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## The German Legal Services Act and the Smartlaw Case: A Precedent for Legal Tech Services in Germany

**Abstract.** The legal services market in Germany is tightly regulated with the Legal Services Act (RDG) serving as the central framework for out-of-court legal services. The RDG outlines which activities are classified as legal services and designates the professional groups authorized to provide them. However, as digitalization and automation evolve in a significant way, the applicability of traditional laws to innovative legal services is increasingly questioned. Emerging legal tech platforms, software, and web-based applications introduce new dimensions of legal assistance, offering user-friendly, cost-effective, and accessible options, particularly for non-experts. As the RDG is not designed to encompass all conceivable aspects of legal services, but rather its primary purpose is to address and regulate existing gaps within the legal service landscape, its requirements become crucial for regulating all types of legal activities beyond the established professions such as lawyers, tax consultants, or auditors.

This paper examines the challenges posed by digital legal services in the context of the RDG, focusing on key decisions by the German Federal Court of Justice (BGH) that have addressed the legality of offering a contract generator under the RDG.

This article aims to analyse the Smartlaw case, emphasising the distinctive aspects of each instance's ruling and clarifying the criteria for the RDG's application. It also explores the boundaries of permissible legal services in Germany in the face of rapid technological advancement.

**Keywords:** legal tech – Legal Services Act – smartlaw

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## Introduction

Compared to some other EU countries,<sup>1</sup> the legal services market in Germany is very strictly regulated. The Legal Services Act (Rechtsdienstleistungsgesetz, RDG) forms the central basis for the provision of legal services out of court and regulates which activities are to be classified as such and which professional groups may legally offer and render them. However, in a world in which digitalization and automation are advancing rapidly, the question arises as to whether these new innovative services can also be subsumed under the existing traditional laws.

The developments and challenges of the digital era are posing new questions regarding the application of the RDG. New facets and possibilities for legal assistance are constantly being brought in through software, apps and web-based applications.<sup>2</sup> The appeal of legal tech is growing thanks to user-friendly platforms, simplified processes for legal laypersons and cost-effective options.

Many of these business models were not even conceivable when the basic principles of the law governing legal services were developed. For this reason, German courts have had to deal with the question of whether certain legal tech applications are compatible with the RDG. Two recent decisions by the German Federal Court of Justice (BGH) have provided some clarity in this area: the Lexfox decision<sup>3</sup> and then the Smartlaw decision, in particular.<sup>4</sup>

While in the Lexfox decision the court was concerned with whether debt collection companies are permitted to offer digital legal services other than the usual traditional debt collection services,<sup>5</sup> the question

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<sup>1</sup> For Estonia, see P. Rott, K. Sein, *Obstacles to Legal Tech Services: Examples from Germany and Estonia*, "Journal of European Consumer and Market Law (EuCML)" 2021, vol. 10, no. 3, p. 101; for other countries, see M. Henssler, *Die Zukunft des Rechtsberatungsgesetzes*, "Anwaltsblatt (AnwBl.\*)" 2001, vol. 51, p. 531; BT-Drucks. 16/3655, pp. 28, 29.

<sup>2</sup> B. Quarch, J. Neumann, *Überblickaufsatz Legal Tech Market 2024*, "Zeitschrift für die digitale Rechtsanwendung (LTZ)" 2024, no. 2, p. 131; Z. Andreae, A. Ovalioglu, *Legal Tech in Rechtsabteilungen*, "Zeitschrift für die digitale Rechtsanwendung (LTZ)" 2024, no. 3, p. 242.

<sup>3</sup> Judgment of BGH of 27 XI 2019, VIII ZR 285/18, "Neue Juristische Wochenschrift (NJW)" 2020, no. 4, pp. 208–235.

<sup>4</sup> Judgment of BGH of 9 IX 2021, I ZR 113/20, "Neue Juristische Wochenschrift (NJW)" 2021, no. 42, pp. 3125–3129.

<sup>5</sup> In this case, the BGH dealt with the permissibility of a legal tech company offering a free rent calculator, which was used to determine the permissible local comparative rent according to the rent index after entering the relevant apartment data. If excessive rents

in the Smartlaw decision was specifically directed at the permissibility of providing a pre-programmed contract generator. The BGH examined whether offering the contract generator is a legal service within the meaning of the RDG, which then could not have been provided by the defendant, but only by the selected professional groups specified by law. The fact that all three court instances came to different conclusions on this matter makes the case noteworthy.

The aim of this article is to explain the Smartlaw case, to highlight the special features of all three instance decisions, and to shed light on which requirements are decisive for the application of the RDG and where the limits to legal services in Germany lie.

## 1. The German Legal Services Act (RDG)<sup>6</sup>

The Act on Out-of-Court Legal Services, also known as the “Legal Services Act,” came into force on July 1, 2008.<sup>7</sup> It replaced the older Legal Advice Act (Rechtsberatungsgesetz, RBerG), which dated back to 1935. The RDG regulates the authorization to provide extrajudicial legal services.<sup>8</sup> Its aim is to protect those seeking legal advice, as well as legal transactions and the legal system as a whole, from unqualified legal services.<sup>9</sup> The RDG is not intended to cover all possibilities of legal services, but only to regulate existing gaps. Traditional professions such as lawyers, tax advisors or auditors are regulated in the specific Acts in Germany and are, therefore, not subject to the scope of application of the RDG. Lawyers in Germany have a monopoly position<sup>10</sup> with regard to the provision of comprehensive legal advice and representation

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were determined, the provider of the rent calculator (debt collection provider) offered to reclaim the difference from the landlord for a fee. It was unclear whether this service could be offered by the debt collection service provider within the meaning of Section 10 RDG. The BGH ruled in favour of the admissibility of the rent calculator – judgment of BGH of 27 XI 2019, VIII ZR 285/18, “Neue Juristische Wochenschrift (NJW)” 2020, no. 4, pp. 208–235.

<sup>6</sup> An English translation is available at [http://www.gesetze-im-internet.de/englisch\\_rdg/index.html](http://www.gesetze-im-internet.de/englisch_rdg/index.html).

<sup>7</sup> BGBl. 2007 I No. 63, p. 2840.

<sup>8</sup> The Act also served to transpose Directive 2005/36/EC of the European Parliament and of the Council of 7 IX 2005 on the recognition of professional qualifications into national law.

<sup>9</sup> Section 1 (1) p. 2 RDG; BT-Drucks. 16/3655, p. 45.

<sup>10</sup> B. Brechmann, *Legal Tech und das Anwaltsmonopol – Die Zulässigkeit von Rechtsdienstleistungen im nationalen, europäischen und internationalen Kontext*, Tübingen 2021, p. 16;

according to Section 3 (1) BRAO<sup>11</sup>; other professions may provide legal services under limited forms at most.<sup>12</sup>

The scope of application of the RDG extends to all legal services whose subject matter is German law,<sup>13</sup> regardless of whether the legal service provider is temporarily or permanently located in Germany or abroad.<sup>14</sup> This means that the scope of application of the RDG applies as soon as a person seeks legal advice on German law or the legal service provider renders a legal service for its client in Germany.<sup>15</sup>

### 1.1. Definition of legal services

According to Section 2 (1) RDG, legal services are “any activity related to the concrete affairs of others as soon as it requires a legal assessment of the individual case.” It is not the overall activity of a legal service provider that is to be evaluated as a general legal service, but each individual activity that is to be performed within the scope of the legal service needs to be evaluated and assessed whether this qualifies as a legal service or not.<sup>16</sup> It is irrelevant whether the activity is only carried out internally between the client and contractor or externally towards third parties,<sup>17</sup> as well as in which form the activity is performed (written or verbal).<sup>18</sup>

Furthermore, the activity must be performed by humans instead of a fully technological service without any human execution.<sup>19</sup> If a service

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M. Fries, *Rechtsberatung durch Inkassodienstleister: Totenglöcklein für das Anwaltsmonopol?*, “Neue Juristische Wochenschrift (NJW)” 2020, no. 4, p. 194.

<sup>11</sup> Bundesrechtsanwaltsordnung (Federal Code for Lawyers).

<sup>12</sup> See below under 2.2.

<sup>13</sup> Section 1 (2) RDG; C. Deckenbrock, M. Henssler, *Rechtsdienstleistungsgesetz*, 5th ed., München 2021, Section 1 RDG, marg. no. 47b.

<sup>14</sup> M. Krenzler, F.R. Remmert, *Rechtsdienstleistungsgesetz*, 3rd ed., Baden-Baden 2023, Section 1 RDG, marg. no. 89.

<sup>15</sup> C. Deckenbrock, M. Henssler, op. cit., Section 1 RDG, marg. no. 47b; Section 15 RDG must be observed here.

<sup>16</sup> M. Krenzler, F.R. Remmert, op. cit., Section 2 RDG, marg. no. 13; BT-Drucks. 16/3655, p. 37; C. Deckenbrock, M. Henssler, op. cit., Section 2 RDG, marg. no. 16; Judgment of BGH of 9 IX 2021, I ZR 113/20, marg. no. 18, “Neue Juristische Wochenschrift (NJW)” 2021, no. 42, pp. 3125–3129.

<sup>17</sup> BT-Drucks. 16/3655, p. 46; C. Deckenbrock, M. Henssler, op. cit., Section 2 RDG, marg. no. 17; S. Overkamp, Y. Overkamp, in: *Bundesrechtsanwaltsordnung: BRAO*, eds. M. Henssler, H. Prütting, 6th ed., München 2024, Section 2 RDG, marg. no. 35.

<sup>18</sup> C. Deckenbrock, M. Henssler, op. cit., Section 2 RDG, marg. no. 18.

<sup>19</sup> Judgment of Higher Regional Court of Cologne of 19 VI 2020, 6 U 263/19, para. 104, “Neue Juristische Wochenschrift (NJW)” 2020, pp. 2734–2740.

is provided by software, the question arises as to whether a person is performing the service at least in part. In cases where the software is only used as an aid (such as a telephone hotline where the service provider uses software during the call) the activity is without doubt being performed through a human. It is in those cases irrelevant which technical means (software, hardware, telephone, web-based application etc.) were used to provide the assistance.<sup>20</sup>

It should be noted that certain activities are by law excluded as legal services, such as the preparation of academic expert opinions, the activities of conciliation and arbitration boards or as arbitrators, mediators and any comparable form of alternative dispute resolution as well as the presentation and discussion of legal issues and legal cases in the media aimed at the general public, Section 2 (3) RDG.

According to Section 2 (1) RDG, a legal service must always relate to a concrete matter. The decisive factor is that it is not a fictitious, but a real, factual legal question of a person seeking legal advice.<sup>21</sup> Activities that are aimed at the general public or an undefined group of people, as well as fictitious or abstract cases, are not covered by the law.<sup>22</sup>

Furthermore, the activity should be a third-party matter. Whether an activity relates to an own or third-party matter depends on whose economic interest the provision of the matter is in.<sup>23</sup> If the provider is acting primarily in the economic interest of a third party and is only indirectly pursuing its own economic interest, this is deemed to be a third-party matter.<sup>24</sup>

The last required element is a legal assessment of an individual case. This refers to any subsumption of facts under the legal provisions that goes beyond a mere schematic application of legal norms and terms.<sup>25</sup> This can be stipulated either in an objective way, according to a relevant

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<sup>20</sup> BT-Drucks. 16/3655, pp. 47, 48; M. Krenzler, F.R. Remmert, *op. cit.*, Section 2 RDG, marg. no. 16.

<sup>21</sup> Judgment of Regional Court of Cologne of 8 X 2019, 33 O 35/19, marg. no. 51; "Zeitschrift für IT-Recht und Recht der Digitalisierung (MMR)" 2020, pp. 56–59; BT-Drucks. 16/3655, p. 48; M. Krenzler, F.R. Remmert, *op. cit.*, Section 2 RDG, marg. no. 65; C. Deckenbrock, M. Henssler, *op. cit.*, Section 2 RDG, marg. no. 22.

<sup>22</sup> Judgment of Higher Regional Court of Cologne of 19 VI 2020, 6 U 263/19, marg. no. 95, "Neue Juristische Wochenschrift (NJW)" 2020, pp. 2734–2740; M. Krenzler, F.R. Remmert, *op. cit.*, Section 1 RDG, marg. no. 65; C. Deckenbrock, M. Henssler, *op. cit.*, Section 2 RDG, marg. no. 22.

<sup>23</sup> Judgment of BGH of 9 IX 2021, I ZR 113/20, marg. no. 30, "Neue Juristische Wochenschrift (NJW)" 2021, no. 42, pp. 3125–3129.

<sup>24</sup> *Ibidem.*

<sup>25</sup> Judgment of Regional Court of Cologne of 8 X 2019, 33 O 35/19, marg. no. 54, "Zeitschrift für IT-Recht und Recht der Digitalisierung (MMR)" 2020, pp. 56–59.

common public perception or in a subjective way based on a wish expressed by the person seeking legal advice.<sup>26</sup> There is no legal service if an act requires knowledge and application of legal norms, but the subsumption is so self-evident for legal laypersons that the application of the law does not require any special legal knowledge.<sup>27</sup> This is intended to prevent any finding, reading or reproduction as well as any mere application of legal norms from being considered a legal service according to the RDG.<sup>28</sup>

In case the service being provided is a legal service according to the RDG, it must then be examined whether the legal service provider was allowed to provide it, as not all professions have such permission in Germany.

## 1.2. Professional groups for legal services

Section 3 RDG states that the provision of extrajudicial legal services is only permitted if explicitly regulated by law. Different professional groups and their permission to offer legal services are regulated by profession-specific laws. The first professional group to be considered when providing legal services is lawyers.<sup>29</sup> Other professional groups such as in-house lawyers,<sup>30</sup> patent attorneys,<sup>31</sup> tax advisors,<sup>32</sup> auditors<sup>33</sup> and notaries<sup>34</sup> may also provide legal services, subject to certain restrictions.<sup>35</sup>

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<sup>26</sup> Both features were originally mentioned in the draft law of the RDG and were only deleted in order to streamline the text, judgment of LG Köln of 8 X 2019, 33 O 35/19, marg. no. 55, BT-Drucks. 16/3655, p. 51; judgment of Regional Court of Cologne of 19 VI 2020, 6 U 263/19, marg. no. 73, "Neue Juristische Wochenschrift (NJW)" 2020, pp. 2734–2740.

<sup>27</sup> Judgment of Higher Regional Court of Cologne of 19 VI 2020, 6 U 263/19, marg. no. 77, "Neue Juristische Wochenschrift (NJW)" 2020, pp. 2734–2740.

<sup>28</sup> Ibidem.

<sup>29</sup> Section 3 (1) BRAO; Section 59k BRAO.

<sup>30</sup> Section 46 (5) BRAO; employees of persons or companies other than those named in Section 46 (1) BRAO exercise their profession as a lawyer if they act as lawyers for their employer within the scope of their employment relationship, Section 46 (2) sentence 1 BRAO.

<sup>31</sup> Section 3 PatAnwO (Patent Attorney Regulations).

<sup>32</sup> Section 3 StBerG (Tax Consultancy Act).

<sup>33</sup> Section 2 (2) WPO (Act on a Professional Code of Conduct for Auditors).

<sup>34</sup> Section 1 BNotO (Federal Notarial Code).

<sup>35</sup> Detailed information on the professional groups can be found in M. Krenzler, F.R. Remmert, op. cit., Section 3 RDG.

The provision of legal services in connection with other services is also permitted under Section 5 RDG as long as the legal service is an ancillary service to this profession. Examples of this include insolvency advice provided by commercial lawyers, advice on issues of construction law or material defects provided by architects or advice on structuring options for asset or company succession provided by banks.<sup>36</sup>

Section 7 RDG allows professional and interest groups as well as cooperatives to provide legal services with certain restrictions. Public and publicly recognized bodies, which are enumerated in Section 8 RDG, are permitted to provide legal services.

Furthermore, anyone may provide legal services free of charge within a family, neighbourly or similarly close personal relationship, Section 6 (1) RDG. However, as long as the free legal service is provided outside this close circle of people, it must be rendered by a person who is permitted to provide the legal service in return for payment, or at least under the instruction of such a person, Section 6 (2) RDG.

### 1.3. Legal consequences in case of violation

If the legal service being provided violates the RDG (for example, in cases of a legal service provided by a non-authorized profession, according to the law), it is to be regarded as an inadmissible legal service. This leads to the legal consequence that the legal service contract is void pursuant to Section 134 BGB<sup>37</sup> and Sections 3 and 4 RDG due to illegality.<sup>38</sup> If financial losses arise in the context of unauthorized legal services due to an advisory error, the advisor is liable based on the invalidity of the contract and must compensate the person seeking legal advice for all losses suffered.<sup>39</sup>

Furthermore, the provider of unauthorized legal services acts unfairly within the meaning of the Act on Unfair Competition (Sections 3, 3a

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<sup>36</sup> See *ibidem*, Section 5 RDG.

<sup>37</sup> Bürgerliches Gesetzbuch (German Civil Code).

<sup>38</sup> BT-Drucks. 16/3655, p. 51; B. Grunewald, V. Römermann, *Beck'scher Online-Kommentar RDG*, 30th ed., München 2024, Section 3 RDG, marg. no. 10; K. Henning, F. Lackmann, A. Rein, *Privatinsolvenz Handkommentar*, 2nd ed., Baden-Baden 2022, Section 3 RDG, marg. no. 2; V.R.S. Hoch, J.D. Hendricks, *Das RDG und die Legal Tech-Debatte: Und wo bleibt das Unionsrecht?*, "Verbraucher und Recht (VuR)" 2020, no. 7, p. 254; C. Deckenbrock, M. Henssler, *op. cit.*, Section 3 RDG, marg. no. 33.

<sup>39</sup> M. Krenzler, F.R. Remmert, *op. cit.*, Section 3 RDG, marg. no. 75.

UWG), hence competitors are entitled to injunctive relief.<sup>40</sup> Even the advertising or offer of an unauthorized legal service is unlawful because it creates the risk that the addressees may turn to the advertiser or provider with their legal matters.<sup>41</sup>

## 2. Smartlaw – case law

The Smartlaw case was heard by all three instances up to the BGH.<sup>42</sup> The facts of the case were as follows:

A bar association (plaintiff) brought an action against Wolters Kluwer, a global leader in information, software solutions and services for professionals (defendant), which had developed a contract generator<sup>43</sup> for the creation of contracts and other legal documents and offered this as a paid legal tech service for consumers and companies on the Internet.

By answering various questions on the envisaged content, subject matter and use of the document – which was possible both on the basis of a selection from predefined alternative answers and by answering open questions – the generator added or removed certain text modules so that an individual draft document was generated for the user at the end. Assistance was also provided in the form of explanations of the applicable legal terms and recommendations for the legally compliant use of the respective documents.

To advertise the generator, the defendant used phrases such as: “cheaper and faster than a lawyer, legal documents in lawyer quality, more individual and secure than any template and cheaper than a lawyer, modelled on a conversation with a lawyer and legal documents in lawyer quality ... you can create every single one of our documents yourself in just a few minutes with our individual question-answer dialogue. All this without any legal know-how – because we have it”. The imprint contained the following information: “[p]lease note that we are not allowed to provide legal advice and the offer ... does not offer

<sup>40</sup> Ibidem, Section 3 RDG, marg. no. 77, 78.

<sup>41</sup> Judgment of BGH of 9 IX 2021, I ZR 113/20, p. 8, “Neue Juristische Wochenschrift (NJW)” 2021, no. 42, pp. 3125–3129.

<sup>42</sup> Ibidem; C. Thole, *Admissibility of a digital offer – contract document generator*, “Neue Juristische Wochenschrift (NJW)” 2021, pp. 3125–3129.

<sup>43</sup> The contract generator is called “Smartlaw,” see <https://www.smartlaw.de/ueber-smartlaw>. For the sake of simplicity, the product is referred to as “Generator” in this article.



legal advice, but exclusively publishing services on legal topics.” The defendant is not admitted to the bar association and is not allowed to provide legal services under the RDG or any other law.

The plaintiff has the task of protecting and promoting the professional interests of its chamber members.<sup>44</sup> It was of the opinion that the defendant was in breach of Sections 2 and 3 RDG by offering the generator because the services provided were legal services, meaning that as the defendant is not allowed to provide legal services, it was obliged to refrain from doing so. In the plaintiff’s opinion, the advertising statements were also misleading according to the Act on Unfair Competition (Section 5 UWG) because the public was misled about the legality of the services offered and the statements conveyed the impression that the services provided corresponded in quality to those of a lawyer.

The defendant, on the other hand, was of the opinion that the offer of the generator did not constitute a legal service and that the advertising was not misleading. Its services were to be equated with those of the computer-based tax declaration programmes that had been available on the market for over 20 years. A contract generator only transfers the principle of computer-assisted preparation of tax returns to the computer-assisted preparation of contracts. The product is aimed at a target group that, for reasons of cost or time, does not expect individual advice from a lawyer, but would like to draw up their own contracts and would otherwise have resorted to traditional forms or templates. The factual requirements of Sections 2 (1), 3 RDG are not fulfilled, as these require the activity to be performed by a human. In addition, at the time the generator was created and programmed, there was no concrete life situation, i.e. no concrete matter to be assessed, so that the user himself selects the relevant information in his own matters and is only supported by general, abstract instructions from the programme.

## 2.1. Smartlaw as a legal service

In the first court instance,<sup>45</sup> the Regional Court of Cologne considered the offering of the generator to be a legal service in the sense of Section 2 (1) RDG and therefore only admissible for qualified professions.

<sup>44</sup> Section 73 (1) S. 3 BRAO.

<sup>45</sup> Judgment of Regional Court of Cologne of 8 X 2019, 33 O 35/19, “Zeitschrift für IT-Recht und Recht der Digitalisierung (MMR)” 2020, pp. 56–59; M. Kilian, *Digitaler*

### **2.1.1. Any activity**

The court saw the use of the software as an aid of the provider and affirmed an activity on the grounds that it is fundamentally irrelevant which technical aids are used to provide the legal service. This can be via a telephone hotline, internet forum or, as in the present case, through computer-based software without direct human interaction.

### **2.1.2. Concrete matters**

In addition, the court affirmed that the generator dealt with concrete matters in the sense of Section 2 (1) RDG. According to the judgment, the decisive factor is that it is not a fictitious but an actual situation of a person seeking advice. Even if the software was developed for numerous abstract cases at the time of programming, the user receives a product that is specifically tailored to them at the time of use. The information requested is not limited to general data but leads to a very narrow concretization of the facts of the case. The court saw the use of the generator as clearly going beyond the scope of classic form manuals, as with form manuals the user has to independently transfer abstract information into a concrete document. In contrast, the generator prepares a “signature-ready” document, whereby the appropriate text modules are automatically compiled for the user. The decision as to which text modules are suitable in a particular case is made solely by the generator. If a service provider were to go through a question-and-answer catalogue with the customer as part of a telephone hotline and create an end product that the user could purchase, there would be less doubt that this service relates to a specific concrete matter. The fact that there is no person talking with the client should not lead to the opposite conclusion.

### **2.1.3. Third-party matter**

The decisive factor in distinguishing between a third-party matter and an own matter is in whose economic interest it is carried out. If the activity was carried out in the economic interest of the user, whereby the

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*Generator für Rechtsdokumente als Rechtsdienstleistung?*, “Deutsches Steuerrecht Entscheidungsdienst (DStRE)” 2020, pp. 1015–1019.

defendant had an indirect economic self-interest, a third-party matter is to be affirmed.

#### 2.1.4. Legal assessment of an individual case

A legal assessment is any concrete subsumption of a factual situation under the relevant legal provisions that goes beyond a merely schematic application of legal norms without further legal examination.<sup>46</sup> It is irrelevant whether it is a simple or difficult legal question. In the opinion of the Regional Court of Cologne, the legal documents created by the generator are of a recognizable complexity that goes beyond a merely schematic application of legal norms. Programming the software involves a legal analysis of how a draft contract based on certain criteria relevant to the user can be produced. This process mirrors the procedure a lawyer would follow, but only takes place upstream due to standardization.

Furthermore, as part of the legal assessment, the relevant common public perception and the recognizable expectation of the person seeking legal advice must be taken into account. From the advertising for the generator, the client expects more than mere assistance in independently creating and filling out a contract form, as the product is sold as an alternative to hiring a lawyer. Even if the user is aware that there is no final check by a human advisor at the end of the creation process, he assumes that he will receive a legal document tailored to his specific needs and that the standardized fact check is designed in such a way that an individual case check is guaranteed. The advertising states: “[we have] designed the creation process in such a way that it is modelled on a conversation with a lawyer, completely without legal know-how – because we have that, legal documents in lawyer quality and more individual and safer than any template and cheaper than a lawyer.” The defendant’s reference that it does not offer legal services is only made in the imprint and is lost in the overall context of the website. According to both the public perception and the expectations of a person seeking legal advice, it can be assumed that the generator provides a legal assessment.

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<sup>46</sup> Judgment of Regional Court of Cologne of 8 X 2019, 33 O 35/19, marg. no. 54; M. Krenzler, F.R. Remmert, *op. cit.*, Section 1 RDG, marg. no. 19.

## 2.2. Counter-argument: Smartlaw not constituting a legal service

Both the Court of Appeal<sup>47</sup> and later the BGH<sup>48</sup> decided (in contrast to the court of first instance) that the generator does not constitute a legal service within the meaning of Section 3, 2 (1) RDG. However, the defendant was ordered to refrain from using certain formulations in the advertising for its services.<sup>49</sup>

Both courts stated that, based on previous decisions of the BGH<sup>50</sup> and taking into account the history of the RDG,<sup>51</sup> the deregulation and liberalization of the development of new professions in extrajudicial legal services is desirable. In view of the increasing juridification of everyday life and the ongoing emergence of new service professions, the RDG should be limited to cases in which legal services are clearly provided.

### 2.2.1. Any activity

The Court of Appeal first established that an activity in the case's specific facts is to be understood as a human or at least one involving human-like reasoning with a legal subsumption process. For the rules of the RDG to apply, it is necessary to establish if there is a human activity and if the activity can be attributed to the defendant. The generator as such is not and cannot constitute an activity, because it represents a purely schematic yes/no decision structure and cannot carry out a legal subsumption process itself. Rather, the development and provision of the generator was regarded as an activity of the defendant. The generator, on the other hand, was not used by an employee of the defendant but by the user himself and was, therefore, primarily classified as an activity of the user. However, the Court of Appeal also regarded the use of the generator to draft a legal document as an activity of the defendant. The service offered consisted of using the generator to create an individual

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<sup>47</sup> Judgment of BGH of 9 IX 2021, I ZR 113/20, "Neue Juristische Wochenschrift (NJW)" 2021, no. 42, pp. 3125–3129.

<sup>48</sup> Judgment of Higher Regional Court of Cologne of 19 VI 2020, 6 U 263/19, "Neue Juristische Wochenschrift (NJW)" 2020, pp. 2734–2740.

<sup>49</sup> Ibidem, marg. no. 4–9.

<sup>50</sup> Judgment of BGH of 27 XI 2019, VIII ZR 285/18, "Neue Juristische Wochenschrift (NJW)" 2020, no. 4, p. 208–235.

<sup>51</sup> BT-Drucks. 16/3655, pp. 38, 42.

legal document. The programming, provision and creation of the legal document using the generator could not be split into independent processes but were dependent components of uniform activity by the defendant as part of its software-based online offering. It is irrelevant that the defendant did not create the legal document personally but used instead the generator it had programmed and provided for this purpose. Therefore, the programming, provision and creation of the legal document is an activity attributed to the defendant.

### 2.2.2. No concrete matters

However, the higher courts ruled that the defendant's activity does not take place in a concrete matter. The decisive factor here is whether it is not a fictitious but a real factual legal issue of a specific person seeking advice.<sup>52</sup> Fictitious and abstract cases should not be considered.<sup>53</sup> Standardized legal documents or ready-made text modules, such as those in the form of manuals, are not aimed at a specific factual situation.<sup>54</sup> The fact that a real situation exists as a result of the user answering the predefined questions does not change the fact that the generator was programmed to cover general situations with common questions for a large number of undefined groups of people. The information provided by the user merely means that text modules are assigned together by the response and compiled into a contract document. Whether the use of the generator by the user leads to an activity in a concrete matter attributed to the defendant was justified differently by the two courts but was ultimately rejected by both.

The Court of Appeal<sup>55</sup> ruled that the use of the generator leads to a concrete matter, albeit one not attributed to the provider but to the user.

The BGH<sup>56</sup> in turn established that the user's answers to the generator's questions do not mean that the resulting contract document is tailored to their concrete case. Queries or additional information on

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<sup>52</sup> *Ibidem*, p. 48.

<sup>53</sup> B. Grunewald, V. Römermann, *op. cit.*, Section 2 RDG, marg. no. 26.

<sup>54</sup> F.R. Remmert, *Legal-Tech - Legal assessment according to the RDG*, "BRAK-Mitteilungen" 2017, pp. 55–58.

<sup>55</sup> Judgment of Higher Regional Court of Cologne of 19 VI 2020, 6 U 263/19, marg. no. 112, "Neue Juristische Wochenschrift (NJW)" 2020, pp. 2734–2740.

<sup>56</sup> Judgment of BGH of 9 IX 2021, I ZR 113/20, "Neue Juristische Wochenschrift (NJW)" 2021, no. 42, p. 36.

special features of the individual case are not possible, nor is there any consideration beyond the standard case.

### **2.2.3. Third-party matter**

The preparation of the legal document primarily serves the economic interest of the user, even if the defendant indirectly pursues their own financial interest with regard to the remuneration incurred.

### **2.2.4. No legal assessment of an individual case**

Furthermore, the courts denied that there was a legal assessment, as the generator runs according to a systematic question-answer scheme, which is also recognizable to the user.<sup>57</sup> Irrespective of that, the generator does not constitute a legal assessment, as not every activity that is aimed at and suitable for realizing specific legal matters of third parties is considered a legal service. A special examination of the legal situation in the sense of a legal subsumption process is required for a legal assessment. If the legal analysis of a question is simple and clear, even for legal laypersons, and no special assessment is required, this does not constitute a legal service. The mere reproduction and application of legal norms are not to be understood as legal services. These transactions also do not become legal services merely due to the fact that a third party is commissioned to carry them out. The situation is different if the person seeking legal advice clearly expects special legal support or clarification.

A legal analysis that goes beyond the mere application of legal norms is determined either objectively according to the relevant public opinion or subjectively on the basis of a wish expressed by the person seeking legal advice.

Objectively speaking, a generator with a question-answer catalogue can do no more than apply legal norms in a purely schematic way. The generator is programmed in such a way that a predetermined, standardized answer is given to each instruction. However, a purely logical and schematic transmission process is not sufficient as a legal examination within the meaning of the RDG.

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<sup>57</sup> Judgment of Higher Regional Court of Cologne of 19 VI 2020, 6 U 263/19, marg. no. 115.

No legal review can be assumed subjectively either. It cannot be assumed that users apply the generator with the expectation that their request will be examined in accordance with the relevant legal provisions or that they will be informed of the legal consequences. When using the generator, it is clear that no legal advice is offered when selecting the options, but that a factual situation is inserted into a predetermined grid on the user's own responsibility, while a purely schematic yes/no code is executed in the background. Therefore, no legal assessment of an individual case can be assumed by using the generator. Although the defendant's activity relates to a third-party matter, the use of the generator does not concretize the matter, nor does it occur as a result of a legal assessment.

## Conclusion

The Smartlaw decision shows the growing influence of the digitalized legal market on the RDG. The BGH states that the creation of contractual documents using an automated generator is not a legal service within the meaning of Section 2 (1) RDG.

When examining the requirements, the BGH rejects an artificial division of uniform activities and states convincingly that the provider's activities include the development, provision and creation of the legal document. However, there was a lack of a concrete matter and a legal assessment, even though the third-party nature was affirmed. The generator is a user-friendly application that resembles a forms manual and contains draft contracts for a large number of conceivable typical legal cases. This is objectively recognizable according to the public's perception. The person seeking legal advice is also subjectively aware that the use of the generator is based on a question/answer system and that there is no legal assessment of the specific individual case.

But what if the BGH had classified the generator as a legal service? The consequence would be that in future the generator could only be operated by lawyers or other professional groups provided for in Section 3 RDG. This seems questionable with regard to the aim of the RDG.<sup>58</sup> It is not clear whether this would provide better protection for those seeking legal services, the legal system and legal transactions. It is important

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<sup>58</sup> C. Deckenbrock, M. Henssler, *op. cit.*, Section 20 RDG, marg. no. 6, 7.

that legal services are offered by professionally qualified people, but the opposite result in the present case would not change the quality of the service provided by the generator, as the problem was not the quality of the contracts. It would be conceivable to impose requirements on the programming, creation and production of the generator instead of on whom may receive the economic advantage.

Courts will have to deal with such issues more and more frequently in the future, as the legal tech sector continues to develop rapidly. Any country that tries to slow down this development will face many problems in the future market, especially in order to remain competitive. It remains to be seen how the courts will rule in the future, especially in cases where there is no pre-programming but applications such as ChatGPT are used through machine learning.<sup>59</sup>

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<sup>59</sup> See R. Hartung, *Smartlaw, ChatGPT und das RDG*, "Recht Digital (RDigital)" 2023, p. 209, marg. no. 21; see M. Krenzler, F.R. Remmert, op. cit., Section 2 RDG, marg. no. 16, 17.



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