

CCBE Position on Legal Expenses Insurance

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Legal expenses insurance allows consumers to know and enforce their rights, where appropriate, until their trial, at a lower cost.

This is important as it promotes fundamental democratic progress aimed at enabling as many citizens as possible to benefit from effective access to the law and equal treatment between them, without discrimination based on their means.

Legal expenses insurance companies have very diverse practices within the European Union, as confirmed by the questionnaire sent by the CCBE to representatives from 25 countries.

Practices range from the worst to the best - the best is therefore possible.

As a first step, this paper analyses the current legal expenses insurance practices within the EU (I) and provides for CCBE proposals (II).

I/ FINDINGS

1.1. Free choice of a lawyer

This principle is enshrined in Article 201 of Directive 2009/138/EC.

According to the answers collected through the questionnaire, it can be considered that the free choice of a lawyer is rigorously and strictly respected in five countries: Estonia, Finland, Iceland, Luxembourg, and Sweden.

Other countries report varying obstacles to this free choice, though through insidious means, as no country openly questions the principle of free choice that all insurers claim to be complying with.

The strict application of this principle is, however, fundamental in order to enable consumers to benefit from advice which is independent from the interests of the legal expenses company with which they have concluded a contract.

The main obstacles encountered happen:

- upon signing the contract: In some countries, legal expenses insurance companies offer, at the conclusion of the contract, different pricing conditions depending on whether the policy guarantees the insured complete freedom of choice of a lawyer or reduced freedom to only those lawyers (one single lawyer or a list of lawyers) proposed to the insured. However, it is obvious that before any dispute would even occur, the insured would have opted for the cheapest contract. In some cases, one notices that the insured is insufficiently aware of the coverage because the insurance is obtained in conjunction with another insurance: e.g. family policy, liability insurance of motor vehicles, etc.

- and/or during the execution of the contract: The company often imposes its own lawyer at the time of the compulsory or optional consultation that precedes any litigation, the insured being invited to exercise their freedom of choice only at the time of the trial.

It is clear that in the majority of cases, the insured are led to opt for the lawyer who will have been responsible for the consultation, and that is the lawyer chosen by the company.

Often still, the treatment is different depending on the lawyer:

- The lawyer chosen by the company will most often lead to full coverage by the insurer without the insured having to advance the fees;
- The lawyer chosen by the insured will most often include limited coverage up to a certain (more or less quickly reached) threshold with the insured having to advance fees, which will be reimbursed under the conditions set out in the policy or will generate a possible deductible borne by the insured.

Such terms or behaviours obviously nullifies any freedom of choice, which becomes merely theoretical.

1.2. Types and areas of intervention of legal expenses insurance companies

- In most countries, legal expenses insurance companies have the role of trying to resolve the dispute out of court, which they try to carry out without recourse to a lawyer.
There are two exceptions which are Finland and Sweden, where a lawyer is systematically called upon.
- Legal expenses insurance companies generally take charge of the consultation phase or anything prior to litigation, and the intervention of a lawyer is very often limited to the trial phase.
- Most policies exclude family law and criminal law matters, and other areas of law (such as banking law, company law, insolvency law, intellectual property etc. For example, in Belgium and Germany, policies also exclude matters of construction law).
- Most countries impose on the insured a maximum threshold for lawyers' fees, with the notable exception of Iceland.
- It should also be noted that countries where legal expenses insurance is most successful in terms of subscriptions are countries where the degree of intervention of companies is lower, and freedom of choice of a lawyer is more respected. For example:
 - Finland: 80-90% of households hold a legal expenses insurance policy;
 - Sweden: 95% of households hold a legal expenses insurance policy.
- In most countries, the system of subsidiarity exists, i.e. legal aid for citizens is only provided to citizens who do not benefit from a legal expenses insurance policy.
- The average amount of premiums varies according to the scope of the coverage and a possible deductible from one country to another. However, it must be noted that basic coverage is available for a modest amount.
For example, in Finland the annual premium is between €20 and €50, where the proposed policies are very protective of the interests of the insured, and in particular, the most respectful of the principle of free choice.
However, it should be noted that lawyers' fees do not make up the cost of the premium as much as the legal experts' fees paid by the legal expenses insurance company, which are often very high and disproportionate to the interests of the case.
- Despite what legal expenses insurance companies often claim, they generally profit regardless of how they handle files and policy contents.

II/ CCBE PROPOSALS

In the light of these findings, the CCBE wishes to provide a number of observations concerning the free choice of a lawyer, lawyers' fees, the conduct of the case, and the scope of legal expenses insurance contracts.

The following proposals wish to place the insured at the core of legal expenses insurance, which should primarily be organised around their interests.

1. **Free choice of a lawyer**

It must be recalled that the free choice of a lawyer is an absolute principle clearly and unambiguously enshrined in Article 201 of Directive 2009/138/EC.

It is therefore only a matter of demanding its effective application.

Free choice is a fundamental rule so protective of the interests of citizens that it cannot have exceptions and cannot be waived by the insured.

- a) Consequently, an insurance company cannot, even indirectly, attempt to infringe this principle or incite the insured not to avail themselves of it or to waive it by asserting any advantages, including financial advantages (such as excess or a reduced contribution).
- b) This principle should apply from the date of the consultation if the insured wishes it to be entrusted to a lawyer, and again in case of proceedings being launched.
The insurance company cannot oppose the choice of its insured, who can change their options at any time.
- c) Only as a service rendered to the insured, and on the absolute condition that they have expressly requested it in writing, the insurance company may suggest the name of at least two lawyers who are competent in the relevant area of law.
- d) Agreements between law firms and legal expenses insurance companies are highly discouraged.
In any case, such agreements should have no direct or indirect impact on the above-mentioned principles and shall most notably not affect the free choice of the insured, or the freedom of determining the fees between the lawyer and the insured or the management or conduct of the case.

In the tripartite relation between the legal expenses insurer, the insured and the lawyer, it must be stressed that the principle of the independence of lawyers needs to be preserved and protected under any circumstance. The independence of the lawyer and the freedom of ensuring the defence of his client are basic principles of the profession expressly underlined in the CCBE Charter of the European Legal Profession¹. Any agreement entered into between a lawyer and a legal expenses insurance company naturally carries the risk of the independence being called into question. That is why, when a legal expenses insurer suggests a lawyer with whom an agreement has been concluded to an insured, the latter must be informed of the existence of such agreement and, if necessary, of certain details of such agreement. This is a basic and fundamental aspect of transparency. The insured must be able to have the certainty that the lawyer in charge of his case is completely independent.

¹ http://www.ccbe.eu/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf

2. Lawyers' fees

- a) Subject to applicable national laws, lawyers' fees are free and freely determined between lawyers and their clients, i.e. the insured.
- b) A fee agreement should be signed between lawyers and their clients should the fees exceed the amount proposed by the insurance company for the envisaged lawyer's intervention.
- c) In the event that the insurance company limits its intervention in the lawyer's fees to a threshold per type of service or per type of court seized, terms and conditions to limit the coverage may not be such as to render it impossible for the insured person freely to choose a lawyer. If there is a fee scale set by law, the coverage may not be lower than the one on such a scale.
- d) Should part of the fees be borne by the insured client, he or she may be reimbursed fully or in part by the indemnity to be awarded in that capacity or, in case of a transaction, agreed and charged to the other party. The reimbursement of the insured for the amount he or she paid will have priority over the reimbursement of the legal expenses insurance company.
- e) The legal expenses insurance company must be entitled to seize the competent arbitration authority for lawyers' fees if it considers that the fees that it would be required to pay are too high.

3. The conduct of the case

The insurance policy should state in bold the clause according to which *'The insured is the only person who has the power to decide how their case is handled'*.

To ensure this, the policy should contain the following provisions:

- a) The insured person alone chooses to entrust the case either to a lawyer, or to the insurance company, provided the latter is entitled to advise him or her and has competent lawyers to carry out such task. No benefit can be given to the insured on the basis that he or her resorts to the services of the insurance company instead of those of a lawyer.
- b) The choice to recourse to resolve the dispute out of court or litigation belongs to the insured alone.
- c) In order to be informed about the conduct and possible outcome of their case, the insured may alone decide to have recourse to a potential consultation with, at their own discretion, the insurance company or a lawyer. No insurance policy may prohibit the prior recourse to a lawyer for advice, the cost of which the insurance company will be bound to bear.
- d) If the opposing party calls upon a lawyer, the insurance company is obliged to advise the insured person to also have recourse to a lawyer, to guarantee equality of arms.
- e) The insurance company is entitled to obtain from the lawyer in charge of the case information on the case and its developments; providing such information is, however, limited to procedural information which is not related to the substance of the case, thus guaranteeing absolute professional secrecy between the lawyer and their client.

It is recommended to include these principles in the first letter from the insurer to the insured, after the declaration that a claim was made by the insured. Indeed, the contract could have been concluded multiple years ago. It would be desirable to reaffirm these principles for both the insurer and the insured at the start of the execution of the contract.

4. The scope of legal expenses insurance contracts

Most legal expenses insurance contracts in the European Union exclude disputes relating to criminal law or family law.

However, these are the areas in which the greatest number of disputes occur.

The extension of legal expenses insurance contracts to family law and criminal law is therefore recommended, on an optional basis only.

The advantage of such extension would also be to enable the effective implementation of the subsidiarity principle existing in most legislations within the EU and under which the insured is never entitled to legal aid if they already hold a legal expenses insurance policy covering them for the same risk.

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Only under such conditions can legal expenses insurance constitute real progress for access to the law for most citizens and will promote equality between citizens in the defence of their rights.

A comprehensive understanding of the interests of insurance companies, lawyers and law consumers reveal that these interests are not opposed: the answers to the questionnaire also point out that the most compliant companies towards the above rules are also the most successful ones with the biggest numbers of subscribers.