

CHALLENGES IN THE FIELD OF EFFECTIVE JUDICIAL PROTECTION

The principle of equality of arms in an international context

Dr. Ágnes Váradi PhD.

research fellow

Hungarian Academy of Sciences Centre for Social Sciences Institute for Legal Studies

varadi.agnes@tk.mta.hu

1. Introduction

In the last couple of years, legal policy has been facing several challenges. Some examples for these tendencies might be the following. Firstly, the more and more complex international contracts affect the interpretation of the relationship between domestic and international law; constitutional law framework, principles of international cooperation and economic aspects also have impact on the evaluation of new forms international contracts (e.g. Unified Patent Court, CETA, TTIP).¹ Secondly, legal norms shall react to rapid technical development, while establishing a balance between the support of innovation, economic efficiency and the need for transparent and predictable legal framework.² Thirdly, the complexity of international

¹e.g. the ratification of the Unified Patent Court Agreement has been criticized in several Member States. In Germany a constitutional complaint is pending in front of the Bundesverfassungsgericht: (Sakowski, 2017); Furthermore: German complaint against Unified Patent Court Agreement: deadline for submitting views is end of October. Kluwer Patent Blog. Retrieved 21st November 2017 from <http://patentblog.kluweriplaw.com/2017/09/12/german-complaint-unified-patent-court-agreement-deadline-submitting-views-end-october/>

Similar considerations arise with respect to international trade agreements, like Canada/EU free trade agreement (CETA) and the EU/US trade deal (TTIP). (Korff, 2016), (Griller et al., 2017). A request for an opinion submitted by the Kingdom of Belgium is pending in front of the European Court of Justice whether CETA is compatible with the Treaties, including with fundamental rights. (Opinion 1/17)

²e.g. the European Commission considers the question of establishing a balance between innovation and transparent regulatory models highly important: „*The right regulatory framework for the digital economy must be conducive to furthering sustainable development and scaling-up of the platform business model in Europe. (...) [P]rinciples-based self-regulatory/co-regulatory measures, including industry tools for ensuring application of legal requirements and appropriate monitoring mechanisms, can play a role. Underpinned by appropriate monitoring mechanisms, they can strike the right balance between predictability, flexibility, efficiency, and the need to develop future-proof solutions. As a general rule, when elaborating responses to issues related to online platforms, the Commission will take the following principles into account: -a level playing field for comparable digital services; -responsible behaviour of online platforms to protect core values; -transparency and fairness for maintaining user trust and safeguarding innovation;-open and non-discriminatory markets in a data-driven economy.*” (Commission, 2016)

financial transactions as well as commercial practices has effects on legislation and jurisprudence. (Cherednychenko, 2010, 246-274)

In the field of civil law relationships, a further challenge stems from the phenomenon that the number of legal relationships, in which there is a significant difference in the financial possibilities or legal knowledge of the parties, is growing. On the one hand a basic principle of civil law relationships is party autonomy, however, on the other hand Member State have an interest or even duty in applying provisions to balance inequalities in such legal relationships,³ as “*the abuse of weaker parties can be viewed as a threat for civil society*”. (van Bochove, 2014, 150)

Although several civil law measures have been elaborated (information obligations, liability measures, exclusion of contractual clauses) to compensate the inequality between the parties’ possibilities in such legal relationships, the procedural aspects should not be neglected either:⁴ the rights stemming from these contracts have to be enforced efficiently at court as well. The imbalance of legal relationships appears in the procedural context in the form, that due to the lack of legal knowledge the weaker party⁵ cannot present his arguments effectively, is not aware of the procedural possibilities in the fields of gathering evidence, seeking legal remedy or interpreting legal norms, due to the lack of financial resources and to the psychological factors (that stem from the fact that generally in such cases private persons are involved in a legal dispute with multinational companies) he cannot take the risk of long and costly procedures. So, the parties do not have equal possibilities to participate in the procedures.

In order to ensure the equal access to justice for the citizens, the efficient enforcement of rights as well as to maintain the trust in the proper functioning of the judiciary, the state has to react to these imbalanced situations and support actively the participation in judicial proceedings, shortly, ensure the equality of arms for the litigants.

For details on specific problems related to e-commerce: Boosting e-commerce in the EU. Retrieved 21st November 2017 from <https://ec.europa.eu/digital-single-market/en/policies/ecommerce>

³ e.g. the question of unfair commercial practices can be seen as a problem addressed in details in the legislation and theory as well: Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council. OJ L 149.

„*The level of protection of the weaker contracting party in a B2B relationship varies across Member States. Various enforcement mechanisms are used at national level to address UTPs.*” (Commission, 2013, 15). Furthermore: van Boom et al., 2014.; Durovic, 2016.

⁴There are certain examples of implementing the aspect of weaker party protection in regulatory models at European Union level: European Economic and Social Committee, 2011.

⁵For a detailed analysis of the concept of weaker party: Váradi, 2017.

In the following this paper aims to introduce the concept of equality of arms based on the international human rights obligations, define its role among the elements of the right to fair trial and draw up possible models for its effective implementation in the civil procedure on the basis of the case-law of the European Court of Human Rights (hereinafter: ECtHR), European Court of Justice (hereinafter: ECJ), sources of EU secondary law and the relevant secondary literature. This preliminary study – based on international human rights standards and analysis of imbalanced legal relationships – can be a useful starting point for a detailed evaluation of the single tools supporting the weaker parties’ position in civil law procedures in the future.

2. The definition of “equality of arms”

The principle of equality of arms can be derived from several international obligations. That is why at analysing the concept of “equality of arms” the most general starting point is the case-law of the ECtHR.

The ECtHR derives the principle from Article 6 of the European Convention on Human Rights (hereinafter: ECHR), according to which the right to a fair trial (Rozakis, 2004, 96-106) means the following: *“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (...).”*

This definition gives a framework for the assessment of a certain quality of procedures,⁶ which is determined by several elements.⁷ Such elements of Article 6 ECHR might be – according to the ECtHR case-law – the following: the right of access to court, right to fair hearing, the right to be tried by a court established by law, right to a public trial and public pronouncement of the judgment, the principle of impartiality or independence of the court, the right to a decision within a reasonable time, the principle of adversarial proceedings and equality of arms, and the right to a motivated judgment.⁸

When the ECtHR deducts equality of arms from the right to fair trial⁹, generally it emphasizes the criminal law aspects. The principle ensures primarily that prosecution and defence had

⁶ECtHR, *Stran Greek Refineries and Stratis Andreadis v. Greece*, judgment of 09 December 1994 (Application no. 13427/87), Series A, no. 301-B, § 49. ECtHR, *Ankerl v. Switzerland*, judgment of 23 October 1996 (Application no. 17748/91), ECHR 1996-V, § 38. Similarly: ECJ, C-450/06., *Varec SA v. Belgium*, judgment of 14 February 2008 [2008 I-00581] para 52.

⁷ This interpretation influenced national constitutional courts, e.g. the settled case-law of the Hungarian Constitutional Court: Decision 22/2014. (VII. 15.) AB para [49]; Decision 36/2014. (XII. 18.) AB para [66]}

⁸ For a detailed description and analysis of the elements of fair trial: Hazelhorst, 2017, 123-173.

⁹ECtHR, *Feldbrugge v. the Netherlands*, judgment of 29 May 1986 (Application no. 8562/79), Series A, no. 99. § 44.

equal chance and opportunities to form an opinion about the legal and factual questions of the criminal charge.

In those cases, where the ECtHR dealt with the adversarial principle and the principle of equality of arms in civil law cases, the interpretation given by the court was that they require “a *“fair balance” between the parties: each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent or opponents.*”¹⁰ Or shortly: “*Equality of arms” and other considerations of fairness therefore also militate in favour of a free and even forceful exchange of argument between the parties.*”¹¹

The case-law of ECJ also states a strong correlation between the principle of equality of arms and the right to fair hearing. “*It is settled case-law that the principle of equality of arms, together with, among others, the principle audi alteram partem, is no more than a corollary of the very concept of a fair hearing (...).*”¹²

Article 47 of the Charter of Fundamental Rights of the European Union¹³ (hereinafter: ChFR) guarantees the right to an effective remedy, fair and public hearing, right to defence and right to legal aid. As far as the interpretation of the right to fair trial is concerned it has to be recalled that according to Article 52 Paragraph 3 ChFR “[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.”¹⁴ However, Article 47 Paragraph (3) ChFR adds

¹⁰ ECtHR, *Avotiņš v. Latvia*, judgment of 23 May 2016 (Application no. 17502/07), ECHR 2016, § 119. Similarly: ECtHR, *Dombo Beheer B.V. v. the Netherlands*, judgment of 27 October 1993 (Application no. 14448/88), Series A no. 274 § 33.

¹¹ ECtHR, *Nikula v. Finland*, judgment of 21 March 2002 (Application no. 31611/96), ECHR 2002-II § 49

¹² ECJ, C-169/14., *Juan Carlos Sánchez Morcillo and María del Carmen Abril García v. Banco Bilbao Vizcaya Argentaria, SA.*, judgment of 17 July 2014. [ECLI:EU:C:2014:2099] para 49.

¹³ “(1) 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.

(2) 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.”

¹⁴ Before the proclamation of the ChFR the ECHR was regarded as a compendium of the constitutional traditions common to the Member States. ECJ, C-50/00, *Unión de Pequeños Agricultores v. Council of the European Union*, judgment of 25 July 2002 [ECR 2002I-06677], para. 39. This way it became possible to rely on the ECHR in cases falling within the scope of EU law and having human rights relevance. (Barnhoorn et al., 2003, 220).

Such obligations are likely to become even more stressed after the EU’s accession to the ECHR as foreseen in Article 6 Paragraph 2 of the Treaty on European Union.

further guarantees, as it prescribes that “[l]egal 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.”

This provision establishes a duty to offer legal aid and shows this way that the European Union has an enhanced obligation support effective access to justice¹⁵ for the needy.¹⁶

While defining the principle of “equality of arms”, the theoretical starting point of ECJ is very similar to that of the ECtHR: the principle of equality of arms is an element of the principle of effective judicial protection,¹⁷ and its basic content is defined similarly as by the ECtHR.¹⁸ However, from the ECJ case-law it is evident that in the EU court’s opinion the aim of that principle is to ensure a procedural balance between the parties to judicial proceedings, which, however, does not entail the obligation to put the parties on an equal footing in every aspect of legal proceedings.¹⁹ [As a consequence of this approach, according to the ECtHR case-law, the principle of equality of arms cannot be interpreted as prescribing specific procedural measures.²⁰] The case-law of ECJ explicitly confirms that full equality of arms is ensured if the procedure gives the parties an adequate and proper opportunity to present their case.²¹

¹⁵For further details on the interpretation possibilities of effective access to justice: Peters & Altwickler, 2012, 150-151.

¹⁶„Access to justice is a fundamental pillar of western legal culture. ‘To no one will we sell, to no one will we deny or delay right or justice’ proclaimed the Magna Carta in 1215, (...) expressing an axiom which has remained in force in Europe to the extent that it features in the European Convention on Human Rights, (...) the Charter of Fundamental Rights of the European Union (...) and the case-law of the Court. (...) Therefore, the right to effective legal protection is one of the general principles of Community law, in accordance with which access to justice is organised.”

ECJ, Opinion of Advocate General Ruiz-Jarabo Colomer (5 March 2009.) in case C-14/08., *Roda Golf & Beach Resort SL* [ECLI:EU:C:2009:134] para 29.

¹⁷ “The principle of effective judicial protection of the rights which individuals derive from EU law comprises various elements; in particular, the rights of the defence, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented (...)”

ECJ, C-348/16, *Moussa Sacko v. Commissione Territoriale per il riconoscimento della protezione internazionale di Milano*, judgment of 26 July 2017 [ECLI:EU:C:2017:591] para 32.

¹⁸“the principle of equality of arms (...) implies that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent, the harm caused by that imbalance having as a general rule to be proved by the person who suffered it.” ECJ, C-205/15., *Direcția Generală Regională a Finanțelor Publice Brașov v. Vasile Toma, Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci*, judgment of 30 June 2016 [ECLI:EU:C:2016:499] para 47.

¹⁹ ECJ, C-543/14, *Ordre des barreaux francophones et germanophone and Others, Jimmy Tessens and Others, Orde van Vlaamse Balies, Ordre des avocats du barreau d’Arlon and Others v. Conseil des ministres*, judgment of 28 July 2016 [ECLI:EU:C:2016:605] paras 41-42.

²⁰ECtHR, *Avotiņš v. Latvia*, judgment of 23 May 2016 (Application no. 17502/07), ECHR 2016 § 119

²¹“Article 6(3) of the ECHR does not require that every witness be called but is aimed at full equality of arms, ensuring that the procedure in issue, considered in its entirety, gave the accused an adequate and proper opportunity to challenge the suspicions concerning him.”

ECJ, C-609/13 P, *Duravit AG and others v. European Commission*, judgment of 26 January 2017 [ECLI:EU:C:2017:46], para 110.

Similar conclusions and at the same time a useful definition of “equality of arms” can be derived from the case-law of the UN Human Rights Committee based on Article 14 of the International Covenant on Civil and Political Rights,²² which describes the concept of “equality of arms” as meaning that “*the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant*”.(UN, 2007, para 13; for further detailed analysis: Grabenwarter & Struth, 2015, 198-238)

3. Identifying a violation of “equality of arms”

The above mentioned definition draws the attention to an important characteristic feature of the principle of equality of arms, namely, that the existence of certain inequalities in the parties’ procedural possibilities (being often inevitable or evident) does not automatically result in the unfairness of the procedure; only if the differences reach a certain level can an infringement be confirmed. Thus, the measurement of the violation of equality of arms is strongly connected to the realization of the other elements of the right to fair trial.²³

This approach is also in line with fair trial being described as a quality of the procedure, which can be assessed only on the basis of all circumstances of the case.²⁴ According to the case-law of the ECtHR, the assessment is based on the examination “*whether the restrictions on the adversarial and equality-of-arms principles, as applicable in the civil proceedings, were sufficiently counterbalanced by other procedural safeguards*”.²⁵ That is why, in cases concerning the specific question of adversarial process or equality of arms, the ECtHR analyses the wider context of fairness of the proceedings: “[t]o that end it will examine each of the grievances raised by the applicant and then undertake an overall assessment of the

²²International Covenant on Civil and Political Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49. Article 14

„1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.(...)”

²³ About the relation of equality of arms to other procedural guarantees: Toma, 2011.

As far as the case-law of the UN Human Rights Committee is concerned, see: OSCE 2012, 110-114.

²⁴ECHR, *Reinhardt and Slimane-Kaïd v. France*, judgment of 31 March 1998 (Application no. 23043/93, 22921/93), ECHR 1998-II., § 104.

²⁵ECtHR, *Regner v. the Czech Republic*, judgment of 19 September 2017 (Application no. 35289/11) § 151.

fairness of the proceedings".²⁶ Interestingly, the ECtHR takes even judicial practice into account when examining the compatibility of domestic law with Article 6 § 1 ECHR.²⁷

The approach of ECJ seems to be a synthesis of all these factors: "*The Court has also held that the question whether there is an infringement of the rights of the defence, including the right of access to the file, must be examined in relation to the specific circumstances of each case, including the nature of the act at issue, the context of its adoption and the legal rules governing the matter in question.*"²⁸

So, it can be concluded that the violation of the principle of equality of arms shall be evaluated on the basis of the characteristics of the whole procedure, including not only the applicable legal norms, but also the judicial practice and the context of procedure.

4. Procedural situations and "equality of arms"

The last step in this procedural analysis is to draw up situations where the procedural imbalance might be especially harmful and could lead to the violation of the principle of "equality of arms" and endanger this way the fairness of the proceedings.

Relevant circumstances might be the following:

4.1. Access to information

The first relevant question is the problem of access to information. The ECtHR confirmed that equal access to the basic documents of the case – and directly the possibility to comment on them – is a basic precondition of "equality of arms".²⁹

In a specific case³⁰ the ECJ had to deal with the question whether in cross-border administrative cooperation documents from another Member State requested by the court

²⁶ECtHR, *Martinie v. France*, judgment of 12 April 2006 (Application no. 58675/00), ECHR 2006-VI, § 45.

²⁷ "It did so in particular in its *Reinhardt and Slimane-Kaïd v. France* judgment (31 March 1998, § 106, Reports of Judgments and Decisions 1998-II), where it took the view that the practice of sending notes to the court in deliberations could remedy the parties' inability to respond to the advocate-general's submissions, provided the latter informed the parties' lawyers of the tenor of his submissions before the day of the hearing." ECtHR, *Gorou v. Greece* (no. 2), judgment of 20 March 2009 (Application no. 12686/03), ECLI:CE:ECHR:2009:0320JUD001268603, § 32.

²⁸ECJ, C-682/15, *Berlioz Investment Fund SA v. Directeur de l'administration des contributions directes*, judgment of 16 May 2017 [ECLI:EU:C:2017:373], para 97.

²⁹"it is inadmissible for one party to make submissions to a court without the knowledge of the other and on which the latter has no opportunity to comment." ECtHR, *APEH Üldözötteinek Szövetsége and Others v. Hungary*, judgment of 5 October 2000 (Application no. 32367/96), ECHR 2000-X, §§ 37-44.

must also be communicated to the relevant person so that his case can be given a fair hearing, or whether he may be refused access on grounds of confidentiality. The ECJ evaluated all circumstances of the case (according to the test described above) including the fact that access to the relevant information in judicial proceedings is a precondition of fair hearing and it has to be ensured in line with the principle of equality of arms.³¹

Nevertheless, it also came to the conclusion that this does not give a right of access to the whole of a secret document, only the disclosure of a minimum of information has to be ensured for the party to be able to prepare his argumentation. This interpretation is in accordance with the fact that the need for specific procedural tools does not stem from the principle of equality of arms. Furthermore, it favours the quality of the procedure to establish a balance between individual interests (fair hearing) and public ones (secrecy of information).³²

It also follows from the case-law that no violation of equality of arms in connection with the right to be heard arises, if legal guarantees preclude that the other party, holding information gathered by means not connected to the given procedure, can use these.³³ [In lack of such guarantees, however, the violation of the principle of equality of arms might arise, if the other party – being an authority itself or supported by one – has significantly better access to documents.³⁴]

³⁰ ECJ, C-682/15, *Berlioz Investment Fund SA v. Directeur de l'administration des contributions directes*, judgment of 16 May 2017 [ECLI:EU:C:2017:373], paras 90-101.

³¹ “a breach of the right of access to a file can entail annulment of a Commission decision in whole or in part only where the lack of proper access to the investigation file during the administrative procedure had prevented the undertaking or undertakings concerned from perusing documents which were likely to be of use in their defence and had thus infringed their rights of defence. That would be the case if disclosure of a document would have had even a slight chance of altering the outcome of the administrative procedure if the undertaking concerned had been able to rely on it during that procedure.” ECJ, T-58/01., *Solvay SA v. European Commission*, judgment of 17 December 2009. [2009 II-04781] para 226.;

³² Similar conclusions follow from the case-law of the ECtHR: “The Court is satisfied that the defence were kept informed and were permitted to make submissions and participate in the above decision-making process as far as was possible without revealing to them the material which the prosecution sought to keep secret on public interest grounds.” ECtHR, *Fitt v. the United Kingdom*, judgment of 16 February 2000 (Application no. 29777/96), ECHR 2000-II, § 48.

³³ ECJ, C-199/11., *Europese Gemeenschap v. Otis NV and others*, judgment of 6 November 2012 [ECLI:EU:C:2012:684] para 74.

³⁴ “In sum, the expropriated party in compensation proceedings is faced not only by the expropriating authority but also by the Government Commissioner; the Government Commissioner and the expropriating authority (which, in certain cases, is represented by an official from the same administrative entity as the Government Commissioner) enjoy significant advantages as regards access to relevant information; in addition, the Government Commissioner, who is simultaneously both an expert and a party to the proceedings, occupies a dominant position in the proceedings and wields considerable influence with regard to the court’s assessment (...). In the Court’s opinion, all

With respect to the protection of the weaker party, this argumentation might lead to the conclusion that access to documents, information has to be facilitated if it is definitely relevant for the procedure and the weaker party does not have access to the relevant documents, or it would put a substantial burden on him to gather these in comparison to the other party. In such cases switching the burden of proof could be necessary either generally, or with respect to individual categories of documents (e.g. general contract terms).

4.2. Deadlines

Another example might be the question of equality concerning deadlines. This might include the prevention of prolongation of procedure, but also that the procedural deadlines do not place one party at clear disadvantage. As the ECtHR confirmed: “[t]he Court is sensitive to the need (...) to ensure that proceedings are not prolonged unnecessarily by allowing a succession of written replies to any pleadings filed, but the principle of equality of arms does not prevent the achievement of such an objective, provided that one party is not placed at a clear disadvantage.”³⁵

Such a clear disadvantage can be detected if e.g. the rules for calculating statutory time-limits do not apply to both parties equally.³⁶ With regard to the position of the weaker party, also the same length of deadlines might cause significant disadvantages. On the one hand, namely, the weaker party might need more time to present his arguments, while the same considerations do not necessarily apply with respect to a party with professional legal background. On the other hand, however, long deadlines might put the weaker party also in substantial disadvantage, as the party with better financial background can take the risk of a long and costly procedure more easily, that is why shorter deadlines and switching the burden of proof could be an efficient alternative in such cases (as e.g. in case of procedures concerning general contract terms of foreign currency credits introduced in Hungary by Act XXXVIII of 2014).

4.3. Legal aid

this creates an imbalance detrimental to the expropriated party that is incompatible with the principle of equality of arms.” ECtHR, *Yvon v. France*, judgment of 24 April 2003 (Application no. 44962/98), ECHR 2003-V, § 37.

³⁵ ECtHR, *Wynen and Centre hospitalier interrégional Edith-Cavell v. Belgium*, judgment of 5 November 2002 (Application no. 32576/96), ECHR 2002-VIII, § 32.

³⁶ ECtHR, *Platakou v. Greece*, judgment of 11 January 2001 (Application no. 38460/97), ECHR 2001-I, §§48-49.

Finally, the compensation of the difference in financial possibilities (legal aid, legal representation) has to be mentioned. Generally, this set of rules offers the framework, in which the states guarantee certain forms of procedural aid, which might include among others pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings to court as well as legal assistance and representation in court, and exemption from, or assistance with the costs of proceedings of the recipient.³⁷

Compared to other procedural tools, legal aid can also itself efficiently contribute to the compensation of procedural inequalities. *A contrario*, the denial of legal aid can deprive the weaker parties of the opportunity to present their case effectively³⁸ before the court and amount to an unacceptable inequality of arms compared to multinational companies, state authorities or other parties having significant advantages³⁹ in legal knowledge or financial resources.⁴⁰ (Cumming & Freudenthal, 2010, 145)

Nevertheless, it has to be recalled that according to ECJ case-law Member States have significant elbowroom to adapt the system of legal aid to the capacities of the state budget, as the right to an effective access to justice “*may be subject to restrictions, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not constitute, with regard to the objectives pursued, a manifest and disproportionate breach of the rights thus guaranteed*”⁴¹.

However, even in the absence of more specific rules of EU law, the margin of appreciation should be applied in a manner consistent with the requirements of the protection of fundamental rights:⁴² the conditions of legal aid shall not be defined in a discriminatory

³⁷ e.g. Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes. OJ L 026

³⁸ About the efficiency of legal aid: ECtHR, *Airey vs. Ireland*, Judgement of 9 October 1979. (Application no. 6289/73), Series A, no. 32. Furthermore: Chalmers, Davies & Monti, 2014, 303-305.

³⁹ ECtHR, *McVicar v. the United Kingdom*, judgment of 7 May 2002 (Application no. 46311/99), ECHR 2002-III, §§ 46-51.

⁴⁰ ECtHR, *Steel and Morris v. the United Kingdom*, judgment of 15 February 2005 (Application no. 68416/01), ECHR 2005-II, § 72.

⁴¹ ECJ, C-619/10, *Trade Agency v. Seramico*, judgment of 6 September 2012 [ECLI:EU:C:2012:531] para 55.

⁴² About the application of margin of appreciation in line with fundamental rights: Opinion of Advocate General Trstenjak (22 September 2011) in Case C-411/10, *N. S. v. Secretary of State for the Home Department* [ECLI:EU:C:2011:611] para. 81; C-5/88, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, judgment of 13 July 1989 [ECR 1989 02609], para. 22.

manner, shall respect the principle of proportionality in connection with restriction of rights and the efficient and actual possibility of access to justice should not be depleted.⁴³

5. Closing remarks

Summarizing the experience of the analysis it can be concluded that the need for facilitating access to justice for the weaker parties is directly connected to the principle of equality of arms and the right to fair trial.

The assessment of equality of arms in individual procedures is aggravated by the fact, that there are no single procedural measures which would definitely ensure this principle; it is usually evaluated in connection with other elements of the right to fair trial. In case of legal relationships where there is a significant imbalance between the parties' position, the situation is even more complex. The above mentioned documents leave no doubt that the principle of equality of arms is strongly connected to the efficient access to justice.

That is why it seems to be plausible to conclude that the legislator shall – as part of its obligation to provide effective legal protection for human rights – actively contribute to the compensation of inequalities in the parties' procedural position, taking the actual differences of their situation into account. No procedural tool can be considered as a universal solution for these situations; the equality of arms and the compensation of procedural inequalities should rather be considered as a whole by the legislator, instead of relying on the positive effects of individual measures.

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⁴³ Hungarian Constitutional Court, Decision 574/B/1996AB of 19 December 1996 and Decision 1106/B/1997 AB of 4 February 2003.

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