

Implementing fair trial standards in Europe

Caroline Morgan outlines the first measure adopted under EU 'roadmap' of suspects' rights

By 27 October 2013, all European Union (EU) member states must have passed laws giving effect to the EU Directive on the right to interpretation and translation in criminal proceedings (EU Directive 2010/64/EU). The Directive was the first piece of EU legislation in the criminal law area to be adopted under the Lisbon Treaty. It was also the first step of a programme of EU wide defence rights measures to which the EU has committed itself to establishing.

The principle of mutual recognition

Much of the EU's internal market legislation relies on the concept of mutual recognition, an economic construct: if an item is suitable for sale in one member state, then all member states should accept it for sale without further enquiry. For the last few years, that notion has been applied to judicial decisions. European measures such as the Framework Decision on the European Arrest Warrant (EU Framework Decision 2002/584/JHA), (whereby an arrest warrant is recognised as valid and executed rapidly and without the formal procedure of extradition throughout the EU) have been adopted, and they in turn have generated a demand for the EU to consider defence rights.

The European Arrest Warrant legislation came into force in 2004 and ideally would have been accompanied by EU common minimum standards for defence rights. This was the European Commission's aim and was essential if member states were to recognise each other's judicial decisions as equivalent to domestic judicial decisions (entailing 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).

The problems of interpretation and translation

The Commission started work on a proposal for legislation of this sort. It quickly became clear that there was a problem with the varying standards of protection for the defence

throughout the EU. This problem

was acute as regards legal interpreting and translation in criminal proceedings. All member states are signatories of the European Convention on Human Rights (ECHR) (this is a requirement for membership of 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 he or she does not understand the language of the proceedings. However, this requirement was not complied with in a satisfactory way in all EU member states. Cost was often mentioned as a reason for low standards. In some member states, translators and interpreters worked under poor conditions, and there was little or no regulation of who could work as an interpreter or translator. For example, it was found that even a prisoner's cellmate might be used as an interpreter. During

police questioning, a qualified interpreter was not always present, with suspects sometimes being offered the services of lay people who had some knowledge of the defendant's language. In one well-known case the person used as an interpreter was a hairdresser who was a friend of the judge's wife. Few documents were translated for defendants. At trial, interpreters were sometimes provided for the benefit of the judge and/or prosecutor, rather than for the accused. The judge's or prosecutor's statements were not always interpreted for defendants and the role of the interpreter was limited to interpreting the judge's direct questions to the defendant and his replies, rather than ensuring that the defendant could understand the proceedings.

The Commission also noted difficulties in recruiting sufficient legal 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, but not in all. The profession suffered from a lack of status, with translators and interpreters

being poorly paid and not having social benefits (paid sick leave, pension rights).

As part of the defence rights exercise, the Commission published a Green Paper on procedural safeguards 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 route to the Roadmap

The proposal was discussed for nearly three 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,

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when dealing with criminal law matters, there was a requirement of unanimity. Unanimous agreement could not be reached, and the proposal was finally shelved in June 2007.

In 2009, it was decided to try again to put forward legislation on rights, but this time, not by way of a proposal covering all rights, but rather a number of separate proposals each covering a different right. The agreement to do this is known as the 'Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings' (Resolution of the Council of 30 November 2009), and the Directive on the right to interpretation and translation is the first measure. During the negotiations, particular attention was paid to the 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.

The right to interpretation under the Directive

The right of a suspect or defendant to benefit from the services of an interpreter is set out in the ECHR Article 6(3)(e), but it was found that member states differed in their legal and practical implementation of this principle. In some, interpretation of communications between the accused and their lawyer was provided almost without limit, but in others they were either only partially interpreted or not interpreted at all. Under the EU Directive (Article 2), interpretation of client-lawyer communication must be provided (free of charge) 'where necessary for the purpose of safeguarding the fairness of the proceedings' if it is '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'.

Article 2(6) of the Directive 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 video-conference, telephone, or Internet. This is already apparently successfully employed in several member states. However this option can only be used if the physical presence of the interpreter is not required 'to safeguard the fairness of the proceedings'.

The right to translation under the Directive

Article 3 of the Directive provides for the right to translation of essential documents. This right is not expressly included in the ECHR Article 6, but it can be implied from ECtHR case-law since other fair trial rights (those under Article 6(1) and (3)) 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 (see *Kamasinski v. Austria*, 19 December 1989, No. 9783/82, in particular para. 74).

The Directive provides that suspected or accused persons, who do not understand the language of the proceedings, must be given 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. Article 3(2) specifies that 'any decision depriving a person of his liberty, any charge or indictment, and any judgment' are essential documents that must always be translated. The case-law of the ECtHR allows an oral translation or oral summary to be provided in exceptional circumstances instead of a written translation (see, for example, *Hermi v. Italy*, 18 October 2006, No. 18114/02, para. 70). Apart from those listed in Article 3(2), it is for the 'competent authorities' of member states to decide which documents are to be considered essential (Art. 3(3)).

Other provisions of the Directive

Specific provisions ensure the quality of translation or interpretation

provided (Arts. 2(8) and 3(9)), requiring 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'. Quality may be subject to a specific review procedure under Articles 2(5) and 3(5). The Directive also addresses the question of the availability of qualified legal interpreters and translators. Article 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 lawyers and the relevant authorities.

Recital 32 of the Directive provides that the level of protection should never fall below the standards stipulated by the ECHR and by the EU Charter of Fundamental Rights. Recital 33 provides that the provisions of the Directive that correspond to rights guaranteed by the ECHR or the Charter should be interpreted and implemented consistently with those rights.

Article 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'.

The ground breaking Directive on the right to interpretation and translation is designed to ensure that foreign suspects and defendants (and those with hearing or speech impediments) throughout the EU receive the linguistic help they need to safeguard the fairness of the proceedings. This will have a knock-on effect on legal assistance, since the ECHR requirement that every accused person is entitled to the assistance of a lawyer cannot be made effective unless the accused can communicate with that lawyer. This is the first step in a number of EU measures which, in the course of the next few years, will dramatically improve defence rights in Europe. ■

Caroline Morgan is Principal Administrator at the European Commission