# THE INTERNATIONAL ACCESS TO JUSTICE AMONG EU MEMBER STATES

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**Abstract**

European law is and remains a generic concept, which goes beyond the scope of the Community legal order. It is comprised of European doctrine and jurisprudence and presents some characteristics and particularities: - Community law, developed under European auspices of the communities and the European Union, includes four main sources: primary law, secondary law, external relations law and complementary law; - the law established by the European Council and especially the European human rights law, remarkably represented by the Rome Convention (1950), which permeated all branches of European law; - the European law seen as regional international law which especially includes the number of bilateral and multilateral agreements among EU member states. The effective and decisive promotion of the law in interstate relations is undoubtedly the most striking feature of the Community legal order.

**Keywords**: *judicial order, European jurisprudence, community law, complementary law, interstate relations.*

## 1. GENERAL NOTIONS. INTERNATIONAL PROVISIONS ON THE ACCESS TO JUSTICE

The access to justice represents a fundamental right, guaranteed in any democratic society. In contemporary society, due to the sometimes poor functioning of the legal system, there were some dissatisfactions and these led to efforts on behalf of justice to preserve a balance between public and private interest, by promoting some policies that were meant to increase the citizens' access to justice, including by using some legal information / education and support services, including legal counselling. Sometimes, a change in the society was requested beyond the legal field by encouraging the judicial system to develop partnerships with communities and governments in order to develop more holistic solutions to various legal issues.

A challenge in this context is represented by the obligation of justice to adapt to the constant evolution of the society, both when it comes to the quality and profoundness of the justice act and under the aspect of promoting some new management models for the judicial systems, based on concepts characteristic to public management, but with specifications characteristic to the latter activity. The access to justice for everybody represents a critical crisis test for the peaceful, fair and inclusive societies, a requirement for substantive equality, human rights and durable development (BARBU, 2013).

The term access to justice defies the precise and single definition. Of course, access to justice represents not only the improvement of people's access to courts or the guarantee of judicial representation but it mainly represents the possibility of the individuals to seek and receive redress through institutions in accordance with human rights standards (DANILEȚ, 2006). It is obvious that there is no access to justice without guaranteeing the rights of the individuals. Access to justice represents a basic principle for the rule of law. In its absence people can no longer exert their rights and they cannot be protected from discrimination. The basis of this principle highlights the right to equal access to justice for everyone, including the members of vulnerable groups, and the states restated the commitment of the member states to take all necessary measures to provide fair, transparent, non-discriminatory and accountable services that promote access to justice for all individuals.

Access to justice has to be impartial and indiscriminatory. We emphasize the independence and impartiality of the judicial system as mandatory requirements in order to

preserve the rule of law and to make sure that there is no discrimination whatsoever in the management of justice.

The right to access justice imposes some obligations both for the legislator and for the executive. The state is obliged to grant every person all the reasonable law facilities and basically, in order to get into court, in one word, the effectiveness of the access right (NĂSTASE & AURESCU, 2012). He highlight the fact that not only the access in itself is important, but also the quality of justice. Inaccessible justice systems deny legal protection.

A more thorough understanding of the access to justice goes beyond the legal system in order to present the efforts made of assess and respond to the ways in which the law hinders or promotes economic and social justice, for example, admitting the interdependence of these systems. In brief, access to justice may imply measures to reduce the substantial unfairness present within the society. The free access to justice represents a fundamental pillar for the organisation of every democratic judicial system and this aspect is presented in various significant international, regional or national documents.

At European level, there are regulated legal aspects referring to the access to justice. In the European law of Human rights,the notion of access to justice is enshrined in various international texts and norms.

## 2. RESTRICTING ACCESS TO JUSTICE

The European Court shows that the limitations should not restrict access to justice to a manner or up to a point in which this right is influenced right in its substance; such limitations are not reconciled with the provisions of art. 6 paragraph 1 of the Convention unless they pursue a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim pursued.

Therefore, restricting access to justice is not incompatible with the provisions of art. 6 paragraph 1 of the Convention if the following requirements are cumulatively fulfilled:

- the limitation not to reach the substance of the law;
- the limitation should pursue a legitimate;
- there should be a relationship of proportionality between the means used and the purpose pursued.

A first limitation stems from the fact that the competent instance is established by the law and therefore such a right cannot be exercised unlimitedly when it comes to choosing the court that is going to analyse the cause. Another category of limitations is represented by the obtaining of prior authorizations for notifying a court in the case of mentally insane people or minors.

The right to have effective access to court is not an absolute right, but it presents some limitations. Referring to the non-absolute character of the right to access justice, the European Court said that the limitations must not restrict access to justice in a way or to an extent that this right is achieved in its very substance; such limitations are not reconciled with the provisions of art. 6 paragraph 1 of the Convention unless they pursue a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the purpose pursued.

If in the field of private rights, the legislation of the contracting states has a fairly pronounced homogeneity, in the criminal field the Court must work with legal systems containing extremely heterogeneous rules of substantive and procedural law (CĂLIN et al., 2010).

## 3. LEGAL COUNSELLING IN CROSS-BORDER MATTERS COUNCIL DIRECTIVE 2002/8/EC

In 2002, the Union adopted a Directive on the right to civil legal counselling in cross-border disputes. The main purpose of this Directive is to guarantee a level of legal counselling in cross-border disputes by establishing certain common minimum standards when it comes to legal aid during these litigations.

Therefore, each member state has its own norms when it comes to financial eligibility. These norms apply including to people who request legal counselling in cross-border disputes, but they are modified in some respects. Mainly, the Directive states that each member

state should take into account the differences in the cost of living between the member states concerned.

As principle, if a person is eligible in the member state of the dispute, he or she will depend on the norms regards the legal aid in that particular country.

Whether a person does or does not do this thing makes it possible, from a financial point of view, for him or her to be eligible for legal aid according to the approach of that particular state when it comes to the disposition or directive that the member states take into account regarding the difference in the cost of living among the respective member states.

Each member state has its own rules regarding the scope of its legal aid schemes and the criteria it uses to decide on the granting or refusal of legal aid.

These rules apply to people seeking legal aid in cross-border disputes, but are amended in some respects. In particular, the Directive requires each member state to take into account the importance of each case for the applicant and the nature of the case.

Therefore, whether or not a person is entitled to legal aid is due to the fact that certain areas of the law are excluded from the member states' legal aid scheme, which cannot be excluded.

The directive also obliges each member state to take into account the global significance of each case for the applicant when it decides whether it should grant legal aid or not.

Pursuant to legislation of the Council of Europe and the EU legislation, respectively Directive 2002/8 / EC (entered into force on 27.01.2003n, published in the Official Gazette of the United Kingdom of Great Britain and Northern Ireland with no. L.26.1. 31.2003 OJEC), legal aid does not have to take a certain form; states are free to decide how to fulfil their legal obligations. As a result, legal aid systems often vary widely.

For example, legal aid consists in the free representation or legal advice offered by a lawyer and/or the exemption from the payment of procedural costs, including court fees.

These measures may exist, alongside other complementary support schemes, such as pro bono defense, centres for legal counselling or for ensuring legal protection – which may be financed by the stated, offered by the private sector or managed by NGOs (NIGEL, 2011).

This chapter approaches legal aid separately from the criminal procedure because the applicable fees vary. The right to access the court (resulting from the right to a fair trial) should be valid for any person, regardless of the financial means at his disposal.This requires states to take steps in order to ensure equal access to procedures; for example, by creating adequate legal aid systems. Legal aid can also facilitate the administration of justice because unrepresented litigants are unaware of the rules of procedure and require significant support from the courts, which can lead to delays.

A person is considered to have effective access to court when he or she is before a supreme court of justice, if the rules of procedure and the instructions of the court, as well as counselling and legal aid are sufficient in order to ensure that the person concerned has an effective opportunity to support him or her cause.

The conditions that must be met in order to ensure effective access to court depend on the specific circumstances of the case.

According to the legislation of the Council of Europe, there is no obligation to grant legal aid for all the procedures that involve civil rights and obligations.

Legal systems may use selection procedures in order to establish whether or not they will grand legal aid to civil causes, but these cannot function arbitrary or disproportionately, nor can they infringe the right to access the court.

A legal aid scheme available only to non-profit legal entities does not infringe the right to access justice, if there is an objective and reasonable justification for this limitation (for example, because for-profit companies can deduct their legal costs from tax obligations)

According to the EU law, specific secondary legislation creates the standards for legal aid in cross-border civil cases.

For example, the Legal Aid Directive establishes the principle that people who do not have sufficient resources to defend their rights under the law receive adequate legal aid (MANOLACHE, 2006).

It describes the legal aid services considered appropriate: for example, access to pre-litigation counselling, legal assistance and representation in court, as well as the exception to - or assistance with - the cost of proceedings, including costs associated with the cross-border nature of the case. The EU legislation also contains specific provisions on the legal and judicial assistance relating to asylum. The principle of effective judicial protection requires member states to ensure that the objectives of these EU tools are met.

## 4. LEGAL AID THROUGH ANATTORNEY, IN ACCORDANCE WITH THE PROVISIONS OF ART. 8 OF COUNCIL DIRECTIVE 2002/8/EC

It is up to the states to ensure the exercise of the right to legal aid under the legal systems. Legal aid may have various forms – for example, counselling during the questioning, court representation and preparation of appeals – but this right is applied to the whole procedure.

The right to an attorney in the initial phases of the criminal procedure is extremely important because the silence of the defendant or suspect can be interpreted unfavourably.

Improving access to justice by establishing some minimal rules regarding the free legal aid also involves some minimal processual warranties: for example, access to legal counselling both before and during trial; free access to interpretation and translation; making sure that the people who are not able to understand or follow the procedures benefit from increased attention; the right to communicate, among others, with consular authorities in the case of foreign suspects; notifying suspects of their rights (MOROIANU, 2008).

One should not ignore the fact that one of the main differences between the European systems of granting legal aid is *the management of the legal aid system by means of the state by managing justice.*

In order to guarantee the right to (free) legal aid, the system of recognition and granting of the right must be accessible, simple and efficient.

As proposals for the ferenda law, we consider that, under this aspect, the realization and implementation of the following measures should be concretized on a legal level:

- dealing with (free) legal aid as a fundamental right which grants access to justice and facilitates an authentic and effective defense
– not just a formal defense, which should be granted to everybody, regardless of their residence or nationality; (free) legal aid should be seen as a priority procedural guarantee;
- we consider that it is absolutely necessary to establish some budget lines able to ensure the development of an efficient (free) legal aid system and to support the bar associations from the EU member states, through organisms specially developed for this purpose;
- paying special attention to assisting suspects from vulnerable groups, prevention activities carried out in such groups in order to know and understand the laws;
- assuring (free) legal aid to all the legal fields, jurisdictions, including by assisting a lawyer in all the processual stages, but also with the assistance of experts, translators and interpreters, as well as covering the costs required by the organization of this activity;
- transmitting and facilitating the free access of the citizens to the necessary information regarding the way in which they can benefit from (free) legal aid;
- promoting the electronic management of the (free) legal aid by the applicants, and also for interoperability, by the public services;
- highlighting and promoting the essential role of the lawyers during the procedures for the (free) legal aid as well as highlighting the role of the bar associations when it comes to supervisingthe deontology and the quality of services;
- supporting the lawyers' specific continuous training when it comes to offering (free) legal aid (STANCESCU, 2017).

## 5. ACCESS TO JUSTICE. GENERAL ASPECTS REFERRING TO THE INTERNATIONAL JUDICIAL COOPERATION OF EU MEMBER STATES, IN CRIMINAL MATTERS

The international relations which took place over the years led to the development of the human society, of the states and of the nations of the world. The principle of upholding

independence and the sovereignty of the states, as well as their internal right represented the basis for international cooperation.

Cooperation among states took place with the help of some bilateral or multilateral judicial tools, with a zonal, regional or universal character, represented by agreements, conventions or treaties.

Mutual trust with a highly regulated institutional framework contributed to the appearance and the development of international cooperation.

In the context of the development of the society on its whole, an increase in crime has become more and more pronounced, reaching the apogee through the proliferation of some forms of organized crime on the territory of several states, such as: those related to drug or live meat trafficking, weapons, water and maritime piracy, acts of terrorism etc. The intensification and improvement of the specific actions of identification, arrest and prosecution of the perpetrators of some crimes is a significant aspect in the activity of prevention and fight against crime.

In order to fulfil and protect their evil purposes, criminal organisations make use of the increase in international tourism, the migration liberalization policy, the free commerce expansion policy, the advanced communication technology and especially the money laundering technique.

Therefore, the presence of criminality in international life generated a solidarity reaction on behalf of the states, raising awareness on the necessity of improving their cooperation in the fight against criminality and forcing them to offer mutual legal aid to each other and to cooperate when it comes to finding, catching and convicting the people who violated the criminal law (BOROI, 2016).

Judicial cooperation between states aims to reduce crime to acceptable limits and, especially, to increase the security of their own citizens.

Under CoE law, the right to legal aid in criminal proceedings is explicitly provided for.

This means that anyone charged with a crime is entitled to free legal aid if he or she does not have "sufficient means" to bear the cost of legal aid by assessing the financial situation or proof of soundness, where necessary in the "interest of the act of justice".

The right to be accompanied by a lawyer during the international criminal procedure is valid during the entire procedure, starting from the police questioning and up to appeals, taking into account the application of the right to legal aid.

Any individual may request another lawyer, but he has to prove that that particular lawyer did not manage to successfully fulfil his duties.

Acceptable limitations on the choice of lawyer may include requesting specialized lawyers for specific procedures (SUDRE, et al., 2009).

One should take into account certain deficiencies pertaining to international legislation, such as:

- giving up a number of limiting factors, such as: the current narrow concept of procedural quality;
- the lack of equal conditions between those involved in a case; the lack of protection of plaintiffs and witnesses of victimization;
- the judges' insufficient knowledge regarding the equality legislation and the improper application of a EU law provision which transfers the burden of proof.

In accordance with the provisions of European legislation and Directive 2002/8/EC, certain aspects should be considered, of course, as ferenda law proposals:

- improving applicants' access to legal aid or insurance to cover costs, which, according to intermediaries, helps to determine whether claimants may or may not have access to justice;
- the development of some quality communication strategies, including comprehensive initiatives, targeting specific groups and tailoring information to their specific needs.
- ensuring adequate human and financial resources and accessible information, avoiding technical and legal jargon, in promoting the knowledge of rights and services.
- the use of public bodies as models of good practice. Effective communication strategies, cooperation with the media and better knowledge among media providerscontribute to upholding the fundamental human rights (MUNTEANU, 1996).

## 6. ACCESS TO JUSTICE. GENERAL ASPECTS REGARDING THE INTERNATIONAL JUDICIAL COOPERATION OF THE EU MEMBER STATES, IN CIVIL AND COMMERCIAL MATTERS

The international governing commission when it comes to civil and commercial matters represents the document whereby a judicial authority of one state mandates a judicial authority of another state to perform, in its place and on its behalf, a judicial act in a particular case. The goal of the governing commission may consist in: hearing witnesses or other people involved, obtaining documents, conducting an expertise, conducting research or procuring other documents or information necessary in order to solve specific cases (PANCESCU, 2014).

The European judicial network in civil and commercial matters facilitates the creation of networks among the judicial authorities of the EU countries, in order to improve judicial cooperation.

The main tasks are the direct contacts and case resolution between the national network contact points, facilitating cross-border access to justice through information provided to the public and practitioners in the form of fact sheets and other publications available on the European e-justice portal in all the official languages of the Union, assessment and exchange of experience on the functioning of certain instruments of Union law in civil and commercial matters.

The purpose of Council Directive 2002/8/ECis to adopt internal rules for the provision of legal aid by each EU member state, by transposing the provisions of the rules on improving access to justice in cross-border litigation and international civil proceedings (MANOLACHE, 2015).

Therefore, public legal aid is that form of assistance provided by the state which aims to ensure the right to a fair trial and guarantee equal access to justice, for the achievement of legitimate rights or interests in court, including the enforcement of judgments or of other enforceable titles, competence and procedure for granting extrajudicial assistance, organization, coordination and control of the activity of granting public legal aid, special rules on granting public legal aid to citizens of EU member states and other general, final and transitional provisions (MANOLACHE, 2015).

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