

Proposal for a Council 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

(2002/C 103 E/29)

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(Submitted by the Commission on 18 January 2002)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Having regard to the opinion of the Committee of the Regions,

Whereas:

- (1) The European Union has set itself the objective of maintaining and developing an area of freedom, security and justice in which the free movement of persons is ensured.
- (2) By Article 65(c) of the Treaty establishing the European Community, these measures are to include measures eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.
- (3) The Tampere European Council on 15 and 16 October 1999 called on the Council to establish minimum standards ensuring an adequate level of legal aid in cross-border cases throughout the Union.
- (4) Neither the lack of resources of a litigant, whether acting as claimant or as defendant, nor the difficulties flowing from a dispute's cross-border dimension should be allowed to hamper effective access to justice.
- (5) The main purpose of the Directive is to guarantee an adequate level of legal aid in cross-border cases, but to guarantee that adequate level it is necessary to lay down certain minimum common standards. A Council directive is the most suitable legislative instrument for this purpose.
- (6) The Directive applies to all disputes in civil matters, which include commercial law, employment law and consumer protection law.
- (7) All persons involved in a civil dispute must be able to assert their rights in the courts even if their personal financial situation makes it impossible for them to bear the costs of the proceedings.
- (8) Legal aid must include at least the services of a lawyer and exemption from the cost of proceedings.
- (9) Legal aid can be regarded as appropriate when it allows the recipient effective access to justice.
- (10) Since legal aid is given by the Member State of the forum, except pre-litigation assistance provided by a local lawyer if the legal aid applicant is not habitually resident in the Member State of the forum, that Member State must apply its own legislation, in compliance with the principles of the Directive.
- (11) The complexity of and differences between the legal systems of the Member States and the costs inherent in the cross-border dimension of a dispute should not preclude access to justice. Legal aid should accordingly cover costs directly connected with the cross-border dimension of a dispute.
- (12) All Union citizens, wherever they reside, must be eligible for legal aid if they meet the conditions provided for by the Directive. The same applies to third-country nationals who habitually and lawfully reside in a Member State.
- (13) If legal aid is granted, it must cover the entire proceeding, including expenses incurred in having a judgment declared enforceable or enforced; the recipient should continue receiving this aid if an appeal is brought against him.
- (14) Judicial cooperation in civil matters should be organised between Member States to encourage information for the public and professional circles and to simplify and accelerate the transmission of legal aid applications between Member States.

- (15) The European Agreement on the Transmission of Applications for Legal Aid, signed in Strasbourg in 1977, which requires the contracting parties to notify sending and receiving authorities and their systems for transmitting applications, remains applicable to relations between Member States and third countries that are parties to the Agreement. But this Directive replaces the Agreement in relations between Member States.
- (16) The notification and transmission mechanisms provided for by this Directive are inspired directly by those of the European Agreement. A time-limit, not provided for by the 1977 Agreement, should be set for the transmission of legal aid applications. A relatively short time-limit would contribute to the smooth operation of justice.
- (17) The establishment of a standard form for the transmission of legal aid applications in the event of cross-border litigation would make the procedures easier and faster.
- (18) Given the differences in the costs of litigation and in standards of living between the Member States, they should accordingly be left free to define the threshold above which a person would be presumed able to bear the costs of proceedings, in such a way as to attain the objectives of the Directive.
- (19) The objective of the Directive could not, however, be attained if legal aid applicants did not have the possibility of proving that they cannot bear the cost of proceedings even if their resources exceed the threshold defined by the Member State of the forum.
- (20) The possibility of resorting to private mechanisms or agreements to ensure effective access to justice is not a form of legal aid. But it can warrant a presumption that the person concerned can bear the costs of the procedure despite his unfavourable financial situation.
- (21) Member States should be allowed to reject applications for legal aid in respect of manifestly unfounded actions, without however going so far as to prejudge the case with a view to evaluating the applicant's prospects of winning the case.
- (22) The Directive does not extend to profit-making legal persons except for non-profit legal persons, such as consumers' associations, which take action in the courts to protect legally recognised general interests. This principle contributes to the attainment of the objectives of Directive 98/27/EC of 19 May 1998 on injunctions for the protection of consumers' interests⁽¹⁾.
- (23) Legal aid must be granted on the same terms both for conventional legal proceedings and for out-of-court procedures such as mediation, where recourse to them is encouraged by the law.
- (24) The possibility that a party to a dispute may have to pay court costs or a lawyer's fees even if he wins the case constitutes an obstacle to access to justice. Their reimbursement by the losing party on an equitable basis mitigates this disadvantage. The protection of weaker parties, in particular in the field of employment and consumer protection law, may justify exceptions to this principle.
- (25) It should be specified that the establishment of minimum standards does not prevent Member States from making provision for more favourable arrangements for legal aid applicants.
- (26) As the objectives of this Directive cannot be achieved adequately by the Member States acting alone and could better be achieved by action at Community level, the Community may take measures in accordance with the principle of subsidiarity as declared by Article 5 of the Treaty establishing the European Community. In accordance with the principle of proportionality laid down in the same article, this Directive goes no further than is necessary to achieve these goals.
- (27) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union as general principles of Community law. In particular, it seeks to promote the application of the principle of legal aid for all persons who lack sufficient resources where access to such aid is necessary to secure access to justice in accordance with the third paragraph of Article 47 of the Charter of Fundamental Rights of the European Union.
- (28) (The United Kingdom and Ireland are not participating in the adoption of this Directive in accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community.) (The United Kingdom and Ireland have given notice of their wish to participate in the adoption of this Directive in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community.)
- (29) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not participating in the adoption of this Directive. This Directive is accordingly not binding on Denmark nor applicable there,

⁽¹⁾ OJ L 166, 11.6.1998, p. 51.

HAS ADOPTED THIS DIRECTIVE:

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.

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.

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 13 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.

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.

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.

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.

Article 7

Continuity of legal aid

Legal aid shall continue to be granted to recipients to cover expenses incurred in having a judgment 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.

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.

*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.

*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 ⁽¹⁾.

⁽¹⁾ 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 time before the case comes to trial.

*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.

*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.

*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.

*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.

*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.

*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.

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.
