

# CCBE key principles and best practices in the relationship between lawyers and legal expenses insurers

17/05/2024

*Taking note of the previous “[CCBE Position on legal expenses insurance](#)” adopted on March 31, 2017, this document intends to provide more concrete and insightful recommendations for good practices between legal expenses insurance companies and lawyers. It is based on a set of national practices reported in certain countries. It essentially recalls the principle of the free choice of a lawyer and its legal consequences, and highlights several best practices in key areas of the relationship between lawyers and insurers.*

*Generally, this document promotes effective legal protection through the assistance of a lawyer, and it seeks to avoid inappropriate obstacles arising from insurance companies’ practices. Ultimately, it can serve to make the principle of access to justice a reality for citizens who need expert assistance in a legal matter.*



## 1. Free choice of lawyer

The free choice of lawyer is a fundamental principle which guarantees that the insured can freely choose the lawyer of their choice. The purpose of hiring a lawyer is to **protect the rights of the insured client (policyholder)**.

- In the context of legal expenses insurance, this right is guaranteed by Article 201 of Directive 2009/138/EC.<sup>1</sup>

<sup>1</sup>The Court of Justice has reiterated on several occasions that the free choice of lawyer (or a qualified representative) has a general scope and a binding value; and cannot be subject to a restrictive interpretation: CJEU 10 Sep., 2009, Eschig, C-199/08, 26 May 2011, Stark, C-293/10; 7 Nov. 2013, Sneller, C-442/12.

- Legal expenses insurance policies must therefore respect the right of policyholders to be represented by their trusted lawyer. In some countries, there may be established practices by insurers to guide policyholders to choose among a list of their “trustee” lawyers i.e. a preferred lawyer (sometimes a specialist in a legal domain or for mediations) with whom they have a remuneration agreement. However, even if this practice can somehow facilitate the collaboration between lawyers and insurers, it **should not be used against the right of the policyholder to choose their own lawyer.**
- Finally, insofar as the policyholder him/herself requests the insurer to refer a lawyer, this request must be explicit and made in writing, which does not preclude the insurance companies’ obligation to inform the insured of their right to freely choose a lawyer.



## 2. Conflicts of interest

Whenever a conflict of interest exists, Article 201 of the above-mentioned directive guarantees the policyholder’s freedom of choice of lawyer.

- In some Member States, the in-house handling of legal expense cases by the insurance provider is prohibited in its entirety. In Member States where this is not prohibited, the legal expense insurance must refrain from handling the case in house if there is a conflict of interest. To make this principle a practical reality, the CCBE therefore recommends that the insurance company draw the insured’s attention to this fact and inform them of their right to freely choose a lawyer.



## 3. Legal expenses coverage

Before taking on a case, the policyholder with the assistance of their lawyer, if necessary, checks that the legal protection insurance or the guarantee to cover costs (and, where applicable, the maximum amount) is in place, but this is not a blank check given to the lawyer.

- For small claims<sup>2</sup>, the insurer may decide to settle the case *in case the policyholder is provided with the reasons for this decision in a transparent way before the decision is taken by the insurer*. Generally, it is of the utmost importance that the choice for such solution/settlement by the client should be preceded by adequate information on the consequences of such a choice, hence this choice should also be made with the assistance of a lawyer. In this case, the lawyer must be able to assess the **economic advantage** of the solution proposed by the insurer and advise their client accordingly. It is important to remember that the prevailing principle in insurance law is that of damage limitation (with regard to the insured).
- If the scope of the lawyer's mandate is not necessarily identical to the insurance coverage or to the guarantee that the legal expenses will be covered by the legal expenses insurance, certain expenses will remain the responsibility of the insured-client.



#### 4. The moment of consulting a lawyer

The insured must have the right to entrust the defence of their interests to a lawyer of their choice from the beginning as soon as he is entitled to claim the insurer's intervention under the insurance contract, i.e. even in the pre-litigation phase.

- In practice, the first point of contact for the policyholder is the legal protection insurance. In other situations, the first point of contact may well be a lawyer, a justice point of contact, or other.
- However, **in any preliminary phase possibly leading to legal proceedings**, the insured must be informed by the insurer of the principle of free choice of a lawyer (see above point 1). At the policyholder's request, the insurer may suggest names of a lawyer, but must also inform the policyholder that he or she is free to choose their own lawyer.
- On the other hand, it is not acceptable that the lawyer's involvement is made subject to formal agreement from the insurer, in which case costs incurred prior to this agreement are not reimbursed. For example, in the Netherlands, insurers often indicate that the order confirmation from the insurer should be awaited ("engagement letter"), and that prior work will not be reimbursed. This position

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<sup>2</sup> We do not define this term, but it is understood as claims of a lower value which may be proper for financial settlement rather than costly judicial proceedings.

contradicts the very principles laid down by European case law in the *Eschig* ruling.<sup>3</sup> The right of free choice of a lawyer arises as soon as the insured has the right under the insurance contract to demand the insurer's intervention, and it is the insured person's decision to choose their own legal representative.

- A lawyer's intervention is not limited to the litigation phase. It can also be used in the pre-litigation phase or in judicial or extra-judicial mediation proceedings (confirmed by a ruling of the Court of Justice of the EU on 14 May 2020).<sup>4</sup> Insofar as, in the interests of better access to justice, alternative methods of dispute settlement (hereby transferring the burden of traditional judicial power) are multiplying, it is important not to undermine the freedom of choice of lawyer.<sup>5</sup> Lawyers can play a central role in the negotiation and resolution of particularly complex disputes. For example, in Belgium, lawyers are even obliged to advise their client on the possibility of mediation.<sup>6</sup>
- The CCBE notes that insurers are still struggling to bring their insurance policies into line with the Court of Justice's ruling, even though it dates from 2020. This ruling also confirmed that the right to free choice of lawyer applies not only to the pre-litigation phase, but also to all preliminary phases likely to lead to "legal proceedings".
- While the definition of the preliminary phases has not been further clarified, the CCBE recommends that the lawyer should be involved as early as possible. Such involvement can help to ensure that the legal issues and options open to the policyholder are understood by an independent professional, without wasting time, and ultimately limit the risks for the policyholder and preserve their rights.
- An example of this drift can be seen in Belgium, with an indicative nomenclature for bodily injury. Over time, this nomenclature has become a reference scale used by insurers to handle cases internally. Moreover, judges refer to it when covering bodily injury claims in litigation, even though most of the time its pure indicative nature is recalled. However, what is important to stress is that, in complex bodily injury cases, insurers do not have the means to adequately inform policyholders of the amounts to which they are entitled, above and beyond the nomenclature amounts. In many cases, the policyholder, poorly informed and without access to a lawyer, may then obtain lower compensation, if only based on the indicative nomenclature and applied by the courts. Indeed, there is a tendency for some magistrates, for the sake of convenience,

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<sup>3</sup> *Infra*

<sup>4</sup> CJEU, 14 May 2020, *Orde van Vlaamse Balies et Ordre des barreaux francophones et germanophone vs. Ministerraad*, C-667/18 : <https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-667/18>

<sup>5</sup> See paragraph 108 of the Advocate General's Opinion in the abovementioned case.

<sup>6</sup> Article 444, paras. 1 and 2, of the Belgian Judicial Code

to favour the application of this indicative table, particularly at the first level of jurisdiction. The danger is that, when these decisions are not appealed, they risk being published and ultimately creating a body of case law transforming this indicative table into an imperative one. The CCBE therefore wishes to avoid such situations which do not guarantee real access to justice.

- In the lawyer–policyholder–insurer triangular relationship, the involvement of a lawyer in a given field can also be an economic advantage for the insurance company. The lawyer’s skills and understanding of complex legal issues at stake mean that they provide their expertise. However, under no circumstances is the lawyer mandated by the insurance company. The lawyer must be able to act with complete independence, and throughout this triangular relationship, the lawyer remains bound (contractually) to the client alone and in the defence of the client’s interests.
- Finally, it should be pointed out that in some cases, insurers put pressure on lawyers to fix their fees and expenses in advance, on a flat–rate basis. This should in no way hinder the lawyer’s obligation to the client to defend the client’s rights independently and with the means made available to them under the law and legal system of their country.



## 5. Communication of information about the client’s case

The lawyer ensures that the information provided to the insurer, or through the client, is only that which is **strictly necessary** to determine the extent or continuation of legal protection insurance coverage (unless the client explicitly agrees with the lawyer to give more information to the insurance company). **As lawyers are bound by professional secrecy with regard to their clients**, they are the only (independent) professionals able to assess the degree of communication of certain information (the lawyer’s role as a filter between the insurer and the insured).

As an example in Sweden, there are some guidelines<sup>7</sup> on what information a bill from a lawyer (member of the Swedish Bar Association) to an insurer should contain in the case the client is a consumer. The guidelines are helpful in setting a standard which facilitates the process for both the lawyers and insurers, as well as preventing that unnecessary information about the client/case is disclosed.

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<sup>7</sup> Available only in Swedish: [https://www.advokatsamfundet.se/globalassets/advokatsamfundet\\_sv/cirkular/50765\\_20061016132634.pdf](https://www.advokatsamfundet.se/globalassets/advokatsamfundet_sv/cirkular/50765_20061016132634.pdf)



## 6. Resolving conflicts between insurers and lawyers

The CCBE has noted that some countries have set up dispute resolution centers (Switzerland) or joint commissions (Belgium) to quickly resolve problems that may arise in the lawyer-insurer relationship. Although these arrangements do not provide binding decisions, these systems may constitute an excellent means of discussing and resolving conflict situations, while offering a flexible framework. The CCBE therefore recommends that such channels be set up, at national level, to enable the resolution of conflicts between insurers and lawyers, to guarantee the interests of the insured.

A description of these systems in Belgium<sup>8</sup> and Switzerland<sup>9</sup> is provided.

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<sup>8</sup>[https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/INSURANCE/Annex-BELGIQUE-Commissions-de-protection-juridique-belges.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/INSURANCE/Annex-BELGIQUE-Commissions-de-protection-juridique-belges.pdf)

<sup>9</sup>The link will soon be available.