



CIVIL LITIGATION AND INSOLVENCY

LEGAL PROTECTION OF FOR-PROFIT LEGAL ENTITIES

The judgment of the Portuguese Constitutional Court declared the unconstitutionality, with general mandatory force, of the rule contained in article 7(3) of the Law on Access to the Law and to the Courts that refuses legal protection to for-profit legal entities, without giving consideration to their actual economic situation.

On 7 June 2018, the Portuguese Constitutional Court published a judgment¹ that declared the unconstitutionality, with general mandatory force, of the rule contained in article 7(3) of the Law on Access to the Law and to the Courts². Specifically, the court held that the part of this rule that refuses legal protection to for-profit legal entities, without giving consideration to their actual economic situation, was unconstitutional because it violates article 20(1) of the Constitution of the Portuguese Republic.

The evolution of this rule was always characterised by a distinction between individuals and legal entities in respect of the scope of the legal protection. However, the redefinition of the personal scope of the system of access to the law and to the courts in 2007³ introduced a new separation, this time, between non-profit legal entities and for-profit legal entities. With this change, the former were allowed access to legal protection, while this protection was refused to the latter.

This situation culminated with the declaration of unconstitutionality and, consequently, with the end of that distinction. The Constitutional Court (abbreviated here to «CC») based its decision on four main points.

First, the CC found that, as for-profit legal entities have the right of access to the courts, it would not make sense for that right to be delayed because they are in a situation of financial hardship. To support its finding, the CC demonstrated that *(i)* even legal entities that are not in an insolvency situation may not be in a position ensure payment of the expenses inherent to litigation before the court; and that *(ii)* a provision of the rules applicable to the situation of insolvency may not, in itself, imply the prevention of recourse to the courts for for-profit legal entities, in the same way it cannot imply it for individuals and non-profit legal entities.

As for-profit legal entities have the right of access to the courts, it would not make sense for that right to be delayed because they are in a situation of financial hardship.

¹ Judgment no. 242/2018 of 08.05.2018, handed down in case no. 598/17 and available at <http://www.tribunalconstitucional.pt/tc/acordaos>.

² Law no. 34/2004 of 29 July, in the wording given by Law no. 47/2007 of 28 August, more commonly known as the Law on Access to the Law and to the Courts.

³ Law no. 47/2007 of 28 August.

Second, the CC rejected the argument that the only situation of lack of economic means that would justify the right to legal protection is the one that would arise from a Special Revitalisation Process (*Processo Especial de Revitalização*) (referred to here as "PER"), in establishing the exemption from court fees in this situation⁴. In summary, the CC held that the exemption from court fees was not sufficient for the legal protection provided by the Constitution for for-profit legal entities. The CC also held that the exemption did not allow the protection to function properly, because the aim of the provision was only to create the conditions for insolvency and PER proceedings to achieve their objectives, in other words, to satisfy the rights of the creditors.

Third, the CC stated that the European Court of Human Rights itself had interpreted the provision in article 6 of the European Convention on Human Rights as making it possible to (also) require the granting of legal aid to for-profit legal entities, and that this depends on the applicable procedural rules and the specific circumstances of the interested parties. Therefore, the refusal to grant legal aid must be based on an assessment of whether or not the right of access to a court by the interested party is at stake, an understanding that was incompatible with the Law on Access to the Law and to the Courts' prohibition on legal aid for-profit legal entities.

Fourth and finally, based on the case law of the Court of Justice of the European Union, the CC, in opposition to the conclusions relating to the last argument against the declaration of unconstitutionality, found that legal aid did not amount to a factor that distorts competition. The CC also further held that it cannot be classed as State aid and that, instead, it can amount to a condition that is necessary for the judicial protection to be effective and that its exclusion, without any assessment of the specific situation, could lead to "solutions clearly contrary to axiological unity in the area of fundamental rights applicable by the Portuguese courts."

Provided they demonstrate that they are in a situation of financial hardship, for-profit legal entities have the right to legal protection in the form of legal aid, because of the declaration of unconstitutionality of article 7(3) of the Law on Access to the Law and to the Courts and of the consequent application of the original version of that law.



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We can draw the following conclusions from the CC's finding of unconstitutionality: (i) provided they demonstrate that they are in a situation of financial hardship, for-profit legal entities have the right to legal protection in the form of legal aid, because of the declaration of unconstitutionality of article 7(3) of the Law on Access to the Law and to the Courts and of the consequent application of the original version of that law; (ii) despite being included in the same legal rule, individual limited liability establishments (*estabelecimentos individuais de responsabilidade limitada* - a single-person business without legal personality) do not have the right to legal protection, because the decision in question only covers for-profit legal entities.

⁴ Article 41(u) of the Procedural Costs Regulations.

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