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Welcoming Remarks: April 8, 2000

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Abstract

Michel Gout welcomed participants and described access to justice initiatives in the European Union. He discussed various instruments in European Union law that ensure access to justice (European Court of Justice, Court of First Instance, European Court of Human Rights, Brussels Convention Article 44, Hague Convention 2 Relating to Civil Procedures, Hague Convention 99 on Access to Justice, and Agreement of the Council of Europe on Transmission for Applications to Legal Aid). Mr. Gout described the successes of these instruments, and also the obstacles the European Union still faces in providing legal aid for its citizens.

WELCOMING REMARKS

APRIL 8, 2000

SPEAKER: Michel Gout, *Former President, Council of the Bars and Law Societies of the European Union, Brussels*

Ladies and gentlemen, distinguished members, my dear colleagues, it is a great honor for me, as past President of the Council of the Bars and Law Society of the European Union, to address such a prestigious audience on an essential subject for our democratic countries: access to justice.

From its very beginning, European integration has been firmly rooted in a shared commitment to freedom based on human rights, democratic institutions, and the rule of law. These common values have proved necessary for securing peace and developing prosperity in the European Union. They will also serve as a cornerstone for the enlarging Union.

The European Union has already put in place for its citizens the major ingredients for a shared area of prosperity and peace—a single market, economic and monetary union, and the capacity to take on global political and economic challenge.

The challenge of the Amsterdam Treaty is now to ensure that freedom, which includes the right to move freely throughout the Union, can be enjoyed in conditions of security and justice accessible to all. It is a project which corresponds to the frequently expressed concerns of citizens and has a direct bearing on their daily lives. But the enjoyment of freedom requires a genuine area of justice where people can approach courts and authorities in any Member State as easily as in their own. It is for those goals that the European Council during its last meeting in Tampere, which is a city in Finland, in October of 1999, held a special meeting on the creation of an area of freedom, security, and justice in the European Union.

Among the objectives, given by the European Council to the Commission, was to establish minimum standards ensuring an adequate level of legal aid in cross-border cases throughout the Union, as well as special common procedural rules for simplified and accelerated cross-border litigation on small consumer and commercial claims, maintenance claims, and uncontested

claims. Alternative, extra-judiciary procedures should also be created by Member States.

So what is the situation today in Europe? We can distinguish two situations: access to the Supreme Court of the European Union and court access for every citizen of the European Union threatened with proceedings or wishing to bring proceedings abroad.

First, access to the European Court of Justice, Court of First Instance, and European Court of Human Rights. I will be very short on this subject, because yesterday you heard all the problems and goals we have for access to the Court of Human Rights. I would just simply say a few words about access to the Court of Justice and the Court of First Instance.

As you already know, we have in Luxembourg two different supreme courts, the Court of Justice, which is competent for treaty matters and for constitutional problems, and the Court of First Instance, which has a larger competence. In front of those two judicial bodies the principle of free access and free justice is guaranteed.

The three main principles are the following. First, a party who is wholly or in part unable to meet the costs of the proceedings may at any time apply for legal aid. This application shall be accompanied by evidence of the applicant's need and, in particular, by a document from the competent authority certifying his lack of means. Second, which is very important for us, the application needs to be made through a lawyer. Third, the chamber, to which a judge is designated by the President as *rapporteur*, shall make an order without giving results, and no appeal shall lie therefrom. So it is a decision from the court and from the tribunal itself.

We have seen, yesterday, the rules in front of the European Court of Human Rights, so I will not develop that point. But access for European citizens threatened with proceedings or wishing to bring proceedings abroad in Europe is a little difficult, and I will try, with you, to look at the reasons it is difficult.

We have different provisions and different treaties on this problem. The first one is Article 44 of the 1968—very famous—Brussels Convention. I think that you know the Brussels Convention. In the Brussels Convention you have Article 44 on access to justice when a judgment creditor, which means a successful

plaintiff, is seeking the enforcement in one contracting state of a judgment obtained in another contracting state. That is a provision in order to permit you to have free access to justice if you want to enforce a decision you have obtained in another contracting state.

The second text we have is the Hague Convention 2 Relating to Civil Procedures, signed at The Hague in March 1954. This Convention has been ratified by some of the member states of the European Union and some other members of larger Europe—Austria, Belgium, Denmark, Finland, France, Germany, Italy, Luxembourg, the Netherlands, Portugal, Spain, and Sweden. This Convention contains a section on free legal aid. In essence, it requires contracting states to extend national treatment to the nationals of other contracting states.

The third text is more important but less ratified, the Hague Convention 99 on Access to Justice, signed at The Hague in October 1980. Convention 99 is only ratified by Finland, France, the Netherlands, Spain, and Sweden, which are very few countries among the European Union. Convention 99 requires nationals of the contracting states and persons habitually residing in a contracting state to be treated, for the purpose of entitlement to legal aid in court proceedings in each contracting state, as if they were nationals or residents in that contracting state. The same principle applies to pre-litigation legal advice, provided that the person concerned is present in the State where the advice is sought. So if Convention 99 were ratified by more than four or five states, it would be a very interesting convention to implement and would give free access to justice in all the countries of Europe.

The last text is an agreement which was signed in 1977 in Strasbourg, the Agreement of the Council of Europe on Transmission for Applications to Legal Aid. The first point is to have the legal aid; and the second point, when you constitute your file in your own country to have access to legal aid, there is a transmission to the country and to the other countries, and that agreement solves those problems.

But we always have difficulties and obstacles obtaining free access to justice in Europe. Why? Because the first obstacle is that, in general, Member States' legal aid systems are national. So certain Member States grant legal aid without any require-

ment of nationality or residence. One Member State in the European Union grants legal aid to foreigners only on the basis of reciprocity, which is contrary to all the treaties and agreements of the European Union, but that is the law of that country. One Member State grants legal aid to residents only. A possible solution would be the larger ratification of The Hague Convention I was speaking about.

The second obstacle is a financial obstacle. The financial threshold, on the basis of which the applicant's demand is examined, varies from state to state. Those situations do not take into account the various income levels in the Member States, let alone where this threshold falls in relation to the national minimum income of the state where the applicant is resident. There is still in the European Union a difference of level and a difference of income and of minimum income in each state.

A solution could consist of a correcting factor, or weighting, which would take account of the differences in the cost of living in the two countries. But you can understand that it can be a political problem to have a weighting or a correcting factor for a problem of minimum income in the different states of the European Union.

The third obstacle I have seen is that in the majority of Member States there is a test on the merits of the claims. With a broad, subjective margin of appraisal, some Member States exclude legal aid before certain courts. The solution is to oblige the Member States to specify and publish the criteria and to give detailed reasons for a refusal to grant legal aid on the grounds that the merits test has not been satisfied.

The fourth obstacle, which is one of the most important, is that in the European Union, sometimes the judicial systems are different, which means that an applicant will certainly need two lawyers, one from his home state and one from the host state. Think of a Portuguese citizen wishing to sue somebody in Ireland. He will need a lawyer in his home country to explain to him, if he finds one, what will be the proceedings in Ireland. And in Ireland, of course, he will need a lawyer to take his case.

So it is a very big and a very important problem because we have different systems, the system of common law and the system of Roman law, as you already know. That is a very big obstacle for legal access in Europe.

The fifth obstacle is to find a lawyer. The cross-border litigant may have great difficulty finding a lawyer competent in his own Member State to give him advice on another system of law or jurisdiction, but he will have more difficulties finding a lawyer abroad. The European Commission has financed a project of the Council of the Bars and Law Societies of Europe ("CCBE"), assessing the feasibility of setting up a European lawyers database. This is an enormous and difficult objective, but the CCBE is trying to succeed in that objective now while we are speaking.

The sixth obstacle is the transmission of application. I can be very brief on this subject, as I have explained the principle of the Strasbourg Agreement. First of all, ratification is needed by all European Union Member States. Secondly, the designation of transmitting authority should be under a duty to ensure that the paperwork and supporting documents forwarded to the host state are correct.

The seventh obstacle is to know what are the proceedings and how you can have access to justice. A guide entitled *Enforcing Your Rights in the Single European Market*, is an absolute necessity and it has to be accessible on a Web site, of course. This guide will be available during this year. But the CCBE has made a guide, the name of which is *Guide to Legal Aid*, and in it you will find some résumés of all of the names through legal aid in each country of the European Union. All these initiatives are to facilitate the knowledge of their rights by the European citizens.

Ladies and gentlemen, in Europe access to justice is a reality in its Member States, but access to justice for cross-border activities can be more effective. This is one of the challenges for our Union for freedom, security, and justice.

As you already know, France will be the next President of the European Union for six months, starting in July, and I am sure that my country will have a proactive approach for access to justice.

Thank you very much.