

CCBE Recommendations on legal aid

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Introduction

In 2010, the CCBE issued a set of recommendations on legal aid calling on the European institutions and Member States to undertake a number of actions. Since then, the CCBE has monitored further developments by regularly asking its member delegations to report about important evolutions in their national legal aid systems.

Following some reports about important national developments, the CCBE Access to Justice Committee decided to develop a new set of CCBE recommendations on legal aid, taking into account the most recent evolutions since 2010, and also focusing on good practices from different jurisdictions.

To this end, an extensive survey was undertaken in 2016 to examine specific aspects of the various national legal aid systems by covering all areas of law. The survey focused on the following aspects in relation to legal aid: the independence of legal aid providers, the qualification of legal aid providers, fees of legal aid lawyers, billing of expenses, budgeting of legal aid by the state, and the administration of legal aid.

The result of the survey formed the basis of the development of a new set of recommendations on legal aid. **These recommendations set out a number of guiding principles for the proper delivery of legal aid, which is an essential tool for ensuring access to justice.**

In this regard it is important to highlight the diversity of different legal aid schemes and national legal traditions that must be taken into consideration when implementing the right to access to justice.

Whilst recognising the different historical backgrounds and specifics of the various national legal aid systems in Europe, these recommendations are primarily aimed at those countries where Bars and Law Societies believe further improvements could be achieved.

I. Qualification of legal aid providers

I.1. In order to ensure the quality of legal aid services, all legal aid providers (LAPs) should, as a minimum, have a legal qualification and be able to practice as lawyers in the relevant jurisdiction.

Access to justice is a fundamental right and legal aid is an essential tool in ensuring access to justice.

The CCBE takes note that in some jurisdictions legal aid services are rendered by non-lawyers (such as NGOs or civil servants). However, in order to be able to fully comprehend and appreciate the nature of the legal issues that are at stake, the CCBE considers it important that legal aid is provided by lawyers.

The core values of the legal profession on independence, professional secrecy and the duty to avoid any conflict of interests – serves as a guarantee that legal aid services are rendered according to the rule of law.

II. Independence of legal aid providers

II.1. In order to ensure absolute independence by avoiding possible conflicts of interests or any undue interference in their work and to ensure protection of professional secrecy, LAPs should not have the status of civil servant/public employee.

Today, in some states, legal aid is provided by persons who have the status of civil servants/public employees. Generally, the concept of independence seems to be in conflict with the status of a civil servant/public employee. The status of a civil servant/public employee normally entails the submission to a hierarchy, hence the obligation to follow hierarchical orders, which could potentially have negative consequences on their independence in providing legal aid services.

Other concerns arise in relation to the control of budgetary expenses. A civil servant/public employee will have to comply with the State's/public entity's monitoring of legal aid expenses and may therefore not be fully independent to decide how much working time, or any other resources, to allocate to each case they have to deal with.

Moreover, an LAP having the status of civil servant/public employee may receive orders not to deal with a particular case, or to deal with it in a certain way. On the other hand, if, for various reasons (e.g. lack of competence in a particular area of law, moral conflict etc.) the LAP would have normally refused to handle a particular case, their status might prevent them from doing so.

LAPs should be fully independent in the sense that once being appointed they should not receive instructions or orders, directly or indirectly, from any source other than their clients. The LAP's judgment should not be guided by any consideration other than their client's interest, the LAP's objective assessment of their client's factual and legal situation, and the legal and/or regulatory provisions applicable to the client's particular situation.

To abide by these simple rules, full independence of the LAP is an absolute necessity, and is in potential contradiction with the status of civil servant/public employee.

In the countries where civil servants/public employees still are competent to provide legal aid services, this competence should not be exclusive, and the beneficiary of legal aid should have a free choice between LAPs that have a public status and those with a private status, with no additional cost for the beneficiary. Moreover, the publicly employed LAP should be subject to the same professional rules as private legal practitioners providing legal aid, in particular with respect to the principle of **independence and confidentiality**.

II.2. LAPs should have the possibility to refuse a mandate only under certain conditions.

The principle regarding the LAPs' refusal should apply unconditionally when LAPs are directly approached by citizens, and should only be subject to certain conditions (such as "conflict of interest", "lack of objectivity", "serious circumstances", "exceptional circumstances", "important reasons", "serious reasons", "legitimate grounds"), when LAPs are nominated by their Bar authority in the absence of choice by the citizen.

II.3. In principle, beneficiaries of legal aid should have a right to have regard to their preferences and wishes in the choice of legal representation.

Particularly in criminal cases, the free choice of the legal aid lawyer is one of the criteria of effectiveness and quality of legal aid. These recommendations are therefore particularly important in criminal cases, and hardly less so in non-criminal cases. The lack of choice can potentially lead to discrimination between parties who can afford to choose a lawyer and those who cannot.

In this regard, reference is made to the fact that all EU Member States must also abide by the rules set out in Directive 2013/48/EU,¹ which in conjunction with the *Commission's recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings*, highlights the importance to "have regard to the preference and wishes of the suspect or accused person in the choice of the legal aid lawyer".

III. Fees of legal aid providers

III.1. States should ensure that LAPs receive fair remuneration for their services. Resources made available in individual cases should be proportionate to the complexity and nature of the case to guarantee an effective representation and/or legal advice.

States have a legal obligation to ensure the quality of legal aid. LAPs are expected to provide quality services and the fees available for such a service must be appropriate and adequately reflect the value of the service.

Access to justice is undermined not only when an individual is denied legal aid due to a lack of sufficient funding (see Recommendation V.1), but also when the remuneration of lawyers working on legal aid cases is so low that it hinders the possibility of an effective defence and/or legal advice.

Therefore, given the different degree of complexity and nature of cases dealt with by those lawyers providing legal aid, their remuneration cannot be standardised but should take into account these factors, as it is the rule for the remuneration of lawyers providing services outside legal aid.

¹ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

III.2. When the fees of LAPs are much lower than the average market rates for similar services, states should aim to reduce the difference by changing the fees and/or fee thresholds applicable to legal aid work, or by introducing other measures to decrease the disparity with average market rates for similar services.

The quality standards and nature of legal services are essentially the same for legal aid work and similar work provided on the regular market. As a general rule, market rates adequately reflect the actual value of goods and services. Therefore, setting the fees applicable to legal aid work much lower than relevant market rates constitutes a severe undervaluation of legal aid work, which is unfair for LAPs and undermines the quality and sustainability of legal aid system as a whole, with negative effects on access to justice, as outlined above. While increasing the fees is the main way to address this problem, other measures such as **providing free training** opportunities or other support to LAPs, like a **lower fiscal treatment**, could also be used.

III.3. Regulations governing the rates of fees and other terms of remuneration of legal aid work should be clear, transparent and available to the general public. This is especially important when the recipient of legal aid may be required to compensate the cost of legal aid in part or in full at a certain stage of the proceedings.

It is important for both the providers of legal aid services, as well as the recipients of legal aid, to have a clear and comprehensive understanding on the terms and conditions of the applicable remuneration scheme.

III.4. Regulations governing the rates of fees and other terms of remuneration of legal aid work should be subject to regular review which takes into account such factors as inflation, changes in the cost of living and providing the relevant service, problems affecting the existing system, etc.

Regulations that remain unchanged for long periods of time usually cause a decline of real term compensation available for legal aid work because the various costs related to the service increase due to macroeconomic factors. Regular review is needed to take into account these factors, as well as practical problems that have been identified in the existing system.

III.5. States should apply payment procedures which guarantee that LAPs receive remuneration within a reasonable time. When legal aid work is performed in proceedings that last long periods of time, states should allow interim payments at regular intervals during the proceedings.

In addition to the amount of fees, the terms of payment, especially the time when payment can be expected, are important to every service provider. Legal aid work is no different in this regard, and situations where LAPs have to work for long periods of time without any interim payments constitute an undue financial burden.

III.6. States should ensure that whenever a final decision determining the amount of fees payable to an LAP is substantially different from what the LAP applied for or otherwise expected, that decision can be challenged by the LAP before an independent authority or a judge.

III.7. Fees of LAPs should cover all the expenses incurred.

In a considerable number of jurisdictions, not all the expenses incurred by LAPs are covered, such as overhead costs, travel costs, parking costs, outlays, disbursements etc. The CCBE sees no justification as to why the burden of these expenses has to be borne by the LAPs themselves.

IV. Budgeting of legal aid

IV.1. Legal aid is a fundamental tool for ensuring access to justice and should be guaranteed by states through the allocation of sufficient funding to ensure that no person entitled to receive legal aid will be left without it.

Legal aid and access to justice are inextricably linked. If a person does not have the financial means to cover the cost of legal advice, he or she is denied access to justice and, as a consequence, cannot protect his or her rights. Therefore, in International and European Law access to justice is widely considered an essential component of human rights protection. It is also considered as one of the main pillars of the rule of law and individual dignity.

It is evident that legal aid is dependent on the provision of funding. If the budget allocated by the state is not sufficient to cover the needs of all those individuals entitled to receive legal aid, access to justice is undermined and states do not fulfil their obligation to respect and protect fundamental rights.

For this reason, states should allocate budgets sufficient to cover the needs of all the beneficiaries of legal aid. The exhaustion of the budget should not constitute an excuse to leave a potential beneficiary without legal aid or to lower the quality of the legal services provided.²

IV.2. Each state should, in the process of preparing the budget for legal aid, take into account pertinent indicators, such as the legal aid budget and the caseload of the previous year, together with an estimate of the expected number of cases.

The expected number of cases can be predicted by taking into account approximately the number of applications for legal aid pending approval, the stage of the proceedings, the nature of the disputes, the moment in which the payment of the lawyer's fees will be due and other similar indicators.

IV.3. Each state should ensure that LAPs, bar associations, legal aid boards or other entities providing legal aid are duly consulted in the preparation of the legal aid budget.

It is fundamental that LAPs are heard by the authorities in charge of preparing the budget for legal aid, since providers are in the best position to provide information on the caseload from the previous year and to help estimate the expected number of cases.

² There are countries, such as **Germany, Switzerland** and **Austria** which offer examples of good practices regarding legal aid budgets. In all three countries, the granting of legal aid to an individual is not dependant on the availability of the budget and therefore, legal aid will always be provided to those entitled to receive it. A different system is in place in the **UK (Scotland)**, where, if the budget is exhausted, the legal aid fund meets the cost of cases and is uncapped. This means that expenditure will often exceed the budget provision.

Input into the development of a budget can be made in different ways, for example by allowing LAPs to make proposals or comments on the draft budget, which already happens in the majority of the countries.³

IV.4. States should ensure that a supplementary budget line is provided for in the event that the regular budget is exhausted before the end of the budget period, in order to avoid delays in the payment of the lawyers' fees.

In the large majority of the EU countries, the exhaustion of the budget results in the delay or postponement to the following year of the payment of the lawyers' fees. Given that the overwhelming majority of delegations have complained that fees for legal aid are generally lower than standard legal fees, states should endeavour to avoid delays or postponements of payments. Moreover, if the supplementary budget line (or part of it) is not utilised, it should be transferable to the following budget period.

IV.5. States should make all the information on the funds allocated to legal aid and on their usage publicly available.

To make the information as widely available as possible, both LAPs and state authorities (according to their division of competences in each country) should publish figures on their website.

IV.6. Legal aid is a fundamental right to assure access to justice for all. Therefore, Member States must take appropriate measures to ensure funding for legal aid on a permanent basis.

If the regular funds for legal aid are not enough, other means must be used in order to provide financial assistance indirectly.

A possible suggestion is to **reduce tax and social security expenses for LAPs**. In that respect, taking into account the loss of income for lawyers working on legal aid cases, there could be a compensation in the form of reduction of tax and social security charges.

Regarding the good use of the funds, a suggestion is to introduce **a *prima facie* analysis into the merits of the case** to be carried out by lawyers, instead of basing the decision to grant legal aid only on the financial needs of the beneficiary. This could be done by the appointment of a special LAP for general legal consultancy and to prevent court disputes. A sufficient part of the legal aid budget should be reserved for these cases, as many cases without any chances of success could be filtered out in this way.

Another idea is to introduce **a special tax** on registered legal acts to contribute to finance access to justice. A very low rate is proposed on every act that is subject to registration by

³ A positive example of cooperation between state authorities and legal aid providers can be found in the **Lithuanian** system; as reported by the delegation, in order to ensure the implementation of the functions assigned to the Ministry of Justice in the field of state-guaranteed legal aid, a State-guaranteed Legal Aid Co-ordination Council is established. This Council is made up of representatives of the Ministry of Justice, the Ministry of Finance, the Lithuanian Bar and other institutions and associations whose activities are related to the provision of state-guaranteed legal aid. This Council submits proposals on the need for state budget funds for the provision of state-guaranteed legal aid and on the efficient utilisation thereof.

The system in place in **Norway** can also be seen as a viable solution, as it is based on a formal agreement between the Ministry of Justice and the Norwegian Bar, allowing the latter to have a say in the definition of those elements which are of importance for the legal aid budget.

lawyers, bailiffs, notaries and judges. The problem with this idea is that the states' obligation is transferred to those who are obliged to deal with justice.⁴

Referring to the CCBE recommendations on legal aid that were issued in 2010, the CCBE reiterates its call upon the EU institutions to **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.**

V. Administration of legal aid

V.1. Each country should have clear legislation about legal aid, including a competent authority/authorities to administer legal aid and rules to guarantee standards for legal aid beneficiaries. Bars or Law Societies are generally the most competent bodies for the administration of legal aid, including the selection/appointment of LAPs.

If the legal framework is fragmented or missing, beneficiaries may find it very difficult to recognise their rights and apply for legal aid in case of real need. The procedure for acquiring legal aid should be easily accessible and understandable with clear eligibility terms and conditions. The same must be said for the procedure of the selection/appointment of LAPs, which must be concrete and transparent.⁵

V.2. In order to fulfil its mandate effectively, the competent authority for the administration and management of the legal aid system should have sufficient powers and competences. A formal legislative framework is therefore desirable.

V.3. The role of lawyers/LAPs in the administration of legal aid system should generally be extended.

Legal aid is mostly provided by lawyers, but their involvement in its administration is often rather limited. Lawyers as LAPs should participate in or, at least, have an advisory role, in many aspects of legal aid administration, including, reporting, monitoring, and enhancing the legal aid system.

V.4. The system of allocation of legal aid cases to individual LAPS should be impartial and not be compromised by a special interest and ensure equal access to legal aid to the broadest range of individuals in need.

The allocation system may grant a possibility of choice amongst LAPs to the beneficiaries, as long as the equal access principle is preserved. It is also advisable that LAPs are in the system voluntarily.⁶

⁴ **Another approach is the “triage system” as used in Ireland.** In 2012, the Irish Legal Aid Board introduced a ‘triage system’ under which applicants are supposed to be seen by a solicitor within the first month of applying for legal services for a short consultation. One of the primary purposes of this system is to allay some of the pressure on the Legal Aid Board by providing applicants with an opportunity to explore other options, such as mediation or alternative dispute resolution, while waiting on their substantive consultations. It is also an opportunity to identify and filter out applications which will not pass the Legal Aid Board’s eligibility tests.

⁵ There are countries, like **Germany** and **Austria**, where the courts are the competent bodies for the administration of legal aid and the LAPs are selected by the parties (in Germany) or determined by the Bar (in Austria).

⁶ **Norway** and **Estonia** may be mentioned as inspiring examples of effective allocation of legal aid. In Norway, lawyers provide legal aid as a part of their ordinary practice. They have an obligation to inform their clients

V.5. In order to be able to identify and address any possible problems, the legal aid authority should monitor the delivery and quality of legal aid.

It is advisable to offer the beneficiaries to the option of giving feedback on received services (communicate satisfaction/dissatisfaction).

Regarding legal aid provided by lawyers, such monitoring should be conducted by the relevant Bar or Law Society, rather than any other possible entity responsible for the administration of legal aid.⁷

VI. New frontiers and potential of legal aid

VI.1. Legal aid systems need to be flexible and regularly evaluated taking into consideration new developments and needs. Legal aid must be extended to include fields with special needs.

Today's societies are facing new challenges, and the demand for legal assistance and support is increasing within new areas and fields of law. Access to justice, particularly through legal aid, must respond to new needs both at an individual and at a social level.

Traditionally, legal aid is mostly applied in judicial proceedings, even if the majority of the Member States confirm its application also in administrative procedures, insolvency procedures, consumer affairs procedures, assistance to minors, as well as in pre-litigation advise.

Some areas deserve particular attention, such as alternative dispute resolution methods and the requests for assistance put forward by migrants and refugees. In this respect, it is important to emphasise the need to protect and safeguard the interests of the weaker party.

In relation to ADR processes, legal aid is mostly applied in compulsory or voluntary pre-trial mediation, and partially also in arbitration. However, different processes such as plea-bargaining, family mediation, workplace mediation, insolvency management, negotiation, debts management show an expanding request for legal aid which should also be duly taken into account.

Furthermore, the increase of migration all over Europe brings along the need to protect the refugees' and migrants' rights. In view of these developments, it is necessary to foresee and cater for an increasing number of special legal aid applications emanating from migrant and refugee communities.

Finally, Member States should provide legal aid and/or legal assistance in prison, in particular for foreign prisoners to ensure the right to appeal and redress."

about the possibility of applying for free legal aid in cases where it is conceivable that the client is eligible for such assistance. Estonian legal aid operates on a voluntary basis of legal aid providers. The **Estonian** electronic (web-based) database of cases enables registered lawyers to take up cases on a voluntary basis, and appoint lawyers on random basis for such cases, which are not taken up.

⁷ **Finland**, for example, uses questionnaires completed by both parties – providers and beneficiaries – in order to monitor quality and gain feedback from both sides.

In **Estonia**, "the Bar Association receives information from police, prosecution service, and courts regarding problems with legal aid lawyers, as well as complaints from persons receiving legal aid. This information and complaints are processed according to Bar Association rules, starting disciplinary action when necessary.

In **Denmark**, the quality of legal aid service is monitored, and a list of approved legal aid institutions is published every year.

VI.2. Also in non-judicial procedures, the authority responsible to grant legal aid should be transparent and neutral.

The authority which grants legal aid in non-judicial matters and procedures must be the same as that which grants legal aid in normal judicial procedures.

VI.3. People need to be duly informed of their right to legal aid.

Informing citizens about legal aid would improve access to justice and public trust in the institutions.

States must make more efforts to disseminate information, in all relevant languages and through electronic means.

Online applications for legal aid must be made available.