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NOTE

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Subject:	Conclusions of the seminars organised by the Spanish Presidency in the area of Justice

Delegations will find in the annex the conclusions of the seminars organised by the Spanish Presidency in the area of Justice.

ANNEX

Conclusions of the seminars organised by the Spanish Presidency in the area of Justice

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I - Seminar "Victims at the centre of European Justice Conclusions of the seminar" (15 January 2010, Madrid)

A - Development of criminal law

Historically criminal law has been focused on the relationship between criminal, crime and penalty.

Modern criminal law now focuses on victims as well. However, victimology needs further development from a social, anthropological and statistical point of view. Of note in this context is the important contribution of victim organizations and associations.

B - The needs of victims

Memory: Oblivion is an injustice against victims, and what is even worse is "macro-victimisation" or attempts to justify crime, in particular terrorism.

Recognition of the condition of the victim.

Assistance: An effective right to information, preventing the victim from getting lost in the justice system. We must ensure better treatment by police and judicial staff, especially at the first point of contact, insisting on training and specialization for such staff. Special measures should be provided for immigrants.

Protection: as the best way for prevention.

Justice: Recognition and application of procedural rights. Secondary victimization must be avoided.

Compensation and greater solidarity, including better financial provision.

C - Overview of European Union legislation and prospects for the future

The European Union already has an "acquis" of law on the protection of victims, in particular Framework Decision 2001/220/JAI on the standing of victims in criminal proceedings, and Directive 2004/80/CE on compensation to victims of crime.

The political will to make progress in this field was already expressed in the Conclusions of the Council last October and in the Stockholm Programme and it will be developed in the Action Plan.

There is a need for a critical examination between the European institutions, national authorities and non-governmental organizations, which will result in a Commission proposal, at the end of this year or the beginning of 2011, for a comprehensive instrument that provides common minimum standards which respond to the needs of victims, without undermining the specific provisions aimed at particular groups, in particular the most vulnerable such as victims of terrorism or gender-based violence.

A balance must be struck between the victim´s right to decide, including in relation to mediation, and the public interest in the prosecution of crime. In any case, the limits of criminal action should be considered.

The progress of the work developed by the CAHVIO in the framework of the Council of Europe should be followed closely.

Equality policies which reduce gender-based violence must be developed, as must accurate and consistent data on this type of crime, developing the necessary tools such as a gender-based violence observatory.

In any case, the importance of the implementation of the legislative instruments adopted must be underlined.

As far as mutual recognition is concerned, there are areas still to be developed, such as the extension of the protection of victims beyond the borders of the Member State that has imposed a protection measure, which will have particular importance in cases of gender-based violence.

Anyway, we must avoid falling into victimization and make victims a factor of social transformation.

II - Seminar "Fundamental rights in the EU in view of the accession of the Union to the European Convention on Human Rights (2-3 February 2010, Madrid)

A - Coherent and improved level of rights protection

It is important to have a global and coherent vision of fundamental rights protection in Europe. This is consistent with the European Union's commitment to create a common space where human rights and civil liberties are guaranteed. Indeed, we must not lose sight of our common goal of making human rights a reality, especially as regards the most vulnerable.

The Lisbon Treaty gives binding legal status to the Charter of Fundamental Rights and states that the EU shall accede to the European Convention of Human Rights (ECHR). The Stockholm Programme on Justice and Home Affairs, which was approved in December 2009 and should be implemented by 2014, recognises that the area of freedom, security and justice must above all be a single area in which fundamental rights are protected.

B - The Charter of Fundamental Rights of the European Union

The Charter acquiring binding legal status is a very important step forward in the protection of the rights of all those living in the European Union.

The Charter is based to a great extent on the ECHR, making explicit reference to the case-law developed by the European Court of Human Rights (ECtHR). The Charter raises the level of protection in some areas, for example in relation to economic and social rights.

Even without binding legal status, the European institutions had been paying increasing attention to the Charter, so this recent step forms part of an ongoing and accelerating process for the consolidation of fundamental rights' protection in the EU. Now both European institutions and Members States must ensure compliance with the Charter when they create or implement EU law.

Both Member States and EU institutions must work to ensure greater visibility and understanding of the Charter amongst the public. It is also vital to keep in mind that, whilst certain rights laid down in the Charter are necessarily enjoyed specifically by "citizens", the majority are enjoyed by all persons within the territories of the Member States.

C - Accession of the European Union to the European Convention on Human Rights

We must avoid the development of different standards of rights protection in Europe. To this end, it is important to achieve the accession of the EU to the ECHR as soon as possible. Accession will also be a symbolic step, confirming the commitment of the EU to fundamental rights. In the Stockholm Programme the European Council invited the Commission to submit a proposal on the accession of the EU to the ECHR as a matter of urgency.

The ECJ already draws on the ECHR, as well as other international conventions such as the International Convention on Civil and Political Rights, and the common constitutional traditions of the Member States.

However, the accession agreement that is to be negotiated between the EU and Council of Europe must set out clearly the relationship between the caselaw of the ECJ and the ECtHR. As required by Protocol 8 of the Lisbon Treaty, we must consider arrangements for the EU's possible participation in the control bodies of the ECHR, as well as the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the EU as appropriate.

In any case it is essential to strengthen the regular contact between the European Court of Justice (ECJ) and the ECtHR in order to resolve issues and prevent the development of potential problems. The Fundamental Rights Agency is a symbol of this new era of rights protection, and already enjoys good links with the Council of Europe.

The EU will become the 48th party to the ECHR. The laws adopted within the EU must be in line with the ECHR in order to avoid the need for recourse to the ECtHR. The backload of cases in the ECtHR must be resolved, but we must not allow this process to distract from or delay the accession process.

The role of national parliaments in the ratification process will be crucial, but in the first stage the EU institutions must do everything possible to ensure accession without getting held up in technical discussions which can be resolved with political will. The Secretary General of the Council of Europe, Members of the European Parliament, representatives from the Commission and the Fundamental Rights Agency all expressed their full support for swift accession to the ECHR. The Spanish Presidency hopes to be able to produce a mandate [in mid-March], following a proposal from the Commission.

III - Seminar "Common criminal procedural standards: a legislative programme to strengthen mutual trust" (1-2 March 2010, Madrid)

A - Roadmap for strengthening procedural rights

It is time to make the rights of those suspected or accused of a criminal offence a reality. A consensus has finally been achieved with the Council's adoption of the Roadmap for strengthening procedural rights in November 2009, following the failure of the 2004 proposal for a Framework Directive.

The legislative proposals set out in the Roadmap should be presented discussed with the European Parliament as soon as possible: rights to interpretation and translation (measure A); information about charges (B); legal advice and legal aid (C); communication with a relative or employer, and where appropriate consular authorities (D); and special measures for vulnerable persons (E). The Roadmap also commits the EU to producing a Green Paper on pre-trial detention (F).

It is essential that we make visible progress on the Roadmap, referred to in the Stockholm Programme, demonstrating to the citizens of the EU the value of these measures. The conditions for progress are now in place: a clear legal basis, a common institutional interest in achieving results, and the necessary political commitment.

B - The way forward

Providing citizens with a catalogue of rights will help to reinforce mutual trust between the judicial authorities of Member States. Procedural rights are necessary given freedom of movement within the EU, and also have an important symbolic value.

The EU has focused on security in recent years, optimising cross-border police and judicial cooperation. We need to redress the balance between security and justice by paying increased attention to the rights of those suspected or accused of criminal offences. We need to send a positive message to citizens that the EU is not just an economic area but is active in protecting their rights, so that they can exercise the freedoms of the Union. This is an important part of promoting the Union in light of the referenda results of recent years.

The Commission considers that progress needs to be ambitious but gradual in order for impact assessments to be carried out, especially in relation to subsidiarity and proportionality, and suggested a provisional timetable of at least one proposal per year. The Commission will propose measures in the order in which they are identified in the Roadmap, with the exception of the Green Paper which may be produced in 2011. A mid-term review of the Stockholm Programme could include a stocktake of the Roadmap.

The Commission identified three principles for producing legislation: thorough impact assessments informed by data on, for example, legal aid costs; full conformity with the European Convention on Human Rights (ECHR) and the Charter on Fundamental Rights (CFR); and linkage with practical measures.

As a minimum, the measures achieved under the Roadmap must meet Articles 47 and 48 of the Charter on Fundamental Rights, and Articles 5 and 6 of the ECHR, and be consistent with the caselaw of the European Court of Human Rights (ECtHR). The EU should be more ambitious than the caselaw of the ECtHR, although differences between Member States will need to be overcome. The measures will of course be limited by the principle of subsidiarity, leaving Member States free to ensure higher levels of protection.

The debate as to whether procedural rights will be universal or only cross-border in nature is no longer relevant in light of the Charter gaining legal status, and hopefully will not come back to haunt the Roadmap process.

The Roadmap is the immediate goal and not the end of the process. We should remember that the door is left open for further rights in the future, for example relating to the presumption of innocence, which is specifically mentioned in the Stockholm Programme.

Legislative work must be coordinated following the Lisbon transition period. All stakeholders must be involved in preparing legislation and communicating the results to the public at large. It is extremely useful to have the views of practitioners and they can provide a valuable reality check. The EU has already asked the Council of Europe for advice on Measure A, and will remain in close contact over the other measures.

C - Right to interpretation and translation

Those papers that are essential to the defence must be translated, whilst interpretation is an absolute right. Confidentiality is key, as the interpreter becomes privy to the defence strategy; all visits by the interpreter to the suspect or accused should be recorded.

A proposal for a Framework Decision on the right to interpretation and translation was published in July 2009. The Swedish Presidency opted to lead the negotiations informally through the Friends of the Presidency, in order to secure more direct communication, and more efficient negotiations. However, the proposal lapsed with the coming into force of the Lisbon Treaty.
The proposal for a Directive on rights to translation and interpretation was considered at the JHA Council meeting of 26th February. The Commission believes that all options remain open, as the current text may not meet ECHR standards. Nevertheless, a separate proposal from the Commission could bring disadvantages, and if we do not make progress with Measure A then we will not achieve the Commission´s timetable. Some delegates queried why the Commission was now objecting to the text. However, the Council of Europe has been asked for advice.

D - Information on rights

The Spanish Presidency is willing to launch work as soon as possible on Measure B, provided the Commission presents the proposal before July. There could be a minimum model for a letter of rights if it were flexible enough to accommodate the national systems of Member States.

E - Legal advice and legal aid

The right to choose a suitable lawyer in which the suspect has confidence is often not possible in the first instance, if the suspect lacks financial resources or is in an unfamiliar country. In such circumstances the state has a duty to ensure a lawyer is provided from the point of arrest or detention, and must interview the suspect before any police interrogation. Any exceptions to these rules must be made with great caution.

The European Criminal Bar Association has produced codes of practice on legal aid which could be useful. We need to concentrate our efforts on improvements in the delivery of legal advice and aid in practice, beyond considerations of legislative harmonisation. Without transparency in the relevant statistics, sanctions for non-compliance and a strong court with better resources, the Directive would not be fully effective.

F - Impact of the new proposals on existing instruments

There have been significant improvements in criminal judicial cooperation within the EU, and the European Arrest Warrant is the most pragmatic example. It has been described as one of the success stories of the EU, and the number of those issued has been rising. However, use of the EAW varies, and it is not free of problems. The right to interpretation and translation is crucial for effective implementation of the EAW, and amongst the Roadmap measures this is the priority.

IV - Seminar "Brussels I: reform of international litigation in Europe" (15-16 March 2010, Madrid)

A - Abolition of exequatur

The enforceability of judicial and extrajudicial decisions is an objective on which European activity should be focussed. The TFEU (art. 81) itself states that the basis of civil judicial cooperation is the mutual recognition of such decisions.

Having established this, we must recognise that it is a task to be undertaken with care. Careful analysis and appropriate guarantees are required, given that improving the regime of recognition and implementation under the Brussels I Regulation in order to facilitate the enforceability of decisions can only be done if clear safeguards are established.

B - Forum selection clauses

Forum selection clauses play a key role in international trade. They should provide safeguards to the parties and certainty regarding which court will hear any litigation arising from their legal relations. At times the effectiveness of these clauses has been undermined by procedural delaying tactics. Faced with such tactics, suitable solutions must be sought. Various solutions are possible (consideration in conjunction with *lis pendens*, demanding civil responsibility for damages…). When reforming the Regulation we shall have to consider what mechanism will be adequate to secure such protection.

Furthermore, we must recognise the importance of the 2005 Hague Convention on forum selection clauses. At the appropriate moment, we must consider the suitability of ratifying the Convention.

C - *Lis pendens*, joint actions and ancillary actions

The *lis pendens* rule has caused many problems in relation to the practical application of the Brussels I Regulation, essentially due to the use of delaying tactics to avoid being taken to the court that should have competence in principle. This situation must be rectified in the future reform of the Regulation. The joint exercise of ancillary actions should also be properly analysed.

Joint actions generate lively discussion between business organisations and consumer associations. The Brussels I instrument must show the way and set out rules on this point. Similarly, possible instruments on collective actions must be examined independently of the field for which they are planned.

D - Intellectual property

Intellectual property must be respected appropriately in order to promote creativity and research. Reform of the Brussels I Regulation must help to improve the level of protection, given that many problems in applying Brussels I have arisen in the area of intellectual property. The Commission, on presenting its proposal, must consider how to overcome the difficulties created by what are known as "torpedo actions", with regard to ancillary actions and, in general, the best method for judicial protection of intellectual property.

E - Brussels I and the international legal system

It is necessary to continue the analysis of whether the current system of competence rules under Brussels I is incomplete and, therefore, should be completed in the forthcoming reform. Questions requiring special consideration include whether it is necessary to unify subsidiary competences and whether the possibility of suing those living in third countries should be included within the ambit of the Regulation. The second question must involve detailed consideration of the criteria according to which those living in third countries may be covered by the Regulation, setting out a requirement for sufficient links.

F - Brussels I and arbitration

It is important that economic operators maintain their confidence in this method of resolving lawsuits. Recent jurisprudence has caused some concerns in the arbitration sector and it has been debated whether these concerns can be resolved in the reform of the Brussels I Regulation. If the currently planned regime is changed, we will need to discuss whether this will be achieved by the incorporation of a new rule on judicial competence or through strengthening the exclusion of arbitration from the ambit of the Regulation.

V - Conclusions of the seminar on the entry into force of the agreements on extradition and judicial assistance in criminal matters between the European union and the United States of America (25 and 26 March 2010, Madrid,)

On 25 and 26 March 2010 in Madrid, under the auspices of the Spanish Presidency of the Council of the EU, a seminar was held on the Agreements on Extradition and Judicial Assistance in Criminal Matters between the European Union and the United States of America, in light of the entry into force of the bilateral instruments relating to the application of these Agreements between the Member States of the EU and the US on 1st February 2010.

Taking part in the seminar were representatives of the US and of the Member States of the EU, as well as representatives of the European Commission, the General Secretariat of the Council of the EU, Eurojust and the European Judicial Network.

In accordance with the programme prepared by the Spanish Presidency, the experts had the opportunity to discuss the main issues relating to the Agreements on Extradition and Judicial Assistance in Criminal Matters, suggesting in light of their practical experience the challenges that our countries face in applying them: chiefly the use of videoconference, the setting-up of joint investigation teams and the exchange of banking information, as well as the recourse to informal tools which can optimise judicial cooperation.

The experts discussed the forms proposed by the US for the identification application and exchange of banking information in line with Article 4 of the Agreement on Judicial Assistance in Criminal Matters, which had been distributed by the Presidency to Member States on 28 January 2010 in document 5833/1/10 REV 1 for their possible use on a provisional basis. The Presidency invited Member States to send their comments on the forms, with a view to their evaluation.

In the context of the debate on the new possibilities for setting up joint investigation teams between the US and one or more EU Member States, the Commission presented the experts with an informal proposal on the adoption of a model agreement for a joint investigation team, which was considered by the experts on a preliminary basis.

The experts tackled practical aspects of cooperation, with the aim of providing the relevant authorities with useful tools for applying the Agreements appropriately and maximising their potential.

The creation and distribution of expert lists, the drafting of practical application manuals for the Agreements, or the drawing up of standard application forms for assistance are some of the solutions that were proposed.

The Presidency will provide all Member States with the draft Manual created by the US which is currently being examined in the working group between the US and Eurojust. The working group will keep Member States informed of their progress.

They agreed upon the benefit of creating a list of experts and authorities competent in extradition matters and criminal judicial assistance, for which the European Judicial Network and the US-Eurojust working group offered their assistance.

They highlighted the usefulness and advantages that videoconferencing offers as a means of taking statements from witnesses and experts, as well as for the exchange of information between the relevant authorities during the investigative stage. The possible creation of a guide to processing applications for statement by videoconference, with the assistance of the European Judicial Network, will facilitate the compilation and recording of best practice identified over these years of experience.

VI - Seminar "Towards a European e-justice" (19 - 20 April 2010, Madrid)[1]

A - Towards online European justice: progress

Electronic justice is fundamental to the construction of the Area of Freedom, Security and Justice. Its essential objective is to facilitate citizens´ access to justice and to improve both cooperation and the operation of the justice systems of EU Member States.

In 2007, the Justice Ministers of the Union agreed to begin work on the creation of the European E-justice portal, representing progress towards a technological Europe at the service of the citizen. The development of this ambitious project is on track according to the E-justice action plan.

E-Justice must be a useful, secure tool, fully and easily accessible in the interests of citizens, businesses, legal practitioners and the Justice System. The main pillars of its development include the inter-connection of databases on a European scale, advancing the creation of online proceedings, promoting the use of modern technologies such as video-conferencing, encouraging mediation, the electronic signature as well as online authentication of documents etc..

The principles which should prevail on this path are the search for greater efficiency and legal certainty. The use of information and communication technologies (ICT) in the field of justice must serve to speed up proceedings and reduce workloads, time limits and operating costs, but always with respect for personal data and the security of communications.

[1] Attendance at this seminar was affected by air traffic restrictions imposed following the volcanic eruption in Iceland.

Cooperation between the EU and Member States is essential to ensure the compatibility of the digitisation processes of the different judicial systems, in particular their information structures and applications. Work carried out at national and European levels must be coordinated. It is also important to take into consideration the efforts made by third countries in this direction.

The Spanish Presidency of the EU hopes to adopt conclusions on progress in e-justice matters in the Justice and Home Affairs Council in June. In particular, the objective is to launch the portal in June, as long as the preparatory work fits with the planned timetable. Online justice will also feature among the priorities of the future Hungarian Presidency during the first semester of 2011.

B - Interoperability and best practice on e-justice in the European union

The transition towards electronic justice is a great challenge. Ensuring interoperability between existing information and communication structures is an objective of any Administration and, in particular, in the field of justice. Different systems exist at national and local level in the EU and it is necessary to make them function together. To this end, there are several initiatives underway, one of which is the Spanish EJIS project which aims to create a Judicial System of Interoperability and Security that includes every public institution with competence in justice matters.

There are also various judicial digitisation projects for moving from traditional to electronic casefiles, such as the one currently under development in Spain by the Audiencia Nacional (National Court). This aims to reduce the use of paper, facilitate the processing of cases, and allow integrated document management etc.. But this process requires great changes - chiefly organisational, technological and cultural – which must be accompanied by a specific management strategy that provides for plans regarding communication, training and user support.

Another specific initiative is the Penalnet project, created on the initiative of the Consejo General de la Abogacía Española (General Council of Spanish Lawyers) and in which some 300 criminal lawyers participate at EU level. It started as a pilot project between 5 Member States aimed at encouraging the cooperation of criminal lawyers in the EU field through a secure system of sending information, in encrypted form and using the electronic signature.

C - Sharing information on previous convictions: from NJR to ECRIS

Experience has shown that mistakes can be made at the point of transmitting criminal data from one Member State to another. These can relate as much to the personal data of the person arrested or held in custody as to his or her previous convictions. The most common errors involve identification data as well as the understanding and interpretation of different information on the implementation of sentences.

The pilot project NJR is an extremely important experiment and it should form the basis of future development towards ECRIS. However the ECRIS Decision refers to questions that were not contemplated in the pilot project and which must be addressed, such as those concerning the process for sharing data relating to the implementation of sentences. Given the diversity of legal systems in Member States it is essential to reach a consensus on a common methodology which will enable the transmission of all the information referred to in the ECRIS Decision in a codified form, so that it can be interpreted simply and without ambiguity, and without the need to translate each concept.

D - Portals and best practice in Latin America

In Latin America as well a series of initiatives is being carried out to promote judicial cooperation through the use of ICT. This is accompanied by other measures, such as greater specialisation amongst judges, the creation of shared services and the streamlining of case files. However, it is important to take action to avoid aggravating the weaknesses these measures are intended to overcome (duplicate files, electronic and traditional, increase in paper use due to printing of electronic case files etc.).

Since 2008 the website of the Latin American Judicial Conference (CJI) has had the most modern content and resources such as audiovisual media, a Latin American judicial map, a table of experiences, different links, publications and the Justice and Technology Fair.

Another relevant organisation in this field is the Conference of Justice Ministers of the Latin American Countries (COMJIB), whose website aims to increase cooperation in preventing cross-border crime between Latin American countries through the incorporation of services such as legislation and jurisprudence databases, news and information, dissemination of good practice, and debate forums.

Also of importance is the initiative launched by the Spanish Consejo General del Poder Judicial (Judicial Council) to standardise jurisprudential, legislative and teaching activity among Latin American countries, Spain and Portugal, the IBERJUS network, which involves developing a website with a single search engine which is constantly updated.

The Latin American Association of Public Ministries (AIAMP), for its part, has launched a website that functions as a platform for information- and experience-sharing.

E - Online training

The field of justice also benefits from the use of ICT in training matters.

Projects currently under way not only provide online training but also encourage the establishment of virtual communities. In relation to the former, the aim is to provide language teaching and computing courses, as well as mixed activities combining traditional courses with online training. In relation to the latter, the aim is to boost virtual communities through participation in blogs, debate forums and instant messaging networks.

Spain and France have designed a specific joint online training project relating to protocols to be followed in the case of natural catastrophes or acts of terrorism involving multiple victims, placing special emphasis on the principle of coordination in this type of situation.