



European Union, CJEU, DEB, judgement of 22 December 2010

Deciding bodies and decisions

CJEU, DEB, judgement of 22 December 2010, Case C-279/09, EU:C:2010:811

Area of law

Effective judicial protection

Subject matter

Access to justice - Access to legal aid for legal persons - State liability for breach of EU law

The *DEB* judgement has a specific relevance with respect to the issue of the access to legal aid by legal person. Firstly, the CJEU clarified whether legal persons are amongst the beneficiaries of the right to legal aid under Article 47(3) CFR and if the Charter provision covers both the exemption from court fees and the payment of the costs for legal assistance by a lawyer. Secondly, the CJEU provides some guidance on how national courts shall assess the compatibility with Article 47(3) CFR of national provisions introducing limits to access to legal aid.

Summary Facts Of The Case

DEB, a German company operating in the market of natural gas, wanted to sue Germany for the damages that had ensued from the delay in the transposition of two EU directives that aimed at enhancing non-discriminatory access to the natural gas networks. DEB contended that, owing to this delay, it was unable to accede the German gas networks, and this had resulted into a profit loss of approximately EUR 3.7 thousand million. Since DEB lacked any income or asset, it could not make the advance payment of court fees requested for the action at issue, nor it could pay a lawyer, whose representation was compulsory under national law.

The relevant national provision, Paragraph 116 of the *Zivilprozessordnung* (German Code of Civil Procedure; 'ZPO'), provides that '*Upon application, legal aid shall be received by (...) a legal person or an entity capable of being a party to legal proceedings, which is established and has its principal office in Germany... if the costs can be paid neither by that party nor by any parties having an economic involvement in the subject-matter of the proceedings, and where the failure to pursue or defend the action would run counter to the public interest.*'

According to the national provisions, as interpreted by the Federal Court of Justice, the granting of legal aid to legal persons is conditional on the circumstance that the decision would have a genuine drawback on the general public, which must go beyond that a correct decision is given. In the specific case, DEB had admitted that a ruling against Germany could not directly result in the liberalisation of the energy market, which was the matter of public interest it had relied on to support its request for legal aid. Moreover, the Federal Constitutional Court had repeatedly stated that the fact that conditions governing the granting of legal aid to legal persons are more stringent than those required of natural persons is not in contrast with the domestic Constitution.

The court of first instance of Berlin (*Landgericht*) rejected DEB's request. By contrast, the Court of Appeal (*Kammergericht*), although it agreed, in principle, that the conditions foreseen by Paragraph 116(2) ZPO were not satisfied, doubted the compatibility of Paragraph 116(2) ZPO, as interpreted by the said higher courts, with the EU principle of effectiveness. The *Kammergericht* decided to suspend the national proceedings and to raise a question for preliminary reference before the CJEU, asking, in essence:

“whether the EU principle of effectiveness, must be interpreted as meaning that, in the context of a procedure for pursuing a claim seeking to establish State liability under EU law, that principle precludes a national rule under which the pursuit of a claim before the courts is subject to the making of an advance payment in respect of costs and under which a legal person does not qualify for legal aid even though it is unable to make that advance payment”.

At the outset, the CJEU reformulated the preliminary question as concerning the right of a legal person to effective access to justice, pointing out that the reference provision was the Article 47(3) CFR.

The Court merely assumed that the case fell within the scope of EU law. The main proceedings indeed concerned a provision – Paragraph 116(2) of the ZPO – that came in question with respect to the exercise of the right to have the Member States make good damages ensuing from the breach of their obligations under EU law.

The Court observed that neither Article 47(3) CFR itself nor its explanation provides indications as to whether access to legal aid can be granted also to legal person. Therefore attention was paid that provision’s context, in light of other EU law provisions, the law of the Member States and, in particular, the case-law of the ECHR, given that Article 47(3) CFR is a “corresponding right” for the purpose of Article 52(3) CFR. The CJEU then highlighted a number of elements, related to the provision’s context, that could suggest that legal persons were not excluded as such from access to legal aid under the EU Charter.

The CJEU paid special attention to the case law of the ECHR on legal aid, quoting several relevant judgements, concerning, in particular the limits that can be legitimately introduced to access to legal aid, referring to both its form: as assistance by a lawyer and exemption from the court fees. Moreover, the CJEU observed that, on several occasions, the case law of the ECHR, concerning access to legal aid by a legal person, indicated that the grant of legal aid is not in principle impossible. Thus, the CJEU concluded, in essence, that access to legal aid under the Charter can similarly apply also to legal persons and that is the task of the national court to verify – in case falling within the scope of EU law – whether the conditions foreseen by national law (which limits such an access) fulfils the requirements for limitations to the exercise of the fundamental rights of the Charter, as laid down by Article 52(1) CFR.

Since the CJEU provided some guidance on how the referring national court (and national courts more generally) should conduct the abovementioned assessment, which consists in verifying if the limitation undermines the very core of the right of access to the courts or whether there is a “reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve”.

In order to achieve this objective, 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 should take account of the costs of the proceedings in respect of which advance payment must be made.

Specifically concerning legal persons, the national court may take into consideration their situation and, inter alia, the form of the legal person in question and whether it is a profit-making or non-profit-making; the financial capacity of the partners or shareholders to obtain the sums necessary to institute legal proceedings.

Relation to the scope of the Charter

Article 47(3) EU Charter - Right to an effective remedy and to a fair trial – Right to legal aid

The Court did not explain why the case fell under the scope of the EU law, hence within the scope of the Charter. The latter’s relevance stemmed, however, from the fact that, in the main proceedings, Paragraph 116(2) of the ZPO came in question with respect to the exercise in court of a right conferred by EU law, notably the right to have the Member States make good damages ensuing from the breach of their obligations under EU law.

Relation between the Charter and ECHR

Article 13 ECHR - Right to effective remedy

According to its official explanation to the EU Charter, the first paragraph of Article 47 of the EU Charter corresponds to Article 13 of the ECHR, while the second paragraph corresponds to Article 6 (1) of the ECHR. With regard to the third paragraph, the explanation of Article 52(3) points out that “Article 47(3) corresponds to

Article 6(1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards Union law and its implementation". Thus, the scope of legal aid under the Charter is broader than under the ECHR. It follows from Article 52(3) of the EU Charter and the related official explanation that Charter provisions that correspond to fundamental rights already granted by the ECHR shall be interpreted as having the same scope and meaning afforded by the ECHR to their correspondents, taking into account also the case law of the European Court of Human Rights. However, a higher level of protection can be granted under EU law (meaning that the ECHR only sets a minimum standard of protection – non-derogable *in peius* – for corresponding Charter provisions)

Article 6(3), point c), ECHR indeed contains an explicit provision on legal aid only with respect to criminal proceedings, whereby "Everyone charged with a criminal offence has [the right] (...), if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require".

There is no similar provision on legal aid, by contrast, with respect to proceedings concerning "the determination of civil rights and obligations", to which the fair process guarantees afforded by Article 6(1) ECHR also apply. Yet, the ECtHR held that, despite this silence, the contracting States are under an obligation (hence, they may be found in breach of Article 6(1) ECHR) to provide for legal aid in these proceedings "where the absence of such aid would make it impossible to ensure an effective remedy" (ECHR, judgment of 9 October 1979, *Airey*, app. no. 6289/73).

Under EU law, the right to legal aid enshrined in Article 47(3) CFR is relevant to any proceedings involving rights conferred on individuals by EU law, thus also beyond criminal proceedings or cases concerning "the determination of civil rights and obligations" under the ECHR meaning.

Notes on judicial interactions dimension

Horizontal Judicial Interaction

Horizontal interaction between the CJEU and the ECtHR, whose case law on legal aid, in particular on the limits that can be legitimately introduced to access to legal aid (referring to both its forms, as assistance by a lawyer and exemption from the court fees), is extensively relied upon (see judgment of 9 October 1979, *Airey v. Ireland*, app. no. 6289/73; judgment of 13 July 1995, *Tolstoy/Miloslavsky v. the United Kingdom*, app. no. 18139/91; judgment of 7 May 2002, *McVicar v. the United Kingdom*, app. no. 46311/99; judgement of 16 July 2002, *P., C. and S. v. the United Kingdom*, app. no. 56547/00; judgement of 19 June 2001, *Kreuz v. Poland*, app. no. 28249/95; judgement of 26 February 2002, *Del Sol v. France*, app. no. 46800/99; judgment of 15 February 2005, *Steel and Morris v. the United Kingdom*, app. no. 68416/01; judgement of 26 August 2008, *VP Diffusion Sarl v. France*, app. no. 14565/04; Decision of 29 September 2009, *Puscasu v. Germany*, app. no. 45793/07; judgement of 14 October 2010, *Pedro Ramos v. Switzerland*, app. no. 10111/06).

Vertical Judicial Interaction

The case was decided by the ECJ on a reference for preliminary ruling issued by the *Kammergericht* (Court of Appeal of Berlin, Germany). Interestingly, the *Kammergericht* was aware of the case law of higher German courts on the interpretation of Paragraph 116(2) ZPO and that the case entailed a EU law dimension, which implied that its reference provisions could not only be the domestic ones.

Assessment of the compatibility with EU law of the national provision concerned by the national court, in light of the guidance provided by the CJEU, provides a door also for the application of the Strasbourg case law in the national proceedings, whilst at the same time leaving some space to safeguard the considerations made by the national legislator.

Strategic use of judicial interaction

The national court doubted the compatibility of an established case law of the *Bundesgerichtshof* and the *Bundesverfassungsgericht* with EU law

Sources - EU and national law

National Law

Paragraph 116 of the German Code of Civil Procedure (*Zivilprozessordnung*) as interpreted by the *Bundergerichtshof*

(Federal Court of Justice) and the *Bunderverfassungsgericht* (Federal Constitutional Court).

EU Law

Council Directive 2003/8/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 (OJ 2003 L 26, p. 41 and corrigendum OJ 2003 L 32, p. 15)

Rules of Procedure of the General Court of the European Union of 2 May 1991 (as last amended on 19 June 2013, OJ 2013 L 173, p. 66) as replaced by the Rules of Procedure of the General Court of 23 April 2015 (OJ 2015 L 105 p. 1-66)

Rules of Procedure of the European Union Civil Service Tribunal of 25 July 2007 (on last amended on 18 May 2011, OJ 2011 L 162/1, p. 19) as replaced by the Rules of Procedure of the European Union Civil Service Tribunal of 14 July 2014 (OJ 2014 L 206/1 p.1-45).

Sources - CJEU Case Law

On the principle of effectiveness

C-33/76 *Rewe*, EU:C:1976:188

C-432/05 *Unibet*, EU:C:2007:163

C-268/06 *Impact*, EU:C:2008:223

On the general principle of effective judicial protection

C-222/84 *Johnston*, EU:C:1986:206

C-222/86 *Heylens and Others*, EU:C:1987:442

C-424/99 *Commission v Austria*, EU:C:2001:642

C-50/00 *P Unión de Pequeños Agricultores v Council*, EU:C:2002:462

Case C-467/01 *Eribrand*, EU:C:2003:364

Comments

The referring court *Kammergericht* (Court of Appeal of Berlin, Germany) delivered its judgment on 15 February 2011 (9 W 50/08)
