



**BOSNIA AND HERZEGOVINA
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SECRETARIAT
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RESEARCH CENTRE**

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**RECOMMENDATIONS FOR MODIFICATION AND PROMOTION OF THE
PROPOSED DRAFT LAW ON FREE LEGAL AID**

I. Introduction – Essence of the Problem and Recommendations

It is estimated that, due to poverty, a large number of people in Bosnia and Herzegovina do not have access to courts, except for the serious crime cases wherein their defence is mandatory, although the Constitution of BiH and the relevant international documents foresee the right to fair trial in both criminal proceedings and civil actions, and guarantee access to justice on an equal basis without discrimination.

Under the Entity laws governing the civil actions, a court may appoint a temporary representative *ex officio* for the defendant in some cases. However, such an appointment may not be considered legal aid, instead, it should be considered as legal substitution for the party the presence of which is required for the conduct of the judicial proceedings.

Furthermore, the development of the free legal aid system constitutes one of the Council of Europe's requirements in the field of the reform of the judicial system in Bosnia and Herzegovina, which our country has accepted as necessary.

In general, legal aid is the method for facilitating access to justice and other authorities deciding on the rights and obligations of citizens of a given country, wherein the costs are borne by the country in part or in their entirety, taking into account the citizens' financial situation and the circumstance indicating that they could not exercise their right without hindering their self-support or support of the members of their household.

The Law on Free Legal Aid has been previously adopted by the Brčko District, Republika Srpska and some of the cantons in the Federation of Bosnia and Herzegovina (Zeničko-Doboj Canton, Tuzla Canton).

The Council of Ministers has established and forwarded to the Parliamentary procedure the Draft Law on Free Legal Aid. The Research Centre of the Parliamentary Assembly of Bosnia and Herzegovina analysed the proposed Draft Law and compared it with the same laws in Croatia and Slovenia, and it drew up a list of recommendations to improve the proposed law, thus diminishing the possibility of malversations with data of the potential users of free legal aid, and arbitrary and erroneous interpretation of the Law. The PABiH Research Centre inferred that it would be good to further develop certain Articles of the Law for easier comprehension, implementation, monitoring and evaluation of the Law implementation.

Before a detailed elaboration of the recommendations, the Research Centre performed the interest- group mapping in the Draft Law on Free Legal Aid, as follows:

The interest-group mapping in the Draft Law on Free Legal Aid

Interest group influence	Importance of interest groups to the Draft Law					
	Unknown	No or little importance	Certain importance	Moderate importance	High importance	Key factor
Unknown						
Little or no influence		Persons with income not exceeding 10% beyond the lowest average net salary				Persons under Article 8 of the Draft Law on Free Legal Aid
Certain influence				The media representatives		
Moderate influence				Civil servants informing the users		
Considerable influence						Providers of free legal aid services - the public sector, NGO, lawyers
Very influential						Members of the Free Legal Aid Committee, Council of Ministers, PABiH

The Research Centre's recommendations for the improvement of the Draft Law pertain to the procedures concerning inaccurate data provided by the potential users of free legal assistance, information on free legal aid, criteria for selection of non-governmental organisations as entities offering free legal aid, performance of the Free Legal Aid Committee, quality of free legal aid, the Law financial projections, and securing of mechanisms for monitoring of evaluation and assessment of the effects of the Law.

II Background

Having analysed the interest groups, the Research Centre established that the Law would differently affect the interests of various interest groups. On the other hand, interest groups will be of different importance for the successful implementation of the Law.

Analysis of interest groups of the Draft Law on Free Legal Aid

	Interest group	Interests	Effect of the Draft Law on Free Legal Aid on interests	Importance of interest groups for the Draft Law successfulness	Interest group criteria degree for the Draft Law
1.	Users under Article 8	- right to a lawyer and free legal aid - fair protection of the rights	+	5	2
2.	Persons with income not exceeding 10% beyond the lowest average net salary at the BiH level	- negative interest (due to the non-existing right to fla* there is the possibility for malversations with income data)	-	1	1
3.	Lawyers offering legal aid (public sector)	- huge interest because of the increased workload - employment possibility for additional lawyers	+	5	4
4.	Lawyers assisting NGO/lawyers	- huge interest because of the increased workload - employment possibility for additional lawyers	+	5	4
5.	Civil servants providing information on f.l.a.	duty within a job description	0	3	1
6.	Members of the Free Legal Aid Committee	- control of quality and implementation of f.l.a. - efficient enlargement and implementation of the free legal aid system	+	5	5
7.	BiH Executive authorities (Council of Ministers, Min. of Justice)	- coordination of the free legal aid systems in BiH - harmonisation of legal regulations with the EU regulations	+	5	5

	of BiH) funding f.l.a.				
8.	PABIH	- enactment of the Law - compliance of legal regulations with the EU standards - budget allocation for the law implementation - supervision over the law implementation and the Committee performance	+	5	5
9.	The media representatives	Positive country image in compliance with the EU rules	+	3	2

* Free legal aid (f.l.a.)

III. Analysis

In the format of socio-economic policy analysis, we have analysed the Draft Law on Free Legal Aid which is currently in the PABIH procedure, and stated the proposals for its improvement:

Phase	Issue	Response
Phase 1: Check, establish and describe the problem thoroughly		
	Analysis of interest groups	Users under Article 8, PABIH
	Data required for the problem establishment?	1) number of potential users of free legal aid 2) tariff of providers of free legal aid
	Does the problem make a part of a major problem?	1) a large number of social categories in need of the assistance by the authorities in this segment 2) citizens uninformed of their rights 3) existence of a large number of unresolved legal matters and disputes instigated by the BiH citizens 3) secure fairness for citizens in non-criminal proceedings 4) enactment of these legal regulations contributes to harmonisation of the respective BiH and EU legislations 4) return of refugees 5) poverty 6) corruption
Phase 2: Establish criteria for interest group evaluation		
	Which one of the following evaluation criteria is applicable and how to evaluate them (as per relevance for influential and/or important interest groups)	1) problem resolution by an out-of-court agreement 2) efficiency – accelerated termination of non-criminal proceedings before the courts 3) price – total costs higher than those existing Cut of costs: lawyers' tariffs reduced (<i>symbolic reduction to lawyers, considerable cut of total costs for the country</i>) 4) political acceptability: depending on the majority in the Parliament (left –right) poverty: different public opinion

		<p>5) benefit: absolute for the user as well as for the country, due to fulfilling its obligations under the Convention of the Council of Europe.</p> <p>6) uncertainty ratio:</p> <ul style="list-style-type: none"> - unknown number of persons providing information on free legal aid - it is unknown as to when the FBiH and Cantons will enact the Law on Free Legal Aid
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Phase 3: Define the alternative socio-economic policy measures

1	Type of socio-economic policy	<ul style="list-style-type: none"> - Offering/Subsidizing: free legal aid services offered to categories under Article 8 - procurement : / - ban: for those not meeting the requirements for f.l.a. - conditioning: <ol style="list-style-type: none"> 1) if the user of free legal aid acquires adequate funds upon termination of the legal action, he/she will be obliged to compensate for the costs of offering free legal aid 2) if his/her financial situation has improved during the legal action (exceeding the total income as stipulated by this Law), he/she will be obliged to compensate for the costs - taxation and petition: / - informing: foreseen
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Phase 4: Evaluate and compare socio-economic policy measures

	3 scenarios	<ol style="list-style-type: none"> 1. Status quo: no legal regulations on free legal aid (the Draft Law has not been enacted) 2. The Draft Law enacted in a form as forwarded to the TA of BiH 3. The Draft Law enacted by taking into account the recommendations for its further development
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Phase 5: Of the alternatives considered, select the best policy measure

		<p>Scenario 3, reasoning:</p> <ol style="list-style-type: none"> 1) higher degree of fairness, 2) smaller possibility of malversations with data by the potential users of f.l.a., 3) smaller possibility of different and erroneous interpretation of the Law, 4) financial projection of the Law presented in more detail, 5) higher degree of responsibility of free legal aid providers 6) feedback provided by users and providers of free legal aid through the mechanisms for monitoring and evaluation of the Law effects 7) more efficient monitoring of the quality of free legal aid and more efficient control of the Law implementation
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Phase 6: Monitor and evaluate an applied policy measure

	Statistic data to be collected and reported by the staff on a regular basis	The number of the service users, number of users per categories, extent of aid, average extent of aid, administrative costs, number of users per sex classification, number of applications for f.l.a., number of cases pending, number of closed cases, amount of funds compensating a service offered;
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	Securing regular feedback from the users	Users poll, complaints box, establishment of the telephone/-e-mail communication between users and an information officer.
	Procedures for the monitoring programme application and updating policy	Regular meetings of the Committee members, consideration of the users' complaints, updating of the Rulebook on Performance, establishment of mechanisms for monitoring and evaluation of the Law effects.

IV Proposed policy measures

Recommendations

Procedures, criteria and securing of quality

- For easier implementation, describe in more detail the documents to be submitted along with the application for free legal aid;
- Define that the Legal Aid Committee of Bosnia and Herzegovina will prescribe the application form (Article 19(1));
- Stipulate the criteria for selection and the method for selection of non-governmental organisations as entities providing free legal aid (Article 25 in conjunction with Article 30(e) and (i));
- Define the obligations of the entities authorised to provide free legal aid and the manner of the appointment of a free legal aid provider;
- Enable a user to chose or replace a service provider once at his/her own discretion (in case of the user's discontent with the service);
- Enable a free legal aid provider to refer to the Committee in case of a problem (Article 26);
- Lay down a procedure in case that a service provider has failed to offer free legal aid of a certain quality and standard (Article 33);
- Foresee that a service provider should initially attempt to resolve the disputes by an out-of-court agreement;
- Set a procedure for classification of the legal aid applications on the basis of urgency and determine the available budget percentage required for funding the applications requiring urgent action.
- Legal aid to be split to primary and secondary depending on the service complexity and for financial evaluation;
- Define the conditions and the method for granting free legal aid (Article 10 through Article 15);
- Define in more detail the minimum financial criteria for exercising the right to free legal aid (exp. the amount of monthly income and earnings which are not considered income per member of the household);
 - Precisely define the term „earnings which are not considered income“ for easier understanding of the Law, for instance, child's allowance, meal allowance, transportation to workplace/school, scholarship, one-time support for a newborn, etc.;
 - Collect data on the current number of social welfare beneficiaries, the unemployed persons – with no other regular income or earnings, persons of low income and other persons under Article 11(1), as

potential users of free legal aid in order to produce a more precise financial projection.

Abuse and sanctions

- Prescribe the accuracy verification of data submitted by the applicants and the mandatory annual percentage of the verification frequency, and appoint a body to perform the verifications (Article 19(3));
- Prescribe the procedures, measures and sanctions in case of the abused right to free legal aid and/or filing inaccurate data. For instance, when a user provides incorrect data for the first time, he/shall be deprived of the right to apply for free legal aid in the following 6 months. If the trend continues, the sanctions shall become more stringent. (Article 16(3));
- In order to prevent abuse, it should be noted that the tariffs prescribed (to be defined by the Committee) are the only valid ones and that any special arrangements between the clients and the providers of free legal aid on percentages of profit to possibly be acquired through the charges shall not be valid at all (Article 22).

Implementing authorities:

Free Legal Aid Committee, competences

- Consider the possibility of a shorter mandate of the Free Legal Aid Committee of Bosnia and Herzegovina, for instance, for two years, should it be established that the Committee would thus operate in a more efficient and responsible manner (Article 28(2));
- Establish parameters to define the remunerations for the Committee members, for instance, the lowest or the average last year's net salary in Bosnia and Herzegovina (Article 29);
- Add on the Committee's competence so as to define an adequate tariff enabling smooth activities of the service providers, including the procedure and dynamics of the payments under the tariff to the free legal aid providers for the services rendered (Article 30(2)).
- Committee Status – define its status with the Ministry of Justice for a better control of work and reporting (first to the Ministry of Justice, then to the Council of Ministers), and appoint a body to dispose of the budget for free legal aid (the Committee itself or the Ministry of Justice within which the Committee would act);
- Strengthen the role of the Ministry of Justice in the implementation and control.

Timelines

- Shorten a deadline for the appointment of the Committee members to two months (Article 36)
- Define a precise deadline for the free legal aid project to take hold in practice.

Reporting, monitoring, evaluation and appraisal of the effect

- Lay down a method for reporting and forwarding of data thus enabling appraisal of the quality of the provided free legal aid (Article 33);
- Lay down the introduction of the centralised free legal aid records (on the applications filed, aid granted, decisions) (Article 33)
- Lay down reporting by the free legal aid providers to the Committee and the Ministry of Justice of Bosnia and Herzegovina, thus enabling the Committee to draw up its own reports (Article 35).
- *The mechanisms for monitoring/evaluation and appraisal of the effects of the Law should be foreseen and defined in the Law itself.*

Financing

- *Develop a financial projection of the funds for the Law implementation .*
- *Foresee the dynamics of the remuneration payments to the providers of free legal aid.*

Informing

- Define the types of information, bodies and employees in charge of providing information on free legal aid (Article 18 in conjunction with Article 30(g));
- Inform the citizens on their rights and possibilities under this Law, such as:
 - Place information on the web sites of the Ministry, Bar Councils, NGOs and all public institutions involved in the project;
 - Develop a TV promotional video for BiH RTV broadcast;
 - Organise a press-conference for the project media promotion (including web portals);
 - Guest appearances in TV shows;
 - Print a small number of the propaganda materials to be used in the relevant institutions;
 - Inform potential users through the Centre for Social Work dealing with the vulnerable categories of the population

Budgetary implications

- The existing solution is not consistent with the new budget planning system and processes (development of a three-year budget, provision of information on the effect);
- According to the Draft Law and the dynamics of its implementation, in the first year of the Law implementation, the funds will mostly be spent for the work of the Free Legal Aid Committee. The amount of funds for the first year of the Law implementation is unknown.
- Should the proposed measures be adopted with regard to the collection of statistic data establishing the number of the potential users and the development of the financial projection for the Law implementation, it will be possible to plan the short-term and long-term budgetary implications of this Law. The Slovenian experience in the implementation of the same Law suggesting that the number of cases increased by 20 times in 5 years, indicates

how important it is to specify the short-term and long-term budgetary implications of the Law on Free Legal Aid, before its enactment.

- Gradual increase in the number of the free legal aid users will result in the increased expenses.

A. Administration

i. Requirements (including staff and feasibility evaluation)

The personnel in charge of the implementation of the Law on Free Legal Aid have already been employed with the BiH public bodies, and so are the lawyers in the NGOs. In RS, the employment of the personnel is underway.

ii. Price

Currently, there is no input based on which the number of potential users and the tariff for the free legal aid services could be determined, therefore, the price is unknown. All relevant data should be compiled to evaluate the price of the Law implementation.

iii. Location of the activities within the public authorities

Ministry of Justice and the Legal Aid Committee of Bosnia and Herzegovina.

B. Budgetary Implications

The existing solution is not consistent with the new budget planning system and processes (development of a three-year budget, provision of information on the effect).

According to the Draft Law and the dynamics of its implementation, in the first year of the Law implementation, the funds will mostly be spent for the work of the Free Legal Aid Committee. The amount of funds for the first year of the Law implementation is unknown

If the proposed measures for collection of statistic data on the number of possible users and the production of the financial projection for the Law implementation are adopted, it will be possible to plan the short-term and long-term budgetary implications of the Law. The Slovenian experience in the implementation of the same Law suggesting that the number of cases increased by 20 times in 5 years, indicates how important it is to specify the short-term and long-term budgetary implications of the Law on Free Legal Aid, before its enactment.

Gradual increase in the number of the free legal aid users will result in the increased expenses.

C. Possible Obstacles

A basic possible obstacle for the proposed measures to improve the Law is the Law enactment lacking a precise financial projection and a defined source of funding the work of the Committee, potential users and providers of free legal assistance.

Limited capacities of the providers of free legal aid (non-governmental organisations, civil servants) wherein the number of granted applications for free legal assistance exceeds the capacities of the providers to offer timely, efficient and quality free legal aid.

Possible lack of interest of the free legal aid providers (lawyers and civil servants), particularly if the dynamics of payment of remuneration for the offered legal assistance is not defined.

Scenario Table: Free Legal Aid			
	Step/Option 1	Step/Option 2	Step/Option 3
	Status quo: no legal regulations on free legal aid (Draft Law not adopted)	Draft Law adopted in a form as submitted to the PA of BiH	Draft Law adopted with the recommendations for its further development being taken into account
<u>Attributes:</u>	Free legal aid is not granted (at the level of Bosnia and Herzegovina)	Free legal aid is granted as stipulated, however, earnings that are not considered income have not been defined (Article 10 – Article 15)	Free legal aid is granted under the stipulated requirements
<u>Evaluation criteria</u>			
<ul style="list-style-type: none"> Price 	No budget expenses	Undefined: Upon the Law adoption, the Council of Ministers is to define the free legal aid tariff (at the proposal of the Committee). The Council of Ministers shall define the remuneration allowances for the Committee members by a special decision (upon the Law adoption)	The remuneration allowance for the Committee members has been regulated. The free legal aid tariff has generally been defined.
<ul style="list-style-type: none"> Privilege 	/	The applicants satisfying the requirements as stipulated by the Law have been granted free legal aid. An applicant will possibly have to spend much time and money to gather the documents: the documents to accompany the application have not been specified.	Free legal aid has been granted to the applicants satisfying the requirements as stipulated by the Law.

Scenario Table: Free Legal Aid			
	Step/Option 1	Step/Option 2	Step/Option 3
	Status quo: no legal regulations on free legal aid (Draft Law not adopted)	Draft Law adopted in a form as submitted to the PA of BiH	Draft Law adopted with the recommendations for its further development being taken into account
		The applicant is not entitled to select or replace a free legal aid provider	
<ul style="list-style-type: none"> • Efficiency 	/	Undefined obligations of the free legal aid providers. Undefined method for selection of the free legal aid providers in a specific case.	The procedure and the dynamics of the payments made to the providers under the tariff have been defined. The obligations of the providers and the method for their selection for a specific case have been regulated.
<ul style="list-style-type: none"> • Fairness 	Citizens who cannot afford legal aid are deprived of the legal protection and have no access to judiciary (at the national level).	A larger number of citizens are entitled to free legal aid.	Quality free legal aid: a procedure has been defined in case the offered free legal aid is not of adequate quality and standards. Sanctions foreseen.
<ul style="list-style-type: none"> • Easy management 	/	Criteria for selection and the method for selection of non-governmental organisations to provide free legal aid have not been defined. The documents to accompany the applications have not been specified. Maintenance of the records on the applications filed and the aid	Easier application of the Law due to the clear procedures and having the required data: The documents to accompany the application have been foreseen. Records on the applications and the aid granted have been maintained. Criteria for selection and the method for selection of non-

Scenario Table: Free Legal Aid			
	Step/Option 1	Step/Option 2	Step/Option 3
	Status quo: no legal regulations on free legal aid (Draft Law not adopted)	Draft Law adopted in a form as submitted to the PA of BiH	Draft Law adopted with the recommendations for its further development being taken into account
		granted has not been regulated. The free legal aid providers do not report to the Committee on the services provided.	governmental organisations to provide free legal aid have been defined.
			Mechanisms for monitoring and appraisal of the effects have been defined. Receiving of information on the users' satisfaction with the offered services.
<ul style="list-style-type: none"> Legal matters 	At the national level: An equal access to judiciary has not been secured for all citizens. Commitments entered into under Article 6 of the European Convention on Human Rights have not been satisfied. Incomplete functioning of the legal system.	A large room for different or erroneous interpretation of the Law, possible data manipulation by the applicants. No obligation to attempt to initially settle the dispute by an out-of-court agreement.	A smaller room for manipulations: Accuracy of data filed by the applicants has been verified. In case of the abused right to free legal aid and/or the provision of inaccurate data, sanctions have been foreseen. The disputes are attempted to initially be settled by an out-of-court agreement.
<ul style="list-style-type: none"> Political acceptability 	Inacceptable. Possible mistrust of citizens in the judicial system.	/	/
<ul style="list-style-type: none"> Uncertainty ratio 		Unknown budgetary implications: Unknown expenses.	Possible discontent of the free legal aid providers with the tariff.

Scenario Table: Free Legal Aid

	Step/Option 1	Step/Option 2	Step/Option 3
	Status quo: no legal regulations on free legal aid (Draft Law not adopted)	Draft Law adopted in a form as submitted to the PA of BiH	Draft Law adopted with the recommendations for its further development being taken into account
	/	No financial projection. No mandatory and foreseen data collection for evaluation of the quality of the aid provided. Mechanisms for evaluation of the Law efficiency have not been foreseen. Possible lack of interest on the side of the free legal aid providers due to undefined payment dynamics.	