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## MODULE V

### SUBJECT 16

***THE IMPROVEMENT OF ACCESS TO  
JUSTICE IN CROSS-BORDER DISPUTES  
IN THE EUROPEAN UNION-COUNCIL  
DIRECTIVE 2003/8/EC OF 27 JANUARY  
2003***

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**DISTANCE LEARNING COURSE  
A SYSTEMATIC STUDY OF THE EUROPEAN  
JUDICIAL AREA IN CIVIL AND COMMERCIAL  
MATTERS: COMPETENCE, RECOGNITION AND  
ENFORCEMENT OF JUDICIAL DECISIONS  
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## **1. Background**

### **1.1. Introduction**

Within the itinerary which has led to the current Community legislation framework, focused on granting access to Law and Justice for citizens economically underprivileged and that wants to contribute to assure universal access to the justice administration systems in Europe, we find certain auxiliary instruments that, over the years and with incidence on the present matter, have been assuming increasingly wider ambitions and solutions.

Therefore, and even in a light way, it is important to make reference to some milestones of the aforementioned itinerary, in order to allow a better understanding of the arrival point of this process, materialised in the document that we must analyse.

### **1.2. International law texts**

#### **1.2.1. *The Convention for the Protection of Human Rights and Fundamental Freedoms* held in Rome on 4 November 1950.**

It was adopted under the aegis of the European Council and binds all Member States of the European Union.

It has “crystallised”, in Article 6, under the epigraph “*Right to a fair trial*” and with regard to the rights of the accused, that these rights include “*if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require*”.

Making the conjugation of Articles 6 and 14, we can extract the notion that the right of individuals to a fair and equitable hearing within a reasonable period of time, by an impartial and independent court established by law, can not be, at any title, damaged by differences emerging from wealth or social origin.

Since no distinction is made, we must conclude, in face of this generic consecration, that the aforementioned system also refers to civil actions<sup>2</sup>.

#### **1.2.2. *The Strasbourg Agreement***

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<sup>1</sup> Paragraph c) of no. 3.

<sup>2</sup> Please refer to the case judgment *Airey vs. Ireland*, delivered at the European Court of Human Rights, of 9 October 1979.

<sup>3</sup> *European Agreement on the Transmission of Applications for Legal Aid*, signed on 27 January 1977, in Strasbourg, and in force since 28 February 1977.

This international law instrument, also produced within the European Council and ratified by all Member States of the Union, with the exception of Germany (considering the structure prior to the enlargement), makes it possible to present legal aid applications in the State of residence and establishes mechanisms for the official and centralised transmission of requests, institutionalizing the figure of the local transmission authorities. It also declares the free of charge nature of the services provided under the Convention.

Taking into account the need to do away with bureaucracy, to simplify, to produce swiftness and warrant effective access to justice, it eliminates the requirement of certification and authentication of documents and establishes the obligation, for the authorities of the State of residence responsible for the transmission, to assist the applicant in the filling of the formal conditions of compliance.

### **1.2.3. *The Convention on International Access to Justice*, finished on 25 October 1980.**

This Convention, celebrated under the aegis of the Hague Conference on Private International Law and in force since 1 May 1988, was ratified by twenty-two European countries, among which we find some Member States of the European Union.

It recognises the right to judicial assistance in civil and commercial matters for all citizens of the signatory States and for the individuals who have their residence in any of those States, and it may also include “*administrative, social or fiscal matters*”.

The system is based on the activity of central authorities and transmitting authorities (to which are conferred attributions in providing assistance to the applicants) and allows the use of diplomatic channels.

It stands on the reduction of formal requirements, simplification and production of celerity, affirming the free character of the intervention of the mechanisms of transmission, reception and decision-making.

## **1.3. The Community background**

### **1.3.1. *The Charter of Fundamental Rights of the European Union***

This document contains, under its Article 47, a structural statement on the present matter.

Under the heading “*Right to an effective remedy and to a fair trial*” it rules as follows: “*Legal aid shall be made available to those who lack*

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<sup>4</sup> In Official Journal of the European Communities no. C 364, of 18 December 2000, pages 0001 – 0022.

*sufficient resources in so far as such aid is necessary to ensure effective access to justice”.*

It was precisely on the basis of this recognized need to grant all European citizens an effective and real access to justice regardless of their own personal economic circumstances that were made the efforts that culminated on the approval of *Directive 2003/8/EC*.

### **1.3.2. The Treaty of Amsterdam**

The change of perspective and dynamics introduced by the Amsterdam Treaty in the area of civil and commercial matters was decisive.

By virtue of the addition to the *Treaty Establishing the European Community* (TEEC) of the Title IV (Articles 61 to 69) and with the ultimate goal of encouraging the progressive creation of a space of freedom, security and Justice, the aforementioned Treaty transferred this matter to the so-called *first pillar* of the Union, whereby this subject was transferred from the intergovernmental sphere to the Community sphere, framed on an integration perspective (by opposition to the former phase of mere cooperation).

The impulse and the key role were vested in the European institutions, in particular the Commission, and it was established that on expiry of a five-year transition period, the Community decision-making and legislation production method would be fully assumed.

It was precisely within the context of this new dynamic that it was deemed necessary to pay attention to the right to have access to justice of those who lack economic resources and an attempt was made to satisfy this need.

### **1.3.3. Presidency Conclusions of the *Tampere* European Council, of 15-16 October 1999.**

The conclusions referred to the area of civil and commercial justice represent a key element for all subsequent legislative enactments, as they clearly evidence the engagement of the European Council on the development of the European Union as a space of freedom, security and Justice and its determination to make full use of its intervention faculties made available by the Treaty of Amsterdam.

Within the framework of the mechanisms which preceded the *Directive* that currently rules legal aid, that inscribed on no. 30 of the aforementioned conclusions had extreme importance, with the following content: “The European Council invites the Council, on the basis of

proposals by the Commission, to establish minimum standards ensuring an adequate level of legal aid in cross-border cases throughout the Union”.

With regard to this matter, the Council has assumed, in a firm and decided manner, the importance of granting legal aid as part of ensuring effective access to Right.

It was this programme that the *Directive* aimed to materialise.

#### **1.3.4. The Green Paper from the Commission**

This document represented an important contribution to the creation of the current legal regime, not only due to the diagnosis offered but also because of the solutions proposed, which acted as a structuring discussion and work basis. Some of them, however, would become totally withdrawn (such is the case, for example, of the proposed extension of this benefit to small businesses).

It allowed becoming familiar with the viewpoint of the Commission, according to which “legal aid” could have any of the following meanings:

a) “*provision of free or low-cost legal advice or court representation by a lawyer*”;

b) “*partial or total exemption from other costs, such as court fees, which would normally be levied*”;

c) “*direct financial assistance to defray any of the costs associated with litigation, such as lawyers’ costs, court fees, witness expenses, liability of a losing party to support winners’ costs, etc.*”

It established that “*A person threatened with proceedings or wishing to bring proceedings abroad, may need legal aid at three stages: (1) First, pre-litigation advice; (2) Second, the assistance of an advocate at a trial and exemption from court fees; (3) Third, assistance at the stage of having a foreign judgment declared in force or being enforced.*”

It contained crucial diagnosis of the obstacles inherent to cross-border litigation.

#### **1.3.5. The opinion of the Social and Economic Committee**

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<sup>5</sup> *Green Paper from the Commission — Legal aid in civil matters: The problems confronting the cross - border litigant*, 9/2/2000 COM (2000) 51 final.

<sup>6</sup> Opinion of the Economic and Social Committee on the ‘*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*’ – (COM(2002) 13 final —2002/0020 (CNS)) (2002/C 221/15).

In this Report, the aforementioned Committee agreed with the Commission's proposal and, particularly, with its "*overriding principles*".

It suggested, however, that the following issues should receive closer attention: "*Access to justice is a fundamental citizens' right, and this being so, aid arrangements should cover all citizens who habitually reside in a Member State, regardless of their residence status*"; "*legal support should be guaranteed in the enforcement phase even if enforcement is to take place in a different Member State to that of the forum*"; "*citizens' interests must be protected by means of legal support from a suitably trained and specialised professional, i.e. a lawyer*"; "*enterprises whose economic situation warrants it should not be excluded from the possibility of legal aid*"; "*to ensure the smooth function of the proposed system, it would be advisable to adopt a single common language and to make sure that the IT systems and programs to be used in the communication network between the various accredited national bodies are fully compatible*"; "*provision should be made for adequate technical and financial resources to publicise the system among the general public and to train professionals who will be involved in making it operative*".

### **1.3.6. The Proposal for a Council Directive**

It is the antechamber of the current system materialised in the *Directive* that will be analysed here below.

It shows considerable differences in terms of structure and content, when compared to the *Directive*.

## **2. The main solutions adopted by the Council Directive 2003/8/EC<sup>8</sup> of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.<sup>9</sup>**

The legislation enacted through this *Directive* is expressly grounded on the will, stated in the Preamble to the text, of "maintaining and developing an area of freedom, security and justice in which the free movement of persons is ensured", with a view to guaranteeing the proper operation of the internal market. Thus, it follows the spirit of the measures announced in section c) of article 61 and in section c) of article 65 of the Treaty establishing the European Community.

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<sup>7</sup> 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 - COM/2002/0013 final - CNS 2002/0020 - Official Journal 103 E, 18/01/2002 P. 0368 – 0372.

<sup>8</sup> The number of this *Directive* was modified in the *Official Journal of the European Union* L 32 of 07.02.2003, page 15

<sup>9</sup> Published in the *Official Journal of the European Union* L 26 of 31.01.2003, pages 41 to 47.

The goal is to ensure that nobody is denied real access to justice (this is to be understood as *de facto*, effective, leading to concrete solutions and to the settlement of conflictive legal relations) as a result of financial hardship and the cross-border nature of the dispute.

It took into account, as immediately diagnosed and assumed by the aforementioned Green Paper of the Commission, that distance, physical absence and ignorance or lack of secure knowledge of the internal legal rules of the Member State where the court is sitting or where the decision is to be enforced and of the market of legal consultants, the different criteria in order to assess the lack of economic resources and the different national patterns of income and prices represent a true obstacle to the creation of the trust that generates the circulation of persons and also acts as a barrier to the exercise of rights within the common judicial space under construction.

The aim of the initiative on producing this Community instrument was to ensure, within the context of the cross-border disputes, minimum common rules on the protection of the right of the European citizens of shorter economic resources to accede to Justice in parity with the other citizens.

We can conclude, from this and from the choice of the juridical instrument "Directive", that Member States are, within this area, free to grant larger, higher and more ambitious levels of protection, once the minimum standards established have been complied with.

On the text of the document here discussed, special care was given to defining "cross-border dispute". Pursuant to its article 2, this conflict exists 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 is determined by applying the internal law of the Community State where it is supposed that such domicile exists.<sup>12</sup>

In terms of time, the relevant moment to determine if there is a cross-border dispute is the one when the application for legal aid is submitted.

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<sup>10</sup> Compressing the initial scope given by the Commission to apply the Directive to all intracommunity disputes.

<sup>11</sup> This also emerges explicitly from section 31 of the *Preamble* and article 19 of the body of the Directive.

<sup>12</sup> Pursuant to article 59 of *Regulation (EC) 44/2001 of the Council, of 22 December 2000, on jurisdiction, recognition and enforcement of judgments in civil and commercial matters*, applicable in accordance with section 2 of article 2 of the Community Directive under examination.

In line with what has been the tendency in domestic legislation, this legal instrument has treated the matter of legal aid not so much as a special benefit or protection provided by the Member States, but as an effective right of the European citizenship that plays a key role in ensuring real access to Justice within the dimension of a common space.

The Directive refers to all civil and commercial cross-border disputes, regardless of the nature of the jurisdictional body which shall hear or judge the quarrel.

In order to ascertain what is its subject-matter, the concept of civil or commercial matters must be obtained by means of a construction effort taking into consideration literal and logical elements, and by the use, as a complementary support, of some data provided by Community jurisprudence.

The *Directive* clearly establishes that “revenue, customs or administrative matters” are not included in its scope.

It also excludes criminal matters (for obvious technical reasons, as results from the relation of exclusion ensuing from the reference made in the first part of section 2 of article 1, and taking into account the intervention imposed by the aforementioned sections of articles 61 and 65 of the TEC, criminal matters are not included).

The use of the term “*in particular*”, included in the second part of this article, precludes that, by mere exclusion of parts, we can affirm that the *Directive* applies to all matters which are not tax-, customs- or administrative-related.

There does not seem to be any valid reason to exclude the technical areas left out by paragraph 2 of article 1 of Council Regulation 44/2001/EC of 22 December 2000, that is the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession, bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings, social security and arbitration. To the contrary, the purposes aimed and the problems pointed as justificatory of the legislative intervention are fully valid in this matter.

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<sup>13</sup> Expressions as “poverty benefit”, once used in Spain, or the Portuguese term “*legal assistance benefit*”, constantly present in article 29 of Decree 562/70 of 18-11, had long been outdated.

<sup>14</sup> See no. 9 of the Preamble.

<sup>15</sup> With regard to the concept of civil and commercial matters in Community case law, once again reference is made, as so often has been, to the judgments of the Court of Justice, *LTU Lufttransportunternehmen GmbH & Co. KG vs. Eurocontrol*, of 14 October 1976, Case no. 29/76, *Netherlands State vs. Reinhold Rüffer*, of 16 December 1980, Case no. 814/79 and *Gemeente Steenbergen vs. Luc Baten*, of 14 November 2002, Case no. C-271/00.

<sup>16</sup> Section 2 of article 1.



We can say that the concept of civil and commercial matters considered in this Directive is much wider and its scope is larger than the one established in *Regulation Brussels I*, covering labour law, rights of minors and insolvency proceedings.

As to the sense that must be given to the term “*in particular*”, perhaps it is possible to consider, in face of the common element of the excluded areas, that it was wanted through its use to leave generically excluded from the text of the Directive discussed hereunder any disputes arising from actions or omissions of the State, acting in its sovereign capacity (with “*ius imperii*”).

Only natural persons may benefit from the legal aid system created by the Directive under analysis.

Therefore, the position of the European Commission standing on the idea that also businesses could benefit from this type of protection did not prevail. This change of course was justified by the *Proposal of Directive* of 18 January 2002 on the grounds of the existence of “differences in the approach of the Member States” and the “reservations expressed by most of them”.

In the aforementioned *Proposal*, corporate bodies acting “*for gain*” would be excluded but it was foreseen that legal aid would be made available to “*non-profit bodies, for example consumers' associations, where proceedings are designed to protect legally recognized general interests, i.e. collective interests rather than a mere accumulation of private interests*”.

This construction on the subjective incidence of the legal text – that would determine that “this provision should be compared with Directive 98/27/EC of 19 May 1998 on injunctions for the protection of consumers' interests” with the inherent possibility of the “qualified entities recognised by the Member States to bring proceedings for an injunction throughout the Community” – disappeared from the text finally approved<sup>20</sup>.

Legal aid should cover, in any case, legal advice, that is, counselling and pre-litigation assistance, particularly in view of using informal mediation mechanisms and of reaching a settlement prior to bringing legal proceedings, as well as the appointment and payment of fees of an attorney to act before the court, providing professional legal services and acting as his client's representative during the trial. It also encompasses

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<sup>17</sup> Cf. Green Paper from the Commission — *Legal aid in civil matters: The problems confronting the cross-border litigant*, 9.2.2000.

<sup>18</sup> Article-by-article commentary, art. 15.

<sup>19</sup> *Ibidem*.

<sup>20</sup> In the same place.

the cost of the proceedings or the exemption from paying them. It may also include the expenses sustained by the other party in the suit when the court has awarded such payment to the legal aid applicant.

The Member State of the domicile or habitual residence is responsible for:

(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 this 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”.<sup>21</sup>

The potential users of the European legal aid system are the EU citizens, regardless of their domicile or place of habitual residence. European citizenship is the sole requirement, considering the personal evaluation criteria (*ratione personæ*), to benefit from legal aid, what keeps away interpretation difficulties, avoids unjustified discrimination with the nationals of the State of the forum, contributes to the construction of an effective space of Justice, to the elimination of any barriers which hamper the exercise of rights in the European Union, and dignifies and highlights the importance of such citizenship.

This mechanism may also be invoked in the benefit of nationals belonging to other States who have a valid residence status in the territory of a Member State.

The suggestion contained in the abovementioned *Opinion of the Economic and Social Committee* has been disregarded in the sense of not considering whether the applicant enjoys a valid residence status in order to qualify for legal aid.

It is up to the Member States to determine the pecuniary values that serve as reference to define the economical insufficiency.

This solution is perfectly suitable. The option of determining the thresholds allows for a prior knowledge of the conditions applicable to granting such legal aid and introduces an objective element for the assessment of the financial resources that make an applicant eligible.

In light of this context and considering the marked development differences in the different Member States, it was only possible (and this has been the option chosen) to define at local level (i.e., by each Member

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<sup>21</sup> Please refer to Article 8 of the Directive.

State) the quantitative factors that determine the existence of insufficient resources.

This solution allows for the development of prior formulae and calculation simulators which make it possible to determine, previously and with certainty, which are the conditions applicable to granting the legal aid requested.

Likewise and in the same apparent reasonability, the Directive provides that the aforementioned thresholds may be exceeded in light of specific factors such as the differences in the cost of living between Member States of domicile or habitual residence and the Member State where the court is sitting, in other words, a hybrid system has been adopted which does not only take into account a set of fixed thresholds but also certain circumstances which clearly evidence the impossibility of meeting the costs of proceedings. This mechanism introduces a noteworthy “*safety valve*” that provides consistency to the system and nourishes the hope that effective access to justice will be made available to all citizens.

It also determines that the economic situation of the candidates should be ascertained on the basis of objective elements, wherefore it is not necessary to resort to a judicial determination, thereof making it possible to make use of purely administrative mechanisms of evaluation for those States who choose to adopt this kind of system.

An important and innovative option lies in the possibility of rejecting applications for legal aid oriented to start legal proceedings in relation to which there are clear elements which reveal, in an evidencing and firm manner, that the claim is based on manifestly unfounded grounds.

Within this possibility of refusal, it is possible to reject an application on grounds related to the merits of the case, that is, to the “*chances of success of the proceedings*”.

This faculty of denial is based on sharp and detailed evaluation, standing on non notorious and immediately evident elements entailing, therefore, a pre-judgment of jurisdictional nature which seems difficult to reconcile with the administrative or bureaucratic evaluation systems, since the faculty to reject an application based on the merits of the case is also vested in non-judicial authorities which are responsible for conceding such legal aid.

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<sup>22</sup> See the Directive – Section 14 and 15 of the *Preamble* and article 5 (particularly section 4).

<sup>23</sup> Please refer to section 17 of the *Preamble* and section 1 of article 6 of the Directive.

<sup>24</sup> Vd. Please refer to the aforementioned *Green Paper*, page 3.

<sup>25</sup> Among which, the non-judicial systems for handling and evaluating legal aid applications, effective in Spain since 1996 and in Portugal since the year 2000, should be included.

At this level, the door could open to internal compression mechanisms for limiting such right, which would contradict the wide scope and comprehensive view assumed by the Directive. In any event, this obstacle will always be sorted out by the institutionalisation of solutions that allow for a judicial appeal against the final resolution given in the course of the administrative proceedings.

In this area, the Member States are required to evaluate the real importance of the suit for the applicant and, eventually, the nature of the claim itself.

Another element which affords protection to the system is that the refusal based on arguments linked to the merits of the case can only occur when pre-litigation advice is offered and access to justice is guaranteed.

The purpose of this type of clauses seems to be to bring in a greater caution in the use of legal aid and reduce the considerable economic costs which, in any event, are always present in this kind of system (and which have been systematically invoked in the drafting stage of the Directive discussed hereunder), channelling the always pithy resources to legal actions related to the exercise of rights that deserve the jurisdictional protection.

It is unquestionable and obvious that bringing a legal action outside the State of residence of the plaintiff would entail higher costs.

Among others, are increased the expenses emerging from translation and interpretation, seeking legal advice on two or more different systems, hiring a lawyer in a State other than the one of residence, summonses and notices<sup>27</sup>, discovering and giving evidence, travel costs of litigants, witnesses and lawyers and recognition and enforcement of judgments.

So, the Directive has made the sensible decision to include within the European system of access to Law and Justice the costs specifically arising from the change of the geographical centre of the dispute decision.

In an effort to cut expenditures and provide greater consistency to the system arising from Council Regulation (EC) No 1206/2001 of 28 May

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<sup>26</sup> Perhaps it has been precisely to avoid this difficulty that the Commission, its *Proposal of Directive of 18 January 2002*, used, in Section 21 of its Preamble, the expression “*without however going so far as to prejudge the case*”. However, it is hardly possible to evaluate motives related to the merits of the case without somehow conducting a logical-legal itinerary of prior assessment of the application.

<sup>27</sup> *Ibidem*, page 4.

<sup>28</sup> These expenses are now mitigated thanks to the preferential use of videoconference, in accordance with *EC Council Regulation 1206/2001 of 28 May 2001* (in force since 1 January 2004) – articles. 10 (4) and 17 (4). However it must be highlighted that no Member State of the European Union (other than Portugal) is currently using a videoconference system available in all its Courts and fully accessible for cross-border judicial cooperation.

2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, in particular with regard to its options on direct contact between courts, residual nature of the intervention of central authorities and importance given to state-of-the-art technical resources concerning the gathering of evidence, in particular videoconference, the *Directive* examined hereunder determines that when assessing the need of the physical presence of some individual before the court of another Member State, it should be considered the system contemplated in the aforementioned Regulation and its solutions that make unnecessary the personal displacement.

The set of provisions examined hereunder consecrate the principle that legal aid must be maintained in all stages of the proceeding, particularly if an appeal takes place, and comprehend any subsequent enforcement of a judgment.

This option seems to be the one that better assures the implementation of the objectives of suppressing all obstacles to a smooth handling of civil actions and creating an European space of Justice, since it is the only one that ensures that the citizen with fewer resources may obtain the effects sought with the prosecution of claim in law court, not “*abandoning*” him somewhere in the itinerary initiated with the bringing of his judicial application.

The only and obvious requirement to put this into practice is that the conditions relating to “the financial resources and the substance of the dispute remain fulfilled”.

The principle was accepted that the legal aid benefit should not only cover the “conventional legal proceedings” but also the “*out-of-court procedures*”, such as mediation, where recourse to them is required by the law or ordered by the court.

It was aimed not to exclude all of those situations in which the resolution of a dispute without a judicial procedure is imposed to the citizen.

If this solution had not been provided for, a major area would have been left uncovered and individuals with fewer financial resources would be barred from a means of resolution of disputes and, consequently, their access to Justice would be precluded.

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<sup>29</sup> Section 20 of the *Preamble* and article 9.

<sup>30</sup> Section 21 of the *Preamble* and article 10.

<sup>31</sup> In the Proposal of Directive of 18 January 2002, extrajudicial procedures were only contemplated «where recourse to them is encouraged by the law» – section no. 23 of the *Preamble*.

Here, the fact that the law requires the parties to use an extrajudicial procedure is the key element in order to determine whether the European legal aid system applies.

Section no. 22 of the Preamble and Article 11 uphold the obligation to provide legal aid for the enforcement in another Member State of “*authentic instruments*”.

It seems that this reference has been included in order to take into consideration all non-private enforceable documents, that is, issued by public authorities or officers duly authorised to produce them – official executive titles (i.e., produced with full compliance of all formalities foreseen by law, by the public authorities in the exercise of their respective competencies) or extra-official (that is, made in strict compliance with the legal formalities required within the scope of a specific set of faculties vested by law in a certain person who has attestation authority, for example a Public Notary).

The qualification of the documents, for the effects aimed in the referred rules, considering the specificities emerging from national legislations, prevailing case-law and legal doctrine, will always depend on the definitions and contents assumed by the Law of each State.

The transposition process itself shows those differences.

The *Directive* has enshrined the following principles:

a) On the assessment of a legal aid request, the applicable legislation is that of the Member State in which the court is sitting or the enforcement is sought;

b) The assessment of the application on legal aid is the responsibility of the authority responsible for such decision considering the legislation of the Member State where the court is sitting or where the decision is to be enforced;

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<sup>32</sup> For instance, the *Bill of Law* no. 121/000015 of the *Spanish Parliament*, of 26 November 2004, proposes adding an article 46 to Law 1/1996 of 10 January, on legal aid, section 2 of which has been transcribed for purposes of this analysis: “*Legal aid may also be granted when the requirements foreseen in this Act are met for: a) the enforcement of judgments passed by the Courts of other Member States of the European Union in which the benefit of legal aid has also been granted. b) The enforcement of public documents which have an enforceable nature*”. France, for its part, in its *Bill of Law* no. 330 of the “*Assemblée Nationale*” of 10 May 2005, proposes an amendment to article 10 of Law 91-647 of 10 July 1991, which would read as follows: “*Legal aid may be granted in litigious or non-contentious matters, acting as defendant or plaintiff in any jurisdiction. It may be granted for all or part of the proceedings. It may also be conferred at the time of the enforcement of a foreign judgment or any other document which has an enforceable nature in the French territory, including those arising from another Member State of the European Union with the exception of Denmark*”.

c) The rule mentioned in the preceding paragraph will not be modified even if the issue of which will be the competent court has not yet been solved.

There is an exception to the principle referred in a) the situation in which the claimant uses the “*pre-litigation advice*”, in other words, the aid of a professional legal adviser in his State of residence in order to solve the dispute and to prepare the eventual bringing of a cross-border action. In this case, and for this concrete purpose, the applicable legislation is the one of the State of Residence, and the competent authority to examine the application and grant it is the one defined in that legislation.

Once more, the *Directive* resorts to the highly commendable procedure of using standard forms. These forms facilitate, to the citizens involved in the law-suit, the presentation of applications and their grant, allow the speeding up of proceedings, contribute to doing away with linguistic and semantic barriers and make easier the intensive use of advanced technology resources.

The text discussed hereunder makes an express reference to the use of the information system made available by the European Judicial Network in Civil and Commercial Matters (EJNCCM).

In order to guarantee an adequate operation and functioning of the system ensuring that the right to legal aid foreseen in the Directive is effectively exercised, a number of mechanisms are in place such as the *European Judicial Atlas in Civil Matters* and the direct and agile system that stands in national Contact Points, which replace, in the area of co-operation and in the domains included in the sphere of their competencies, the cumbersome bureaucratic structures traditionally found in the Member States.

This reference afforded the system a greater degree of cohesion and efficiency, better adapting it to the general philosophy that informs this area of intervention and which increasingly consolidates the structure and

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<sup>33</sup> Please refer to section no. 23 of the *Preamble* and articles 12 and 8 of the Directive.

<sup>34</sup> To verify the technological possibilities associated to the use of forms, please consult, in the *European Judicial Atlas*, the pages referred to legal aid, in which it is made possible the filing via internet and the forwarding, by email, of the forms foreseen in the Directive, for the submission and transmission of applications, and the applicant may choose to submit his request directly to the adequate authorities of the other Member State from the moment he is sure that they are competent in the matter, at [http://europa.eu.int/comm/justice\\_home/judicialatlascivil/html/index.htm](http://europa.eu.int/comm/justice_home/judicialatlascivil/html/index.htm). See also the Commission Decisions of 9 November 2004 in the *Official Journal of the European Union* L 365 of 10 December 2004, pages 27 to 27 and the Decisions of 26 August 2005 in the *Official Journal of the European Union* L 225 of 31 August 2005, pages 23 to 27, where these forms are established.

<sup>35</sup> Created by the Council Decision of 28 May 2001 (2001/470/EC).

<sup>36</sup> For additional information on the European Judicial Network in Civil and Commercial Matters (which is also covered in the following chapter), please visit the following site: <http://ec.europa.eu/civiljustice>. With regard to the *Atlas*, visit the above-referenced website.

operation criteria of the aforementioned Network, which is becoming a key referent in this area given its involvement in a number of European cooperation processes as a result of explicit mentions in the various Community regulations produced after the entry into force of the Decision which instituted the Network.

Excluded from the possibility of granting aid for legal advice and representation in court are situations where the process has been specifically designed to allow the conflicting parties to defend their claims themselves.

The procedural framework envisaged is certainly unique and exceptional as it refers to what seems to be a particular context of procedural law developed in view of certain objectives previously considered by the legislator, based on encouraging personal appearance before the Courts. It seems that we are not before the equivalent of the situations merely defined by the non mandatory character of the support of a lawyer as occurs, for example, in those cases in which the assistance of professional counsel is not required in view of the amount of the claim.

In these cases, in which the procedure does not seem to be particularly focused on allowing litigants to make their case in person, it seems that there is no reason for the States to consider that they are not obliged to provide legal assistance to individuals who lack economic resources by designating a legal counsel or by granting legal aid.

Even when the described specific procedural framework is materialized, the obligation to provide legal assistance on the mentioned modalities may be imposed in these types of litigation “*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*”.

European legal aid may be total or partial (sections 1 and 3 of article 5 and section 4 of article 3 of the *Directive*). This means that applicants who do not qualify for a total exemption of the costs incurred from the legal procedure may have to satisfy part of the expenses of the proceedings.

The last article above mentioned used the expression “*reasonable contributions*”. It seems that this expression must be read as a proportionate contribution in view of the applicant’s income, in other words, suited to the effective capacity of personally sustaining the costs incurred in the pre-trial stage of the procedure and during the preparing and handling of the proceeding.

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<sup>37</sup> Article 3, section 3.

<sup>38</sup> *Ibidem*.



It also establishes, and this is certainly a sensible decision, that recipients of legal aid must refund it in whole or in part if their financial situation has substantially improved.

It is therefore created a strict system to control costs – at least at formal level because it can happen that supervisory and control mechanisms may act marginally and with considerable loopholes, only detecting any blatant situations in which the financial conditions have been substantially modified.

In any case, the Directive expressly foresees that the States will set up re-examination mechanisms in order to detect this type of situations..

The Directive also provides that the applicant is obliged to refund in whole or in part the legal aid received in the event of any misrepresentation on his part which was taken into consideration when granting such aid, what constitutes a mechanism that clearly moralizes the system.

Within the domain of processing applications, an important provision from the point of view of simplifying the use of this instrument establishes that applications may be submitted to either the competent authority of the Member State in which the applicant is domiciled or habitually resident or the competent authority of the Member State in which the court is sitting or where the decision is to be enforced.

It would be idle to point out the advantages of this kind of system in the context of a framework marked by considerable geographical distances between States.

The legal aid application and the supporting documents may be submitted in the official language or one of the languages of the Member State of the competent receiving authority since corresponding to one of the languages of the Community institutions. It may also be written or translated into another language which that Member State has indicated it can accept..

It has also been foreseen, with undeniable practical utility, that the authority responsible for transmitting the application (“*transmitting authority*”) to the Member State competent for its approval (inside which

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<sup>39</sup> See section 4 of article 9.

<sup>40</sup> The information on the languages which may be used in the request form in any Member State, and on the channels available to the States to receive requests is available on the *European Judicial Atlas*. Any visitor to this website will learn, with respect to Portugal for example, that this country declared that “*Applications for legal protection submitted by residents of other EU Member States for action within the jurisdiction of the Portuguese courts may be made in Portuguese or English*” and that “*Applications may be made in person, by fax or by post. They may also be made electronically by completing an on-line form which can be accessed by hyperlink*”.

<sup>41</sup> Section 1 of article 14.

functions the “*receiving authority*”) should assist the applicant, at no cost, to the latter, “*in ensuring that the application is accompanied by all the supporting documents known by it to be required to enable the application to be determined*” and “*in providing any necessary translation of the supporting documents*”.

It may, however, occur that the applicant must repay the costs of translation borne by the competent transmitting authority, if the application for legal aid is rejected.

The creation of these authorities consists on the exploitation of a good idea which was already embodied in the *European Agreement on the Transmission of Applications for Legal Aid* of 27 January 1977.

Their intervention may greatly contribute to fostering this procedure because it narrows, focuses and provides more specialisation to the communication channel.

Their “co-ordinates” (the names and addresses, the geographical areas in which they have jurisdiction, the means by which they are available to receive applications, and the languages that may be used for the completion of the applications) must be previously communicated to the Commission.

All their elements of localisation consist of the *European Judicial Atlas*, with a system for querying a database which allows identifying any authority in any EU Member State. Moreover, this information is published in the *Official Journal of the European Communities*.

It is also possible to benefit, in this area, from specialised and detailed support from the Contact Points of the European Judicial Network in Civil and Commercial Matters.

The competent transmission authorities may decide to refuse to transmit an application if it is manifestly unfounded or outside the scope of this Directive.

To facilitate transmission and reduce its costs, documents under this Directive are exempt from legalisation or any equivalent formality, which not only has a great symbolic value but clearly expedites the granting of legal aid within a context in which, due to considerable geographical distances, obtaining officially certificated documents poses additional difficulties.

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<sup>42</sup> *Ibidem*.

<sup>43</sup> Article 13, sections 4 and 6.

<sup>44</sup> Section 2 of article 14.

In order to ensure an agile and efficient handling of the procedure, it was defined that the competent transmitting authority shall transmit the application to the receiving authority within only 15 days.

This term is reckoned from the date of receipt of application and in calculating it the provisions set out in *Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971* determining the rules applicable to periods, dates and time limits must be taken into account, considering the determinations of article 1 of this text.

The Directive assumes the principles of full availability of information and motivation of decisions. The national authorities competent to examine the legal aid applications are bound to the observance of these principles.

It becomes undeniably important to make the system more accessible and transparent, that the citizen is fully informed of all matters related to the processing of his application. This procedure does not have a secret nature, so there are no reasons for concealing certain information.

With regard to providing the grounds for a decision, it must be borne in mind that only with the imposition of establishing on factual and legal basis the decision-making process (even only when the applications are totally or partially rejected), it is possible to produce the clarity consistent with the notion of free access to the procedure, as well as to make the final decision more responsible, more comprehensive and less capricious, so making viable a coherent and well structured appeal (that will have a judicial nature when the decision has a merely administrative nature) - article 15, paragraphs (3) and (4).

As regards relations between the Member States and in connection with the subject matters of the legal instruments of reference, the Directive has absolute prevalence over the provisions of bilateral or multilateral agreements in place between the Member States<sup>45</sup>

This would seem to arise naturally as a consequence of the notional combination of the legal nature of the document and its implementation in time. Nevertheless, this conclusion was explicitly included in the document if only because "*quod abundant non nocet*".

As stated in section no. 32 of the Preamble of the Directive, "*The 1977 Agreement and the additional Protocol to the European Agreement on the transmission of applications for legal aid, signed in Moscow in 2001, remain applicable to relations between Member States and third countries that are parties to the 1977 Agreement or the Protocol.*"

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<sup>45</sup> Please refer to Art. 20.

Denmark is not bound by the *Directive*. Therefore, the European Agreement<sup>46</sup> between the signatory states is to be applied with respect to this country.

## **ANNEX**

**Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes - Official Journal L 026 , 31/01/2003 P. 0041 - 0047**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61(c) and 67 thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the Economic and Social Committee(3),

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. For the gradual establishment of such

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<sup>46</sup> Denmark ratified this Agreement on 11 October 1979, and it entered into force in this country on 12 November of the same year.

an area, the Community is to adopt, among others, the measures relating to judicial cooperation in civil matters having cross-border implications and needed for the proper functioning of the internal market.

(2) According to Article 65(c) of the Treaty, 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) All Member States are contracting parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. The matters referred to in this Directive shall be dealt with in compliance with that Convention and in particular the respect of the principle of equality of both parties in a dispute.

(5) This Directive seeks to promote the application of legal aid in cross-border disputes for persons who lack sufficient resources where aid is necessary to secure effective access to justice. The generally recognised right to access to justice is also reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union.

(6) 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.

(7) Since the objectives of this Directive cannot be sufficiently achieved by the Member States acting alone and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(8) The main purpose of this Directive is to guarantee an adequate level of legal aid in cross-border disputes by laying down certain minimum common standards relating to legal aid in such disputes. A Council directive is the most suitable legislative instrument for this purpose.

(9) This Directive applies in cross-border disputes, to civil and commercial matters.

(10) All persons involved in a civil or commercial dispute within the scope of this Directive 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. Legal aid is regarded as appropriate when it allows the recipient effective access to justice under the conditions laid down in this Directive.

(11) Legal aid should cover pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings, legal assistance in bringing a case before a court and representation in court and assistance with or exemption from the cost of proceedings.

(12) It shall be left to the law of the Member State in which the court is sitting or where enforcement is sought whether the costs of proceedings may include the costs of the opponent imposed on the recipient of legal aid.

(13) 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 if they meet the conditions provided for by this Directive. The same applies to third-country nationals who habitually and lawfully reside in a Member State.

(14) Member States should be left free to define the threshold above which a person would be presumed able to bear the costs of proceedings, in the conditions defined in this Directive. Such thresholds are to be defined in the light of various objective factors such as income, capital or family situation.

(15) The objective of this Directive could not, however, be attained if legal aid applicants did not have the possibility of proving that they cannot bear the costs of proceedings even if their resources exceed the threshold defined by the Member State where the court is sitting. When making the assessment of whether legal aid is to be granted on this basis, the authorities in the Member State where the court is sitting may take into account information as to the fact that the applicant satisfies criteria in respect of financial eligibility in the Member State of domicile or habitual residence.

(16) The possibility in the instant case of resorting to other mechanisms 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/her unfavourable financial situation.

(17) Member States should be allowed to reject applications for legal aid in respect of manifestly unfounded actions or on grounds related to the merits of the case in so far as pre-litigation advice is offered and access to justice is guaranteed. When taking a decision on the merits of an application, Member States may reject legal aid applications when the applicant is claiming damage to his or her reputation, but has suffered no material or financial loss or the application concerns a claim arising directly out of the applicant's trade or self-employed profession.

(18) 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.

(19) When considering if the physical presence of a person in court is required, the courts of a Member State should take into consideration the full advantage of the possibilities offered by Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters<sup>(4)</sup>.

(20) If legal aid is granted, it must cover the entire proceeding, including expenses incurred in having a judgment enforced; the recipient should continue receiving this aid if an appeal is brought either against or by the recipient in so far as the conditions relating to the financial resources and the substance of the dispute remain fulfilled.

(21) Legal aid is to 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 required by the law, or ordered by the court.

(22) Legal aid should also be granted for the enforcement of authentic instruments in another Member State under the conditions defined in this Directive.

(23) Since legal aid is given by the Member State in which the court is sitting or where enforcement is sought, except pre-litigation assistance if the legal aid applicant is not domiciled or habitually resident in the Member State where the court is sitting, that Member State must apply its own legislation, in compliance with the principles of this Directive.

(24) It is appropriate that legal aid is granted or refused by the competent authority of the Member State in which the court is sitting or where a judgment is to be enforced. This is the case both when that court is trying the case in substance and when it first has to decide whether it has jurisdiction.

(25) 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.

(26) The notification and transmission mechanisms provided for by this Directive are inspired directly by those of the European Agreement on the transmission of applications for legal aid, signed in Strasbourg on 27 January 1977, hereinafter referred to as "1977 Agreement". A time limit, not provided for by the 1977 Agreement, is set for the transmission of legal aid applications. A relatively short time limit contributes to the smooth operation of justice.

(27) The information transmitted pursuant to this Directive should enjoy protection. Since Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data<sup>(5)</sup>, and Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector<sup>(6)</sup>, are

applicable, there is no need for specific provisions on data protection in this Directive.

(28) The establishment of a standard form for legal aid applications and for the transmission of legal aid applications in the event of cross-border litigation will make the procedures easier and faster.

(29) Moreover, these application forms, as well as national application forms, should be made available on a European level through the information system of the European Judicial Network, established in accordance with Decision 2001/470/EC(7).

(30) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission(8).

(31) It should be specified that the establishment of minimum standards in cross-border disputes does not prevent Member States from making provision for more favourable arrangements for legal aid applicants and recipients.

(32) The 1977 Agreement and the additional Protocol to the European Agreement on the transmission of applications for legal aid, signed in Moscow in 2001, remain applicable to relations between Member States and third countries that are parties to the 1977 Agreement or the Protocol. But this Directive takes precedence over provisions contained in the 1977 Agreement and the Protocol in relations between Member States.

(33) 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 to the Treaty establishing the European Community.

(34) 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 taking part in the adoption of this Directive and is not bound by it or subject to its application,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

SCOPE AND DEFINITIONS

Article 1

Aims and scope



1. The purpose of this Directive is to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid in such disputes.
2. It shall apply, in cross-border disputes, to civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.
3. In this Directive, "Member State" shall mean Member States with the exception of Denmark.

## Article 2

### Cross-border disputes

1. For the purposes of this Directive, a cross-border dispute is one where the party applying for legal aid in the context of this 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.
2. 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 judgments in civil and commercial matters<sup>(9)</sup>.
3. The relevant moment to determine if there is a cross-border dispute is the time when the application is submitted, in accordance with this Directive.

## CHAPTER II

### RIGHT TO LEGAL AID

## Article 3

### Right to legal aid

1. Natural persons involved in a dispute covered by this Directive shall be entitled to receive appropriate legal aid in order to ensure their effective access to justice in accordance with the conditions laid down in this Directive.
2. Legal aid is considered to be appropriate when it guarantees:
  - (a) pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings;
  - (b) 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 and the fees to persons mandated by the court to perform acts during the proceedings.

In Member States in which a losing party is liable for the costs of the opposing party, if the recipient loses the case, the legal aid shall cover the costs incurred by the opposing party, if it would have covered such costs had the recipient been domiciled or habitually resident in the Member State in which the court is sitting.

3. Member States need not provide legal assistance or representation in the courts or tribunals in proceedings especially designed to enable litigants to make their case in person, 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.

4. Member States may request that legal aid recipients pay reasonable contributions towards the costs of proceedings taking into account the conditions referred to in Article 5.

5. Member States may provide that the competent authority may decide that recipients of legal aid must refund it in whole or in part if their financial situation has substantially improved or if the decision to grant legal aid had been taken on the basis of inaccurate information given by the recipient.

#### Article 4

##### Non-discrimination

Member States shall grant legal aid without discrimination to Union citizens and third-country nationals residing lawfully in a Member State.

### CHAPTER III

#### CONDITIONS AND EXTENT OF LEGAL AID

#### Article 5

##### Conditions relating to financial resources

1. Member States shall grant legal aid to persons referred to in Article 3(1) who are partly or totally unable to meet the costs of proceedings referred to in Article 3(2) as a result of their economic situation, in order to ensure their effective access to justice.

2. The economic situation of a 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 set out in Article 3(2). These thresholds shall be defined on the basis of the criteria defined in paragraph 2 of this Article.

4. Thresholds defined according to paragraph 3 of this Article may not prevent legal aid applicants who are above the thresholds from being granted legal aid if they prove that they are unable to pay the cost of the proceedings referred to in Article 3(2) as a result of differences in the cost of living between the Member States of domicile or habitual residence and of the forum.

5. Legal aid does not need to be granted to applicants in so far as they enjoy, in the instant case, effective access to other mechanisms that cover the cost of proceedings referred to in Article 3(2).

## Article 6

### Conditions relating to the substance of disputes

1. Member States may provide that legal aid applications for actions which appear to be manifestly unfounded may be rejected by the competent authorities.

2. If pre-litigation advice is offered, the benefit of further legal aid may be refused or cancelled on grounds related to the merits of the case in so far as access to justice is guaranteed.

3. When taking a decision on the merits of an application and without prejudice to Article 5, Member States shall consider the importance of the individual case to the applicant but 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 7

### 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 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.

## Article 8

Costs covered by the Member State of the domicile or habitual residence

The Member State in which the legal aid applicant is domiciled or habitually resident shall provide legal aid, as referred to in Article 3(2), necessary to cover:

(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 this 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.

## Article 9

### Continuity of legal aid

1. Legal aid shall continue to be granted totally or partially to recipients to cover expenses incurred in having a judgment enforced in the Member State where the court is sitting.

2. A recipient who in the Member State where the court is sitting 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 and 6.

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 this Article.

## Article 10

### Extrajudicial procedures

Legal aid shall also be extended to extrajudicial procedures, under the conditions defined in this Directive, if the law requires the parties to use them, or if the parties to the dispute are ordered by the court to have recourse to them.

## Article 11

### Authentic instruments

Legal aid shall be granted for the enforcement of authentic instruments in another Member State under the conditions defined in this Directive.

## CHAPTER IV

## PROCEDURE

## Article 12

### Authority granting legal aid

Legal aid shall be granted or refused by the competent authority of the Member State in which the court is sitting, without prejudice to Article 8.

## Article 13

### Introduction and transmission of legal aid applications

1. Legal aid applications may be submitted to either:

(a) the competent authority of the Member State in which the applicant is domiciled or habitually resident (transmitting authority); or

(b) the competent authority of the Member State in which the court is sitting or where the decision is to be enforced (receiving authority).

2. Legal aid applications shall be completed in, and supporting documents translated into:

(a) the official language or one of the languages of the Member State of the competent receiving authority which corresponds to one of the languages of the Community institutions; or

(b) another language which that Member State has indicated it can accept in accordance with Article 14(3).

3. The competent transmitting authorities may decide to refuse to transmit an application if it is manifestly:

(a) unfounded; or

(b) outside the scope of this Directive.

The conditions referred to in Article 15(2) and (3) apply to such decisions.

4. The competent transmitting authority shall assist the applicant in ensuring that the application is accompanied by all the supporting documents known by it to be required to enable the application to be determined. It shall also assist the applicant in providing any necessary translation of the supporting documents, in accordance with Article 8(b).

The competent transmitting authority shall transmit the application to the competent receiving authority in the other Member State within 15 days of the receipt of the application duly completed in one of the languages referred to in paragraph 2, and the supporting documents, translated, where necessary, into one of those languages.

5. Documents transmitted under this Directive shall be exempt from legalisation or any equivalent formality.

6. The Member States may not charge for services rendered in accordance with paragraph 4. Member States in which the legal aid applicant is domiciled or habitually resident may lay down that the

applicant must repay the costs of translation borne by the competent transmitting authority if the application for legal aid is rejected by the competent authority.

## Article 14

### Competent authorities and language

1. Member States shall designate the authority or authorities competent to send (transmitting authorities) and receive (receiving authorities) the application.

2. Each Member State shall provide the Commission with the following information:

- the names and addresses of the competent receiving or transmitting authorities referred to in paragraph 1,
- the geographical areas in which they have jurisdiction,
- the means by which they are available to receive applications, and
- the languages that may be used for the completion of the application.

3. Member States shall notify the Commission of the official language or languages of the Community institutions other than their own which is or are acceptable to the competent receiving authority for completion of the legal aid applications to be received, in accordance with this Directive.

4. Member States shall communicate to the Commission the information referred to in paragraphs 2 and 3 before 30 November 2004. Any subsequent modification of such information shall be notified to the Commission no later than two months before the modification enters into force in that Member State.

5. The information referred to in paragraphs 2 and 3 shall be published in the Official Journal of the European Communities.

## Article 15

### Processing of applications

1. The national authorities empowered to rule on legal aid applications shall ensure that the applicant is fully informed of the processing of the application.

2. Where applications are totally or partially rejected, the reasons for rejection shall be given.

3. 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.

4. When the appeals against a decision refusing or cancelling legal aid by virtue of Article 6 are of an administrative nature, they shall always be ultimately subject to judicial review.

#### Article 16

##### Standard form

1. To facilitate transmission, a standard form for legal aid applications and for the transmission of such applications shall be established in accordance with the procedure set out in Article 17(2).

2. The standard form for the transmission of legal aid applications shall be established at the latest by 30 May 2003.

The standard form for legal aid applications shall be established at the latest by 30 November 2004.

## CHAPTER V

### FINAL PROVISIONS

#### Article 17

##### Committee

1. The Commission shall be assisted by a Committee.

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply.

3. The Committee shall adopt its Rules of Procedure.

#### 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, established in accordance with Decision 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 and recipients.

#### Article 20

##### Relation with other instruments

This 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.

#### Article 21

##### Transposition into national law

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 30 November 2004 with the exception of Article 3(2)(a) where the transposition of this Directive into national law shall take place no later than 30 May 2006. 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 Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

#### Article 22

##### Entry into force

This Directive shall enter into force on the date of its publication in the Official Journal of the European Communities.

#### Article 23

##### Addressees

This Directive is addressed to the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 27 January 2003.

For the Council

The President

G. Papandreou

(1) OJ C 103 E, 30.4.2002, p. 368.



(2) Opinion delivered on 25 September 2002 (not yet published in the Official Journal).

(3) OJ C 221, 17.9.2002, p. 64.

(4) OJ L 174, 27.6.2001, p. 1.

(5) OJ L 281, 23.11.1995, p. 31.

(6) OJ L 24, 30.1.1998, p. 1.

(7) OJ L 174, 27.6.2001, p. 25.

(8) OJ L 184, 17.7.1999, p. 23.

(9) OJ L 12, 16.1.2001, p. 1; Regulation as amended by Commission Regulation (EC) No 1496/2002 (OJ L 225, 22.8.2002, p. 13).

**Corrigendum to Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes (Official Journal of the European Communities L 26 of 31 January 2003) - Official Journal L 032 , 07/02/2003 P. 0015 - 0015**

**In the contents on the cover and on page 41 in the title,**

**for:**

**Council Directive 2002/8/EC ...,**

**read:**

**Council Directive 2003/8/EC ....**