

LEGAL AID IN GERMANY

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The subject. The article is devoted to problems of institute of legal aid in German civil procedure law.

The purpose of the article is to confirm or disprove hypothesis that financial support is the main but not exclusive form of legal aid in Germany.

The methodology of the study includes analysis and synthesis of German civil procedure legislation, description of decisions of German Federal Court of Justice and interpretation of legal studies concerning legal aid issues.

The main results and scope of their application. The right to state support for equal access to judicial protection, regardless of property status, has constitutional grounds. The fundamental aspect of the principle of the rule of law is the prohibition of unauthorized enforcement of legal claims, and, therefore, the need to go to the court. Thus, ensuring equal access to judicial protection for all, including the needy persons, is a duty of a state governed by the rule of law. An important guarantee in this case is legal aid. In Germany, this aid, enshrined in civil procedure law, is a special reflection of the General social and legal institution of social assistance.

The author reveals the structure of the main costs associated with the conduct of the process and covered by the legal aid, as well as conditions for the provision of such assistance in Germany – personal preconditions and prerequisites regarding the prospects for the conduct of the process. The provision of legal aid does not exclude the risk of a poor party that arise in connection with the loss process and the reimbursement court costs to the prevailing party. In addition, the provision of legal aid does not exempt from the obligation of its subsequent reimbursement to the Federal land budget from free revenues.

The compilation and maintenance of statistics on the cost of certain types of proceedings by the Federal States of Germany, which account for the lion's share of the costs of maintaining the judicial system, seems justified from a fiscal point of view. However, it does not mean that the judicial system as a whole should be subordinated to the logic of economic profitability of "services" for dispute resolution.

Conclusions. The provision of legal aid in Germany requires the identification of a set of conditions-relating to both the person and the prospects of the case. However, financial assistance in the conduct of proceedings is not the only way to ensure legal aid, another one is, for example, the simplification of judicial procedure. It is at the discretion of the state to choose the means of legal aid to ensure effective protection of rights, however it may not be possible without qualified legal assistance.

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1. Introduction

Access to judicial protection of rights is one of the fundamental guarantees in a state of law that excludes the enforcement of rights in the private sector. Access to justice may be restricted for a variety of reasons, including the lack of means to conduct the proceedings or the inability of the party to bear other property risks associated with the proceedings.

The German code of civil procedure of 1877 (hereinafter-the CPC), which is still in force with numerous changes, in its original version contained rules aimed at reducing the "property barrier" of access to judicial protection. They were contained in the subsection entitled "the right of the poor" (Armenrecht). This institution still exists today. Regulation has changed repeatedly. The last major reform occurred in 1979-80. The current provisions of the CPC are based on the wording that entered into force on 1 January 1980. The sub-section was renamed "process cost Assistance" (Prozesskostenhilfe). At the same time as this reform, a separate law introduced "Advisory assistance" (Beratungshilfe), which is financial support for obtaining legal advice [1, p. 2041-2048; 2, p. 297-302; 3, p. 302-307].

Consulting assistance in Germany has been provided before, for example, in the legal form of private aid associations. However, as a mandatory form provided for by law, it was first enshrined in the said reform.

Let us consider in more detail the system of financial assistance in the costs of conducting the process (Prozesskostenhilfe; hereinafter - assistance in the conduct of the process). After discussing the constitutional framework of this institution, the main characteristics of legal regulation will be presented, as well as other ways to promote access of poor and low-income persons to judicial protection. In conclusion, some information on the state of European law on this issue will be presented.

2. Constitutional and legal bases of ensuring access to judicial protection taking into account the property status.

Sentence 1 of paragraph 4 of article 19 of the Basic

law of Germany (hereinafter-GG) States: "a Person whose rights are violated by public authority may go to court." This provision applies to disputes between citizens or legal entities, on the one hand, and entities belonging to the public authority, on the other hand.

The guarantee of judicial protection in a dispute against the public authority has received a special constitutional provision in paragraph 4 of Article 19 of the German Federal Law, since fundamental rights are subjective rights that directly affect and restrict the public authorities. The basic law, which for the first time in Germany explicitly enshrined these qualities of fundamental rights and freedoms, simultaneously introduced several provisions aimed at their practical implementation in administrative procedures and in the judicial process. The more general right to protection in court, as the authors of the Constitution believed, was understood by itself and therefore was not specifically included in the text of the Basic law [4]. In addition, Germany recognizes the General constitutional guarantee of access to justice. It follows from the following considerations. One of the fundamental functions of the state is to ensure peaceful coexistence of citizens. The relations of citizens among themselves, as well as between citizens and subjects of public power are regulated by law. The state establishes a monopoly on the enforcement of both public and private rights. By virtue of this monopoly, individuals are forced to apply to the relevant public authorities for the protection and restoration of violated rights. In return, the state is obliged to provide citizens with mechanisms to do so. The Federal constitutional court of Germany therefore removes the state's obligation to provide assistance to citizens in the conduct of the process of two principles: from the General guarantee of personal liberty (paragraph 1 of article 2 GG) and the principle of the rule of law (paragraph 3 of article 20 GG) [5, p. 349-353]. From the above it follows that a formal guarantee in the form of securing the right to appeal to the court is not enough. It is necessary that the state should be obliged to actively eliminate, as far as possible, the actual restrictions on citizens' access to justice. Such actual limitations include the lack of funds.

The Federal constitutional court of Germany on this issue stated: "the Basic law requires the creation of a generally comparable situation for the haves and for the poor regarding the exercise and protection of their rights. This follows from paragraph 1 of article 3 of GG in relation to the principle of the rule of law, which is generally reflected in paragraph 3 of article 20 of GG and found special consolidation in paragraph 4 of article 19 of GG. One of the fundamental aspects of the principle of the rule of law is the prohibition of arbitrary enforcement of legal claims. To do this, the parties are forced to go to court. This situation necessitates the establishment of a system of state courts and equal access for all to this system. Measures should also be taken to ensure that the poor, including the poor, have equal access to judicial protection. By virtue of paragraph 1 of article 3 of the GG, this requirement of equal protection of rights is ensured as a fundamental subjective right."

At the same time, as the Federal constitutional court notes, equal protection of rights arising from the principle of the rule of law implies the following: "Paragraph 1 of article 3 of the GG does not require full equality in the situation of the poor and the haves, but only implies the creation of a generally comparable situation. It is sufficient for the poor to be in a situation comparable to the possessor of the dispute, taking into account a reasonable weighting of the prospects of litigation and possible court fees, as well as other costs of conducting the process. Therefore, from the point of view of constitutional law, the decision to provide material assistance for reimbursement of court costs is subject to the condition that the proposed process has sufficient prospects for judicial settlement of the dispute and does not constitute an abuse of law and state support."

3. Regulation of assistance in the conduct of the process by Federal law

3.1. Source of law

Assistance in the conduct of the process is regulated by §§ 114-127a of the CPC. Other procedural legislation contains references to the provisions of the CPC, such as: § 11a of the labour litigation Act (Arbeitsgerichtsgesetz); §§ 76 to 78 of the Law on proceedings in family disputes and

cases of voluntary jurisdiction (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit); § § 379a, 397a, 406g of the German Criminal procedure code (Strafprozessordnung); § 166 Of the code of administrative procedure (Verwaltungsgerichtsordnung); § 142 of the financial litigation Act (Finanzgerichtsordnung); § 73a of the Law on the proceedings of social dispute (it.: Sozialgerichtsgesetz); § § 18, 129 et seq. Patent law (Patentgesetz).

For judicial disputes in the European Union, if the place of residence (location) of at least one party is outside the country where the court is located, the Council Directive of 27 January 2003 No. 2003/8/EG "on improving access to law in disputes complicated by a foreign element" (implemented in Germany in §§ 1076 1078 CPC) is additionally applicable.

3.2. The legal nature of assistance in the conduct of the process

Social law was chosen as the basis of the legislative concept of assistance in the conduct of the process in Germany: it is a kind of the General Institute of social assistance (Sozialhilfe) [2, p. 279; 6, p. 240]. In this regard, the regulation of procedural assistance contained in the CPC should be considered as special in relation to social law – if on the basis of the CPC assistance for the conduct of the process is not provided, the same interest cannot be satisfied in the framework of social assistance.

3.3. Content assistance in the conduct of the process

3.3.1. Main expenses arising in connection with the conduct of litigation

What are the costs incurred by the party in connection with the conduct of the trial?

First, as a General rule, a state fee is charged for the conduct of the process in accordance with the law on judicial expenses. This rule is by no means self-evident: protection of rights and enforcement through state courts are carried out, including in the public interest. If the rule-of-law state assumes a monopoly on the enforcement of obligations between private persons, such activities may be considered as a public function of the state, the costs of which it must bear. The collection of fees for judicial activities is justified, however, by the fact that judicial protection of private rights is mainly

carried out in the interests of the parties to the proceedings. Property turnover is characterized by the risk of violation of property interests. Accordingly, the transfer of this risk to the participants of the turnover looks in such cases the most correct. They, in turn, more effectively than other participants (in particular, the state) can assess this risk in each individual case, avoid or minimize it, as well as insure against it. The state fee for court proceedings, as a General rule, depends on the price of the claim (see §§ 3, 34 of the law on court costs and annexes No. 1, 2 to this Law). However, such economic considerations are not always justified. Therefore, the legislation provides for a large number of cases in which the parties are exempt from paying the state fee. This applies, inter alia, to certain types of labour disputes, family disputes and disputes over social benefits, taxes and Finance (see § 2 of the law on court costs, etc.). In such cases, the legislator considers it inappropriate to impose a financial burden on the parties to the dispute. The compilation and maintenance by the Federal States of Germany, which account for the lion's share of the costs of maintaining the judicial system, of statistics on the cost of certain types of proceedings seems justified from a fiscal point of view. However, this does not mean that the judicial system as a whole should be subordinated to the logic of economic profitability of "services" for dispute resolution.

Along with the state fee, the parties bear the costs associated with obtaining legal advice and legal representation in court. The remuneration of a lawyer for representation in court is determined in accordance with the tax established By the law on remuneration of lawyers . The amount of remuneration, as a General rule, as well as the state fee, depends on the price of the claim (§ 2 of the Law on remuneration of lawyers and annexes No. 1, 2 to this Law).

Before the beginning of the process, the state fee is paid by the plaintiff. Both parties shall bear the costs of representation of their interests by lawyers. The court of each instance in the decision on the results of the proceedings shall decide on the final distribution of costs. As a General rule, both the state fee and the expenses of the parties

for the payment of representative services of lawyers (within the amount established by law) are assigned to the party that lost the process, or, in case of partial satisfaction of the claims, the court costs are distributed between the parties proportionally .

3.3.2. Costs covered by assistance in the conduct of the process

The party to whom assistance is provided in the conduct of the process is exempt from paying the state fee. The lawyer of this party shall be paid remuneration at the expense of the Treasury (§ 122 of the CPC). Such payment for cases with a claim price of more than 4,000 euros is set at a lower rate than in cases where no assistance is provided in the conduct of the process (see section 49 of the law on the remuneration of lawyers).

The party to whom assistance is provided in the conduct of the process is obliged to return the assistance received, depending on its income, in whole or in part by paying monthly contributions for a period of not more than 48 months (§ 115 of the CPC).

3.3.3. The right of the other party to recover the costs of the process

If the party who has been assisted in the conduct of the proceedings loses it, it is obliged on a General basis to reimburse the other party for the costs of conducting the proceedings (§ 123 of the CPC), except for the state fee, that is, the basic costs of legal advice and representation in court.

Such a rule means that the party assisted in the conduct of the process carries a significant risk. This provision is preserved in the law, based on the fiscal interests of the Federal lands, which bear the lion's share of the costs of paying for assistance in the conduct of the process. As a consequence of this rule, a reasonable party may refrain from entering into a case, although it has a good chance of winning it. For example, for the heir of a large fortune, who himself does not possess liquid property, this risk may be unbearable when deciding on the conduct of a legal dispute about the inheritance. Another example is an intellectual property dispute: for example, a large firm sues a private entrepreneur to prohibit the use of a trademark [7, p. 545-551].

On the other hand, the party that has not been assisted in the conduct of the process carries a

certain risk. For example, it may be entitled to claim its costs from the other party, but the losing party, who has been assisted in the conduct of the process, will not be able to meet such a claim. Therefore, the court is obliged to weigh the possible negative consequences of such a decision, both for the applicant and for the other party, when making a decision to provide assistance in the conduct of the process.

3.3.4. Funding assistance in the conduct of the process

Funding assistance to conduct a process occurs mainly at the expense of the budgets of Federal lands. The financial burden consists of the amount by which the state fee is reduced, and of remuneration for legal advice and representation in court. The amount of financial burden of Federal lands in connection with assistance in the conduct of trials in courts of General jurisdiction in 2014 amounted to about 500 million euros [8]. Until 2008, these volumes grew steadily, since then they remain approximately at the same level [9].

3.3.5. Prerequisites for providing assistance in the conduct of the process

In accordance with proposition 1 of part 1 § 114 of the CPC assistance in the conduct of the process is provided under the following conditions:

- background to the case: the alleged process appears to be promising for the applicant and does not constitute an abuse of law;
- personal background: the applicant for personal and economic reasons is not able to bear the costs of the process in full or even in part, or can not implement them at this time.

This requirement in its content goes back to the original wording of § 106 of the CPC.

3.3.5.1. Background on the prospects of the case

In the 1877 edition, assistance in the conduct of the process was excluded if it seemed hopeless (wenn die beabsichtigte Rechtsverfolgung oder Rechtsverteidigung aussichtslos erscheint). In the reform of 1934, this criterion was formulated more strictly: assistance is provided only when the process promises a sufficiently good chance of success (wenn die beabsichtigte Rechtsverfolgung oder Rechtsverteidigung hinreichende Aussicht auf Erfolg bietet ...) and is not an abuse of right (...und nicht mutwillig erscheint).

The court is obliged to establish the existence of this premise. To do this, he evaluates the evidence, but is not allowed to draw conclusions on the merits of the case, prejudging the outcome of its consideration. If, for example, the outcome of a case depends on the resolution of a complex legal issue that has not yet been answered in the practice of the courts of last resort, the court may not refuse to provide assistance in the conduct of the process.

Absence of abuse of the right is considered as a separate criterion. Such abuse is assumed, for example, when the applicant has at his disposal a simpler way to protect his rights and interests. So, for example, as a General rule, the party before the appeal to court has to try to recover the sum of money due to it by means of writ proceedings. A claim may also be an abuse of right if it is obvious that even if the process is successful, it will not be possible to satisfy the claim.

Thus, the General purpose of complying with the preconditions for the prospects of the case is to ensure that assistance in the conduct of the process is provided only in cases where a bona fide party acting on the basis of its economic interests has sufficient grounds to go to court or defend against a claim filed against it.

3.3.5.2. Personal background

3.3.5.2.1. Need

A party receives assistance in the conduct of the process only if, for personal economic reasons, it is unable to reimburse the costs of the conduct of the process in full or in stages.

Unlike the previous version, § 114 of the CPC mentions the possibility of partial reimbursement of the costs of conducting the process and the payment of fees in monthly installments. Although some courts provided this opportunity before the reform [2, p. 279].

Detailed regulation of economic preconditions is contained in § 115 of the CPC, which was last amended in 2014. The General meaning of this rule is as follows: the parties are obliged to bear the costs of conducting the process within the framework of free income (einzusetzendes Einkommen) and, to the extent permissible, at the expense of existing property (part 2 § 115 of the CPC). "Admissibility", within the meaning of this rule, is determined in the same way as for the purposes of determining the

amount of minimum social support according to § 90 of the Social Code No. XII (Sozialgesetzbuch XII, SGB XII). It is unacceptable, for example, to collect the costs of conducting the process at the expense of the object in which the applicant lives. Free income is defined as the income of a person reduced by the cost of living determined by the method established in social legislation (SGB XII, in particular part 2 § 82). The party to which assistance is provided for the conduct of the process is obliged to direct half of its free income, which does not exceed 600 euros, to repay the costs of the process to the budget of the relevant Federal land (and if the assistance was first provided for the proceedings in the Supreme court – to the Federal budget) (part 2 § 115, part 2 § 120 of the CPC). That part of the monthly free income, which exceeds 600 euros, is fully paid to the relevant budget to repay the costs of the process.

Before the 1980 reform, the law in this part was much more concise. The old version said only that assistance is provided if the party is "unable to bear the costs of conducting the process without prejudice to the life of the family." For all years of existence of this rule of uniform practice of courts concerning what specific sums should be included in necessary expenses, did not develop [2, p.279]. Therefore, in practice, there was a great deal of uncertainty about the prerequisites for providing assistance in the conduct of the process.

Since 1980, the right to receive assistance in the conduct of the process does not depend on the nationality of the party in need. Prior to the 1980 reform, assistance to foreigners was provided on the basis of the principle of reciprocity, so it was extended only to citizens of the respective States (proposition 2 § 106 of the 1877 CPC).

3.3.5.2.2. Bankruptcy Trustee; legal entities and other associations of persons with legal capacity

The rules of the aid management process was originally intended for individuals, as is clear in particular from the analysis the method of determining the amount of available income.

At the same time, the law does not exclude the provision of assistance in the conduct of the process to legal entities and other associations with legal capacity (in particular, partnerships). For

them, the limitation that the assistance process is, if no corresponding face-side of the process nor of persons who are obliged to finance the costs of participants in the process, unable to bear the costs of conducting the process and if along with this fact, the protection of the law is necessary due to public interests. On the one hand, assistance in the conduct of the process as a special form of social assistance is not intended to support legal entities. On the other hand, the law takes into account that there are cases when the outcome of the process involving a legal entity may affect not only the interests of this person, but also individuals or public interests in General. Examples:

- the existence of a legal entity that provides work for a large number of employees depends on the outcome of the process [10];
- without providing assistance to the legal entity in the conduct of the process, there is a threat of violation of the rights of many small creditors who will not be able to satisfy their claims .

Special rules exist for persons who act on their own behalf, but at the expense of the separate property of another person (in particular, this applies to the bankruptcy Trustee (Insolvenzverwalter) and the estate Manager (Testamentsvollstrecker), who act on their own behalf at the expense, respectively, of the debtor or heirs). They are given assistance for maintenance process, regardless of considerations of the public good if the costs of running process is impossible to pay from the assets managed by the person, and if taking into account the interests of all parties unfair to require the payment of costs for the conduct of the process from individuals who from an economic point of view, are the parties to the dispute – financially interested parties. Such persons-parties are in bankruptcy cases-the debtor, and in cases of execution of the will or the management of the inheritance (Testamentsvollstreckung) - the heir(s) and (or) persons who are entitled to a mandatory share in the inheritance, or the beneficiaries. They do not formally participate in the process, but at the same time, from an economic point of view, they are directly concerned with the outcome of the process.

3.3.6. Other regulations designed to facilitate access to justice for the poor

Along with assistance in the conduct of the

proceedings, there are other regulations designed to reduce the financial burden associated with the conduct of the case in court, for a party who does not have sufficient funds, for example:

- § 82 Of the law on the protection of trademarks and other means of individualization (Gesetz über den Schutz von Marken und sonstigen Kennzeichen-Markengesetz, MarkenG) contains a General reference to the provisions of the CPC. This reference in accordance with the Basic law of Germany should be interpreted in such a way that it also refers to §§ 114 and the following paragraphs of the CPC [11].

- P. 3 § 14 Nr. 3 Of the law on court costs (Gerichtskostengesetz) provides that the claim can be considered without paying the state fee in advance, if the plaintiff can not immediately pay such an advance, and the process is sufficiently promising.

- Part 4 § 12 of the Act against unfair competition (Gesetz gegen den unlauteren Wettbewerb), part 2 § 247 of the Law on joint-stock companies (Aktiengesetz), § 144 of the Patent law (Patentgesetz), § 142 of the trade marks Act provide for the possibility to reduce the price of a claim solely for the purpose of calculating state duty (and the lawyer's remuneration is calculated on the basis of a valid claim).

- §§ 4a 4d of the bankruptcy Law (Insolvenzordnung) establishes the possibility to reduce, delay or not to charge the legal costs of the consumer bankruptcy procedure.

- In accordance with part 2 § 247 Of the law on joint-stock companies, the court may, upon application of a party, reduce the price of a claim to challenge the decision of the General meeting of the joint-stock company if the party documents that the risk of incurring legal costs may expose its economic situation to a serious threat.

4. Assistance in the conduct of the process in European law

At the European level, standards for providing financial support to parties to a process to ensure access to justice exist in both European Union (EU) law and the European Convention for the protection of human rights and fundamental freedoms (ECHR).

4.1. EU law

With regard to the EU, article 47 of the EU Charter of fundamental rights, which deals with the right to an effective remedy and access to court, specifically mentions the right to financial assistance to conduct proceedings. This right applies to all cases of violation of the rights and freedoms guaranteed by EU law (even if it is a violation of a legal act of a member state that implements EU law). It applies to proceedings in both the EU court of Justice and national courts. For proceedings before the EU Court of justice since 1991, the Rules of this court provide for the provision of financial support to the poor party to conduct the process .

4.2. European Convention for the protection of human rights and fundamental freedoms

The ECHR does not contain special provisions on assistance in the conduct of the process. However, the European court of human rights (ECHR), applying the principle of fair trial (article 6, paragraph 1, ECHR), notes that the right of access to court implies the possibility of effective protection of rights, which, in turn, may not be possible without qualified legal assistance [12-15].

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