

Translators' Corner

Ensuring quality in legal translation by 3 parties – governments, courts and translators

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ABSTRACT

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 stipulates that EU Member States should introduce safeguards ensuring that translation provided in the course of criminal proceedings is of a sufficiently high quality. This can be achieved by various means by governments, courts and translators: through enacting a legal framework regulating the position, rights and obligations of translators by governments, through appropriate practical arrangements introduced and followed by courts and other judicial and law enforcement authorities and finally by translators themselves through specialisation and targeted improvement of qualifications. Each of the aforementioned groups has different tools and opportunities at their disposal. It seems however clear that an effective system of quality assurance requires the cooperation of all three of them so that the measures enacted complement and support each other, rather than operate in a legal void.

KEYWORDS

Directive 2010/64/EU, regulated profession, essential documents, confidentiality, specialisation, professional qualifications.

Introduction

As of 2016, the European Union encompasses 28 Member States and is home to over 500,000,000 people speaking 24 different official languages and countless dialects and tongues. Some of the languages may be similar to each other, but others are completely divergent, unique, even utilising different alphabets. This in itself would be a bewildering linguistic panoply but in practice is further compounded by the fact that Europe's inhabitants take advantage of the internal market and free circulation of people and services — both for business and leisure.

Obviously, it would take a superhuman to master enough languages to be able to travel to any EU Member State and be able to effectively communicate in the local language. Citizens of the EU must instead rely on the fact that if another Member State approaches them in its official capacity, it will do so in a language they can understand in order to explain their position and, if need be, defend themselves. And there is hardly a more vital aspect of a state's power over people within its territory than criminal proceedings.

This gives rise to the need for highly qualified, professional translators and interpreters whose services allow the authorities of a Member State to communicate with participants of criminal cases who do not happen to understand or speak the language of the proceedings. The Member States and European institutions recognise this necessity, as was evidenced by the fact that the first instrument on the roadmap on procedural rights presented in the 2009 *Stockholm Programme*¹ pertained to translation and interpreting in criminal proceedings. It is a further testament to the importance of such matters that the European Commission and the Member States were largely in accord as to what provisions should be contained in this instrument and negotiations were concluded swiftly and efficiently.

The result is 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. The European Commission, which drafted the proposal, recognised that in order to provide a practicable and effective right for suspected and accused persons, the translation or interpreting provided must be of sufficiently high quality. As such, Articles 2(8), 3(9) and 5 of the Directive expressly provide that Member States must ensure that national laws implementing the Directive guarantee that the quality of the translation/interpreting is sufficient to safeguard the fairness of proceedings.

By its very nature the Directive cannot impose any specific, pre-ordained quality control systems on the Member States. A Directive only binds the individual states as to the end result intended – states are free to choose their own way of achieving it. There are however certain aspects of this process that seem impossible to circumvent and this article provides some suggestions on how to approach them.

Ensuring high quality in translation poses different challenges than with respect to interpreting and requires somewhat different approaches. For practical reasons the scope of the present text is limited to matters concerning translation.

Translation drafted in the context of criminal proceedings is not an abstract, detached creation. To the contrary, it exists for very specific reasons, specific recipients and requires cooperation from persons acting in various capacities, all in the framework of applicable national and European law. As such it seems prudent to approach the matter from three perspectives: that of governments, courts and translators themselves. It is important to note here that from all three perspectives it is in the best interests of the persons concerned that translation in criminal proceedings is of high quality. Governments can demonstrate that their national legal systems ensure all procedural rights for defendants, courts can achieve smooth proceedings and translators themselves can

increase their prestige and importance in the justice systems thereby achieving a stronger position in any negotiations with the government, in particular relating to translation rates.

For simplicity, in the context of the present text, 'governments' means the entirety of the law-giving system of a given Member State. As such it also encompasses the legislative and any state-dependent bodies that have a say in the law-making process. 'Courts' in turn means not only the courts themselves but also police authorities, prosecutors and any other bodies whose task is to conduct or oversee any part of criminal proceedings in which the right to translation arises.

1. Governments

Translation as an element of criminal proceedings is normally subject to a set of rules and provisions which differentiate it from other translations provided commercially or even in other types of court proceedings. While the Directive leaves it to the individual Member States to lay down specific rules on how to ensure quality of translation according to their own legal systems and practical considerations, several observations of a more general nature can be made.

It is obviously not sufficient for an act of law to stipulate that "translation provided for courts should be of high quality" or something to that effect. It is the responsibility of the governments to enact an entire network of legislation that will enable court translators to fulfil such obligation.

One way of achieving that goal is to introduce a regulated profession of court (or "sworn") translator. This approach is far from universal but seems to be the favoured one in the Member States employing the continental legal system.

The most obvious advantage of a regulated profession is the ability to control, to an extent, who is permitted to follow such profession. This is commonly done by introducing entry exams but other ways, such as mandatory courses or recognition of qualifications gained abroad, are also possible. The underlying principle is that the State requires some sort of proof that the person in question is qualified enough to cope with the requirements and rigours of court translation.

Such proof should naturally encompass an excellent knowledge of both the translator's native and chosen language, including specialised terminology used in criminal proceedings. Excellent language skills however are not sufficient on their own. It is also of vital importance that the translator has a grasp of the rules of criminal proceedings and substantive criminal law. This issue will be addressed in more detail below, suffice to say for now that in order to provide a good translation,

let alone an excellent one, the translator must fully understand the contents of the original document. Without a knowledge of criminal law and criminal procedure this is often impossible. As such, any courses or exams the government sees fit to introduce should not only ascertain the candidate's knowledge of language but of law as well. This can be achieved by the exam requiring a legal text to be translated where the knowledge of law is inferred from the way particular phrases or expressions are translated but would ideally take the form of a separate test ascertaining the candidate's knowledge of basic acts of law and their application. While a double (lawyer-linguist) education would be optimal, it would be unrealistic in practice to expect all candidates to be trained lawyers; the complexity of the questions and concepts raised should be adjusted accordingly.

The introduction of a regulated profession also allows for effective enforcement of obligations imposed upon a court translator. The foremost of such obligations should be professional secrecy. Criminal proceedings often pertain to sensitive and personal matters which should not be made available to the general public unless so ordered or allowed by the court. Just as lawyers are obliged to keep in secrecy information they obtain in connection with the proceedings, so should the translators.

A regulated profession enables the introduction of disciplinary responsibility of translators. While from the point of view of the translators this may not seem welcome, it must be kept in mind that in the absence of disciplinary sanctions, the alternative is to pursue breaches of regulations pertaining to court translation as criminal offences. A dedicated disciplinary responsibility body, whether operated by the state government or the translators' self-governance, is much better suited to adjudicate on the existence and severity of any potential breach of translator obligations. As a consequence, it is likely that any sanction imposed will be more proportionate to the transgression.

One shortcoming in the regulated profession system is that there may occur cases where a sworn translator is unavailable, especially if the language involved is rare or the translation has to be obtained immediately. As a remedy, there should also be a way to appoint a translator from outside the profession in exceptional circumstances. Such an *ad hoc* translator should however be subject to analogous obligations as a sworn translator, particularly with regard to professional secrecy (as provided for by Article 5 (3) of the Directive). Since the judicial authorities of a given Member State are responsible for the overall fairness of proceedings, it is their responsibility to identify and appoint persons whose professional experience and conduct indicates that they would discharge the obligations of translator with appropriate professionalism and observe all requirements of secrecy (such as respected academics).

The position, i.e. the rights and obligations of court translators, should be clearly defined in the laws pertaining to criminal proceedings. Just what those rights and obligations will be should depend on the particulars of the given State's legal system. However, there is one right that should be always available to translators, that is that they should be allowed to examine the case file.

Access to the case file is essential if the translator is to understand the background of documents and their content. As already mentioned, translators must know what they are translating. A single document, taken out of context and without any additional information will be very hard to translate accurately.

It has been brought up, particularly by judicial authorities, that granting translators access to the case files could jeopardise the integrity of the proceedings and affect the neutrality of the translator. This is another reason why professional secrecy and a mechanism to enforce it are essential. An effective disciplinary system would serve to allay the fears of the judiciary in granting translators access to the case files.

In many Member States it is the government that determines the rates for translation provided to courts and/or other official bodies. Just as is the case with lawyers providing work under legal aid, such rates are not always in line with what the translator would earn on a commercial basis for similar work. The State can simply use its authority to make it a legal obligation for the translator to provide a translation for the judicial authorities, *in lieu* of any economic incentive. This is despite the fact that translation provided for courts in most cases requires more effort on the part of the translator due to the sensitive subject matter and perhaps the need to examine the case file, often entailing a separate journey to the court. As such, it is important that those rates are set at a reasonable level, taking into account the amount of work and complexity of the text, as well as the economic realities of a particular Member State. This will go a long way in attracting more experienced and specialised translators to voluntarily undertake work for courts whereas otherwise they might want to avoid such duties. The rates should be adjusted in accordance with the complexity of the document, its saturation with legal terminology and the deadlines set by the authority requesting the translation. Naturally, it is for the individual Member States to decide what such rates should be, taking into account local, practical considerations.

2. Courts

Criminal cases involving a suspected or accused person who does not speak the language of proceedings require a specific approach. The necessity of drafting a translation extends the proceedings and makes them more costly. Due to that, some judges tend to see translation as a

necessary evil if not, in extreme and fortunately rare cases, an obstruction to the smooth process of law. Nevertheless, effective cooperation between the court and the translator can greatly contribute to a higher quality of the final text.

First and foremost it must be noted that the accuracy standard when translating is much higher than when interpreting. While it is implicit that an interpreter cannot be expected to interpret every single word and is generally allowed a degree of simplification, a written translation is expected to reflect the original text exactly. As such, the translator must be given sufficient time to discharge his or her obligations properly. The amount of time required can vary according to the volume of the text, its complexity and even the quality of the document or copy. For instance, a poorly photocopied handwritten text will require more time and effort than a high resolution reproduction of a typed text. A highly specialised text pertaining to non-legal circumstances, such as an expert's opinion on medical or ballistics issues, will also require more time than one drafted using plain language, such as a witness statement. Courts should keep in mind that it is often impossible to ascertain in advance how long a particular translation will take. Even if an approximation mechanism is available (such as an approximate number of words translated per day), this can prove unreliable in cases of more complex texts or poor quality of the document. Court activities should be planned accordingly, ensuring that in justified circumstances the deadline for completing the translation can be extended without detriment to the proceedings.

Another matter, connected to some extent with what the translators themselves can do, is the issue of specialisation. In modern societies, increasingly more aspects of human life and activity are governed by provisions of law, which itself tends to become more detailed and specific. It seems all but impossible to be equally well versed in all aspects of the law, hence lawyers generally pick one or a few branches in which they specialise. The same could be true for translators. Courts for their part should recognise such specialisation and be able to choose a particular translator knowing that they are well acquainted with a given field of criminal law. This can be achieved by courts internally where they would keep lists of translators and their fields of expertise based on their own experience, but would be even more effective if such information was made available in sworn translator registers, whether operated by the state or translator associations. Such registers should be freely available to courts so that they not only know whether a given person has appropriate qualifications but also to be able to appoint a particular translator to a given case. This, incidentally, demonstrates why in many systems it is advisable to have a regulated profession of sworn translator and a register thereof. The introduction of a register is also recommended in Article 5 (2) of Directive 2010/64/EU.

A matter often brought up in the context of court translation is an effective way of assessing its quality. Such assessment should not however lie with the courts themselves. Judicial authorities usually lack the qualifications and/or the time to be able to effectively assess the translation. Furthermore, translation is not an exact science and it can be often the case that different translations of the same text can be equally valid. The translator should not labour in the fear of being second-guessed by the judge or other official.

On the other hand, courts do require tools that would allow them to intervene if there are justified doubts as to the quality of the translation, in particular if such doubts are voiced by the defendant or their defence counsel. One way of approaching this situation is to allow courts to appoint a second translator to translate the same text. While the court normally won't decide on the quality of the translation, it can nevertheless ascertain whether the doubts raised as to the original translation are enough to warrant a second one.

In systems where it is for the court to decide which particular translator is appointed, it is beneficial if a given case is handled by a single translator. This enables the use of a common vocabulary and linguistic reference network and makes it easier for the suspected or accused person to understand court documents. A change of translator should only occur in justified circumstances, such as illness, doubts as to the translator's qualifications or objectivity or instances when the translation is extensive, yet so urgent that a single translator would be unable to provide it in the time required.

Finally one must keep in mind that Directive 2010/64/EU introduces an obligation to translate only 'essential documents'. This is a rational and practical solution - for example in a case where there are several accused persons, only one of whom does not speak the language of proceedings, there is rarely a need to translate documents pertaining solely to some of the other defendants. Even if there is only a single defendant courts would sometimes order the translation of the entire case file or an entire act of law whereas only certain parts or passages are relevant for the pending proceedings.

Article 3 (2) of the Directive lists documents which are always considered essential, that is any decision depriving a person of liberty, any charge or indictment, and any judgment. Article 3 (3) in turn stipulates that it is for the 'competent authorities' to decide what other documents are essential. While defining what 'competent authorities' means in this context is left for the Member States, in practice it will often be the body conducting the proceedings at the given stage and commissioning the translation, i.e. the court, prosecutor or police.

This gives the court a substantial degree of influence over the right to translation. When deciding on the scope of 'essential documents', judicial authorities should therefore be very careful not to adopt a too narrow or too wide definition of this term. In the former case the suspected or accused person's right to defence would be prejudiced. In the latter, the proceedings would be needlessly drawn-out and costly, neither of which is usually desired by the defendant. While Article 3 (5) of the Directive expressly provides for a possibility to file a complaint against a decision on what is considered essential documents, any such complaint will be normally considered by a court as well, albeit in a different panel. In either case the court should always be prepared to be flexible and approach each case individually.

3. Translators

Finally, it is naturally the translators themselves who have to contribute to ensuring high quality of translation provided to courts. Quite obviously, translators must strive to achieve the highest professional qualifications and language skills, in their mother tongue as well as their chosen language. Knowledge of languages alone is however not enough to provide high quality translation for courts. The first prerequisite for a good translation is that the translator understands the source material and this requires knowledge of law as well. Court documents are often drafted in a specific language and pertain to complex legal instruments and concepts. Some legal terms have different meanings than the same words used in the common language. The translator must be well-versed in provisions of criminal law, both procedural and substantive, in order to be able to spot such differences and intricacies and unravel the true meaning of the original text. On the other hand, the translator also needs a knowledge of the target legal system in order to use a term or expression which best reflects the meaning of the original text, even if it is not always the literal translation. While it would be unrealistic to expect all court translators to be professional lawyers, a thorough understanding of basic concepts and terms in criminal law is essential.

Such knowledge and skills can, in some cases, be gained through individual study but this requires significant dedication from the person concerned as well as thorough previous education (e.g. in the field of philology). Therefore professional courses and training can often be more effective and time-efficient. Such training could be organised both by the state and by translator associations or universities and should combine expert linguistic knowledge with information on the legal systems of the countries concerned. Representatives of courts, other judicial authorities and legal practitioners could be involved as guest lecturers in order to facilitate the exchange of views and a better understanding of the other partner's expectations.

Specialisation is another concept that has been mentioned before. In order for courts to appoint experts in particular aspects of criminal law, such specialists must first exist. Just as lawyers often specialise in a particular aspect of criminal law, even particular types of crime, so should court translators. The fields of specialisation can be varied and could include, e.g. medicrime, military crime, offences connected with banking (incl. money laundering), transport, 'white collar' crime, etc. Information on any such specialisation should be made available to the courts, be it through a central register, translator associations or even directly.

Specialisation can be effectively implemented by translation companies or translator associations. In such cases the court could approach a given organisation with the nature of the case and information on what kind of specialist is required. The company or association could then recommend a particular translator known for their qualifications and interest in a particular subject.

It is understandable that a translator will usually not be able to make a living translating documents in criminal cases alone. The vast majority of court work will involve commissions which usually contain aspects of contract, commercial, even tort law, but rarely criminal. Nevertheless, should a translator choose a particular field of specialisation in criminal law, they could reasonably expect to be appointed in cases that match such specialisation whilst not having to take assignments in cases in which they hold less interest.

As mentioned above, professional secrecy is of particular importance in criminal proceedings. Just as there should be rules in place to safeguard it, so should the translators themselves realise that their work pertains to very sensitive aspects of human life and activity and that through it they will receive access to information otherwise unavailable to them. Considering that the accused or suspected person normally has no influence over who is appointed a translator in his or her case, it is vitally important that translators strictly follow professional ethics, including keeping professional secrecy.

Secrecy is important guarantee of the right to a fair trial for the defendant. Article 6 (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms requires that any person shall be deemed innocent until proved guilty, which as a rule happens with the pronouncement of a final judgement. Therefore, it would be to the detriment of the interests of the suspected or accused person if information about the trial, charges or developments in the proceedings were made available to other persons, beyond what was authorised by the court. It goes without saying that professional secrecy is particularly vital if parts of the proceedings are closed to the public (conducted *in camera*).

Finally, it must be mentioned that following the profession of a court translator requires certain character traits from the translator. Court work is often stressful and the contents of court documents, particularly in criminal cases, can be rather unsettling. Such documents may contain accounts of particularly violent or vicious acts, drastic descriptions (e.g. autopsy results, crime scene depictions) or cite foul language. When one undertakes to become a court translator, one must take this into account and approach any such text with equal professionalism and accuracy standards. On the other hand certain persons may see the translator as a 'weak link' in the criminal proceedings and attempt to obtain from them information pertaining to the case, such as confidential information. The translator should be prepared to resist such attempts. A degree of mental fortitude is therefore required to properly carry out such work. Universities and other institutions conducting training for translators should consider including such aspects, be as it may that they are not directly connected with drafting a translation, in the curricula of the courses they offer.

Conclusion

The remarks above mention only the most general of factors that contribute to ensuring a high quality of translation in criminal proceedings. How they are practically implemented will depend greatly on the local conditions in the Member States, such as the legal system, the budget for criminal justice administration, even the number of courts and translators *per capita*.

However, one recurring conclusion flowing from the above observations is that the three perspectives mentioned at the outset overlap and interweave. The best laws will be ineffective if they are not followed by translators, the best efforts of translators can be thwarted by lack of cooperation from the courts, etc. The cooperation of all three parties, governments, courts and translators, is essential if an effective system to ensure high quality of translation is to be set up and operate properly. The parties should listen to each other and heed each other's needs and expectations. Similarly, any instruments or mechanisms aiming to ensure quality of translation should be co-created by all three parties and take their individual perspectives into account.

The need for translation in criminal proceedings is unlikely to diminish. On the contrary, the constantly increasing mobility of EU citizens and the enlargement of the EU itself means that ever more cases will require the participation of a translator. All three parties must be ready to face the upcoming challenges in a spirit of good will and cooperation if the right to translation in criminal proceedings is to be real and effective.

Biography

Michał Hara studied law and linguistics at the University of Warsaw and completed a course on English and European law run by the University of Cambridge. He is an advocate (attorney at law) and member of the Warsaw Bar Association as well as a sworn translator and interpreter. He currently works as chief expert at the European and International Criminal Law Unit at the Ministry of Justice of Poland.

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Notes

¹ *The Stockholm Programme — an open and secure Europe serving and protecting the citizens* was put forward during the Swedish presidency in the Council of European Union in 2009. It outlines the topics and fields of development for the EU on issues such as citizenship, justice, security, asylum, immigration and visa policy. It resulted in, among others, the adoption of a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (OJ of the EU of 2009, Series C, No. 295/1) which called on the adoption of several new directives regulating the procedural rights of defendants in criminal cases. The right to translation and interpreting was the first of those, designated “Measure A”. Other measures of the Roadmap relate to issues such as information in criminal proceedings, the right to legal assistance and legal aid and the right to communication with family members, employers and consular officials.