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## LOST IN TRANSLATION: IMPLEMENTATION OF THE RIGHT TO A TRANSLATOR THROUGH THE USE OF MACHINE TRANSLATORS IN THE LIGHT OF EU AND POLISH LAW

### MIĘDZY SŁOWAMI: REALIZACJA PRAWA DO TŁUMACZA POPRCZEZ WYKORZYSTANIE TŁUMACZY MASZYNOWYCH W ŚWIETLE PRAWA UNIJNEGO I POLSKIEGO

Both national and EU law provide for the right of an accused person to receive essential procedural documents in a language they understand and to participate in the proceedings in the presence of an interpreter. The need to implement these procedural guarantees raises several problems, such as the limited availability of interpreters and the cost to the State. This prompts the search for other solutions to implement the indicated individual rights. This article aims to answer the question of the admissibility and legitimacy of using machine translators to implement the right to an interpreter for defendants in criminal proceedings, and to indicate the opportunities and risks associated with the use of AI-based systems in this regard. The article presents the result of a linguistic, systematic and purposive interpretation of the relevant provisions of national laws and the provisions of Directive 2010/64/EU. Formal-dogmatic and statistical methods were used. The results of research into the quality of machine translations and statistics on the costs of translations are presented. The results support the recognition of the admissibility and legitimacy of the use of machine translators in criminal proceedings in order to implement the indicated rights. The text presents possible ways of applying these solutions in judicial practice and formulates a demand to the Ministry of Justice to begin work on the programme without delay. However, currently, both law enforcement and justice authorities can use publicly available machine translation software.

Keywords: machine translation; Directive 2010/64/EU; procedural guarantees; artificial intelligence; judiciary

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Zarówno prawo krajowe, jak i unijne przewiduje prawo oskarżonego do uzyskania kluczowych dokumentów postępowania w języku dla niego zrozumiałym, a także udział tłumacza w czynnościach procesowych z jego udziałem. Konieczność realizacji owych gwarancji procesowych pociąga za sobą szereg problemów związanych między innymi z ograniczoną dostępnością tłumaczy oraz kosztami ponoszonymi przez państwo. Skłania to do poszukiwania innych rozwią-

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zań umożliwiającą realizację wskazanych praw jednostki. Celem artykułu jest udzielenie odpowiedzi na pytanie o dopuszczalność i zasadność korzystania z tłumaczy maszynowych w celu realizacji prawa do tłumacza dla oskarżonego w postępowaniu karnym oraz wskazanie, jakie są szanse i zagrożenia związane z wykorzystaniem systemów opartych na sztucznej inteligencji w tym zakresie. W tym celu poddano wykładni językowej, systemowej i celowościowej relewantne postanowienia ustaw krajowych oraz postanowień dyrektywy 2010/64/UE. W analizie posłużono się metodami formalno-dogmatyczną oraz statystyczną. Przedstawiono również wyniki badań w zakresie jakości tłumaczeń maszynowych i statystyki w zakresie kosztów realizacji prawa do tłumaczenia. Wyniki analizy przemawiają za uznaniem dopuszczalności i zasadności wykorzystania tłumaczy maszynowych w procesie karnym w celu realizacji prawa do tłumacza. W tekście przedstawiono możliwe sposoby zastosowania owych rozwiązań w praktyce wymiaru sprawiedliwości i sformułowano postulat do Ministerstwa Sprawiedliwości o niezwłoczne wdrożenie prac nad programem, z tym zastrzeżeniem, że obecnie zarówno organy ścigania, jak i wymiaru sprawiedliwości mogą korzystać z ogólnodostępnych programów do tłumaczenia maszynowego.

Słowa kluczowe: tłumaczenie maszynowe; dyrektywa 2010/64/UE; gwarancje proceduralne; sztuczna inteligencja; sądownictwo

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## I. INTRODUCTION

The right to a translator for the accused in criminal proceedings is provided for in both national and international law. The accused has the right to receive a translation of relevant documents, as well as the right to take part in the proceedings with the assistance of an interpreter in order to exercise their defence rights and to guarantee the fairness of the proceedings. The number of participants who do not speak the language of the country in which the proceedings are being conducted has been steadily increasing for many years. This dynamic has also increased as a result of the war in Ukraine and the movement of refugees. According to statistics from 2023, almost 47,000 foreigners were charged with a crime in Poland in just five months (Zawadka, 2018, 2023).

The necessity to guarantee the right to a translator for those who do not speak Polish fluently entails certain costs. It is indicated that the costs of translation occur in approximately 4% of cases heard in criminal divisions (Orfin, 2020, p. 213), and their average amount is several hundred euro (Os-taszewski & Włodarczyk-Madejska, 2016, p. 22; for the author's research see Section I). There is also the problem of the availability of translators, especially for rare languages. Consideration should be given to reducing costs and increasing the availability of interpreters while maintaining the standards of a fair trial and not prejudicing the rights of the accused to a translator.

The use of machine translators based on artificial intelligence systems has become commonplace. These operate largely in open access in the form of applications or websites. They enable the instant translation of sentences, text fragments and entire documents – also preserving the original formatting – in up to several hundred languages. They also recognize spoken language and make it possible to translate oral statements. Although they were far from

perfect in the early days of their use, the quality of these translations is now considered to be high (see below, Section IV).

Regarding the above, and the development of technology in this area, one would have to ask whether it is legitimate and permissible under national and international law to use these programmes for the following purposes:

a) translating court documents served on defendants in criminal proceedings,  
b) the interpretation of procedural acts, such as the questioning of the accused,

as the implementation of the right to a translator and, consequently, the total or partial abandonment of the use of human interpreters in this area in order to improve the economy of the proceedings.

In order to answer the questions posed in the context of permissibility, first the EU standard and then the Polish standard are presented, with particular focus on the linguistic, systemic and functional legal interpretation of the relevant provisions. The result of the interpretation of these regulations makes it possible to answer the question of whether the use of machine translations is admissible and complies with the European and national standard of procedural guarantees. In order to answer the legitimacy questions raised, the second part of the text presents practical problems related to the exercise of the right to a translator, statistical data on the costs of translation in criminal cases, as well as the results of studies on the quality of machine translation.

Regarding the statistical data on translation costs, part of the data is acknowledged as the author's own research. The data comes from the District Court in Jarocin, Poland, for the years 2022–2023. The information was obtained through the court service system ('Sędzia2'). The author, as a judge, has an access to all statistics. All cases where translation costs occurred were identified and the data was included.

## II. THE EUROPEAN UNION STANDARD

The right to interpretation and translation in the EU derives from the right to a fair trial and the right to defence, enshrined in Article 47 and Article 48(2) of the Charter of Fundamental Rights of the European Union (hereinafter, the Charter; FRA, 2016, p. 24; Fair Trials, 2020, p. 31). The Charter is legally binding and directly applicable. It does not require transposition into national law. However, in order to facilitate the application of the rights deriving from the Charter (and also from the European Court of Human Rights; Fair Trials, 2020, p. 14) the EU institutions decided to adopt so-called roadmap directives aimed at harmonizing standards on the rights of suspects and defendants in criminal proceedings.<sup>1</sup> Directive 2010/64/EU of

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<sup>1</sup> European Council (2010), The Stockholm Programme — An open and secure Europe serving and protecting citizens (2010/C 115/01), OJ 2010/C115/01, 4 May 2010. p. 10, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2010:115:FULL>

the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings<sup>2</sup> (hereinafter, the Directive) has been in force in the European Union (EU) space for more than a decade. According to the Directive, Member States shall ensure that suspected or accused persons who do not understand the language of the criminal proceedings concerned are, within a reasonable period of time, provided with a written translation of all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings. Essential documents shall include any decision depriving a person of his liberty, any charge or indictment, and any judgment (Article 3(1) and (2)). Translation 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 (Article 3(9)). Member States shall take concrete measures to ensure that interpretation and translation are of an adequate quality. In order to promote the adequacy of interpretation and translation and efficient access thereto, Member States shall endeavour to establish a register or registers of independent translators and interpreters who are appropriately qualified (Article 5(1) and (2)). As indicated in Recital 31, Member States should facilitate access to national databases of legal translators and interpreters where such databases exist. In that context, particular attention should be paid to the aim of providing access to existing databases through the e-Justice portal, as planned in the multiannual European e-Justice action plan 2009–2013 of 27 November 2008.

The word ‘translation’ means ‘something that has been translated from one language to another, or the process of translating’, while the word ‘interpretation’ – in the context under consideration means ‘oral translation’ (Cambridge Dictionary, n.d.; cf. Brown, 1993, p. 3371; Klein, 1967, p. 1640; Schwarz et al., 1989, p. 1128). The term does not refer to the subject performing the translation, only to the result. The result of linguistic interpretation indicates that the translation can be done either by a human being or by a machine. There is no reason to reject either of these results of linguistic interpretation on the basis of the rules thereof (Zieliński, 2017, pp. 294–296). In fact, neither result leads to absurdity or contradiction, both of them work in a common language (Zieliński, 2017, pp. 294–296).

However, a systemic interpretation, taking into account an analysis of the preamble to the Directive, shows that the concept of translation is to be understood as the result of the work of human interpreters. This is indicated by the references to registers of translators, which only apply to human translators. The result of a systemic interpretation thus restricts the concept of ‘translator’ to human beings and rejects the understanding of the concept that would include a computer programme.

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<sup>2</sup> 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 OJ L 280, 26 October 2010, pp. 1–7.

Nevertheless, it should be pointed out that extra-linguistic rules of interpretation prevail in EU law, in the form of functional and purposive interpretation (Helios, 2019, p. 125; Zieliński, 2020, pp. 185–186). The Court of Justice of the European Union (CJEU) has repeatedly indicated that the linguistic interpretation of EU rules is not the limit of interpretation and that such interpretation can be departed from (Helios & Jedlecka, 2018, p. 79), often giving preference to functional interpretation (Jedlecka, 2019, p. 142). When embarking on the process of interpretation, one should start by analysing the text linguistically, but the analysis of the purpose and function of the regulation is of equal importance (Helios & Jedlecka, 2018, p. 123).

Moreover, the concept of dynamic interpretation prevails in EU law. The evaluative approach enables the EU legal order to cope with social changes (Lenaerts & Gutiérrez-Fons, 2013, p. 40; Szot, 2019, p. 174). Although legislative materials showing the process of arriving at the final wording of a provision (*travaux préparatoires*) and, consequently, the rationale behind its enactment, play a certain role in the interpretation process (Lenaerts & Gutiérrez-Fons, 2013, p. 24), it should be borne in mind that the interpretation of a provision, according to the concept of dynamic interpretation, should take into account social, technological, cultural changes.

The concept of dynamic and purposive interpretation is also adopted by the CJEU. The starting point of the interpretation process is the analysis of the linguistic layer, but this is followed by an analysis of the extra-linguistic layer of the text (Helios & Jedlecka, 2018b, p. 201). The reasons for giving primacy to the *omnia sunt interpretanda* principle instead of the *clara non sunt interpretanda* principle in the process of interpreting EU law are: the need to ensure uniform interpretation of the law with more than 20 equivalent language versions of the text, the large number of undefined phrases in legislative texts, and the need to ensure that EU law is in line with the evolution of the legal, social, cultural environment (Helios & Jedlecka, 2018a, p. 139). Further reasons are the occurrence of autonomous concepts, which have a meaning specific to EU law, and the circumstance that the norms of EU law are reconstructed not only on the basis of the provisions of state law, but also on the basis of unwritten law (Helios & Jedlecka, 2018b, p. 201). A purposive approach is adopted by the CJEU both for acts of primary law and for acts of secondary EU law, bearing in mind in particular the need to include in their preambles the reasons for the introduction and wording of the act in question (Helios & Jedlecka, 2018b, p. 178).

In EU law, purposive interpretation fulfils three functions: it promotes the achievement of the objective pursued, prevents undesirable results, and allows legislative gaps to be filled. The CJEU has repeatedly given preference to purposive interpretation over literal interpretation. The choice of this method of interpretation also allows ‘a flexible interpretation of EU law in accordance with changing socio-economic conditions in the European Union’ (Helios & Jedlecka, 2018b, p. 180; Zawidzka, 2005, pp. 402–403). On the other hand, some experts argue in the public sphere that this direction is not correct, and that a departure from the principle *clara non sunt interpretanda* may lead to

the paralysis of the CJEU jurisprudence due to the disregard of the *acte clair* doctrine (Helios & Jedlecka, 2018a, p. 139). However, these seem to be isolated voices. Purposive interpretation is at the heart of CJEU jurisprudence (Helios & Jedlecka, 2018b, p. 180; Jopek-Bosiacka, 2001, p. 166; Szot, 2019, p. 178; Zieliński, 2020, p. 186). This being the case, it is not possible for the same EU law to be interpreted differently by the courts of the EU Member States (Helios & Jedlecka, 2018b, p. 182).

The purpose of the provisions in question is to ensure that foreigners who are parties to proceedings have the opportunity to understand the procedural steps taken in the case, the charges against them, to defend themselves by making certain statements that are understood by the authorities conducting the proceedings, to understand the content of the decision taken in the case, to receive proper instructions and, ultimately, and to lodge an appeal. The minimum standard to be met by translations is that they should be of such a quality as to permit the exercise of the rights of defence and the conduct of fair proceedings. This standard is deemed to be met if the translation is accurate and understandable. Failure to preserve the style of the original document: the use of a commonly used language instead of the official language, does not invalidate the above standard. The standard under the Directive is met if the quality of the translation received can be checked by the public authorities commissioning the translation. The authors of the Directive pointed to one way of verifying this standard, namely the creation of registers of translators. In the Polish context, this is possible through a register of sworn translators. It is possible to obtain a sworn translator's diploma after fulfilling certain criteria,<sup>3</sup> and thus using the services of such translators makes it possible to ensure the quality of translations. However, this is not the only way to exercise the rights under the Directive. It is also possible to use translators other than sworn translators, provided that the authority has the possibility of verifying the quality of the translations. This possibility may take the form of knowledge of the foreign language to the extent that the translation can be verified, third party opinions on the translator's knowledge of the language, documentary evidence of qualifications (language certificates, certificates of completion of courses, studies, etc.).

A similar standard should be applied to machine translators. Their use is not excluded by the standard decoded from the provisions of the Directive 2010/64/EU. However, it must be possible to verify the quality of these translations. This will be possible in particular in cases where the person commissioning the translation, or any other employee of the body, has a command of the language into which the text is translated. This knowledge must be at a level which allows the quality of the translation to be verified. The Common European Framework of Reference for Languages (CEFR) distinguishes six

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<sup>3</sup> Cf. the Act of 25 November 2004 on the Profession of Sworn Translator, *Journal of Laws of the Republic of Poland [JL]* 2019, item 1326.



levels of language proficiency.<sup>4</sup> Level B1 should be considered sufficient to check the quality of translation in criminal proceedings. A speaker at level B1 can describe events and give reasons for opinions. A person with this level of competence can understand the main points of clear, standard speech on familiar topics and typical events, produce simple connected text in spoken or written form, and deal with most situations in communication with native speakers.<sup>5</sup> Another option is to compare the translation received with translations of similar documents: judgments and orders obtained from registered sworn translators. It is also possible to verify the quality of the translation by using more than one translator and comparing the results.

In the field of interpretation, the use of a translator is particularly possible when the interrogator has a certain command of the language of the proceedings, but complete understanding and communication of the content is impaired. The use of a translator has a supportive role and the quality of the translation can be verified by the interrogator and the interrogated through the consistency of the conversation.

It should be pointed out that EU bodies use machine translators. The Committee of the Regions uses the eTranslation application,<sup>6</sup> adapted to the needs of the EU institutions, and offers machine translation of news and events if an official translation is not available. It is a free machine translation tool that allows automatic translation of texts and full documents into any of the official languages of the EU and several others. As indicated on the EU website, the application developed by the European Commission is one of the most accurate and efficient machine translation applications on the market. It offers a level of high security, as all data processed by the system stays within the Commission's firewalls.<sup>7</sup> The Speech-to-Text Unit (S2T)<sup>8</sup> also operates in the EU space. It has provided real-time speech-to-text conversion and simultaneous machine translation services to parliamentary committees and to plenary sessions since 2022.

The Directive also requires translations to be carried out confidentially. In this respect, it should be noted that the translated document should be uploaded to the programme in an anonymized version, namely without personal data (name, surname, parental data, identification number). These data should be added to the final translated document. This is particularly possible given that translators retain the formatting of the source document, so there are no concerns about where personal data should be added.

In the light of the foregoing, it must be concluded that the result of the interpretation of Article 3(1) and (2) of the Directive indicates that it is permissible to use machine translators in criminal proceedings for the translation of

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<sup>4</sup> Council of Europe, *Common European Framework of Reference for Languages*, <https://www.coe.int/en/web/common-european-framework-reference-languages>

<sup>5</sup> Council of Europe, *CEFR Descriptors*, <https://www.coe.int/en/web/common-european-framework-reference-languages/cefr-descriptors>

<sup>6</sup> <https://cor.europa.eu/pl/engage/Pages/e-translation.aspx>

<sup>7</sup> [https://commission.europa.eu/resources-partners/etranslation\\_en](https://commission.europa.eu/resources-partners/etranslation_en)

<sup>8</sup> <https://termcoord.eu/speech-to-text/>

documents, as well as for interpretation in the course of the trial, where the translator is an auxiliary tool, and

1) the person responsible for the activity understands, at a communicative level, the language into which the translation is to be made;

2) the participant in the activity, the beneficiary of the interpretation, understands, at a communicative level, the language of the activity.

It should be noted in passing that the right to an interpreter is also provided for in other instruments of international law, in particular Article 6(3) (e) of the European Convention on Human Rights,<sup>9</sup> and Article 14(3) of the International Covenant on Civil and Political Rights, according to which anyone charged with a criminal offence shall at least be entitled to the right to the free assistance of an interpreter if he cannot understand or speak the language used in court. Again, it is reasonable to apply a purposive and dynamic interpretation, taking into account the same arguments as in the case of the interpretation of EU law. The result of the interpretation of the aforementioned rules of international law is not inconsistent with the result of the interpretation of the relevant EU provisions.

### III. THE POLISH STANDARD

The right to interpretation, as part of the right to defence and fair trial, is guaranteed by the Constitution of the Republic of Poland (Articles 42(2), 45(1); Wiliński, 2006, pp. 326–327). This right is further provided for by the regulations of both the Code of Criminal Procedure<sup>10</sup> (CCP) and the Law on the System of Common Courts<sup>11</sup> (LSCC). Pursuant to the content of Article 5(2) of the LSCC, a person who does not have sufficient command of the Polish language has the right to appear before the court in the language they know and to be assisted by a translator free of charge. It should be pointed out that the costs of translation constitute an exception to the principle according to which a convicted person bears all the costs of proceedings (Article 627 of the CCP).<sup>12</sup> The costs of the translator shall be borne by the State Treasury and are not taken into account when calculating the costs of proceedings in the decision concluding them. In accordance with the content of Article 72 § 1–3 of the CCP, the accused has the right to be assisted by an interpreter free of charge if he or she does not have a sufficient command of Polish. The interpreter should be summoned to the actions with the participation of the accused, and the decision to present, supplement or amend the charges, the indictment and

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<sup>9</sup> Cf. ECHR judgment of 28 November 1978, 6210/73, 6877/75, 7132/75, *Luedicke, Belkacem and Koç v. Germany*, HUDOC, § 48; ECHR judgment of 19 December 1989, 9783/82, *Kamasinski v. Austria*, HUDOC, § 74; ECHR judgment of 9 June 1998, 24294/94, *Twalib v. Greece*, HUDOC; Brannan (2017, p. 43).

<sup>10</sup> Act of 6 June 1997 – Code of Criminal Procedure, JL 2022, item 1375.

<sup>11</sup> Act of 27 of July 2001 – Law on the System of Common Courts, JL 2023, item 217.

<sup>12</sup> Judgment of the Supreme Court of 13 September 2016, V KK 36/16, OSNKW 2016/11/77.



the decision subject to appeal or ending the proceedings should be delivered together with the translation; alternatively, upon the consent of the accused, only the translation of the ruling closing the proceedings may be announced, if not subject to an appeal. The wording of the provisions clearly indicates the participation of a human interpreter ('summon').

Traditionally, the process of interpreting national law should start with an analysis of the linguistic layer of the text. According to the derivational concept of interpretation, regardless of whether the result of linguistic interpretation is clear or not, a purposive and systemic interpretation is necessary (Zieliński, 2017, pp. 76–77). Functional interpretation is used to confirm the result of linguistic interpretation and in exceptional situations motivated by important reasons it is used to justify modifications or even deviations from the linguistic sense of a provision (Morawski, 2010, pp. 135–136). It should be pointed out that *ratio legis* allows a complete departure from the literal wording of a provision in order to reconstruct a legal norm in accordance with the axiology of the legislator (Hermann, p. 197; Wronkowska, 2001, p. 108; Zieliński, 2020, p. 184). An expansive interpretation, going beyond the literal wording of a legal provision, is permissible. The interpretation of the law is not limited to the linguistic and systemic context of a given provision – it is necessary to take into account the broad functional context, including social, economic, political and moral factors (Morawski, 2006, p. 161).

The word 'translator' is understood in two ways. Firstly as a person who translates a text (written or spoken) from one language into another, and secondly as a computer program that automatically translates a text from one language into another (Instytut Języka Polskiego PWN, n.d.). Some dictionaries give only the former meaning, stating that it is a person who translates speech or written text from one language into another (Dubisz, 2018, p. 857; Sikorska-Michalak & Wojniłko, 2005, p. 51). The result of linguistic interpretation is not clear. It has to be considered whether the term should be understood as 'person or computer program' or only as 'person'. It should be noted that the word 'translator' has traditionally referred exclusively to a person (because only a person had the ability to translate). It could be pointed out that the legislator, wishing to take account of both understandings of the term, should use the term 'right to translation' (following the example of the EU legislator). It should be recognized that the assumption of a rational legislator: one who deliberately uses the word 'right to translator' and not 'right to translation', is an idealizing assumption and not a true one (Zieliński, 2017, pp. 258–260). In reconstructing a legal norm – in order to take into account the judgements of the legislator – one must decode the values promoted by the legislator in the law-making process. In the judgement of the legislator, legal norms always have some axiological justification (Zieliński, 2017, pp. 258–260). In view of this, an attempt should be made to reconstruct the legislator's judgements and values and to assign to the interpreted legal provisions such a meaning in which they express indications that are maximally consistent with these values (Helios & Jedlecka, 2018, pp. 176–177). Nowadays, the legislator is undertaking a number of initiatives aimed at the digitization and automation of

the public sphere, often replacing services traditionally performed by a human being with IT services. Elements of the digital evolution in the administration of justice include: Random Case Assignment System, Electronic Custody System, Electronic Land Records, Electronic Civil Proceedings, e-KRS, information technology in courtrooms.<sup>13</sup> In this context, it should be noted that the values promoted by the legislator are: technological development, implementation of digital solutions in public administration, use of new technologies – including artificial intelligence systems – in the judiciary in order to improve the economy of procedures.

Turning to the systemic interpretation, it should be pointed out that it is carried out by means of rules which prescribe taking into account the fact that legal rules form a legal system and it is necessary to take into account their mutual relations and place in this system. These rules – the so-called second-degree rules – indicate that a given concept must be assigned a meaning that is consistent with the meanings of other rules of the system and those that lead to a systemic conflict must be rejected, and legal language terms must not be assigned a meaning that is inconsistent with the principles of a specific branch of law or system of law (Wronkowska & Ziemiński, 2001, p. 169). The internal and external systematics of the legal act must also be taken into account (Wronkowska & Ziemiński, 2001, p. 169). The provision of Article 72 § 2 CCP speaks of the ‘summoning’ of a translator, which by its very nature cannot be realized with a programme, but only with a person. Also, the wording of Article 5 § 3 LSCC refers to ‘granting’ an interpreter, which is a reference to a person, not a programme. It should be pointed out that in the case of the right to a translator, a systemic interpretation would necessitate the rejection of the result of linguistic interpretation indicating the understanding of the term ‘translator (interpreter)’ as a computer programme.

Turning to a purposive interpretation, it should be pointed out that the purpose of the regulations in question is the same as in the case of the EU regulations: to ensure that the accused understands the course of the action in which they participate, as well as the procedural decisions made during the proceedings, and to enable him to provide explanations in a way that is comprehensible to the procedural authority.

These objectives can be achieved by using both the services of human translators and programmes that translate spoken and written text. Although these programmes did not offer a level of service meeting the EU or national standard of quality of translation in criminal proceedings at the time the legislation entered into force, such a possibility now exists. Purposive interpretation must take into account the role that a piece of legislation plays in society. A provision must be interpreted in such a way as to be the most appropriate means of achieving the purpose of the provision. A purposive interpretation makes it possible to recognize that the use of a human interpreter is not the

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<sup>13</sup> Cf. Artificial Intelligence Portal, <https://www.gov.pl/web/ai>; Ius ex silico. Artificial intelligence in the service of justice, <https://www.si-dla-sprawiedliwosci.gov.pl>; Digital Poland, <https://www.polskacyfrowa.gov.pl>; Ministry of Digitisation, Poland, <https://www.gov.pl/web/cyfryzacja>

only possible solution and – as in the case of the Directive – this assumption was made by the authors of the legal text due to the lack of other ways of realizing this right. On the other hand, the remarks made in Section II regarding restrictions on the use of these programmes to control the quality of translations and interpretations remain valid.

In discussing the question of the purpose of legislation, it is important to refer in passing to purposivism, an approach which requires the interpreter to read the meaning of statutes and regulations in the context of the purpose of the law (Hart & Sacks, 1958, pp. 1410–1415). The decoded purpose of a statute may lead to a departure from a linguistic understanding of the legal text in favour of an interpretation of the legal norm based on the functions that the regulation is intended to fulfil. This theory is found in American jurisprudence, rather than in European, but its existence points to a possible way of interpreting legal texts, and of understanding the idea of law in general, as a social tool (Wiliński, 2020, p. 31) to fulfil specific purposes set by the legislator, rather than as an abstract creation.

The question of static and dynamic interpretation should be also addressed. Static interpretation is the interpretation leading to the determination of the content of a legal provision in accordance with the intention of the (historical) legislator which actually guided them when issuing the act in question. This theory raises certain difficulties in the context of the possibility of determining these intentions, as well as in the context of technological progress and the development of social and legal institutions. Static interpretation, on the other hand, provides stability and legal certainty. Dynamic interpretation is the interpretation that leads to the determination of the content of a legal provision in accordance with changing socio-political conditions. The content of a legal norm changes over time as the situation changes. According to this theory, it is assumed that if the modern legislator did not change the old regulations, it advocates their maintenance and application in the new conditions. In the context of the regulations in question, it should be considered that a static interpretation would lead to a rejection of the result of linguistic interpretation indicating an understanding of the notion of ‘translator’ as a computer programme. The restriction of this concept to human beings is indicated above all by the fact that, at the time the legislation in question was enacted, the use of machine translators was not widely known and used. The number of such programmes was very limited and the quality of the translations was low. It is therefore difficult to assume that the legislator understood the term ‘translator’ to encompass machine translators, given that this would have been contrary to the common understanding of the word. However, the result of a dynamic interpretation is different. The development of new technologies, including artificial intelligence, has meant that the popularity and quality of machine translators has increased in recent years. Nowadays, the quality of machine translation and interpretation is very high (see below, Section IV), and these interpreters are widely available through free access. They are used in both the private and public sectors. In view of the above, the position should be that the result of dynamic interpretation supports the conclusion that the

term ‘translator’ should be understood as including both the person and the computer programme performing the translation. Furthermore, it is necessary to point out that the concept of dynamic interpretation currently prevails (Smolak, 2020, pp. 281–288).

#### IV. OPPORTUNITIES AND THREATS

The doctrine and case law are divided as to when the need for a translator arises. The position adopted in this respect determines the expected and accepted standard of the interpretation provided. It has been argued that the obligation to provide an interpreter also arises in respect of persons who, although they speak the language of the proceedings, do not understand the official language typical of judicial or preliminary proceedings (Długosz, 2009, p. 104; Hofmański, 2000, p. 148). However, it is also pointed out that setting such a high standard is unjustified. Even people for whom the language of the country concerned is the native language do not understand the terms used by the court or the prosecutor.<sup>14</sup> It is the defence counsel, rather than the interpreter, who is responsible for ensuring people understand and feel at ease during the proceedings, while safeguarding their rights and interests amidst the complexity of the process. Above all, however, it should be borne in mind that it is unlikely that the defendants would be able to understand the legal language even in their mother tongue. This problem is highlighted by the interpreters themselves. In a survey report on the quality of translation in criminal proceedings, they pointed out that ‘if the interpreter tries to translate the judge’s message faithfully, he or she very often ... encounters a misunderstanding of the content of the message. The interpreter is forced to convert this kind of message into a message with a low complexity of meaning, relying on his or her knowledge and the correct interpretation of the judge’ (Mendel, 2011, p. 26). In this context, it should be noted that the right to an interpreter becomes relevant when a person is not fluent in the language concerned – but in the sense of common, everyday language, not legal language. Given that such persons usually do not understand the procedural nuances and concepts in their own language either, the quality of the translation must remain impeccable, but it is not necessary for the translator to specialize in legal language. It is not the role of the interpreter to explain the procedural situation of a party to the proceedings; indeed, it is undesirable in view of the interpreter’s lack of expertise. If there is a need for assistance in this respect, the assistance of a defence counsel is required. When considered in this light, advocating for the use of sworn translators specializing exclusively in legal terminology and rejecting the possibility of using *ad hoc* translators (cf. Fingas, 2019, pp. 107–123; Hertog, 2015, p. 92), bearing in mind the problems with

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<sup>14</sup> Judgments of the Appeal Court in Warsaw: of 7 March 2016, II AKa 3/16; of 9 February 2000, II AKa 484/99; Matusiak-Frańczak (2018).

access to translators and the need to avoid delaying proceedings, should be regarded as inconsistent with the reality of judicial practice.

A current problem in Poland, but also in many other countries worldwide, is the lack of access to interpreters for the purposes of criminal proceedings, in particular interpreters of rare languages. In research carried out on the quality of interpreting in criminal proceedings, representatives of the judiciary and law enforcement agencies pointed to practical problems in the form of the lack of interpreters of languages other than English, German and Russian in the immediate vicinity (approximately 60 km from the unit), interpreters' reservations regarding low remuneration, the need for the interpreter to appear immediately and, finally, the refusal to provide interpreting (Mendel, 2011, pp. 6–7). As an example, there are currently four Albanian translators registered in Poland and only eight Latvian translators, two of whom are based outside the country and five in Warsaw.<sup>15</sup> The disadvantage of the currently existing solutions: basing the realization of the right to an interpreter in practical terms exclusively on the participation of sworn translators in the proceedings, is also the cost of translation borne by the State and the waiting time for translations. The amount of the remuneration of sworn translators in proceedings is determined by the Regulation of the Minister of Justice of 24 January 2005 on remuneration for the activities of a sworn translator.<sup>16</sup> According to Article 8 of the Regulation, a page is considered to be 25 lines and a line is considered to be 45 characters. A character is defined as all visible print marks, in particular letters, punctuation marks, numerals, hyphens and spaces between them that are justified by the structure of a sentence. A started page counts as a full page. In practice, a document sent for translation consists of more pages within the meaning of the above provision than the physical pages of the document. Translators' fees are not low. In the case of the translation of Polish documents into Russian (which is also often used by Ukrainians), the translator's remuneration for the service of translating the final judgment ranges from PLN487.12 to PLN535.84.<sup>17</sup> For languages using a non-Latin alphabet – such as Georgian – the rates are much higher. The remuneration ranges from PLN1,256.80 to PLN1,599.56 for the service of translating a final judgment with instructions.<sup>18</sup> Research conducted by the Institute of Justice between 2013 and 2016, revealed that the average amount of interpreters' remuneration at the time was PLN426.70, with a minimum remuneration of PLN4.10 and a maximum of PLN54,048.60 (Ostaszewski & Włodarczyk-Madejska, 2016, p. 22). Considering that in 86% of cases a sworn interpreter is used in criminal proceedings, the data on their remuneration is representative of the cost of an interpreter's participation in proceedings (Mendel, 2011, p. 5).

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<sup>15</sup> Ministry of Justice, Poland, List of sworn translators, <https://arch-bip.ms.gov.pl/pl/rejestr-y-i-ewidencje/tlumacze-przysiegli/lista-tlumaczy-przysieglych/search.html>

<sup>16</sup> Regulation of the Minister of Justice of 24 January 2005 on remuneration for the activities of a sworn translator, JL 2005, no. 15, item 131.

<sup>17</sup> Statistics from the District Court in Jarocin, Poland, for the years 2022–2023.

<sup>18</sup> Statistics from the District Court in Jarocin, Poland, for the years 2022–2023.

The personal appearance of the interpreter at the hearing involves considerable costs, time spent travelling – sometimes over a considerable distance – and reluctance on the part of the interpreters to participate in the hearing, due to, *inter alia*, the need to translate specific wording which is unfamiliar for both the interpreter and the foreigner, lack of context, namely unfamiliarity with the case, lack of time and inability to prepare translations (Mendel, 2011, pp. 22, 27, 39). One of the proposed solutions to the problem of the non-availability of interpreters or their reluctance to travel a considerable distance is the introduction of remote interpreting by means of video and audio recording devices (Mendel, 2011, pp. 37–38). On the other hand, it should be noted that remote interpreting is considered to be the most difficult form of video-based interpreting (Braun & Taylor, 2011, pp. 85–100). With regard to the use of heterogeneous terminology in foreign languages, it is recommended that ‘a team of experts (representatives of the judiciary and experienced translators) be set up at the Ministry of Justice to prepare a glossary with recommendations for the translation of legal and judicial terms in the most commonly used languages’ (Mendel, 2011, pp. 44–45). It should be pointed out that these proposals can also be used with the help of machine translators, the use of which can further reduce costs and ensure faster translation.

The use of machine translators in criminal proceedings is possible either through the use of such translators widely available on the Internet, or by purchasing a licence to use one of the existing translators on the market, or through the creation of a new programme dedicated to justice and law enforcement. The latter proposal offers the greatest data security, and would adapt the system’s functions to the needs of the judiciary, by providing a standardized and prepared glossary, for example. However, it would also require a great deal of time to test and then implement the system, as well as substantial financial expenditure, but in the long term, it should allow for a significant reduction of expenditure by the State.

It should also be recognized that the use of machine translators does not pose major risks. The need to protect personal data should be taken into account. According to Directive (EU) 2016/680,<sup>19</sup> Member States shall provide for the processing of personal data during criminal proceedings in a manner that ensures adequate security of personal data, including protection against unauthorized or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organizational measures (Article 4.1). Detailed obligations on data confidentiality are set out in Article 29.1. Member States are obliged to implement appropriate technical and organizational measures to ensure a level of security appropriate to the risk, in particular in the case of automated processing, to prevent the use of systems by unauthor-

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<sup>19</sup> Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119, 4.5.2016, p. 89–131.



ized persons and to prevent the unauthorized reading, copying, modification or deletion of personal data.

As is well known, in order for a machine translator to improve its quality, the system needs to learn continuously. This can be ensured by providing text samples and storing them for a while to be re-processed. If the samples contain personal data, this could be in breach of Directive (EU) 2016/680. However, paid services (such as DeepL, Google Translate and Microsoft Translator) do not store the data entered into the tool, according to their policies (Gheorghe, 2019; Excel Translation, n.d.; Wołoszyk, 2021). Nevertheless, I argue that if commercial tools are used, the translated documents should not contain personal data. It is possible to use fictitious personal names (e.g. John Black, Flower Street, identification number 11223344556) and replace these data in the translation with real data, or to leave blanks for data completion.

As far as the quality of translations is concerned, it should be noted that the quality of translations made by translators is currently very high. More than half of people believe that the translations of Google and Baidu come from human translators (Hanji & Haiqing, 2019, p. 50), the quality of well-trained translators is rated lower than that of machine translators (Ying, 2021), and the profession of translator is considered to be among those most easily replaced by artificial intelligence (Jiang & Lu, 2021; Kirov & Malamin, 2022, p. 70; Moorkens, 2017, pp. 464–477; Moorkens & Lewis, 2019, pp. 2–25). According to surveys, AI will have the greatest impact on legal and technical translation because of the higher degree of routine work (Kirov & Malamin, 2022, p. 70). A lot has changed in this area in the last five years (Zong, 2018). The programmes also correctly translate technical language in many fields, including legal language (Borja & Martinez-Carrasco, 2019, pp. 195–197; Killman, 2014; Wiessman, 2019).

Legal texts have always been among the most complex technical texts (Borja & Martinez-Carrasco, 2019, pp. 195–197; Killman, 2014; Wiessman, 2019). If the solution of developing an in-house translation programme for the judiciary and other authorities is implemented, it will also be possible to introduce uniform translation templates, verified by legal language specialists, bearing in mind that much of the text in translated documents is repetitive (the content of instructions, orders, judgments). The possibility for the authority to check the quality of the translation is no less than that of the translations received from the translators (Vela-Valido, 2021, pp. 93–111). The use of a translator saves costs and time – the translation can be done immediately.

As far as interpreting is concerned, it should be pointed out that it is much more difficult, both for humans and for machines. With regard to the use of machine interpretation, it should be pointed out that there is a risk of the spoken text being misinterpreted by the system (e.g. due to unclear speech, accent, use of dialect, noise in the venue). Although this risk also exists for the human interpreter, in case of uncertainty about the word used, or doubts arising from a lack of connection between the word/phrase and the context, the interpreter can ask follow-up questions, request repetition, rephrasing, additional description. With machine interpreters, there is a risk of misinter-

preting the message, partly because the machine translator understands the context in which the translation is taking place and the nuances involved less well than a human interpreter (Thai, 2022). In this case, if the people involved in the activity do not understand both languages, at least at a basic level, they will not be able to check the accuracy and quality of the interpretation and raise objections or clarify doubts. It should therefore be pointed out that the use of automatic interpreters in the course of an activity is not excluded, but should be used when:

1) the person carrying out the activity understands, at least at B1 level, the language into which the translation is being made,

2) the participant in the activity, the beneficiary of the interpretation, understands at least at B1 level the language in which the activity is carried out.

In this case, the machine interpreter is a tool to support communication, not a condition for it. The possibility of mistranslation is reduced, while the cost and barrier of not having access to a human interpreter is minimized. When deciding on the type of interpreter to use, the authority does not have the opportunity or the obligation to check the level of language skills in a formal way (e.g. through language certificates). Instead, they should carry out a preliminary interview about the participant's understanding of the spoken language in order to determine whether he or she has a communicative level. On the other hand, they can assess their own level in the language concerned. An incorrect assessment in this respect may give rise to a claim for violation of the right to an interpreter.

It should also be noted that translations are generally done unilaterally: from the language of the proceedings into the language of the participant. Moreover, the source text is written in the formal, official language, and linguistic and syntactic errors, as well as dialectical and colloquial expressions, are generally excluded. In the case of interpretation, however, the situation is different, as the translation is done bilaterally and the language of the party to the proceedings may contain regionalisms, abbreviations and colloquialisms, which make it difficult to interpret correctly.

Concerning the protection of personal data, it should be noted that, unlike in the case of translation, it is not possible to easily separate passages containing personal data from those that do not. In the course of the interrogation, the names of witnesses and victims are mentioned and the interrogating authority also establishes the identity of the accused. With the use of commercially available tools, the user in principle gives his consent to the processing and storage of the data to which he gives access. In a case where the data are processed only for the purpose of the current translation and are not stored afterwards, this would seem to be acceptable, on the same basis that the data are made available to a human translator. In the case of the creation of a specific application for judicial and procedural authorities, personal data would be protected on the same basis as, for example, data contained in case files or court service systems.

As far as interpretation is concerned, it should therefore be pointed out that the use of machine interpreting is possible, but currently only in the situ-

ations indicated above, as an auxiliary tool, not as a prerequisite for communication, due to the higher risk of mistranslation and lower quality. However, this reservation may become obsolete given the development of technology, including machine translation, and the leap in its quality.

## V. CONCLUSIONS

In the light of the above, it should be considered permissible and legitimate to use machine translation for the translation of procedural documents in criminal proceedings served on defendants – without restriction, as well as oral interpretation in the course of procedural actions, where the translator is a supporting tool and:

- 1) the person responsible for the activity understands the language into which the translation is to be made at a communicative level,
- 2) the participant in the activity, the beneficiary of the interpretation, understands, at a communicative level, the language of the activity.

The result of the interpretation of the EU and Polish provisions shows that the use of these instruments makes it possible to implement the right to translation under both national and European law. In particular, the use of purposive and dynamic interpretation is justified in this area.

The main areas of risk associated with the use of machine translation relate to the quality of the translation and the protection of personal data. With regard to the first area, it is important to note the rapid development of technology in this field and the significant improvement in the quality of machine translations in recent years. Today, even for legal texts, they are at a similar, if not higher, level than human translations. As far as the protection of personal data is concerned, it should be pointed out that it is possible to use the programmes in question without breaching protection standards, but great care is required on the part of those who enter data into the systems.

The use of machine translation in criminal proceedings is justified by the requirements of procedural rules, including the principle of procedural economy. The use of machine translators reduces the cost of proceedings and makes it possible to speed them up, as there is no need to wait for translation services to be provided or, in the case of interpreting, to adapt the time limits to the availability of interpreters. It should be noted that access to translators is limited in the case of less common languages or in the case of courts and public prosecutor's offices being located in smaller towns. In practice, law enforcement agencies rely on the participation of people other than interpreters – for example, carers in refugee centres, or they simply use publicly available translation applications. It should also be noted that this limits the possibility of violating the standards of protection of personal data. Personal data are not disclosed when using a machine translator. In the case of traditional translators, on the other hand, documents are sent

to the translator – often by email – and processed by the next participant of the process.

Nor does it appear that the protection of the rights of suspects and defendants in criminal proceedings would be jeopardized by allowing machine translators to exercise the right to translation. First of all, it is necessary to point out the restrictions and conditions that must be met in order for the use of these programmes to be admissible (inter alia, reasonable possibility of verifying the quality of the translation). Secondly, both the accused and their defence counsel have the possibility of claiming a violation of the right to translation at the complaint, appeal or cassation stages (Sakowicz, 2016, p. 783). The court is obliged to examine the fulfilment of these conditions ex officio upon receipt of the indictment. In practice, such allegations are taken into account.<sup>20</sup> In the event of a negative verification of the fulfilment of the right to translation at the pre-trial stage, a return of the case to the prosecutor is justified.<sup>21</sup> These rights are also guaranteed by Directive 2010/64. The provisions of Article 2.5 and 3.5 indicate that Member States shall ensure that suspected or accused persons have the right to challenge, following procedures under national law, a decision that there is no need for interpretation or translation and, if interpretation or translation has been provided, the possibility to complain that the quality of the interpretation is not sufficient to ensure the fairness of the proceedings. As a consequence, each Member State should ensure the possibility of lodging a complaint or appeal on the grounds of the above-mentioned violations, and should specify clear measures to remedy the position of a suspect or defendant.

The use of machine translation is possible either through publicly available applications and programmes or through the creation of a programme dedicated to the judiciary and law enforcement agencies. The second solution allows for a higher level of protection of personal data, and an improvement in the quality of translations by standardizing the glossary and model procedural decisions. It is reasonable to formulate a request to the Ministry of Justice to begin the work on such a programme without delay. On the other hand, it should be emphasized that at present, in the absence of such software, both law enforcement agencies and the judiciary can use freely available machine translation programmes, subject to the restrictions and conditions mentioned above. The use of machine translation in criminal proceedings makes it possible to dispense with some of the services of translators and, consequently, to improve the economy of proceedings, to speed up proceedings, and to reduce the costs of the administration of justice, while maintaining the standard of a fair trial.

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<sup>20</sup> Cf. inter alia: judgment of the Supreme Court of 27 November 2020, V KK 518/19, Lex no. 3095018.

<sup>21</sup> Decision of the Appeal Court in Warsaw of 1 February 2012, II AKz 32/12, Lex no. 1237805; Stefański & Zablocki (2021, p. 662).

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