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The new European directive on the rights to interpretation and translation in criminal proceedings

1 Introduction

On 20 October 2010, the European Parliament and the Council adopted Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings. The Directive is the first legislative instrument in the field of criminal law to be adopted under the Lisbon Treaty. This is the first step of a programme designed to increase mutual trust between Member States in relation to their criminal justice systems. The Commission is committed to this procedural rights package so as to honour our commitment, via the EU Charter, to protect fundamental rights in the EU and to facilitate the operation of mutual recognition between judicial authorities in the EU.

2 Background

In its criminal law legislation, the EU uses a concept called "mutual recognition". It is borrowed from the internal market, where it is an economic concept: if an item is suitable for sale in one Member State, then all the Member States should accept it for sale without further enquiry. That notion has been adapted to judicial decisions. European measures such as the Framework Decision on the European Arrest Warrant¹ (a mutual recognition measure whereby an arrest warrant is recognised as valid and executed rapidly and without the formal procedure of extradition, which has now been almost entirely abolished throughout the EU) have been adopted, and they in turn have generated a demand for the EU to consider fundamental rights, especially the rights of the defence, in a rather more concrete way.

The Commission decided, in 2001, to present a proposal that would set in place basic minimum standards for defence rights throughout the EU. This was important if we are to recognise each others' judicial decisions as equivalent to domestic judicial decisions and all that entails (e.g. sending one's nationals to another Member State to face trial, sending evidence across borders for use in trials, receiving one's nationals back from another Member State where they have been sentenced to prison in order that they serve their sentence back home).

In the research phase for the proposal, it became quickly clear that there was a problem with the varying standards of legal interpreting and translation available in criminal proceedings throughout the EU. All Member States are signatories to the ECHR (this is a requirement for joining the EU) and the ECHR provides that anyone facing a criminal charge should be provided with the services of an interpreter, free of charge, if

¹ Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002, p. 1.

s/he doesn't understand the language of the proceedings. However, the information we received suggested that this requirement was not complied with in a satisfactory way in all EU Member States.

The Commission held an experts' meeting held in October 2002. At that meeting, experts from various institutions (the Institute of Linguists, the Committee for Legal Translators and Court Interpreters of the International Federation of Translators (FIT) and Lessius Hogeschool) set out their "vision". The experts suggested that minimum requirements for court translators and interpreters should be a good, broad educational background and a knowledge of as many subjects as possible, including cultural specificities as well as linguistic skills, that linguistic training be as full as possible (for example for interpreters learning not just conference interpreting but also whispered, consecutive and simultaneous interpreting), that there be training in the legal systems of the countries that they use the languages of, with visits to courts, police stations and prisons, leading to a recognised qualification, that Member States introduce a system of accreditation or certification for these translators and interpreters, and that the accrediting body work in collaboration with the Ministry of Justice of the country in question, that accreditation be by way of a scheme of registration that is not "once and for all", but rather subject to review so as to encourage professionals to keep their language skills and knowledge of court procedures up to date. It was also suggested that there be a system of Continuous Professional Development, a Code of Ethics and Guidelines for Good Practice and that Member States undertake to train lawyers and judges to work with translators and interpreters. Member States that didn't have any training system should be made to offer one.

In some Member States, translators and interpreters were found to work under very poor conditions, e.g. even a prisoner's cellmate could be used as an interpreter.

Cost was often mentioned as a reason why Member States do not fulfil their ECHR obligations in this respect. The Commission took the view that Member States should make funds available for this purpose. Court interpreters and translators should be offered competitive rates of pay so as to make this career option more attractive to language graduates. This should not be seen simply as a question of salary. Better rates of pay would attract more people into the profession, but there are other factors too, such as treating language professionals with more respect, consulting them about court procedures and involving them in such a way as to ensure that their specialist skills are acknowledged and valued.

The Commission's own research confirmed that there were problems. During police questioning, a qualified interpreter was not always present, with defendants sometimes being offered the services of lay persons who had some knowledge of the defendant's language. There were limitations on the documents translated for defendants. At trial, interpreters were sometimes provided for the benefit of the judge and/or prosecutor, rather than for the defendant. In some instances, the judge's or prosecutor's statements were not interpreted for defendants and the role of the interpreter was limited to interpreting the judge's direct questions to the defendant and his replies back to the judge, rather than ensuring that the defendant could understand the proceedings.

The Commission also noted that Member States had difficulty in recruiting sufficient legal/court translators and interpreters. In some Member States, the profession of public service interpreter/translator has official status, with training organised at national level, registration, accreditation and continuous professional development. This is not the case in all Member States. The Commission found that the profession suffers from a lack of

status, with translators and interpreters sometimes being poorly paid, not having social benefits (such as paid sick leave and pension rights) and complaining that they are not consulted enough by their counterparts in the legal profession.

This Commission wanted Member States to be required to ensure that the arrangements they offer to legal translators and interpreters were such as to make this an attractive career choice. It is essential that there are enough translators and interpreters in each Member State to cover the needs of foreign defendants.

The Commission followed up this experts' meeting with a Green Paper in 2003 and then, in 2004, a proposal for European legislation covering a number of rights, including the right to interpretation and translation, in criminal proceedings. The proposal did not take up all the suggestions of the linguistic experts but it represented a start.

The proposal was discussed for nearly 3 years in a working group made up of the Commission, the Council and representatives of all the Member States. Prior to the Lisbon Treaty entering into force, when dealing with criminal law matters, there was a requirement of unanimity. Despite our best efforts, unanimous agreement could not be reached, and the proposal was finally shelved in June 2007.

Under the 2009 Swedish Presidency, it was decided to try again to put forward legislation on rights, but this time, not to put forward a proposal covering all rights, but rather a number of separate proposals covering a number of different rights. The agreement to do this is known as the "Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings".

The first measure in the roadmap is on translation and interpretation.² The Commission put forward a proposal for a Framework Decision, the old pre-Lisbon Treaty instrument, in July 2009. The Lisbon Treaty entered into force on 1 December 2009. In the immediate aftermath, Member States put forward a proposal for a Directive, using the text that had been agreed as a result of the negotiation on the Commission's July 2009 text. That Member State proposal is what formed the basis for the text finally adopted in October 2010.

In July 2009, when the Commission presented its proposal for a Framework Decision, the Swedish Presidency presented an accompanying draft Resolution on "best practice". This Resolution fell within the scope of the Roadmap, according to which action to strengthen the rights of suspected and accused persons could comprise legislation "*as well as other measures*". The proposed Resolution encouraged Member States to promote measures on the involvement of bodies representing interpreters and translators, qualification of interpreters and translators, training, registration of qualified interpreters and translators, remote access to interpretation, and codes of conduct and guidelines on best practice. In October 2009, unanimous agreement was reached on the text. The Resolution was not formally adopted, however, since it was linked to the draft Framework Decision, which had to be "abandoned" after the entry into force of the Lisbon Treaty.

During the negotiations for the adoption of the Directive, particular attention was paid to the European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights in Strasbourg (ECtHR). The Directive had to be "Strasbourg-proof", meaning that the text should, as a minimum, meet the standards of the ECHR, as interpreted in the case law of the ECtHR.

² Resolution of the Council of 30 November 2009, OJ C 295,4.12.2009, p. 1

3 Details of the Directive

3.1 Scope (Art. 1)

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

According to Art. 1(1), the Directive applies to criminal proceedings as well as to proceedings for the execution of a European Arrest Warrant (EAW).

The Directive does not give a definition of “criminal proceedings”: this legal concept should be interpreted in the light of the case-law of the ECtHR with respect to the field of application of Art. 6 ECHR. The specific reference to EAW proceedings was necessary in view of the fact that extradition procedures do not fall within the scope of application of this ECHR provision. It was decided that the Directive should not lay down cumbersome obligations where the offences were minor, e.g. traffic offences following roadside checks, where sanctions/fines are imposed “on the spot” by police. It would not be reasonable to require that interpreters be available for such roadside checks. In order to address this concern, Art. 1(3) of the Directive provides that “where the law of a Member State provides for the imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed to such a court, this Directive shall apply only to the proceedings before that court following such an appeal”.

3.2 Right to Interpretation (Art. 2)

The right of the suspected or accused person to benefit from the services of an interpreter is set out in Art. 6(3)(e) ECHR. There is a divergence in Member States about their legal and practical implementation of this principle. The greatest divergence relates to client-lawyer communication. Whereas in some Member States, interpretation of communication between the accused and his lawyer is provided almost without limit, in others, such communication is not interpreted at all or only with substantial restrictions.³

Under this provision, interpretation of client-lawyer communication is to be provided (free of charge) “where necessary for the purpose of safeguarding the fairness of the proceedings”. In order to prevent possible abuses of this right, the communication should be “in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural application”. Article 2(2) provides that interpretation is to be provided during any appeal or “other procedural application”. This term has been left vague; recital 20 refers to the example of an “application for bail”.

Art. 2(6) provides for the possibility of “remote interpretation”. In order to allow for the prompt assistance of an interpreter in situations where there is no interpreter at hand at short notice, interpretation can be facilitated via videoconference, telephone, or Internet. This is already apparently successfully employed in several Member States. (e.g.

³ The restrictions are justified in various ways: the most important is costs, but the restrictions may also serve to prevent the defence from using a request for interpretation to slow down proceedings. In some Member States, interpreters are at the service of the court and not the suspected or accused person, so that the only communication to be interpreted is that between the court and the suspected person.

in cases of rare languages if an interpreter cannot – for reasons of time or distance – attend the location of the proceedings). However this option can only be used if the physical presence of the interpreter is not required “to safeguard the fairness of the proceedings”.

3.3 Right to Translation (Art. 3)

Art. 3 provides for the right to translation of *essential documents*. This right is not expressly included in Art. 6 ECHR. It can be implied from the ECtHR case-law since other ECHR rights (Art. 6(1) and (3) ECHR) can only be effective if the suspected or accused person who does not speak or understand the language of the proceedings, is able to understand the content of the trial.⁴

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

Art. 3 (2) specifies three types of essential document that must always be translated: “any decision depriving a person of his liberty, any charge or indictment, and any judgment”.⁵

Art. 3(7) allows “an oral translation or oral summary” of essential documents. The case-law of the ECtHR⁶ allows an oral translation or oral summary to be provided instead of a written translation.

The “competent authorities” of the Member States will be responsible for applying these provisions. Under Art. 3(3), it is for them to decide which documents are to be considered essential - apart from those listed in Art 3(2) - as well as which documents may be translated in part – Art 3(4)- or orally - Art 3(7).

Art. 3(7) provides that a suspected or accused person may waive the right to translation, if they “have received prior legal advice or have otherwise obtained full knowledge of the consequences of such a waiver, and that the waiver was unequivocal and given voluntarily”.

3.4 Other Provisions

The need to ensure quality of the translation or interpretation provided to the suspected or accused person is the object of specific provisions in Arts. 2(8) and 3(9), which require a “quality sufficient” to ensure “that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence”. Furthermore, the quality of the service provided may be the object of a specific review procedure according to Arts. 2(5) and 3(5).

⁴ See *Kamasinki v. Austria*, 19 December 1989, in particular par. 74.

⁵ But NB Art. 3(4) excludes from the scope of the right to translation “passages of essential documents which are not relevant for the purposes of enabling suspected or accused persons to have knowledge of the case against them”.

⁶ *Hermi v. Italy*, 18 October 2006, par. 70, “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”.

The Directive also addresses the question of practical availability of qualified legal interpreters and translators. Art. 5(2) invites Member States to set up “a register of independent translators and interpreters who are appropriately qualified”, which, where appropriate, should be made available to legal counsel and relevant authorities.⁷

Recital 32 provides that the level of protection of the Directive should never fall below the standards stipulated by the ECHR and by the Charter. Indeed, the Directive is supposed to be “Strasbourg- and Charter-proof” and should be interpreted and applied in such a way.

Recital 33 provides that the provisions of this Directive that correspond to rights guaranteed by the ECHR or the Charter should be interpreted and implemented consistently with those rights.

Art. 8 contains an important non-regression clause: nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the ECHR, the Charter, other relevant provisions of international law, or the law of any Member State that provides a higher level of protection.

Member States have to transpose the Directive by 27 October 2013.

⁷ See recital 31, which encourages Member States to provide wider access to the registers by way of the e-Justice portal.