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Legal Fees and Legal Aid in EU Law

'Applying the Charter of Fundamental Rights of the European Union', ERA Seminar, 22 June 2021

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Structure

1. Basic principles in the Charter

- Right to a fair trial
- Access to a court, equality of arms

2. Legal fees

- Lawyers' fees, court fees, and the Charter
- Prohibitively expensive procedure in environmental litigation

3. Legal aid in EU law

- EU directives on legal aid
- Legal aid for corporations

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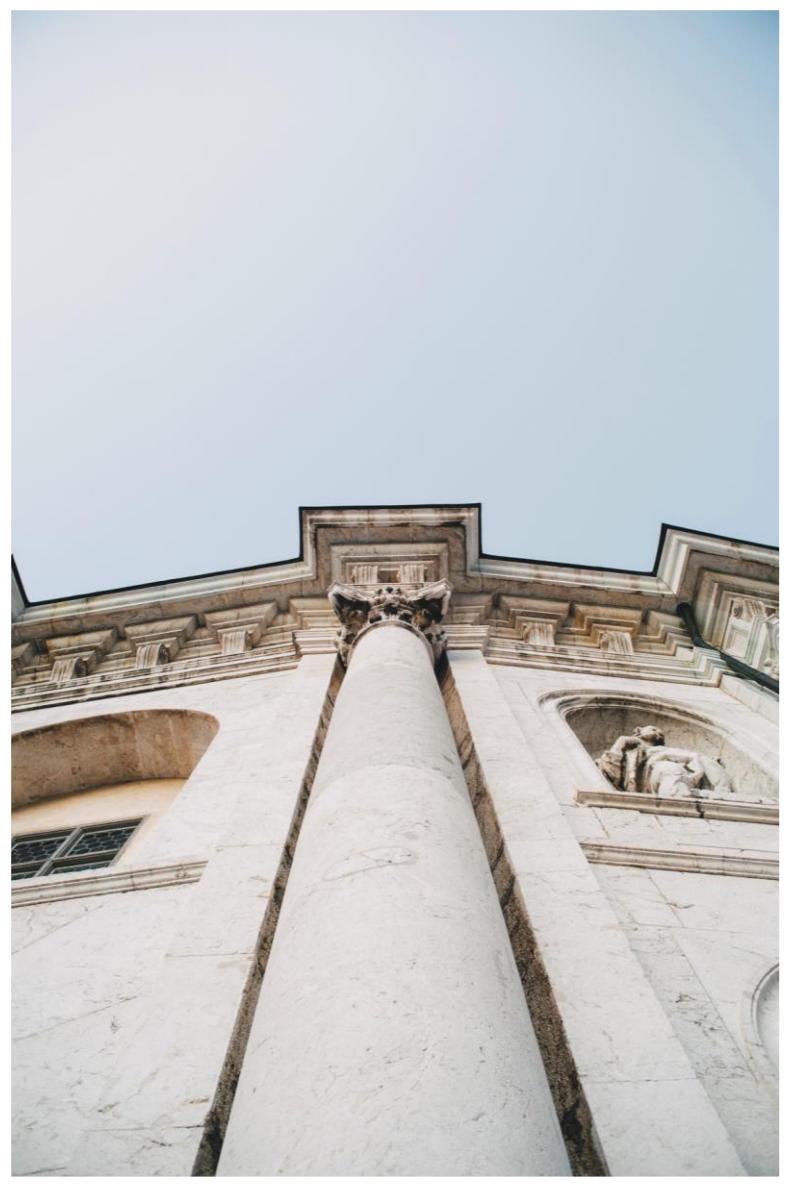


1. Basic principles in the Charter

Right to a fair trial

Art 47(2) Charter

- ~ Art 6(1) ECHR
 - See Art 52(3) and Explanations
 - Charter covers not only ‘civil rights and obligations’ but all EU law
- Right of access to a court and the principle of equality of arms
 - See eg C-199/11, *Otis*, para 48



Access to a court

Art 6§1 ECHR

- ECtHR, *Golder v. United Kingdom*
- Not absolute, may be restricted; however, must be ‘practical and effective’

In EU law: Art 47(2)
Charter

Equality of arms

In medieval judicial duel:
requirement that swords be
of equal length

In EU law, Art 47(2)
Charter:

- ‘an obligation to offer each party a reasonable opportunity to present its case in conditions that do not place it in a clearly less advantageous position by comparison with its opponent’
- See eg C-189/18, *Glencore Agriculture Hungary*, para 61



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2. Legal fees



Lawyers' fees

Lawyers' fees, combined with the 'loser pays' rule, may hinder access to a court.

An issue under the Charter?

Lawyers' fees and equality of arms

Principle's aim: procedural balance between parties
(bringing of evidence, adversarial hearing, right to bring an action)

-> No obligation to 'put the parties on an equal footing in terms of the financial costs incurred in connection with legal proceedings'

C-543/14, *Ordre des barreaux francophones et germanophone*, paras 41-42

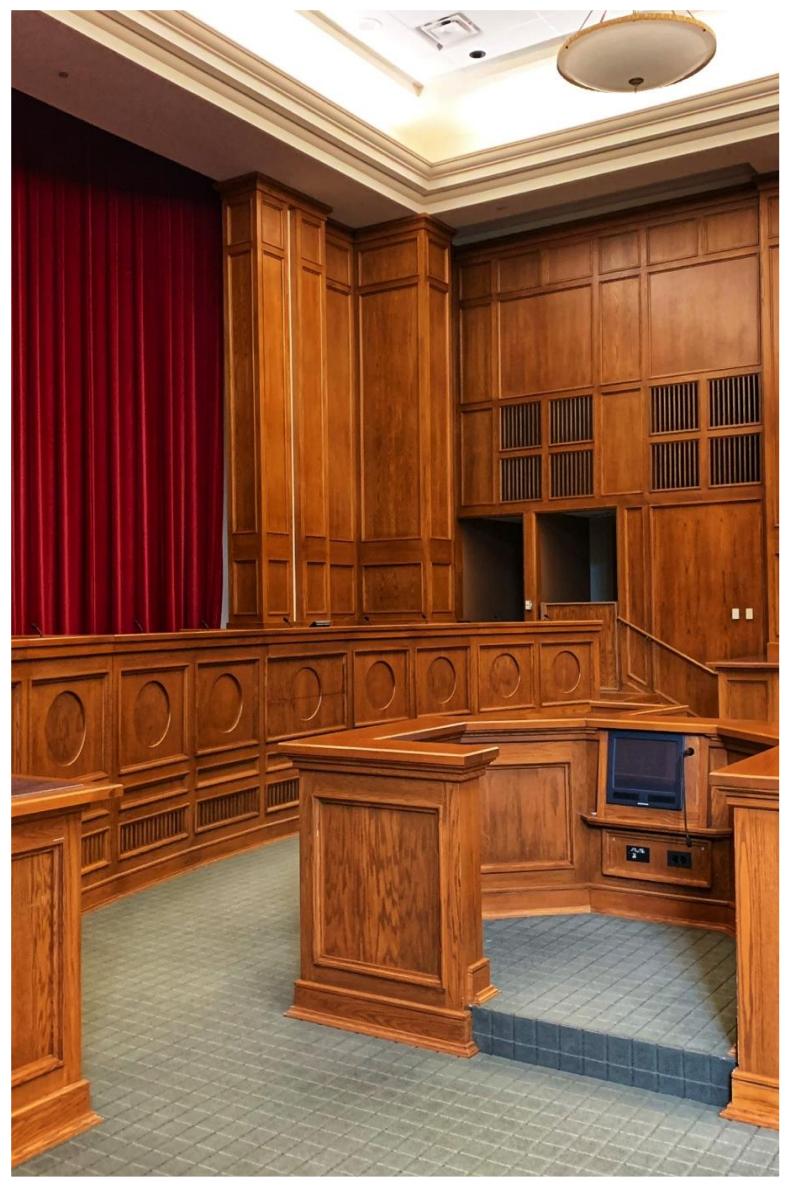
Remedy to lawyers' fees: legal aid

- Legal fees challengeable under Art 47 Charter only if an ‘insurmountable obstacle’ to access to justice
- Obstacles posed by legal fees primarily remedied with appropriate legal aid
 - See C-543/14, *Ordre des barreaux francophones et germanophone*, paras 31 and 37

If no legal aid available -> possible inequality of arms

However, holistic assessment of all elements, see eg

- ECtHR, *Airey v. Ireland*
- ECtHR, *Steel and Morris v. United Kingdom*
- Cf. simple cases



Court fees

Fees to institute proceedings limit access to court

Not incompatible *per se* with Art 47(2) Charter

Can court fees be an issue under the Charter?

Court fees and Art 47(2) Charter

Fees must not impair the ‘very essence’ of the right of access to a court

Need to balance interests of 1) state in collecting fees and 2) applicant in vindicating claim through courts

Factors to consider:

- Individual’s ability to pay, object and purpose of fee, stage of proceedings, determination of fee (automatic or with judicial discretion)

‘Prohibitively expensive procedure’ in environmental litigation

Aarhus Convention (Dir. 2003/35): access to justice in environmental matters

- Procedures shall be ‘not prohibitively expensive’

Factors to consider include:

- Interests of claimant and of the environment, financial situation of the person concerned and objective reasonableness of the costs, and available legal aid
- ECJ in C-260/11, *Edwards and Pallikaropoulos*, paras 35 ff.

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3. Legal aid in EU law

Legal aid in the Charter

Article 47(3):

‘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.’

But also:

Art 47(2) (legal aid in civil matters, cf. ECHR Art 6§1)
and Art 48(2) (free legal assistance in criminal matters,
cf. ECHR Art 6(3)(c)

EU legal aid legislation

1. Legal aid in cross-border civil disputes:

- Directive 2003/8

2. Legal aid in criminal prosecutions and European Arrest Warrant proceedings:

- Directive 2016/1919

Legal aid in cross-border civil disputes

Directive 2003/8

- Approximation of minimum legal aid rules in Member States
- Applicable in
 - Cross-border disputes
 - Art 2: ‘where party applying for legal aid ... 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 ‘civil and commercial’ matters ('civil and commercial dispute')

Legal aid in criminal proceedings

Directive 2016/1919

Approximation of minimum legal aid rules in Member States in criminal proceedings – part of broader criminal procedure harmonization (esp. Dir. 2013/48)

Art 2: Scope

Art 3: Definition of ‘legal aid’

Art 4: Content of legal aid (see Art 48(2) Charter)

Art 5: Legal aid in European arrest warrant proceedings

Specific rules on legal aid/free legal assistance

Maintenance obligations:

- Regulation 4/2009, Chapter V ('Access to justice')

Asylum procedures:

- In determining responsible Member State: 'Dublin III'
Regulation 604/2013, Art 27 'Remedies'
- In granting and withdrawing international protection:
'Procedures' Directive 2013/32, Arts 19-21
- In deportation procedures: 'Returns' Directive 2008/115,
Art 13

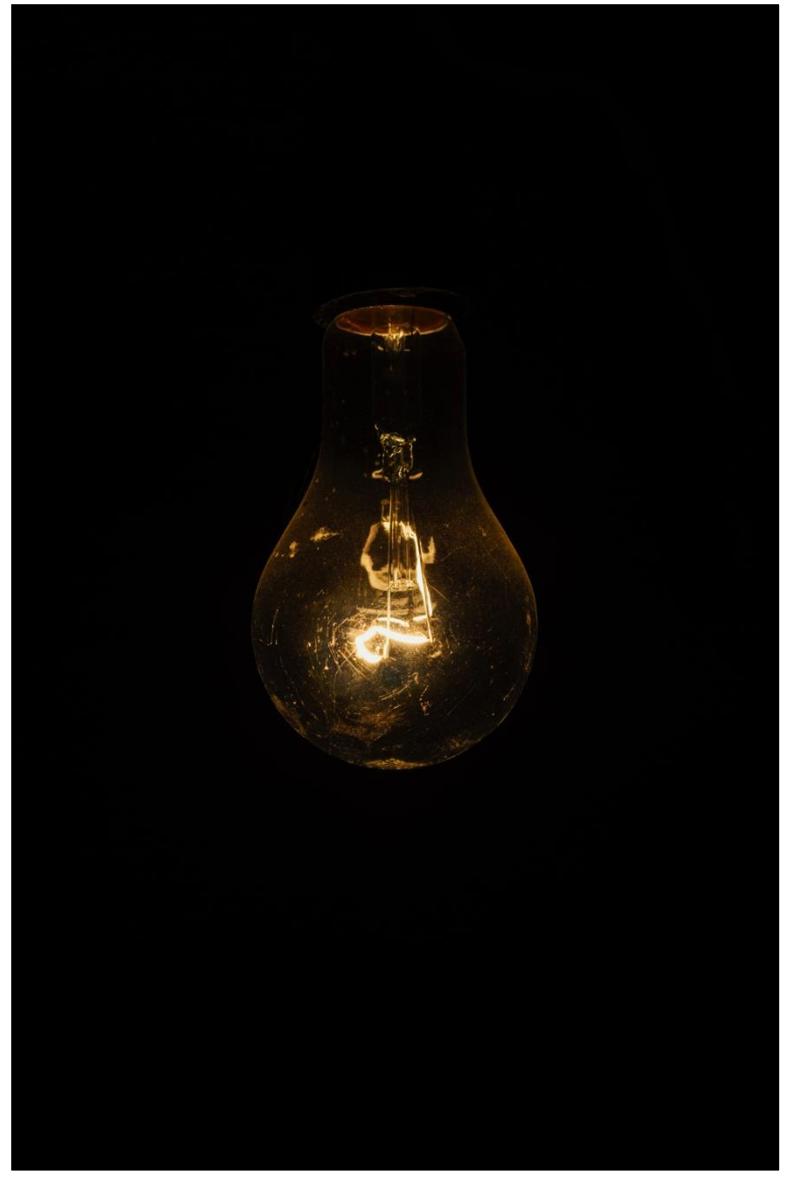
Legal aid and corporations

Art 47(3) Charter: applicable to legal persons

Case C-279/09, *DEB*

- Criteria include: subject-matter of litigation, prospect of success, importance for applicant, complexity, applicant's capacity to self-representation, form of legal person, financial capacity of members
- 'proceduralization' of legal aid

See also Case C-156/12, *GREP*, and ECtHR in *VP Diffusion Sarl v. France*



Conclusions

- Arts 47-48 Charter: autonomous, but inspired by ECHR
- Primary remedy to high legal fees: legal aid
- Specific EU legislation on legal aid
- Availability of legal aid to corporations



Questions?

Thank you for your attention.