Best practices for effective communication (EU Directive on the right to interpretation and translation in criminal proceedings – Article 6)

"Vademecum" for lawyers

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Dear ladies and gentlemen,

It is a great pleasure for me to be invited to this EULITA-workshop, especially as I am no interpreter, nor a translator but merely a lawyer from Vienna, who is specialized in criminal law. On the other hand I am a member of the executive board of the European Criminal Bar Association, who since its foundation in 1997 is the pre-eminent independent organisation of specialist defence lawyers in all Council of Europe countries. The ECBA aims to promote the fundamental rights of persons under investigation, suspects, accused and convicted persons, not only in theory but also in the daily practice of criminal proceedings throughout Europe.

As most of you will know Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as Article 47 of the Charter of Fundamental Rights of the European Union guarantee everybody the right to a fair trial. One of the fundamental elements of this right is that everyone charged with a criminal offence has the minimum right under Article 6 subpara. 3 lit (a) "to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him" as well as

under Article 6 subpara. 3 lit (e) “to have the free assistance of an interpreter if he cannot understand or speak the language used in court”.

Despite the fact that the Convention recognizes the assistance of an interpreter as fundamental in order to ensure a fair trial for the accused who does not understand the Court’s language the quality of this assistance has never been of a central interest to the European Court of Human rights. The Court has set out in *Protopata vs. Turkey*: *“Even if the Court has no information on which to assess the quality of the interpretation provided, it observes that it is apparent from the applicant´s own version of the events that she understood the charges against her and the statements made by the witnesses at the trial. In any event, it does not appear that she challenged the quality of the interpretation before the trial judge, requested the replacement of the interpreter or asked for clarification concerning the nature and cause of the accusation.”* For the Court this was enough. As long as the accused understands the charges and can somehow understand what is going on in the courtroom this seems to be sufficient.

The Directive on the right to interpretation and translation is based on the same minimum standards, although the Directive has its own commitment to quality in court interpreting under Article 5. As we can see in Article 8 (8) the interpretation provided under Article 2 shall be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence. What has to be translated to the accused person is any decision depriving a person of liberty, any charge or indictment, and any judgment (Art 3 (2)). The rest of the file, most importantly the witness statements would only be translated free of charge, if a reasoned request of the

defence would be made to that effect (Art 3 (3)). If denied there might be a right of appeal against this decision (Art 3 (5)).

All these new regulations create an important step forward, but are still only minimum standards. As Article 6 of the directive requests those responsible for the training of judges, prosecutors and judicial staff involved in criminal proceedings to pay special attention to the particularities of communicating with the assistance of an interpreter so as to ensure efficient and effective communication. EULITA and the ECBA thought that this kind of education would need something more. They have stuck their heads together and created a "Vademecum for magistrates, prosecutors, attorneys and legal interpreters", which some of you might already know. Let me pick out just some points of this Vademecum that would have to be an essential part of every educational approach as set out in Article 6.

Point 1 of this Vademecum reads as follows:

"Selecting the interpreter

In order to guarantee excellent language skills and appropriate interpretation according to proper professional ethics, in principle only legal interpreters (sworn and court certified interpreters) are to be used.

For languages for which there are no registered court interpreters it would be beneficial if the judge or the prosecutor would verify the qualifications and skills of the interpreters before a hearing by means of a short conversation in order to obtain assurance about the knowledge and skills of the interpreter in the language of the proceedings".

To give you an example why it is so important to select only qualified interpreters I can only give you an insight into my personal experience as an Austrian defence attorney, as I – although being a member of the ECBA – do not know the situation in all member states or Council of Europe countries. About two years ago I represented a Georgian citizen of Jewish origin. In his criminal court hearing at the regional court of Vienna the judge used a Hebrew translator that he thought would do a proper job although this interpreter was not a court certified one. After half an hour of the court hearing the judge, the prosecutor and myself were actually quite pleased by the work of the interpreter as none of us was able to understand one word in Hebrew and the German translation sounded at least reasonable to us. My client of course did not complain because he did not understand the German translation. After half an hour a member of the audience, who appeared to be a rabbi from Vienna, stood up and said that the whole translation was absolute rubbish and did not represent what the client really had said. After some confusion I did what the European Court of Human Rights´ expects a lawyer to do in such a situation: I challenged the quality of the interpretation and requested the replacement of the interpreter, which was granted immediately by the presiding judge.

My colleague who I asked about her own experiences in this regard told me about a case where she was representing a client from Gambia. While the “official language” in Gambia is English, there are also 5 “national languages” (namely Mandinka, Wolof, Fula, Serer, Jola). For some reason her client was assisted only by a Mandinka interpreter while being questioned by the police. While this was in fact his mother tongue (and English only his second language), there seem to be multiple regional versions of this language and her client was barely able to understand the interpreter and vice versa. After it turned out that it was impossible to find a Mandinka interpreter – of which there seem to be only two or three in Austria, one of them was the person who had

already done the interpretation at the police stage – the client asked my colleague to make a request to the Court that he would rather be assisted by an English interpreter than by someone who officially spoke his mother tongue (and was certified to do so) but in a way that was still impossible for him to understand.

Generally, I have to say that even with sworn and court certified interpreters there arose some problems lately. Like all European countries also Austria tries to reduce its public expenditures. For this reason the government installed at the beginning of this year a federal agency to provide legal interpretation in criminal proceedings. The interpreters are employed by the state on a 40-hour per week stand-by service. The problem is that these interpreters are – at least that is what judges and prosecutors tell me – those who have never before worked in a court room. All the experienced court-room interpreters refuse to join this kind of employment as they have a chance to earn the fees stipulated by law as independent interpreters. Nonetheless judges are obliged to use these interpreters in the first place. The results are foreseeable and lead to outrages from the members of the judiciary caused by a very poor standard of interpretation.

Not only for this reason point 1 of the Vademecum has to be supported strongly.

Point 2 of this Vademecum reads as follows:

"Information on interpreting

In complicated and long proceedings, as well as in connection with voluminous files and difficult cases, a brief review of the case by the interpreter before the trial or a few days before the hearing is to be recommended in order to prepare

effectively the specific terminology of a case (such as in the field of medicine, engineering, or economics)".

In Austria we are momentarily confronted with a huge "wave" of criminal proceedings that deal with very complicated share deals at the international financial markets/stock exchanges. As most of you know this really is a place for experts. For this reason it is of utmost importance that judges need to let the interpreters prepare themselves for the court hearing by studying the file and the language used therein. The practical problem might nonetheless be that judges need the files for themselves as they also have to prepare themselves in the days before the court hearing to come and do not want the file to be copied for days. To follow point 2 of the interpretation they judges should at least make a copy of the charges to give the interpreter a chance to prepare and not to be left in the dark completely.

Point 6 of this Vademecum reads as follows:

"Interpreting the hearing to the foreign-language parties

In order to allow foreign participants in a hearing to follow the proceedings (for example, during the interrogation of witnesses), the court interpreter must be allowed – e.g. by sitting next to the parties – to interpret the statements of witness and/or the judge (prosecutor, lawyers) in the whispering interpreting mode.

To facilitate this demanding type of interpretation and to avoid any acoustic disturbance during the court hearing, caused by the whispered interpretation, the use of a so-called "bidule" is recommended."

This demand is a very justified one although I think that it will never become reality in Austria. In many cases in Austrian court rooms I have e.g. represented Nigerian citizens charged with selling drugs, and many times I have asked myself how it would be if I myself would have to sit in a Nigerian tribunal, when all I can understand of the case that affects my own fate is the questions of the judge directed at me and a short summary of the witness statements, and in the end the judgement. I would not be able to understand what the judge says to other people in the court room and not even what my own lawyer says on my behalf. This is the sad truth about many European states at the moment.

Only in one case that I dealt with in the last ten years the court decided to hire an interpreter who was able to translate simultaneously in the whispered interpreting mode. When I asked the interpreter why such an interpretation – which of course was of great benefit to the accused – was not a common standard in Austrian criminal procedures I was told that there would not be enough interpreters for all required languages and it would be too expensive as such interpreters charge much higher rates than the "traditional" ones. And these are exactly the reasons why I fear that this recommendation of the Vademecum will never become reality.

What can you as interpreters and what can we as lawyers do in order to prevent at least the worst cases of bad quality interpretations and to ensure that the fair trial rights of the accused are respected?

First, I think it must become a **standard** to raise the issue of whether the accused or someone else present had doubts about the quality of the interpretation provided whenever foreign-language parties are involved. Awareness for interpretation problems and their consequences for the accused have to be raised among judges, prosecutors, police officers and lawyers. I hope

that the “Vademecum” for magistrates, prosecutors, attorneys and legal interpreters can assist in this regard.

Second, especially lawyers have to be aware that the European Court of Human Rights will only consider that there has been a breach of the right to a fair trial if the quality of the interpretation is actually **challenged** and a formal request for the replacement of the interpreter is made. Ideally we should also point this out to our clients so that they know how much depends on them, i.e. to make their doubts about the interpretation known to us at the earliest stage. What is clear from the case law of the European Court of Human Rights is that it is too late to raise the issue that the quality of interpretation has been insufficient for the first time in an appeal or in a complaint to the European Court of Human Rights.

I am therefore grateful that this Workshop here in Ljubljana gives us the possibility to discuss and to compare our experiences with interpreting in and out of the court room and to raise our awareness for the fact that we have to be watchful for signs of misunderstandings, lack of technical terms etc. in order to prevent scenarios where accused persons are denied fundamental trial rights due to bad quality interpretations. I thank you for your interest and your attention!