

The proposed EC Directive on legal aid

Sarah Croft, Shook Hardy & Bacon International LLP

www.practicallaw.com/A27956

Funding of litigation is central to the debate on “access to justice” in Europe. Consumer groups argue that the lack of affordable funding options prevents some individuals from bringing genuine claims, particularly where contingency fees are not permitted. From an industry perspective, any new proposals which provide funding for litigation must be fair, balanced and, in particular, legislation should contain enough checks and balances to avoid unmeritorious claims from being brought. The proposed European Directive on Legal Aid (*COM/2002/0013 final CNS 2002/0020; OJ C 103E, 30/04/2002 p.0368-0372*) (the Proposal) is a therefore a significant development for consumers and industry alike.

The stated purpose of the Proposal is to improve access to justice in cross-border disputes by establishing common rules relating to provision of legal aid across the EU. The Proposal has been the cause of controversy for some time between some members of the European Parliament and the governments of member states as represented by the European Council of Ministers. Governments have largely been unwilling to see a significant extension of legal aid because of the cost involved. They want the Proposal confined to the provision of legal aid for cross-border disputes. The MEPs in question have pushed for the Proposal to be extended so that it would serve to set minimum common standards for legal aid for *all* civil disputes within the EU.

Matters came to a head at the turn of the year because, until 1st January, 2003, EC legislation could be passed without the consent of the European Parliament. New powers, which came in to force after that date, will give MEPs more rights to amend legislation. Before the January deadline, the European Council reportedly made amendments to the Directive which would confine the provision of legal aid to cross-border disputes. The MEPs expressed concern that the Council would try to force this “watered down” version of the proposed Directive through before the end of 2002. In addition, the Dutch government entered a “parliamentary scrutiny reservation”, the effect of which is to suspend the ratification process pending resolution of outstanding issues. At the time of going to press, the proposed Directive had not been ratified. It may be that the situation will necessitate the appointment of a rapporteur to resolve the dispute concerning the scope of the proposal. (See the web version of this article at www.practicallaw.com/global/A27956 for developments on ratification.)

Reviewing the Proposal from an industry perspective, it seems that the consultation process ensured the inclusion of a number of provisions which serve to balance the interests and concerns of legal aid applicants on one hand and of industry on the other. However, a number of a number of key points emerge which will be of concern to many companies which may be involved in claims covered by the new legislation:

- The scope of the Proposal is still subject to dispute. If the MEPs are ultimately successful in their argument that there should be minimum common provision of legal aid across the EU, this could potentially lead to significant changes including, in some jurisdictions, a marked increase in the availability of legal aid.
- The “merits test” in the Proposal is weak. Member states would only be able to reject legal aid applications in claims that were “manifestly unfounded”. There would be no real examination, therefore, of whether or not the cases in question have any reasonable prospect of success. This will not give much comfort to industry sectors that in the past have faced claims which have been lacking in merit and which have ultimately been dismissed.
- No threshold is set for a common “means test” across the EU because of the differences in costs of living between some member states. Each member state is therefore to set its own financial threshold. The fear may be that any large differences between member states on financial thresholds will encourage “forum shopping”.
- The means test is not determinative. The Proposal provides that, if an applicant can show that without aid he or she would not be able to pay for the costs of proceedings, legal aid should be granted, particularly where the inability to pay is as a result of differences in the cost of living between the state of residence and the forum state in cross border proceedings.
- The Proposal covers not only individuals but also non-profit making organisations bringing an action based on a “collective right” as opposed to an “accumulation of individual rights”. It is easy to see how this provision could be used by, say, a consumer action group or a support group seeking declaratory or injunctive relief concerning allegations of safety relating to a pharmaceutical product or medical device. Again, the Proposal does not contain a significant merits test in this context.
- The Proposal goes beyond the provision of legal aid and includes a section which introduces a “loser pays” rule in all cases to which the Proposal applies. This is an important feature of the new legislation for industry, as the potential costs liability should result in a realistic assessment of the merits of claims at the outset. It is also provided, however, that member states may make exceptions to this principle to “ensure appropriate protection of weaker parties” and that member states may provide that where the losing party is a recipient of legal aid, reimbursement is not due or will be paid by the state.

There are two existing international conventions relevant to the question of legal aid in cross-border disputes within the EU:

- The Strasbourg Agreement of 1977 on the Transmission of Legal Aid Applications (ratified by all member states except Germany and The Netherlands). The Strasbourg Agreement provides that applications for legal aid may be made in the applicant's home state, for the purpose of proceedings in another state. The conditions of eligibility, however, remain those of the state where the litigation will be brought.
- The 1980 Hague Convention on International Access to Justice (only ratified by nine of the member states). The Hague Convention requires persons resident in another Contracting State to be treated for the purposes of entitlement to legal aid as if they were nationals of or resident in that Contracting State.

The European Council agreed in Tampere in October, 1999 to establish minimum standards ensuring an adequate level of legal aid in cross-border cases throughout the EU. Following on from this, in March, 2000, the European Commission issued a Green Paper, the purpose of which was to prompt an examination of the difficulties encountered by cross-border litigants using existing procedures. The difficulties identified relate to the national rules on the nature of legal aid, the amount of aid available, the rules on financial and or personal eligibility and difficulties relating to the need for the legal aid applicant to be familiar with the procedure of the state in which the litigation was to take place (see the *Explanatory Memorandum*).

The publication of the Green Paper was followed by a consultation period with national experts on the problems raised and how

These points are examined further below in the context of the key provisions of the Proposal, namely those relating to:

- The overall aims and scope of the Proposal.
- The right to legal aid.
- Eligibility and financial thresholds.
- Eligibility and merits tests.
- Responsibility for legal aid among member states.
- Making and processing applications.
- Reimbursement of court costs and lawyer fees.

The stated purpose of the Proposal is to improve access to justice in cross border disputes by establishing minimum common rules relating to legal aid and other financial aspects of civil proceedings. It would apply to civil disputes of all types, irrespective of the type of court (*Article 1*).

to solve them. A meeting took place in June, 2001 between the Commission and national experts to discuss a preliminary draft of the Proposal. The conclusion reached was that any initiative arising from the Green Paper must contain common minimum standards of legal aid to ensure effective access to justice throughout the EU for cross-border litigants. Neither the Strasbourg Agreement nor the Hague Convention contains any such common minimum standards for eligibility for legal aid. The Explanatory Memorandum that accompanies the proposed Directive on legal aid also states that the purpose of laying down minimum common standards is to "avoid situations where the poorest people are deprived of access to legal aid and are thus excluded from the European judicial area simply because they cannot afford to exercise their rights effectively." The Explanatory Memorandum also notes that the Commission initiative follows on from other international and EC instruments, including The Charter of Fundamental Rights for the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Charter provides that legal aid is to be made available to those who lack sufficient resources in so far as such aid is necessary to ensure sufficient access to justice (*Article 47 (3)*). The Convention on Human Rights provides that everyone is entitled to a fair hearing (*Article 6*). Although this principle primarily concerns criminal law, it was extended to include a right to legal aid in civil matters in certain circumstances (see *Airey v Ireland (1979-80) 2 E.H.R.R. 305 ECHR*).

The European Council of Ministers agreed the terms of the Proposal in October, 2002, subject to the EU Justice and Home Affairs Council dealing with various technical issues. At the time of going to press, however, the Proposal had not been ratified because of a dispute between the European Parliament and the European Council regarding its exact scope (see *main text*).

"Civil matters" is defined as all matters of civil law including commercial law, employment law and consumer protection law. The European Commission Explanatory Memorandum (*COM (2002) 13 final 2002/0020 (CNS)*) (the Explanatory Memorandum) adds that the proposed Directive excludes disputes concerning administrative law.

"Legal aid" is defined as "all resources made available to persons to ensure effective access to justice where their financial resources are inadequate to cover the costs of litigation, and includes at least the services of a lawyer and the costs of proceedings" (*Article 2*).

Legal aid will cover (*Article 3*):

- Pre-litigation advice.
- Representation in court.
- Exemption from, or assistance with, the cost of proceedings.

Legal aid will continue to be granted to cover expenses incurred in having a judgment declared enforceable, or enforcing the judgment (*Article 7*) and will continue if an appeal is brought against the recipient (although the application would have to be

re-examined where the appeal is brought by the recipient). The Proposal extends the provision of legal aid to circumstances “where disputes are settled via extra-judicial procedures, if the law makes provision for such procedures or if the parties to the dispute are ordered by the court to have recourse to them” (*Article 16*). According to the Explanatory Memorandum, this would include the provision of legal aid for mediation.

Legal aid will cover the costs related to the cross-border nature of the dispute, including translation fees (*Article 5*). Travel costs will also be covered where attendance in court is mandatory.

The principle of non-discrimination is enshrined at Article 6 which states that member states must grant legal aid without discrimination to EU citizens and third-country nationals residing lawfully in a member state. The Explanatory Memorandum adds a quote from the European Council in Tampere in which it was emphasised that “the enjoyment of freedom requires a genuine area of justice, where people can approach courts and authorities in any member state as easily as in their own.”

The preamble to the Proposal states that all persons involved in a civil dispute must be able to assert their rights in the courts even if their financial situation makes it impossible for them to bear the costs of the proceedings. Following on from this, the Proposal itself provides that all persons involved in a civil dispute would be entitled to receive appropriate legal aid if they do not have sufficient resources within the meaning of the Proposal to enforce their rights by court action (*Article 3*). Article 3 is expressed to be without prejudice to Article 14 of the Proposal, under which member states may provide that legal aid applications for actions, which appear to be “manifestly unfounded” may be rejected by the relevant authorities (*see below “Eligibility and merits test”*).

The Proposal extends the provision of legal aid to “not for profit legal persons” based in a member state where proceedings are designed to protect legally recognised general interests and they do not have sufficient resources to bear the costs of proceedings (*Article 15*). Again, this is expressed to be without prejudice Article 14. The Explanatory Memorandum gives “consumer associations” as an example of a “not for profit legal person” which may be covered by Article 15. It also states, however, that the grant of legal aid would only apply “where proceedings are designed to protect legally recognised interests, i.e. collective interests rather than a mere accumulation of private interests.” The Explanatory Memorandum refers specifically in this context to the cross-border injunction Directive (*Directive 98/27/EC of the European Parliament and of the Council of 19th May, 1998 on Injunctions for the Protection of Consumers’ Interests*) that allows “qualified” entities to bring injunctive proceedings throughout the EU. It states that “the possibility of legal aid for these organisations contributes to the objectives of the cross-border injunctions Directive.”

The Proposal provides that member states must grant legal aid to natural persons involved in a dispute within their jurisdiction who are unable to meet the costs of proceedings as a result of their personal financial situation (*Article 13*). Most member states which already have legal aid have established thresholds below

which people are eligible for legal aid subject to certain conditions. The Proposal does not lay down a common European threshold to define financial eligibility for legal aid. The reason given for this in the Explanatory Memorandum is the differences in the costs of living between member states. Article 13 therefore further provides that member states may define income thresholds above which legal aid applicants are presumed to be able to bear the costs associated with disputes. These thresholds will be defined in the light of “various objective factors such as the cost of living and the costs of proceedings.”

Significantly, however, the Proposal also provides that legal aid applicants who do not meet the [financial] conditions must be granted legal aid if they could prove that they are unable to pay the cost of proceedings, in particular as a result of differences in the cost of living between the member states of residence and forum (*Article 13*). Or, as is it put in the Explanatory Memorandum, “irrespective of the thresholds set objectively, it must always be possible for legal aid applicants to prove that without this aid, they would be unable to assert their rights.”

Legal aid applicants would be presumed to be able to bear the cost of proceedings if in the case in question they enjoy “actual access” to a private mechanism involving a no win, no fee agreement with the lawyer and providing that court costs will be paid by a third party (*Article 13*). The Explanatory Memorandum cites insurance as an example of a “private financing mechanism” which would give the person concerned access to justice “removing the need for legal aid”. Another such mechanism would presumably be a conditional fee agreement, already available in England and Wales. The lawyer in a conditional fee agreement is not allowed to agree to receive a percentage of any damages recovered. A conditional fee agreement is conditional upon the outcome of the case but the amount paid is based on the lawyer’s normal fees on a time recorded basis. The client and lawyer may agree on an additional “success fee” on top of the basic fee. In England there is also a “loser pays” rule, such that if a client to a conditional fee is unsuccessful, while he or she will not have to pay his or her own lawyer, there will be a potential liability for the costs of the other side. In some cases individuals can insure against the possible liability for the winner’s costs.

It is not clear what “actual access” would mean in practice. If a conditional fee arrangement was available to an applicant but insurance for the liability for the potential liability under the “loser pays” rule was not, would the applicant be entitled to legal aid under the Legal Aid Directive?

Where member states have national provision for legal aid, there is often a “merits test” as well as a “means test” which the applicant must meet in order to be eligible for legal aid. The extent of the “merits test” in the Proposal is such that member states may provide that legal aid applications for actions which appear to be “manifestly unfounded” may be rejected by the relevant authorities (*Article 14*). According to the Explanatory Memorandum in practice Article 14 “would enable member states to reject legal aid applications for unrealistic or hopeless cases”. It also states, however, that “the proposal intentionally does not refer to concepts like the “reasonable prospects of success” of the action as that would become a kind of “pre-judgment”. The Explanatory Memorandum explains that this approach was “inspired” by the judgement in *Aerts v. Belgium* in

which the European Court of Human Rights held that the authority responsible for considering the legal aid application should not examine the prospects of success of the action (*Aerts v. Belgium*, 30th July, 1998). Mr Aerts was detained following his arrest for assault in the psychiatric unit of a prison. He was denied legal aid and complained that this constituted a breach of article 6(i) of the European Convention on Human Rights. This article provides that in determination of his civil rights everyone is entitled to a hearing by a tribunal. The ECJ found that Mr. Aerts' right to liberty was a civil right. In addition, the court found that it was not for the Belgian Legal Aid Board to assess the prospects of success of the proposed appeal, it was for the court to determine this issue. By refusing legal aid, the Belgian Legal Aid Board "impaired the very essence of Mr. Aerts' right to a tribunal" and so there was a breach of article 6(i). As already noted, this provision will be of some concern to potential defendants as the merits test is an opportunity to identify those cases which are without merit at an early stage in the proceedings.

RESPONSIBILITY FOR LEGAL AID

It is of particular importance in cross-border disputes to identify which member state is responsible for the provision of legal aid. The Proposal provides that legal aid will be provided by the member state "in which the court is sitting" or, in other words, the forum member state rather than the member state of residence of the applicant. According to the Explanatory Memorandum, the forum member state will apply its own system of legal aid, particularly as regards the scale of aid and the eligibility criteria, whilst also in compliance with the Proposal.

For cross-border disputes the member state in which the legal aid applicant resides is to grant legal aid to cover costs incurred by the recipient in that state and, in particular, the cost of consulting a lawyer in the resident member state (*Article 5*). According to the Explanatory Memorandum, this would include if a person needed the advice of a lawyer in the country of residence before embarking on litigation in another state.

APPLICATIONS

The current rules on transmission of legal aid applications between member states are contained in the Strasbourg Agreement of 1977 (see box "Background to the Proposal"). The same mechanisms are adopted by the Proposal, which would eventually replace the Strasbourg Agreement. Therefore, in cross-border disputes, applicants for legal aid may submit their applications to the state of residence rather than to the forum state. The state of residence has the responsibility for transmitting the application to the forum state. This transmission must take place within eight days (*Article 9*). The introduction of an eight-day time limit for completing the transmission process is the only significant change from the procedure set out under the Strasbourg Agreement. The Proposal also provides that documents transmitted will be "exempt from legalisation or other comparable formalities". Member states may not charge for receiving or transmitting the application. The Proposal does, however, provide that the relevant authority of the resident member state may refuse to transmit the application if it is "manifestly inadmissible" and, in particular, if the dispute is not a "civil matter" as defined (*Article 9*). The national authorities empowered to rule on legal aid applications would also have to ensure that the processing of applications "is as transparent as possible." Where applications are rejected, for example, the reasons for rejection

would have to be given. Member states would also have to make provision for appeals against decisions rejecting legal aid applications.

The European Commission will develop a standard form for legal aid applications so as to facilitate the transmission of applications from one member state to another (*Article 10*). The member states are required to identify to the Commission the list of authorities empowered to send and receive applications. The list of authorities will be published in the Official Journal of the European Community. The member states are also required to provide a list of languages in which the relevant authorities will accept applications. It is anticipated that the authorities empowered to receive and transmit applications will be the same as those identified under the Strasbourg Agreement.

There is no mechanism in the Proposal which would allow the opposing party in the litigation will be notified of the application for legal aid. Similarly, there appears to be no opportunity for the defendant to make representations to the authority giving its perspective on the grant of legal aid, such as commenting on the merits of the claim.

REIMBURSEMENT

As noted above, the Directive goes beyond the provision of legal aid. Member states would be required to provide that the winning party be entitled to fair reimbursement from the losing party of all or part of the costs of the proceedings. Member states may provide for exceptions to this principle to ensure appropriate protection of weaker parties and that where the losing party received legal aid, reimbursement is not due or is dealt with by the state (*Article 17*).

In August 1999, the European Commission sent questionnaires to the member states to ascertain to what extent national legislation entitles winning parties to have their lawyer's fees reimbursed. The majority of member states that responded confirmed that they have a system whereby the winning party is reimbursed and that, generally, the costs are borne by the losing party. The procedure by which fees are reimbursed varies from one member state to another. Some member states also have a ceiling above which costs are not reimbursed. The ceiling is sometimes determined by law and sometimes by professional legal bodies (*Explanatory Memorandum, page 9*). The Explanatory Memorandum also states that "the proposal aims to generalise this type of system, while leaving the member states with a great degree of flexibility (illustrated by the use of the words 'fair' and 'all or part of the costs incurred in the proposed Directive')." It also states that "the prospect of having to pay court costs or lawyer's fees even if one wins the case is a major barrier to access to justice. Anybody who knows that these expenses will be as high as, or even higher than, what they can hope to gain at the end of case will probably not bother to assert their rights". By way of example, the Explanatory Memorandum identifies employment and consumer protection law as possible exceptions to the principle of loser pays in order to "protect the weaker party". It states that "it would not be fair for an employee who unsuccessfully contests his dismissal to have to refund the expenses of the company which dismissed him." Therefore, while the inclusion of a "loser pays" element will be of comfort to industry, on the basis of these statements it remains to be seen how it will be applied in practice.