
CCBE

**CONSEIL DES BARREAUX DE
L'UNION EUROPEENNE RAT DER
ANWALTSCHAFTEN DER
EUROPÄISCHEN UNION CONSEJO DE
LOS COLEGIOS DE ABOGADOS DE LA
UNION 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
FÆLLESKAB EUROOPAN UNIONIN
ASIANAJAJALIITTOJEN NEUVOSTO
RÅD LÖGMANNAFELAGA I
EVROPUSAMBANDINU 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**

**RESPONSE OF THE CCBE TO THE GREEN PAPER
FROM THE EUROPEAN COMMISSION
ON LEGAL AID IN CIVIL MATTERS.**

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Introduction

The CCBE, which represents some 450,000 European lawyers, welcomes the Green Paper prepared by the European Commission on Legal aid in civil matters (hereinafter referred to as the "Green Paper") and more generally it welcomes all works of reflection and initiatives which have as their purpose the improvement of access to justice for citizens of the Union, whether in their home jurisdiction or in other jurisdiction in the Union.

The right of access to justice is a fundamental democratic right and is of the utmost importance to the protection of the citizen's rights in a Democratic society. For many years, lawyers have been the essential element in protecting this right of access to justice when it could not be exercised by the citizen, sometimes by providing financial assistance and sometimes by providing the service free of charge. The CCBE is therefore pleased to express its views to the European Commission about this issue.

Article 6 (1) of the human rights convention provides in material part as follows :

In the determination of his civil rights and obligations... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."

The concept of "fair and public hearing" has been confirmed as broad in its various incidents by the jurisprudence of the European Court of Human Rights. They require that a litigant has real and effective access to the court and a real opportunity to present the case he seeks to make. This carries with it the right to be represented by a competent lawyer in order to deal with difficult issues of law. Where the means of a litigant do not allow him to engage a lawyer, the right to a fair hearing also requires that he be provided with legal aid. A natural consequence of these rights is that there should be equality of arms between litigants.

The first part of the current paper is dedicated to the CCBE observations on the overall problem regarding access to justice. The second part answers some items dealt with in the Green Paper.

I. CCBE's Observations on legal aid

1. The CCBE wishes to emphasise that certain realities must remain to the forefront of one's mind when considering the position of a litigant and the intimidating circumstances which invariably exist for a person who requires to have recourse to the justice system:
 1. Most litigants have recourse to the justice system only as a last resort, having explored every other means of resolving their difficulty.
 2. The litigant may need advice on how to qualify for and obtain legal aid under the domestic system.
 3. If the dispute involves a foreign jurisdiction, all the problems can be further exacerbated by :
 - (a) the costs incurred in the foreign jurisdiction.
 - (b) the geographical factor.
 - (c) the language problem.
 - (d) additional costs (i.e. legal advice in two separate jurisdictions, travel costs, translation costs, witnesses' costs, etc.)
 - (e) cultural worries concerning the foreign jurisdiction.

These problems are particularly relevant in securing the free movement of workers and services within the European Union

2. 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.
3. One can perhaps best demonstrate the predicament of the litigant by considering a number of not untypical and recurring examples:-
 - (a) Mr. Zaphos from Greece in order to support his wife and children goes to Germany where he works eight months each year as a construction worker, leaving his wife and three young children in Greece where he sends them money every month. Mr. Zaphos is killed in an accident at work when part of the site on which he is working subsides. His employer is a subcontractor on the site which is supervised by the architect, a firm of structural engineers and the main contractor. After the necessary formalities in Germany, Mr. Zaphos' body is returned to Greece and his funeral takes place. Mrs. Zaphos has no money to pay her rent and is forced, with her children, to go and live with her parents.

Mrs. Zaphos has no money, no telephone, no passport, doesn't speak German, doesn't know a lawyer and doesn't know the name of the main contractor on the building site, the architect or the structural engineer.

How and where does Mrs. Zaphos establish if she has a case for damages arising out of the death of her husband, how does she identify the appropriate Defendant to sue and how, if her husband has been paying tax in Germany, does she establish if she and/or her children are entitled to any rebate of tax which might have been overpaid by her husband.

- (b) Mrs. Murphy is fifty-seven years old, a widow living alone in the West of Ireland in poor circumstances. Her only child is thirty-five and living and working in Spain, he dies without children while cohabiting with a Spanish lady who came to live with him in a house which he owns. He dies without making a will. The lady with whom he was cohabiting refuses to surrender the house and claims that she married her partner informally while on holiday with him in Mexico.

Mrs. Murphy lives fifteen miles from a town, has no telephone, no passport and doesn't speak Spanish.

How and where does Mrs. Murphy begin to establish her rights?

- (c) Jennifer from London is single and has a baby. The father Henning is Danish and lives in Denmark. He supports Jennifer and the baby with an agreed monthly payment. This continues long after the relationship ended and Henning returned to Denmark. Henning visits the child in London regularly by agreement and establishes a good relationship with his child. When the child is four and a half and at school in London close to Jennifer's home, Henning loses his job in Denmark and can no longer make payments to support Jennifer and the child, nor can he afford to visit the child as regularly as he used to do. Jennifer takes the child out of school and moves to the South of France and refuses to keep Henning advised as to where his son is living and refuses to make any arrangements for access by Henning to his son. Henning was not recorded as the father of the child on its birth certificate. Henning continues to be unemployed and is without means, and living in Denmark.

How and where does he seek to establish his paternal rights of access to his child?

4. The examples set out above illustrate the type of problems which occur with increasing regularity. The only two things one can say with certainty are:
- (i) that the present patchwork of legal aid systems do not provide a readily available, competent and speedy route to a judicial determination of the problems of the kind outlined in the examples; and
 - (ii) that the fee paying litigant might have more readily available access to fundamental and specialised advice than the litigant who is dependent on a legal aid system.
5. The many inadequacies apparent in the different legal aid systems can almost all be identified as being due to lack of adequate financing, this results in limited availability of legal aid and often when legal aid is granted it is to a very restricted service. The question of funding and mandatory funding of legal aid systems in order to achieve a quality of access to justice for all citizens needs to be urgently addressed.

II. CCBE's Response to certain points of the Green Paper

In addition to the general remarks on legal aid, the CCBE focuses on the following questions raised by the Green Paper:

1. Community legislation in the field of legal aid

The CCBE entirely agrees with paragraph 3 of page 4 of the Green Paper which states that :

"In the absence of community legislation, it is for each Member State's legal system to lay down the detailed procedural rules to safeguard the rights which individuals derive from Community law, including those relating to legal aid. However, such rules may neither discriminate against those to whom Community law gives the right to equal treatment nor restrict the fundamental freedoms guaranteed by Community Law "

The CCBE is also of the opinion that Community legislation will be both desirable and necessary in order to secure a reasonable and effective means of access to justice for citizens of the Community. For the moment however, it is quite clear that the evolution of the different systems of legal aid in the Member States is at an elementary and experimental level. We should all work to create a norm which will provide a model. In this context, one might consider the existing system concerning car insurance¹.

In the meantime, the Community must support and encourage each country to develop and provide a proper system of legal aid so as to facilitate access to justice, not only for its own citizens, but for citizens of the Community who might have the requirement to litigate in another Member State, and in the context of the Green Paper to ensure that access to justice is not thwarted by administrative or qualifying standards operating in different jurisdictions.

2. Extension of non-discrimination principle to third countries nationals habitually resident in a Member State

The Green Paper raises the question of the extension of the « non-discrimination principle » to third country nationals habitually resident in a Member State (part II, point A, page 10 of the Green Paper – English version)

The CCBE is in favour of such an extension as recommended by the Hague Convention of 1980 on International Access to Justice.

¹ Council Directive 72/166/EEC of 24/04/72 on the approximation of law of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability modified several times.

3. Pre-litigation advice within the framework of a cross-border litigation

The Green Paper deals in particular with the question on costs relating to pre-litigation advice within the framework of a cross-border litigation (part II, point C, page 13 of the Green Paper - English version). It mentions the possibility for the applicant's home country to bear the costs for advice rendered in the country even if the dispute takes place in another country.

Pre-Litigation advice must be the most strategic and economic commitment that can be made towards a system of access to justice, as it is most likely, at an early stage, to discourage unmeritorious litigation while encouraging and advancing litigation which has merit.

The CCBE considers that this solution is definitely desirable inasmuch as it seems the only solution conceivable.

4. European Lawyers Database

The Green Paper mentions the project of the creation of a European lawyers database (part II, point D, pages 13 and 14 of the Green Paper– English version). Following the Commission's request to think about creating such a database, the CCBE took the initiative to submit in March 1999 a grant application under the Grotius Programme for the phase 1 of the installation of the European lawyers database. This first phase consists of a feasibility study containing the description and exploitation of the database, the ethical aspects of the publicity of lawyer's language skills and specialisation, the estimated costs of a running operation, the marketing of the database and the possible co-operation with third parties as publishers. The final version of the feasibility study has to be submitted to the European Commission before the 29th of May 2000.

Further to this feasibility study, the CCBE has submitted a new grant application under the Grotius programme in March 2000 for the phase 2 of the installation of a European lawyers database. This second phase would consist in creating links between the CCBE web site and the existing bars' web sites as well as creating the model of the European lawyers database. It would prepare the installation of the database and incite bars which do not have an electronic database yet to create one, in order to provide consumers with better information. This new project has not been approved yet by the European Commission.

After this step, there would be a last phase consisting in the final implementation of the European lawyers database.

The reason for setting up this European lawyers database is to provide better information for the litigant who will then have easier access to practical details immediately online. This will be facilitated by consulting the CCBE web site which will act as a relay for national web sites. The consumer of law will know who to consult with and how. He will thus be able to ask the right questions and get the adequate answers. This requires important work of reflection, compiling of information, organising and translating. The CCBE is ready and willing to contribute in order to secure access to justice for every one.

5. Creation of a network of correspondents and analogous application of an ISO-like system

Following the creation of a European network of lawyers, the Green Paper envisages the possibility to qualify lawyers as correspondents for one or more other Member States than their own. These correspondents should be willing to handle cases involving more than one Member State (part II, point D, pages 13 and 14 of the Green Paper - English version). The Green Paper also proposes the analogous application of an ISO-like system whereby the lawyers of the network would be permitted to carry a particular emblem or logotype.

The CCBE considers that these points are more academic than practical. It deems that networks of correspondents do not bring adequate response in this field. In any case it would be preferable to constitute a network gathering bodies empowered as far as legal aid is concerned (institutions, offices, etc.) rather than a network of correspondents gathering only lawyers.

Furthermore, the CCBE deems that it would be convenient to give importance to the linguistic issue which is essential. For instance, if a State A national is involved in a court proceedings taking place in a State B, who would bear the translation costs of the lawyer's consultation written in the language of State A?

6. Guide to Legal Aid and Advice in the European Economic Area

The Green Paper refers to the Guide to Legal Aid and Advice in the European Economic Area prepared by Professor David Walters in 1995 (part II, point F, page 17 of the Green Paper – English version). The CCBE notes that a grant application under the Grotius programme has been submitted to the European Commission on March 2000 for a new project. This project would consist in a new Guide or Handbook in a style accessible to non-lawyers which would provide details of Access to Justice for citizens of the European Union and of the other States in the European Economic Area. The publication would explain the civil procedure for commencing and conducting, whether in court, before administrative bodies or using arbitration or other alternative dispute resolution methods (ADR) and how to enforce any resulting decision. Professor David Walters would carry out the research and draft the publication. It has also been proposed, if the European Commission agrees, to include in summary form, similar matter applicable in States which are candidates for membership of the European Union in the near future (Estonia, Latvia, Lithuania, Poland, the Czech Republic, Hungary and Slovenia). The objective would also be to prepare this material in such a way that it could easily be reproduced on an Internet web site (CCBE or Europa). This project would, among others, contribute to the implementation of the Tampere conclusions and would provide information which may assist in realising the objective of bringing Member States' civil procedures into harmony. This project has not been approved yet by the European Commission.

7. Alternative means of ensuring access to justice

The Green Paper mentions the other means established by some Member States to ensure access to justice i.e. contingent or conditional fees and legal expenses insurance (part II, point G, pages 18 and 19 of the Green Paper - English version).

The CCBE recommends for consideration alternative means of financing such as:

- community wide loser pays rule,
- encouragement to the insurance industry to provide private means of funding legal aid such as citizen's payment with tax relief.