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ERA Seminar: Applying the Charter of
Fundamental Rights of the European Union
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Workshop exercise: Access to a court in EU law

Marius runs a local electronics shop, "The Great TV Shop LLC". Its business consists mainly of after-sale maintenance of TVs sold to hotels. The business has not been doing well during the Covid-19 pandemic, but recently Marius signed a consequential maintenance deal with an Alpine hotel chain in a neighbouring EU member state. Marius hopes this order will allow him to pay off his debts and save his business.

To Marius' chagrin, the hotel informs him that the local authorities require that foreign TV maintenance service providers obtain a business permit for a fee of 5,000 euros. Marius considers that since he is providing a service within the EU, requiring such a certificate is contrary to EU law. Marius contacts a lawyer who agrees that the requirement likely violates the freedom to provide services, as codified in Directive 2006/123 on services in the internal market (O.J. 2006, L376/36). Convinced of the prospect of success, the lawyer agrees to bring a case against the local authority.

The case is brought in the name of The Great TV Shop LLC, which is however without funds. The lawyer makes a legal aid application for the benefit of Marius' company. However, the judge hearing the application considers the application unfounded.

Indeed, the judge explains that the national legislation on legal aid does not foresee legal aid for corporations, such as Marius' company. In fact, legal aid is traditionally seen as a measure of social assistance and connected to ensuring human dignity. Such rationale is absent in the case of legal persons, especially ones which are profit-making. It is also apparent, according to the judge, that the EU directives on legal aid only apply to civil and criminal proceedings. Similarly, the judge estimates that the European Convention on Human Rights only guarantees legal aid in criminal proceedings and, exceptionally, in civil cases. However, the present claim against the public authority being of an administrative nature, he concludes that none of these instruments is applicable. The judge dismisses the application for legal aid.

The judge's decision can be appealed under the applicable national procedural law. How should the following issues be argued on appeal:

- (a) Is the Charter of fundamental rights of the European Union (Charter) applicable in the circumstances of the case?
- (b) If yes, which Article(s) of the Charter is/are pertinent?
- (c) Can The Great TV Shop LLC rely on the Charter to claim legal aid?
- (d) If The Great TV Shop LLC has a right to legal aid under the Charter, how should the judge take this into account in the application/interpretation of national rules on legal aid?

Answer key:

(a) The dispute is about whether a EU member state is unlawfully restricting Marius' right to provide services across borders under the Services Directive 2006/123. The question is whether the member state in question is acting in breach of EU law which it is obliged to implement. The Charter can be relied on in this dispute since its provisions bind member states when they are implementing EU law (see Article 51).

(b) Legal aid is regulated in Articles 47(2)-(3) and 48(2) of the Charter. However, Article 48(2) concerns legal assistance in criminal prosecutions, so it is not applicable here. By contrast, Article 47(2) is applicable in proceedings before an administrative court. Regardless of whether Article 6§1 ECHR could be applied [probably yes: see by analogy eg ECtHR, *Ringeisen v. Austria*, 16 July 1971, (2614/65) §94], the Charter is broader in its scope in that it is 'not confined to disputes relating to civil law rights and obligations' (see Charter Explanations). Similarly, Article 47(3), which specifically concerns legal aid, applies to the legal aid issues in the proceedings.

(c) Since the Charter is applicable to the proceedings, the question is whether The Great TV Shop LLC is eligible to legal aid *ratione personae*. On the level of principle, this is possible. Under the case law of the ECJ (see Case C-279/09, *DEB*), legal persons are eligible for legal aid if the legal costs would otherwise constitute an insurmountable obstacle to access the courts.

(d) In Case C-279/09, *DEB* (operative part of judgment), the ECJ noted the following:

'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.

In that connection, it is for the national court to ascertain whether the conditions for 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 relevant 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.' [Underlined here.]

The national law at issue does not permit granting legal aid to corporations. If the judge nonetheless considers that The Great TV Shop LLC should be awarded legal aid under the Charter, he must interpret the national legislation using all the available means of interpretation to achieve the result which enables due access to the courts. If he considers it impossible to interpret the national law in this way, he is required to disapply it to give full effect to Article 47 of the Charter (a provision of EU law with direct effect) in his ruling (see eg Case C-30/19, *Braathens Regional Aviation*).