

# THE GUARANTEES OF THE EU CHARTER OF FUNDAMENTAL RIGHTS IN RESPECT OF LEGAL COUNSELLING, ASSISTANCE AND REPRESENTATION IN ASYLUM PROCEDURES

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# I. INTRODUCTION

Commonly understood as the right to a lawyer, access to legal aid is an essential component of judicial and administrative procedures. At the international level, the provision of legal aid services is conceived in the context of equal access to justice for all and as a *sine qua non* of “effective, fair, humane and accountable justice systems.”<sup>1</sup> In the EU, national and EU legislation regulate legal aid and related legal assistance services in different legal fields.

Despite its prominence, the realisation of the right to a lawyer is not a given, not least in the area of asylum. The organisation of legal aid in national asylum systems implementing the EU asylum *acquis* is largely dependent on national rules and has not been optimal so far. The incorrect application of the relevant legal provisions of the recast Asylum Procedures Directive (APD),<sup>2</sup> the misallocation of resources, information gaps and the lack of a rights-based understanding of the legal aid in asylum systems have all impeded access to this right for asylum applicants in the EU. The newly adopted Pact on Migration and Asylum<sup>3</sup> includes revised rules on the provision of legal aid to asylum applicants and introduces the right to legal counselling for all applicants during the administrative procedure. As the Pact will necessitate an overhaul of national asylum systems, these provisions raise questions in relation to the proper administration and required standards of legal aid, as well as to the definition, content and minimum guarantees to be applied for legal counselling.

The purpose of this legal note is to examine the relevant EU law guarantees, in particular those stemming from the EU Charter of Fundamental Rights (the Charter or CFREU), and identify the applicable standards in respect of legal aid and legal counselling in view of the upcoming implementation of the new Asylum Procedures Regulation (APR or the new regulation),<sup>4</sup> which repeals and replaces the APD.<sup>5</sup> The analysis will focus on the content of the right to an effective remedy under Article 47 CFREU. This provision guarantees access to effective judicial protection across the EU not only through the right to defence and access to a tribunal (which includes the right to be heard) but also through the right to be advised, defended and represented.<sup>6</sup> Where necessary, the relevant legal standards of the European Convention on Human Rights (ECHR), as interpreted by the European Court of Human Rights (ECtHR), will be included in the analysis of Article 47 in line with the possibility offered by Article 52 (3) CFREU vis-à-vis EU rights that correspond to ECHR rights.<sup>7</sup>

As the analysis concerns highly technical subjects, it is important to avoid terminological confusion from the outset. Generally, in respect of the term “legal aid” the terminology varies considerably in Europe and there is no harmonious use of a single term in national, EU and international legal texts. For the purposes of this note, the term “legal aid” will be used to refer to publicly funded legal assistance and representation, in line with the term used in the CFREU.<sup>8</sup> This term corresponds to the provision of free legal assistance and representation in the appeal procedure under Article 17 APR.

The term “legal counselling” is new in EU law. It was introduced into the APR by an amendment from the Council of the EU and was subject to lengthy discussions. The text of the Regulation does not include a definition and the precise content of this right remains a source of discussion. No information can be drawn from the explanatory memorandum that accompanied the 2016 and 2020 proposals,<sup>9</sup> as the concept was introduced during the negotiations that followed. The final explanatory memorandum that was published in

1. United Nations, Resolution adopted by the General Assembly on 16 December 2020, 75/185. Human rights in the administration of justice, 28 December 2020, A/RES/75/185, point 6, available at: <https://bit.ly/3xNPISJ>.
2. Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180, 29.6.2013, p. 60–95.
3. For the final texts of the Pact instruments, as published on the Official Journal of the EU, see OJ L, 22 May 2024, available at: <https://shorturl.at/1z7l>.
4. See Section III of Chapter II, Provision of legal counselling and legal assistance and representation, Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, PE/16/2024/REV/1, OJ L, 2024/1348, 22.5.2024.
5. According to Article 79, the APR entered into force on 11 June 2024 and shall apply as of 12 June 2026.
6. CJEU, Judgment of 26 July 2017, Moussa Sacko, C-348/16, EU:C:2017:591, paragraph 32, available at: <https://cutt.ly/sYTSya2>
7. ECRE would like to thank Rachel Murphy, Sixtine Schaffers, Jessica Weston and Oleksandr Khachatryan for their support in CJEU-related research. The support was provided in the context of their work for the “Human Rights and Migration Law Clinic at the Ghent University.
8. Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407. For the scope and definition of legal aid in different European states, please refer to: ECRE/ELENA, Survey on legal aid for asylum seekers in Europe (2010), pp. 9–11, available at: <https://shorturl.at/aCITY>
9. European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM/2020/609 final.

May 2024 after the adoption of the Pact makes few references to legal counselling without clarification as to its content.<sup>10</sup> It does, however, mention that “the right to information is backed by a new right to free legal counselling” which makes it clear that legal counselling is not merely a right to information, such as existed under the APD. This legal note discusses the right to legal counselling and examines the text of the APR to identify its essential components and propose a definition. The relevant CFREU provisions and other relevant sources will be examined, with the aim of setting out the standards that will be required in the provision of legal counselling.

## II. LEGAL AID IN PRACTICE: CHALLENGES IN THE PROVISION OF LEGAL AID IN THE ASYLUM PROCEDURE IN THE EU

In 2017, ECRE conducted comparative research on national practices relating to access to legal aid for asylum applicants in a number of European countries.<sup>11</sup>

Although good practices were reported in some jurisdictions, numerous issues were identified in respect of the content of the legal aid, the strict conditions in accessing it in some cases and the lack of lawyers. Structural issues were also noted, such as the lack of long-term funding, the lack of interpretation in otherwise available legal aid services and the existence of complex administrative rules. In border procedures, the research revealed a wider issue of lack of access to legal aid even in jurisdictions where legal aid was available in the regular procedure. The reasons for this included inadequate information at the border, physical obstacles to accessing lawyers and legal aid organisations, and strict time limits which do not permit the effective use of legal aid services. Similar issues were found in respect of accelerated procedures and detention. Lastly, deficiencies in respect of the protection of minors and other persons in need of special procedural guarantees were also found to hamper their access to legal aid.

Since 2017, the AIDA Country Reports have underlined various concerns in the provision of legal aid services in asylum procedures in Europe.<sup>12</sup> Research into the practices of countries that are covered by ECRE’s AIDA database reveal a variety of issues. The latest updates (2022) mention concerns regarding the independence of legal aid lawyers (Austria, Malta and Switzerland), delays in the appointment of lawyers (Austria, France, Greece, Romania), limited resources and funding (Austria, Bulgaria, Cyprus, France, Greece, Italy, Malta, Poland, Romania, Slovenia), lack of access to a lawyer in remote areas and other territorial inequalities (France, Germany, Italy, Spain), difficult working and remuneration conditions for legal aid providers (Belgium, Croatia, France, Germany, Hungary, Italy, Malta, Netherlands, Portugal, Romania, Slovenia, Sweden), lack of specialisation (Austria, Belgium, Portugal, Romania, Sweden), legal and practical difficulties (Malta, Poland, Romania, Slovenia), including hostile attitudes towards lawyers and criminalisation (Greece and Hungary), as well as the strict application of the means/merits test (Austria, Cyprus, Germany, Italy, Portugal, Ireland, Sweden).

Legal aid comprises legal assistance and legal representation and challenges arise in relation to both components. Accessibility obstacles and misconceptions regarding the provision of legal assistance stemming from or combined with a lack of information about legal aid have been reported in Portugal, Spain, Austria, Bulgaria, Cyprus, France, Germany, Greece, Hungary, Italy and Malta. Procedural limitations have impeded the work of NGO lawyers in legal representation in Austria, Germany, Bulgaria, Croatia and Cyprus, while in Hungary and Poland there are limitations in the way NGO lawyers can access open reception centres or detention centres or persons at the border.

10. European Commission, Explanatory memo on the Pact on Migration and Asylum, 14 May 2024, Brussels, available at: [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_24\\_1865](https://ec.europa.eu/commission/presscorner/detail/en/qanda_24_1865)

11. ECRE/ELENA Legal Note on Access to Legal Aid in Europe, November 2017, available at: <https://bit.ly/3wc2N28>

12. You can find the most recent AIDA Country reports on the AIDA website at: <https://asylumineurope.org/>

### III. THE REFORM OF THE CEAS

The APR introduces significant changes in the asylum systems of EU Member States and is bound to affect the way asylum applicants access asylum procedures and any associated services. This section examines the new provisions on legal aid and legal counselling and the likely challenges in their implementation, drawing on the evidence referred to above on existing gaps.

Article 15 of the APR reiterates the right of all applicants to consult, in an effective manner, a legal adviser or other counsellor on matters relating to their applications at all stages of the procedure. The consultation differs based on the stage of the procedure: an applicant is entitled to free legal counselling in the administrative procedure (i.e., in the first-instance procedure) and to free legal assistance and representation in the appeal procedure.

#### The right to legal counselling

Under Article 16, the concept of legal counselling is introduced as a new right for asylum applicants and a new term in EU law. As noted in the [Introduction](#), the text provides no definition for this term and there is no single official clarification on its constitutive elements, which are instead mentioned at different points in the text. The complicated and at times vague wording of the text, resulting *inter alia* from the need for political compromise, contributes to terminological imprecision and a lack of legal clarity.

A comparison of the different language versions of the instrument, a potential source of interpretation for courts when the text presents ambiguity, does not make it any clearer: legal counselling is translated as legal guidance in the Greek (*νομική καθοδήγηση*) and Italian text (*orientamento legale*) and legal advice in the French (*avis juridiques*) and Spanish text (*Consejo jurídico*). In addition to the lack of precise terminology, references to the introduction of national rules may lead to divergent and incorrect implementation of the regulation's provisions. For an EU legal instrument that is directly applicable in the national legal order, there is a high degree of potential discretion in the national rules which might also serve to limit access to legal counselling in practice.

Nonetheless, an examination and bringing together of all the references to legal counselling in the text of the regulation allows for identification of the essential elements of legal counselling and for a tentative definition on that basis. It should be noted, first of all, that the right goes beyond the provision of legal information and is in fact closely related to legal aid. This is also supported by an examination of the negotiations that led to the final text: while the original proposal from the European Commission was for free legal assistance and representative in the administrative procedure, the Council's General Approach proposed only a right to free information during the administrative procedure. This reduction in the right was not accepted by the European Parliament and the final text distinguishes between information rights (guaranteed in Article 8 APR) and the right to legal counselling.<sup>13</sup> Evidently, the latter cannot be equated with the rejected element of the Council's General Approach.

Although not a definition as such, Article 16 provides the most specific explanation of what legal counselling includes. As can be seen below, the text itself permits the conception of legal counselling as a right to legal guidance and explanation, as well as assistance on a variety of legal issues relating to the lodging of an application, admissibility rules and any other legal questions that arise during the procedure.

#### Article 16 – Free legal counselling in the administrative procedure

[...] 2. For the purposes of the administrative procedure, free legal counselling shall include the provision of:

- (a) guidance on and an explanation of the administrative procedure including information on rights and obligations during that procedure;
- (b) assistance on the lodging of the application and guidance on:
  - (i) the different procedures under which the application may be examined and the reasons for the application of those procedures;
  - (ii) the rules related to the admissibility of an application;
  - (iii) legal issues arising in the course of the procedure, including information on how to challenge a decision rejecting an application in accordance with Articles 67, 68 and 69.

13. ECRE, Reforming EU Asylum Law: The Final Stage, Policy Paper, August 2023, available at: <https://shorturl.at/Nu5Nn>

In addition, in terms of the constitutive elements of legal counselling, in various other provisions throughout the APR, the following are identified as part of legal counselling: “the preparation for the interview,”<sup>14</sup> “good quality information and legal support,”<sup>15</sup> consultation before the lodging of the individual application<sup>16</sup> and consultation before any decision to conduct substantive and admissibility interviews together.<sup>17</sup>

On the basis of the above elements, ECRE would propose the following definition: legal counselling is the provision of legal advice and guidance by a lawyer on procedural and substantive issues related to an asylum application during the administrative procedure, including assistance with the lodging of the application, support during the preparation for the first-instance interview and guidance on any legal issues arising throughout the procedure. As noted above, legal counselling must be provided throughout the administrative procedure, from the making of the application to the decision, and on any legal issue that arises.

It should be noted that the variety of terms used to describe legal counselling partially overlap with one of the two constitutive elements of legal aid, namely legal assistance. While the other constitutive element - legal representation - is clearly excluded from the scope, legal counselling as per the APR explicitly includes services that fall under the traditional and general usage of the term “legal assistance”, including legal guidance, legal support, legal advice and explanation from a legal professional towards a client.

Beyond the potential definitional issues that can impact implementation, the new rules permit certain limitations to the right to legal counselling that may lead to arbitrary situations if they are not applied correctly. The counselling may be excluded in the following three cases: where a first subsequent application is considered to have been lodged merely in order to delay return procedures, where a second or a further subsequent application is submitted and, lastly, where the applicant is already assisted by a legal adviser. Although the APD foresaw a possibility to exclude legal and procedural information on the basis of the applicant’s financial resources, this is not possible for legal information as a component of legal counselling under the new APR. However, the possibility to impose monetary limits or time limits of the previous Article 21 remains in the new Article 19 APR and covers free legal counselling as well. Therefore, the obligation to provide free legal counselling is not straightforward and it may be further weakened by the new text’s heavy reference to the national rules. Section 5 examines in more detail the guarantees in EU law that set the standards for each of the constitutive elements of legal counselling identified here.

## **The right to legal aid**

The right to legal aid was not subject to significant changes; Article 17 of the APR foresees the provision of free legal assistance and representation in the appeal procedure in a similar manner to Article 20 APD. The possibilities to exclude free legal assistance and representation include those provided under Articles 20 and 21 APD (sufficient resources, no tangible prospect of success, no further appeals of a higher level, re-hearings and reviews of appeals) and new ones (the application is a subsequent application considered to intend to delay a return procedure or it is a second subsequent application). As with legal counselling, Article 19 APR maintains the previous possibility to impose monetary and time limits on legal aid too and Member States can request reimbursement of costs where the financial situation changes or where the applicants benefited from the free services by submitting false financial information. Lastly, the scope of the services under Article 18 remains largely unchanged in the new regulation. The obligation to grant access to information in the applicant’s file that is explicitly stated in respect of the provider of legal assistance and representation does not apply to the legal counsellor, even if the latter provides assistance services and individualised guidance throughout the entire procedure.

Overall, the new provisions do not introduce lower standards for the provision of free legal aid services in asylum procedures. Although the 2016 proposal was stronger in terms of procedural guarantees, as it secured the right to legal aid at all stages of the asylum procedure, the introduction of a broad right to legal counselling that includes individual advice throughout the procedure and not just information provision is still a positive change in comparison to the APD. In principle, the provision is able to improve the asylum applicants’ navigation of the procedure compared to the previous rules if implemented properly with the aim of ensuring access to justice.

Similarly, the lack of a specific obligation to provide access to the applicant’s file for persons providing

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14. Recital 14, APR.

15. Recital 16, APR.

16. Article 8 (2) d, APR and Article 8 (4), APR.

17. Article 12 (1), APR.

counselling may deprive the counsellor and the applicant from an opportunity to meaningfully discuss the case. These points lack legal clarity and practical coherence increasing the chances of an improper implementation that significantly affects the applicants' information rights and their ability to explain their case to the legal counsellor. Lastly, the retention of the possibility to impose monetary and time limits and the increased reasons for excluding the provision of such services increase the risk of creating arbitrary situations with detrimental effects to the procedural rights of asylum applicants.

## IV. LEGAL AID UNDER EU LAW

### A. PROVIDING LEGAL AID: CONCEPTUALISING, CREATING AND ADMINISTERING LEGAL AID SYSTEMS

Article 47 CFREU consolidated the Union's general principle of effective judicial protection and the relevant fair trial guarantees and established a set of rights relating to access to justice for everyone in the EU. According to the article, access to justice includes, *inter alia*, the right to be advised, defended and represented and the right to access legal aid in the absence of sufficient resources in so far as such aid is necessary to ensure effective access to justice.

The Explanations relating to the Charter clarify that the first paragraph of Article 47 (effective remedy) corresponds to Article 13 of the European Convention on Human Rights (ECHR) while the second mirrors the fair trial guarantees of Article 6 ECHR.<sup>18</sup> However, the fair trial guarantees under EU law go beyond Article 6 ECHR which is only applicable in civil and criminal procedures, rights and obligations.<sup>19</sup> The Court of Justice of the EU (CJEU) recognised that Article 47 is applicable in cases involving asylum or immigration procedures.<sup>20</sup>

Therefore, while the content of legal aid-related guarantees under EU law can be drawn from Article 47 CFREU with reference to Article 6 ECHR where necessary, their scope cannot be limited by the exclusion of immigration and asylum procedures by the ECtHR. Citing the Opinion of Advocate General Cruz Villalón, "[...] *the right to effective judicial protection, as expressed in Article 47 of the CFREU, has [...] acquired a separate identity and substance under that article which are not the mere sum of the provisions of Articles 6 and 13 of the ECHR. [...] that fundamental right goes on to acquire a content of its own, the definition of which is certainly shaped by the international instruments on which that right is based, including, first and foremost, the ECHR, but also by the constitutional traditions from which the right in question stems [...].*"<sup>21</sup> This legal note will follow a similar interpretative approach focusing primarily on EU law, the ECtHR jurisprudence and the other relevant Council of Europe standards.

On the basis of the identification of the right to an effective remedy as an autonomous concept of EU law, the CJEU has developed a substantial body of case law that defines the nature of legal aid under Article 47 CFREU. From the outset, it should be noted that the Court has attached importance to the position of Article 47 in Title VI of the Charter, which relates to justice.<sup>22</sup> This position reveals that legal aid forms part of EU law's protected procedural principles and "[...] *is not conceived primarily as social assistance,*" even if the national system has conceived it as such.<sup>23</sup> Consequently, Member States must structure and provide legal aid services in a manner that respects legal aid as a right, namely by employing a rights-based approach with all its attendant obligations which will be discussed in this note.

On a practical level, a robust legal aid system can be established only through the good administration of the available schemes and the proper allocation of resources. The standards that the Council of Bars and Law Societies of Europe (CCBE), to which the CJEU has referred in its jurisprudence,<sup>24</sup> are authoritative. In respect of the general organisation of legal aid, the European association has compiled a set of standards

18. Explanation on Article 47, Explanations relating to the Charter, Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, p. 17–35.

19. CJEU, Judgment of 15 July 2021, *Commission v Poland (Régime disciplinaire des juges)*, C-791/19, ECLI:EU:C:2021:596, paragraph 165.

20. CJEU, Judgment of 28 July 2011, *Samba Diouf*, C-69/10, ECLI:EU:C:2011:524, paragraphs 48-50.

21. Opinion of Advocate General Cruz Villalón, Delivered on 1 March 2011, *Samba Diouf*, C-69/10, ECLI:EU:C:2011:102, paragraph 39.

22. CJEU, Judgment of 22 December 2010, *DEB*, C-279/09, ECLI:EU:C:2010:811, paragraph 40.

23. *Ibid*, paragraph 41.

24. CJEU, Judgment of 19 September 2006, *Commission v Luxembourg*, ECLI:EU:C:2006:588, paragraph 44.

underlining the importance of legal aid in access to justice, which should dictate its administration.<sup>25</sup>

According to the Recommendations, Member States must allocate sufficient funding to make legal aid available for everyone, ensure long-term availability of services and supplementary lines in the event that the regular budget is exhausted. In the context of asylum, where fluctuating numbers of arrivals may affect the demands on the system during various periods of the year, this is a significant point. Member States should organise legal aid on the basis of potential increased demand and establish procedures and mechanisms to ensure preparedness. For the accurate assessment of the legal aid needs of asylum applicants, authorities should involve legal aid providers and other stakeholders in the preparation of the budget. Regarding the administration of justice, clarity of laws and the involvement of bar associations are key for the creation of a successful legal aid system. Where that system involves specialised areas of law, the engagement of relevant stakeholders should be sought.

As a last point, it should be noted that legal aid can only work in the context of a justice system that ensures the independence of justice practitioners. The independence of lawyers is an internationally recognised principle<sup>26</sup> and is applicable in the context of legal aid too. The CCBE standards on the legal profession explicitly require that legal aid providers should not have the status of civil servant/public employee but must enjoy freedom to perform their duties in the interest of their client and without any instruction.<sup>27</sup> Moreover, it is evident that they must be able to deliver their services in a court system that is itself able to benefit from similar guarantees. The scope of this note does not include any analysis of relevant rule of law guarantees in justice systems but it is important to underline that where the court system does not offer guarantees of independence the right to legal aid is *de facto* nullified. The CJEU has clarified that undue interference with the justice system of a Member States is in violation of EU law.<sup>28</sup>

## B. BENEFITTING FROM LEGAL AID: EFFECTIVENESS, QUALITY AND ACCESSIBILITY

Beyond the structural requirements for a good legal aid system, equally, the provision of legal aid must be ensured in practice. Legal aid is by definition a dynamic concept that needs to adapt to the individual circumstances of a case and the applicable rules in order to respond different needs. Continuous and consistently effective provision of legal aid is therefore important. This section will analyse the most important elements that ensure such effectiveness with a focus on challenges that can arise during the implementation of the APR. As noted above, legal counselling partially overlaps with one of the constitutive elements of legal aid, namely that of legal assistance. In this line, the standards identified in the following analysis should also be considered applicable to legal counselling insofar as they relate to legal assistance and not representation.

The connection of legal aid with the right to an *effective* remedy is important because the content of legal aid is not exhaustively prescribed by EU law. Different instruments that establish minimum guarantees in relation to criminal,<sup>29</sup> civil and commercial procedures<sup>30</sup> allow certain discretion in how these guarantees are to be observed. A common thread in the provision of legal aid in different areas of EU law is necessary. Under the Charter, legal aid is part of the right to *effective* remedy and should therefore be understood in this context: effectiveness is a key element of legal aid provision. Member States are therefore free to decide how they organise their legal aid systems and to determine which form legal aid will take as long as effective access to justice is guaranteed and the guarantees of the relevant EU secondary law are respected.

In the context of asylum procedures, the APR provides a common definition for legal aid, that is defined as legal assistance and representation which includes the preparation of procedural documents required under

25. Recommendations no. 4 and 5, CCBE Recommendations on legal aid, 31/03/2023, available at: <https://shorturl.at/EiJVd>

26. Principle 16 of the United Nations (UN) Basic Principles on the Role of Lawyers, 7 September 1990, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-role-lawyers>; UNODC, Principle 2 and 12 of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, June 2013, available at: [https://www.unodc.org/documents/justice-and-prison-reform/UN\\_principles\\_and\\_guidelines\\_on\\_access\\_to\\_legal\\_aid.pdf](https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf).

27. Recommendation no. 2, CCBE Recommendations on legal aid, op. cit.

28. CJEU, Judgment of 15 July 2021, Commission v Poland (Régime disciplinaire des juges), C-791/19, ECLI:EU:C:2021:596.

29. Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297, 4.11.2016, p. 1–8.

30. Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such dispute, Official Journal L 026 , 31/01/2003 P. 0041 – 0047.



national law, the preparation of the appeal and participation in any hearings before a judicial body. The relevant provisions do not contain the detailed guarantees that can be found in the legal aid instruments in criminal and civil and commercial matters mentioned above but they make several references to the obligation of Member States to ensure effective access to justice in the organisation of legal aid and to respect the right of defence. It is in this line that any analysis of the obligations of the authorities under the new APR must be made.

This approach is consistent with the CJEU jurisprudence that puts *effective* access to justice at the core of the right to legal aid under Article 47 CFREU. The Court has clarified that the interpretation of that article may not constitute “[...] a *disproportionate limitation on the right of access to the courts, which undermine[s] the very core of that right.*”<sup>31</sup> Therefore, the practical application of EU rules related to the provision of legal aid through national systems must be conducted in a way that protects and promotes the effectiveness of all the instruments, procedures and systems that allow access to justice for individuals. Consequently, in the context of asylum procedures Member States are required to create functional and resilient legal aid services of high quality in order to respect the obligations under both the APR and the Charter. In a case concerning legal privilege, the CJEU stated that lawyers must be able to “*carry out satisfactorily their task of advising, defending and representing their clients*” otherwise they are deprived of their rights under Article 47.<sup>32</sup> Arguably, when legal aid is not provided in a satisfactory manner, asylum applicants too are deprived of their rights under Article 47.

The close link between effectiveness and quality is self-evident. Early in its jurisprudence, the European Court of Human Rights clarified that in the context of legal aid the provision of free assistance may not be equated with the mere appointment of a lawyer. On the contrary, Article 6 implies a continuous obligation to ensure that the assistance is available, serviceable and effective throughout a procedure; to suggest that the assignment of a lawyer in the context of legal aid is sufficient on its own would be too strict an interpretation under Article 6.<sup>33</sup> Although a state cannot be held responsible for every shortcoming in the services provided by a legal aid lawyer, the authorities are required to respond when the failure to provide effective assistance and representation is “[...] *manifest or sufficiently brought to their attention in some other way.*”<sup>34</sup>

The shortcomings that may affect the effectiveness of legal aid may be linked to elements of the procedure, the case or the needs of the person that seeks to benefit from free legal assistance and representation. In *Daud v. Portugal*, the ECtHR noted that the lack of effectiveness resulted from the appointment of a second lawyer who had only three days to study the file, visit the person in prison and prepare their representation.<sup>35</sup> The seriousness and complexity of the case was an additional factor. In *Czekalla v. Portugal*, which concerned negligent procedural failure on behalf of the appointed lawyer, the Court differentiated between suboptimal legal work and negligence that essentially hampers access to justice, in particular when the negligence is not addressed by higher courts.<sup>36</sup> In that case, the judges also underlined the fact that the individual concerned did not know the language in which the proceedings were being conducted.

Although these cases concerned criminal procedures, the importance that the ECtHR attaches to the quality of legal aid and its relation to the specific needs of the individual and the characteristics of the case is relevant for the interpretation of Article 47 CFREU, as noted above. The distinction between the mere nomination of a lawyer and the continuous and effective assistance they provide should be the basis for any analysis of whether a state has dispensed with its obligations vis-à-vis the provision of legal aid to asylum applicants. This will be especially relevant in the context of the implementation of the new APR which foresees an increased use of special procedures, in particular through mandatory border and accelerated procedures, which can affect the quality of legal aid by limiting cooperation between lawyers and beneficiaries of legal aid either through the potentially reduced possibilities for meaningful contact and communication between lawyers and applicants or by shortening the time available for the preparation of a case.<sup>37</sup>

31. Judgment of 28 October 2020, Slim Ben Tijani Ben Haj Hamda Ben Ali v. Council of the European Union, T-151/18, ECLI:EU:T:2020:514, paragraph 46.

32. CJEU, Judgment of 8 December 2022, Orde van Vlaamse Balies, C-694/20, ECLI:EU:C:2022:963, paragraph 60.

33. ECtHR, *Artico v. Italy*, 6694/74, 13 May 1980, para. 33; *Imbrioscia v. Switzerland*, 13972/88, 24 November 1993, para. 38.

34. ECtHR, *Daud v. Portugal*, 22600/93, 21 April 1998, para. 38.

35. *Ibid.*, para. 39.

36. ECtHR, *Czekalla v. Portugal*, 38830/97, 10 October 2002, para. 65.

37. See ECRE, Comments on the Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, June 2024, available at: <https://shorturl.at/rDMbT>. ECRE's has analysed the implementation of the use of border procedures and their impact on procedural and substantive rights in: Asylum Procedures at the border: Implementation Parliament Assessment, Study, European Parliamentary Research Service, 2020, available at: <https://shorturl.at/17Nr4>.

In this respect, the CCBE's general standards on legal aid underline the obligation of states to ensure the quality of legal aid through actions that reflect and reinforce the value of the service, such as appropriate fees and monitoring activities by the competent authority.<sup>38</sup> Regarding legal aid in the context of migration, the CCBE has issued specific recommendations referring to the establishment of protocols and guidance, as well as to the promotion of specialised services, as measures that can increase the capacity of legal aid actors to deliver services to third-country nationals and to handle cases with vulnerability-increasing circumstances.<sup>39</sup>

The Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law contain elaborate quality-related guarantees. These include regular quality assessment activities, the continuous professional development of legal aid providers, complaint procedures and disciplinary measures.<sup>40</sup> Appropriate levels of remuneration and simple reimbursement procedures for lawyers involved in legal aid schemes are equally necessary to ensure quality through the engagement of specialists that can offer adequate services.<sup>41</sup> For legal aid providers working in specific areas of law or with vulnerable populations the guidelines recommend the assignment of lawyers in accordance with competence and specialisation and the sensitisation of legal aid providers vis-à-vis the needs of the populations they support.<sup>42</sup>

Lastly, a significant factor in the quality and effectiveness in the relationship between a lawyer and the beneficiary of legal aid is the level of adherence to confidentiality principles and professional privilege. Private communication ensures that the provider of legal aid and the asylum applicant are able to discuss and analyse the case in depth. Securing privacy can be challenging when procedures take place in spaces that do not guarantee private communication either due to physical aspects of the design of the facilities or, where detention or restriction of movement is involved, due to the carceral environment that can hamper the development of a relationship of trust between the legal aid provider and the beneficiary of legal aid. Asylum applicants, who are trying to navigate an administrative system in a foreign country, often following traumatic events, may perceive the carceral environment as particularly threatening. Confidentiality is an indispensable element of the work of a lawyer and a principle in the CCBE's Code of Conduct for European Lawyers and the national codes of Member States.<sup>43</sup> Lawyers are required to observe it and states must protect it. The CJEU has recognised that confidentiality between lawyers and clients is protected under Article 7 CFREU and entails an obligation to ensure private communication.<sup>44</sup> It is therefore necessary that the arrangement of legal aid during the asylum procedure ensures that consultations can be conducted in a safe and private environment.

In addition to quality, a major element in the effectiveness of an established legal aid scheme is the actual possibility to access it in practice. Different factors can affect the accessibility of legal aid: some of them may relate to the way the system itself is designed and implemented or to the way the overall asylum system functions and the context it operates in. The lack of a rights-based approach increases the possibility of adverse effects in every situation. In the context of the new rules under the Pact, several elements that can render legal aid inaccessible should be highlighted.

First, accessibility issues can emerge during the implementation of the legal aid scheme where the authorities do not take every measure to ensure that the asylum and reception system of the country creates the conditions for the good use of the respective procedures by its beneficiaries, i.e., asylum applicants. The latter must be able to interact with competent authorities and navigate the procedures from a position of well-informed agency. The ECtHR has noted the multiple factors that can affect the accessibility of remedies in the area of asylum, including the linguistic barriers, access to necessary information and informed advice (which will be discussed in the following section), the material conditions faced by the individual concerned and any other circumstances of the case.<sup>45</sup> The challenges mentioned in the introduction confirm that these

38. CCBE, Recommendations on legal aid, 31/03/2023, available at: <https://bit.ly/3JSu5Oh>.

39. CCBE, Recommendations no. 9, 11 and 14, CCBE recommendations on a framework on legal aid in the field of migration and international protection, 25 November 2022, available at: <https://shorturl.at/hB9d6>.

40. Guideline no. 9, Committee of Ministers, Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law, CM(2021)36-add2final, 31 March 2021, available at: <https://bit.ly/4achYX1>.

41. Ibid, Guidelines no. 22 and 23.

42. Ibid, Guideline no. 20.

43. General Principle 2.3, CCBE, Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers, available at: <https://bit.ly/4buOFAd>. You can consult different national codes of conduct on the website of the CCBE at <https://bit.ly/3UPmiHk>.

44. CJEU, Judgment of 8 December 2022, Orde van Vlaamse Balies, C-694/20, ECLI:EU:C:2022:963, paragraph 27.

45. ECtHR, Akkad v. Turkey, application no. 1557/19, 21 June 2022, para. 80.

factors are likely to affect legal aid in practice and are not merely theoretical scenarios.

Although implementation gaps that render legal aid inaccessible can affect any asylum procedure that lacks careful design and operation, the risk is higher under the new APR due to the increased use of border procedures, as noted above, in particular where a Member State decides to conduct such procedures at border locations. According to Article 54 APR, during the examination of border procedures Member States shall require the applicants to reside “at or in proximity to the external border or transit zones as a general rule or in other designated locations within its territory, fully taking into account the specific geographical circumstances of that Member State.” While the use of locations at or near the border is the general rule under this provision, the possibility to use other designated locations within a Member State’s territory is a significant alternative that was introduced during the negotiations. While in all locations the Member State must continue to ensure respect for the procedural guarantees, it is possible that this alternative could be used to avoid violations of the applicants’ rights, including those relating to legal aid, for instance through the choice of locations that allow better access to service providers than the border context.

Numerous stakeholders have expressed concerns over the lack of access to legal aid during border procedures,<sup>46</sup> especially when the designated locations are remote and/or where the location involves the restriction of movement of the residents of the facility or the restriction of access to unauthorised individuals and entities in areas near the border. In order to comply with Articles 15 and Article 18 (3) APR, Member States must ensure that all locations that are likely or planned to receive asylum applicants are accessible to legal aid providers, including those where border procedures will take place. Such accessibility requires that legal aid providers are able to reach the location without incurring significant costs or without encountering other logistical difficulties. It should also require freedom of movement for the applicants so that they can independently visit the legal aid provider at their place of professional activity and consult them throughout the procedure.

Where Member States decide to conduct border procedures near or at the border, they should consider the need for such accessibility and avoid locations that are remote. This is particularly important where the geographical characteristics of a Member State do not allow for border locations that are easily accessible (e.g., because the locations are far from urban centres with substantial services or because the location naturally restricts movement, as is the case with mountainous or island regions). In such cases, other designated locations within the territory of that Member State should be used in line with the text of Article 54 (1) which requires full consideration of the specific geographical circumstances of the country. The role of the Commission, to which the Member States must notify the locations where the border procedure will be conducted according to Article 54 APR, will be key in ensuring that access to legal aid is not compromised.

A similar recommendation has been made by the CoE Committee of Ministers, according to which the organisation of a legal aid scheme must ensure, *inter alia*, the proper geographical distribution of legal aid providers, including in remote areas.<sup>47</sup> Physical presence and personal contact between lawyers and asylum applicants must be secured and access facilitated for everyone including through the deployment of less formal activities, such as mobile teams, or with the collaboration of local bar associations. Where necessary and as a complementary measure only, legal aid provision may be supported with the use of information technology tools.

Second, legal aid may be rendered inaccessible through the incorrect interpretation or arbitrary application of the provisions of Article 17 (2) APR which allow the refusal of legal aid on the basis of specific criteria. Similarly, issues may arise in the application of Article 19 (4) APR, which allows Member States to impose monetary limits or time limits on the provision of legal aid. In these cases, it is important to apply those provisions as an exception to the general obligation to secure the right to legal aid and following a thorough assessment of the way the measures may affect a person’s ability to exercise their right to be heard. Under this right, which is a component of the rights of defence and a general principle of EU law, every individual must be able to make known their views effectively during an administrative procedure and before the adoption of any decision liable to affect their interests adversely.<sup>48</sup> The CJEU has established that any restriction on the right to be heard must correspond to objectives of general interest and may not involve “[...] a disproportionate and intolerable interference which infringes upon the very substance of the rights

46. EUAA, Asylum Report 2023, Section 4.10 on Legal assistance and representation, available at: <https://shorturl.at/L9KWL>; Fundamental Rights Agency, *Opinion 3/2019*, Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the ‘hotspots’ set up in Greece and Italy, February 2019, available at: <https://shorturl.at/GtW9x>; See also, ECRE’s analysis in: Asylum Procedures at the border: Implementation Parliament Assessment, op. cit.

47. Committee of Ministers Guidelines, op. cit., Guideline no. 20.

48. CJEU, Judgment of 26 July 2017, Moussa Sacko, C-348/16, ECLI:EU:C:2017:591, paragraph 34.

*guaranteed*.<sup>49</sup> Limitations to the right to legal aid may hamper the individual's ability to understand the procedure and make known their views *effectively* before the adoption of a decision and should therefore be permissible only insofar as they do not violate the person's right to be heard.

In addition to a possibility of restricting the right only on the basis of general interest objectives, Member States must also put the rights of asylum applicants at the centre of any assessment of the need to grant legal aid. The CJEU has noted that the very inclusion of legal aid in the article of the Charter that relates to the right to an effective remedy dictates the aspects of its accessibility. In this sense, it has established that "[...] *the assessment of the need to grant that aid must be made on the basis of the right of the actual person whose rights and freedoms as guaranteed by EU law have been violated, rather than on the basis of the public interest of society, even if that interest may be one of the criteria for assessing the need for the aid.*"<sup>50</sup> In addition, according to the CJEU, the lawfulness of an interference with the right to legal aid will be examined in relation to the circumstances of the case and the legal rules that regulate the matter in question.<sup>51</sup>

In the same line, the ECtHR has established that the necessity of legal aid must be determined on the basis of the importance of what is at stake in the relevant procedures, as well as the complexity of the relevant law and the capacity of the individual concerned to represent themselves.<sup>52</sup> In *Airey v. Ireland*, the ECtHR underlined the complicated points of law of the case in question and the emotional involvement due to the subject matter (a family dispute) as elements that increase the need for access to legal aid.<sup>53</sup> In *Anakomba Yula v. Belgium*, which concerned the refusal of legal aid on the basis of the residence status of the applicant, the Court confirmed that that refusal must be subjected to intense scrutiny when it would have definitive impact on the private and family life of the individual concerned.<sup>54</sup>

The above is especially relevant in the context of legal aid during asylum procedures as the rights at stake include the right to human dignity (Article 1 CFREU), the right to asylum (Article 18 CFREU) and the right to protection from *refoulement* (Articles 4 and 19 (2) CFREU), which can have far-reaching consequences if violated. Other key Charter rights, such as those relating to liberty and security (Article 6 CFREU), family life (Article 7 CFREU), protection from trafficking (Article 5 CFREU) and the rights of the child (Article 24 CFREU) are relevant and their violation too can produce serious consequences in the life of an asylum applicant. Those rights are likely to be violated where legal aid is unduly restricted as it deprives asylum applicants from the possibility to exercise them by accessing the guarantees of effective judicial protection during the asylum procedure.

Indeed, the CJEU has referred to the "*the protection inherent in the right to an effective remedy and in the principle of non-refoulement*" which requires Member States to ensure procedures of certain standards that protect applicants against unlawful removals.<sup>55</sup> Where children are involved, the CJEU has interpreted the general obligation of Article 24 CFREU to always consider the best interests of the child in every procedure that involves them and has found that it requires an in-depth assessment of the situation of the child before a return decision can be taken.<sup>56</sup> The importance of legal aid in the context of this assessment is more than evident. In the same vein, the European Court of Human Rights has clearly linked the right to legal aid to the principle *non-refoulement*. In *M.S.S. v. Belgium and Greece*, it noted that the applicant had received no information regarding access to actors which offer legal advice and guidance and there was a shortage of lawyers on the list of the legal aid system, which rendered the system ineffective in practice.<sup>57</sup> It found that this situation deprived asylum applicants of an effective remedy under Article 13. Similarly, in *Abdolkhani and Karimnia v. Turkey*, the ECtHR found that by not considering the applicants' asylum requests and by not authorising them to have access to legal assistance the authorities prevented the applicants from effectively raising their asylum-related claims under Article 3.<sup>58</sup>

49. CJEU, Judgment of 5 November 2014, *Sophie Mukarubega v Préfet de police, Préfet de la Seine-Saint-Denis*, Case C-166/13, ECLI:EU:C:2014:2336, paragraph 53; see also DEB C-279/09, *op. cit.*, paragraph 60.

50. CJEU, Judgment of 22 December 2010, DEB, C-279/09, ECLI:EU:C:2010:811, paragraph 42.

51. CJEU, *Mukarubega*, *op. cit.*, paragraph 54.

52. ECtHR, *Steel and Morris v United Kingdom*, 68416.01, 15 February 2005, para. 61.

53. ECtHR, *Airey v. Ireland*, 6289/73, 9 October 1979, para. 24.

54. ECtHR, *Anakomba Yula v. Belgium*, 45413/07, 10 March 2009, para. 37. See a similar reasoning in *Nenov v. Bulgaria*, 33738/02, 16 July 2009, para. 52.

55. CJEU, Judgment of 25 June 2020, VL, C-36/20 PPU, EU:C:2020:495, paragraph 97.

56. CJEU, Judgment of 14 January 2021, TQ, Case C-441/19, ECLI:EU:C:2021:9, paragraph 46. See also, CJEU, Judgment of 6 December 2012, O, S v Maahanmuuttovirasto and Maahanmuuttovirasto v L, C-356/11 and C-357/11, ECLI:EU:C:2012:776.

57. ECtHR, *M.S.S. v Belgium and Greece* [GC], Application No. 30696/09, 21 January 2011, para. 319.

58. ECtHR, *Abdolkhani and Karimnia v. Turkey*, Application No. 30471/08, 22 September 2009, para. 115.

It follows that the obligation to prevent the violation of those rights can only be complied with through the establishment of robust procedures for the assessment of a person's need to receive free legal aid to support their claims related to asylum and non-*refoulement* or their claims related to any other relevant rights. Consequently, the application of the relevant clauses of the APR that allow exclusion from legal aid and impose monetary or time limits should only be made following a rigorous assessment of the needs of the individual, the characteristics of the case and its complexity and the rights at stake. The right to asylum and non-*refoulement* obligations must be the basis for that assessment. The decision to apply them should be made in exceptional circumstances only and after having established that there is no risk of procedural or substantive harm to the applicant's rights. In every case, the national authorities should make necessary arrangements to ensure that no individual is arbitrarily deprived of access to legal aid. The Court's jurisprudence is clear in this respect: in *Ordre des barreaux francophones et germanophones*, the CJEU found that the charging of VAT on the services of lawyers must be implemented in line with the third paragraph of Article 47 CFREU where such a measure "[...] were to create, by itself, an insurmountable obstacle to access to justice or make it in practice impossible or excessively difficult to exercise the rights conferred by the EU legal order [...]."<sup>59</sup> Similarly, the ECtHR has stated that the selection of the cases that should benefit from legal aid must be compatible with the Convention and that authorities must display diligence and act to secure the effective enjoyment of fair trial rights when refusing legal aid.<sup>60</sup>

Lastly, access to legal aid may also be prejudiced by the prevailing climate and approach in respect of the management of migration and asylum in the country which can eventually render the work of legal aid providers difficult and/or dangerous. This is the case where a state either devalues asylum-related legal aid by allocating insufficient resources or where it fails to create the conditions for the independent and safe exercise of the lawyers' duties under the scheme.

The CJEU has underlined the importance of this element specifying that the lawyer must "[...] actually be able to carry out satisfactorily his or her task of advising, defending and representing his or her client, failing which that client would be deprived of the rights conferred on him or her by Article 47 of the Charter and by Article 6 ECHR."<sup>61</sup> In *European Commission v. Hungary*, the CJEU confirmed that domestic law that criminalises the provision of legal aid in certain cases is capable of preventing lawyers from defending the interests of asylum applicants and violates Article 47 CFREU.<sup>62</sup> Consequently, a strong set of rules and effective operational management in line with the aforementioned guarantees is not sufficient for the authorities to discharge their duties; concrete actions must be taken to ensure that lawyers are able to participate in legal aid schemes with dignity and safety.

In a similar manner, access to justice may be affected where the management of migration and asylum is guided by heavy reliance on national security considerations. As far as legal aid is concerned, such considerations can affect the proper interpretation and application of Article 18 APR which concerns access to case-related files for the provider of legal aid. Security interests should never infringe the core of the right of access to justice; the application of Article 18 in this context should follow the guarantees that the CJEU has identified in its jurisprudence.<sup>63</sup> Where disclosure of information placed on the file has been restricted on grounds of national security, the asylum applicant must be able to make known their views regarding the information that led to the decision. For this to happen, either them or their representatives should have access to the decisive elements of the case. The Hungarian Helsinki Committee have conducted a detailed analysis of the fundamental rights implications of decisions to limit access to classified information in asylum procedures.<sup>64</sup>

59. CJEU, Judgment of the Court (Fourth Chamber) of 28 July 2016, *Ordre des barreaux francophones et germanophone and Others v Conseil des ministres*, Case C-543/14, ECLI:EU:C:2016:605, paragraph 37.

60. ECtHR, *Sialkowska v. Poland*, 8932/05, 22 March 2007, para. 107.

61. CJEU, Judgment of 15 July 2021, *Commission v Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 206.

62. CJEU, Judgment of 16 November 2021, *European Commission v. Hungary*, C-821/19, ECLI:EU:C:2021:930, paragraphs 122-124.

63. CJEU, Judgment of 22 September 2022, *GM*, C-159/21, ECLI:EU:C:2022:708, paragraphs 51 and 60.

64. Joint Legal Note by the European Council on Refugees and Exiles (ECRE) and the Hungarian Helsinki Committee (HHC), *Effective Remedies in National Security – Related asylum cases, with a particular focus on access to classified information*, May 2022, available at: <https://shorturl.at/083yh>; Hungarian Helsinki Committee, *The Right to Know in the European Union: Comparative Study on Access to Classified Data in National Security Related Immigration Cases*, 16 April 2024, available at: <https://shorturl.at/GbGXK>.

# V. LEGAL COUNSELLING IN THE NEW APR: APPLICABLE GUARANTEES UNDER EU LAW

The provision of legal counselling is likely to encounter unique challenges, not least because of the novelty of the concept and the complexity of the APR itself. It is important to clarify the legal standards that legal counselling must be subject to given the importance of this right in ensuring that asylum applicants are able to navigate the asylum system on the basis of professional legal advice as early as possible. This section will analyse the constitutive elements of legal counselling as defined earlier in the text, underline the functional role of the right to legal counselling in securing access to asylum and present the guarantees for its effective provision.

## A. THE LEVEL OF SERVICE PROVISION IN RESPECT OF LEGAL COUNSELLING: ENSURING ADEQUATE ADVICE, TARGETED GUIDANCE, AND INDIVIDUALISED INFORMATION

According to Article 16, at the start of the procedure, legal counselling guarantees that asylum applicants receive all guidance on and explanation of the procedure, including information on their rights and obligations. Based on an analysis of the references to legal counselling in the text, ECRE proposes the following definition for legal counselling, as explained above: legal counselling is the provision of legal advice and guidance by a lawyer on procedural and substantive issues related to an asylum application during the administrative procedure, including assistance with the lodging of the application, support during the preparation for the first-instance interview and guidance on any legal issues arising throughout the procedure.

Due to the term's novelty, it is not possible to identify characteristics and standards that are specific and unique to legal counselling within the meaning of Article 16. As noted in the previous section, certain legal aid standards should be considered to apply to legal counselling, insofar as some of its components overlap with those of legal aid. More specific information on the level of provision of legal counselling services as a precursor to legal aid can be derived from existing national and European law.

A source of such information can be found in laws that codify obligations for the legal profession. Professional standards for providers of legal services are usually set by the competent regulatory bodies and they are applicable to all services provided by a lawyer. It is beyond the scope of this legal note to examine national regulatory instruments for the legal profession in different Member States. However, the CCBE's Charter of Core Principles of the European Legal Profession and the Code of Conduct for European Lawyers<sup>65</sup> can be an important reference as it crystallises a European concept of deontology and quality for all kinds of legal services and sets out binding rules for all members of bar associations in the EU. Diligence, responsibility, knowledge and independence are essential qualities that should characterise the provision of every legal service, including the ones found within the scope of legal counselling, whether it is advice, guidance, assistance or information.

The nature of legal advice associated with legal counselling can also be inferred from the standards of the Council of Europe. The Committee of Ministers has differentiated between legal aid for the purpose of accessing courts and securing representation and legal advice outside that context. In its Resolution 78 (8) on Legal Aid and Advice,<sup>66</sup> the Committee clarified that legal advice should be available to those who need it on a series of matters which may affect a person's interests, including those related to administrative procedures, rights and obligations. States should ensure that "advice-giving agencies" are provided the necessary information on the legislation of the state. An interpretation of Article 16 APR in light of these standards requires the deployment of legal counselling providers that advise on a wide range of matters related to the administrative procedure and are able to do so from a position of specialised knowledge. Similarly, the International Bar Association has produced a number of principles related to legal aid and has identified the need for legal advice services that can adequately support the person in need when legal aid is not available. Principle 11 recommends the general availability of "initial advice" when there are no other

65. CCBE, Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers, available at: <https://bit.ly/4buOFAd>. You can consult different national codes of conduct on the website of the CCBE at <https://bit.ly/3UPmiHK>.

66. Council of Europe, Resolution (78)8 on Legal Aid and Advice, Res(78)8, 02/03/1978, CM-Public, available at: <https://search.coe.int/cm?i=09000016804e2bb2>.

satisfactory sources for such a service.<sup>67</sup>

It follows that the advice component of legal counselling must be generally available, able to guide the asylum applicant on a variety of questions regarding their application, and supported by a certain level of expertise and professionalism in accordance with national and European regulations. The [last sub-section](#) will analyse in more detail the standards that can ensure that legal counselling is provided in an effective way.

Beyond advice services, another component of legal counselling is the provision of information, which must be understood as distinct from the information obligations under Article 8 APR. Whereas under the latter applicants are to receive general information on rules and procedures, the guidance of Article 16 must provide advice that is specific to the applicant's case and needs and offer in-depth, individualised information. As noted above, this interpretation is in line with the Commission's 2024 Explanatory Memorandum on the Pact, which notes that the right to information "is backed" by the new right to legal counselling; the reference confirms that legal counselling is a right that goes beyond mere information provision.

## B. THE RIGHT TO LEGAL COUNSELLING AS A PREREQUISITE FOR ACCESS TO JUSTICE AND ASYLUM

Before any analysis of the effectiveness standards of legal counselling, it is important to underline the crucial role of this right in securing access to asylum. The obligation to provide it as early as possible, including before the lodging of the application, as well as jurisprudence related to early information and advice in asylum procedures, confirms that legal counselling is a *sine qua non* of access to asylum. The absence of legal counselling may thus give rise to a violation of Articles 4 and 18 CFREU.

In relation to legal information, one of the elements of legal counselling, the CJEU has pronounced on the consequences of the violation of obligations relating to information provision under EU law with reference to the principle of effectiveness. In *Ministero dell'Interno (Brochure commune - Refoulement indirect)*, the Court examined a case relating to the provision of information before a personal interview under Article 5 of the Dublin III Regulation.<sup>68</sup> Where information is not provided, it is necessary to determine whether the irregularity affected the outcome of the procedure. More specifically, in light of the legal and factual circumstances of the case, national courts must ascertain "[...] *whether the infringement, notwithstanding the fact that the personal interview has taken place, actually deprived the party relying thereon of the possibility of putting forward his or her arguments, to the extent that the outcome of the administrative procedure in respect of that person could have been different [...]*."<sup>69</sup> Therefore, the importance of legal counselling must be understood not only in its construction as a right and obligation under the new APR but also as a significant procedural element that can affect the asylum procedure *regardless* of whether other guarantees (e.g., personal interview, legal aid on appeal) are present. It is crucial that Member States organise and provide legal counselling on the basis of that understanding and interpret Article 16 accordingly.

Indeed, the ECtHR has produced a body of case law that underlines the importance of adequate information provision and advice in asylum procedures before the interview or the appeal stage, connecting it with Articles 3 and 13 ECHR. Noting that the lack of access to information is a "*major obstacle*" in accessing asylum procedures, it has reiterated "[...] *the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints.*"<sup>70</sup> Although most of its case law relates to pure information rights, the Court has also discussed the need to ensure provision of adequate advice in addition to information. In this line, it has found that, under Article 13 ECHR, "*the necessary information and informed advice*" is a prerequisite of access to any remedy in the context of asylum.<sup>71</sup>

The jurisprudence confirms that the non-existent or inadequate provision of legal counselling at the beginning of the procedure diminishes the capacity of the asylum applicant to navigate the asylum system

67. International Bar Association, IBA Guidelines on Legal Aid Principles on Civil, Administrative and Family Justice Systems and its Commentary, 25 May 2019, available at: <https://shorturl.at/bnhhT>.

68. Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180, 29/06/2013, p. 31–59.

69. CJEU, Judgment of 30 November 2023, *Ministero dell'Interno (Brochure commune - Refoulement indirect)*, Joined Cases C-228/21, C-254/21, C-297/21, C-315/21 and C-328/21, ECLI:EU:C:2023:934, paragraphs 125 and 126.

70. ECtHR, *Hirsi Jamaa and others v. Italy*, 27765/09, 23 February 2012, para. 204.

71. ECtHR, *Akkad v. Turkey*, 1557/19, 21 June 2022, para. 80.

and to support their claim. This diminished capacity may lead to a procedurally and substantively weak application regarding a claim that is otherwise valid, changing thus the outcome of the administrative procedure in an unfair manner. Such circumstances may affect the appeal procedures as well, regardless of whether access to legal aid is granted at a later stage, an issue that has been reported by asylum lawyers including in Poland.<sup>72</sup>

Beyond the need for early guidance, in line with the definition proposed above, legal counselling must also be available in the form of legal assistance to the person throughout the administrative procedure both for the preparation for the interview and for any other issues that may arise. A failure to provide legal counselling in general, or a failure to provide it in the form of proper legal assistance, can compromise the ability of the applicant to support their claim at first-instance and could lead to situations that are incompatible with the principle of non-*refoulement*.

In this vein, when examining violations of Article 13 ECHR in conjunction with Article 3 ECHR, the ECtHR has sought to ascertain the existence of procedural guarantees before one reached the appeal stage, asking whether the applicant “[...] *had the benefit of any legal assistance in the preparation of his asylum application, during his interview and all throughout the process until a few days before the first decision*”.<sup>73</sup> The Article 3 implications underline the seriousness of the rights at stake in the context of legal counselling and highlight the need to ensure its continuous provision with the necessary care and on the basis of strong safeguards. It follows that, despite the limited scope of legal counselling (in comparison with that of legal aid), the duty to provide it under the new APR cannot be discharged by way of mere information provision or general and standardised advice. The advice and guidance elements are crucial and should be able to address the applicant’s individual needs ensuring and promoting its effectiveness.

### C. THE EFFECTIVENESS OF LEGAL COUNSELLING IN THE NEW APR

Following the above analysis, legal counselling must be construed as a service that encompasses comprehensive information, meaningful advice and concrete guidance and is supported by a reliable system of communication between authorities and asylum applicants.<sup>74</sup> In addition to a broader conception of the right, it is important to ensure that its provision is available, accessible and effective. The CoE Committee of Ministers guidelines, too, underline the importance of what they describe as early intervention and “*preliminary legal aid*” and recommend concrete action to ensure that individuals are informed *before* they need to access legal aid. A central component of such services is the widely available and easily accessible information on law and the legal system, especially the relevant legal rights, obligations and remedies.<sup>75</sup> Legal advice and assistance through integrated and holistic public services are also included as examples of mechanisms that can eventually contribute to the better use of legal aid at a later stage in a procedure. Similarly, the CCBE recommends the establishment of legal information points in cities and at the border with the involvement of local bar associations to ensure proper information provision.<sup>76</sup>

As legal counselling under the APR goes beyond legal information, Member States must ensure that it is provided in a way that allows meaningful interaction between the applicant and the legal counsellor. This will be particularly important a person is entrusted with the provision of legal counselling to several applicants at the same time according to Article 16 (1). As noted above, legal counselling includes continuous support from the lodging of the application to the preparation for the interview and may also need to take the form of guidance on any issues that arise during the procedure. Such services require substantial time on behalf of the person providing legal counselling and they must be able to perform their duties properly. Member States must ensure that persons providing legal counselling are not entrusted with the counselling of a disproportionate number of applicants at the same time and take measures to address potential increases in workload during periods of higher numbers of asylum applicants.

In addition, the requirements of effectiveness and the principles of privacy and confidentiality which are referred to throughout the APR, discussed below, suggest an interpretation of the reference under Article 16 (1) to providing legal counselling “to several applicants at the same time” to mean that a counsellor may be responsible for a caseload that comprises a number of applicants, rather than that counselling may be provided to a group of people simultaneously. Only certain elements of legal counselling could be adequately

72. ECRE, AIDA Country Report: Poland, 2022 Update, p. 32, available at: <https://shorturl.at/ULLAI>.

73. ECtHR, S.H. v. Malta, application no. 37241/21, 20 December 2022, para. 82.

74. ECtHR, M.S.S. v Belgium and Greece, 30696/09, 21 January 2011, para. 301.

75. CoM Guidelines, op. cit., 6.

76. CCBE Guidelines, op. cit., 11.



provided in a group setting, such as the provision of basic legal information, whereas other elements, including assistance in the lodging of the application, interview preparation and many forms of legal guidance, would need to be provided one-to-one in order to meet the requisite standards.

In this connection, confidentiality is another element that must play a role in the organization of legal counselling services in the context of asylum where sensitive information and serious events can be at the heart of an application for international protection. Applicants should be able to benefit from confidentiality guarantees when they seek legal counselling. The absence of privacy safeguards can undermine the effectiveness of counselling by precluding applicants from sharing information that is necessary for the person providing guidance to be aware of. Matters of confidentiality are important as well. The CJEU has clarified that the protection of Article 7 of the Charter, which guarantees the secrecy of legal consultation, covers “[...] *not only the activity of defence but also legal advice* [...].”<sup>77</sup> As noted above, legal counselling does include legal assistance, insofar as it involves the provision of legal advice and guidance and should, in this sense, be available to those who need to receive it in privacy.

Similarly, where legal advice and guidance is sought, it should be possible for the individual providing legal counselling to be able to consult the files of the applicant’s case. Asylum applicants cannot be expected to sufficiently explain all the procedural details of their case and the legal steps they have undertaken and which are necessary for the formulation of the advice. Although Article 18 does not expressly secure the right to access to the case files for the individual providing legal counselling, Member States should choose to provide access to ensure that the provider is able to exercise their duties properly. As a minimum, the authorities should facilitate the communication between applicants and legal counsellors by informing the former on the importance of sharing their case files with the latter in order to receive proper counselling.

Where access to the case files is restricted in application of Article 18 (2) for reasons of national security, applicants must be able to secure a minimal level of understanding of their circumstances, when navigating the asylum procedure or seeking legal guidance from the provider of counselling services. In line with the analysis made in the relevant paragraph of the previous section in respect of classified information and legal aid, the decision to characterise certain files as classified cannot deprive asylum applicants from any possibility to receive information regarding their case, in particular the crucial aspects of it.

Securing access to files is not only protected by Article 47 and does not only concern access to court files. The CJEU has interpreted Article 41 (2) CFREU establishing that the right to good administration includes the right of every person to have access to their file during an administrative procedure so that they can make known their views effectively before the adoption of any decision liable to affect their interests adversely.<sup>78</sup> Consequently, even where there is a legitimate interest of confidentiality, the authorities are required under Article 41 CFREU to disclose “[...] *at the very least a summary*[...]” of case-related information or files that are necessary for the person navigating the administrative procedure. Although Article 41 CFREU is addressed to the EU institutions, the Court has found that the right to be heard and access one’s files during an administrative procedure is a general principle of EU law that binds Member States.<sup>79</sup>

In addition, Article 16 (3) allows Member States to exclude free legal counselling where the application is a first subsequent application lodged with the intention to delay or frustrate the enforcement of a return decision, where a second or further subsequent application is lodged and where the applicant is already assisted by a legal adviser. The relevant interpretation approach discussed in the previous section is equally applicable here. Regarding the possibility to refuse legal counselling where the application is a second or further subsequent application, the authorities should be careful not to exclude applicants who may have had valid reasons for not providing all the relevant information in the previous application(s).<sup>80</sup> As noted in the previous section too, an individual assessment of the needs of the applicant and the circumstances of their case before exclusion is warranted.

In the case of vulnerable individuals, it is evident that there is a need for higher procedural standards and more tailored assistance on behalf of the persons providing legal counselling. In *Darboe and Camara v. Italy*, which concerned access to asylum and procedural guarantees in an age assessment procedure, the Court examined the lack of a guardian and the absence of information provision as procedural shortcomings that

77. CJEU, Judgment of 8 December 2022, *Orde van Vlaamse Balies and Others*, C-694/20, ECLI:EU:C:2022:963, paragraph 27.

78. CJEU, Judgment of 15 December 2021, *HB v. European Investment Bank (EIB)*, T-757/19, ECLI:EU:T:2021:890, paragraphs 79-92.

79. CJEU, Judgment of 11 December 2014, *Khaled Boudjlida v Préfet des Pyrénées-Atlantiques*, ECLI:EU:C:2014:2431, paragraphs 32-38.

80. See, for example, CJEU, Judgment of 2 December 2014, *A, B and C, Joined Cases C-148/13 to C-150/13*, ECLI:EU:C:2014:2406.

deprived the minor of “[...] *the necessary tools to file an asylum request* [...]”<sup>81</sup> In this case, the Court’s rationale did not only concern the lack of information but also the lack of assistance that a guardian would have been able to offer the children navigating Italy’s asylum system. Although guardianship cannot be equated with legal counselling, the need to ensure that a qualified person assists the asylum applicant throughout the procedure is analogous.

Lastly, as is the case with legal aid, the effectiveness of legal counselling will be affected by the reliability of the system within which it is provided, i.e., the asylum and reception system. Legal counselling will therefore be ineffective where adequate interpretation services, trained staff and accessible communication channels with the competent authorities are not available<sup>82</sup> or where the persons entrusted with legal counselling do not satisfy guarantees of independence. Article 19 (1) makes it clear that free legal counselling must be provided “by legal advisers or other counsellors, admitted or permitted under national law to counsel, assist or represent the applicants or by non-governmental organisations accredited under national law to provide legal services or representation to applicants.” Insofar as the service includes legal assistance, Member States must ensure that the persons entrusted with it are independent from the determining authority regardless of their title or designation under national law. The CCBE’s Charter of core principles of the European legal profession and the Code of conduct for European lawyers elaborate on the necessary safeguards.<sup>83</sup>

It is important to note that Article 16 foresees the possibility for Member States to receive technical support from the European Union Agency on Asylum (EUAA) and financial support from Union funds for implementation purposes. This possibility allows Member States to build legal counselling services that are in line with the APR and the safeguards identified above. Where Union funds are involved in the provision of legal counselling services, Member States must ensure compliance with the Charter in line with Article 9 of the Common Provisions Regulation.<sup>84</sup>

## VI. CONCLUSIONS

The provision of legal aid and legal counselling in asylum procedures is not a simple matter. The practical implementation of the APD in Member States has revealed the many obstacles that national authorities must overcome or prevent to comply with EU law guarantees. From the design and organisation of legal aid schemes to their operation in the context of a functioning asylum and reception system, the factors that can affect the realisation of the right to a lawyer can be complex and mutually reinforcing. However, the EU law standards that must guide Member State action in this respect are clear.

### Building robust legal counselling services

- » Legal counselling is a prerequisite for access to asylum. Its provision should make access to procedures effective in practice and navigation of the asylum system easier through advice, guidance, assistance and information services. Although more limited in scope, it should not be considered less important than legal aid neither should it be de-prioritised due to legal aid being available on appeal.
- » Drawing on the references in the APR to legal counselling, it should be defined as the provision of legal advice and guidance by a lawyer on procedural and substantive issues related to an asylum application during the administrative procedure, including assistance with the lodging of the application, support during the preparation for the first-instance interview and guidance on any legal issues arising throughout the procedure. Legal counselling must be provided throughout the administrative procedure, from the making of the application to the decision, and on any legal issue that arises.
- » Legal counselling should thus encompass comprehensive information, meaningful advice and guidance and individualised guidance and should be available to everyone, under any

81. ECtHR, *Darboe and Camara v. Italy*, 5797/17, 21 July 2022, para. 150.

82. European Court of Human Rights, *S.H. v. Malta*, application no. 37241/21, 20 Decembre 2022.

83. CCBE, Charter of core principles of the European legal profession & Code of conduct for European lawyers, 17 May 2019, available at: <https://shorturl.at/Rfle7>.

84. Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, PE/47/2021/INIT, OJ L 231, 30.6.2021, p. 159–706.

circumstances. Individualised counselling should be available for the provision of assistance on the lodging of the application and guidance on the procedures and other legal issues under Article 16 (2) (b). Authorities should make sure that the persons entrusted with the counselling of a caseload of several applicants at the same time have sufficient time and resources to perform their duties. Adequate interpretation services and sufficient numbers of properly trained staff are necessary for effective counselling.

- » Access to case files should be secured for every asylum applicant; authorities must inform applicants of their right to obtain access to case files and of the importance of receiving legal counselling on the basis of their case files where necessary. Any limitations to the right to access files and any exclusion from free legal counselling should only be decided exceptionally and after a thorough assessment of the needs of the applicant without nullifying their right.

### **Establishing and administering reliable legal aid systems**

- » Member States must structure and organise their legal aid systems on the basis of an understanding that legal aid is a right under EU law. In this sense, it is necessary that the system that ensures access to this right is robust and follows the European and international quality standards.
- » In the context of asylum, a rights-based approach is necessary to guarantee that the establishment of a legal aid system complies with EU and international law, in particular the requirements of Article 47 as well as the guarantees that the CJEU and the ECtHR have identified regarding access to asylum.
- » The sound administrative and financial management of the legal aid system, the allocation of sufficient resources, the clarity of the respective legal framework and the guarantees of a functioning and independent justice system are key.

### **Ensuring the effectiveness of legal aid in practice**

- » In the context of the APR, a rights-based approach must inform the interpretation that competent authorities use when they apply the legal aid provisions at all times. Internal administrative rules and guidance should reflect such an interpretation in order to ensure that the competent officers act in line with EU law. The EU legal principle of effectiveness must be translated into a functioning legal service that is accessible and adheres to quality standards and does not create obstacles for applicants in enjoying their rights.
- » The quality of legal aid must be ensured through the appointment of lawyers that are sufficiently trained and able to represent asylum applicants effectively. The effective representation and the quality of the legal aid can be affected by the complexity of the law or the circumstances of the case. Where asylum applicants point to shortcomings in their representation, the authorities must act to ensure that the right to a lawyer is adhered to. Appropriate fees for legal aid lawyers, training and monitoring activities can contribute to a high-quality system.
- » Legal aid must be accessible for everyone and in every situation in which they might find themselves. Where procedures are conducted at the border or other remote locations, the authorities must take additional measures to ensure access to legal aid. In every location, Member States must guarantee that the state of the asylum and reception system does not undermine the provision of legal services: interpretation services, early access to information, private spaces, and personal contact between lawyers and applicants must be available to everyone.
- » Means and merits testing must not result in the infringement of the right to a lawyer. The assessment of the existence of grounds for exclusion from legal aid must take into account the rights involved, the circumstances of the case and the needs of the individual. A decision to exclude legal aid must be made only in exceptional circumstances, where the authorities are satisfied that the individual will not be deprived of their right to access justice.