



**COUNCIL OF
THE EUROPEAN UNION**

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LIMITE

JUSTCIV 137

NOTE

from : Presidency
to : Coreper Part II

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Subject : Proposal for a Council Directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid of such disputes

Delegations will find in Annex I a revised version of the Council Directive referred to above prepared by the Presidency in the light of previous discussions in the Committee on Civil Law Matters (legal aid), JHA Counsellors and Coreper.

In annex II, delegations will find the new proposed structure of the Directive.

2002/0020(CNS)

Proposal for a

COUNCIL DIRECTIVE**to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid (...) such disputes**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61(c) **and 67** thereof,Having regard to the proposal from the Commission,¹Having regard to the opinion of the European Parliament,²Having regard to the opinion of the Economic and Social Committee,³**(...)**

Whereas:

- (1) The European Union has set itself the objective of maintaining and developing an area of freedom, security and justice in which the free movement of persons is ensured.
- (2) **According to** Article 65(c) of the Treaty establishing the European Community, these measures are to include measures eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

¹ OJ C [...], [...], p. [...].

² OJ C [...], [...], p. [...].

³ OJ C [...], [...], p. [...].

- (3) The Tampere European Council on 15 and 16 October 1999 called on the Council to establish minimum standards ensuring an adequate level of legal aid in cross-border cases throughout the Union.
- (4) Neither the lack of resources of a litigant, whether acting as claimant or as defendant, nor the difficulties flowing from a dispute's cross-border dimension should be allowed to hamper effective access to justice.
- (5) The main purpose of the Directive is to guarantee an adequate level of legal aid in cross-border **disputes by laying** down certain minimum common standards **relating to legal aid**. A Council directive is the most suitable legislative instrument for this purpose.
- (6) The Directive applies to **cross-border** disputes in civil **and commercial matters**.
- (6a) **All Member States are contracting parties to the European Convention for the Protection of Human Rights and Fundamental Freedom of 4 November 1950. The matters referred to in this Directive shall be dealt with in compliance with that Convention and in particular the respect of the principle of equality of both parties in a dispute.**
- (7) All persons involved in a civil **or commercial** dispute **within the scope of this Directive** must be able to assert their rights in the courts even if their personal financial situation makes it impossible for them to bear the costs of the proceedings.
- (8) Legal aid must include **pre-litigation advice with a view to possible judicial proceedings, legal assistance and representation in court and assistance with or** exemption from the cost of proceedings.
- (8a) *It shall be left to national law whether the costs of proceedings may include the costs of the opponent imposed on the recipient of legal aid.*
- (9) Legal aid **is** regarded as appropriate when it allows the recipient effective access to justice.
- (10) [Since legal aid is given by the Member State of the forum, except pre-litigation assistance provided by a local lawyer if the legal aid applicant is not **domiciled or** habitually resident in the Member State of the forum, that Member State must apply its own legislation, in compliance with the principles of the Directive.]

- (11) The complexity of and differences between the legal systems of the Member States and the costs inherent in the cross-border dimension of a dispute should not preclude access to justice. Legal aid should accordingly cover costs directly connected with the cross-border dimension of a dispute.
- (12) All Union citizens, wherever they **are domiciled or habitually resident in the territory of a Member State**, must be eligible for legal aid **in cross-border disputes** if they meet the conditions provided for by the Directive. The same applies to third-country nationals who habitually and lawfully reside in a Member State.
- (13) If legal aid is granted, it must cover the entire proceeding, including expenses incurred in having a judgment declared enforceable or enforced; the recipient should continue receiving this aid if an appeal is brought **either against or by the recipient insofar as the conditions relating to the financial resources and the substance of the dispute remain fulfilled**.
- (14) Judicial cooperation in civil matters should be organised between Member States to encourage information for the public and professional circles and to simplify and accelerate the transmission of legal aid applications between Member States.
- (15) The European Agreement on the Transmission of Applications for Legal Aid, signed in Strasbourg in 1977 **[as amended by the additional protocol to the European Agreement on the Transmission of Applications for Legal Aid, signed in Moscow in 2001]**, which requires the contracting parties to notify sending and receiving authorities and their systems for transmitting applications, remains applicable to relations between Member States and third countries that are parties to the Agreement. But this Directive **takes precedence over provisions contained in** the Agreement in relations between Member States.
- (16) The notification and transmission mechanisms provided for by this Directive are inspired directly by those of the European Agreement. A time-limit, not provided for by the 1977 Agreement, should be set for the transmission of legal aid applications. A relatively short time-limit would contribute to the smooth operation of justice.
- (17) The establishment of a standard form for **legal aid applications and for** the transmission of legal aid applications in the event of cross-border litigation would make the procedures easier and faster.
- (17a) **[Moreover, national application forms shall be made available on a European level through the information system of the European Judicial Network, established in accordance with Council Decision 2001/470/EC.]**
- (18) Given the differences in the costs of litigation [and in standards of living] between the Member States, they should accordingly be left free to define the threshold above which a person would be presumed able to bear the costs of proceedings, **in the conditions defined in this Directive. Such thresholds shall be defined in the light of various objective factors such as income, capital and the family situation.**

- (19) [The objective of the Directive could not, however, be attained if legal aid applicants did not have the possibility of proving that they cannot bear the cost of proceedings even if their resources exceed the threshold defined by the Member State of the forum. **When making the assessment of whether legal aid shall be granted on this basis, the authorities in the Member States of the forum shall take into account information to the fact that the applicant satisfies criteria in respect of financial eligibility in the Member State of domicile or habitual residence**].
- (20) The possibility **in the instant case** of resorting to **other** mechanisms or agreements to ensure effective access to justice is not a form of legal aid. But it can warrant a presumption that the person concerned can bear the costs of the procedure despite his unfavourable financial situation.
- (21) Member States should be allowed to reject applications for legal aid in respect of manifestly unfounded actions **or on grounds related to the merits of the case insofar as pre-litigation advice is offered and access to justice is guaranteed**. [...]
- (22) (...)
- (22a) *Legal aid must be granted to an applicant where a document has been formally drawn up or registered as an authentic instrument and is enforceable in one of the Member States.*
- (23) Legal aid must be granted on the same terms both for conventional legal proceedings and for out-of-court procedures such as mediation, where recourse to them is **required** by the law, **or ordered by the court**.
- (24) (...)
- (25) It should be specified that the establishment of minimum standards **in cross-border disputes** does not prevent Member States from making provision for more favourable arrangements for legal aid applicants **and recipients**.
- (26) As the objectives of this Directive cannot be achieved adequately by the Member States acting alone and could better be achieved by action at Community level, the Community may take measures in accordance with the principle of subsidiarity as declared by Article 5 of the Treaty establishing the European Community. In accordance with the principle of proportionality laid down in the same article, this Directive goes no further than is necessary to achieve these goals.

- (27) [This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union as general principles of Community law. In particular, it seeks to promote the application of the principle of legal aid **in cross-border disputes** for all persons who lack sufficient resources where access to such aid is necessary to secure access to justice in accordance with the third paragraph of Article 47 of the Charter of Fundamental Rights of the European Union.]
- (28) (...)The United Kingdom and Ireland have given notice of their wish to participate in the adoption of this Directive in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community.
- (29) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not **taking part** in the adoption of this Directive **and is not bound by it or subject to its application**.

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

SCOPE AND DEFINITIONS

Article 1

AIMS AND SCOPE

1. The purpose of this Directive is to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid **in such disputes**. (...)
2. It shall apply, *in cross-border disputes*, to civil **and commercial matters whatever the nature of the court or tribunal**. (...)
3. **In this Directive, "Member State" shall mean Member States with the exception of Denmark.**

Article 1A

Cross-border disputes

OPTION 1

- [1. For the purposes of this Directive, a cross-border dispute is one in which one or more of the parties involved (...) *are* domiciled or habitually resident in a Member State other than the Member State whose courts have jurisdiction or where the decision is to be enforced.**
- 2. The Member State in which a party is domiciled shall be determined in accordance with Articles 59 and 60 of Council Regulation (EC) No 44/2001.**
- 3. The relevant moment to determine if there is a cross-border dispute is the time when the application is submitted, in accordance with this Directive.]**

OPTION 2

- /1. For the purposes of this Directive, a cross-border dispute is one where the party applying for legal aid in the context of this Directive is domiciled or habitually resident in a Member State other than the Member State whose courts have jurisdiction or where the decision is to be enforced.**
- 2. The Member State in which a party is domiciled shall be determined in accordance with Articles 59 and 60 of Council Regulation (EC) 44/2001.**
- 3. The relevant moment to determine if there is a cross-border dispute is the time when the application is submitted, in accordance with this Directive./**

Article 2

(Deleted)

CHAPTER II
CONDITIONS FOR LEGAL AID

Article 3

RIGHT TO LEGAL AID

1. **Natural persons (...) involved in a (...) dispute covered by this Directive (...) shall be entitled to receive appropriate legal aid in order to ensure their effective access to justice in accordance with the conditions laid down in this Directive. (...)**
2. ***Legal aid is considered to be appropriate when it guarantees;***
 - [a) pre-litigation advice in a view to reaching a settlement prior to bringing legal proceedings;¹]***
 - b) legal assistance and representation in court, and exemption from, or assistance with, the cost of proceedings of the recipient, including the costs referred to in Article 5 and the fees to persons mandated by the Court to perform acts during the proceedings.***

[In Member States in which a losing party is liable for the costs of the opposing party, if the recipient loses the case, the legal aid shall cover the costs incurred by the opposing party, if it would have covered such costs had the recipient been domiciled or habitual resident in the Member State in which the Court is sitting.]
3. **Member States need not provide legal assistance or representation in the courts or tribunals in (...) proceedings especially designed to enable litigants to make their case in person, except when the courts or any other competent authority otherwise decide in order to ensure equality of parties or in view of the complexity of the case.**
4. **Member States may request that legal aid recipients pay reasonable contributions towards the costs of proceedings taking into account the conditions referred to in Article 13.**
5. **Member States may provide that the competent authority may decide that recipients of legal aid must refund it in whole or in part (...) if their financial situation has substantially improved (...) or if the decision to grant legal aid had been taken on the basis of inaccurate information given by the recipient.**

¹ ***A declaration should be included in the minutes of the Council that will adopt the Directive indicating that Member States, when transposing the Directive, may provide that pre-litigation advice is guaranteed through existing national authorities or services that facilitates access to justice.***

Article 4

RESPONSIBILITY FOR LEGAL AID

1. Legal aid shall be granted **or refused** by the *competent authority of the* Member State in which the court is sitting, **without prejudice to paragraph 2.**
- /2. The Member State in which the legal aid applicant is domiciled or habitually resident shall *provide legal aid, as referred to in Article 3(2), necessary to cover*
 - a) costs relating to the assistance of a local lawyer or any other person entitled by the law to give legal advice, incurred (...) in that Member State until the application for legal aid has been *submitted in the Member State where the Court is sitting.*¹/
 - b) *the translation of the application and of the necessary supporting documents when the application is submitted to the authorities in that Member State.*

Article 5

COSTS RELATED TO THE CROSS-BORDER NATURE OF THE DISPUTE

1. Legal aid granted in the Member State in which the court is sitting shall cover the following costs directly related to the cross-border nature of the dispute:
 - a) interpretation;
 - b) (...)
 - c) translation of the (...) documents required by the court or by the competent authority and presented by the *recipient* which are necessary for the resolution of the case; and,
 - d) */travel costs to be borne by the applicant where the physical presence of the persons concerned with the presentation of the applicant's case is required in court by the law or by the court of that Member State./*

(...)
3. (moved to Article 4(2)).

¹ Moved from Article 5(3).

Article 6

NON-DISCRIMINATION

Member States shall grant legal aid without discrimination to Union citizens and third-country nationals residing lawfully in a Member State.

Article 7

(Removed to Article 16A)

CHAPTER III

PROCEDURE

Article 8

PROCESSING OF APPLICATIONS

1. The national authorities empowered to rule on legal aid applications shall ensure that the *applicant is fully informed on the* processing of *the* application. (...)
2. (...) Where applications are **totally or partially** rejected, the reasons for rejection shall be given.
3. Member States shall make provision for **review of or** appeals against decisions rejecting legal aid applications. **Member States may exempt cases where the request for legal aid is rejected by a court or tribunal against whose decision on the subject of the case there is no judicial remedy under national law or by a court of appeal.**
4. **When the appeals against a decision refusing or cancelling legal aid by virtue of Article 14 (...) are of an administrative nature, they shall always be ultimately subject to judicial review.**

Article 8 A

COMPETENT AUTHORITIES AND LANGUAGE

1. Member States shall **designate the authority or authorities competent to send ("transmitting authorities") and receive ("receiving authorities") the application.**
2. **Each Member State shall provide the Commission with the following information:**
 - **the names and addresses of the receiving [or transmitting] authorities referred to in paragraph 1,**
 - **the geographical areas in which they have jurisdiction;**
 - **the means *by* which they *are* available to receive applications; and**
 - **the languages that may be used for the completion of the application.**
3. Member States shall notify the Commission (...) of the official language or languages of the **institutions of the European Community** other than their own (...) which **is or are acceptable to *the receiving authority* for completion of the legal aid applications to be received,(...) in accordance with this Directive.**
- 3a. **Member States shall communicate to the Commission the information referred to in paragraphs 2 and 3 before[...].¹ *Any subsequent modification of such information shall be notified to the Commission no later than 2 months before the modification enters into force in that Member State.***
4. **The information referred to in paragraphs 2 and 3 shall be published in the Official Journal of the European Communities.**

Article 9

INTRODUCTION AND TRANSMISSION OF LEGAL AID APPLICATIONS

1. Legal aid **applications may be submitted to either**
 - a) **the competent authority of the Member State in which the applicant is domiciled or habitually resident (transmitting authority), or**
 - b) **the competent authority of the Member State in which the court is sitting or where the decision is to be enforced (receiving authority).**

¹ *See date in footnote 1 to Article 21(1).*

- 1a. Legal aid applications (...) shall be **completed in, and supporting documents translated into**
- a) the **official language or one of the languages of the Member State of the receiving authority which corresponds to one of the languages of the Institutions of the Community; or,**
 - b) **another language which that Member State has indicated it can accept in accordance with Article 8 A (3).**
- 1b. The transmitting authorities may **decide to** refuse to transmit an application if it is manifestly (...)
- a) **unfounded, or**
 - b) **outside the scope of this Directive.**

The conditions referred to in Article 8(2) and (3) apply to such decisions.

2. *The transmitting authority shall assist the applicant in ensuring that the application is accompanied by all the supporting documents known by it to be required to enable the application to be determined. It shall also assist the applicant in proceeding any necessary translation of the supporting documents.*

The **competent transmitting** authority (...) shall transmit the application to the **competent receiving** authority in the **other** Member State (...) within [15] days¹ of the receipt of the application duly completed *in one of the languages referred to in Article 1a, and the supporting documents, translated, where necessary, into one of those languages.*

3. Documents transmitted under this Directive shall be exempt from legalisation or **any equivalent** formality.
4. The Member States may not charge for services rendered in accordance with paragraph 2. *Member States in which the legal aid applicant is domiciled or habitual resident may lay down that the applicant must repay the costs of translation borne by the transmitting authority if the application for legal aid is rejected by the competent authority.*
5. (Removed to Article 19 A)

¹ See Regulation No.1182/71 of 8 June 1971, OJ L 124, page 1.

Article 10

NOTIFICATIONS TO THE COMMISSION

(Removed to Article 8 A)

Article 11

STANDARD FORM

1. To facilitate transmission, a standard form for legal aid applications **and for the transmission of such applications** shall be established **by the committee referred to in Article 11 A.**
2. (...).
- [3. The standard form for the transmission of legal aid applications shall be established at the latest [...]¹

The Standard form for legal *aid* applications shall be established at the latest by [...].²

Article 11 A

COMMITTEE

1. ***The Commission shall be assisted by a Committee.***
2. ***Where reference is made to this Article, Articles 3 and 7 of Decision 1999/468/EC shall apply.***
3. ***The Committee shall adopt its Rules of Procedure.***

Article 12

(deleted)

¹ ***6 months after the adoption of the Directive.***

² ***See date in footnote 1 to Article 21(1).***

Article 13

CONDITIONS RELATING TO FINANCIAL RESOURCES

1. Member States shall grant legal aid to (...) persons **referred to in Article 3(1)** who are **partly or totally** unable to meet the costs of proceedings **referred to in Article 3(2)** as a result of their **economic situation, in order to ensure their effective access to justice.**
2. **The economic situation of a person shall be assessed by the competent authority of the Member State in which the court is sitting,** in the light of various objective factors such as **income, capital (...) or the family situation, including an assessment of the resources of persons who are financially dependant on the applicant .**
3. **Member States may define thresholds above which legal aid applicants are deemed partly or totally able to bear the costs of proceedings set out in Article 3(2). These thresholds shall be defined on the basis of the criteria defined in paragraph 2.**
4. **Thresholds defined according to paragraph 3 may not prevent legal aid applicants who (...) are above the thresholds from being granted legal aid if they (...) prove that they are unable to pay the cost of the proceedings referred to in Article 3(2) as a result of differences in the cost of living between the Member States of domicile or habitual residence and of the forum.**
5. **Legal aid does not need to be granted to applicants insofar as they enjoy, in the instant case, effective access to other mechanisms that cover the cost of proceedings referred to in Article 3(2).**

Article 14

CONDITIONS RELATING TO THE SUBSTANCE OF DISPUTES

1. Member States may provide that legal aid applications for actions which appear to be manifestly unfounded may be rejected by the *competent* authorities.
2. **If pre-litigation advice is offered, the benefit of further legal aid may be refused or cancelled on grounds related to the merits of the case insofar as access to justice is guaranteed.**

[3. When taking a decision on the merits of an application and without prejudice to Article 13, Member States shall consider the importance of the individual case to the applicant but may also take into account the nature of the case in particular that the applicant is claiming damage to his or her reputation and has suffered no material or financial loss or the application concerns a claim arising directly out of the applicant's trade or profession.]

Article 15

APPLICATION TO CERTAIN ORGANISATIONS IN THE FIELD OF CONSUMER PROTECTION

(deleted)

Article 15 A

AUTHENTIC INSTRUMENTS

Legal aid (...) shall be granted for the enforcement of authentic instruments in another Member State under the conditions defined in this Directive. (...)

Article 16

EXTRA-JUDICIAL PROCEDURES

(...) Legal aid shall also be extended to extra-judicial procedures, under the conditions defined in this Directive, if the law (...) requires the parties to use them, or if the parties to the dispute are ordered by the court to have recourse to them.

Article 16 B

CONTINUITY OF LEGAL AID

1. Legal aid shall continue to be granted **totally or partially** to recipients to cover expenses incurred in having a judgment */declared enforceable or/ enforced*
 - in the Member State of the forum, without prejudice to Article 3(5) *or*
 - *in another Member State.*
- 1a (...)
2. Legal aid shall continue to be **available** if an appeal is brought **either** against **or by** the recipient, **subject to Articles 13 and 14.**
3. **Member States may make provision for the re-examination of the application at any stage in the proceedings on the grounds set out in Articles 3(3), 13 and 14, including proceedings referred to in paragraphs 1(...) and 2.**
4. (...)

CHAPTER IV

REIMBURSEMENT OF COURT COSTS AND LAWYERS' FEES

Article 17

(deleted)¹

¹ ***Member States will make a declaration, to be annexed to the minutes of the Council that will adopt this Directive, indicating the general support (...) for the principle of reimbursement from the losing party of court costs and lawyers' fees.***

CHAPTER V

FINAL PROVISIONS

Article 18

INFORMATION

The competent national authorities shall cooperate to provide the general public and professional circles with information on the various systems of legal aid, in particular via the European Judicial Network in Civil and Commercial Matters established by Council Decision No 2001/470/EC.

Article 19

MORE FAVOURABLE PROVISIONS

This Directive shall not prevent the Member States from making provision for more favourable arrangements for legal aid applicants **and recipients** .

Article 19 A

RELATION WITH OTHER INSTRUMENTS

This Directive shall, as between the Member States, and in relation to matters to which apply, take precedence over provisions contained in bilateral and multilateral agreements concluded by Member States including

- **the Strasbourg agreement of 1977 on the Transmission of Legal Aid *[as amended by the additional protocol to the European Agreement on the Transmission of Applications for Legal Aid, signed in Moscow in 2001]*;**
- **the 1980 Hague Convention to facilitate the International access to justice**

Article 20

ENTRY INTO FORCE

This Directive shall enter into force on *[the date of publication in the Official Journal.]*

Article 21

TRANSPOSAL INTO NATIONAL LAW

1. The Member States shall put into force the laws, regulations and administrative provisions needed to comply with this Directive no later than [...]¹. They shall forthwith inform the Commission thereof.
2. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

This Directive is addressed to the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, [...]

For the Council

The President

¹ *24 months after the adoption of the Directive by the Council.*

Table of correspondance

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