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from:	General Secretariat
to:	Delegations
Subject:	Conference "Legal aid in criminal proceedings in the European Union"

Delegations will find attached a summary report of the proceedings at the Conference "Legal aid in criminal proceedings in the European Union", which was held in Warsaw on 5/6 December 2011.

Legal aid in criminal proceedings in the European Union
Warsaw, 5 – 6 December 2011

Summary report

The conference on "Legal aid in criminal matters in the European Union" was held on 5-6 December in Warsaw in the framework of the Polish Presidency in the European Union, in cooperation with the European Commission, the Council of Bars and Law Societies in Europe (CCBE) and the Academy of European Law (ERA).

The main theme of the conference, legal aid in criminal matters, is one of the measures foreseen in the roadmap on procedural rights[1]. The Conference provided an opportunity for the exchange of views and experiences of experts from a variety of backgrounds – legal practitioners, judges, prosecutors, academics, representatives of EU's bodies and international courts – and by this contributed to a more effective implementation of the roadmap.

The Conference was divided into separate sessions and panels, each dealing with a different aspect of legal aid in criminal matters. The subjects discussed included:

- the presentation of the roadmap on procedural rights and the current state of the measures dealing with legal aid;
- legal aid from the perspective of international judicial bodies, such as the European Court of Human Rights (ECtHR) and the International Criminal Court (ICC);
- conditions to receive legal aid;
- financing legal aid;
- mandatory defence;
- problems relating to maintaining high quality of legal aid;

Each panel was followed by an open discussion.

[1] OJ C 295/1, 2009.

Session I: Six steps towards common procedural rights in the EU – state of play of the roadmap.

The first session dealt with the legislative aspects of the roadmap on procedural rights and the place of legal aid in the framework of criminal procedures in the Member States and the case-law of the ECtHR. It was explained how the roadmap features separate measures concerning different aspects of procedural rights, which are to be successively agreed upon and implemented. This approach was adopted after the failure of the Commission proposal on procedural rights of 2004, which sought to address all aspects of criminal procedure in one text.

The representative of the European Commission elaborated on the current state of the roadmap and explained the decision not to deal with the issue of legal aid in the proposal on measure C regarding the right of access to a lawyer (which also deals with measure D on the right to communication upon arrest), given that the issue of legal aid proved to be very complex and requires further studies in terms of legal and financial consequences.

All the measures to be adopted on the basis of the roadmap should be "Strasbourg-proof", that means that they should comply with the minimum standards set out in the European Convention on Human Rights (ECHR), as interpreted in the case-law of the ECtHR. In particular, it was stressed that the Commission proposal on the right of access to a lawyer draws much from the ECtHR case of *Salduz v Turkey*, but goes even beyond that, by clarifying and expanding upon it, e.g. by establishing rights for the accused person even where the case-law of the ECtHR is silent (such as in proceedings to execute a European Arrest Warrant).

The following discussion yielded a number of questions, such as the point in time the right to legal aid arises, the application of the proposed directive to minor offences and the possibilities of waiver of the right to legal aid.

Session II: Legal aid in the EU.

The topic of the second session was the current state of legal aid in the EU Member States, as well as in proceedings before international courts. It was noted that significant differences exist in the legal aid systems in various Member States, given that they were created in diverse cultural and legal backgrounds. However, the right to legal aid is expressly recognised in Article 6 of the European Convention of Human Rights, and the case-law of the ECtHR serves to promote consistency and helps to bring the various systems closer together.

To demonstrate this, a selection of landmark judgments was presented. These judgements have established rules, which the Member States should follow in creating their internal legal aid regulations. These rules include the following: the right to legal aid arises from the time of the first interrogation by the police (and can sometimes arise even earlier); the accused is not required to prove the inability to pay beyond all doubt; any limitation of legal aid must be sufficiently justified and limited in time; the interests of justice require that a person deprived of liberty should always be allowed legal aid; courts should monitor whether the legal aid granted was enough to comply with the requirements of the ECHR.

The system of legal aid before the International Criminal Court was also presented. There, the defence lawyer is appointed by the Secretariat of the ICC and legal aid is available both to accused persons and to victims. Since the ICC is still at an early stage of its operation, it is yet to be determined how this system will work in practice, and how effective it will be.

Session III: Legal aid – perspectives of the individual and of the state.

The third session sought to examine how legal aid is influenced by the perspectives of the citizens and of the states. Legal aid, as a right of the citizen, creates an obligation for the state and it is important to create a system that would safeguard this right without overburdening the state's budget.

The first panel focused on the conditions of granting legal aid. It was stressed that both the right of access to a lawyer and legal aid are indispensible elements of the right to a fair trial as defined in the ECHR and in the Charter of Fundamental Rights of the European Union. The test whether legal aid should be granted is two-part. First, the inability of the suspect or accused person to bear the costs must be proven, with the burden of proof being on that person. Secondly, the provision of legal aid must be in the interests of justice. As was noted, this last term has to be understood broadly to include factors such as the complexity of the case, the severity of the penalty, the personal situation of the suspect or accused person and should always apply when a person is deprived of liberty. In some circumstances, the interests of justice could even outweigh factors such as the right of the person to waive legal aid.

The role of the lawyer in the proceedings was also discussed. The practitioners stressed that the role of the defence counsel in criminal proceedings is often misperceived as an obstacle to the smooth administration of justice, while in fact it serves to safeguard the rights in the proceedings and ensure a better quality of justice. It was noted that the participation of the defence counsel can lead to a reduction of pre-trial detention, limit false confessions and wrong testimonies, accelerate complex proceedings and by that, in fact, generate savings.

The second panel presented the point of view of the state, mostly in the context of costs of legal aid, a sensitive point for many Member States affected by the financial crisis. Significant differences exist between the Member States in what funds are dedicated to legal aid and the particular systems of funding, as was demonstrated by the results of a survey conducted by CEPEJ[1].

[1] European Commission for the Efficiency of Justice

Several ideas were presented on how to increase the cost-effectiveness of the legal aid systems. Some of these involved imposing an obligation on the suspect or accused person to reimburse part of the costs in the event of conviction, other ideas suggested making savings, e.g. through specialisation of defence lawyers. It was agreed that the most effective system of funding legal aid is one, which avoids unnecessary spending in criminal proceedings. In this respect, making excessive cuts in the funding for legal aid would be counter-productive, since underfunded defence lawyers tend to provide a lower quality of legal services, which would give rise to costs in other areas of proceedings that outweigh the expenditure on legal aid. These areas include the length of proceedings, unnecessary detention, appeal proceedings and prison service. Therefore, effective legal aid at an early stage of proceedings can lead to significant savings in the later stages.

Session IV: Mandatory defence counselling.

The last session was dedicated to the issue of mandatory defence. The first panel dealt with the right to choose a defence counsel in instances of mandatory defence. Mandatory defence is imposed for a variety of reasons, such as the age of the suspect or accused person, the mental state of that person, the severity of the case, or in certain specific types of proceedings (such as a plea bargain).

Irrespective of the grounds for imposing mandatory defence, the most sensitive issue in such cases is that of mutual trust between the suspect or accused person and his lawyer, which is essential for a proper defence, especially in cases of legal aid, where the person has not chosen his own counsel. The general rule in the Member States seems to be that the wishes of the person to the choice of the lawyer should be respected as far as it is practical, but there is no formal obligation on the judicial authorities to follow them.

There was some discussion whether the state should be allowed to impose a defence counsel, especially if the person concernd already has his own lawyer. Such practice was deemed legitimate, but in cases in which a chosen defence counsel has already been appointed, the chosen counsel should have priority. The mandatory counsel would have a supporting role.

It was noted that there exists a misconception that a mandatory counsel appointed by the court or other authority in fact works for them and does not represent the interests of the suspect or accused person in an impartial way. One method to counter that would be to delegate the appointment of mandatory defence lawyers to an independent state institution. This would also allow for a swifter appointment and a more equal distribution of the workload since courts often tend to appoint the same lawyers known for their specialisation in particular branches of law. While this ensures that lawyers practice more in the area of their specialisation, it inevitably leads to a small group of dedicated criminal lawyers being overburdened, with less time for each case and ultimately a possible drop in quality.

This was addressed in greater detail at the final panel of the conference dealing with the issue of quality of legal aid. There was little doubt that assistance in cases of legal aid should be of the same quality as in regular cases. This is, however, a particularly complex problem, since the clients are normally unable to properly assess the quality of legal service provided. Hence the suggestion that a system of peer review should be instituted. Such a system would have to go beyond mere disciplinary proceedings, which usually cover only the most extreme cases. This would risk incurring additional costs but, as was argued, such spending could well lead to savings at a later stage of the proceedings. It was noted, though, that such control could bear the risk of breaching the lawyer-client confidentiality and its effectiveness could be impaired due to professional solidarity.

Another mechanism that could improve the quality of legal aid provided would be to allow the defendant to dismiss a lawyer, who does not meet their expectations and seek the appointment of a new one. However, such a system could be easily abused by the defendant and lead to significant protraction of the proceedings. Finally, there was a general agreement that continuous training and professional development of defence lawyers leads to a better quality of work provided.

Closing remarks.

In conclusion of the conference, it was reiterated that the road to common procedural rights is not a quick and easy one. The harmonisation of procedural law is even more difficult than harmonisation of substantive law. Nevertheless, the fact that the first two measures were successfully adopted is a good prognosis for the future, especially with the new opportunities offered by the Treaty of Lisbon. There was no doubt that the expenses needed for an efficient and high-quality legal aid system may be a challenge but there is still room for optimisation. This conference may serve as a first step to prepare the ground for further work on this subject.