OPINION OF ADVOCATE GENERAL MENGOZZI
delivered on 2 September 2010[1]

I — Introduction

1. This reference for a preliminary ruling concerns the interpretation of the principles of effectiveness and equivalence in the light of the rules applying, in the German legal order, to applications for legal aid, where those applications are made by a legal person in the context of an action seeking to establish State liability for infringement of European Union ('EU') law.

2. The Court is called upon for the first time to assess whether a mechanism for legal aid, intended inter alia to exempt persons from payment of the administrative charge for proceedings, the grant of which is subject to more restrictive conditions in respect of legal persons than natural persons, is consistent with EU law, and, consequently, to rule on the scope of the procedural guarantees which must be made available to legal persons.

1 — Original language: French.

II — Relevant legislation

A — *International law*

3. The Hague Convention on Civil Procedure of 1 March 1954, to which twenty-one Member States of the European Union are, to date, parties, devotes one section, under Title IV, to free legal aid. More specifically, Article 20 of the Convention provides that '[i]n civil and commercial matters, nationals of the Contracting States shall be granted free legal aid in all the other Contracting States, on the same basis as nationals of these States, upon compliance with the legislation of the State where the free legal aid is sought'.

4. Article 1 of the European Agreement on the Transmission of Applications for Legal Aid, signed in Strasbourg on 27 January 1977, under the aegis of the Council of Europe, and to which twenty-one Member States of the European Union are parties, states that '[e]very person who has his habitual residence in the territory of one of the Contracting Parties and who wishes to apply for legal aid in civil,

commercial or administrative matters in the territory of another Contracting Party may submit his application in the State where he is habitually resident. That State shall transmit the application to the other State'.

5. The first paragraph of Article 1 of the Hague Convention on International Access to Justice of 25 October 1980, to which nineteen Member States are parties, provides that '[n]ationals of any Contracting State ... shall be entitled to legal aid for court proceedings in civil and commercial matters in each Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State'. The second paragraph of that article states that '[p]ersons to whom paragraph 1 does not apply, but who formerly had their habitual residence in a Contracting State in which court proceedings are to be or have been commenced, shall nevertheless be entitled to legal aid as provided by paragraph 1 if the cause of action arose out of their former habitual residence in that State'.

B — *EU law*

6. Article 6(2) EU lays down the principle that '[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 ["the ECHR"] and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.

7. Under the heading 'Right to an effective remedy and to a fair trial', Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') provides as follows:

'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

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.'

8. The first paragraph of Article 10 EC provides that 'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks'. The second paragraph of that article states that '[t]hey shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty'.

9. Recital 4 in the preamble to 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 [2] states that all Member States are contracting parties to the ECHR and that the matters referred to in Directive 2003/8 are to be dealt with in compliance with that convention.

10. Recital 5 in the preamble to the Directive sets out the aim of the Directive as follows:

'This Directive seeks to promote the application of legal aid in cross–border disputes for persons who lack sufficient resources where aid is necessary to secure effective access to justice. The generally recognised right to access to justice is also reaffirmed by Article 47 of the [C]harter....'

11. Recital 11 in the preamble to Directive 2003/8 defines legal aid, specifying that it 'should cover pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings, legal assistance in bringing a case before a court and representation in court and assistance with or exemption from the cost of proceedings'.

12. Recital 13 in the preamble to the Directive defines the scope of the Directive as follows:

'All Union citizens, wherever they are domiciled or habitually resident in the territory of a Member State, must be eligible for legal aid in cross-border disputes if they meet the conditions provided for by this Directive. The same applies to third-country nationals who habitually and lawfully reside in a Member State.'

13. Article 1(2) of Directive 2003/8 provides that the directive 'shall apply, in cross-border disputes, to civil and commercial matters whatever the nature of the court or tribunal.

2 — OJ 2003 L 26, p. 41.

It shall not extend, in particular, to revenue, customs or administrative matters'.

14. Article 3(1) of Directive 2003/8 states that '[n]atural persons involved in a dispute covered by this Directive shall be entitled to receive appropriate legal aid in order to ensure their effective access to justice in accordance with the conditions laid down in this Directive'.

15. Under the heading 'Conditions relating to the substance of disputes', Article 6 of the Directive provides, in paragraph (1), that 'Member States may provide that legal aid applications for actions which appear to be manifestly unfounded may be rejected by the competent authorities'.

16. Article 6(3) further provides:

'When taking a decision on the merits of an application and without prejudice to Article 5, Member States shall consider the importance of the individual case to the applicant but may also take into account the nature of the case when the applicant is claiming damage to his or her reputation but has suffered no material or financial loss or when the application concerns a claim arising directly out of the applicant's trade or self-employed profession.'

17. Article 94(2) and (3) of the Rules of Procedure of the General Court, the wording of which is identical to Article 95(2) and (3) of the Rules of Procedure of the Civil Service Tribunal, read as follows:

'2. Any natural person who, because of his economic situation, is wholly or partly unable to meet the costs referred to in paragraph 1 shall be entitled to legal aid.

The economic situation shall be assessed, taking into account objective factors such as income, capital and the family situation.

3. Legal aid shall be refused if the action in respect of which the application is made appears to be manifestly inadmissible or manifestly unfounded.'

18. For its part, the first subparagraph of Article 76(1) of the Rules of Procedure of the Court of Justice reads as follows:

'A party who is wholly or in part unable to meet the costs of the proceedings may at any time apply for legal aid.'

C — *National law*

19. Paragraph 12(1) of the Law on Court Costs (Gerichtskostengesetz; 'GKG') provides:

'In civil litigation, the originating application may, in general, be served only after payment of the administrative charge for the proceedings. Should the grounds of the action be extended, no judicial action may, in general, be undertaken before payment of the administrative charge for the proceedings has been made; this also applies in regard to appellate proceedings.'

20. Paragraph 839 of the German Civil Code (Bürgerliches Gesetzbuch) categorises actions for damages brought against the German State as civil-law disputes.

21. Paragraph 78(1) of the German Code of Civil Procedure (Zivilprozessordnung; 'the ZPO') states that '[i]n proceedings before the Landgericht [Regional Court] and the Oberlandesgericht [Higher Regional Court], the parties must be represented by a lawyer …'.

22. Paragraph 114 of the ZPO reads as follows:

'A party which, on account of its personal and financial circumstances, is unable to pay the costs of the proceedings, or is able to pay them only in part or in instalments, shall receive legal aid, upon application, if the intended action or defence at law presents a sufficient prospect of success and does not appear to be frivolous …'.

23. Paragraph 116(2) of the ZPO provides that legal aid is to be obtained, upon application, 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 …'.

24. Paragraph 122 of the ZPO states:

'(1) In light of the grant of legal aid,

1. the Federal or *Land* Collection Office may demand payment of

   (a) the court and bailiff costs already due or falling due,

   (b) the debts owed to the appointed lawyers which have been passed to that office

   from the party concerned only in accordance with the arrangements established by the court,

2. the party shall be exempted from the obligation to provide security for the costs of the legal proceedings,

3. the appointed lawyers may not claim fees from the party concerned.

…'

25. Paragraph 123 of the ZPO states, lastly, that '[t]he grant of legal aid shall be without prejudice to the obligation to reimburse the costs incurred by the opposing party'.

III — The dispute in the main proceedings and the question referred for a preliminary ruling

26. DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH ('the DEB') is a German undertaking, established in 1998, which was authorised by the Ministry of the Economy of the Land Brandenburg to operate as an independent energy wholesaler and supplier of energy in Germany. Maintaining that it has suffered a loss on account of the delayed transposition in Germany of Directives 98/30/EC [3] and 2003/55/EC, [4] which were intended to facilitate non-discriminatory access to the national gas networks, DEB is pursuing a claim before a national court, by which it is seeking to establish State liability for infringement of EU law. When it brought its court action, DEB had no employees or assets.

27. In a judgment given in respect of failure to fulfil obligations, [5] the Court of Justice, for its part, found that the Federal Republic of Germany had failed to transpose Directive 98/30 within the period prescribed.

28. DEB claims to have suffered a loss and is seeking compensation amounting to just over EUR 3.7 thousand million. At the hearing, DEB explained that in 1998 it had almost 200 employees but gradually had to make them redundant because of its inactivity, and that it had assets of its own which it lost for the same reason. It maintains that it was consequently no longer able to carry on the activity for which it had been granted a licence, once access to the gas networks was actually made possible.

29. In DEB's view, the fact that it could not obtain access to the gas networks resulted in its losing at least six contracts. It explains how the amount claimed by way of damages was reached, asserting that it corresponds to the difference between the average statistical sale price to major German industrial customers and the purchase price in Russia, after deduction of payment for transit and transport

3 — Directive of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas (OJ 1998 L 204, p. 1).

4 — Directive of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30 (OJ 2003 L 176, p. 57).

5 — Case C-64/03 *Commission* v *Germany* [2004] ECR I-3551.

costs. DEB then deducted from that figure a precautionary reduction of 50 %, as prescribed by the relevant German legislation.

30. According to DEB's calculations, the administrative charge for the proceedings, which it must pay and which is calculated on the basis of the amount involved in the action, amounts to some EUR 275 000. Since it is compulsory, moreover, to obtain the services of a lawyer, DEB estimates the costs relating to representation at just over EUR 990 000. In order to succeed in the pursuit of its action, and without sufficient financial means, DEB, which is not able to pay either the charge laid down by Paragraph 12(1) of the GKG or the costs of a lawyer, whose instruction is compulsory, applied for legal aid to the Landgericht (Regional Court) Berlin.

31. By decision of 4 March 2008 the Landgericht Berlin refused to grant legal aid on the ground that DEB does not satisfy the conditions laid down in Paragraph 116(2) of the ZPO. While DEB's impecuniousness is not in any doubt, it appears that discontinuance of the action would not run counter to the public interest as construed by the German courts and by the Bundesverfassungsgericht (Federal Constitutional Court). Moreover, the Landgericht Berlin did not take a view on the merits of the application in the main proceedings.

32. DEB immediately lodged an appeal against that decision before the Kammergericht (Higher Regional Court) Berlin. That court held that if it were to rule in the light of German law alone, it would have to establish that the Landgericht Berlin interpreted the conditions laid down by Paragraph 116(2) of the ZPO correctly. After all, German courts have, according to settled case-law, acknowledged only very few circumstances in which discontinuance of an action would actually be prejudicial to the public interest. That would be the case if the decision affected a sizeable proportion of the population or if it were to have social repercussions. There would also be detriment to the public interest within the meaning of Paragraph 116(2) of the ZPO if discontinuance of the action prevented the legal person from continuing to discharge a duty in the public interest or where the very existence of that legal person depended on the action being pursued, and where jobs were at stake or the legal person had a large number of creditors.

33. The Kammergericht Berlin further points out that, under German case-law and in particular the case-law of the Bundesgerichtshof (Federal Court of Justice), the fact that adopting a correct decision is in the public interest or that it is necessary to deal with points of law of public interest in order to dispose of the case does not mean that the condition laid down by Paragraph 116(2) of the ZPO is met.

34. In DEB's case, it has no income, assets, employees or creditors. Discontinuance of the action does not in itself threaten its survival. Nor is it considered to fulfil duties in the public interest. Since it has always been required that, in addition to individual parties having an economic involvement in the

proceedings, a significant group of people should be affected detrimentally by discontinuance of the action, and since that is not the position with regard to DEB, the decision by the Landgericht Berlin rejecting its application for legal aid must be upheld.

35. The Kammergericht Berlin also points out that the difference in treatment afforded under the ZPO as between natural and legal persons was, furthermore, found by the Bundesverfassungsgericht to be in accordance with the German Basic Law. That court held that the granting of legal aid may be treated as a measure of social assistance which is derived from the principle of the social State and is necessary for the safeguarding of human dignity. From that position the referring court infers that such a measure of solidarity cannot be extended to impecunious legal persons. In the case of legal persons, having sufficient assets is a prerequisite for their creation and their existence, and they have a fundamental reason for existing which is acknowledged under the national legal system only if they are in a position to pursue the objective for which they were created and to fulfil their duties using their own resources.

36. However, the Kammergericht Berlin is unsure whether Paragraph 116(2) of the ZPO, as interpreted thus far by the national courts, is consistent with EU law. The conditions for granting legal aid, which are more restrictive for legal persons than for natural persons, and which are, moreover, subject to strict interpretation by the German national courts, have the specific effect, in DEB's case, of depriving that undertaking of any possibility of seeking to establish the liability of the German State for infringement of EU law. Thus, the refusal to grant legal aid makes it impossible, or at the very least extremely difficult, to obtain, where relevant, reparation from the State in respect of its liability for infringement of EU law. The referring court therefore doubts whether the national measure is compatible with the principles relating to State liability, and in particular with the principle of effectiveness as established by the case-law of the Court of Justice.

37. Faced with a problem of interpretation of EU law, and ruling at final instance on this matter, the Kammergericht Berlin therefore decided to stay the proceedings and, by order of 30 June 2009, to refer the following question, pursuant to Article 234 EC, to the Court for a preliminary ruling:

'In view of the fact that Member States may not, through the structuring of conditions under national law governing the award of damages and of the procedure for pursuing a claim seeking to establish State liability under [EU law], make the award of compensation in accordance with the principles of State liability impossible, or excessively difficult, in practice, must there be reservations with regard to 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 a legal person, which is unable to make that advance payment, does not qualify for legal aid?'

IV — The Procedure before the Court of Justice

38. The appellant in the main proceedings, the Danish, French, German, Italian and Polish Governments, the European Commission and the EFTA Surveillance Authority have submitted written observations.

39. At the hearing, which was held on 3 June 2010, the appellant in the main proceedings, the German Government, the Commission and the EFTA Surveillance Authority made oral submissions.

V — Legal analysis

A — *Summary of the observations*

40. A preliminary point to note is that, like the Danish, French and Italian Governments and the Commission, the German Government claims that the national legislation at issue does not give rise to reservations in light of the principles of equivalence and effectiveness. They essentially take the view that, while individuals must actually be able to seek to establish the liability of the State for infringement of EU law, the principles of effectiveness of EU law and of effective judicial protection cannot extend so far as to require Member States to grant legal aid to legal persons, which are merely artificial creations of the national legal system and whose recognition depends in particular on their having sufficient resources to ensure their survival. In the absence of a harmonising measure adopted at European Union level, in view of the rules of procedure applying before its courts and the very nature of legal aid — the essentially social nature of which, associated with human dignity, has been noted by some governments — it is entirely justified and reasonable to make any conditions that may exist governing the grant of legal aid to legal persons much more stringent than those applying to natural persons.

41. Conversely, the appellant in the main proceedings, the Polish Government and the EFTA Surveillance Authority express reservations concerning the national provision at issue. DEB submits that, inasmuch as it will have to abandon its claim for compensation if it is not awarded legal aid, the principle of effectiveness has clearly been infringed since it

is specifically prevented from having recourse in court to the rights it derives from EU law, a view also expressed by the EFTA Surveillance Authority, albeit in a more moderated tone. The Polish Government disputes the excessively restrictive interpretation by the German courts of the concept of 'public interest' and takes the view that the offence against the principle of effectiveness is not proportionate. In those circumstances, the appellant in the main proceedings, the Polish Government and the EFTA Surveillance Authority claim that the principle of effectiveness has been infringed.

B — *Effective judicial protection of the rights conferred on individuals by EU law, and principle of State liability for infringement of that law*

42. As the Court has consistently held, [6] the principle of effective judicial protection of the rights conferred on individuals by EU law is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR and, more recently, in Article 47 of the Charter. [7]

43. Effective judicial protection established in that manner consists in ensuring that individuals have the possibility of asserting their rights under EU law. Even where their rights have been infringed by the State, individuals must be able to obtain reparation before the national court.

44. It is apparent, indeed, from the very logic of the treaties and the commitments made by the Member States themselves following their decision to become members of the European Union that individuals must be able to bring claims to establish the liability of those States where they consider themselves to be victims of an infringement of EU law committed by the State.

45. Therefore, the objectives of fulfilling the obligations which the Member States entered into under EU law and of guaranteeing for individuals the full effectiveness of their rights under EU law are accordingly pursued. Indeed, it has been consistently held that Member States must, by virtue of the principle of sincere cooperation set out in Article 10 EC,

6 — Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37 and case-law cited.

7 — As regards the Charter, I should like to point out that, although it was not legally binding at the material time, it is undeniably a factor to be considered in this case, bearing in mind in particular the fact that the European Union legislature expressly acknowledged its importance in recital 5 in the preamble to Directive 2003/8 (see, for a similar situation, Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraph 38).

ensure that the rules of the Union take full effect and protect the rights which they confer on individuals. [8]

46. The right to reparation of persons harmed by an infringement of EU law is a fundamental principle of the Union based on the rule of law established by the treaties and a specific variation on the principle of effective judicial protection. At the same time, the Union's fundamental constitutional charter, formed by the treaties, is imbued with a spirit of judicial cooperation. Accordingly, where the Court has, logically, affirmed the principle of State liability for infringement of EU law, it has pointed out, also logically, that it should be possible to bring proceedings asserting that principle before the national courts, ordinary law courts of the Union, and that it is therefore for the national legal systems to determine the competent courts and the procedural and substantive conditions governing such actions. The procedural and judicial autonomy of Member States requires that they be afforded discretion in the matter.

47. However, that discretion must necessarily be subject to restrictions. Whilst national law on liability is indeed the context within which individuals must be able to seek to establish the liability of the State which has infringed EU law, the conditions for reparation of loss or damage laid down by national law must not be less favourable than those relating to similar domestic claims (principle of equivalence) and must not be so framed as to make it in practice impossible or excessively difficult to obtain reparation (principle of effectiveness). [9]

48. In this instance, it should be noted that there is the possibility for individuals to bring an action to establish the liability of the German State for infringement of EU law. It remains to be established whether the principles of equivalence and effectiveness are observed by the national law.

C — *The principle of equivalence*

49. The principle of equivalence, which requires that all the rules applicable to actions apply without distinction to actions alleging infringement of EU law and to similar actions alleging infringement of national law, [10] is in fact observed in this case. Payment of an administrative charge for the proceedings

8 — Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 16; Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 19, and Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 32.

9 — Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 27.

10 — Case C-118/08 *Transportes Urbanos y Servicios Generales* [2010] ECR I-653, paragraph 33 and case-law cited.

is demanded each time that an action to establish liability is pursued against the State, whether on the basis of an alleged infringement of domestic law or of an alleged infringement of EU law. Furthermore, the conditions for granting legal aid to legal persons are the same, whether those legal persons institute proceedings to establish State liability for infringement of national law or whether they seek to establish liability on the part of the German State for infringement of EU law.

D — *The principle of effectiveness*

50. As the referring court has rightly pointed out, the question raised in this case also involves the compatibility with EU law, and in particular with the principle of effectiveness, of national legislation which, in the specific case now before the Court, is of no assistance in overcoming the difficulty faced by a legal person in its obtaining access to a court to assert rights which it claims to derive from EU law.

51. The situation described above is the result of the combined application of two provisions.

52. First, Paragraph 12 of the GKG subjects all parties, without distinction, to payment of an administrative charge proportionate to the estimated cost of the proceedings. The German law makes no provision for a ceiling on that charge. Secondly, Paragraph 116(2) of the ZPO makes legal persons eligible for legal aid, provided, in particular, that discontinuance of the action would run counter to the public interest, a condition which is interpreted strictly by the German courts.

53. Following the general trend of the case-law of the Court of Justice, I think it is important to place Paragraph 116(2) of the ZPO in the broader context of German procedural rules. In other words, even though the written observations of the interested parties were focused on the issue of the refusal to grant legal aid to legal persons, the conditions governing the grant of legal aid must be analysed in the broader context of the overall structuring of the procedure as established by the Member State in question.

1. The possibility of subjecting the initiation of proceedings to the payment of an administrative charge, provided that the charge is not disproportionate

54. At this juncture I should remind the Court that Member States, by exercising their procedural autonomy, are free to subject the initiation of proceedings before a court to procedural costs. In general, those costs take two entirely different forms: either a charge levied by the State by way of contribution of the parties to the proceedings to the financing

of the public administration of justice, or an advance payment in respect of court costs — security deposited by the applicant — with the result that the defendant can be confident that, if the applicant is unsuccessful in its claim, it will contribute to the costs incurred by the defendant.

55. Thus far the Court has been called upon to rule on *cautio judicatum solvi* mechanisms only; these correspond to the second form of costs referred to above. The special feature of such mechanisms, which the Court has had to assess in respect of their compatibility with EU law, lay in the fact that the security, generally known as 'security deposited by the foreign applicant', must be paid by the applicant where it is not resident in the territory and does not possess the nationality of the Member State before whose courts the action is brought, although such security is not demanded from nationals of the Member State in question, even if they do not reside in the territory of their State of origin or hold any assets in that State. Thus, it is striking that the Court conducted its assessment on the basis of Article 12 EC and on the general principle of non-discrimination, [11] and not on the basis of the principle of effectiveness of EU law.

11 — Case C-20/92 *Hubbard* [1993] ECR I-3777, Case C-43/95 *Data Delecta and Forsberg* [1996] ECR I-4661, Case C-323/95 *Hayes* [1997] ECR I-1711, and Case C-122/96 *Saldanha and MTS* [1997] ECR I-5325.

56. During the hearing, the German Government was called upon to set out the circumstances in which the administrative charge for the proceedings was calculated. On that occasion, it explained that a scale was drawn up under the relevant German legislation so that, based on the estimated amount involved in the dispute, the individual is in a position to know beforehand, and with complete transparency, the amount of the charge that he will be obliged to pay. Depending on the amount involved, a percentage is applied to calculate the charge. The German Government stated that the charge in essence pursued the objective of making users of the public court service contribute to its financing. Since the charge levied in respect of disputes of minor financial significance is insufficient to cover the actual cost of proceedings, the charge levied in respect of disputes involving larger amounts is more onerous. The administrative charge for the proceedings that DEB was obliged to pay was fixed at some EUR 275 000 in the light of all those considerations.

57. However, the greater the costs of the proceedings are, the greater the likelihood is that the applicant will be unable to defray them and will have to apply for legal aid. The fixing of high procedural costs in conjunction with highly restrictive conditions for the grant of legal aid might be considered likely to result in impairment of the right of access to a court, *a fortiori* where payment of the charge is required, as is the case in this instance, before the proceedings are conducted. The relevant question here is whether it is appropriate to share the costs of the public administration of justice between the State and the users of that service, as arranged under the German legislation, or whether such sharing goes beyond

what is reasonable or fair, becoming — in a specific situation such as that in issue here — an unacceptable restriction on access to justice. Only the court hearing the case in the main proceedings can address that question properly, by actual reference to the prima facie case that the appellant in the main proceedings intends to put forward and on which neither the Landgericht Berlin, as pointed out at point 31 of this Opinion, nor the Kammergericht Berlin has taken a view.

58. The German Government pointed out, also at the hearing, that, without actually being intended as a condition of admissibility of the proceedings, failure to pay the charge means that the proceedings will not be initiated. I must confess that I find this a somewhat subtle distinction but, in any event, access to the court is made all the more difficult as, unlike some systems established in other Member States, the Federal Republic of Germany has not set a ceiling and offers no possibility for paying the charge *ex post facto*. [12] For that reason I take the view that DEB's situation must be assessed by taking into consideration not only the German law on the conditions for granting legal aid to legal persons but also the German procedural system which requires payment of an administrative charge for proceedings. On the other hand, this corresponds to the referring court's question, as is apparent from point 37 of this Opinion, whether there must be reservations with regard to a national law under which, first, the pursuit of a claim before the courts is subject to the payment of a charge, and, secondly, a legal person which is unable to make that advance payment and which does not satisfy the restrictive conditions laid down by it does not qualify for legal aid.

59. As a matter of fact, the establishing of a legal aid mechanism carries special importance in the States which have chosen to subject the bringing of court proceedings to costs, since such a measure is generally intended as a form of consideration in those States. Therefore, assessing whether court fees are appropriate provides an additional insight into the degree to which the principle of the right of access to a court has been infringed as a result of the refusal to grant legal aid. [13] I do not by any means claim to anticipate the referring

12 — Contrary to the provisions of Italian law, for example, which authorise the enforced recovery *ex post facto* of the charge which has not been paid in advance of the proceedings.

13 — The European Court of Human Rights ('the Court of Human Rights') has already had the opportunity to investigate the matter, since it also considers that 'the requirement to pay fees to civil courts in connection with claims they are asked to determine cannot be regarded as a restriction on the right of access to a court that is incompatible *per se* with Article 6 § 1 of the [ECHR]' on the condition, however, that 'a proper balance [is secured] between, on the one hand, the interest of the State in collecting court fees for dealing with claims and, on the other hand, the interest of the applicant in vindicating his claim through the courts' (Court of Human Rights, judgment of 19 June 2001, application no 28249/95, *Kreuz* v *Poland*, paragraphs 60 and 66 respectively). It should be noted that the applicant in this case was a natural person.

court's response on this issue, but I think it should be borne in mind that, in DEB's situation, if the administrative charge for the proceedings had been lower, DEB would have had objectively more prospects of achieving success with its court action as it would have had more options available to it for calling on external financing (a bank loan, for example).

2. Scope of the right to legal aid for legal persons

(a) The body of evidence

60. I have already mentioned that this sensitive issue is raised for the first time at the Court of Justice. Dealing with it will require even greater sensitivity as very few legal rules proper in fact apply to this case. Thus I am required to have recourse to what I will refer to as a 'body of evidence'. It is made up of international practice, the case-law of the Court of Human Rights, the position in EU law on the matter and the respective practices of the Member States.

(i) International practice

61. International practice does not seem to require States to grant legal aid to legal persons. It cannot be concluded either from Article 20 of the Hague Convention on Civil Procedure or from Article 1 of the European Agreement on the Transmission of Applications for Legal Aid, or from the first or second paragraph of Article 1 of the Hague Convention on International Access to Justice that legal persons are afforded a right to legal aid which is equivalent to the right afforded to natural persons. Indeed, the various instruments mentioned above refer, as recipients of the aid, only to 'nationals of the Contracting States', '[e]very person who has his habitual residence in the territory of one of the Contracting Parties' or '[n]ationals of any Contracting State … [and] [p]ersons … who formerly had their habitual residence in a Contracting State in which court proceedings are to be or have been commenced'.[14] It appears to me that the terms nationals and habitual residents are used more to describe natural persons.

62. It should also be noted that the Hague Convention on International Access to Justice

14 — See Article 20 of the Hague Convention on Civil Procedure, Article 1 of the European Agreement on the Transmission of Applications for Legal Aid, and Article 1 of the Hague Convention on International Access to Justice respectively.

makes no reference whatsoever to legal persons in Chapter I on legal aid. However, it mentions them expressly in Chapter II on security for costs and enforceability of orders for costs. In other words, this means that the absence of any reference to legal persons in Chapter I of that convention does not stem from any omission or oversight on the part of the draftsmen of the convention. Even more significantly, international practice thus accepts the possibility of subjecting legal persons to the payment of court costs (provided that those costs are not required from plaintiffs by reason only of their foreign nationality) but makes no provision, in relation to them and as consideration, for a legal aid system.

(ii) The ECHR and the case-law of the Court of Human Rights

63. As regards the ECHR which has, for some time, been a source of primary importance for the legal order of the European Union and which, in the light of the EU's accession, will become officially legally binding for it on the basis of a binding international agreement, it must be observed that Article 6(3)(c) thereof refers to the grant of legal aid only in relation to criminal cases. From that provision the Court of Human Rights inferred a fundamental distinction since it held that 'there is no obligation under the Convention to make legal aid available for all disputes (*contestations*) in civil proceedings, as there is a clear distinction between the wording of Article 6 §3(c), which guarantees the right to free legal assistance on certain conditions in criminal proceedings, and of Article 6 §1, which makes no reference to legal assistance.' [15] In other words, Article 6(3)(c) of the ECHR may not be interpreted so broadly as to require the States parties to the Convention to award legal aid systematically.

64. Therefore, the Court of Human Rights will consider refusals of legal-aid claims in civil proceedings only on the basis of Article 6(1) of the ECHR, with which that court associated the right of access to the courts. [16] In the case of *Airey* v *Ireland*, to which the explanation on the third paragraph of Article 47 of the Charter refers, an Irish national was seeking to commence proceedings to obtain a decree of judicial separation from her husband. Although it was not compulsory to obtain the services of a lawyer, it appeared that all parties to a similar set of proceedings, which had to be communicated to the High Court, had obtained the assistance of a lawyer. Furthermore, there was no provision at that time in Ireland for a legal-aid system in respect of civil litigation. The Court of Human Rights held that it was necessary to ascertain 'whether … appearance before the

15 — Judgment of the Court of Human Rights of 26 February 2002 in *Del Sol* v *France* (application No 46800/99, paragraph 20).

16 — See judgment of the Court of Human Rights of 21 February 1975 in *Golder* v *United Kingdom* (application No 4451/70).

High Court without the assistance of a lawyer would be effective, in the sense of whether [the applicant] would be able to present her case properly and satisfactorily'.[17] The Court of Human Rights acknowledges that the ECHR does not have as an objective the generalised institution of a legal-aid scheme; it merely requires 'that an individual should enjoy his effective right of access to the courts in conditions not at variance with Article 6 para. 1'.[18] The Court of Human Rights accepts that 'the [ECHR] contains no provision on legal aid'[19] for civil disputes but that 'Article 6 para. 1 may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case'.[20]

65. The assessment carried out by the Court of Human Rights is, of course, highly dependent on the circumstances of the case. In the case of *Del Sol* v *France,* the applicant (again, here, a natural person) submitted that the refusal to grant her legal aid had deprived her of access to the French Court of Cassation and Article 6(1) of the ECHR had therefore been infringed. The Court of Human Rights did not adopt that approach. It undertook a specific analysis of the French legal-aid scheme, taking the view that '[t]he scheme set up by the French legislature offers individuals substantial guarantees to protect them from arbitrariness', guarantees provided, on the one hand, by the arrangements governing the composition of the Legal Aid Office set up at the Court of Cassation and, on the other hand, by the fact that appeals against refusals of legal aid by that office could be lodged with the President of the Court of Cassation.[21] In addition, the Court pointed out that the applicant had been able to put forward her case both at first instance and on appeal.[22] The Court of Human Rights had taken care beforehand to point out that '[a]s the European Commission of Human Rights has said, it is obvious that a legal aid system can only operate if machinery is in place to enable a selection to be made of those cases qualifying for it'.[23] Finally, it inferred from this that the very essence of the applicant's right of access to a court was not undermined by the Legal Aid Office's refusal to grant her legal aid.

66. More recently, the Court of Human Rights has specified the criteria to be taken into consideration when assessing the compatibility

17 — Judgment of the Court of Human Rights of 9 October 1979 in *Airey* v *Ireland* (application No 6289/73, paragraph 24).

18 — Ibid., paragraph 26.

19 — *Idem*.

20 — Idem.

21 — Judgment of the Court of Human Rights in *Del Sol* v *France*, paragraph 26.

22 — *Idem*.

23 — Judgment of the Court of Human Rights in *Del Sol* v *France*, paragraph 23.

of a legal aid mechanism with the ECHR. Accordingly, the question concerned must be 'determined on the basis of the particular facts and circumstances of each case and will depend, inter alia, upon 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 him- or herself effectively'. [24] It accepts, however, that the right of access to a court is not absolute and may be subject to restrictions, 'provided that these pursue a legitimate aim and are proportionate'. [25] The Court of Human Rights therefore considers that conditions may be imposed on the grant of legal aid based on the financial situation of the litigant or his or her prospects of success in the proceedings. [26] The Court of Human Rights further acknowledges that it is not incumbent on States to seek, through the use of public funds, to ensure total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case. [27]

67. Clearly, the use by the Court of Human Rights of the term 'individual' — where it states that the ECHR simply requires 'that an individual should enjoy his effective right of access to the courts' [28] — is of particular importance to this case. However, the Court of Human Rights has also had to adjudicate on a refusal to grant legal aid to a legal person in the case of *VP Diffusion Sarl* v *France*. [29] Again the refusal was issued by the Legal Aid Office of the French Court of Cassation. The French Government concluded from the fact that there was no obligation under the ECHR to make legal aid available for all disputes in civil proceedings that the refusal of the aid did not undermine the very essence of Article 6(1) of the ECHR as it met a legitimate aim and respected a reasonable relationship of proportionality between the means deployed and the aim sought to be achieved. Again, the Court of Human Rights took the view that the essence of Article 6(1) of the ECHR was not undermined, in particular inasmuch as the right of access to a court was satisfied at first instance and on appeal. Moreover, however, it also noted that the Convention does not afford litigants, in proceedings concerning their civil rights, any automatic entitlement to legal aid or to be represented by a lawyer. [30] Furthermore, the Court of Human Rights acknowledged that the judicial system may comprise a selection procedure for civil actions, but it must operate in a non-arbitrary, non-disproportionate manner and without compromising the essence of the right of access to a court. The Court of Human Rights further observed that, at European level, there is no consensus, or at least no defined trend, as regards the grant of legal aid. The laws of a large number of States make no provision for legal persons to be eligible for the aid, whether or not their aim is profit-making. Here, the Court of Human Rights took the view that the distinction in law, in the French legal-aid scheme, between natural persons and legal persons with or without a profit-making aim, which is based on the tax arrangements governing legal aid, is not arbitrary. It further held that French law has an objective basis,

24 — Judgment of the Court of Human Rights of 15 February 2005 in *Steel and Morris* v *United Kingdom* (application No 68416/01, paragraph 61).

25 — Ibid., paragraph 62.

26 — Ibid., paragraph 62 and case-law cited.

27 — *Idem*.

28 — See *Airey* v *Ireland*, paragraph 26.

29 — Judgment of the Court of Human Rights of 26 August 2008 in *VP Diffusion Sarl* v *France* (application no 14565/04).

30 — *Idem*.

namely the rules relating to corporation tax, which enables commercial companies, even those in financial difficulty, to meet the costs relating to court proceedings. The Court of Human Rights even regarded as non-discriminatory the different treatment vis-à-vis legal aid afforded to commercial companies, on the one hand, and natural persons and non-profit-making legal persons on the other, as that difference is based on objective and reasonable justification, namely the tax arrangements governing legal aid.

68. It is apparent, in my view, from the foregoing that the ECHR, as interpreted by the Court of Human Rights, does not contain any provision expressly requiring the States parties to the Convention to establish a legal aid system for the unconditional benefit of natural and legal persons alike. Of course, nothing can prevent the legal order of the Union from offering a greater level of protection for Article 6(1) of the ECHR, [31] but nor is there any actual express legal basis upon which the Federal Republic of Germany may be required to review as such its legal aid mechanism for legal persons.

(iii) EU law on the matter

69. The third paragraph of Article 47 of the Charter, to which Directive 2003/8 refers but which had no binding legal force at the material time in the main proceedings, provides that legal aid is to be made available 'to those who lack sufficient resources'. The other two paragraphs of that article for their part refer to 'everyone'. The explanations relating to the Charter [32] refer to the judgment of the Court of Human Rights in *Airey* v *Ireland* [33] as well as to the system of assistance for cases before the Courts of the European Union, with the result that no definitive conclusion can be drawn from the Charter's recognition of a right to legal aid, which is, after all, borrowed to a large extent from the ECHR.

70. Moreover, a provision harmonising the conditions in which legal aid must be granted and must apply to this case could not be identified. However, despite its inapplicability in

31 — I shall have to return to this matter when dealing with the Charter: see below at point 98 et seq. of this Opinion.

32 — OJ 2007 C 303, p. 30.

33 — Cited above, in footnote 17.

this case, Directive 2003/8 contains elements which can provide me with proper guidance on the current position of the EU legislature with regard to legal aid.

71. Directive 2003/8 seeks to organise the conditions for granting legal aid in cross-border disputes. In such circumstances, only natural persons are eligible for legal aid, recital 13 in the preamble to that directive referring to '[a]ll Union citizens, wherever they are domiciled or habitually resident' and Article 3 of the directive laying down the principle that '[n]atural persons' may claim legal aid in accordance with the conditions and restrictions laid down by Directive 2003/8'.

72. The Rules of Procedure of the Courts of the European Union are no more favourable towards legal persons. Whether before the Civil Service Tribunal (before which the possibility of a referral by a legal person is, in any case, more limited) or before the General Court, legal aid is reserved strictly for natural persons, [34] even where the application for legal aid is lodged by the receiver for a commercial company in bankruptcy. [35]

73. In cases before the Court of Justice the situation is probably more ambiguous: In the first subparagraph of Article 76(1) of the Rules of Procedure, the term 'party' is used rather than the term 'person'. Thus the provision could have been interpreted broadly, since parties are capable of being construed as both natural and legal persons.

74. However, it appears that applications for legal aid lodged before the Court by legal persons have, in practice, been systematically rejected. Although, for a long time, the Court was not required to give reasons for its orders refusing legal aid, [36] it might be assumed, in view of consistent practice, that those refusals

34 — For a recent illustration before the General Court, see order of the President of the Fourth Chamber of the General Court of 11 January 2010 in Case T-235/09 *Commission* v *Edificios Inteco*, which states in paragraph 3 that, if the application is to be regarded as having been lodged on behalf of Edificios Inteco, it must be rejected on the ground that a legal person is ineligible for legal aid since it is apparent from Article 94(2) of the Rules of Procedure that only natural persons who are wholly or partly unable to meet the costs involved in legal assistance and representation by a lawyer in proceedings before the General Court are to be entitled to legal aid.

35 — Case T-316/07 *Commercy* v *OHIM-easyGroup IP Licensing (easyHotel)* [2009] ECR II-43, paragraphs 16 to 30.

36 — See the amendments to the Rules of Procedure of the Court of 12 July 2005, amending in particular the second subparagraph of Article 76(3) which, as amended, provides that orders refusing in whole or in part applications for legal aid are to state the reasons for that refusal (OJ 2005 L 203, p. 19).

were based on the fact that the applicant was a legal person. [37]

75. The refusal to grant legal aid in cases before the General Court, thus including in direct actions, is evidence that, even within the Courts of the European Union, the principle of effectiveness of EU law and the right of access to a court enjoyed by individuals are not absolute and may be subject to restrictions. Indeed, the costs incurred in proceedings before the Courts of the European Union are those involved in legal assistance and representation by a lawyer, since the various sets of rules of procedure do not levy any charge comparable to that at issue in the main proceedings or require any payment of security. However, the situation in which a legal person precluded from obtaining legal aid in proceedings before the General Court, and in light of the amount usually demanded — in particular in the area of competition law — by lawyers, must abandon its claim cannot be ruled out.

37 — See, orders of 6 June 1980 in Case 96/80 *Jenkins*, of 7 May 1992 in Joined Cases C–106/90, C-317/90 and C–129/91 *Emerald Meats* v *Commission*, of 4 March 1994 in Case C–3/94 *Iraco* v *Commission*, of 29 February 1996 in Joined Cases C–267/95 and C–268/95 *Merck and Beecham*, of 3 February 1997 in Case C–337/96 *Commission* v *Iraco* and of 23 September 1999 in Case C–303/98 *Simap*. To my knowledge, the Court has made only one reasoned order refusing an application for legal aid lodged by a club; surprisingly, the Court checked in the circumstances of that case that the applicant did indeed meet the conditions laid down by Article 76 of its Rules of Procedure. It accordingly checked that the applicant legal person could furnish evidence of its lack of means and considered whether there was manifestly no cause of action. The Court refused to grant legal aid specifically because those two conditions were not met in the case in point (see order of 26 October 1995 in Case C–133/95 *Amicale des résidents du square d'Auvergne*).

(iv) The respective practices of the Member States

76. Far from claiming to present an exhaustive list, I shall confine myself to referring only to a number of Member States of the European Union in order to show that a definitive conclusion cannot be drawn from a comparison of national practices relating to the grant of legal aid.

77. I have already referred to the example of France, which provides for the possibility — by way of exception — of granting legal aid only to non-profit-making legal persons established in France and lacking sufficient resources. [38] Other legal persons are ineligible for legal aid but may deduct the costs relating to court proceedings for tax purposes. The Italian Republic, for its part, adopted a scheme similar to that at issue in the main proceedings, since it demands payment for entry in the cause list in proportion to the amount involved in the case concerned. Only 'poor citizens', according to the actual wording of the Italian legislation, might be exempted from payment of the charge. [39] As regards the Grand Duchy of Luxembourg, legal aid is reserved for natural persons, but some of them are none the

38 — See Article 2 of Law No 91–647 of 10 July 1991 on legal aid, amended by Law No 2007–210 of 19 February 2007 reforming legal protection insurance (*JORF* of 21 February 2007, p. 3051).

39 — Testo unico in materia di spese di giustizia (Consolidated text on legal costs) 115/2002 (Article 74(2)).

less ineligible for it; these include tradesmen, manufacturers, craftsmen and members of the liberal professions which are involved in proceedings relating to their commercial or professional activity. Similarly, legal aid cannot be granted in respect of proceedings stemming from a speculative activity. [40] The Kingdom of Denmark restricts availability of legal aid to natural persons, except in the entirely exceptional circumstances of cases having implications of principle or in the public interest; cases set in the manufacturing and commercial context fall, as a rule, outside the scope of the right to legal aid. [41]

80. Secondly, the practice of distinguishing between commercial legal persons and non-commercial legal persons, with the effect that the latter are more readily granted legal aid, is relatively commonplace across the Member States.

(b) Application to a situation such as that in the main proceedings

78. This small sample of national practices allows me to draw two sets of conclusions.

79. First, it underlines the absence of a truly common principle which is shared by the Member States in awarding legal aid and which could, where appropriate, be reflected and established in EU law.

81. In line with the orders made by the Court of Human Rights in its rulings on whether Article 6(1) of the ECHR has been infringed, the Court of Justice has consistently held that, when called upon to rule on a provision's compatibility with the principle of effectiveness, it has to analyse the matter in relation to the specific circumstances of the case concerned, rather than in an abstract manner, in order to establish that the action is not rendered excessively difficult 'by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies. For those purposes, account must be taken, where appropriate, of the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct

40 — For all such restrictions on the grant of legal aid for natural persons in Luxembourg, see the second subparagraph of Article 2(2) of the Law of 18 August 1995 on legal aid (*Mémorial A* No 81, p. 1914).

41 — Articles 325 to 336 of the Procedural Code (Retsplejeloven).

of procedure'.[42] If such a restriction on the principle of effectiveness is to be allowed, the Court of Justice requires it to be regarded as reasonably justified.[43] Therefore, it must now be assessed whether the interpretation by the German courts of Paragraph 116(2) of the ZPO can be justified for the purpose of protecting one of the abovementioned principles.

82. Although it is apparent from settled case-law that it is not for the Court to rule on the interpretation of national law, that being exclusively for the national court, which must, in the present case, determine whether the requirements of equivalence and effectiveness are met by the provisions of the relevant national legislation, the Court may, none the less, when giving a preliminary ruling, provide clarification designed to give the national court guidance in its interpretation,[44] which is what I intend to do below.

83. DEB's difficulty in obtaining access to a court stems from the fact that legal persons are subject to more restrictive conditions for the grant of legal aid. The question raised here is whether the right to effective judicial protection and the principle of effectiveness of EU law must be safeguarded to the same extent for legal and natural persons alike.

84. In the German legal system, a legal person can be guaranteed access to the court, to the extent of being granted legal aid which is funded by the local authority, only if the case in question has a broader dimension than merely the economic interests of that legal person. In any event, that was how the national courts construed Paragraph 116(2) of the ZPO and, more specifically, the concept of 'public interest'.

85. Particular care should be taken, in my view, in assessing the public interest at issue. Some might consider that the restrictive interpretation of that national provision consequently renders Paragraph 116 of the ZPO meaningless and would provide the basis for a covert, systematic refusal of applications for legal aid submitted by legal persons.

86. That last remark prompts me to make two points.

42 — Case C-312/93 *Peterbroeck and Others* [1995] ECR I-4599, paragraph 14, Joined Cases C-430/93 and C-431/93 *Van Schijndel and van Veen* [1995] ECR I-4705, paragraph 19, and Case C-2/08 *Fallimento Olimpiclub* [2009] ECR I-7501, paragraph 27.

43 — *Fallimento Olimpiclub*, at paragraph 31. That expression calls to mind the nature of the compatibility test carried out by the Court of Human Rights in the light of the ECHR, since it considers that 'a restriction placed on access to a court or tribunal will not be compatible with Article 6 §1 unless it pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved' (see *Kreuz* v *Poland*, paragraph 55 and case-law cited).

44 — Case C-63/08 *Pontin* [2009] ECR I-10467, paragraph 49 and case-law cited.

87. First, although the relevant German legislation is in fact restrictive, although it probably makes it more difficult for legal persons than natural persons to bring an action, it must still be acknowledged that legal aid may be granted, in Germany, to legal persons, which is not the case in all the legal systems of the other Member States of the European Union. [45]

88. Legal aid is never, in any circumstance, intended to be an unqualified right. [46] Even where it concerns natural persons, it is, of course, dependent on means-testing and sometimes on the merits of the application.

89. Secondly, it seems to me that, when considering the judicial protection afforded to individuals as regards their rights under EU law, a twofold distinction must be made, something the German legislation does not expressly do, although it can be easily inferred: A distinction must be made, depending — first — on whether the matter involves natural or legal persons and — then — on whether the matter involves a profit-making or a non-profit-making legal person. National case-law on Paragraph 116(2) of the ZPO seeks, in fact, to combat vexatious actions which might be brought by legal persons operating on a profit-making basis whose sole purpose of existence is to generate a profit exclusively from the court proceedings. In those circumstances, responsibility for guaranteeing effective access to the courts for such legal entities, even if this means the local authority bearing the related costs, and even if this is in the name of the effectiveness of EU law, cannot — to my mind– fall to our Member States.

90. Paragraph 116(2) of the ZPO as interpreted by the German courts therefore seems to have as its aim the possibility of making ineligible for legal aid legal persons operating on a profit-making basis which would otherwise seek to become involved in legal proceedings for the purpose of protecting their own economic and commercial interests. In effect, the legal person must assume responsibility for the economic risk relating to its activity, which it alone bears, including in court proceedings.

91. In that regard it should be noted that, under Directive 2003/8, which, however, applies only to natural persons, legal aid applications may be rejected if the natural person makes 'a claim arising directly out of the applicant's trade or self-employed profession.' [47] Whether at international level or at the level

45 — See point 76 et seq. of this Opinion.

46 — See inter alia judgment in *Kreuz* v *Poland*, paragraph 59.

47 — See recital 17 in the preamble to, and Article 6(3) of, Directive 2003/8. The Court of Human Rights likewise seems to allow that restriction in principle: see *Kreuz* v *Poland*, paragraph 63.

of the European Union, it is accepted that even natural persons can be refused legal aid in such cases. Clearly, therefore, in those specific cases, there is the risk that a party will be deprived of its right of access to a court as a result of the balancing of conflicting interests, that is to say the interest of the parties in having their case heard and the interest of States in ensuring the proper administration of justice as well as in controlling their public expenditure.

92. In Germany, that restrictive approach towards legal persons is none the less offset, on the one hand, by the fact that, where a limited liability company is in serious financial difficulty and insolvency proceedings must be initiated, German law provides in those circumstances that legal aid is to be granted automatically to the liquidator, [48] and, on the other hand, by the fact that where the action brought by a legal person is likely to have serious social repercussions, or even economic consequences for persons other than the applicant legal person alone, the German courts will in that case consider that discontinuance of the action will be contrary to the public interest, and the criterion laid down in Paragraph 116(2) of the ZPO will be met.

93. Turning now to the other category of legal persons, namely those which do not operate on a profit-making basis, they mainly aim to safeguard common interests (these include consumer organisations and environmental protection associations) and may assume various forms, such as an association, a foundation or even a club. In that situation, it seems obvious to me that the condition relating to the pursuit of the public interest would be met because the scope of the proceedings goes beyond the members of the said non-profit-making legal persons alone, in which case they could obtain legal aid and, without hindrance, bring an action to establish State liability for infringement of EU law.

94. Accordingly, the right of access of legal persons to a court and, by extension, the principle of effectiveness of EU law in relation to them are not restricted by the German law; on the contrary, only the right of access of legal persons operating on a profit-making basis is subject to restriction.

95. That finding requires clarification in two respects.

96. First, the Court of Human Rights appears already to have implicitly accepted that distinction in the grant of legal aid. [49] However, subjecting legal persons pursuing

48 — Paragraph 116(1) of the ZPO; however, that situation is unrelated to the issue of the effectiveness of EU law.

49 — See *VP Diffusion Sarl* v *France*.

a commercial objective to more restrictive conditions for the grant of legal aid makes access to that aid more difficult, increases the chances of refusal and therefore increases the frequency with which legal persons cannot actually obtain access to a court. Nevertheless, in such circumstances, and in the light of the foregoing, the restriction set out in the German legislation could be regarded as a reasonably justified restriction. [50]

97. The Court has already held that the aim of ensuring the proper conduct of procedure, which is met, in my view, by the German requirement to pay the administrative charge in conjunction with the law on legal aid, including in the case of proceedings brought against the State, could constitute a lawful restriction on the principle of effectiveness. [51] The State, like any other defendant, must be able to protect itself against vexatious actions, in view of the cost, borne by the local authority, of occupation of its courtrooms and of its defence. In this regard it would prove counterproductive to require the State to offset the impecuniousness of all persons, both natural and legal, which are unable to pay the court costs.

98. Neither the ECHR nor the case-law of the Court of Human Rights allows me to state that there is an unconditional right to legal aid for legal persons. Of course, Article 52(3) of the Charter [52] — should the Court decide that the provision could indeed be applied with binding force in this case — could allow me to go further than the guarantee offered thus far by the ECHR and by the case-law of the Court of Human Rights. A broad interpretation could then be given to the third paragraph of Article 47 of the Charter, which would have to be construed as requiring Member States to make legal aid available to legal persons. However, as EU law currently stands, I consider such a construction to be excessive.

99. The preamble to the Charter states that '[t]his Charter reaffirms, with due regard for the powers and tasks of the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States ...'. As I have attempted to show, it is impossible to infer from the respective practices of the Member States any constitutional tradition whatsoever common to the Member States. As regards international practice, the outcome of the analysis seems to suggest that there is no international obligation incumbent on the State to grant legal aid to legal persons.

50 — In line with the expression used by the Court in *Peterbroeck*, paragraph 20.

51 — *Peterbroeck*.

52 — Which provides that '[i]n so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

100. To adopt such a broad interpretation of the third paragraph of Article 47 of the Charter when dealing with a case the facts of which predate the entry into force of the Lisbon Treaty and, therefore, of the Charter, seems, in my view, to run counter to the spirit of sincere cooperation which must act as the driving force of the Union and its Member States.

101. The principle of effectiveness of EU law cannot be interpreted as requiring Member States, in such circumstances as those at issue in the main proceedings, that is to say, in all actions to establish liability brought against Member States for infringement of EU law, to grant legal aid systematically to legal persons, short of disregarding the necessarily qualified nature of legal aid. Furthermore, adopting such an approach would mean running a high risk of EU law being used by legal entities for their own ends, the proceedings instituted by them pursuing a strictly commercial objective only.

102. Secondly, the different treatment afforded in the German legal system to legal persons (operating on a profit-making basis) and natural persons as regards the grant of legal aid is mitigated to a considerable degree by the fact that the German Government conceded at the hearing that the preservation of the effectiveness of EU law and, by extension, the safeguarding of the rights that individuals derive from it may absolutely constitute measures in the 'public interest' which must be protected by granting legal aid to the legal person requesting it. In those circumstances, it seems to me that the question raised here ultimately relates more to the powers of interpretation of the German national courts which now have all the information available to them to adopt an interpretation of Paragraph 116(2) of the ZPO which is consistent with EU law.

VI — Conclusion

103. In the light of the foregoing, I propose that the Court of Justice give the following reply to the question referred by the Kammergericht Berlin for a preliminary ruling:

'In light of the fact that, as EU law currently stands, there is no general principle requiring Member States to grant legal aid to legal persons on the same conditions as those applying to natural persons, the compatibility with EU law of national legislation which subjects the pursuit of an action to establish State liability for infringement of EU law to the payment of an administrative charge and provides that legal aid, which is designed inter alia to exempt the applicant from payment of the charge, cannot be granted to a legal person which, although unable to make that payment, appears not to fulfil the restrictive conditions laid down by that legislation must be examined having regard to the role of that legislation in the procedure as a whole.

Therefore, it is for the national court to assess whether the amount of the administrative charge in point is appropriate in view of the circumstances of this case, in particular the prima facie case of the intended action and the appropriate sharing, between the State and the user, of the costs involved in the administration of justice which takes duly into account the user's situation, including the origin of the loss or damage that it claims to have suffered.

Furthermore, the national court may, in applying the principle that national law must be interpreted in conformity with EU law, take account of the fact that the German Government accepts that the preservation of the effectiveness of EU law — and, by extension, the safeguarding of the rights that individuals derive from it — may constitute "public interests" that should be taken into consideration when adjudicating on an application for legal aid submitted by a legal person.'