

# **Legal aid for legal persons**

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**International Judicial Cooperation in Civil Matters – European Civil Procedure**

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## 1. Introduction

This presentation will focus on considering whether, in respect of Article 47 of the Charter of Fundamental Rights of the European Union (2012/C 326/02, hereinafter ‘the Charter’), a legal person should be granted legal aid and if so, under which conditions. First, the paper will examine how the principles that arise from the Lisbon Treaty, the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ‘the Convention’), the Charter and the case-law of the European Court of Human Rights (hereinafter ‘the ECHR’) and the European Court of Justice (hereinafter ‘the ECJ’) should be interpreted in light of this topic. Next, the paper will focus on the European perspective of legal aid. After that, the paper will give a quick overview of the history and basics of the current legal aid system in Finland. Finally, after the analysis of the essential case-law, the paper will finish with the conclusions.

Under Article 47 (3) of the Charter legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice. The Article does not specify to whom free legal aid may be given. In European case-law and in the legal systems of European countries, there has been a variety of views on granting legal aid to a legal person.

The right to free legal assistance is derived from the European Convention for the Protection of Human Rights and Fundamental Freedoms, which came into force on 3 September 1953. Article 6 (1) of the Convention guarantees not only the right to a fair trial but also the right to effectively participate in the proceedings. The right to trial or access to a Court of Justice must be secured not only in principle but also in practice by ensuring conditions that enable everybody to have an effective access to court proceedings if necessary. Thus, it may also be required under Article 6 (1) to provide free legal aid to parties that are not accused of a crime.

According to the basic requirements of a fair trial, the parties, regardless of their wealth and status, should have an effective opportunity to refer a matter to a Court of Justice and qualify for free legal assistance if necessary. These basic requirements safeguard fundamental human rights such as access to justice and equality of arms.

## 2. Charter of Fundamental Rights of the European Union

The Treaty of Lisbon entered into force on 1 December 2009. The Treaty gave the Charter its legally binding status, bringing it up to par with the Treaties of the EU<sup>1</sup>. The Charter was proclaimed for the first

<sup>1</sup> The Treaty of Rome is officially called the Treaty establishing the European Economic Community (TEEC). It led to the

time on 7 December 2000 and consolidated in 2012<sup>2</sup>. Before its legally binding status the Charter already had an effect as a soft-law instrument on how general provisions and EU law were meant to be interpreted<sup>3</sup>.

The Lisbon Treaty is the legal basis for the Charter. Article 6 (1) of the Lisbon Treaty states that the provisions of the Charter shall not extend in any way the competences of the EU as defined in the Treaties and that the rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter that set out the sources of those provisions. The Charter's Article 51 (1) concerns the principle of subsidiarity and states that the Charter must be taken into account when EU law is implemented<sup>4</sup>. Fundamental rights are part of EU primary law and, therefore, must "be respected when this body of law is applied by courts or authorities of the Member States"<sup>5</sup>. This applies to the rights of both legal and natural persons in the European Union. These are essential elements in understanding and interpreting the Charter. The Charter does not exclude legal persons from its scope. Hence the Charter guarantees the rights and freedoms of legal persons, such as companies, as well as natural persons.

The Convention and the Charter are closely related. The Charter's Article 52 points out the difference between rights and principles. Article 52 (1) states that any limitation on the exercise of the rights and freedoms recognized by the Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the EU or the need to protect the rights and freedoms of others. This highlights the importance of rights and freedoms in EU law and how they should be taken into account. It also informs us about the prerequisites for limiting rights and freedoms.

Guidance in the interpretation of the Convention can be found in Articles 31–33 of the Vienna Convention of 23 May 1969 on the Law of Treaties<sup>6</sup>. Based on the general rule of interpretation set forth in the Vienna Convention, the Convention should be interpreted in good faith in accordance with the

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founding of the European Economic Community (EEC) on 1 January 1958. The Maastricht Treaty is called The Treaty of European Union (TEU) and it was signed by the members of the European Community on 7 February 1992. See more closely about the historical development of the EU in *Rosas and Armati: EU Constitution law*, Oxford, Hart Publishing, 2012, pp. 1-4 and 9-12

2 *Mathijssen P. S. R. F.: A guide to European Union Law : as amended by the Treaty of Lisbon*, 10th ed., London, Sweet & Maxwell, 2010, pp 25-26; and the Treaty of Lisbon Article 6 (1)

3 *Rosas: Fundamental Rights in the Luxembourg and Strasbourg Courts*, in Carl Baudenbacher et al. (eds), *The EFTA Court: Ten Years On*, Oxford, Hart Publishing, 2005, pp. 164-165

4 The ECJ has taken the Charter as a premise and directly applicable source of law after the Lisbon Treaty. The Charter has been interpreted inter alia in the light of the Convention. See for example case *Volker und Markus Schecke GbR and Hartmut Eifert v. Land Hessen*, 9.11.2010 (C-92/09 and C-93/09).

5 *Rosas and Armati: EU Constitution law*, Oxford, Hart Publishing, 2012, pp. 164-165

6 See for example ECHR case *Golder v. United Kingdom* (21.2.1975, A 18)

ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

When we look more closely at how we should interpret the Convention and consequently the Charter, the following principles have been established by case-law of the ECHR. First of all, the ECHR stated in *Soering v. United Kingdom*<sup>7</sup> that the Convention's text should be understood in its context and in light of its object and purpose, which is closely related to the principle of effectiveness<sup>8</sup>. The ECHR and other European institution have been reluctant to consider potential violations, but in the *Soering* case the ECHR made exception<sup>9</sup>. Secondly, in *Airey v. Ireland*<sup>10</sup>, the ECHR stated, concerning the principle of effectiveness, that the Convention is not intended to guarantee rights that are theoretical or illusory but rights that are practical and effective.

Thirdly, terms should be interpreted independently (autonomous concept) if comparing the ordinary meaning of terms in the Convention to similar terms in domestic law leads to unsatisfactory or even impossible result<sup>11</sup>. It is also necessary to highlight that the ECHR has a dynamic and ever-developing way of interpreting the Convention when creating new case-law. This can be seen in the ECHR case *Tyrer v. United Kingdom*<sup>12</sup>, where the Court stated that the Convention is a living instrument which must be interpreted in light of present-day conditions.

Fourthly, it is notable that the ECHR uses comparison of the laws and legal systems of Member States (comparative method) when the Convention is interpreted<sup>13</sup>. In the case of *Tyrer v. United Kingdom* the Court compared commonly accepted standards in the penal policy of the Member States of the Council of Europe to Isle of Man's standards and this led to a conclusion that the provisions of Manx legislation

7 7.7.1989, A 161

8 In para 87 the Court stated that "in interpreting the Convention regard must be had for its special character as a treaty for the collective enforcement of human rights and fundamental freedoms (see the *Ireland v. the United Kingdom* judgment of 18 January 1978, Series A no. 25, p. 90, § 239). Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective (see, inter alia, the *Artico* judgment of 13 May 1980, Series A no. 37, p. 16, § 33). In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with "the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society" (see the *Kjeldsen, Busk Madsen and Pedersen* judgment of 7 December 1976, Series A no. 23, p. 27, § 53)."

9 *Zwart: The Admissibility of Human Rights Petitions : The Case Law of the European Commission of Human Rights and the Human Rights Committee*, Netherlands, Martinus Nijhoff Publishers, 1994, pp. 51-54

10 9.10.1979, A 32

11 See ECHR case *Engel et al. v. The Netherlands* (8.6.1976, A 22) and *Letsas: The Truth in Autonomous Concepts: How To Interpret the ECHR*, *European Journal of International Law*, 2004, Vol. 15, No. 2, pp 281-290; Letsas describes the idea of autonomous concept on page 4 saying that "the Commission grants that there is a lack of correspondence between the two and it makes a claim about their relation: domestic law classification is relevant but not decisive for the meaning of the concepts of the Convention. This is what the adjective 'autonomous' stands for: the autonomous concepts of the Convention enjoy a status of semantic independence: their meaning is not to be equated with the meaning that these very same concepts possess in domestic law. In other words, 'ECHR criminal charge' does not necessarily mean 'domestic-law criminal charge'."

12 25.4.1978, A 26

13 See more about the comparative method in *Gless and Martin: The comparative method in European Courts: A comparison between the CJEU and ECtHR?*, *Bergen Journal of Criminal Law and Criminal Justice*, Volume 1, Issue 1, 2013, pp. 36-52; and see also paras 76-80 of General Advocate Mengozzi's opinion in the case of *DEB v. Germany* (C-279/09)

concerning judicial corporal punishment were not up to date<sup>14</sup>.

Fifthly, we must consider the doctrine of the margin of appreciation when the Convention is interpreted<sup>15</sup>. The doctrine refers to the space for maneuvering that the Strasbourg organs are willing to grant national authorities in fulfilling their obligations under the Convention<sup>16</sup>. This doctrine has different meanings and it is difficult to define precisely because it depends on the context<sup>17</sup>. In spite of that one general definition of the doctrine states that “the (contracting) state is allowed a certain measure of discretion, subject to European supervision, when it takes legislative, administrative or judicial action in the area of a Convention right”<sup>18</sup>.

Article 52 (3) states that the meaning and scope of rights guaranteed by the Charter shall be the same as those laid down by the Convention and that this provision shall not prevent EU law providing more extensive protection.

Article 52 (5) states that the provisions of the Charter may be implemented by legislative and executive acts. Article 52 (7) states that the explanations drawn up as a way of providing guidance in the interpretation of the Charter shall be given due regard by the courts of the EU and of the Member States. These explanations have been published in the Official Journal of the EU.

In the ECJ case *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Germany*<sup>19</sup> (hereinafter ‘DEB v. Germany’), the Court stated in para 28 that the principle of effectiveness, the detailed procedural rules governing actions for safeguarding an individual’s rights under EU law must not make it impossible or excessively difficult in practice to exercise rights conferred by EU law<sup>20</sup>. The Court was looking for guidance from explanations concerning the question of the right of a legal person to legal aid in paras 32 and 36. In para 32 the Court stated that according to the explanations relating to that article, which, in accordance with the third subparagraph of Article 6 (1) TEU and Article 52 (7) of the Charter, have to be taken into consideration for the interpretation of the Charter, the second paragraph of Article 47 of the Charter corresponds to Article 6 (1) of the Convention. In para 36 the Court continued its interpretation and stated that as regards Article 47 (3) of the Charter, in particular, the last paragraph of

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14 See para 31

15 See CETS 213 – Human Rights (Protocol No. 15), 24.VI.2013, Article 1 which highlights the importance of the doctrine of the margin of appreciation; and see also the well known ECHR case *Handyside v United Kingdom* (7.12.1976, A 24) paras 48-49

16 *Greer*: The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights, Council of Europe, 2000, p. 5

17 *Scheinin, Krunke and Aksenova* (Eds): Judges as Guardians of Constitutionalism and Human Rights, Cheltenham, UK and Northampton, MA, USA, Edward Elgar Publishing, 2016, p. 345

18 *Anthony*: UK Public Law and European Law - The Dynamics of Legal Integration, Oxford and Portland, Oregon, Hart Publishing, 2002, p. 71

19 22.12.2010, C-279/09

20 See, inter alia, Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* (1976) ECR 1989, paragraph 5; Case C-432/05 *Unibet* (2007) ECR I-2271, paragraph 43; and Case C-268/06 *Impact* (2008) ECR I-2483, paragraph 46

the explanation relating to Article 47 mentions the judgment *Airey v. Ireland*<sup>21</sup>, according to which provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy. No indication is given as to whether such aid must be granted to a legal person or of the nature of the costs covered by that aid. The Court could not find a clear answer on how to interpret the right of a legal person to legal aid from those explanations, but we will discuss *DEB v. Germany* in more detail later.

When considering whether domestic courts should apply the Charter, we must point out the ECJ case *Åklagaren v. Hans Åkerberg Fransson*<sup>22</sup>. The Court ruled on how the Charter must be respected in cases based on domestic law, and when the Charter is applicable. In para 20 the Court considered that the definition of the field of application of the fundamental rights of the EU is borne out of the explanations relating to Article 51 of the Charter, which, in accordance with the third subparagraph of Article 6 (1) TEU and Article 52 (7) of the Charter, have to be taken into consideration for the purpose of interpreting it<sup>23</sup>. According to those explanations, the requirement to respect fundamental rights defined in the context of the EU is only binding on the Member States when they act within the scope of EU law. In para 21 the Court continued by saying that since the fundamental rights guaranteed by the Charter must be complied with where national legislation falls within the scope of EU law, situations covered by EU law where those fundamental rights are not applicable cannot exist. The applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter. However, in para 22 the Court ruled that where a legal situation does not come within the scope of EU law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction<sup>24</sup>. The Court's ruling was important and at the same time this landmark case raised controversial opinions concerning its legal issues<sup>25</sup>.

### **3. Legal aid in the European Union and in Finland**

#### **3.1. Access to justice and legal aid – the European perspective**

There are varied approaches to the scope of legal aid among European states. At the very minimum, legal aid comprises legal representation before the court. However, the majority of European states also provide legal aid in the form of legal advice. Legal aid can thus both safeguard the rights of individuals in

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21 Eur. Court H.R., Series A, No 32, p. 11

22 C-617/10

23 See, to this effect, Case C-279/09 *DEB* (2010) ECR I-13849, paragraph 32

24 See, to this effect, the order in Case C-466/11 *Curà and Others* (2012) ECR, paragraph 26

25 See the Opinion of Advocate General and written observations by the Kingdom of Sweden, the Kingdom of the Netherlands, the Kingdom of Denmark, the Czech Republic, the Republic of Austria, Ireland and the European Commission.

legal proceedings in the form of representation and provide access to law in the form of legal advice. In most European states legal aid includes an exemption from paying court fees. Many states also provide legal aid for the enforcement of judicial decisions. In some legal systems, legal aid is even provided for alternative dispute resolution or for fees of technical advisers or other experts.<sup>26</sup>

A key element in granting legal aid is to consider who the beneficiary of the aid is. Legal aid can be, and it often is, restricted to particular categories of users. Legal persons are usually not eligible for legal aid. In his opinion of *DEB v. Germany*, General Advocate Mengozzi summarised some national approaches. According to the opinion para 77, in France it is possible to grant legal aid to non-profit-making legal persons established in France which lack sufficient resources. Other legal persons are ineligible for legal aid but may deduct the costs relating to court proceedings for tax purposes. In Italy, a payment in proportion to the amount involved in the case concerned is required for entry in the cause list. Only ‘poor citizens’, the actual wording of the Italian legislation, may be exempted from payment of the charge. In Luxembourg, legal aid is reserved for natural persons, but some of them are nonetheless ineligible for it; these include tradesmen, manufacturers, craftsmen and members of liberal professions who are involved in proceedings relating to their commercial or professional activity. Similarly, legal aid may not be granted in respect of proceedings arising from a speculative activity. Denmark restricts the availability of legal aid to natural persons, except in entirely exceptional circumstances in cases having implications of principle or that are in the public interest; cases set in the manufacturing and commercial context fall, as a rule, outside the scope of the right to legal aid.

General Advocate Mengozzi concluded in paras 79–80 that there is no truly common principle which is shared by the Member States in awarding legal aid to legal persons. His second conclusion was that the practice of distinguishing between commercial and non-commercial legal persons, with the effect that the latter are more readily granted legal aid, is relatively commonplace in the Member States.

EU legislation does not call for a unified approach to granting legal aid to legal persons. The Council Directive concerning legal aid in cross-border disputes<sup>27</sup> has set minimum standards for the legal aid systems of Member States. The Directive seeks to promote the application of legal aid in cross-border disputes for persons who lack sufficient resources where aid is necessary to secure effective access to justice<sup>28</sup>. The Directive establishes the minimum level of legal aid to be made available to EU citizens and third-country nationals habitually residing in a Member State provided they meet the conditions set forth in the Directive.<sup>29</sup> The Member States are, of course, free to provide applicants with a more favorable

<sup>26</sup> *CEPEJ Studies No. 12*, European judicial systems, 2010, p. 49-52

<sup>27</sup> 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 disputes

<sup>28</sup> *Ibid.*, (5)

<sup>29</sup> *Ibid.*, (13)

legal aid arrangement than the minimum required by the Directive<sup>30</sup>.

It is worth noting at this point that the Directive only calls for legal aid to be provided for natural persons. According to Article 3 (1), natural persons involved in a dispute covered by the Directive shall be entitled to receive appropriate legal aid in order to ensure their effective access to justice in accordance with the conditions laid down in the Directive. According to Article 4, Member States shall grant legal aid without discrimination to EU citizens and third-country nationals residing lawfully in a Member State.

Furthermore, Article 6 (3) of the Directive states that when taking a decision on the merits of an application and without prejudice to Article 5, Member States shall consider the importance of the individual case to the applicant but may also take into account the nature of the case when the applicant is claiming damage to his or her reputation but has suffered no material or financial loss or when the application concerns a claim arising directly out of the applicant's trade or self-employed profession. The Directive thus seems to exclude all manner of profit-seeking endeavors and legal persons from its scope. This being the case, there is no necessity for Member States to have a unified approach to granting legal aid to legal persons or even natural persons seeking to initiate court proceedings which arise from or pertain to their livelihood (i.e. trade or self-employed profession). No requirement to grant legal aid to legal persons is conferred on Member States by other international conventions or institutions, either<sup>31</sup>. It is therefore not surprising to find differences in Member States' legislation.

The Directive only concerns cross-border litigation. According to Article 2 (1) of the Directive, for the purposes of the Directive, a cross-border dispute is one where the party applying for legal aid in the context of the Directive is domiciled or habitually resident in a Member State other than the Member State where the court is sitting or where the decision is to be enforced. In cross-border litigation the Directive thus applies regardless of the nature of the case save for the exceptions stated above. The case is not required to be based directly or indirectly on EU law.

### **3.2. Legal aid history in Finland**

In Finland, there was no legislation concerning free trial before the year 1955. However, the Act of 1734 included a provision under which the court could designate an advocate to represent the poor in the court for free. This provision was very seldom applied. The Act also included a few other provisions aiming to make the situation of the poor easier, but they eventually proved to be quite meaningless. The largest cities had legal aid offices, but legal aid was provided only for the local residents.<sup>32</sup>

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<sup>30</sup> Council Directive 2002/8/EC (31)

<sup>31</sup> It is worth noting that the Council of Europe has given several Recommendations and Resolutions in the field of legal aid.

<sup>32</sup> Paragraph translated from: *Jokela: Oikeudenkäyntikulut ja maksuton oikeusapu, Lakimiesliiton kustannus, Tammer-Paino, Tampere, 1995, p. 50*

The first Act on Cost-Free Legal Proceedings came into effect at the beginning of 1956. According to the Act, civil or criminal proceedings before a general court or military court were free of charge. Petitionary matters and litigations in other special courts were excluded from the scope of the Act, mainly for economic reasons. The purpose of the legislation was to remove the obvious defects until the State had enough experience on free trial and its costs to the State. However, the Act remained virtually unaltered for almost 20 years.<sup>33</sup>

In 1973, a new Act on Cost-Free Legal Proceedings and the Public Legal Aid Act were enacted. The essential difference between their scope was that a free trial could only be granted in certain legal issues specified by the Act, whereas general legal aid could be given to natural persons in all legal matters. The Acts were parallel and complementary elements of the legal aid system. The Law Committee of Parliament considered that, in principle, a free trial should have been granted in all cases in which the legal aid office was required to provide general legal aid, but this was not possible for economic reasons. Therefore, the expansion of the scope of the Act was modest. This hardly increased the cost of legal aid to the State. In matters which were excluded from the scope of the Act, the necessary legal assistance was meant to be arranged through municipal legal aid.<sup>34</sup>

The scope of petitionary matters was expanded significantly in the 1980s. After the amendment of the Marriage Act, which came into effect at the beginning of 1988, divorce cases were considered petitionary matters; before that they were civil cases. This significantly reduced the number of free trials. In 1988, the State began to prepare amendments to repeal certain specific conditions for free trials in petitionary matters. At the same time, some technical amendments were made to the Act on Cost-Free Legal Proceedings in order to prepare Finland for accession to the Convention, which set forth special requirements for the Parties to the Convention to provide legal protection for people. The amendments enabled Finland's accession to the Convention in 1989 and its ratification in the following year.<sup>35</sup>

Because of the recession in the early 1990s, the Government had to find means to reduce the costs of the free trial system. This led, once again, to legislative amendments. The new amendments included restriction of access to legal counsel in simple petitionary and criminal matters, and the introduction of a Ministry of Justice approved table to assess the conditions for a free trial.

### **3.3. Legal aid in Finland**

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33 Paragraph translated from: Jokela: Oikeudenkäyntikulut ja maksuton oikeusapu, Lakimiesliiton kustannus, Tammer-Paino, Tampere, 1995, p. 51

34 *Ibid.*, pp. 51-52

35 *Ibid.* pp. 54-56

The Legal Aid Act<sup>36</sup> regulates legal aid in Finland. Legal aid can be defined as professional legal services made available to people who cannot afford such services at market prices. The fees for legal services compel many people to apply for free or cheap services. Legal aid may be granted for civil, criminal and administrative matters. A person who receives legal aid is totally or partially exempt from having to pay for a lawyer and interpreter, court hearings, official documents, compensation for witnesses, and enforcement charges in connection with the judgment.<sup>37</sup>

Under section 2 (1) of the Legal Aid Act, legal aid may be given to a person who has a legal domicile in Finland and to persons who have a legal domicile or a place of residence in a Member State of the EU or the European Economic Area. “Where a case is heard by a Finnish court, the person involved may be entitled to legal aid irrespective of where he or she lives. For a special reason, a person may also be entitled to legal aid in other cases.”<sup>38</sup> A special reason may occur, for instance, where a foreigner who does not meet the requirements of section 2 (1) but currently stays in Finland needs legal advice or other legal aid in a matter that concerns his or her stay in Finland.

Under section 2 (3) of the Legal Aid Act, legal aid is not provided to companies or corporations. Legal aid may be given to an entrepreneur in a matter that concerns his or her business activities only if there is a special reason for this, taking account of the nature and scale of the activities, the economic and personal situation of the entrepreneur and the circumstances as a whole. However, legal aid is not given to an entrepreneur if the case is brought to court.

In Finland matters considered as part of business activities have traditionally not been eligible for general legal aid, such as basic legal counseling. Restrictions to this result from the idea that entrepreneurs generally have sufficient resources to finance the legal counseling that they need in their business. This is also the main reason why supporting entrepreneurs through legal counseling has not been found justifiable. However, it has recently been recognised that especially small entrepreneurs and self-employed persons can in fact be comparable to employees in terms of their financial means. According to the government proposal<sup>39</sup> for the Legal Aid Act, the aim is, for instance, to make it possible for small entrepreneurs to get legal aid if the requirements of the above mentioned section are met. An entrepreneur should be entitled to legal aid without special reasons in matters that concern his or her business when the said requirements are met and he or she is personally a party in court.

“In order to receive legal aid, one must apply for it from a state legal aid office. It is given either free of

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36 Act 257/2002

37 *Surakka*:: Access to Finnish Law, Helsinki, Talentum Media Oy, 2012, p. 225

38 *Ibid.*

39 Source of law in Finland: Legislation, common habit, preparations for the law (committee reports, government proposals and Parliamentary committee’s reports and statements), case-law, legal literature and legal comparison

charge or, where the applicant's available means exceed a certain limit, against his or her own contribution called a deductible. The amount of the deductible varies according to the available means. The decision in each case is based on the applicant's financial situation. Applicants whose available means do not exceed an amount specified by the relevant government decree will receive legal aid. Where the monthly available means of a single person are at least EUR 1,300<sup>40</sup> (2016)<sup>41</sup>, or those of each spouse at least EUR 1,200 (2016), legal aid is not granted."<sup>42</sup>

When legal aid is granted, a public legal aid attorney or a private lawyer is appointed for the applicant. In special cases, legal aid may only cover court fees. "A public legal aid attorney serves at a state legal aid office. He or she provides legal services for recipients of legal aid. As a rule, a court may appoint a private lawyer chosen by the client to act as a trial lawyer in cases heard by a court of law. The private lawyer has to be either an advocate or usually another lawyer eligible under the Code of Judicial Procedure."<sup>43</sup>

#### 4. Access to justice and legal aid

As described above, the scope of legal aid varies in Europe. We will now explore some basic elements concerning legal persons' right to receive legal aid. The first premise is described in the Charter's Article 47 (3), which states that legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice. Legal aid has become an ancillary right intended to guarantee the right to an effective remedy and fair trial, and it is an important component of the principle of effectiveness. Before the Charter these rights were based on the Convention and ECHR case-law concerning the Convention.<sup>44</sup>

Article 6 (1) of the Convention states that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special

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40 A calculation of the applicant's available monthly means is prepared. The assessment is based on the applicant's and his/her spouse's monthly income, necessary living expenses, various costs like maintenance support, child allowances, housing costs day-care charges, taxes, savings and assets. Legal aid will not be given if the applicant has legal expenses insurance, with certain exceptions. Legal aid offices provide minor legal counseling free if it is given by phone or email.

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42 *Surakka*:: Access to Finnish Law, Helsinki, Talentum Media Oy, 2012, pp. 225-226

43 *Ibid*, p. 226

44 *Liisa Holopainen in Peers, Harvey, Kenner and Ward* (eds): The EU Charter of Fundamental Rights: A Commentary, Baden-Baden/Munich/Oxford, Nomos/C.H.Beck/Hart Publishing, 2014, p. 1269

circumstances where publicity would prejudice the interests of justice. Article 6 (3c) states that everyone charged with a criminal offense has the (following minimum) right(s) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

In the ECHR case *Golder v. The United Kingdom*<sup>45</sup> the Court stated that Article 6 (1) of the Convention secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only<sup>46</sup>. In the ECHR case *Airey v. Ireland*, Mrs. Airey wanted to obtain a decree of judicial separation from her husband and referred to the *Golder* case. Mrs. Airey was unable to obtain legal assistance because of her financial situation and the absence of legal aid. Legal aid was not available in any civil matter in Ireland at the time.<sup>47</sup> The Court stated concerning the Convention's Article 6 para 3(c) that despite the absence of a similar clause for civil litigation, Article 6 para. 1 of the Convention may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case<sup>48</sup>. The Court concluded that Mrs. Airey did not enjoy an effective right of access to court and, therefore, there had been a breach of Article 6 (1)<sup>49</sup>. In other words, the Court established that the right of effective access to court may entail legal assistance<sup>50</sup>.

In the ECJ case *DEB v. Germany*, DEB was seeking reparation from Germany for the delay in the transposition of directives concerning common rules for the internal market in natural gas and had applied for legal aid. DEB submitted that it was unable to obtain access to the gas networks of German network operators because of that delay.<sup>51</sup> DEB did not have any income or assets and, therefore, DEB was unable to make the necessary advance payment of court costs. DEB was also unable to pay the lawyer's fees when the lawyer's instruction was compulsory in the main proceedings<sup>52</sup>.

First, the Court approached the problem from a linguistic point of view and stated, as the Commission of the European Communities observed in its written submissions, that the word 'person' used in the first two paragraphs of Article 47 of the Charter may cover individuals, but, from a purely linguistic point of

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45 21.2.1975, A 18

46 *Golder v. The United Kingdom* (21.2.1975, A 18), para 36

47 *Airey v. Ireland* (9.10.1979, A 32), para 9 and 11

48 *Ibid*, para 26

49 *Ibid*, para 28

50 *Palmer, Cornford, Guinchard and Marique* (eds.): *Access to Justice – Beyond the Policies and Politics of Austerity*, Oxford, Hart Publishing, 2015, p. 53

51 *DEB v. Germany*, 22.12.2010 (C-279/09) paras 14-15

52 *Ibid*, paras 16-17

view, it does not exclude legal persons<sup>53</sup>. The Court continued that the right to an effective remedy before a court applies to both natural and legal persons<sup>54</sup>.

The Court pointed out that the right to receive legal aid is not conceived as social assistance in the Charter, unlike in German law. The Court also stated that, similarly, the inclusion of the provision relating to the grant of legal aid in the article of the Charter relating to the right to an effective remedy indicates 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>55</sup> This highlights the nature of legal aid as part of the effective remedies granted by the Charter. The Court stated that it is important in this regard for a litigant not to be denied the opportunity to present his case effectively before the court and referred to the ECHR case *Steel and Morris v. the United Kingdom*<sup>56</sup>. After the references to the ECHR's case-law (see paras 43–47) concerning legal aid, the Court concluded that legal aid may cover both assistance by a lawyer and dispensation from payment of the costs of proceedings and that the selection procedure for legal aid must operate in a non-arbitrary manner.<sup>57</sup> In light of our topic it is worth highlighting the ECHR's decision in the case *VP Diffusion Sarl v. France*<sup>58</sup>, where the ECHR pointed out that the difference in treatment between profit-making companies, on the one hand, and natural persons and non-profit-making legal persons, on the other, is based on an objective and reasonable justification which relates to the tax arrangements governing legal aid, since those arrangements provide for the possibility of deducting all costs of proceedings from taxable profits and of carrying over losses to a subsequent tax year.

After examining the ECHR's case-law, the Court underlined that the grant of legal aid to legal persons is not in principle impossible, but must be assessed in light of the applicable rules and the situation of the company concerned, and continued by listing the elements of consideration when legal aid could be granted to legal persons.<sup>59</sup> The Court ended up with concluding that the principle of effective judicial protection, as enshrined in Article 47 of the Charter, must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, inter alia, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer<sup>60</sup>.

As a conclusion the Court stated that the national court should ascertain whether the conditions for

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53 *DEB v. Germany*, 22.12.2010 (C-279/09), para 38

54 *Ibid*, para 40

55 *Ibid*, paras 41-42

56 15.2.2005, ECHR 2005-II, § 59

57 *DEB v. Germany*, 22.12.2010 (C-279/09) para 45 and 48-49

58 *Ibid*, para 50

59 *Ibid*, para 52 -58

60 *Ibid*, para 59

granting legal aid constitute a limitation on the right of access to the courts which undermines the very core of that right, whether they pursue a legitimate aim and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve. In making that assessment, the national court must take into consideration the subject matter of the litigation, whether the applicant has a reasonable prospect of success, the importance of what is at stake for the applicant in the proceedings, the complexity of the applicable law and procedure, and the applicant's capacity to represent himself effectively. In order to assess the proportionality, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made, and whether or not those costs might represent an insurmountable obstacle to access to the courts. With regard more specifically to legal persons, the national court may take account of their situation. The court may therefore take into consideration, inter alia, the form of the legal person in question and whether it is profit-making or non-profit-making, the financial capacity of the partners or shareholders and the ability of those partners or shareholders to obtain the sums necessary to institute legal proceedings.<sup>61</sup> This means that legal aid is not an absolute part of the right of access to court.

Engström states in her article<sup>62</sup> that the DEB judgment raised the question whether the Court had created a new test for effective judicial protection because the Court did not consider the principle of effectiveness<sup>63</sup> but instead the principle of effective judicial protection and Article 47 of the Charter. The Court also used a different test when assessing the aim and proportionality of the national procedural rule. These things together led to the question whether the principle of effectiveness and principle of effective judicial protection required different things from Member States or whether they were just an expression of the same idea. Engström suspects that the DEB case might be the start of simplification in the area of effective judicial protection in the post-Lisbon Treaty era. She continues by reflecting whether the Court might intend to establish a single *modus operandi* when dealing with the effectiveness of national procedural and remedial rules and Article 47 of the Charter.

In the ECJ's case *GREP GmbH v. Freistaat Bayern*<sup>64</sup> the Court reiterated the DEB judgment by stating that the principle of effective judicial protection, as enshrined in Article 47 of the Charter, may include the right to be exempted from payment of procedural costs and/or fees due for obtaining the assistance of a lawyer in respect of such an action. However, it is for the national court to ascertain whether the conditions for grant of such aid constitute a restriction on the right of access to courts and tribunals which infringes the very essence of that right, whether they pursue a legitimate aim and whether there is a reasonable level of proportionality between the means used and the aim pursued. In carrying out that

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61 *DEB v. Germany*, 22.12.2010 (C-279/09), paras 60-62

62 *Engström*: The Principle of Effective Judicial Protection after the Lisbon Treaty, *Review of European Administrative Law*, Vol 4, Nr 2, pp. 67-68

63 See Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* (1976) ECR 1989

64 C-156/12

assessment, the national court may take into consideration the subject matter of the dispute, any reasonable chances of the applicant's success, the gravity of what is at stake for the applicant, the complexity of the law and procedure applicable and the ability of the applicant to effectively defend his or her cause. In order to assess the proportionality, the national court may also take into account the extent of the procedural costs to be advanced and whether or not they constitute an insurmountable obstacle to access to justice. Having regard more specifically to legal persons, the national court may take account of their situation. Thus, it may take into consideration, in particular, the legal form of the legal person in question and whether it is for profit or not, and the financial capabilities of its members or shareholders and whether it is possible for them to obtain the sums necessary to bring the court proceedings. We can say that the Court made its ruling clear concerning the case DEB and reaffirmed its earlier position.

In the ECJ's case *Sociedade Agrícola v. Instituto da Segurança Social IP*<sup>65</sup> the Portuguese court requested a preliminary ruling concerning the interpretation of Article 47 of the Charter. Portuguese law provides that legal persons pursuing a commercial objective and individual establishments with limited liability are not entitled to legal aid. *Sociedade Agrícola*, established in Lisbon, had requested legal aid of the Instituto in the form of an exemption from payment of court fees and other expenses relating to legal proceedings, as well as the appointment and payment of a lawyer. *Sociedade Agrícola* intended to bring a legal action of the sum of EUR 52,500. The application was denied by the Instituto based on *Sociedade Agrícola* being a legal person pursuing a commercial objective and, therefore, not eligible for legal aid according to Portuguese law.<sup>66</sup>

In the following proceedings, *Sociedade Agrícola* requested that a preliminary reference be made concerning the interpretation of Article 47. The Portuguese court therefore submitted the request for a preliminary ruling regarding whether Article 47, which lays down the right to effective legal protection, precludes national legislation that prohibits legal persons pursuing a commercial objective from obtaining legal aid. Furthermore, the Portuguese court inquired whether Article 47 must be construed as having ensured the right to effective judicial protection, where the domestic law of the Member State, whilst excluding legal persons pursuing a commercial objective from receiving legal aid, automatically grants them an exemption from the costs and charges relating to legal proceedings where they are insolvent or have entered into a composition with creditors.<sup>67</sup>

The ECJ stated that the Charter's scope so far as concerns action of the Member States is defined in Article 51 (1) thereof, according to which the provisions of the Charter are addressed to Member States only when they are implementing EU law. Where a legal situation does not fall within the scope of EU

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65 C-258/13, *Sociedade Agrícola e Imobiliária da Quinta de S. Paio Lda v Instituto da Segurança Social IP*

66 *Ibid*, paras 8-10

67 *Ibid*, paras 11-13

law, the Court has no jurisdiction to rule on it and any Charter provisions relied upon cannot, of themselves, form the basis for such jurisdiction. There was no evidence in the order for reference to indicate that the objective of the main proceedings concerned the interpretation or application of a rule of EU law other than those set out in the Charter. As Directive 2003/8 concerning legal aid did not apply to legal persons and, unlike the case giving rise to the judgment in DEB in which the Court interpreted Article 47 of the Charter in an action for State liability brought under EU law, there was no concrete evidence in the order for reference to indicate that Sociedade Agrícola submitted a request for legal aid for a legal action seeking to protect the rights conferred on it by EU law, the Court concluded that it had no jurisdiction to rule on the questions set forth.<sup>68</sup>

In the case described above, the Court clearly stated that it has no jurisdiction over cases that are purely national. Sociedade Agrícola had no right to invoke Article 47 when the case, for which it was seeking legal aid, did not appear to have a connection to EU law. The Court's decision was consistent and predictable taking into account its former case-law, especially *Åklagaren v. Hans Åkerberg Fransson* referred to above. It seems that access to justice is thus substantially more limited for legal persons than natural persons in the European context.

## 5. Summary

Legal aid has historically been viewed as a social benefit for citizens of insufficient means. From this point of view there are valid reasons for excluding legal persons from its scope. Legal persons are primarily profit-seeking entities that take on risks relating to their endeavors. On the other side of that risk awaits the possibility of profit. Legal proceedings are usually a consequence of one of those risks materializing. There is no need for the State to provide financial support when legal persons incur costs resulting from such an integral part of their economic activity.

That being said, the nature of legal aid has changed from being a social benefit to being a human right and an integral part of ensuring access to justice as enshrined in Article 47 of the Charter. There is nothing to suggest that the rights of Article 47 are conferred on natural persons with a broader scope than they are conferred on legal persons. When rights and freedoms guaranteed by EU law are violated, everyone has a right to an effective remedy before a tribunal regardless of their status as a natural or legal person.

In *Åklagaren v. Hans Åkerberg Fransson* the Court clearly stated that the fundamental rights of the Charter must be applied when Member States act within the scope of EU law. In *DEB v. Germany* the

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<sup>68</sup> C-258/13, *Sociedade Agrícola e Imobiliária da Quinta de S. Paio Lda v Instituto da Segurança Social IP*, paras 16, 20-22, 24

Court stated that legal persons can by invoking Article 47 be eligible for legal aid. In *GREP v. Freistaat Bayern* the Court reiterated its legal position and more clearly defined the conditions which should be considered when assessing the need for granting legal aid to legal persons. In *Sociedade Agricola v. Instituto* the Court outlined the limit of a legal person's right to invoke Article 47.

As there is no truly common approach to the granting of legal aid to legal persons amongst Member States, one can conclude that the Member States have, at least as far as it pertains to the Convention, a broad margin of appreciation concerning the interpretation of effectiveness, access to justice and how big a part legal aid for legal persons plays in it. Member States are therefore well within their rights to limit the accessibility of legal aid to legal persons. However, Member States may not make it in practice impossible to initiate legal proceedings.

Limiting access to legal aid should be based on objective and reasonable justifications. For example, as seen in *VP Diffusion Sarl v. France*, the difference in treatment can be based on differences in tax arrangements. Another interesting possibility would be to consider whether or not responsibility for debt is limited to the legal person itself or if it extends to its members or shareholders. *DEB v. Germany* and *GREP v. Freistaat Bayern* provide the circumstances, which, according to the ECJ, need to be taken into account when assessing whether to grant legal aid or not. Consideration may be given, in particular, to the legal form of the legal person in question and whether it is for profit or not, and the financial capabilities of its members or shareholders and whether it is possible for them to obtain the sums necessary to bring the court proceedings.

We therefore conclude that legal persons should be eligible for legal aid, but only under the strictest of conditions and when legal aid either in the form of exemption of court fees or representation and legal counseling, or both, is necessary to ensure access to justice.