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**Summary of provisions of the directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes (2002/8/EC of 27 January 2003 OJ L26, 31.1.2003 p. 41) issued by the CCBE for Bars and Law Societies in the European Union**

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**Scope of application of the directive (article 1)**

1. The purpose of the directive is to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid in such disputes.
2. The directive applies, in cross-border disputes, to civil and commercial matters whatever the nature of the court or tribunal; it also applies to extra-judicial procedures, if the law requires parties to use them or if the parties to the dispute are ordered by the court to have recourse to them. It shall not extend, in particular, to revenue, customs or administrative matters.
3. In the directive, "Member State" means Member States with the exception of Denmark.

**Definition of cross-border disputes (article 2)**

For the purposes of the directive a cross-border dispute is one where the party applying for legal aid in the context of the directive is domiciled or habitually resident in a Member State other than the Member State where the court is sitting or where the decision is to be enforced. The Member State in which a party is domiciled shall be determined in accordance with Article 59 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters.

**Who is entitled to legal aid? (article 5)**

1. Only natural persons who are partly or totally unable to meet the costs of proceedings as a result of their economic situation and are involved in a dispute covered by the directive shall be entitled to receive appropriate legal aid in order to ensure their effective access to justice.
2. The economic situation of a (natural) 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 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. If applicants who are above the thresholds prove that they are unable to pay the cost of the proceedings can be granted legal aid as well.

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 within the scope of the directive. The same applies to third-country nationals who habitually and lawfully reside in a Member State (see article 4).

**When is legal aid appropriate?**

Legal aid is considered to be appropriate when it guarantees:

1. Pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings.
2. 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 7 (see below) of the directive and the fees to persons mandated by the court to perform acts during the proceedings.

## Which Member State pays what costs?

In articles 7 and 8 you can find which Member State is responsible for what costs.

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. 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
  - c. 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 and the court decides that the persons concerned cannot be heard to the satisfaction of the court by any other means.
2. Costs covered by the Member State of the *domicile or habitual residence* are:
  - 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 received, in accordance with the Directive, in the Member State where the court is sitting;
  - b. the translation of the application and of the necessary supporting documents when the application is submitted to the authorities in that Member State.

It shall be left to the law of the Member State *in which the court is sitting or enforcement is sought* whether the costs of proceeding may include the costs of the opponents imposed on the recipient of legal aid (article 3.2).

## Continuity of legal aid

Article 9 states when legal aid shall continue to be granted totally or partially to cover expenses incurred in having a judgment enforced in the Member State where the court is sitting:

1. Legal Aid shall continue to cover expenses incurred in having a judgment enforced in the Member State where the court is sitting.
2. Legal Aid shall continue to be granted to a recipient who has received legal aid shall receive legal aid provided for by the law of the Member State where recognition or enforcement is sought.
3. Legal Aid shall continue to be available if an appeal is brought either against or by the recipient, subject to articles 5 (conditions relating to financial resources, see before) and 6 (conditions relating to the substance of disputes, see before).

However, according to article 9(4) 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) and (5), 5 and 6, including proceedings referred to in paragraphs 1 to 3 of article 9. This re-examination can take place:

- a. when no legal assistance or representation in the courts or tribunals is needed, because the proceedings are especially designed to enable litigants to make their case in person needs to be provided, no legal aid will be granted, 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 (article 3(3))
- b. if the financial situation of the applicant/recipient has substantially improved or if the decision to grant legal aid had been taken on the basis of inaccurate information given by the recipient, the competent authority may then decide that recipients of legal aid must refund it in whole or in part (article 3(5))

Article 10 states that the legal aid will be extended to extrajudicial procedures if the law requires parties to use them or if the parties to the dispute are ordered by the court to have recourse to them.

### **How to make a request for cross-border legal aid?**

Legal aid application shall be completed, and supporting documents translated in the official language or one of the languages of the receiving Member State on a standard form, but does not have to be legalised (or any equivalent formality) and may be submitted in the Member State *in which the court is sitting or the where the decision is to be enforced (receiving authority)* or in the Member State of the *domicile or habitual residence (transmitting authority)* (see article 13).

### **Decisions by Member State**

The transmitting competent authority can, according to article 13(3), decide if it transmits an application or not when applications are manifestly unfounded or falling outside the scope of the directive.

According to article 6(1) Member States may provide that legal aid applications for actions which appear to be manifestly unfounded may be rejected by the competent authorities and if pre-litigation advice is offered, the benefit of further legal aid may according to article 6(2) be refused or cancelled on grounds related to the merits of the case in so far as access to justice is guaranteed.

Without prejudice to article 5 (see before) which deals with the conditions relating to financial resources, Member States shall consider the importance of the individual case to the applicant, when a decision on the merits of an application is taken. Member States may also take into account the nature of the case when the applicant is claiming damage to his or her reputation but has suffered no material or financial loss or when the application concerns a claim arising directly out of the applicant's trade or self-employed profession (article 6(3)).

If the application is transmitted it is the competent authority of the Member State *in which the court is sitting* who shall decide if legal aid will be granted or refused (see article 12). This is without prejudice to article 8, which deals with the costs covered by the Member State of the domicile or habitual residence (see before).

Article 15 deals with the processing of applications. According to this article the national authorities shall take care that the applicant is fully informed of the processing of the application. The Member State shall also give the reasons when an application is totally or partially rejected. In this article it is also stated that Member States have to make provisions for review of or appeal against decisions rejecting legal aid applications

### **Appeal or review?**

As mentioned before in article 15(3) it is stated that 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.

According to article 15(4) decisions shall always be ultimately be subject to judicial review, when the appeals against a decision refusing or cancelling legal aid by virtue of article 6 (see before) are of an administrative nature.

### **More favourable provisions**

Article 19 states that the directive shall not prevent the Member States from making provision for more favourable arrangements for legal aid applicants and recipients.

### **Relation with other instruments**

According to article 20 the directive shall, as between the Member States, and in relation to matters, to which it applies, take precedence over provisions contained in bilateral and multilateral agreements concluded by Member States including:

- a. the European Agreement on the transmission of applications for legal aid, signed in Strasbourg on 27 January 1977, as amended by the additional Protocol to the European Agreement on the transmission of applications for legal aid, signed in Moscow in 2001;
- b. the Hague Convention of 25 October 1980 on International Access to Justice.