

1400th meeting, 31 March 2021

10 Legal questions

10.2 European Committee on Legal Co-operation (CDCJ)

c. Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law

Preamble

The Committee of Ministers,

Considering that the aim of the Council of Europe is to achieve a greater unity between the member States, in particular by promoting the adoption of common rules in legal matters;

Recalling the right to a fair trial in determining an individual's civil rights and obligations as provided by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5, the European Convention on Human Rights) and recognising the importance of legal aid schemes in giving access to justice, particularly for vulnerable people;

Recalling Committee of Ministers' Recommendation Rec(93)1 to member States on effective access to the law and to justice for the very poor, and, in particular, its invitation to the member States to promote legal advice services for the very poor by defraying the cost of legal advice through legal aid, by supporting advice centres in underprivileged areas and by enabling non-governmental organisations or voluntary organisations providing support to the very poor, to give legal assistance;

Acknowledging the progress made by the member States in the provision of legal aid services to their citizens;

Recognising the importance of ensuring that legal aid schemes function as effectively and efficiently as possible and noting that in this respect there are many examples of good practice in the member States which can be shared and built upon;

Conscious of the need to respect the diversity of the legal systems of the member States and the overall organisational framework of their legal aid schemes,

Adopts the following guidelines to serve as a practical framework for the member States to assist them in strengthening their legal aid schemes in the areas of civil and administrative law, particularly with respect to their effectiveness and their efficiency, and invites them to disseminate these guidelines widely to those responsible for the development and functioning of their legal aid schemes.

Purpose and scope

1. The guidelines aim to provide generic solutions that can make national legal aid schemes in the areas of civil and administrative law more efficient and effective, without changing their overall organisational framework.

Definitions

2. For the purpose of these guidelines:
 - a. “lawyer” refers to a person qualified and authorised according to national law to plead and act on behalf of his or her clients, to engage in the practice of law, to appear before the courts or advise and represent his or her clients in legal matters;
 - b. “legal aid” refers to the provision of legal advice, assistance and/or representation by a legal aid provider either at no cost or subject to a financial contribution;
 - c. “legal representation” refers to representation by a legal aid provider, including in courts or proceedings before other State tribunals;
 - d. “legal advice” refers to the provision of information by a legal aid provider on a person’s legal rights and/or responsibilities and on the manner of and existing possibilities for solving a particular legal issue;
 - e. “legal assistance” refers to assistance by a legal aid provider, including, for example, assistance in drafting documents and court pleadings, support in mediation and help in navigating the rules and procedures of State administrative agencies;
 - f. “legal aid provider” refers to any person (legal or natural, and whether professionally qualified in law or not) involved in the delivery of State-funded legal aid in the areas of civil and administrative law, whether it be provided on a full-time, part-time or case-by-case basis;
 - k. “vulnerable person” means any person who, because of his or her specific situation or circumstances, requires specific care, attention or assistance.

General principles

Access to justice

3. An accessible, effective, sustainable and reliable legal aid scheme should be in place, allowing individuals to effectively exercise their right of access to justice.

Non-discrimination

4. Legal aid should be available to every individual, regardless of age, race, colour, gender, language, religion or belief, political or other opinion, national or social origin, property, citizenship or domicile, birth, education, social or other status. Specific protection and assistance may be granted to vulnerable people.

Early intervention with the help of legal aid systems (preliminary legal aid)

5. The use of early intervention mechanisms and techniques to help resolve legal disputes quickly and, as far as possible, at the source should be encouraged in order to alleviate financial demands on the legal aid scheme and, more generally, pressure on the legal system.

6. Consideration should be given to, in particular, the following mechanisms and techniques:
- making widely available, and easily accessible for everyone, information on law and the legal system and, in particular, on legal rights, obligations and remedies;
 - providing the public with easy access to legal advice and assistance through integrated and/or holistic public services (for example, “one-stop shops”) in areas such as social policy, health, housing, employment and education;
 - supporting access to information on legal rights, obligations and remedies through integrated and interactive information technology solutions.

Quality assurance mechanisms in legal aid schemes

7. Mechanisms and measures should be in place to ensure the quality of legal aid schemes, both in terms of their general functioning and, more importantly, in terms of the legal services delivered by legal aid providers.

8. In designing mechanisms for legal aid delivery and possible changes to them, consideration should be given to the needs of and difficulties faced by potential users of the legal service; consulting users as to whether the legal aid scheme as designed meets their needs is likely to produce a more resilient and effective overall structure.

9. Consideration should be given, in particular, to the following mechanisms and measures, all of which should be implemented with full respect for the principles of professional independence (of all legal aid providers) and legal advice privilege:

- the use of clear, objective criteria for the appointment of legal aid providers;
- thorough and regular assessment of legal aid providers (whether governmental, not-for-profit or commercial) against clear criteria, including the quality of their management, policies, accreditation, electronic and paper-based case-management systems, customer-care standards, complaints procedures, in-service training programmes, adequacy of premises, and accessibility;
- continuous professional development on a regular basis for legal aid providers;
- the use of quality assurance clauses in public contracts between governmental bodies responsible for legal aid providers;
- requirements that legal aid providers adhere to ethical codes and other forms of ethical provisions;
- the use of quality assessment tools such as client satisfaction surveys and peer reviews by other legal aid providers, based on objective sets of criteria and/or rating systems, and carried out by either an independent body or by individuals (for example, fellow lawyers);
- establishing formal and impartial procedures that allow clients to complain about a legal aid provider;
- establishing formal and impartial procedures that allow for the replacement of a legal aid provider whose services are of unsatisfactory quality;
- establishing procedures for imposing disciplinary measures (including warnings, fines, withdrawal from a list of approved legal aid providers, removal of files and transfer to another legal aid provider) on a legal aid provider who fails to comply with quality standards.

Means and merits testing

10. With a view to contributing to robust and financially sound legal aid schemes, procedures for testing an applicant's means and the likelihood of a successful outcome of the legal proceedings should be in place.

11. The member States which choose to make legal aid available to legal persons may take into account the financial situation of the legal person, and of natural persons with an interest in the legal person, when deciding whether legal aid should be granted or refused.

12. Potential applicants for legal aid should be informed of the eligibility criteria and the application procedure, which should be clear and easy to understand.

Methods of measuring financial eligibility

13. Member States should consider ensuring that financial eligibility for legal aid is measured (for example, by taking into account the applicant's gross income, disposable income and assets).

14. When an applicant is not eligible for legal aid but cannot afford to pay for the legal services of a private lawyer, member States should inform him or her about the available alternatives to legal aid (for example, the availability of pro bono legal services and legal clinics).

Waiving of means testing

15. Member States should consider allowing the waiving of means testing whenever justified.

Verifying financial eligibility

16. Member States should ease the bureaucratic burden imposed on applicants, in particular by reducing the number of documents they are required to provide in support of an application for legal aid.

Informing about the refusal or granting of legal aid

17. Whenever an application for legal aid is refused, member States should consider allowing applicants to challenge the refusal before a competent authority which should give reasons for its decision. Applicants should also be informed of the alternatives to legal aid and, in particular, about any available:

- free legal advice and representation (pro bono) provided by legal professionals, municipalities, non-governmental organisations, trade unions, etc;
- alternative dispute resolution mechanisms;
- legal insurance.

18. Whenever an application for legal aid is granted, member States should provide applicants with accessible information, in plain language, about the procedure to follow in order to benefit from legal aid and the extent to which legal costs will be covered by the State.

Repayment of legal aid costs

19. Member States should consider the possibility of revoking legal aid and of seeking repayment of legal aid costs by the recipient, where it is found to have been granted on the basis of false information provided by the applicant.

Organisation of legal aid schemes and availability of legal aid providers

20. Without prejudice to the institutional independence of the national legal aid scheme and the existing legal framework governing its functioning, member States should consider taking the following measures:

- ensuring proper geographical distribution of legal aid providers, including in remote areas (for example, through the use of information technology tools, call services and videoconferencing);
- facilitating access to legal aid services for beneficiaries, particularly vulnerable people, who may experience difficulties in accessing them (for example, through awareness-raising events for target groups, mobile teams, community law centres or pop-up advice centres);
- launching initiatives to increase the diversity of legal aid providers;
- allowing beneficiaries to freely choose a legal aid provider and/or to change the legal aid provider or request a second opinion (for example, when a client has a legitimate reason not to be satisfied with the quality of the legal aid provider's work);
- setting up safeguards to ensure the professional independence of all legal aid providers;
- assigning legal aid cases to legal aid providers based on their competence and specialisation;
- taking into account possible conflicts of interest;
- sensitising potential legal aid providers to the importance of legal aid work to meet the needs of vulnerable people (for example, through legal clinics, community law centres or awareness-raising events).

21. Member States should have a mechanism in place that allocates cases to legal aid providers. Allocation of cases may be based on, for example, an alphabetical list and/or competence, specialisation and/or the workload of legal aid providers.

Reimbursement procedure

22. Member States should ensure an appropriate level of remuneration for legal aid providers and reimbursement of costs related to the provision of legal aid.

23. Member States should establish a procedure to reimburse legal aid providers. This procedure should be as simple as possible in order to encourage legal aid providers, particularly lawyers, to take on cases.

Specialisation

24. When allocating cases, member States should consider taking into account the specialisation of the legal aid provider.

Conflict of interest

25. Member States should establish mechanisms for avoiding conflict of interest when appointing legal aid providers and for appointing a new provider whenever such conflicts arise.

Data collection

26. Member States should consider using tools to collect data on legal aid systems, which may include surveys, focus groups, complaints mechanisms, lawyer self-assessments and case-management systems.

27. Member States should consider ensuring that the collected data are of appropriate quality. The quality of the data may be assessed as to their relevance (coverage and content), accessibility and comparability (over time, by region or other criteria). Member States should comply with the applicable provisions on data protection, confidentiality and the obligations of professional confidentiality and legal professional privilege.

28. Member States should consider collecting data which may include the following:

- the annual budget spent on the legal aid system;
- the number of legal aid providers;
- the number of beneficiaries;
- the number of legal aid applications rejected;
- the number and type of cases.

Monitoring and analysis

29. Member States should analyse the data collected in order to understand the legal needs of the population and how the latter interacts with legal aid services.