GERMANY

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FROM « UNEMPLOYMENT BENEFIT II » TO « CITIZEN'S INCOME » IN GERMANY

Developments in society determine its (social) law[1]. The Federal German Government, consisting of SPD, Bündnis90/Die Grünen and FDP, has recently been referring to « new times », indicating a move away from the old system of minimum subsistence benefits. A shortage of specialised workers and market instability caused by multiple crises now dominates the picture, contrasting with the problem of a high unemployment rate that constituted the focus at the beginning of the century[2]. For the SPD, in particular, the reform represents the litmus test of whether it can overcome the system that it initially supported and which was generally described as conflicting with a social democratic agenda. With this in mind, a debate has been opened as to whether the new *Bürgergeld-Gesetz* of 16 December 2022 represents a change of paradigm or only « old wine in new skins »[3]. While some see the *Bürgergeld-Gesetz* as an expression of a stealthy change away from the concept of strict market-activation (« demanding and encouraging ») and the idea of subsidiarity, others consider the legislative reform to be symbolic rather than effective[4].

This article traces the proposed change in minimum income legislation and outlines the main instruments accompanying the transition from « unemployment benefit » (*Arbeitslosengeld II*) to « citizen's income » (*Bürgergeld*). The German minimum benefit for persons capable of working is available to all persons who can work at least 15 hours a week in the general labour market and to those living with a person capable of working in a so-called « community of need » (*Bedarfsgemeinschaft*). Persons with social insurance rights must use them as a matter of priority. Entitlement arises if the needs exceed the income and assets to be taken into account. In line with this regulatory approach, this article begins by looking at changes in the determination of need **(I)**, then moves to the consideration of

1 H. F. Zacher, « Annäherungen an eine Phänomenologie des Sozialrechts », *in* W. Durner, F.-J. Peine and F. Shirvani (ed.), *Freiheit und Sicherheit in Deutschland und Europa*, 2013, p. 43.

2 Bundesregierung, Entwurf eines Zwölften Gesetzes zur Änderung des Zweiten Buches Sozialgesetzbuch, Bt-Drs. 20/3873, p. 46.

3 F. Welti, « Grundsicherung für Arbeitsuchende - Bürgergeld ein Fortschritt? », *ZRP*, 2022, p. 174; A. Groth and K. Güssow, « Bürgergeld Änderungen des SGB II im Überblick - das neue Bürgergeld », *NJW*, 2023, p. 184; F. Beckmann, « Wie viel Hartz IV steckt im Bürgergeld? Eine institutionentheoretische Analyse », *Sozialer Fortschritt*, no. 72, 2023, p. 55.

4 I. Vorholz, « Bürgergeld-Gesetz darf "Fördern und Fordern" nicht in Frage stellen », *Sozialer Fortschritt*, no. 72, 2023, p. 75; A. Groth and K. Güssow, « Bürgergeld Änderungen des SGB II im Überblick - das neue Bürgergeld », *op. cit.*; T. Spitzlei, « Das neue Bürgergeld - Paradigmenwechsel im SGB II? », *NZS*, 2023, p. 121; A. Lenze, « Epochenwende in der Grundsicherung durch Einführung von Bürgergeld? », *SGb*, 2023, p. 94.

income **(II)**, and from there to labour market integration **(III)** and benefit reductions **(IV)**, and finally addresses sanctions linked to the cooperation plan **(V)**.

I - ASSESSING PERSON'S NEEDS UNDER THE NEW LAW

Art. 1 (1) and Art. 20 (3) Basic Law provide a right to benefits that ensure the minimum subsistence level required for a life in human dignity. In a series of fulminant decisions, the Federal Constitutional Court has emphasized that the legislature must guarantee the security of the physical and socio-cultural subsistence minimum by means of an enforceable claim[5]. In addition to the evident inadequacy of the needs-assessment, the court examines whether the calculation of the basic needs has been carried out in a comprehensible manner. All expenses necessary for securing the minimum subsistence level must be determined in a transparent and appropriate procedure in accordance with actually accruing needs[6].

The legislature responded to the requirements of the Federal Constitutional Court by passing a Standard Needs Assessment Act (*Regelbedarfsermittlungsgesetz*, « RBEG ») and ultimately opted for a restricted statistical model. This model is based on the Federal Statistical Office's sample survey of income and consumption (*Einkommens- und Verbrauchersticprobe*, « EVS »), which is conducted every five years. Due to price developments that can take place in the meantime, an update mechanism is required under constitutional law[7]. Before the introduction of the *Bürgergeld-Gesetz*, the update was carried out with the help of a mixed index. This index reflects the rate of change in the price of goods relevant to basic needs and net wages in a closed two-year period. The rate of change forms the multiplier for the raising of the level of need that has been determined on the basis of the survey statistic. The suitability of the standard needs update using the mixed index had already been critically assessed before the crises that have cascaded since 2020.

Beyond short-term payments, the legislator has now reacted to the price developments occuring since 2020 with the *Bürgergeld-Gesetz*, modifying the update system itself. The adjustment via the mixed index now functions only as a « basic update » and is complemented through a « supplementary update ». This compares the rate of change between April 1 and June 30 of the previous year with the corresponding period of the year before that. However, the supplementary update is not taken into account in a further update in the following year. A negative development of the level of need that has been assessed is nevertheless ruled out.

The « supplementary update » has a positive effect on the needs-assessment in several respects. By multiplying by the rate of the « supplementary update » price increases are taken into account twice. Net wage development is thus pushed back as a factor, resulting in a better reflection of inflation. Furthermore, by including only the second quarter of each year instead of a closed annual period, it should be possible to reflect price jumps more accurately. Nevertheless, observers consider the adjustment to be inadequate. In particular, they criticize the fact that the legislator has stuck to an annual adjustment and

5 BVerfGE 125, 175, 222; BVerfGE 132, 134, Rn. 62 ff, 65; BVerfGE 137, 34, Rn. 74 f; BVerfGE 142, 353, Rn. 36 f; BVerfGE 152, 68, Rn. 118 ff; BVerfG, 19 October 2022 - 1 BvL 3/21 - juris, Rn. 53.

6 BVerfGE 125, 175, 225 f; BVerfGE 132, 134, Rn. 78 f; BVerfGE 137, 34, Rn. 80 ff; BVerfGE 142, 353, Rn. 38; BVerfG, 19 October 2022 - 1 BvL 3/21 - juris, Rn. 57 ff.

7 BVerfGE 125, 175, 242 ff; BVerfGE 137, 34, Rn. 136 ff.

that the price development of the current year is not taken into account. Although the new update mechanism is a reaction to inflation, there is still no legal mechanism that can cushion sudden price jumps at the time when the needs arise. Depending on how the social situation develops, the determination of standard needs may thus be overshadowed by an improper procedure and thus run the risk of being ruled unconstitutional.

II - A MORE FLEXIBLE APPROACH TO ACCOMMODATION COSTS

In addition to the change in the legal basis for determining standard needs, the Citizen's Income Act also provides for an adjusted determination of accommodation costs in § 22 SGB II (Social Code Book II).

Accommodation costs are taken into account in the minimum income scheme according to the individual expenses incurred. The approval of costs is limited by an appropriateness test. The test is carried out in a complicated three-stage process in which the previously determined expenses are checked for their abstract and concrete adequacy and, in a final step, the possibility of reducing costs is evaluated.

The Citizen's Income Act now provides for a waiting period of one year by omitting the adequacy test. The law reform has been proposed as a market-activation policy[8]. The fear of losing one's home, however, would draw the benefit recipient's attention, reducing their capacity for job hunting. In addition, the aim is to create legal certainty and to recognise the basic needs for housing[9]. The introduction of the waiting period has met with criticism in terms of legal policy. The subsistence system should not be allowed to finance luxurious apartments and properties; furthermore, it is argued to lead to unequal treatment[10].

However it is questionable whether the legislative description of the problem is correct. The appropriateness test is friendly to Bürgergeld-recipients, and even unreasonably high expenses can be covered by the state in individual cases to avoid hardship. A move-out is not required, even after negative outcomes in all three review stages, if the cost is unreasonable. What merely follows, initially, is the recognition of a lower need. In addition to a clear reduction of bureaucratic hurdles, the provision thus has the primary function of introducing elements of compensation into the minimum income system and reducing social burdens in favour of the middle class.

III - TAKING INTO ACCOUNT THE BENEFICIARY'S INCOME AND ASSETS

The regulations concerning the waiting period were also applied to the consideration of assets, regulated in § 12 SGB II. Assets up to €40,000 per beneficiary and €15,000 for each additional person living in the « community of need » do not have to be used by the beneficiary to cover expenses for one year. A presumption is made that the claimant's assets do not exceed the limit. Only after the end of the waiting period does an asset exemption limit of €15,000 apply, independent of age.

8 Bundesregierung, Entwurf eines Zwölften Gesetzes zur Änderung des Zweiten Buches Sozialgesetzbuch, Bt-Drs. 20/3873, p. 3.

9 *Ibid*., p. 89.

10 I. Vorholz, « Bürgergeld-Gesetz darf "Fördern und Fordern" nicht in Frage stellen », *op. cit*.

The regulation eliminates the need for a time-consuming asset check in the first year of benefits-receipt. As with the means test, the waiting period has been criticised for undermining the principle of subsidiarity[11].

In addition to the waiting period, further relaxations have been introduced in determining the assets to be taken into account. Of particular relevance here is the exclusion of assets acquired for the purpose of old-age provision. Furthermore, the provisions on the retention of owner-occupied apartments and land have also been made more specific.

IV - RIGHTS AND DUTIES WITH REGARD TO INTEGRATION INTO THE LABOUR MARKET

The « cooperation plan » (*Kooperationsplan*) is intended to replace the «job integration agreement » (*Eingliederungsvereinbarung*), which was regulated in § 15 SGB II[12].

The integration agreement served to specify the rights and obligations of the administration and the benefit recipients[13]. Its subject matter was the personal efforts to be made by the beneficiary and the employment promotion measures to be provided. In the process of labour market integration, the « job integration agreement » thus had a significant coordination function[14]. It specifies for the beneficiary which actions he or she must take to overcome his or her need for assistance. These include: looking at job advertisements, writing applications, making inquiries with employers and agents, and visiting job fairs. In return, the administration had to bear the costs of job applications, make placement offers, or propose and specify certain legally stipulated employment promotion measures in accordance with §§ 16 ff SGB II.

The specific requirements for the conclusion and content of the integration agreement and its legal nature have long been controversial. The jurisprudential literature has proposed all conceivable variants, from purely administrative action, to a *sui generis* form, to a contract under public law[15]. The Federal Social Court opted for a contract solution[16]. The adoption of the contractual form necessitated certain requirements to be met to ensure the legal effectiveness of the agreements. In accordance with the adoption of a consensual

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11 *Ibid*.; D. Meyer, « Bürgergeld-Gesetz in Deutschland », *ZAS*, 2023, p. 59.

12 Bundesregierung, Entwurf eines Zwölften Gesetzes zur Änderung des Zweiten Buches Sozialgesetzbuch, Bt-Drs. 20/3873, p. 82.

13 Fraktionen SPD und Bündnis 90/ Die Grünen, Entwurf eines Vierten Gesetzes für moderne Dienstleistungen am Arbeitsmarkt, BT Drs 15/1516, p. 54. See also I. Fröhlich, *Vertragsstrukturen in der Arbeitsverwaltung*, *Nomos*, 2007, p. 105.

14 K. von Koppenfels-Spies, « Kooperation unter Zwang? - Eingliederungsvereinbarungen des SGB II im Lichte des Konzepts des "aktivierenden Sozialstaats" », *NZS*, 2011, p. 1.

15 A. Busse, « Die Eingliederungsvereinbarung als öffentlich-rechtlicher Vertrag oder kooperatives und informales Verwaltungshandeln », RsDE, no. 67, 2008, p. 56; W. Spellbrink, « Eingliederungsvereinbarung nach SGB II und Leistungsabsprache nach dem SGB XII aus der Sicht der Sozialgerichtsbarkeit », *Sozialrecht aktuell*, 2006 , p. 52; I. Fröhlich, *Vertragsstrukturen in der Arbeitsverwaltung, op. cit., p.* 107; K.-H. Kretschmer, *Das Recht der Eingliederungsvereinbarung des SGB II*, Duncker & Humblot, 2012, p. 182; M. Banafsche, « Die Eingliederungsvereinbarung zwischen Subordination und Koordination - Ausdruck eines alten verwaltungsrechtlichen Diskurses », *Soziales Recht*, 2013, p. 121.

16 BSGE 112, 241, Rn. 21 f; BSGE 115, 210, Rn. 33 ff; BSGE 121, 261, Rn. 16.

legal institution, the administration had to enter into genuine negotiations and ensure an appropriate relationship between the obligations of the basic income recipient and the obligations of the administration[17]. It was not possible to agree on obligations that did not meet the goal of integration into the labour market or which were unreasonable. In addition to the written form required by § 56 SGB X (Social Code Book X), there was also a formal requirement to give the recipient detailed information regarding the applicable law if a breach of their obligations were to result in a reduction of benefits[18].

In practice, the legal institution of the «job integration agreement» has led to considerable implementation problems. The legal requirements would overburden the parties and, in practice, there have been restrictions on possible agreement procedures to ensure legal certainty[19]. Here, the legislator is referring especially to the litigation that challenges the fulfilment of the substantive and formal requirements of the agreement. The principles developed by the Federal Social Court for the legality or legal effectiveness of the agreement, such as « a comprehensive presentation, the balanced relationship between performance and consideration, documentation and completeness », is said to stand in the way of a « trusting cooperation »[20]. The « cooperation plan » is now to be regarded as an informal agreement. A legally binding request to cooperate in employment promotion measures will only be made at a second procedural stage.

In conceptual terms the « cooperation agreement » is similar to the « job integration agreement » in several key respects. The concept of determining integration measures is retained. The legal form and thus both the binding nature and the existing requirements are to be removed. The legally binding nature of the agreement is to be replaced by the possibility of an internal review. From now on, disagreements about the definition of measures are to be resolved through an arbitration procedure overseen by an independent body. This can be made up of employees of the competent authority who are not bound to follow its directions, or it can involve external persons. The mediator will be appointed by the administration itself. One advantage of this type of procedure is that it can be used immediately in the negotiation process and does not merely function as a retrospective review. If no agreement is reached in the arbitration procedure, then the benefits entitlement and obligations can be determined by a unilateral act, as before.

However, it is doubtful whether the outlined change in legal form will be successfully implemented. If the legally binding nature can be abrogated at all, then new discussions regarding justiciability and the applicable requirements will generate more confusion than clarity[21]. It is unlikely that the courts and legal scholarship will entirely accept the lack of judicial review. After all, the « cooperation plan » still forms the basis for sanctions - even if,

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17 BSGE 121, 161, Rn. 18 f; BSGE 123, 69, Rn. 22 ff; LSG Niedersachsen-Bremen, 12.01.2012 – L 7 AS 242/10 B - juris, Rn. 11.

18 BSGE 102, 201, Rn. 35; LSG Baden-Württemberg, 5 July 2017 - L 9 AS 2050/17 ER-B - juris, Rn. 31.

19 K.-H. Kretschmer, *Das Recht der Eingliederungsvereinbarung des SGB II*, *op. cit.*; Bundesregierung, Entwurf eines Zwölften Gesetzes zur Änderung des Zweiten Buches Sozialgesetzbuch, Bt-Drs. 20/3873, p. 83.

20 Bundesregierung, Entwurf eines Zwölften Gesetzes zur Änderung des Zweiten Buches Sozialgesetzbuch, Bt-Drs. 20/3873, p. 83.

21 See U. Kern, « Kooperationsplan im Bürgergeldgesetz - eine unverbindliche Zielvereinbarung? », *NZS*, 2023, p. 81; J. Hökendorf and M. Jäger, « Der neue Kooperationsplan im Bürgergeld-Gesetz », *info also,* 2023, p. 13; M. Uyanik, « Schlichten ist besser als richten », *NZS*, 2023, p. 525.

between the plan and the reduction in benefits, there is a further legally binding request to cooperate involving information disclosure of the legal consequences[22]. However, since the request for cooperation is substantively linked to the obligations previously stipulated in the plan, a waiver of judicial review of that content sits uneasily with the constitutional right to effective legal protection under Art. 19 (4) Basic Law. The discussions concerning the new or old doctrinal status of § 15 SGB II have thereby begun. Whether this can be expected to improve the situation of benefit recipients, fulfilling the promise of a cultural change in the administration-practice, remains to be seen.

V - PENALTIES RELATED TO THE COOPERATION PLAN

In November 2021, the Federal Constitutional Court declared benefit cuts in the event of the recipient's breach of duty to cooperate in the market-integration-process to be disproportional and thus unconstitutional.[23] The legislature responded to the ruling with the *Bürgergeld-Gesetz* in §§ 31 ff SGB II and adopted the required adjustments.

The graduation of reductions from 30 to 100 percent was abandoned in favour of a graduation from 10 to 30 percent, and of a reduction period of between one and three months. In addition, a goodwill test now supplements the inquiry as to whether there was good cause for an identified breach of duty. Reductions in benefits can be reversed if beneficiaries subsequently fulfil their obligations or declare their willingness to do so in the future.

A hardship clause has also been introduced. This allows the relevant authority to refrain from making reductions if the consequences are particularly unbearable. The regulation is mainly regarded as successful and in accordance with the requirements of the Federal Constitutional Court[24].

Conclusion

The legislative reform of the *Bürgergeld-Gesetz* makes structural changes. The situation of some benefit recipients has improved and access to minimum subsistence benefits has been simplified.

However, the extent to which a visit to the authorities - hitherto perceived as a burdensome experience[25] - will now take a cooperative form remains to be demonstrated primarily through the administrative practice, more so than through the legal changes.

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22 U. Kern, « Kooperationsplan im Bürgergeldgesetz - eine unverbindliche Zielvereinbarung? », *op. cit*.

23 BVerfGE 152, 68, Rn. 153 ff. See also BVerfG, 12 May 2021 - 1 BvR 2682/17 - juris, Rn. 11 ff.

24 G. Beaucamp, « Hätte man die Sanktionen im SGB II abschaffen sollen? », *NZS*, 2023, p. 161; R. Hoenig and A. Lahne, « Eine Umgestaltung im SGB II: Von "Sanktionen" zu "Leistungsminderungen" », *ZFSH/SGB*, 2023, p. 195; U. Berlit, « Änderungen der §§ 31 ff SGB II durch das Bürgergeld-Gesetz », *info also*, 2023, p. 22.

25 See V. Neumann, « Menschenwürde und Existenzminimum », *NVwZ*, 1995, p. 426.