

Pro Bono Practices and Opportunities in Belgium

INTRODUCTION

Under the Belgian Constitution, all individuals have a right to legal assistance, which is provided and obtained in the form of advisory services and representation in judicial matters. Even outside the framework of state organized legal assistance and aid, ample opportunities exist for lawyers and law firms to provide voluntary legal services on a pro bono basis including, for instance, advising and representing social enterprises and non-profit organisations on European law issues. However, just as any other form of generosity or charity requires a fostering environment, the provision of *free-of-charge* services can only truly prosper in a legal community that is characterized by a culture of commitment to pro bono projects. Although Belgian law mandates the government to make differing types of assistance available to indigent people, thereby requiring a fair contribution from the legal profession in assuring the constitutional right to legal assistance, a strong pro bono culture has not traditionally existed in the Belgian domestic legal community for various reasons. In fact, the vast majority of pro bono projects have been undertaken by the local offices of international law firms and corporate legal departments with UK or US roots, rather than by domestic firms or Benelux organizations.

OVERVIEW OF THE LEGAL SYSTEM

The Justice System

Constitution and Governing Laws

According to article 23 of the Belgian Constitution (the “Constitution”), all Belgian citizens have the right to legal assistance.¹ However, article 191 of the Constitution seems to extend this protection to anyone residing on Belgian territory, unless the legislator can objectively justify a differential treatment for non-Belgian citizens.² The intention of the founding fathers of the Constitution must have been to avoid situations where laymen would lose the enjoyment of a certain privilege or right, or the possibility to formulate a defense against allegations, due to lack of legal knowledge or social resilience. Citizens should have access to legal experts, and in this regard a primary institutional obligation rests with the government. However, the actual implementation of this right has been left primarily to specialized organisations, and notably to the legal profession. Access to justice is particularly critical for the poor, who typically depend on various entitlements to meet basic needs such as food, housing and medical care.³ In other words, even those who lack sufficient resources should be entitled to access to justice, not least because attempting to navigate the legal system without counsel generally puts lay participants at a disadvantage. For the same reason, the government should absorb the financial burden arising from the conduct of legal proceedings, where *justiciables*, or citizens, are unable to carry the expenses themselves (legal aid).

The Courts

Belgium is a federal state divided into three economic regions⁴: Dutch-speaking *Flanders* in the north, francophone *Wallonia* in the south, and *Brussels*, the bilingual capital, where French and Dutch share official status. There is also a small German-speaking minority in the eastern part of the country. These

¹ Authoritative authors even argue that since the constitutional right to legal assistance qualifies as an individualizable right, justiciables should be able to enforce it directly in courts and tribunals. See for instance M. Van Damme, *Overzicht van het Grondwettelijk Recht*, Brugge, die Keure, 2008, 456.

² See for instance the judgment of the Constitutional Court, June 10, 2010, no. 69/2010.

³ See D. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 *Fordham L. Rev.* 2415 (1999).

⁴ From an institutional perspective, a distinction is made between economic regions and cultural communities which both have distinct competences, apart from the powers that remain at federal level.



territorial divisions are also reflected in the strict language requirements observed before the Belgian courts.⁵ Belgium's judicial system falls within the civil law tradition, where a set of codified rules are applied and interpreted by judges. The organisation of the courts and tribunals is a competence of the federal government only.

The Belgian court system is modeled on the French system, where courts and tribunals are hierarchically organized according to a pyramidal structure. The resolution of disputes relating to (subjective) *civil* rights (both vis-à-vis other justiciable parties and the State in all its forms) falls within the exclusive competence of the judiciary (*rechterlijke macht; pouvoir judiciaire*). However, jurisdiction over disputes relating to *political* rights and *legal relationships* with the State that only give rise to an '*interest*' on the part of the claimant, is typically granted to *administrative* jurisdictions (*administratieve rechtscolleges; juridictions administratives*) which, from a constitutional perspective, are not part of the judiciary. Generally speaking, administrative, civil and criminal law proceedings are distinct in terms of procedures and fair trial guarantees.

In terms of trial judges, a distinction is made between "sitting magistrates" (*zittende magistratuur; magistrature assise*) who are professional judges (called *rechters* or *juges* in the lower courts and *raadsheren* or *conseillers* in the appellate courts), and "standing magistrates" (*staande magistratuur; magistrature debout*) who are officers from the public prosecutor's office (*openbaar ministerie; ministère public*). In some of the lower courts, professional judges sit alongside non-professional judges or lay judges (*lekenrechter; juge laïc*). Judges are appointed by the Executive (*uitvoerende macht; pouvoir exécutif*) after having passed exams and also on the basis of their professional experience.⁶ There is no political interference in this process.

Administrative proceedings are conducted before administrative courts. The "Council of State" (*Raad van State; Conseil d'État*) serves as an advisory court at the junction of the legislative, executive and judicial powers. The Council of State has the power to suspend and annul administrative acts (individual and statutory) that are contrary to the legal rules in force, acts as an advisory body in legislative and statutory matters, and, being the administrative supreme court, reviews the external and internal legality of decisions of lower administrative jurisdictions, without reconsidering the facts leading to the dispute.

Minor offences (*overtredingen; contraventions*) and road traffic offences are brought in the first instance before a "Police Court" (*politie rechtbank; tribunal de police*), while intermediate offences (*wanbedrijven; délits*) and more serious crimes like burglary, robbery and fraud, are tried before a "Misdemeanors Court" (*correctionele rechtbank; tribunal correctionnel*), which is the penal department of a "Tribunal of First Instance" (*rechtbank van eerste aanleg; tribunal de première instance*).⁷ The latter also houses a so-called "Court for the Application of Sentences" (*strafuitvoeringsrechtbank; tribunal de l'application des peines*) which is responsible for ensuring the effective execution of sentences in penal cases and which delivers judgments on the legal status outside prison of persons sentenced to a deprivation of liberty.⁸ Persons accused of having committed the most serious "crimes" (*misdaad; crime*), are summoned to appear before "Assize Courts" (*hof van assisen; cour d'assises*) which are convened on an *ad hoc* basis and where a jury deliberates on the question of guilt and the resulting penalty (typically in different sessions).⁹ In penal cases, judgments of the Police Court can be appealed before the Misdemeanors Court, while judgments of the Misdemeanors Court, ruling at the first instance level, are open to appeal

⁵ See also the fact that on April 1, 2014, the Brussels tribunals were split into separate Dutch and French tribunals, so as to provide for a more efficient and accessible legal system.

⁶ The High Council of Justice (Hoge Raad voor de Justitie; Conseil supérieur de la justice) plays a vital role in the policy for the appointment of judges, on an objective and non-political basis.

⁷ There are 15 police courts and 13 tribunals of first instance, one for each judicial district (gerechtelijk arrondissement; arrondissement judiciaire).

⁸ Decisions of the courts for the application of sentences may be appealed to the court of cassation by the State Counsel's Office or by the convicted person.

⁹ There is an assize court for each of the ten provinces and for the Brussels-Capital district.

before a “Court of Appeal” (*hof van beroep; cour d’appel*).¹⁰ However, the party claiming damages, the public prosecutor’s office and the convicted person may only lodge an “appeal in cassation” (*cassatieberoep; pourvoi en cassation*) against a judgment of the Assize Court.

Civil lawsuits are dealt with at the first instance by a so-called “Justice of the Peace Court” (*vrederichter; justice de paix*) or a “District Court” (*burgerlijke rechtbank; tribunal civil*), depending on the nature of the dispute and/or the monetary value of the claims; the latter court being the civil branch of the First Instance Court.¹¹ A reform in 2013 created a specialized “Family and Juvenile court” (*familie-en jeugdrechtbank; tribunal de la famille et de la jeunesse*) within the structure of the Tribunal of First Instance. Commercial Courts (*rechtbank van koophandel; tribunal de commerce*) and Labor Tribunals (*arbeidsrechtbank; tribunal du travail*) respectively deal with commercial and labor matters.¹² Decisions of the Justice of the Peace Court can be appealed before a District Court or a Commercial Court, depending on whether the claim is of civil or commercial nature. Judgments of District Courts, Family and Juvenile Courts, and Commercial Courts are all open to appeal before a Court of Appeal, while decisions of Labor Tribunals are subject to review before a “Labor Appellate Court” (*arbeidshof; cour du travail*).¹³

The “Court of Cassation” (*hof van cassatie; cour de cassation*), the supreme judicial court, heads all the judicial courts in Belgium. Appeals can be brought only against judgments delivered at last instance, that is to say judgments for which it is no longer possible to lodge an “ordinary appeal” (*hoger beroep; appel*) on points of fact and law. It does not deal with the substance of cases but examines whether the decisions referred to it contravene the law or the rules of procedure. Whenever it quashes a judgment, the case is referred back to the previous level. The “Constitutional Court” (*grondwettelijk hof; cour constitutionnelle*) is a court of law composed of 12 judges who ensure the observance of the Constitution by the legislative authorities of Belgium. It has the power to annul, declare unconstitutional and suspend laws, decrees and ordinances infringing on Title II of the Constitution (articles 8 to 32 on the rights and freedoms of the Belgians), on articles 170 and 172 (legality and equality of taxes) and 191 of it (protection of foreign nationals) and on the power-defining rules between those authorities, provided for in the Constitution and in laws on institutional reform. Its jurisdiction can be seized either through the instigation of an action for annulment, or by way of referrals for preliminary questions from courts and tribunals.

The Practice of Law

As part of their three-year apprenticeship post-educational qualification, “aspirant lawyers” (*stagiair-advocaat; avocat-stagiaire*) not only have to obtain a declaration of professional aptitude (rewarded after having passed bar exams in the first year of the apprenticeship), but are also enrolled in what is called “*pro deo*” assistance¹⁴, that is to say, legal assistance to indigent people that could not otherwise afford the services of a lawyer (see further below).¹⁵ This is an inextricable part of the aspirant lawyer’s training and serves to broaden their experience allowing them to develop a preference for a specific area of law. Currently, the Flemish Bar council commands that every aspirant lawyer completes 15 *pro deo* cases during their apprenticeship. These cases are assigned during monthly aspirant lawyer meetings, which are supervised by senior lawyers appointed by the local bar. These cases can be challenging as they range from asylum cases to divorce proceedings, often within a tight time schedule.

¹⁰ Five such courts exist, one for each “judicial resort” (*rechtsgebied; resort*).

¹¹ Conceptually, a justice of the peace court can be seen as a civil magistrates’ court, of which there are 187 in Belgium, one for each “judicial canton” (*gerechtelijk kanton; canton judiciaire*).

¹² There are nine Commercial Courts and nine Labour Tribunals.

¹³ As is the case for Labour Tribunals as well, the divisions of a Labour Appellate Court consist of a professional judge and two or four lay judges. In Belgium there are five Labour Appellate Courts.

¹⁴ Note that it is important not to associate and confuse *pro deo* with *pro bono*. Although both virtues have in common that services are provided (partially) free-of-charge on the part of the justiciable, in *pro deo* cases lawyers are still compensated for rendering such services by the government, albeit indirectly through the Bar associations.

¹⁵ See notably articles 428 and 428bis of the Belgian Judicial Code and Chapter II.1 “Traineeships” and Chapter II.2 “Professional training” in the Code of Ethics for Lawyers of the Flemish Bar Council, 10/09/2014.



Note that even though aspirant lawyers hold law degrees, they are still required to complete a three-year apprenticeship under the supervision of a senior qualified lawyer (*stagemeester; patron*) before being qualified to practice independently.¹⁶ However, even during such time, aspirant lawyers are full members of the Bar association, may handle and represent cases themselves and are allowed to use the title of lawyer.

Role of In-house Counsel

The statute of in-house counsel (*bedrijfsjurist; juriste d'entreprise*) is defined in the Act of March 1, 2000 (as amended by the Act of May 19, 2010). Central to the legislative framework is the establishment of an Institute for In-House Counsels (*Instituut voor bedrijfsjuristen; Institut des juristes d'entreprise*) which is tasked with drawing up a list of its members, setting ethical rules and ensuring compliance therewith, coordinating the further expansion of the activities of in-house counsels, overseeing the legal education of its members and giving advice on matters which relate to in-house counsel. Membership of the Institute is only open to individuals who hold a law degree and provide legal counsel and assistance under a private or public employment contract with a private or public employer who is engaged in economic, social, administrative or scientific activities in Belgium. Membership is available to foreign-trained and qualified counsel working for an enterprise in Belgium. The principal difference between a lawyer and in-house counsel is that the former acts as a self-employed legal service provider while the latter provides similar services, except those that remain reserved to the legal profession, under an employment contract.

Article 5 of the Act of March 1, 2000 states that the advice given by in-house legal counsel (who are members of the Institute) for the benefit of their employers in the framework of their work as legal counsel is confidential. This was confirmed by both the Court of Appeal of Brussels and the Supreme Court in the context of a dawn raid that was carried out by the Belgian Competition Authority at the premises of Belgacom.¹⁷ The legal professional privilege does not only extend to the legal advice given by in-house counsel, but also to requests for legal advice made to in-house counsel and correspondence relating to such requests, draft legal opinions of in-house counsel and other preparatory documents. However, the professional privilege protection is lost as soon as such legal advice is disclosed to a person outside the company.

Opportunities for Foreign Lawyers

Requalification – Nationals of the EU, the European Economic Area (the “**EEA**”),¹⁸ Member States and Switzerland (hereinafter collectively referred to as “**EU lawyers**”) may requalify as local Belgian lawyers either by taking an aptitude test or by following three years of continuous and effective practice in Belgium under the supervision of a Belgian-qualified senior lawyer. For all *other* foreign lawyers, requalification is dealt with on a case-by-case basis where reciprocity will be applied under certain conditions by the Bar association to whom the request was addressed, such as having been domiciled in Belgium for at least three to six years.¹⁹

Establishment²⁰ – EU lawyers who are authorized to use one of the professional lawyer titles mentioned in Directive 98/5/EC, may practice in Belgium on a *permanent basis* under their home title, after registration with a Belgian Bar on the list of European Lawyers (the “E-list”), and are allowed to carry out the *same* professional activities in Belgium as fully qualified members of the Belgian Bars, in particular the provision of legal advice on the law of his or her home state, on EU and international law and even on

¹⁶ This is what distinguishes full-fledged lawyers from trainee lawyers.

¹⁷ See judgments of the Court of Appeal of Brussels, March 5, 2013 and the Supreme Court, January 22, 2015.

¹⁸ The Agreement creating the European Economic Area entered into force on January 1, 1994 and aimed to extend parts of the EU law *acquis* to the EFTA States Norway, Iceland and Liechtenstein.

¹⁹ See for the specific legal framework regarding these issues, articles 428 bis-decies of the Judicial Code and the Royal Decree of August 24, 1970.

²⁰ For a distinction between the provision of services and establishment according to EU law, see the judgment of the European Court of Justice of November 30, 1995, Gebhard, C-55/94.



Belgian law.²¹ All other foreign lawyers pursuing their activities on a full-time basis, may (but do not have to) request registration on the list of associated members of the Brussels Bar (*liste des membres associés du barreau de Bruxelles*, sometimes referred to as “B-List”).

Services – EU lawyers who hold recognized professional titles may also provide temporary services in Belgium on an unrestricted basis, apart from the fact that they may only represent and defend clients in Belgian courts in association with a local lawyer.²² Unregistered third country citizens may also provide services in areas other than Belgian law.

Legal Regulation of Lawyers

Although the Judicial Code sets out a basic framework of rules of conduct, the legal profession is to a large extent governed by two overarching Bar associations: the “Flemish Bar Council” (*Orde van Vlaamse Balies*) for the Dutch speaking Bars and the *Ordre des Barreaux Francophones et Germanophones* for the French and German speaking Bars (each referred to herein as “**Orde**” and collectively as, the “**Ordes**”). Divided over 27 Court Districts, there are in total 14 Dutch, 13 French, and one German local Bar associations. Even though each lawyer is required to be a member of the Bar (*balie; barreau*) of the judicial district where his/her services are primarily rendered, that does not prohibit the lawyer from appearing in courts located in other judicial districts. In practical terms, all of the Belgian Bar Associations are organized under and governed by similar principles. The *Ordes* are not only the principal bodies in charge of organizing legal assistance, they also monitor the quality of the legal services rendered, promulgate ethics rules within the limited legal framework, and function as a disciplinary institution which can disbar lawyers for certain breaches of their legal and ethical duties (regulated by the *Ordes*’ Codes of Conduct). Even more important is that the *Ordes* are also endowed with the competence to moderate lawyer fees where they prove to be excessive in relation to the services rendered (see further below).

LEGAL RESOURCES FOR INDIGENT PERSONS AND ENTITIES

The Right to Legal Assistance

The legal profession has traditionally been regarded as having a broad social responsibility in terms of contributing to access to justice for those who cannot afford counsel. This may be seen as a tradeoff for the extensive social privileges lawyers enjoy, for instance the monopoly to plead in courts, professional independence, legal professional privilege, and far-reaching self-regulation through the profession’s ethical codes. As early as the beginning of the 19th century, Napoleon’s Imperial Decree of December 14, 1810 already required Bar associations to develop mechanisms of free legal assistance for those in need, and the prevailing Belgian Judicial Code still pays tribute to this tradition.

The Constitution grants all citizens the right to legal assistance, and the Judicial Code further identifies two systems of assistance: “legal assistance” (*juridische bijstand; aide juridique*) where the substantive aspect prevails over the pecuniary one, and “legal aid” (*rechtsbijstand; assistance judiciaire*) which is a purely financial intervention on the part of the state. Legal assistance takes place at two levels, i.e. *front-line* and *second-line* legal assistance. Finally, there are also a few opportunities to lodge complaints with Ombudsmen.

²¹ See articles 477 quinques-nonies of the Judicial Code.

²² See articles 477 bis-quarter of the Judicial Code. With regard to the exception to unrestricted provision of services, reference should be made to the judgements of the European Court of Justice of February 25, 1988, *Commission v. BRD*, case 427/85 and of July 10, 1991, *Commission v. France*, case 294/89.

Front-line Legal Assistance

Front-line legal assistance²³ (*eerstelijnsbijstand; aide juridique de première ligne*) is provided by a local “Legal Assistance Commission” (“**LAC**”) (*Commissie voor Juridische Rechtsbijstand; Commission d’Aide Juridique*). Each Court District has its own LAC, composed of an equal number of representatives from the local *Orde* and public social welfare centers (*openbare centra voor maatschappelijk welzijn; centres publiques d’action sociale*). During LAC sessions – which are consultation sessions open to both natural and legal persons – lawyers provide preliminary (but limited) legal and practical advice on a variety of issues, or they refer persons to lawyers or a specialized body capable of providing second-line (more elaborate) legal assistance.²⁴ In turn they receive compensation from the LAC. A lawyer providing front-line legal assistance does not conduct a thorough investigation of the case and does not draft letters or agreements, but only provides advice on simple matters and does not address complex issues. To avoid abusive practices, a lawyer offering front-line legal assistance is not allowed to offer assistance and representation in further proceedings relating to the same client, nor is he allowed to refer the client to one particular lawyer for further assistance.

Note that, unlike second-line legal assistance, the front-line legal variant is available to all, and is *not* linked to income, nationality or age. As of January 1, 2004 Legal Assistance at LAC sessions is a free service.²⁵ Each qualified lawyer willing to participate in primary LAC sessions informs the LAC of the areas of the law that he or she is qualified to advise on.

Second-line Legal Assistance

Second-line legal assistance is organized by a “Legal Assistance Bureau” (“**LAB**”) (*Bureau voor juridische bijstand; Bureau d’aide juridique*) and consists of giving more sophisticated legal advice and/or assisting and representing someone in a judicial proceeding. This type of assistance may be requested in any proceeding, whether criminal, civil or administrative, and at *any* stage of the proceedings. In the context of this assistance, one can rely on a lawyer for more detailed legal opinions, establishing the necessary contacts, drafting letters, accompanying the client to meetings with government institutions and even in situations leading up to actual proceedings. Although assistance with court actions, and notably legal representation, are the most common expressions of legal assistance, there is no requirement that the assistance take place within the context of formal proceedings.

A LAB is in charge of organizing the availability of second-line legal assistance in each Court District, depending on the *Orde* to which that district is subject. Second-line legal assistance is available *only* to natural persons who have insufficient financial means.²⁶ Citizens who fulfil the criteria are partially or completely exempt from paying fees for second-line legal assistance. Lawyers rendering second-line legal assistance services are paid by the Belgian Department of Justice through the intermediary of the local *Ordes*. The remuneration is determined by the Department of Justice and is based on a points system, in which the value of one point is determined annually, taking into account the entire State’s legal assistance budget and the number of matters in that year.²⁷

²³ Belgian Judicial Code (Belg. Jud. Code), art. 508/1 to 508/6; see also L’aide Juridique: Un Meilleur Accès à la Justice, Service Public Fédéral Justice, available at http://justice.belgium.be/fr/publications/een_betere_toegang_tot_justitie.jsp?referer=tcm:421-138590-64 (last visited on September 4, 2015).

²⁴ Each LAC maintains a list of all lawyers qualified by the local *Orde* wishing to perform services in the context of secondary legal assistance, which is updated annually.

²⁵ Royal Decree, Dec. 18, 2003.

²⁶ Center groups can rely on a rebuttable presumption of sufficient financial means. Those groups include, among others, minors below 18, people who have been found to be mentally ill, and foreigners claiming refugee status or applying for residence on the basis of asylum legislation.

²⁷ For judicial year 2014-2015, the budget for secondary legal assistance is estimated approximately € 74 million according to the verbal answer of the Minister of Justice to an oral question during the plenary meeting of May 21, 2015, CRIV PLEN 047 p.20. The value of one point is € 24.76€.

Under the *Ordes*' rules, lawyers cannot accept contingency fees from clients, nor can they seek further remuneration from an indigent client who receives complete legal assistance.²⁸ Secondary legal assistance often results from a referral of the lawyer providing primary legal assistance. However, natural persons have the right to choose any lawyer qualified by the local *Orde* for secondary legal assistance. If the lawyer is willing to accept the case, he or she can request that the LAB designate him or her as the person's secondary legal assistance provider. Ultimately, every lawyer must be authorized by the *Orde* to give secondary legal assistance in each individual case. In urgent matters, one may contact an on-duty lawyer from the emergency service of the LAB for this authorization.

Accordingly, Second-line legal assistance is not only provided by aspirant lawyers in the course of their three-year apprenticeship, but also full-fledged lawyers who volunteer to take on *pro deo* cases, either on a principal or incidental basis. The latter can also specify in which area of law they want to render *pro deo* services. Aspirant lawyers on the other hand are obliged to enroll for *pro deo* assistance, are not allowed to identify a legal area of preference and cannot refuse to take on second-line legal assistance cases assigned to them, unless they have good reason to do so. A lawyer who is consulted by a client and who knows or suspects that the client qualifies for second-line legal assistance, is under an obligation to inform the client of this fact.²⁹

As of January 2012, under the Statute of August 13, 2011³⁰ (also called the "**Salduz Bill**" in reference to the Case Law of the European Court of Human Rights), all natural persons are entitled to prior consultation with a lawyer, and can demand that this lawyer be present at the first interrogation by the police or the magistrate in charge of an inquest. Following the partial annulment of the Salduz Bill by the Constitutional Court in 2013, a *Salduz Bis* scheme will be put in place, taking effect from January 1, 2016 which would require a lawyer to be present during *any* questioning.³¹ To give effect to this statutory right, the *Ordes* have established a "Salduz-Permanency" in order to ensure that suspects can consult a lawyer within two hours. In theory, when an individual wishes to invoke his or her right to prior consultation and assistance, the police must first contact a call-center set up by the *Ordes*, requesting the assistance of an on-duty lawyer from the neighbourhood. The on-duty lawyer will then offer a 30-minute (maximum) consultation. After that, the interrogation can take place. In practice, due to the limited number of lawyers available, prior consultations are sometimes held over the phone, and lawyers rarely assist in the actual interrogation.

State-Subsidized Legal Aid

The other component of state-sponsored legal services, "legal aid", means that certain costs and fees incurred during judicial or extra-judicial proceedings are waived either in part or in full, for litigants who do not have adequate income to cover those costs. These fees include, among others, registration fees (*registratierechten; droits d'enregistrement*), registry costs (*griffierechten; droit de greffe*), the fees related to intervention of bailiffs (*rechtsdeurwaarders; huissiers de justice*), notaries (*notarissen; notaires*) and specialists in the context of a judicial expert investigation (*deskundigenonderzoek; expertise*). Access to legal aid is available to Belgian nationals, nationals of EEA member states, foreign nationals in accordance with international treaties, foreign nationals having their ordinary residence in Belgium or in a Member State of the EU, foreign nationals in immigration proceedings, and even legal persons can request legal aid.

Mandatory Assignments to Legal Assistance Matters

In terms of mandatory assignments to legal assistance matters, Belgian law requires Flemish aspirant-lawyers to enroll for *pro deo* assistance in the course of their three-year apprenticeship, with the

²⁸ See BELG. JUD. CODE art. 459.

²⁹ See article III.1.8.1 of the CODE OF ETHICS FOR LAWYERS of the Flemish Bar Council.

³⁰ Legal Act of Aug. 13, 2011.

³¹ See also judgment of the Constitutional Court of February 14, 2013, no. 7/2013.



possibility that the attorney-general of the Bar assigns even more *pro deo* matters, if such need may exist. Aspirant lawyers are not allowed to identify a legal area of preference and cannot refuse to take on second-line legal assistance cases assigned to them, unless they have good reason to do so.

Unmet Needs and Access Analysis

Currently, in order to qualify for second-line legal assistance, a single individual may not earn more than € 944 net per month (full exemption from payment) or between € 944 and € 1,213 per month (partial exemption). However, if the individual is married, co-habiting or single but taking care of dependents, the thresholds are based on *total family income* and amount to a maximum of € 1,213 (full exemption) and € 1,480 net per month (partial exemption), increased by approximately € 164 per dependent that the individual is taking care of.³² The majority of people in need of legal support exceed these thresholds. The law also identifies certain individuals for which it creates a legal presumption of indigence, among others, refugees, minors, disabled people and people receiving other forms of social state-subsidized benefits. Legal persons are not eligible for second-line legal assistance at all. There are no current clear figures on whether the current state-subsidized legal assistance scheme meets current unmet legal needs of indigent and marginalized individuals. Certainly, the amount of eligible categories for legal assistance and aid has not kept pace with the increasing volume of legal proceedings, implying that those who rely on the system, use it extensively.

Alternative Dispute Resolution

Ombudsman

In Belgium, people who feel that they have been wronged may, in certain cases, also resort to an Ombudsman (*ombudsman; médiateur*) with their complaints.³³ An Ombudsman is an impartial complaint handler whose mediation services can be solicited in order to assess the fairness of decisions taken by government institutions, autonomous public companies and even private companies. Ombudsmen have not only been created at the federal level³⁴, but also at the regional³⁵ and municipal levels (for instance Antwerp, Bruges, Sint-Niklaas and Ghent). Similarly, customers can consult specific Ombudsmen regarding dealings with service-providing public companies (national Postal and Railway companies). Furthermore, many different types of Ombudsmen have been established on the basis of commercial legislation for disputes between customers and private companies in particular business segments like insurance, financial disputes, telecom, energy and consumer services. Even though all Ombudsmen are governed by different acts and establish different rules of conduct and procedure, in general they all require that the complainant has already attempted to resolve the dispute him or herself, but failed to do so. Ombudsmen will collect information, subject companies and administrative departments to requests for information and even hearings if necessary, and give a form of opinion that might reconcile the interests of the parties. Ombudsmen typically do not adjudicate matters. Even though their opinions are not binding, the incriminated company or administration cannot simply ignore this advice, without properly explaining why. If the ombudsman's acts fail, it always remains possible to submit the dispute to arbitration or to take the case to a court. Fees incurred by citizens for having relied on the services of an Ombudsman are very rare.

³² These figures are applicable as of September 1, 2014.

³³ The following website provides a useful overview of the different types of ombudsmen and their areas of competence: it is available at <http://www.ombudsman.be/nl> (last visited on September 4, 2015).

³⁴ Act of March 22, 1995 "establishing the positions of Federal Ombudsmen", O.J., April 7, 1995.

³⁵ "Vlaamse Ombudsdienst" for the Flemish region, "Médiateur de la Région wallonne" for the Walloon region, "Médiateur de la Communauté française" for the francophone Community and "Ombudsmanns für die Deutschsprachige Gemeinschaft" for the German-speaking Community.



PRO BONO ASSISTANCE

Pro Bono Opportunities

Private Attorneys

Although a system of legally mandated pro bono assistance and a consequential duty to report such matters does not exist in Belgium, neither the Belgian Judicial Code nor the Code of Conduct for Lawyers of the *Ordes* requires a lawyer to request payment for his or her services. Similarly, there is no imposed tariff for calculating lawyer fees. Each lawyer establishes his own fees, but he must comply with the requirements of article 446ter of the Judicial Code, which states “*that the fees should be established with fair moderation*”.³⁶

Thus, while the Belgian legal system described above renders it possible for individuals to receive legal consultation for free, along with a free defense, free consultation and assistance, and legal aid, any self-employed lawyer – acting as private attorney or as a member of a law firm – is permitted to provide free legal assistance at their discretion to anyone, regardless of their ability to pay and without being sanctioned for offering services for free or for a fixed fee.³⁷

Law Firm Pro Bono Programs

Statistics reveal an increase in the number of pro bono programs undertaken by various law firms. This change has coincided with the establishment of branches of big Anglo-American law firms, where a vibrant pro bono culture has existed for many years. These firms have played a crucial role in the cultivation and professionalization of pro bono services in Belgium, although spill-over to the Belgian domestic legal landscape remains fairly limited. A recent statistical survey incorporating data of 14 international law firms with offices in Belgium and representing more than 500 lawyers, estimated that in Belgium, lawyers performed on average 27.1 hours of pro bono services over the last 12 months, which compares favourably with the European average of 17.7 hours.³⁸

Law firms have commonly provided pro bono services to NGOs seeking legal advice on matters relating to European law or information on how to lobby for or against initiatives of European institutions. The main beneficiaries of such pro bono services are charitable organisations like Amnesty International, Human Rights Watch, and Friends of the Earth. According to the results of the *Brussels Pro Bono Project*, initiated in 2004 and led by lawyers of different Anglo-American law firms, Brussels in particular offers a wide “*number of opportunities, especially in the area of advising and representing non-profit organizations in Europe*.”³⁹ The handling of (high profile) pro bono cases is in part due to the increasing implementation of corporate social responsibility charters by international law firms, thus obliging or encouraging lawyers from such firms to take up a minimal amount of pro bono hours every year.

In-House Pro Bono Programs

Although there have not been any official studies looking at pro bono services by in-house counsel, informal evidence shows that, similar to law firms, local offices of multinational corporations have expanded their pro bono programs to include opportunities for Belgium-based in-house counsel. In-house counsel from the Brussels offices of several US corporations have participated in the annual PILNet Pro Bono Forum over the past few years, evidencing a growing commitment to pro bono by in-house legal

³⁶ What this means is not entirely clear. See for instance JO STEVENS, *Advocatuur: Regels & Deontologie*, Mechelen, Wolters Kluwer, 2015, 718-783.

³⁷ A law firm can provide the service either free of charge, for a minimum charge or for a fee upfront.

³⁸ See *TrustLaw: Index of Pro Bono 2015* by Thomson Reuters Foundation, available at <http://www.trust.org/trustlaw/> (last visited on September 4, 2015).

³⁹ Mayer, Brown, Rowe & Maw LLP, *Pro Bono Update*, 30 (2005), available at http://www.mayerbrown.com/Files/Publication/ec4bcbbf-cfef-4563-9a1c-9b8fbb2e0b3e/Presentation/PublicationAttachment/t6fa6db0c-318e-4ec7-9921-9c0bb4563479/news1_probono_July05.pdf (last visited on September 4, 2015).



staff. For example, in-house counsel for one such corporation worked with the Brussels office of an international law firm to organise a pro bono “desk project” available to the legal staff of both entities located in Belgium and around the globe. In addition, these two organisations collaborated again to kick off an asylum clinic, in conjunction with a local NGO focusing on refugee rights.

In-house lawyers often work in close collaboration with international law firms to identify appropriate pro bono opportunities. This type of partnership helps address any issues of legal expertise, insurance, and staffing coverage. Most in-house pro bono projects tend to avoid the litigation sphere, and instead focus on research, drafting memoranda, and providing basic advice in administrative matters.

Non-Governmental Organisations

Although NGOs are typically the recipients of pro bono legal assistance, some of them are also engaged in the provision of such services. Belgium’s most prominent pro bono NGO is *Avocats Sans Frontières* (“ASF”) which seeks to provide legal assistance in sensitive cases around the world. Headquartered in Brussels, ASF regularly organises seminars for European lawyers on topics such as corporate social responsibility and the role of lawyers in the prevention of torture. However, most of its activities are implemented ‘in the field’, in fragile or post-conflict countries, where it offers legal aid services, among others through the establishment of legal centres (mobile and fixed office locations), organization of mobile court hearings and raising awareness and educating the population on their rights. It also seeks to expand capacity in those countries by offering professional training to lawyers, institutional support to the local Bar associations for the development of the profession, organization of legal aid, and observation of trials and networking for the creation of local synergies. In terms of advocacy, ASF arranges meetings with local and international institutions and authorities and submits position papers and publications. All these activities are carried out in partnership with local entities: NGOs and civil society groups, lawyers, bar associations, local institutions and authorities, and international NGOs and other institutions. ASF counts some major international law firms in its International Legal Network.⁴⁰ However, the vast majority of its members are individual lawyers, working for international law firms and mid-sized Belgian law firms, choosing independently to commit themselves in symbolic or high profile pro bono cases.

Bar Association Pro Bono Programs

According to the ASF website, quite a few Belgian Bar associations support the initiatives of the ASF financially. Similarly, on April 19, 2011 the Dutch speaking Order of the Brussels Bar entered into a protocol agreement (*protocolakkoord; accord de jumelage*) with the Bar of Lubumbashi in the Democratic Republic of Congo, which facilitates exchange opportunities between members of the respective bars, the financing and establishing of a library containing not only books on Congolese, Belgian, French and International law, but also of legislation in neighbouring African countries and the OHADA (*organisation pour l’Harmonisation en Afrique du Droit des Affaires*).

Historic Development and Current State of Pro Bono

Historic Development of Pro Bono

For decades the Belgian legal profession (mainly aspirant lawyers) was engaged in pro bono activities to indigent individuals, without any form of financial support from the government. This pro bono system was gradually replaced in 1980 (with regard to aspirant lawyers) and in 1995 (with regard to full-fledged lawyers) by a state-subsidised *pro deo* scheme as a result of the integration of a directly enforceable right to legal assistance in article 23 of the Constitution.

Proposals for mandatory pro bono requirements have come and gone mainly due to resistance from the Bar associations and the legal profession in general. Accordingly, a proposal in 2013 to reform the regime of second-lie legal assistance which, among other things, aspired to establish a framework for mandatory pro bono services, was abandoned.

⁴⁰ See <http://www.asf.be/action/> (last visited on September 4, 2015).



Current State of Pro Bono including Barriers and Other Considerations

There are several regulatory and cultural reasons why pro bono services have not become prominent or commonplace in the Belgian domestic legal landscape.

Excess of lawyers – Belgium has an excess of lawyers. In terms of demographics, Belgium had more than 15 lawyers per 10,000 inhabitants⁴¹ in 2015, which is almost twice the rates of neighbouring countries like France and the Netherlands. The consequential struggle for clients, by offering services for very low fees, resulted in the observation that as much as 30% of the legal profession earns less than € 1,000 per month. Recently, high-level members of the bar associations have made calls for a limit on the number of lawyers and law students, while others have urged that exams at universities and during apprenticeships are intensified.⁴² This struggle for paying clients clearly undermines the incentive to provide pro bono services; on the contrary, it effectively reserves these opportunities for those lawyers and law firms who can afford not to charge for all the services they render.

Lawyer's publicity – Another indirect barrier to maintaining a pro bono practice in Belgium is the various restrictions on legal advertising, as this prevents lawyers and law firms from promoting their pro bono activities. Although members of the *Orde van Vlaamse Balies* are not restricted from advertising pro bono services, for members of the *Ordre des Barreaux Francophones et Germanophones*, such advertising is restricted and might go beyond the scope of what is permissible. In any event, it is advisable to present any pro bono advertising campaign to a representative of either the *Orde van Vlaamse Balies* or the *Ordre des Barreaux Francophones et Germanophones*, and to request an informal approval before launch. Many advertising campaigns will lead to claims from other law firms to the President of the respective orders, and an informal approval will in many cases avoid long discussions with the President and any affected parties.

Loser pays – In terms of procedural expenses, the losing party bears the procedural costs in principle, but the court can allocate costs between the parties as it sees fit if the winning party fails to prove particular claims. Notwithstanding the court's discretion to allocate costs in this manner, the perception that the "loser pays" principle applies by default is likely to have a detrimental effect on the willingness of indigent individuals who are not eligible for state-subsidized legal aid to pursue claims, for fear of exposing themselves to costs they cannot afford. With regard to attorney's fees, the fees of the successful parties' attorney are not recoverable, except for a portion of such fees that is known as the "procedural indemnity", which is in fact a lump sum paid by the losing party towards the attorney's fee incurred by the successful party.

State-funded legal assistance – The relative ease with which indigent natural persons can access state-organized legal assistance and legal aid will also be a barrier to pro bono. Many NGOs or other similar organisations will be inclined to bring their case to the LAB *through* one of the victims they represent (e.g. victims of human trafficking, domestic violence, asylum seekers, etc. many of whom have a right to pro deo assistance). These organisations will thus receive a referral, rather than start an independent search for a pro bono lawyer willing to assist and represent him or her for free. In fact, the perception that state-subsidised legal assistance is sufficient to fully satisfy the social task of granting access to justice, has to some extent undermined the emergence of a complementary pro bono culture.

Attitude – Recent generations of lawyers expect to be duly compensated for state-subsidised legal assistance to underprivileged people. There may be a reluctant attitude towards pro bono services, primarily motivated by income-related concerns, especially for those who are entangled in the *pro deo* system, and receive their only income from state-subsidised legal assistance.

⁴¹ On January 1, 2015, the population of Belgium was approximately 11,191,000.

⁴² See for instance JAN DYCK in Today's Lawyer: "Er zijn te veel advocaten", available at <http://www.jubel.be/tl-artikel-van-de-maand-trop-is-te-veel-te-veel-is-trop-jan-dyck/> (last visited on September 4, 2015).



Pro Bono Resources

As stated on ASF's website, the International Legal Network is comprised of "lawyers with one or several fields of legal expertise, thematic or contextual, who are available to act in the field or from their local bar association. Whenever there is a new mission to be undertaken, the ILN sends out a 'call for volunteers' to the whole of the network and entrusts the mission to available lawyers according to their fields of expertise of ASF." More information regarding ASF and the International Legal Network are available at <http://www.asf.be/international-legal-network> (last visited on September 4, 2015). Other pro bono clearinghouses exist in Europe, although Belgium-based projects are seldom listed.

CONCLUSION

All attempts in Belgium to let pro bono work take place in a regulated environment have failed so far, but there are increased calls for the establishment of a pro bono culture in the Belgian domestic legal market. The Bar's failure to secure broader participation in pro bono work is all the more disappointing when measured against the success that such work has yielded. Opportunities exist for law firms to provide free legal assistance outside the *pro deo* system as well as for in-house counsel to actively participate in pro bono projects (either in collaboration with a major law firm or alone). Considering the presence of various international organizations in Belgium, interesting pro bono work can be undertaken here, especially in Brussels, although firms and in-house counsel will have to make a conscious effort to obtain the work as pro bono schemes are not known to the general public. It will take special dedication, particularly from in-house counsel, to identify appropriate pro bono opportunities.

September 2015

Pro Bono Practices and Opportunities in Belgium

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