

---

# CCBE

---

**CONSEIL DES BARREAUX DE  
L'UNION EUROPÉENNE RAT DER  
ANWALTSCHAFTEN DER  
EUROPÄISCHEN UNION CONSEJO DE  
LOS COLEGIOS DE ABOGADOS DE LA  
UNIÓN EUROPEA CONSIGLIO DEGLI  
ORDINI FORENSI DELL'UNIONE  
EUROPEA RAAD VAN DE BALIES  
VAN DE EUROPESE UNIE CONSELHO  
DAS ORDENS DE ADVOGADOS DA UNIÃO  
EUROPEIA ΣΥΜΒΟΥΛΙΟ ΤΩΝ  
ΔΙΚΗΓΟΡΙΚΩΝ ΣΥΛΛΟΓΩΝ ΤΗΣ  
ΕΥΡΩΠΑΙΚΗΣ ΕΝΩΣΗΣ RÅDET FOR  
ADVOKATERNE I DEN EUROPÆISKE  
FAELLESKAB EUROOPAN UNIONIN  
ASIANAJAJALIITTOJEN NEUVOSTO  
RÁÐ LÖGMANNAFÉLAGA Í  
EVRÓPUSAMBANDINU RÅDET FOR  
ADVOKATFORENINGENE I DET  
EUROPEISKE FELLESKAP RÅDET FOR  
ADVOKATSAMFUNDEN I DEN  
EUROPEISKA UNIONEN **COUNCIL OF  
THE BARS AND LAW SOCIETIES OF THE  
EUROPEAN UNION****

---

## CCBE COMMENTS

**relating to the 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**

---

---

**CCBE Comments**  
**relating to the 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**

---

Further to the Green Paper on legal aid in civil matters adopted in February 2000, and the hearing organised in February 2001, the European Commission adopted on January 18<sup>th</sup>, 2002, 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.

The CCBE welcomes a community initiative on legal aid. In its response to the Green Paper from the European Commission on legal aid in civil matters, the CCBE underlined that the current patchwork of legal aid systems in the European Union did not provide reasonable and effective means of access to justice for citizens of the European Union, and that, consequently, Community legislation would be necessary.

Therefore, the CCBE believes that it is necessary to establish minimum common rules relating to cross-border cases in order to ensure the widest and fairest access to justice for all EU citizens.

After having collected national delegations' opinions regarding the draft Directive's content and the impact of its provisions on the various Member States national law, the CCBE wishes to comment on some points of the proposal. (for convenience, the CCBE comments appear in bold under the articles of the draft Directive).

**General remarks:**

**- Scope of application of the draft Directive**

**The CCBE considers that the way in which the Directive is drafted is not clear in relation to its scope of application. The draft Directive is supposed to apply to cross-border disputes but some parts of the text suggest that it will apply to legal aid domestically. In page 3 of the explanatory memorandum, it is mentioned that : “*To guarantee this proper level, it is necessary to ensure that compatibility of certain provisions of national law.*”**

**Article 65 of the Treaty refers to “measures in the field of judicial co-operation in civil matters having cross-border implications”. As a result, there may be a legal problem with the scope of the Directive as currently drafted. However, the CCBE shares the aim of the current draft.**

## - Impact of the Directive

There are two principles which the CCBE believes should be promoted in relation to the impact of the Directive. One is that there should be clearly worded minimum standards for granting legal aid and for the economic thresholds of candidates under the Directive, to avoid undermining its purpose. The second is that subsidiarity should be respected where Member States already have detailed legal aid systems. These two principles may well come into conflict – if, for instance, the minimum standards go beyond what a Member State currently grants. Until the minimum standards are more clearly and precisely worded (as requested elsewhere in the CCBE comments), it will be impossible for the CCBE to tell whether there is a conflict, and to recommend how it should be resolved.

### Article 1

#### *AIMS AND SCOPE*

*The purpose of this Directive is 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.*

*It shall apply to civil disputes of all types, irrespective of the type of court.*

**The CCBE is in favour of the extension of legal aid to all civil disputes irrespective of the type of court. However, it considers that it should be left to Member States to decide which type of court should be covered.**

### Article 2

*For the purposes of this Directive:*

*“Legal aid” means all resources made available to persons to ensure their effective access to justice where their financial resources are inadequate to cover the costs of litigation, and includes at least the services of a lawyer and the costs of proceedings;*

*“Litigation in civil matters” means all litigation in matters of civil law, including commercial law, employment law and consumer protection law;*

*“Costs of proceedings” means the costs of the proceedings themselves and lawyers’ fees.*

**The CCBE is of the view that the expression “litigation in civil matters” should be clarified as there are countries in which administrative law would be included in civil matters.**

**Article 2 of the draft Directive should also be made clear as to whether all the various types of legal assistance which are provided in the Member States are within the scope of the draft Directive (for example in the United Kingdom there are provisions for civil legal aid, legal advice and assistance and assistance by way of representation).**

## **Article 3**

### ***RIGHT TO LEGAL AID***

*All persons involved in a civil dispute, as either claimant or defendant, shall be entitled to receive appropriate legal aid if they do not have sufficient resources within the meaning of Article to enforce their rights by court action, without prejudice to Article 14.*

*Legal aid shall include the services of a lawyer and/or other person entitled by the law to represent parties in the courts, providing pre-litigation advice and representation in court, and exemption from, or assistance with, the cost of proceedings.*

*Member States may provide that recipients of legal aid must refund it in whole or in part at the end of the procedure if their financial situation has substantially improved meanwhile.*

**The CCBE supports the principle in article 3, paragraph 1, i.e. all persons shall be in a position to obtain legal aid when they do not have sufficient resources.**

**The CCBE however regrets the too vague feature of this provision. The word “appropriate” should be defined to make clear that it means appropriate to the dispute not to the government’s budget.**

**The CCBE disagrees with the wording of paragraph 2 which refers to the services of a lawyer “and/or other person entitled by the law to represent parties in the courts”. The CCBE is of the view that a citizen’s legal interests are best safeguarded by the use of a lawyer before justice. Especially in cross-border cases, it is of particular importance that legal advice is provided by a professional who has the necessary qualification and expertise. The assistance of a lawyer, who has high qualification and expertise due to a particular education and practice, is in the interest of consumers, in the general public interest for a good functioning of procedures and in the public interest of avoiding unreasonable procedures via legal aid.**

**The CCBE considers that the right to a lawyer should be included in the draft Directive. It is the CCBE’s opinion that not only should legal aid recipients have a right to a lawyer but also legal aid schemes should primarily cover only the legal profession.**

## **Article 4**

### ***RESPONSIBILITY FOR LEGAL AID***

*Legal aid shall be granted by the Member State in which the court is sitting in accordance with its law and with this Directive.*

**The CCBE supports the Commission’s choice whereby in the case of a cross-border dispute, legal aid shall be granted by the Member State in which the court is sitting according to its own financial criteria.**

**The CCBE however considers that article 4 should include the fact that legal aid should be granted by court decision (the court where the proceedings takes place).**

## **Article 5**

### ***COSTS RELATED TO THE CROSS-BORDER NATURE OF THE DISPUTE***

*Legal aid granted in the Member State in which the court is sitting shall cover the costs directly related to the cross-border nature of the dispute.*

*Such costs shall include interpretation and translation and travel costs where the physical presence of the persons concerned in court is mandatory.*

*The Member State in which the legal aid applicant resides shall grant legal aid to cover costs incurred by the recipient in that state and, in particular, the cost of consulting a local lawyer.*

**The CCBE believes that it should be made clear, what is actually meant by “the costs directly related to the cross-border nature of the dispute”. It should be expressly stated in paragraph 1 of article 5 that the “costs” include the costs of consulting a lawyer in the Member State in which the court is sitting (only the costs of consulting a local lawyer in the Member State in which the legal aid applicant resides are mentioned expressly in paragraph 3 of article 5).**

## **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.*

**As indicated in its response to the Green Paper from the European Commission on legal aid, the CCBE supports the extension of the non-discrimination principle to third country nationals. However, the CCBE regrets that the proposal for a Directive from the European Commission adds as a condition that the third-country nationals shall be residing lawfully in one of the Member States. The CCBE is in favour of an extension of the non-discrimination principle to third country nationals residing habitually in a Member State, as recommended by the Hague Convention of 25 October 1980 on International Access to Justice.**

## **Article 7**

### ***CONTINUITY OF LEGAL AID***

*Legal aid shall continue to be granted to recipients to cover expenses incurred in having a judgement declared enforceable or enforced in the Member State of the forum, without prejudice to Article 3(3).*

*Article 50 of Council Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters shall apply in exequatur matters.*

*Legal aid shall continue to be provided if an appeal is brought against the recipient. Provision shall be made for re-examination of the application where the appeal is brought by the recipient.*

**The CCBE considers that legal aid should also cover enforcement proceedings in another Member State. This is important in a free market where assets may be located in any Member State. To only limit it to the Member State of the forum would run the risk that the judgement may not be enforced where assets are located outside this State.**

**In addition, the CCBE believes that legal aid should be available to the recipient to bring an appeal provided his means and the merits of his case have not radically altered. We suggest adding the words “to ensure that the applicant still satisfies the conditions relating to financial eligibility” after the word “application” and before the words “where the appeal is brought by the recipient”.**

## **Article 8**

### ***PROCESSING OF APPLICATIONS***

*The national authorities empowered to rule on legal aid applications shall ensure that the processing of applications is as transparent as possible.*

*Where applications are rejected, the reasons for rejection shall be given.*

*Member States shall make provision for appeals against decisions rejecting legal aid applications.*

**The CCBE supports the provisions of article 8.**

## **Article 9**

### ***INTRODUCTION AND TRANSMISSION OF LEGAL AID APPLICATIONS***

*Legal aid applicants who habitually reside in a Member State other than the one in which the dispute is heard may submit their application to the authorities of the Member State in which they habitually reside.*

*The relevant authorities of the Member State of residence shall transmit the application to the relevant authorities in the Member State of the forum within eight days.*

*Documents transmitted under this Directive shall be exempt from legalisation or other comparable formalities.*

*The Member States may not charge for services rendered in accordance with paragraph 2.*

*The transmitting authorities may refuse to transmit an application if it is manifestly inadmissible, and in particular if the dispute is not in a civil matter.*

*Legal aid applications transmitted in accordance with the procedure provided for by this Directive shall be written in the language of the receiving authority or in another language which it accepts.*

*This Directive replaces the Strasbourg Agreement of 1977 on the Transmission of Legal Aid Applications in relations between Member States.*

**The CCBE supports the provisions of article 9 which implement the mechanisms established by the European Agreement of 1977 on the Transmission of Legal Aid Applications.**

## **Article 10**

### ***NOTIFICATIONS TO THE COMMISSION***

*Member States shall provide the Commission with a list of authorities empowered to send and receive applications. This list shall be published in the Official Journal of the European Communities.*

*The Member States shall notify the Commission of the list of official languages of the European Union other than their own language or languages in which they accept that legal aid applications may be transmitted to the relevant authorities.*

## **Article 11**

### ***STANDARD FORM***

*To facilitate transmission, a standard form for legal aid applications shall be established by the Commission, assisted by the committee provided for by Council Regulation No 1348/2000 on the service in the Member States of judicial and extra-judicial documents in civil and commercial matters.<sup>1</sup>*

**The CCBE is in favour of creating a standard form even though this will raise many practical difficulties. The CCBE is willing to assist the Commission in drafting a standard form.**

---

<sup>1</sup> OJ L 160, 30.6.2000, p. 37.

## Article 12

### *EMERGENCY PROCEDURE*

*Member States shall ensure that legal aid applications made by applicants not residing in the Member State of the forum are examined within a reasonable [period of time]<sup>2</sup> before the case comes to trial.*

**The CCBE disagrees with the wording of article 12. When a person applies for legal aid in a Member State other than the one in which he/she resides, through an urgent procedure, he/she should be in a position to obtain legal aid very quickly. The phrase “within a reasonable period of time before the case comes to trial” may be interpreted in many different ways from one Member State to another, and does not guarantee quick treatment. It would be better to ensure examination within a fixed period of time.**

## Article 13

### *CONDITIONS RELATING TO FINANCIAL RESOURCES*

*Member States shall grant legal aid to natural persons involved in a dispute within their jurisdiction who are unable to meet the costs of proceedings as a result of their personal financial situation.*

*Member States may define income thresholds above which legal aid applicants are presumed able to bear the costs associated with disputes. These thresholds shall be defined in the light of various objective factors such as the cost of living and the costs of proceedings.*

*Legal aid applicants who do not meet the conditions set out above shall be granted legal aid if they can prove that they are unable to pay the cost of the proceedings, in particular as a result of differences in the cost of living between the Member States of residence and of the forum.*

*Legal aid applicants shall be presumed able to bear the costs of proceedings if in the instant case they enjoy actual access to a private mechanism involving a no-win no-fee agreement with the lawyer and providing that court costs will be paid by a third party.*

**The CCBE considers that the wording of article 13, paragraphs 1, 2 and 3, is too vague. These provisions do not guarantee harmonisation or fair treatment in the various Member States. The vague feature of this article is likely to undermine the principle of the directive by re-introducing unequal treatment. There need to be specific and measurable mechanisms outlined in the proposal for a directive.**

**The CCBE considers that article 13, paragraph 4, should not include a “private mechanism involving a no-win no-fee agreement with the lawyer”. Apart from the fact that these mechanisms are prohibited in a great majority of Member States and in the CCBE Code of Conduct (article 3.3.1.) - for various reasons, such as the need to**

---

<sup>2</sup> This word was added by the CCBE secretariat as it was missing in the English version of the 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.



**maintain the independence of the lawyer - the CCBE does not consider such mechanisms to be an alternative solution to legal aid. They can have a harmful effect by precluding access to justice for persons who have a small chance of winning their case. To tacitly make valid these mechanisms through a European Directive might encourage governments to develop these mechanisms with a view to decreasing the costs of legal aid, which would be harmful overall.**

#### **Article 14**

##### *CONDITIONS RELATING TO THE SUBSTANCE OF DISPUTES*

*Member States may provide that legal aid applications for actions which appear to be manifestly unfounded may be rejected by the relevant authorities.*

**The CCBE deems that the notion of “manifestly unfounded” actions should be defined in order to avoid too extensive an interpretation.**

#### **Article 15**

##### *APPLICATION TO LEGAL PERSONS*

*Legal aid shall be granted to not-for-profit legal persons based in a Member State where proceedings are designed to protect legally-recognised general interests and they do not have sufficient resources to bear the cost of the proceedings, without prejudice to Article 14.*

**The CCBE supports article 15. This article has obvious benefits, particularly in the area of human rights and other public interest cases.**

#### **Article 16**

##### *EXTRA-JUDICIAL PROCEDURES*

*Legal aid shall be granted in cases where disputes are settled via extra-judicial procedures, if the law makes provision for such procedures or if the parties to the dispute are ordered by the court to have recourse to them.*

**In principle, the CCBE supports the extension of legal aid to alternative modes of dispute settlement to the extent that such extra judicial procedures are under the control of the Court and/or comply with certain minimum legal requirements such as fair trial procedures.**

## **Article 17**

### ***REIMBURSEMENT OF COURT COSTS AND LAWYERS' FEES***

*Member States shall provide that the winning party shall be entitled to fair reimbursement from the losing party of all or part of the costs of the proceedings.*

*Member States may provide for exceptions to this principle to ensure appropriate protection of weaker parties.*

*Member States may provide that where the losing party received legal aid, reimbursement is not due or is dealt with by the State.*

**The CCBE welcomes the principle that the winning party is entitled to recover procedural costs from the losing party.**

**However, the CCBE questions the expression “fair reimbursement” used in the first paragraph of article 17. This notion should be specifically defined.**

**Moreover it is questionable whether the exception to the principle laid down in article 17 “that where the losing party received legal aid, reimbursement is not due or is dealt with by the State” will prevent people from conducting unreasonable proceedings.**

## **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.*

**The CCBE supports article 19 and considers that it must indeed be a minimum harmonisation and should not prevent Member States from making provisions for more favourable arrangements.**

## **Article 20**

*This Directive shall enter into force on the [twentieth] day following its publication in the Official Journal of the European Communities.*

## **Article 21**

*The Member States shall put into force the laws, regulations and administrative provisions needed to comply with this Directive no later than 1 January 2004. They shall forthwith inform the Commission thereof.*

*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.*

## **Article 22**

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