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THE RIGHT TO A FAIR TRIAL OF LEGAL PERSONS THROUGHOUT THE CASE LAW OF THE ECHR AND THE CJEU

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Abstract The ambition of this article is an analysis of the right to a fair trial of legal entities through the prism of the jurisprudence of the ECtHR and the CJEU. Despite the factual admission of the right to a fair trial to companies in the case law of the Courts, the absence of a strong theoretical foundation and persuasive explanation in their judgments raises ambiguity as to the ECtHR and the CJEU positions in that regard. In that context, the article examines landmark cases of both Courts and relevant doctrinal considerations concerning the application of guarantees provided by the right to a fair trial to legal persons. The ECtHR case law is considered inconsistent and the Strasbourg court, it appears, tries to avoid any far-reaching conclusions. The CJEU in its case law, due to the inherent focus of EU law on economic values, interprets the right to a fair trial of companies broadly, and sometimes, broader than it is needed. It is concluded that the issue requires more attention from both the Courts and legal scholars, in the view of serious consequences the ignorance and unfounded admission of any fundamental right could entail to the society and economy.

Keywords
the right to a fair trial,
the right to an effective legal remedy,
legal persons,
companies,
fundamental rights of companies,
ECHR,
Charter of Fundamental Rights

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1 Introduction

The thorny issue of whether legal entities in question can possess and be subject to human – or more appropriately to use the term *fundamental* rights in relation to companies[1] – raises long-lasting debates among legal scholars.

Proponents claim it is quite obvious that legal entities should enjoy (certain) fundamental rights. Companies as forms of associations of human beings in a corporate form are considered social phenomena, which independently from human beings behind (shareholders, managers, workers) exercise some fundamental rights (Kulick, 2021: 559, 560). Certain rights are vital for the companies' functioning, the most obvious examples of such are the freedom of speech enjoyed by publishing houses and the freedom of religion of religious groups. Without other rights, such as the right to property, the very idea of companies as entities, which can separately from their shareholders be liable for their obligations with their assets, appears diminished. Acknowledging the companies as independent legal actors but merely holders of duties and responsibilities including compliance with human rights, while simultaneously denying they are bearers of certain fundamental rights, is inconsistent since denying companies fundamental rights protection thus denies the specific socio-economic phenomenon that companies represent as independent legal entities (Kulick, 2021: 559, 560). In turn, recognition will additionally stimulate companies to protect human (fundamental) rights that they share equally with others (Dhooge, 2007: 205). From a global perspective, recognition and protection of companies' fundamental rights is a matter of public interest, not only companies own one, otherwise, the rule of law can appear undermined, which can lead to catastrophic consequences to the economy and welfare of the population (Oliver, 2015: 662; Oliver, 2022: 48-49).[2]

[1] For the purposes of this article, the terms *human rights* and *fundamental rights* are used interchangeably, as well as the terms *legal persons, legal entities, companies* and *corporations*, since the strict distinction is not of crucial importance here.
[2] In particular, the author refers to *Yukos* case, when the Russian oil company (Yukos) managed by a political opponent of Russian president Mikhail Khodorkovsky was arbitrarily prosecuted with procedural violations for alleged fraud and tax evasion, that resulted in Yukos' demise and 8 years of imprisonment to Mr. Khodorkovsky. Insufficient attention of foreign investors to the violations of fundamental rights has become a starting point for absolute corruption and confidence in the impunity of Putin's regime.

Opponents in essence claim that granting human rights to legal persons would entail marginalization and dehumanization of human rights, a sufficient increase in the amount of litigation deriving from it, and consequently, a reduction of the level of the protection provided to individuals now. Particular arguments of the critics of this idea will be discussed also further throughout the article.

It is worth mentioning here, that some fundamental rights of the legal entities have been recognized by international courts, first and foremost by the ECtHR, though without any principal discussion in that regard. Indeed, the European Convention on Human Rights[3] (hereinafter – the ECHR) contains some indications that companies can enjoy certain human rights. In particular, Article 10 states that "This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema *enterprises*," Article 34, in turn, recognizes the right to an individual application of "any person, non-governmental organisation or *group of individuals*…"*,* and Article 1 of the Protocol 1 to the ECHR provides the protection of property to "every natural or *legal person*…" Nevertheless, the issue of whether cited above provisions of the ECHR grants fundamental rights to companies is controversially assessed in doctrine (Scolnicov, 2013: 4-6). The absence of persuasive explanations from the side of the ECtHR, as well as the absence of a coherent theory for granting fundamental rights to companies, is the main complaint of the opponents of this idea, along with the claims of dehumanization of human rights mentioned above.

Further discussion requires delving into existing concepts of corporate personhood. There are three traditional theories concerning corporate personhood, however, neither of the existing theories sufficiently explains the recognition of companies as bearers of human rights. Particularly, the fiction theory of corporate personhood, in a nutshell, refers to the understanding of the company as an intendment and a creature of the state (law), respectively such a creature can possess only rights that the state (law) confers upon it. That conception allows designating human rights to the companies merely by an act of legislator, which is in contradiction with one of the central ideas of human rights, according to which human rights are considered as attributed to human beings regardless of granting or revocation them by the state (Isiksel, 2016: 316). Following the natural theory of corporate agency, a company is

[3] Convention for the Protection of Human Rights and Fundamental Freedoms, singed in Rome 4.XI.1950.

an objectively real entity, which is distinct from its shareholders, and has its spirit, will, and purpose, while law merely recognizes it and gives legal effect to its existence. Proponents of this theory ascribe to the company certain purely human characteristics and claim autonomous agency, that, however, does not imply humanity and human rights protection. Even though business entities indeed share certain attributes with human, humanity is intuitively considered more than the sum of certain attributes to be shared with humans. Therefore, traditionally human rights norms identify and protect human characteristics that corporations lack (Isiksel, 2016: 318-320). The third, aggregative theory holds that a company is a form of human organization to achieve particular objectives and it acquires the rights of the humans it is composed of. This theory ignores some essential features of the company such as limited liability, identity in succession, *etc.*, as well as other characteristics that make a company distinct from its shareholders.

The right to a fair trial, however, places a specific position. The most rigorous critics arguing companies cannot be entitled to human rights assume the right to a fair trial is applicable to business entities (Sanchez-Graells and Marcos, 2014; Scolnicov, 2013: 20-22). The extent and intensity of the right to a fair trial remain the principal points for further discussion.

In the view of foregoing, the aim of this article is to explore the right to a fair trial enjoyed by companies through the prism of the case law of the ECtHR and the CJEU, as well as to thoroughly examine doctrinal studies relevant to the issue that is the focus of the article. The article is logically divided into two substantial parts, apart from the introduction with a brief overview of companies' fundamental rights and the conclusion summarizing the main inferences. The first part is dedicated to the application of the right to a fair trial to legal entities by the ECtHR, and the second one by the CJEU. Each part consists of the analysis of the right to a fair trial and its components according to the underlying legislation and the case law and is complemented by doctrinal commentaries on the issues concerned. Taking into account space constraints, guarantees of the right to a fair trial related to civil litigation are predominantly examined throughout the article.

2 The European Court of Human Rights

The right to a fair trial is enshrined in Article 6 of the ECHR and refers to civil and criminal proceedings. Although the first paragraph applies to both categories of cases and the ECtHR has never made an explicit assignment of it to the particular type of litigation, it is widely considered to refer to civil proceedings (*e.g.* Rozakis, 2006: 117; the ECtHR, 2022). In this case, a kind of artificial distinction is made by the doctrine, taking into account that the paragraph has been implemented by the ECtHR mostly in civil cases or in a manner differentiating civil and criminal proceedings. The second and the third paragraphs are thought to apply primarily to criminal proceedings, though there is a practice of applying these paragraphs to civil proceedings by analogy and vice versa, whenever it is possible.[4]

From a literal interpretation of the first paragraph, several elements of the right to a fair trial are inferred, which can be distinguished between two aspects: institutional and procedural. A guarantee of determination of the case by an independent and impartial tribunal established by law refers to the institutional aspect. Fairness, publicity and reasonable time of a hearing, public pronunciation of the judgment, in turn, are procedural guarantees in their nature, that is, they are dimensions of the procedural aspect. The ECtHR through its case law has acknowledged also other guarantees[5], such as the right to access to a court, the principle of equality of arms, the right to adversarial proceedings, the right to be present at the trial, the requirement to give reasons for judicial decisions, the principle of legal certainty and consistency and some others.

The second and third paragraphs are designed to apply to criminal proceedings, traditionally requiring more specific guarantees. The second paragraph recognizes the presumption of innocence, guaranteeing that no guilt can be presumed until proved according to law and imposing the burden of proof on the prosecution (Schabas, 2015: 298). The third paragraph, in turn, set out a number of minimum guarantees that apply in criminal proceedings, complementing the general requirement of the fairness of all judicial proceedings. This includes the right to

[4] In particular, in criminal proceedings the ECtHR frequently examines the first and the third paragraphs together.
[5] See *e.g.* case Golder v. the UK, no. 4451/70, 21.02.1975, acknowledging the right to access to a court; Case Dombo Beheer B.V. v. the Netherlands, no. 14448/88, 27.10.1993 acknowledging the principle of the equality of arms; case H. v. Belgium, no. 8950/80, 30.11.1987 recognizing the obligation of the courts to provide reasoning, *etc.*

information about the nature and cause of the accusation, the right to adequate time and facilities to prepare a defence, including the right to defence through legal assistance, guarantees concerning the examination of witnesses, the right to an interpreter, as well as certain implicit guarantees recognized by the Court, such as the right to be present at trial, protection against self-incrimination and some others.

Predominantly, the right to a fair trial is deemed attributable to legal persons, "because of its importance to the quality and fairness of the court proceedings" (van der Muijsenbergh and Rezai, 2012: 49), the only limits of its application constitute a point for discussion. In that regard, certain authors state that there is no reason why the level of protection provided by the right to a fair trial to companies should be weaker than one provided for natural persons since otherwise legal persons cannot enforce their substantive rights as they have (Oliver, 2015: 678). Moreover, it is considered unfair if a party has a stronger position in proceedings against a legal person than in proceedings against a natural person (Julicher, *et al*., 2019: 10). Other commentators insist on the reduced scope of the protection for corporations since *e.g*., they cannot suffer state coercion at the same level as individuals, while one of the primary objectives of the right to a fair trial is to create a counterbalance between an individual and public powers (Sanchez-Graells and Marcos, 2014: 7, 9). Moreover, legal persons can suffer only economic detriment from the breach of fairness, impartiality, the publicity of the trial, while in the case of individuals, human autonomy is affected (Scolnicov, 2013: 22). Both arguments are specifically relevant to criminal proceedings, because the person charged with a criminal offence is subject to stressful process full of anxiety and uncertainty, at the same time corporation experiences nothing of that sort (Scolnicov, 2013: 22).

For its part, the reference to the personal component of the right to a fair trial, that is protected humanity, human dignity and other purely human characteristics, raises certain issues. On the one hand, it reverts the issues of corporate personhood, in particular, whether and to what extent companies can attribute procedural guarantees-derivatives of those enjoyed by individuals following the aggregative theory. On the other - it leads to the issue of the nature, purpose and objective of each particular guarantee of the right to a fair trial: whether the guarantee derives from the individual's dignity, personality, and weakness and is aimed primarily at its protection or it is rooted in the rule of law, and its pursuit is the main objection. It is assumed by certain authors that the recourse to human dignity doubts legitimate

reasons for the application of certain guarantees to legal persons, and contrary, if the root of a certain privilege is in the rule of law, it relates to all litigants, including companies (Višekruna, 2018: 116).

As to the ECtHR jurisprudence on the issues concerned, the right to a fair trial in principle has been regarded as applicable to companies without any kind of discussion, despite the decades-long practice, the vast amount of proceedings instituted by companies on alleged violations of almost every guarantee of Article 6 ECHR and constant criticism from the side of legal scholars. However, judgments and concurring opinions in some cases deserve detailed analysis.

2.1 Comingersoll SA v. Portugal

It is appropriate, to begin with the landmark case *Comingersoll SA v. Portugal.*[6] The case in question concerned a company formed under Portuguese law, complaining about the length of civil proceedings instituted upon the enforcement of bills of exchange, which had lasted more than 17 years and was pending by the time of the consideration of the case by the ECtHR. The Court found the violation of the right to a fair trial, as it is expected, without any reference to the specific status of the applicant. Nevertheless, commenting on the right of *Comingersoll* company to the compensation of non-pecuniary damage the Court provided reasoning, which can be considered (in the absence of others) showing the Court's positions as regards the corporate personhood, the nature of the right to a fair trial and other relative issues.

In particular, the Court stated that the Convention must be interpreted in a way *'to guarantee rights that are practical and effective'* (para. 35). This argumentation of the Court is considered in doctrine a shift from a traditional focus on human dignity towards a focus on the rule of law aspect of human rights protection - the ECtHR pragmatically moved away from the discussion of the applicant's specific status, nature of the compensation and other issues while pointing out the importance of the effectiveness principle for the rule of law (Emberland, 2003: 424-425; Isiksel, 2019). In general, however, out of purely *Comingersoll* context, is pointless to interpret the right to a fair trial based on 'human' or 'the rule of law' nature, since all the

[6] Comingersoll S.A. v. Portugal, no. 35382/97, 6.04.2000.

guarantees forming it have ambivalent nature. Moreover, the ECHR as an instrument has its own value system, formed by individual dignity, as well as, by the rule of law, alongside other values such as democracy and European liberalism. Therefore, a restrictive approach to the interpretation of the right to a fair trial based on one of the dimensions of the underlying value system does not reflect the essence of the object and purpose of the Convention regime, especially in the context of corporate protection (Emberland, 2006: 38-51).

Non-pecuniary damage, in the opinion of the Court, can be claimed out of objective or subjective reasons, *"among these, account should be taken of the company's reputation, uncertainty in decision-planning, disruption in the management of the company (for which there is no precise method of calculating the consequences) and lastly, albeit to a lesser degree, the anxiety and inconvenience caused to the members of the management team"* (para. 35). The latter cited is deemed in legal doctrine as the Court's commitment to an aggregative theory of corporate personhood (Emberland, 2003: 429-430; Isiksel, 2019: 993-995; Scolnicov, 2013: 14 *et. seq*), since the reference to a personal component, namely to uncertainty in decision planning, disruption in the management, anxiety and inconvenience, is quite strong. These are, however, considerations of general nature, which form a certain context for the case but do not correlate with the facts of the particular case in full. Concerning the case, the ECtHR noted, that *"the proceedings continued beyond a reasonable time must have caused Comingersoll S.A., its directors and shareholders considerable inconvenience and prolonged uncertainty, if only in the conduct of the company's everyday affairs. The applicant company was in particular deprived of the possibility of recovering its claim earlier…it remains outstanding today. In this connection, it is, therefore, legitimate to consider that the applicant company was left in a state of uncertainty that justified making an award of compensation"* (para. 36). In this part of the reasoning, directly referring to the facts of the case the Court made at least a verbal distinction between the company, its shareholders and its management, assuming that each of them suffered from the considerable inconvenience and prolonged uncertainty. In substance, the state of uncertainty, following the Court's emphasis, is caused by a deprivation of the company from the recovery of the debt. Here there is no reference to a personal component, in contrast, the Court rather protects the company's right to recover debts, i.e. to maintain the balance of its assets and liabilities – a key attribute of a company and factual protection of its economic interests. That can indicate the recognition of the company as an independent subject protected by the Convention, without a human component.

In a concurring opinion,[7] four judges clarified their position (disagreement) as to the personal reference, such as anxiety and inconvenience of management, made by the Court. In particular, judges pointed out that *"the company is an independent living organism… whose rights also receive autonomous protection under the ECHR"*. Moreover, judges state that the majority of rights apply directly to autonomous legal entities, deserving the Convention's protection. Therefore, there are no reasons for the Court *"to be prevented from accepting, without any reservation, implied or otherwise, that a company may suffer non-pecuniary damage, not because of the anxiety or uncertainty felt by its human components, but because, as a legal person, in the society in which it operates, it has attributes, such as its own reputation, that may be impaired by acts or omissions of the State"*. This reasoning resembles a moderate version of a natural theory of corporate personhood, concerning the company as an autonomous agent separate from its shareholders, management and so forth.

That is to say, *Comingersoll* case provides equivocal reasoning, on the one hand with the strong reference to personal implications attributed to humans forming the company, on another hand, factually protecting the right of the company to recover its debts, highlighting the feature of the company that makes it distinct from the shareholders, managers, etc.

2.2 Marpa Zeeland B.V. and Metal Welding B.V. v. the Netherlands

Another case deserving analysis is the case of *Marpa Zeeland B.V. and Metal Welding B.V. v. the Netherlands*[8] concerned criminal proceedings instituted against applicant companies and their director. They were convicted of forgery and tax fraud. There were imposed fines on the companies, and the director was sentenced to 2 years of imprisonment. In exchange for the remission of the sentence (reduction of the fines and term of imprisonment), the applicants withdrew their appeals. Further, the request for remission was rejected, and the appeal against the initial sentence was rejected as well. Besides it, proceedings lasted at least 6 years. In this case, the Court found a violation of the right to access to a court, consequently, the right to lodge a meaningful appeal, and the violation of the reasonable time requirement. There was no reasoning provided as regards the applicability of Article 6 of the ECHR to the

[7] Concurring opinion of judge Rozakis, joined by judges Sir Nikolas Bratza, Caflisch and Vajić in case Comingersoll S.A. v. Portugal, no. 35382/97, 6.04.2000.
[8] Marpa Zeeland B.V. and Metal Welding B.V. v. the Netherlands, no. 46300/99, 09.02.2005.

companies, nevertheless, the Court's considerations on the applicant's right to compensation for non-pecuniary damage contain a valuable position. The ECtHR referred to *Comingersoll,* however, stated that *"…that the applicant companies and their director must have experienced considerable frustration when, after being refused remission of sentence, they were barred from pursuing their appeals. Their situation was further aggravated by the fact that the proceedings continued beyond a reasonable time"* (para. 71). Following cited justification, the Court points out that the companies and the director distinctly experienced frustration because they both failed in remission of the sentence: the companies - in reduction of the imposed fines, the director – in the term of his imprisonment. That is, again, there is no reason to state that the Court equates the companies with their director or by other means emphasizes a personal component.

2.3 Granos Organicos Nacionales S.A. v. Germany

The third case to examine is *Granos Organicos Nacionales S.A. v. Germany*[9], which concerned the issue of the refusal to grant legal aid to a legal entity and, consequently, violation of the right to access to a court, since the Convention does not contain an independent article, providing the right to legal aid. The applicant company was registered and operated under Peruvian law. It was engaged in the export of organic bananas in Europe through sales agents - two German companies under the concluded commission agreement, which contained a clause that all legal disputes would be brought to the German courts. The applicant company requested legal aid in the form of dispensation from advanced payment of court fees before the German court in a civil dispute for the breach of the commission contract, submitting that the company and shareholders were insolvent and were not able to pay the court fee. The requested legal aid was not granted, which became a ground for the application for the alleged violation of the right to access to a court. The Court did not find the violation of Article 6 of the ECHR out of several reasons, among them out of considerations of reciprocity of German and Peruvian law, proportionally to the aims pursued by national legislation and mainly *"the absence of a consensus among State Parties to the Convention on the granting of legal aid to legal persons"* (paras. 47-53). In addition, the Court, examining the violation of the right to access to a court in conjunction with Article 14 of the ECHR, prohibiting discriminative treatment, accepted the arguments of the Government and found that there were '…relevant

[9] Granos Organicos Nacionales S.A. v. Germany, no. 19508/07, 22.03.2012.

reasons *for the different treatment of natural and legal persons…'* with respect to legal aid in the particular case (para. 57). In doctrine, this case is considered proof of a limitation of the scope of the right to a fair trial under Article 6 to companies in comparison with natural persons, supported by the ECtHR (Wilcox, 2018: 42). Substantively, however, the Court's position, in this case, cannot be regarded as conclusive, since the Court did not independently examine the issue of availability of legal aid to legal persons within the notion of the right to access to a court, but refers it to the discretion of the States (Johan Settem, 2016: 405-407). Nevertheless, it appears inconsistent to claim, that the positions of the Court in the *Comingersoll* and *Marpa Zeeland B.V.* cases are conclusive, but the one in the *Granos Organicos* case is not. In fact, the Court does not manifestly exclude the companies' right to legal aid, though admits that there can be different treatment between natural and legal persons as regards certain components of the right to a fair trial if it is justified by the particular situation of the company concerned.

For the most part, other case law on the violation of the right to a fair trial is vaguer: it either does not contain any justification at all,[10] or it refers to *Comingersoll* considerations, without extensive reasoning regarding the facts of the particular case, irrespective of whether the proceedings at issue concerned the right to an independent and impartial tribunal[11], publicity[12] and fairness of hearing[13], the right to access to a court.[14] For certain cases, however, *Comingersoll* reasoning appears far-fetched, e.g. it is doubtful that the lack of publicity of a trial or the absence of a public pronunciation of a judgment can directly affect the reputation of the company, or can directly cause *"uncertainty in decision-planning, disruption of management or anxiety, inconvenience of members of management team"*. It is clear, that *e.g.* lengthy proceedings, judgment without reasoning, and limitation of access to a court can produce the perverse effects cited above, that, however, is not so clear in case of the

[10] Centroprom Holding AD Beograd v. Montenegro, no. 30796/10, 10.02.2022, para. 13; MUDr. Vladimír Gergel, s.r.o. v. Slovakia, 22.07.2021, no. 48858/20, para. 19; Ialtexgal Aurica S.A. v. the Republic of Moldova, no. 16000/10, 16.02.2021, para. 21; Framipek s.r.o. and AGRORACIO Senica, a.s. v. Slovakia, no. 51894/14 and 52073/14, 28.01.2020, para. 47.

[11] Advance Pharma sp. z o.o v. Poland, no. 1469/20, 03.05.2022, para. 357 no justification; Beg S.p.a. v. Italy, no. 5312/11, 20.08.2021, para. 165 no justification.

[12] Mirovni Inštitut v. Slovenia, no. 32303/13, 13.06.2018, para. 51, the Court cited para. 35 of Comingersoll case.

[13] Wohlmeyer Bau GmbH v. Austria, no. 20077/02, 08.07.2004, para. 61, the Court cited paras. 35, 36 of Comingersoll case; Alpha Doryforiki Tileorasi Anonymi Etairia v. Greece, no. 72562/10, 22.02.2018, para. 94, the Court cited para. 35 of Comingersoll.

[14] Dareskizb Ltd v. Armenia, no. 61737/08, 21.09.2021, para. 97, the Court cited para. 35 of Comingersoll case; Association BURESTOP 55 and others v. France, no. 56176/18, 01.10.2021, para. 121, no justification.

violation of some guarantees. That is not to say, that these violations do not affect the company, they do indeed, but not in the perspective described by the Court in *Comingersoll.*

3 The European Court of Justice

The right to a fair trial within the EU has two main periods of its development – before the Charter on Fundamental Rights of the European Union (hereinafter: CFR)[15] entered into force and after it. Before the adoption of the CFR, the right to effective judicial protection and, a bit later, the right to a fair legal process, has long been recognized as general principles of EU law by the CJEU. In its case law, the CJEU identified a number of elements of the right to effective judicial protection and the right to a fair legal process is comprised of, such as the right to access to a court, the right to an independent tribunal, the right to a legal process within a reasonable time, the right to be heard (Teleki, 2021: 316-318) and other "traditional" elements. Since the CFR has been proclaimed, these rights have been reaffirmed by the right to an effective remedy and to a fair trial, which is embodied in Article 47. Article 47 CFR is largely inspired by Articles 6(1) and 13 of the ECHR but goes further than both (Kellerbauer, *et al.*, 2019: 2215; Gutman, 2019: 889; Peers, *et al.*, 2021: 1253-1254).

Notwithstanding that it follows from Article 52(3) CFR, that rights, which correspond to the rights guaranteed by the ECHR have the same meaning and scope laid down in the Convention and relevant case law, a higher level of protection is welcomed by the CFR. In comparison with the equivalent provisions of the ECHR, the Article 47 CFR *per se* offers more extensive guarantees, e.g. the right to an effective remedy or the right to legal aid. The latter *e.g.* is absent in the text of the Convention and the conditions under which it is granted are not so clear according to the case law of the ECtHR. Moreover, legal scholars note a tendency to assert the autonomy of the right to a fair trial under the CFR from the side of the CJEU (Gutman, 2019: 888; Kellerbauer, *et al.*, 2019: 2216; Schütze and Takis Tridimas, 2018: 398). In particular, AG Cruz Villalon in his opinion in the case *Samba Diouf* stated that *"…the right to the effective judicial protection... acquired a separate identity and*

[15] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407.

substance under that article which are not mere a sum of Articles 6 and 13 of the ECHR." [16] In a number of cases, the CJEU noted that *"Article 47 of the Charter secures in EU law the protection afforded by Article 6(1) of the ECHR. It is necessary, therefore, to refer only to Article 47."* [17] In other words, Article 47 be considered within its own content and the CJEU case law.

Thus, the first paragraph of the commented article guarantees the right of everyone whose rights and freedoms guaranteed by the law of the Union are violated to an effective remedy before a tribunal. The notion of the right to an effective remedy refers first and foremost to the right to access to a court, which in turn implies time limits applicable to the institutions of proceedings, the requirement to adjudicate and give a decision in reasonable time and some other guarantees (Kellerbauer, *et al.,* 2019: 2217-2219; Gutman, 2019: 889). The second paragraph provides that everyone entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law and shall have the possibility of being advised, defended and represented. In its sufficient part, this paragraph is equal to Article 6(1) ECHR examined in detail above. Apart from the rights literally perceived from the paragraph, the CJEU acknowledged also other aspects of the right, e.g., constituting the notion of the "fairness" of proceedings. In particular, the CJEU's case law is focused on the principle of equality of arms, the right to defence and corresponding to its duty to give reasons upon which the decision is based, the right to appear in person at a trial and certain other guarantees (Kellerbauer, *et al*., 2019: 2222, 2224-2225). The third paragraph ensures that legal aid shall be available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Concerning the right to an effective remedy and to a fair trial of legal persons, it has to be pointed out that EU law by its very nature is oriented to the economic sphere, and economic freedoms are still core values of EU law, despite the fact that the protection of individual rights and the rule of law has been included in its objectives in last decades. Therefore, generally, the doctrine unanimously considers fundamental rights under the CFR, including the discussed one, applicable to legal

[16] Opinion of AG Cruz Villalon in Case C-69/10, Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration, 28.07.2011, ECLI:EU:C:2011:102, para. 39.
[17] Case C-199/11, Europese Gemeenschap v Otis NV and Others, 6.11.2012, ECLI:EU:C:2012:684, para. 47; Case C-386/10, Chalkor AE Epexergasias Metallon v European Commission, 8.12.2011, para. 51 and others.

persons, apart from provisions obviously related to natural persons or to specific target groups, such as EU citizens (Oliver, 2015: 679-680; Julicher, *et al.*, 2019: 4-5).

In contrast to the case law of the ECtHR, the CJEU case law provides considerations which more precisely indicate that companies are entitled to the right to an effective remedy and to a fair trial under the CFR.

For instance, in case *Bank Mellat,*[18] which concerned among others the issue of whether an Iranian state-owned bank can invoke the protection of fundamental rights under EU law, in particular the right of defence and the right to effective judicial protection under Article 47 of the CFR, the General Court concluded that Article 47*"…guarantees the right to 'everyone', a wording which includes legal persons, such as applicant"* (para. 36). The General Court pointed out that neither the CFR nor EU primary law contains provisions preventing legal persons – emanations of non-EU states from the protection of fundamental rights, *"those rights may be therefore relied upon by those persons before the Courts of the European Union in so far as those rights are compatible with their status as legal persons"* (para. 41). This judgment was upheld by the CJEU, the Court noted that the right of defence and the right to effective judicial protection *"…may be invoked by any natural person or any entity bringing an action before the Courts of the European Union "*.[19] A similar position was expressed in cases *Good Luck Shipping*[20] and *Almaz-Antey*[21], which concerned alleged infringements of the obligation to state reasons for the decisions on freezing assets, the right to effective judicial protection and the right of defence are applicable to foreign (non-EU Member States) legal entities, the General Court recalled, among others, that *"the effectiveness of the judicial review guaranteed by Article 47…requires… to ensure that the decision, which affects the person or entity concerned individually, is taken on a sufficiently solid factual basis"* (para. 51 of case *Good Luck Shipping*, para. 84 of case *Almaz-Antey*).

These considerations create an impression, that the issue of whether legal entities are entitled to the right to an effective remedy under the CFR is not even considered controversial by the CJEU. In that regard, the Court pursued an unambiguous and non-restrictive approach, determining the widest circle of persons invoking the

[18] Case T-496/10, Bank Mellat v Council of the European Union, 29.01.2013, ECLI:EU:T:2013:39.
[19] Case C-176/13 P, Bank Mellat v Council of the European Union, 18.02.2016, ECLI:EU:C:2016:96, para. 49.
[20] Case T-423/13, Good Luck Shipping LLC v Council of the European Union, 24.05.2016, ECLI:EU:T:2016:308.
[21] Case T-225/17, Joint-Stock Company 'Almaz-Antey' Air and Space Defence Corp., formerly OAO Concern PVO Almaz-Antey v Council of the European Union, 25.01.2017, ECLI:EU:T:2017:25.

protection of the rights under Article 47 CFR – from foreign legal entities to even emanations of foreign States.

3.1 Orkem v. Commission of the European Communities

In order to show, how far the CJEU has taken corporate human rights, the *Orkem* case[22] should be observed. Despite the fact, that the case concerned the privilege against self-incrimination, which falls within the scope of Article 48 CFR, it is nevertheless an indispensable element of the right to a fair trial under Article 6 of ECHR and, therefore, can be analysed in the context of the examined issue. Orkem was a French company engaged in chemical activity. It brought an action to the CJEU for the annulment of the Commission's decision adopted within the alleged violation of the competition law from the side of Orkem, according to which it had been obliged to reply to certain questions. Respectively, Orkem claimed, among others, that its right to defence was infringed because the Commission in fact sought to compel Orkem to incriminate itself. The Court supported the position of the applicant and annulled the contested decision, by stating that *"the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove"* (para. 35). The CJEU's reasoning does not exclude the Commission's right to compel an undertaking to answer factual questions as to the subject matter and disclose certain documents (paras. 37-40), however, *de facto* the privilege against self-incrimination was recognized for legal entities. This judgment is ambiguously perceived by legal scholars, in particular, some commentators state, that the CJEU is "more generous to legal entities than it need have" and any further movements in that direction "would jeopardize the enforcement of competition law for no good" (Oliver, 2015: 686). Researchers note, in particular, that the notion of "undertaking" under the CJEU case law is wide, therefore problems may arise, *e.g.* in determining to whom of a legal person the privilege extends (Veenbrink, 2015: 134-135). In general, the discussion within the *Orkem* case raises issues of a limitation of the scope of the privilege against self-incrimination for legal entities similar to those mentioned above and relating mostly to specific guarantees for criminal proceedings, provided by Article 6 ECHR. The most radical positions were expressed by the AGs in certain

[22] Case 374/87, Orkem v. Commission of the European Communities, 18.10.1989, ECLI:EU:C:1989:387.

cases of the CJEU. Thus, AG Geelhoed in the case *SGL Carbon*[23] stated that the concept of the privilege against self-incrimination was developed in relation to natural persons in the context of classical criminal proceedings, *inter alia* by the ECtHR case law to which the CJEU usually refers, consequently *"it is not possible simply to transpose findings of the ECtHR without more to legal persons or undertakings"* in competition proceedings (para. 63). AG Ruiz Jarabo-Colomer in the case *Volkswagen*[24] arguing irrespective of the privilege against self-incrimination, noted that guarantees specific to criminal law cannot be transferred *en bloc* to competition law, since they are *"designed specifically to compensate for that imbalance of power…The same procedural guarantees for natural and legal persons, apart from being a mockery to the most needed individuals… would entail a lower degree of protection"* (para. 66). Nevertheless, the CJEU has not moved away from its position and has constantly confirmed it.[25]

3.2 DEB v. Bundesrepublik Deutschland

Returning to the guarantees forming the right to a fair trial under Article 47 CFR, the landmark case *DEB,*[26] in which the CJEU recognized the right to legal aid of the legal persons has to be commented on. DEB, a company registered and operated under German law, requested legal aid to cover advanced costs of the compulsory representation by a lawyer in a court dispute against the Federal Republic of Germany for its failure to timely transport two Directives concerning common rules in natural gas, that lead to sufficient damages and loss of profit of DEB (paras. 14-17). DEB was refused in granting legal aid at the court of the first instance due to the conditions of national law. The appeal court, in turn, was uncertain, whether the refusal was consistent with the principle of the effectiveness of EU law since it makes it impossible to pursue an action seeking to establish State liability under EU law (paras. 18-25), the respective question to the preliminary ruling was therefore referred to the CJEU. The CJEU, in turn, noted that the question in fact concerns

[23] Opinion of AG Geelhoed in Case C-301/04 P, Commission of the European Communities v SGL Carbon AG, 19.01.2006, ECLI:EU:C:2006:53.
[24] Opinion of AG Ruiz Jarabo-Colomer in Case C-338/00 P, Volkswagen AG v Commission of the European Communities, 17.10.2002, ECLI:EU:C:2002:591.
[25] Case C-238/99 P, Limburgse Vinyl Maatschappij NV v. Commission of the European Communities, 15.10.2002, ECLI:EU:C:2002:582, paras. 273-276; Case C-301/04 P, Commission of the European Communities v SGL Carbon AG, 29.06.2006, ECLI:EU:C:2006:432; Case T-112/98, Mannesmannröhren-Werke AG v Commission of the European Communities, 20.02.2001, ECLI:EU:T:2001:61.
[26] Case C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland, 22.12.2010, ECLI:EU:C:2010:811.

the right of a legal person to effective access to justice that is ensured by the principle of effective judicial protection under EU law, enshrined in Article 47.

In that regard, the Court provided the substantive analysis in three aspects – in light of other provisions of EU law, the law of Member States and the case law of the ECtHR (para. 37).

The CJEU first examined the wording of Article 47, it stated, in particular, that the use of the word 'Person' or 'Mensch' in German may indicate that legal persons are not excluded from the scope of Article 47. Moreover, the right to an effective remedy and to a fair trial under Article 47 is included in the Chapter 'Justice' of the Charter, other rights of which are invoked equally by natural and legal persons. Other EU law, such as Directive 2003/8/EC, establishing common rules on legal aid in cross-border disputed, in the opinion of the CJEU, is not persuasive for the conclusion of general application, since relates to specific categories of litigation (paras. 39-43). Analysis of the law of the Member States, in turn, shows the absence of any common approach to the issue of granting legal aid to companies (para. 44). Lastly, the CJEU referred to the case law of the ECtHR, since the right to legal aid under EU law is bound by the meaning and scope of the corresponding right under the ECHR and the case law of the ECtHR. In particular, the Court examined certain cases of the ECtHR and found out that *"the grant of legal aid to legal persons is not in principle impossible but must be assessed in the light of the applicable rules and the situation of the company concerned"* (para. 52), consequently, it is for the national courts to make the assessment. The CJEU suggested that the following may be taken into consideration in making the assessment of grating legal aid: subject-matter of the litigation, whether the applicant has a reasonable prospect of success, the complexity of the applicable law and procedure and its economic importance for the applicant (paras. 53, 61); as well as the financial capacity of an applicant, inter alia the form of the company, whether it is a capital company or a partnership, whether it is a limited liability company or otherwise; the financial capacity of its shareholders, namely, their ability to obtain sum necessary to institute court proceedings; the objects of the company, whether it is profit-making or non-profit making company; the manner in which it has been set up; and, more specifically, the relationship between the resources allocated to it and the intended activity (paras. 54, 62); and, lastly, whether the costs of proceedings represent an unsurmountable obstacle to access to court (para. 61). The CJEU confirmed its position in the case *GREP* a few years later (Peers, *et al.*,

2021: 1380).[27] *DEB* judgement is controversially assessed in doctrine, despite its clear (at first glance) position on granting legal aid to legal persons. In particular, researchers state, that *DEB* judgment expresses itself in allowing legal aid to legal persons, however, does not provide the conditions under which legal aid must be granted, as well as, the inferences made in the judgment do not clarify whether legal aid is available to legal persons if national law precludes such aid in principle (Engström, 2011: 59, 65-66; Oliver, 2015: 682) and so on.

4 Conclusion

Despite the doctrinal controversy in the question of entitlement of legal entities to fundamental rights, the right to a fair trial places a specific position among legal scholars and in the case law of the ECtHR and the CJEU.

The right to a fair trial is enshrined in Article 6 ECHR and contains various guarantees for the litigants of civil and criminal proceedings, such as the right to public and fair hearing in a reasonable time, impartial and independent tribunal; other guarantees, in turn, were developed by the case law of the ECtHR. Article 6 ECHR and relevant case law served as a source of inspiration for Article 47 CFR, which ensures the right to an effective legal remedy and to a fair trial to everyone those rights and freedoms guaranteed by EU law are violated. Notwithstanding Article 52(3) CFR, according to which the rights guaranteed by the CFR shall have the same meaning and scope laid down in the ECHR and relevant case law, a higher level of protection is not prevented by the CFR and is welcomed by the CJEU.

As to the applicability to legal persons, the right to a fair trial in principle has been regarded as applicable to companies without any kind of discussion by both courts. This, however, is constantly criticized by legal scholars in relation to the case law of the ECtHR, at the same time, is perceived without any ambiguity regarding the case law of the CJEU. The reason behind this is that EU law by its very nature is focused on the economic sphere, and economic freedoms are still core values of EU law, while the ECHR is inherently oriented to the protection of the rights of humans as a response to the atrocities carried out during the Second World War. Therefore, in order to be applicable to legal entities, it is thought, the ECHR has to have a strong

[27] Case C-156/12, GREP GmbH v Freitstaat Bayern,13.06.2012, ECLI:EU:C:2012:342.

theoretical foundation and at least any persuasive discussion whatsoever in that regard from the side of the ECtHR.

It appears excessively difficult to make inferences from the case law of the ECtHR as to its firm position concerning the right to a fair trial of legal persons, since the case law is vague, and the positions of the Court are inconsistent. On the one hand, one might argue for the ECtHR commitment to an aggregative theory of corporate personhood, since the reference to a personal component, namely to uncertainty in decision planning, disruption in the management, anxiety and inconvenience, in the Court's judgments is quite strong. On the other hand, a closer look at the ECtHR reasoning shows various indicators of recognition of the company as an independent subject protected by the Convention, without any individual component. In particular, in some cases, the Court directly refers to the right of the company to recover debts, or experienced frustration in relation to consequences influencing the company, and not its shareholders, managers and workers. In general, the case law of the Strasbourg court creates an impression, that it by any means avoids explicit admissions and prohibitions to legal entities in that regard. For instance, the Court does not manifestly exclude the companies' right to legal aid, though substantively does not examine this issue, but refers it to the discretion of the States.

In contrast, the CJEU case law provides considerations which precisely indicate that companies are entitled to the right to an effective remedy and to a fair trial under the CFR. In general, the Court pursued an unambiguous and non-restrictive approach, ensuring the protection of the rights under Article 47 CFR to the widest possible circle of legal persons – even to non-EU legal entities and emanations of foreign States. Moreover, it appears from the case law, that the CJEU pursues the idea of separate identity and substance of the right to a fair trial under the CFR, consequently, a level of protection higher than it is provided by the ECHR and case law of the ECtHR is often welcomed. Thus, the right to legal aid was explicitly granted to legal persons, moreover, the Court states different criteria for the national courts as to the factors that could be taken into consideration in the assessment of this right. In spite of certain doctrinal doubts, this is an unprecedented Court position, which sufficiently increases guarantees of the legal persons under the CFR. In the view of certain scholars, the CJEU sometimes has taken corporate fundamental rights too far. In particular, the Court recognized the privilege against self-incrimination for legal entities in proceedings instituted by the Commission for

the alleged violations of competition law. Any further movement in this direction, in the opinion of researchers, would entail a lower level of protection to individuals because it is not possible simply to transpose purely "criminal" guarantees designed for individuals without more to legal persons, as it was done by the CJEU.

In general, it can be concluded that insufficient attention is paid to the issue of whether legal persons are entitled to the right to a fair trial, and fundamental rights in principle - from both the doctrine and the courts. However, it requires extensive examination and a careful judicial approach, due to the consequences both the excessive admission and the ignorance of the human rights of companies may lead to the society, economy and welfare of the population.

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