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THE DETERMINATION OF CRITERIA OF PROPORTIONALITY OF PROFESSIONAL LEGAL AID COSTS IN THEIR ALLOCATION BETWEEN THE PARTIES: THE PRACTICE OF THE SUPREME COURT

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The article examines the legal nature of professional legal aid costs primarily in the context of determining the criteria of proportionality of the amount of legal costs incurred by the party to the proceedings and the amount of costs claimed by this party which are subject to compensation. The law enforcement of the Supreme Court and the European Court of Human Rights is analyzed with regard to determining the criteria of proportionality in the amount of such costs and making the decision to reduce this amount in case of their non-compliance. The article argues the position according to which the consequence of finding the inconsistency of the compensation costs for professional legal aid claimed by the party with the above-mentioned criteria, i. e. establishing the disproportionality of such costs, is taking the decision to reduce their amount to be compensated.

To achieve this aim the methods characteristic of legal science were applied. The study was carried out employing the dialectical method of inquiry of legal reality which provided an opportunity to analyze the legal nature of the institution of legal aid costs, in particular, in the context of determining the criteria for the proportionality of their amount. The use of the systemic-structural method made it possible to specify the general structure of the work, which contributed to meeting the tasks of this study properly. The dialectical method of inquiry of legal reality enabled the analysis of the law enforcement acts of the courts concerning the procedure for determining the amount of legal assistance costs, primarily in the aspect of establishing the appropriate criteria for their proper compensation.

Based on this, the authors have come to the conclusion that the introduction of the principle of proportionality, which envisages the use of a number of evaluative concepts by the legislator,

indicates the significant importance of judicial practice aimed at forming effective criteria for determining the amount of costs to be paid for an advocate's assistance when distributing them between the parties.

Key words: advocate; legal aid; professional legal aid costs; court costs; proportionality principle; criteria for reasonable justification of costs.

В статті досліджується правова природа витрат на професійну правничу допомогу насамперед в контексті визначення критеріїв співмірності розміру понесених учасником процесу судових витрат та розміру заявлених ним витрат, які підлягають компенсації. Аналізується правозастосовна Верховного Суду та Європейського Суду з прав людини щодо визначення критеріїв співмірності розміру таких витрат та прийняття рішення про зменшення такого розміру в разі їх недотримання. Аргументується позиція, згідно з якою наслідком встановлення невідповідності заявленого учасником справи розміру компенсації витрат на професійну правничу допомогу вищевказаним критеріям, тобто встановлення неспівмірності такого розміру, є прийняття рішення про зменшення їх розміру, що підлягає компенсації.

Для досягнення поставленої мети були застосовані характерні для правової науки методи. Дослідження проводилося із застосуванням діалектичного методу пізнання правової дійсності, що надав можливість проаналізувати правову природу інституту витрат на правову допомогу, зокрема, в контексті визначення критеріїв співмірності їх розміру. Використання системно-структурного методу надало можливість визначити загальну структуру роботи, що сприяло належному розкриттю завдань даного дослідження. Діалектичний метод пізнання правової дійсності надав можливість проаналізувати правозастосовні акти судів, які стосуються порядку визначення розміру витрат на правничу допомогу насамперед в аспекті встановлення відповідних критеріїв задля належної їх компенсації.

На підставі цього, автори доходять до висновків, що запровадження принципу співмірності, який передбачає застосування законодавцем ряду оціночних понять, вказує на визначальне значення судової практики, що спрямована на формування дієвих критеріїв для визначення розміру витрат на оплату допомоги адвоката при їх розподілі між сторонами.

Ключові слова: адвокат; правнича допомога; витрати на професійну правничу допомогу; розподіл судових витрат; принцип співмірності; критерії розумності та обґрунтованості витрат.

Problem statement. The essence of costs paid for professional legal aid [1; 2; 3], including the maximum amount [4] and the criteria for limiting the amount of compensation for such costs [5; 6; 7] were the subject of our study. The topicality of the study lies, first of all, in the fact that the proper determination of the amount of legal aid costs, in particular regarding their full and fair compensation to the party in whose favor the respective court decision was made, is not only one of the basic principles of justice but also a guarantee. ensuring a person's constitutional right to professional legal assistance and, consequently, access to justice. The need for this study was raised by the change of the legislator's approach to determining the amount of compensation for legal aid costs as well as the extensive judicial practice, inter

alia, in the aspect of preventing individuals from abusing their right to compensation of such costs.

Analysis of scientific publications. The issue of determining the nature of the costs of professional legal aid, including the identification of criteria for the proportionality in their amount has been the subject of research conducted by a number of scholars. Some results of this research were approved in the works of Yu. Babenko, I. Holovan, N. Yu. Holubieva, O. Yu. Kokorieva, V. V. Manzyuk, K. R. Syvko, I. O. Sotnikov and others.

The purpose of this article is to reveal the legal nature of professional legal assistance costs, primarily in the context of determining the criteria for the proportionality in their amount. The main tasks that the authors formulate are: to analyze regulatory framework as well as the scholars' positions in the aspect of determining the amount of professional legal assistance costs; to clarify the law enforcement practice, first of all, of the Supreme Court and the European Court of Human Rights in view of determining the criteria for the proportionality in the amount of such costs and making a decision to reduce this amount in case of failing to them (these criteria).

Results and discussion. One of the most difficult and challenging issues of the institution of professional legal aid costs is the procedure for determining their amount, first of all, in terms of establishing the appropriate criteria for the adequate compensation of such costs as court costs incurred by the party involved in the case.

The Procedural Codes (the Civil Procedure Code of Ukraine, the Commercial Procedure Code of Ukraine and the Code of Administrative Procedure of Ukraine) enshrine almost identical provisions that regulate the procedure for determining the amount and compensation of professional legal aid costs. The analysis of these provisions enables us to conclude that the Ukrainian legislator, moving away from the use of the institution of «the maximum amounts» of compensation for legal aid costs, while providing certain means which aim to prevent the civil procedure participants from abusing their procedural rights including the compensation of overstated costs for such aid. Such means, according to them, are primarily the principle of proportionality of costs for a lawyer's services (Part 4 Article 137 of the Civil Procedure Code of Ukraine) and the mechanisms for monitoring its implementation (Part 3 Article 141 of the Civil Procedure Code of Ukraine).

Regarding the principle of proportionality of costs for a lawyer's services, it should first be noted that proportionality is a category that depends on several factors (Part 4 Article 137 of the Civil Procedure Code of Ukraine) whose detailed analysis indicates the application of a number of valuation concepts («the complexity of the case», «the significance of the case for the party», etcetera) by a legislator. On the one hand, this indicates the need for the court to interpret them in accordance with its discretionary power, and on the other hand – the determinative importance of the case law for identifying the cost for a lawyer's services.

Without going into a detailed analysis of the essence of the criteria for limiting the cost of professional legal assistance, which certainly requires separate research, it should be emphasized that some scholars state that the subjective concept of «reasonable limits» gives courts the discretion to reduce the cost actually incurred by the party to a dispute, as neither the essence of such a concept nor its legal criteria are currently legally enshrined, and therefore are not a legal guarantee that enables citizens to protect their rights and interests in terms of

appealing to the representatives with the request for a full compensation of the costs, incurred by the party that won the case, in the future [8, p. 61]. With respect to this the parties, involved in the case, may also apply for the legal costs, the amount of which clearly does not comply with the principles of reasonableness. Therefore, an important role is played by the law enforcement practice of the Supreme Court, which in essence determines the criteria of proportionality of the amount of the legal costs incurred by the involved participant and the amount of costs, claimed by this participant, which are subject to compensation.

Despite the considerable variety of Supreme Court's judgments that dealt with the institution of legal costs, most of such decisions were related to the abuse by the involved parties of their right to compensation for legal aid. The consequence of identifying the inconsistency of the amount of compensation for professional legal aid costs, asserted by the party, with the above criteria, i. e. revealing the disproportionality of such amount, is making the decision to reduce their amount to be compensated. Examples of such decisions, in particular, are:

- the decision of the Supreme Court composed of the panel of judges of the Civil Court of Cassation dated 26 September, 2018 [9]. The Supreme Court, allocating the costs for professional legal assistance incurred by the bank, concluded that the materials available in the case file such as the legal services contract, the memorial order for the payment of 120 thousand UAH, the description of services provided and additional costs, and the act of acceptance of work performed do not offer incontestable grounds for compensation of professional legal assistance costs by the court in the specified amount on the other hand, because this amount must be proven, documented and it must meet the criterion of reasonable expenses. Thus, the court established that the indicated services were provided to the bank by three advocates who were engaged in studying this case, met with the client to discuss aspects of conducting the case in the court of cassation, made adjustments to the written requests and explanations after each other, that is, they actually performed the same work, and therefore the amount of professional legal aid costs indicated by the bank is overstated, unjustified duly and put the excessive burden on the defendant, and this contradicts the principle of allocating the court costs. Taking into account the complexity of the case and the performed work, the principles of proportionality and reasonableness of litigation costs, the Supreme Court came to conclusion that it was necessary to reduce their amount and recover from the defendant only 5 thousand UAH as the cost of professional legal assistance in favor of the claimant;
- the additional decision of the Supreme Court composed of the panel of judges of the Economic Court of Cassation dated 22 June, 2018 [10], in which the court concluded that the amount of legal aid costs determined by the party involved in the case is unreasonable, given primarily the overestimation of the time required for processing the procedural documents and preparing a response, as well as the time to represent his interests at the court hearing;
- the additional decision of the Supreme Court composed of the panel of judges of the Economic Court of Cassation dated

11 June, 2018 [11], where the basis for the critical perception of the defendant's calculation of the cost and volume of the legal aid provided was the overestimation of the time required for providing such aid considering that the representative participated in the proceedings starting from the court of the first instance and could not be unaware of the position of the claimants, the legislation regulating the dispute proceedings, the documents and arguments with whose help the claimants substantiated their claims, etcetera;

– the decision of the Supreme Court composed of the panel of judges of the Economic Court of Cassation dated 24 January, 2019 [12] in which based on the inconsistency of the asserted costs with the complexity of the case, the volume of services provided by the advocate in the court of cassation, the time he spent on providing such services (the preparation of this case for reviewing in the court of cassation did not require a significant amount of legal and technical work because the advocate was aware of the claimant's position; the regulatory frameworks of the disputed legal relationship did not change), and also on the fail to meet the criterion of actual costs and cost reasonableness, the court reduced the amount of professional legal aid costs from the claimed 65,000 UAH to 32.500 UAH;

– the additional decision of the Supreme Court composed of the panel of judges of the Economic Court of Cassation dated 6 March, 2019 [13], where in fact the reason for reducing the costs of professional legal assistance was that the price of services provided by the advocate was not agreed between the parties by means of introducing the respective clauses in the contract, and hence, the court concluded to partially satisfy the claim about such costs in the amount of 14,000 UAH (from the claimed 28,000 UAH) taking into account the criterion of reasonableness of such costs amount in view of the specific circumstances of the case and the volume of legal assistance, provided to the party as a client, in representing its interests in the court during the proceedings;

– the decision of the Kyiv Administrative Court of Appeal dated 14 May, 2018 [14], in which the court proceeded from the need to determine the amount of costs for professional legal assistance based on the actual duration of providing such assistance, in particular, the participation of the advocate in the hearing (for four minutes, not one hour of participation).

Cases of reducing the amount of compensation for legal aid costs are typical of the law-enforcement practice of the European Court of Human Rights. For instance, in the decision related to the case of «Gusinsky v. Russia» [15] the Court, in view of the fact that the party's claimed amount of compensation for legal aid provided by the advocate (over 446 thousand Euros) cannot be considered either mandatory (among the claimed costs there were some recognized as unrelated to the case) or reasonable, awarded compensation in the amount of only 88,000 Euros with regard to the court costs including the involvement of the advocate who represents the claimant (see paragraphs 85-88). Due to similar reasons (not meeting the criteria of reasonableness and justification) compensation for legal aid costs was reduced in the case of «Cosmopoulos v.

Greece» [16] (initially the claimed amount was more than 19,000 Euros and only 6, 000 Euros was compensated for legal aid provided) , the case of «Balogh v. Hungary» [17] (3000 Euros was compensated instead of the claimed 6.000 Euros) and others [18; 19; 20]. The case law of the European Court of Human Rights is also characterized by cases of reducing the asserted legal aid costs due to indicating, in the Court's view, an excessive number of hours to calculate compensation for such costs («Krombach v. France» [21], «Savran v. Denmark» [22]], «Aliyev v. Azerbaijan» [23], «Tsalikidis and Others v. Greece» [24], etcetera.

When considering the issue of reducing professional legal aid costs, in particular through the prism of law enforcement practice of courts, it should be borne in mind that the issue of reducing such costs is possible only if a party requests to reduce them due to disproportionality (the decision of the Supreme Court composed of a panel of judges of the Economic Court of Cassation dated 18 December, 2018) [25]. This position of the Court corresponds to the provision of Part 5 Article 137 of the Code of Civil Procedure of Ukraine, according to which in case of non-compliance with the requirements of disproportionate costs of professional legal aid, the court may, at the request of the other party, reduce the amount of such costs to be distributed between the parties.

Based on this provision the position, specified in the decision of the Supreme Court composed of the panel of judges of the Administrative Court of Cassation dated 9 April, 2019 [26], is quite appropriate. According to it, the current procedural law does not oblige the party requesting compensation for legal aid costs, to prove the validity of their market value, because it is the party requesting a reduction in the cost of legal aid provided by an advocate, that is obliged to prove the disproportionality of the costs with the provision of the relevant evidence. Despite this, as noted by Yu. Babenko, in practice the courts often make their own assessment of the amount of the fee (although the text of the decisions does not contain any information about the fact that the other party has requested a reduction in these costs) and may refuse to meet the claimed amount just when the amount of the fee is set as a percentage of the cost of the claim [27]. He further states that courts may reduce or even refuse to compensate legal aid costs on the basis of a number of formal grounds for such a refusal (for example, on the grounds that the agreement on the provision of legal aid does not specify a case, in which an advocate is assigned to represent the interests [28]).

A challenging issue in determining the amount of compensation for professional legal assistance costs is the determination of the cost, in particular, an advocate charges per hour of work performed in the aspect of providing one or another type of legal assistance. From our perspective, the determination of the indicative (recommended) rates of an advocate's fee should be positive. These rates are approved by the councils of advocates of the region (for example, the decision of the Council of Advocates of Chernihiv region No. 57 of 16 February, 2018 [29] and the decision of the expanded meeting of the Council of Advocates of Kharkiv region No. 17 of 21 March, 2018, approved recommendations on the application of the recommended rates of advocates' fees [30]). The reasonableness of the amount of legal assistance costs, as emphasized by O. Yu. Kokorieva, would be easy to justify if a system of minimum rates were developed, taking into account the specifics of the regions and it would be based on three principles: reality, relevance, efficiency [31, p. 128].

We agree with the position, specified in the aforementioned additional decision of the Supreme Court composed of the panel of judges of the Economic Court of Cassation dated 6 March, 2019 [13], according to which the above decisions are, by their legal nature, recommendatory, so can only be taken into account by the court, but they are not mandatory in terms of applying because the court determines the approximate cost of an advocate's services, taking into consideration the specific circumstances of the case, the advocate's qualifications and experience, the client's financial condition and other significant circumstances. N. Yu. Holubeva's position makes sense as she stresses that in a particular case the price can vary greatly in view of many factors characterizing this case, that is why the average cost of legal services will always be only approximate [32]. With regard to this, in our opinion, the determination of such recommended rates of advocates' fees, including the calculation of time, can serve as a guide for both the client in choosing an advocate who will provide him with legal assistance, and the court in determining the amount of compensation for the provided professional legal assistance.

When studying the case law of the European Court of Human Rights, one should pay attention to its decision in the case of «Krombakh v. France» (paragraph 104) [21], in which the Court not only points out the reasonableness, obligingness and reality of the costs incurred by the party, but also notes the possibility of recovering those costs, in particular for a representative's services, which the party has already incurred, but has not paid yet, and is obliged to do it in the future.

Conclusion. In terms of distributing court costs, first of all, the costs of professional legal aid, the Ukrainian legislator has moved away from employing the institution of «the maximum amounts» of their compensation, envisaging with regard to this the means aimed at preventing abuse of civil procedural rights, including compensation of the specified costs, by the participants of the civil proceedings. Such means, in particular, are the principle of proportionality of the costs to be paid for an advocate's aid and mechanisms for monitoring its implementation.

The introduction of the principle of proportionality involves utilizing a number of evaluative concepts («the complexity of the case», «the significance of the case for the party», etc.) by the legislator. On the one hand, this points to the need for their interpretation by the court in accordance with its discretionary power, and on the other hand, – the crucial importance of case law to determining the amount of costs for paying an advocate's aid services.

The analysis of law enforcement practice, first of all, of the Supreme Court indicates that the consequence of identifying the inconsistency of the amount of compensation for professional legal aid, claimed by the party, with the principle of proportionality of such amount is deciding to reduce their amount which is subject to compensation. In making the decision on the compensation of professional legal aid costs, the Court, first of all, proceeds on the assumption that this amount must be justified, documented and it must meet the criterion of reasonableness. It is necessary to take into account time for preparing procedural documents (including the participation of the representative in the lower courts) as well as the direct participation in the court hearing. The amount must also be based on the actual duration of providing legal aid, correspond to the complexity of the case and the volume of aid provided by an advocate in the court and be based on the concrete circumstances of the case.

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