THE PORTUGUESE LEGAL AID SYSTEM – A JUDICIAL AND EU PERSPECTIVE

Carlos M. G. de Melo Marinho
Senior Judge
Lisbon Court of Appeal

Dear Mr. Orlando Nascimento, President of the Court of Appeal of Lisbon, Ms Lin Xi, Mr Zhang Yuliang, Mr Zhou Jisheng, Mr Cheng Wei, Ms Chong Ruojing, Mr Rou Jianguang, Mr. Paul Dalton, Mr. Renato Gonçalves, Mrs. Ana Simões Correia, Mr. Pedro Alves Loureiro, Mrs. Maria do Carmo Viana, Mr. António Oliveira, Mrs. Joana Abreu, Mrs. Clara Lúcia Guerra dos Santos, ladies and gentlemen,

It is my task to present to you a brief insight of the Portuguese Legal Aid system under a judicial and European Union Law perspective.

1. Internal disputes

In first place, I would like to say something about the legal aid ruling applicable to internal disputes.

At this level, the present Portuguese legal aid system stands on a **group of laws created in the middle of the first decade of the XXIst century** with the goal of both materialising the commands coming from **Article 20 of the Constitution of the Portuguese Republic** and the demands emerging from the International and European Union Law.

Underlying the national ruling, there is a set commands of upper level, coming, namely, from: 1. the **European Convention on Human Rights** (**Article 6** – *Right to a fair trial* – «*1. In the* ***determination of his civil rights and obligations or of any criminal*** *charge against him, everyone is* ***entitled to a fair***

and public hearing *within a reasonable time by an i****ndependent and impartial tribunal established by law****. (...)*» and 2. the **Charter Of Fundamental Rights Of The European Union – Article 47** – *Right to an effective remedy and to a fair trial – «Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the* ***right to an effective remedy before a tribunal*** *in compliance with the conditions laid down in this Article.* ***Everyone*** *is* ***entitled*** *to a* ***fair and public hearing*** *within a reasonable time by an* ***independent and impartial tribunal previously established by law****. Everyone shall have the* ***possibility of being advised, defended and represented****.* ***Legal aid shall be made available*** *to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice»*.

This context **moved** the national legal aid system from a **mere assistance and social** support logics to a domain of materialisation of decisive efforts made in order to **grant the full exercise** of a structural and **fundamental right** – the right of **access to justice and the courts (right to a judge)**.

That's why it **lost the designation «benefit»** that it had in previous legislation.

The **Constitution** imposes a **principle of universality**: all (here including **natural persons** and **non-profit legal persons**) should have **access to the law and the courts** in order to **defend their rights and interests**, independently from their economical situation.

The goal is to surpass **inequalities** and **difficulties** in the access to justice emerging not only from the lack of financial means but also from limitations emerging from the social or cultural conditions of the citizens.

Such access comprehend the rights to: 1. **free generic legal information on rights and duties;** 2. **legal advice;** 3. **legal assistance;** 4. **interpretation** and 5. **accompaniment by a legal professional before any public authority**.

But, if the constitutional goals have remained the same, **the ways to reach it changed deeply** in the last decades.

In the **perspective of a judge** that started his career some decades ago applying national rules approved in the year of 1970 on what was called the "benefit of legal aid" – that considered the granting of such aid as a special "benefit" given to the citizens, and that called for his every day's intervention on these questions, namely evaluating its grounds for concession – the major changes that can be noticed nowadays are that:

a. **judges don't decide any more, systematically and on a first level,** such questions (except in the context of the not so common appeals against a decision on such matters – Articles 27 and 28 of the Law No. 34/2004, of 29 July);

b. **New actors** (administrative authorities, e.g., social security bodies), **new criteria** (standing on the use of forms, mathematical formulae and objective indicators); and

c. **Automatisms** have appeared.

To the less attentive, this could raise the notion that legal aid had become a problem external to the courts and to the strict functioning of the Justice administration. However, this an absolutely wrong perception. **Legal aid remains at the core of the functioning of the Justice systems** of all the EU Member States, even as a prerequisite of its coherent existence, and Portugal is no exception.

The stability of the national legal rules don't mean immobility or absence of evolution. It is **through the case-law of the courts that this decisive technical area is permanently growing**. On this field, the **Constitutional Court** has been called to give its important permanent contribution for the enlightening and development of concepts – e.g., it declared, with general obligatory strength,

in 2014 (*Case Nº 538/2014, in Official Journal Nº 182/2014, I Serie of 2014-09-22*), that it was **unconstitutional** a rule of the Judicial Costs Regulation interpreted as imposing the **previous payment of court fees as a condition to appeal** from the administrative decision that denies the concession of legal aid.

2. Cross-border disputes

It is also my task, today, to give you a brief an insight on the legal aid seen from a European Union level.

As to the European Union Law applicable to the **cross-border disputes** – where 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 – a Directive (**Council Directive 2003/8/EC**) produced a homogeneous and transversal effect in the European common space of Justice which determines that you can find in all the Member States **similar minimum common rules**, objectives and solutions that can be surpassed by internal law but **never downgraded**.

Under the light of the EU Directive, the internal legal systems must ensure that **to no one is denied real access to justice** (that is, **effective**, **generating concrete solutions**, searching the **pacification of the conflicts**) because of its **economical debility** or due to the **cross-border nature of the dispute**.

The Directive took into account the special difficulties coming from: 1. **distance;** 2. **physical absence;** 3. **ignorance** or **lack of secure knowledge** of the **internal legal rules** of the Member State where the court is **sitting** or where the decision is to be **enforced** and of the **market of legal consultants;** 4. different **criteria in order to assess** the **lack of economic resources; and** 5. the **diverse national patterns of income** and **prices**,

It considered that such difficulties could represent true obstacles to the

creation of the trust needed to generate the free circulation of persons and act as a barrier to the exercise of rights within the common judicial space under construction.

In line with what has been the tendency in domestic legislation, this legal instrument has **treated the matter of legal aid** not so much as a special benefit or protection provided by the Member States but as an **effective right emerging from the EU citizenship** that plays a key role in ensuring real access to Justice within the borders of a common space.

The Directive refers to all **civil and commercial cross-border disputes** – see No. (9) of the Preamble – **regardless of the nature of the jurisdictional body** which shall hear or judge the conflict.

In the Directive, **only natural persons** may benefit from legal aid.

Legal aid should cover, in any case, **legal advice**, **pre-litigation assistance and counselling** – particularly with a view to allow the use of informal mediation mechanisms for reaching a settlement prior to bringing legal proceedings – as well as the **appointment and payment of fees of an attorney to act before the Court**.

It also encompasses the **cost of the proceedings** or an **exemption** from paying them.

It **may** also include the **costs incurred by the other party**– see Article 3(2)(b).

The Directive stands on a system of **split costs between** the Member State of the **domicile or habitual residence** and the **Member State where the court is sitting** or where the decision is to be **enforced** – see Article 8.

The potential users of this European legal aid system are the **EU citizens, regardless of their domicile or place of habitual residence**. European citizenship is the sole requirement to benefit from legal aid.

This mechanism may also be invoked in the benefit of **nationals belonging to other States** which have a **valid residence status** in the territory of a Member State.

It is up to the Member States to determine the **economic thresholds** above which it is considered that the resources are insufficient.

This solution allows the development of **prior formulae** and **calculation simulations** which make possible to determine, previously and with certainty, which are the conditions applicable to a specific legal aid requested.

The Directive has taken the reasonable decision of including within the European system of legal aid the **costs directly arising** from having to **travel** to the jurisdiction where the dispute is being heard.

The set of provisions examined consecrate the principle that **legal aid must be available in all stages of the proceedings**, particularly if an appeal takes place, and comprehend any subsequent enforcement of a judgement.

Legal aid is to be granted on the same terms both for **conventional** legal proceedings and for **out-of-court procedures** such as **mediation**, where recourse to them is required by the law, or ordered by the court'.

The European legal aid may be **granted in full** or **in part.**

The Directive makes use of standard forms that **facilitate access** by citizens and all the involved in the applications, **speeding up** the proceedings and contributing to **surpass linguistic** and **semantic barriers**, also making easier the

intensive use of advanced **technology resources**.

The Directive consecrates the principles of **full availability** of information and **reasoned decisions**. Are bound to comply with it the **national authorities** empowered to rule on legal aid. This means that it must be ensured that the applicant is **fully informed of the processing** of the application and that where 'applications are totally or partially rejected, the **reasons for rejection** shall be given' – Article 15(1) and (2).

This helps to set up an obligatory, formal and coherent **appeal mechanism** based on judicial review of the decision which has a merely administrative nature – Articles 15(3) and (4).

Just to finish I would like to say that you are going to listen, today, several approaches to the Portuguese Legal Aid system presented by its own actors, according with the perspectives generated by their tasks, achievements and, eventually, difficulties and reason to a change. It will also be shown some views for a potential change.

I am sure that, joining the several presentations of this morning, you will get a global, comprehensive and realistic view of the Portuguese Legal Aid system.

Thank for you interest and for the pretext to join so many competent, generous and gentle contributions and insights coming from the persons that have the everyday task of assuring that all of our citizens have real access to justice.

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