

# pro facta

Verkenning van het vrije keuzerecht van rechtsbijstands-  
verzekerden en de toegang tot het recht

Verzekerd van een vrije keuze

SUMMARY

Groningen, 26 augustus 2024

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## Colofon

Pro Facto  
Ossenmarkt 5  
9712 NZ Groningen  
www.profacto.nl  
info@profacto.nl  
050-3139853

Auteurs	mr. Ernst van Bergen, mr. Stef Roest en prof. dr. Heinrich Winter
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Dit onderzoek is – in opdracht van het Wetenschappelijk Onderzoek- en Datacentrum – uitgevoerd door Pro Facto, bureau voor bestuurskundig en juridisch onderzoek, advies en onderwijs.

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# Summary

## Introduction

Legal expenses insurers are required to explicitly stipulate in the insurance contract that the insured is free to choose their own legal representative in a judicial or administrative procedure. This means that businesses and citizens who take out legal expenses insurance are free to choose their own lawyer or another legal aid provider in a judicial or administrative procedure. Therefore, the insured is not bound to the in-house lawyer or a lawyer chosen by the legal expenses insurer. This right to freely choose a legal representative is stated in Article 201 of Directive 2009/138/EU and is implemented in Article 4:67 of the Dutch Financial Supervision Act.

In the judgment of May 14, 2020, the Court of Justice of the European Union, in response to a preliminary question from the Belgian Constitutional Court, found that 'Article 201 (1) (a) of Directive 2009/138 must be interpreted as meaning that the term 'proceedings' referred to in that provision includes judicial and extrajudicial mediation proceedings in which a court is involved or is capable of being involved, whether when those proceedings are initiated or after they are concluded.'<sup>1</sup> Following this judgement, it is not entirely clear which procedures and legal actions can be considered part of the right to free choice following this judgment. It is possible, however, that this ruling could lead to an expansion of the right to free choice and might therefore have implications for the access to justice for users of legal expenses insurance.

## Methodology

This exploratory study answers the following question:

*In what way and to what extent can, given the current case law regarding the free choice of lawyer, the access to justice for users of legal expenses insurance (particularly the middle-income group) change and how can this access be maintained as much as possible?*

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<sup>1</sup> Judgement of 14 May 20202, *Vlaamse Balies*, C-667/18, ECLI:EU:C:2020:372, paragraph 42.

Due to the existing relevant information available on this topic, WODC requests an inventory of existing knowledge and for this to be tested with the involved parties. We conduct this by means of three ‘expertise sessions’. During these sessions, involved professionals and experts discussed the Dutch market for legal expenses insurance and the potential implementation of the right to free choice of lawyer (session 1), the scope of the right to free choice of lawyer and its financial consequences (session 2), and possible solutions to maintain access to justice as much as possible in the event of an expansion of the right to free choice of lawyer (session 3). Sessions 2 and 3 built upon the outcomes of the previous sessions. Prior to the expertise sessions, we studied the relevant literature and case law. The results of this were outlined in an memo that served as the basis for discussion during the knowledge sessions.

## Access to justice and legal expense insurance

In the Netherlands, legal expenses insurance is primarily taken out by middle-income earners. For this group, legal expenses insurance is an important way to gain access to justice. Middle-income earners earn too much to qualify for subsidized legal aid (or have to pay a substantial personal contribution) and generally too little to pay for a lawyer out of their own pocket. Over 40% of Dutch households have legal expenses insurance.

In the Netherlands, legal expenses insurance is offered in the form of in-kind insurance where legal assistance is provided by a lawyer employed by the legal expenses insurer. A switch to a different type of insurance, such as a cost insurance policy, would result in rising costs for insurers and lead to premium increases or additional cost-cutting measures. This carries the risk that policyholders may cancel their insurance. Legal expense insurers argue that the right to free choice could undermine itself. The more this right is expanded, the greater the risk that some policyholders will decide to cancel the more expensive legal expenses insurance. This would result in a larger group of middle-income earners without legal expenses insurance, putting pressure on this group’s access to justice.

## Scope of the right to free choice of lawyer

The ruling of May 14, 2020 and the preceding case law of the Court of Justice can be interpreted in different ways. It is currently not possible to say with certainty which procedures and legal actions exactly fall under the right to free choice. To do so, the right to free choice will need to be further clarified in Dutch and European case law. The participants in the expertise sessions repeatedly emphasized that at this time it is only possible to give an outline of possible interpretations of the case law of the Court of Justice.

We distinguish three possible scenarios based on the outcome of the expertise sessions. The first scenario (maintaining the status quo) implies that the right to free choice will not be further expanded. In this scenario the right to free choice remains applicable only to proceedings before the government courts, arbitration, administrative preliminary procedures, and the procedure for obtaining a dismissal permit from the Dutch Employee Insurance Agency. The second scenario is that the right to free choice is expanded to all legal disputes. The Disputes Committee of the Financial Services Complaints Institute (Kifid) interpreted the case law of the Court of Justice in this way on March 31, 2021. However, the ruling was overturned by the Appeals Committee of Kifid. The third scenario is that the right to free choice is expanded, but

remains confined to binding advice procedures and mediation ending in a settlement agreement.

## Implications of the expansion of the free choice of lawyer

An expansion of the right to free choice could have implications for policyholders' access to justice. As mentioned earlier, legal expenses insurance is primarily taken out by middle-income earners. In the current situation (scenario 1), access to justice for individual policyholders is somewhat limited due to cost-cutting measures, but legal expenses insurance remains affordable for a broader group. If the right to free choice is expanded, this affordability and access to justice may come under pressure as people may no longer purchase insurance, or if insurers withdraw from the market. In the case of a full expansion (scenario 2), the impact on access to justice for middle-income earners would be greater than with a more limited expansion (scenario 3). Based on this exploration, it is not possible to conclusively determine the effects that the expansion of the right of free choice will have on the access to justice.

## Interventions

The current state of case law regarding the right to free choice of lawyer does not provide clarity on the procedures and legal actions that fall under this right. Although multiple interpretations of the Court's case law can be given and various scenarios can be outlined, more clarity about the scope of this right can only be obtained once it is further clarified in Dutch or European case law. An expansion of the right to free choice would lead to more expensive insurance policies (because an external lawyer is more costly than a lawyer or legal expert employed by the insurer) which could result in fewer people taking out legal expenses insurance. This would limit access to justice for users of legal expenses insurance. As mentioned earlier, it is primarily middle-income earners who use legal expenses insurance. This group will therefore also experience the consequences of a potential expansion.

To maintain access to justice, the following interventions could be implemented. First, research could be conducted into the reasons why policyholders make use of the right to free choice. Second, insurers could implement more refined cost-cutting measures. The Dutch healthcare insurance system or the French legal expenses insurance system could possibly serve as inspiration for this. Third, a form of fee regulation for the legal profession could be introduced. The consequences of an expansion of the right to free choice could have far-reaching implications in the Netherlands, particularly because lawyer fees are relatively high. Finally, the possibility of offering cost insurance could be considered. For this, however, the costs of external lawyers need to be transparent and predictable. This could be for example achieved through price agreements between legal expenses insurers and law firms or through the aforementioned fee regulation by the government.

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