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Legal Interpreting and Translation in the EU: Justice, Freedom and Security through Language

Any discussion on the fundamental rights of EU citizens in legal proceedings must begin with a reference to the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (the 'ECHR'), which in Articles 5 (2) and 6 (3a and 3e) lays down the right to a 'fair trial', including the right "to be informed promptly, in a language which he understands …of the nature and the cause of the accusations against him" and the right " to have the free assistance of an interpreter if he cannot understand or speak the language used in court".

Landmark case-law by 'Strasbourg' (the European Court of Human Rights) in decisions like i.a. the 1978 Luedicke, Belkacem and Koc v. Germany (on the right to the free assistance of an interpreter), Kamasinski v. Austria (1989, on the issue of the quality of the interpreting) or Cuscani v. United Kingdom (on the ultimate responsibility of the presiding judge to monitor both provision and quality of interpreting in court) have fleshed out the ECHR principles and turned them into judicial realities. It is crucial to understand the importance of ECHR as it will feature heavily in the responses to the ambition of the EU to take action itself in the area of fundamental rights and freedoms.

As a matter of fact, this is a fairly recent ambition which stems from the recent collective treaties of the EU: Maastricht (1993), which first introduced justice and home affairs as "matters of common interest" for the EU and Amsterdam (1999, and Nice 2001) setting out to make the EU into "an area of freedom, security and justice". Once again it is important to consider that 'Justice' and therefore also criminal matters come under Title VI of the TEU (Treaty of the European Union as the above treaties are collectively known; and see particularly Articles 29, and 31), which is also referred to as the 'Third Pillar' area (besides the economic and social objectives). As such this 'third pillar' brings with it specific characteristics, the most important of which are the limitation to specific instruments (e.g. The Framework Decision i.o. a Directive), a limited role for the European Parliament and, again crucial to the further development of our story, adoption by unanimous vote.

Equal access to justice

The Tampere (1999) and The Hague (2004) European Councils then set about implementing 'Justice' in the EU. This implementation was meant to secure closer cooperation between the member states in the area of justice, mutual recognition of judicial decisions, approximation of rules and standards and to guarantee all EU citizens equal access to justice also across languages, cultures or impediments. Mutual recognition, collaboration and access, are the keywords and key objectives. Now it is obvious that such collaboration between member states (see e.g. the Framework Decision on the European Arrest Warrant and Surrender Procedure of 13.06.2002) as well as the

safeguarding of procedural rights in criminal proceedings both rest on mutual confidence in each other's legal systems, which is itself impossible without there being effective channels of communication in place across languages and cultures. Hence the need for reliable, competent legal interpreters and translators (LITs) in the EU.

Different quality standards

However, the current situation in the EU reveals that there are insufficient numbers of trained LITs who meet, if at all, very different quality standards. There is a lack of compatible national registers as well as a lack of interdisciplinary guidelines for best practices in the legal services (e.g. on how to work best with an interpreter). This is why the EU Commission has started a wide range of programmes (Grotius, Agis, Criminal Justice) and a number of concrete projects in the area of justice, including some projects on the provision and quality of legal interpreting and translation as part of the procedural safeguards in criminal proceedings. The overall aim being to make the ECHR practical and effective in the EU and to implement it consistently and equally in all member states.

The EU processus on Procedural Safeguards in Criminal Proceedings was launched with a Consultation paper in January-February 2002, followed by a Questionnaire for the Member States (beginning of 2002), a Seminar on the Quality of Justice (March 2002) and a Hearing on the Consultation Paper (April 2002). This processus led to a Discussion paper (September 2002) and a Meeting of Experts (October 2002).

As said, the issue of cooperation and of access to justice across languages -- and therefore the need for quality interpreting and translation -- featured right from the beginning as one of the major fundamental rights and procedural safeguards. This concern was researched and underpinned by a number of Grotius and later Agis Projects on LIT, such as GROTIUS project 98/GR/131, GROTIUS project 2001/GRP/015 and AGIS project 2003/AGIS/048 which set out to propose EU-equivalencies on standards of selection, training and assessment of LITs, standards of ethics, codes of conduct and good practice, interdisciplinary working arrangements between LITs and the legal services and, last but not least, to disseminate and promote the implementation of those standards throughout the EU. These recommendations were published in book form (Aequitas, 2001; Aequalitas, 2003 and Aequilibrium, 2005) and are accessible on a website (www. legalinttrans. info).

All this preliminary work resulted in the publication of a Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union (February 2003). This Green Paper contained proposals in five areas:

- Access to interpretation and translation
- Access to legal representation both before and at the trial
- Ensuring that vulnerable suspects and defendants in particular are protected
- Consular assistance to foreign detainees
- Notifying suspects and defendants of their rights (the "Letter of Rights")

On LIT the Green Paper contained quite concrete proposals (very much drawing their inspiration from the Grotius-Agis projects), viz. that member states must

- have a system to train qualified LITs
- have a system for the certification of LITs, including a registration system
- establish a system of CPD
- have a system of monitoring the provision and quality of LIT
- have a code of ethics and guidelines for good professional working practices
- offer training to judges, public prosecutors and solicitors on how to work with LITs.

The responses to the Green Paper were, predictably enough, quite varied. On the whole, the European Parliament (see e.g. the important EP resolution of 6 November 2003), the experts at the Public Hearing in June 2003 and most stakeholders such as e. g. Amnesty International, Justice or the CCBE (Conseil des Barreaux européens), were very positive and welcomed the Commission's initiative in this area. However, some Member States were quite skeptical or even negative about the Green Paper ideas, mostly because they felt the ECHR was a sufficient legal basis for these issues, a basis the EU actually lacked, and because of subsidiarity principle (they felt these issues belonged to the member states' prerogatives). Moreover there was the rather perverse argument that these proposals might actually lead to a lowering of standards in some countries and there was a fear of the financial consequences the Green paper might entail.

Taking these comments and positions into consideration, the EU Commission moved forward on the issue with the presentation of a Proposal for a Council Framework Decision on certain Procedural Rights in Criminal Proceedings throughout the EU (COM (2004) 328 final -- 28.4.04). It is important here to repeat again that the Framework Decision is the 'highest' or most binding instrument that is available in the area of the Third Pillar and that it needs adoption by the member states by unanimous vote.

Common minimum standards?

The Proposal still wanted to establish common minimum standards in the same five areas as the Green Paper but certainly as far as LIT was concerned, the Green Paper proposals were diluted and sized down to a number of rather vague requirements. The following are the relevant articles on LIT in the proposal.

- Article 6: The right to free interpretation ("free of charge to the suspected person"; "where necessary throughout the proceedings"; applies also to "persons with hearing or speech impairments")
- Article 7: Free translation (of "relevant documents" at the discretion of "competent authorities" or "the suspect's lawyer")
- Article 8: Accuracy of the translation and interpretation (the LITs should be "sufficiently qualified" and if not, "member states must implement a mechanism to provide for a replacement of the LIT").
- Article 9: Recording of the proceedings ("an audio or video recording…to ensure quality control", and " a transcript shall be provided to any party in the event of a dispute" but only "for the purposes of verifying the accuracy of the

interpretation")

- Article 16: Duty to collect data to monitor the provision i.a. on the number of persons for whom the services of an interpreter or translator was required, on nationalities, languages, people requiring Sign Language etc.)

To elaborate just one example: all the quality safeguards in LIT which were enumerated in the Green Paper (training, certification, a register, CPD, codes etc.) and worked out in the Grotius-Agis projects were now watered down in the Proposal to the requirement in Article 8 that LITs must be "sufficiently qualified".

Once again, the responses to the proposed Framework Decision were quite diverse and even antagonistic. The EU Parliament (see e.g. the important response A6-0064/2005 of the Committee on Civil Liberties), the NGOs (such as Amnesty International, the European Criminal Bar Association, Justice, etc.), and of course the Grotius-Agis projects partners, but also a number of member states, some national parliaments and, of course, the Commission were supportive of this Proposal because, at least, it lays down minimum norms**,** implements consistent and uniform rights in the EU, monitors adherence to and effectiveness of these rights, increases mutual confidence in the member states' legal systems and raises effectiveness of ECHR to EU level. However, concerning LIT in particular, there was also real, serious concern about the effectiveness of the articles and an overall feeling of disappointment because the Proposal was seen as a step back from Green Paper. For instance, why not define qualified LIT, or why no obligation of training? Why no required certification or registration procedures? Why no minimum uniform code of ethics? And of course also once again, the response of a number of member States was quite negative because along the lines of their previous objections they felt that ECHR (Art. 5 & 6) and concordant ECtHR case law is sufficient to safeguard the fundamental rights. These member states continue to feel that the EU legal basis is insufficient, that as a matter of fact the Proposal contravenes the subsidiarity principle, that it might lead to a lowering of standards in some member states and that it certainly would lead to an increase of costs**.**

These discussions continued far into 2007 when it finally became clear that six member states remained adamantly opposed and would not give in on the issues raised above. The United Kingdom, Ireland, the Czech Republic, Slowakia, Malta and Cyprus remained opposed to the Proposal and in spite of strong support from other member states and the commission, the Proposal was finally buried in June 2007.

So, where does that leave us at this point in time? The needs and rationale for an EU Commission initiative are still the same, if not more urgent now than ever. There is ever growing citizens' and migrants' movement in the EU, collaboration and cooperation between member states in the face of new threats remains a priority, confidence in each others' decisions and procedures is required, efficiency and quality of LIT, fairness, consistent application of ECHR, potential miscarriages of justice, all remain issues of concern. All this should propel all member states to take action to safeguard justice, freedom and security throughout the EU.

How to get out of the 'impasse'

So, are there ways to get out of the present 'impasse'. Perhaps the EU Commission could use the 'salami' strategy on LIT in the Proposal and cut the bit about LIT -- which most states agree on with the exception of the Article 9 (on recording) -- out of the Proposal and seek agreement on that. (cfr. Droipen 07-08.09.06) Or the EU Parliament might consider taking an initiative on the Proposal or stimulate the 'Network' (°2000) into action. An EU presidency might want to take up the issue, possibly via limiting the unanimity rule on certain matters of Justice, but then again even that 'passerelle' proposal by the German presidency collapsed early 2007. Maybe some member states might consider following the "enhanced cooperation" strategy on this issue. And maybe, one might consider taking the whole LIT-quality issue out of DG Justice altogether and try to get it enforced throughout the EU as part of a professional internal market regulation. Or make it an issue of a regulated service provision (cfr. the EN 15038-2006 norm on Translation Services). Or perhaps some sort of initiative by the Commission might pool the needs and expertise of the Commissioner for Multilingualism, the DG Interpretation and the DG Justice to get the processus on the rails again. Maybe one could relaunch the proposal on LIT on the basis of the results of current Agis-projects (cfr. JLS/2006/AGIS/052) on the provision of LIT throughout the EU, or via new projects under the new Criminal Justice programme.

Even so, a number of member states, inspired by the momentum of the Green Paper and of the Proposal, have already taken measures or are progressing towards better quality arrangements in LIT, such as a. o. Denmark where a national interdisciplinary working party on LIT has been set up and where political parties have taken initiatives in the Parliament; or Belgium where there is an excellent bill on LIT before Parliament, or the Netherlands where one has a bill and one has actually very much implemented all recommendations of the Grotius-Agis projects on LIT. There have been seminars and conferences on the provision of LIT in Vienna, Frankfurt, Madrid, Rome, Helsinki etc. all examples of the desire of many member states to take action.

But whatever happens in the (near?) future, the Grotius-Agis recommendations on LIT stand, we believe. In the end all EU Member States should first of all establish the foundations (assess situation and needs, set up appropriate structures, identify targets, instruments and strategies, budgets…), implement a structure of LIT professionalisation (training, certification, registration, working arrangements etc., including 'emergency measures'), and implement continuous development strategies (new needs, advanced training, specialisms…). In short, they should

- have a system to train qualified LITs
- have a system for the certification of LITs, including a registration system
- implement a quality monitoring system
- have a code of ethics and guidelines for good professional working practices
- establish a system of CPD
- offer training to the judiciary on the importance of LIT and on how to work with LITs
- stimulate and implement LIT research.

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