

Improving access to justice: legal aid in cross-border civil and commercial disputes

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PURPOSE: to present the evaluation, by the Commission, on the application of Directive 2003/8/EC to improve access to justice in cross border disputes.

BACKGROUND: [Directive 2003/8/EC](#) aims to improve access to justice in cross border disputes by establishing minimum common rules relating to legal aid for such disputes. It seeks to promote the application of legal aid in cross-border civil and commercial disputes for persons who lack sufficient resources and where aid is necessary to secure effective access to justice.

The Directive entered into application on 30 November 2004. After 5 years of the application of the Directive, the Commission decided to launch its evaluation. The Commission launched a study in 2010 in order to be provided with input to assess in detail the transposition and the application of the Directive. In addition, the application of the Directive was discussed with the European Judicial Network in civil and commercial matters in its meetings in 2006 and 2010. Furthermore, the Commission has accommodated letters, complaints and petitions concerning the Directive in its assessment.

This report presents the Commission assessment of the application of the Directive for the period of 30 April 2004 – 31 December 2010.

CONTENT: the report concludes that **all the Member States which are bound by the Directive have transposed** the right to legal aid in cross border cases in civil and commercial matters, although it can be observed that **not all the application modalities of the Directive have been perfectly implemented**. These difficulties are explained principally by the fact that the dispositions of the Directive are sometimes different from national provisions concerning legal aid and the lack of the ECJ case law did not yet add to the uniformity of application.

The report underlined, however, that there has been **only one case before the European Court of Justice** concerning cross-border legal aid which may prove that the practical application of the Directive is satisfactory.

Possible improvements: the Commission considers that the implementation of the Directive can be improved firstly on the basis of current provisions, notably as regards the following:

Economic criteria to benefit from legal aid: it appears that there is a need to have further clarification on the issue of economic criteria to grant legal aid. This is important as there are cases where the claimant obtains from the court of his domicile a confirmation that under national rules he would be eligible for legal aid but he is deprived of it by the competent court.

From this perspective two solutions could be considered: (i) taking into account the difference in the cost of living between Member States, the eligibility and the amount of legal aid could be calculated on the basis of a common and objective criteria or on the basis of the criteria applied in the usual place of residence of the person applying for legal aid, or; (ii) harmonisation of the economic level or mutual recognition of thresholds.

Costs not covered currently: an interesting situation which is not covered by the Directive arises when travelling costs are to be incurred for the hearing before the judge who is to decide whether or not legal

aid should be granted. Should the applicant have not sufficient financial resources to cover these expenses, he may be deprived of the possibility to obtain legal aid by the competent court.

Facilitation of relationship between legal professionals and beneficiaries: a second point to tackle could be the facilitation of relationships between professionals and beneficiaries in another Member State through measures such as: the designation of a professional who speaks the language of the beneficiary, the assistance of a translator, or even the designation of a second professional from the State of the legal aid recipient, who would serve as a link and, for example, conduct correspondence with the legal professional based in another State.

Clarity as to the whereabouts of the competent authority: it appears to be advisable to designate a single receiving and transmitting authority in each Member State in order to facilitate the implementation of the Directive. This is particularly important in the situation when the legal aid application is submitted directly to the competent authority of the Member State in which the court is sitting or where the decision is to be enforced. As the Directive does not regulate the issue what happens if the application is submitted to the incorrect receiving agency, discrepancies in such situation may arise.

Scrutiny of the same application by two authorities with two possibly different results: the Directive foresees two ways of submitting the application for legal aid: either to the competent authority of the Member State in which the applicant is domiciled or to the competent authority of the Member State in which the court is sitting. In addition, the Directive foresees the possibility to refuse to transmit the application if the transmitting authority decides that the application is unfounded or outside the scope of the Directive. Such a situation may potentially create confusion as it is possible that the receiving authority may reject the application although the transmitting authority would consider it as founded. It is also possible that the applicant, whose application was rejected by the transmitted authority, will resend the application to the receiving authority directly which would create unnecessary burden as the same application would have to be considered twice, most likely with the same negative result.

Increase awareness about the Directive: the Commission observes the insufficient knowledge about the dispositions of the Directive among citizens, legal professionals and national legal boards, as evidenced by the survey: only 15% of citizens are aware of the Directive and 30 % of barristers know about the Directive's advantages.

The main point of improvement for the Member States is an efficient and active promotion of the Directive through **providing the general public and professionals with information** on the various systems of legal aid under the Directive.

Furthermore, the Commission will step up its efforts to increase awareness about the provisions of this Directive. The Commission also will analyse the findings of the conformity checks and follow up them as appropriate.

Further to the points of reflection presented above, the Commission will also take into account the reactions to this Report in its considerations for actions, as appropriate.

Finally, as regards the **legal aid policy with third countries**, the Commission will consider the accession of the European Union to the 1980 Hague Convention on Access to Justice, particularly as the European Union is a member of the Hague Conference. Such a step could be desirable as it would enable the uniform application of the Convention through the Union and could attract the accession of other states.