22 The Concept of Legal Aid in the Most Recent Case Law of ECJ

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22.1 Introduction

Article 47 of the Charter of Fundamental Rights[1] of the European Union (ChFR) lays down the principles of effective judicial protection containing in particular, the rights of the defence, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented.[2] These rights result in a consistent system and ensure that each citizen had 'the right to turn to such a court with his legal questions that has to make and enforce a decision in a fair trial after the necessary legal examination.'[3] The right to access to justice can be seen as an essential precondition to achieve this aim. It articulates at the level of fundamental rights the individual's claim to enforce his rights effectively and independently from his financial and material circumstances, legal knowledge or other possibilities. The right to an effective[4] access to justice presumes a state obligation, 'the duty to ensure justice.'[5] In order to fulfil this obligation the state has to introduce procedural measures to facilitate citizens to assert their rights. The concept of legal aid is one major element[6] of these institutions. In the following the question will be examined how the

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1 In other declarations on fundamental rights, the concept of access to justice does not appear e*xpressis verbis*. From the European Convention on Human Rights (ECHR) it can be derived only indirectly by referring to the right to the decision of an independent and impartial tribunal or the provisions on legal assistance. Although the interpretation of these clauses has been considerably broadened by the European Court of Human Rights (ECtHR), the principle of access to justice can still only be extracted by argumentation making it more difficult to rely on it in specific proceedings. *Access to justice in Europe: an overview of challenges and opportunities*, European Union Agency for Fundamental Rights, Vienna, 2010, p. 17. The situation is similar with regards to Art. 14 of the International Covenant on Civil and Political Rights.

2 Judgment of 6 November 2012 in Case C-199/11, *Europese Gemeenschap v. Otis NV and Others* (ECLI:EU:C:2012:684) Para. 48.

3 E. Schilken, *Gerichtsverfassungsrecht*, Carl Heymanns Verlag, Köln, 2003, p. 49.

4 The ECtHR derived the necessity of effective (in contrast to theoretical or illusory) access to justice from the spirit of the ECHR: *Airey v. Ireland*, ECHR (1979) Series A, No. 32, Para. 24.

5 *Airey v. Ireland*, Para. 25.

6 The institutions of the claim to justice support primarily the plaintiff in bringing the legal dispute to court. However, the guarantees of access to justice also have a protective effect for the defendant e.g. the principle of '*actor sequitur forum rei*', special jurisdiction in asymmetric legal relationships or the struggling for a

Court of Justice of the European Union (ECJ) interprets the concept of legal aid, with regards to the principles of legal aid and their interpretation as well as the forms of legal aid and the criteria for entitlement. Through the analysis of the latest judgments of the ECJ a list of standards on legal aid in the context of EU law can be set up. This is especially important in a field where the jurisdiction of the ECJ has developed considerably only recently, after the ChFR gaining the same value as the Treaties.[7]

22.2 The Competence of ECJ

The starting point has to be the limitation of competence as provided for in Article 51 ChFR, as it declares that the fundamental rights guaranteed in the ChFR[8] can be relied on only in legal situations falling within the scope of EU law.[9] This also means that the ChFR does not extend the field of application of EU law, establish any new power for the EU,[10] or modify powers and tasks.[11] So, a provision of the ChFR cannot be, of itself, the basis for jurisdiction of ECJ,[12] not even the light of Article 6 Paragraph 1 TEU.[13] If, however, the legislation at hand falls within the scope of EU, the Court has to give the necessary guidance for the national court to determine whether that legislation is compatible with fundamental rights.[14]

That is why, in cases relating to human rights, the ECJ firstly examines whether the legislative or administrative act in question could/should be regarded as the implementation

unified system of class-action: H. Rösler, *Europäische Gerichtsbarkeit auf dem Gebiet des Zivilrechts*, Mohr Siebeck, Tübingen, 2012, p. 223.

7 It is not aim of this paper to analyse Art. 6 Para. 1 of the Treaty on European Union (TEU) in details. It is only assumed that this provision leads to the ChFR becoming more prominent in the case-law of ECJ and making a more extensive interpretation of human rights in the EU-jurisdiction necessary.

8 In the Kremzow-judgment, ECJ stated that outside the field of application of EU law, the ECJ cannot give the interpretative guidance for the national court especially with regards to the ECHR. Judgment of 29 May 1997 in *Case C-299/95, Friedrich Kremzow v. Republik Österreich*, [1997] ECR I-02629, Para. 19.

9 Judgment of 26 February 2013 in *Case C-617/10, Åklagaren v. Hans Åkerberg Fransson* (ECLI:EU:C:2013:105) Para. 19.

10 Order of 6 October 2005 in *Case C-328/04, Criminal proceedings against Attila Vajnai*, [2005] ECR I-08577.

11 E.g. concerning the labour law relationship between a Member State and its public servants, Order of 10 October 2013 in *Joined Cases C-488/12 to C-491/12 and C-526/12, Sándor Nagy v. Hajdú-Bihar Megyei Kormányhivatal, Lajos Tiborné Böszörményi, Róbert Gálóczhi-Tömösváry and Magdolna Margit Szabadosné Bay v. Mezőgazdasági és Vidékfejlesztési Hivatal and Józsefné Ványai v. Nagyrábé Község Polgármesteri Hivatal* (ECLI:EU:C:2013:703) Para. 15.

12 Order of 12 November 2013 in *Case C-258/13, Sociedade Agrícola e Imobiliária da Quinta de S. Paio Lda v. Instituto da Segurança Social IP* (ECLI:EU:C:2013:810) Para. 20.

13 Order of 1 March 2011 in *Case C-457/09, Claude Chartry v. État belge* [2011] ECR I-00819, Para. 24.

14 *Case C-617/10, Åklagaren v. Fransson*, Para. 19.

of EU law.[15] legal aid[16] or the judiciary rights in general[17] traditionally do not belong to the core competences of the EU and are therefore mainly not covered by the Community legislation, it is highly probable that there is no connection to EU law, e.g. concerning legal aid applicable in criminal procedure (concerning the payment of court costs, more precisely, the determination of fees and expenses of the defendants' advocate).[18] Exceptions are only situations where the party of the main proceedings is requesting legal aid for a legal action seeking to protect the rights conferred on it by EU law,[19] e.g. legal remedy against a decision[20] according to Brussels I. Regulation[21] or jurisdiction in disputes relating to decisions on the payment of agricultural support under the EU common agricultural policy.[22] This way a certain predictability of the case law has evolved, which lead to the declaration of the obligation for national courts to 'ascertain, in the light of the facts in the main proceedings, whether the situation of the claimant in the main proceedings is governed by European Union law'[23] and, if that is the case, to provide an interpretation of the national law in accordance with the human rights. (This interpretation principle will be discussed in details below.)

22.3 The Role of Principles in Legal Aid Cases in the Context of EU Law

Analyzing legal aid in the jurisprudence of the ECJ, it should be attempted to draw up the system of principles which influence the jurisprudence concerning legal aid in the context of EU law.

15 For example by referring to a specific piece of community legislation which gives the framework of the relevant national law, like in order of 13 June 2012 in *Case C-156/12, GREP GmbH v. Freistaat Bayern* (ECLI:EU:C:2012:342) Para. 31. J. Kokott & C. Sobotta, The Charter of Fundamental Rights of the European Union after Lisbon, *EUI Working Papers*, 2010/6. http://cadmus.eui.eu/bitstream/handle/1814/15208/AEL_WP_2010_06.pdf?sequence=3.

16 The existence of a possible connection to EU law is not sufficient either: Judgment of 27 March 2014 in *Case C-265/13, Emiliano Torralbo Marcos v. Korota SA and Fondo de Garantía Salarial* (ECLI:EU:C:2014:187) Paras. 36-37.

17 Order of 19 June 2014 in *Case C-45/14, Criminal proceedings against István Balázs and Daniel Papp* (ECLI:EU:C:2014:2021) Paras. 21-22.

18 Order of 8 May 2013 in *Case C-73/13, T* (ECLI:EU:C:2013:299) Paras. 13-14.

19 *Case C-258/13, Sociedade Agrícola*, Para. 23.

20 *Case C-156/12, GREP.*

21 Council Reg. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 012 and its Recast, Council Reg. 1215/2012, OJ 2012 L 351.

22 Judgment of 27 June 2013 in *Case C-93/12, ET Agrokonsulting-04-Velko Stoyanov v. Izpalnitelen direktor na Darzhaven fond 'Zemedelie' – Razplashtatelna agentsia* (ECLI:EU:C:2013:432).

23 Judgment of 17 January 2013 in *Case C-23/12, Mohamad Zakaria* (ECLI:EU:C:2013:24) Para. 40.

22.3.1 Interpretation in Accordance with ECHR

The principle of interpretation in accordance with ECHR, providing a coherent scheme for the interpretation of human rights has been an important feature of the ECJ case law even before the ChFR entered into force.[24] Currently the legal basis is provided by Article 52 Paragraph 3 ChFR.[25] ECJ has given considerable guidance to interpret this provision paying attention to several practical scenarios: If the situation is governed by EU law, the level of protection has to be compared in the two documents. If the ChFR grants wider protection,[26] it forms the legal basis of the judgment. Are there any uncertainties concerning the meaning or scope of terms or provisions, they 'must be interpreted in its context, in the light of other provisions of EU law, the law of the Member States and the case-law of the European Court of Human Rights.'[27] If the level of protection of a particular right is the same[28] in the ECHR and in ChFR, the interpretation given by the ECtHR[29] has to be followed.[30] Through the adaptation of the provisions of ChFR to the corresponding provisions of the ECHR, the ECHR does not become an integral part of EU law,[31] but this way the national legislator, national courts and even applicants in a given case can be more certain in the probable outcome of the supervision of a legal act in the field of access to justice.

22.3.2 Margin of Appreciation

The second important feature of access to justice under EU law is that concerning several aspects of this right, EU law offers only implicit requirements, leaving a considerable margin of appreciation for the domestic legislator. This is especially characteristic with regards to the elaboration of the detailed procedural rules under the principle of procedural

24 Before the ChFR the ECHR was regarded as a compendium of the constitutional traditions common to the Member States. Judgment of 25 July 2002 in *Case C-50/00, Unión de Pequeños Agricultores v. Council of the European Union*, [2002] ECR I-06677, Para. 39. This way it became possible to rely on the ECHR in cases falling within the scope of EU law and having human rights relevance. L.A.M. Barnhoorn, et al. (eds.), *Netherlands Yearbook of International Law – 2002*, T. M. C. Asser Instituut, The Hague, 2003, p. 220.

25 For a detailed description on the evolution of this provision: S. Peers &. A. Ward: *The European Union Charter of Fundamental Rights*, Hart, Oxford, pp. 170-173.

26 Judgment of 5 October 2010 in *Case C-400/10 PPU, J. McB. v. L. E*, [2010] ECR I-08965, Para. 53.

27 Judgment of 22 December 2010 in *Case C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, [2010] ECR I-13849, Para. 37.

28 For the determination of 'similarity': *Case C-400/10, PPU, J. McB*., Para. 53.

29 ECJ concluded that ECHR is inseparably linked to the practice of ECtHR: *Case C-279/09, DEB*, Para. 35.

30 Judgment of 14 February 2008 in *Case C-450/06, Varec SA v. État belge*, [2008] ECR I-0058, Para. 48.

31 H-J. Blanke & S. Mangiameli, *The European Union after Lisbon*, Springer, Berlin-Heidelberg, 2012, p. 173; Opinion of the Court *2/13* of 18 December 2014, Para. 180.

autonomy of the Member States.[32] This kind of autonomy appears e.g. with respect to the determination of preconditions for litigation,[33] the assurance of further levels of judicial supervision[34] or the transposition and enforcement of obligation resulting from EU law but not having direct effect in the domestic legal order.[35]

This margin of appreciation has a significant effect on the interpretation of the requirements of EU law by national courts as well. It is a generally accepted principle of EU law that national courts are responsible for the correct application of the ruling by ECJ in specific cases.[36] As, however, there are very few specific EU rules in the fields where the question of access to justice arises because the competences of the EU are often limited or at least have not been exercised, national courts have generally wider possibilities and duties of interpretation. An example might be the DEB-case,[37] in which the referring court asked whether exclusion of legal persons from legal aid would be in accordance with the principle of effectiveness.[38] Nevertheless, the ECJ considered that the problem was rather connected to the right of a legal person to effective access to justice and to the principle of effective judicial protection.[39] After a recast of the question, ECJ ruled on the interpretation possibilities of the national courts. The fact that in this specific case the ECJ gave a broad margin of evaluation to the national courts can be lead back to two facts. Firstly, legal aid is very much connected to the functioning of the judiciary in each state, so it affects a field where the competences of the EU are limited, even with regard to the ChFR. Secondly, the right to access to justice and legal aid operate with such terms (like neediness, financial capacities, legitimate aim of the persecution of rights, prohibitively expensive character of the litigation etc.) which cannot and should not be determined at EU level, they have to take the specificities, legal traditions and even the standard of living in a particular state into account. This kind of subsumption and appreciation should not be excluded from the competences of national courts.

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32 Judgment of 15 March 2007 in *Case C-35/05, Reemtsma Cigarettenfabriken GmbH v. Ministero delle Finanze*, [2007] ECR I 02425, Para. 40.

33 Judgment of 18 March 2010 in Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, *Rosalba Alassini v. Telecom Italia SpA, Filomena Califano v. Wind SpA, Lucia Anna Giorgia Iacono v. Telecom Italia SpA and Multiservice Srl v. Telecom Italia SpA*, [2010] ECR I-02213, Para. 67.

34 Judgment of 30 May 2013 in Case C-168/13 PPU, *Jeremy F. v. Premier minister* (ECLI:EU:C:2013:358) Para. 44.

35 Judgment of 8 March 2011 in Case C-240/09, *Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky*, [2011] ECR I-01255, Para. 45.

36 Judgment of 27 June 2013 in Case C-492/11, *Ciro Di Donna v. Società imballaggi metallici Salerno srl* (ECLI:EU:C:2013:428) Para. 24. Judgment of 18 October 1990 in Joined Cases C-297/88 and C-197/89, *Massam Dzodzi v. Belgian State*, [1990] ECR I-03763, Para. 38.

37 Case C-279/09, DEB; Case C-156/12, *GREP*, Para. 38.

38 Case C-279/09, DEB, Para. 27.

39 On the question of effective judicial protection: G. Di Federico (ed.), *The EU Charter of Fundamental Rights*, Springer, Dordrecht-Heidelberg-London-New York, 2011. pp. 98-100.

Nevertheless, this does not mean that the ECJ does not or should not give any guidance on the factors to be taken into account. In a case concerning environmental matters ECJ ruled that the national court should not decide on the prohibitively expensive nature of the litigation solely on the basis of that claimant's financial situation, but must also carry out an objective analysis on the amount of the costs, the situation of the parties concerned, the prospect of success, the importance of the question for the claimant and the complexity of the relevant law and procedure, the potentially frivolous nature of the claim as well as the existence and features of the national legal aid scheme.[40]

A further restriction concerning the autonomy of national courts in interpreting the right to access to justice is that several times the right to legal aid stems from provisions of EU law, as in the case of the right of members of the public concerned to have access to a review procedure to challenge the legality of administrative decisions, acts or omissions.[41] In these cases the national courts should not leave the necessity for a uniform application of EU law out of consideration.[42]

These examples show that in the absence of binding EU law setting out the framework of the claim for legal aid a broader margin of appreciation is allowed in the national law. Concerning the legislation, this affects the way, how specific procedural provisions are constructed, in the jurisprudence the definition of particular factors of consideration and the application of these terms to the specific case. However, even in the absence of more specific rules of EU law, the margin of appreciation should be applied in a manner consistent with the requirements of the protection of fundamental rights.[43]

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40 Judgment of 11 April 2013 in Case C-260/11, *The Queen, on the application of David Edwards and Lilian Pallikaropoulos v. Environment Agency and Others* (ECLI:EU:C:2013:221) Para. 41. At this point, it should be mentioned that concerning some features, the legal aid scheme under Aarhus Convention and the general requirements towards access to justice under Art. 47 ChFR might differ. Nevertheless this paper holds the view that these differences are only relevant to the extent that they affect the different aims of the two institutions, namely the protection of social interests versus individual rights: 'Nevertheless, legal protection under the Aarhus Convention goes further than effective legal protection under Article 47 of the Charter of Fundamental Rights, as the Commission rightly points out. Article 47 expressly relates to the protection of individual rights. The basis for the assessment of the need to grant aid for effective legal protection is therefore the actual person whose rights and freedoms as guaranteed by the European Union have been violated, rather than the public interest of society, even if that interest may be one of the criteria for assessing the need for the aid.' [Advocate General Kokott in Case C-260/11, *Edwards and Pallikaropoulos*, (ECLI:EU:C:2012:645), Para. 39.] As even AG Kokott suggests these differences influence rather the judicial assessment in specific cases, the determination of the necessity of legal protection, the general statements concerning legal aid seem to be applicable even if they have been formulated with regards to the Aarhus Convention.

41 Art. 10a of Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment OJ 1985 L 175; Art. 13 a) of Council Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ 2008 L 348.

42 Case C-260/11, *Edwards and Pallikaropoulos*, Para. 30.

43 Advocate General Trstenjak in Case C-411/10, *N. S. v. Secretary of State for the Home Department*, [2011] ECR I-13905, Para. 80; Judgment of 13 July 1989 in Case C-5/88, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, [1989] ECR 02609, Para. 22.

Furthermore, the national law is subject to the general principles of equivalence and effectiveness (in so far as the question falls within the scope of EU law). Where the national act concerned does not comply with them, an infringement of EU law can be taken to exist.[44]

22.3.3 *General Principles of EU Law: Principle of Equivalence and Effectiveness*

As already mentioned, national legal aid schemes – in lack of more specific EU rules – have to comply with the general principles of EU law, especially the principles of equivalence and effectiveness.

The principle of equivalence means that the legal aid available at national level for individuals to secure their rights under EU law should not be less favourable than that available for similar actions in national law.[45] Firstly, the principle may have relevance if in lack of relevant national law provisions the applicant is deriving his right to an effective access to justice immediately from EU law. This is typical, if the applicant is relying on community provisions because there is no adequate domestic law granting the access or he wants to prove its inapplicability.[46] In this case, his procedural position may not be less favourable than that of the one who may rely on the national legislation when enforcing his rights. Secondly, it may occur that domestic provisions concerning access to justice treat claims with an interstate element less favourably than purely domestic ones. In this case the difference in treatment is not due to a lack of legal basis but concerns the persons enforcing their procedural rights. Despite the national legislator's margin of appreciation, this may not result in the breach of the principle of equivalence.

As already mentioned, according to ECthR, the requirement of effectiveness is a conceptional feature of legal aid: 'The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective […] This is particularly so of the right of access to the courts in view of the prominent place held in a democratic

44 Judgment of 6 October 2009 in Case C-40/08, *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira*, [2009] ECR I-09579, Para. 38; Advocate General Trstenjak in Case C-618/10, *Banco Español de Crédito, SA v. Joaquín Calderón Camino* (ECLI:EU:C:2012:74) Para. 61.

45 Judgment of 16 May 2000 in Case C-78/98, *Shirley Preston and Othes v. Wolverhampton Healthcare NHS Trust and Others and Dorothy Fletcher and Others v. Midland Bank*, [2000] ECR I-03201, Para. 31. For a more detailed analysis on the principle of equivalence in general, see: M. Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation*, Hart, Oxford, 2004, pp. 53-55; P. Craig & G. de Búrca (eds.), *The Evolution of EU Law*, Oxford University Press, Oxford, 2012, pp. 421-430; L. Ortega Álvárez, *Derecho comunitario europeo*, Lex Nova, Valladolid, 2007, pp. 87-90.

46 E.g. Judgment of 5 December 2013 in Case C-413/12, *Asociación de Consumidores Independientes de Castilla y León v. Anuntis Segundamano España SL* (ECLI:EU:C:2013:800).

society by the right to a fair trial.'[47] However, in the context of EU law, attention should be paid to the specific meaning of effectiveness under EU law too: the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law.[48] This principle gave grounds to an extensive interpretation of the personal scope of legal aid[49] in the already mentioned DEB-case with regards to the entitlement between natural and legal persons. In a case about court fees for an application for a European payment order, ECJ ruled that national courts remain free to determine the amount of the court fees in accordance with national law, but only if they safeguard the principles of effectiveness and equivalence.[50] As the amount of court fees is a decisive question when initiating a procedure, the principle of effectiveness gives guidance to the courts not to determine the fees in an extremely high sum, so indirectly supports access to justice. It can be concluded that the principle of effectiveness affects the (personal) scope of legal aid, as well as the determination of material, substantial questions.

22.4 The Scope of Legal Aid

The next question is to determine the scope of legal aid delimited by the above mentioned principles. In this context the factual scope of application (the forms of legal aid) and the personal scope (the different categories of persons to whom legal aid may be granted) have to be examined.

22.4.1 The Forms of Legal Aid

The question of legal aid is in the public opinion repeatedly connected to the criminal procedure, especially because the international human rights documents place the question

47 The concept of effective access to justice is highly connected to the interpretation of the ECtHR: *Airey v. Ireland*, Para. 24.

48 Judgment of 16 December 1976 in Case C-33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, [1976] ECR 01989, Para. 5; Judgment of 13 March 2007 in Case C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern*, [2007] ECR I-02271, Para. 43. For a more detailed analysis on the principle of effectiveness in general: K. Lenaerts, I. Maselis & K. Gutman, *EU Procedural Law*, Oxford University Press, Oxford, 2014, pp. 107-155; A. Thies, General Principles in the Development of EU External Relations Law in M. Cremona & A. Thies (eds.), *The European Court of Justice and External Relations Law*, Hart, Oxford, 2013, pp. 155-157; M. Frischhut, *Grundlagen des Rechts der Europäischen Union*, Linde, Wien, 2013, pp. 49-51.

49 Case C-279/09, *DEB*, Para. 59. F. Fontanelli, The European Union's Charter of Fundamental Rights two years later, *Perspectives on Federalism*, 2011/3.

50 Judgment of 13 December 2012 in Case C-215/11, *Iwona Szyrocka v. SiGer Technologie GmbH*, (ECLI:EU:C:2012:794) Para. 34.

in chapters related to the basic guarantees of criminal process (*nullum crimen*, presumption of innocence). As in these cases the state and its organs are persecuting a crime and the success is a public interest, the accusation has to be confirmed at the expense of the state as well. So, concerning the position of the accused, it is generally the lack of qualified legal representation that can influence his defence.[51] As far as the private prosecutor and the injured party in an adhesive procedure are concerned, their persecution of rights should be assured from the first steps of the criminal procedure.[52] In this context their position is rather similar to a claimant in a civil or administrative procedure.[53]

In the civil procedure, the major barrier that can definitely impede the enforcement of rights is the amount of court fees and other procedural costs that – under certain circumstances – may include the costs of the legal representation[54] as well. It is namely, the claiming party who has to pay the costs of the judicial procedure in advance. So, ECJ has confirmed that proceedings should not be prohibitively expensive, meaning that they should not prevent the persecution of rights.[55] ECJ case law illustrates possible solutions in national legal orders to achieve this aim, like to offer a general exemption from court fees in certain cases,[56] to cap the costs for which the unsuccessful party may be liable,[57] to reduce certain costs with regard to the neediness of the claimant[58] or to give courts discre-

51 K. Schroth, *Die Rechte des Opfers im Strafprozess*, C.F. Müller, Heidelberg, 2005, p. 169.

52 Art. 13 of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Dec. 2001/220/JHA, OJ 2012 L 315/57.

53 A detailed analysis of victim's rights with special regard to legal aid in: *Local and regional good practices on victims' rights*, Centre for European Policy Studies, 2011. http://cor.europa.eu/en/documentation/studies/Documents/local-regional-good-practices-victims.pdf.

54 In this context, the costs of legal representation have to be interpreted broadly: they do not only cover the lawyer's fees but may include the travel costs and subsistence expenses as well. Order of 13 December 2012 in Case C-252/10, *European Maritime Safety Agency (EMSA) v. Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE*,(ECLI:EU:C:2012:789) Para. 15.

55 Case C-260/11, *Edwards and Pallikaropoulos*, Para. 35.

56 Order of 8 November 2012 in *Case C-433/11, SKP k.s. v. Kveta Polhošová*, (ECLI:EU:C:2012:702) Para. 36. Although the reference for preliminary ruling was declared inadmissible on grounds of time-issues, it might be assumed that in lack of directly linked provisions of EU law, such a rule for the allocation of procedural costs would fall into the competence of the national legislator.

57 Case C-260/11, *Edwards and Pallikaropoulos*, Para. 35. On the capping of costs: Judgment of 29 March 2011 in Case 565/08, *European Commission v. Italian Republic* [2011] ECR I-02101, Para. 53; Judgment of 5 December 2006 in Joined Cases C-94/04 and C-202/04, *Federico Cipolla v. Rosaria Portolese and Stefano Macrino and Claudia Capoparte v. Roberto Meloni* [2006] ECR I-11421, Para. 70.

58 There are no direct hints to this possibility in the case-law of ECJ yet. But some authors argue that the efficiency of litigation should/could be insured by empowering national courts 'to modulate the rules as to claimants' costs where necessary to assure effective exercise of the right to compensation'. E. De Smijter and D. O'Sullivan, The Manfredi judgment of the ECJ and how it relates to the Commission's initiative on EC antitrust damages actions. 3 *Competition Policy Newsletter*, 2006, p. 25.

tionary competences to decide on the payment of court costs by taking the financial situation of the parties into consideration.[59]

From these possibilities, it is only the first one – the general exemption from costs – that reacts to the fact that it is usually the prepayment duty that impedes litigation. So, all the other measures concerning court fees can only be effective if they are accompanied by automatic and free legal representation or by the suspension[60] of payment of duty allowances or other costs. Finally, it should be added that a non-professional claimant might need help to decide on initiating a procedure, so the costs of out of court legal counselling might play a decisive role at the enforcement of rights preventing unnecessary costs at the same time.[61]

The above mentioned forms of aid are only examples, there is no right to a certain form of legal aid. What the legislator has to ensure is that the rules on legal aid 'do not constitute, with regard to the objectives pursued, a manifest and disproportionate breach of the rights thus guaranteed.'[62] The major cause of limitations in the system of legal aid is the capacities of the state budget. (Some authors argue that the approach of the ECJ in the DEB-judgment concerning the entitlement of legal persons to legal aid is a proof of the recognition of financial implications.[63]) Nevertheless, the general principles of EU law – the majority of them being a human right as well – like the antidiscrimination clause and the proportional restriction of rights etc. should be kept in mind and the efficient and actual possibility of access to justice should not be depleted.[64]

So, it can be concluded that legal aid is a summarizing concept for the facilities at court costs typical for the civil procedure, the assignment of a defender especially important in criminal procedures and the legal advice service in out of court procedures granted under conditions prescribed by law with regard to the capacities of the state budget in order to ensure the effective persecution of rights for the needy.[65]

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59 Judgment of 16 July 2009 in Case C-427/07, *Commission of the European Communities v. Ireland*, [2009] ECR I-06277, Para. 93.

60 E.g. Section 59 Para. 1 of Hungarian Act No 93 from 1990 on duties. 'Persons who have been granted the right for the suspension of payment of duties shall be exempt from the advance payment of duties. In such cases the duty shall be paid by the party so ordered by the court.'

61 W. Zimmermann, Prozesskostenhilfe – insbesondere in Familiensachen, Gieseking, Bielefeld, 2007, p. 2.

62 Judgment of 6 September 2012 in Case C-619/10, *Trade Agency Ltd v. Seramico Investments Ltd*, (ECLI:EU:C:2012:531) Para. 55. Similarly: Hungarian Constitutional Court, judgment of 19 April 1993 (1518/B/1991); judgment of 20 November 1992 [61/1992. (XI. 20.)] *Bundesverfassungsgericht*, judgment of 13 March 1990 (BVerfGE 81, 347.).

63 B. Hess, Procedural Harmonisation in a European Context in X.E. Kramer & C.H. van Rhee (eds.): *Civil Litigation in a Globalising World*. TMC Asser, the Hague, 2012. p. 167.

64 Hungarian Constitutional Court, judgment of 19 December 1996 (574/B/1996) and judgment of 4 February 2003 (1106/B/1997).

65 A. Gutiérrez Barrenengoa et al. (eds.), *El proceso civil. Parte general. El juicio verbal y el juicio ordinario*, Dykinson, Madrid, 2007, p. 316.

22.4.2 The Beneficiaries of Legal Aid

The next question concerning the possible scope of legal aid is the personal scope, so the determination of the potential beneficiaries. As neediness is a conceptional feature of legal aid, natural persons should be able to benefit from this help if they qualify as needy. In the most important decision[66] on legal aid, ECJ dealt with legal persons' entitlement. The provision of ChFR does not include any restriction from which the limited scope of the right could be derived. ECJ also argued that the application of the term 'person' instead of 'human' leads to the conclusion that legal persons are not excluded from this right. However, the ChFR stresses at some places *expressis verbis* that the personal scope of application is extended to legal persons, irrespectively the applied terminology of the provision. So, it could be argued that in lack of such a reference – as in the case of access to justice – only natural persons could be subject of the right. Nevertheless, the ECJ has extended the grammatical interpretation with teleological and systematic arguments. As the formulation of the right to access to justice is the same as that of all other rights in Chapter VI ChFR, if the scope of access to justice would be limited to natural persons, legal persons would be excluded from such basic rights like the effective legal remedy as well. This would be definitely against the aim of the ChFR. With the help of this argumentation the ECJ has created a clear basis for extending legal aid to legal persons, but it did not go further concerning the scope of their right. Namely, from the judgment no sufficiently clear answer can be derived, whether legal persons should be entitled to legal aid under the same conditions as natural persons. Denying such a clear correlation, ECJ ruled that in case of legal aid for legal persons the national legislator had much broader possibilities and the only expectation is that the preconditions of the claim of legal persons shall not be determined arbitrary.

Furthermore, concerning the personal scope of legal aid, attention should be paid to the growing number of legal relations where individual, separated claims cannot reach their goals. The necessity of involvement of organizations in these procedures can be lead back to two factors. Firstly, if the legal interest behind the litigation is a public or quasi-public one (like in environmental case[67]), in case of an individual claim the *locus standi* could be questionable.[68] Secondly, if there is a significant economic imbalance between

66 Case C-279/09, *DEB*.

67 A critical analysis on the EU granting access to justice in environmental case: Ch. Poncelet, Access to Justice in Environmental Matters – Does the European Union Comply with its Obligations? 24 *Journal of Environmental Law*, 2012, pp. 287-309.

68 For a detailed analysis of NGOs in the enforcement of individual claims see: *Possible initiatives on access to justice in environmental matters and their socio-economic implications*, 2013, pp. 41-46. http://ec.europa.eu/environment/aarhus/pdf/access%20to%20justice%20-%20economic%20implications%20-%20study%202013.pdf.

the parties (like in consumer law cases[69]), only high publicity or a high cumulated fee/compensation could lead to the change of existing practice. Because of the high social importance of these cases, the litigation rights of the organizations can usually be derived directly from EU legislation[70] and could be available for NGOs and joint plaintiffs[71] as well under the conditions laid down by the special piece of legislation constituting the right to access for these groups.

So, the personal scope of legal aid is interpreted widely in the case law of ECJ. However, the conditions for claiming legal aid show significant differences. Generally natural persons have access to the widest range of legal aid measures if they prove their neediness under the conditions laid down by the domestic law. In case of legal persons, the national legislator decides whether to grant legal aid under the same conditions as for natural persons. In case of collective litigation, the EU act establishing the possibility is decisive.

22.5 Eligibility Criteria

In the following it has to be examined what kind of preconditions can be set for granting legal aid according to the case law of ECJ. Two major factors can be distinguished: the subjective ones – related to the applicant's personal status – and the objective ones – related to the legal dispute at hand –, the financial neediness being the decisive factor. This is the so-called 'means test' while the test considering the features of the legal matter in dispute, especially its prospects to success is the 'merits test'.

22.5.1 Means Test

As already mentioned, financial neediness in the context of EU law can be perceived by resulting in the litigation being 'prohibitively expensive'[72] for the claimant. At determining this, all the costs arising from participation in the judicial proceedings have to be taken into account.[73] The basic question is what should be the point of reference, more precisely, how should the level of resources be determined under which the party could not pay the costs of the procedure? Generally we speak about neediness, if as a result of lack of sufficient

69 Judgment of 26 April 2012 in Case C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési Zrt*, (ECLI:EU:C:2012:242), Para. 33.

70 E.g. Art. 10a of Council Directive 85/337/EEC, Art. 7 of Council Directive 93/13/EEC on unfair terms in consumer contracts OJ 1993 L 095.

71 Judgment of 18 October 2011 in Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09, *Antoine Boxus and others v. Région wallonne*, [2011] ECR I-09711, Para. 42.

72 Case C-427/07, *Commission v. Ireland*, Para. 92.

73 Case C-260/11, *Edwards and Pallikaropoulos*, Para. 28.

resources, the applicant[74] is not able to pay certain costs without endangering his own and his family members' alimony[75] or if he would get into such a situation after paying them.

The case law of ECJ, however, does not give such a definition. As the specific conditions of the evaluation cannot be determined on grounds of the case law of ECJ, it is for the national legislator to determine the conditions of neediness with regard to the income and fortune of the applicant. As it follows from the previous argumentations, in this paper legal aid is not considered as a social benefit[76] but rather as a procedural institution serving the enforcement of human rights. That is why it should be attempted to give neediness a *sui generis* definition in relation to legal aid. Article 5 Paragraph 2 of the Legal Aid Directive[77] gives an exemplificative list of factors to be considered: income, capital or family situation, including an assessment of the resources of persons who are financially dependent on the applicant. But the thresholds have to be determined with regard to differences in the costs of living between the Member States of domicile or habitual residence and that of the forum.

The problem is even more complex in the case of legal persons. As a legal person by nature does not have a family and does not need alimony[78] either, the concept of neediness is not applicable.[79] That is why ECJ ruled that examining the situation of legal persons special factors might be taken into consideration: business form of the legal person, existence or lack of profit-orientation, financial situation of the associates and their capacities to provide the necessary means for paying the costs of litigation.[80] Although the EU legislation has acknowledged the importance of NGOs at facilitating access to justice, little attention

74 The exclusive basis of the assessment cannot be an 'average' applicant, 'since such information may have little connection with the situation of the person concerned.' *Case C-260/11, Edwards and Pallikaropoulos*, Para. 41.

75 W. Sommer, *Elsaß-lothringisches Armenrecht*, Straßburg, 1910, pp. XI-XII.

76 Some, especially German authors look at legal aid as a kind of social benefit. J. Albers, Prozeßkostenhilfe als Sozialhilfe, in P. Selmer & I. Münch (eds.), *Gedächtnisschrift für Wolfgangs Martens*, de Gruyter, Berlin, 1987. p. 283; D. Meyer, *GKG/FamGKG 2012*, de Gruyter, Berlin, 2012, p. 113; J. Adoplhsen, *Europäisches Zivilverfahrensrecht*, Springer, Heidelberg – Dordrecht – London – New York, 2011, p. 43. Their position can be lead back to the constitutional provision of '*sozialer Rechtsstaat*' and a decision of the *Bundesverfassungsgericht* (judgment of 3 July 1973, BVerfGE 35, 348.) declaring that the judge who decides on legal aid, exercises a social care power as well.

77 Council Directive 2002/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ 2003 L 26. For the detailed analysis of the Directive: O. L. Knöfel, Prozesskostenhilfe im Internationalen Zivilverfahrensrecht in R. Geimer & R. A. Schütze (eds.), *Recht ohne Grenzen: Festschrift für Athanassios Kaissis zum 65. Geburtstag*, Sellier European Law Publishers, München, 2012. pp. 501-522; E. Storskrubb, *Civil Procedure and EU Law*, Oxford University Press, Oxford, 2008, pp. 169-180.

78 A possibility could be to release the analysis from a specific definition of neediness and to connect the qualification for legal aid to more normative criteria (like margin of subsistence). B. König & H. Broll, Verfahrenshilfe (Prozesskostenhilfe) für Masseverwalter (Konkursverwalter) in Österreich in W. Gerhardt (ed.), *Festschrift für Wolfram Henckel zum 70. Geburtstag*, de Gruyter, Berlin, 1995, p. 456.

79 B. König & H. Broll 1995, p. 456.

80 Case C-156/12, *GREP*, Para. 47.

was paid to the fact how they finance their participation at collective litigation not to mention the persecution of their individual rights. Although this is rather a matter of political and economic decision of the national legislator (as it contains further benefits), it should be mentioned that if the State offers more favourable conditions of litigation for those legal persons whose activity is to the benefit of the whole society, it could have positive effect on the efficient litigation of other legal subjects as well. E.g. Section 5 Paras. 2-4 of the Hungarian Act on Duties grants certain organizations promoting general interests of the society, like church, foundations, other NGOs an exemption of duties in the civil procedure, if they prove not having gained any taxable profit in the previous two tax years. This condition can be interpreted as an appearance of 'means test' in case of the NGOs. Although this is an isolated example, its promotion would definitely contribute to the access of justice of NGOs and at the same time it would be in accordance with the principles of ECJ case law concerning the 'means test'.

It seems, namely, that ECJ has tried to put the concept of financial neediness onto an objective basis in case of the legal persons, so the above-mentioned model would fit in this scheme while taking account of the growing role of NGOs in ensuring effective access to justice. However, the neediness of natural persons is much more difficult to determine in a uniform way, that is why the case law of ECJ does not limit the evaluation possibilities of the legislator/tribunal at deciding on neediness. However, the general principles of legal aid have to be considered, the evaluation should not lead to discrimination or to the right to access to justice losing its meaning.

22.5.2 Merits Test

The so-called 'merits test' applied by the ECtHR[81] as well, seems to be more adequate for use in a supranational context. This test is based on the assessment whether 'the interests of justice required that the applicant be granted such assistance.'[82] This test appears in an implicit manner in an order of ECJ on the question whether the conditions of legal aid can be considered as a hinderance of access to justice. In this analysis – according to ECJ – regard should be taken to the chances of success of the planned litigation, the importance of the legal dispute for the applicant, the complexity of the legal norms concerned, the applicant's capacity to defend his rights effectively the legal matter in dispute.[83] With the

81 *Benham v. United Kingdom*, ECHR, 1996-III, Para. 60; *Barsom and Varli v. Sweden*, decision of 4 January 2008; European Union Agency for Fundamental Rights, *Access to justice in Europe, Factsheet*. http://fra.europa.eu/sites/default/files/fra_uploads/1506-FRA-Factsheet_AccesstoJusticeEN.pdf.

82 *Quaranta v. Switzerland* ECHR (1991) Series A No. 205, Paras. 27, 32-36.

83 Case C-156/12, *GREP*, Para. 46.

help of these factors it can be determined whether the core of the right to an effective access to justice is impeded. (Of course, this test applies only in civil procedure.[84])

Applying the merits test the national courts take usually two factors into consideration: whether the claim has a reasonable prospect of success and whether the litigation can be seen as dishonest.

The choice of approach on the prospects of success has effects on the whole concept of legal aid. The first alternative is to reject the claim for legal aid only if there is an obvious lack of prospects for success, e. g. in the Hungarian law.[85] In this case the situation of the person claiming legal aid is much simpler; the court only considers whether there are factors to cause the obvious lack of prospect for success. The second alternative (e.g. in the German[86] law) makes the position of party more difficult in the process for obtaining legal aid: he has, namely, to prove that the claim has sufficient chance for success.[87] This approach is problematic also from the point of view of the judiciary principles. Deciding on the chances of success the court or authority examining the application for legal aid, has to rule on the substance of the case, making a prejudice on the claim before it gets to the tribunal.[88]

Concerning the approach of EU law, the Article 6 Paragraph 1 of the Legal Aid Directive can be referred to, which excludes legal aid only if the claim appears to be manifestly unfounded.[89] So, although the ECJ has not ruled on the question of merits in national legal aid procedures, it can be presumed that the merits test would be based on the examination of the 'manifestly unfounded' nature of the claim.

As far as the (dis)honest character of the litigation is concerned, the situation is much easier, as the ECJ has a *sui generis* concept for bad faith, which describes it as a 'dishonest intention' or unfair practices. As this approach is a very subjective one, based on 'standards of honest or ethical conduct – which is ascertainable from objective evidence, and which

84 In criminal proceedings, the major form of legal aid is the free legal representation. For a detailed analysis of the factors national laws take into account: E. Rekosh & V. Terzieva, *Access to justice in Central and Eastern Europe: too little for too few*. www.errc.org/article/access-to-justice-in-central-and-eastern-europe-too-little-for-too-few/693.

85 Both Art. 85 Para. 3 of the Code on Civil Procedure – governing the exemption from costs – and Art. 61. Para. 2 of the Code on Duties – governing the prenotation of duties – uses this formulation.

86 Art. 114 of the German Code on Civil Procedure (ZPO).

87 A. Schoreit & I. Groß, *Beratungshilfe, Prozesskostenhilfe, Verfahrenskostenhilfe*, 10th edn, C.F. Müller, Heidelberg, 2010, p. 297.

88 S. Lissner et al., *Beratungshilfe mit Prozess- und Verfahrenskostenhilfe*, Kolhammer, Stuttgart, 2010, p. 225.

89 A similar approach can be deducted from the Brussels Regime: in order to establish fraudulent or wrongful intent on the part of the claimant, the action must, at the time when it was lodged appear to be manifestly unfounded in all respects. Advocate General Mengozzi in *Case C-98/06, Freeport plc v. Olle Arnoldsson*, [2007] ECR I-08319, Para. 66.

must be assessed case by case.'[90] Some possible, rather objective factors that might be an evidence for bad faith, e.g. a.) if there is no actual need for the protection of rights, the legal aid procedure was only initiated to delay the main procedure;[91] b.) if the claimant has not chosen the most cost-efficient and simple way to litigate although he has known the alternative methods or c.) if the procedure could have been simplified by joining more claims and not litigating in separate procedures.

So, it can be concluded that in the case law of ECJ the objective features of the entitlement for legal aid are elaborated in a uniform way, independently from the single national laws. Still, the applicant's financial situation cannot be left out of consideration. And these examination criteria will remain in the competence of the national legislator on a long-term basis, especially in case of natural persons. The brief summary of the eligibility criteria for legal aid can be set down as follows: 'the cost of proceedings must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable'[92] (manifestly unfounded or pursuing a dishonest aim).

22.6 Conclusions

Finally, the question arises, what kind of conclusions can be derived from this analysis of the ECJ case law concerning legal aid.

First of all, it has to be confirmed, that the jurisprudence of ECJ on access to justice has significantly evolved since the Lisbon Treaty. In the most recent judgments ECJ has confirmed the applicability of the general principles of EU law (principle of effectiveness, principle of equivalence etc.) giving them special meaning with regards to legal aid procedures. At the same time it has declared the requirement of a consistent and uniform interpretation of judiciary rights with the ECHR and the case law ECtHR.

As far as the scope of legal aid is concerned, the case law of ECJ rather confirms the legal institutions, norms developed in the national legal systems supplementing it with guidance for the application in accordance with EU law. Concerning the eligibility criteria, however, a struggling for a *sui generis* definition for the entitlement for legal aid can be recognized from the side of ECJ putting the objective criteria into focus. In the ECJ case law the test is much more relevant, which looks at the importance of the right the applicant is trying to enforce, as well as whether the denial of legal aid would preclude a fair hearing. Nevertheless, in case of natural persons the necessity of a 'means-test' cannot be eliminated

90 Advocate General Sharpston in Case C-529/07, *Chocoladefabriken Lindt & Sprüngli AG v. Franz Hauswirth GmbH*, [2009] ECR I-04893, Paras. 51, 75. Similarly: Judgment of 3 June 2010 in Case C-569/08, *Internetportal und Marketing GmbH v. Richard Schlicht* [2010] ECR I-04871, Paras. 37-39.

91 A. Baumbach et al. (eds.), *Zivilprozessordnung*, C.H. Beck, München, 2009, p. 512.

92 Case C-260/11, *Edwards and Pallikaropoulos*, Para. 40.

and according to the tendencies of ECJ-jurisprudence, its determination will stay in the discretionary competence of the Member States in the future as well.

Why is legal aid so important in the European society? Because legal aid institutions contribute to the adequate working of the judiciary, to the proper realization of judiciary rights, being an important aim on the level of the constitutional law. Furthermore, if the effective access to justice is not available for wide social groups, it might lead to the questioning of the basis of the democratic state based on human rights and the rule of law, especially in young democracies. As the number of these is quite high in the enlarged EU, the guidance on the interpretation from the ECJ will stay highly important even in the future.