



COMMISSION OF THE EUROPEAN COMMUNITIES

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**GREEN PAPER FROM THE COMMISSION**

**Legal aid in civil matters:  
The problems confronting the cross - border litigant**

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### Legal aid in civil matters: The problems confronting the cross - border litigant

#### Part I: General presentation of the issues

One concomitant of increasing use of the Treaty rights of free movement of persons, goods and services is an increase in the potential number of cross-border disputes. Such disputes are not necessarily between large companies; they may affect small business or individuals, who may be of modest means. For example, individuals may be involved in an accident while on holiday or while making a shopping trip abroad, or they may buy goods, which later turn out to be faulty or dangerous. Their spouse may have left the matrimonial home with the children of the marriage and settled in another country. They may need to pursue the matter in the country in which the dispute arose or, worse still may be threatened with proceedings there. A small company might sell goods abroad and later be threatened with proceedings in the purchasers' country. A consumer may order, over the Internet, goods from abroad which are never dispatched or which turn out to be faulty.

The scope of what may constitute "legal aid" may vary from country to country. For the purpose of this Green Paper, the Commission understands by the expression "legal aid" any of the following :

- provision of free or low-cost legal advice or court representation by a lawyer;
- partial or total exemption from other costs, such as court fees, which would normally be levied;
- 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.

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 enforceable or being enforced.

For a number of years, a series of questions to the European Parliament and correspondence addressed to the Commission have brought to light some of the problems that exist with regard to access to legal aid for persons involved in disputes and litigation in a Member State other than their own. A comparative study of the national schemes on legal aid shows that in

fact these systems differ considerably, thereby presenting a cross-border litigant with serious difficulties.

The Commission has already given support to initiatives in this field. For example, the "Guide to legal aid and advice in the EEA" produced in 1996 by Professor D. Walters on behalf of the Commission and under the auspices of the Council of the Bars and Law Societies of the EU, and the seminar held at the University of Angers in April 1998 on Legal Aid, which was based on the report of Professor Adrian Wood entitled "Access to Legal Aid in the Member States of the EU: Problems and tentative solutions", which received financial support from the GROTIUS-programme.

The Commission is also interested in the related problem of recovery of legal expenses and lawyers fees. It will publish a Commission Working Paper on this issue in the course of the first half of 2000.

Even a cursory examination reveals that there are fundamental differences in the philosophy and organisation and management of the legal aid systems in the Member States. As regards the philosophy of the systems, the broad objective in some States seems to be to make legal services and access to justice generally available, whereas in others the legal aid system can be seen as an adjunct of welfare law, available only to the very poorest.

These differences also have practical repercussions. In some countries there is a well-developed system whereby the State or an agency thereof directly provides realistic reimbursement to the lawyers involved whereas in others the scheme consists of lawyers themselves offering (whether voluntarily or compulsory) pro-bono services or services which are not realistically remunerated.

In a number of Member States, radical reforms have been introduced or are envisaged in the comparatively near future.

Taking into consideration that each national scheme is in principle available only for proceedings to be held on that nation's territory, an applicant from Member State A. needing legal aid in Member State B. will be faced with several obstacles, some of which may owe their instance precisely to the fact that the applicant is resident abroad.

These obstacles may be caused by:

- A requirement of residence or presence in the Member State where the aid is sought
- Conditions linked to the applicant's financial means
- Conditions linked to a review of the merits or chances of success of the proceedings for which legal aid is requested.
- Lack of information about the availability of legal aid in other Member States or about existing channels for transmitting applications for legal aid in other Member States
- The fact that national legal aid schemes do not take into account the extra costs of cross-border litigation (translations of documents, double legal advice, service of documents, etc.)
- Language difficulties

Whilst it is true that the second and third obstacles may exist even in the case of domestic applicants, they may be compounded in the case of foreign applicants. These difficulties are analysed further below.

It is a corollary of the freedoms guaranteed by the EC Treaty that a citizen must be able, in order to resolve disputes arising from his activities while exercising any of those freedoms, to bring or defend actions in the courts of a Member State in the same way as nationals of that Member State. In many circumstances, such a right to access to justice can be effectively exercised only when legal aid is available under given conditions.

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

Even under the provisions of Title VI of the Treaty on European Union (the Maastricht Treaty), judicial cooperation in civil matters was already regarded as an issue of common interest, whatever the nature of the rights for which cooperation is required. "Without prejudice to the powers of the European Community" Title VI was intended to complement the latter and to contribute to the construction of an "ever closer union", i.e. to go beyond Europe merely as a market.

Under the Amsterdam Treaty, the question of judicial cooperation in civil matters having cross-border implications falls under Title IV of the EC Treaty (Art. 65). The Council can now adopt measures inter alia to eliminate obstacles to the good functioning of civil proceedings. In the conclusions to the special meeting held in Tampere on 15 and 16 October 1999 on the creation of an area of freedom, security and justice in the European Union, the European Council invited 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. This Green Paper represents the first step towards the achievement of this goal.

As well as obligations arising directly from Community law, other international instruments are relevant. In particular, Art. 6(3) of the European Convention on Human Rights (applicable in all Community Member States) entitles everyone charged with a criminal offence to free legal assistance if he/she has not sufficient means to pay for it, when the interests of justice so require. In addition to this specific provision, applicable only in criminal cases, the general entitlement of Art. 6 to a fair hearing whatever the nature of the proceedings, has been held to comprise a right, in certain circumstances, to legal aid.

The scope of this Green Paper, which concentrates primarily on civil legal aid, is to analyse the existing obstacles to effective access to legal aid for European citizens involved in legal proceedings in another Member State than their own. It then makes some suggestions for reform. Its primary goal, however, is to call for reactions from interested parties.

In order to integrate the results of the discussion launched by this Green Paper, the Commission invites all interested parties to comment in writing no later than 31 May 2000 to:

**The Director General**

**Directorate General Justice and Home Affairs**

**European Commission**

**Rue de la Loi 200**

**B-1049 Brussels**

**Fax: (+32 2) 2967481**

## **Part II: Development of a Community policy to improve access to legal aid for the cross-border litigant**

The reasons for the differences between national systems, which are the root cause of the problem, are mainly historical and of little relevance in this context. The reasons for resisting change are mainly political and financial, though they are seldom given explicitly. Still they can easily be discerned from a brief comparative study of the various national systems:

- ☞ Any modifications to the present systems could increase costs for the responsible governments, and ultimately for the taxpayer
- ☞ Any improvement of access to legal aid might increase the number of court cases (debates exist about whether legal aid expenditure is demand-led or supply-led)
- ☞ Questions concerning the quality of legal aid services could arise, and one improvement may therefore trigger demands for additional improvements
- ☞ There is a fear that any integrated policy would involve at least a degree of harmonisation.

In certain Member States, there is currently a debate about how best to ensure affordable access to justice. This debate may involve options going beyond the provision of legal aid. It may involve advocacy of solutions based on the introduction or extension of contingent fees, insurance by either clients or lawyers or market solutions designed to reduce lawyers' fees. Legal aid will, however, continue to play an important role in this area.

A reflection at Community level, and the development of a Community policy on legal aid are necessary in order to ensure that the interests of the cross-border litigant and the extra difficulties with which he/she is confronted are not overlooked.

One could suggest therefore a series of actions to remove any discrimination against Community nationals, on the ground of residence or nationality, and also to remove or minimise the impediments engendered by the extra costs of cross-border litigation and by differences in the national systems as regards financial thresholds and examination of the merits of the application.

### ***A. Eligibility *ratione personae****

#### *1. The present situation in the Member States*

A Community national with a legal problem in a Member State other than that in which he is resident must surmount several hurdles, even assuming that he can obtain access to information about the law, including eligibility to obtain legal aid in that State.

The first question is whether he falls within the categories of potential recipients designated by the legislation of the State in which he wishes to obtain legal aid.

The starting point is that in general Member States' legal aid systems are territorial, in the sense that legal aid is granted only in respect to proceedings in that State (there are some limited exceptions to this in Scandinavia, but only in special cases such as cross-border custody of children). Consequently, a Community national resident in Member State A but involved in a dispute in Member State B, whether as plaintiff or defendant, is unlikely to be

able to obtain any assistance from State A; he will instead have to look to the Legal Aid system of Member State B.

However, not all the Member States ensure equal treatment of legal aid applicants irrespective of their nationality, their residence, or their presence in the State of litigation. The situation is complicated and affected by international treaties and conventions to which the Member States have acceded. Four basic groups can be identified:

- 📖 Certain Member States grant legal aid without any requirement of nationality or residence
- 📖 One Member State grants legal aid to foreigners only on the basis of reciprocity
- 📖 One Member State grants legal aid to residents only, which leads it to discard some benefits of legal aid to their own non-resident nationals
- 📖 Some Member States grant legal aid for their nationals, whatever their residence, and assimilate non-nationals who reside and in some cases, who are present, on their territory.

Concerning the last two categories of States, an individual who does not reside in such a State but wishes either to initiate a procedure there or who will be the defendant in such a procedure cannot benefit from legal aid in this State.

It is clear from the above that in some States the cross-border litigant simply falls between two stools; he will not be entitled to legal aid in either the Home or Host State.

Another issue is the fact that in some Member States legal entities are entitled to legal aid according to existing national legislation. In a cross-border context, this question could have a major impact on the way directive 98/27/EC on injunctions – the deadline for implementation of which is the 1/1/2001 – is implemented by Member States. Legal aid could solve the problem that consumers' associations are most likely to face when trying fully to take advantage of the *locus standi* which the directive gives them, i.e. the scarcity of financial resources.

## 2. *The impact of Community law on such conditions*

The legitimacy or otherwise of such conditions (residence, nationality, or even presence on national territory, etc.) with regard to Community law is a very complex matter.

The Court of Justice of the European Communities has never had the opportunity to rule on this question with regard to legal aid. However, a large corpus of case-law on analogous issues enables a number of conclusions to be drawn with confidence.

①In the first place, it seems quite clear that a formal rule limiting access to legal aid to nationals of the State where the litigation is taking place or threatened (referred to as the "Host State") could not be invoked against Community nationals working in the Host State (whether or not resident there) or members of their family for whom they are financially responsible<sup>1</sup>.

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<sup>1</sup> This flows from the Mutsch judgment (case 137/84, ECR 1985 2681-2697) in which the Court of Justice held that a right to have court proceedings conducted in one's own language contributed significantly to the integration of the migrant worker in the Host State and thus constituted a "social advantage" within the meaning of Art. 7(2) of Regulation 1612/68. Community nationals working there

②Secondly, more recent case law suggests that a Community national residing in the Host State is entitled to equal treatment with nationals irrespective of whether or not he/she is a worker<sup>2</sup>.

③Thirdly, the Court of Justice has held that the right to go to a State, even on a temporary basis, in order simply to receive services (a right guaranteed by Community law), involves the right to be treated on the same basis as nationals or residents of that country as regards the protection of the physical integrity of the person (see the Cowan judgment)<sup>3</sup>. More recently, the Court held that it is a corollary of the freedoms granted by Community law that the beneficiaries of those freedoms must be able to bring actions before the courts of a Member State on the same basis as nationals of that State (see the judgement in *Data Delecta*<sup>4</sup> *Aktibolag*).

④Lastly, the Court held in the *Bickel* judgment<sup>5</sup>, that the right to use one's own language in criminal proceedings fell within the scope of the EC Treaty, and was thus subject to the prohibition of discrimination on grounds of nationality enunciated in Article 12 (ex- Article 6) of that Treaty, with the result that a Community national involved in criminal proceedings in the Host State (in casu the Bolzano province of Italy) was entitled to use his own language (German) as if he were not merely an Italian national but an Italian national residing in the province of Bolzano, (to whom this privilege was accorded by Italian law) without the necessity of acquiring the status of a worker in that country or being resident there.

This case law taken as a whole, suggests that **any** beneficiary of a Community law right (including a cross-border recipient of services or purchaser of goods) is entitled to equal treatment with nationals of the host country, as regards both formal entitlement to bring actions and also the practical conditions in which such actions can be brought, irrespective of whether he is, or ever has been, resident or even physically present in that country. It is only logical that the right to bring actions comprises the effective right of access to courts, and hence entitlement to legal aid, when a national of the State would, *mutatis mutandis*, be so entitled.

This would imply not only that rules restricting entitlement to legal aid to nationals of the Host State, but also conditions requiring foreign nationals to be resident or even present on the national territory in order to be assimilated to nationals, would be struck at by Art. 12 of the EC Treaty and such conditions could therefore not be invoked against Community nationals involved in litigation in the Host State.

Even a condition which was not formally discriminatory (such as a residence or presence condition applicable to nationals and foreigners alike) could constitute disguised

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were therefore entitled to avail themselves of this right on the same basis as nationals of the Host State. This reasoning would seem to apply a fortiori to legal aid. Case law makes it clear that this right is also open to frontier-workers (see *Meints*, Case C-57/96, ECR 1997, p. I-6689 ) and members of the worker's family for whom he/she is financially responsible, (see *Deak*, Case 94/84, ECR 1985 p. 1873 and *Bernini*, C-3/90, ECR 1992 p.

<sup>2</sup> See *Martinez Sala* judgment, Case C-85/96, ECR 1998 p. I-2694. This case concerned access to welfare benefits on the same basis of the Member State, even when the applicant was not a worker.

<sup>3</sup> Judgment of 2 February 1989, Case 186/87, ECR p. 195. This case involved entitlement to the French national system of compensation for criminal injury. The applicant (a UK national) was held to be entitled to equal treatment with French nationals simply as a tourist ( and have a recipient of services) despite the fact that he was neither working nor resident in France at the relevant time.

<sup>4</sup> Judgment of 26 September 1996, Case C-43/95, ECR 1996, p.I-4661.

<sup>5</sup> Judgment of 24 November 1998, *Bickel & Franz*, Case C-274/96

discrimination (since nationals are far more likely to satisfy it than foreigners are)<sup>6</sup> and would hence be impermissible unless it could be justified on objective grounds. It would be for a Member State to invoke such grounds in a given case, but a priori it is difficult to envisage what they might be.

A further point which is relevant in this context is that the cross-border litigant may, as a practical matter, require two lawyers, one in his Home State to give preliminary advice, and one in the Host State to conduct the litigation. Any rule of the Host State which made it more difficult for a litigant to receive legal aid in respect of advice given by an "out of State" lawyer than a local lawyer could equally constitute disguised discrimination both against the litigant (in respect of his freedom to receive services) and the lawyer (in respect of his freedom to provide services)<sup>7</sup>.

A provision of limited ambit, but directly related to legal aid is found in Article 44 of the Brussels Convention (Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 1968, as periodically revised, to which all Member States are parties). This article applies when a judgment creditor, i.e. a successful plaintiff, is seeking the enforcement in one Contracting State of a judgment obtained in another Contracting State. It provides that a person who has benefited from legal aid or exemption for costs and expenses in the State where he has obtained a judgment is automatically entitled to benefit from the most favourable legal aid or the most extensive exemption from costs or expenses provided for by the law of the State in which he is seeking enforcement of the judgment. This provision may therefore, albeit in a limited field, entail the applicant being treated more favourably than would nationals of the Host State bringing proceedings in that State.

### *3. The impact of other international instruments*

In addition to the requirements of Community law, applicable as such in all Member States, the European Convention on Human Rights also has an impact<sup>8</sup>. Art. 6, enshrining the right to a fair trial, sets out specific requirements for the granting of legal aid in criminal cases (paragraph. 3). That article has also been interpreted as requiring legal aid to be granted to indigent persons in **civil** cases, when the interests of justice so require (see *Airey v. Ireland* A32-1979).

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<sup>6</sup> See on this point the *Bickel* judgment, *supra*. In that case the disputed national rules contained elements which were both directly and indirectly discriminatory, in that only German speaking Italian nationals resident in the Bolzano province were permitted to avail themselves of the right to use the German language in court proceedings. The Court of Justice held that Article 12 (ex-article 6) entitled not only non-Italian Community nationals resident in the Bolzano province, but also those there on a temporary basis, to be treated as if they were Italian nationals resident in that region, on the grounds that most of the Italian nationals who would wish to avail themselves of this facility would in fact be resident in the Bolzano province whereas most German-speaking non-Italians would not.

<sup>7</sup> See especially judgment of 30 November 1995, *Gebhard*, C-55/94, ECR 1995 p. I-4165 (freedom of establishment), judgment of 28 March 1996, *Guiot*, Case C-272/94, ECR 1996 p. I-1905 (freedom to provide services) and judgment of 28 April 1998, *Kohll*, Case C-158/96, ECR 1998 p. I-1831 (freedom to receive services).

<sup>8</sup> The relationship between Community law and the Human Rights Convention is a complex one Suffice it to say in this context that all Member States are signatories to the Convention and hence bound by its provisions.

Although extremely important, the extent to which Art. 6 of the European Convention on Human Rights imposes such an obligation in civil cases is far from clear. It is however clear that the article has had an impact on Contracting States' legal aid systems.

Finally, it is worth mentioning two Hague Conventions, namely Convention II of March 1954 on civil procedure and Convention XXIX of 25 October 1980 on international access to justice. Convention II, ratified by Austria, Belgium, Denmark, Finland, France, Germany, Italy, Luxembourg, the Netherlands, Portugal, Spain and Sweden, contains a section on free legal aid. In essence, it requires contracting States to extend national treatment to nationals of other Contracting States.

Convention XXIX, ratified by Finland, France, the Netherlands, Spain and Sweden, goes further in that it requires nationals of contracting States and persons habitually resident in a contracting State to be treated, for the purposes of entitlement to legal aid in court proceedings in each contracting State, as if they were nationals of and resident in that State. The same principle applies to pre-litigation legal advice provided that the person concerned is present in the State where advice is sought.

General ratification and correct application of the Hague Convention of 1980 on international access to justice would be highly desirable. A proposal for a Recommendation was submitted by the Commission to the Council in 1986 (COM(86) 610 final, 13.11.1986) for this purpose. This proposal was welcomed by the European Parliament and by the Economic and Social Committee, but did not have consequences at the level of the Council or Member States.

#### **Possible solutions**

At present, the international and Community obligations governing cross-border entitlement to legal aid on the same basis as nationals of the Host State form a confusing patchwork which leaves the citizen in considerable doubt as to what his rights are.

The 1980 Hague Convention on international access to justice is clear but has been ratified only by a minority of Member States. The scope of the European Convention on Human Rights is unclear with respect to its impact on Contracting States' obligations to grant legal aid. The obligations flowing from the Article 12 of the EC Treaty apply uniformly but are not stated clearly. The fact that they have to be deduced from the case law makes them inaccessible to the citizen.

Before legislating in this area, it would therefore be appropriate to clarify the Member States' obligations under Article 12 CE (ex Article 6) and to remind them that they should ratify the Hague Convention of 1980 on International Access to Justice.

However, the Commission would welcome comments from interested parties as to the appropriate strategy to adopt in this area, in particular on the question of whether Community legislation is necessary. The Commission takes the view that the interests of transparency require these principles to be set out in an easily accessible and binding form. The Commission will consequently examine whether it should propose legislation setting out clearly the Member States' obligation not to discriminate, directly or indirectly, against nationals of the other Member States in the granting of legal aid or the partial or total exemption from costs or expenses.

The Commission would also welcome comments from interested parties as to whether this principle should be extended to third country nationals habitually resident in a Member State,

as is the case in the 1980 Hague Convention. Comments are also welcome as to whether Member States see in the extension of the scope of the legal aid legislation a possible avenue for the solution to the financial problems of consumers associations when acting as "qualified entities" according to the above mentioned "injunctions" directive.

### ***B. Substantive eligibility***

Even assuming that the applicant satisfies the criteria *ratione personae* in force in the Host State, he must also demonstrate, first, that he meets the conditions of eligibility envisaged by that State's legislation, in particular with regard to his financial circumstances and those concerning the "merits" of the case in respect of which legal aid is required, and also that legal aid is available for the type of procedure in which he is involved.

#### **(a) Conditions of financial eligibility**

Certain Member States apply a financial threshold, which may vary according to, *inter alia*, the applicant's family structure, or his income and assets. If he earns above this ceiling he cannot obtain legal aid. Although such thresholds would appear to be neutral, since they do not involve any overt discrimination based on nationality or residence, they do not take into account the various income levels in the Member States, let alone where this threshold falls in relation to the national minimum income of the State where the applicant is resident.

Consequently, an applicant resident in a high cost country, whose resources would satisfy the financial criteria in the State where he resides, but who is above the ceiling of the (low-cost) State where the procedure is to take place, will be, for this reason, disentitled to legal aid.

On the other hand, certain Member States do not fix a specific amount. The applicant has rather to demonstrate that he/she is not in a position to finance the cost of the lawsuit, generally on the basis of a certificate of the financial resources of the applicant, established by the authorities in the country of residence. This particular formula, if properly applied, enables the authorities to take into account both the applicant's resources and the likely cost of proceedings.

The absence of homogeneity of these conditions within the Member States constitutes a deterrent for anyone who wants to embark upon a cross-border procedure, in particular a person from a high-cost country involved in a dispute in a low-cost country, and is therefore an additional obstacle to effective access to justice. A further complicating factor is that in some States the assistance granted may be repayable later if the applicant's financial situation improves within a particular time.

#### **(b) Conditions connected with the "merits" of the procedure for which legal aid is required**

Member States generally try to discourage ill-founded applications for legal aid by merit tests. Ill-founded applications can thus be refused, but the degree of subjectivity of decision-makers can cause great difficulty for EU citizens to access the justice system of a State other than their own.

The majority of Member States test the merits of the claim, on the basis of variable criteria leaving room for a broad subjective margin of appraisal. It is asked sometimes whether the request "has a reasonable chance of success", whether there is "a good chance that the applicant is likely to win", whether an "unassisted litigant would risk his own money," or

some similar test. This control is relatively formal in some Member States, but in others the test may develop into a genuine pre-examination.

(c) Conditions related to the type of procedure for which legal aid is being sought

It should be noted that in the majority of Member States, legal aid can be obtained in relation to all courts, whether civil, commercial, administrative or penal. However, some States exclude legal aid before certain courts, for example administrative tribunals, or in respect of certain types of action, for example defamation.

**Possible solutions**

The challenge is to attempt to devise ways to eliminate or reduce the difficulties with which cross-border suitors are faced without encroaching on the Member States' competence to organise their legal aid systems as they wish.

⌚ With regard to the financial criteria, every system is constructed on the basis of the costs of litigation and the income levels in that country. A person resident in a high-cost country who would satisfy the financial criteria there might, if involved in litigation in a low-cost country, have too high an income to qualify for legal aid there. However, the differences in the financial criteria may reflect not merely these costs and income levels but also different policies on access to justice, since some countries' criteria are, even taking into account income differences, more generous than others. It is not reasonable in all circumstances to expect the country of litigation simply to apply the criteria of the applicant's country of residence, since this might involve a litigant from country A being treated more favourably in country B, than residents of that country. However, a more targeted solution might be to apply those of the country of litigation, but adjust them by means of a "corrective factor" or "weighting" which would take account of the differences in the cost of living in the two countries involved or, alternatively, to apply the more flexible and objective test which allows the authorities to take into account both the applicant's disposable income and the likely cost of the lawsuit.

⌚ With regard to merits tests, there needs at the very least to be greater transparency. This could comprise the obligation to specify and publish the criteria, which are taken into account, not only in the State of litigation, but also in the other Member States. This could be done via the competent authorities set up under the 1977 Agreement of the Council of Europe on the Transmission of Applications for Legal Aid (the mechanism whereby cross-border applications for legal aid may be transmitted, discussed below). In addition, the competent authorities should be under an obligation to give detailed reasons for a refusal to grant legal aid on the grounds that the merits test has not been satisfied.

***C. The problem of extra costs engendered by the fact that the litigation is cross-border***

Even if the applicant surmounts the legal hurdles in his way and establishes an entitlement to legal aid in the country of the dispute or litigation, he is nevertheless very likely to find that the system is tailored to purely domestic proceedings and hence that it does not make any provision for defraying the extra expenses engendered by the fact that the case has a cross-border element. These expenses may comprise the following:

- (1) Necessity of hiring two lawyers. The directives on the provision of services and on the establishment of lawyers in the Member States have certainly facilitated cross-border access to lawyers. However, as a practical matter, the litigant is likely to need access to a lawyer in both the Home State (i.e. the State where he resides) in order to acquire basic advice about the law and the procedures in the Host State, and in the Host State itself, for more detailed advice and, if need be, representation in court. In most cases the Home State will not grant legal aid if the advice is on foreign law or if it is concerned with a dispute which will be litigated abroad. Conversely, the Host State may not grant legal aid in respect of advice offered by a lawyer in another State, even if that advice concerns a dispute which will be litigated in the Host State, and the system in force in that State may in any event only cover the costs of one lawyer. The legitimacy of such conditions is discussed above under Point A, but while they continue to exist, it is very possible that the applicant himself will fall between two stools and will thus have to shoulder the extra burden of the costs of the lawyer in the Home State.
- (2) Translation and interpretation costs. Interpretation may need to be provided for the court proceedings and even for consultations between the client and his lawyer in the Host State if it is not possible to find a lawyer who shares a common tongue with the applicant. Documents may also need to be translated.
- (3) Miscellaneous factors, such as extra travel costs of litigants, witnesses, lawyers etc.

#### **Possible solutions**

What are the best means of ensuring that the extra costs of cross-border litigation do not constitute an impediment to access to justice?

Should the burden be on the Home State of the applicant to take on board at least the cost of the pre-litigation advice dispensed in that country even when the litigation takes place in another country? (Even this might be of little avail to the litigant, since a lawyer in the applicant's country might be unable to give sufficient advice on the laws and procedures in another country to dispense the litigant from the need to consult a lawyer in that country.)

#### ***D. Effective access to an appropriately qualified lawyer***

The cross-border litigant, who is not physically present in the State of litigation, may be faced with the very difficult practical problem of actually finding a lawyer in that country who can handle his case. He needs a lawyer who is qualified to plead in the courts which have jurisdiction to hear the case who is experienced in the relevant field and, ideally, who shares a common language with the litigant.

He may also, in order to acquire preliminary advice, wish to find a lawyer in his Home country who has some knowledge of the law and legal system of the country of litigation and who speaks the language of that country and who can assist him in making contact with a lawyer in the Host country.

## National and Community-wide databases

The Commission welcomes the creation of databases of legal professionals. In some countries (e.g. Germany) such a base already exists at national level. The Commission has in particular financed through the Grotius programme a project of the CCBE assessing the feasibility of setting up a European lawyers' database, which could be made accessible to the general public anywhere in the countries of the European Union. The information available on each database might not be able to be precisely the same in each country due to differences in the ethical and professional rules in force in each country, but ideally it would indicate the courts before which the lawyer is authorised to plead, his areas of expertise and of experience, the languages in which he is competent or fluent and whether he is available (whether voluntarily or automatically) to handle cases funded on a legal-aid basis.

One could propose that national lawyers, within the framework of a European network of lawyers, be qualified as correspondents for one or more other Member States than their own. These correspondents should be lawyers willing to handle cases involving more than one Member State if necessary on a legal aid or even pro-bono basis.. The correspondents must, therefore, be able to guide their *national* clients in :

- ☞ Commencing or defending legal proceedings in another Member State
- ☞ Resisting, in the client's country, enforcement of a judgment obtained in another Member State
- ☞ Obtaining legal aid in another Member State,

and their *foreign* clients in

- ☞ Commencing or defending legal proceedings in the lawyer's own country
- ☞ Enforcing a foreign judgment in that country
- ☞ Obtaining legal aid in that country.

Correspondents should be able to process the necessary forms used between the jurisdictions concerned and to forward the case to the appropriate foreign authority. Where the lawyer's ability stops, he should be able to link-up with another lawyer of the network to pursue the case in another jurisdiction.

In order to make the network idea attractive for the professionals, and easily identifiable for the beneficiaries, and also to guarantee the quality of the services offered, one could envisage an analogous application of an ISO-like system, whereby lawyers of the network are permitted to – for instance – carry a particular emblem or logotype next to their own. Only these lawyers would then appear on the official lists that will subsequently be distributed throughout the Union, and that will be kept for the benefit of the public, among other possibilities, at the Commission's Delegations and Offices in the capitals of the Member States.

<p>The Commission would welcome ideas from interested parties as to how these ideas could be implemented.</p>
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### ***E. Technical Procedures***

Aside from the other questions mentioned, the mechanics of applying for legal aid abroad can also constitute an impediment to access to justice for the cross-border litigant.

This question of how to apply for legal aid abroad is, at least in theory, relatively simple to solve, since all the Member States of the Union, with the exception of Germany, have ratified the 1977 Agreement of the Council of Europe on the Transmission of Applications for legal aid, known generally as the Strasbourg agreement. This agreement sets up a system whereby applications may be made in one country and sent, via a system of transmitting and central receiving authorities designated for this purpose by the Contracting States, to the Contracting State where legal aid is sought. The declared aim of this agreement is to facilitate the approach by the legal aid applicants who, instead of being required to identify the competent authorities in another State, can thus restrict themselves to submitting a request to the transmitting authority of their own country of residence, which then has to assist them in putting together their documents and, where necessary, translating the relevant parts, before forwarding the application to the receiving authority of the Host State

In principle, the application and any supporting documentation may be established, at the applicant's option, either in the language of the country of the receiving authority, or English or French. Contracting States may, however, enter a reservation removing the option to use English or French and insisting that applications be received in the Host State's own language.

- The agreement is supplemented both by a guide to procedures, which is updated from time to time, and at present is circulated only amongst the competent authorities, as well as by Recommendations of the Committee of Ministers. The recommendation at present in force (no. R(97) 6) contains recommendations inter alia on the speedy processing of claims and also has annexed a model application form, which Contracting States are invited both to use and to accept.
- Application of the agreement is monitored by a multilateral Committee of the Contracting States, which reports to the Committee of Ministers and which inter alia makes suggestions to improvement of the operation of the agreement.

It appears, however, that this agreement is comparatively little used. This under-utilisation seems to reflect insufficient knowledge, both of the existence of a right to legal aid abroad,<sup>9</sup> and of the mechanism set up by the Convention. It would also seem that the central authorities are not informed sufficiently of the applicable legislation in force in the other States and of any amendments.

There is also a considerable risk that delays transmitting the application may seriously compromise the chances of the applicants' request for legal aid being considered in due time.

#### **Possible solutions**

The 1977 Agreement on the Transmission of Applications for legal aid has not been ratified by all Member States. Furthermore, some States have insisted on linguistic reservations, which create difficulties for litigants.

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<sup>9</sup> Although in some States, applications may be sent directly to the relevant body, thereby bypassing the mechanism of the Convention.

Consideration needs to be given to the question whether attention should be focussed on the existing Strasbourg Agreement mechanism or whether Member States of the Union should take separate action at Union level.

The first option would comprise at least a recommendation that all Member States ratify the Strasbourg Agreement. This option would have the advantage of building on what exists already and would avoid unnecessary duplication. Such a solution would, however, have comparatively little added value since on the one hand 14 out of 15 Member States are signatories of the Agreement and, on the other hand, it would do little to solve the problems associated with the functioning of the Agreement, particularly under-utilisation and delay.

The second option could be adopted in the context of a more ambitious and integrated action at Union level. It could for example comprise the setting up of more localised receiving authorities and could also provide for a standard form and a duty to give reasons for the refusal of applications as well as for an appeal mechanism. It could also encourage greater use of new technologies to transmit forms and information and promote contact between the relevant authorities. It could also provide for the elaboration and regular updating, if necessary on the Internet, of a manual or guide for the benefit of the authorities, potential beneficiaries of legal aid and lawyers. This would help to increase transparency and cut down delays which would be of particular benefit in this area where time may be of the essence.

The recently signed Convention on the service of judicial and extra judicial documents in civil or commercial matters of 26 May 1997 (OJ C 261 of 27 August 1997) (now proposed as a draft regulation) could provide a model for such a system.

The Transmitting Authority should be under a duty to ensure that the paperwork and supporting documents forwarded to the Host State are correct.

Finally, it is worth noting that the abundance of questions arriving at European level concerning a problem that has so far been only nationally regulated appears to reflect the absence of requirements on the part of Member States' authorities to cooperate. Problems that concern the authorities in two Member States could in fact often be solved simply by correspondence or a telephone call.

## ***F. Information and training***

As regards information, it is obvious that any improvement to the legal basis for access to justice would be of limited value if it were not properly communicated to its potential beneficiaries. Information about rights and procedures has so far mainly been distributed at national level and normally concerning only the domestic remedies and forms of assistance available. The target of presenting the rights in the whole Community to the citizen of the Community, is seldom set, nor is the information distributed along the lines of the practical division between its "audiences" that has to be made, in order to make it effective. A distinction therefore needs to be made between

- (1) Information to the public about the existence of rights and procedures in the Union; potential beneficiaries of legal aid
- (2) Information to the professions concerned on how to guide applicants through procedures to the sources of legal aid

- (3) Information to the professions concerned that will be the executors of decisions to grant legal aid.

A Guide to Legal Aid and Advice in the European Economic Area was prepared in 1995 by Professor D. Walters on behalf of the European Commission and under the auspices of the Council of the Bars and Law Societies of the European Union. This guide contains information on the relevant regulations in the European Economic Area, i.e. the EU and Norway, Island and Liechtenstein, but it meets mainly the needs of category (2) above, namely legal practitioners. Due to the continuous changes of legislation in the Member States, the guide is also in need of more frequent updating. As none of the participating countries' central authorities appear to be making use of the guide, it may also benefit from more publicity.

A guide entitled "Enforcing Your Rights in the Single European Market" was written as a response to the need for greater awareness about how individuals can seek redress if they encounter difficulties when exercising their single market rights. This guide was developed by the "Dialogue with Citizens and Business" initiative and describes, in simple terms, the various means of redress at both national and European level, including legal aid.

Legal aid is more thoroughly described in country-specific factsheets, to which every Member State contributed, that accompany the guide. These factsheets provide key information on how to gain access to legal aid, eligibility, and the types of legal aid available. They also provide contact points where further information can be attained. Each factsheet is translated into all 11 official languages of the EU so that people are able to find information about any Member State in their own language.

The guide and the factsheets will be both made available in early 2000. The factsheets can be found on the Dialogue with Citizens website then at <http://europa.eu.int/citizens>.

### **Possible solutions**

In order to secure effective access to information about one's rights, the production of an up-to-date Access to Justice booklet is recommended, for distribution through the competent authorities to consumer organisations, citizens advice bureaux and national governing bodies of lawyers. As this line of action has already been tried, the best results could probably be achieved by building on what is already there: namely the Guide to Legal Aid.

In its revised version the booklet could contain not only the type of information contained in the original version, namely the procedures for legal aid and relevant contact addresses. It could also be combined with the information available both from the proposed lawyers' databases and the manual discussed above under D and E. It would therefore identify lists of competent lawyers able to handle legal aid originating from other EU States. This information should exist in all national languages. It could be distributed within the framework of the "Dialogue with Citizens and Business Initiative" campaign and within the framework of the specific guide "Access to Justice" that already exists. It should also be made available by electronic means and updated regularly.

A layman version – ideally possible to attach e.g. to a travel agency brochure – should also be developed. This guide would contain practical information on the right to obtaining legal aid

for the foreigner, on the steps to take and on the relevant authorities' addresses for this purpose.

The guide "Enforcing Your Rights in the Single European Market" created by the "Dialogue with Citizens" initiative, and in particular the factsheets on legal aid, could both be more widely promoted. National authorities are encouraged to promote these materials which provide useful information to people seeking legal aid. Therefore, citizens should be made aware of their existence.

Such initiatives could be complemented by actions to promote training and interdisciplinary training as well as information campaigns for the benefit of those professions involved in legal aid (lawyers, judges, police officers, social workers, migration authorities). One can also reflect on the various methods making it possible, in this context, to make relevant training available within the framework of international courses. One could also suggest creating a permanent centre of information, giving the lawyers, agreeing to work under the legal aid system, continuous updated information.

Community support could be a powerful incentive for young advocates. It would encourage the young "BI-national" lawyers to move in this way rather than towards the traditional way of the networks of business advocates. The insufficiency, or even the non-existence, of the compensation for the advocates designated under legal aid in certain Member States, can only affect negatively the quality of provided work.

Information campaigns tend to put the responsibility on the individual to become better informed, rather than on the public bodies and officials, who have a role in advising them. The Commission has introduced training schemes, i.a. for Customs officials at the Union's external borders. Similar training schemes could be envisaged for officials dealing with legal aid schemes.

### ***G. Reform of the national legal aid systems and alternative means of ensuring access to justice***

In the context of any reflection on the problems of the cross-border litigant in obtaining legal aid, it would be idle to ignore the fact that some Member States have found that a well-performing system of legal aid is costly and have thus been experimenting with alternative means to ensure that justice is affordable. Alternatives under discussion or being introduced include:

- ◇ Contingent or conditional fees. In particular the UK is experimenting with conditional fees, a system whereby lawyers agree to waive their fees if their client loses his case, but take a percentage of the damages awarded if the client wins. A system of this kind could have certain advantages. It could however still expose the litigant to the risk of having to pay the other party's costs if he loses the case and national rules require him to shoulder the winner's costs. Furthermore, there would also appear to be little incentive, other than creating goodwill, for a lawyer to accept a case on this basis unless he was reasonably confident of winning.
- ◇ Legal expenses insurance. In some Member States, legal expenses insurance is advocated as a means of ensuring affordable justice. For example, in Germany it is common for most families to subscribe to such a policy. In Sweden, the recent reforms have produced a

situation in which legal aid will only be granted if it was reasonable for the applicant not to be covered by legal expenses insurance in the circumstances.

Whilst this trend could have positive effects if it allows wider access to affordable justice, a note of caution needs to be sounded. In the first place, there seems to be little enthusiasm among the Member States for introducing a general, statutory scheme of compulsory legal expenses insurance. Any insurance would therefore be limited to commercial insurance and, to be successful, would thus have to be an attractive proposition to both insurance companies and individuals. It is likely that the level of cover would vary from country to country and, in any event, the really needy are unlikely to take out such a policy. It would therefore be likely that all Member States would need to maintain some form of legal aid to cover at least the very poorest.

Any generalised trend to legal expenses insurance could also comprise dangers for the cross-border litigant. For example, unless such a policy specifically covered the risk of litigation abroad, the cross-border litigant would still need to turn to the system of legal aid of the Host Country. If a litigant who was resident in a country where insurance was not common was involved in litigation in a country where it was common he might be faced with the danger either that the statutory legal aid scheme in that country had largely been dismantled, or that he could only obtain legal aid if according to the Host Country's criteria, it was reasonable not to have been covered by a legal expenses insurance policy in the circumstances.

At a time when the European Council has recently called on the Council to establish minimum standards ensuring an adequate level of legal aid in cross-border cases, it would not be acceptable for reforms adopted at national level to jeopardise this goal. Those Member States which are considering reforms in their legal aid systems need therefore to ensure that there is no conflict between those reforms and Community policy.

#### **Possible solutions**

What is the best way to ensure that reforms of Member States' systems of legal aid do not jeopardise the aim of ensuring an adequate level of legal aid in cross-border cases ?

How can the policy of establishing minimum standards in such cases best be ensured ?