

ILPA response to the draft Lord Chancellor's Direction on Cross Border Disputes' (implementation of Council Directive 2003/8/EC, 27 January 2008.**Introduction**

ILPA is a professional association with around 1,000 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum, through training, disseminating information and providing research and evidence-based opinion. ILPA is represented on numerous government and other stakeholder and advisory groups and has recently been invited to join the Legal Services Commission Civil Contracts Advisory Group. ILPA has active Legal Aid and European subcommittees.

The covering email to the draft direction sent to us for consultation states:

'This European Legal Aid Directive seeks to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid. You may recall that we previously consulted on this in October 2004 and made some necessary regulatory amendments to the Community Legal Service (Financial) Regulations 2000 and the Community Legal Service Funding Order 2000. We need to make these additional changes following concerns expressed by the European Commission about compliance with certain articles of this Directive.

At present an application under the Directive would be dealt with through the exceptional funding arrangements and we are confident that in practice any such application would be granted where the Directive required it (there have, in fact, been no applications relating to the Directive). However we accept that that might not be enough to fulfil our obligations. We therefore propose that the Lord Chancellor should exercise his power under section 6(8)(a) of the Act to direct that the LSC must fund cross-border cases covered by the Directive where this is required to ensure compliance.'

Given that this is the sum total of the information provided in addition to the draft direction, the consultation has been drafted with expert commentators in mind only. A link to the Directive, or to the matters covered in Schedule 2 to the Access to Justice Act 1999 might have made the consultation suitable for a wider audience, given the high level of interest in legal aid.

Cross border disputes are defined in the Article 2(1) of Directive 2003/8/EC ('the Directive') as those in which the party applying for legal aid:

'...is domiciled or habitually resident in a Member State other than the Member State where the court is sitting or where the decision is to be enforced.'

As set out in Article 1(2), the Directive applies to civil and commercial matters and does not, in particular, apply to revenue, customs or administrative matters. The consultation states that the draft Order is intended to provide powers to grant legal aid where the matter would otherwise be excluded from legal aid under schedule 2 to the Access to Justice Act 1999 as amended) and it would be necessary to rely on exceptional arrangements.

ILPA concurs with the statement in the sixth Preamble to the Directive that:

‘(6) Neither the lack of resources of a litigant, whether acting as claimant or as defendant, nor the difficulties flowing from a dispute's cross-border dimension should be allowed to hamper effective access to justice.’

ILPA is mindful that, as set out in the eighth preamble, the purpose of the Directive is to establish minimum standards and that Member States are free to adopt higher standards.

Comments on the Draft Direction

The wording of the draft direction does not sit well with Article Six of the Directive whereby only legal aid applications for actions that appear ‘manifestly unfounded’ can be rejected, unless pre-litigation advice on legal aid is offered (see also Article 13(3) which provides for refusal only where applications are unfounded or outside the scope of the Directive).

The drafting of 3(i) which states

‘Where without public funding for representation it would be practically impossible...’

is very poor. ‘[P]ractically impossible’ has the idiomatic meaning of ‘nigh on impossible’, as well as the meaning ‘impossible in practice’. It is necessary to make clear what is meant, viz. ‘it would not be possible in practice’.

The use of the word ‘obvious’ in 3(i) also appears to be an example of poor drafting, and liable to lead to debates about what is ‘obvious’.

It is of course always open to a party to seek exceptional funding, but it would be unfortunate if people set out along the route of making an application for exceptional funding when it was the intention that their cases be covered by these amendments.

Suggested amendments – 3(i)

Delete ‘practically impossible’, base the drafting on Article 3 of the Directive and use the phrase

‘where this is necessary to ensure their effective access to justice.’

Delete the word ‘obvious and replace with

‘prima facie’

The drafting of 3(ii) and (iii) has the advantage of referring to existing definitions in the Code and ILPA has no comments on these, or on paragraph four. Paragraph five, however, is not well-drafted. It states

‘Any Level of Service specified in the Funding Code may be funded under this Direction but all applications under this Direction remain subject to the relevant regulations under the Act and all relevant criteria in the Code.’

This leads to a situation of ambiguity where it is unclear that the criteria in the Code meet the requirements of Article 3 of the Directive. Again, it would always be possible for an applicant to seek exceptional funding, but it is desirable to avoid this in situations where the failure to fund is incompatible with the UK’s obligations under European Union law.

Suggested amendment

Specify that

‘Where there is a conflict between the Direction and the Code, the Direction shall prevail’.

The Directive specifies in Article 5(1) that member States shall grant legal aid to persons who are ‘partly or totally unable to meet the costs of proceedings’. It further states at Article 5(5) that

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

It does not appear to ILPA that the draft direction has addressed this matter. We should be grateful if the Ministry of Justice could indicate to us whether there is guidance relating to exceptional funding that deals with this very specific point.

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Chair, ILPA
25 April 2008