

The right to interpretation and translation within criminal proceedings in the European Union. Comparative examination. Critical opinions

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Abstract

In the present study we have examined the Directive 2010/64/EU of the European Parliament and the Council, the European legal instrument governing the right to interpretation and translation within criminal proceedings in the European Union. The innovations in this paper concern the examination of the regulatory way of the mentioned two rights, the formulated critical opinions and the proposals of de lege ferenda. The value of the paper lies in the de lege ferenda proposals, which that can contribute to improving the system of European legislation in the field, which in the constant interpretation of the ECHR it also requires respecting the right to interpretation and translation in ongoing criminal proceedings. Also, the examination highlights the importance and necessity of adopting this European legal instrument regarding the harmonization of the national laws in terms of compulsoriness and the procedure for complying with the two rights to which we referred, in case where the suspect or the accused is to be judged of the territory of a Member State other than his State of origin. The work can be useful to theorists, practitioners and to the European legislator from the perspective of operating the suggested changes.

Keywords: *suspect; accused; offense; criminal proceedings; the right to a fair trial.*

JEL Classification: K 14, K33

1. Introduction

As argued in the doctrine, the scientific and technical progress and widening the democratization process across several states has created the possibility of easy movement of people and goods, thus leading to the development of human society as a whole. The unquestionable beneficial effect for the whole humanity has created some advantages for the possibilities of proliferation of crime phenomena worldwide.²

The increase of crime of all kinds and especially the organized one with direct effects on many states of the world required a strong response of many countries of the world known for accepted democratic political regimes.

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² Boroi, Al. & Rusu, I. (2008). *Cooperarea judiciară internațională în materie penală, Curs master/International Judicial Cooperation in criminal matters, Master Course*. Bucharest: C.H. Beck, p. 2.

Against this background there was a need to intensify specific activities of international judicial cooperation in criminal matters through cooperative efforts of many countries and their direct action in the plan for preventing and combating the transnational organized crime.

Regarding its importance related to international cooperation as a whole, on multiple levels, we can say that in general, the international judicial cooperation in criminal matters represents only one area within the specific activities of cooperation between countries of the world, an extremely important domain, which was imposed by necessity since the beginning of last century.³

In this context, the growing danger caused by the growth of cross-border crime, the need to prevent and combat more effectively in an organized worldwide framework prompted the adoption of zonal, regional and global international instruments, which would unify the world states' efforts.⁴

In this sense, in the recent Romanian doctrine it has been appreciated that one of the most important legal instruments of this kind (if not the most important one) is the United Nations Convention against Transnational Organized Crime, together with the Protocol to Prevent, Suppress and Punish Trafficking in persons, especially women and children and the Protocol against the smuggling of migrants by land, air and sea (both additional to the Convention), adopted in New York on 15 November 2000 and ratified by Romania by Law no. 565/2002.⁵

In their essence, the Convention and the two Additional Protocols establish a series of measures mainly aiming at the improvement of international judicial cooperation between the countries of the world, the main purpose being that of preventing and combating more effectively the transnational organized crime.

Moreover, the object of the Convention is set out in art. 1 and it consists of "promoting cooperation in order to prevent and combat transnational organized crime more effectively."⁶

As expected the transnational organized crime has evolved unprecedentedly also at the level of the European Union, in different forms, sometimes with more serious consequences.

The bloody events in the recent years, culminating with the blow to the U.S. 11 September 2001 by some members of the terrorist organization "Al-Qaida" lead until recently by the billionaire Osama bin-Laden (being considered responsible also for the bombings of American embassies in Kenya and Tanzania on August 7, 1998), have horrified and at the same time it has being acknowledged

³ Boroï, Al. Rusu, I. & Balan-Rusu, M.-I. (2012). *The Judicial Cooperation in Criminal Matters in the European Union, EU Judicial Cooperation*. LAP LAMBERT Academic Publishing, Danubius University, Saarbrücken, Germany, p. 16.

⁴ Boroï, Al. & Rusu, I., *op. cit.*, p. 2.

⁵ Boroï, Al. (coord); Rusu, I. & Balan-Rusu, M.-I. (2016). *Cooperarea judiciară internațională în materie penală, Tratat/The international judicial cooperation in criminal matters. Treaty*. Bucharest: C.H. Beck, p. 5; both the Convention and the two Protocols have been ratified by Romania by Law no. 565 of 16 October 2002, published in the Official Monitor of Romania, Part I, no. 813 of 8 November 2002.

⁶ *Ibidem*, p. 5.

worldwide. In the same context there are also included the terrorist attacks in Russia, Spain, England, Italy and Japan, all resulting in numerous casualties and significant property damage.⁷

Armed conflicts newest or oldest in near areas of the European Union have brought new challenges in terms of internal security of Member States. Thus, in the second half of 2015 (especially the end of the year), the European Union faced a new way of internal destabilization, involving invasion of Member States by large groups of immigrants originating from areas of armed conflict i.e. Syria, Iraq, Afghanistan, etc.

The number of people seeking asylum in the European Union (particularly in Germany) will implicitly increase crime of all kinds, focusing on terrorism.⁸

The last terrorist attack in the heart of Europe in Brussels, leaving more than 30 dead people and about three hundred wounded, demonstrated once again, if necessary, the need to intensify specific activities of international judicial cooperation in criminal matters, the ultimate goal being that of preventing and combating more effectively this scourge.

Against this background, in the European Union, the judicial cooperation in criminal matters has been developed and accepted by Member States in a different way, meaning that in addition to the established forms recognized worldwide, there have been established new forms, based on the principle of recognition and enforcement of judgments of courts of another Member State.⁹

Against this background extremely complex, the European Union has set the objective of maintaining and developing an area of freedom, security and justice in the European Union, adopting numerous laws meant to ensure the increase the efficiency of judicial bodies with concrete attributions in this area.

On the other hand, in the complex activity of judicial cooperation in criminal matters it was also imposed the compliance of the provisions of art. 6 of the European Convention on Human Rights and Fundamental Freedoms and article 47 of the EU Charter of Fundamental Rights, which establish the right to a fair trial.

Thus, for the right to a fair trial, the European Union has adopted a series of laws with express provisions in this area.

According to the conclusions of the Tampere Council adopted on 29 November 2000, a program of measures had to implement the principle of mutual recognition to judgments in criminal matters.¹⁰

Subsequently, on 30 November 2009, the Council adopted a resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.¹¹

⁷ Rusu, I. & Balan-Rusu, M.-I. (2013). *The European Arrest Warrant, Romanian and European Legislation, Doctrine and Jurisprudence*. LAP LAMBERT Academic Publishing, Danubius University, Saarbrücken, Germany, pp. 14-15; Boroï, Al. & Rusu, I., *op. cit.*, p. 5.

⁸ Boroï, Al. (coord.), Rusu, I. & Rusu, M.-I., *op. cit.*, p. 7.

⁹ Rusu, Minodora-Ioana (2015). *Asistența judiciară în materie penală la nivel European/Judicial assistance in criminal matters at European level*. Bucharest: Universul Juridic, p. 23.

¹⁰ Published in OJ C 12 of 15.01.2001.

Through a gradual approach regarding certain rights of suspected, accused persons, detained or arrested within criminal proceedings taking place in another Member State, the Roadmap sets out the need to adopt the following measures: the right to translation and interpretation (measure A), the right to information on rights and about the charges (measure B), the right to legal advice (measure C), the right to communicate with relatives (measure D) and special guarantees for suspected or accused persons who are vulnerable (measure E).

Within the Stockholm Programme, adopted on 10 December 2009, the European Council accepted the Roadmap and made it part of the Stockholm Programme (point 2.4.).

The Council also emphasized the non-comprehensive feature of the Roadmap, by inviting the Commission to study further elements of minimum procedural rights of suspected or accused persons and whether it is necessary to analyze other issues, such as the presumption of innocence, in order to promote a better cooperation in this area. In this study we will proceed in examining the first of the legal acts adopted in this area (Measure A) i.e. 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.¹²

Under the European legislative act, the right to interpretation and the right to translation for those who do not understand the language of the proceedings are established in art. 6 of the European Convention on Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights (Preamble, par. 14).

2. Purpose and scope

By adopting the European legal instrument there were set a series of legal rules aiming at ensuring the right to interpretation and translation in criminal proceedings and the execution proceedings of a European Arrest Warrant. This right will ensure people from the moment they shall be made aware by the competent authorities of the Member State in which they are, by official notification or otherwise, that they are suspected or accused of committing a crime until the completion of the procedures; the completion of the procedures means the final solution for the case, which involves a final decision, including an appeal. Assuming that the law of a Member State provides a sanction for minor offenses by an authority other than a court with jurisdiction in criminal matters and the application of such a sanction may be appealed before such a court, the provisions of the European legislative act is only applicable to proceedings before that court following the exercise of such appeal (art. 1 of the European legislative act).

¹¹ Published in OJ C 295 of 04.12.2009.

¹² Published in the OJEU no. L 280/1 of 26.10.2010.

3. The Right to Interpretation

In the course of criminal proceedings, the suspected or accused of a crime persons who do not speak or understand the language of the criminal proceedings it shall be offered, without delay, interpretation services in criminal proceedings conducted before authorities and judicial prosecution, including within the interrogation by the police, during all court hearings and during any necessary interim hearings.

Also, it will be ensured when necessary in order to ensure the fairness of the proceedings, to be available the interpretation for communication between suspected or accused persons and their lawyers, which is directly related to interrogation or hearing during the proceedings or with the introduction of an appeal or other procedural applications.

The right of interpretation mentioned above includes also appropriate assistance for persons with hearing and speech deficiencies.

In order to avoid certain abuses, each Member State will take steps to establish a procedure or mechanism in order to ascertain whether the suspected or accused persons speak and understand the language of the criminal proceedings and whether they need to be assisted by an interpreter.

However, the Member States shall ensure that in accordance with their internal procedures (in their national legislation), the suspected or accused persons have the right to exercise an appeal against any decision that establishes that there is no need for interpretation and, when interpretation has been insured, these people have the opportunity to complain that interpretation is not of sufficient quality to ensure fairness of the proceedings.

In the course of criminal proceedings, there may be used communication technologies such as videoconferencing, telephone or the Internet, unless the physical presence of the interpreter is necessary to ensure the fairness of the proceedings.

Regarding the procedure for enforcing the European arrest warrant, the executing State, through its competent authorities shall provide to persons subject to such proceedings, i.e. who do not speak or understand the language of the proceedings, appropriate interpretation services.

Regarding the interpretation, we should specify that it must be of a sufficient quality so as to insure the fairness of the proceedings, in particular by ensuring the fact that the suspected or accused persons know the case against them and they can exercise their right of defense in full knowledge (art. 2 of the European legislative act).

4. The right to translation of essential documents

In the criminal proceedings, the Member States shall ensure that to suspects or accused persons, who do not understand the language of the criminal proceedings concerned, there will be provided within a reasonable time the written

translations of all essential documents, in order to ensure that the people can exercise their right to defense and to guarantee the fairness of the proceedings.

According to the European legislator the expression of essential documents includes the following:

- Any decision of deprivation of liberty of a person;
- Any indictment;
- Any document for accusation;
- Any judgment.

In all circumstances, the competent authorities shall decide, for each case if there are other essential documents.

On identifying other key documents, the suspected or accused person and his lawyer may submit a reasoned request to the judicial authorities.

Under the European legal act, the judicial authorities are not obliged to translate passages of essential documents which are not relevant for the purposes of enabling the suspected or accused persons to know the case against them.

Each Member State will ensure that the suspected or accused persons in accordance with the procedures in their national law, have the right to exercise an appeal against any decision finding that there is no need to translate documents or parts of them and when the translation has been provided, these people have the opportunity to complain that the translation was not of sufficient quality so as to ensure the fairness of the proceedings.

During the enforcement proceedings of a European arrest warrant, the executing Member State, through its judicial authorities involved in the execution of these procedures, provides written translation of this document to any person subject to such proceedings who does not understand the language in which the European warrant arrest is written or the language in which it was translated by the issuing Member State.

Under certain conditions which we call as being special, notwithstanding the provisions cited above, it can be provided instead of a written translation, an oral translation or an oral summary of essential documents, provided that such oral translation or oral summary does not prejudice the fairness of the proceedings.

Any waiver of the right to a translation of the above documents must be subject to the requirement that the suspects or accused persons have received prior to legal assistance and they have been fully informed about the consequences of their renunciation or the waiver must be unequivocal and voluntarily.

Regarding the translation, it must be of a quality sufficient to guarantee the fairness of the proceedings, in particular by ensuring the fact that the suspected or accused persons know the case against them and they can exercise their right to defense (art. 3 of the European legislative act).

5. The Right to Interpretation and Translation in the Romanian Law

Given the importance of the right to interpretation and the right to translation in the enforcement proceedings against a person who is in the territory

of a Member State other than his State of origin and the way in which the Romanian law meets the European requirements, we will refer to the provisions of the Romanian law.

Thus, paying particular attention to these two rights, the Romanian legislator has reached to the level of principle, being provided in the Criminal Procedure Code under Title I, entitled “Principles and limits of applying the criminal procedural law” in art. 12 called marginally “The official language and the right to an interpreter”.

According to these provisions, the official language in a criminal trial is Romanian.

Also, according to art. 12, par. (3) of the Criminal Procedure Code, *the parties and actors in the proceedings, who do not speak or understand the Romanian language or cannot express themselves shall, free of charge, have the opportunity to inspect parts of the dossier, to speak and to draw conclusions in the court through an interpreter. In cases where judicial assistance is compulsory, the suspect or defendant has the opportunity, free of charge, to communicate through an interpreter, lawyer in the preparation for the hearing, the introduction of an appeal or any other claim related to the case.*

As we observe the Romanian law provides a number of additional rights in relation to the European legal instrument in the sense that when the judicial assistance is compulsory, to the suspect or defendant (accused) it is ensured the opportunity to communicate through an interpreter free of charge, with a lawyer in the preparation for the hearing, the introduction of an appeal and any other claim related to the case.

However, the Romanian law provides that in the case of legal proceedings there are used certified interpreters, being included in this category also the certified translators.

Regarding obtaining some photocopies of some essential documents in the file, we specify that such provisions are found in article 94, par. (2) of the Criminal Procedure Code, which mentions the possibility for the lawyer (suspect or defendant) to consult the file, which in the view of the Romanian legislator assumed the right to study its documents, the right to take notes, data or information from the file and to obtain photocopies on the client’s expense.

The right to interpretation and translation within the law enforcement procedures of the European Arrest Warrant by the Romanian judicial authorities is also expressly provided for in the provisions of Title III of Law no. 302/2004 on international judicial cooperation in criminal matters.¹³

¹³ Law no. 302/2004 on international judicial cooperation in criminal matters was originally published in the Official Monitor of Romania, Part I, no. 594 of 1 July 2004, then republished in the Official Monitor of Romania, Part I, no. 377 in 2011; latest changes and additions have been made by Law no. 300/2013 amending and supplementing Law no. 302/2004 on international judicial cooperation in criminal matters, published in the Official Monitor of Romania, Part I, no. 772 of 11 December 2013.

Thus, according to art. 104, par. (1) of Law no. 302/2004, the arrested person has the right to be informed about the content of the European arrest warrant; also in art. 104, par. (3) of the same law, the arrested person who does not understand or speak Romanian has the right to an interpreter provided by the court free of charge.

So we can say that the Romanian legislator has transposed into the national law, the European provisions governing the right to interpretation and translation.

6. The cost and quality of the interpretation and translation

The costs related to interpretation and translation services will be covered entirely by the Member States on the territory in which the criminal proceedings in question are conducted.

Furthermore, the Member States will ensure that the interpretation and translation provided meets the specified quality standards.

Under the European legal instrument in order to promote the adequacy of interpretation and translation and efficient access thereto, the Member States shall endeavor to establish a register or registers of independent translators and interpreters who are appropriately qualified. After creating the records, they will be made available to lawyers and the competent authorities (Art. 4 and 5 of the European legal act).

7. Creating and maintaining the level of protection

Without bringing prejudice to the independence of judges and differences in the organization of the judiciary system across the Union, the Member States shall require the persons responsible for training judges, prosecutors and judicial staff involved in criminal proceedings to pay special attention to participants' communication with an interpreter, so as to ensure efficient and effective communication (art. 6 of the European legislative act).

Also in accordance with the provisions of the European legislative act, the Member States shall ensure that when the law enforcement or judicial authorities questions or hears the suspect or accused with the help of an interpreter, or when it provides, in the presence of such authority, an oral translation or an oral summary of essential documents, or when a person has waived his right to translation, it records that such event took place in accordance with the procedure of procedure of keeping a record required by the legislation of the Member State.

Meanwhile, in the examined legislative act it is provided that no deposition shall be construed as restricting or derogating from any of the rights and procedural guarantees that are ensured under the European Convention for the Protection of Human Rights and fundamental Freedoms under the Charter of fundamental rights of the EU under other relevant provisions of international law or the law of any Member State that provides a higher level of protection (art. 6-8 of the European legislative act).

8. Conclusions, critical opinions and *de lege ferenda* proposals

Adopting the examined legislative act is motivated primarily by the objective necessity of the right to a fair trial, as interpreted consistently by the ECHR jurisprudence.

On the other hand, by adopting this legislative act, the European legislator has sought to harmonize the national laws with regard to respecting the right to interpretation and translation, for those rights to be insured also to citizens that are investigated, suspected or accused of committing a crime on the territory of a Member State other than the State of origin.

Not least we appreciate that the adoption of the legal instrument to which we refer, the European legislator intended to ensure for the foreign citizens rights to at least the level of rights granted to nationals in identical cases.

Besides some aspects that lead to the necessity and usefulness in the legal practice of this European legal instrument, this examination gives us the opportunity to make critical opinions, complemented by proposals of *de lege ferenda* aiming at improving the system of European legislation in this domain.

A first critical remark concerns how the European legislator sought to regulate the obligation to provide the translation of some essential documents. According to the provisions of art. 3, par. (2) of the examined legislative act, the essential documents mean *any decision of deprivation of liberty of a person, any indictment or accusation and any judgment*.

From the interpretation of those provisions and others, it results that the European legislator has imposed to judicial authorities of the states to translate and release these documents upon request, without making any reference to other evidence (documents) in the file.

We appreciate that the suspected or accused of an offense in another Member State may require translation and other documents which may be essential, although the legislator did not define them, such as a complaint, witness statements, expert reports, etc.

In this context, *we believe that the European legislator should renounce at defining the term of essential documents, leaving to the discretion of the suspect or the accused (his lawyer) to require the translation of documents which they consider essential. This is imperative because, in our opinion the judicial organs of the State concerned should not be called upon to appreciate the importance of the documents for the suspect or accused, this attribute is the sole responsibility of the suspect or the accused or his lawyer.*

Also, in the provisions of art. 3, par. (3) of the examined legislative act it is considered *that the competent authorities decide in each case whether there are other essential documents*. It further shows that the suspect, accused or their lawyers *may submit a reasoned request*.

From the interpretation of those provisions it results that the suspect, the accused or his lawyer may request a translation and other essential documents, but the status of these *essential documents* is established still by the judicial bodies.

We consider that those provisions are in flagrant violation of the right to a fair trial as this right is interpreted consistently in the ECHR jurisprudence.

In this context, we believe that the European legislator should renounce at the mentioned text.

Another provision that appears to be questionable is contained in art. 3, par. (4) where it provides that where there is *no obligation to translate passages of essential documents which are not relevant for the purpose of enabling the suspected or accused persons to know the case against them.*

These provisions allow the judicial bodies to assess the relevance of evidence that should be made known to the suspect or accused or his lawyer to base the defense.

We believe that these measures lead to serious prejudice to the suspected or accused person's right to know the evidence in the file and the implicit rights of defense, since no prosecution must establish the essential documents that are not relevant from defense but the suspect, the accused or his lawyer. Therefore we consider that these provisions need to be removed from the text.

A final critical opinion regards the provisions of art. 3 par. (7) to allow an oral translation or an oral summary presentation of translation, provided that this does not prejudice the fairness of the proceedings.

We think this text should be completed with the possibility of an oral translation or an oral summary *only at the express request of the suspect, the defendant or his lawyer.*

As one general conclusion we appreciate the usefulness of this European legal instrument that requires respect for the right to interpretation and translation of the suspected or accused of committing a crime on the territory of another Member State, while retaining the expressed critical opinions.

Bibliography

1. Boroi, Al. & Rusu, I. (2008). *Cooperarea judiciară internațională în materie penală, Curs master/International Judicial Cooperation in criminal matters, Master Course.* Bucharest: C.H. Beck;
2. Boroi, Al. (coord); Rusu, I. & Balan-Rusu, M.-I. (2016). *Cooperarea judiciară internațională în materie penală, Tratat/The international judicial cooperation in criminal matters. Treaty.* Bucharest: C.H. Beck;
3. Boroi, Al. Rusu, I. & Balan-Rusu, M.-I. (2012). *The Judicial Cooperation in Criminal Matters in the European Union, EU Judicial Cooperation.* LAP LAMBERT Academic Publishing, Danubius University, Saarbrücken, Germany;
4. Rusu, I. & Balan-Rusu, M.-I. (2013). *The European Arrest Warrant, Romanian and European Legislation, Doctrine and Jurisprudence.* LAP LAMBERT Academic Publishing, Danubius University, Saarbrücken, Germany;
5. Rusu, Minodora-Ioana (2015). *Asistența judiciară în materie penală la nivel European/Judicial assistance in criminal matters at European level.* Bucharest: Universul Juridic;

6. Program of measures to implement the principle of mutual recognition to judgments in criminal matters, adopted by the Council on 29 November 2000, published in OJ C 12 of 15.01.2001;
7. 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, published in the OJEU no. L 280/1 of 26.10.2010;
8. Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, published in OJ C 295 of 04.12.2009;
9. Law no. 302/2004 on international judicial cooperation in criminal matters, was originally published in the Official Monitor of Romania, Part I, no. 594 of 1 July 2004, then republished in the Official Monitor of Romania, Part I, no. 377 in 2011; latest changes and additions have been made by Law no. 300/2013 amending and supplementing Law no. 302/2004 on international judicial cooperation in criminal matters, published in the Official Monitor of Romania, Part I, no. 772 of 11 December 2013.
10. Law no. 265/2002 ratifying the Convention against Transnational Organized Crime, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime and the Protocol against the Smuggling of Migrants land, air and sea, supplementing the United Nations Convention against transnational organized crime, adopted in New York on 15 November 2000, published in the Official Monitor of Romania, part I, no. 813 of 8 November 2002.