

PUBLIC LEGAL AID – METHOD OF INSURING FREE JURIDICAL ASSISTANCE¹

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Taking into consideration the issues associated with the actual integration of Romania into the European Union and also the judicial and institutional models that apply to this process, allow me to subject to your analysis the issue of free juridical assistance.

This issue may present interest since, from October 2008, Law 193/2008 approving the Emergency Ordinance no. 51/2008² and its modifications regarding the public juridical assistance in civil matters came into force. On the grounds of this new legal framework, free juridical assistance was fundamentally changed, fact which subsequently affected other regulations³ which contribute to the building of the free juridical assistance system in our country.

While presenting in a comparative manner the new legal framework, we will try to answer to the following question: „*To what extent does the present Romanian legislation comply with the European standard on the matter?*”. In order to do this, after some terminological explanations, we will state the European standard on the matter, followed by the Romanian legislation and its dynamics in the past year.

Although different terms like *free judicial assistance*, *compulsory judicial assistance* or *assistance granted by the state*, *free assistance* or *free defence*, are being used in our legislation, we would like to use the phrase ***free juridical assistance*** as, in our opinion, the relationship between free juridical assistance and free judicial assistance is a part-and-whole instance. Juridical assistance refers to the financial and professional support granted by the state to the needy people and it includes all forms of activity in accordance with the law, which have as a purpose the insurance of the right to defence and the guarantee of the access to justice, both in court and outside the court. Judicial assistance is limited to offering the same kind of support in view of people's exercising their right to defence, but only when dealing with the judicial organs: the court, the prosecutor's office or the police.

¹ The article is based on the legislation in force by February 15th 2009.

² The Government Emergency Ordinance no. 51, from April 21st 2008, concerning the judicial public aid in civil matters, published in the Official Gazette of Romania, 1st part, no. 327 from the 25th of April 2008 and modified through Law no. 193 of October 21st 2008 approving the Government Emergency Ordinance no. 51/2008 concerning the judicial public aid in civil matters, published in the Official Gazette of Romania, 1st part, no. 723 of October 24th 2008.

³ References to the modification of Law no. 51 of June 7th 1995 concerning the organization and functioning of the lawyers' profession, republished in the Official Gazette of Romania, 1st part, no. 113 of March 6th 2001 through the Government Emergency Ordinance no. 159 of November 12th 2008 published in the Official Gazette of Romania no. 792 of November 26th 2008, to the Decision of the U.N.B.R.(National Association of the Romanian Bars) Council no. 419 of September 27th 2008, recensed on November 29th 2008, approving the Frame-regulation concerning the organisation of the Bars judicial assistance services, to the Statute of the lawyer's profession that is to be modified, to the Regulations concerning the organisation of the bars judicial assistance services, out of which just some have been adopted.

In order to reach our goal, that of comparing the internal and the European legislation concerning free juridical assistance, it's useful for us to remember that the European standard on the matter is set by Directive 8/2003⁴ of the Council of the European Union which regulates the obligation of the member states of the European Union to insure for any citizen of another member state, effective access to justice, including by means of judicial assistance when facing any authority having jurisdictional attributions and inclusive in the phase of forced execution.

This Directive sets minimum common rules concerning the judicial assistance granted in cases of cross-border litigations and it is opposable to Romanian authorities even since January 2007.

Based on this directive, any citizen of a member state of the European Union may request judicial assistance when facing a Romanian jurisdictional authority, whether that is an administrative organ or a court of law, whatever the procedural phase he/she is in and inclusive in the form of a judicial consulting, of a judicial expertise or of a forced execution of a decision. In such a case, a jurisdictional authority receiving such a request before May 2008, would have been in the impossibility of granting this kind of aid, in the absence of a legal provision transposing into internal law the obligation that the Romanian state had taken toward the other member states of the EU, a situation which could provide the possibility of a trial against Romania in the European Court of Justice.

In order to remedy this situation, the Ministry of Justice was the beneficiary of a PHARE Project of support in view of creating an efficient system of free juridical assistance in Romania⁵. The project ended in March 2008 with a report which underlined the necessary measures for aligning the Romanian legislation to that of the European Union⁶.

If the European standard resides in a sole normative act, Directive 8/2003, the Romanian law on the matter appears to be the result of the synthesis and corroboration of more regulations having different sources of law. One can distinguish a *common law* regarding free juridical assistance, as well as *special regulations*, belonging to branches of law like penal law, processal inclusive, and civil law, civil procedure inclusive.

Referring to the first category, we appreciate that the regulations in the Constitution of Romania, art. 21 and especially art. 24, Law 51/1995 concerning the organisation and functioning of the lawyers' profession, especially art. 68-69⁷, and the Statute of the lawyer's profession⁸ - art.

⁴ The Council Directive 2003/8/CE to improve access to justice in cross-border disputes by establishing a minimum common rules relating to legal aid for such disputes, published in the Official Gazette of the European Union L no. 26 of January 31st 2003.

⁵ The PHARE Project RO 2004/016-772.01.04.12 „Improvement of the juridical assistance system”, financed by the European Union and implemented through a consortium made of GDSI Ireland, Legal Aid Board Ireland and Transparency International Romania.

⁶ Suggested measures: allocation of supplementary funds, improvement of the quality of free juridical assistance services, clarification of the criteria and the conditions for granting free juridical assistance, improvement of the method of assigning a lawyer, incrementation of the degree of public informing.

⁷ Following the modification of Law no. 51 of June 7th 1995 concerning the organisation and functioning of the lawyers' profession, through the Government Emergency Ordinance no. 159 on November 12th 2008, article 68 was modified and articles 68¹ - 68¹⁴ were introduced.

⁸ The Statute of the lawyer's profession has last been modified through Decision no. 6 of the Lawyers' Congress on the 21st of June 2008; the modification stated by the

155-61, outline the general framework for granting free juridical assistance in Romania and represent, by way of consequence, **the common law** on the matter.

The special regulations regarding the insurance of the right to defence **in penal trials** have as a source the Code of Penal Procedure⁹ (art. 6 and 171-173), for both the accused and defendant and for the civil party or the civil responsible party, respectively. The legislative framework for insuring free juridical assistance for the benefit of the injured party has grown rich since 2003 with new regulations which have as a source Law no. 217/2003¹⁰ for fight against domestic violence and Law no. 211/2004¹¹ on certain measures to protect victims of crime.

In respect of the regulations that rule the free juridical assistance **in civil trials** (including commercial, administrative, labour and social insurances) some words in advance are futile.

Before the Emergency Ordinance 51/2008¹² came into force, the source of the right to free juridical assistance in civil matters was represented by the Code of Civil Procedure (art. 74-81)¹³ and Law 146/1997¹⁴ on charges of judicial stamp. One may add to these Law 188/2000¹⁵ regarding the judicial executors and the provisions of application residing in the Orders of a Minister (or protocols¹⁶).

If the juridical statute of free juridical assistance in penal trials has had only slight modifications in the last years, reason why we will not insist on them¹⁷, the coming into force of

Government Emergency Ordinance 159/2008 to come into force by February 8th 2009 at the latest, has not occurred yet.

⁹ The Code of Penal Procedure, republished in the Official Gazette of Romania, 1st part, no.78 of April 30th 1997, with ulterior modifications, including those made through Law no. 57 of March 19th 2008 published in the Official Gazette of Romania, no. 228 of March 25th 2008

¹⁰ Law no. 217 of May 22nd 2003 for preventing and fight against domestic violence, published in the Official Gazette of Romania, on the 29th of May 2003.

¹¹ Law no. 211/2004 on certain measures to protect victims of crime, published in the Official Gazette of Romania, 1st part, no. 505 on June 4th 2004 and modified through the Government Emergency Ordinance no. 113 of October 17th 2007, published in the Official Gazette of Romania no. 729 of October 26th 2007

¹² See 1st page

¹³ Abrogated through the Government Emergency Ordinance 51/2008

¹⁴ Law 146/1997 on charges of judicial stamp, published in the Official Gazette of Romania, 1st part, no. 173 of July 29th 1997, with ulterior modifications and completations

¹⁵ Law no. 188/2000 regarding the judicial executors, published in the Official Gazette of Romania, 1st part, no. 559 of November 10th 2000, with ulterior modifications.

¹⁶ Order 2550/2006 of the Minister of Justice concerning the approval of minimum and maximum fees for the services performed by judicial executors and the Protocol of June 26th 2005 sealed between the Minister of Justice and the National Association of Bars, concerning the fees of lawyers performing free juridical assistance, Protocol which was replaced in November 2008, given the new reglementation.

¹⁷ Some exception which are worth mentioning: 1) the abrogation and ulterior restoration of the defendant's right, stated by art. 172 of the Code of Penal Procedure, to assist to any act of penal investigation and not only to those which involve the hearing or presence of the party insuring his/her defence, or 2) declaring as unconstitutional, through Decision no. 1086/2007 of the Constitutional Court, the limitation of the right of the defence lawyer of the injured party, of the civil party or the civil responsible party, to be

the Emergency Ordinance 51/2008 and of Law no. 193/2008, literally creates a new legislative statute for free juridical assistance in civil matters.

The Emergency Ordinance 51/2008 abrogates, among other, both the previously stated provisions of the Code of Civil Procedure, and some provisions of Law 146/1997 on charges of judicial stamp, which, in our opinion, expresses the will to change the statute of free juridical assistance in non-penal matters.

The new reglementation sets out to solve the two issues concerning the aspect of free juridical assistance, created by the integration of Romania in the EU: one of them is the actual insuring of free juridical assistance, in all its forms, for the citizens of EU states, other than Romania, on the territory of our country – as the previously mentioned Directive states, and the other is that of the predictable discrimination between the EU citizens and its own citizens – in the instance in which the new regulation would have been limited only to transpose Directive 8/2003 into internal plan, without granting the same rights to Romanian citizens, too.

Moreover, through the law of approval, the applicability of the provisions in the Government Emergency Ordinance 51/2008 is extended to physical persons which do not have the domicile or permanent residence on the territory of Romania¹⁸ or of another member state of the EU, and when between Romania and the state whose citizen the inquirer is or where the inquirer has his/her residence, there is a conventional connection which contains provisions concerning the international access to justice¹⁹.

In order to grant the citizens of the European Union the rights stated by the Directive 8/2003 and, at the same time, to avoid granting them supplementary rights in comparison with the Romanian citizens on the territory of Romania, the Government Emergency Ordinance is to be applied to all *physical persons* having domicile or residence in Romania, in other state of the EU²⁰, with a net medium income per family member²¹ of at most 500 lei and respective 800 lei²².

For the persons in the first category, the Romanian state takes the obligation to insure, out of the budget of the Ministry of Justice²³ (that is out of the charges of judicial stamp, the judicial penalties and the taxes on the fees of lawyers, notaries and executors) a public judicial aid that covers entirely the services stated in the article 6 of the Ordinance. For the people in the second category, it insures half of this necessary, within the limit of 12 minimum national gross incomes at the level of the year²⁴ when the granting request was formulated.

The above formulation covers only one of the possible interpretations of article 8 of the Ordinance²⁵. In a different interpretation, this aid could be granted to the people with net incomes

assisted just in those acts of penal investigation which require the hearing or presence of the party that he/she provides defence for (art. 173 of the Code of Penal Procedure).

¹⁸ In order to determine if the inquirer has the domicile on the territory of Romania, the Romanian law is applied. If the inquirer does not have the domicile on the territory of Romania, in order to determine if he/she has the domicile on the territory of another member state, the law of that member state is applied.

¹⁹ See article 2¹ of the Government Emergency Ordinance 51/2008.

²⁰ Or in any other state, with regard to the conditions stated by art. 2¹ of the Ordinance.

²¹ Meaning „people that live in the same household”, see art. 5.

²² The incomes in the last two months will be taken into consideration (art. 8 of the Ordinance)

²³ Now, Ministry of Justice and Civic Freedoms

²⁴ The level of year 2009 for the minimum national gross income is of 600 lei, which means that the public judicial aid for this year can reach the amount of 7200 lei

²⁵ Art. 7 of the GEO 51/2008 states: “The public judicial aid may be granted, separate or cumulated, in any of the forms stated by art.6, without exceeding, as a total, during the

under the level of 800 lei per month, per family member, and limited to 50% of the maximum permitted sum of the public judicial aid (12 minimum national gross incomes). The rules of application or of judicial practice will eventually clarify this aspect. Taking into consideration the importance of the defended right, and the fact that the Ordinance allows the granting of the aid in other situations, proportional with the needs of the inquirer, in the case when the certain or estimated costs of the trial are bound to limit his/her effective access to justice²⁶, we consider the first interpretation to be a more adequate one.

Free juridical assistance in the form of public judicial aid is granted according to the income of the inquirer, the costs of his/her trial or independent of the material status of the inquirer, as a measure of protection, considering some special situations like the belonging to a minority, a handicap, a certain statute and other alike. In this case, the public judicial aid is given only for the defence or granting of some rights and interests connected with the special situation of the inquirer²⁷.

The aid is granted in view of both the *judicial* and the *extrajudicial assistance*; the Ordinance is to be applied to civil cases, but also to administrative, labour, commercial or cases of other nature, except the penal ones.

In what it concerns the forms of the granted juridical assistance, the following are identified:

- the *assistance of a lawyer*²⁸, or
- the cut, the deduction, multiple payments or the postponement of the expenses with *judicial taxes* – as forms of free juridical assistance regulated previously, also
- the payment of the *expert, his/her translator or interpreter* or
- the payment of the *judicial executor* – as new elements in the positive Romanian law.

Other new elements are represented by the expansion of the forms of free juridical assistance through a lawyer from assistance and representation in court to assistance or representation in front of another jurisdictional authority²⁹ and to prelitigation consulting or mediation.

period of a year, the maximum sum equivalent of 12 minimum national gross incomes, at the level of the year when the granting request was formulated ”

Art. 8 of the GEO 51/2008 states :„(1) May benefit of public judicial aid, in the forms stated by art. 6, the persons whose net medium monthly income per family member, for the last 2 months previous to formulating the request, is under the level of 500 lei. In this case, the sums constituting public judicial aid are entirely advanced by the state.

(2) If the net medium monthly income per family member, for the last 2 months previous to formulating the request, is under the level of 800 lei, the sums of money constituting public judicial aid are advanced by the state in a quantum of 50%”.

²⁶ Art.8 al.3 of the Ordinance;

²⁷ Art.8¹ of the Ordinance;

²⁸ The manner and level of the remuneration of lawyers for the extrajudicial assistance services are settled by protocol between the Ministry of Justice and the National Association of the Bars in Romania.

²⁹ The notion of *another jurisdictional authority* is not defined in the Ordinance, but our opinion is that it refers to any administrative authority having jurisdictional or decisional attributions.

The right to grant this aid remains, as it has been until now, of the competence of a court, be it the one that trials the litigation³⁰, or the one the inquirer's domicile belongs to – for the non-litigious cases. The inquirer will sent the approved request to the Lawyers' Bar, the Territorial Chamber of Judicial Executors, the Office of Judicial Expertise etc. and the court will also order the payment of the appropriate fees by means of executory closure.

If judicial public aid is requested for a trial in progress, the request/requests of granting public judicial receive(s) a resolution, if the law doesn't state otherwise, by the court solving the main request, the request of grating this aid having an incidental character. This provision represents the application of the civil procedure principle stated in article 17 of the Code of Civil Procedure, according to which accessory and incidental requests are to be solved by the court solving the main request. The court pronounces on the request without summoning the parts, through motivated closure decided in the council chamber.

Regarding the public judicial aid in view of exercising a remedy, the request of granting the aid is addressed to the court, whose decision is being attacked and it is given an emergency resolution, by a different court than the one solving the main issue of a suit.

As a new element, we have to notice that the closure which the court pronounces about the request for public judicial aid is not irrevocable and that it can be attacked with a reexamination request in term of 5 days from the conveying of the resolution of rejection, unlike the case of the decision for solving the request for judicial assistance based on article 77 of the Code of Civil Procedure. The existence of the possibility of remedy represents, in our opinion, a guarantee of the observance of this right and of the effective access to justice.

There are also worth underlining as elements of novelty:

- the concern for using objective criteria to differentiate the persons that can benefit of this aid, unlike the previous regulation which was limited to stating “the one who can not afford the expenses of a trial, without endangering his own support or that of his family”;
- the forms of this aid – which are extended, as we previously stated;
- the possibility for the beneficiary of the public judicial aid to choose his/her lawyer or judicial executor;
- the limits of the aid – 12 national minimum gross wages;
- the procedure and the authority of granting – which removes the obscurity in the previous text referring to the institution to which the request is addressed: the court or the bar;
- the cases when the aid can be denied³¹ - Cases, when, from justified reasons, we appreciate, the category of ‘chances of success’ lacks, and there are also

³⁰ In the case of public judicial aid requested for the execution of a decision, the request is of the competence of the court of execution.

³¹ The public judicial aid can be denied when it is abusively requested, when its estimated cost is disproportional with the value of the object of the cause, when it is not requested for the defence of a legitimate interest or it is requested for an action which contravenes with the public or constitutional order, when the inquirer claims compensation for offences to his/her image, honor or reputation, when he/she has not suffered any material prejudice, when the request devolves from a commercial activity or another independent activity undertaken by the inquirer.

Also, the request for public judicial aid can be denied if it is done for a cause whose resolution is part of the category of those which can be subjected to mediation or other alternative ways of solving, and, moreover, if the inquirer for public judicial aid can

references at a disproportional cost comparing with the value of the object of the cause – an applicable criteria only in the case of patrimonial litigations;

- the sanction for the person who unjustly benefits of the aid, based on a request submitted with truthlessness and on concealment of the truth – the person is to return six times the sum he/she received;
- the possibility to obligate the party that benefited of public judicial aid to refund the whole or part of the expenses supported by the state, if by undiligent behavior during the trial, the party has caused the losing of the case or if, by court order, the action was ascertained as abusively exercised.
- The situation of covering these sums after an irrevocable court order in that case - by the person having pretensions or by the state – in case the person having pretensions is the same person who benefited of the aid.

A series of provisions concerning the refund of the public aid has been introduced through the Law of Approval of the Emergency Ordinance no. 51/2008. Thus, it is mentioned that if the beneficiary of the public aid receives, by final and irrevocable court order, goods or rights of credence whose value exceeds 10 times the quantum of the granted public aid, he/she is bound to refund the public aid, by means of applying the refund procedure stated in legal provisions.

On the other hand, we underline some aspects that, in our opinion, are to be clarified by normative or praetorian manner:

- The sphere of the notion “other authorities with jurisdictional attributions”;
- The sphere of the notion of “abusive application” as reason for denying the request for public judicial aid;
- The method through which the Ministry of Justice will organize, coordinate and control the activity of granting public judicial aid – through a department, be it a separate structure or not.

In our opinion, the new regulation solves, at least for the most part, the issue of free juridical assistance, containing elements that allow an effective access to justice, the actual exercising of the right to defence and the observing of the principle of equality of arms.

The most important test, which would give the real measure of the new law, will be, without any doubt, the practice. It will precisely state which are the highs and lows of the new regulation. Our opinion is that the lacks or ambiguous wordings of provisions do not always need a new intervention of the legislator, as they can be mended by praetorian manner, fact that would increase the stability of the juridical system.

The changes which appeared at legal level will soon be followed by administrative adaptations, at the level of the Ministry of Resort, the bars of lawyers, the chambers of judicial executors. Among the bars of lawyers, only some have established a service of judicial assistance and have taken other administrative steps necessary for the actual granting of this legal aid.

Getting over the inherent imperfections of the new regulation, we appreciate the special relevance that it has for the Romanian positive law and for the national juridical reality, especially when taking into account the incomes of Romanian citizens³² which qualify an important percent of people to be eligible for such an aid, fact which affects both the state budget and, more important, the quality of the act of justice.

be proven to have refused, previous to the beginning of the trial, to follow such a procedure.

³² According to statistics, the juridical aid granted by the Romanian state has a wide area of applicability. The data gathered by the end of October 2008 by the National Institute of Statistics indicate that more than 32% of the number of employees in Romania has wages of up to 700 lei.

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