



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 30 September 2002**

**12428/02**

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**Interinstitutional File:  
2002/0020(CNS)**

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**LIMITE**

**JUSTCIV 138**

**NOTE**

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from : Presidency

to : Coreper (Part 2)

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No. prev. doc. : 11890/02 JUSTCIV 130

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No. Cion prop. : 5513/02 JUSTCIV 7

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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.

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**I. Introduction**

1. On 21 January 2002, the Commission submitted to the Council a proposal for a Directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid and other financial aspects of civil proceedings (5513/02 JUSTCIV 7).

2. The United Kingdom and Ireland, 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, have given notice of their wish to take part in the adoption and the application of this Directive (8560/02 JUSTCIV 68 and 8558/02 JUSTCIV 67).

3. In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark does not take part in the adoption of this Directive and is not bound by it or subject to its application.
4. The European Parliament delivered its Opinion on the draft Directive on 25 September 2002 on the basis of the Commission proposal (5513/02 JUSTCIV 7) and having regard to the version of the Directive forwarded by Coreper, reflecting the state of play of discussions within the Council at the beginning of September (10856/02 JUSTCIV 105)<sup>1</sup>. The Economic and Social Committee delivered its Opinion on 29 April 2002.
5. At its meeting on 18 September 2002, Coreper already examined some issues relating to the draft Directive.<sup>2</sup> In the light of that debate, JHA Counsellors met on 24 September 2002 and considered possible solutions to reach agreement on those issues.
6. At the same time, the Committee on Civil Law Matters (Legal Aid) examined the other provisions relating to the draft Directive during its meeting on 25 and 26 September 2002.
7. Work on this proposal is making very positive progress within the fora of the Council (see progress report in document 12427/02 JUSTCIV 137) and there is a common desire among Member States to adopt the Directive in the near future. It is in this context that the Presidency has the intention to submit this file to Coreper.
8. In the light of work done, the Presidency would like to suggest to Coreper the following compromise proposals with a view to reaching agreement on the main issues relating to the draft Directive.

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<sup>1</sup> See preamble to the European Parliament Opinion.

<sup>2</sup> See 11890/02 JUSTCIV 130. The issues examined were the lists of exclusions from the scope of the Directive (Article 1), the definition of cross-border disputes (Article 1a), pre-litigation advice (Article 3(2)) and the application of the principle of non discrimination (Article 6).

## II. Compromise suggested by the Presidency

### *a) List of exclusions from the scope of the Directive.*

9. The Commission proposed that legal aid should be applied to all civil and commercial matters and that no exclusions should be provided for in the Directive.

10. It appeared during work on this Directive that in certain Member States there are matters that are excluded from legal aid. In this context, some of these delegations requested that the Directive should provide for the two following exclusions from the scope of application of the Directive.

- **Defamation cases** (suggested by the United Kingdom and the Irish delegations) <sup>1</sup>
- **Cases arising out of or relating to the applicant's business activities** (suggested by the Irish, Netherlands, Luxembourg and United Kingdom delegations)<sup>2</sup>

11. Several delegations expressed doubts or opposition to such exclusions. They consider that in the context of the European Union, legal aid should be granted in all cases involving civil and commercial matters. Moreover, since the scope of application of the Directive is already limited to cross-border cases, some of these delegations considered it unacceptable to provide for such exclusions.

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<sup>1</sup> Defamation cases was excluded from legal aid at national level for a number of reasons (see 11362/02 JUSTCIV 115): proceedings are speculative, it is open to abuse, and conditional agreements are available as an alternative form of funding for strong claims. Moreover, defamation should be understood in a restrictive manner.

<sup>2</sup> They took the view that legal costs were part of the commercial risks associated with running a business or profession and should not be met by the State (see 11362/02 JUSTCIV 115).

12. The Presidency suggests, as a compromise, that the Directive should be applied to all civil and commercial matters. However, when and if taking a decision on the merits of a case, as indicated in Article 14(2), Member States shall consider with particular attention if the applicant is claiming damage to his or her reputation, but has suffered no material or financial loss and whether the application concerns a claim arising directly out of the applicant's trade or profession. In this context, the Presidency suggests that Article 14(3) should be worded as follows:

*Article 14*  
*Conditions relating to the substance of disputes*

(...)

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.*

**b) *Definition of cross-border disputes (Article 1A)***

13. Article 1A defines what should be understood by a cross-border dispute. However, it appeared during the discussions that there were different interpretations of that Article.

14. Some delegations felt that cross-border implications should be interpreted broadly to mean that the Directive would apply to any dispute in which at least one of the parties was domiciled or habitually resident in a Member State other than the forum State.

15. In other words, in proceedings involving several parties, the Directive would apply to all parties even if only one of them was domiciled or habitually resident in a Member State other than the one where the court was sitting. This interpretation would also be supported by the European Convention on Human Rights (equality of both parties in a dispute). These delegations were of the opinion that option 1 in 12427/02 JUSTCIV 137 should be chosen.

16. This interpretation was not acceptable to other delegations. They were of the view that the Directive would apply only to a person applying for legal aid who was domiciled or habitually resident in a Member State other than the forum State. Moreover, there would not be a risk of discrimination between parties to the same dispute since all Member States were contracting parties to the European Convention on Human Rights. For those delegations, only option 2 would be acceptable.

The Presidency suggests that Article 1A is read as follows:

*Article 1A*  
*Cross border disputes*

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.*

**c) *Pre-litigation advice***

17. According to Article 3(2), legal aid is considered to be appropriate when it also guarantees pre-litigation advice.

18. For certain delegations such a definition went beyond the needs of legal aid in the context of the Community. Article 6 of the European Convention on Human Rights only indicated that a person had the right to be heard by a tribunal, pre-litigation advice not being required.

19. Moreover, for those delegations, the inclusion of pre-litigation advice in the definition of legal aid would imply important additional costs for these Member States, unless the definition were subject to certain guarantees. For these reasons, they requested that pre-litigation advice be excluded from the scope of application of the Directive. In particular, the French and Italian delegations tabled reservations on Article 3(2).

20. For other delegations, pre-litigation advice was an important element of legal aid and thus it should be included in the Directive. Pre-litigation advice promotes out-of-court settlements and is an increasingly important element in the legal aid system of certain Member States.

21. JHA Counsellors discussed this question. They consider a French proposal on this issue, that was welcomed.

22. In the light of these discussions, the Presidency proposes, as a compromise, that Article 3(2) is worded as follows:

*Article 3*  
*Right to Legal aid*

(...)

2. *Legal aid is considered to be appropriate when it guarantees;*

- a) pre-litigation advice within a view to reaching a settlement prior to bringing legal proceedings;*
- 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.*

(...)

23. Moreover, a declaration should be included in the minutes of the Council at which the Directive is adopted indicating that the Member States, when transposing the Directive, may provide that pre-litigation advice is guaranteed through existing national authorities or services that facilitate access to justice.

**d) *Costs incurred by the opposing party (Article 3(2))***

24. According to Article 3(2), legal assistance and representation in court covers the costs of proceedings of the recipient. In certain Member States, national law provides that legal aid shall cover also the costs incurred by the opposing party. These costs are borne by the recipient of legal aid. In other states, those costs are not covered by legal aid.

25. This is an important item for certain delegations. It is in this context that the Spanish delegation suggested adding a second paragraph to Article 3(2) as follows:

*Article 3  
Right to legal aid*

(...)

3. *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.*

(...)

**e) *Costs related to the cross-border nature of the dispute.***

26. The draft Directive provides that the costs of legal aid should be provided by the Member State of the forum to cover costs connected with the cross-border dimension of the dispute. This means that the costs of interpretation and translation of the documents which the competent authority considers necessary for the resolution of the case as well as certain travel expenses (required by the law or by the court of that Member State) should be borne by the State of the forum.

27. During the last meeting of the Committee on Civil Law Matters, there was broad acceptance of a text for Article 5 but certain delegations expressed doubts on the principle of including the costs relating to travel expenses in the scope of the Directive. In particular, the French delegation tabled a reservation on this question due to the financial implications for the national budget. <sup>1</sup>

28. Coreper is invited to consider whether all delegations, and the French delegation in particular, are now able, in a spirit of compromise, to accept Article 5 as it stands.

*f) Principle of non-discrimination*

29. Article 6 reflects the ban on discrimination on grounds of nationality enshrined in Article 12 of the Treaty. The Commission proposes extending this principle to all persons who are habitually and lawfully resident in a Member State.

30. The Portuguese delegation entered a reservation on Article 6 since it considered that it should be applicable to third country nationals legally resident in a Member State only on the basis of the principle of reciprocity. This would imply that any third country national living in Member State "A" would receive legal aid in Member State "B" only if nationals of that Member State received legal aid in the third country of which the person concerned was a national.

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<sup>1</sup> Article 5 is worded as follows :

"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)).

31. A number of delegations expressed doubts or objections to this idea since it would exclude persons who were lawfully resident in a Member State and who in certain cases were in special need of assistance and protection.

32. The Presidency suggests that, due to the nature of the Directive, legal aid should be provided to all persons who are habitually and lawfully resident in one of the Member States.

*g) Time-limits*

33. The President suggests the following time-limits for the application or the implementation of the Directive:

- a) the Directive should enter into force on the date of publication in the Official Journal;
- b) the standard form for the transmission of legal aid applications should be established within 6 months of adoption of the Directive;
- c) the standard form for legal aid applications should be established within 24 months at the latest of the adoption of the Directive by the Council;
- d) Member States should transpose the Directive into national law no later than 24 months after the adoption of the Directive of the Council.

### III. Conclusions

34. Coreper is requested to take a position on the issues indicated in item 2. These matters should be examined **as a package** with a view to reaching a general consensus on the Directive.

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