter's abilities or conduct on appeal. The ECtHR does not seem to consider the fact that communications with counsel and solicitors had been intermediated by an interpreter at all times and that the applicant's lack of trust in the interpreter might have hindered his ability to convey his complaints.

²⁶ Judgment of 23 November 2021, C-564/19, §§ 117–120 and 132–138.

courts to examine the allegations of inadequate services of an interpreter may lead to a violation of Article 6(3)(e) ECHR.²⁷

Member States are, however, not required to ensure the training, certification, and registry of interpreters and translators specialised in legal translation, nor to always appoint qualified and experienced interpreters for proceedings before investigative and judicial authorities, as was suggested during the debates held in preparation of Directive 2010/64/EU [11: 534–537]. Instead, the provision that bears the title ‘quality of the interpretation and translation’ (Article 5) only demands that Member States take ‘concrete measures’ to ensure that the interpretation and translation provided meets the quality required to safeguard the fairness of the proceedings, and, to that end, that they endeavour to establish a register or registers of ‘independent’ translators and interpreters who are ‘appropriately qualified’,²⁸ and that they ensure that interpreters and translators be required to observe confidentiality regarding interpretation and translation provided to suspected or accused persons in criminal proceedings. Acknowledging that the quality of the linguistic assistance provided is very much dependent on the existence of conditions for efficient and effective communication during criminal proceedings, Article 6 of Directive 2010/64/EU requires, furthermore, that Member States request that those responsible for the training of judges, prosecutors, and judicial staff pay special attention to the particularities of communicating with the assistance of an interpreter. This stipulation represents a nod to the concerns expressed during the preparatory works of Directive 2010/64/EU about the lack of preparedness of judicial actors to communicate in multilingual contexts [11: 544–545].

3 Suspected and Accused Persons’ Rights to Linguistic Assistance in Portuguese Law

Portugal’s initial stance vis-à-vis Directive 2010/64/EU was that it did not require any amendments to the domestic legal framework, which already ensured the right of accused persons in criminal proceedings to be assisted by an interpreter and to be provided with the translation of relevant documents if they do not speak or understand the language of the proceedings, i.e., Portuguese.²⁹ This stance was criticised

²⁷ Judgment of 24 January 2019, application No. 76,577/13, §§ 186–187. Contrary to what happened in *Uçak v. United Kingdom*, here the ECtHR was persuaded that the interpreter had gone beyond the duties expected of an interpreter by playing the role of a mediator and adopting a motherly attitude vis-à-vis the defendant (§ 185).

²⁸ In *IS*, mentioned earlier, the CJEU noted that the use of the verb ‘endeavour’ indicates that this is more a programmatic requirement than an obligation to achieve a certain result, which, moreover, does not, in itself, have any direct effect (§ 105). Nevertheless, the CJEU held that the obligation to adopt concrete measures means that Member States are required to promote the adequacy of the interpretation and translation services and efficient access thereto (§ 110), and that, in order to enable national courts to review whether the defendant has been provided with interpretation of a ‘sufficient quality’, those courts must, *inter alia*, have access to information relating to the selection and appointment procedure for independent translators and interpreters (§ 115).

²⁹ Portuguese is the language to be used in both written and oral procedural acts, on pain of nullity, per Article 92(1) of the Code of Criminal Procedure.

in Portuguese literature as being short-sighted [e.g. 11: 545–553; 18: 48–49; 21: 35],³⁰ and did not persuade the European Commission, which initiated infringement proceedings against Portugal in 2021. To ‘complete’ the transposition of Directive 2010/64/EU,³¹ Law No. 52/2023 of 28 August 2023 finally amended the Code of Criminal Procedure. Regrettably, it did not touch on the provisions in Article 120(2)(c) and (3) of the Code, which allow for the relative nullity resulting from the failure to appoint an interpreter to be rectified if not pleaded before the act is finalised, despite the CJEU conclusions about its incompatibility with EU law in *TL*.

The regime now set by the Code of Criminal Procedure is as follows: Where a person with no knowledge or command of Portuguese is required to take part in criminal proceedings in any capacity, the investigative or judicial authority, depending on the case, must appoint a suitable interpreter, free of charge, even if the language used by the person is known by the authority presiding over the act or by any of the procedural participants [Article 92(2) and (11)].³² Similarly, when a deaf or hearing impaired person is due to give a statement, a suitable interpreter of sign language, lip reading or written expression, as appropriate, must be appointed to him or her [Article 93(1)(a)].³³ It should be noted, however, that only the lack of an interpreter of sign language, lip reading, or written expression results in the mandatory postponement of the hearing [Article 93(2)]. As mentioned earlier, in all other cases of mandatory appointment of an interpreter, failure to appoint an interpreter constitutes a relative nullity which must be pleaded by the person concerned, before the act is finalised, in the event of the nullity of an act at which the person is present, or within five days after notification of the order closing the inquest [Article 120(2)(c)(3)(a)(c)].

Accused persons enjoy, at any stage in the proceedings, the right to translation and interpretation, and they must be informed of this right at the time of the indictment, at the act itself, or without undue delay, by means of a document written in a language that they understand, containing, *inter alia*, their procedural rights and obligations. If the document is not available in a language that they understand, the information is given orally, if necessary with the assistance of an interpreter, without prejudice to the subsequent provision of a written document, and without undue delay [Articles 57(3), 58(5) and (6), 59(4), 61(1)(j), and 336(2)].³⁴ The authority presiding over the proceedings ensures that accused persons with no knowledge or command of Portuguese are provided, within a reasonable time, with a written translation of the relevant passages of the notifications related to the accusation, the indictment, the objection, the setting of a trial date and the judgment, the application of provisional coercive

³⁰ Some authors were less critical, finding that despite some omissions, Portugal’s legislation accomplished the minimum standards outlined in the Directive [19].

³¹ As well as of Directive 2012/13/EU and other EU legal acts.

³² An interpreter is also appointed when it is necessary to translate a document in a foreign language that is unaccompanied by an authenticated translation [Articles 92(10) and 166(1)].

³³ When the statement is to be given by a deaf person who knows how to write, the questions are asked orally and the person answers in writing; if he or she does not know how to write and requests it, a reliable interpreter is appointed; also here, the lack of interpreter leads to the postponement of the hearing [Article 93(1)(b) and (2)].

³⁴ If the accused persons do not understand Portuguese, the assistance by counsel is mandatory in all proceedings, except for the act of placement under investigation [Article 64(1)(d)].

measures and the claim for civil damages, as well as other documents that the presiding authority may deem essential for the defence [Articles 92(3)(4) and 113(10)]. Exceptionally, accused persons may be given an oral translation or summary of those documents, provided that it does not hinder the fairness of the proceedings [Article 92(5)]. They are entitled to submit a reasoned request for the translation of case documents that they deem essential for the exercise of their right of defence, which, if granted, leads to the provision of a written translation of the relevant passages within a reasonable time or its replacement by oral translation or summary [Article 92(6)]. They are furthermore entitled to choose, free of charge, an interpreter other than the one appointed by the investigative or judicial authority to assist them in their communications with legal counsel [Articles 92(7) and 93(4)].

The interpreter is bound to secrecy and is not at liberty to disclose the conversations between the accused person and his or her legal counsel, whatever the stage of the proceedings in which they take place, on pain of breach of professional confidentiality [Articles 92(8) and 93(4)].³⁵ The role of interpreter is equated to that of an expert [Article 92(12)], which means, *inter alia*, that interpreters may ask to be excused for lack of the indispensable conditions for their intervention and may be dismissed, on the same grounds, by the Public Prosecutor, by the accused person, by the victim or the civil parties, unless their intervention is urgent or there are risks in delaying the hearing, and may also be replaced by the appointing authority when they perform their tasks in a negligent manner [Article 153(2)(3)]. Evidence obtained through interpreters in breach of their confidentiality obligations may not be used [Articles 92(9) and 93(4)].

Portugal does not have a proper registry of professional interpreters and translators specialised in legal translation, because these professions are not yet regulated. Despite several attempts to establish a ‘legal regime of sworn interpreters and translators’ [11: 554–557], thus far only interpreters of sign language have the exercise of their activities defined by law³⁶ and, even in this case, there are still aspects in need of regulation for its practical application to be possible (e.g., labour conditions, professional career, deontological code).³⁷ ‘Authenticated’ or ‘certified’ translations are presumed to be of good quality – dispensing with the intervention of an interpreter [Article 92(10) of the Code of Criminal Procedure] – but almost anyone can make a translation and submit it to a notary for certification. Notaries are competent to certify, or make and certify, translations of documents, despite the fact that the requirements for access to the profession do not include proficiency in foreign languages.³⁸ This competence, moreover, is not even the sole prerogative of notaries, having been extended to commerce and industry chambers, to registry officials, attorneys and paralegals, who only need to register in a database created for this purpose

³⁵ Except when they are civil servants intervening in the exercise of their functions, interpreters are required to take an oath before the investigative or judicial authority, promising to perform their tasks faithfully, and are warned of the penalties if they fail to honour it (Article 91).

³⁶ Law No. 89/99 of 5 July 1999.

³⁷ As was acknowledged by the Portuguese Parliament in its Resolution No. 328/2021.

³⁸ Articles 4(4)(b) and 25 of the Notary Statute, approved by Decree Law No. 26/2004 of 4 February 2004, last amended by Law No. 69/2023 of 7 December 2023.

by the Ministry of Justice.³⁹ Portuguese courts have informal lists of interpreters and translators who are called on when necessary to assist in criminal proceedings, but these lists are often compiled on the basis of personal contacts and include both professional interpreters/translators and amateurs [11: 550; 18: 35–37]. Portugal still has a long way to go to meet the quality standards (tenuous as they are) set by Directive 2010/64/EU, and it is of little consolation that the same can be said of Germany, Poland, and Spain, which were much faster than Portugal in transposing the Directive [13].

4 Linguistic Diversity and the Right to Linguistic Assistance in the Practice of Portuguese Courts

4.1 Methodology

Linguistic diversity is just one of several sources of ‘cultural diversity’ with which domestic courts are increasingly faced in Europe. Taking a cue from Marie-Claire Foblets and Alison Dundes Renteln’s *Multicultural Jurisprudence* [9], we designed a research project to look into the ways in which cultural diversity impacts and is being dealt with in the practice of Portuguese courts. We wanted to know, *inter alia*, the types of legal issues that arise, the diversity profiles (religion, ethnicity, nationality, language), the cultural arguments invoked, and the responses of Portuguese courts, including their openness to cultural information, sensitivity to the needs of minorities, and legal reasoning when balancing equality and cultural diversity and when addressing culturally based claims for reasonable accommodation or exemptions to general rules. To capture the practice of the courts, we used a mixed methodology, which combined documentary research into the case law with individual and group interviews with key stakeholders (judges, prosecutors, attorneys, civil society representatives, interpreters, and translators) [12].

The research into the case law was conducted by using two main open-access case law databases – DGSI, which is run by the Portuguese Ministry of Justice,⁴⁰ and the Constitutional Court database⁴¹ – and by combining keywords (e.g., religion, ethnicity, Islam, African, Asian, interpreter, translation) with the databases’ own descriptors. The review of the judgments focused on the legal reasoning, the courts’ findings, the use of international and foreign legal sources, the use of extra-legal sources, and the language adopted by the courts. The necessary reliance on open-access case law databases means that our review only covers a fraction of the potentially relevant case law, since these databases do not include rulings by first instance courts, only publish a selection of higher court judgments [5: 103–131], and only cover judgments issued from the 1980s onwards. Nevertheless, we were able to identify more than 100 judgments on linguistic assistance in criminal proceedings alone, which allows for a good approximation of what has been the practice of the courts over the years.

³⁹ Article 38 of Decree Law No. 76-A/2006 of 29 March 2006.

⁴⁰ Available at <https://www.dgsi.pt/>.

⁴¹ Available at <https://www.tribunalconstitucional.pt/tc/acordaos/>.

The interviews with stakeholders were conducted in two stages. First, we organised separate focus groups with judges, prosecutors, attorneys, representatives of civil society organisations working with ethnic minorities and/or immigrants, and interpreters and translators with experience working in judicial settings. The focus groups were held online in October and November 2020, with seven to eight participants each, who were invited through contacts with courts from different court districts in the country, attorneys' offices and civil society organisations, and personal contacts. We asked participants to share their experiences and views on how the judicial system in Portugal handles cultural diversity, including their experiences with linguistic diversity and language barriers. This first set of interviews allowed us to get a feel for the experiences and perceptions of the different stakeholders and to prepare for the individual interviews with judges and prosecutors, which delved in greater detail into the topics covered in the focus groups. A total of 40 individual interviews were conducted online between May 2021 and September 2022.⁴²

4.2 Review of the Case Law – Before and after Directive 2010/64/EU

Since the adoption of Directive 2010/64/EU, the number of Portuguese court judgments dealing with the right to interpretation and translation in criminal proceedings has risen exponentially, but there is no clear dividing line separating the quality of the case law before and after the Directive entered into force in November 2010. The Directive's influence was not immediately apparent, as Portuguese courts continued to refer exclusively to Article 6 ECHR and the case law of the ECtHR for almost a decade after the Directive entered into force. The first reference to the Directive in a court's reasoning appears in a judgment from the Évora Court of Appeal of 20 December 2018.⁴³ On the other hand, before 2010, there were already a few judgments which were highly protective of accused persons' rights to linguistic assistance, and went beyond the standard at the time set by the ECtHR, most notably in the case law of the Évora Court of Appeal.⁴⁴ Nevertheless, the idea that the Directive represented a 'radical change' for the better in the way Portuguese courts deal with linguistic diversity seems to be common and was spontaneously voiced by one of the judges interviewed for the project.⁴⁵

⁴² All focus group discussions and individual interviews were conducted in Portuguese and have been translated into English for the purposes of this article by the author. Translations of direct quotes from participants in the individual and group interviews will be referenced by the code attributed to each interview/participant (FGJ, FGP, FGI, FGA, FGCSO – for focus groups with judges, prosecutors, interpreters, attorneys, and representatives of civil society organisations, respectively; IJM, IJW, IPM, IPW – for individual interviews with male judges, female judges, male prosecutors, and female prosecutors, respectively).

⁴³ Case No. 55/2017.9GBLGS.E1. The Directive had already been invoked in 2015 before the Porto Court of Appeal, by the appellant in case No. 347/10.8PJPT-E.P1, which concerned linguistic assistance for communications with legal counsel in prison, but the Court only mentioned the ECHR in its reasoning (judgment of 30 September 2015). For a critical take on this judicial aloofness, see Sousa [21: 4].

⁴⁴ Évora Court of Appeal judgments of 26 June 2007, case No. 848/07–1, and of 1 April 2008, case No. 331/08–1.

⁴⁵ *'Afterwards things started to get better. I think that there was a time in which there was an investment in that area. There is also an EU Directive which helped a great deal at the time, which required states to*

A good illustration of Portuguese courts' cavalier approach to the linguistic assistance needs of accused persons who do not understand Portuguese, fairly common in the 1990s and 2000s, is Constitutional Court judgment No. 547/98 of 23 September 1998. The Constitutional Court had been asked to review the constitutionality of Article 92(2) of the Code of Criminal Procedure when interpreted with the meaning that the oral translation of the accusation is sufficient. In rejecting the appeal, the Court noted, *inter alia*, that an oral translation might be 'less comfortable' for the defendant than a written one, but it did not restrict, in any 'minimally relevant way', the defendant's rights of defence, since nothing prevented the defendant from taking written notes during the oral translation or from requesting that more complex passages be clarified or repeated in order to have a full understanding of the charges. The Court paid no heed to the fact that in the main proceedings the accusation ran to 100 pages, the defendant was interacting with the interpreter for the first time, and the oral notification of the accusation started a 20-day time limit for appeal. The Court's disregard for the complexities of legal translation were apparent when it reasoned that, since the judicial clerk in charge of the notification had to communicate the content of the accusation faithfully, the 'perfect performance of the interpreter' would give the defendant the information necessary for him to plan his defence strategy. The Court allowed that the interpreter might not have a perfect performance, but noted that, in that case, the problem would not be the invalidity of the legal provision under review.⁴⁶

Another example of this line of case law is Constitutional Court judgment No. 529/2003 of 31 October 2003, which concerned the possible unconstitutionality of Article 176(1) of the Code of Criminal Procedure when interpreted with the meaning that, prior to a house search by the police, it is sufficient to deliver a copy of the court order, written in Portuguese, to the person residing there, even if this person does not understand Portuguese. The case in the main proceedings concerned a house search at the residence of a Russian national, during which she received copy of the court order without being given an explanation (oral or otherwise) of the content of the order in a language that she could understand. The Constitutional Court held that it was no use to rule on the (un)constitutionality of the legal provision, since, as had been noted by the appeal court, even if there was a procedural irregularity, it should have been pleaded before the house search was concluded, and the defendant had only pleaded it the following day, when questioned by the police with the assistance of an interpreter. Both the appeal court and the Constitutional Court had no issue with the fact that the time limit to plead the procedural irregularity resulting from the lack of linguistic assistance had started and ended before the person concerned could understand what was going on. As already indicated, this is a problem that persists to this day, despite the improvements brought by Directive 2010/64/EU and the conclusions of the CJEU in *TL*.

have a list of certified interpreters, etc. I distinctly remember that after the Directive was transposed things changed radically.' [IJM24].

⁴⁶ This reasoning was replicated by the Constitutional Court in its judgment No. 713/2005 of 14 December 2005. Commenting on this later judgment, Silva [18: 23–24] argued that the reasoning, which was already questionable in light of the ECtHR case law, had become inadmissible in light of Directive 2010/64/EU, even if nothing had changed in the Portuguese statutory legal framework.

Other telling illustrations of the pre-2010 Portuguese case law – taken now from the case law of common courts – are the definition of ‘suitable interpreter’ simply as someone who could understand the defendant and be understood by him;⁴⁷ the finding that the ECHR did not require the translation of the decision placing an accused person who did not understand Portuguese in pre-trial detention and that it sufficed that the competent foreign representation in Portugal be informed of the detention so that they could assist their co-national;⁴⁸ the finding that the proximity between Spanish (the defendant’s mother tongue) and Portuguese was such that the defendant could easily have understood the full extent of the accusation in writing and in Portuguese;⁴⁹ the finding that the nullity resulting from the absence of an interpreter at the time when the competent authorities had drafted the indictment and the DIR had not been pleaded before the end of the act and was therefore rectified;⁵⁰ and the finding that it was not necessary to appoint an interpreter to conduct an alcohol test on a person who did not understand Portuguese, since the person concerned had not yet been formally indicted.⁵¹

As mentioned earlier, there are also counter examples of pre-2010 judgments in which the courts strongly affirmed the importance of effective linguistic assistance to allow suspected or accused persons who did not understand Portuguese to exercise their rights of defence. In its judgment of 26 June 2007,⁵² the Évora Court of Appeal stressed that accused persons have a personal right to be notified of the accusation in a language that they understand, and that it did not suffice to serve the notification on their legal counsel. It added that the right is only effective with the notification of the accusation to the defendant in writing and fully translated, which rendered procedurally null and void the notification of an accusation written in Portuguese to a defendant who only understood Mandarin. In its judgment of 1 April 2008,⁵³ the Évora Court of Appeal held that, while the positions a defendant who does not understand Portuguese and one whose mother tongue is Portuguese can never be fully equivalent, given the existence of linguistic intermediation, it is the national court’s responsibility to ensure that the equivalency is as close as possible. It held furthermore that the right to be assisted by an interpreter and to use the benefits of that assistance could not be restricted according to the nature of the proceedings, and should cover not only the assistance during the trial, but also the understanding of any oral or written acts in the proceedings, even if limited to the simple communication between the defendant and his or her legal counsel. Citing the letter and spirit of the ECHR, the Court held that, while Portuguese law did not recognise the right to the translation of all orders issued in criminal proceedings, Article 113(9) [current (10)] of the Code of Criminal Procedure should be interpreted as requiring the translation

⁴⁷ Lisbon Court of Appeal judgment of 30 June 1992, case No. 0017345.

⁴⁸ Lisbon Court of Appeal judgment of 24 January 2001, case No. 00114783.

⁴⁹ Porto Court of Appeal judgment of 8 June 2005, case No. 0513062. A similar argument was used by the Porto Court of Appeal in its judgment of 14 October 2009, case No. 0817737.

⁵⁰ Coimbra Court of Appeal judgment of 6 December 2006, case No. 264/06.6JELSB-A.C1.

⁵¹ Guimarães Court of Appeal judgment of 14 May 2007, case No. 216/07–2.

⁵² Case No. 848/07–1.

⁵³ Case No. 331/08–1.

in writing of the notifications concerning the accusation, the indictment, the setting of a trial date and the judgment, as well as those related to coercive measures and patrimonial safeguards, and the claim for civil damages.

Also worth mentioning as an example of pre-2010 good practice is the Coimbra Court of Appeal judgment of 14 January 2009,⁵⁴ which found that it would be unreasonable to require that the nullity resulting from the failure to appoint an interpreter should be pleaded no later than the end of the act at which the person concerned was present without the assistance of an interpreter, as that would completely erase the protection afforded by the law. This, however, was applicable only for situations in which the accused person was not assisted by legal counsel. In such cases, the Court found that the general rule for pleading relative nullities should apply, meaning that the acceptable time limit for pleading nullity would be ten days (i.e., the general time limit for procedural acts, per Article 105(1) of the Code of Criminal Procedure), counting from the day on which the person concerned is notified for any further act in the proceedings or has any intervention in an act in the proceedings. This ten-day time limit has been adopted in many judgments since,⁵⁵ albeit sometimes with other markers for the start of the time limit (e.g., the end of the act at which the concerned person was present;⁵⁶ the moment when counsel first intervenes in the proceedings and is made aware of the possible nullity⁵⁷).

Notable examples of good practice in the post-2010 case law are the Porto Court of Appeal judgments of 4 July 2012⁵⁸ and 22 January 2020;⁵⁹ and the Évora Court of Appeal judgments of 8 January 2013,⁶⁰ 24 October 2017,⁶¹ 20 December 2018,⁶² and 2 August 2022.⁶³

In its judgment of 4 July 2012, the Porto Court of Appeal held that the provisions in the Code of Criminal Procedure treating the failure to appoint an interpreter as a relative nullity which can be rectified if not pleaded before the end of the act at which a defendant who does not understand Portuguese is present are ostensibly in breach of the rights of defence and fair trial enshrined in the Portuguese Constitution, as well as in Article 14 ICCPR and Article 6 ECHR. The defendant was a Moroccan national

⁵⁴ Case No. 275/08.7GBVNO-A.C1.

⁵⁵ E.g., Guimarães Court of Appeal judgment of 8 November 2021, case No. 1071/19.1GBBCL.G1; Guimarães Court of Appeal judgment of 21 October 2013, case No. 936/13.9PBBRG.G1; Supreme Court judgment of 14 December 2016, case No. 303/14.7JELSB.E1.S1; Guimarães Court of Appeal judgment of 8 November 2021, case No. 1071/19.1GBBCL.G1.

⁵⁶ E.g., Évora Court of Appeal judgment of 17 January 2012, case No. 206/10.4GDABF.E1.

⁵⁷ E.g., Porto Court of Appeal judgment of 29 March 2017, case No. 256/16.7PAPVZ-B.P1, where the Court held that, if the precise determination of the moment when counsel became aware is impossible, the pleading of the nullity is to be accepted as timely. The Évora Court of Appeal judgment of 8 March 2016, case No. 4/07.2GAMMN.E1, started counting from the day the defendant was questioned with the assistance of counsel and an interpreter.

⁵⁸ Case No. 765/09.4PRPRT-A.P1.

⁵⁹ Case No. 921/19.7JAPRT-A.P1.

⁶⁰ Case No. 128/12.4GTABF.E1.

⁶¹ Case No. 884/15.8PBSTB.E1.

⁶² Case No. 55/2017.9GBLGS.E1.

⁶³ Case No. 53/19.8GACUB-B.E1.

who had signed a DIR drafted in Portuguese without being assisted by an interpreter or by legal counsel. The Court noted that, while from a merely formal perspective it could be said that the nullity had been rectified and the defendant was bound by the obligations arising from the DIR, from a fundamental rights perspective it was not certain that he had understood the meaning of those obligations and even less that he had been in a position to plead the nullity. Therefore, the DIR could not have any procedural relevance, since it could even lead in the future to the defendant's involuntary absence from the trial hearing, for lack of understanding of his procedural obligations, which would amount to an absolute (unrectifiable) nullity.

Two of the standout Évora Court of Appeal judgments also concern the DIR. In its judgment of 20 December 2018, the Court pointed out the insufficiencies of Article 92 of the Code of Criminal Procedure and criticised the 'lack of vision' of Portuguese courts for their insistence on making a literal interpretation of that provision. The Court held that the courts (much like the police and the prosecutors) have a positive obligation to ascertain whether the suspected or accused person is capable of understanding the proceedings and, when in doubt, must ensure the interpretation or translation of essential documents. In this regard, the Court held that the DIR had to be considered an essential document within the meaning of Article 3(1) of Directive 2010/64/UE and that therefore the signature of a DIR written in Portuguese by a German national about whom there was no certainty that she understood Portuguese constituted an invalid act.⁶⁴ Pursuant to the CJEU judgment in *TL*, the Évora Court of Appeal declared the nullity of the DIR (which had not been translated in writing into a language that the defendant understood) and of all subsequent procedural acts, and ordered the immediate release of the defendant, finding that any attempt to salvage some of the procedural acts that had followed the annulled DIR would relativize EU law and fail to fully comply with the CJEU judgment. Since then, the Court has on several occasions restated that Article 120(2)(c)(3)(a) is inapplicable and treated the failure to appoint an interpreter as an absolute nullity, which invalidates all subsequent procedural acts.⁶⁵

In an earlier judgment from 8 January 2013, the Évora Court of Appeal had held that the defendant could not be expected to plead the nullity derived from the failure to appoint an interpreter if he was unaccompanied by counsel, since pleading is a

⁶⁴In its judgment of 7 May 2019, case No. 22/13.1GBPTM.E1, the Évora Court of Appeal criticised the fact that several police actions of great procedural significance (including a house search and a DIR) had been conducted exclusively in Portuguese and without the assistance of an interpreter when the defendant was a British national who did not understand Portuguese, and acquitted him.

⁶⁵In its judgment of 25 October 2022, case No. 128/22.6GDFAR.E1, the Court concluded that the criminal proceedings against a foreign defendant who did not understand Portuguese and had not been provided with the assistance of an interpreter or a translation of essential documents were irreversibly null from the moment he was placed under investigation. In its judgments of 20 February 2024, case No. 428/21.2GESLV.E1, and 21 May 2024, case No. 399/22.8GESLV.E1, the Court found that the failure to provide a foreign national with a written translation of the accusation in his mother tongue, even though he was assisted by an interpreter during questioning in the investigative stage, amounted to an absolute nullity, which led to the nullity of all subsequent procedural acts. In its judgment of 23 April 2024, case No. 1485/23.2GBABF.E1, the Court annulled all the procedural acts subsequent to the placement under investigation of an Indian national due to the failure to appoint an interpreter to assist him after the alcohol blood test had determined that he was over the legal limit.

legal reaction, and added that, if the defendant meets his counsel for the first time at the reading of the judgment, he should be allowed to plead the nullity derived from the lack of interpreter on appeal against the judgment. Interestingly, what was at stake in the case at bar was not the appointment of an interpreter as such, but the quality of the interpretation provided. The Court stressed the importance of ensuring that the performance of the interpreter is effective, and held that the interpreter's failure to fulfil his or her role, or a deficient performance compromising the adequate understanding of the proceedings, amounts to a failure to appoint an interpreter and must be treated as such. The Court held furthermore that the failure to inform the accused person of the trial date in a language which he or she understands, and in a detailed manner, amounts to an impediment for the defendant to be present and constitutes an absolute nullity.⁶⁶

Another standout judgment from the Évora Court of Appeal is the judgment of 24 October 2017, where the Court found that the refusal of a German national to take an alcohol test, after having been stopped and subjected to an initial alcohol test by a police officer who interacted with him in English, did not constitute an offence of disobedience because he had not been assisted by an interpreter and it was therefore not certain that he understood that he was required to take a second alcohol test and the consequences of refusing to do so. Interestingly, the Court held that the use of English as a third language does not ensure unequivocal communication as is required in criminal proceedings, finding therefore that it was immaterial whether or not the accused and the police officer conducting the search spoke reasonably good English. This judgment is also interesting for the observations made *a propos* the capacity of the judge to determine, on his own, if the accused person understands Portuguese. The appealed judge had mentioned that he was not entirely persuaded that the defendant did not understand Portuguese, since he had answered instinctively to some of the questions he had asked during the hearing. The Court noted in this regard that, having had only very brief contact with the defendant, the judge's feelings or perceptions as to the defendant's understanding of Portuguese, if not confirmed by other means, were inevitably tenuous.

Finally, it is also worth mentioning the Porto Court of Appeal judgment of 22 January 2020, which concerned the notification of a decision to place an accused person in pre-trial detention. The Court held that, when that person is a foreigner who does not understand Portuguese, the oral translation of the decision is not sufficient, even if provided by a suitable interpreter, and the person is only considered to be duly notified after receiving the translation in writing of the decision, meaning that the time limit to appeal against the decision only starts after this date.⁶⁷

⁶⁶ More recently, the Évora Court of Appeal clarified that, if a defendant, after being placed under investigation and informed of his or her rights in a language he or she understands, is notified to appear in court at a precise date and time, receiving only a document written in Portuguese, that constitutes a nullity which requires the repetition of the invalid act and of all those that are dependent on it. Judgment of 25 May 2023, case No. 8/23.8GBABT-A.E1.

⁶⁷ It is worth noting in this regard that, in 2008, Portugal was found to be in breach of Article 6 ECHR for, among other reasons, having considered that the time limit to appeal a judgment ran from the moment when the judgment was served on the defendant in Portuguese and not from the moment he received the translation of the judgment in Ukrainian. *Panasenko v. Portugal*, judgment of 22 July 2008, application

As anticipated, the positive evolution in the case law of Portuguese courts with regard to the recognition of the importance of linguistic assistance to ensure the rights of defence and a fair trial – largely driven by Directive 2010/64/EU and mostly visible in the last five years – is not consistent across the different appellate courts and even within the same appellate court. For example, the Lisbon Court of Appeal, in a judgment from 15 June 2021,⁶⁸ held that it was not necessary to appoint an interpreter for a house search conducted pursuant to a court order since the person concerned had not yet been indicted and was merely a suspect. The Coimbra Court of Appeal, in a judgment from 24 April 2024,⁶⁹ held that the Code of Criminal Procedure does not require the presence of an interpreter during searches conducted at the initiative of the investigative authorities, nor for the placement under investigation and the DIR of a foreigner who does not understand Portuguese. The Guimarães Court of Appeal, in a judgment from 2 July 2024,⁷⁰ held that if a defendant who does not understand Portuguese is voluntarily absent from the reading of the judgment, but is represented by legal counsel who understands Portuguese, there is no need to deliver a translation of the judgment in writing. The Évora Court of Appeal held, in a judgment from 10 July 2024,⁷¹ that Directive 2010/64/EU does not require an extension of the time limit for appeal, nor does it stipulate that the time limit only starts after delivery of a translation of the judgment in writing, and concluded that, since the defendant was present at the reading of the judgment and was assisted by an interpreter who provided an oral translation, he had been duly notified of the judgment on that date.

4.3 Views of Key Stakeholders

One of the most consistent findings of the individual and group interviews with judges and prosecutors is that they do not consider that cultural diversity raises particular challenges to court practice and are confident that Portuguese courts are well equipped to address culturally based claims and ensure a fair trial to all without discrimination. The only form of diversity that they are willing to concede as somewhat challenging is linguistic diversity – to the extent that it requires intermediation by interpreters – but even here, many expressed confidence that Portuguese courts are able to ‘make do and mend’, to quote the expression used *a propos* the UK courts in *Cuscani v. United Kingdom* (§ 38).⁷² Unsurprisingly, the participants in the focus groups with attorneys and representatives of civil society organisations were less

No. 10.418/03, §§ 51–53. Meanwhile, in a judgment of 21 May 2024, case No. 597/23.7PCAMD-A.L1-3, the Lisbon Court of Appeal found that, since the judgment had been read in summary version and the defendant had requested a written translation into Nepali, which had been granted to him, the time limit for the appeal only ran from the date on which he was notified of the translation of the judgment in its entirety.

⁶⁸ Case No. 5/19.8ZCLSB-C.L1-9.

⁶⁹ Case No. 20/20.9GAIDN.C1.

⁷⁰ Case No. 161/23.0GAMTR.G1.

⁷¹ Case No. 279/23.0PBBJA-A.E1.

⁷² Interviewees told us: ‘The interpreters, whenever it was necessary, always overcame the issue’ [FGJ8]; ‘[the interpreter] summarised what people said and there were some difficulties, but in the end we understood’ [FGJ4]; ‘We manage, each time better and with interpreters, as well as possible. Sometimes it is difficult, takes time, but we manage’ [FGP9].

optimistic, pointing out as negative aspects the judges' habitual dismissiveness of the language barriers and reluctance to appoint interpreters for defendants whose mother tongue is Cape Verdean or Bissau-Guinean Creole,⁷³ as well as the difficulties in having an interpreter appointed for meetings with defendants held in prison.⁷⁴

The practical difficulties pointed out by judges and prosecutors concern mainly the scarcity of interpreters for some language combinations and the frequent need to resort to amateurs, such as high school teachers and shop owners;⁷⁵ the break in the flow of communication during the hearings, which the intervention of interpreters necessarily entails;⁷⁶ and the discomfort derived from their lack of control over the accuracy of the interpretation provided when they do not understand the foreign language being used, coupled with distrust of some interpreters' technical accuracy

⁷³ 'It does not even occur [to the judges], for example, that there are interpreters of Creole in the courts and, in the case of Amadora and Sintra, this question should effectively be raised in the courts, because there is a large community and it may be very relevant for the production of evidence' [FGA8]; 'We go to court with clients who do not speak Portuguese or who speak it very poorly and would naturally need a Creole interpreter or whatever, [but] the judges just speak louder because it is a bother to bring in a translator. And when we argue that maybe the persons would need a translator because they do not understand Portuguese enough to understand what is going on, they tell me to explain it better outside [the courtroom]. But I also do not speak Creole, or Hindi, or Gujarati, and speaking louder will not solve the problem. This is cross-cutting; it happens in the courts because [having to find and appoint an interpreter] would delay the proceedings and would cause many inconveniences, and therefore persons are tried and sentenced without having a minimum capacity to understand' [FGA5]. The judges' reluctance to appoint interpreters of Creole is confirmed by a statement made by one of the judges interviewed, quoted in fn. 76 below.

⁷⁴ 'We do not get, not even through request to the court or the bar association, an interpreter appointed to accompany us to jail, and we arrive in court to defend them without ever having spoken with them, because the interpreters are not made available and are not paid by the state to accompany the attorneys in their visits to those who apply for legal aid' [FGA5]; 'Someone must explain to the General Directorate of the Prison Services that it must have, like the courts, a team of translators who are not stopped at the entrance [to the prison], that is, the attorney for the Romanian community, with Romanian clients in prison, has a problem! Has a judicial questioning, goes to the prison, the law says that for 48 hours the attorney can go to prison to speak to the foreign detainee, but it does not allow the translator to enter!' [FGCSO7].

⁷⁵ 'We had situations in which the defendants were released from prison because we could not find an interpreter within 48 hours to conduct the first questioning, mainly Arabic and Chinese' [FGJ7]; 'It was like this: we need a translation from Romanian or Ukrainian, then there was someone or someone knew someone, as a last resort, we looked in the community for some Ukrainian or Romanian gentleman who has a store, he must know, well.... The result was not always entirely satisfactory. Also because a part of the translation must be technical and therefore, if it is not done by someone competent, a very wrong idea may be conveyed' [IJM25]; 'There are translators who are found in ways that I am not very happy with... the only thing that makes them translators is knowing the language' [IPW11].

⁷⁶ 'Sometimes, the biggest difficulty I feel is with people, namely Cape Verdeans, Guinean, who already speak Portuguese, but continue to use some expressions specific to the Cape Verdean or the Guinean Creole, and that therefore creates some difficulties of communication which could possibly be solved by an interpreter, but the interpreter would then be a third element which will always break the dynamic between the judge, the prosecutor, etc. and the person, because from the moment the interpreter arrives the person no longer speaks both languages; he or she starts to speak solely in Creole and therefore there is a loss there.... [These are] situations for which often there is no good option' [FGJ5]; 'It is a bit different from a trial with a national citizen, where we ask a question and immediately see his reaction. It is not just what is said, but also the body language that the judge must also consider and, with this language barrier, the principle of immediacy is hindered. It has happened many times that we ask a question with half a dozen words and sometimes the translation takes one minute' [FGP1].

and/or impartiality.⁷⁷ The fact that some of the hearings are recorded was mentioned as a safeguard against possible shortcomings in the interpreters' performance.⁷⁸ The use of English as third language was pointed out by judges and prosecutors as an unsatisfactory solution of last resort⁷⁹ – which squares well with the case law, where the standard reference is to the defendant's mother tongue⁸⁰ – but participants in the focus group with interpreters mentioned that oftentimes the courts appoint interpreters of English primarily to allow the judges to understand the exchanges between the interpreter and the person being questioned.⁸¹

Some judges and prosecutors showed awareness of the situational character of linguistic competences and of the complexity of legal translation, even for experienced and skilled interpreters, namely due to dialectal variations within the same language.⁸² Others seemed less aware, expressing an unreserved trust in the system that the courts have in place to appoint suitable and competent interpreters, and even incredulity at the possibility of interpreters not providing an accurate translation of

⁷⁷ 'We have many difficulties in having an accurate translation. There are languages in which we manage to understand and manage to intervene and we have sometimes replaced interpreters during a hearing because they are not providing an accurate translation. Other times we are at their mercy, because we do not have a command of the languages and they say what they want – we do not know [what they are saying], we are not sure. Many times, people have complained that that was not what they said and there is no way of reviewing it, so I think it complicates [the proceedings] a lot' [FGJ7]; 'That translator, well, with a feeling of belonging, was trying to help the defendant who was from the same country as her and was saying that he did not know etc....' [IJM24]; 'We ask a question and the interpreter, instead of asking the question in an objective and dry manner, no, he asks the question and we see that he does something else and the person answers and he asks another question, that is, we witness a dialogue between translator and the person and it is completely out of our hands what is happening' [IPM32]; 'It is obviously often difficult to find an interpreter and a reliable one, because often the problem lies there' [IJM29].

⁷⁸ 'If we suspect that something is not right or might not be right, some of these proceedings are recorded and the image may help' [FGP9]; 'The trials being recorded also sometimes help us guard against some deficiencies in the interpreter's performance, which can compromise the accuracy of the statements made' [FGP11].

⁷⁹ 'I had many difficulties in finding a person to translate; I even asked the embassy, and then we did things in English and I had the impression that the person did not understand English well...' [IJM12].

⁸⁰ There are a few judgments, however, where the use of English is considered inevitable for reasons of expediency. That was the case, for example, in the Lisbon Court of Appeal judgment of 20 February 2019, which concerned a defendant whose mother tongue was Nepali, but who was proficient in English, both written and spoken. The Court held that there is no obligation to appoint an interpreter for the defendant's mother tongue or dialect (which, it pointed out, would be simply impossible in many situations), but instead what is required is the use of a language that the defendant understands and is able to express him/herself in. Nothing prevented therefore the appointment of an interpreter or the translation of the accusation in English, or another language, provided the purpose of the provision granting the defendant the right to be assisted by an interpreter is fulfilled. Case No. 806/17.1PWLSB.L1-3.

⁸¹ 'The only thing is that, many times, they call an English translator or interpreter for a German witness who speaks poor English so that the judge can follow. Sometimes this is very difficult because the German witness is unable to explain herself in English. So, the situation is unfair. It has happened to me a number of times and it is very difficult and they have the right to an interpreter in their own language' [FGI5].

⁸² 'It is very different, the Portuguese used in the supermarket or a store and the Portuguese to be questioned in court, you see? Even when they say "I speak good Portuguese", it is always necessary to have an interpreter' [IJM28]; 'In some languages such as those of the Chinese, Pakistani, Hindus, in which there is such diversity of languages, dialects... it is very difficult for a given translator to provide a faithful translation. And we sometimes realise that' [FGJ9]; 'Much information is lost along the way, no matter how good the interpreters are' [IJM37].

what is said in the hearings.⁸³ It is not entirely clear whether the more trusting, optimistic testimonies came from a place of self-preservation and institutional loyalty or are simply the result of lack of training on working with interpreters and indifference as to the technical challenges faced by interpreters and translators. The interpreters we interviewed said that the most challenging aspect of working with the courts is the fact that they almost never have prior access to information about the legal subject that will be dealt with and are forced to work without a net, even when the courts contact them well in advance (and not on the same day, as is often the case).⁸⁴ There seem to be many misconceptions about the role of interpreters, including the range of language combinations they can work with, the time needed for preparation and translation of documents, and the extent to which interpreters and translators can rely on translation technology.⁸⁵ Another misconception is that interpreters can, in addition to interpreting, be expected to give cultural information about the background of the persons being questioned,⁸⁶ which is problematic from a deontological perspective, since it is not the interpreters' job to provide that kind of information to the courts [8: 145], even though interpreters and translators are inevitably acting as 'cultural mediators' [22: 2]. On the part of the interpreters themselves, there seem to be some misunderstandings as to their role in criminal proceedings, since the examples they volunteered as good work experiences in court were the rare occasions in which judges invited them to sit by their side, which they explained as better than the usual standing side-by-side with the defendant both because it allowed them a view over the whole courtroom and of the various participants, and it gave them a table on which to place their working materials.⁸⁷ However, this is not entirely without

⁸³ 'When we appoint an interpreter, we appoint a person who, obviously, is suited, that is, who is reliable in his performance vis-à-vis the foreigner, who speaks his language' [IJM5]; 'There was never a situation in which I was left wondering if that was or was not what was said, also because I cannot even imagine for what reason the translator, with what interest, would adulterate anything. I cannot even understand. It never happened to me, I never had that suspicion' [IJM6]; 'Interpreters are competent, so, nothing out of the ordinary, no troubles. I always assume that we are all in good faith, assume the persons perform their tasks correctly' [IJW15].

⁸⁴ 'My experience with the courts is always to go without any net at all. I do not know if it is a white-collar crime, smuggling of goods into the EU, I do not know what it is about' [FGI9]; 'Oftentimes we go to the court without any information. We do not know what we will interpret. That is what happens most of the time' [FGI8]; 'I only remember one time going to the court and the judge being so kind and patient to talk to me five minutes before and explained what the subject was. But even here, only after I arrived in court!' [FGI4]; 'Generally the biggest challenge is always to get access to the documents, right? Access to the subject matter that we will be interpreting, right? Sometimes we are just "parachuted" in there...' [FGI7].

⁸⁵ 'The worst part is when they sometimes have no idea what it is to be a translator. I said: 'I am sorry but my languages do not include Moldovan or Russian, so... 'Ah, but are you not a translator?' 'I am a translator but only for some languages.' So, sometimes it is difficult to explain, also because, since we work increasingly more with IT tools and translation programmes which help a lot, but there is still the need for the translator to revise the text and ensure that it is correct. For interpretation it is the same. Our area of work and our function are scarcely understood' [FGI4].

⁸⁶ 'We often use the interpreters because they are persons who know well who we are dealing with culturally and clarify what is needed' [IPM32]; 'This interpreter was also, because he knows the culture in question, decisive to understanding all the aspects of that relationship' [IPW18].

⁸⁷ 'The first time I interpreted in court, I was made to sit next to the judge. It was excellent, because I got a completely different view and had the witness in front of me. The fact that I am side by side with the witness is a complicating factor, because I do not see the attorneys and cannot see the witness. Being at the

problems, as it may raise doubts in the defendants and other intervening parties as to whether the interpreters are there to assist the defendants (as they should) or the court, a potential source of confusion already signalled as problematic by the European Commission during the run-up to Directive 2010/64/EU [11: 531]. With regard to the neutrality expected from interpreters, the participants in the focus group with interpreters acknowledged that it is clearly a requirement, but also that it is difficult to maintain in certain circumstances,⁸⁸ which confirms the inadequacy of common expectations about interpreters' neutrality and invisibility [1: 186; 4: 313–314] and also the fears expressed by some of the judges and prosecutors heard.

5 Concluding Remarks

The good news is that Directive 2010/64/EU prompted positive (if belated and not thoroughly consistent) developments in Portugal's statutory legal framework and case law on the rights to interpretation, translation, and information in criminal proceedings. There seems to be little doubt as to the importance of linguistic assistance for the exercise of the rights of defence and a fair trial,⁸⁹ which suggests that blatant indifference to the negative effects of language barriers for those who do not understand the language of the proceedings is a thing of the past. However, despite the CJEU judgment in *TL* and the recent case law of the Évora Court of Appeal, the law in the books still treats the failure to appoint an interpreter as a relative nullity which can be rectified if not pleaded in time, instead of treating it as an absolute (irreversible) nullity and making it a reason for postponing the act, as is now the rule for the appointment of sign language interpreters in Article 93(2) of the Code of Criminal Procedure.

Equally (if not more) important is the work still to be done to comply with Articles 5 and 6 of Directive 2010/64/EU, to ensure the quality of the interpretation and translation provided to defendants in criminal proceedings. As suggested by the findings of our interviews, while blatant indifference to language barriers among judges and

attorneys' or the judge's table could help in some cases, not all' [FGI5]; *'Sometimes, the judges have that understanding, that kindness, and invite us to be next to them at the table and that is very pleasant because it allows for better work, right? A better performance, but of course it all depends on the judge's sensitivity to invite you to sit next to him or her'* [FGI7].

⁸⁸ *'When I go, I am called by a law firm which works for one of the parties, but before the judge I must translate what is said with the utmost neutrality'* [FGI7]; *'We must think that sometimes, perhaps, our role is important, because we have to be neutral and there are also judges and attorneys who have to defend people whom they do not like, right? It is true that it touches us – it is impossible not to be touched, and it is very difficult to be impartial in some situations'* [FGI4]; *'I confess that I also have some difficulties with neutrality. I once whispered to a Portuguese person – I knew that I shouldn't, but I told the man: "Don't say that. Say something else." Because the man was going to jail. And I, well...'* [FGI9].

⁸⁹ *'People have the right to understand what is said to them... not only understand the decision, but also what goes on at the trial, so I make a point of having an interpreter from the very start'* [IJM21]; *'It is elementary for someone to be able to defend themselves, to understand what is being said to them... I think that is like trying to put ourselves in the place of the other, someone who is in a country where he does not have command of the language, who has a problem to solve, who is stuck in a court hearing with all the formality that goes with it, is normally nervous and the only person with whom he can communicate is the person who speaks the same language'* [IJW2].

prosecutors is not common, there are still some blind spots regarding how well the system works and what can and should be done to improve it. Training of judges, prosecutors, and judicial staff, but also of interpreters and translators working in judicial settings, attorneys, and investigative officials, is key to dispelling current misconceptions about the role of interpreters and translators, and for all to better understand the specificities (technical and ethical) of legal translation and the rights of suspected and accused persons to linguistic assistance and information in criminal proceedings.

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