

## **Recommendations from the Analysis of alignment of normative and institutional framework of the Republic of Serbia with the relevant EU standards in the field of procedural safeguards**

### **- Recommendations relating to alignment with the EU acquis in the field of procedural safeguards-**

#### **I Amendments to the Criminal Procedure Code for the purpose of alignment with:**

**- Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty**

**-Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings**

- The defendant must have the right to be informed immediately after deprivation of liberty that he has the right to remain silent, that any statement he makes may be used as evidence against him and that he has the right to be questioned in the presence of a defense council of his choice.**

Unlike the previous CPC, according to which the defendant had to be informed of these rights at the time of his arrest, the new CPC provides that the defendant shall be informed of these rights immediately before the first hearing<sup>1</sup>, which leaves a time gap in which the defendant may provide different information to the police and help the police to his detriment, without having previously been informed of his rights. According to Article 29 of the Constitution, any person deprived of liberty without decision of the court shall be informed promptly about the right to remain silent and about the right to be questioned only in the presence of a defense counsel they chose or a defense counsel who will provide legal assistance free of charge if they are unable to pay for it. If the Constitution provides that a person deprived of liberty must be informed of his rights "promptly" - at the moment of deprivation of liberty, then the law cannot prescribe that this advice should be given to the arrested person at a later time.

- It is necessary to amend Article 69 of the CPC in order to introduce a legal obligation to inform the defendant in writing that he has the right to defense counsel**

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<sup>1</sup> See Art. 5 Para 1 Item 1 of the CPC, Art. 68 Para 2 and Art. 69 Para 1 Item 1 CPC (Official Gazette RS no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014)

**at the expense of budget funds if he has no resources to bear the costs of defense. The same notice should be given to a person who is deprived of liberty.**

- **Develop and distribute Letter of rights** which contains the basic rights set in the Directive.
- **Introduce an obligation of the police, prosecutors and the court to inform the defendant or arrested person about the possibility to request a defense counsel at the expense of budget funds** (in the context of the Letter of Rights, which will be developed and distributed in accordance with the Action plan for Chapter 23).
- **Article 77 should be amended in a way that defense counsel should be appointed, in addition to mandatory defense, when a person does not have the financial means to pay for the defense, bearing in mind (1) the seriousness of the offense, (2) the complexity of the proceedings and (3) the ability of a person to defend himself.**

These conditions derive from the jurisprudence of the ECtHR and are binding for Serbia. However, it should be additionally noted that any possible criminal charge is a great burden to a person and given that a new criminal procedure is complex and introduces more active role of defendant, there is a question if there is any person who is able to adequately defend himself unless he/she is a lawyer? Concurrently, the fact is that there are a number of criminal offences for which “prison sentence up to 3 years” is prescribed in the Criminal Code.

Current article 77 of the CPC does not provide the possibility for indigent persons to acquire legal aid in criminal matters, bearing in mind that the dominant criteria is a prescribed sanction. The law makes a distinction between mandatory defense for offenses which are punishable by more than 8 years in prison, and criminal offences punishable by up to 3 years in prison (for the reason of fairness). However, it seems that in practice judge estimates these two conditions as cumulative even though they are clearly posted alternatively.

Legal aid is only available during the trial, but not in a pre-trial stage. This needs to be changed, as it is not in compliance with binding international standards (Article 16. 2 of the Constitution and Article 18 of the Constitution), and is contrary to the notion of legal aid. Therefore, the defense in this case must also be guaranteed from the first hearing, as it is stipulated in Article 74, par. 2 on mandatory defense.

The current practice shows that persons who risk imprisonment up to 3 years are rarely informed of the right to seek defense counsel and therefore hardly use this possibility. Thus, the law serves only persons who have the right to mandatory defense (over 8 years in prison). Relevant international standards require the assignment of counsel in all criminal proceedings, when the interests of justice so require. However, in Serbia there is

no clear practice on informing on the right to seek counsel for poverty. The waiver of this right can be claimed only if the person knew that he has this right, and if he/she made this statement freely and fully understanding its effects. Therefore, it is necessary to introduce a legal obligation to inform about this right through amendment to the Article 69 where the rights of the defendant are enlisted. To this end, it should be prescribed that the person deprived of liberty or a detained person also has a right to be informed that he has a right to a defense counsel funded by the state budget, if his/her financial status requires so.

In criminal proceedings, the right to free legal aid referred to in Article 6 (3) (c) of the ECHR implies that the person must fulfill two conditions to receive free legal aid:

- (1) he or she does not have sufficient means to pay for legal assistance, and
- (2) the interests of justice so require.

It is for domestic authorities to define the financial threshold for exercising the right to free legal aid and to apply the means test. In deciding whether free legal aid is required, in the interest of justice, in a particular case, the court should take into account the following elements:

- (1) the seriousness of the offense;
- (2) the complexity of the proceedings; and
- (3) the ability of the defendant to provide his or her own representation.

The seriousness of the offense criterion includes the assessment of the severity of a potential sentence (the length of deprivation of liberty) and of other adverse consequences of the conviction for a defendant. Where deprivation of liberty is at stake, the interest of justice in principle requires legal representation. The interests of justice would usually also require free legal aid for vulnerable groups such as minors, foreigners, refugees, asylum seekers and persons suffering from mental illness. Legal aid, free when applicable, should be available at all stages of the proceedings, from preliminary police investigation to final court decision.

According to the jurisprudence of the ECtHR, the defendant may waive his rights under Art. 6, if (1) the waiver does not interfere with an important public interest, (2) the waiver is done in a clear manner and if (3) the defendant could have reasonably foreseen the consequences of his waiver. Given that in practice there are common standpoints that individuals often waive their right to defense council, it is necessary to specify under which conditions that is possible.

- **Specify the body or state authority responsible for issuing the certification on financial status**

It is necessary to specify the particular authority that issues the certificate of financial status, rather than solely prescribing a "competent" authority, which may require the defendant or a person deprived of liberty to undertake a number of different administrative procedures before a set of 'competent authorities' for the purpose of proving financial status. In this way, access to justice is additionally hindered.

- **Criteria for the assignment of lawyer at the expense of budget funds must be known in advance to citizens** (improve the websites of the courts, enable access to information through the court portal, brochures)
- It is necessary to amend Article 74, paragraph 1, item 3 to read as follows: "The defendant must have a lawyer if he **is arrested and brought to the public prosecutor (Article 293)**, or detained, or he is not allowed to leave the residence, or is remanded in custody - from the moment of deprivation of liberty until the decision on the suspension of measures;"

When the defendant is brought to the public prosecutor by the police, he is arrested despite the fact that decision on detention is not yet made, which means that the mandatory defense must include this situation as well.

- **Develop guidelines for courts to enable unified implementation of the new provisions**

In order to avoid the courts to make decisions on the allocation of defense counsel under Article 77 of the CPC on a case-by-case basis, which includes an assessment of the court in each case, it is necessary to establish a practice which would enable a greater degree of certainty as to when the defense counsel can be obtained at the expense of budget funds. It is therefore necessary to determine as precisely as possible the guidelines and criteria that would unify the practice of the courts, which would help the court to apply this provision.

- **It is necessary to pay particular attention to sensitive (vulnerable) social groups (e.g. through enumeration in the guidelines)**
- **It is necessary to amend Article 293, paragraph 1**, so as to delete the words " the identity of which must be revealed to the public prosecutor and, if necessary, help him to find defense counsel."

The right to inform a third party of their choice is contained in Art. 3 of the European Convention and cannot be restricted on the basis of the assessment of the prosecution. Likewise, it makes no sense that the prosecutor "helps" the arrested person to "find" the defense counsel because it leaves room for manipulation. Taking the arrested person to the public prosecutor should be equated with detention because the defendant is, *de facto*, deprived of liberty and the mandatory defense during the first questioning, must be provided.

## **II Alignment with the Directive on the right to interpretation and translation in criminal proceedings with an aim to specify waiver of the right to translation**

- It is necessary to **amend Article 11 of the CPC** in order to precisely define the following:
  - competent body/person for determining the need for translation or interpretation,
  - precise criteria for the provision of translation/interpretation, as well as
  - procedure for decision making and providing translation and interpretation.

Also, it is necessary to ensure that the right to translation/interpretation is especially available to injured parties/victims.

## **III Alignment with the Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings**

Bearing in mind the obligation of the Republic of Serbia to improve the application of the presumption of innocence, due to the numerous cases of breaching the presumption of innocence:

- **It is necessary to prescribe appropriate measures to ensure that suspects or accused persons are presumed innocent until proven guilty according to law, in public statements and official decisions from public authorities do not refer to the suspects or accused persons as if they were convicted.**
- **It is necessary to prescribe sanctions in case of violation of the presumption of innocence by the public authorities.**

## **IV Alignment with the Directive on procedural safeguards for children suspected or accused in criminal proceedings**

- Directive refers to children under 18 years, regardless of national legislative framework.

It is necessary to prepare table of alignment with the CPC, as well as with the new Draft Law on Juveniles, in order to assess the need for alignment.

## **V Alignment with the Proposal of the Directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings**

Given that the Proposal of the Directive has not yet been adopted, it is necessary to create a basis in the CPC to ensure the right to provisional legal aid for suspects and defendants in criminal proceedings when they are deprived of their liberty and in connection with the European arrest warrant.

Provisional legal aid would include access to a lawyer in the initial stages of the proceedings, pending the decision upon requests for free legal aid and the assessment of the fulfillment of the criteria for free legal aid. To this end, it is necessary to consider potential mechanisms and procedures, for example, on duty counsel programs or emergency defense services.

## **-Basic principles of organization and functioning of the network of support services for victims and witnesses -**

### **I AVAILABILITY**

The key principle that should be followed when establishing a network of support services at the national level is the high level of availability of services through:

- maximum territorial coverage;
- a uniform structure of services throughout the territory;
- development of a precise plan for the gradual improvement of network availability, both geographically and in terms of the variety of services offered.

### **II MAXIMUM UTILIZATION OF AVAILABLE RESOURCES**

Bearing in mind the need of a prompt establishment of a network of support services for victims and witnesses, as well as the limited material and human resources, it is necessary to work on the maximum utilization of existing resources by:

- mapping of existing service providers;
- mapping available services;
- networking of existing providers that meet clear, objective and previously established criteria, including from among the institutions of the Republic of Serbia, as well as civil society organizations.

### **III SUSTAINABILITY**

Although project support will be provided for the initial establishment of the network services, one of the key challenges will be to ensure its sustainability through balancing the need to provide a sustainable source of funding of the providers and restrictive budgetary policy of the Government of the Republic of Serbia. In this regard, it will be necessary to:

- establish a Fund for periodic allocation of funds to service providers;
- identify sources of inflow of funds into the Fund (gambling, seized proceeds from crime, funds raised by applying the principle of opportunity of criminal prosecution, fines, etc.);
- establish a system of specialized training with the emphasis on training of trainers (ToT);

**Recommendations for establishment of high quality and sustainable network of support services for victims and witnesses at national level:**

1. Adopt a long-term and comprehensive strategic framework for improving the position of victims in the Republic of Serbia through the adoption of the National Strategy for the Improvement of the position of victims in the Republic of Serbia;
2. Harmonize the normative framework with the *acquis* in the area of victims' rights through amendments to the Criminal Procedure Code, Law on Juveniles, Law on misdemeanors and the relevant secondary legislation (Court Rules of Procedure, Rulebook on the administration of the Public Prosecutor's Office, as well as the bylaws and internal acts governing acting by the police);
3. Conduct mapping of existing providers and available services throughout the territory of the Republic of Serbia;
4. Establish a coordination mechanism involving representatives of key institutions (Ministry of Justice, Ministry of Interior, High Judicial Council, State Prosecutorial Council, Republic Public Prosecutor's Office, Ministry of Labor, Employment, Veteran and Social Affairs);
5. Establish a special Fund for the co-financing of the work of providers;
6. Define clear, precise and objective criteria to be met by potential providers in order to become part of a national network of providers;
7. Connect the existing providers that meet clear, objective and previously determined criteria, both from among the institutions of the Republic of Serbia, as well as civil society organizations;
8. Establish a single database of available providers and forms of support as the basis for an effective referral mechanism, as well as the internet information portal and a free telephone line;
9. Establish sustainable system of training for holders of judicial functions, judicial assistants and prosecutorial assistants, as well as for police and service providers;
10. Conduct a public campaign aimed at familiarizing citizens with the rights of victims and witnesses in the legal order of the Republic of Serbia and the available support services;
11. Establish a monitoring mechanism over the work of a national network of support services.