
Von: Gerds, Johannes
Gesendet: Montag, 13. Oktober 2014 14:23
An: [REDACTED]
Cc: Karcher, Johannes
Betreff: Draft legal team Experts Panel
Anlagen: 141010 draft legal aid - experts panel.docx; 141010 Explanatory notes legal aid - experts panel.docx

Dear Colleagues,

two weeks ago I had the honor to present our draft text on legal aid to the Expert Panel of the UPC in London. The experts thanked us for our efforts and support most of the provisions. Nevertheless, they raised some critical points which I now tried to take care of in our draft. In the comments to the draft text on legal aid you will find their concerns.

The draft has not been streamlined by a native speaker, this will be done after we agreed on a final version. It would be great to hear from you until 21 September 2014, otherwise we would forward the text to Prep. Comm.

Best regards

Johannes Gerds
Federal Ministry of Justice and Consumer Protection Judge, Staff Counsel, Division RA 2: civil procedure
Mohrenstraße 37, 10117 Berlin, Germany Tel. (030) 18 580 - [REDACTED]
Fax: (030) 18 580 - [REDACTED]

9330(28-3-1-31 733/2014

LEGAL AID**Rule 375 – Aim and scope**

1. In order to ensure effective access to justice, the Court may grant legal aid to a party who is a natural person (the applicant).
2. Legal aid may be granted in respect of any proceedings before the Court.

Rule 376 – Costs eligible for legal aid

1. Subject to Article 71(3) of the Agreement, legal aid may cover, in whole or in part, the following costs:
 - (a) court fees;
 - (b) costs of legal assistance and representation regarding
 - (i) pre-litigation advice with a view to reaching a settlement prior to commencing legal proceedings;
 - (ii) commencing and maintaining proceedings before the Court,
 - (iii) all costs relating to proceedings including the application for legal aid.
 - (iv) enforcement of decisions
 - (c) other necessary costs related to the proceedings to be borne by a party, including costs of witnesses, experts, interpreters and translators and necessary travel, accommodation and subsistence costs of the applicant and his representative.
2. Subject to Article 71(3) of the Agreement, legal aid may also cover the costs awarded to the successful party, in the event that the applicant loses the action.

Rule 376a – Maximum amount to be paid for representation

~~1. In determining the exact amount of legal aid for the costs of legal advice, the Court shall take into account the usual costs for legal advice in the member state where the applicant is established.~~

For the costs of representation in the sense of Rule 376 (1) b) the maximum level of legal aid that can be granted by the Court corresponds to the maximum amount of recoverable costs laid down in the decision of the Administrative Committee pursuant to Article 69 (1) of the Agreement and Rule 152 (2) of the Rules of Procedure.

2. The Administrative Committee may define thresholds below the level set in Paragraph 1 for the maximum level of legal aid for representation in the sense of Rule 376 (1) b), considering the necessary costs for legal representation in the member states and the guarantee to adequate access to justice.

Rule 377 – Conditions for granting legal aid

1. Any natural person who is a union citizen or a third country national residing lawfully in a EU member State shall be entitled to apply for legal aid where:
 - (a) due to his or her economic situation, he or she is wholly or partly unable to meet the costs referred to in Rule 376; and

Kommentar [GJ1]: The Expert Panel advised to delete the reference to the costs of representation in the applicants member state and give the Administrative Committee the power to define thresholds below the maximum recoverable costs. They emphasized that legal aid should not cover the maximum costs for the best representation possible but only the necessary costs of effective representation.

- ~~(a) assets originating from public funds for creating or securing livelihood or for establishing a household;~~
- ~~(b) capital, including proceeds from such capital, that serves to supplement retirement, and the generation of which is subsidized by the state;~~
- ~~(c) an appropriate number of household effects, whereby the party's previous life circumstances shall be taken into account;~~
- ~~(d) objects that are indispensable with regard to taking up or continuing vocational training or employment;~~
- ~~(e) family keepsakes or heirlooms, the loss of which would be a particular hardship for the party or his/her family;~~
- ~~(f) objects that serve to satisfy intellectual needs, especially of an academic or artistic nature, and of which ownership is not a luxury;~~
- ~~(g) an appropriate piece of real estate which is fully or partially inhabited by the party alone or by the party and his/her relatives and which is to be inhabited by his/her relatives after the party's death. Appropriateness shall be assessed depending on the number of residents, need for housing, size of the real estate, size of the building, design and furnishing of the residential building, as well as the value of the property including the residential building;~~
- ~~(h) small amounts of cash or other material value; any particular situations of need of the requesting person shall be taken into account;~~
- ~~(i) assets where this would be a hardship for the person having to use such assets or for his/her relatives entitled to maintenance payments.~~

Rule 378 – Application for legal aid

1. An application for legal aid may be lodged before or after proceedings have been started before the Court.
2. The Application for legal aid shall contain in a language of a Contracting Member State:
 - (a) the name of the applicant;
 - (b) postal and electronic addresses for service on the applicant and the names of the persons authorised to accept service;
 - (c) the name of the other party as well as postal and electronic addresses for service on the other party where available and the names of the persons authorised to accept service, if known;
 - (d) the action number of the action in respect of which the application is made or, where the application is lodged before the action has been brought, a brief description of the action;
 - (e) an indication of the value of the action and the costs to be covered by legal aid;
 - (f) where legal aid is requested for costs of legal assistance and representation, the name of the proposed representative;
 - (g) an indication of the applicant's financial resources, such as income, assets and capital, and of the applicant's family situation including an assessment of the resources of persons who are financially dependent on the applicant;
 - (h) where appropriate, a reasoned request for suspension of a time limit which would otherwise need to be observed until the date of notification of the order deciding on legal aid.
3. The application for legal aid must be supported by:
 - (a) evidence of the applicant's need for assistance, such as certificates attesting his income, assets and capital and family situation; and
 - (b) where the application is lodged before the action has been brought, an indication of the evidence in support of the action.
4. In the event of an appeal, a new application shall be lodged.

(d) a contribution to be made by the applicant to the costs referred to in Rule 376.1(c).

7. Legal aid may be granted only for the period from receipt of the application with the court.

8. Where the legal aid covers, in whole or in part, the costs of legal assistance and representation the order granting legal aid shall designate the representative of the applicant

9. On a request by the designated representative, the Court may order that an amount shall be paid by way of advance.

10. Where requested by the applicant in accordance with Rule 378.2(g), the Court shall decide on the suspension of any time limit.

Rule 379a – Alternation of economic situation

The applicant has an obligation to inform the Court promptly of any alternation in his economic situation.

Rule 380 – Withdrawal of legal aid

1. If the economic situation of the applicant which has led to the grant of legal aid according to Rule 377.1(a) alters during the proceedings, the Court may at any time, of his own motion or on a reasoned request of the other party, withdraw wholly or partly legal aid but only after having heard the applicant.

2. The court may withdraw wholly or partly legal aid if the party

- (a) by inaccurately representing the circumstances of the case, has misrepresented its prospects of success, which are determinative for the approval of assistance with court costs; or
- (b) has at least grossly negligently made false statements as to his/her personal or economic circumstances; or
- (c) has not immediately informed the court of a considerable improvement to his/her financial circumstances;
- (d) has been in arrears for longer than three (3) months with the payment of a monthly instalment or with the payment of any other amount.

3. An order withdrawing legal aid shall state the reasons on which it is based.

Rule 381 – Appeal

An order wholly or partly refusing or withdrawing legal aid may be appealed to the Court of Appeal. The appeal must be filed with the Court of First Instance Appeal within a period of one month from receipt after receiving the order. As far as the Court of First Instance considers the appeal to be correct, it has to remedy; in all other cases, the complaint is to be presented to the Court of Appeal without undue delay. The Court of Appeal may grant legal aid for the conduct of the appeal under the conditions set in Rules 377 to 379.

Kommentar [G37]: The experts prefer a simplified appeal procedure in which the appeal is not filed with the Court of first instance, but directly with the Court of Appeal

Kommentar [G38]: It should be clear in the text that the deadline for appeals starts after receipt of the order.

Rule 382 – Recovery

1. Where the Court has ordered another party to pay the costs of the applicant for legal aid, that other party shall be required to refund to the Court any sums advanced by way of legal aid. In the event of a shortfall between the costs so ordered and the sums advanced by way of legal aid the applicant may be

Explanatory notes for rules on legal aid

In order to guarantee adequate access to justice, Article 71 of the Agreement provides that a party who is financially unable to meet the costs of proceedings before the Unified Patent Court is to be granted legal aid. This is intended to ensure that parties are not deterred from pursuing claims that would otherwise have good prospects of success on account of their economic circumstances.

The rules of procedure set out the details of the conditions, scope, procedure and withdrawal of legal aid. In order to create a high degree of legal clarity and transparency, thus allowing potential applicants to gauge the prospects of an application for legal aid in advance, the rules of procedure contain detailed provisions in particular for assessing financial need. This will increase the transparency and, consequently, acceptance of the Court's decisions.

The suggested provisions are based on a proposal by the group of experts headed by Kevin Mooney. Additions and amendments to the original proposal are highlighted in red.

Rule 375 (Aim and scope)

The provision of legal aid and its restriction to natural persons is in line with Article 71 para. 1 of the Agreement.

Rule 376 (Costs eligible for legal aid)

In order to ensure that those in financial need have effective access to justice, legal aid must cover court fees as well as the costs of professional legal assistance and representation. Since it is sometimes necessary to enforce one's rights by way of compulsory enforcement, legal aid must also cover the costs of such enforcement. Ultimately, access to justice would not be guaranteed if the party winning the case were unable to enforce the judgment for lack of funds.

Rule 376a (Maximum amount to be paid for representation)

~~With regard to the costs of legal advice, the Court is to determine the amount to be granted based on the usual cost of legal advice in the member state where the applicant is established. While it might be more practical for the Court to set a uniform amount, this cannot be recommended for budgetary reasons, because lawyers' fees vary widely among member states. Considering the applicant's right to freely choose a lawyer and the freedom~~

~~If any income remains after deduction of the above-mentioned items (disposable income remains, which is not high enough to cover all costs), the applicant is generally obliged to use this money to cover the costs of the proceedings by paying monthly instalments; in order to spread the burden, however, the applicant is only expected to pay monthly instalments amounting to 50 percent of this sum. Administrative Committee shall set thresholds. Rates of less than ten euros are not to be claimed, since the administrative outlay would be disproportionate to the amount obtained. Where disposable income exceeds 600 euros, it is appropriate in the interests of economical use of public funds to assess monthly instalments exceeding 50% of that income in accordance with the financial circumstances of the applicant, defining the percentage of disposable income to be used by the applicant to cover the costs of proceedings. These should guarantee that applicants are not burdened with monthly instalments creating a disincentive to work while taking account of the public budgetary interests. The provision of Rule 377a para. 3 means that the relative portion of disposable income payable as an instalment increases as the income rises (progression). In order to ensure that applicants are not burdened with monthly instalments over too long a period of time (which could discourage them from judicially asserting their rights and therefore impede access to justice) the number of monthly instalments is limited to a maximum of 48.~~

~~In addition to their income, applicants must use their assets to the extent that this can be reasonably expected of them. In order to avoid undue hardship, the provision lists the categories of assets which are protected and are thus exempt from use. These include assets securing livelihood or serving to supplement retirement, or the sale of which would understandably amount to an unacceptable hardship for the applicant. Here as well, having to sell such special assets could discourage applicants from judicially asserting their rights, which would inappropriately impede access to justice. Claims against third parties for reimbursement of litigation costs and lawyers' fees — in particular against a legal expenses insurer — are considered as assets which must be used. If the applicant's legal expenses insurance is liable to pay the costs, the applicant is not considered to be in need of assistance and legal aid cannot be provided.~~

~~The Administrative Committee will have to determine and adjust the provisions on assets to be used to cover the costs of proceedings.~~

Rule 378 (Application for legal aid)

The application to be granted legal aid may be lodged before or after proceedings have been started. The rule also stipulates the information that must be included in the application.

instalments. This provision outlines the repercussions of such conduct and serves to protect the Court's budget. If approval is withdrawn, the applicant is required to refund the costs in full (Rule 382).

Rule 381 (Appeal)

In the interests of providing effective legal protection, an order refusing or withdrawing legal aid may be appealed. ~~The ruling division of the Court of First Instance is given the opportunity to remedy its own decision, which is appropriate for reasons of procedural economy. If the Court of First Instance does not remedy its decision,~~To accelerate and simplify the appeal procedure, the matter will be adjudicated~~appeal has to submitted by to~~ the Court of Appeal within one month after receiving the order of the Court of First Instance. To guarantee effective access to the appeal procedure, the Court of Appeal may grant legal aid under the same conditions as the Court of First Instance. Changes in the economic or financial situation of the applicant or the prospects of success taking place after the decision of the Court of First Instance have to be considered by the Court of Appeal.

Rule 382 (Recovery)

The provision serves to implement Article 71 para. 3 of the Agreement and is in line with the principle that the unsuccessful party must bear all the costs. Accordingly, the party opposing the party granted legal aid must refund the sums paid out as legal aid to the Court.

Druckerei

Von: Gerds, Johannes
Gesendet: Freitag, 17. Oktober 2014 17:26
An: [REDACTED]
Cc: Karcher, Johannes
Betreff: AW: Draft legal team Experts Panel
Anlagen: 141017 Explanatory notes legal aid - experts panel_redrafted2.docx;
 141017 Tilmann-Amendment Rule 375 Legal aid_redrafted.docx

Dear Colleagues,
 attached you find the amended version. I took account of Elkes critique.
 I wish you all a nice weekend.

Best regards

Johannes Gerds

Johannes Gerds
 Federal Ministry of Justice and Consumer Protection Judge, Staff Counsel, Division RA 2: civil procedure
 Mohrenstraße 37, 10117 Berlin, Germany Tel. (030) 18 580 - [REDACTED]
 Fax: (030) 18 580 - [REDACTED]

-----Ursprüngliche Nachricht-----

Von: Gerds, Johannes
Gesendet: Donnerstag, 16. Oktober 2014 15:09
An: [REDACTED]

Cc: Karcher, Johannes
Betreff: AW: Draft legal team Experts Panel

Dear Colleagues,
 In addition to the draft submitted on Monday, [REDACTED] from the Experts Panel sent me another Amendment to the text in Rule 375 which I find considerable. It makes clear that applicants for legal aid need a reasonable interest in the claim to apply for legal aid.
 The amended explanatory note will follow. If you have any suggestions to the changes in the new draft, please let me know as soon as possible, since we will have to submit the text to Prep. Comm. on 22 September 2014.

Best regards

Johannes Gerds
 Federal Ministry of Justice and Consumer Protection Judge, Staff Counsel, Division RA 2: civil procedure
 Mohrenstraße 37, 10117 Berlin, Germany Tel. (030) 18 580 - [REDACTED]
 Fax: (030) 18 580 - [REDACTED]

Explanatory notes for rules on legal aid

In order to guarantee adequate access to justice, Article 71 of the Agreement provides that a party who is financially unable to meet the costs of proceedings before the Unified Patent Court is to be granted legal aid. This is intended to ensure that parties are not deterred from pursuing claims that would otherwise have good prospects of success on account of their economic circumstances.

The rules of procedure set out the details of the conditions, scope, procedure and withdrawal of legal aid. In order to create a high degree of legal clarity and transparency, thus allowing potential applicants to gauge the prospects of an application for legal aid in advance, the rules of procedure contain detailed provisions in particular for assessing financial need. This will increase the transparency and, consequently, acceptance of the Court's decisions.

The suggested provisions are based on a proposal by the group of experts headed by Kevin Mooney. Additions and amendments to the original proposal are highlighted in red.

Rule 375 (Aim and scope)

The provision of legal aid and its restriction to natural persons is in line with Article 71 para. 1 of the Agreement. It clarifies that legal aid for the claimant is limited to parties as defined in Article 47 of the Agreement on a Unified Patent Court (UPCA). In particular, all claimants applying for legal aid not entitled under Article 47 (1) – (5) UPCA have to be concerned by a patent and entitled to bring actions in accordance with its national law.

Formatiert: Deutsch (Deutschland)

Formatiert: Englisch (USA)

Formatiert: Englisch (USA)

Formatiert: Englisch (USA)

Formatiert: Englisch (USA)

Rule 376 (Costs eligible for legal aid)

In order to ensure that those in financial need have effective access to justice, legal aid must cover court fees as well as the costs of professional legal assistance and representation. Since it is sometimes necessary to enforce one's rights by way of compulsory enforcement, legal aid must also cover the costs of such enforcement. Ultimately, access to justice would not be guaranteed if the party winning the case were unable to enforce the judgment for lack of funds.

Rule 376a (Maximum amount to be paid for representation)

~~detailed rules on the deductions of income to be used and adjust these rules regularly. Applicants could not be expected to use these parts of their income primarily for conducting the proceedings. Since they cannot do without housing or food, they would, in reality, be denied access to justice. Naturally, the allowances for spouses and children do not apply to those spouses and children who have a sufficient income of their own.~~

~~If any income remains after deduction of the above-mentioned items (disposable income remains, which is not high enough to cover all costs), the applicant is generally obliged to use this money to cover the costs of the proceedings by paying monthly instalments; in order to spread the burden, however, the applicant is only expected to pay monthly instalments amounting to 50 percent of this sum. Administrative Committee shall set thresholds. Rates of less than ten euros are not to be claimed, since the administrative outlay would be disproportionate to the amount obtained. Where disposable income exceeds 600 euros, it is appropriate in the interests of economical use of public funds to assess monthly instalments exceeding 50% of that income in accordance with the financial circumstances of the applicant, defining the percentage of disposable income to be used by the applicant to cover the costs of proceedings. These should guarantee that applicants are not burdened with monthly instalments creating a disincentive to work while taking account of the public budgetary interests. The provision of Rule 377a para. 3 means that the relative portion of disposable income payable as an instalment increases as the income rises (progression). In order to ensure that applicants are not burdened with monthly instalments over too long a period of time (which could discourage them from judicially asserting their rights and therefore impede access to justice) the number of monthly instalments is limited to a maximum of 48.~~

~~In addition to their income, applicants must use their assets to the extent that this can be reasonably expected of them. In order to avoid undue hardship, the provision lists the categories of assets which are protected and are thus exempt from use. These include assets securing livelihood or serving to supplement retirement, or the sale of which would understandably amount to an unacceptable hardship for the applicant. Here as well, having to sell such special assets could discourage applicants from judicially asserting their rights, which would inappropriately impede access to justice. Claims against third parties for reimbursement of litigation costs and lawyers' fees — in particular against a legal expenses insurer — are considered as assets which must be used. If the applicant's legal expenses insurance is liable to pay the costs, the applicant is not considered to be in need of assistance and legal aid cannot be provided.~~

situation improves, he/she must contribute as appropriate to covering the costs of the legal action.

In addition, the Court may withdraw its approval if the applicant has provided misrepresentative information regarding the fulfilment of criteria determinative for the grant of legal aid or, through gross negligence, has made false statements as to his/her financial circumstances, or has not complied with his/her reporting duties or an obligation to pay instalments. This provision outlines the repercussions of such conduct and serves to protect the Court's budget. If approval is withdrawn, the applicant is required to refund the costs in full (Rule 382).

Rule 381 (Appeal)

In the interests of providing effective legal protection, an order refusing or withdrawing legal aid may be appealed. ~~The ruling division of the Court of First Instance is given the opportunity to remedy its own decision, which is appropriate for reasons of procedural economy. If the Court of First Instance does not remedy its decision,~~To accelerate and simplify the appeal procedure, the matter will be adjudicated~~appeal has to be submitted by to~~ the Court of Appeal within one month after receiving the order of the Court of First Instance. To guarantee effective access to the appeal procedure, the Court of Appeal may grant legal aid under the same conditions as the Court of First Instance. Changes in the economic or financial situation of the applicant or the prospects of success taking place after the decision of the Court of First Instance have to be considered by the Court of Appeal.

Rule 382 (Recovery)

The provision serves to implement Article 71 para. 3 of the Agreement and is in line with the principle that the unsuccessful party must bear all the costs. Accordingly, the party opposing the party granted legal aid must refund the sums paid out as legal aid to the Court.

LEGAL AID

Rule 375 – Aim and scope

1. In order to ensure effective access to justice, the Court may grant legal aid to a party who is a natural person (the applicant).
2. Legal aid may be granted in respect of any proceedings before the Court for which the applicant may bring actions pursuant to Article 47 ~~(6)~~ of the Agreement.