

The impact of Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings

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1. DIRECTIVE 2010/64/EU ON THE RIGHT TO INTERPRETATION AND TRANSLATION IN CRIMINAL PROCEEDINGS

Directive 2010/64/EU of the EU Parliament and Council on the right to interpretation and translation in criminal proceedings was adopted on 20 October 2010.¹ This Directive (Measure A) was the first of a series of Directives planned under the Stockholm Roadmap.² The subsequent topics to be covered by Directives relate to the right to information on rights and information about the charges (Measure B), the right to legal advice and legal aid (Measure C), the right to communication with relatives, employers and consular authorities (Measure D), and special safeguards for suspected or accused persons who are vulnerable (Measure E).

The adoption of Directive 2010/64/EU marked a milestone in the long history of efforts by legal interpreters and translators to obtain a certain measure of official recognition. In essence, the different articles of the Directive stipulate that suspected and accused persons have the right to obtain the services of an interpreter whenever they do not speak the language of the court (Article 2) and to obtain a

¹ EN L 280/6 Official Journal of the European Union, 26.10.2010.

² Official Journal C 295, 4.12.2009, p. 1.

translation into their mother tongue (or a language they can read and understand) whenever they are confronted with an essential document or a European Arrest Warrant (Article 3). The “essential documents” include any decision depriving a person of his/her liberty, any charge or indictment, and any judgment.

Article 5 then requires that the interpretation and/or translation provided to a suspected or accused person is of a quality sufficient to safeguard the fairness of the proceedings. In particular, it must be ensured that – with the interpretation or translation provided to him/her – the suspected or accused person has sufficient knowledge of the case against him/her and is able to exercise his/her right of defence.

The Directive also states in Article 5 that – in order to promote the adequacy of interpretation and translation and efficient access thereto – Member States shall endeavour to establish a register or registers of independent translators and interpreters who are appropriately qualified. Once established, such register or registers is/are to be made available to legal counsels and relevant authorities, whenever appropriate.

Article 6 then requests that those responsible for the training of judges, prosecutors and judicial staff involved in criminal proceedings pay special attention to the particularities of communicating with the assistance of an interpreter so as to ensure efficient and effective communication.

Finally, Member States are called upon to bring into force the laws, regulations and administrative provisions necessary to comply with Directive 2010/64/EU by 27 October 2013.

2. TRANSPOSITION OF DIRECTIVE 2010/64/EU

As Directive 2010/64/EU requires that ministries of justice should take specific measures concerning all judicial stakeholders, i.e. judges, prosecutors, court and police staff, lawyers, court interpreters and certified translators, EULITA applied for EU funding to carry out a project that would create better understanding of the Directive articles and support all those concerned in transposing its provisions. This project – TRAFUT (Training for the Future) – consisted of four regional workshops to which all judicial stakeholders were invited. The workshops were held in Ljubljana (November 2011), Madrid (March 2012), Helsinki (June 2012) and Antwerp (October 2012). On average, 80 to 100 participants attended the two-day workshops.³

TRAFUT addressed the very practical issues deriving from the Directive such as the qualifications that legal interpreters and translators should have in order to provide high-quality services, the experience gathered by lawyers, police

³ Information about the structure and content of the workshops is available on EULITA's website: www.eulita.eu. Most of the presentations given at the workshops can also be found there.

officers and judges when communicating through legal interpreters, the regimes used by court administrations to recruit legal interpreters and translators, the remuneration schemes applied to interpreting and translation services, and the admission criteria for registers of legal interpreters and translators as well as their management. Current training programmes and outlines for future training programmes were also discussed at the TRAFUT workshops.

The discussions among the judicial stakeholders in the course of the workshops eventually led to the adoption, by EULITA, of a Code of Professional Ethics (adopted at the 2nd General Assembly of EULITA in Prague, Czech Republic, February 2012, and updated at the 3rd General Assembly of EULITA in London, United Kingdom, April 2013), a “Vademecum” (a set of guidelines for judges and lawyers, in particular, on points to observe when communicating via an interpreter; it was drafted in cooperation with the ECBA [European Criminal Bar Association] and will be supplemented by a similar text for legal translations in the course of the QUALETRA project [Quality in Legal Translation]) and a basic outline for a register of legal interpreters and translators.⁴

During the period reserved for transposition, members of the EULITA Executive Committee were also invited to speak at a number of seminars, workshops and round tables to present to national audiences of judicial stakeholders the substance of Directive 2010/64/EU and present EULITA's views on possible transposition steps. Furthermore, EULITA was invited to an Expert Meeting hosted by DG Justice in Brussels in April 2013 to report about the TRAFUT project.

Another interesting and perhaps more hands-on project in connection with the transposition of Directive 2010/64/EU was the ImPLI project (Improving Police and Legal Interpreting). Six universities in France, Germany, Belgium, Scotland, Italy and the Czech Republic participated in this project which described the legal systems in these countries. In addition, six videos demonstrate the police interviewing practices in the participating countries. One objective of the project was to provide interpreter training institutes with a better understanding of the interviewing techniques developed by the police, customs and prosecution services and thus enhance their training methods. The other objective was to inform police and prosecution services about interpreting techniques and how these techniques can assist them in their work when properly implemented.⁵

The present event is held at a very important date – as far as the transposition of Directive 2010/64/EU is concerned – namely more or less on the deadline date for transposition: 27 October 2013. According to current EU sources, eight countries have communicated their national execution measures, and one country reported that it did not see any need to adopt any transposition measures.

⁴ Details can be found on the EULITA website.

⁵ Details about the ImPLI project can be found on both the ISIT website – www.isit-paris.fr – and the EULITA website.

One therefore needs to wonder about what will happen in the remaining nineteen EU Member States.

3. CURRENT SITUATION OF LEGAL INTERPRETING AND TRANSLATION IN EU MEMBER STATES

Perhaps a brief look at the CEPEJ 2012 Study will shed some light on the required transposition measures in the various EU Member States.⁶ The study offers valuable information about the approach adopted by some countries, especially by ministries of justice in EU Member States, concerning their national regimes in relation to legal interpreting and translation services.

First of all, EU Member States hold divergent views on the criteria that should be applied to legal interpreters and translators. What is generally absent is an EU-wide position on the standards to be applied to the qualifications of legal interpreters and translators. There is also a general feeling about the fact that the EU Directive, which at the time of the cited CEPEJ Study was still being transposed by EU Member States, was limited to criminal proceedings. This can be seen as a drawback (see below), as legal interpreters and translators are also recruited for civil proceedings. A common regime should apply to both criminal and civil cases, as the current practice in most countries expects legal interpreters and legal translators for criminal proceedings also to accept assignments in civil proceedings.

One question in the CEPEJ 2012 Study inquired whether the title of court interpreter was protected by law and whether the functions of court interpreter were also regulated by law.

Affirmative answers came from thirteen EU member states, namely Austria, Croatia, Cyprus, Czech Republic, France, Latvia, Luxembourg, Netherlands, Poland, Portugal, Slovakia, Slovenia, and the United Kingdom (Scotland). A closer look at the protective and regulative provisions in force in these countries reveals, though, that the respective standards are highly divergent and that real-life circumstances do not bear out the effectiveness of these legal regimes. It would definitely serve the purpose of the Directive if the title and functions of legal interpreters and translators were clearly defined and protected.

One EU Member State (Hungary) indicated that the title of court interpreter was protected. When considering the Hungarian situation – one central agency responsible for certifying translations – one realizes that this protection offers legal interpreters and translators little practical value.

Only the functions of court interpreters are regulated in five EU member states, namely Denmark, Italy, Romania, Spain and United Kingdom (N-Ireland). Again, the discrepancies among these countries are considerable and no comparisons can be drawn on the actual regulations pertaining to legal interpreting and translation functions.

⁶ CEPEJ: European Commission for the Efficiency of Justice (Council of Europe).

Finally, the CEPEJ 2012 Study lists ten EU member States where the title “court interpreter” is not protected and where the functions of court interpreters are not regulated. These are: Belgium, Bulgaria, Estonia, Finland, Germany, Greece, Ireland, Malta, Sweden and the United Kingdom (England + Wales). In view of the fact that several of these countries have two (in the case of Belgium actually three) official languages, it is most surprising that national authorities have not seen any need to date to implement a proper regime that would ensure reliable and effective language services by professional interpreters and translators. Moreover, when considering that the United Kingdom used a National Register of Public Service Interpreters, created in 1994, as a basis for assignments to judicial settings, it is surprising to find the United Kingdom in this category of countries.

In a further question the CEPEJ 2012 Study inquired whether there are binding provisions on the quality of court interpreting services in judicial proceedings. Twelve EU Member States (Austria, Belgium, Croatia, Denmark, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Slovakia, Slovenia and the United Kingdom) replied in the affirmative, and sixteen EU Member States (Bulgaria, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Malta, Portugal, Romania, Spain and Sweden) gave a negative answer. Again, the quality standards of the countries providing affirmative answers are highly divergent, and the fact that sixteen countries gave a negative answer shows that the quality requirements stipulated in Directive 2010/64/EU would require some action by these Member States when transposing the Directive.

The next question in the CEPEJ 2012 Study was dedicated to the policy applied by EU Member States to the recruitment of legal interpreters and translators and/or the issue of appointing them for a specific term of office. Here, six EU member states – namely Bulgaria, Denmark, Ireland, Latvia, Lithuania and the United Kingdom (N-Ireland) – gave an affirmative answer. However, four EU Member States (Austria, Croatia, Estonia and France) indicated that – in addition to registering legal interpreters for a defined number of years – they also allowed recruitment and/or appointment on an ad-hoc basis, according to the specific needs of proceedings. In thirteen EU Member States recruitment and/or appointment is only on an ad-hoc basis, in line with the specific needs of a given case. These are Belgium, the Czech Republic, Germany, Greece, Italy, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia and Sweden. The issue of ad-hoc recruitment and/or appointment will be further discussed below. Finally, six EU Member States – Cyprus, Finland, Hungary, Slovenia, Spain and the United Kingdom (England + Wales) – indicated that there is no selection of interpreters by the courts. The conclusion to be drawn from these data is that it is fairly easy for agencies to convince ministries of justice and/or courts of the “benefits” of outsourcing the administrative work required to sign up legal interpreters and translators for specific hearings and trials on a day-to-day basis.

The main reason that so much room is given here to a detailed presentation of the results obtained in the CEPEJ 2012 Study is to show that EU Member States

have a long way to go to establish fairly comparable and equitable regimes for language services in judicial settings. On account of the fact that Directive 2010/64/EU is very general in its provisions – after all, it is the smallest possible denominator that EU Member States were able to agree upon – it is quite obvious that governments will try to transpose only a minimum of the requirements stipulated in Directive 2010/64/EU, especially under the present economic circumstances and the current budget constraints.

4. KEY CONCERNS IN CONNECTION WITH TRANSPOSITION

The discussions with representatives of ministries of justice in all EU Member States have shown that the cost of translations is regarded as a major burden on the budget. A look at current transposition measures indicates that the exception under Directive article 3 (7) – “oral translation” – is to be deployed on a regular and not only an exceptional basis. In EULITA’s view the actual magnitude of this requirement is grossly over-estimated. With a pragmatic approach to the “essential documents” (arrest warrant, charges, judgment) it should be possible to standardize major sections of these documents. Professional associations and judicial authorities should engage in a constructive dialogue to find a cost-effective solution to this issue that will also make it possible for suspected and accused persons to be informed of the causes for their arrest, offer them a basis for their defence and help them understand the outcome of proceedings and the legal remedies related to a judgment. In the course of the aforementioned QUALETRA project, a database is currently compiled on the terminology of the “essential documents” and the European Arrest Warrant that will be of benefit to legal translators and judicial authorities alike.

The Directive also calls for interpreting services by qualified professional legal interpreters during investigative procedures. This is in contrast to the current practice in many countries where the next-best person is often called into police stations to help with communication. As this first phase in criminal proceedings has major implications on the subsequent stages (hearings, judgment and legal remedies), any mistake during investigative procedures caused by “interpreting services” provided by unqualified persons will trigger a chain reaction of mistakes and may lead to procedural delays and/or miscarriages of justice. Unfortunately, police authorities do not fall within the scope of Directive 2010/64/EU. Home offices and/or ministries of the interior in EU Member States therefore do not consider it their duty to take any measures in connection with the Directive. It is only the courts that come under the remit of ministries of justice and are thus bound to observe the Directive requirements.

The training of the judicial stakeholders is a requirement that addresses the lack of awareness, among judges, lawyers, prosecutors as well as court and police staff, of the practical processes and needs in interpreting. Judicial

academies should include appropriate modules on effective communication through interpreters in their training programmes. Moreover, there is already a considerable corpus of video material available that can be used to further develop the communication skills of practicing judges etc. who have to examine suspected or accused persons with the help of an interpreter. This should eventually eliminate their old preconceived notion that “interpreting is a time-consuming obstacle to communication”. One could also imagine that the judicial stakeholders establish common platforms that serve the purpose of developing Best Practices for interpreting and translation services in judicial settings. Such initiatives could certainly be regarded as confidence-building measures, where legal interpreters and translators, on the one hand, and judges, prosecutors, lawyers and police officers, on the other, get to know each other – and each other’s problems – better and find pragmatic and cost-effective solutions for them.

In the course of the TRAFUT project it was possible to observe that there is very little coordination and cooperation between the judicial authorities responsible for transposition and the professional associations of legal interpreters and translators who will ultimately be affected by many of the transposition measures in their day-to-day work. A practice-oriented dialogue could definitely offer constructive input from practitioners, which will certainly also have a positive financial impact on the costs of transposition. It is EULITA’s impression that, for the time being, initiatives for joint discussions come primarily from the professional associations and not the ministries of justice, that there is too little involvement of the professional associations in developing the transposition documents, and that the judicial and/or legislative authorities pay too little attention to the comments submitted by professional associations on draft transposition texts.

To many judicial authorities the outsourcing of interpreting services to one or several agencies appears to be an attractive and economical solution in connection with transposing Directive 2010/64/EU. However, the tenders and ultimately the contracts between ministries of justice and agencies often lack transparency in that they do not specify what fees should be paid to the legal interpreters and translators and what costs the agencies will invoice for their intermediary services. Outsourcing contracts also often fail to specify what qualifications are required for the legal interpreters and translators that the agencies will contact for court assignments. The result is frequently a drastic – sometimes 30 to 50% – reduction in the (often statutory) fees paid to legal interpreters. As fees paid to court interpreters are definitely not at the upper end of pay schemes, qualified and experienced interpreters are deterred from working in judicial settings. This triggers a vicious circle: agencies have to resort to persons with ever poorer qualifications who will cause problems during examinations and hearings which may eventually result in procedural delays and/or miscarriages of justice on account of the language blunders. Outsourcing contracts should therefore also require agencies to clearly document their activities so that their practices and recruitment routines can be followed up by their counterparts (and national audit offices).

By the same token, judicial authorities have given in to the temptation of outsourcing translation services to agencies. In the age of internet communications, the contracted agencies sometimes find it “rewarding” to have translations for court cases translated overnight by persons on the other end of the globe, who offer their services at low prices without demonstrating their qualifications (“price dumping”). Especially with legal translations, the issue of liability is not addressed adequately in these outsourcing contracts.

Modern technology has not yet found its way into court rooms. Too little attention is being paid to the possibilities offered by remote interpreting which can be a time- and cost-saving solution to many language issues. If more focus were put on this option when training judges, police officers and prosecutors, it could become an everyday routine in most countries. Again, Best Practices should be elaborated and applied not only for the use of the technical equipment but also for resorting to legal interpreters for remote and/or video interpreting assignments.

It was mentioned earlier that the ad-hoc recruitment of legal interpreters is an instrument available to judicial authorities in many countries. While it is impossible to offer training and certification in the many different – and often exotic – languages required in courts and at police stations, which justifies the option of ad-hoc recruitment, this possibility is occasionally used by judges and police staff as an excuse to bypass the official registers of legal interpreters and translators and to resort to unqualified service providers. Clear guidelines should therefore apply to the situations in which an uncertified person needs to be called in to interpret during an examination or court hearing. In addition, EULITA members reported on several occasions that courts create their own “house lists” – a parallel system to the official registers. There is also anecdotal evidence of judges who force suspected or accused persons to use the language of the court, although it is not their mother tongue. As a consequence, they have difficulties in understanding the proceedings and expressing themselves properly.

5. THE WAY FORWARD?

At the same time as the conference on needs and training needs in cross-linguistic communication in police and court settings is taking place in Trieste, DG Justice is hosting “*Assises de la Justice*”, a conference to which all judicial stakeholders were invited. In a written contribution to this event EULITA proposed a number of measures that will support the practical implementation of Directive 2010/64/EU, such as:

- involving the Civil Justice section of DG Justice in the practical implementation of Directive 2010/64/EU,
- involving DG Home Affairs in implementation measures concerning

Directive 2010/64/EU in order to reach out to police authorities and to facilitate a better integration of legal interpreters into investigative procedures,

- encouraging EU Member States to adopt a more pro-active approach to national registers,
- discontinuing efforts to abolish certified translations, as this would be counter-productive to the intentions of Directive 2010/64/EU to improve the quality of legal translations,
- launching a review of procurement processes, which are currently geared to industrial production and products (after all, legal interpreters and translators are professionals who pursue excellence for its own sake, and for the sake of their profession and those whom they serve. Healthy societies will ensure that such professionals are adequately remunerated for their services),
- requesting the EJTN (European Judicial Training Network) to include effective communication through legal interpreters in their training programmes for judicial stakeholders (mock trials, webinars, videos, best practice guidelines, etc.).

In the meantime the “LIT Search” consortium has been awarded EU funding for a pilot project to set up a European database for legal interpreters and translators. In this project EULITA will play an active role in also developing models for establishing national and/or regional registers of legal interpreters and translators. These will cover aspects such as, for example, the training of legal interpreters and translators, the qualifications to be satisfied by interpreters and translators applying for admission to the national/regional register, or the management of such registers. EU Member States wishing to launch or re-launch their legal interpreting and translation regimes will be able to use these models as a point of reference. The ultimate goal is to bring about a gradual approximation of the systems used in EU Member States to provide legal interpreting and translation services in judicial settings. This will gradually facilitate the cross-border exchange of these language professionals on an equitable basis. However, as the legal systems in EU Member States are quite different from one another, this will be a long and thorny process.

EULITA also embarked on a dialogue with EUATC (European Union of Associations of Translation Companies), which should lead to a better understanding of the needs of legal interpreters and translators among agencies that bid for legal interpreting and translation contracts under national and/or regional tenders in EU Member States.

Unfortunately, suspected and accused persons as well as witnesses or victims – in other words, all those who need the assistance of language professionals in judicial settings – do not have a European ombudsman to whom they could turn with their concerns and complaints about poor-quality interpreting or

translation services. Many insights into legal interpreting and translation practices could be gained from such a contact point, which would stimulate a constructive discussion of day-to-day issues and lead to pragmatic and effective solutions.

6. CONCLUSIONS

The Directive on the right to interpretation and translation in criminal proceedings is a first and very essential step in the direction of ensuring that persons requiring linguistic assistance will be given a fair and equitable treatment when confronted with measures depriving them of their liberty, charges for crimes brought against them, or judgments issued against them by foreign courts. With the adoption of the Directive, ministries of justice in EU Member States have been alerted to the issues involved in legal interpreting and translation. The three-year period allowed for its transposition – which is one year more than usually granted to EU Member States for the transposition of a Directive – is over. The EU Commission now has the task to produce and submit a report to the European Parliament and to the Council by 27 October 2014, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive, accompanied, if necessary, by legislative proposals. They must also establish that there has been no violation of the non-regression clause contained in the Directive.

EULITA thinks that it is important to keep up the momentum that has been created with the adoption of the Directive. Together with its full members, the professional associations of legal interpreters and translators in EU Member States, as well as its associate members, primarily the universities training legal interpreters and translators, dynamic and concerted action should continue in the years to come, so as to ensure the further successful implementation of the requirements stipulated in Directive 2010/64/EU. EULITA's position on the EU level – as a recognized judicial stakeholder – will help promote the objectives of the Directive in cooperation with the other players in judicial settings.