This project is co-funded by the Justice Programme of the European Union

TRANSLAW

Workstream 2

Legal and interpreting service paths of persons suspected or accused of crime

D.2.1. Desk research report

Project title: TransLaw – Exploring Legal Interpreting Service Paths and Transcultural Law Clinics for persons suspected or accused of crime

Grant Agreement number: 760157 — TransLaw — JUST-AG-2016/JUST-AG-2016-06

Editors: Katalin Balogh, Isabelle Bambust, Heidi Salaets

Authors: Katalin Balogh, Isabelle Bambust, Katja Drnovšek, Caterina Falbo, Mira Kadric-Scheiber, Natalia Kaloh Vid, Vlasta Kučiš, Sylvi Rennert, Heidi Salaets, Maurizio Viezzi, Christina Weißenböck

Place: Antwerp, KU Leuven, Antwerp Campus

Date: November 2018

Content

1 Introduction

While the service paths of persons suspected or accused of crime (PACs) in general differ among the legal systems of the countries under review, the aspects concerning interpretation (language rights) in the national service paths in criminal matters is strongly influenced by European law and European case law. The two main regulations governing this are the European Convention on Human Rights (and the European Court on Human Rights) and 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.

This right to interpretation stands beside other guarantees in criminal proceedings:

- The right to information
- The right to translation
- The right to have a lawyer
- The right to be presumed innocent and to be present at trial
- The right to legal aid

However, there are differences between the European and the national levels. Although all Member States must transpose Directive 2010/64, the exact way in which they transpose it is up to each country. This is not the only situation where a certain operating margin exists, either: the ratification of the European Convention on Human Rights can contain reservations. Additionally, the letter of the law and legal practice may be at odds (cf. Chapter 7 Challenges in practice).

This report describes the legal service paths of PACs in Austria, Slovenia, Italy, Belgium and the Netherlands and the laws and regulations concerning interpreting in the different stages of these service paths.

This project is co-funded by the Justice Programme of the European Union

2 Legal and interpreting service paths of PACs in Austria

The Austrian Code of Criminal Procedure (*Strafprozessordung, StPO*) regulates the processes of criminal prosecution by the police, the public prosecutor and the court. Most offences have to be prosecuted and cannot be withdrawn once the authorities have got knowledge of them (*Offizialdelikt).* A person suspected of having committed a criminal act is called "suspect" (*Verdächtiger*) at the very beginning of a criminal investigation and "accused" (*Beschuldigter*) in a later stage of the criminal investigation. After being formally charged, he or she is called "defendant" (*Angeklagter*).

2.1 Provision of interpretation and translation in the criminal law system

Article 56 StPO (Translation aid) implements the jurisprudence on Article 6 (3) of the European Convention on Human Rights (ECHR) and the Directive 2010/64 and governs the translation and interpretation for suspects, accused persons and defendants who do not speak or understand the language used in court. In Austria, the official language at courts is German. If one of the conditions mentioned in the Directive or Convention is met, an interpreter will be provided. The decision whether an interpreter is needed is taken by the authority in charge, but must be based on the opinion of the suspect or defendant regarding his or her own language skills, unless it is self-evident that an interpreter is needed. The interpretation is free of charge for the suspect/accused/defendant regardless of their financial situation and does not have to be reimbursed in the event of a conviction. However, should an interpreter be required only for the communication with witnesses, the defendant must cover these costs in the case of a conviction.

Article 56 StPO stipulates (oral) interpretations and written translations. Oral interpretation shall be provided for any proceedings or taking of evidence in which the suspect/accused/defendant participates, as well as for communication with the legal representative related to each of these cases. If no interpreter is available on site, interpreting can generally be provided remotely, i.e. via video and audio link. Following the 2016 reform of the Criminal Procedure Act, the cost of an interpreter is now also covered for defendants who have chosen their own defence lawyer for communication regarding matters directly related to key stages of the process.

2.1.1 Service of documents

Key documents must be translated into a language the suspect or defendant understands in a timely manner if necessary to ensure his or her right of defence and a fair trial. Such key documents include the arrest warrant, the charge and the judgment. These documents may also be translated orally; if the accused or defendant has a legal representative, the translation of the documents may be given as an oral summary. The accused or defendant may waive his or her right to translation only under certain formal conditions.

2.2 Preliminary investigation

The first stage of the criminal procedure is the criminal investigation (*Ermittlungsverfahren*), it ends with a discontinuation of the investigation or a charge. The investigation shall be conducted by or

This project is co-funded by the Justice Programme of the European Union

under the supervision of the public prosecutor; in practice, the police play a considerable role in large-scale investigations . The prosecution can give orders to the police, investigate on its own, or call experts. The police, in practice, initiate and conduct investigations on their own to a certain extent, but the prosecutor is in general the only one who communicates with the court.

Preliminary detentions are exceptional (the number of prisoners in preliminary detention is currently approximately 1,850); the accused is summoned to appear before the police or prosecutor during the pre-trial stage and before the court during the actual trial, but usually remains at large otherwise. If the defendant does not comply with a summons (*Ladung*), a written order (*Vorführbefehl*) may direct the police to bring him or her before court.

2.2.1 Measures of compulsion against the accused

2.2.1.1 Arrest (*Festnahme*)

A person may be arrested if they have been caught in the act of committing a crime, or credibly accused of the crime immediately after the act, or apprehended with objects (such as weapons) directly indicating their involvement in a criminal act, if they are fleeing or hiding or are very likely to do so, if they have already attempted to influence witnesses, experts, or co-defendants, or to destroy evidence or otherwise impede the investigation or are very likely to do so, or if they may commit another crime against the same object or person of legal protection or complete the attempted or threatened crime.

Instead of arrest, other means of detention can be applied (e.g. confiscation of passport, driver's license). However, the suspect must be taken into preliminary custody if the crime is punishable by a minimum sentence of ten years. To take a suspect into custody, the supervising judge must approve an arrest warrant issued by the prosecutor, which must be handed to the suspect within 24 hours of his or her arrest by the police. The suspect must also be brought to the court's detention facility within 48 hours. In the case of arrest, the suspect must be immediately interrogated by the police. He or she has to be informed of the suspicion against him or her and the reasons for the custody. The suspect must also be informed of their rights, especially their right to consult a lawyer, to inform a relative, and to refuse to testify. They must also be warned that their testimony may be used against them. They must be freed immediately if after the interrogation no further grounds for detention exist. Otherwise, the public prosecutor must be informed. The suspect is released if the prosecutor finds no reason to order ordinary preliminary detention.

2.2.1.2 Preliminary detention (*Untersuchungshaft*)

Once a suspect has been brought to the court detention facility, they must be interrogated within 48 hours by the authorised supervising judge (*Haft- und Rechtsschutzrichter*). These supervising judges are assigned to regional courts of justice. Confinement must not continue for longer than absolutely necessary. Preliminary detention must be lifted immediately once the reasons for confinement have expired or if its purpose may be achieved through lesser means. Such means may include the promise of the suspect not to flee or hide until trial, or not to relocate without the permission of the supervising judge, the promise to abstain from any attempts to obstruct the investigations, a judicial order to remain or live at a specific location, the temporary confiscation of identity papers, and the deposit of bail.

This project is co-funded by the Justice Programme of the European Union

2.2.2 Role of the interpreter in the preliminary investigation phase

Pursuant to Article 50 StPO, suspects must be informed promptly in a language they understand of the accusations and of their rights. When a person is arrested, he or she must be informed of his or her rights in writing in a language he or she understands. Should this information not be available in writing, it can first be given orally in a language he or she understands, with a written translation provided later as soon as possible (Article 171 StPO). An interpreter is also required for interrogations and when hearing evidence (Article 56 StPO).

The authority conducting that part of the procedure is in charge of summoning the interpreter. The law (Article 126 StPO) defines for police authorities, public prosecution and courts a certain order of preference, which includes giving preference to sworn court interpreters and interpreters recommended by the Ministries of the Interior or Justice. If a specially qualified interpreter is not available or not available in time, other people can be called to interpret.

The suspect or defendant must be informed that an interpreter will be summoned and who this is. Objections against an interpreter can be raised on grounds of bias or lack of qualifications. Having interpreted in the preliminary investigation is not grounds for dismissal from interpreting in the main trial.

The preliminary investigation ends with the investigation being discontinued or the accused being formally charged by the prosecutor.

2.3 Hearing (*Hauptverfahren*)

In the event of an indictment, the court decides on the verdict and the sentence. The main hearing is called *Hauptverhandlung* and requires the presence of (lay) judges, the public prosecutor, the defendant and his or her lawyer (in all cases requiring defence counsel). In cases tried before the district court or minor offences tried before a single judge, the defendant is not required to have legal counsel at the trial.

The trial may take place without the defendant only if the defendant is charged only with a misdemeanour, has already given testimony in court, or has received a summons to the trial and has failed to appear and in certain other exceptional cases. The victim may participate in the trial, and may claim damages for suffered harm as an intervenor (*Privatbeteiligter*); the victim also has the right to interpretation.

The Austrian legal system has two different types of court of first instance for criminal proceedings. The district courts are responsible for all criminal cases punishable by a prison sentence of no more than a year, e.g. minor theft and fraud offences, minor assault, or drug possession offences. Here, the presiding judge is always a single judge.

The regional courts are responsible for all other, larger and more serious criminal cases. Trials before the regional court may be decided by a single judge, or a lay court – consisting of two lay judges and two professional judges – for serious offences, or jury courts in the case of political offences and homicides.

Cases before a single judge (*Einzelrichter*) are characterised by charges filed without detailed reasons. The prosecutor develops the case during the trial. To protect the defendant from potential judgement

This project is co-funded by the Justice Programme of the European Union

errors, verdicts and sentences by single judges are subject to “full” appeal.

2.3.1 Structure of the hearing

1. Case is called in
2. Presiding judge questions defendant regarding personal background
3. Prosecutor makes opening statement, addressing all charge points, defence may reply
4. Defendant is interrogated by (presiding) judge, pleads guilty/not guilty. The defendant does not have to answer, lying is allowed unless wrongfully accusing another person of a crime
5. Witnesses and experts are heard, other evidence is presented
6. After submission of all evidence, first prosecutor, then defence plead
7. (Presiding) judge declares hearing closed, court retires to deliberate (single judge continues without retiring)
8. (Presiding) judge pronounces verdict and sentence, informs defendant of rights to appeal

Unlike this usual structure, the jury trial consists of three professional judges and eight jurors. The decision-making process is different: After taking the evidence, the bench presents written questions to the jury, which are read aloud, and the parties can petition the court for amendments. After the pleas, the jury is sequestered. The professional judges may give advice to the jury; however, in the actual decision-making, the jury must be alone. In exceptional cases, the jury decision may be reassessed or suspended. If the court accepts the decision, the court bases its verdict and punishment on it.

2.3.2 Mandate procedure (Landes-/Bezirksgericht)

If a misdemeanour is punished by a fine or imprisonment of a maximum of one year, the verdict may be imposed by single judges at the regional or district court without a trial (written procedure). The written procedure without a hearing is rarely used in practice.

2.3.3 The role of the interpreter in the trial

In the trial, the judge is in charge of summoning an interpreter (Article 221 (1) StPO). Defendants and their lawyers must be given at least 8 days to prepare for the trial (Article 221 (2) StPO), interpreters must have at least 3 days to prepare. Usually the judge will be able to determine based on the documentation of the preliminary investigation whether an interpreter will be needed for a trial. Should the need for an interpreter only become evident during the trial itself, it must be adjourned.

2.3.4 Appeal

There are only two appeal stages in criminal matters. District court rulings are challenged in the Regional Court, and Regional Court rulings can be challenged either in the Court of Appeal or the Supreme Court. The appeal procedure is highly formalised in parts.

A guilty verdict may be appealed by the defence or prosecution, while an acquittal may be appealed only by the prosecution. Appeal must be filed within three days after the verdict and must be submitted within four weeks of the delivery of the judgement in writing.

This project is co-funded by the Justice Programme of the European Union

2.3.4.1 The role of the interpreter in the appeal process

The defendant has a right to the free translation of key documents until a final judgment has been passed and therefore extends to appeals and other legal remedies (Article 56 (2) StPO).

2.4 Penal system

There are no special provisions regarding interpreting in prisons. The provisions of the Code of Criminal Procedure apply analogously. In practice, few interpretations take place in prisons.

2.5 Infringements of the right to translation/interpretation

Although the parties do not have any rights with regard to the appointment of their preferred interpreter, they may express their reservations against an appointed interpreter on grounds of possible bias or lack of professional competence. If these reservations are not taken into consideration, an objection can be lodged. Furthermore, objections can be raised if the defendant is completely denied their right to an interpreter. If the defendant feels disadvantaged by the decision, they may lodge an appeal. Translation/interpreting errors or an infringement of the right to translation/interpretation do not as such require the judge to declare a mistrial. Such infringements must be noted in an objection or by lodging an appeal against the court's ruling. In any case, the court or the police should be made aware of mistakes as soon as possible.

This project is co-funded by the Justice Programme of the European Union

3 Legal and interpreting service paths of PACs in Italy

The right to one's own language within the Italian justice system is enshrined in Article 111 of the Constitution, which reads: "In criminal law trials, the law provides that the alleged offender shall be promptly informed confidentially of the nature and reasons for the charges that are brought and shall have adequate time and conditions to prepare a defence. The defendant shall have the right to cross-examine or to have cross-examined before a judge the persons making accusations and to summon and examine persons for the defence in the same conditions as the prosecution, as well as the right to produce all other evidence in favour of the defence. The defendant is entitled to the assistance of an interpreter in the case that he or she does not speak or understand the language in which the court proceedings are conducted". Article 111 of the Constitution is in line with the provisions of supra-national legal instruments that have been incorporated into Italy's legal system, e.g. the European Convention on Human Rights (ECHR, 1950) and the International Covenant on Civil and Political Rights (ICCPR, 1966).

According to the provisions of Article 109(1) of the Code of Criminal Procedure (CCP), "The language of the acts of criminal proceedings is Italian". The subsequent paragraph 2, however, explicitly states that Italian citizens belonging to recognised linguistic minorities are entitled to use their own languages: "Before the judicial authority with first-instance or appeal competence over a territory where a recognised linguistic minority is settled, the Italian citizen belonging to such minority shall be questioned or examined, upon his request, in his mother tongue and the related record shall also be drafted in that language. All the proceedings documents addressed to him produced after his request shall be translated into that language. These provisions are without prejudice to the other rights provided for in special laws and international conventions". Translation and interpreting services are free of charge for citizens belonging to linguistic minorities. The non-observance of the provisions of Article 109(1) and (2) nullifies the proceeding (Article 109(3): "The provisions of this article shall be observed under penalty of nullity").

Special provisions apply to deaf, mute and deaf-mute citizens (Article 119 CCP): "1. If a deaf, mute or deaf-mute person wants or has to make statements, any questions, warnings and admonitions shall be submitted in writing to the deaf person who shall reply orally; any questions, warnings and admonitions shall be submitted orally to the mute person who shall reply in writing; any questions, warnings and admonitions shall be submitted in writing to the deaf-mute person, who shall reply in writing. 2. If the deaf, mute or deaf-mute person cannot read or write, the proceeding authority shall appoint one or more interpreters, preferably chosen among persons accustomed to dealing with such person". It is worth noting that these provisions do not seem to be based on a clear understanding of what sign languages are. Actually, deaf, mute or deaf-mute persons might simply be regarded as persons who do not understand or speak Italian, thus requiring – and being entitled to – an interpreter, except for the cases in which they are unable to use any sign language.

Leaving aside persons belonging to recognised linguistic minorities and people with speech or hearing impairment, the right to language assistance for persons accused of crime who do not understand or speak Italian is guaranteed by Title IV of Book II of the Code of Criminal Procedure – "Translation and Interpreting", Article 143–147 – which covers the appointment and recusal of the interpreter, and the assignment of the job to the interpreter. Title IV was modified after Directive 2010/64/EU of the

This project is co-funded by the Justice Programme of the European Union

European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings was transposed into Italian law through Legislative Decree no. 32 of 4 March 2014 and Legislative Decree no. 129 of 23 June 2016. Article 143(1) of CCP states that "the accused who does not know the Italian language is entitled to be assisted by an interpreter – free of charge and regardless of the outcome of the proceedings – to understand the accusations against him and follow the actions and hearings in which he participates. The accused is also entitled to be assisted by an interpreter – free of charge – to be able to confer with his lawyer prior to questioning or for the submission of a request or brief during proceedings". Article 143(4) states that "Knowledge of the Italian language shall be assessed by the judicial authority. Knowledge of the Italian language by Italian citizens shall be presumed unless proven otherwise".[1] Article 143(5) provides for the impartiality of the proceeding by stating that "An interpreter and translator shall be appointed also in the case where the court, the public prosecutor or criminal police officer knows the language or dialect to be interpreted". Article 143-bis mentions other cases for the appointment of interpreters and translators among which "cases where the victim to be interviewed does not know the Italian language or [...] wants to attend the hearing and has required the assistance of an interpreter" (art. 143-bis(2). Modifications to Article 143-bis¬ were introduced through Legislative Decree no. 212 of 15 December 2015 which transposed Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards for the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

3.1 Criminal proceedings

Criminal proceedings in Italy can be ordinary or special (Tonini, 2015). The former are divided into three stages: preliminary investigations, preliminary hearing and trial, which will be described in the following subsections; the latter are simpler in that at least one of the three stages does not take place. In direct trials and immediate trials there is no preliminary hearing; in summary trials, application of punishment upon request of the parties and suspension of proceedings pending probation, there are only preliminary investigations and the preliminary hearing; in proceedings by decree there are only preliminary investigations, and if the public prosecutor deems that a fine should be imposed, he or she may submit a request for issuing a criminal decree of conviction to the preliminary investigation judge. The choice of the type of proceedings to be carried out depends on a number of factors including the crime involved.

3.1.1 Preliminary investigations

The first stage – preliminary investigations – of an ordinary criminal proceeding begins when the police or the public prosecutor become aware of a fact that might be regarded as an offence or a crime. The public prosecutor investigates the alleged crime in order to collect evidence and identify the person(s) who committed it. During this phase the public prosecutor may order searches, seizures and technical analyses to be performed and may request precautionary measures to be applied.

[1] An Italian citizen being only able to speak a dialect should prove his or her inability to speak Italian. In such a case, an interpreter is appointed (cf. Curtotti Nappi 2002: 360–361).

This project is co-funded by the Justice Programme of the European Union

The preliminary investigation judge guarantees respect for the procedure and decides on any requests put forward by the parties. The public prosecutor must conclude his or her preliminary investigations within a time limit set by the Code of Criminal Procedure and then decide whether to file a request for committal to trial, which leads to the preliminary hearing, or discontinue the case.

During this stage, the accused person may be questioned at his or her request or at the public prosecutor's request.

In case of a temporary detention or arrest, the accused person appears before the preliminary investigation judge in the confirmation hearing.

The accused person is entitled to an interpreter in both the questioning (by the criminal police or the public prosecutor) and the confirmation hearing and retains the right to an interpreter even if the confirmation of the temporary detention or arrest is appealed against at the re-examination hearing. It is worth noting that "An interpreter and translator shall be appointed also in the case where the court, the public prosecutor or criminal police officer knows the language or dialect to be interpreted" (Article 143(5) CCP) and "[...] The accused is also entitled to be assisted by an interpreter – free of charge – to be able to confer with his lawyer prior to questioning or for the submission of a request or brief during proceedings" (Article 143(1) CCP). These provisions are completed by those stated in Article 104(4-bis): "The accused who is either under arrest or under temporary or precautionary detention and does not know the Italian language is entitled to be assisted by an interpreter – free of charge – to be able to consult with his lawyer [...]. The interpreter shall be appointed according to the provisions of Title IV, Book II". As a rule, an interpreter is provided free of charge for one meeting with the lawyer, but may be provided for further meetings if necessary to guarantee the right to defence.

3.1.2 Preliminary hearing

The preliminary hearing takes place in chambers before the preliminary hearing judge and with the necessary participation of the public prosecutor and the accused person's lawyer. Immediately after the end of the debate, the preliminary hearing judge delivers either a judgment of no grounds to proceed or a decree for committal to trial. The preliminary hearing therefore acts as a filter that aims to avoid trials based on false accusations and the waste of resources these would entail.

During this stage, the accused person is entitled to language assistance. The interpreter is appointed by the judge. The defence may appoint its own interpreter to guarantee quality and reliability of interpreting, but it rarely happens.[2]

3.1.3 Trial

If a decree for committal to trial is issued, a trial dossier is produced containing the documents related to the admissibility of criminal prosecution, the records of unrepeatable actions conducted by the criminal police, the public prosecutor and the lawyer, the records of evidence gathered at the special

[2] The right of an accused foreigner who does not know Italian to appoint an interpreter is an integral part of the right of defence guaranteed by the Constitution and the right to a fair trial (cf. Decision no. 254/2007 of the Constitutional Court).

This project is co-funded by the Justice Programme of the European Union

evidentiary hearing held during preliminary investigations etc. (Article 431 CCP). The dossier may be used by the judge during the trial phase. A prosecution dossier is also produced containing documents that are not included in the trial dossier. As a rule, documents included in the prosecution dossier may not be used by the judge during the trial phase: "for the purposes of deliberation, the court shall not use evidence other than that lawfully gathered during the trial" (Article 526 CCP).

The nature and seriousness of crimes determine whether the competent authority is the Justice of Peace (Legislative Decree no. 274 of 28 August 2000), the Tribunal or the Court of Assizes. The Justice of Peace is competent for minor crimes; while for very serious crimes resulting, for example, "in the death of one or more persons" and for "crimes for which the law imposes a life sentence or the penalty of imprisonment for a maximum term of at least twenty-four years" (Article 5 CCP), the competent authority is the Court of Assizes. The Tribunal is competent for "the offences which do not fall within the competence of the Court of Assizes or the Justice of Peace" (Article 6 CCP).

Unlike preliminary hearings, first instance hearings before the Justice of Peace, the Tribunal and the Court of Assizes are generally public, and evidence is again gathered when hearing the parties, i.e. the public prosecutor, the defence lawyer and the accused person, who may be absent under certain circumstances (Article 420-bis) . The court shall use evidence thus gathered for the purpose of deliberation, and deliver a judgment of dismissal or a judgment of conviction, thus ending the first instance trial. Appeals against first instance decisions may be lodged with the Court of Appeal; appeals against Court of Appeal decisions may be lodged with the Court of Cassation.

The accused person is entitled to an interpreter during the first instance trial and its various hearings as well as during appeals.

3.2 Service of documents

After the transposition of Directive 2010/64/EU, modifications have been introduced with regard to translation. Article 143(2) and (3) CCP provide for the right to the translation of essential documents free of charge: "2. […] the proceeding authority shall order the written translation of the notice of investigation, the notice of the right to defence, the decisions ordering personal precautionary measures, the notice of the conclusion of preliminary investigations, the decrees of summons for trial, the judgements and the criminal decrees of conviction. The translation of the mentioned documents must be provided within a suitable period of time so as to enable the defence to exercise its rights and powers. 3. The free-of-charge translation of any other document or part thereof which is deemed essential for the accused to understand the accusation against him may be ordered by the court, also upon request of a party, by means of a reasoned decision, appealable together with the judgement".

This project is co-funded by the Justice Programme of the European Union

4 Legal and interpreting service paths of PACs in Belgium

In Belgium, the rights of suspects are governed by the Criminal Procedure Code. This, along with the Belgian Language Act of 1935, lays out the language and interpreting rights of persons suspected or accused of crime.[3]

This chapter first describes the service paths of PACs, followed by a separate discussion of language rights in all stages of the service path.

4.1 Questioning by the police

The police can always question a suspect. This happens under the control of the public prosecutor. **During the questioning, the person has the right to remain silent** and not incriminate himself or herself; i.e., the person has the right not to collaborate in producing evidence against him or her.

Section 47bis Criminal Procedure Code describes the **following rights**:

Before proceeding with the hearing of a suspect, **the person to be questioned** is briefly informed of the facts about which he or she will be heard, and **is informed** that:

- He or she is interrogated as a suspect and that he or she has the right to have a confidential consultation with a lawyer of his or her choice or a lawyer assigned to him or her for the interrogation, the right to be assisted by that lawyer during the interrogation, in so far as the concerned facts are charged with a crime for which a custodial sentence may be imposed, and that, if the suspect is not deprived of liberty, they must take the necessary measures for assistance themselves;
- After stating his or her identity, the suspect has the choice to make a statement, to reply to the questions or to remain silent;
- He or she cannot be obliged to incriminate himself;
- His or her statements can be used as evidence in court;
- He or she can request that all questions asked and all answers he or she gives are recorded in the used terms;
- During the questioning the suspect is not deprived of his or her liberty and can go wherever he or she wants at any time;[4]
- He or she can request that a specific investigation be carried out or a certain interview be conducted;
- He or she may use the documents in his or her possession, without thereby delaying the interview, and that, during the questioning or later, he or she may request that these documents be attached to the report of the interview or to the record.

[3] See Bambust, I. (2012). Constitutional and judicial language protection in multilingual states: a brief overview of South Africa and Belgium, Erasmus Law review, Volume 5, Issue 3, pp. 211–232 (with Albert Kruger en Thalia Kruger).

[4] This, naturally, does not apply to suspects in preliminary detention.

This project is co-funded by the Justice Programme of the European Union

Also, a **person can be immediately detained** (and questioned afterwards) in the case of a crime or offence discovered while or immediately after being committed, or at the request of the crown prosecutor or investigating judge if there are serious indications of guilt. **The person cannot be detained by the police for more than 24 hours**. The police can enter the home (or office or car) of the person in the case of an offence discovered while or immediately after being committed, or with the consent of the person. However, some places are protected, for instance the office of a diplomat, of a member of parliament, or the premises of persons holding professional secrets. If the police consider it useful, or upon request, the person will be examined by a doctor. At this first stage, the police decide whether or not to allow the person to use the telephone.

In general, the concerned person pays the lawyer. The person may be asked for a payment on account before any work is carried out. Fees are not set by law. However, the lawyer must tell the suspect how the bill will be calculated: hourly rate applied according to the time spent on defence or set amount for each type of service (consultation, reading file, pleading, etc.).

If the concerned person does not have sufficient income to pay a lawyer, they can request free legal aid from the legal aid office to cover the lawyer. The list of offices for each district is available on the Internet.

4.2 Investigation

The investigating judge can use all the investigation measures available to the public prosecutor[5]: coercive measures, issue an arrest warrant, have telephone conversations monitored, particular search methods, etc. The home of the suspect may be searched if a search warrant has been signed by the judge, and if the search is carried out between 5 am and 9 pm, unless agreed otherwise. The questioning by the investigating judge is only compulsory when an arrest warrant is issued.

In principle, the judge must charge the suspect if there is serious evidence of his or her guilt. He or she is charged after being questioned or by letter. This gives him or her the right to request access to the criminal file and the right to demand additional investigations.

4.3 Before the court

In principle, the trial is held in public by professional judges. However, before the assize court, 12 jury members will rule on whether the accused is guilty (they will then decide on the penalty together with three professional judges). The suspect can always be represented by a lawyer. In exceptional cases, he or she must appear in person. If the suspect is not present or represented by a lawyer, the trial will take place without him or her and he or she will be judged in absence. The suspect has the right not to incriminate themselves and to develop their own defence strategy. This also includes the right to remain silent. The suspect can contest the evidence against him or her by asking the judge further

[5] The investigating judge is an independent and impartial magistrate who leads the judicial research. He or she takes into account all elements of the criminal case, while the public prosecutor only searches for elements against the suspected or accused person.

This project is co-funded by the Justice Programme of the European Union

investigations.

In general[6], the structure of the procedure before the criminal court is as follows:

- The presiding judge gives a brief summary of the case and/or interrogates the accused person
- The witnesses and experts are heard
- The civil party, possibly assisted or represented by a lawyer, gets the floor to explain the facts and to demonstrate their claim
- The public prosecutor gives their opinion on the guilt of the accused person and about the punishment
- The accused person, possibly assisted or represented by a lawyer, carries out his or her defence
- If they wish, the public prosecutor and the civil parties can respond
- The accused person always gets the last word
- The judge closes the debate
- The court pronounces the judgment or postpones the judgment to a later date

4.4 After the trial

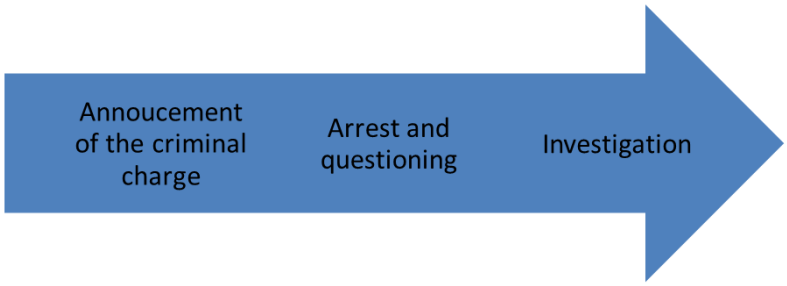
A judgment in the absence of the suspect, or when he or she has not been represented by a lawyer, is taken by default. In that case an application can be made to set aside the judgment by default. An appeal is also possible. The suspect may submit new evidence in appeal.

An appeal in cassation may be brought before the Court of cassation against a decision given on appeal, by making a declaration at the office of the court of appeal. An appeal in cassation is only justified in the event of a breach of law or procedure.

Monetary compensation for the loss suffered as a result of being held in custody can be requested from the Federal Justice Department.

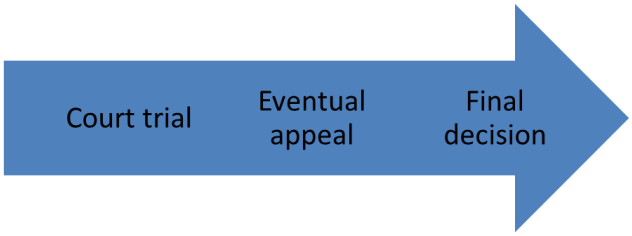
4.5 Language rights

In theory, all suspected and accused persons have, in the light of their rights of defence, a right to an interpreter, in all phases of the procedure (see the following visualisation), i.e. from the indictment until the final decision.



[6] The jury trial is different.

This project is co-funded by the Justice Programme of the European Union



The main supranational sources are expected to be converted into two important national sources in Belgium: The Belgian Language Act of 1935[7] and the Belgian Criminal Procedure Code (CPC).[8] This report distinguishes between language rights in the preliminary investigation and the court hearing itself, and pays attention to the service of documents to the persons involved. Judicial officers serve those documents, and on that occasion, when they meet the addressee, they intervene orally to inform the addressee.

4.5.1 Preliminary investigation

In Belgium, the basic public language structure is rather complicated. The official reports concerning the investigation and the establishment of criminal offenses, as well as the official reports in tax matters are in French in the French-speaking region, in Dutch in the Dutch-speaking region, and in German in the German-speaking region. In the municipalities of the Brussels agglomeration, these official reports are drawn up in French or in Dutch, as long as the concerned person uses one or the other of these languages for his or her statements. In the absence of such statements, the language will be chosen according to the needs of the case (section 11 Language Act).

For their actions of prosecution and investigation, the officials of the public prosecutor's office and the investigating judge make use of the language of the court to which they belong. The proceedings before the chambers (*raadkamer*) and the indictment chamber (*kamer van inbeschuldigingstelling*) are entirely conducted in the language used in the judicial investigation (sections 12 and 13 Language Act).

Conforming to the ECHR, the suspect must be informed in a language that he or she understands of the nature and cause of the accusation against him or her.

For all **interrogations, the party** that appears in person uses the language of his or her choice for his or her oral statements. If the responsible persons do not know the language used by the party, they call on the co-operation of a **sworn interpreter**. The need for interpretation is evaluated by the competent authority according to the stage of the procedure. The costs of translation are borne by the Treasury (section 31 Language Act).

Section 47*bis* (6) point 4 CPC contains some possibilities when the interrogated person does not understand or speak the language of the proceedings, or suffers from hearing or speech impediments.

[7] This law is a concretisation of Article 30 of the Belgian Constitution: "The use of languages spoken in Belgium is free; only the law can rule on this matter, and only for acts of the public authorities and for judicial affairs."
[8] See Meurens, N., & Mathieu, S. (reviewed by W. Vandenhole) (2015, May). The right to interpretation and translation and the right to information in criminal proceedings in the EU, Belgium (Franet contractor: Milieu Ltd).

This project is co-funded by the Justice Programme of the European Union

In that case, a sworn interpreter is used. The costs of translation are borne by the Treasury. However, **if a sworn interpreter cannot be found for the language, the interrogated person can be asked to write down his or her declarations in his or her own language**. This latter method includes the risk of not being accompanied by a thorough questioning, as it limits the interview to an unilaterally written statement in the language of the suspected or accused person. The question also arises which language will be used to encourage the suspected or accused person to make this statement.

The Law of 20 July 1990 concerning pre-trial detention mentions that if the questioned suspect does not understand or speak the language of the proceedings or if he or she suffers from hearing or speech impairments and if the lawyer does not understand or speak the language of the person, a sworn interpreter will be called during the prior confidential consultation with the lawyer. The costs of that interpretation are borne by the State.

4.5.2 Service of documents

Judicial officers serve trial documents to the persons involved (https://www.gerechtsdeurwaarders.be), and on that occasion, when they meet the addressee, and to fulfil their social role, they often intervene orally to inform the addressee. The main problem is that the written documents (that have to be served), even when they are translated, remain rather opaque. When the judicial officer meets a person whose language he or she speaks, the officer can provide additional information. However, the problem is that if the judicial officer does not speak the language of the addressee, **no interpretation is legally provided**.

4.5.3 Court hearing

French, Dutch, or German will be the language of the proceedings. It depends on where the proceedings are initiated (French-speaking language territory, Dutch-speaking language territory or German-speaking territory). In some cases, if all the parties in the case agree, a request can be made to have the proceedings in another official language. The Region of Brussels is bilingual and divided into Dutch-speaking and French-speaking judicial districts. In Brussels, the language of the proceedings is determined by the residence of the accused or the suspected person (either French or Dutch). If the person resides in a unilingual French area, the language of the proceedings will be French, and if the person resides in a unilingual Dutch area, the language of the proceedings will be Dutch. However, if the accused or suspected person is domiciled in the Brussels Region, he or she can choose between Dutch or French proceedings.

The parties in the case that do not understand the language of the proceedings are assisted by a sworn interpreter who interprets all oral statements. **The need for interpretation is evaluated by the competent authority according to the stage of the procedure**. The costs of interpretation are borne by the Treasury (section 31 Language Act).

If the accused person does not understand or speak the language of the proceedings or if the accused person suffers from hearing or speech impairments, the court shall officially appoint a sworn interpreter. If the person concerned suffers from hearing or speech impairments, he or she also has the right to ask for a special assistance of a person who is most habituated to deal with him or her. The costs of interpretation are borne by the State. (section 152bis CPC).

This project is co-funded by the Justice Programme of the European Union

According to section 282 CPC, the President at the assize court has to appoint a sworn interpreter if the accused, the civil party, or the witnesses do not speak the same language or the same dialect. The costs of translation are borne by the Treasury. Again, when the accused party is suffering from hearing or speech disorders, the President at the Assise court appoints a sworn interpreter. The costs of translation are borne by the Treasury. Those persons have also the right to ask at the same time the assistance from a person that is common to deal with them and with their disorders. (section 283 CPC).

This project is co-funded by the Justice Programme of the European Union

5 Legal and interpreting service paths of PACs in the Netherlands

The main national legal source of the Netherlands is the Code of Criminal Procedure. This section distinguishes between the preliminary investigation and the court hearing itself, and also pays attention to the service of documents.

5.1 Language rights

5.1.1 Preliminary investigation

In the Netherlands, all proceedings generally take place in the Dutch language.

Conforming to the ECHR, the suspect must be informed in a language that he or she understands of the nature and cause of the accusation against him or her. The authorities can make use of a telephone interpreter for this purpose.

The defendant is entitled to have the assistance from an interpreter during the consultation with the lawyer.

If a suspect, witness or expert witness does not understand the Dutch language, the examining magistrate shall be authorised to appoint an interpreter. If a suspect or witness has a hearing or speaking impairment, the examining magistrate shall determine that the questions will be posed or the answers will be given in writing. However, if the suspect or witness is illiterate or has great trouble reading or writing, then the examining magistrate may appoint a suitably qualified person as interpreter. If necessary, the interpreter shall be called to appear by order of the examining magistrate and shall take an oath to perform his or her duties in good conscience before the examining magistrate. (section 191 Code of Criminal Procedure).

5.1.2 Service of documents

Judicial officers serve trial documents to the persons involved (https://www.kbvg.nl/en), and on that occasion, when they meet the addressee, and to fulfil their social role, they often intervene orally to inform the addressee. The main problem is that the written documents (that have to be served), even when they are translated, remain rather opaque. When the judicial officer meets a person whose language he or she speaks, the officer can provide additional information. However, the problem is that if the judicial officer does not speak the language of the addressee, **no interpretation is legally provided**.

5.1.3 Court hearing

The suspect may have witnesses and expert witnesses called to appear at the court session. A suspect who is not fluent or sufficiently fluent in the Dutch language may apply to the public prosecutor for the assistance of an interpreter at the court session (section 263 Code of Criminal Procedure).

This project is co-funded by the Justice Programme of the European Union

If the suspect has a hearing or speaking impairment, the questions shall be posed or the answers shall be given in writing. The presiding judge shall verbally state the results of this questioning. If that suspect is illiterate or has great trouble reading or writing, then the services of a suitably qualified person as interpreter shall be requested (section 274 Code of Criminal Procedure).

If the suspect is not or is not sufficiently fluent in the Dutch language, the hearing shall not be continued without the assistance of an interpreter. In cases where the assistance of an interpreter is requested, that which has been said or read out and has not been interpreted for the suspect shall not be taken into account to his or her detriment (section 275 Code of Criminal Procedure).

Before closing the hearing, the presiding judge shall ask the suspect who has been assisted by an interpreter at the court session whether he or she wishes to be present when the judgment, which will not be rendered right away, is pronounced. If the defendant states that he or she does not wish to be present, the interpreter shall not be called to be present on pronouncement of judgment. If the defendant states that he or she does wish to be present, the presiding judge shall give the interpreter notice of the date and the time of the pronouncement of judgment; the notice shall be considered as equivalent to a summons (section 325 Code of Criminal Procedure).

This project is co-funded by the Justice Programme of the European Union

6 Legal and interpreting service paths of PACs in Slovenia

The conduct of Slovenian criminal proceedings is regulated by *Zakon o kazenskem postopku* (Criminal Procedure Act, hereinafter: ZKP) and several executive acts that regulate certain aspects and phases of criminal proceedings in more detail (e.g. Rules on criminal records, Instruction on the settlement in criminal cases, Rules on reimbursement of costs related to criminal procedure, and others). This chapter first looks at the language and translation rights in Slovenian court proceedings, followed by an outline of the criminal proceedings.

6.1 Language and translation rights in Slovenian court proceedings

Legislation regulating the use of language in all proceedings before Slovenian authorities (courts and other state authorities) reflects two basic (but somewhat conflicting) concepts, both of which are guaranteed by the Slovenian Constitution: the official language and the right to use one's language and script. They are also reflected in the relevant provisions of ZKP, which are presented below.

According to Article 11 of the Constitution, **the official language** in Slovenia is **Slovene**. In those municipalities where Italian or Hungarian national communities reside, **Italian or Hungarian** are also official languages. The implication of this provision is a (mandatory) requirement for all state and other authorities performing a public function in the territory of the Republic of Slovenia to carry out their tasks in the Slovenian language (or Italian or Hungarian in respective municipalities). No such authority may choose to conduct proceedings in another language at their own discretion, regardless of whether their representatives understand the language in question. This also applies to criminal proceedings, which are conducted in the official language of the court (Article 6 of ZKP). In general, the requirement to use the official language applies to all phases of criminal proceedings and to all written communication between the court and other participants, with some particularities and limitations that will be explained in greater detail below.

In order to guarantee the fundamental constitutional principles of equality before the law and effective judicial protection to persons who do not understand the official language, the Constitution balances this requirement with **the right to use one's language and script**. According to Article 62 of the Constitution, everyone has the right to use his or her language and script in a manner provided by law in the exercise of his or her rights and duties and in procedures before state and other authorities performing a public function. This right is especially important in relation to oral procedural acts; a party who does not understand the official language can obtain outside help when preparing written documents, but the inability to understand and participate in proceedings could effectively prevent the party from exercising their procedural rights. In such cases, the court will generally appoint a **professional court interpreter** (Article 8(3) of ZKP). Court interpreters are persons appointed for an unlimited time with the right and duty to interpret at main hearings and to interpret documents at the request of the court. They are appointed by the Minister of Justice for the interpretation of spoken and written word from or to a particular language and for the Slovenian sign language (Article 2(3) and Article 4 of Court experts, certified appraisers and court interpreters Act). If no court interpreter is available for a particular language, the court may appoint another person who is fluent in a foreign language for which there are no (or not enough) court interpreters (Article 8(4) of ZKP). In such a case,

This project is co-funded by the Justice Programme of the European Union

the newly appointed interpreter shall swear to interpret accurately the questions put to the accused and the answers of the accused (Article 233(3) of ZKP).

It is worth clarifying that since Italian or Hungarian, respectively, are already considered official languages in three municipalities with Italian minority (Koper, Izola and Piran) and five municipalities with Hungarian minority (Hodoš, Šalovci, Moravske Toplice, Dobrovnik and Lendava), the members of minorities do not need to invoke the right to use their language in this territory. Instead, all proceedings (including criminal; Article 6 of ZKP) shall be conducted in the language spoken by such party, in the manner defined by law. Depending on whether all parties speak the same official language or not, the proceedings could be conducted in one official language or bilingually. If there are no judges available at the court who are properly trained to conduct proceedings in Italian or Hungarian, or if one of the parties does not understand the (official) language spoken by another party, a court interpreter must be appointed. Any additional costs arising from such bilingual proceedings are borne by the state (Articles 62–69 of Court Rules). However, in any other municipality, the members of the Italian or Hungarian minority have the right to use their language in proceedings under the same conditions as any other person who does not understand Slovene.

6.2 Outline of Slovenian criminal proceedings

The conduct of Slovenian criminal proceedings is regulated by ZKP and several executive acts that regulate certain aspects and phases of criminal proceedings in more detail (e.g. Rules on criminal records, Instruction on the settlement in criminal cases, Rules on reimbursement of costs related to criminal procedure, and others). The main aim of ZKP is to "determine the rules whereby no innocent person shall be convicted and whereby the perpetrator of a criminal offence shall only be sentenced under the conditions provided by criminal law and within a lawfully conducted procedure." A defendant's freedom and rights may only be restricted under the conditions provided by ZKP, before a legally binding court judgement has been issued (Article 1 of ZKP). **The outline of ordinary criminal procedure is presented below.**

ZKP also contains **special provisions** on summary proceedings, proceedings for the issue of punitive order, proceedings for the pronouncing of judicial admonition, proceedings involving minors, proceedings for the application of security measures, proceedings for the confiscation of property of unlawful origin, proceedings for the revoking of suspended sentence, proceedings for the cancellation of sentence and cessation of security measures and legal consequences of the sentence, proceedings for international legal aid and the execution of international agreements on matters of penal law, proceedings for the extradition of accused and convicted persons, proceedings for compensation, rehabilitation and the exercise of other rights of unjustifiably convicted or arrested persons, and proceedings for the issuing of wanted notices and public announcements.

6.2.1 Preliminary procedure

6.2.1.1 Pre-trial procedure (Chapter XV of ZKP)

Any person may report a criminal offence which is liable to public prosecution (in some cases, a failure to report a crime is itself considered a criminal offence), **while all state agencies and**

This project is co-funded by the Justice Programme of the European Union

organisations having public authority are bound to report criminal offences liable to public prosecution of which they have been informed or which were brought to their notice in some other way (Articles 145 and 146 of ZKP). Any such crime reports must be submitted to the competent public prosecutor in writing or orally (Article 147(1) of ZKP).

If grounds exist for suspicion that a criminal offence liable to public prosecution has been committed, **the police is bound to take steps necessary for discovering the perpetrator**, ensuring that the perpetrator or his or her accomplice do not go into hiding or flee, detecting and preserving traces of crime or objects of value as evidence, and collecting all information that may be useful for the successful conducting of criminal proceedings. With that goal in mind, **the police may** seek information from citizens, inspect transportation vehicles, passengers and luggage, restrict movement within a specific area for a specific period of time, perform what is necessary to identify persons and objects, send out a wanted circular for persons and objects, inspect in the presence of the responsible person specific facilities, premises and documentation of enterprises and other legal entities, and undertake other necessary measures. On the basis of collected information, the police shall **draw up a crime report**, in which they set out evidence discovered in the process of gathering information, and send it to the public prosecutor (Article 148 of ZKP). Under certain conditions, the police may also take and publish a photograph of the person suspected of a criminal offence, their fingerprints and an oral mucous membrane swab, order secret surveillance, order information on communications using electronic communications networks, monitor electronic communications using listening and recording devices, control letters and other parcels, control computer systems of banks or other legal entities which perform financial or other commercial activities, resort to wire-tapping and recording of conversations (Articles 149–151 of ZKP). Most of these measures may only be ordered by means of a written order by the investigating judge following the public prosecutor's written proposal (otherwise, the court may not base its decision on information, messages, recordings or evidence obtained in this manner; Article 154 of ZKP). If it is possible to justifiably conclude that a particular person is involved in certain forms of criminal activities, the public prosecutor may, by written order, permit measures of feigned purchase, feigned acceptance or giving of gifts or feigned acceptance or giving of bribes or undercover operations carried out by undercover operatives (none of which may incite criminal activities) (Articles 155–156 of ZKP).

If it follows from the crime report that the act reported is not a criminal offence subject to prosecution ex officio, if prosecution is barred by statute or the offence has been amnestied or pardoned, if other circumstances exist which bar prosecution, and if no reasonable suspicion exists that the suspect has committed the indicated criminal offence, the public prosecutor shall **dismiss the report** (Article 161 ZKP). The public prosecutor may also transfer a crime report or a charge for a criminal offence punishable by a fine or not more than three years' imprisonment (or, under special circumstances, some other criminal offences) to **a settlement procedure** or, with the consent of the injured party, **suspend prosecution** if the suspect is willing to behave as instructed by the public prosecutor and to perform certain actions to allay or remove the harmful consequences of the criminal offence (e.g. elimination or compensation of damage) (Articles 161a and 162 of ZKP).

6.2.1.2 Investigation (Chapters XVI to XVII of ZKP)

The aim of investigation is to gather evidence and information necessary for deciding whether to bring

This project is co-funded by the Justice Programme of the European Union

charges or discontinue proceedings, and to collect evidence that might be needed in the proceedings if this seems warranted by the circumstances of the case (e.g. the evidence might be difficult or impossible to obtain later). Investigation may only be instituted against a specific person when a well-grounded suspicion exists that they have committed a criminal offence. In such case, the public prosecutor submits the request for the opening of investigation to the investigating judge, who examines the documents and, if they support such decision, opens the investigation by issuing a decree. The investigation is conducted by the investigating judge of the court with jurisdiction (Articles 167–171 of ZKP).

ZKP regulates the following **acts of investigation**: house search and personal search (Articles 214–219 of ZKP), seizure of objects (Articles 220–224 of ZKP), treatment of objects of doubtful ownership (Articles 225–226 of ZKP), interrogation of the accused (Articles 227–233 of ZKP), examination of witnesses (Articles 234–244 of ZKP), inspection (Articles 245–247 of ZKP), and expert opinion (Articles 248–267 of ZKP).

If the public prosecutor declares in the course of or upon completion of an investigation that they refrain from prosecution, the investigating judge shall inform the injured party of the investigation, as well as of their right to continue prosecuting. If the injured party does not continue prosecution, **investigation is suspended**. Furthermore, the panel of judges will suspend investigation by issuing a decree (1) if they find that the offence the accused is charged with is not a criminal offence, (2) if circumstances exist which exclude criminal responsibility of the accused and there are no grounds for application of security measures, (3) if criminal prosecution is barred by law, or the act is covered by an amnesty or pardon, or other circumstances exist which exclude prosecution, (4) if evidence that the accused has committed a criminal offence does not exist (Articles 180–181 of ZKP).

When the investigating judge is satisfied that a case has been elucidated, they shall terminate investigation and send the file of the case to the public prosecutor. The public prosecutor is required within fifteen days to either **propose the supplementing of the investigation or to file a charge sheet or to declare that they refrain from prosecution** (Article 184 of ZKP).

6.2.1.3 Charges and objections to the charges (Chapter XIX of ZKP)

After the investigation has been completed, **proceedings before court may be conducted only on the basis of a charge sheet filed by the public prosecutor or by the injured party acting as prosecutor** (Article 268 of ZKP). If the accused is in detention, they shall be served the charge sheet within twenty-four hours of being detained; otherwise, they shall be served the charge sheet without delay. If the remand in custody is ordered against the accused, the charge sheet shall be served on them at the time of their arrest, together with the ruling ordering remand in custody (Article 272–273 of ZKP).

The accused has the right to **submit an objection** to the charge sheet within eight days of it being served. Objection may be submitted by the defence counsel, but not against the will of the accused, who may also renounce the right to object to the charge sheet (Article 274 of ZKP). The panel will **reject the charge** and discontinue proceedings if it finds that (1) the act charged is not a criminal offence, (2) circumstances exist which exclude criminal liability and there are no grounds for application of security measures, (3) the criminal prosecution is barred by law, or the act is covered by an amnesty or pardon, or other circumstances exist which exclude prosecution, (4) there is not enough evidence to suspect

This project is co-funded by the Justice Programme of the European Union

with good reason that the accused has committed the act with which they are charged (Article 277 of ZKP).

6.2.2 Main hearing and judgement

6.2.2.1 Preparations for the main hearing (Chapter XX of ZKP)

The main hearing shall be scheduled no later than two months after the court has received the charge sheet. The presiding judge will issue a decree determining the day, hour and venue of the main hearing (Articles 286 and 287 of ZKP). **The persons summoned to appear** at the main hearing include the defendant, their counsel, the prosecutor, the injured party and their legal representatives and attorneys, the interpreter, witnesses and experts (except those whose presence at the main hearing in the opinion of the presiding judge is not necessary). The defendant will be served with the summons with enough time left to prepare his or her defence, which may not be less than eight days between the service and the main hearing. At the request of the defendant, or at the request of the prosecutor agreed to by the defendant, this time period may be shortened. All persons summoned to appear shall be informed in the summons of the consequences of the failure to appear at the main hearing (Article 288 of ZKP).

The parties and the injured person may request that **new witnesses or new experts** be summoned, or **new evidence** produced, whereas the presiding judge may even without the motion of the parties order that new evidence be produced for the main hearing (Article 289 of ZKP).

The presiding judge may **discontinue criminal proceedings** if the prosecutor withdraws the charge sheet prior to the opening of the main hearing, if the injured party abandons prosecution, or in instances where, after the indictment or a private charge has taken effect, it is established that some other circumstances exist that would require the rendering of a judgement of rejection in the main hearing (Article 293 of ZKP).

6.2.2.2 Main hearing (Chapter XXI of ZKP)

The main hearing is **held in open court** and may be attended by any adult person, unless a reason exists for excluding the public (e.g. to protect state secrets, personal or family life, interests of minors, etc.). The exclusion of the public does not apply to the parties, the injured person, their representatives and counsel (Articles 294–296 ZKP).

The presiding judge generally directs the hearing in the following manner:

1. The presiding judge **opens the session** and announces the case to be tried at the main hearing and the composition of the panel of judges. They **verify if all persons who were summoned have appeared**. If they have not, the judge checks if they were served with a summons and if they have excused their failure to appear in court. If necessary, the presiding judge may order absent participants to be brought to court by force (Articles 305–309 of ZKP).
2. After the presiding judge has established that all persons who were summoned have appeared at the main hearing, or the panel has decided to conduct the main hearing without some of the persons summoned, the presiding judge calls on the defendant and asks them to give their personal data in order to establish their identity, invites the defendant to follow closely the

This project is co-funded by the Justice Programme of the European Union

course of the main hearing and instructs them that they may state their case, address questions to co-defendants, witnesses and experts, and make comments on and give explanations of their statements (Article 318–320 of ZKP).

3. The main hearing proceeds with the **reading of the charge sheet or the private charge**. The presiding judge shall ask the defendant if they have understood the accusation. If the defendant has not understood the accusation, the presiding judge calls on the prosecution to explain the accusation in a way the defendant may understand without difficulty. The defendant and defence counsel have the right to **answer the charge and state their position** regarding the accusation and the indemnification claim of the injured party; at this point, the defendant may only declare if they admit the act and the indemnification claim and if they has any objection of a legal nature. Unless the defendant decides not to plead their case, they may **set forth their defence, after which they may be asked questions** (first by the prosecutor and then by the defence counsel; the injured party, legal representative, attorney, co-defendant and expert may ask the defendant direct questions only with the permission of the presiding judge, who may also ask questions). The presiding judge will disallow a question or answer to a question if it is not permitted or bears no relation to the case (Articles 321-324 of ZKP).
4. The interrogation of the defendant is followed by **the hearing of evidence**, which shall include all facts that the court considers material to a correct adjudication. Evidence is taken in the sequence determined by the presiding judge; however, as a rule, evidence proposed by the prosecution is generally heard first, followed by evidence proposed by the defence, and finally the evidence taken by the panel ex officio (Article 329 of ZKP).
5. When the taking of evidence is completed, the presiding judge invites the parties, the injured person and the defence to **sum up their arguments**. The prosecutor speaks first, then the injured party and counsel, and finally the defendant. In **the closing statement**, the prosecutor presents their evaluation of evidence taken at the main hearing, explains their conclusions concerning facts material to the adjudication, and puts forward their proposal regarding the criminal responsibility of the defendant, the provisions of the criminal law to be applied, and the extenuating and aggravating circumstances to be taken into consideration in determining the punishment. When presenting arguments for the defence, the defence counsel or the defendant may comment on the allegations of the prosecution and the injured party. The prosecutor and the injured party have the right of reply, and defence counsel or the defendant have the right of rejoinder. The defendant always has the last word (Articles 346–349 of ZKP).
6. If after the final statements of the parties the panel is not aware of the need for any further evidence, the president of the panel indicates that the main trial has been **concluded**. The panel then withdraws for consultations and voting on the ruling (Article 352 of ZKP).

6.2.2.3 Issuing judgement (Chapter XXII of ZKP)

The presiding judge **announces the judgement** immediately after the court has passed it. If the court is unable to pass judgement on the day the main hearing has been completed it may postpone the announcement by a maximum of three days (Article 360 of ZKP). After announcing the judgement the presiding judge **instructs the parties** entitled to appeal of their right to appeal and the obligation to announce the appeal and warns them that they will be considered to have waived the right to appeal if they fail to announce it within eight days of the day of announcement of the judgement. Where a

This project is co-funded by the Justice Programme of the European Union

suspended sentence has been pronounced on the defendant, the presiding judge warns them of the meaning of the sentence and the conditions by which they are bound to abide (Article 362(1–2) of ZKP). Judgement is **drawn up in writing** within fifteen days of its announcement if the accused is on remand and within thirty days in other instances and is served on the defendant, the private prosecutor and the injured party acting as prosecutor(Article 363(1, 4) of ZKP).

The court must base its judgement solely on the facts and evidence considered at the main hearing, upon assessing each item of proof separately and in relation to other items of proof and on the basis of such evaluation to reach a conclusion whether or not a particular fact has been proved (free assessment of evidence; Article 355 of ZKP). Judgement determines rejection of the charge, acquittal of the accused or pronouncement of guilt (Article 356(1) of ZKP). It has an introductory part, the enacting terms and a statement of grounds. In **the statement of grounds** the court explains reasons for each individual point of the judgement and indicates clearly and exhaustively which facts it considers proved or not proved, as well as the reasons for this; in particular how it evaluates the credibility of conflicting evidence, reasons for denying certain motions of the parties, key considerations by which it was guided in settling points of law and in establishing whether a criminal offence and criminal responsibility of the defendant exist, as well as in applying specific provisions of criminal law to the defendant and his or her act. If the defendant has received a sentence, the statement of grounds shows which circumstances the court took into consideration (especially which reasons were decisive in its decision to impose a sentence severer than that prescribed, or to reduce or remit the sentence, or to impose a suspended sentence or pronounce a security measure or confiscation of property benefits), whereas if the defendant is acquitted of a charge, the court indicates the reasons for acquittal. If the court decided to reject the charge, it shall not enter into the evaluation of the principal matter but shall confine itself to presenting the reasons for the rejection of the charge (Article 364 of ZKP).

6.2.3 Procedure with legal remedies

6.2.3.1 Ordinary legal remedies (Chapter XXIII of ZKP)

Appeal against judgement of the court of first instance (Articles 366–397 of ZKP): an appeal may be lodged against judgements passed in first instance by the parties, defence counsel, the legal representative of the defendant, the injured party, the public prosecutor and some other persons entitled to judicial review within fifteen days of the serving of the copy of the judgement (following the obligatory announcement of appeal no later than within eight days of the date the judgement is passed, or from the day of service of the copy of the operative part of the judgement). A properly filed appeal has a consequence of staying the execution of the judgement. A judgement may be challenged on the following grounds: (1) on the ground of substantial violation of provisions of the criminal procedure, (2) on the ground of violation of criminal law, (3) on the ground of erroneous or incomplete determination of the factual situation, (4) on account of the decision on criminal sanctions, confiscation of property benefits, costs of criminal proceedings, indemnification claims and the announcement of the judgement in the press and on radio or television. The panel of the court of second instance may in its conference or on the basis of the trial dismiss an appeal as belated or inadmissible, or reject an appeal as unfounded and affirm the judgement of the court of first instance,

This project is co-funded by the Justice Programme of the European Union

or annul the judgement and return the case to the court of first instance for retrial and decision, or modify the judgement of the court of first instance.

Appeal against judgement of the court of second instance (Article 398 of ZKP): An appeal may be lodged with the Supreme Court in the following instances: (1) if a court of second instance has passed a sentence of twenty years imprisonment or has affirmed the judgement of a court of first instance by which such sentence was pronounced, (2) if the court of second instance after conducting a hearing determined the factual situation other than the court of the first instance and based its judgement on such factual determination, (3) if the court of second instance has modified a judgement of acquittal passed by the court of first instance and rendered instead a judgement of conviction. The Supreme Court will consider such appeal in a conference of the panel of judges, according to provisions applying to the appellate procedure in second instance. A trial may not be conducted before this court.

Appeal against (procedural) rulings (Articles 399–404 of ZKP): Appeals against rulings of the investigating judge and against other rulings rendered in first instance may be lodged by the parties and persons whose rights have been violated, unless such appeal is explicitly excluded by ZKP.

6.2.3.2 Extraordinary legal remedies (Chapter XXIV of ZKP)

Reopening of criminal proceedings (Articles 406–416 of ZKP): Criminal proceedings that ended with a finally binding judgement may only be reopened in favour of the convicted person. Proceedings may be reopened for the following reasons: (1) if it is proven that the judgement rests on a forged document or a false statement of a witness, expert or interpreter, (2) if the judgement is proven to have ensued from a criminal offence committed by a judge, a lay judge or the person who carried out acts of investigation, (3) if new facts are discovered or new evidence is produced which may in themselves or in connection with previous evidence lead to the acquittal of the convicted person or to the conviction under less severe criminal law, (4) if a person was tried more than once for the same act or if several persons were convicted of the same act which could have been committed only by a single person or only by some of them, (5) if in case of conviction of a continuing criminal offence, or some other offence which under the law includes several acts of the same kind, new facts are discovered or new evidence is produced which indicate that the convicted person did not commit the act included in the adjudicated criminal offence, whereas that act would have critically influenced the punishment. The reopening of criminal proceedings may be requested by the parties and counsel, even after the death of the convicted person or even after the convicted person has served their sentence and irrespective of the statute of limitations, an amnesty or a pardon.

Extraordinary mitigation of punishment (Articles 417–419 of ZKP): Mitigation of a sentence is possible where, after the judgement has become final, circumstances occur which either did not exist when the judgement was passed or were unknown to the court at that time, and such circumstances obviously would have led to a less severe punishment. The request may be filed by the public prosecutor, the convicted person and his or her defence counsel, as other persons entitled to appeal against a judgement in favour of the convicted person. Such requests are decided by the Supreme Court.

Request for protection of legality (Articles 420–428 of ZKP): A request for the protection of legality against a final judicial decision and judicial proceedings which preceded that decision may, after the final conclusion of the criminal procedure, be submitted by the defendant and counsel in the following

This project is co-funded by the Justice Programme of the European Union

instances: (1) on grounds of violation of criminal law, (2) on grounds of certain substantial violation of provisions of criminal proceedings, (3) on grounds of other violations of provisions on criminal proceedings if such violations affected the lawfulness of a judicial decision. The public prosecutor may submit request for the protection of legality in any instance of violation of law and both to the prejudice and in favour of the defendant. Requests for the protection of legality will be considered by the Supreme Court at its session. If the Supreme Court finds that a request for the protection of legality is well-founded, it shall pass a judgement by which, depending on the nature of the violation, it shall modify a finally binding decision, or annul in whole or in part the decision of both the court of first instance and higher court or the decision of the higher court only, and return the case for a new decision or retrial by the court of first instance or the higher court, or it shall confine itself to establishing the existence of a violation of law.

6.3 Preliminary investigation

The right to use one's language and script has important implications for procedural acts in pre-trial phases of criminal proceedings. In compliance with Article 8 of ZKP, the suspect has the right to use their own language and the right to interpretation and translation during all investigative police actions and questioning (see also section 2.4 below). The police have a corresponding duty to inform the suspect of his or her procedural rights. If grounds exist for suspicion that a criminal offence subject to public prosecution has been committed, the police is bound to take steps necessary for discovering the offender, ensuring that the offender or his or her accomplice do not go into hiding or flee, detecting and preserving traces of crime or objects of value as evidence, and collecting all information that may be useful for the successful conducting of criminal proceedings (Article 148(1) of ZKP). If, in the course of gathering information, the police find **grounds to suspect that a particular person (the suspect) has committed or participated in a criminal offence**, they must inform that person (before they start to gather information from them) what criminal offence they are suspected of and the grounds for suspicion, and instruct them that they are not obliged to give any statement or answer questions and that, if they intend to plead their case, they are not obliged to incriminate themselves or their close relatives or to confess guilt, that they are entitled to have a lawyer of their choosing present at their interrogation, and that anything they say may be used against them in the trial. The police must also **inform the suspect that they have the right to use their language** in investigative and other judicial actions and at the main hearing, as well as **the right to interpretation or translation** if a judicial action or the main hearing is not conducted in their language (Article 148(4) of ZKP).

In addition to informing a suspect of this right, the police will provide them with the list of registered court interpreters. If for some reason, this is not possible (e.g. in case the postponement of an action would endanger the success of investigation), the investigative action should be postponed until the arrival of the court interpreter, but no longer than two hours. These guidelines are provided in *Dodatne usmeritve ob uveljavitvi ZKP-M* (Additional guidelines on the implementation of ZKP-M), which is an internal document regulating police actions, and is not legally binding.

If the suspect is also being **deprived of liberty**, their rights are additionally protected under both Article 19 of the Constitution, which guarantees everyone the right to personal liberty and stipulates that no one may be deprived of his or her liberty except in such cases and pursuant to such procedures as are

This project is co-funded by the Justice Programme of the European Union

provided by law, and Article 4 of ZKP. Anyone deprived of their liberty must be immediately **informed in their mother tongue, or in a language which they understand, of the reasons for being deprived of their liberty** (this provision corresponds with Article 5(2) of ECHR). Within the shortest possible time thereafter, they must also be informed in writing of why they have been deprived of their liberty. They must be instructed immediately that they are not obliged to make any statement, that they have the right to immediate legal representation of their own free choice and that the competent authority must, on their request, notify their relatives or those close to them of the deprivation of their liberty. They must also be **informed of their right to interpretation and translation in writing**, in accordance with point C of **Appendix 1 to the ZKP**, which states the following: 'If you do not speak or understand the language of the police or other authorities you have the right to an interpreter free of charge. The interpreter may assist you in conversing with your legal counsel and must keep the contents of the conversation confidential. You have the right to translation of at least the relevant passages of essential documents, including any judicial decision on the deprivation of liberty (apprehension and arrest), charges filed and judgement. In some cases, you may be provided with an oral translation or summary.' The **written notice must be composed in their mother tongue or in a language which they understand**. If a written notice in the proper language is not available, then the suspect who is being deprived of liberty must first be informed of their rights orally, in a language which they understand. The written notice must be provided without undue delay (Article 4(5) of ZKP).

Dodatne usmeritve ob uveljavitvi ZKP-M provide that if the detention lasts for more than six hours, a court **interpreter must be provided by the police in 48 hours** in order to provide the suspect with an oral translation of all documents related to the decision on detention and relevant for his or her possible appeal on this decision and to assist in communication with the suspect's legal counsel (under Article 157(6) of ZKP).

6.4 Court hearing

According to Article 8(1) of ZKP, parties, witnesses, suspects and other participants in the proceedings shall have the right to use their own languages in investigative and other judicial actions and at the main hearing. If a judicial action or the main hearing is not conducted in the languages of these persons, the oral translation of their statements and of the statements of others, and the translation of documents and other written evidence (for suspects and the accused, the latter include all essential documents, e.g. indictments, summons, decisions on the deprivation of liberty, judgments, decisions on the exclusion of evidence, decisions on the rejection of motion for evidence and decisions on the exclusion of judges), must be provided. Upon a motion filed by the suspect or the accused, the court may decide that, in the light of the specific circumstances of the case, interpretation or translation must also be provided in other cases, in order to ensure the exercise of guarantees or rights in pre-trial or criminal proceedings. In exceptional circumstances, the court may also decide that only oral translation must be provided of certain parts of the essential documents, which are not relevant the participants to understand their criminal case or for a possible use of legal remedies under ZKP.

The above-listed participants in the proceedings shall be advised of their right to translation and interpretation. They may only waive the right to translation or interpretation of certain investigative and other judicial actions, a part of the main hearing, and of certain judicial or other documents, by

This project is co-funded by the Justice Programme of the European Union

voluntarily and unequivocally declaring that they understand the language in which the proceedings are conducted. The fact that they have been informed of their right, as well as their statements in this regard, should be noted in the record (Article 8(3) of ZKP). In accordance with the general duty of the presiding judge to ensure that the case is elucidated from all aspects, that the truth is discovered and that whatever might protract proceedings without contributing to elucidation of the case be eliminated (Article 299(2) of ZKP), the judge may determine that interpretation is necessary even if a participant waives this right, but obviously does not understand the language of proceedings. Such is often the case of citizens of ex-Yugoslavian countries who understand Slovene and, consequently, waive the right to translation and interpretation, but who do not speak the language well enough to provide precise and clear answers. It is up to the judge to decide whether the court interpreter should be appointed and even to postpone the hearing, if necessary.

6.5 Written communication and service of documents

In accordance with the requirement to use the official language in court proceedings, all written communication between the court and the parties shall proceed in the official language (exceptions will be explained below).

Therefore, Article 7 of ZKP stipulates that **charges, complaints and other submissions shall be filed with the court in the Slovenian language**. In those areas in which members of the Italian or Hungarian national minority reside, members of these national minorities shall be allowed to file submissions in the Italian or the Hungarian language if these languages are used as official languages of the court. An important exception applies to **a foreigner who has been deprived of freedom** in any way (detention, incarceration, mandatory psychiatric care, etc.). Such a person is granted the right to file submissions with the court in their language. In other cases, foreign subjects may file submissions in their languages solely on the condition of reciprocity.

If the submissions are not filed in the Slovenian language or do not meet other legally determined requirements, the court shall consider it **unintelligible** and ask the applicant to correct and supplement it. Should he or she fail to do so within a set time limit, the court shall **reject the submission** without assessing its contents after informing the applicant of the consequences of failure to comply with the order (Article 76(3–4) of ZKP).

Whereas Article 7 of ZKP imposes an obligation on the parties to use Slovenian language in written communication, Article 9 of ZKP imposes a similar obligation on the court by providing that **summons, orders and other written material shall be served on the parties in the Slovenian language**. Those courts in which the Italian or Hungarian languages are in official use shall also serve a summons in the Italian or Hungarian language, while court orders and other written material shall be served in the Italian or Hungarian language only where the procedure is conducted in both official languages (participants in proceedings may waive this right).

A person who has been deprived of freedom shall be served the written material in the language which he or she uses in the proceedings unless he or she has waived the right to translation. In accordance with Article 8(3) of ZKP, participants in the proceedings are informed of their right to translation and interpretation, as well as of a possibility to waive this right. However, suspects and the accused may not waive the right to translation of charges or indictments, summons, decisions on the

This project is co-funded by the Justice Programme of the European Union

deprivation of liberty, judgments, court decisions on the exclusion of evidence, on the rejection of motions for evidence and on the exclusion of judges. They may waive the right to translation of other documents, but the judge might nevertheless decide that the translation is necessary and order such documents to be translated (Article 299(2) of ZKP).

6.6 Proceedings with remedies

Provisions that refer to the right to translation and interpretation in other parts of proceedings also apply to proceedings with ordinary (appeal against a first instance judgement, appeal against a second instance judgement, appeal against a decree) and extraordinary legal remedies (reopening of criminal proceedings, request for protection of legality). Therefore, participants in proceedings have **the right to use their own languages in all judicial actions** (including at the main hearing, if it takes place). If a procedural action is not conducted in the participant's language, the oral translation of their statements and of the statements of others, as well as the translation of documents and other written evidence, must be provided (Article 8 of ZKP; see also under section 2.4).

All documents and submissions related to proceedings with ordinary or extraordinary remedies shall be filed with the court in the official language, with the exception of submissions filed by a foreigner who has been deprived of freedom; he or she has the right to file submissions with the court in his or her language (Article 7 of ZKP). Correspondingly, all summons, orders and other written material shall be served on the parties in the official language, with the exception of a person who has been deprived of freedom; he or she shall be served the written material in the language which he or she uses in the proceedings, unless he or she has waived the right to translation (Article 9 of ZKP).

In accordance with Article 8(3) of ZKP, participants in the proceedings with remedies shall be **advised of their right to translation and interpretation, as well as of a possibility to waive this right** in regard of certain actions and documents by voluntarily and unequivocally declaring that they understand the language in which the proceedings are conducted (see also under section 2.5).

6.7 Infringement of the right to translation and interpretation

Infringements of the right to translation and interpretation may give rise to the following legal consequences:

1. Participants in the proceedings may file **an objection** if they consider that the interpretation or translation is or was not appropriate because it does not provide for the implementation of the guarantees or rights in pre-trial or criminal proceedings, or if they consider that interpretation or translation should also be provided in other cases in order to ensure the exercise of these guarantees and rights, given the specific circumstances of the case (Article 8(2) of ZKP). If the inadequacy of interpretation or translation can be remedied by the replacement of the court interpreter, the judge may decide to do so, but such a decision is at the discretion of the court. There is no immediate remedy against such a decision but it may be challenged before the appellate court in the appeal against the judgement, by claiming that such action represents an infringement of essential procedural requirements (Article 371 of ZKP).

This project is co-funded by the Justice Programme of the European Union

2. Suspects may also **file a motion to exclude the appointed court interpreter** under conditions stipulated in Article 39 of ZKP, namely: (1) if they themselves have suffered harm through the criminal offence, (2) if they are married to or live in a domestic partnership with the accused, the defence counsel, the prosecutor, the injured party and their legal representatives or attorneys, or if they are related to the aforesaid persons by blood in direct line at any remove or collaterally up to four removes, or related through marriage up to two removes, (3) if their relationship with the accused, the defence counsel, the prosecutor or the injured party is that of a custodian or a ward, adopter or adoptee, foster parent or foster child, (6) if circumstances exist that give rise to doubts over their impartiality. The motion to exclude is decided by the panel of judges, the presiding judge of the panel, or by a judge sitting alone (Article 44(3) of ZKP).
3. Under Article 18(2) of ZKP, the court may not base its decision on evidence obtained in violation of human rights and basic freedoms provided by the Constitution, nor on evidence which was obtained in violation of the provisions of criminal procedure and which may not serve as the basis for a court decision, or which were obtained on the basis of such inadmissible evidence. Consequentially, any information (and evidence) obtained by the police before or without informing the suspect of his or her rights (including the right of interpretation or translation), as provided in Article 148 of ZKP, must be **excluded from the file and may not serve as the basis for the court decision**. The court must dismiss such information or evidence as illegally obtained. The decision on the exclusion or on the rejection of a motion for the exclusion may be challenged by a special appeal. Once the decision becomes final, the excluded records and other evidence are sealed in a separate envelope and kept apart from other files, where no one is allowed to view them or use them in criminal proceedings (Article 83 of ZKP).
4. If a suspect entered into a plea agreement without being properly informed of their procedural rights, such violation will result in the **rejection of the plea agreement** (Article 285.č of ZKP).
5. Any judicial action resulting in the defendant, counsel, the injured party as prosecutor or the private prosecutor having been, notwithstanding their request, denied the right to use their own language in the main hearing and to follow the course of the main hearing in their language (as provided under Article 8 of ZKP) is considered an **infringement of essential procedural requirements** (Article 371 of ZKP), which in turn represents **grounds on which a judgment may be challenged** before appellate court (Article 370 of ZKP) and **grounds for a request for the protection of legality against a final judicial decision** which may be filed before the Supreme Court (Article 420 of ZKP). By claiming the violation of their constitutionally protected procedural guarantees, participants in the proceedings may also file a constitutional complaint with the Constitutional Court.

6.8 Costs of translation and interpretation

Article 92 of ZKP defines the costs of the criminal procedure, which include, inter alia, **the expenses of interpreters** (point 1 of paragraph 2), simply as all the expenses which arise in or due to the criminal procedure. Regardless of general rules on who shall bear the costs of criminal procedure, the costs of translation **shall not be charged against an accused person who does not understand or speak the**

This project is co-funded by the Justice Programme of the European Union

language in which criminal proceedings are conducted, or to persons referred to in Article 8 of ZKP (parties, witnesses, suspects and other participants in the proceedings). Instead, these costs shall be covered by the State.

Furthermore, the costs of translation into the Slovenian, Italian or Hungarian language, arising in connection with the right of members of the Italian and Hungarian minorities to use their own language, shall not be charged against those who would otherwise be obliged to refund the costs of criminal proceedings under the provisions of ZKP (e.g. the convicted person is, as a general rule, required to refund the costs of criminal proceedings) (Article 92(4) of ZKP).

This project is co-funded by the Justice Programme of the European Union

7 Challenges in practice

One of the objectives of the TransLaw project is to investigate how the real situation corresponds to the language and interpretation rights described in this report, evaluating whether there is a need for the real language situation to be adapted more closely to the language rights stated and promised by law. A jurisprudence and case-law analysis shows that there are some deviations.

First of all, there seems to be a **discrepancy regarding the legal interpretation of the notion "a language one does or does not understand"**. It is often thought too quickly that someone speaks a language sufficiently. Section 2.4 of the European Directive 2010/64 says that "Member States shall ensure that a procedure or mechanism is in place to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter." The problem is that such a concrete procedure or mechanism is not always in place.

In this regard, however, the ECHR has recently set out some clear guidelines concerning those mechanisms. The case concerns a person from Lithuania who was prosecuted in Slovenia and was given a Russian interpreter.

Illustration: ECHR, 28 August 2018, Vizgirda v. Slovenia, Application no. 59868/08, recital 83: "(…) **the fact that the defendant has a basic command of the language of the proceedings or, as may be the case, a third language into which interpretation is readily available, should not by itself bar that individual from benefiting from interpretation into a language he or she understands sufficiently well to fully exercise his or her right to defence.**" – recital 84: "the precise measures (…) should be taken by domestic authorities with a view to verifying the linguistic knowledge of a defendant who is not sufficiently proficient in the language of the proceedings. Depending on different factors, such as the nature of the offence and the communications addressed to the defendant by the domestic authorities (…), a number of open-ended questions might be sufficient to establish the defendant's language needs. In this connection, the Court observes that recital 21 of Directive 2010/64/EU likewise leaves it to the authorities to choose the most appropriate manner of verification, which may include consulting the suspected or accused persons concerned." – recitals 91–97: "In the present case, the authorities were clearly aware that the applicant, who was a Lithuanian national and had arrived in Slovenia only shortly before his arrest, did not understand the language of the criminal proceedings against him, which was Slovenian. (…) When questioned by the investigating judge, the applicant was also assisted by the Russian interpreter. He continued to be assisted by the Russian interpreter throughout the proceedings and during consultations with his court-appointed lawyer and was served with a Russian translation of the relevant court documents. However, although the records of the investigation and the transcript of the hearing are quite detailed, the Court cannot find any indication that the applicant was ever consulted as to whether he understood the interpretation and written translation in Russian well enough to conduct his defence effectively in that language. In that connection, the Court cannot accept the Government's suggestion that any general assumption about the applicant's knowledge of Russian could be made on the basis of his Lithuanian nationality (…). **The Court must therefore conclude that the authorities did not explicitly verify (…) the applicant's linguistic competency in Russian. The lack of such verification is an important element in the Court's consideration of the case as the effective protection of the rights.** (…) [T]he Court notes that there are no audio recordings of the questioning by the investigating judge or the hearing and that no other evidence (…) to determine the applicant's actual level of spoken Russian has been put forward by the Government. (…) **[T]he few rather basic statements the applicant made during the hearing, presumably in Russian (…), cannot be considered as sufficient to show that he was in fact able to conduct his defence effectively in that language. (…) [A]lthough the applicant appeared to have been able to speak and understand some Russian, (…) the Court does not find it established that his competency in that language was sufficient to safeguard the fairness of the proceedings.**"

In Italy there also seems to be an issue with the assessment of knowledge of the Italian language (cf. Falbo 2016). No Italian instruments have been developed to ascertain whether a person has sufficient

This project is co-funded by the Justice Programme of the European Union

command of Italian (Article 143(4). Judges interviewed within a local research project stated that when a foreign person is suspected or accused of crime they prefer to appoint an interpreter in order to guarantee his or her right to defence. The appointment of interpreters, however, is not easy in some phases of the preliminary investigation, where stringent deadlines may pose a problem when searching for an interpreter for a less commonly spoken language (Mometti, 2014, p. 44).

The second **issue concerns the minimisation of language rights in the light of the right of defence**. For instance, the presence of a lawyer will have an enormous minimising effect on the question of assessing whether the language rights of the suspected or accused person are being violated or not. Another example is when a complaint about language protection was not taken into account when the party concerned did not react to that language irregularity in earlier stages of the procedure. However, there seems to be a recent spectacular reversal in ECHR case law on that last topic.[9] It concerns the same case about the person from Lithuania prosecuted in Slovenia.

Illustration: ECHR, 28 August 2018, Vizgirda v. Slovenia, Application no. 59868/08, recitals 98–101: "(…) [N]either the applicant nor his counsel made any remarks about the appointment of the Russian interpreter during the investigation, at the hearings or on appeal (…). As regards the applicant, the Court finds it important to note that there is no indication in the file that the authorities informed him of his right to interpretation in his native language or of his basic right to interpretation into a language he understood (…). The Court emphasises in this connection that the notification of the right to interpretation was an integral part of the authorities' duty to provide adequate language assistance to the applicant in order to ensure the right to a fair trial (…). In the Court's view **the lack of the** aforementioned **notification of the right to interpretation, coupled with the applicant's vulnerability as a foreigner who had arrived in Slovenia only for a brief period before the arrest and had been detained during the proceedings, and his limited command of Russian, could well explain the lack of any request for a different interpreter or complaint in this regard until later in the proceedings, at which point he was able to use his native language** (…). As regards the lack of complaints by the applicant's counsel, the Court reiterates that although the conduct of the defence is essentially a matter between the defendant and his or her counsel, whether counsel has been appointed under a legal-aid scheme or privately financed, the ultimate guardians of the fairness of the proceedings – encompassing, among other aspects, the possible absence of translation or interpretation for a non-national defendant – are the domestic courts (…). The failure by the applicant's legal representative to raise the issue of interpretation did not therefore relieve the domestic court of its responsibility under Article 6 of the Convention."

Another problem is the **quality of language assistance** (cf. Falbo, 2016). For instance, the Italian Legislative Decree no. 129 of 23 June 2016 provides for the creation of a national register of interpreters and translators whose names appear on the lists of technical consultants or expert witnesses. In fact, the register is the result of combining the lists of translators and interpreters kept by all courts and is not a solution to the main problem, i.e. the selection and qualifications of interpreters included in those lists. Currently, whoever claims to know Italian and a foreign language may be included in the lists. Furthermore, all judges or legal professional have their own lists of trusted people they rely on as interpreters for specific languages. According to the law, judicial authorities are supposed to use the national register, but are allowed to appoint translators and interpreters who are not included in the list when specific needs arise (Legislative Decree no. 129, 23 June 2006).

The Austrian courts and public prosecutors try to use only certified interpreters (certified freelance interpreters or interpreters employed by the judicial support agency), and must give preference to

[9] About that twofold deviation, in Belgium and also in the Netherlands, see I. Bambust, *De Europese gerechtelijke taalbescherming*, Brugge, Die Keure, 2017, 620 p.

This project is co-funded by the Justice Programme of the European Union

them. The courts keep a list of court-certified and sworn interpreters, and registration there is only possible after proving relevant qualifications and passing an exam. For some of the languages in demand there are no or only a few certified interpreters available. The police are not required to give preference to interpreters on this list, and often also use people who do not have a special qualification certificate, especially on weekends and afternoons. The widespread use of lay interpreters might be due to the lack of qualified interpreters in non-European languages, but also due to the lower costs (Tempfer, 2015). A further barrier to ensuring language assistance quality is the fact that interpreters do not have access to the trial dossier – they often receive very little or no information and legal professionals are often unaware of the negative impact this may have on interpreting quality.

A research carried out in the framework of a Master thesis in Italy showed that **essential documents are not always translated** (Sframeli, 2015; Falbo, 2016). Judges, criminal police and prosecutors are often confronted with great difficulties when trying to recruit interpreters and translators: it is a direct consequence of the lack of training, qualification and accreditation characterising legal interpreting and translation in Italy and entailing serious consequences for the right to language assistance and therefore the right to defence. In Austria, it is common for the main hearing not to be interpreted in its entirety. In most cases, the questioning of the accused is interpreted, while the witnesses' testimonies are mostly given to the accused as a very short summary only. Due to possible errors, an interpretation which is only a summary with a time delay is certainly not the best solution (Stuefer, 2010). Nevertheless, Austrian courts and public prosecutors work mainly with consecutive interpreting. Whispered interpreting is used occasionally. There are no booths for simultaneous interpreting (Kadric, 2012; Kadric, forthcoming). Audio and video recordings of questioning and trials are the exception, making interpretations difficult to assess. Interpreting via technical transmission is rare. These circumstances and practices lead to serious problems, potentially impacting the correctness and fairness of the investigation process and trials. Only few resources are available for interpreting in prisons; here, mostly fellow prisoners interpret.

This project is co-funded by the Justice Programme of the European Union

8 Summary

As the language rights discussed in all the country reports arise from European instruments, the national service paths in criminal cases and the corresponding language rights are quite similar. Thus, all the country reports mention a preliminary investigation, a court hearing, and the possibility of an appeal. In all those phases, language rights (interpreting) are provided.

As the previous chapter 7 Challenges in practice shows, **the biggest challenge is not the legal framework for language rights, but how to find a way in which those language rights can be successfully exercised**. In view of this, it can be said that enormous problems remain in the European language landscape: the assessment of knowledge of a certain language, the minimisation of language rights in the light of the right of defence, the assurance of the quality of the language assistance provided, and the occurrence of fragmentary interpretation.

Taking the literature research in this report as a starting point, the next step of the TransLaw project will be to conduct field research by means of interviews to gain first-hand accounts of the provision and the quality of interpretation during service paths in criminal matters.

This project is co-funded by the Justice Programme of the European Union

9 References

Bambust, I. (2012). Constitutional and judicial language protection in multilingual states: a brief overview of South Africa and Belgium, Erasmus Law review, Volume 5, Issue 3, pp. 211–232 (with Albert Kruger en Thalia Kruger).

Bambust, I. (2016). Een taalkronkel in het Belgische politieverhoor, De Taalsector. Retrieved from http://www.detaalsector.be/cms/tolkwerk/3676-een-taalkronkel-in-het-belgische-politieverhoor

Bambust, I. (2011). La protection linguistique internationale: “mag het iets meer zijn?” – De internationale taalbescherming: “il y en a un peu plus; je vous le mets?”. De taal van het proces – La langue du procès, Vlaams Pleitgenootschap bij de balie te Brussel en Conférence du jeune barreau de Bruxelles (eds.). Antwerpen-Cambridge: Intersentia, pp. 115–163.

Bambust, I. (2017). De Europese gerechtelijke taalbescherming. Brugge: Die Keure.

Constitution of the Italian Republic. Retrieved from https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf

Criminal Procedure Act – StPO. Retrieved from https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002326

Dežman, Z., Erbežnik, A. (2003). Kazensko procesno pravo Republike Slovenije. Ljubljana: GV založba.

Erbežnik, A. (2010). Tolmačenja in prevajanja v kazenskih postopkih. Pravna praksa, 29 (43), pp. 12–13.

European Convention on Human Rights. Retrieved from https://www.echr.coe.int/Documents/Convention_ENG.pdf

Falbo, C. (2014). I risultati emersi dal progetto FRA 2011, in Falbo C., Viezzi M. (eds.) Traduzione e interpretazione per la società e le istituzioni, Trieste, EUT, pp. 19–39.

Falbo, C. (2016). L'interprétation juridique en Italie: droits linguistiques et droits de defense. Études de Linguistique Appliquée, 181, pp. 43–54.

Gialuz M., Lupária L., & Scarpa F. (2017). The Italian Code of Criminal Procedure. Padova: CEDAM.

Horvat, Š. (2004). Zakon o kazenskem postopku (ZKP): s komentarjem. Ljubljana: GV založba.

Kadric, M., (2012). Dolmetschung als Ausdruck staatlicher Fürsorgepflicht – neue Impulse durch die RL 2010/64/EU. Juridikum, 1/2012, pp. 76–85.

Kadric, M., (forthcoming). Gerichts- und Behördendolmetschen aus rechtlicher und translatorischer Perspektive. Wien: Facultas.

Kamerstuk 33 355 Implementatie van richtlijn nr. 2010/64/EU van het Europees Parlement en de Raad van 20 oktober 2010 betreffende het recht op vertolking en vertaling in strafprocedures (PbEU L 280), Nr. 3, Memorie van toelichting. Retrieved from https://zoek.officielebekendmakingen.nl/kst-33355-3.html

Kaučič, I., & Grad, F. (2011). Ustavna ureditev Slovenije, 5th ed. Ljubljana: GV založba.

This project is co-funded by the Justice Programme of the European Union

Komac, M., Zupančič, J., & Winkler, P. (1999). Varstvo narodnih skupnosti v Republiki Sloveniji: vademecum. Ljubljana: Inštitut za narodnostna vprašanja.

Kranjc, J. (2002). Slovenščina kot uradni jezik (v Evropski uniji). Podjetje in delo, 28 (6/7), pp. 1107–1123.

Lalić, G. (2002). Slovenščina kot uradni jezik. Pravna praksa, 21 (17), pp. 4–8.

Meurens, N., & Mathieu, S. (reviewed by W. Vandenhole) (2015, May). The right to interpretation and translation and the right to information in criminal proceedings in the EU, Belgium (Franet contractor: Milieu Ltd).

Rights of defendants in criminal proceedings – Belgium, https://e-justice.europa.eu/content_rights_of_defendants_in_criminal_proceedings_-169-be-en.do?init=true&member=1

Rights of defendants in criminal proceedings – Netherlands, https://e-justice.europa.eu/content_rights_of_defendants_in_criminal_proceedings_-169-nl-en.do?member=1

Sodni red – Court Rules (Uradni list RS, št. 87/16).

Stuefer, A. (2010). Kommunikation mit Verfahrensbeteiligten aus afrikanischen Herkunftsländern aus Sicht einer Strafverteidigerin. Stichproben/Wiener Zeitschrift für kritische Afrikastudien Nr. 19/2010, 10. Jg., pp. 197–206.

Šturm, L., et al. (2002). Komentar Ustave Republike Slovenije. Ljubljana: Fakulteta za podiplomske državne in evropske študije.

Tempfer, P. (2015, 5 May). Fehler bei Justiz und Polizei durch Hausdolmetscher. Retrieved from: https://www.wienerzeitung.at/nachrichten/oesterreich/chronik/750331_Fehler-bei-Justiz-und-Polizei-durch-Hausdolmetscher.html

Tonini, P. (2015). Manuale di procedura penale, 16a edizione. Milano: Giuffrè.

Ustava Republike Slovenije – Constitution of the Republic of Slovenia (Uradni list RS, št. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90,97,99 in 75/16 – UZ70a).

Van Puyenbroeck, L. (2008). Country Report Belgium, Draft version to be discussed at the conference To-wards Effective Criminal Defence Rights: An Opening Debate, 27–28 November 2008, Maastricht, the Netherlands.

Virjent, B. (2002). Policisti o znanju in uporabi tujega jezika (Primerjava vzorcev Slovenije, Hrvaške, Madžarske). Varstvoslovje, 4 (1), pp. 48–56.

Wet van 11 oktober 2007, houdende regels inzake de beëdiging van tolken en vertalers en de kwaliteit en de integriteit van beëdigde tolken en vertalers (Wet beëdigde tolken en vertalers). Retrieved from http://wetten.overheid.nl/BWBR0022704/2016-01-18#HoofdstukV_Artikel28

Žaberl, M. (2002). Policijsko zbiranje obvestil ali policijsko zasliševanje v predkazenskem postopku. Revija za kriminalistiko in kriminologijo, 53 (4), pp. 326–336.

Žaberl, M. (2006). Temelji policijskih pooblastil. Ljubljana, Univerza v Mariboru, Fakulteta za policijsko-

This project is co-funded by the Justice Programme of the European Union

varnostne vede.

Zakon o kazenskem postopku – Criminal Procedure Act (Uradni list RS, št. 32/12 – uradno prečiščeno besedilo, 47/13, 87/14, 8/16 – odl. US, 64/16 – odl. US, 65/16 – odl. US in 66/17 – ORZKP153,154).

Zakon o sodnih izvedencih, sodnih cenilcih in sodnih tolmačih – Court experts, certified appraisers and court interpreters Act (Uradni list RS, št. 22/18).

This project is co-funded by the Justice Programme of the European Union