

Ensuring Equal Legal Aid to the Citizens in the European Procedural Law*

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Abstract. “*The right of poor persons*” or legal aid, as part of the free access to justice and a fundamental right of the citizens, represents one of the most important components of the right to defence in proceedings brought before the European Union’s courts, if we include also the exemption of taxes and other financial obligations that can be ordered whenever individuals for financial reasons, cannot afford hiring a lawyer, no matter the object of the dispute, such as: civil, labour, administrative etc.

This right is provided for both in the European primary and secondary legislation, including in Article 47 para. 3 of the Charter of Fundamental Rights of the European Union, and also at the national level, namely in the national constitutions and legislations of the 28 Member States.

Establishing minimum common rules relating to legal aid for disputes by the Council Directive 2003/8/EC in January 2003 to improve access to justice in cross-border disputes is considered to be a cornerstone in respecting the principle of a good representation of the individuals in front of the European courts, pointing out the humanism of the European judicial system.

Keywords: legal aid, human rights, European Court of Justice, European procedural law, access to justice

I. GENERAL CONSIDERATIONS

The right to defence is not a modern right introduced by the developed countries as a fundamental right which belongs to the citizens in order to ensure a better defending of their position during a dispute.

Initially, this right was mentioned in the Old Testament, then in the ancient Greek, when Aristotle wrote for the first time on the right to defence in *The Constitution of the Athenians* (*Athenaion Politeia*)¹ and finally in the ancient Rome, when the Roman judicial system delivered an important contribution to the evolution and developing of the right of appeal, while the right to have a lawyer was closely connected to the right to defence (Serzhanova 2009).

Presently, the right to defence is understood in the doctrine (Serzhanova 2009: 196) as a personal entitlement of the individual to take the actions in the limits and forms determined

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¹ According to paragraph 16 of the Athenian Constitution “*Once [a person] was summoned on a charge of homicide before the Areopagus, [...] he appeared in person to make his defence, but the prosecutor was afraid to present himself and abandoned the case [...]*”; website: <http://ebooks.adelaide.edu.au/a/aristotle/athenian/>

by the procedural provisions in order to defence himself/herself as better as possible, independently or with the help of a lawyer, against the negative legal consequences of the accusations, or to have free access to legal aid in the cases when the individual does not have the financial means to pay his own lawyer.

Bearing in mind the above-mentioned, it should be noticed that guaranteeing the right to defence² represents a substantive principle for the carrying out – under good conditions – of any lawsuit (such as: civil, commercial, labour, administrative etc.) (Roşu-Dănilă 2007: 31–32), regardless of whether it is tried by the national courts, by the European courts or by the international courts. It is also important to mention that this right is enshrined in the constitutions and legislations of the Member States as well as in the Rules of Procedure of the European courts, based in Luxembourg.

In other way of saying, whenever someone feels prejudiced in his/her rights, he/she is entitled to ask another person or institution, as applicable, to act, not to act or to refrain from behaving in a certain immoral or unlawful way. Thus, if the person prejudiced in his/her rights finds that the other person or institution that he/she addressed is not willing to acknowledge such prerogatives, then he/she shall have to take such person or institution to court in order to obtain a court decision that can no longer be challenged (Lenaerts–Arts–Maselis 2006: 587).

It is important to mention that the right to defence is linked to the compulsoriness to ensure legal aid, as an obligation for each state to ensure that its legal system promotes justice on the basis of equal opportunity for all the persons without any exception and especially for those who cannot access justice due to the economic reasons and other disabilities and guarantees an effective and complete free access to justice.

Normally, the access to justice refers to the rules granting legal protection to the persons of the legal order (Finocchiaro 2009: 119), expression which has been developed constantly and significantly, in the recent years (Uzelac–van R Hee 2009: 1).

Nowadays, the access to justice represents, among others, the possibility given to the people to brought their cases more easily in front of the courts, and to obtain, when it is necessary, an effective judicial remedy of their cases, especially when the access to justice *“is not only central to the exercise of constitutionally guaranteed rights, but also to the reduction of poverty”* (Pushkarova 2009: 45). Starting from this point and strengthening the idea which makes the legal and judicial institutions more accessible and responsive to the people who do not have the necessary financial funds, we consider that the free access to justice *“represents one of the most [...] legal challenges confronting judicial reform initiatives”* (Pushkarova 2009: 46).

On the other hand, the right to defence includes the right to be assisted by a lawyer (Tridimas 2006: 373) or the right to be heard in self-defence against any measure is imposed by the court (Chalmers–Hadjiemmanuil–Monti–Tomkins 2006: 238). The main reason is that the persons have always the fundamental right to be represented in the best conditions before the national or European courts by the lawyers.

If the citizens do not have the necessary financial funds to bear the costs related to the legal representation and to pay the lawyer fees, then they would not have free access to these courts, which from our point of view represents an important violation of their fundamental rights, causing in the same time serious damages.

² The right to defence includes the legal aid or “the right of poor persons” as a fundamental right of the citizens.

In general, using this right in the contentious way, both in the national law and in the European or international law, involves a “*price*” named judicial expenses (Fábián 2006: 302) with one exception, when the entire proceeding carried out before the European courts is, in principle, exempt from fees or other pecuniary obligations. Nevertheless, there are situations in which filing claims and carrying out lawsuits before such courts implies, among other things, spending money by the parties, such as: travelling expenses, hiring a lawyer, burden of evidence (Fábián 2002: 95) etc.

In a modern society, where the good administration of justice is built on the principles of law and humanity, the recognition and asserting a right cannot be thwarted by “*the poverty*” or by the financial incapacity of the holder of the action to start and run a trial before any court, no matter what is the level of the court and the issue of the dispute, especially when such administration implies an efficient process and viable structure which allows the litigations to be trialed by the courts in such a way as to provide a true and complete right to legal or judicial protection of the persons, as “*an essential element of the ‘rule of law’ within the European Union*” (Lenaerts 2013), aiming to ensure “*the protection of the substantive rights which EU laws confers*” (Lenaerts 2013) to the persons.

II. BRIEF HISTORY OF THE “RIGHT OF POOR PERSONS” AND ITS EUROPEANIZATION

A primitive right to legal aid was promoted in England in the Statute of Henry VII (since 1495) when all the fees for civil litigants in the common law courts were paid by the state, while the courts were empowered to appoint lawyers to provide representation in court without any compensation (Skinnider 1999), having as main beneficiary only the poor persons.

The end of the 18th century and the entire 19th century marked a period of time when the right to defence and ensuring the legal aid³ were promoted from indirect rights recognised by the local courts to the constitutional rank. In this context, one of the first mentions to be remembered is the *French Declaration of the Rights of Man and the Citizen* from 26 August 1789, which on 3 September 1791 became part of the French Constitution. In the same year, France abolished tortures and granted the accused the right to defence including the right to have a lawyer by means of the Constituent Assembly’s decrees (Serzhanova 2009).

During the entire 19th century most continental codes of law started to include the principle codification of the “*poor person’s law*”, providing court fee waivers and appointment of duty lawyer for the poor persons while lawyers were expected to act on a professional *pro bono* basis. This early concept of legal aid was primarily seen in relation to assistance in court, while the legal advice outside the court and covering broader social issues was left in the hands of the voluntary organisations, such as trade unions and churches (Skinnider 1999), the latest still ensuring this beneficiary through specialised persons or non-governmental organisations.

The 20th century represents an important period for promoting and granting the right to defence, including the legal aid ensured in the criminal trials, through the *Convention for the Protection of Human Rights and Fundamental Freedoms* (also known as the European

³ Known as legal assistance, in the American judicial system.

Convention of Human Rights, ECHR) from 4 November 1950,⁴ which in Article 6 par. 3 letter c) highlights that every accused person for committing a punishable offence has the right “[...] *to defend personally or by a defender appointed by himself, and in case he has no financial means being enough for covering the defence expenses, to take advantage of a free of charge defender appointed by court, when good of justice requires it [...]*” (Serzhanova 2009).

Another important document is the *International Covenant on Civil and Political Rights* from 19th of December 1966, which in Article 14 par. 3 letter d) stipulates with no doubt that every person accused of committing a crime, on the principle of absolute equality, has all the rights ensured by this Covenant, including “*defending personally or by means of the lawyer chosen by himself [...]* and to have legal assistance assigned to him/her, in any case where the interests of justice so require, and without payment by him/her in any such case if he/she does not have sufficient means to pay for it”.

At the level of the European Union with at least 500 million persons, if we are taking into account the recent accession of Croatia to the European Union starting with 1 July 2013, the access to legal aid system is consecrated both in Article 47 par. 3 of the Charter of Fundamental Rights of the European Union which is dealing with the idea that the “*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*”,⁵ and in the Rules of Procedure of the European Courts, as the secondary legislation of the European Union.

Apart from this, it is worth mentioning others relevant documents in this field, such as: the adoption of the Council Directive no. 2003/8/EC of 27 January 2003⁶ with amendments, to improve the free access to justice in civil cross-border disputes by establishing minimum common rules related to legal aid, whenever the individuals applying for legal aid live outside the Member State where the case is tried or the decision is enforced. According to the said directive only the persons who do not have enough financial resources to defend their rights in the court are entitled to obtain this benefit, stipulating in the same time which are the services to be supplied in order to deem legal aid in a proper manner (such as: access to pre-trial counselling; legal aid and representation in front of the court; exemption from the payment of procedural costs or granting support for payment thereof, including costs related to the cross-border nature of the case) or other aspects related to: the financial requirements to be fulfilled by the applicant; the persons eligible to obtain this benefit; the mechanisms for the judicial cooperation between the judicial authorities of the Member States, meant to facilitate as much as possible the transmission and processing of legal aid applications; the possibility for the individuals to file the application in their country of residence and that the application should subsequently be sent, quickly and free of charge, to the competent state authorities that shall grant aid.

Later, by means of the Commission Decision no. 2004/844/EC of 9 November 2004⁷ for setting out a form for the legal aid applications and the Commission Decision

⁴ Website: http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/CONVENTION_ENG_WEB.pdf.

⁵ Websites: http://ec.europa.eu/civiljustice/legal_aid/legal_aid_ec_en.htm; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:364:0001:0022:EN:PDF>.

⁶ Council Directive no. 2003/8/EC of 27 January 2003, published in the OJ, L 26 of 31 January 2003; website: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0008:en:NOT>.

⁷ Article 1 of the Commission Decision no. 2004/844/EC stipulates that “*the standard form for submission of legal aid applications according to Directive 2003/8/CE is provided in the annex*”. The

no.2005/630/EC of 26 August 2005⁸ establishing a form for the transmission of legal aid applications under Council Directive no.2003/8/EC, it was established the standard form for the submission of applications which should be supported by the relevant documents to enable the applications for legal aid to be determined, having as general aim to implement in the best conditions the Council Directive no. 2003/8/EC.⁹

Except these directives, other legal instruments provide for, among others, provisions concerning the free legal aid to be granted to those who are unable for financial reason to hire a lawyer by giving them a real chance to defend their position during the proceedings and with a clear intention to make the life of the citizens much easier, such as:

- The Treaty of Amsterdam (Articles 61–67);
- Conclusions of the Tampere European Council (item 30);
- Green Paper from the Commission on Legal aid in civil matters: the problems confronting the cross-border litigant;
- The European Agreement on the Transmission of Applications for Legal Aid of Council of Europe¹⁰ (signed in Strasbourg in 1977, with the exception of Germany);
- Convention on International Access to Justice signed in The Hague in 1980.¹¹ So far, this Convention has not been ratified by all the Member States of the European Union (EU).

All in one, we consider that providing legal aid for the parties reveals the humanism of the European judicial system, generally speaking, as well as its continuing effort to guarantee and to improve constantly the free and unhindered access to justice, as a balance between the individuals and the society interests.

On the other hand, the fundamental right of ensuring legal aid is enshrined in the national constitutions and legislations of the Member States of the European Union. In the

Decision was published in OJ, C 365 of 10 December 2004. There is, however, an exception to the rule established by means of this decisions, in the sense that in accordance with articles 1 and 2 of the Protocol on the Position of Denmark annexed to the Treaty on the European Union and to the Treaty Establishing the European Community, Denmark is not bound by this Directive or subject to its application.

⁸ Commission Decision no. 2005/630/EC of 26 August 2005, published in OJ L no. 225 of 31 August 2005; website: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005D0630:EN:HTML>.

⁹ Article 16 of Council Directive 2003/8/EC on “Standard Form” provides for that: “(1) To facilitate transmission, a standard form for legal aid applications and for the transmission of such applications shall be established in accordance with the procedure set out in article 17 paragraph (2). (2) The standard form for the transmission of legal aid applications shall be established at the latest by 30 May 2003 (3) The standard form for legal aid applications is to be established at the latest by 30 November 2004”.

¹⁰ The Agreement introduces a procedure whereby, if you have your habitual residence in the territory of one of the Contracting Parties and wish to apply for legal aid in the territory of another Contracting Party, you may submit your application in the State where you are habitually resident. That State will transmit the application to the other State under certain conditions; website: http://ec.europa.eu/civiljustice/legal_aid/legal_aid_int_en.htm.

¹¹ This Convention makes provision for the transmission of applications for legal aid between the Contracting Parties in the form of a model agreed by all. Also, this Convention requires that nationals and residents of the Contracting Parties be granted legal aid in other Contracting States under the same conditions as if they resided there. At 27.03.2012, 26 states have signed the Convention; website: http://www.hcch.net/index_en.php?act=conventions.text&cid=91.

following we will make a brief presentation of certain national judicial systems, without having in mind a criterion or another, since from our point of view each of these judicial systems is important for a better understanding of the current paper, such as:

The Romanian Constitution revised and republished in 2003, in Article 24 par. 1 stipulates that “*the right to defence is guaranteed*” and “*all throughout the trial, the parties shall have the right to be assisted by a lawyer of their own choosing or appointed ex officio*” (Article 24 par. 2).

In addition, according to the amendments brought in the recent years to the Criminal Procedure Code in force by Law no. 281/2003¹² amending the Criminal Procedure Code, the right to defence and the legal aid are guaranteed during the criminal investigation made by the judicial bodies and during the criminal trial (Neagu 2006: 94) when the parties (the accused person, the defendant and other parties) are entitled to be informed about these rights and to be represented, if necessary, assisted by a lawyer, chosen or appointed *ex officio* in conformity with the provisions on the legal aid. Similar provisions are stipulated in Law no. 51/1995¹³ for the organisation and practice of the lawyer’s profession with amendments, where the legal aid is also mandatory when: the accused person or defendant is a juvenile held in a re-education centre or in a medical-educational unit or arrested in another case; the court ordered the hospitalization of the juvenile; the judicial body or the court appreciates that the accused person or the defendant could not defend himself/herself in the best way without ensuring the legal aid; in the cases in which the law provides for the offence committed life detention or imprisonment for 5 years or more; in the cases when the defendant does not have all the necessary financial support to hire a lawyer.

Furthermore, in order to guarantee the effective access to justice in civil cases, starting with 2008, Romania created the public system of legal aid by adopting Government Emergency Ordinance (GEO) no. 51/2008¹⁴ concerning the public legal aid in civil matters, which is granted on the following bases: to those who are already parties in a certain dispute or who are about to become parties; to the persons who have serious financial problems;¹⁵ it shall not represent a modality to encourage the abuse of this procedural right; it is financed from the state budget etc.

Finally, the provisions of GEO no. 51/2008 are transposing the Council Directive 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

¹² The law was published in the Official Gazette of Romania, Part I no. 468 of 1 July 2003.

¹³ The law was published in the Official Gazette of Romania, Part I no. 116 of 9 June 1995 and was re-published in the Official Gazette of Romania, Part I, no. 113 of 6 of March 2001.

¹⁴ The Ordinance was published in the Official Gazette of Romania no. 327 of 25 April 2008.

¹⁵ This condition was introduced after the case *Weissman and others vs. Romania* (application no. 63945/00). This situation which will be analysed case by case by the court before granting it, when the European Court of Human Rights (ECtHR) decided that the enormous level of the stamp duty was a real obstacle, in concrete, to the free access to justice. In this sense, the ECtHR stated that “[...] the Court notes that the failure to pay the EUR 323,264 due in stamp duty for bringing the proceedings resulted in the cancellation of the action” [...] because the stamp duty was “undoubtedly very high for any ordinary litigant, [and] not justified either by the particular circumstances of the case or by the applicants’ financial position”. [Also] “the Court holds that the amount claimed from the applicants in order to lodge their action was excessive. As a result, they were implicitly obliged to abandon the action, which deprived them of the right to have their case heard by a court”. See also website: <https://wcd.coe.int/ViewDoc.jsp?id=1003851&Site=COE>.

The Spanish Constitution stipulates *expressis verbis*, in Article 24, the right to judicial remedy which includes legal aid ensured by the state aimed at providing the necessary means to make this a real and effective right, even when the person wishing to exercise it fails because of the lack of financial means, as the main aim is to guarantee free access to justice under the same conditions to all citizens, and to those who are in need, in particular, while their legitimate rights and interests are adequately protected by the state.

Furthermore, in civil matters, Law no. 16/2005 of 18 July 2005¹⁶ transposing Council Directive no. 2003/8/EC regulates the legal aid (or “*asistencia jurídica gratuita*”) as a fundamental right for the persons who cannot afford to pay, amongst others, the costs of a pre-trial legal advice, of the lawyers’ fees or of a trial, of the experts’ fees etc. Granting the legal aid shall be analyzed by the court on a case-to-case basis, taking into consideration: the financial situation of the members of the family; the legal protection sought; the particulars of the each litigant etc.

In the Polish legislation, the right to defence is guaranteed in Article 42 par. 2 of the Fundamental Law from 2 of April 1997, according to which any person, against whom the criminal proceedings is pending, has the right to defence at all stages of the proceedings, and also to benefit of the lawyer appointed by the court or to choose his/her lawyer if the perpetrator has all the financial means to hire a lawyer (Serzhanova 2009).

On the other side, detailed regulations concerning the right to defence and legal aid are enshrined in proceedings’ regulations, such as: Article 6¹⁷ of the *Code of Criminal Proceedings* from 6 July 1997 and Article 8 of the *Executive Criminal Code* from 6 July 1997¹⁸ which establish only the cases of obligatory defence and principles of communication of the convicted with his/her lawyer.

In Bulgaria, the legal aid has suffered important changes in the last 20 years, while a new legal aid system has been introduced in 2006 (Pushkarova 2009).

Thus, legal aid is provided for all types of civil, administrative and criminal cases by the members of the National Legal Aid Bureau,¹⁹ established as an independent body within the Bulgarian Ministry of Justice, taking also into consideration the provisions of the Act on Legal Aid,²⁰ adopted by the Bulgarian Parliament. Thus, if the individual does not have enough funds and he/she cannot pay the fees and expenses due in the civil or administrative proceedings, he/she can submit an application before the court where the case is pendent for fees and expenses exemption, which are covered by the funds envisaged in the court’s budget.²¹

In the criminal cases, Article 15 of the **Bulgarian Criminal Procedure Code** states that “*the accused party shall enjoy the right to defence* [by the lawyer, in accordance with the Criminal Procedure Code]. *The accused party and the other persons who take part in*

¹⁶ Law no. 16/2005 of July 18 amending Law no. 1 of 1 January 1996 on free legal assistance in relation to cross-border disputes in civil and commercial matters in the European Union.

¹⁷ Article 6 of the Code of Criminal Proceedings states, that the accused is entitled to the right to defence (material defence), which includes the right to use a defender’s aid (formal defence) and which he must be instructed on – Serzhanova 2009.

¹⁸ See footnote 16, 198.

¹⁹ The organization, the function and the activity of the National Legal Aid Bureau and the Ordinance of payment of legal services have been adopted with a Decree of the Council of Ministers no. 4/06.01.2006 (SG5/17.01.2006), in force from 01.01.2006.

²⁰ The law was published in SG no. 79/04.10.2005, in force from 1 January 2006.

²¹ Website: <http://www.a4id.org/sites/default/files/u3/A4ID%20Legal%20AID%20Guide.pdf>.

criminal proceedings shall be afforded all procedural means necessary for the defence of their rights and legal interests". As we can observe, the legal aid is ensured by the Bulgarian legislation both for the civil and criminal cases.

The legal aid is stipulated under the **German** Legal Advice Scheme and assistance with court costs and it is granted in the civil, employment, administrative and social cases, when the applicant's personal and financial circumstances are such that he/she cannot afford to hire a lawyer and has no other reasonable possibilities to obtain assistance.²²

The German system for granting the legal aid is unique, compared with other legal aid systems, for the following reasons: this benefit is provided almost exclusively by lawyers; legal aid is based only on the applications coming from the persons, without any prioritization; it is focused mainly on the representation before the courts, while the cases for granting such benefit outside the courts are limited; in the criminal cases and in the cases involving administrative offences, is assured only the advice,²³ which means that the German legal aid system spent up to four time more money on non-criminal legal aid than on the criminal legal aid.²⁴

Another particularity of the German system is that there are two national laws regulating the legal aid system at national level, namely: *Beratungshilfegesetz* (Legal Advice Scheme Act) for legal advice and the *Gesetz über Prozesskostenhilfe* (Court Proceedings Costs Assistance Act) plus other 16 federal legal aid laws (*Bundesländer*), which are exclusively responsible for their own legal aid policy.²⁵

IV. THE MODALITY FOR GRANTING LEGAL AID BY THE EUROPEAN COURTS

In the following section we will analyse the modality for granting legal aid in the cases when it is requested by the natural and legal persons, bearing in mind, on the one hand, the general provision of Article 263 par. 4 TFEU according to which "*Any natural or legal person may [...] institute proceedings against an act addressed to that person or which is of direct and individual concern to them [...]*", and, on the other hand, the special provisions of the Rules of Procedure of the European Courts (Craig-De Burca 2011: 491) which describe in a clear manner the conditions to award legal aid, the terms for introduction an application for legal aid, the effects and other details, all these being analysed as follows.

Thus, in order to avoid any conflictive situations, in the case of the direct and preliminary actions, the Rules of Procedure of the European courts²⁶ establish the legal framework to grant legal aid, as a financial support, in the cases when one of the parties (claimant, defendant or third party intervener) who is a natural or legal person "*is, wholly or partly, unable to cover judicial expenses, he/she/it may, at any time, ask for free legal aid*", which "*can, wholly or partly, cover expenses related to legal aid and representation*

²² Website: http://ec.europa.eu/civiljustice/legal_aid/legal_aid_ger_en.htm#2.

²³ Website: <http://www.a4id.org/sites/default/files/u3/A4ID%20Legal%20AID%20Guide.pdf>.

²⁴ Website: http://www.ilagnet.org/jscripts/tiny_mce/plugins/filemanager/files/Helsinki_2011/national_reports/National_Report_-_Germany.pdf.

²⁵ Website: <http://www.a4id.org/sites/default/files/u3/A4ID%20Legal%20AID%20Guide.pdf>.

²⁶ Art. 115 paragraph 1 of the Rules of Procedure of the Court of Justice; Art. 94 paragraph 2 of the Rules of Procedure of the General Court; Art. 95 paragraph 1 of the Rules of Procedure of the Civil Service Tribunal (Mariño Menéndez-Moreiro González-Catena 2001).

before the courts”,²⁷ to which purpose the EU courts count with a separate budget, provided for such exceptional cases,²⁸ and the expenses are advanced by the cashier of the courts, and only in the cases when the party in question did not receive the legal aid under the national rules.

To grant such aid, the European courts shall analyse and assess, on a case-to-case basis, “*the financial situation [...] taking into account objective elements such as: income, the capital, and the family situations*”,²⁹ whilst the party concerned shall have to submit to the court a certificate issued by the competent authority, in accordance with the national law, including *relevant information* with respect to his/her financial situation.

By “*relevant information*” one can understand, for instance: income statements, salary certificates, salary certificates, certificates issued by the social security office or the unemployment office, bank account statements. On the other hand, sworn statements filled in by the party concerned herself/himself are not sufficient to prove the state of necessity.³⁰

As stated, such an application is not conditional upon the nature of the action or of the proceeding within which it is made, and it can be submitted both in the case of direct actions and in the case of applications for preliminary rulings. In this situation the party concerned should first submit such application to the competent authority in his/her own country.³¹

In order to elaborate the application, the party shall not be represented by a lawyer,³² following that the legal aid application should be filed at any time of the proceeding, “*before or after the action has been brought*” (Art. 95 par. 1 of the Rules of Procedure of the General Court).

It should be noted that the moment of introduction the application for free legal aid differs, as follows:

a) If it is formulated *before the main action has been brought*, the party concerned must briefly mention: the subject matter of the action; the facts of the case; the arguments in support of the action, in order to enable the court to assess its legitimacy. To this effect, the compulsory form which accompanies the application includes a section where the

²⁷ Lenaerts–Arts–Maselis 2006: 587; Art. 115 paragraph 1 of the Rules of Procedure of the Court of Justice; Art. 94 paragraph 1 subparagraph 2 of the Rules of Procedure of the General Court; Art. 95 paragraph 1 subparagraph 2 of the Rules of Procedure of Civil Service Tribunal.

²⁸ Lenaerts–Arts–Maselis 2006: 589; Notes for the guidance of counsel in written and oral proceedings before the Court of Justice of the European Communities, drawn up by the CJEC, in February 2009, 8.

²⁹ Art. 94 paragraph 2 subparagraph 2 of the Rules of Procedure of the General Court; Art. 95 paragraph 2 subparagraph 2 of the Rules of Procedure of the Civil Service Tribunal.

³⁰ Voican–Burdescu–Mocuța 2000; Fábán 2006; Notes for the guidance of counsel in written and oral proceedings before the Court of Justice of the European Communities, drawn up by the CJEC, in February 2009, 8; website: <http://curia.europa.eu/ro/instit/txtdocfr/txtsenvigueur/aidejud.htm>.

³¹ Notes for the guidance of counsel in written and oral proceedings before the Court of Justice of the European Communities, drawn up by the CJEC, in January 2009, 8.

³² Lenaerts–Arts–Maselis 2006: 587; Case T-157/96 Paolo Salvatore Affatato v The European Commission, judgement of 29 January 1998 (fourth chamber), published in the CJEC Court Reports of 1996; website: http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61996A0157.

supporting documents³³ necessary for the assessment of the financial situation shall be attached.

b) When the application is made *during the proceedings*, it shall be accompanied by all supporting information and documents relevant for the assessment of the financial situation of the party concerned, including the certificate issued by the competent national authority.³⁴

As for the **special compulsory form**,³⁵ imposed by the court as a mandatory requirement in drafting the application, it shall be filled in, hand-signed, accompanied by the supporting documents and sent to the address of one of the Registries of the courts of Luxembourg, by fax or electronic mail. In the latest situation, only a scanned copy of the original document signed by the applicant or his/her lawyer shall be accepted. If the requirements mentioned above are not fulfilled, the application for legal aid will not be taken into consideration, and the document will be returned.³⁶

In addition, the Rules of Procedure of the European courts³⁷ clearly regulate the manner how the application filed by the party concerned is tried, namely: the application is tried by a Chamber of Judges, upon the recommendations of the Judge-Rapporteur, appointed by the President and after hearing the Advocate General, in which situation the chamber of judges verify, *inter alia*, if the application lodged or the upcoming application is not clearly unfounded or inadmissible (Lenaerts–Arts–Maselis 2006: 588).

As regards **the effects** that the lawful submission of the application for legal aid produces, they differ depending on the moment when it is made, as follows:

a) Where the application for granting legal aid is formulated *before the main action is brought*, the term prescribed for the bringing of the initial action shall be suspended until the date of notification of the order making a decision on such application, or the order designating the lawyer instructed to represent the applicant (Lenaerts–Arts–Maselis 2006: 588) in compliance with the Rules of Procedure of the European courts and to the effect of improving access to justice.³⁸

Regarding the period of suspension of the time-limit for bringing the main action, it is of ten days after the lodgement of the application for legal aid, by fax or electronic mail. If the original application is received at the court after this 10-day time-limit, the date of

³³ Lenaerts–Arts–Maselis 2006: 588; Notes for the guidance of counsel in written and oral proceedings before the Court of Justice of the European Communities, drawn up by the CJEC, in February 2009: 8; Art. 115 paragraph 2 of the Rules of Procedure of the Court of Justice; Art. 95 paragraph 2, subparagraph 2 of the Rules of Procedure of the General Court; Art. 96 paragraph 2, subparagraph 2 of the Rules of Procedure of the Civil Service Tribunal.

³⁴ Art. 115 paragraph 2 of the Rules of Procedure of the Court of Justice; Art. 95 paragraph 2 of the Rules of Procedure of the General Court; Art. 96 paragraph 2 of the Rules of Procedure of the Civil Service Tribunal.

³⁵ Website: http://curia.europa.eu/jcms/jcms/Jo2_10056/formulaire-de-demande-d-aide-judiciaire and http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-10/formaj_2008-10-09_15-14-59_69.pdf.

³⁶ Website: <http://curia.europa.eu/ro/instit/txtdocfr/txtsenvigueur/aidejud.htm>.

³⁷ Art. 186 paragraphs 2–4 and Art. 187 of the Rules of Procedure of the Court of Justice; Art. 96 paragraphs 2–6 and Art. 97 of the Rules of Procedure of the General Court; Art. 97 of the Rules of Procedure of the Civil Service Tribunal.

³⁸ Lenaerts–Arts–Maselis 2006: 588; Case T-109/98 A.V.M. v The European Commission, order of 24 November 1999, published in the CJEC Court Reports of 2000, website: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:079:0025:0026:EN:PDF>.

lodgement of the original application for legal aid shall be taken into account instead of the date of lodgement of the application by fax or electronic mail.³⁹

b) If the application is made during the main proceedings, it can produce the following effects:

i) the admission of the application for granting free legal aid, which is granted, wholly or partly, by order that cannot be challenged by means of any judicial remedies, and the following rules shall be stipulated, such as:

- the lawyer shall be appointed to represent the person concerned and, if the he/she has not indicated his choice of lawyer himself/herself or if his/her choice is deemed unacceptable by the court, the Registrar shall send the competent authority of the Member State concerned, the order accepting the application for legal aid, accompanied by a copy thereof. The lawyer instructed to represent the party concerned shall be designated having regard to the suggestions made by such authority;⁴⁰

- an amount to be paid to the lawyer shall be specified or a limit that the lawyer's disbursements and fees may not, in principle, exceed, shall be fixed; such amounts shall be advanced by the cashier of the court;

- upon application of the lawyer, a contribution to be made by the person concerned to the costs shall be specified, having regard to his/her financial situation, or the cashier of the court of justice shall advance the funds required for the disbursements and fees of the designated lawyer, amounts to be subsequently recovered.

When, during the proceedings related to the main action, the circumstances that led to granting legal aid alter, the court may, on his/her own motion or on application, by means of reasoned order and after having heard the party concerned, withdraw the benefit of legal aid already granted (Mariño Menéndez–Moreiro González–Catena 2001: 62). However the provisions of the Rules of Procedure of the European courts do not make any mention about this, which from our point of view means that these circumstances may involve an improvement of the financial standing of the party concerned, which would enable him/her to cover the costs generated by the dispute or, on the contrary, these circumstances may underline that the financial situation initially indicated by the party applying for legal aid was not real.

By virtue of the decision closing the proceedings, the recipient of legal aid has to bear his/her own judicial expenses, while the unsuccessful party shall be liable to pay the judicial expenses, and, besides that, to refund to the cashier of the court any amounts advanced by way of aid, which shall thus be recovered.⁴¹ There are situations when although the legal aid recipient is unsuccessful, the court may, if equity so requires, order that one or both parties should bear their own judicial expenses or that such expenses should be borne, in whole or in part, by the cashier of the court.

It is to be highlighted that although these rules are not imperative, in practice, the European courts have not given up the amounts advanced by the cashier of the court by

³⁹ Websites: http://curia.europa.eu/jcms/jcms/Jo2_10056/formulaire-de-demande-d-aide-judiciaire; and <http://curia.europa.eu/ro/instit/txtdocfr/txtsenvigreur/formAJTFP.doc>.

⁴⁰ Supplementary Rules of the CJEC, with the latest amendments of 21 February 2006, published in the OJEU, L series, no. 72 of 11.03.2006, website: http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/regladd_2008-09-25_17-34-13_860.pdf; Mariño Menéndez–Moreiro González–Catena 2001: 63.

⁴¹ Notes for the guidance of counsel in written and oral proceedings before the Court of Justice of the European Communities, drawn up by the CJEC, in February 2009, 8.

way of legal aid, even when the “*poor*” party has proven unsuccessful, and this because the aid granted by the court is meant to eradicate possible obstructions in the free exercise of certain rights and not to provide subsidy to some of the European citizens (Fábián 2002: 100). We are partially agree with this idea with the amendment that the European courts should analyze very carefully when they decide to take the money back from the “*poor person*” without violating its fundamental right to defence enshrined at national, international and European level, including in Article 47 of the Charter of Fundamental Rights of the European Union.

ii) The application is rejected, in which situation legal aid is refused, wholly or partly, by reasoned order, on which occasion the court shall check, *inter alia*, whether the application brought or to be brought is manifestly inadmissible or manifestly unfounded (Lenaerts–Arts–Maselis 2006; Dashwood–Dougan–Ridger–Spaventa–Wyatt 2011: 380). This order cannot be challenged by means of any judicial remedy. We consider that such a situation can occur when the party concerned fails to satisfactorily justify in his/her application, from the legal point of view, the financial distress he/she faces which makes impossible for him/her to cover the judicial expenses.

V. CONCLUSIONS

In a modern and democratic society, the legal aid represents the central element in providing free access to justice by ensuring the right to a fair trial and same treatment before the law for all the citizens, in equal conditions, without any discrimination based on political, personal, financial, social, cultural or other grounds.

In this context, the European documents in the field, including Charter of Fundamental Rights of the European Union, enshrine very clearly the conditions to approve and to grant legal aid especially to those citizens who cannot afford to hire a lawyer, no matter what is the object of the dispute: civil, labour, administrative, criminal, employment etc.

In time, the legal aid increased due to its importance as a fundamental right to social and legal justice, becoming today an indispensable right belonging to all the citizens, right which is protected and promoted by every society through the general or specific legislation. In addition, it should be highlighted that legal aid is part of the principle of good or proper administration, as it is well-known in the doctrine,⁴² principle that was developed in the case – law of the European Court of Justice starting with 1990s.⁴³

To improve the system of ensuring legal aid, in the last years many European countries elaborated and implemented Strategies in the field, having as principle group-target the disadvantaged categories of society. In achieving this mission the entire society is involved, such as: the governmental and local institutions with responsibilities in the field, the judicial system, different non-governmental organizations and associations, the media while numerous awareness campaigns were conducted at the national and European levels to emphasize the importance of granting such aid.

⁴² Tridimas (2006): *The general principles of EU Law* (ed. Oxford): 410.

⁴³ Case C-255/90 P Jean-Louis Burban v European Parliament, judgement of 31 March 1992, published in the CJEC Court Reports of 1992, website: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61990CJ0255:EN:HTML>; Case T-167/94 Nölle v Council of the European Union and Commission of the European Communities, judgement of 18 September 1995, published in the CJEC Court Reports of 1995, website: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1998:055:0025:0025:EN:PDF>.

REFERENCES

I. Authors

- Chalmers, D.–Hadjiemmanuil, C.–Monti, G.–Tomkins, A. (2006): *European Union Law, text and materials* (ed. Cambridge University Press): 238.
- Craig, P.–De Burca, G. (2011): *EU Law, Text, Cases and Materials*, 5th ed. (ed. Oxford University Press): 491.
- Dashwood, A.–Dougan, M.–Ridger, B.–Spaventa, E.–Wyatt, D. (2011): *Wyatt and Dashwood's European Union Law* (ed. Hart). Oregon: 380.
- Fábián, Gy. (2002): *The European Court of Justice, Supranational Court of Justice* (ed. Rosetti). Bucharest: 95.
- Fábián, Gy. (2006): *Institutional Community Law*, 2nd ed. (ed. Sfera Juridica). Cluj–Napoca: 302.
- Finocchiaro, G. (2009): *Access to the Judiciary under the New Italian Law on the Judicial System: Critical Remarks within Access to Justice and the Judiciary. Towards New European Standards of Affordability, Quality and Efficiency of Civil Adjudication* (ed. Metro): 119.
- Lenaerts, K.: *Effective Judicial Protection in the EU, Court of Justice*, 1, website: <http://ec.europa.eu/justice/events/assises-justice-2013/files/interventions/koenlenarts.pdf>.
- Lenaerts, K.–Arts, D.–Maselis, I. (2006): *Procedural Law of the European Union*, second edition (ed. Sweet and Maxwell): 587.
- Mariño Menéndez, F. M.–Moreiro González, C. J.–Catena, V. M. (2001): *Derecho procesal comunitario* (ed. Tirant Lo Blanch): 62.
- Neagu, I. (2006): *Criminal Procedural Law, General Part*, Monograph (ed. Global Lex). Bucharest: 94.
- Pushkarova, I. (2009): *Access to justice: Legal aid systems within Access to Justice and the Judiciary. Towards New European Standards of Affordability, Quality and Efficiency of Civil Adjudication* (ed. Metro): 51.
- Roșu, C.–Dănilă, L. (2007): *Civil Procedural law*, 5th edition (ed. C.H. Beck). Bucharest: 31–32.
- Serzhanova, V. (2009): The right to defence in Polish legislation, *Revista Drept – Series Jurisprudentia* 12: 195, *Alba Iulia*, 196; website: http://www.uab.ro/reviste_recunoscute/reviste_drept/annales_12_2009/29serzhanova.pdf.
- Skinnider, E. (1999): *The responsibility of states to provide legal aid*, paper prepared for the Legal Aid Conference Beijing, China, March 1999, 2; website: <http://www.icclr.law.ubc.ca/Publications/Reports/beijing.pdf>
- Tridimas, T. (2006): *The general principles of EU Law* (ed. Oxford University Press): 373, 410.
- Uzelac, A.–van R Hee, C. H. (2009): *Access to Justice and the Judiciary. Towards New European Standards of Affordability, Quality and Efficiency of Civil Adjudication* (ed. Metro): 1.
- Voican, M.–Burdescu, R.–Mocuța, G. (2000): *International Courts of Justice* (ed. C. H. Beck). Bucharest: 105.

II. European and international legislation

- Act on Legal Aid published in SG no.79/04.10.2005, in force from 1 January 2006
- Commission Decision no. 2004/844/EC published in OJ, C 365 of 10 December 2004
- Commission Decision no. 2005/630/EC of 26 August 2005, published in OJ L no.225 of 31 August 2005
- Council Directive no. 2003/8/EC of 27 January 2003, published in the OJ, L 26 of 31 January 2003
- Decree of the Council of Ministers no. 4/06.01.2006 (SG5/17.01.2006)
- Government Emergency Ordinance (GEO) no. 51/2008, published in the Official Gazette of Romania no. 327 of 25 April 2008
- Law no. 281/2003 amending the Criminal Procedure Code, published in the Official Gazette of Romania, Part I no. 468 of 1 July 2003
- Law no. 16/2005 of July 18 amending Law no. 1 of 1 January 1996 on free legal assistance in relation to cross-border disputes in civil and commercial matters in the European Union

Law no. 51/1995 published in the Official Gazette of Romania, Part I no. 116 of 9 June 1995 and was re-published in the Official Gazette of Romania, Part I, no. 113 of 6 of March 2001

Notes for the guidance of counsel in written and oral proceedings before the Court of Justice of the European Communities, drawn up by the CJEC, in February 2009

Rules of Procedure of the Civil Service Tribunal

Rules of Procedure of the Court of Justice

Rules of Procedure of the General Court

Supplementary Rules of the CJEC, with the latest amendments of February, 21st 2006, published in the OJEU, L series, no. 72 of 11.03.2006

III. Jurisprudence

Case T-109/98 A.V.M. vs. The European Commission, order of November 24th, 1999, published in the CJEC Court Reports of 2000

Case T-157/96 Paolo Salvatore Affatato vs. The European Commission, judgement of January 29th, 1998 (fourth chamber), published in the CJEC Court Reports of 1996

Case Weissman and others vs. Romania, application no. 63945/00, European Court of Human Rights

Case C-255/90 P Jean-Louis Burban v European Parliament, judgement of 31 March 1992, published in the CJEC Court Reports of 1992

Case T-167/94 Nölle v Council of the European Union and Commission of the European Communities, judgement of 18 September 1995, published in the CJEC Court Reports of 1995

IV. Websites

http://curia.europa.eu/jcms/jcms/Jo2_10056/formulaire-de-demande-d-aide-judiciaire

http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/regladd_2008-09-25_17-34-13_860.pdf

http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-10/formaj_2008-10-09_15-14-59_69.pdf

<http://curia.europa.eu/ro/instit/txtdocfr/txtsenvigreur/aidejud.htm>

<http://curia.europa.eu/ro/instit/txtdocfr/txtsenvigreur/formAJTFP.doc>

<http://ebooks.adelaide.edu.au/a/aristotle/athenian/>

http://ec.europa.eu/civiljustice/legal_aid/legal_aid_ec_en.htm

http://ec.europa.eu/civiljustice/legal_aid/legal_aid_ger_en.htm#2

http://ec.europa.eu/civiljustice/legal_aid/legal_aid_int_en.htm

http://ec.europa.eu/justice_home/judicialatlascivil/html/la_information_en.htm

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0008:en:NOT>

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005D0630:EN:HTML>

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:079:0025:0026:EN:PDF>

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:364:0001:0022:EN:PDF>

http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61996A0157

<http://www.a4id.org/sites/default/files/u3/A4ID%20Legal%20AID%20Guide.pdf>

http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/CONVENTION_ENG_WEB.pdf

http://www.hcch.net/index_en.php?act=conventions.text&cid=91

<http://www.icclr.law.ubc.ca/Publications/Reports/beijing.pdf>

http://www.ilagnet.org/jscripts/tiny_mce/plugins/filemanager/files/Helsinki_2011/national_reports/National_Report_-_Germany.pdf

http://www.uab.ro/reviste_recurioscute/reviste_drept/annales_12_2009/29serzhanova.pdf

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1998:055:0025:0025:EN:PDF>

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61990CJ0255:EN:HTML>