



The Right to Interpretation and Translation in Criminal Proceedings. The Exigencies Imposed by the European Union. National Standards

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Abstract: In the present study we have analysed the right to interpretation and translation in criminal proceedings in accordance with the European Union and national regulations in the matter. From this point of view, we took into consideration EU Directives and the Romanian legal framework in criminal procedural matters (norms provided by the Criminal Procedure Code in force and provisions of the new Criminal Procedure Code). We are going to approach the present topic from a legislative perspective and also in relation to special literature in the matter and jurisprudence solutions. In the special literature from Romania, as far as we know, this topic was not studied before, the present study being one of the first attempts to analyse the national legislation comparing it to the European standards in this matter. We are going to separately analyse the right to interpretation and the right to translation in criminal proceedings. As it will be observed, there are relevant differences among the existing procedural rights and the minimum standards from this field, the presentation of this differences representing an aspect of novelty for the researchers, especially from the perspective of the fact that the European standards must be implemented within the national legislation by October 2013.

Keywords: right to translation; right to interpretation; criminal proceedings in Romania

1. Introduction

The need to ensure common minimum standards that safeguard the observance of procedural rights for persons against whom charges are brought in criminal matters is more and more acute within the European Union security space. The procedural regime of minimum and common rights is seen as the expression of judicial cooperation in criminal matters, and its final aim is represented by the reinforcement of trust in the criminal legal systems within all the EU member states.

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From this perspective, services of interpretation and translation are minimum safeguards in criminal procedural matters. Thus, the person accused of committing an offence must have a complete understanding of the accusation brought against him/her; this aspect is directly linked to the right of defence since it is unconceivable for the participants in a trial who do not master the foreign language in which the criminal proceedings are held to face any obstacle in the exercise of their rights. (Volonciu, p. 115)

2. The Evolution of Legal Regulations on the Right to Interpretation and Translation

Before enumerating the EU concerns for ensuring minimum standards as to the right to interpretation and translation in criminal proceedings, it is necessary to mention similar provisions, which have the value of principles and which are set forth in Article 14 § (3) of The International Covenant on Civil and Political Rights (ICCPR), according to which “Everyone shall be entitled to the following minimum safeguards, in full equality: (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court”. Similarly, according to Article 6 § (3) of the European Convention on Human Rights, “Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation brought against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

On 30th November 2009, The Council of the European Union adopted a resolution regarding the Roadmap for strengthening procedural rights of persons who are suspected and accused of having committed crimes and who – consequently – are involved in criminal proceedings. This document, which comprises five measures, provides the right to services of translation and interpretation as a main component thereof, alongside with the right to be informed, the right to legal counselling and assistance, respectively the right to communicate with relatives, employers and consular authorities, as well as the introduction of safeguards for persons who are suspected or accused of having committed criminal acts and who are considered vulnerable.

The Roadmap was subsequently integrated in the Stockholm Programme (§ 2.4.), adopted on 10th December 2009¹, a document by which The European Council required The European Commission to complete the minimum procedural rights whenever justifiable.

Within this context, in order to regulate certain minimum standards as regards the procedural rights of persons who are suspected or accused of having committed crimes, in accordance with Article 82 § (2) letter b) of the Treaty on the Functioning of the European Union – the consolidated version² – it was established that the European Parliament and the European Council are entitled to set up minimum norms regarding, among other things, the rights of the persons involved in criminal proceedings. These are the circumstances under which – on 20th October 2010 – The European Parliament and The European Council adopted Directive 2010/64/UE on the right to interpretation and translation within criminal proceedings³.

3. The Motivation for Regulating the Right to Interpretation and Translation as Minimum Procedural Standards

The analysis of the Preamble to the Directive 2010/64/EU reveals the necessity to maintain and develop a space of freedom, security and justice. Thus, it was found that – even if EU member states are signatory parties to The European Convention on Human Rights – this element is insufficient for safeguarding trust in the criminal systems of the states. Thus, it is necessary to consistently apply the rights and safeguards set up by the Convention, and extremely important to impose minimum standards for procedural rights particularly for services of interpretation and translation within criminal proceedings.

A particularly important idea for the argumentation which supported the issuance of Directive 2010/64/EU is the inter-conditioning relationship existing between the regulation of minimum and common standards for ensuring translation and interpretation services during the criminal proceedings, on the one hand, and the consolidation of mutual trust between member states, on the other hand. Thus, for

¹ The Stockholm Programme was published in the Official Journal of the European Union, C 115/04.05.2010.

² The consolidated version of The Treaty on the Functioning of the European Union was published in The Official Journal of The European Union, C 83/30.03.2010.

³ Directive 2010/64/UE was published in the Official Journal, L 280/26.10.2010.

safeguarding the right to a fair trial principle it is essential for the persons who do not speak or understand the language in which proceedings are held to benefit from common standards as regards the right to interpretation and translation.

Obviously, the exercise of these rights, which are directly linked to the right to defence, is not absolute. Thus, the European lawmaker provided procedural hypotheses according to which the exercise of these rights is not obligatory, particularly in the cases in which national authorities apply sanctions for deeds which present little social peril. This is the case of antisocial acts stipulated by traffic regulations which do not require the exercise of the right to translation and interpretation. Thus, (...) *where a certain period of time elapses before interpretation is provided, that should not constitute an infringement of the requirement that interpretation be provided without delay, as long as that period of time is reasonable in the circumstances* (§ 18 of the Preamble to the Directive).

However, as we are going to notice, Romanian criminal bodies act in a similar manner for they do not regard the right of the defendant to be informed of the charge brought against him in a foreign language that he understands as an absolute principle; the exercise of this right is linked to the reasonable possibilities of ensuring these services at the moment and on the place where the crime was committed etc.

4. The Object and Domain of Application of Directive 2010/64/EU

Directive 2010/64/EU establishes minimum norms as regards the right of a person that is suspected or accused of having committed a crime to benefit from the right to interpretation and translation. The standards of the Directive are applied both in criminal proceedings and in the procedure for the execution of a European arrest warrant.

Persons who are suspected or accused of having committed a crime and who do not speak / do not understand the language in which criminal proceedings are held or who cannot communicate because they are speech or hearing impaired benefit from these rights.

From this perspective, one can notice that minimum norms set up through Directive 2010/64/EU are also provided by domestic legislation. Thus, according to Article 128 of The Constitution of Romania, foreign citizens and stateless persons who do not understand or do not speak Romanian have the right to be informed of

all the acts and stages comprised in their file, to speak in court and draw conclusions through an interpreter. It is true, the fundamental law of the state does not mention persons who cannot express themselves in Romanian because they are unable to communicate since they are impaired; however, the constitutional norm is completed with other provisions comprised by domestic legislation. Thus, the exercise of the right to an interpreter is ensured, according to Article 8 § (1) of the Criminal Procedure Code (hereinafter referred to as C.p.p.), “for the parties (...) who cannot express themselves”. We can notice that Article 12 § (3) in the new Romanian Criminal Procedure Code (hereinafter referred to as N.C.p.p.) provides a regulation according to which the procedural parties and subjects who do not speak or understand Romanian or who cannot express themselves have the right to a translator and interpreter. These rights are also provided by Law no. 303/2004 on the organization of the judiciary – in Article 14.

Directive 201/64/EU sets forth that it is compulsory to ensure the exercise of these rights: “*when the persons (who are suspected or accused of having committed a crime – our note) are informed by the competent authorities of a member state through an official notification or in another way of the fact that they are suspected or accused of having committed a crime*”. The termination of the period in which the rights to translation and interpretation are to be exercised is referred to in the text of the European Parliament as “the ending of the procedures”.

These standards are also provided by domestic legislation. In this respect, we refer to the provisions of Article 23 § (8) of the Constitution of Romania which – even if they do not *stricto sensu* refer to the right to translation or interpretation – can be regarded as application norms. Thus, the above mentioned article of the Constitution stipulates that “Any person detained or arrested shall be promptly informed, in a language he understands, of the grounds for his detention or arrest, and notified of the charges against him, as soon as practicable” (in the language that the defendant understands). The constitutional norm sets forth the procedural hypothesis of adopting preventive detention measures against the defendant or culprit; however, it is likely for judicial bodies to try the defendant or the culprit while he/she is not imprisoned.

Under these conditions, the minimum procedure set up in the matter by Directive 2010/64/EU has the role to ensure that the right to interpretation and translation is exercised once the person is informed of the deed he is accused of, as well as of the legal framing of his crime. Consequently, according to the EU authorities, if the

accused does not understand or cannot express in Romanian, the procedure for informing the accused of the charge that is brought against him is going to be applied through interpretation and translation services – in conformity with the provisions of Article 6 C.p.p.

However, it is possible for the procedure regulated by Article 6 C.p.p. – which is meant to inform the defendant or culprit of his right to defence – to be preceded by a procedure that identifies the perpetration of a serious crime. In other words, it is possible to pursue important procedural acts, which have a probation value, before the first statement is made. Under these conditions, the practice of criminal investigation bodies derived from the solutions adopted by courts of law¹ points out the problem of establishing the existence or non-existence of a procedural damage if the procedure for identifying the perpetration of a serious crime was applied in the absence of an interpreter and the author of the crime was a foreigner who did not understand or speak Romanian. In our opinion, it has been correctly stated that criminal procedural norms do not imply the presence of a defender during the pursuance of this procedural activity, which is meant to identify the perpetration of a serious crime, because as many cases have proved it would be impossible to ensure the presence of an authorized interpreter. The solution is justified because the identification of a flagrant crime implies an important degree of unpredictability. Similarly, many of the acts that lead to the identification of a flagrant crime are pursued through police actions and after the identification of a previous activity meant to disclose crimes and criminals; thus, the participation of an authorized interpreter in such activities is quite unlikely. Under all these circumstances, we appreciate that the standards for ensuring the right to an interpreter are satisfied if, within a reasonable term, the person accused of having committed the crime can exercise this right.

The application of the provisions of the Directive in domestic legislation as regards the final limit of the obligation to ensure the exercise of the right to interpretation and translation, i.e. “*the termination of procedures*”, leads – in our opinion – to the end of the criminal proceedings, which is followed by the execution of the final criminal decision.

¹ The Bucharest Court of Appeal, The Second Criminal Section, Decision no. 318/1998, in *Culegere de practică judiciară pe anul 1998/ Collection of judicial practice 1998*, with notes by (Papadopol, 1999, p. 126).

4. The Right to Interpretation

According to Article 2 § (1) of the Directive, “Member States shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings”.

We consider that the exigencies imposed by this law are provided by the present criminal procedural legislation applied in Romania. Within this context, it is important to clarify the meaning of the phrase “necessary interim hearings”, which are different from the hearings held during the criminal proceedings, before the criminal investigation bodies, respectively before the courts of law. We consider that the category of *interim hearings* could include, e.g., statements made during the preliminary criminal investigation acts; during this stage the investigated person is “suspected” of having perpetrated a crime. If this example is a correct one, the present Romanian legislation does not offer the minimum safeguards provided by the Directive either in The Constitution or The Criminal Procedure Code. Thus, the lawmaker uses the phrase “criminal proceedings” in both normative acts, which, however, do not cover the stage of preliminary acts. This is also true for Law no. 304/2004 on the organization of the judiciary.

One can also notice that the text of the Directive also refers to *the interrogations made by the police*, i.e. the national systems in which police employees do not actually belong to the judiciary. However, according to the domestic criminal procedure law, judicial police investigation bodies are qualified as criminal investigation bodies (Article 201 C.p.p.), a fact which indicates that the European standards in the analysed matter are observed. According to the new Criminal Procedure Code, one can notice the regulation of the same statute for the judicial police investigation bodies, which are considered to be “specialized bodies of the state that pursue judicial activity” (Article 30 N.C.p.p.).

A novelty element as regards national regulation is represented by the provisions of Article 2 § (2) of the Directive, according to which “Member States shall ensure that, where necessary for the purpose of safeguarding the fairness of the proceedings, 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.”

Thus, the text of the Directive takes into account the hypothesis of ensuring the right to interpretation not only as regards the hearing of the person who is suspected or accused of having committed a crime, but also as regards the exercise of the right to communication, which is directly linked with the statement made by the accused or the culprit, the statements made by the other parties, witnesses, as well as with the exercise of the remedies and the introduction of any other requests. Thus, in fact, we can conclude that the right to interpretation is regulated so that during the criminal proceedings the accused or culprit and his defender could communicate. The extension of the right to interpretation within the existing national framework is important and it is necessary to underline once again that the minimum standards for these rights are observed. Similarly, the analysis of the provisions stipulated by the new Criminal Procedure Code leads to the same conclusion, i.e. the non-accomplishment of these standards because Article 105 N.C.p.p. sets forth the right to an interpreter only during the hearing of the accused / culprit who does not understand, speak or is unable to express himself well in Romanian.

Moreover, the text of the Directive also refers to the necessity of using a procedure whereby it can be established whether it is necessary to exercise the right to interpretation and translation. Thus, it is necessary to regulate a mechanism whereby one can establish whether the person suspected or accused of having committed a crime speaks or understands the language in which criminal proceedings are held. Furthermore, the accused / suspects must be offered the possibility to contest decisions whereby judicial bodies could establish that they are not entitled to benefit from an interpreter or translator. These persons can also contest the quality of interpretation or translation services by means of the same remedy.

The analysis of the provisions set forth by Article 2 § (4) and (5) of the Directive and by the national legal framework determines us to conclude that Romanian legislation is under the minimum standards of the Directive. Thus, while this study was being drawn up, the Romanian criminal proceedings lacked a procedure whereby it could be established whether the suspect/the accused/the culprit needed to benefit from the right to interpretation or translation. Establishing whether a person understands or speaks Romanian can be made outside the rules of a procedure and, most of the time, the parties involved in criminal proceedings invoke the violation of the right to defence as a consequence of their not being offered an interpreter.

For a better illustration of our arguments we can refer to a case in which the accused declared that he could speak Romanian; however, the fact that he did not know how to write or read in Romanian could not be used as an argument for being offered an interpreter due to the oral character of the proceedings¹. For the present study it is not relevant that the court of law regarded the necessity of an interpreter or translator as unnecessary but the fact that a procedure whereby this could be established does not exist.

As to the same norms of the Directive, one can identify the impossibility of the accused or culprit to exercise a remedy against a procedural act whereby it could be established that it is unnecessary to use an interpreter or translator. This aspect applies especially for the criminal investigation stage, during which the only ways to criticise criminal investigation acts are those provided by Article 275-278 C.p.p. Similarly, during the criminal proceedings stage, one must invoke a procedural error consisting in the impossibility to exercise the right to interpretation and criticise the disposal of a case and the ruling on the substance thereof.

As to the right to benefit from an interpreter, the text of the Directive emphasizes the importance of offering quality services to the suspected or accused person, services that might safeguard this person the right to a fair procedure and the possibility to really exercise the right to defence.

5. The Right to Translation

The first observation one has to make as regards the right to translation is that the Directive regulates the right to translate the “essential documents” which are comprised in a criminal file. Under these conditions, for reasonable grounds which refer to the celerity and costs of the criminal procedures applied during the criminal proceedings it is important to have only the essential documents translated, i.e. procedural acts whereby it is decided to deprive the accused or culprit of liberty or to charge him, altogether with the indictment and any delivered judgment.

The application of this norm in the Romanian criminal trial brings with it the necessity to translate the following acts, which are included in a criminal file: the 24-hour detention ordinance, the judgment or the decision of the court which establishes preventive detention, the decision to treat the accused or the culprit in

¹ The Bucharest Court of Appeal, The Second Criminal Section, Decision no. 54/1998, in (Neagu & Damaschin, 2009, p. 38).

hospital (a medical procedural measure which implies deprivation of liberty), the warrant for prosecution, the indictment and all judgments.

Apart from these documents the Directive entitles the judicial authorities to establish *ex officio* or upon request whether other essential documents must be included in the file. Alongside with the need to regulate the right to interpretation, it is necessary to be entitled to resort to a remedy for contesting a decision which states that it is unnecessary to translate certain documents, and for contesting the quality of the translation.

Article 3 § (7) of the Directive sets forth that in an exceptional case it is possible not to resort to the written translation of the essential documents of a case and instead to resort to an oral translation or summary of these documents on condition that the fairness of the procedures applied against persons suspected or accused of having perpetrated crimes is not aggrieved.

Last but not least, the text of the Directive provides the right of the person to give up translation. In such a case, the judicial body is obliged to inform the person of the consequences of this act and, at the same time, it is important for the decision of giving up translation to be unambiguous and voluntary.

6. Common Dispositions

The text of the Directive also contains dispositions that refer to the costs and quality of the interpretation and translation services, as well as to the necessity to write down the way these rights are exercised during the criminal proceedings and to bring into line national legislation with European norms and to report to The European Parliament and The European Council.

Thus, as to the costs of interpretation and translation services, Article 4 of the Directive provides that member states must cover the costs which derive from the exercise of these rights, no matter the results of the procedures. This standard is provided by national legislation, i.e. by The Constitution, which safeguards the free cost of interpretation and translation services. Thus, according to Article 128 § (4) of the Romanian Constitution, "Foreign citizens and stateless persons who do not understand or do not speak the Romanian language shall be entitled to take cognizance of all the file papers and proceedings, to speak in court and draw conclusions, by means of an interpreter; in criminal law suits, this right is ensured free of charge."

As regards the quality of translations and interpretations, it is recommended to create directories of freelance qualified translator and interpreters; these directories should be at the disposal of all those interested. These provisions of the Directive are also observed; thus, on the webpage of The Ministry of Justice one can consult the list of authorized translators and interpreters. Thus, in conformity with Article 5 § (1) of Law no. 178 / 4th November 1997¹, The Ministry of Justice creates the lists of authorized interpreters and translators, which are communicated to the Superior Council of Magistracy, The High Court of Cassation and Justice, The Public Prosecutor's Office Attached to The High Court of Cassation and Justice, The National Anti-Corruption Public Prosecutor's Office and appellate courts.

At the same time, one cannot fail to notice a novelty of the criminal procedural law – the disposition comprised in Article 12 § (4) of the N.C.p.p., according to which *“Authorized interpreters shall be used within judicial procedures, as provided by the law. They belong to the category of authorized interpreters and translators, as stipulated by the law.”*²

As regards the application of the provisions stipulated by The Directive in domestic legislation, Article 9 § (1) sets forth that member states are bound to ensure the coming into force of legislative and administrative acts that are necessary for satisfying the recommendations until 27th October 2013. The bringing into line of these minimum standards also refers to the obligation assumed by member states to communicate The European Commission the text of these acts. Similarly, by 27th October 2014, The European Commission will have presented the European Parliament and the European Council a report meant to assess the extent to which the provisions of the Directive will have been brought into line by domestic legislations in the EU member states.

¹ Law no. 178 – dated 4th November 1997 on the authorization and payment of interpreters and translators used by The Superior Council of Magistracy, The Ministry of Justice, The Public Prosecutor's Office attached to The High Court of Cassation and Justice, The National Public Prosecutor's Anti-Corruption Office, by criminal investigation bodies, courts of law, public notary offices, lawyers and bailiffs – was published in the Official Gazette no. 305/10.11.1997.

² In special literature, as regards this aspect, one has noticed that the notion of interpreter also comprises the concept of translator (see Neagu, 2012, p. 114).

7. Conclusions

Analysing the text of the Directive no. 2010/64/EU and national legislation in the matter as regards the assurance of the right to interpretation and translation within criminal proceedings we conclude that, in principle, minimum standards set forth by the above mentioned Directive are met in Romanian criminal procedural legislation. Thus, this procedural right is provided in the Constitution and it is a fundamental principle in criminal proceedings according to the provisions of the Criminal Procedure Code (both the present Criminal Procedure Code and the future one, which will come into force in 2013); thus, citizens may benefit for free from the right to an interpreter and translator and they can consult lists of interpreters and authorized translators within the legal framework etc.

However, one can also notice the fact that some provisions of the Directive do not have a correspondent in national legislation, a fact which leads to the idea of non-accomplishment of the minimum standards imposed for procedural rights. First of all, we refer to the right of any defendant to benefit from an interpreter or translator for ensuring communication between the defendant or culprit and his/her defender, an aspect which is totally neglected by the present Romanian criminal procedural legislation. In this respect, there are no legal norms that provide the right to a free interpreter or translator and the right of the defender and defendant or culprit to benefit from the assistance of a translator or interpreter in order to facilitate the written or verbal communication thereof.

Similarly, we subscribe to the same conclusion as regards the non-accomplishment of the minimum standards when it comes to the lack of norms that regulate the procedure whereby it can be established whether a person needs to be assured of the exercise of these rights. It is necessary for a person to be assured of the exercise of these rights especially that in the practice of judicial criminal bodies there were situations when the criminal procedure was contested on grounds of aggrieving a person's right to defence because of not having an interpreter or translator. We should also mention the lack of procedural remedies for the defendant or the culprit who, during the criminal investigation, intends to contest the lack of translation and interpretation services.

Under these circumstances, according to the provisions of the Directive, the Romanian lawmaker is bound to have adopted in the national legislative framework the normative acts that are necessary for ensuring a minimum standard

for procedural rights and that must satisfy the European exigencies in the analysed matter by 27th October 2013.

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