



CCBE RECOMMENDATIONS ON LEGAL AID

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I. INTRODUCTION

The Council of Bars and Law Societies of Europe (CCBE) is the representative organisation of around 1 million European lawyers through its member bars and law societies from 31 full member countries, and 11 further associate and observer countries.

Access to justice is a fundamental right. Legal aid is an essential tool in ensuring access to justice. Access to justice is an essential part and instrument of human rights, stipulated and protected by the European Convention on Human Rights¹, i.e. free access to justice for any individual, without regard to his or her social status or economic position (see Article 6 of the ECHR). It is considered as one of the main pillars of the Rule of Law and individual dignity. It is the duty of states and governments to guarantee, organise and finance such legal-aid systems, which permit those with the least means to obtain access to justice and essentially include the cost of legal advice, defence and representation by legal professionals, who are for the most part lawyers, as well as other legal-service providers, such as international and national organisations.

In international law, many other legislative texts and judgments govern the practice of this right², in order to guarantee that those individuals in need of legal aid in a country other than that of their residence may also benefit from the system. Other conventions also exist such as the European Agreement on the Transmission of Applications for Legal Aid, signed in Strasbourg in 1977, or the 1980 Hague Convention intended to ease international access to justice, which provide a scheme of transmission of applications for legal aid between the contracting parties.

The European Union accords fundamental importance to compliance with human rights and access to justice in accordance with Articles 2, 6, and 7, of the Treaty on the European Union (as amended by the Treaty of Lisbon) and in its Charter of Fundamental Rights³. The Legal Aid Directive (Directive [2003/8/EC](#)) adopted on 27 January 2003, furthermore, aimed to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes. It is also important to note that the European Commission has identified the following minimal procedural safeguards: access to legal advice, both before the trial and at trial; access to free interpretation and translation; ensuring that persons who are not capable of understanding or following the proceedings receive appropriate attention; the right to communicate, inter alia, with consular authorities in the case of foreign suspects, and notifying suspected persons of their rights (by giving them a written 'Letter of Rights')⁴.

It is important to highlight the diversity of different legal-aid schemes and national legal traditions that must be taken into consideration in implementing this right. In particular, one of the main divergences in European systems is in having a state-run scheme (by the administration of justice) as opposed to one governed by a delegated organisation (by Bar councils) with supervision.

The increase in freedom of movement has multiplied the workload due to increased numbers of tourists, trade, cross-border crime, marriages and divorces between people from different Member States. This has in turn intensified the pressure on the number of cases and the administration of budgets allocated to legal aid. Every period of crisis, such as that of the emergence of international terrorism, usually has a serious impact on citizens' rights. For all of these reasons, the current situation must be considered as an opportunity for the EU, through the Stockholm Programme, to

1 The Convention provides in Article 6 that 'everyone is entitled to a fair and public hearing' (...). It specifies that anyone charged with a criminal offence has the right 'to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require'.

2 http://www.europarl.europa.eu/comparl/libe/elsj/charter/art47/default_en.htm

3 Article 47(3) of the Charter of Fundamental Rights of the European Union provides as follows: 'Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice'.

4 Please see www.ccbe.eu. CCBE Manifesto: The Right Kind of Justice for Europe, and both CCBE responses to the Green Paper and to the Proposal for a council framework Decision on certain procedural rights in criminal proceedings throughout the European Union.

introduce effective legal aid throughout its territory by legislating on the matter and by financing its implementation.

II. EXECUTIVE SUMMARY

The CCBE calls on the European Institutions and, where appropriate, Member States to undertake the following actions:

1. Deal with **legal aid as a fundamental right** that guarantees access to justice and allows real and effective defence – and not only formal defence - which should be granted to all, irrespective of residence or nationality. Consider legal aid as the priority procedural safeguard;
2. Set up a **specific EU budget line** to ensure **the development of a European legal-aid scheme and to support national schemes within Member States**;
3. Give specific attention to **assistance to suspects and particularly vulnerable groups**;
4. **Ensure legal-aid coverage** for all legal areas, jurisdictions and alternative dispute resolutions, including the assistance of a lawyer at all stages of the proceedings, the assistance of experts, translation and interpretation, and other trial costs;
5. Guarantee **specific coverage for additional costs arising out of cross-border trials**;
6. Set **common minimum standards** for granting legal aid within the territory of the EU;
7. Circulate and make easy broad **access for citizens to the necessary information** on how to receive legal aid;
8. Promote **e-management for legal aid** by applicants and interoperability by public services;
9. Recognise the **essential role of lawyers in legal proceedings, in particular by highlighting deontological supervision and quality of service initiatives developed by Bars and Law Societies**;
10. **Support specific training for lawyers** who provide services in the framework of legal aid.

III. CCBE RECOMMENDATIONS

1. Legal aid is a fundamental right

Legal aid is a vital tool by which the fundamental right of access to justice is respected. It is of the utmost importance in the protection of citizens' rights in a democratic society. It requires that a litigant/defendant has real and effective access to the court and a real opportunity to exercise his or her rights to all legal intents and purposes. This implies that where the means of litigants/defendants do not allow them to appoint a lawyer, the right to a fair hearing guaranteed by the European Convention on Human Rights also requires that they be provided with legal aid. A natural consequence of these rights is that the parties should be on equal terms.

The main purpose of the recommendations is to ensure the efficient enforcement of the fundamental right to a fair trial, which starts with the right of access to justice by means of legal advice which, in the case of insufficient economic capacity, must be funded by the competent public services in order to prevent any person from being deprived of a defence. Defence must indeed be effective and real and not only formal⁵. In seeking to enforce or defend one's rights no-one should be denied the right to a fair trial due to lack of financial means.

2. EU financial commitment is needed to ensure the effective application of this fundamental right

A discussion of the economic aspect is unavoidable since such right needs proper funding, without which – or in case of its reduction – States cannot obtain efficient results when ensuring such fundamental socio-legal services for European citizens and societies.

While ensuring the effective protection of citizens' fundamental rights does carry a cost, it is impossible to put a price on the injustice and human suffering that would otherwise arise.

Both national and supranational schemes based on safeguards guaranteeing rights and freedoms of individuals, as recognised by democratic states through the principle of the rule of law and by international institutions, must absolutely be provided with necessary content and resources to guarantee their practical efficiency.

Consequently, the Charter of Fundamental Rights of the European Union, made legally binding by the Treaty of Lisbon, sets out a catalogue of rights from which all citizens of the Union must benefit, and which EU institutions and Member States must respect and apply when they implement EU legislation.

In Chapter VI relating to Justice, the Charter expressly refers in Article 47 to the right to legal aid to guarantee Access to Justice. Given that the Treaty of Lisbon gives the Charter equal legal value with the Treaties, it thereby grants more rights and freedoms to citizens, the duty of the European Institutions is therefore to allow the necessary resources to guarantee its enforcement and the enforcement of European law by the Member States.

An unavoidable challenge for the European Union is to assume responsibilities in the following domains: regulation and funding, the scope of recognised rights, and, to the extent that it exerts broad legislative competences in such matters, deciding whether legal aid should be only for cross-border issues, or whether also for other domains pertaining to the rights of persons.

Therefore, the CCBE – in the interest of justice and the rule of law – calls on the European Institutions to prioritise the setting up of a budget line (in the next annual budget and financial perspectives for 2013-2020) in order to ensure the development of a European legal-aid scheme and to support national schemes within Member States, since it is sometimes difficult for Member States to provide financial cover for all needs and costs connected to access to justice for citizens in cross-border cases. However, this financing should not modify in substance the organisation and the very functioning of the respective legal aid schemes of the Member States. The financial support should focus on cross-border cases, aid at borders and European and/or international jurisdictions.

⁵ ECHR judgment, *Artico v. Italy*.

3. Specific attention is required regarding assistance to suspects and vulnerable groups

In criminal matters, specific attention should be accorded in order to assist suspects and for certain trials (serious charges, judgments by jury, accelerated procedures etc.)

Likewise, specific treatment – including preliminary advice – must be granted, by proper legislation, to the most vulnerable groups, such as victims of gender-based violence, minors, older persons, migrants and people with disabilities.

Moreover, the context of the current global economic crisis affects all aspects of life in society, and also has an immediate impact on legal aid. With the growing immigration phenomenon, due to sustained growth by the European economy in the recent past, immigrants were among the first victims of the crisis, as were their working conditions, both social and economic, which were already precarious. In such a context where repressive measures affect the right to access legal aid, the CCBE Presidency has sent a letter to the European Parliament with a view to promoting access by migrants to legal aid, which was not sufficiently safeguarded by the wording of the Directive, during the discussions on the 'Return Directive'⁶.

4. The scope of legal aid

Legal aid must cover the main national jurisdictional orders (e.g. civil, criminal, administrative etc.). Legal aid should also properly cover all European and international bodies and courts (ECJ, ICT, ECHR, ICC etc.).

The right to access legal aid must include, *inter alia*, the following activities:

- 1- **Assistance of a lawyer** (lawyer understood within the meaning of Directive 98/5/EC⁷). Based on the concept of universal defence, the assistance of a lawyer must be granted to all, irrespective of residence or nationality and must cover every area of legal intervention before courts or any other alternative dispute resolution (ADR) body, and must include:
 - a. Advice before trial, which includes in particular: information on the possible use of the legal-aid scheme, which can be free depending on the case, as well as the content and scope of such a right⁸ - help to legalise the legal-aid request-form application templates - assessment of whether the application for legal aid will be successful - nomination or refusal of a lawyer's appointment as defender (provisionally and without prejudice to a subsequent resolution confirming the lawyer's appointment within the legal-aid scheme) - effects of the application on the limitation of action, suspension of proceedings etc.
 - b. Any type of proceedings – even when the intervention of a lawyer is not obligatory – before any judicial or administrative body, including ordinary and extraordinary appeals as well as the enforcement of judgments and decisions.
 - c. The principle of unity of defence: the same lawyer acts for all phases of proceedings and potential ancillary cases, in certain areas defined by the bars.
 - d. Covering the various parties within the proceedings ...
 - e. Extrajudicial solution and ADRs.
 - f. Intervention of a second lawyer in significantly important and/or long trials or where significant advocacy skills are required.

6 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

7 i.e. any person who is a national of a Member State and who is authorised to pursue his professional activities under one of the professional titles listed in Directive 98/5 as modified by the Acts of Accession of new Member States.

8 The ECHR judgment of 27 March 2007 in *Talat Tunç v. Turkey* considers the violation of Art. 6(1) and 6(3)(c) of the Convention based on a citizen's complaint on the lack of information on his right to ask for legal aid, alleging that the obstacles to the effective exercise of the right of defence could have been overcome if national authorities had been more active in order to ensure that the interested party could ask for free legal aid. It therefore condemns these authorities for their passivity and the violation of their obligation to guarantee a fair trial.

g. The free choice of the lawyer for the defence which guarantees the independence of the lawyer from judges and public prosecutors, and guarantees trust between the client and lawyer. This is essential especially in criminal matters.

2- **Assistance of experts:** Where the defence requires a technical report.

3- **Right to interpretation and translation.** This right must be guaranteed not only for procedural acts in which the beneficiary must intervene, but also for the purpose of his or her full knowledge of the proceedings and in communication with the lawyer.

4- **Exemption from ancillary costs:** People who are below the thresholds set by national laws must have access to courts by being exempted from ancillary expenses such as notary and registration fees, publications, taxes, costs of filing legal documents, transport costs and others.

5. Free legal aid in cross-border cases

Until now, the binding EU legal text on cross-border legal aid has been Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, as well as its implementing regulations.

At the time of its adoption, the CCBE declared that establishing minimum common rules for cross-border cases proved to be essential in allowing effective access to justice. Six years on, the CCBE notes that, worryingly, not only does legal aid still not extend to certain basic legal and social domains, in the absence of any improvement in regulation, but also a large quantity of cross-border legal instruments have been developed without guaranteeing the rights of persons in this respect. This is particularly obvious in criminal matters with the European arrest warrant, and in the management of external borders with the Return Directive. The first of these measures was adopted without approval of a framework of common procedural safeguards, and the second was adopted without guaranteed access to legal aid for part of the inland, maritime and air frontiers of the EU. The CCBE wishes to underline that in its response to the Commission Green Paper on Directive 2003/8/EC, it had stated that the principle of non-discrimination had to be extended to persons from third countries.

With regard to European citizens, it clearly becomes contradictory that the divided competences of the EU give a person rights in a certain legal-aid area and not in others – whereas EU legislation affects their rights more severely. This patchwork phenomenon, which has already been criticised by the CCBE on many occasions, could be resolved in this very sensitive area for citizens through a horizontal standard leaving some margin to Member States for more favourable provisions.

Furthermore, it should be underlined that cross-border trials often imply additional costs that should also be covered by legal aid. The main additional expenses are the following:

- Expenses for a second lawyer – double defence – as long as it is necessary for the beneficiary's defence or as long as the trial or stage in the proceedings is open in two or several European countries;
- Interpretation and translation of documents;
- Travel expenses for the beneficiary who must appear before a Member State authority, and travel expenses for his or her lawyer;
- Expenses linked to the effects of the judgment in the Member States concerned with the dispute.

6. Common minimum standards for granting legal aid within the territory of the EU

In order for the Area of Freedom, Security and Justice to develop, and in order for it to guarantee the free movement of people, strengthen mutual trust and judicial cooperation and allow some compatibility between applicable rules within the European Union, officially recognisable minimum principles should be introduced.

Starting from the difference between the economic capacity and the cost of living in the different EU Member States, some minimum criteria for access to justice could be officially recognised. Beyond such limits, applicants could have to pay costs, totally or in part.

Likewise, within a larger framework than that established by Directive 2003/8/EC, the following minimum principles could be considered to qualify for legal aid:

- 1- Being a natural person, irrespective of residence or nationality.
- 2- Certifying evidence of insufficient funds – private legal expenses insurance being taken into consideration – to face proceedings according to scales and limits set by law.

Therefore, in order officially to recognise these minimum scales at a European level, a table with correcting indexes could be designed.

7. Improve access for citizens to the necessary information on how to receive legal aid

The CCBE acknowledges the work already done at EU level with a view to enhancing access to information for citizens on how to receive legal aid (e.g. information available on the European Judicial Network in civil and commercial matters and on the European Judicial Atlas websites).

However, the CCBE believes that more could be done both at EU and national level in order to improve citizens' awareness regarding their right to legal aid, notably in cross-border cases. Particular efforts should be made in favour of vulnerable persons who do not necessarily have access to IT tools. The EU should therefore take initiatives, and encourage Member States to take initiatives, to that end through, for example, the financing of awareness campaigns.

8. E-management of legal aid

In order to guarantee the right to legal aid, the recognition and granting system has to be accessible, simple and efficient. The CCBE would therefore like to suggest the use of e-management of legal aid.

Applying for legal aid could be made possible through a secure webpage that directly provides information and economic simulations. The applicant could fill in application forms through the Internet. Subsequently, applicants possessing an e-signature compliant with European standards could identify and manage any necessary documentation with full legal validity through the Internet (e.g. obtaining a copy of a tax return, household composition etc).

This electronic-form option, through a secure network, would not replace traditional forms and procedures and would rather be a complementary option – efficient and cheaper in terms of financial savings, and human and environmental resources.

Therefore, an interoperable system at a European level including European courts and different public services, Bars and Law Societies and citizens should be set up on the long term. Some experience in this area already exists in some European Bars and Law Societies⁹.

The e-Justice portal could also be used as a tool for this purpose in the future. At a first stage, the e-Justice portal is to be regarded as an information portal for citizens, companies, administrations, and legal professionals. The CCBE considers that European information tools for citizens on legal aid and ADRs are good quality, even though one regrets that they are not sufficiently used.

The new e-Justice portal should – in its second stage – host a number of services, which could include e-management of legal aid, secure communication between lawyers involved in cross-border trials¹⁰, a lawyer search engine for citizens who do not meet requirements for legal aid¹¹ and the setting up of an electronic platform for some mediation proceedings.

⁹ Please see www.justiciagratis.es

¹⁰ Please see www.penalnet.eu

¹¹ Please see www.ccbe.eu (European lawyer search).

9. Role of lawyers and Bars/Law Societies

The fundamental role of lawyers and professional associations of lawyers in the administration of justice and the protection of human rights and fundamental freedoms has been recognised by the Council of Europe¹².

The role of Bars and Law Societies in the administration of legal aid varies from one Member State to another. In particular, one of the main differences between European systems is management by the State (by the administration of justice) as opposed to delegated management (by bar councils) with supervision. However, common elements are first, the essential role of lawyers in legal aid proceedings, and second, the deontological supervision ensured by Bars and Law Societies in relation to their members, thus ensuring a control on the quality of lawyers' services.

For many years, lawyers have been the essential element in protecting the right of access to justice, when it could not be exercised otherwise by the citizen, by providing legal services in the framework of legal aid.

The Council of Europe recommendations provide that '*All necessary measures should be taken to ensure that all persons have effective access to legal services provided by independent lawyers.*'¹³ References to the importance of access to justice, the professional secret and the independence of lawyers may also be found in various decisions of the Court of Justice of the European Union.

Therefore, litigants seeking access to the justice system need ready and immediate access to competent and professional advice and guidance from the beginning of the process. This can only be achieved by providing competent and willing professional assistance from the earliest moment of legal concern right through to the conclusion of the judicial process.

Furthermore, lawyers have a role to play in the delivery of information in relation to legal aid. The CCBE Code of Conduct provides that '*A lawyer shall inform the client of the availability of legal aid where applicable.*' (Article 3.7.2.)

10. Support continuing professional development and training for lawyers who provide services in the framework of legal aid

The Council of Europe recommendation Rec(2000)21 of 25 October 2000 on the freedom of exercise of the profession of lawyer stresses that "*Legal education, including programmes of continuing education, should seek to strengthen legal skills, increase awareness of ethical and human rights issues, and train lawyers to respect, protect and promote the rights and interests of their clients and support the proper administration of justice.*" (Principle II paragraph 3)

The CCBE would like to highlight that lawyers, too, should benefit from European-funded training as they are essential actors in the administration of justice and indeed the first persons that users of justice contact. Lawyers should be on an equal footing with judges and prosecutors in initiatives to provide funding for training to legal practitioners in EU substantive and procedural law. Such training could be delivered through existing training bodies at the national and European levels. The organisation of such training, which should be optional, must fully respect the independence of lawyers in Europe. It is also important that training programmes for the accession of neighbouring countries of the European Union include lawyers and not focus only on judges and prosecutors. This should fall under what the Commission indicates as one of the five main tools for implementing the Stockholm Programme, i.e. that 'political priorities must be accompanied by adequate financial resources'.

In this context, the CCBE calls on the EU and Members States to support (including providing financial support to) national Bars and Law Societies in the training and continuing professional development of lawyers involved in the provision and delivery of legal aid, in order to ensure the delivery of legal aid services to the highest possible standards.

¹² Council of Europe recommendation Rec(2000)21 of 25 October 2000 on the freedom of exercise of the profession of lawyer

¹³ Council of Europe recommendation Rec(2000)21 of 25 October 2000 on the freedom of exercise of the profession of lawyer – Principle IV, Paragraph 1.