Studia Prawa Publicznego

2025 • NR 1 (49)

WYDAWNICTWO NAUKOWE UAM

Studia Prawa
Publicznego

Studia Prawa Publicznego / Studies in Public Law
Kwartalnik / Quarterly

Sposób cytowania: „Studia Prawa Publicznego"

Redakcja czasopisma

Adres Redakcji

Wydział Prawa i Administracji UAM, al. Niepodległości 53, 61-714 Poznań
Collegium Iuridicum Novum, budynek Dziekanatu, p. I, pok. 25
tel. +48 61 829 31 60, e-mail: spp@amu.edu.pl,
adres strony internetowej: http://spp.amu.edu.pl

Studia Prawa Publicznego

2025 • NR 1 (49)

UNIWERSYTET
IM. ADAMA MICKIEWICZA
W POZNANIU

WYDAWNICTWO NAUKOWE

POZNAŃ 2025

Redakcja naukowa
KRYSTYNA WOJTCZAK

Tytuł i koncepcja czasopisma „Studia Prawa Publicznego"
KRYSTYNA WOJTCZAK

Projekt okładki
EWA WĄSOWSKA

Na okładce

X.A. Knesing, *Skazana*, drzeworyt, 1886
(*Meisterwerke Holzschneidekunst aus dem Gebiete der Architektur, Skulptur und Malerei*,
wyd. J.J. Weber, Leipzig 1891)

Redaktor
MARZENA URBAŃCZYK

Redaktor techniczny i łamanie komputerowe
REGINALDO CAMMARANO

ISSN (Online) 2720-2445 ISSN (Print) 2300-3936 DOI: 10.14746/spp

Wersja pierwotna czasopisma: elektroniczna

WYDAWNICTWO NAUKOWE UNIWERSYTETU IM. ADAMA MICKIEWICZA W POZNANIU
UL. FREDRY 10, 61-701 POZNAŃ
www.press.amu.edu.pl
Sekretariat: tel. 61 829 46 46, faks 61 829 46 47, e-mail: wydnauk@amu.edu.pl
Dział sprzedaży: tel. 61 829 46 40, e-mail: press@amu.edu.pl

Ark. wyd. 12,0. Ark. druk. 11,625

DRUK I OPRAWA: VOLUMINA.PL SP. Z O.O., SZCZECIN, UL. KS. WITOLDA 7–9

SPIS TREŚCI

IV. RECENZJE

V. PRZEGLĄD PIŚMIENNICTWA

VI. SPRAWOZDANIA I INFORMACJE

TABLE OF CONTENTS

STUDIA PRAWA PUBLICZNEGO
2025 • NR 1 (49) ISSN 2300-3936
https://doi.org/10.14746/spp.2025.1.49.1

I. ARTYKUŁY

Roland Fritz*, Julia Lefèvre**

The Lawyer as Conflict Manager: Exploring the Lawyer's Role in ADR, Especially as an Advisor in Mediation and as Lawyer-Mediator in Germany

Abstract. This article advocates redefining the lawyer's role as a conflict manager, shifting from adversarial approaches to interest-based, consensual conflict resolution. Although litigation remains the norm, alternative dispute resolution (ADR), especially mediation, offers significant benefits that are often underutilized. Lawyers can act as advisors, guiding clients to select and engage in ADR processes tailored to their needs, or as mediators, facilitating neutral, self-determined outcomes.

The article examines key ADR methods, including mediation, collaborative practice, and procedural hybrids like med-arb, highlighting their applications, advantages and challenges. Special emphasis is placed on the lawyer's dual role: advising clients during ADR proceedings and serving as a neutral third party in mediation. Preparation, confidentiality and risk analysis are central to the lawyer's responsibilities in ensuring effective mediation outcomes.

Additionally, the article addresses the professional and ethical considerations for lawyers acting as mediators, including adherence to legal standards and avoidance of conflicts of interest. It argues that adopting a conflict-management approach not only aligns with legal professional standards but also enhances client satisfaction and outcomes by prioritizing efficient, amicable solutions over confrontational disputes.

* Justus Liebig University Giessen, Germany | Uniwersytet Justusa Liebiga w Giessen, Niemcy, https://orcid.org/0009-0006-4362-4966, e-mail: roland.fritz@adribo.com.

** Frankfurt University of Applied Sciences, Germany | Uniwersytet Nauk Stosowanych we Frankfurcie, Niemcy, https://orcid.org/0009-0006-8903-2990, e-mail: Julia.lefevre@fit.fra-uas.de.

SPP 1(49), 2025: 9–29. © The Author(s). Published by: Adam Mickiewicz University Press, 2025.

By integrating conflict management into legal practice, lawyers can expand their professional scope, offering valuable alternatives that promote long-term cooperation and resolution beyond the courtroom.

Keywords: conflict management – alternative dispute resolution – mediation – lawyer-mediator – lawyer's role in mediation

Introduction

A norm should fundamentally be known to every lawyer, and most likely it is the norm of paragraph 1 section 3 of the Rules of Professional Practice (Berufsordnung der Rechtsanwälte, BORA).[1] Among other things, it states that lawyers should advise and represent their clients, protect them from legal losses, and guide them in a way that shapes the law, avoids conflicts, and resolves disputes.

However, when one looks at legal reality, it becomes apparent that legal practice falls short of what the legislature intended and what is possible in this area. In legal practice, confrontational disputes, the "fight for rights," and consequently, recourse to the courts, regularly take centre stage, while the search for a consensual solution remains somewhat neglected. This occurs despite the (optional) provision in paragraph 253 section 3 number 1 of the German Code of Civil Procedure (Zivilprozessordnung, ZPO), which suggests that the complaint should include information on whether an attempt at mediation or another out-of-court conflict resolution procedure preceded the lawsuit, as well as an explanation of any reasons that may have precluded such an attempt. Conversations with judges and lawyers repeatedly show that only in a very small number of cases are the required details provided, and instances where the court has raised objections to this omission are equally rare.[2]

Fortunately, it is noticeable that those who have gained experience in active conflict management, whether as lawyers or corporate representatives, often become strong proponents of alternative dispute resolution

[1] English Version of the Rules of Professional Practice Version of 1 X 2023 under: https://www.brak.de/fileadmin/02_fuer_anwaelte/berufsrecht/BORA_Stand_01.10.2023-en.pdf (accessed: 21 VIII 2024). For a more detailed description of the lawyer's professional profile, see: J. Lefèvre, *Eine explorative Untersuchung der anwaltlichen Beratungshilfe, Das Berufsbild des Rechtsanwalts und seine Pflicht aus § 49 a Abs. 1 BRAO als Instrument der Sicherung des gleichen Zugangs zum Recht in Recht und Praxis*, Berlin 2024, pp. 53–70.

[2] See https://gemmeeurope.org/en/das-guterichterverfahren-auf-dem-prufstand (accessed: 21 VIII 2024).

methods. Schroeder and Lerch have illustrated this impressively in their insightful article *Interest-Based Legal Conflict Management for Companies*.[3] Nevertheless, there is still a long way to go before these insights are fully embraced by the legal profession as a whole.

With this article, the authors aim to contribute to a changed understanding of legal practice. Therefore, when the term "lawyer as conflict manager" is mentioned, as in the title, it primarily refers to the situation in which the lawyer supports and represents their client in a procedure of alternative dispute resolution (see Section 1), with particular emphasis on the mediation process (see Section 2). It also refers to the scenario where the lawyer takes on the role of a neutral third party, acting as a mediator, helping the conflicting parties to develop a self-determined solution (see Section 3). The article closes with a conclusion.

1. Client support through alternative dispute resolution methods

Acting in a conflict-avoiding and dispute-resolving manner for the client requires interest-based conflict management on a case-by-case basis. In discussions with the client, the lawyer must determine what the client is really seeking within the context of their legal position and what their true interests and needs are. Based on this, the lawyer will consider which alternative method of resolution can best achieve these interests and then discuss their findings with the client. This approach is not limited to the beginning of the mandate but should be kept in mind throughout every phase of the dispute. The goal is to ensure that any potential "mediation window" is not overlooked, even during an ongoing procedure.

In this context, the lawyer will also reflect on and determine what role they will assume in an alternative procedure: as a participating advisor and representative of their client,[4] as a background consultant advocating for their client's interests, or as a "third party" directing the conflict resolution process.[5]

---

[3] H.-P. Schroeder, M.P. Lerch, *Interessengerechtes anwaltliches Konfliktmanagement für Unternehmen*, "ZIP" 2024, vol. 45, no. 25–26, p. 1428.

[4] D. Pielsticker, *Kommentierung § 2 MediationsG*, in: *Handbuch Mediationsrecht*, eds. R. Fritz, D. Pielsticker, 3rd ed., Hürth 2024, p. 116.

[5] A. Hacke, *Mediationsbegleitung durch Rechtsanwälte*, in: *Mediationsgesetz*, eds. J. Klowait, U. Gläßer, 2nd ed., Baden-Baden 2018, p. 837.

Among the known ADR (alternative dispute resolution) procedures,[6] in addition to mediation and collaborative practice, which will be discussed again in Section 3, lawyer-supported settlement negotiation (Ger. *Anwaltliche Vergleichsermittlung*), conciliation (Ger. *Schlichtung*), conciliation proceedings (Ger. *Güteverfahren*), mini-trial, and early neutral evaluation should be considered, as they are procedures in which the parties themselves determine the outcome. However, procedures such as adjudication, expert determination (Ger. *Schiedsgutachten*), and arbitration (Ger. *Schiedsverfahren*, also known as *Schiedsgerichtsverfahren* or *schiedsgerichtliches Verfahren*) should also be considered, where third parties make a binding decision, but depending on the case and client preference, these may offer advantages over state court proceedings. Finally, procedural combinations, such as the med-arb procedure (Ger. *Med-Arb-Verfahren*) or the med-adj procedure (Ger. *Med-Adj-Verfahren*), should also be taken into account.

The purpose of this article is not to provide a comprehensive overview of all ADR procedures, as this would exceed the scope of this contribution. However, a brief presentation of some procedures and their essential methodological advantages and disadvantages seems appropriate for a better understanding, before focusing in more detail on the mediation process and the steps to be taken by the consulting lawyer in this context.[7] There are various reasons to choose an alternative dispute resolution procedure: limited time and financial resources, the desire for future cooperation, the importance of confidentiality, and the ability to influence the outcome. Each of the procedures presented below has its own advantages and disadvantages. Reasons that initially favour a particular procedure may change as the conflict evolves. Accordingly, it may be advisable, for example, to switch from an agreed arbitration procedure to mediation, either entirely or for specific disputed issues.[8]

1.1. Lawyer supported settlement negotiation

The term lawyer-supported settlement negotiation (Ger. *Anwaltliche Vergleichsvermittlung*) refers to a process in which, after being duly instructed by the client, the lawyers first assess the other party's willingness to

[6] R. Fritz, *Zusammenfassende Darstellung alternativer Konfliktbeilegungsmethoden im Überblick*, in: *Handbuch Mediationsrecht*, op. cit., p. 936; T. Lapp, *Außergerichtliche Streitbeilegung*, "Anwaltsblatt" 2024, no. 1, p. 64.

[7] R. Fritz, *Kommentierung § 278 ZPO*, in: *Handbuch Mediationsrecht*, op. cit., p. 267.

[8] H.-P. Schroeder, M.P. Lerch, op. cit., p. 1429.

negotiate and reach a settlement, and then work together to find a solution to the existing points of dispute.[9] However, this requires a shift in the traditional role perception of the lawyers involved: the rigidity and legal stringency of asserting claims must be replaced by a firm advocacy for the respective client's interests. These interests must therefore be carefully identified and prepared in advance between the lawyer and the client. At the same time, a shift from a combative approach to a more conciliatory mode of communication is necessary to consider the interests of the opposing party as well, and thereby achieve a mutually agreeable outcome.

1.2. Conciliation

The conciliation process is not dissimilar to mediation: this similarity includes a fundamentally consensual and informal approach, as well as the use of mediation techniques within the process itself. However, the conciliator chosen by the parties will often conduct an inquisitorial investigation of the facts and will not exclude legal issues. The key difference from mediation lies in the fact that the conciliator will present the parties with a non-binding proposal to resolve their conflict (conciliation proposal or conciliator's recommendation). If this proposal is rejected, the conciliation process is considered unsuccessful.[10]

1.3. Conciliatory proceedings

A particular form of conciliation in civil disputes is known as conciliatory proceedings (Ger. *Güteverfahren*), which are conducted before state-recognized conciliation bodies (Ger. *Gütestellen*).[11] These bodies are staffed by individuals who must be qualified to hold judicial office. Each conciliation body operates according to its own specific set of rules, which determine the procedure, methodology, and costs. While the conciliation body is responsible for organizing and conducting the negotiation, the parties themselves remain responsible for reaching a substantive agreement.

---

[9] G. Erdmann, *Anwaltliche Vergleichsvermittlung*, in: *Handbuch Mediationsrecht*, op. cit., p. 1064.

[10] M. Lembcke, *Schlichtung*, in: *Handbuch Mediationsrecht*, op. cit., p. 1105.

[11] R. Fritz, *Zusammenfassende Darstellung alternativer Konfliktbeilegungsmethoden im Überblick*, in: *Handbuch Mediationsrecht*, eds. R. Fritz, D. Pielsticker, 3rd ed., Hürth 2024, p. 936.

1.4. Mini-trial

A mini-trial, a voluntary and private negotiation procedure, aims to assess the chances and risks of a judicial process and clarify these for the conflicting parties. It consists of a senior decision-maker from each party, authorized to conclude a settlement, and a neutral chairperson agreed upon by both parties. After the presentations by the parties' lawyers, the respective representatives and the chairperson consult and attempt to reach an agreement.[12]

1.5. Early-neutral evaluation

The procedure is designed to involve a neutral third party at an early stage of the dispute, who, as an independent expert in the relevant area of conflict, provides a preliminary, non-binding assessment of the dispute.[13] In brief negotiations with the parties (and their lawyers), the expert investigates both the facts of the case and the respective legal positions, and then provides a written evaluation of the legal and factual aspects. This allows the conflicting parties to assess their potential success in a judicial proceeding better and to evaluate further actions in a manner appropriate to the conflict. If desired, settlement negotiations can then be initiated based on the expert's assessment.

1.6. Adjudication

Adjudication is a procedure in which an expert (adjudicator) renders a provisionally binding decision on a dispute between the parties, typically in areas such as major construction and plant engineering, both in terms of facts and legal issues.[14] The advantage of this procedure lies

[12] A. May, *Kommentierung § 13 Andere Verfahren einvernehmlicher Konfliktlösung*, in: *Mediation in der Praxis des Anwalts*, eds. F. Schmidt, T. Lapp, A. May, 2nd ed., München 2022, p. 356; R. Fritz, *Zusammenfassende Darstellung alternativer Konfliktbeilegungsmethoden im Überblick*, in: *Handbuch Mediationsrecht*, eds. R. Fritz, D. Pielsticker, 3rd ed., Hürth 2024, p. 938.

[13] R. Fritz, *Zusammenfassende Darstellung…*, p. 939; A. May, *§ 13 Andere Verfahren einvernehmlicher Konfliktlösung*, in: *Mediation in der Praxis des Anwalts*, eds. F. Schmidt, T. Lapp, A. May, 2nd ed., München 2022, p. 355.

[14] M. Lembcke, *Adjudikation…*, p. 1115.

in its ability to minimize disruptions to the construction process and allow for adjustments in the construction schedule.[15] Enforcement of the adjudicator's decision can, if necessary, be pursued through the courts in a so-called 'enforcement process'. The parties are bound by the adjudicator's decision until the conflict is ultimately resolved through (arbitration) court proceedings or an ADR process.

1.7. Expert determination

An expert determination (Ger. *Schiedsgutachtenverfahren*) refers to the binding decision made by a neutral third party, usually an expert with specialized knowledge relevant to the conflict, on the disputed matter presented to them by the conflicting parties.[16] This can involve both factual and legal issues. The written arbitral expert opinion is binding between the parties and thus serves to resolve the dispute.

1.8. Arbitration

Arbitration proceedings are comparable to state court proceedings but differs in that it is voluntary and confidential, the arbitrators can be selected and appointed on a parity basis, the process can be flexibly structured, and typically, only one instance decides the dispute, with the decision being enforceable (paragraph 1060 German Code of Civil Procedure).[17] However, once the process has been initiated, the parties' ability to influence the proceedings, as in the previously described adjudication and expert determination, is extremely limited.

1.9. Combination of procedures (med-arb and med-adj)

Combinations of procedures such as med-arb,[18] a combination of mediation and arbitration, or med-adj,[19] a combination of mediation and adjudication, merge the distinct advantages of each respective procedure.

[15] A. May, *§ 16 Schiedsverfahren*, in: *Mediation in der Praxis des Anwalts*, op. cit., p. 376.
[16] M. Lembcke, *Schiedsgutachten*, in: *Handbuch Mediationsrecht*, op. cit., p. 1168.
[17] M. Löggering, *Schiedsgerichtsbarkeit*, in: *Handbuch Mediationsrecht*, op. cit., p. 1128.
[18] R. Fritz, *Zusammenfassende Darstellung…*, p. 942.
[19] M. Lembcke, *Adjudikation…*, p. 1122.

If interest-based conflict resolution (mediation) does not lead to success, an enforceable decision (arbitration or adjudication) can be promptly rendered afterwards. A potential issue is the mediator's role switching to that of a decision-maker, as this may reduce the parties' willingness to fully engage in consensual conflict resolution.

2. Mediation

2.1. The procedure

The mediation procedure, regulated at the European level by the EU Mediation Directive of 2008[20] and the 2013 Directive on Alternative Dispute Resolution for Consumer Disputes,[21] as well as at the national level by the Mediation Act of 2012 (Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung, or Mediationsgesetz),[22] is a confidential and structured process in which the parties, with the help of one or more mediators, voluntarily and autonomously seek to reach an amicable resolution of their conflict.[23] It is the procedure in which the parties have the greatest influence over the outcome.

Although not specifically regulated, a mediation procedure typically follows this sequence: Initially, the parties clarify which issues they want to discuss and resolve in the mediation, and decide which issue will be addressed first (Phase 1). Then, the focus shifts to exploring the interests and needs underlying each issue (Phase 2), in order to subsequently generate options that may help satisfy those interests (Phase 3). Following this, the parties negotiate (Phase 4) and agree (Phase 5) on which options are suitable for a consensual solution.[24]

[20] Directive 2008/52/EC of the European Parliament and of the Council of 21 V 2008 on certain aspects of mediation in civil and commercial matters.

[21] Directive 2013/11/EU of the European Parliament and of the Council of 21 V 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

[22] Art. 1 of the Mediation Act (Gesetzes zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung) of 21 VII 2012, https://www.gesetze-im-internet.de/englisch_mediationsg/index.html6 (accessed: 21 VIII 2024).

[23] Para. 1 Sec. 1 Mediation Act.

[24] C. Duve, H. Eidenmüller, A. Hacke, M. Fries, *Mediation in der Wirtschaft*, 3rd ed., Köln, 2019, p. 79; R. Fritz, N. Etscheit, *Bedeutung und Methodik der Mediation*, in: *Handbuch Mediationsrecht*, op. cit., p. 747.

Mediation is applicable to nearly all types of conflict situations, ranging from a wide variety of civil disputes to family and inheritance controversies, and even diverse public law disputes.[25] The broad scope of mediation's application highlights two key points: Firstly, the methods, techniques, and tools that mediation offers cannot be universally applied to every conflict in the same way but must be appropriately adapted to the specific case and conflict. Here too, the principle of "one size does not fit all" applies. Secondly, mediation is overestimated and misunderstood if it is assigned an exclusive role, even though it is often considered the "golden path." It is not the ideal tool for every conflict that arises but rather competes with (or complements) the conflict resolution procedures previously discussed.

2.2. Preparatory consultation in connection with the conclusion of a mediation agreement

Comprehensive preparation of the client is essential, particularly for a non-adversarial procedure like mediation, and is crucial for its successful outcome.[26] This includes informing the client about what mediation is, how it works, and what they can expect. It must be clear to the client that the mediator does not make binding decisions but rather assists the conflicting parties in finding their own solution. Furthermore, unlike in court proceedings, lawyers will generally take a more reserved role[27]; therefore, it must be clarified in advance between the lawyer and the client who will say what and when during the mediation. This also applies in cases where mediation is initiated based on a mediation clause[28] agreed upon between contracting parties.

The case itself must be prepared together with the client[29] and, at first, does not differ from the preparation for an adversarial procedure. This includes reviewing the files, requesting documents and materials,

[25] H.-P. Schroeder, *Anwendungsbereiche der Mediation: Zivilrecht, Anwendungsbereiche der Mediation: Öffentliches Recht*, in: *Handbuch Mediationsrecht*, op. cit., pp. 869, 925; R. Fritz, *Einführung in die Mediation im öffentlichen Bereich*, in: *Praxishandbuch professionelle Mediation*, eds. S. Kracht, A. Niedostadek, P. Sensburg, Berlin 2023, p. 733.

[26] H. Friedrichsmeier, H. Hammann, *Der Rechtsanwalt als Mediator*, in: *Handbuch Mediation*, eds. F. Haft, K. von Schlieffen, 3rd ed., München 2016, p. 1123.

[27] C. Duve, H. Eidenmüller, A. Hacke, M. Fries, op. cit., p. 300.

[28] M. Mattioli, *Mediation in der anwaltlichen Praxis*, Frankfurt am Main 2012, p. 44.

[29] C. Duve, H. Eidenmüller, A. Hacke, M. Fries, op. cit., p. 299.

determining the participants/involved parties, assessing the time and financial resources and limitations, as well as evaluating the scope of the willingness to negotiate and possible settlement proposals. In addition, it is essential to discuss the client's underlying interests and needs, as well as, to the extent possible, hypothetically consider those of the opposing party. It is also advisable to begin exploring potential solutions in advance.

Finally, the mediation agreement and the mediator's contract must be discussed and then – after negotiations with the opposing party or the mediator – implemented.

If both conflicting parties are represented by lawyers, it is effective for them to cooperate in the interest of achieving a consensual solution. Building mutual trust is not only desirable but often a crucial component for reaching a consensual resolution. If the parties have already exchanged extensive written submissions, it should be ensured that this correspondence is made available to the mediator, so that they can familiarize themselves with the legal positions taken so far.

2.3. Tasks and role of the lawyer in preparing for mediation, particularly risk analysis

When financial claims are involved, a litigation risk analysis[30] can help clarify the chances of enforcing a claim and thus improve the prospects of reaching an agreement during negotiations. A risk analysis can help challenge over-optimism regarding a disputed claim and provide more realistic expectations about its current value and enforceability. Acting in this way for the benefit of the client is one of the tasks that the lawyer must perform in the run-up to mediation.

2.4. Mediation agreement and mediator contract, particularly ensuring confidentiality

The organization of a mediation requires the conclusion of two contracts at the outset, which provide the framework for the procedure. These are

[30] T. Schömig, *Prozessrisikoanalyse*, in: *Praxishandbuch Güterichterverfahren*, ed. F. Schreiber, Norderstedt 2022, p. 131; J. Risse, *Wirtschaftsmediation*, 2nd ed., München 2022, p. 279.

the mediation agreement and the mediator contract,[31] both of which can also be combined into one contractual document, the mediation contract.[32]

2.4.1. Mediation agreement

The mediation agreement is a contract entered into by the mediation parties, governing their mutual rights and obligations in connection with the mediation process. If no institutional mediation rules are applied (e.g., those of the German Institution of Arbitration – DIS – or the International Chamber of Commerce – ICC),[33] the mediation agreement should at least include[34]:

– A trigger mechanism for the procedure,
– Provisions for selecting the mediator,
– Rules on the participation of third parties,
– A temporary obligation to refrain from litigation (exclusion of enforceability),
– Obligations to support and cooperate during the procedure,
– Termination options,
– Cost arrangements,
– A waiver of evidence submission,
– An obligation of confidentiality for the parties.

Since confidentiality is a hallmark of the mediation process, it is usually advisable to include a comprehensive confidentiality clause, which should also extend to any third parties involved in the procedure.

2.4.2. Mediator contract

The mediator contract is the legal agreement between the conflicting parties and the mediator. It outlines the mediator's role in the process, their authority, liability, compensation, and their (legally mandated) duty of confidentiality. Legally, the mediator contract is considered

[31] R. Fritz, *Mediation*, in: *Verwaltungsrecht*, eds. L. Eiding, J. Hofmann-Hoeppel, 3rd ed., Baden-Baden 2022, p. 330; D. Pielsticker, op. cit., p. 136.
[32] C. Duve, H. Eidenmüller, A. Hacke, M. Fries, op. cit., pp. 101, 294.
[33] J. Risse, op. cit., p. 119.
[34] C. Duve, H. Eidenmüller, A. Hacke, M. Fries, op. cit., p. 295.

a service contract with a management obligation (paragraphs 675, 611 of the German Civil Code, Bürgerliches Gesetzbuch, BGB).

While the mediator is legally obligated to inform the parties about their duty of confidentiality (paragraph 4 sentence 4 of the German Mediation Act – Mediationsgesetz), the advising lawyer should also inform their client about this in advance.

2.5. Tasks and role of the lawyer during mediation

Individual meetings (caucuses)[35] and shuttle mediation[36] are commonly used methods in mediations. The lawyer will prepare their client for these and also participate in these meetings/negotiations.[37]

In as far as this has not already been done during the preparation, the lawyer, especially in business mediations, will work with their client to determine the BATNA ("Best Alternative to a Negotiated Agreement")[38] and, if necessary, conduct a risk analysis to explore how far the negotiation, the actual "deal-making," can go. Additionally, the client should be advised on potentially expanding the negotiation scope by including additional topics if necessary.

What is BATNA? A conflict participant can only rationally agree to an offer in mediation if it is better, in terms of their interests, than their BATNA. Thus, the BATNA serves as a benchmark for proposed or potential settlement options. In this sense, an agreement in a (business) mediation can typically only be expected if it is better for all participants than their respective BATNA. Solutions that meet this standard fall within the so-called 'settlement zone', which outlines the spectrum of solutions that are potentially acceptable to everyone involved.[39]

---

[35] D. Pielsticker, op. cit., p. 113; R. Greger, *Kommentierung § 2 MediationsG*, in: *Recht der alternativen Konfliktlösung*, eds. R. Greger, H. Unberath, F. Steffek, 2nd ed., München 2016, p. 110.

[36] R. Fritz, *Besondere Formen: Shuttle-Mediation*, in: *Handbuch Mediationsrecht*, op. cit., p. 817.

[37] D. Pielsticker, op. cit., p. 116.

[38] C. Duve, H. Eidenmüller, A. Hacke, M. Fries, op. cit., p. 219.

[39] A simple example of a two-person negotiation illustrates this clearly: Entrepreneur U wants to sell his company and retire. A potential buyer has already offered him €1.3 million; this is his BATNA. U now enters into negotiations with his competitor K, who could buy a comparable company from a third party for €1.7 million (this is K's BATNA). Any purchase price between €1.3 million and €1.7 million is potentially acceptable for U and K, as it falls within the settlement zone.

To provide qualified advice in this regard, knowledge of business law is required. The accompanying lawyer should be familiar with the decision-making processes within the client's company, as well as the legal framework in which the company operates. This includes, for example, the powers of boards of directors, supervisory boards, or works councils, dependencies on parent companies within a corporate group, or – on a smaller scale – the position of partners in a law firm.

In addition, it is the lawyer's task to behave appropriately for mediation during the procedure. This means holding back during conflict diagnosis and interest exploration and only intervening when it comes to legal assessments, such as during the options phase.

2.6. Tasks and role of the lawyer at the conclusion

The role of the accompanying lawyer is not finished once a fundamental agreement has been reached. A preliminary understanding does not yet constitute a legally binding agreement.

However, a final agreement may not (yet) be possible if certain expert evaluations, such as in tax matters, are necessary. Such situations should be avoided, and relevant experts should be integrated into the process as early as possible to prevent the mediation from failing afterwards. Typically, the accompanying lawyers will at least determine the key points of the agreement, and in some cases, they will address all necessary details up to a legally binding and enforceable settlement.[40] The acronym "SMART," which stands for specific, measurable, achievable, realistic, and timed, provides a good standard for review the above-mentioned points of the agreement.[41] If one party does not adhere to the agreement reached in the mediation, the other party can file a lawsuit for performance and obtain an enforcement order in this way.

Aside from that, there are good reasons to consider making the agreement enforceable at the time of conclusion. In Germany, there are different options available for this purpose, mentioned in the following sections.[42]

---

[40] A. Hacke, *Die Abschlussvereinbarung*, in: *Mediationsrecht*, eds. H. Eidenmüller, G. Wagner, Köln 2015, p. 216.

[41] C. Duve, H. Eidenmüller, A. Hacke, M. Fries, op. cit., p. 246.

[42] Ibidem, p. 247.

2.6.1. Notarial deed

The parties can have the settlement agreement notarized.[43] A notarial deed is an enforceable title under paragraph 794 section 1 number 5 of the German Code of Civil Procedure provided that the debtor has submitted to immediate enforcement in the deed. Recognition and enforceability in all EU member states are ensured through Art. 58 of the Brussels I Regulation.[44]

Notary fees arise from notarization, and their amount is determined by the value of the settlement. Declarations that require a party to express intent are not enforceable, even if notarized.

2.6.2. Lawyer settlement

Paragraph 796a of the German Code of Civil Procedure stipulates that a settlement as defined in paragraph 779 of the German Civil Code can be declared enforceable if it was concluded by lawyers in the name and with the authorization of their clients, the debtor submits to immediate enforcement, and the settlement, along with the date of the agreement, is deposited at a local court where one of the parties resides.[45] This settlement also cannot be directed toward the issuance of a declaration of intent. Although this is a cost-effective option, the procedure is cumbersome: the creditor must first obtain an enforceability declaration, which, according to paragraph 796b German Code of Civil Procedure, is issued by the court where the enforceable claim would otherwise be filed.

2.6.3. Settlement before a conciliation body

It is also possible for the parties to formally record their settlement agreement before a conciliation body (Ger. *Gütestelle*) officially established

[43] A. Hacke, *Die Abschlussvereinbarung…*, p. 240.

[44] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 XII 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 XII 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[45] A. Hacke, *Die Abschlussvereinbarung…*, p. 241.

by the state justice administrations.[46] For example, under the Bavarian Conciliation Act,[47] notaries and lawyers who are authorized by the bar association for this purpose are legally recognized as conciliation bodies.

2.6.4. Court settlement

If the mediation procedure was preceded by a pending court case, the parties can also record an enforceable title in court under paragraph 794 section 1 number 1 German Code of Civil Procedure.[48] This approach has the advantage that by court recording, all formal contract requirements are automatically fulfilled under paragraph 127a German Civil Code (e.g., for property transfers or the transfer of company shares). Additionally, this method concludes the pending court case without the need for a cost-incurring withdrawal of the lawsuit.

2.6.5. Arbitral award with agreed terms

The parties also have the option of initially reaching a provisional agreement, then concluding an arbitration agreement and appointing the mediator as an arbitrator. The arbitrator will then issue the settlement as an arbitral award with agreed terms (paragraph 1053 section 1 sentence 1 and section 2 German Code of Civil Procedure).[49] The necessary transition to an arbitration procedure can already be decided in the mediation agreement between the parties, in case they reach a settlement. The advantage of an arbitral award with agreed terms is that it is practically enforceable worldwide under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. However, there are also pitfalls: paragraph 1053 German Code of Civil Procedure requires that the settlement be reached "during" an arbitration proceeding and that the procedural rules for fair proceedings, as outlined in paragraphs 1025 et seq. German Code of Civil Procedure, are followed.

---

[46] Ibidem, p. 240.

[47] BaySchlG: Bayerisches Gesetz zur obligatorischen außergerichtlichen Streitschlichtung in Zivilsachen (Bayerisches Schlichtungsgesetz), https://www.gesetze-bayern.de/Content/Document/BaySchlG (accessed: 21 VIII 2024).

[48] A. Hacke, *Die Abschlussvereinbarung…*, p. 239.

[49] Ibidem, p. 242.

There is a risk that an enforcement court might not consider the arbitral award with the agreed terms resulting from a mediation as enforceable.

If the mediation fails and no agreement is reached, it is the lawyer's task to advise the client on how to proceed. Further bilateral negotiations based on the interim results may be considered.

3. The lawyer as mediator

3.1. Requirements

Unlike the scenarios outlined in sections 1 and 2, where the lawyer, in their legal role, accompanies their clients to avoid conflict and facilitate dispute resolution, especially mediation, this section deals with situations where the lawyer acts directly as a mediator (Ger. *Anwaltsmediator*). A lawyer who is admitted to the bar and also wishes to act as a mediator must comply with the provisions of paragraph 7a of the Rules of Professional Practice[50]: "A lawyer who refers to themselves as a mediator must meet the requirements of paragraph 5 section 1 of the Mediation Act with regard to education, training, theoretical knowledge, and practical experience."

This required training may – but does not have to – include certification as a certified mediator, which is specifically regulated in terms of hours, content, and continuing education in the Training Ordinance for Certified Mediators (Ausbildungsverordnung für Zertifizierte Mediatoren).[51]

Parties who approach a "lawyer-mediator" (Ger. *Anwaltsmediator*) might do so with the assumption that they will receive both procedural guidance and legal advice. However, this assumption is incorrect, as the role of a mediator is characterized, among other things, by the fact that they do not offer solutions or provide legal advice. Therefore, a mediator whose primary profession is law will inform the parties of this at the beginning of the process and ideally agree with them that, before finalizing any agreement, they should have it reviewed by a legal professional, such as a (party) lawyer (cf. paragraph 2 section 6 Mediation Act).

[50] M. Bauckmann, *Anwaltliches Berufsrecht und Mediation*, in: *Praxishandbuch professionelle Mediation*, op. cit., p. 158.

[51] Zertifizierte-Mediatoren-Ausbildungsverordnung of 21 VIII 2016 (BGBl. I S. 1994), last amended by Artikel 1 der Verordnung of 11 VII 2023 (BGBl 2023 I Nr. 185).

3.2. Acceptance of a mandate

When a lawyer is sought out or proposed as a mediator, legal professional regulations and mediation law intersect. Accordingly, activity restrictions can arise from both mediation law and professional legal regulations. An absolute prohibition applies to anyone who has previously acted for a party in the same matter before the mediation. Moreover, the mediator may not act for a party in the same matter during or after the mediation (cf. paragraph 3 section 2 Mediation Act). Additionally, the lawyer-mediator is professionally prohibited from representing conflicting interests, as stipulated in paragraph 356 of the German Criminal Code (Strafgesetzbuch, StGB), paragraphs 43 section 4, 45 of the Federal Code for Lawyers (Bundesrechtsanwaltsordnung, BRAO), and paragraph 3 of the Rules of Professional Practice. This means that the lawyer may not act if they, in any capacity, advise, represent, or have already advised or represented another party in the same legal matter with conflicting interests, or have otherwise been professionally involved in that matter.

This prohibition extends to all professional activities of the lawyer, including advisory, conciliatory, mediative, or legal drafting roles. Therefore, the risk of violating these regulations already exists when a lawyer is approached by a client with the intention of hiring them as legal counsel for a specific case. Only if the lawyer informs the client right at the start of the conversation about the various conflict resolution options in general terms does the possibility remain of considering mediation without breaching the above-mentioned regulations. In the case of a more detailed initial consultation, which addresses not only the chances of success in court but also alternative out-of-court solutions, such as mediation, the lawyer would then only be able to accompany the client in an alternative dispute resolution procedure.

3.3. General activity

The lawyer-mediator is bound by confidentiality, as stipulated by paragraph 4 sentences 1 and 2 of the Mediation Act, as well as by the professional legal regulations of paragraph 203 section 1 number 3 of the German Criminal Code and paragraph 43a section 2 of the Federal Code for Lawyers. The professional confidentiality obligation is

comprehensive and, unlike the confidentiality obligation of the Mediation Act, does not have exceptions. The relevant facts for confidentiality must become known in the course of professional activity.[52]

As long as the lawyer-mediator limits their role to guiding the parties through the mediation process and refrains from developing solutions or providing legal advice, there is little risk of liability.[53] However, if the lawyer-mediator takes on the classic role of legal advisor, they become subject to the liability provisions of the Act on Out-of-Court Legal Services (Rechtsdienstleistungsgesetz, RDG).[54] In this case, the lawyer assumes legal responsibility for the outcome of the negotiation, instead of strongly recommending, as per paragraph 2 section 6 sentence 2 Mediation Act, that the parties have the final agreement reviewed by legal counsel before signing it.

3.4. Collaborative practice

Lawyers trained as mediators have access to another form of alternative dispute resolution beyond those previously discussed, known as "Collaborative Practice (CP)" or "collaborative law."[55] In this process, lawyers work together with their clients to reach a mutual resolution of the disputed issues.[56]

In a contractual agreement, known as a participation agreement, the parties agree to this process, commit to the disclosure of all relevant facts, agree on confidentiality and secrecy, and waive the right to pursue litigation. Additionally, they agree to a disqualification clause, which stipulates that if the process fails, the respective lawyers will no longer be available for court proceedings.

Following preparatory individual meetings between each party and their lawyer, joint four-way meetings take place, modelled on the phases of mediation, with the aim of resolving the conflict. If necessary, experts

---

[52] S. Kracht, *Die Verschwiegenheit des Mediators*, in: *Praxishandbuch professionelle Mediation*, op. cit., p. 95.

[53] R. Ponschab, *Der Anwaltsmediator*, in: *Praxishandbuch professionelle Mediation*, op. cit., p. 832.

[54] See https://www.gesetze-im-internet.de/englisch_rdg/index.html (accessed: 21 VIII 2024).

[55] B. Schneider-Koslowski, *Cooperative Praxis – CP*, in: *Handbuch Mediationsrecht*, op. cit., p. 1069.

[56] M. Daube, *Cooperative Praxis*, "Die Mediation" 2023, p. 71.

(e.g., tax advisors, psychologists) can be brought into the process. After the four-way meetings, the lawyers draft the agreement into a contractual form, usually a settlement proposal, which can be enforced – if desired – either through notarization (paragraph 794 section 1 number 5 German Code of Civil Procedure) or as a lawyer's settlement (paragraph 794 section 1 number 4b in conjunction with paragraphs 796a to 796c German Code of Civil Procedure).

The indication criteria for a CP process are similar to those of a mediation process. CP may be preferable in individual cases when at least one party feels the need for stronger support from their own lawyer, when special psychological support is indicated for at least one party on the emotional side, when complex factual, legal, or financial issues are involved but there is still an explicit desire for fair and out-of-court conflict resolution, when there is a (dominant) power imbalance between the conflicting parties that mediation can hardly compensate for, or when at least one of the parties feels particularly insecure in articulating their own interests or desires and believes that the other party can express and assert themselves much better, or for any other reason feels unable to adequately advocate for themselves, or believes they cannot do so.

The advantages of the CP process, especially for lawyers, are clear: CP integrates the experiences and insights of mediation as a learned method. Lawyers do not have to abandon their role as advocates for their clients' interests, even though they must adopt a new understanding of their role. If an out-of-court conflict resolution model is appropriate and desired, a party lawyer who is also a mediator does not need to transfer the process leadership to an external mediator, but can continue to accompany their client. Overall, this allows the lawyer to act as a flexible advisor and practical conflict manager, which can be seen as a competitive advantage.

Conclusion

Active conflict management by the appointed lawyer means moving away from adversarial thinking and shifting toward interest-based client counselling. Starting with a conflict analysis and an exploration of the interests underlying the client's expressed concerns, the question arises as to alternatives to litigation. In this process, the lawyer will regularly accompany and support the client in out-of-court conflict resolution

procedures. If the lawyer is also a trained mediator, they may, with the consent of the client and the opposing party, act as a neutral third party, for example, in a mediation procedure. However, this assumes that the initial consultation has not yet involved a substantive engagement with the subject matter of the dispute. Even in such cases, collaborative practice offers an effective alternative dispute resolution process. This approach consistently provides added value for the client being advised, as it opens up the possibility of realizing their interests as comprehensively as possible.

BIBLIOGRAPHY

Bauckmann M., *Anwaltliches Berufsrecht und Mediation*, in: *Praxishandbuch professionelle Mediation*, eds. S. Kracht, A. Niedostadek, P. Sensburg, Berlin 2023, pp. 155–164.

Daube M., *Cooperative Praxis*, "Die Mediation" 2023, pp. 71–73.

Duve C., Eidenmüller H., Hacke A., Fries M., *Mediation in der Wirtschaft*, 3rd ed., Köln 2019.

Erdmann G., *Anwaltliche Vergleichsvermittlung*, in: *Handbuch Mediationsrecht*, eds. R. Fritz, D. Pielsticker, 3rd ed., Hürth 2024, pp. 1064–1068.

Friedrichsmeier H., Hammann H., *Der Rechtsanwalt als Mediator*, in: *Handbuch Mediation*, eds. F. Haft, K. von Schlieffen, 3rd ed., München 2016, pp. 1123–1140.

Fritz R., *Besondere Formen: Shuttle-Mediation*, in: *Handbuch Mediationsrecht*, eds. R. Fritz, D. Pielsticker, 3rd ed., Hürth 2024, pp. 817–824.

Fritz R., *Einführung in die Mediation im öffentlichen Bereich*, in: *Praxishandbuch professionelle Mediation*, eds. S. Kracht, A. Niedostadek, P. Sensburg, Berlin 2023, pp. 733–738.

Fritz R., *Kommentierung § 278 ZPO*, in: *Handbuch Mediationsrecht*, eds. R. Fritz, D. Pielsticker, 3rd ed., Hürth 2024, pp. 267–294.

Fritz R., *Mediation*, in: *Verwaltungsrecht*, eds. L. Eiding, J. Hofmann-Hoeppel, 3rd ed., Baden-Baden 2022, pp. 309–336.

Fritz R., *Zusammenfassende Darstellung alternativer Konfliktbeilegungsmethoden im Überblick*, in: *Handbuch Mediationsrecht*, eds. R. Fritz, D. Pielsticker, 3rd ed., Hürth 2024, pp. 931–945.

Fritz R., Etscheit N., *Bedeutung und Methodik der Mediation*, in: *Handbuch Mediationsrecht*, eds. R. Fritz, D. Pielsticker, 3rd ed., Hürth 2024, pp. 734–766.

Greger R., *Kommentierung § 2 MediationsG*, in: *Recht der alternativen Konfliktlöösung*, eds. R. Greger, H. Unberath, F. Steffek, 2nd ed., München 2016, pp. 73–152.

Hacke A., *Die Abschlussvereinbarung*, in: *Mediationsrecht*, eds. H. Eidenmüller, G. Wagner, Köln 2015, pp. 198–246.

Hacke A., *Mediationsbegleitung durch Rechtsanwälte*, in: *Mediationsgesetz*, eds. J. Klowait, U. Gläßer, 2nd ed., Baden-Baden 2018, pp. 812–843.

Kracht S., *Die Verschwiegenheit des Mediators*, in: *Praxishandbuch professionelle Mediation*, eds. S. Kracht, A. Niedostadek, P. Sensburg, Berlin 2023, pp. 95–106.
Lapp T., *Außergerichtliche Streitbeilegung*, "Anwaltsblatt" 2024, no. 1, pp. 64–66.
Lefèvre J., *Eine explorative Untersuchung der anwaltlichen Beratungshilfe, Das Berufsbild des Rechtsanwalts und seine Pflicht aus § 49 a Abs. 1 BRAO als Instrument der Sicherung des gleichen Zugangs zum Recht in Recht und Praxis*, Berlin 2024.
Lembcke M., *Adjudikation*, in: *Handbuch Mediationsrecht*, eds. R. Fritz, D. Pielsticker, 3rd ed., Hürth 2024, pp. 1115–1127.
Lembcke M., *Schiedsgutachten*, in: *Handbuch Mediationsrecht*, eds. R. Fritz, D. Pielsticker, 3rd ed., Hürth 2024, pp. 1169–1196.
Lembcke M., *Schlichtung*, in: *Handbuch Mediationsrecht*, eds. R. Fritz, D. Pielsticker, 3rd ed., Hürth 2024, pp. 1105–1114.
Löggering M., *Schiedsgerichtsbarkeit*, in: *Handbuch Mediationsrecht*, eds. R. Fritz, D. Pielsticker, 3rd ed., Hürth 2024, pp. 1128–1168.
Mattioli M., *Mediation in der anwaltlichen Praxis*, Frankfurt am Main 2012.
May A., *§ 13 Andere Verfahren einvernehmlicher Konfliktlösung*, in: *Mediation in der Praxis des Anwalts*, eds. F. Schmidt, T. Lapp, A. May, 2nd ed., München 2022, pp. 353–358.
May A., *§ 16 Schiedsverfahren*, in: *Mediation in der Praxis des Anwalts*, eds. F. Schmidt, T. Lapp, A. May, 2nd ed., München 2022, pp. 373–376.
Pielsticker D., *Kommentierung § 2 MediationsG*, in: *Handbuch Mediationsrecht*, eds. R. Fritz, D. Pielsticker, 3rd ed., Hürth 2024, pp. 70–139.
Ponschab R., *Der Anwaltsmediator*, in: *Praxishandbuch professionelle Mediation*, eds. S. Kracht, A. Niedostadek, P. Sensburg, Berlin 2023, pp. 817–834.
Risse J., *Wirtschaftsmediation*, 2nd ed., München 2022.
Schneider-Koslowski B., *Cooperative Praxis – CP*, in: *Handbuch Mediationsrecht*, eds. R. Fritz, D. Pielsticker, 3rd ed., Hürth 2024, pp. 1069–1104.
Schömig T., *Prozessrisikoanalyse*, in: *Praxishandbuch Güterichterverfahren*, ed. F. Schreiber, Norderstedt 2022, pp. 131–142.
Schroeder H.-P., *Anwendungsbereiche der Mediation: Zivilrecht, Anwendungsbereiche der Mediation: Öffentliches Recht*, in: *Handbuch Mediationsrecht*, eds. R. Fritz, D. Pielsticker, 3rd ed., Hürth 2024, pp. 869–924.
Schroeder H.-P., Lerch M.P., *Interessengerechtes anwaltliches Konfliktmanagement für Unternehmen*, "ZIP" 2024, vol. 45, no. 25–26, pp. 1428–1437.

STUDIA PRAWA PUBLICZNEGO
2025 • NR 1 (49) ISSN 2300-3936
https://doi.org/10.14746/spp.2025.1.49.2

Olaf Meyer*, Priscila Luz Barreiros**

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

* Frankfurt University of Applied Sciences, Germany | Uniwersytet Nauk Stosowanych we Frankfurcie, Niemcy, https://orcid.org/0000-0002-9759-6634, e-mail: olaf.meyer@fb3.fra-uas.de.

** Frankfurt University of Applied Sciences, Germany | Uniwersytet Nauk Stosowanych we Frankfurcie, Niemcy, https://orcid.org/0009-0000-6556-6791, e-mail: priscila.luz-barreiros@fb3.fra-uas.de.

SPP 1(49), 2025: 31–47.

Introduction

Compared to some other EU countries,[1] 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.[2] 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[3] and then the Smartlaw decision, in particular.[4]

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,[5] the question

[1] 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.

[2] 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.

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

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

[5] 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)[6]

The Act on Out-of-Court Legal Services, also known as the "Legal Services Act," came into force on July 1, 2008.[7] It replaced the older Legal Advice Act (Rechtsberatungsgesetz, RBerG), which dated back to 1935. The RDG regulates the authorization to provide extrajudicial legal services.[8] 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.[9] 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[10] with regard to the provision of comprehensive legal advice and representation

---

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.

[6] An English translation is available at http://www.gesetze-im-internet.de/englisch_rdg/index.html.

[7] BGBl. 2007 I No. 63, p. 2840.

[8] 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.

[9] Section 1 (1) p. 2 RDG; BT-Drucks. 16/3655, p. 45.

[10] 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[11]; other professions may provide legal services under limited forms at most.[12]

The scope of application of the RDG extends to all legal services whose subject matter is German law,[13] regardless of whether the legal service provider is temporarily or permanently located in Germany or abroad.[14] 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.[15]

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.[16] It is irrelevant whether the activity is only carried out internally between the client and contractor or externally towards third parties,[17] as well as in which form the activity is performed (written or verbal).[18]

Furthermore, the activity must be performed by humans instead of a fully technological service without any human execution.[19] If a service

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

[11] Bundesrechtsanwaltsordnung (Federal Code for Lawyers).

[12] See below under 2.2.

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

[14] M. Krenzler, F.R. Remmertz, *Rechtsdienstleistungsgesetz*, 3rd ed., Baden-Baden 2023, Section 1 RDG, marg. no. 89.

[15] C. Deckenbrock, M. Henssler, op. cit., Section 1 RDG, marg. no. 47b; Section 15 RDG must be observed here.

[16] M. Krenzler, F.R. Remmertz, 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.

[17] 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.

[18] C. Deckenbrock, M. Henssler, op. cit., Section 2 RDG, marg. no. 18.

[19] 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.[20]

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.[21] 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.[22]

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.[23] 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.[24]

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.[25] This can be stipulated either in an objective way, according to a relevant

[20] BT-Drucks. 16/3655, pp. 47, 48; M. Krenzler, F.R. Remmertz, op. cit., Section 2 RDG, marg. no. 16.

[21] 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. Remmertz, op. cit., Section 2 RDG, marg. no. 65; C. Deckenbrock, M. Henssler, op. cit., Section 2 RDG, marg. no. 22.

[22] 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. Remmertz, op. cit., Section 1 RDG, marg. no. 65; C. Deckenbrock, M. Henssler, op. cit., Section 2 RDG, marg. no. 22.

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

[24] Ibidem.

[25] 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.[26] 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.[27] 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.[28]

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.[29] Other professional groups such as in-house lawyers,[30] patent attorneys,[31] tax advisors,[32] auditors[33] and notaries[34] may also provide legal services, subject to certain restrictions.[35]

---

[26] 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.

[27] 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.

[28] Ibidem.

[29] Section 3 (1) BRAO; Section 59k BRAO.

[30] 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.

[31] Section 3 PatAnwO (Patent Attorney Regulations).

[32] Section 3 StBerG (Tax Consultancy Act).

[33] Section 2 (2) WPO (Act on a Professional Code of Conduct for Auditors).

[34] Section 1 BNotO (Federal Notarial Code).

[35] Detailed information on the professional groups can be found in M. Krenzler, F.R. Remmertz, 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.[36]

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[37] and Sections 3 and 4 RDG due to illegality.[38] 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.[39]

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

[36] See ibidem, Section 5 RDG.

[37] Bürgerliches Gesetzbuch (German Civil Code).

[38] 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.

[39] M. Krenzler, F.R. Remmertz, op. cit., Section 3 RDG, marg. no. 75.

UWG), hence competitors are entitled to injunctive relief.[40] 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.[41]

2. Smartlaw – case law

The Smartlaw case was heard by all three instances up to the BGH.[42] 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[43] 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

[40] Ibidem, Section 3 RDG, marg. no. 77, 78.

[41] Judgment of BGH of 9 IX 2021, I ZR 113/20, p. 8, "Neue Juristische Wochenschrift (NJW)" 2021, no. 42, pp. 3125–3129.

[42] Ibidem; C. Thole, *Admissibility of a digital offer – contract document generator*, "Neue Juristische Wochenschrift (NJW)" 2021, pp. 3125–3129.

[43] 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.[44] 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,[45] 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.

[44] Section 73 (1) S. 3 BRAO.

[45] 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

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.[46] 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.

[46] Judgment of Regional Court of Cologne of 8 X 2019, 33 O 35/19, marg. no. 54; M. Krenzler, F.R. Remmertz, op. cit., Section 1 RDG, marg. no. 19.

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

Both the Court of Appeal[47] and later the BGH[48] 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.[49]

Both courts stated that, based on previous decisions of the BGH[50] and taking into account the history of the RDG,[51] 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

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

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

[49] Ibidem, marg. no. 4–9.

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

[51] 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.[52] Fictitious and abstract cases should not be considered.[53] Standardized legal documents or ready-made text modules, such as those in the form of manuals, are not aimed at a specific factual situation.[54] 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[55] 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[56] 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

[52] Ibidem, p. 48.

[53] B. Grunewald, V. Römermann, op. cit., Section 2 RDG, marg. no. 26.

[54] F.R. Remmertz, *Legal-Tech - Legal assessment according to the RDG*, "BRAK-Mitteilungen" 2017, pp. 55–58.

[55] 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.

[56] 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.[57] 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.

[57] 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.[58] It is not clear whether this would provide better protection for those seeking legal services, the legal system and legal transactions. It is important

[58] 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.[59]

BIBLIOGRAPHY

Andreae Z., Ovalioglu A., *Legal Tech in Rechtsabteilungen*, "Zeitschrift für die digitale Rechtsanwendung (LTZ)" 2024, no. 3, pp. 242–243.

Brechmann B., *Legal Tech und das Anwaltsmonopol – Die Zulässigkeit von Rechtsdienstleistungen im nationalen, europäischen und internationalen Kontext*, Tübingen 2021.

Deckenbrock C., Henssler M., *Rechtsdienstleistungsgesetz*, 5th ed., München 2021.

Fries M., *Rechtsberatung durch Inkassodienstleister: Totenglöcklein für das Anwaltsmonopol?*, "Neue Juristische Wochenschrift (NJW)" 2020, no. 4, pp. 193–195.

Grunewald B., Römermann V., *Beck'scher Online-Kommentar RDG*, 30th ed., München 2024.

Hartung R., *Smartlaw, ChatGPT und das RDG*, "Recht Digital (RDi)" 2023, pp. 209–217.

Henning K., Lackmann F., Rein A., *Privatinsolvenz Handkommentar*, 2nd ed., Baden-Baden 2022.

Henssler M., *Die Zukunft des Rechtsberatungsgesetzes*, "Anwaltsblatt (AnwBl.)" 2001, vol. 51, pp. 525–533.

Hoch V.R.S., Hendricks J.D., *Das RDG und die Legal Tech-Debatte: Und wo bleibt das Unionsrecht?*, "Verbraucher und Recht (VuR)" 2020, no. 7, pp. 254–261.

Kilian M., *Digitaler Generator für Rechtsdokumente als Rechtsdienstleistung?*, "Deutsches Steuerrecht Entscheidungsdienst (DStRE)" 2020, pp. 1278–1280.

Krenzler M., *Der Rechtsdienstleistungsbegriff in Zeiten von Legal Tech*, "BRAK-Mitteilungen" 2020, pp. 119–123.

Krenzler M., Remmertz F.R., *Rechtsdienstleistungsgesetz*, 3rd ed., Baden-Baden 2023.

Mitsch W., *Karlsruher Kommentar zum Gesetz über Ordnungswidrigkeit*, 5th ed., München 2018.

[59] See R. Hartung, *Smartlaw, ChatGPT und das RDG*, "Recht Digital (RDi)" 2023, p. 209, marg. no. 21; see M. Krenzler, F.R. Remmertz, op. cit., Section 2 RDG, marg. no. 16, 17.

Overkamp S., Overkamp Y., in: *Bundesrechtsanwaltsordnung: BRAO*, eds. M. Henssler, H. Prütting, 6th ed., München 2024.

Quarch B., Neumann J., *Überblickaufsatz Legal Tech-Markt 2024*, "Zeitschrift für die digitale Rechtsanwendung (LTZ)" 2024, no. 2, pp. 131–136.

Remmertz F.R., *Legal-Tech – Rechtliche Beurteilung nach dem RDG*, "BRAK-Mitteilungen" 2017, pp. 55–61.

Rott P., Sein K., *Obstacles to Legal Tech Services: Examples from Germany and Estonia*, "Journal of European Consumer and Market Law (EuCML)" 2021, vol. 10, no. 3, pp. 101–108.

Thole C., *Zulässigkeit eines digitalen Angebots – Vertragsdokumentengenerator*, "Neue Juristische Wochenschrift (NJW)" 2021, pp. 3125–3129.

Wessels F., *Legal Tech als unzulässige Rechtsdienstleistung*, "Zeitschrift für IT-Recht und Recht der Digitalisierung (MMR)" 2020, pp. 56–60.

STUDIA PRAWA PUBLICZNEGO
2025 • NR 1 (49) ISSN 2300-3936
https://doi.org/10.14746/spp.2025.1.49.3

Christopher Rennig*

The Use of Artificial Intelligence and the Professional Duties of German Lawyers

Abstract. The rapid progress in the field of artificial intelligence, which is particularly evident to the public in the form of the emergence of large language models (LLMs) like ChatGPT, now allows the technology to be used in the field of legal services. Consequently, a growing number of lawyers are using AI to assist with legal research or drafting legal documents. This is associated with a wide range of legal issues, ranging from the regulation of legal service providers and the contractual duties of lawyers vis-à-vis their clients to the professional duties of lawyers that derive from professional codes governing the legal profession. This article shows that the professional duties of German lawyers may be affected when AI is used. After providing the reader with a general overview of the legal challenges associated with AI use by lawyers, as well as the development and current state of the legal landscape imposing German lawyers with professional duties, the article concentrates on the duty to remain independent, confidentiality obligations, in addition to the general duty to act faithfully. It also gives an overview of possible sanctions in cases of non-compliance with professional duties. By summarizing the findings, the article emphasizes remaining legal uncertainties, advising German lawyers to exercise caution when turning to AI for assistance.

Keywords: artificial intelligence (AI) – large language models – legal profession – lawyer – professional duties

Introduction

We live in the times of artificial intelligence's (AI) ascent – a technology that is believed to possess revolutionary potential for the way humanity works. As a recent study by *Goldman Sachs* estimates that

* University of Marburg, Germany | Uniwersytet w Marburgu, Niemcy, https://orcid.org/0000-0001-8009-5238, e-mail: christopher.rennig@jura.uni-marburg.de.

SPP 1(49), 2025: 49–63.

44% of legal tasks may be subject to future automation,[1] this also includes the legal profession. However, the anticipated displacement of humans in providing legal services has yet to materialise. At the moment, most pioneering efforts appear to be suffering from typical teething problems: for example, the attempt to establish the "world's first robot lawyer" in the US through the use of AI has proved rather unsuccessful, as it has recently resulted in the Federal Trade Commission (FTC) bringing charges against the company running the AI-based legal service due to its output not being reviewed by humans.[2] While widespread AI replacement of humans in the field of legal services does not seem imminent, it is already a reality that lawyers use AI, especially generative AI (gAI), which forms the basis of large language models (LLMs) like *ChatGPT*, to assist with their legal work: using legal chatbots to communicate with clients, prepare legal documents or do legal research with AI. In fact, according to a survey conducted in January 2023, 36% of US lawyers already use this type of technology in their profession.[3]

As both the market for legal services and the legal profession itself are thoroughly regulated, it is not surprising that the use of AI by lawyers leads to legal questions. According to the German "Rechtsdienstleistungsgesetz" (RDG), the provision of out-of-court legal services is restricted to qualified persons, especially lawyers. As the law aims to protect both law-seeking individuals and the legal system from unqualified legal services,[4] there is obvious potential for conflict when AI is used to autonomously provide legal services or to support human providers of such services, as seen with the example of the "world's

[1] J. Briggs, D. Kodani, *The Potentially Large Effects of Artificial Intelligence on Economic Growth*, "Goldman Sachs Economics Research", 26 III 2023, p. 6, https://www.key4biz.it/wp-content/uploads/2023/03/Global-Economics-Analyst_-The-Potentially-Large-Effects-of-Artificial-Intelligence-on-Economic-Growth-Briggs_Kodnani.pdf (accessed: 3 X 2024).

[2] See *DoNotPay*, FTC, 25 IX 2024, https://www.ftc.gov/legal-library/browse/cases-proceedings/donotpay (accessed: 3 X 2024). The FTC and "DoNotPay" ultimately settled the charges. The settlement obliges "DoNotPay" to pay $193.000 and to give a notice to customers who used the companies' service warning them about the limitations of the law-related features on the service.

[3] LexisNexis, *Generative AI & the Legal Profession (2023 Survey Report)*, p. 5, https://www.lexisnexis.com/pdf/ln_generative_ai_report.pdf?srsltid=AfmBOopLsEdm0ZoUA5yXeX-1Y7WvSD4UHrIt2PAoEoYFeZjqmOAl8m78C (accessed: 22 X 2024).

[4] M. Krenzler, F. Remmertz, in: *Rechtsdienstleistungsgesetz*, eds. M. Krenzler, F. Remmertz, 3rd ed., Baden-Baden 2024, section 1, recitals 71 et seq.

first robot lawyer."[5] Additionally, the recently adopted AI Act[6] of the European Union uses a risk-based approach to AI that raises questions concerning the harmonisation with sector-specific regulation, e.g. the rules governing the provision of legal services.[7] Using AI might have implications for the contractual duties of lawyers vis-à-vis their clients that also derive from private law. Consequently, the scope of such duties influences the potential contractual or tort liability of lawyers when the use of AI has unintended consequences.[8] One such instance is the rather prominent case of a court document filed by a New York-based lawyer, which contained several references to precedents that in reality did not exist: it transpired that *ChatGPT* had invented (or rather, in technical terms, 'hallucinated'[9]) them while assisting the lawyer in drafting the document.[10]

---

[5] M. Ebers, *Erbringung von Rechtsdienstleistungen durch LLMs*, in: *Rechtshandbuch ChatGPT*, eds. M. Ebers, B. Quarch, Baden-Baden 2024, chapter 13, recitals 39 et seq.; M. Hartung, *Smartlaw, ChatGPT und das RDG*, "Recht Digital" 2023, p. 211 et seq.; F. Remmertz, *Rechtsdienstleistungen durch Large Language Models (LLMs)*, "Recht Digital" 2023, p. 401. Similar potential for conflict exists if LLMs are used in a medical context, see S. Vorberg, F. Gottberg, *ChatGPT als Medizinprodukt*, "Recht Digital" 2023, p. 159.

[6] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 VI 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No. 300/2008, (EU) No. 167/2013, (EU) No. 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act).

[7] For the relationship of the AI Act with the regulation of legal services, see specifically M. Hartung, *AI-Act für die Anwaltschaft?*, "beck-aktuell," 30 IX 2024, https://rsw.beck.de/aktuell/daily/magazin/detail/kolumne-njw-2024-40-ai-act-fuer-die-anwaltschaft?bifo=port (accessed: 3 X 2024); F. Remmertz, *Legal Tech-Update im anwaltlichen Berufsrecht und im RDG*, "Legal Tech Zeitschrift" 2024, p. 99 et seq.

[8] See, for example, D. Schnabl, *ChatGPT im Lichte der Anwaltshaftung*, "Recht Digital" 2025, p. 8 et seq.; D. Michel, *Haftung für Fehler autonomer Systeme in den Freien Berufen*, in: *Arbeit, Wirtschaft, Recht: Festschrift für Martin Henssler zum 70. Geburtstag*, eds. C. Deckenbrock et al., München 2023, p. 1461.

[9] According to a recent study, the hallucination rate of the most widely used AI-driven legal research tools lies between 17% and 33%, see V. Magesh et al., *Hallucination-Free? Assessing the Reliability of Leading AI Legal Research Tools*, preprint 2024, https://dho.stanford.edu/wp-content/uploads/Legal_RAG_Hallucinations.pdf (accessed: 24 X 2024). Another study that focused on general LLMs found that such models hallucinate at least 58% of the time when being prompted with legal tasks, see M. Dahl et al., *Large Legal Fictions: Profiling Legal Hallucinations in Large Language Models*, "Journal of Legal Analysis" 2024, no. 16, p. 64.

[10] See B. Weiser, *Here's What Happens When Your Lawyer Uses ChatGPT*, "New York Times," 27 V 2023, https://www.nytimes.com/2023/05/27/nyregion/avianca-airline-lawsuit-chatgpt.html (accessed: 3 X 2024).

While the above-mentioned areas will require further research, this article focuses on the professional duties of lawyers when using AI, because the lawyer profession is defined by these duties. This seems to be a rather topical issue,[11] as regulatory bodies that are tasked with implementing professional conduct rules increasingly seem to notice the challenges deriving from AI used by lawyers. For example, in July 2024, the "American Bar Association" (ABA) issued a formal opinion that contained substantiations of the rules for professional conduct laid down in the "ABA Model Rules of Professional Conduct,"[12] when lawyers use gAI for providing legal services for their clients.[13] Before analysing specific professional duties, the ABA formulates several questions resulting from the meeting of AI use and rules regarding the professional conduct of lawyers:

> What level of competency should lawyers acquire regarding a gAI tool? How can lawyers satisfy their duty of confidentiality when using a gAI tool that requires input of information relating to a representation? When must lawyers disclose their use of a gAI tool to clients? What level of review of a gAI tool's process or output is necessary? What constitutes a reasonable fee or expense when lawyers use a gAI tool to provide legal services to clients?[14]

As these questions pertain to issues regarding the competent provision of legal services as well as the relationship between lawyer and client, they affect core components of lawyering. There are several guidelines of this nature, albeit legally non-binding,[15] and mainly operating in the US, though increasingly in the European Union, which aim at enabling lawyers to act according to professional duties.[16] Since

---

[11] The clash between AI and lawyers' professional law is also discussed in a recent podcast by the German Bar Association ("Deutscher Anwaltsverein"), which was published on 22 X 2024, and is available in German at: https://zurechtgehoert.podigee.io/34-new-episode (accessed: 24 X 2024).

[12] Available at: https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/ (accessed: 3 X 2024).

[13] *Formal Opinion 512 – Generative Artificial Intelligence Tools*, American Bar Association, 29 VII 2024, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-512.pdf (accessed: 24 X 2024).

[14] Ibidem, p. 2.

[15] B. Quarch, S. Thomas, *Regelung der Nutzung intelligenter Sprachmodelle*, "Legal Tech Zeitschrift" 2024, p. 245.

[16] See, for example, the Council of Bars and Law Societies of Europe, Guide on the use of Artificial Intelligence-based tools by lawyers and law firms in the EU, 2022, https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/IT_LAW/ITL_Reports_studies/EN_ITL_20220331_Guide-AI4L.pdf (accessed 21 X 2024); see for further examples M. Ebers, op. cit., recital 70; B. Quarch, S. Thomas, op. cit., p. 245 et seq.

AI systems are widely available, such challenges are not limited to the work of lawyers in the US, but also pertain to lawyers in other countries, for example, Germany. After a brief overview of possible ways to use AI for legal task assistance (section 1), the analysis of specific professional duties of German lawyers amid the use of AI forms the core of this article (section 2), which concludes with a brief look at the potential future developments.

1. AI use for legal tasks

The provision of legal services is a language-based profession, and gAI models like LLMs are increasingly deployed by lawyers to assist them with legal tasks. Regarding the use of such systems for legal purposes, the literature distinguishes two types of LLMs: general LLMs – prominent examples being *ChatGPT* or *Copilot* – and specialised legal software that uses LLMs trained on legal data (so-called Legal AI), examples being services like *Harvey* or *Lexion*.[17] The landscape for Legal AI is currently developing, as early 2024 saw the release of *Noxtua*, which is described as "Europe's first sovereign Legal AI."[18] (g)AI systems can be used for several tasks that are typical of legal work, for example, analysing the facts of the case or for legal research,[19] drafting legal texts such as pleas or contract templates,[20] or developing speech-to-text-tools or legal chatbots.[21] Because tasks of this nature need to be performed not only by lawyers but the entire legal profession, it is natural that lawyers are not the only ones that can use AI. A recent study authored by the German law firm *Noerr* investigates AI use in the legal departments of private companies and shows that a quarter of the companies interviewed already use AI technology.[22] Legal protection insurance companies have started to deploy AI as well.[23]

[17] M. Ebers, op. cit., recital 10.

[18] See https://xayn.com (accessed: 21 X 2024).

[19] M. Ebers, op. cit., recital 12 et seq.; D. Schwarcz, J. Choi, *AI Tools for Laywers*, "Minnesota Law Review Headlines" 2023, vol. 108, p. 8 et seq.

[20] M. Ebers, op. cit., recital 16 et seq.; D. Schwarcz, J. Choi, op. cit., p. 20 et seq.

[21] M. Ebers, op. cit., recital 18 et seq.

[22] *KI in der Rechtsabteilung – Use Cases und KI-spezifische Rechtsfragen*, Noerr, August 2024, https://www.noerr.com/de/-/media/files/web/studien/240905_noerr_ki_studie.pdf?rev=b6834b5d4523440b825fddca4bdab252&hash=6CF92B2B6D23760935DE7794536ED3DE (accessed: 11 X 2024).

[23] See D. Wendt, *Rechtsschutzversicherung und Legal Tech (AI Systems)*, "Legal Tech Zeitschrift" 2024, p. 110.

2. Lawyers' use of AI and the German professional code for lawyers

2.1. A short introduction to the German professional code for lawyers

As legislation concerning professional duties of lawyers is not heavily influenced by European Union law, the form of its codification and content mainly lies within the jurisdiction of national states. In Germany, the professional code for lawyers is codified in the federal law governing the legal profession in the "Bundesrechtsanwaltsordnung" (BRAO). The BRAO is a formal act and contains provisions concerning the admission of lawyers (sections 4 to 17 of the BRAO), their professional duties (sections 43 to 59a of the BRAO), federal and regional bar associations (sections 60 to 89 of the BRAO), and also the implementation of and procedural rules for lawyer courts that are responsible for litigating violations of professional duties (sections 116 to 211 of the BRAO). As this article focuses on the professional duties of lawyers, it is necessary to mention the professional rules and regulations for lawyers ("Berufsordnung für Rechtsanwälte," BORA, not to be confused with the aforementioned BRAO). These stipulate some of the duties laid down in the BRAO and are issued in the form of by-laws by the federal bar chamber ("Bundesrechtsanwaltskammer," BRAK), based on the authority given to it by section 59b of the BRAO. It should be noted that the BRAK may utilise this authority to issue further substantiations of lawyers' professional duties in the future, especially regarding the use of AI. However, at the time of writing, no such update of the BORA is imminent.[24]

2.2. Professional duties of German lawyers and the use of AI

In the following section, several professional duties that could be affected by using AI will be analysed. The rationale behind the professional duties of the BRAO was originally based on the idea of an individual lawyer. Pursuant to section 59e (1) of the BRAO, the professional duties

[24] While the responsible committee of the BRAK at the time of writing did not see the need for update the BORA, discussions will be continued in the future, reports F. Remmertz, *Legal Tech-Update*…, p. 99.

that will be discussed in the following equally apply to law firms ("Berufsausübungsgesellschaften"). Based on risk evaluation, law firms must take appropriate steps to prevent and detect any violations of professional duties, for example, by training lawyers (section 59e (2) of the BRAO, section 31 (1), (2) of the BORA). The use of new technologies like AI can be qualified by law firms to come with the risk of violating professional duties.[25] Professional duties must also be observed by in-house lawyers working in the legal departments of private companies ("Syndikusrechtsanwälte"), as they are subject to regulations concerning lawyers, according to section 46c of the BRAO.

Section 43 of the BRAO contains a general duty to act in a faithful manner, while subsequent provisions contain more specific duties. Section 43a of the BRAO contains, for example, the duty to remain independent, to treat client information confidentially and to act objectively, in addition to rules for dealing with conflict of interest. The coexistence of a 'general duty' and 'more specific duties' is the result of the German legislators' reaction to a ruling by the German Federal Constitutional Court ("Bundesverfassungsgericht," BVerfG) from 1987. In the so-called "Bastille decisions,"[26] the court considered the concretisation of the general duty to act faithfully through guidelines issued by the Federal Bar Association as unconstitutional infringing on the freedom of profession (article 12 of the German constitution, "Grundgesetz").[27] The German legislator had to react to this ruling by introducing more specific professional duties, which have been enacted as formal law in 1994. Because of this, it is uncertain whether section 43 of the BRAO possesses a stand-alone meaning. Considering this, the following analysis begins with the more specific professional duties which can without question be applied on their own. Particularly in the context of the use of information technology (IT), it is important to note that professional duties follow the principle of "technology neutrality."[28] This means that while there are, with few exceptions, no duties directly concerning the use of IT in general or AI in specific, they still apply of the type of technology used by the lawyer.

---

[25] F. Remmertz, *Rechtsanwalt, Berufsrecht*, in: *Legal Tech: Recht, Geschäftsmodelle, Technik: alphabetische* Gesamtdarstellung, ed. M. Ebers, Baden-Baden 2024, recital 6.

[26] BVerfG "Neue Juristische Wochenschrift" 1988, p. 191; BVerfG "Neue Juristische Wochenschrift" 1988, p. 194.

[27] See also M. Bauckmann, in: *Bundesrechtsanwaltsordnung*, ed. D. Weyland, 11th ed., München 2024, section 43 of the BRAO, recital 7 et seq.

[28] F. Remmertz, *Rechtsanwalt*…, recital 59.

2.2.1. Duty to remain independent, section 43a (1) of the BRAO

The professional code is based on the idea of the lawyer as an "independent body of the administration of justice" (section 1 (1) of the BRAO). The independence of lawyers is one of the profession's key features, as can be seen in section 43a (1) of the BRAO, which prohibits lawyers from entering into any commitments that could compromise their professional independence. The overarching concept of lawyers' independence includes several aspects, ranging from a lawyer's independence from state, society and clients as well as financial independence.[29]

Before even considering the use of AI systems as a potential 'commitment' precluding a lawyer's independence, the sheer existence of a commitment within the meaning of section 43a (1) of the BRAO is already questionable, based on the described uses of (g)AI in mind.[30] This is because AI merely serves as an auxiliary device, while the lawyer still bears the responsibility for the service provided. Even before the digital age, lawyers used analogue handbooks containing contract templates in the drafting process: since this does not preclude independence, there is no convincing reason why using AI cannot be dealt with in a similar manner.[31]

2.2.2. Confidentiality obligation, section 43a (2) of the BRAO

As confidentiality is a major component of the relationship between lawyers and their clients, it may seem intuitive that, in principle, lawyers are not allowed to disclose any information about their clients to human parties that stand outside of the lawyer-client-relationship. The use of AI may challenge this intuition, as interpersonal exchanges are replaced with interaction between human and machine. Moreover, to individualise desired outputs and increase the degree to which AI simplifies legal work, lawyers might be tempted to enrich AI prompts[32] by using information that directly or indirectly relates to their client.

---

[29] M. Bauckmann, op. cit., section 43a of the BRAO, recital 4.

[30] M.S. Haase, H. Heiss, *Der Einsatz von künstlicher Intelligenz im Rechtsanwaltsberuf*, "Zeitschrift für Innovations- und Technikrecht" 2023, p. 165.

[31] Ibidem.

[32] Prompts can be information, sentences, or questions that you enter into a gAI tool, see, *Getting started with prompts for text-based Generative AI tools*, Harvard University

Such a use of AI may constitute a violation of a lawyer's professional duty to treat client information as confidential. In order to clarify the US model rules for professional conduct, the ABA's formal opinion has already stated that lawyers are obliged to "keep confidential all information relating to the representation of a client, regardless of its source, unless the client gives informed consent, disclosure is impliedly authorised to carry out the representation, or disclosure is permitted by an exception."[33] In Germany, this is regulated in a similar manner as section 43a (2) of the BRAO contains an equivalent obligation concerning professional confidentiality. Its material scope covers any information – regardless of its source – that lawyers obtain during the provision of their services, while its temporal applicability begins with the initiation phase of the relationship with a client (e.g. first contact) and is binding even beyond the end of the relationship.[34] Section 2 (2) sentence 1 of the BORA clarifies the requirements for lawyers to uphold the confidentiality obligation of the BRAO when using IT: Lawyers have to take organisational and technical measures appropriate to the risk to safeguard client confidentiality. The measures must be within reason to their legal profession at the same time, which means that they must be implemented based on an assessment of possible risks to the lawyer's practice and clients and at an appropriate cost. As technical measures are deemed sufficient if they conform to the requirements of personal data protection law (section 2 (2) sentence 2 of the BORA), there is a link between the confidentiality obligation and data protection law.[35]

Regarding the use of (g)AI by lawyers, there is a clear distinction to be made: if the AI systems used by lawyers necessitate the transfer of client information to third parties because they are stored on an external server that is not solely controlled by the lawyer or the law firm, entering such information directly or indirectly relating to clients constitutes a violation of the confidentiality obligation as well as the data protection law.[36] There is an additional risk of the system using client-related information for training to generate new output in another context, especially with

Information Technology, 30 VIII 2023, https://huit.harvard.edu/news/ai-prompts (accessed: 9 X 2024).

[33] *Formal Opinion 512…*, p. 6.

[34] Section 2 (1) of the BORA; see also M. Bauckmann, op. cit., section 43a of the BRAO, recital 16.

[35] J.-P. Praß, in: *Beck'scher Online-Kommentar BORA*, ed. V. Römermann (last updated: 1 IX 2022), section 2 of the BORA, recital 12b.

[36] M. Hartung, op. cit., p. 216; M.S. Haase, H. Heiss op. cit., p. 165.

self-learning gAI. Conversely, at least with regard to the confidentiality obligation, lawyers are allowed to prompt AI systems with abstract requests, for example, to draft a contract template that is then tailored to the individual case by the lawyer without the assistance of AI.[37] Furthermore, the use of an AI system that is controlled by the lawyer or the law firm, thus not requiring the transfer of client information to third parties, is compliant with the confidentiality obligation.[38] Neither of the last two instances requires the client to give consent. In theory, one might consider the disclosure of client information to AI systems as necessary for the performance of a contract between lawyer and client. According to article 6 (1) (b) of the General Data Protection Regulation (GDPR[39]), data processing would be possible without the client's consent in this case. However, it is hard to imagine a situation in which the disclosure of client information to an AI system is necessary for the performance of the contract, as the lawyer is generally obliged to perform the legal services on a personal basis (section 613 of the German Civil Code, BGB).

In all other instances, clients 'control' the confidentiality obligation, as they can release their lawyer from confidentiality by consenting to the disclosure of all or certain information. This consent can be given by the client either through the expressive release from the confidentiality obligation or, while not being expressly declared, implied consent, e.g. if the client is aware that the lawyer must use third parties to fulfil his obligations.[40] In the case of the disclosure of client information, for a consent of the client to be valid, it must be informed, which means that the lawyer must inform the client about the scope of information and the way that it will be disclosed.[41] Conclusive consent mainly comes into consideration when the disclosure of information by the lawyer is necessary to provide the legal services the client asked for.[42] For example, the enforcement of a claim requires the lawyer disclosing information to the opposing party or the court to prove the existence of the claim. However, as mentioned previously, it is difficult to imagine a scenario

[37] M.S. Haase, H. Heiss, op. cit., p. 165.

[38] F. Remmertz, *Legal Tech-Update*…, p. 99.

[39] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 IV 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

[40] M. Bauckmann, op. cit., section 43a of the BRAO, recital 23 et seq.

[41] Ibidem.

[42] Ibidem, recital 24.

in which the use of AI is necessary for providing the required legal services, as its deployment exclusively functions as an aid to the lawyer's work and not as a substitute.

Another potential exception to the confidentiality obligation is laid down in section 43e of the BRAO, which allows lawyers to disclose client information to "service providers"[43] in cases in which such a disclosure is necessary for service provision. By introducing this exemption in 2017, the legislator wanted to simplify non-legal outsourcing like the use of cloud-based storage space.[44] While the use of AI systems has not been considered when this provision was introduced, the professional code is in general technologically neutral, leading scholars to question whether section 43e of the BRAO can be used to justify the disclosure of client information to AI systems. With common (g)AI systems like *ChatGPT* in mind, the applicability of the exemption seems doubtful at the very least. To begin with, it is not even clear whether AI systems qualify as "service providers" at all.[45] Furthermore, the application of section 43e of the BRAO is connected to several further requirements with which the lawyer who aims to integrate the service provider must comply. For example, pursuant to section 43e (2) sentence 1 of the BRAO, the lawyer is obliged to meticulously select the service provider with regard to its professional competence and reliability.[46] Fulfilling such a requirement when using AI systems, lawyers face several major obstacles, such as systems still being prone to error when used for legal services.[47] A lawyer would need a certain degree of technological knowledge to safely assess the quality of a system's degree of competence.[48] Furthermore, if the AI system is operated abroad, its potential use as a service provider requires a comparable level regarding the protection of secrets in the foreign country as that found in Germany (section 43e (4) of the BRAO).[49]

---

[43] According to the legal definition of a "service provider," this is another person or authority that the lawyer within the frame of his profession delegates services to.

[44] Deutscher Bundestag, *Entwurf eines Gesetzes zur Neuregelung des Schutzes von Geheimnissen bei der Mitwirkung Dritter an der Berufsausübung schweigepflichtiger Personen,* Bundestag-Drucksache 18/11936, p. 34.

[45] M.S. Haase, H. Heiss, op. cit., p. 166; B. Quarch, S. Thomas, op. cit., p. 247.

[46] M.S. Haase, H. Heiss, op. cit., p. 166; T. Yuan, *Künstliche Intelligenz*, in: *Legal Tech: Recht, Geschäftsmodelle, Technik: alphabetische Gesamtdarstellung*, ed. M. Ebers, Baden-Baden 2023, recital 55.

[47] See, for example, the hallucination rates described in n. 9.

[48] B. Quarch, S. Thomas, op. cit., p. 246.

[49] Ibidem, p. 247.

2.2.3. General duty to act faithfully, section 43 of the BRAO

While the professional code is neutral with regard to technology used by lawyers, the more specific professional duties that have been introduced in response to the above-mentioned "Bastille decisions" are not sufficient to answer all the questions raised by the ABA: Is the lawyer obliged to disclose the use of (g)AI systems to the client? To what degree is a lawyer obliged to review the output generated by the AI system? One is tempted to use the general duty of acting faithfully as a 'catch-all duty': after all, the provision is formulated in a way that leaves it open to interpretation. There is, however, a disagreement regarding the stand-alone meaning of section 43 of the BRAO. Some commentators interpret the "Bastille decisions" in such a way that the general duty to act faithfully can be used exclusively to transfer the violation of other legislation like criminal or administrative law to the professional code for lawyers, making the violation a breach of professional duties at the same time.[50] For example, the criminal embezzlement (section 266 of the German Criminal Code, "Strafgesetzbuch," StGB) of client funds would therefore also be classified as a violation of professional duties. Meanwhile, others still deem section 43 of the BRAO to be applicable on its own.[51] Even in this case, the interpretation of the rule must be restrictive to ensure adherence to the constitutional principle of legal certainty ("Bestimmtheitsgrundsatz," article 20 (3) of the Grundgesetz).[52] While this shows that even the most basic application conditions surrounding the general duty to act faithfully cannot be assessed safely, the subsequent question of when and under which conditions the use of AI is faithful in this sense has yet to be touched upon. It seems possible that lawyer courts responsible for litigating violations of professional duties utilise this room for interpretation to develop principles regarding the

[50] See, for example, H. Prütting, in: *Bundesrechtsanwaltsordnung*, eds. M. Henssler, H. Prütting, 6th ed., München 2024, section 43 of the BRAO, recital 21; W. Hartung, *Sanktionsfähige Berufspflichten aus einer Generalklausel? Keine speziellen Pflichten aus der allgemeinen Pflicht des § 43 BRAO*, "Anwaltsblatt" 2008, p. 783; F. Busse, *Anwaltsethik unter der Geltung des neuen Berufsrechts*, "Anwaltsblatt" 1998, p. 232.

[51] For example, M. Kleine-Cosack, *Bundesrechtsanwaltsordnung mit Berufs- und Fachanwaltsordnung*, 9th ed., München 2022, section 43 of the BRAO, recital 9; Lawyers Court of North Rhine-Westphalia "Neue Juristische Wochenschrift Rechtsprechungs-Report" 2013, p. 624.

[52] M.S. Haase, H. Heiss, op. cit., p. 166.

use of AI.[53] As the general duty laid down in section 43 of the BRAO has been ignored since the introduction of the more specific professional duties, the challenges of the use of AI and technology by lawyers may lead to its "revival."[54]

However, section 43 of the BRAO is generally interpreted to include the duty for lawyers to provide services *in person*, which is obviously affected when lawyers make use of AI technology.[55] Accordingly, if one assumes that the general duty is independently applicable and therefore has stand-alone meaning, it can result in the duty to notify clients about the use of AI. Article 50 of the AI Act lays down comparable obligations of transparency for providers and deployers of certain AI systems, which might also apply to lawyers who use AI systems in the sense of article 3 no. 1 of the AI Act.[56] As section 43 of the BRAO is universally seen as a transitional provision, which allows other legislation to be incorporated into the professional conduct rules, a violation of article 50 of the AI Act could at the same time be considered a violation of professional duties, making the discussions on the independent meaning of section 43 of the BRAO redundant.[57]

2.3. Non-compliance with professional duties and possible sanctions

The violation of professional duties can be addressed by a multitude of legal consequences, which can result in major repercussions affecting the lawyer professionally and personally. As an example, the violation of the confidentiality obligation of section 43a (2) of the BRAO can be sanctioned as a criminal offence pursuant to section 203 (1) of the StGB. In other instances, sections 113 to 115b of the BRAO contain provisions that specify possible professional consequences. Pursuant to section 113 (1) of the BRAO, a violation of professional duties is penalised by lawyer courts through the imposition of a so-called "lawyer court measure" ("anwaltsgerichtliche Maßnahme"). These measures are specified in section 114 of the BRAO and include warning the lawyer

[53] Ibidem.
[54] This possibility is put forward by F. Remmertz, *Rechtsanwalt*…, recital 9.
[55] F. Remmertz, *Rechtsanwalt*…, recital 9; B. Quarch, S. Thomas, op. cit., p. 246.
[56] F. Remmertz, *Legal Tech-Update*…, p. 100.
[57] Ibidem.

or law-firm, monetary penalties or even the lawyer's expulsion from the advocacy or revocation of a law firm's permission to offer legal services. Minor infringements can also be met by a reprimand issued by the board of the regional bar association (section 74 of the BRAO). It is widely disregarded that professional duties have a direct impact on the contractual relationship between lawyer and client.[58]

Conclusion

The application of professional conduct rules is only one of several legal challenges to be overcome with regard to the use of AI in legal services. However, as an ideal type of a lawyer is defined by these duties and AI is here to stay, it is important to face the questions resulting from this interaction. The good news is that professional duties deriving from the German Professional Code for Lawyers can be used when AI is involved because of these duties being technologically neutral. However, this requires the interpretation of legal provisions and therefore results in a high degree of legal uncertainty. Therefore, it seems almost certain that the regulatory landscape will be subject to substantial developments through efforts by the legislator or (which is more likely) through further concretisations of professional duties in the BORA itself put forward by the federal bar chamber BRAK. In the meantime, lawyers who are using AI are strongly advised to act with caution, especially with regard to protecting their clients' information if they do not want to risk drastic sanctions. Even when using new technology, the old saying of being 'better safe than sorry' seems to be a good rule of thumb.

BIBLIOGRAPHY

Briggs J., Kodani D., *The Potentially Large Effects of Artificial Intelligence on Economic Growth*, "Goldman Sachs Economics Research," 26 March 2023, https://www.key4biz.it/wp-content/uploads/2023/03/Global-Economics-Analyst_--The-Potentially-Large-Effects-of-Artificial-Intelligence-on-Economic-Growth-Briggs_Kodnani.pdf (accessed: 21.01.2025).

Bundesrechtsanwaltsordnung, ed. D. Weyland, 11th ed., München 2024.

Bundesrechtsanwaltsordnung, eds. M. Henssler, H. Prütting, 6th ed., München 2024.

[58] For example by M. Heese, *Beratungspflichten*, Tübingen 2015, p. 345 et seq.

Busse F., *Anwaltsethik unter der Geltung des neuen Berufsrechts*, "Anwaltsblatt" 1998, pp. 231–236.
Dahl M. et al., *Large Legal Fictions: Profiling Legal Hallucinations in Large Language Models*, "Journal of Legal Analysis" 2024, no. 16, pp. 64–93.
Ebers M., *Erbringung von Rechtsdienstleistungen durch LLMs*, in: *Rechtshandbuch ChatGPT*, eds. M. Ebers, B. Quarch, Baden-Baden 2024.
Haase M.S., Heiss H., *Der Einsatz von künstlicher Intelligenz im Rechtsanwaltsberuf*, "Zeitschrift für Innovations- und Technikrecht" 2023, pp. 162–168.
Hartung M., *AI-Act für die Anwaltschaft?*, "beck-aktuell," 30 September 2024, https://rsw.beck.de/aktuell/daily/magazin/detail/kolumne-njw-2024-40-ai-act-fuer-die-anwaltschaft?bifo=port (accessed: 16.01.2025).
Hartung M., *Smartlaw, ChatGPT und das RDG*, "Recht Digital" 2023, pp. 209–217.
Hartung W., *Sanktionsfähige Berufspflichten aus einer Generalklausel? Keine speziellen Pflichten aus der allgemeinen Pflicht des § 43 BRAO*, "Anwaltsblatt" 2008, pp. 782–783.
Heese M., *Beratungspflichten*, Tübingen 2015.
Kleine-Cosack M., *Bundesrechtsanwaltsordnung mit Berufs- und Fachanwaltsordnung*, 9th ed., München 2024.
Kommentar zur Berufsordnung für Rechtsanwälte, ed. V. Römermann, Beck'scher Online.
Magesh V. et al., *Hallucination-Free? Assessing the Reliability of Leading AI Legal Research Tools*, preprint 2024, https://dho.stanford.edu/wp-content/uploads/Legal_RAG_Hallucinations.pdf (accessed: 25.01.2025).
Michel D., *Haftung für Fehler autonomer Systeme*, in: *Arbeit, Wirtschaft, Recht: Festschrift für Martin Henssler zum 70. Geburtstag*, eds. C. Deckenbrock et al., München 2023, pp. 1461–1472.
Quarch B., Thomas S., *Regelung der Nutzung intelligenter Sprachmodelle*, "Legal Tech Zeitschrift" 2024, pp. 244–247.
Rechtsdienstleistungsgesetz, eds. M. Krenzler, F. Remmertz, 3rd ed., Baden-Baden 2024.
Remmertz F., *Legal Tech-Update im anwaltlichen Berufsrecht und im RDG*, "Legal Tech Zeitschrift" 2024, pp. 95–104.
Remmertz F., *Rechtsanwalt, Berufsrecht*, in: *Legal Tech: Recht, Geschäftsmodelle, Technik: alphabetische Gesamtdarstellung*, ed. M. Ebers, Baden-Baden 2023.
Remmertz F., *Rechtsdienstleistungen durch Large Language Models (LLMs)*, "Recht Digital" 2023, pp. 401–408.
Schnabl D., *ChatGPT im Lichte der Anwaltshaftung*, "Recht Digital" 2025, pp. 8–15.
Schwarcz D., Choi J., *AI Tools for Laywers*, "Minnesota Law Review Headlines" 2023, vol. 108, pp. 1–39.
Vorberg S., Gottberg F., *ChatGPT als Medizinprodukt*, "Recht Digital" 2023, pp. 159–164.
Wendt D., *Rechtsschutzversicherung und Legal Tech (AI Systems)*, "Legal Tech Zeitschrift" 2024, pp. 110–118.
Yuan T., *Künstliche Intelligenz*, in: *Legal Tech: Recht, Geschäftsmodelle, Technik: alphabetische Gesamtdarstellung*, ed. M. Ebers, Baden-Baden 2023.

STUDIA PRAWA PUBLICZNEGO
2025 • NR 1 (49) ISSN 2300-3936
https://doi.org/10.14746/spp.2025.1.49.4

Maria Lewandowicz*, Tomasz Chyrek**

Etyka i dentologia zawodów adwokata i radcy prawnego w Polsce i zawodu adwokata w Niemczech

Ethics and Deontology of the Profession of Advocate/ Legal Advisor in Poland and Germany

Abstract. The international movement of people, services, goods and capital has contributed to demand for cross-border cooperation among lawyers. The lack of harmonised rules for the practice of these professions at the supranational level prompts a search for differences and similarities in the rules for different countries. Advocates and legal advisors are professions of public trust, the practice of which involves an obligation to respect certain ethical and deontological rules of the profession. The lack of universally binding rules at the EU level means that each Member State decides independently what rules guarantee this profession is practiced correctly and in the public interest. The purpose of this article is to analyse and compare the Polish and German provisions on exercising the profession of advocate/legal advisor in terms of fulfilling the obligation of professional training and continuous improvement of qualifications. The authors conclude that despite some systemic differences, the rules for practising the profession in both countries provide a guarantee of legal services being rendered in accordance with the highest standards of knowledge and ethics. A special element distinguishing the German and Polish legal profession is the existence of a category of 'Fachanwlat', i.e. lawyer-specialists in a particular field. In Poland, there are no separate categories of lawyer-specialists, although within the framework of non-normative practice, attorneys independently choose their areas of specialization. However, this is not done in a formalised manner, as it is in Germany. German attorneys who have successfully completed a specialized theoretical course and have a certain number

* University of Gdansk, Poland | Uniwersytet Gdański, Polska, https://orcid.org/0000-0002-0777-5154, e-mail: maria.lewandowicz@prawo.ug.edu.pl.
** University of Gdansk, Poland | Uniwersytet Gdański, Polska, https://orcid.org/0009-0005-9191-6464, e-mail: tomasz.chyrek@ug.edu.pl.

SPP 1(49), 2025: 65–84. © The Author(s). Published by: Adam Mickiewicz University Press, 2025.

of hours worked in a particular specialization can obtain the title of Fachanwalt. In Poland, the issue of specialization within the advocacy/advocacy profession has not yet been legally regulated.

Keywords: advocate – legal advisor – profession of public trust – professional training

Wprowadzenie

W myśl Kodeksu Etyki Prawników Europejskich, „[w] społeczeństwie zbudowanym na zasadach państwa prawa adwokat ma do wypełnienia szczególną rolę. Jego obowiązków nie wyczerpuje należyte i mieszczące się w prawnie zakreślonych granicach wykonywanie zleconych mu czynności. Spoczywają na nim niezbywalne obowiązki zarówno w stosunku do wymiaru sprawiedliwości, jak i wobec tych, których prawa i wolności zostały powierzone jego pieczy; adwokat powinien zatem nie tylko dochodzić interesów swoich klientów, lecz także stawać się jednocześnie ich doradcą. Szacunek dla działalności zawodowej adwokatów jest istotnym warunkiem rządów prawa i demokracji w społeczeństwach”[1].

Zawody adwokata i radcy prawnego są zawodami zaufania publicznego, których wykonywanie wiąże się z obowiązkiem poszanowania określonych reguł etycznych i deontologicznych. Choć międzynarodowe stowarzyszenia prawników podejmowały działania mające na celu ustanowienie swoistego międzynarodowego standardu wykonywania tych zawodów, uchwalone przez nie reguły nie uzyskały mocy prawa powszechnie obowiązującego, w związku z czym nie mogą stanowić podstawy odpowiedzialności adwokatów i radców prawnych w Europie[2]. Z uwagi na brak norm wspólnotowych każde państwo członkowskie zachowuje co do zasady swobodę w organizowaniu wykonywania zawodu adwokata lub radcy prawnego na swoim terytorium. W związku z tym zasady dotyczące wykonywania zawodu adwokata lub radcy prawnego mogą znacznie się różnić w poszczególnych państwach członkowskich, co w praktyce oznacza, że w poszczególnych państwach członkowskich

[1] Kodeks Etyki Prawników Europejskich. Preambuła, przyjęty przez Radę Adwokatur i Stowarzyszeń Prawniczych Europy (CCBE) w dniu 28 X 1988 r., następnie zmieniony uchwałami Sesji Plenarnych CCBE w dniach 28 XI 1998 r., 6 XII 2002 r. i 9 V 2006 r. Integralną część Kodeksu stanowi Memorandum objaśniające, zaktualizowane podczas Sesji Plenarnej w dniu 19 V 2006 r.

[2] T. Jaroszyński, *Kodeks Etyki Prawników Europejskich (CCBE) w polskim systemie prawa*, „Przegląd Prawa Konstytucyjnego” 2023, nr 1, s. 217–228.

można napotkać również odmienne postanowienia służące zagwarantowaniu wykonywania zawodu w sposób prawidłowy i służący interesowi publicznemu[3]. W motywie 108 wyroku Trybunału Sprawiedliwości Unii Europejskiej (TSUE) z 19 lutego 2002 r., C-309/99, Trybunał stanął na stanowisku, że nawet jeśli w innym państwie członkowskim stosowane są odmienne reguły, to adwokatura krajowa ma pełne prawo przyjąć krajowo specyficzne zasady wykonywania tego zawodu i nie będzie to stanowiło o sprzeczności tych reguł z prawem unijnym (w szczególności z przepisami dotyczącymi swobody przedsiębiorczości i swobody świadczenia usług)[4].

Międzynarodowy przepływ osób, usług, towarów i kapitału przyczynił się do zwiększenia zapotrzebowania na transgraniczną współpracę prawników wykonujących zawody zaufania publicznego. Brak ujednoliconych reguł wykonywania tych zawodów na poziomie ponadnarodowym skłania do poszukiwania różnic i podobieństw odnośnie do zasad wykonywania tych zawodów w poszczególnych państwach. Celem podjętych w niniejszym artykule badań jest porównanie zasad wykonywania zawodu adwokata i zawodu radcy prawnego w Polsce i zawodu adwokata w Republice Federalnej Niemiec oraz wykazanie, że pomimo pewnych odmienności systemowych zasady wykonywania tych zawodów w obu państwach dają rękojmię świadczenia usług prawniczych zgodnie z najwyższymi standardami wiedzy i etyki.

1. Reglamentacja zawodu zaufania publicznego i jego cechy

Słowo „reglamentacja" wywodzi się od francuskiego słowa *reglementation*, które oznacza ograniczenie określonej działalności bądź podporządkowanie jej normom oraz zasadom ustalonym przez przepisy prawa[5]. W języku potocznym ujmowane jest m.in. jako ograniczenie określonej

[3] M. Biliński, H. Wolska, M. Jaś-Nowopolska, *Dopuszczalność posiadania udziałów majątkowych przez osoby niewykonujące zawodów prawniczych w działalności podmiotów świadczących pomoc prawną (adwokatów) w prawie polskim i niemieckim*, „Przegląd Ustawodawstwa Gospodarczego" 2024, nr 6, s. 43–49.

[4] Wyrok Trybunału Sprawiedliwości Unii Europejskiej (TSUE) z 19 II 2002 r., C-309/99, *J.C.J. Wouters, J.W. Savelbergh and Price Water – house Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten, intervener Raad van de Balies van de Europese Gemeenschap*, ECR 2002, s. I-1577.

[5] Zob. hasło: *reglamentacja*, Słownik języka polskiego PWN, https://sjp.pwn.pl/sjp/reglamentacja;2573714.html (dostęp: 26 IX 2024).

działalności bądź podporządkowanie jej normom[6]. *Wielki słownik języka polskiego PWN* definiuje reglamentację m.in. jako ograniczenie, podporządkowanie jakiejś działalności zasadom ustalonym przez przepisy prawne oraz ograniczenie czyichś praw, wolności, inicjatyw, kontrolowanie czyjejś działalności tak, by nie wychodziła poza ustalone arbitralnie ramy[7]. Natomiast w internetowej *Encyklopedii Zarządzania* pojęcie to występuje jako ograniczenie praw przedsiębiorców nałożone przez państwo, któremu podlega zazwyczaj produkcja towarów lub wykonywanie określonych zawodów[8].

W literaturze wskazuje się, że termin „reglamentacja" ma zastosowanie do wielu różnych dziedzin, sfer aktywności oraz podstawowych praw i wolności obywateli[9]. Warto przy tym zwrócić uwagę, że reglamentacja realizowana przez państwo dotyczy również licznych zawodów, a materializuje się głównie przez wyznaczenie koniecznych do spełnienia warunków dostępu do danego zawodu, jak również w sposobie przeprowadzania postępowania kwalifikacyjnego obejmującego ocenę przydatności do zawodu, umiejętności i kompetencji[10].

Reglamentacja zawodów w sposób szczególny uwidacznia się w stosunku do zawodów regulowanych, w tym również do zawodów zwanych „zawodami zaufania publicznego". Należy wskazać, że określenie „zawód regulowany" zostało przejęte do polskiego porządku prawnego z prawa wspólnotowego. Zgodnie z treścią Dyrektywy 25/36/WE Parlamentu Europejskiego i Rady z dnia 7 września 2005 r. w sprawie uznania kwalifikacji zawodowych[11], zawodem regulowanym jest taka działalność lub zespół działalności zawodowych, których podjęcie, wykonywanie lub jeden ze sposobów wykonywania wymaga posiadania specjalnych kwalifikacji zawodowych, a sposób wykonywania tej działalności opiera się na tytule zawodowym zastrzeżonym na mocy przepisów ustawowych, wykonawczych i administracyjnych dla osób

[6] K. Dąbrowski, *Wolność działalności gospodarczej a publicznoprawna reglamentacja*, w: *Wolność działalności gospodarczej i jej ograniczenia. Problematyka prawna i aksjologiczna*, pod red. M. Karpiuka, Warszawa 2011, s. 65.

[7] Hasło: *reglamentacja*, *Wielki słownik języka polskiego PWN [r–t]*, pod red. S. Dubisza, Warszawa 2018, s. 52.

[8] Hasło: *reglamentacja*, Encyklopedia Zarządzania, https://mfiles.pl/pl/index.php/Reglamentacja (dostęp: 10 X 2024).

[9] T. Gawlik, *Analizowanie wybranych zagadnień prawa materialnego*, Radom 2006, s. 25.

[10] J. Jaworski, *Reglamentacja zawodów rynku nieruchomości*, Warszawa 2010, s. 35–57; K. Strzyczkowski, *Prawo gospodarcze publiczne*, Warszawa 2007, s. 142.

[11] Dz.Urz. UE L 255 z 30 IX 2005 r., s. 22–142.

posiadających odpowiednie kwalifikacje zawodowe. A zatem zawód regulowany oznacza zespół czynności zawodowych, których wykonywanie uzależnione jest od posiadania określonych w przepisach regulacyjnych formalnych kwalifikacji niezbędnych do wykonywania tych czynności zawodowych oraz, o ile jest to wymagane, od spełnienia innych warunków określonych kwalifikacji fachowych[12].

Na gruncie prawa polskiego zawodami reglamentowanymi są zawody zaufania publicznego. Jest to termin inkorporowany do polskiego porządku prawnego mocą art. 17 ust. 1 Konstytucji Rzeczypospolitej Polskiej[13]. Artykuł ten stanowi, że w drodze ustawy można tworzyć samorządy zawodowe, reprezentujące osoby wykonujące zawody zaufania publicznego i sprawujące pieczę nad należytym wykonywaniem tych zawodów w granicach interesu publicznego i dla jego ochrony. Zarówno Konstytucja RP, jak i inne akty prawne nie definiują wprost pojęcia „zawód zaufania publicznego", natomiast w piśmiennictwie zostało ono wielokrotnie scharakteryzowane[14]. Istotę tych zawodów tłumaczy się szczególną wagą wykonywanych czynności przez osoby uprawnione oraz szczególnej pozycji, jaką prawo gwarantuje recypientom tych usług. Wykonywanie zawodu zaufania publicznego polega z reguły na obsłudze osobistych potrzeb ludzkich, opierającej się na informacjach dotyczących życia osobistego „oraz zorganizowane jest w sposób uzasadniający przekonanie społeczne o właściwym dla interesów jednostki wykorzystywaniu tych informacji przez świadczących usługi. W literaturze eksponuje się również, że dla specyfiki wykonywania zawodu zaufania publicznego kluczowym elementem jest obowiązek zachowania tajemnicy zawodowej, który stanowić powinien swego rodzaju gwarant dopuszczenia przedstawiciela tego zawodu do prywatnej sfery życia odbiorcy takich świadczeń"[15].

---

[12] H. Izdebski, *Samorząd terytorialny. Pionowy podział władzy*, Warszawa 2020.

[13] Konstytucja Rzeczypospolitej Polskiej z dnia 2 IV 1997 r. (Dz.U. 1997 Nr 78, poz. 483 ze zm.), dalej „Konstytucja RP".

[14] M. Biliński, H. Wolska, *The profession of an advocate as a profession of public trust against the background of Polish jurisprudence*, „Franz von Liszt Institute Working Paper" 2021, nr 2, s. 72–78; M. Biliński, *Podstawy aksjologiczne regulacji wykonywania tzw. zawodów zaufania publicznego*, w: *Aksjologia prawa gospodarczego publicznego*, pod red. A. Powałowskiego, Warszawa 2022, s. 169–178; P. Antkowiak, *Polskie i europejskie standardy wykonywania wolnych zawodów*, „Przegląd Politologiczny" 2013, nr 1, s. 135.

[15] M. Biliński, op. cit., s. 3–4.

W doktrynie wskazuje się, iż zakresy pojęciowe wolnego zawodu i zawodu zaufania publicznego częściowo się pokrywają[16], co oznacza, że wszystkie zawody zaufania publicznego będą miały cechy wolnych zawodów, ale nie każdy wolny zawód można zaliczyć do zawodów zaufania publicznego. Cześć autorów wskazuje, że przyczyną takiej interpretacji jest występowanie samorządu zawodowego, o którym mowa w przywołanym powyżej artykule ustawy zasadniczej[17].

Podkreślić należy, że instytucja zawodu zaufania publicznego była kilkukrotnie obiektem zainteresowania Trybunału Konstytucyjnego Rzeczypospolitej Polskiej, który w jednym z orzeczeń wskazał, że „[w]ykonywaniu zawodów zaufania publicznego zgodnie z ich konstytucyjnym określeniem […] towarzyszy realne «zaufanie publiczne»[18]. Na zaufanie to składa się szereg czynników, wśród których na pierwszy plan wysuwają się: przekonanie o zachowaniu przez wykonującego ten zawód dobrej woli, właściwych motywacji, należytej staranności zawodowej oraz wiara w przestrzeganie wartości istotnych dla profilu danego zawodu"[19]. Trybunał Konstytucyjny zwrócił szczególną uwagę na rolę, znaczenie i cechy zawodów zaufania publicznego, w tym zawodów prawniczych[20]. Stwierdził, że:

Po pierwsze, o wykonywaniu zawodu zaufania publicznego decydują dodatkowo normy etyki zawodowej, określona treść ślubowania, tradycja korporacji zawodowej czy też specyfika uzyskanego wykształcenia

---

[16] M. Kulesza, *Pojęcie zawodu zaufania publicznego*, w:*Zawody zaufania publicznego a interes publiczny – korporacyjna reglamentacja versus wolność wykonywania zawodu. Materiały z konferencji zorganizowanej przez Komisję Polityki Społecznej i Zdrowia Senatu RP przy współudziale Ministerstwa Pracy i Polityki Społecznej pod patronatem Marszałka Senatu RP Longina Pastusiaka 8 kwietnia 2002 r.*, opr. S. Legat, M. Lipińska, Warszawa 2002, s. 27.

[17] K. Wojtczak, *Reglamentacja form wykonywania zawodów zaufania publicznego w rozwiązaniach prawa polskiego i państw Unii Europejskiej*, w: *Zawody zaufania publicznego a interes publiczny…*, s. 40–41.

[18] A. Powałowski, *Podstawy aksjologiczne regulacji wykonywania tzw. zawodów zaufania publicznego*, w: *Prawo gospodarcze*, pod red. A. Powałowskiego, Warszawa 2022, s. 4.

[19] Wyrok Trybunału Konstytucyjnego (TK) z 2 VII 2007 r., sygn. akt K 41/05, OTK-A 2007 nr 7, poz. 72 W orzeczeniu tym przywołano również szeroko poglądy doktryny prawa na instytucję zawodu zaufania publicznego.

[20] Zob wyroki TK z: 8 XII 1998 r., sygn. akt K 41/97, OTK 1998 nr 7, poz. 117; 22 V 2001 r., sygn. akt K 37/00, OTK 2001 nr 4, poz. 86; 7 V 2002 r., sygn. akt SK 20/00, OTK-A 2002 nr 3, poz. 29; 18 III 2003 r., sygn. akt K 50/01, OTK-A 2003 nr 3, poz. 21; 26 XI 2003 r., sygn. akt SK 22/02, OTK-A 2003 nr 9, poz. 97; 18 II 2004 r., sygn. akt P 21/02, OTK-A 2004 nr 2, poz. 9; 2 VII 2007 r., sygn. akt K 41/05 OTK-A 2007 nr 7, poz. 72; 18 X 2010 r., sygn. akt K 1/09, OTK-A 2010 nr 8, poz. 76.

wyższego i specjalizacji (np. szkolenia[21]). Ustawodawca ma prawo uzależnić wykonywanie zawodu zaufania publicznego od spełnienia przez zainteresowanego określonych warunków dotyczących np. jego kwalifikacji zawodowych i moralnych, w tym wymogu „nieskazitelnego charakteru" i „rękojmi należytego wykonywania zawodu"[22].

Po drugie, ograniczenia niektórych wolności, w odniesieniu do zawodów zaufania publicznego, muszą mieścić się w standardzie ograniczeń konstytucyjnych wolności i praw, określonym w art. 31 ust. 3 Konstytucji RP. Ograniczenia te powinny być z kolei zgodne z zasadą proporcjonalności, a ponadto z warunkami formalnymi ich wprowadzenia „w drodze ustawy", określonymi w art. 31 ust. 3 oraz – w przypadku wolności wyboru i wykonywania zawodu – w art. 65 ust. 1 Konstytucji RP[23].

Po trzecie, przymiot zawodu „zaufania publicznego", charakteryzujący zawody objęte dyspozycją art. 17 ust. 1 Konstytucji RP, polega nie tylko na objęciu zakresem ich wykonywania pieczy nad prowadzeniem spraw lub ochroną wartości (dóbr) o podstawowym i (najczęściej) osobistym znaczeniu dla osób korzystających z usług w zakresie zawodów zaufania publicznego. Nie wyczerpuje się również w podejmowaniu publicznie ważnych czynności zawodowych, wymagających przygotowania zawodowego, doświadczenia, dyskrecji, a także taktu i kultury osobistej[24].

Po czwarte, zawody zaufania publicznego są wykonywane w sposób założony i społecznie aprobowany, o ile ich wykonywaniu towarzyszy rzeczywiste „zaufanie publiczne". Na zaufanie to składa się szereg czynników, wśród których do najważniejszych należą: przekonanie o dobrej woli osoby wykonującej dany zawód, odpowiednia motywacja, należyta staranność zawodowa oraz przekonanie o przestrzeganiu wartości istotnych dla profilu danego zawodu. W odniesieniu do wykonywania prawniczych zawodów zaufania publicznego do istotnych wartości należy zaliczyć pełne i integralne poszanowanie prawa, obejmujące w szczególności przestrzeganie wartości konstytucyjnych oraz dyrektyw procesowych[25].

Po piąte, cel funkcjonowania zawodów zaufania publicznego, jakim jest sprawowanie pieczy w granicach interesu publicznego i dla jego ochrony, pociąga za sobą obowiązkową przynależność do samorządu

[21] Zob. H. Wolska, *Obligation of continuing legal education for lawyers (advocates and attorneys-at-law) under German and Polish law*, Warszawa 2024.

[22] Zob. M. Biliński, H. Wolska, op. cit.

[23] Ibidem.

[24] Ibidem.

[25] Ibidem.

zawodowego. Samorząd zawodowy ma za zadanie sprawować kontrolę prawidłowości wykonywania obowiązków przez członków samorządu. W konsekwencji może się to wiązać z koniecznością wprowadzenia całego szeregu ograniczeń, w zakresie zarówno swobody wykonywania zawodu, jak i swobody podejmowania działalności gospodarczej, jeżeli działalność ta ma być związana z wykonywaniem zawodu.

Po szóste, wyodrębnienie procedur odpowiedzialności dyscyplinarnej należy do specyfiki wykonywania tych zawodów i stanowi element ich samorządności. Postępowania dyscyplinarne prowadzone przez organy samorządu zawodowego zawodów zaufania publicznego są elementem wypełniania przez nie konstytucyjnej funkcji sprawowania pieczy nad należytym wykonywaniem tych zawodów. Dlatego też zarówno prowadzenie postępowania, jak i wymierzane w nim kary (oraz ich dalsze konsekwencje – np. zakaz ubiegania się o ponowny wpis do rejestru korporacyjnego) muszą mieścić się w granicach interesu publicznego i jego ochrony (art. 17 ust. 1 Konstytucji RP), nie naruszając art. 31 ust. 3 Konstytucji RP[26].

Immanentną cechą zawodu adwokata, będącego zawodem zaufania publicznego, jest obowiązek zachowania w tajemnicy informacji uzyskanych przez adwokata w toku świadczenia pomocy prawnej. Istotą tajemnicy zawodowej adwokata jest stworzenie nici zaufania pomiędzy profesjonalnym pełnomocnikiem a jego klientem. Istnienie zaufania jest korzystne zarówno dla klienta, który powierza adwokatowi swoje tajemnice, jak i dla ogółu społeczeństwa, gdyż umożliwia realizację prawa do obrony, rzetelnego wymiaru sprawiedliwości i ujawnienia prawdy. Tajemnica zawodowa adwokatów istnieje w większości państw członkowskich Unii Europejskiej, mając status prawa podstawowego i zasady porządku publicznego, choć jej zakres różni się w poszczególnych systemach prawnych. Fundamentalne znaczenie przypisuje się prawu do rzetelnego procesu sądowego jako podstawie ochrony tajemnicy zawodowej adwokatów we wspólnotowym porządku prawnym (art. 6 Konwencji o ochronie praw człowieka i podstawowych wolności[27] w zw. z art. 6 Traktatu o Unii Europejskiej[28]) oraz podstawowemu prawu do

[26] Ibidem.

[27] Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności sporządzona w Rzymie dnia 4 XI 1950 r., zmieniona następnie Protokołami nr 3, 5 i 8 oraz uzupełniona Protokołem nr 2 (Dz.U. 1993 Nr 61, poz. 284).

[28] Traktat o Unii Europejskiej z dnia 13 XII 2007 r. – wersja skonsolidowana (Dz.Urz. UE C 202 z 7 VI 2016 r., s. 13–46).

ochrony życia prywatnego. Podwójny charakter ochrony tajemnicy zawodowej adwokata oznacza, że nie musi być ona zachowana jedynie w ramach i na potrzeby prawa do obrony, ale może rozciągać się również na szerszy zakres informacji powierzonych profesjonaliście przez klienta[29].

Wykładnia literalna i systemowa art. 17 ust. 1 Konstytucji RP prowadzi do wniosku, że zespół regulacji przewidzianych w tym przepisie odnosi się do „osób wykonujących zawody zaufania publicznego", natomiast „piecza" samorządu dotyczy należytego „wykonywania tych zawodów". W aspekcie podmiotowym, obok adwokatów i radców prawnych wykonujących swoje zawody, sprawowanie pieczy na podstawie i w trybie art. 17 ust. 1 Konstytucji RP odnosi się także do aplikantów adwokackich wykonujących czynności zawodowe (pod nadzorem patrona). Mocą bowiem art. 2 ustawy Prawo o adwokaturze[30], adwokaturę stanowi ogół adwokatów i aplikantów adwokackich. Oznacza to jednocześnie, że studenci i absolwenci prawa, dopóki nie zostaną wpisani na listę aplikantów, nie mogą ubiegać się o dopuszczenie do wykonywania zawodu i nie będą podlegali odpowiedzialności zawodowej[31].

Z uwagi na fakt przyjęcia pojęcia zawodu regulowanego w polskim porządku prawnym za sprawą implementacji regulacji wspólnotowych, konieczne jest zwrócenie uwagi na niezwykle istotny skutek tej regulacji, a mianowicie na wzajemne uznawanie kwalifikacji osób wykonujących takie zawody w państwach należących do Unii Europejskiej, a także w innych państwach, niebędących członkami UE, które na mocy umów międzynarodowych, w tym zwłaszcza umowy o Europejskim Obszarze Gospodarczym (EOG), przyjmują stosowanie regulacji wspólnotowych. Implementacja regulacji skutkuje tym, że obywatelom państw członkowskich UE, Konfederacji Szwajcarskiej lub państw członkowskich Europejskiego Porozumienia o Wolnym Handlu (EFTA) – stron umowy o EOG, których kwalifikacje zostały uznane, przyznaje się prawo wykonywania zawodu regulowanego w innych krajach członkowskich na takich samych zasadach jak osobom, które kwalifikacje do jego wykonywania uzyskały w tym innym państwie[32]. Takie rozwiązania

[29] Ibidem.

[30] Ustawa z dnia 26 maja 1982 r. – Prawo o adwokaturze (tekst jedn. Dz.U. 2024, poz. 1564).

[31] Ibidem.

[32] C. Kosikowski, *Art. 19*, w: *Ustawa o swobodzie działalności gospodarczej. Komentarz*, Warszawa 2013.

przyjęto również w Polsce. Na mocy art. 3 Ustawy z dnia 5 lipca 2002 r. o świadczeniu przez prawników zagranicznych pomocy prawnej w Rzeczypospolitej Polskiej[33], na zasadzie wzajemności, o ile umowy międzynarodowe ratyfikowane przez Rzeczpospolitą Polską lub przepisy organizacji międzynarodowych, których Rzeczpospolita Polska jest członkiem, nie stanowią inaczej, prawnicy zagraniczni są uprawnieni do wykonywania stałej praktyki na zasadach określonych ustawą, po wpisaniu na jedną z list prawników zagranicznych, prowadzoną odpowiednio przez okręgowe rady adwokackie lub rady okręgowych izb radców prawnych. Przepisy tejże ustawy stanowią wdrożenie dyrektywy Rady 77/249/EWG z dnia 22 marca 1977 r.[34] oraz dyrektywy Parlamentu Europejskiego i Rady 98/5/WE z dnia 16 lutego 1998 r. mającej na celu ułatwienie stałego wykonywania zawodu prawnika w państwie członkowskim innym niż państwo uzyskania kwalifikacji zawodowych[35] oraz ułatwienie skutecznego korzystania przez prawników ze swobody świadczenia usług.

2. Publicznoprawna pozycja zawodu radcy prawnego w Polsce

Wśród wolnych zawodów podlegających reglamentacji zawód radcy prawnego stanowi przykład wpływu zachodzących przemian społeczno-gospodarczych na kształt i prawną regulację profesji prawniczych. Od chwili utworzenia zrębów zawodu, po dziś dzień, zawód ten uległ daleko idącym przekształceniom: od pełnienia obsługi prawnej jednostek gospodarki uspołecznionej po wolny zawód, który niewiele odbiega od praktyki adwokackiej[36]. Dla zrozumienia aktualnej pozycji zawodu radcy prawnego niezwykle przydatne jest spojrzenie wstecz do poprzednich aktów regulujących zasady sprawowania tego zawodu, zwłaszcza że pewna część unormowań dotycząca zatrudnienia radcy prawnego w ramach umowy o pracę, pomimo upływu czasu oraz zmiany ustroju państwa, zachowuje aktualność.

[33] Dz.U. 2002 Nr 126, poz. 1069 ze zm.

[34] Dz.Urz. WE L 78 z 26 III 1977 r., s. 17–18, ze zm.

[35] Dz.Urz. WE L 77 z 14 III 1998 r., s. 36–43, ze zm.; Dz.Urz. UE Polskie wydanie specjalne, rozdz. 6, tom 3, s. 83, ze zm.

[36] P. Łabieniec, *Podmiotowość, odpowiedzialność, historyczność profesji i profesjonalisty na przykładzie zawodu radcy prawnego*, „Archiwum Filozofii Prawa i Filozofii Społecznej" 2018, nr 1(16), s. 43.

Historycznie zawód radcy prawnego powstał tuż po II wojnie światowej, gdy mianem tym określano tych prawników, którzy świadczyli pomoc prawną na rzecz podmiotów gospodarki uspołecznionej, w ramach łączących ich z tymi jednostkami umów o pracę. Powstanie odrębnego zawodu radcy prawnego można zaś umiejscowić w chwili wydania pierwszego aktu dotyczącego tejże profesji, tj. uchwały nr 533 Rady Ministrów z 13 grudnia 1961 r. w sprawie obsługi prawnej przedsiębiorstw państwowych, zjednoczeń oraz banków państwowych[37].

Instytucję radcy prawnego ukształtowano tam jako samodzielnego pracownika zakładu pracy, podlegającego służbowo wyłącznie dyrektorowi tejże jednostki lub jego zastępcy, któremu powierzano jej obsługę prawną, polegającą między innymi na udzielaniu porad prawnych, sporządzaniu opinii prawnych, opracowywaniu i opiniowaniu projektów umów czy też zastępowaniu jednostki w postępowaniu sądowym, arbitrażowym, administracyjnym oraz przed innymi organami orzekającymi. Co więcej, zakres realizowanych przez radcę prawnego obowiązków nie mógł wykraczać poza czynności związane z obsługą prawną, a odnośnie do wykonywanej pracy nie można było wydawać poleceń co do treści żądanej od niego opinii prawnej.

Zgodnie z treścią Uchwały, radcą prawnym mogła zostać osoba, która ukończyła wyższe studia prawnicze, była co najmniej przez okres 3 lat zatrudniona w jednostce gospodarki uspołecznionej, w administracji gospodarczej, w organach prezydiów rad narodowych lub w innych organach państwowych, odbyła aplikację sądową lub arbitrażową. Nowością była z kolei możliwość złożenia w tym celu stosownego egzaminu, pod warunkiem że dotychczasowa praca oraz postawa obywatelska dawały rękojmię należytego wykonywania obowiązków radcy prawnego. Egzaminy przeprowadzały komisje organizowane przez Państwowy Arbitraż Gospodarczy. Ponadto radcą prawnym mógł czasowo zostać adwokat lub osoba posiadająca kwalifikacje do uzyskania wpisu na tę listę albo osoba, która ukończyła wyższe studia prawnicze i co najmniej przez 5 lat pełniła służbę referendarską w naczelnych organach administracji państwowej na stanowiskach związanych z pracami ustawodawczymi lub z obsługą prawną tych organów, albo która ukończyła wyższe studia prawnicze, pracowała przez 5 lat w prezydiach rad narodowych, w tym co najmniej przez 2 lata zajmowała stanowiska kierownika komórki prawnej prezydium, radcy prawnego prezydium lub radcy prawnego

[37] M.P. 1961 Nr 96, poz. 406, dalej „Uchwała".

do spraw zastępstwa sądowego albo przez 4 lata stanowisko samodzielnego referenta prawnego[38].

Za prowadzenie list radców prawnych odpowiadały okręgowe komisje arbitrażowe. Podstawą wpisu na listę było zatrudnienie prawnika na stanowisku radcy prawnego, pod warunkiem niewykonywania zawodu adwokata. Zwolnienie radcy prawnego z pracy było podstawą skreślenia z listy. Radcowie prawni odpowiadali dyscyplinarnie w przypadku nienależytego wykonywania zawodu lub stwierdzenia braku przesłanek koniecznych celem wpisania na listę radców prawnych lub stwierdzenia u radcy prawnego zachowania godzącego w zaufanie konieczne do pełnienia tej funkcji. Sankcjami w tym przypadku były: upomnienie, nagana lub zagrożenie skreśleniem z listy, co w razie stwierdzenia dalszych naruszeń, skutkowało skreśleniem[39]. W latach siedemdziesiątych wprowadzono również pierwszy zbiór zasad etyki radcy prawnego, który stanowił element zbioru zasad etyki adwokackiej i godności zawodu[40].

Jak wskazuje się w literaturze, zasadniczą zmianę w postrzeganiu zawodu radcy prawnego, w tym przez samych radców prawnych, wprowadziła Ustawa z dnia 6 lipca 1982 r. o radcach prawnych[41]. Uznaje się, że właściwie dopiero od tego momentu można mówić o istnieniu tego zawodu jako odrębnej profesji[42]. Wspomniana ustawa, pomimo licznych i nieraz zasadniczych zmian, obowiązuje do dzisiaj. Zaznacza się, że chociaż została wprowadzona w czasie trwania stanu wojennego, duchem i treścią odpowiadała solidarnościowej odwilży[43]. Samo istnienie ustawy ustanawiającej samorząd zawodowy radców prawnych, która reguluje zarówno warunki przystąpienia do jego wykonywania, obowiązki związane z jego pełnieniem, jak również przepisy dyscyplinarne, stanowi jednoznaczny i silny dowód na zaliczenie zawodu radcy prawnego do kategorii zawodów zaufania publicznego.

Pod rządami ustawy zasadnicze warunki pracy radców uległy pewnym ewolucyjnym zmianom, polegającym zwłaszcza na zwiększeniu poziomu niezależności zawodu, poszerzaniu zakresu świadczonych

[38] Referentem prawnym, zgodnie z brzmieniem uchwały, była osoba zajmująca się obsługą prawną jednostki gospodarki uspołecznionej, w tym zwłaszcza cechująca się przynajmniej kilkuletnim doświadczeniem, która nie ukończyła studiów wyższych.

[39] § 14 ust. 1–3 Uchwały.

[40] R. Tokarczyk, *Etyka prawnicza*, Warszawa 2005, s. 183–184; K. Kwapisz, *Art. 1*, w: *Ustawa o radcach prawnych. Komentarz*, Warszawa 2011.

[41] Dz.U. 1982 Nr 19, poz. 145. Ustawa weszła w życie 1 X 1982 r.

[42] P. Łabieniec, op. cit., s. 36.

[43] Ibidem.

usług oraz wprowadzeniu przez nowy akt rangi ustawowej samorządu zawodowego, do tej pory o ograniczonych kompetencjach, gdyż organizację aplikacji prowadziły wciąż okręgowe komisje arbitrażowe. Poza kompetencją samorządu pozostała również kwestia związana z podejmowaniem decyzji w przedmiocie dokonania wpisu na listę radców prawnych – robił to prezes wyżej wspomnianej komisji. Bardzo ważnym wydarzeniem było wprowadzenie w 1987 r. Zasad etyki zawodowej radcy prawnego, co nastąpiło na II Krajowym Zjeździe Radców Prawnych[44].

W III Rzeczypospolitej zawód radcy prawnego podlegał dalszym przekształceniom. Aktualizowano zasady etyki, wprowadzono obowiązkowe ubezpieczenie od odpowiedzialności cywilnej, dopuszczono radców prawnych do reprezentowania w niektórych rodzajach spraw karnych. Ponadto jedna z nowelizacji ustawy o radcach prawnych – z dnia 22 maja 1997 r.[45], wprowadziła do ustawy podstawowej przepis upoważniający Ministra Sprawiedliwości do określenia wzoru stroju urzędowego radców prawnych biorących udział w rozprawach sądowych, po czym radcowie prawni rozpoczęli reprezentować klientów przed sądem w togach[46].

Zgodnie z aktualnym brzmieniem ustawy o radcach prawnych[47], wykonywanie zawodu radcy prawnego polega w szczególności na udzielaniu porad i konsultacji prawnych, sporządzaniu opinii prawnych, opracowywaniu projektów aktów prawnych oraz występowaniu przed urzędami i sądami w charakterze pełnomocnika lub obrońcy. Radca prawny podczas wykonywania czynności zawodowych i w związku nimi korzysta z ochrony prawnej przysługującej sędziemu i prokuratorowi. Tytuł zawodowy radcy prawnego podlega ochronie prawnej.

Wpis na listę radców prawnych może nastąpić w stosunku do osoby, która ukończyła wyższe studia prawnicze w Rzeczypospolitej Polskiej i uzyskała tytuł magistra lub która ukończyła zagraniczne studia prawnicze uznane w Rzeczypospolitej Polskiej, korzysta w pełni z praw publicznych, ma pełną zdolność do czynności prawnych, jest nieskazitelnego charakteru i swym dotychczasowym zachowaniem

[44] Uchwała nr 3 II KZRP z 20 IX 1987 r. w sprawie Zasad etyki zawodowej radcy prawnego.

[45] Ustawa z dnia 22 maja 1997 r. o zmianie ustawy – Prawo o adwokaturze, ustawy o radcach prawnych oraz niektórych innych ustaw (Dz.U. 1997 Nr 75, poz. 471).

[46] P. Łabieniec, op. cit., s. 41.

[47] Tekst jedn. Dz.U. 2024, poz. 499.

daje rękojmię prawidłowego wykonywania zawodu radcy prawnego oraz odbyła w Rzeczypospolitej Polskiej aplikację radcowską i złożyła egzamin radcowski. Wpis osoby, która uzyskała pozytywny wynik z egzaminu radcowskiego, następuje na jej wniosek[48].

W ustawie o radcach prawnych skonkretyzowano wymagania odnośnie do sposobu wykonywania zawodu przez radcę prawnego. Wskazano, że radca prawny powinien wykonywać swój zawód ze starannością wynikającą z wiedzy prawniczej oraz z zasad etyki radcy prawnego. Ma obowiązek zachować w tajemnicy wszystko, o czym dowiedział się w związku z udzieleniem pomocy prawnej, a obowiązek zachowania tajemnicy nie może być ograniczony w czasie. Co więcej, osoba wykonująca zawód radcy prawnego nie może być zwolniona z obowiązku zachowania tajemnicy zawodowej co do faktów, o których dowiedział się, udzielając pomocy prawnej lub prowadząc sprawę.

Radcowie prawni mogą prowadzić swoją działalność w ramach stosunku pracy, a także na podstawie umowy cywilnoprawnej lub w kancelarii radcy prawnego. Dopuszczalne jest również świadczenie pomocy prawnej przez radcę prawnego w spółce (cywilnej, jawnej, partnerskiej, komandytowej lub komandytowo-akcyjnej).

Radcowie prawni przynależą do samorządu zawodowego. Jednostkami organizacyjnymi samorządu posiadającymi osobowość prawną są okręgowe izby radców prawnych i Krajowa Izba Radców Prawnych, nad którymi nadzór sprawuje minister właściwy ds. sprawiedliwości. Przynależność radców prawnych i aplikantów radcowskich do samorządu jest obowiązkowa.

Ustawa określa również zasady odpowiedzialności dyscyplinarnej, której podlegają radcowie prawni i aplikanci radcowscy. Wskazano w niej sankcje za postępowanie sprzeczne z prawem, zasadami etyki lub godnością zawodu bądź za naruszenie swych obowiązków zawodowych. Karami dyscyplinarnymi są: upomnienie, nagana, kara pieniężna, zawieszenie prawa do wykonywania zawodu radcy prawnego na czas od 3 miesięcy do 5 lat, a w stosunku do aplikantów radcowskich – zawieszenie w prawach aplikanta na czas od roku do 3 lat, pozbawienie prawa do wykonywania zawodu radcy prawnego, a w stosunku do aplikantów radcowskich – wydalenie z aplikacji.

[48] K. Kwapisz, *Art. 24*, w: *Ustawa o radcach prawnych. Komentarz*, Warszawa 2011, LEX/el.

3. Publicznoprawna reglamentacja zawodu adwokata w Niemczech

Zasady wykonywania zawodu adwokata w Niemczech zostały uregulowane w Bundesrechtsanwaltsordnung[49] – ustawie federalnej o adwokatach, która została uchwalona 1 sierpnia 1959 r. i weszła w życie 1 lipca 1959 r. Jest to kluczowy akt prawny regulujący działalność adwokatów w tym państwie, określający warunki uzyskania kwalifikacji, obowiązki i prawa adwokatów oraz kwestie dotyczące ich działalności. BRAO definiuje, kim jest adwokat, jakie są wymagania dotyczące wykształcenia i licencjonowania, a także zasady etyki zawodowej[50].

Mocą § 1 BRAO adwokat (niem. *Rechtsanwalt*) jest niezależnym organem wymiaru sprawiedliwości. Adwokat wykonuje wolny zawód, a jego działalność nie jest działalnością handlową. Jest on niezależnym doradcą i przedstawicielem we wszystkich sprawach prawnych, a jego prawo do występowania przed sądami, trybunałami arbitrażowymi lub władzami w sprawach prawnych wszelkiego rodzaju może być ograniczone wyłącznie przez prawo federalne (§ 3 BRAO). Działalność zawodowa adwokatów niemieckich cechuje się zatem szeroką autonomią, która może być ograniczona jedynie w drodze ustawy[51]. Wedle doktryny niemieckiej prawnicy biorą udział w realizacji idei państwa prawnego w sensie formalnym i materialnym poprzez pomoc obywatelom jako znawcy porządku prawnego, pozostający w pełnej niezależności od władz państwowych, są niezawiśli w wykonaniu swych obowiązków[52]. Adwokat zapewnia urzeczywistnienie realizacji prawa, działając niezależnie i samodzielnie jako reprezentant mandanta.

Zgodnie z brzmieniem § 4 BRAO, do adwokatury mogą być dopuszczone wyłącznie osoby, które: posiadają kwalifikacje do sprawowania urzędu sędziego (referendariat) zgodnie z niemiecką ustawą o sędziach; spełniają wymogi integracyjne zgodnie z częścią 3 ustawy o działalności prawników europejskich w Niemczech lub posiadają zaświadczenie

[49] BGBl. I S. 565, dalej „BRAO".

[50] M. Fink, *Rechtsgeschichtliche Seminararbeit im Rahmen des Seminars „Geschichte der juristischen Berufe" zum Thema „Die Entwicklung der deutschen Anwaltschaft seit 1871" bei Prof. Dr. Karlheinz Muscheler* , Ruhr-Universität Bochum 2009, s. 24–26, https://www.ruhr-uni-bochum.de/ls-muscheler/downloads/seminar09/Matthias_Fink_Die_Entwicklung_der_deutschen_Anwaltschaft_seit_1871.pdf (dostęp: 15 X 2024).

[51] W.E. Feuerich, D. Weyland, *§ 1*, w: *Bundesrechtsanwaltsordnung: BRAO. Kommentar*, pod red. D. Weylanda, München 2016, Nb. 1–4.

[52] Ibidem.

zgodnie z § 16a ust. 5 ustawy o działalności prawników europejskich w Niemczech. W praktyce spełnienie pierwszego z wyżej wymienionych obowiązków sprowadza się do ukończenia studiów prawniczych, złożenia państwowego egzaminu końcowego (niem. *Erstes Staatsexamen*), odbycie jednej z dwuletnich aplikacji prawniczych (niem. *Referendariat*), która kończy się kolejnym egzaminem (niem. *Zweites Staatsexamen*) otwierającym drogę do wykonywania zawodu[53]. Warto przy tym wspomnieć, że złożenie egzaminu z wynikiem pozytywnym pozwala podjąć pracę w każdym z zawodów prawniczych, tj. jako sędzia, prokurator, adwokat, notariusz, urzędnik służby cywilnej, a także w dziedzinie niezwiązanej z prawem[54].

Należy wskazać, że ustawa BRAO nie jest jedynym aktem prawnym, który reguluje zasady wykonywania zawodu adwokata niemieckiego: ustawa z dnia 5 maja 2004 r. – Gesetz über die Vergütung der Rechtsanwältinnen und Rechtsanwälte (RVG) określa warunki wynagradzania adwokatów za świadczone usługi prawne oraz sposób, wedle którego adwokaci powinni ustalać przysługujące im honoraria, a także normy dotyczące obowiązków informacyjnych wobec klientów[55]. Poza powyższym, istotne dla wykonywania zawodu adwokata jest stosowanie się do zasad etyki zawodowej wskazanych w Kodeksie postępowania zawodowego prawników. Uregulowania te dotyczą reguł zachowania, tajemnicy adwokackiej oraz obowiązków wobec klientów i sądu[56]. Istotne zagadnienia są również przedmiotem treści Kodeksu adwokatów specjalistów (Fachanwaltsordnung, FAO)[57]. FAO to zawodowy kodeks postępowania uchwalony przez Izbę Adwokacką Republiki Federalnej Niemiec (Bundesrechtsanwaltskammer) na podstawie § 59a ust. 2 nr 2a BRAO. Reguluje on szczególne obowiązki zawodowe związane z używaniem oznaczenia adwokata specjalisty w Niemczech. Co istotne, reglamentacja zawodu adwokata w Niemczech jest uregulowana na poziomie federalnym oraz w poszczególnych krajach związkowych (niem. *Bundesländer*). Każdy kraj związkowy może wprowadzać dodatkowe przepisy dotyczące adwokatury. Przykładowo, to ministerstwa sprawiedliwości poszczególnych krajów związkowych mają wpływ na

[53] Por. https://iurratio.de/journal/das-zweite-staatsexamen (dostęp: 27 IX 2024).

[54] Por. https://iws.gov.pl/wp-content/uploads/2019/04/IWS_praca-zb._Wolne-zawody-prawnicze.pdf (dostęp: 27 IX 2024).

[55] Por. https://www.gesetze-im-internet.de/rvg/ (dostęp: 27 IX 2024).

[56] Por. https://dejure.org/gesetze/BORA (dostęp: 27 IX 2024).

[57] https://www.brak.de/fileadmin/02_fuer_anwaelte/berufsrecht/FAO_Stand_01.10.2023.pdf (dostęp: 27 IX 2024).

program kształcenia w trakcie studiów uniwersyteckich oraz referendariatu. Pomimo powyższego wszystkie regulacje regionalne muszą być zgodne z prawem federalnym[58].

Charakterystyczne dla Niemiec jest funkcjonowanie w kraju instytucji wyspecjalizowanych adwokatów (niem. *Fachanwalt*, np. Fachanwalt für Steuerrecht – adwokat wyspecjalizowany w prawie podatkowym). Specjalizacja wynika przede wszystkim z systemu edukacji prawników, który jest na tyle ogólny, że umożliwia pracę w każdym z zawodów prawniczych. Specjalizacja ma za zadanie zapewnić wysoki poziom usług prawniczych w stosunku do różnych dziedzin życia społeczno-gospodarczego[59]. Na podstawie § 15 Fachanwaltsordnung (FAO), adwokaci, którzy posiadają tytuł specjalisty w danej dziedzinie (*Fachanwalt*), podlegają obowiązkowi szkolenia zawodowego w obszarze swojej specjalizacji poprzez udział w szkoleniach, publikowaniu, wykładaniu (jako prelegent lub wykładowca), w wymiarze co najmniej 15 godzin w każdym roku kalendarzowym (w tym maksymalnie 5 godzin samokształcenia)[60]. Niewywiązanie się z obowiązku doskonalenia zawodowego może prowadzić do cofnięcia uprawnienia do posługiwania się przez adwokata tytułem *Fachanwalt*. Na mocy § 25 ust. 2 FAO cofnięcie lub uchylenie zezwolenia na posługiwanie się tytułem specjalisty w danej dziedzinie prawa jest dopuszczalne w terminie jednego roku od daty powzięcia przez zarząd izby adwokackiej informacji o zaistnieniu przesłanek do cofnięcia tytułu specjalisty. Przed uchwaleniem decyzji o cofnięciu tytułu adwokat musi być wysłuchany, sama zaś decyzja musi być uzasadniona i doręczona temu, którego ona dotyczy[61].

Adwokat niemiecki ma obowiązek, podobnie jak w Polsce, przynależeć do samorządu zawodowego – żeby móc wykonywać zawód, musi należeć do swojej regionalnej izby adwokackiej. Na terenie Republiki Federalnej funkcjonuje 28 izb adwokackich (27 o charakterze regionalnym i 1 izba przy BGH – Federalnym Trybunale Sprawiedliwości). Nadzór nad odpowiednim wykonywaniem zawodu adwokata sprawują poszczególne regionalne izby adwokackie. W ramach adwokatury funkcjonuje też dwuinstancyjne sądownictwo dyscyplinarne. Przepisy

[58] Por. https://iws.gov.pl/wp-content/uploads/2019/04/IWS_praca-zb._Wolne-zawody-prawnicze.pdf (dostęp: 27 IX 2024).

[59] § 43c ust. 1 FAO.

[60] D. Weyland, *Bunderechtsanwaltsordnung: BRAO, Kommentar*, München 2024, Nb. 125–127.

[61] H. Wolska, op. cit., s. 25–26.

dotyczące postępowania przed tymi sądami zawarte są w § 113–161 BRAO. Sądy adwokackie działają przy każdej izbie adwokackiej.

Naruszenie zasad wykonywania zawodu adwokata skutkuje wszczęciem wobec niego postepowania dyscyplinarnego. W wyniku stwierdzenia naruszeń adwokat może zostać ukarany: ostrzeżeniem, naganą, grzywną w maksymalnej wysokości 50 tys. euro, zakazem wykonywania zawodu w poszczególnych dziedzinach prawa jako pełnomocnik na okres od roku do 5 lat, natomiast ostateczną karą jest skreślenie z listy. Jak wskazuje się w literaturze, ostatnie dwie sankcje stosowane są bardzo rzadko, ponieważ uznaje się, że jedynie bardzo istotne naruszenie zasługuje na tak dotkliwą karę[62].

Podsumowanie

Mając na względzie powyższe rozważania, można stwierdzić, że zarówno zawód radcy prawnego w Polsce, jak i zawód adwokata w Niemczech spełniają przesłanki określone w obu tych porządkach prawnych pozwalające uznać je za zawody wolne, regulowane, o reglamentowanym dostępie. Dodatkowo, zgodnie z polską myślą prawniczą, zawód radcy prawnego wypełnia również definicyjne przesłanki uznania go za zawód zaufania publicznego.

Należy stwierdzić, że regulacje prawne w Polsce i w Niemczech dotyczące zawodów prawniczych omawianych w artykule są bardzo podobne, da się jednak zauważyć pewne różnice. I tak, w Niemczech nie dokonano podziału na zawód radcy prawnego i zawód adwokata. Przedstawiciele zawodów prawniczych, w tym także prokuratorzy, sędziowie i urzędnicy państwowi, mają jedną wspólną aplikację prawniczą. Ponadto, w Niemczech funkcjonuje instytucja referendariatu, zgodnie z którym adwokaci, aby przystąpić do wykonywania zawodu, muszą zdobyć kwalifikacje umożliwiające im pełnienie urzędu sędziego w Niemczech albo kwalifikacje adwokata z innego państwa członkowskiego Unii Europejskiej[63]. Dodatkowo, z uwagi na federalizację Niemiec i duże zróżnicowanie poszczególnych landów, adwokaci doznają pewnych ograniczeń związanych z możliwością występowania przed sądami w poszczególnych krajach związkowych lub przed Federalnym

[62] Por. https://iws.gov.pl/wp-content/uploads/2019/04/IWS_praca-zb._Wolne-zawody-prawnicze.pdf (dostęp: 16 IX 2024).

[63] Ibidem.

Trybunałem Sprawiedliwości[64]. Szczególnym elementem odróżniającym zawód adwokata niemieckiego i polskiego jest istnienie kategorii tzw. *Fachanwlat*, czyli prawników specjalistów w danej dziedzinie. W Polsce nie istnieją osobne kategorie adwokatów specjalistów, choć w ramach praktyki pozanormatywnej adwokaci samodzielnie wybierają obszary swoich specjalizacji. Nie odbywa się to jednak w sposób sformalizowany, jak ma to miejsce w Niemczech. Niemieccy adwokaci, którzy pomyślnie ukończyli specjalistyczny kurs teoretyczny i legitymują się określoną liczbą godzin przepracowanych w ramach danej specjalizacji, mogą uzyskać tytuł *Fachanwalt*. Początkowo istniały specjalizacje tylko w obszarze prawa pracy, prawa administracyjnego, prawa podatkowego i prawa socjalnego. Z czasem zakres specjalizacji objął kolejne dziedziny, jak prawo karne, prawo medyczne, prawo transportowe, prawo rolne, prawo rodzinne[65]. W Polsce natomiast każdy z adwokatów czy radców prawnych samodzielnie ustala zakres swej praktyki i specjalizacji.

Chociaż aktualnie w Polsce można zaobserwować pewne działania związane z deregulacją dostępu do zawodów, w tym również do zawodów prawniczych, to droga do osiągnięcia poziomu liberalizacji zawodu prawnika, którą obserwuje się w Niemczech, jest daleka. W literaturze wskazuje się, że postępujące już od początku XX wieku, a wzmożone w ciągu ostatnich 20 lat, otwieranie dostępu do zawodu spowodowało lawinowy wzrost liczby prawników. Podkreśla się przy tym, że nie można tego trendu oceniać jednoznacznie pesymistycznie z uwagi na fakt obniżenia poziomu elitarności na rzecz wzrostu liczby wykonujących zawód, którzy charakteryzują się coraz młodszym wiekiem[66].

BIBLIOGRAFIA

Antkowiak P., *Polskie i europejskie standardy wykonywania wolnych zawodów*, „Przegląd Politologiczny" 2013, nr 1, s. 129–142.

Biliński M., *Podstawy aksjologiczne regulacji wykonywania tzw. zawodów zaufania publicznego*, w: *Aksjologia prawa gospodarczego publicznego*, pod red. A. Powałowskiego, Warszawa 2022, s. 169–178.

Biliński M., Wolska H., Jaś-Nowopolska M., *Dopuszczalność posiadania udziałów majątkowych przez osoby niewykonujące zawodów prawniczych w działalności pod-*

[64] Ibidem.

[65] M. Jaś-Nowopolska, H. Wolska, *Women in legal services (as attorneys and legal advisors) in Poland and Germany*, „Franz von Liszt Institute Working Paper" 2018, nr 2, s. 8–9.

[66] M. Fink, op. cit., s. 32–34.

miotów świadczących pomoc prawną (adwokatów) w prawie polskim i niemieckim, „Przegląd Ustawodawstwa Gospodarczego" 2024, nr 6, s. 43–49.

Biliński M., Wolska H., *The profession of an advocate as a profession of public trust against the background of Polish jurisprudence*, „Franz von Liszt Institute Working Paper" 2021, nr 2, s. 72–78.

Bundesrechtsanwaltsordnung: BRAO. Kommentar, pod red. D. Weylanda, München 2024.

Dąbrowski K., *Wolność działalności gospodarczej a publicznoprawna reglamentacja*, w: *Wolność działalności gospodarczej i jej ograniczenia. Problematyka prawna i aksjologiczna*, pod red. M. Karpiuka, Warszawa 2011, s. 61–82.

Fink M., *Rechtsgeschichtliche Seminararbeit im Rahmen des Seminars „Geschichte der juristischen Berufe" zum Thema „Die Entwicklung der deutschen Anwaltschaft seit 1871" bei Prof. Dr. Karlheinz Muscheler*, Ruhr-Universität Bochum 2009.

Gawlik T., *Analizowanie wybranych zagadnień prawa materialnego*, Radom 2006.

Izdebski H., *Samorząd terytorialny. Pionowy podział władzy*, Warszawa 2020.

Jaroszyński T., *Kodeks Etyki Prawników Europejskich (CCBE) w polskim systemie prawa*, „Przegląd Prawa Konstytucyjnego" 2023, nr 1, s. 217–228.

Jaś-Nowopolska M., Wolska H., *Women in legal services (as attorneys and legal advisors) in Poland and Germany*, „Franz von Liszt Institute Working Paper" 2018, nr 2, s. 1–19.

Jaworski J., *Reglamentacja zawodów rynku nieruchomości*, Warszawa 2010.

Kosikowski C., *Ustawa o swobodzie działalności gospodarczej. Komentarz*, Warszawa 2013.

Kulesza M., *Pojęcie zawodu zaufania publicznego*, w: *Zawody zaufania publicznego a interes publiczny – korporacyjna reglamentacja versus wolność wykonywania zawodu. Materiały z konferencji zorganizowanej przez Komisję Polityki Społecznej i Zdrowia Senatu RP przy współudziale Ministerstwa Pracy i Polityki Społecznej pod patronatem Marszałka Senatu RP Longina Pastusiaka 8 kwietnia 2002 r.*, opr. S. Legat, M. Lipińska, Warszawa 2002, s. 25–31.

Kwapisz K., *Ustawa o radcach prawnych. Komentarz*, Warszawa 2011.

Łabieniec P., *Podmiotowość, odpowiedzialność, historyczność profesji i profesjonalisty na przykładzie zawodu radcy prawnego*, „Archiwum Filozofii Prawa i Filozofii Społecznej" 2018, nr 1(16), s. 34–45.

Powałowski A., *Podstawy aksjologiczne regulacji wykonywania tzw. zawodów zaufania publicznego*, w: *Prawo gospodarcze*, pod red. A. Powałowskiego, Warszawa 2022, s. 3–8.

Strzyczkowski K., *Prawo gospodarcze publiczne*, Warszawa 2007.

Tokarczyk R., *Etyka prawnicza*, Warszawa 2005.

Wielki słownik języka polskiego PWN [r–t], pod red. S. Dubisza, Warszawa 2018.

Wojtczak K, *Reglamentacja form wykonywania zawodów zaufania publicznego w rozwiązaniach prawa polskiego i państw Unii Europejskiej*, w: *Zawody zaufania publicznego a interes publiczny – korporacyjna reglamentacja versus wolność wykonywania zawodu. Materiały z konferencji zorganizowanej przez Komisję Polityki Społecznej i Zdrowia Senatu RP przy współudziale Ministerstwa Pracy i Polityki Społecznej pod patronatem Marszałka Senatu RP Longina Pastusiaka 8 kwietnia 2002 r.*, oprac. S. Legat, M. Lipińska, Warszawa 2002, s. 39–47.

Wolska H., *Obligation of continuing legal education for lawyers (advocates and attorneys-at-law) under German and Polish law*, Warszawa 2024.

STUDIA PRAWA PUBLICZNEGO
2025 • NR 1 (49) ISSN 2300-3936
https://doi.org/10.14746/spp.2025.1.49.5

Matti Gurreck*

The EU's Renewable Energy Directive – Planning and Permitting Under the RED III

Abstract. The article examines the recent changes to the EU's Renewable Energy Directive, in short: RED. In order to accelerate the roll-out of renewable energy, the EU legislator has for the first time introduced spatial planning obligations to the RED and significantly changed the provisions on permitting. Possible conflicts between renewable energy plants, on the one hand, and environmental protection, on the other, should ideally be avoided at the planning stage. In areas designated as Renewable Acceleration Areas (RAAs), renewable energy projects shall be exempt from the requirement to carry out an environmental impact assessment (EIA) pursuant to the EIA Directive (2011/92/EU) and an appropriate assessment of the implications for Natura 2000 sites, according to Article 6(3) of the Habitats Directive. As a result, the reformed Directive prioritises the expansion of renewable energy over nature conservation. In order to fulfil the promise of accelerating the deployment of renewables, open legal questions must be clarified and Member States must use the discretion afforded to them by the Directive. Otherwise, Member State authorities will not be able to implement the measures effectively or risk being caught up in litigation against permits for renewable power plants.

Keywords: EU law – climate mitigation – environmental assessment – planning law

Introduction

According to the latest emissions gap report by the UN Environment Programme, the international community's climate protection efforts are failing to meet the goals of the Paris Agreement, even if current commitments are met.[1] Since decarbonising the energy system is an

* University of Eastern Finland, Finland | Uniwersytet Wschodniej Finlandii, Finlandia, https://orcid.org/0009-0006-4456-4205, e-mail: matti.gurreck@uef.fi.

[1] United Nations Environment Programme, *Emissions Gap Report 2024: No more hot air … please! With a massive gap between rhetoric and reality, countries draft new climate commitments*, 2024.

SPP 1(49), 2025: 85–108. © The Author(s). Published by: Adam Mickiewicz University Press, 2025.

important tool for climate mitigation, the first global stocktake identified the tripling of renewable energy capacity by 2030 as a global effort to be pursued by the UNFCCC parties.[2] However, except for solar PV, the world is not on track to reach this threefold increase.[3]

In this context, the EU's recently amended Renewable Energy Directive[4] (RED) aims to significantly and quickly increase the share of energy from renewable sources in the energy system. It does so in particular by imposing spatial planning obligations on the Member States and by lowering environmental standards. This is intended to speed up the permitting process because the possible negative environmental impacts of renewable energy projects should already be taken into consideration at the earlier planning stage. This article describes and analyses the recent changes by first locating the reform of the RED in its (geo-)political context (section 1), followed by an overview of its central innovations (section 2). Section 3 highlights select legal and practical issues that need addressing so that the RED can be an effective tool to accelerate renewables deployment.

1. Genesis and context of the RED III

The latest reform of the EU Renewable Energy Directive – known as RED III due to it being the third major amendment – is the result of a complex interplay of political, economic and geopolitical developments that have significantly shaped Europe in recent years. In order to fully understand the emergence of the RED III, it is essential to place the reform in the context of key initiatives and challenges: The European Green Deal, the Fit for 55 package, the energy crisis resulting from the Russian war of aggression on Ukraine, and the EU Emergency Regulation.

[2] UNFCCC, *Outcome of the first global stocktake (2024)*, FCCC/PA/CMA/2023/16/Add.1, Decision 1/CMA.5, para. 28, point a.

[3] International Renewable Energy Agency, COP28 Presidency, COP29 Presidency, Ministry of Energy of the Republic of Azerbaijan, Government of Brazil, *Delivering on the UAE Consensus. Tracking progress toward tripling renewable energy capacity and doubling energy efficiency by 2030*, 2024.

[4] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 XII 2018 on the promotion of the use of energy from renewable sources (recast) (OJ L 328, 21 XII 2018, p. 82).

1.1. The European Green Deal and the Fit for 55 package

The European Green Deal was launched by the von der Leyen Commission in 2019 as a set of policy initiatives that seek to tackle environmental challenges.[5] Most of these initiatives were subsequently proposed and adopted as binding legislative acts, with the so-called EU Climate Law[6] being particularly noteworthy, as it is the central legal act to achieve climate neutrality by 2050 and a 55% emissions reduction by 2030.[7] To this end, the European Green Deal provides for extensive measures in various sectors, including transport, agriculture, industry and energy – the latter accounting for three quarters of the EU's greenhouse gas emissions. Switching to energy from renewable sources is therefore identified as essential for the transformation towards climate neutrality.[8]

Many of the initiatives of the European Green Deal assumed a more concrete form through the Fit for 55 package of July 2021. It originally contained 16 proposals to adopt new and amend existing legislative acts as well as non-binding instruments in order to reach the eponymous 55% emissions reduction target by 2030.[9] Most of the measures were based on the EU's legislative competences in the field of environment (Article 192 (1) TFEU) and energy (Article 194 (2) TFEU), one of them being the revision of the RED. The main aim of the Fit for 55 package was to adapt the sector targets and the respective instruments to the overriding objective of GHG neutrality laid down in the new EU Climate

[5] European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – The European Green Deal, 11 XII 2019, COM(2019) 640 final.

[6] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 VI 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No. 401/2009 and (EU) 2018/1999 ('European Climate Law'), (OJ L 243, 9 VII 2021, p. 1).

[7] K. Kulovesi, S. Oberthür, H. Van Asselt, A. Savaresi, *The European Climate Law: Strengthening EU Procedural Climate Governance?*, "Journal of Environmental Law" 2024, vol. 36, no. 1, pp. 23–42.

[8] European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – The European Green Deal, 11 XII 2019, COM(2019) 640 final, p. 6.

[9] On the Fit for 55 package see S. Schlacke, H. Wentzien, E. Thierjung, M. Köster, *Implementing the EU Climate Law via the "Fit for 55" package*, "Oxford Open Energy" 2022, vol. 1, art. no. oiab002, pp. 1–13.

Law.[10] With regard to the RED, the revision proposed in the Fit for 55 package included an increase in the overall share of energy from renewable sources in the EU's gross final consumption of energy of 40% by 2030, which is 8% more than the previous target that was set in 2018.[11]

1.2. REPowerEU and the Emergency Regulation

Russia's aggression against Ukraine in February 2022 and the ensuing energy price crisis served as a catalyst for the legislative efforts in the energy sector. The EU was left vulnerable to supply disruptions as Russia, one of the main suppliers of natural gas and oil to Europe,[12] attempted to use its energy exports as political leverage. This development highlighted that moving away from fossil fuels is not only necessary from a climate mitigation perspective but also required as a matter of national security to become independent of Russian oil and gas. While the amendments to the RED envisioned in the Fit for 55 package already sought to speed up the roll-out of renewable energies, the war in Ukraine provided a sense of urgency to the temporal component. At the Member State level, domestic measures to avoid social hardship caused by exceedingly high energy prices were adopted,[13] some of which were mandated by EU emergency responses.[14] One of the EU's reactions took the form of the REPowerEU plan.[15] It proposes measures to save energy,

[10] See Article 2 (1) European Climate Law (OJ L 243, 9 VII 2021, p. 1).

[11] See Article 5 (2) of the 2018 version of the RED (OJ L 328, 21 XII 2019, pp. 1–77).

[12] In 2021, 45% of the EU's demand for natural gas was met by imports from Russia, see European Commission, DG Energy, In focus: EU energy security and gas supplies, available at https://energy.ec.europa.eu/news/focus-eu-energy-security-and-gas-supplies-2024-02-15_en (accessed: 25 I 2025).

[13] See, in the case of Germany, the "Third Relief Package," which comprises measures like imposing levies on electricity producers' windfall profits to finance an electricity price brake, one-off payments to students and other low-income households, and greater support for particularly energy-intensive companies: see https://www.bundesregierung.de/breg-en/news/third-relief-package-2123130 (accessed: 25 I 2025).

[14] See Article 6–11 of the Council Regulation (EU) 2022/1854 of 6 X 2022 on an emergency intervention to address high energy prices (OJ L 261 I, 7 X 2022, pp. 1–21), which stipulate a mandatory cap on market revenues of producers obtained from the generation of electricity.

[15] European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – REPowerEU Plan, Brussels, 18 V 2022, COM(2022) 230 final.

diversify energy supplies, quickly substitute fossil fuels by accelerating Europe's clean energy transition, and smartly combine investments and reforms.[16] It does not replace the Fit for 55 proposals but instead modifies them, in particular, the envisioned trajectory since the phase out of Russian fossil fuels should be achieved much earlier.[17] Although at that point the negotiations on the revision of the RED were already ongoing, the Commission proposed additional changes to the Directive, including raising the renewables target to 45% by 2030.[18]

The REPowerEU plan included the adoption of the Emergency Regulation by the Council.[19] To speed up the deployment of renewable energy sources, it allows the Member States to simplify the procedures for permitting renewable energy plants as well as energy storage and electricity grid projects essential to integrate renewable energy into the power system. The Emergency Regulation was based on Article 122 (1) TFEU and adopted quickly without the European Parliament. Since this is problematic in itself from the democratic legitimacy point of view and because Article 122 TFEU has been used more frequently in the recent past,[20] discussions in legal scholarship about its appropriateness as a legal basis for economic policy measures whose effects extend beyond the period of application of the Regulation have become more frequent.[21] As crisis measures, any measure based on Article 122 TFEU must be time-limited until the crisis at hand is resolved. However, the case of the Emergency Regulation seems less problematic than other measures like the Next Generation EU (NGEU) measures for example, since the Regulation is clearly a temporal measure and intended only to bridge the period until the revision of the RED comes into force.[22] That

[16] Ibidem, p. 2.

[17] Ibidem, p. 3.

[18] European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources, Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency, COM(2022) 222 final, Article 1 (2).

[19] Council Regulation (EU) 2022/2577 of 22 XII 2022 laying down a framework to accelerate the deployment of renewable energy (OJ L 335, 29 XII 2022, p. 36).

[20] M. Chamon, *The rise of Article 122 TFEU*, "VerfassungsBlog," 1 II 2023, available at https://verfassungsblog.de/the-rise-of-article-122-tfeu/.

[21] See, for example, P. Leino-Sandberg, M. Ruffert, *Next generation EU and its constitutional ramifications: a critical assessment*, "Common Market Law Review" 2022, vol. 59, no. 2, p. 448, who warn that Article 122 TFEU might "develop into a new super competence, to be used without effective democratic scrutiny."

[22] See Article 1 (1) and recitals 3 and 8 of Council Regulation (EU) 2022/2577.

being said, some of the Regulation's provisions have been prolonged for 12 months until 30 June 2025 and amended slightly.[23]

The Emergency Regulation introduced an element that is also central to the RED III and which will be further discussed below: To accelerate the permitting process for renewable energy projects, Article 6 of the Emergency Regulation allows for exemptions from certain environmental impact assessment requirements[24] for renewable energy projects, energy storage projects, and electricity grid projects necessary to integrate renewable energy into the electricity system, on condition that the projects are situated in "designated renewable or grid areas." Such areas must have undergone a strategic environmental assessment in line with the Strategic Environmental Assessment Directive (SEA Directive).[25] The competent authority must also apply appropriate and proportionate measures to mitigate the environmental impacts on species protected under the Habitats Directive[26] and the Birds Directive.[27] In cases where such measures are not feasible, the competent authority shall require the operator to provide monetary compensation for species protection programmes aimed at maintaining or improving the conservation status of the affected species.

2. RED III – key innovations

The regulation amending the RED and "transforming" it into the RED III was adopted and published in October 2023. With regard to terminology, it should be noted that the term 'RED IV' is also sometimes used

[23] A detailed analysis of this is provided by E. Thierjung, *Notfall-VO: Ist der Kommissionsvorschlag eine sinnvolle Ergänzung der jüngsten Änderungen der EE-RL?*, "EnK-Aktuell" 2023, art. no. 010273.

[24] Article 2 (1) Directive 2011/92/EU of the European Parliament and of the Council of 13 XII 2011 on the assessment of the effects of certain public and private projects on the environment (OJ L 26, 28 I 2012, p. 1), hereinafter: "EIA Directive"; Article 12 (1) Council Directive 92/43/EEC of 21 V 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22 VII 1992, p. 7), hereinafter: "Habitats Directive"; Article 5 Directive 2009/147/EC of the European Parliament and of the Council of 30 XI 2009 on the conservation of wild birds (OJ L 20, 26 I 2010, p. 7), hereinafter: "Birds Directive."

[25] Directive 2001/42/EC of the European Parliament and of the Council of 27 VI 2001 on the assessment of the effects of certain plans and programmes on the environment (OJ L 197, 21 VII 2001, p. 30).

[26] Article 12 (1) of the Habitats Directive.

[27] Article 5 of the Birds Directive.

to refer to the updated RED. This is due to the fact that, as shown above, two Commission proposals to amend the RED were published and negotiated in parallel: The first one as part of the Fit for 55 package in June 2021 (RED III) and then, in response to Russian's invasion, another proposal as part of the REPowerEU plan in May 2022 (RED IV).[28] Both proposals were combined in the legislative process and ultimately incorporated into the same amended regulation, now referred to as RED III.

2.1. Increased ambition

An important cornerstone of the reform is the aim to increase the overall share of energy from renewable sources in the EU's gross final consumption of energy to 42.5% by 2030. In addition, although not legally binding, a share of 45% is aimed for.[29] The inclusion of the non-binding aspirational 45% target is the result of a political concession by the conservative majority in the European Parliament and Council to the more progressive voices. A look at the 24% share of renewable energy in 2023[30] makes it clear that the new targets are ambitious. To achieve the increased goal, the European legislator has introduced a new approach addressing the planning and permitting procedure for renewable energy power projects. This new regulatory framework consists of three main elements: Firstly, the planning, construction and operation of renewable energy power plants as well as grid connection and storage facilities are stipulated to be in the overriding public interest and to serve public health and safety according to Article 16f RED III.[31] Secondly, monetary compensation for adverse environmental impacts is facilitated where mitigation measures are not available and other compensatory measures

[28] European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources, Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency, COM(2022) 222 final.

[29] See Article 3 (1) RED III.

[30] European Environment Agency, Report 11/2024: Trends and projections in Europe 2024.

[31] In German energy law, a similar provision had already been introduced into the German Renewable Energy Act (EEG) before the adoption of the RED III, § 2 sentence 1 EEG. See on this E. Thierjung, *The Legal Concept of '(Overriding) Public Interest' as an Indicator for Changing Premises in German Energy Law with References to the European Level Focusing on Recent Developments*, "Studia Iuridica" 2023, vol. 98, p. 169.

are deemed disproportionate.[32] Thirdly, Member States are obliged to designate 'Renewables Acceleration Areas' (RAAs) and acceleration areas for related grid and storage facilities in which simplified permitting requirements apply.[33] This third aspect is further elaborated in the next section.

2.2. Planning obligations – designation of Renewables Acceleration Areas (RAAs)

Article 15b, 15c and 16a of the RED III constitute the core of the new approach to renewables acceleration that was already outlined in Article 6 of the Emergency Regulation: Member States are required to designate RAAs in which a simplified permitting procedure applies. Whereas this is optional for the Member States under the Emergency Regulation, it is now obligatory under Article 15b and 15c of the RED III and far more detailed.[34]

The designation consists of two steps to be carried out by the Member States: The mapping of areas necessary to reach the renewables target (Article 15b RED III) and the actual designation of RAAs according to the criteria (Article 15c RED III).

2.2.1. Mapping of necessary areas, Article 15b RED III

As a first step, Article 15b (1) sentence 1 RED III obliges Member States to map by 21 May 2025 the areas within their territories to identify the domestic potential and the available areas necessary for the installation of renewable energy plants and their related infrastructure to meet their national contributions towards the overall renewables target. This mapping does not need to take the form of a binding decision because it is only a preparatory step – an initial selection of the areas that are potentially available for renewables projects to contribute to the target.[35]

---

[32] Article 16a (5) RED III.

[33] Article 15c RED III.

[34] Additionally, Article 15e RED III contains provisions on the designation of infrastructure areas. This is optional for the Member States and will not be discussed in this contribution.

[35] D. Römling, *Die Novelle der Erneuerbare-Energien-Richtlinie (EU) 2018/2001 (RED III)*, "Europäisches Umwelt- und Planungsrecht" 2024, vol. 22, no. 3, p. 238. This opinion is

The Regulation does not explicitly quantify the size of the necessary areas that need to be mapped. Although Article 15b (1) sentence 1 RED III refers to "national contributions" towards the EU's 42.5% target, these are not broken down to the Member State level, unlike the Effort Sharing Regulation, for example, which sets out greenhouse gas reduction targets for each Member State.[36] Instead, the obligation can be quantified using the Member States' respective National Energy and Climate Plans (NECPs) because Article 15b (1), subparagraph 2 RED III requires the mapped necessary areas to be commensurate with the renewables trajectories specified there.[37] Germany, for example, has set itself a renewables target of 80% in 2030 in its draft updated NECP for the period 2021–2030.[38] Accordingly, the mapped areas need to be large enough to meet this national target.[39]

Article 15b (2) RED III states three criteria to be used by the Member States when mapping: "(a) the availability of energy from renewable sources and the potential for renewable energy production of the different types of technology in the land surface, sub-surface, sea or inland water areas; (b) the projected demand for energy, taking into account the potential flexibility of the active demand response, expected efficiency gains and energy system integration; (c) the availability of relevant energy infrastructure, including grids, storage and other flexibility tools or the potential to create or upgrade such grid infrastructure and storage."

The wording suggests that at this stage Member States need to apply only energy-related criteria, not environmental ones. Recital 25,

shared by the German government that has commissioned a study titled "Analyse der Flächenverfügbarkeit für Windenergie an Land post-2030" [Analysis of land availability for onshore wind energy post-2030] to carry out the mapping, see the proposal for the transposition of the RED III into German law, Bundestag Drucksache 20/12785, 9 IX 2024, p. 31.

[36] Article 4 (1) and Annex I Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 V 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No. 525/2013 (OJ L 156, 19 VI 2018, p. 26).

[37] J. Wulff, *Die Umsetzung der Erneuerbare Energien-Richtlinie (RED III) in nationales Recht*, "Neue Zeitschrift für Verwaltungsrecht" 2024, p. 372.

[38] Bundesministerium für Wirtschaft und Klimaschutz, Aktualisierung des integrierten nationalen Energie- und Klimaplans Bundesrepublik Deutschland – August 2024, p. 68.

[39] An overview of the updated NECPs can be found here: https://commission.europa.eu/energy-climate-change-environment/implementation-eu-countries/energy-and-climate-governance-and-reporting/national-energy-and-climate-plans_en#national-energy-and-climate-plans-2021-2030 (accessed: 25 I 2025).

on the other hand, states that the mapping should take into consideration the area's "environmental sensitivity in accordance with Annex III" to EIA Directive. While this is not included in the operative text of the Regulation and therefore not legally binding and cannot be relied on as a ground for derogating from the actual provisions of the act,[40] it can still be used to interpret and clarify the provisions of the act according to the established case law of the European Court of Justice (ECJ).[41] In the case of Article 15b(2) RED III, there is no contradiction between the operative text and Recital 25. In addition, the criteria mentioned in Article 15b(2) RED III are to be taken into account "in particular," meaning they are non-exhaustive. It is thus legally permissible – and also expedient – to apply environmental criteria when mapping potential areas according to Article 15b RED III, in order to exclude already at this point areas that cannot be designated according to Article 15c RED III for environmental reasons (see 2.2.2.1 below).[42]

Article 15b (3) RED III obliges Member States to favour multiple uses of the areas to be mapped and demands that renewable energy projects be compatible with pre-existing uses of those areas. This provision has great potential to use space more efficiently as a recent study illustrates: Looking at wind energy in Germany, it concluded that 97–98% of the land surface area needed for wind turbines is usable for other purposes at the same time.[43] Overall, land use conflicts are likely to increase due to a growing number of legal incentives and requirements concerning space. Land is required for energy production, nature and climate protection, transport, agriculture, and other uses.[44] Therefore, establishing the principle of multifunctional use in spatial planning law seems necessary in general.[45] In the case of renewable energy, the combination of

[40] Judgment of ECJ of 19 XI 1998, Case C-162/97, para. 54.

[41] Judgment of ECJ of: 25 XI 1998, Case C-308/97, para. 33; 10 I 2006, Case C-344/04, paras. 69, 70, 75.

[42] M. Deutinger, F. Sailer, *Die Beschleunigungsgebiete nach der Erneuerbare-Energien-Richtlinie. Handlungsnotwendigkeiten und -spielräume bei der Umsetzung in nationales Recht*, "Würzburger Studien zum Umweltenergierecht" no. 35, 8 II 2024, p. 12.

[43] S. Bampinioti, N. Christakou, B. Paulitz, L. Pöhler, A. Stevens, R. Winter, E. Zatsepina, *Land: A crucial resource for the energy transition*, May 2023.

[44] S. Schlacke, D. Plate, *Multifunktionale Flächennutzung: Potentiale und Grenzen des Raumordnungsrechts*, "Zeitschrift für Umweltrecht" 2024, p. 323.

[45] WBGU (German Advisory Council on Global Change), *Rethinking Land in the Anthropocene: from Separation to Integration*, Berlin 2021.

solar energy with agriculture (AgriPV) and the rewetting of peatlands is particularly promising.[46]

2.2.2. Designation of RAAs, Article 15c RED III

Building on the mapping of necessary areas, Member States need to designate RAAs as a subset of the necessary areas by 21 February 2026. Article 2 (2) No. 9a RED III defines RAAs as "a specific location or area, whether on land, sea or inland waters, which a Member State designated as particularly suitable for the installation of renewable energy plants." The suitability of the areas from an energy production perspective (for example, the intensity and duration of solar radiation where photovoltaic systems are concerned or the right wind conditions in case of wind energy) has already been subject to the mapping of necessary areas. Unlike Article 15b RED III, Article 15c RED III requires Members States to use legally binding planning instruments and sets up environmental criteria that need to be met to designate an area as RAA.[47] Like Article 15b RED III, it does not precisely determine the size of the RAAs required. Paragraph 4 explicitly places this question within the remit of Member States, only demanding that the combined size of the RAAs be "significant" and that they contribute to the achievement of the objectives set out in the Directive. There is thus a risk of non-uniform application among the Member States when applying this provision and it is uncertain whether the ECJ will be able to provide clarification when the wording is this open.[48] This is especially true because Article 15c RED III has no equivalent to Article 15b (1), subparagraph 2 RED III, mentioned above, which would suggest a similar interpretation, i.e. that the size of the RAAs needs to be commensurate with the renewables trajectories specified in the Member States' NECPs.

The process of designating RAAs must ensure public participation[49] and is carried out in three stages described below, intending first and foremost to uphold the given standard of environmental protection. However, under certain conditions, it can be abbreviated with regard to

[46] WBGU (German Advisory Council on Global Change), *Biodiversity: Act Now for Nature and Humanity*, Policy Paper #13, Berlin 2024.

[47] J. Wulff, op. cit., p. 372.

[48] M. Deutinger, F. Sailer, op. cit., p. 15.

[49] As detailed in Article 6 of the SEA Directive (2001/42/EC), see Article 15d RED III.

areas that were already designated as suitable areas for the accelerated deployment of renewable energy sources in a preceding procedure.[50] This is supposed to integrate previously designated areas into the RED III and avoid duplication of environmental assessments.[51] One of the applications for this provision concerns areas designated under the Emergency Regulation. However, "re-labelling" these areas as RAAs is not automatic, but requires certain environmental conditions to be met.[52]

2.2.2.1. Exclusion of environmentally sensitive areas

The first condition for the RAA designation is that they need to be sufficiently homogeneous and the deployment of renewable energy sources cannot be expected to have a significant environmental impact, in view of the particularities of the selected area.[53] According to Article 15c (1), point (a)(i) RED III, Member States need to prioritise artificial and built surfaces like rooftops. This makes sense not only from an environmental point of view, as the need for additional spaces is minimised, but also has significant potential for energy production: A study by the EU's Joint Research Centre estimates that EU rooftops could potentially meet approximately a quarter of the current electricity consumption needs.[54] Other areas with low environmental value that should be prioritised include facades of buildings, transport infrastructure and their direct surroundings, parking areas, farms, waste sites, industrial sites, mines, artificial inland water bodies, lakes or reservoirs and degraded land not usable for agriculture.[55]

Article 15c (1), point (a)(ii) RED III excludes certain environmentally sensitive areas from the RAA designation: Natura 2000 sites and areas designated under national protection schemes for nature and biodiversity conservation, major bird and marine mammal migratory routes as

[50] Article 15c (4) RED III.

[51] Recital 31 RED III.

[52] E. Thierjung, *Erleichterungen des Ausbaus der Erneuerbaren Energien durch die EU-Notfall-Verordnung und weitere Änderungen im Umweltrecht*, "Das Deutsche Verwaltungsblatt" 2024, p. 536.

[53] Article 15c (1) point (a) RED III.

[54] K. Bódis, I. Kougias, A. Jäger-Waldau, N. Taylor, S. Szabó, *A high resolution geospatial assessment of the rooftop solar photovoltaic potential in the European Union*, "Renewable and Sustainable Energy Reviews" 2019, vol. 114, art. no. 109309.

[55] See SWD(2024) 333 final, pp. 9–12, with examples on how these areas are already used for renewable energy projects in some Member States.

well as other areas identified on the basis of sensitivity maps and other tools and data. Apart from the Natura 2000 sites, Member States enjoy some freedom as to which environmentally sensitive areas to exclude from the RAA designation. Germany's draft law to transpose the RED III, for example, mentions "nature conservation areas, national parks or core and maintenance zones of biosphere reserves within the meaning of the Federal Nature Conservation Act [Bundesnaturschutzgesetz]" as well as "areas with a nationally significant occurrence of at least one species affected by the deployment of wind energy within the meaning of […] the Federal Nature Conservation Act, which can be determined on the basis of existing data on known species occurrences or on particularly suitable habitats."[56] Other areas protected under the Federal Nature Conservation Act like landscape protected areas (Landschaftschutzgebiete)[57] are not included. However, given that these areas generally enjoy a lower level of protection compared to Natura 2000 areas or the other areas protected by German law,[58] this appears to be an appropriate use of the Member State's discretion.

To identify possible RAAs, i.e. areas where renewable energy plants are not likely to have a significant environmental impact, Member States are required to use all appropriate and proportionate tools and datasets, according to Article 15c (1), point (a)(iii) RED III. The wording "appropriate and proportionate tools and datasets" indicates that incomplete data is not necessarily a reason to exclude an area from the possible RAAs. A lack of knowledge can, in other words, be to the detriment of local biodiversity. Data on bird migratory routes, for example, can be scarce or not available to Member State authorities because it is gathered and kept by research institutions or non-governmental organisations.[59] Member States may have to decide on a case-by-case basis which data to use. One source they may refer to is the European Commission's Energy and Industry Geography Lab,[60] which contains geographical data related to energy, industry and infrastructure like Natura 2000 sites, Important Bird Areas or information on peatlands.

[56] See § 249a of the draft proposal for the transposition of the RED III into German law, Bundestag Drucksache 20/12785, 9 IX 2024, p. 16.

[57] See § 26 Federal Nature Conservation Act [Bundesnaturschutzgesetz] of 29 VII 2009 (BGBl. I p. 2542), as last amended by Article 48 of the law of 23 X 2024 (BGBl. 2024 I Nr. 323).

[58] O. Hendrischke, *§ 26 BNatSchG*, in: *Gemeinschaftskommentar zum Bundesnaturschutzgesetz*, ed. S. Schlacke, 3rd ed., Hürth 2023, para. 2.

[59] SWD(2024) 333 final, p. 12.

[60] See https://energy-industry-geolab.jrc.ec.europa.eu/ (accessed: 25 I 2025).

2.2.2.2. Mitigation rulebook

Secondly, according to Article 15c (1), point (b) RED III, when adopting the plans, Member States need to establish appropriate rules to prevent or, where prevention is not feasible, significantly reduce the adverse environmental impacts of renewables projects. Furthermore, mitigation efforts must be applied in a proportionate and timely manner to ensure compliance with obligations under the Habitats Directive,[61] the Birds Directive,[62] and the Water Framework Directive.[63] These rules adopted at the planning stage are intended to undergo standardisation to some extent; the European Commission refers to them as the "mitigation rulebook."[64]

While the selection process of the RAAs should ideally minimise the environmental impact of the renewable energy projects, negative effects can still occur due to the characteristics of the area concerned and the specific energy technology. Accordingly, the RED III mandates that Member States to incorporate into their RAA plans a framework of rules detailing effective mitigation measures that renewable energy projects must implement and adhere to, aimed at addressing the most probable impacts. If those rules are complied with and appropriate mitigation measures are implemented by the individual projects, they benefit from a rebuttable presumption of compliance with the environmental law mentioned above concerning the protection of habitats, protected species and water.[65]

2.2.2.3. Strategic environmental assessment

Thirdly, the plans need to be subject to a strategic environmental assessment under the SEA Directive and an appropriate assessment according to Article 6 (3) of the Habitats Directive, if they are likely to have a significant impact on Natura 2000 sites.[66] Since Natura 2000 sites are already excluded as possible RAAs according to Article 15c (1), point (a)(ii)

[61] Article 6 (2) and Article 12 (1) Habitats Directive.

[62] Article 5 Birds Directive.

[63] Article 4 (1), point (a)(i) and Article 4 (1), point (a), of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ L 327, 22 XII 2000, p. 1).

[64] SWD(2024) 333 final, p. 8.

[65] See Article 15c (1), subparagraph 3 RED III.

[66] Article 15c (2) RED III.

RED III, the appropriate assessment under Article 6 (3) of the Habitats Directive mostly concerns cases in which an RAA would be located in close proximity to a Natura 2000 site,[67] for example, if a mobile species protected under the site's conservation objectives is affected by collision or killing outside of the site.[68] The purpose of the assessment is to determine the most probable environmental impacts and also evaluate the adequacy of the mitigation rulebook in effectively addressing them.

2.3. The permitting stage, Article 16a RED III

Individual renewable energy projects to be realised within RAAs benefit from a lower level of scrutiny at the permitting stage when it comes to their environmental impacts, as specified by Article 16a RED III. They can still be realised outside of RAAs,[69] subject to the relevant requirements, but the simplifications in substantive environmental law are not as far-reaching as within the RAAs.[70]

Paragraphs 1 and 2 of Article 16a RED III contain procedural provisions limiting the maximum allowed deadlines for the permit-granting procedure: six months for newly installed renewable energy power plants with an electrical capacity of less than 150 kW, for co-located energy storage, as well as for their grid connection; twelve months for offshore renewable energy projects. An extension of up to six months is possible in both cases. These deadlines are halved, according to paragraph 2, in case of repowering, which typically has a lower environmental impact than constructing new facilities, thanks to the use of existing sites and infrastructure.[71]

At the level of substantive law, Article 16a (3) RED III exempts new applications for renewable energy plants from the environmental impact assessment under the EIA Directive. This exemption does not apply,

[67] SWD(2024) 333 final, p. 16.

[68] O. Hendrischke, K. Drewing, *Die Novelle der Erneuerbare-Energien-Richtlinie – Neue Regeln für den Naturschutz (Teil 1)*, "Europäisches Umwelt- und Planungsrecht" 2024, p. 94.

[69] Recital 32 of the RED III. For this reason, the term "go-to areas" used in the legislative proposal is less appropriate than the term RAAs, see M. Deutinger, F. Sailer, op. cit., p. 5.

[70] The permit-granting procedure outside RAAs is regulated by Article 16b and will not be discussed here.

[71] I. Gil-García, A. Fernández-Guillamón, M. Socorro García-Cascales, A. Molina-García, *A Multi-Factorial Review of Repowering Wind Generation Strategies*, "Energies" 2021, vol. 14, no. 19, art. no. 6280.

however, in the case of likely cross-border impacts of the renewables project, i.e. if the project is likely to have significant effects on the environment in another Member State or where a Member State potentially affected so requests, according to Article 7 of the EIA Directive.[72] An appropriate assessment according to Article 6 (3) of the Habitats Directive is not required if the renewable energy project complies with the mitigation rulebook established according to 15c (1), point (b) RED III. Since the planning of RAAs already takes environmental impacts into consideration, there is a rebuttable presumption that renewable energy projects do not have significant effects on the environment.[73]

The environmental assessments mentioned above are replaced by a "screening" laid down in Article 16a, paragraphs 4 and 5 RED III: Instead of the time-consuming and complex assessments of the EIA Directive and the Habitats Directive, the screening process is only meant to determine whether the renewable energy project in question is highly likely to cause significant unforeseen adverse effects, taking into consideration the environmental sensitivity of its geographical location. The screening focuses on impacts that were not identified during the strategic environmental assessment based on the SEA Directive and, where applicable, the Habitats Directive of the plans designating the RAAs. Member State authorities are required to carry out the screening process within 45 days from the date of submission of sufficient information.[74] Paragraph 5 makes it clear that authorising renewables projects within RAAs is now the rule, whereas an EIA for individual projects is the exception. An EIA will only be conducted if "the competent authority adopts an administrative decision, setting out due reasons on the basis of clear evidence, to the effect that a specific project is highly likely to give rise to significant unforeseen adverse effects in view of the environmental sensitivity of the geographical area where the project is located that cannot be mitigated by the measures identified in the plans designating acceleration areas or proposed by the project developer."

Taking all of this together, it seems very unlikely that renewables projects in RAAs will in practice be denied a permit because of EU environmental law: The unforeseen adverse effects must be significant, highly likely, occur due to the environmental sensitivity of the geographical

[72] Article 16a (3), subparagraph 1, sentence 2 RED III.

[73] See Article 15c (1), subparagraph 3 RED III and recital 33 of the RED III.

[74] 30 days in case of installations with an electrical capacity of less than 150 kW and in case of repowering, see Article 16a (4), subparagraph 2 RED III.

area, be impossible to mitigate, and the competent authority must present clear evidence. On top of that, Member States can exclude wind and solar photovoltaic projects from the obligation to carry out an EIA even if the screening finds unforeseen environmental impacts.[75] In this case, operators must implement proportionate mitigation measures or, if such measures are unavailable, compensatory actions, potentially including monetary compensation, which has to be used to fund species protection programmes if the adverse impact affects protected species. It will thus be easier to shortcut the mitigation hierarchy that usually applied when a project has negative environmental impacts (avoidance, mitigation, compensation of biodiversity losses through biodiversity gains, monetary compensation) and instead directly adopt compensatory measures in the form of monetary compensation. This is the second element of the RED's new regulatory framework mentioned above (see section 2.1).

3. Evaluation and select issues

The RED III adopts a novel approach with regard to reconciling conflicts between renewable energy deployment and nature conservation: The focus of renewable energy projects' environmental impact is shifting from the permitting stage to the planning stage. As the European Commission has put it in a non-binding guidance on designating RAAs, the idea is to move away from the strict standard of protection according to the EU nature Directives and instead adopt a "strategic vision on possible environmental impacts."[76] Whether the RED III can fulfil the promise of acceleration will depend on a number of factors, some of which are discussed below.

3.1. Focus on weakening EU nature protection law

The RED III not only modifies the procedural law provisions of the permitting process but also the substantive environmental standards of the Habitats Directive, the Birds Directive, and Water Framework Directive. This makes sense insofar as previous approaches that have

[75] Article 16a (5), subparagraph 2 RED III.
[76] SWD(2024) 333 final, p. 2.

focussed on simplifying procedural rules have proven largely ineffective, for example, limiting public participation.[77] Together with the short deadlines foreseen for the decisions of the Member States authorities in permitting procedures,[78] there is indeed great potential for acceleration.

However, it remains to be seen whether the right balance between climate and energy was struck.[79] On a general note, the Habitats Directive and the Birds Directive have had significant achievements, as the European Commission concluded in the 2016 Fitness Check of both Directives: These have demonstrated their effectiveness and efficiency by significantly improving the status and trends of bird species, other protected species, and habitats, which would have deteriorated further without their implementation. Additionally, despite compliance costs of around €5.8 billion annually for Natura 2000 sites, the Directives deliver multiple benefits valued at €200–300 billion per year, driven by increased funding, enhanced stakeholder engagement, and strengthened knowledge-sharing, albeit with room for further scaling.[80] Thus, the pursuit of accelerated renewable energy expansion at the cost of nature conservation warrants critical examination and should be closely monitored.

The same is true for the described stronger emphasis on monetary compensation for negative environmental impacts of individual renewable energy projects (see section 2.3). Bypassing the mitigation hierarchy carries the risk that avoidable biodiversity losses will increase as paying into nature conservation projects is a more attractive and swift

---

[77] D. Römling, *Die Novelle…*, p. 242.

[78] S. Schlacke, *Expert opinion in the context of the public hearing of the Committee on Climate Protection and Energy of the German Bundestag on the Federal Government's draft law on the implementation of Directive (EU) 2023/2413 in the areas of onshore wind energy and solar energy and for energy storage facilities at the same location*, BT-Drs. 20/12785, 20/13253, 16 X 2024, https://www.bundestag.de/resource/blob/1024706/493a49b7fbb977a77a66d8fcac65279d/Stellungnahme_SV_Prof_Dr_Sabine_Schlacke_Uni_Greifswald.pdf (accessed: 25 I 2025).

[79] Answering the question about the right balance in the affirmative C. Kliem, *Die novellierte Richtlinie zur Förderung erneuerbarer Energien – Kommt der Turbo für das Genehmigungsverfahren?*, "Zeitschrift für Neues Energierecht" 2023, p. 468.

[80] Commission Staff Working Document, Fitness Check of the EU Nature Legislation (Birds and Habitats Directives) Directive 2009/147/EC of the European Parliament and of the Council of 30 XI 2009 on the conservation of wild birds and Council Directive 92/43/EEC of 21 V 1992 on the conservation of natural habitats and of wild fauna and flora, 16 XII 2016, SWD(2016) 472 final, p. 5.

option for operators of renewable energy power plants. Depending on the projects funded, the biodiversity gains made this way can be uncertain and will depend on proper implementation and monitoring through the Member States, whereas the loss in species and habitats occurs immediately.[81]

3.2. Uncertainty about the new rules

The complexity of the new rules and inadequate staffing could be an impediment to speeding up renewable energy deployment. On the first point, as shown above, Member State authorities need to fulfil several new legal obligations in spatial planning and permitting procedures, especially the mapping and RAA designation according to Articles 15b and 15c, as well as the screening according to Article 16a RED III. These new obligations must be reconciled in a coherent and effective way with the diverse and long-established legal regimes of planning and permitting law in the Member States. If discussions in German legal scholarship and practice around the draft law transposing the RED III serve as an example, implementation may be a challenge for Member State authorities.[82] Among the legal questions that need to be clarified is the exact size of the RAAs required. As shown above,[83] this question cannot be answered in a satisfying way using the RED III alone. Furthermore, concerning the RAA designation, the question of whether only existing data should be utilized or if new data such as species occurrence mapping should also be collected remains unresolved. Some of the terminology used in Article 15c (1), subparagraph 1, point (a)(iii) RED III ("data sets" and "available data") suggests the former. On the other hand, the Directive's reference to the use of "all appropriate and proportionate instruments" leans towards a broader interpretation, particularly given that in the context of the screening, the data basis is expressly confined to

[81] S. Kingston, V. Heyvaert, A. Cavoski, *European Environmental Law*, Cambridge 2017, p. 441 et seq.

[82] See, for example, the points raised in a public hearing of the Committee on Climate Protection and Energy of the German Bundestag on the Federal Government's draft law on the implementation of Directive (EU) 2023/2413 in the areas of onshore wind energy and solar energy and for energy storage facilities at the same location, BT-Drs. 20/12785, 20/13253, available at: https://www.bundestag.de/ausschuesse/a25_klimaschutz_und_energie/anhoerungen/20-12785-1022262 (accessed: 25 I 2025).

[83] Sections 2.2.1 and 2.2.2 above.

existing data, see recital 35.[84] The European Commission also recognises the need for clarification, as it has issued multiple guidance documents on the issue after the RED III's adoption.[85] While this can be useful, it is, of course, not a binding and authoritative interpretation of the existing law.[86] Thus there remains a degree of legal uncertainty when it comes to transposing and implementing the RED III.

3.3. Multiple uses – potential not realised

While it is to be welcomed that Article 15b (3) RED III obliges Member States to favour multiple uses when mapping the necessary areas, its effectiveness in alleviating land use conflicts will depend to a large degree on the Member States. That is because the Directive only demands that Member States "favour" multiple uses and lacks any further specification (including a definition of multiple uses), except that renewable energy projects shall be compatible with pre-existing uses of the areas. Likewise, recital 27 of the RED III only asks the Member States to "explore, enable and favour multiple uses" and to "facilitate changes in land and sea use where required, provided that the different uses and activities are compatible with one another and can co-exist." All that can be inferred from this is the aim of selecting areas with minimal conflict to mitigate the risk of protracted disputes.[87] With the wording of Article 15b (3) RED III, it seems unlikely that the European Commission

[84] M. Deutinger, F. Sailer, op. cit., p. 21.

[85] Commission Recommendation (EU) 2024/1343 of 13 V 2024 on speeding up permit-granting procedures for renewable energy and related infrastructure projects (OJ L, 21 V 2024); Commission Staff Working Document, Guidance on designating renewables acceleration areas. Accompanying the document Commission Recommendation on speeding up permit-granting procedures for renewable energy and related infrastructure projects SWD(2024) 333 final; Commission Staff Working Document, Guidance to Member States on good practices to speed up permit-granting procedures for renewable energy and related infrastructure projects. Accompanying the document Commission Recommendation on speeding up permit-granting procedures for renewable energy and related infrastructure projects, SWD(2024) 124 final. Another guidance document will be published on multiple uses of areas, see SWD(2024) 333 final, p. 4.

[86] See, for example, ECJ Case C-226/11, *Expedia*, para. 30; Case C-133/79, *Sucrimex*, para. 16, on similar guidance documents. On EU soft law in general, see O. Ştefan, *Soft Law in Court*, p. 190. For an overview of the non-binding character, see M. Gurreck, *Informelle Administrativnormen im Unionsrecht*, Baden-Baden 2023, pp. 214–223.

[87] M. Lau, K. Wulfert, L. Vaut, H. Köstermeyer, J. Blew, *RED: Auseinandersetzung mit rechtlichen und fachlichen Fragen*, short paper from 2 V 2024, p. 3, https://www.

will be able to enforce the obligation, possibly through infringement proceedings, because "favouring" only constitutes an obligation of effort, not an obligation of result. Member States are likely to fulfil this obligation already if the consideration of multiple uses is incorporated into the decision-making process and not completely disregarded. It is therefore up to the Member States to specify the rules on multiple uses. To support this, the European Commission has announced that it will publish a dedicated guidance on multiple uses.[88] To implement Article 15b (3) RED III, the introduction of a new guiding principle of multifunctional land use into planning law was rightly proposed for German law in legal scholarship.[89] This could change the practice of spatial planning and place multifunctional land use on the same level as other guiding principles, such as sustainable land use.

3.4. Member State capacity for implementation

While the changes to substantive environmental law certainly have the potential to speed up the deployment of renewables, Member State authorities also need to be appropriately staffed to implement the new provisions.[90] As has been remarked in the German context, even without any legislative changes, ensuring sufficient human resources in the permitting authorities would lead to faster procedures for renewables[91] and other projects.[92] Where authorities lack trained personnel, decisions made by the authorities are more susceptible to successful legal challenges, often following protracted court proceedings.[93] This is especially true in the case of the RED III since, as shown above, it incorporates complex and novel elements that the competent authorities are not yet familiar with. Therefore, bringing about renewables acceleration requires addressing this and other obstacles as well.

---

natur-und-erneuerbare.de/fileadmin/Daten/Download_Dokumente/240502_Kurzpapier_Fragestellungen_RED.pdf (accessed: 25 I 2025).

[88] SWD(2024) 333 final, p. 4.

[89] S. Schlacke, D. Plate, op. cit., p. 329.

[90] SWD(2024) 333 final, p. 4.

[91] Sachverständigenrat für Umweltfragen (SRU), *Klimaschutz braucht Rückenwind: Für einen konsequenten Ausbau der Windenergie an Land*, 2022, p. 51.

[92] M. Burgi, M. Nischwitz, P. Zimmermann, *Beschleunigung bei Planung, Genehmigung und Vergabe*, "Neue Zeitschrift für Verwaltungsrecht" 2022, p. 1324.

[93] D. Römling, *Analyse der Ursachen von Verzögerungen von Planungs- und Zulassungsentscheidungen für Erneuerbare Energien-Anlagen*, Berlin 2023, p. 19.

Conclusion

The latest reform of the RED presents itself as a continuation and modification of the approach introduced by the Emergency Regulation: The RED III now contains planning obligations for the Member States who are required to designate RAAs, following a mapping of suitable areas. Within the RAAs, renewable energy projects benefit from special permitting provisions. The Directive sets the maximum deadlines allowed for the permitting procedure and exempts renewables projects from environmental impact assessments, according to the EIA Directive and appropriate assessment according to Article 6 (3) of the Habitats Directive. Instead, a "screening" is supposed to detect significant negative impacts of individual projects that were not foreseen when designating the RAAs.

The reform has great potential to accelerate the deployment of renewable energies. However, some provisions, like the one on multiple uses of space, remain vague and their effectiveness for achieving the Directive's goals will depend largely on the Member States further specifying them. The deadlines for transposition of the Directive are rather short: The mapping of the necessary areas and the designation of the RAAs is to be achieved by 21 May 2025 and 21 February 2025, respectively. This, along with the legal uncertainties that persist, makes the transposition and implementation by the Member States challenging.[94] They will also need to address other obstacles to speeding up the renewables roll-out, among them appropriate staffing of the competent authorities.

BIBLIOGRAPHY

Bampinioti S., Christakou N., Paulitz B., Pöhler L., Stevens A., Winter R., Zatsepina E., *Land: A crucial resource for the energy transition*, May 2023, https://www.mckinsey.com/industries/electric-power-and-natural-gas/our-insights/land-a-crucial-resource-for-the-energy-transition#/ (accessed: 25.01.2025).

Bódis K., Kougias I., Jäger-Waldau A., Taylor N., Szabó S., *A high resolution geospatial assessment of the rooftop solar photovoltaic potential in the European Union*,

[94] The European Commission seems particularly determined to enforce the RED III: Already in July 2024, is has opened infringement procedures against 26 Member States (all except Danmark) for failing to transpose into national law the RED III's permitting acceleration provisions of Article 16 (not discussed in this article), see https://energy.ec.europa.eu/news/september-infringement-package-key-decisions-energy-2024-09-26_en (accessed: 25 I 2025).

"Renewable and Sustainable Energy Reviews" 2019, vol. 114, art. no. 109309, https://doi.org/10.1016/j.rser.2019.109309 (accessed: 25.01.2025).

Burgi M., Nischwitz M., Zimmermann P., *Beschleunigung bei Planung, Genehmigung und Vergabe Zehn Thesen für ein ambitionierteres Sofortprogramm – Klima-Infrastruktur und Bundeswehr*, "Neue Zeitschrift für Verwaltungsrecht" 2022, pp. 1321–1329.

Chamon M., *The rise of Article 122 TFEU*, "VerfassungsBlog," 1.02.2023, https://verfassungsblog.de/the-rise-of-article-122-tfeu/ (accessed: 25.01.2025).

Deutinger M., Sailer F., *Die Beschleunigungsgebiete nach der Erneuerbare-Energien-Richtlinie. Handlungsnotwendigkeiten und -spielräume bei der Umsetzung in nationales Recht*, "Würzburger Studien zum Umweltenergierecht" no. 35, 8.02.2024.

Gil-García I., Fernández-Guillamón A., Socorro García-Cascales M., Molina-García A., *A Multi-Factorial Review of Repowering Wind Generation Strategies*, "Energies" 2021, vol. 14, no. 19, art. no. 6280, pp. 1–25, https://doi.org/10.3390/en14196280 (accessed: 25.01.2025).

Gurreck M., *Informelle Administrativnormen im Unionsrecht*, Baden-Baden 2023.

Hendrischke O., *§ 26 BNatSchG*, in: *Gemeinschaftskommentar zum Bundesnaturschutzgesetz*, ed. S. Schlacke, 3rd ed., Hürth 2023.

Hendrischke O., Drewing K., *Die Novelle der Erneuerbare-Energien-Richtlinie – Neue Regeln für den Naturschutz (Teil 1)*, "Europäisches Umwelt- und Planungsrecht" 2024, pp. 86–98.

International Renewable Energy Agency, COP28 Presidency, COP29 Presidency, Ministry of, Energy of the Republic of Azerbaijan, Government of Brazil, *Delivering on the UAE Consensus. Tracking progress toward tripling renewable energy capacity and doubling energy efficiency by 2030*, 2024.

Kingston S., Heyvaert V., Cavoski A., *European Environmental Law*, Cambridge 2017.

Kliem C., *Die novellierte Richtlinie zur Förderung erneuerbarer Energien – Kommt der Turbo für das Genehmigungsverfahren?*, "Zeitschrift für Neues Energierecht" 2023, pp. 462–468.

Kulovesi K., Oberthür S., Van Asselt H., Savaresi A., *The European Climate Law: Strengthening EU Procedural Climate Governance?* "Journal of Environmental Law" 2024, vol. 36, no. 1, pp. 23–42.

Lau M., Wulfert K., Vaut L., Köstermeyer H., Blew J., *RED: Auseinandersetzung mit rechtlichen und fachlichen Fragen*, short paper from 2.05.2024, https://www.natur-und-erneuerbare.de/fileadmin/Daten/Download_Dokumente/240502_Kurzpapier_Fragestellungen_RED.pdf (accessed: 25.01.2025).

Leino-Sandberg P., Ruffert M., *Next generation EU and its constitutional ramifications: a critical assessment*, "Common Market Law Review" 2022, vol. 59, no. 2, pp. 433–472.

Römling D., *Analyse der Ursachen von Verzögerungen von Planungs- und Zulassungs-entscheidungen für Erneuerbare Energien-Anlagen. Studie im Auftrag der Wissenschaftsplattform Klimaschutz*, Berlin 2023, https://wissenschaftsplattform-klimaschutz.de/veroeffentlichungen/23-06-01_ursachen-verzogerungen-erneuerbare-energien-anlagen-1.pdf (accessed: 25.01.2025).

Römling D., *Die Novelle der Erneuerbare-Energien-Richtlinie (EU) 2018/2001 (RED III)* "Europäisches Umwelt- und Planungsrecht" 2024, vol. 22, no. 3, pp. 237–246.

Sachverständigenrat für Umweltfragen (SRU), *Klimaschutz braucht Rückenwind: Für einen konsequenten Ausbau der Windenergie an Land*, Berlin 2022.

Schlacke S., *Expert opinion in the context of the public hearing of the Committee on Climate Protection and Energy of the German Bundestag on the Federal Government's draft law on the implementation of Directive (EU) 2023/2413 in the areas of onshore wind energy and solar energy and for energy storage facilities at the same location, BT-Drs. 20/12785, 20/13253*, 16 October 2024, https://www.bundestag.de/resource/blob/1024706/493a49b7fbb977a77a66d8fcac65279d/Stellungnahme_SV_Prof_Dr_Sabine_Schlacke_Uni_Greifswald.pdf (accessed: 25.01.2025).

Schlacke S., Plate D., *Multifunktionale Flächennutzung: Potentiale und Grenzen des Raumordnungsrechts*, "Zeitschrift für Umweltrecht" 2024, pp. 323–332.

Schlacke S., Wentzien H., Thierjung E., Köster M., *Implementing the EU Climate Law via the "Fit for 55" package*, "Oxford Open Energy" 2022, vol. 1, art. no. oiab002, pp. 1–13.

Ştefan O., *Soft Law in Court. Competition Law, State Aid and the Court of Justice of the European Union*, 2013.

Thierjung E., *Erleichterungen des Ausbaus der Erneuerbaren Energien durch die EU-Notfall-Verordnung und weitere Änderungen im Umweltrecht*, "Das Deutsche Verwaltungsblatt" 2024, pp. 529–563.

Thierjung E., *The Legal Concept of '(Overriding) Public Interest' as an Indicator for Changing* E. *Premises in German Energy Law with References to the European Level Focusing on Recent Developments*, "Studia Iuridica" 2023, vol. 98, pp. 169–183.

Thierjung E., *Notfall-VO: Ist der Kommissionsvorschlag eine sinnvolle Ergänzung der jüngsten Änderungen der EE-RL?*, "EnergieKrise-Aktuell" 2023, art. no. 010273.

United Nations Environment Programme, *Emissions Gap Report 2024: No more hot air … please! With a massive gap between rhetoric and reality, countries draft new climate commitments*, 2024, https://doi.org/10.59117/20.500.11822/46404 (accessed: 25.01.2025).

WBGU (German Advisory Council on Global Change), *Biodiversity: Act Now for Nature and Humanity*, Policy Paper #13, April 2024.

WBGU (German Advisory Council on Global Change), *Rethinking Land in the Anthropocene: from Separation to Integration*, 2021.

Wulff J., *Die Umsetzung der Erneuerbare Energien-Richtlinie (RED III) in nationales Recht*, "Neue Zeitschrift für Verwaltungsrecht" 2024, pp. 368–377.

STUDIA PRAWA PUBLICZNEGO
2025 • NR 1 (49) ISSN 2300-3936
https://doi.org/10.14746/spp.2025.1.49.6

II. KOMENTARZE, OPINIE I POLEMIKI

Maximilian Roth*

The Lawyer as Process and Project Manager for Infrastructure Projects

Abstract. In the Federal Republic of Germany, lawyers can be employed as project managers to relieve the authorities of the burden of approval procedures for large infrastructure projects. This particularly applies to procedures for the expansion of federal highways, railway lines or trams, power lines or wind turbines. This article presents the relevant legal basis, classifies it in relation to the state, and highlights the opportunities and risks of employing a lawyer as a project manager: The lawyer has a secure and large mandate for a longer period of time and can rely on a secure fee due to the solvency of the state. For the project sponsor, the use of a project manager means that the procedure can be completed more quickly, and external expertise or know-how represents additional support for the authority, which in principle cannot be detrimental. The cooperation between project manager and authority can take place under civil law on the basis of a contract or under public law via a public-law contract, in accordance with the provisions of the Administrative Procedure Act. The article concludes with a conclusion and summarizes the main findings.

Keywords: project manager – infrastructure – public participation – authority

Introduction

Major infrastructure projects such as the expansion of a motorway, railway line, power lines or wind turbines require official approval. This is preceded by extensive public and official participation. In order to speed up these procedures, the German legislator has created the possibility in numerous laws in recent years of outsourcing procedural tasks from

* Higher Regional Court of Rostock, Germany | Wyższy Sąd Krajowy w Rostoku, Niemcy, https://orcid.org/0009-0002-1987-9820, e-mail: Maximilian.Roth95@gmx.de.

the authorities to private parties. Lawyers specialising in administrative law and environmental law are often commissioned to act as so-called "procedure managers" or "project managers." This article first presents the various laws (section 1) in which the possibility of employing a project manager is enshrined, before going into its central tasks (section 2) and drawing a distinction from the sovereign activity of the authority (section 3). After a comparison of the opportunities and risks of using a project manager (section 4), a conclusion rounds off this article.

1. The use of project managers in current infrastructure law

The possibility of using a project manager is expressly stipulated in German law in some infrastructure laws. Although there are also regulations in the state law of the respective federal states,[1] only federal law will be considered here.

1.1. Lex scripta

In federal law, the following laws and paragraphs provide for the use of a project manager:

– section 43g of the Energy Industry Act (EnWG) for high-voltage lines,

– section 29 of the Grid Expansion Acceleration Act (NABEG) for cross-border extra-high-voltage lines and offshore connection lines,

– section 17a of the General Railway Act (AEG) for operating facilities of a railway system including traction power lines,

– section 17h of the Federal Trunk Roads Act (FStrG) for the construction or modification of federal trunk roads, i.e. federal motorways and federal highways,

– section 28b of the Passenger Transport Act (PBefG) for the construction or modification of operating facilities for trams,

– section 14f of the Federal Waterways Act (WaStrG) for the expansion, new construction or removal of federal waterways,

– section 2b of the Ordinance on the Authorisation Procedure (9th BImSchV) for certain installations requiring authorisation in accordance with the Ordinance on Installations Requiring Authorisation – 4th BImSchV.

[1] For example, Section 38b of the North Rhine-Westphalia Road and Paths Act.

1.2. Legal qualification: The lawyer as an administrative assistant

It is well known under administrative law that the administration involves third parties. For example, the public order office or the police do not tow away an illegally parked car themselves, but have this task carried out by a towing company. In these constellations, the private party acts as an "administrative assistant." As an appointed project manager, the lawyer also acts as an administrative assistant. Classification as an authorised agent should be rejected because the project manager is not entrusted with sovereign tasks and does not issue any administrative acts in accordance with Section 35 sentence 1 VwVfG. This is because the role of the project manager is conceptualised as a coordinator, communicator and supporter of the official decision, but without participating in it and without carrying out sovereign activities.[2]

Such a model is also understood as a "co-operative state," which is not surprising given the increasingly complex public tasks and the fact that the public administration has reached its personnel and financial limits.[3] However, this means that the project sponsor ultimately has to compensate for a shortage of administrative staff at its own expense by commissioning the project manager, which is also viewed critically in infrastructure practice.[4]

In energy industry law, there is even the possibility for the Federal Government to issue general administrative regulations on the implementation of the procedure in accordance with Section 43g EnWG with the approval of the Bundesrat. However, this has not yet been utilised.[5]

1.3. No entitlement to the assignment of a project manager

However, there is no entitlement to the deployment or commissioning of a project manager. The law only *enables* this, but does not oblige the

[2] Dominant opinion; see S. Missling, L. Winkler, in: *Energierecht. Kommentar*, eds. C. Theobald, J. Kühling, 125th supplementary ed., München 2024, section 43g EnWG, marg. no. 5b.

[3] J.-C. Pielow, in: *Berliner Kommentar zum Energierecht*, ed. F.J. Säcker, 4th ed., München 2019, section 43g EnWG para. 1.

[4] L. Winkler, in: *AEG/ERegG. Kommentar*, eds. J. Kühling, K. Otte, 1st ed., München 2020, section 17a AEG marg. no. 2.

[5] M. Kment, J. Arnold, in: *Energiewirtschaftsgesetz. Kommentar*, ed. M. Kment, 3rd ed., München 2023, Section 43g EnWG, marg. no. 3.

authority to appoint one. In practice, the proposal to appoint a project manager therefore comes either from the authority or the project sponsor. Even if the project sponsor wishes to appoint a project manager and requests this from the authority, the authority is not obliged to fulfil this request.[6] Rather, the authority has discretionary power, in which it must consider the extent to which the procedure can be organised more professionally and effectively, and accelerated overall through the involvement of a project manager.[7]

The decision to appoint or not appoint a project manager must therefore be categorised as an internal procedural act in accordance with Section 44a VwGO, which cannot be contested independently, i.e. no isolated legal protection is possible against the decision.[8]

1.4. Type of contract and award

If the authority decides to appoint a project manager and this is to be a lawyer, a civil-law service contract is concluded between the authority and the law firm in accordance with Sections 611 et seq. BGB, but a contract under public law within the meaning of Sections 54 et seq. VwVfG would also be possible.[9]

As a rule, no tendering procedure under European law or budgetary law is required beforehand and the contract can be awarded directly.[10] Law firms specialising in administrative and environmental law, in particular, so-called "boutiques," can be considered. Lawyers specialising in administrative law are particularly suitable for this, but this additional title is not a prerequisite for being appointed as a project manager.

---

[6] In certain constellations, however, the use of the technology is mandatory, so that the discretion may be reduced to zero; see S. Riege, *Praxisfragen zum Projektmanager*, "EnWZ" 2022, no. 5, pp. 170–172.

[7] M. Kment, J. Arnold, op. cit., Section 43g EnWG, marg. no. 13.

[8] Ibidem, Section 43g EnWG para. 44.

[9] Ibidem, Section 43g EnWG para. 15.

[10] For more details, see C. Donhauser, T. Schröck, *Ausschreibungspflichten bei der Beauftragung von Rechtsanwälten als Projektmanager in der Planfeststellung*, "VergabeR" 2020, no. 2, p. 139; S. Riege, op. cit., p. 174 et seq.

1.5. Cost allocation and invoicing

According to the respective laws (e.g. Section 43g EnWG, Section 29 NABEG, Section 17a AEG, Section 14f WaStrG), the project sponsor must always bear the costs of the project manager. In these cases, the consent of the project developer is required for a project manager to be commissioned (see Section 43g (1) EnWG). However, in the laws that do not stipulate the bearing of costs, such bearing of costs is regulated in accordance with the relevant cost laws, namely via so-called 'expenses of the authority'.[11] Contractually, this is regulated in such a way that a tripartite agreement is reached between the authority, the project sponsor and the project manager/lawyer.[12] In infrastructure areas in which the state is both the authorising authority and the project sponsor, e.g. railway infrastructure, federal trunk road infrastructure and federal waterway infrastructure, the costs are charged to the state budget, i.e. to the taxpayer.

Invoicing is also regulated in some laws: Section 43g para. 2 sentence 2 and sentence 3 EnWG stipulates that the project manager is obliged to submit the invoicing documents to the competent authority, which then checks whether the services invoiced by the project manager correspond to the respective order and informs the project sponsor of the result of this check without delay. The project sponsor can then instruct the payments accordingly.

1.6. Termination

The activities of the project manager can be terminated by the authority for objective reasons under the conditions of a cancellation of the civil-law contract. The authority then takes over the procedural steps itself again. However, it cannot be ruled out that fee payments will still have to be made to the project manager on the basis of the civil-law agreement. This must be taken into account when drafting the contract. The lawyer in particular should insist on this in order to be able to plan reliably in the long term. The project sponsor can also withdraw its consent at any time for objective reasons and thus terminate the obligation to bear the costs.[13]

[11] C. Donhauser, T. Schröck, op. cit., p. 140.
[12] M. Kment, J. Arnold, op. cit., Section 43g EnWG para. 19.
[13] Ibidem, Section 43g EnWG para. 42 f.

2. Tasks and services of a project manager

The tasks of a project manager relate to the preparation and implementation of procedural steps. The following procedural steps are listed by law as examples: the preparation of procedural master plans with the determination of procedural stages and interim deadlines, the monitoring of deadlines, the coordination of necessary expert opinions, the quality management of applications and documents of the project developers, the coordination of expropriation and compensation procedures, the drafting of a hearing report, the initial evaluation of the comments submitted, the organisational preparation of a discussion meeting, the management of the discussion meeting, and the drafting of decisions. However, these tasks and procedural steps are only examples and are not exhaustive; it is therefore possible to go beyond these procedural steps. The limit lies in sovereign tasks that are the sole responsibility of the authority (see below). Which tasks and procedural steps are taken over by the lawyer as project manager in individual cases is regulated in individual contracts with the lawyer.

These tasks can consume enormous resources. In this respect, the lawyer or the law firm must weigh up whether the activity as project manager is compatible with the other mandates.

3. Demarcation from the sovereign activity of the authority

The activities of the project manager must not affect decisions that are originally the responsibility of the authority. In some cases, the laws also explicitly stipulate that the final decision concluding the procedure, i.e. the approval or the plan approval decision, lies solely with the competent authority (see Section 29 (3) NABEG). The transferable tasks must be limited to *supporting* activities for the implementation and coordination of the procedure and, according to the explanatory memorandum to the law, may not directly penetrate the core of the balancing process, i.e. the area reserved for the authorisation decision.[14] The preparatory activities must also not lead to a de facto decision already having been made by the project manager (‘prejudging of the

[14] BT-Drs. 17/6073, p. 31.

decision').[15] This risk is particularly high due to the possibility that the project manager may also prepare the draft approval decision. In this respect, the project manager must not be given the blanket task of carrying out the entire authorisation or planning approval procedure. The authority must always remain "master of the procedure" and exercise the final decision-making authority.[16] However, if the project manager is entrusted with tasks that go beyond what is permitted by law, this infringement can be contested, though this cannot be done directly, but only as part of an appeal against the final authorisation decision.[17]

It should also be noted that the project manager is always bound by the instructions of the authority,[18] and that legal responsibility remains with the authority.[19] The authority must therefore review all preparatory and supporting activities.[20] The project manager is also not directly bound by fundamental rights because he is only assigned to the controlling administration.[21]

4. Opportunities and risks of using a project manager

4.1. Opportunities

The opportunities are obvious – for everyone involved. The lawyer has a secure and large mandate for a longer period of time and can rely on a secure fee due to the solvency of the state. In the end, however, the responsibility remains with the authority, thus the risks on the part of the lawyer with regard to legal liability are likely to be low. For the project sponsor, the use of a project manager means that the procedure can be completed more swiftly, and external expertise or know-how represents additional support for the authority, which in principle cannot

[15] In general, C. Sellmann, *Privatisierung mit oder ohne gesetzliche Ermächtigung*, "NVwZ" 2008, no. 8, p. 821.

[16] J.-C. Pielow, op. cit., Section 43g EnWG para. 13, 31; M. Kment, J. Arnold, op. cit., Section 43g EnWG para. 22.

[17] M. Kment, J. Arnold, op. cit., Section 43g EnWG para. 45.

[18] L. Winkler, op. cit., Section 17a AEG para. 4 with further references.

[19] F. Schoch, in: *Verwaltungsrecht. Kommentar*, eds. F. Schoch, J.P. Schneider, 4th supplementary ed., München 2023, section 1 VwVfG para. 173.

[20] D. Greinacher, *Energieleitungsausbau: Tatsächliche Herausforderungen und rechtliche Lösungen*, "ZUR" 2011, no. 6, p. 307.

[21] M. Herdegen, in: *Grundgesetz. Kommentar*, vol. 1, eds. G. Dürig, T. Herzog, R. Scholz, 104th ed., München 2024, Art. 1 paras. 3, 127.

be detrimental. For the authority, the use of a project manager means a considerable reduction in time and personnel resources, especially if the project manager prepares draft decisions.[22] Whether the use of a project manager also increases public acceptance of the infrastructure project is questionable because the project manager only works in the background.[23]

4.2. Risks

In contrast, the risks are low. It is true that the project manager burdens the project budget and, in the case of exclusively state-owned infrastructure, also the state budget and therefore ultimately the taxpayer. The authority must also be able to rely on the lawyer. Intensive (time-consuming) cooperation requires an unrestricted relationship of trust, which should not be broken. The lawyer must be aware that the mandate will require them to work for a longer period of time. This can lead to conflicts with other clients. In this respect, the lawyer should consider employing additional staff, such as student or research assistants, to provide support.

Conclusion

The use of a project manager offers all parties involved – authorities, lawyers and the general public – more opportunities than risks. It is an effective means of outsourcing the authority's workload in a major infrastructure project and thus taking pressure off the authority. However, this is associated with costs, in some cases, also incurred by the taxpayer. As a project manager, the legal profession is opening up new, lucrative fields of application that can also enhance its portfolio of prestigious mandates. However, it should not be forgotten that such a mandate lasts for several years and sometimes ties up considerable resources.

[22] Cf. M. Kment, J. Arnold, op. cit., Section 43g EnWG para. 40.
[23] Ibidem, Section 43g EnWG para. 18.

BIBLIOGRAPHY

Donhauser C., Schröck T., *Ausschreibungspflichten bei der Beauftragung von Rechtsanwälten als Projektmanager in der Planfeststellung*, "VergabeR" 2020, no. 2, pp. 139–149.

Greinacher D., *Energieleitungsausbau: Tatsächliche Herausforderungen und rechtliche Lösunge*n, "ZUR" 2011, no. 6, pp. 305–312.

Herdegen M., in: *Grundgesetz. Kommentar*, vol. 1, eds. G. Dürig, T. Herzog, R. Scholz, 104th ed., München 2024.

Kment M., Arnold J., in: *Energiewirtschaftsgesetz. Kommentar*, ed. M. Kment, 3rd ed., München 2023.

Missling S., Winkler L., in: *Energierecht. Kommentar*, eds. C. Theobald, J. Kühling, 125th supplementary ed., München 2024.

Pielow J.-C., in: *Berliner Kommentar zum Energierecht*, ed. F.J. Säcker, 4th ed., München 2019.

Riege S., *Praxisfragen zum Projektmanager*, "EnWZ" 2022, no. 5, pp. 170–176.

Schoch F., in: *Verwaltungsrecht. Kommentar*, eds. F. Schoch, J.P. Schneider, 4th supplementary ed., München 2023.

Sellmann C., *Privatisierung mit oder ohne gesetzliche Ermächtigung*, "NVwZ" 2008, no. 8, pp. 817–823.

Winkler L., in: *AEG/ERegG. Kommentar*, eds. J. Kühling, K. Otte, 1st ed., München 2020.

STUDIA PRAWA PUBLICZNEGO
2025 • NR 1 (49) ISSN 2300-3936
https://doi.org/10.14746/spp.2025.1.49.7

III. Z ORZECZNICTWA

Magdalena Jaś-Nowopolska*

Age Restrictions for Notaries – Gloss on the Judgment of the Federal Court of Justice (BGH) of 21 August 2023, Case NotZ(Brfg) 4/22

Abstract. This commentary examines the ruling of the Federal Court of Justice (BGH) of 21 August, 2023 (NotZ(Brfg) 4/22), and its implications for the notarial profession in Germany. Under § 47 No. 2 and § 48a of the Federal Notarial Code (BNotO), a notary's office expires at the end of the month in which they reach the age of 70. The judgment addresses the legality of this age limit, particularly in relation to European Union law, and assesses its compliance with the principles set out in Directive 2000/78/EC. The BGH reaffirms the necessity of the age restriction as a means of ensuring generational turnover within the notarial profession, which is essential for maintaining its sustainability and preventing an aging workforce. This commentary explores the BGH's interpretation of employment policy objectives, the balance between the interests of older and younger notaries, and the broader impact on Germany's notarial system. Ultimately, the ruling highlights the importance of upholding the age limit to foster a dynamic, responsive, and representative notarial profession.

Keywords: notary – Directive 2000/78 – age limit – lawyer-notary

Facts

The plaintiff (…), born in 1953, a lawyer and notary public in Germany, seeks a declaration that his mandate as a lawyer-notary (Ger. *Anwaltsnotar)* does not expire at the end of the month in which he reaches the

* Justus Liebig University Giessen, Germany | Uniwersytet Justusa Liebiga w Giessen, Niemcy, https://orcid.org/0000-0002-0278-8335, e-mail: Magdalena.Jas-Nowopolska@recht.uni-giessen.de.

SPP 1(49), 2025: 119–126. © The Author(s). Published by: Adam Mickiewicz University Press, 2025.

age of 70. The plaintiff regards the age restriction as violating the prohibition of age discrimination under the European Union law. He bases his argument on Article 21 of the Charter of Fundamental Rights of the European Union[1] and on the provisions of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation,[2] in particular, Article 1 or Article 2 (2)(a) of that Directive, inter alia. The plaintiff claims that, in view of the existing substantial shortage of young professionals, the age limit is not (or is no longer) objective and appropriate within the meaning of Article 6 (1) of Directive 2000/78 and is not justified by a legitimate aim.

1. European Union age regulation

The plaintiff argues that the age restriction under the German regulation violates the prohibition of age discrimination under the EU law. Article 21 of the Charter of Fundamental Rights, which he refers to, prohibits any discrimination based on any grounds such as gender, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, being part of a national minority, property, birth, disability, age or sexual orientation. Article 1 of Directive 2000/78, which is invoked by the plaintiff, indicates the purpose of the Directive itself, which is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect the principle of equal treatment in the Member States. Article 2 (2a) of Directive 2000/78 refers to direct discrimination, which occurs where one person is treated less favourably than another and is, has been or would be treated in a comparable situation on any of the grounds referred to in Article 1.

According to Article 6 (1) of Directive 2000/78, Member States may stipulate that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and

[1] OJ C 364/5.

[2] Council Directive 2000/78/EC of 27 XI 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2 XII 2000, pp. 16–22, hereinafter: "Directive" or "Directive 2000/78."

necessary. The article also defines this differential treatment. The article indicates, inter alia, the introduction of "special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection"[3] or "the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement."[4]

The Court of Justice of the European Union has consistently held in previous judgments that Member States have a wide margin of discretion, in particular, when deciding on general (retirement) age limits.[5] However, it must be emphasised that an age limit must meet the need to achieve the objectives it pursues in a consistent and systematic manner.[6] It is for the competent authorities of the Member States to strike an appropriate balance between the various conflicting interests, and it is for the national court to verify whether those requirements have been met.[7]

2. German law on notaries

2.1. Legal basis

In Germany, the profession of a notary is regulated by the Federal Code for Notaries of 24 February 1961 Bundesnotarordnung (BNotO).[8] Here, it should be noted that for historical reasons, the professions of a full-time notary and a lawyer commissioned as a notary (Ger. *Anwaltsnotar*) have coexisted in Germany. According to § 3 (2) BNotO, in those judicial districts in which the office of a notary was exercised exclusively as a secondary

[3] Point (a) of Article 6 (1) of Directive 2000/78.

[4] Point (c) of Article 6 (1) of Directive 2000/78.

[5] In its judgment of 16 X 2007, Case C-411/05 (BeckRS 2007, 70804 with a commentary by Krieger FD-ArbR 2007, 245083), the ECJ granted Member States a wide margin of discretion in setting general age limits and held that a general collectively agreed age limit, which is linked to the receipt of a standard pension, is proportionate despite direct discrimination.

[6] Among others, the necessity to achieve the objectives pursued is raised in the judgment of ECJ of 18 XI 2010, *Georgiev*, Case C-250/09, ECR 2010, I-11869, para. 56.

[7] Ibidem.

[8] Act of 24 II 1961 (BGBl. I p. 97) last amended by the Act of 20 XII 2023 (BGBl. I p. 389).

occupation on 1 April 1961, only lawyers (Ger. *Rechtsanwälte*) will continue to be appointed as notaries to exercise the office concurrently with the profession of a lawyer (a lawyer commissioned as a notary; Ger. *Anwaltsnotar*) for the duration of their membership in the bar association competent for that judicial district. In contrast, the § 3 (1) BNotO notaries are appointed for life to exercise their office as their main occupation (full-time notaries).

Since 1991, the provisions of Federal Code for Notaries have provided for an age limit as a restriction on the appointment of a notary for life. According to § 47 No. 2 BNotO, the office of a notary expires upon reaching retirement age (section 48a) or death. Section 48a regulates that notaries reach retirement age at the end of that month in which they reach the age of 70. Reaching the age of 70 is a mandatory and automatically effective reason for the termination of notarisation.

As indicated in the literature,[9] the purpose of the age limit introduced in 1991 was to achieve an orderly age structure in the notary profession and to protect those that seek legal advice from problems associated with the over-ageing of notaries. The age limit also ensures that a greater number of younger candidates can be considered for the office of notary. According to § 1 BNotO, notaries are independent holders of a public office, who are appointed in the Länder to record legal acts ('notarial recording') and to perform other tasks in the field of the preventive administration of justice. However, in accordance with § 4 BNotO, "As many notaries are to be appointed as are required to meet the needs of the proper administration of justice. In particular, consideration is to be given to ensuring that the consumers of legal services are adequately supplied with notarial services and that an orderly age structure of the members of the profession is maintained." The demand of those that seek legal services for notarial services should primarily be inferred from the notarial transactions carried out by notaries to date, with the need to provide services in a particular official area being the decisive factor.[10] The decision of the state judiciary to announce recruitment for notarial positions is not related to the resignation of an appointed notary from a lawyer-notary's office, as it is in the case of a full-time notarial office.[11]

[9] R. Regler, *§ 48a*, in: *BeckOK BNotO*, ed. C. Eschwey, 10th ed. (1 VIII 2024), marg. no. 1, 2, Beck online. Compare also: J. Vogel, *§ 48a*, in: *Bundesnotarordnung Kommentar*, eds. N. Frenz, U. Miermeister, 6th ed., 2024, Beck online.

[10] Decision of BGH 22 X 1979 – NotZ 3/79OLG Cologne 21 XII 1978.

[11] The decision is taken after obtaining the activity data for the previous year or previous years on the basis of the number of existing notaries. For this reason – as

2.2. Age limitation

It should be noted that if younger candidates can only be considered for vacant notary positions, without an age limit, this would lead to the ageing among the notary population. Increasingly, only older notaries, whose professional experience would be more limited due to them obtaining their qualifications later, would be available to those seeking legal advice. As pointed out in the literature and case law, this would jeopardise the functioning of the justice system.[12] This provision therefore serves an employment policy objective within the meaning of Article 6 (1) of Directive 2000/78. On the one hand, the intention of the legislator is to facilitate the access of younger candidates to the office of a notary public. On the other hand, the age limit is intended to ensure sufficient turnover in the interests of the career prospects of younger trainees.[13] As indicated in the literature, most notaries use the statutory age limit to the last day. The fear is therefore that removing the age limit would quickly lead to the ageing of the profession.[14]

2.3. Number of notaries and their age in Germany

The argumentation above requires presenting data on notaries in Germany. Such was the finding of the Senate when it stated that an age restriction applicable to all notaries throughout the country is (still) necessary to achieve this goal. The expert report of the Federal Notary Chamber obtained by the Senate pursuant to Section 78 (1) No. 4 of the BNotO has shown that there is indeed a shortage of trainee notaries in the notary's office, in some cases a significant shortfall. However, this does not apply to full-time notary offices. There is a significant surplus of trainees in all areas. As cited in the judgment: "Only a negligible number of vacancies (well below 1%) were filled in the full-time notary's office between 2020 and 2022 (…). In all federal states and in all local court districts, significantly more candidates applied for vacancies than

---

the defendant rightly points out – the newly appointed lawyer-notary is not the legal successor of the notary who has left. The notarial activity of the latter is, in principle, liquidated in accordance with § 56 (2) sentence 1 BNotO.

[12] Inter alia: BGH, decision of 17 III 2014 – NotZ(Brfg) 21/13.

[13] Judgment of BGH of 27 V 2019 – NotZ(Brfg) 7/18, DNotZ 2020, 71.

[14] T. Grote, *Höchstaltersgrenze für Notare war auch zum 31.10.2021 mit deutschem Verfassungs- und Unionsrecht vereinbar*, "DNotZ" 2024, p. 229.

there were vacancies. (…) According to the evidence, there is also no difficulty in filling the vacancies advertised for notary assessors with highly qualified candidates."[15] There is a shortage of trainees only in certain districts, including the district of the higher regional courts, where lawyers practise as notary publics as an additional profession (Braunschweig, Bremen, Celle, Frankfurt am Main, Hamm, Oldenburg, Schleswig and the district of the court of appeal, as well as the district of the higher regional court in Düsseldorf, part of the district of the regional court in Duisburg on the right bank of the Rhine and the district court in Emmerich). The Judgment also pointed that "the number of lawyer-notaries in the lawyer-notary profession also fell insignificantly during this period, namely from 5,275 to 5,102 (-3.28%) (expert opinion Annex 1, pp. 2–48)."[16] The notary statistics for this period show a change of -2.8% and -0.9% for 4,997 lawyer-notaries.[17] However, unlike in the full-time notary's office, there were not always significantly more applications for vacancies, or at least not a sufficient number of applications.[18]

The literature indicates that the number of filled positions for both types of notaries is decreasing (for example, from 9,164 in 2005 to 6,658 in 2023[19]), admittedly more so in case of notaries who are lawyers than just notaries.[20] The number of positions depends on the number of required positions, which is regulated differently in the Länder and is only comparable to a limited extent due to different calculation methods. As indicated in the literature, the profession is certainly not one characterised by youth.[21] Analysing publicly available data from, for example, the Senate of the Administration of Justice in Berlin, the average age is 56.8 years.[22] For a profession that can be practised almost exclusively between the ages of about 30 and 70, an even age distribution should not be expected due to the late age of entry. Rather, a concentration in

[15] Marg. no. 33 of the Judgment.

[16] Marg. no. 27 of the Judgment.

[17] Source: www.notar.de/der-notar/statistik (accessed: 15 IX 2024).

[18] Marg. no. 27 of the Judgment.

[19] See https://www.notar.de/der-notar/statistik (accessed: 15 IX 2024).

[20] U.J. Fischer, *Altersgrenze für Notare vor dem BGH und in der Presse – ein Blick auf die Altersgrenze für Notare vor dem BGH und in der Presse – ein Blick auf die Realität Realität Altersgrenze für Notare flexibilisieren? Vorteile für Nachwuchs, Amtsinhaber Altersgrenze für Notare flexibilisieren? Vorteile für Nachwuchs, Amtsinhaber und Bevölkerung und Bevölkerung*, 2023, p. 472, AnwBl online.

[21] Ibidem. This fact is also pointed out by Kilian: M. Kilian, *Europarechtskonformität der Altersgrenze für Notare*, "EWiR" 2024, no. 1, p. 19.

[22] Ibidem.

the later decades of life should be expected, completely independent of any demographic shortcomings.

The Senate on notarial matters of the Federal Court of Justice has also identified other structural reasons for the shortage of candidates for the notary profession. These are, in particular, the specialised notarial examination that has to be passed, and the ever-increasing (also technical) requirements for practising as a lawyer-notary.[23] The doctrine also points out that new specialised procedures related to digitisation are emerging in the practice of the notary profession. The situation requires the lawyer-notary to become more involved in the notarial profession. In particular, the duplicate file management required in connection with the digitisation of the document archive leads to a considerable investment of time and personnel. New data protection and anti-money laundering guidelines, which have become increasingly centralised in recent years, mean further monitoring and control obligations for individual notary offices.[24]

The Senate also pointed out that in 2021 the legislature adopted certain changes to the rules governing the notary profession. Some facilities were introduced for the practice of the notarial profession (§ 48b and § 5b (3) BNotO), but the age limit was still maintained. The Act of 25 June 2021 on the modernisation of notarial professional law and the amendment of further provisions, introduced changes to improve the exercise of the notary profession with family responsibilities. Among other things, § 48b BNotO also concerns the period of resignation from office with the guarantee of reappointment, which has been extended from one to three years.

Conclusion

Having analysed the statistical data, the changes introduced to improve the practice of the notarial profession with family responsibilities and the purpose for which the age limit was introduced, it must be concluded that the age limit is also still necessary in the notarial profession in order to achieve a legitimate objective within the meaning of Article 6(1) of Directive 2000/78. If older notaries with an established notarial position remain in office without the age limit, younger lawyers will not

[23] Marg. no. 31 of the Judgment.
[24] T. Grote, op. cit.

have sufficient and foreseeable prospects of becoming economically efficient notaries. It should also be emphasised that an appropriate balance of interests is ensured by the fact that the age limit for notaries is significantly higher than the retirement age limit applicable at federal and state level, and that legal notaries who retire are not prevented from continuing to practise law nor work as notary public agents or notary administrators.

BIBLIOGRAPHY

Fischer U.J., *Altersgrenze für Notare vor dem BGH und in der Presse – ein Blick auf die Altersgrenze für Notare vor dem BGH und in der Presse – ein Blick auf die Realität Realität Altersgrenze für Notare flexibilisieren? Vorteile für Nachwuchs, Amtsinhaber Altersgrenze für Notare flexibilisieren? Vorteile für Nachwuchs, Amtsinhaber und Bevölkerung und Bevölkerung*, 2023, pp. 472–474, AnwBl online.

Grote T., *Höchstaltersgrenze für Notare war auch zum 31.10.2021 mit deutschem Verfassungs- und Unionsrecht vereinbar*, "DNotZ" 2024, pp. 229–238.

Kilian M., *Europarechtskonformität der Altersgrenze für Notare*, "EWiR" 2024, pp. 18–20.

Regler R., *§ 48a*, in: *BeckOK BNotO*, ed. C. Eschwey, 10th ed. (1.08.2024), Beck online.

Vogel J., *§ 48a*, in: *Bundesnotarordnung Kommentar*, eds. N. Frenz, U. Miermeister, 6th ed., 2024, Beck online.

STUDIA PRAWA PUBLICZNEGO
2025 • NR 1 (49) ISSN 2300-3936
https://doi.org/10.14746/spp.2025.1.49.8

Carsten Schirrmacher*

Gloss on the Judgment of the German Federal Labor Court (Bundesarbeitsgericht) of 24 October 2018, Case 10 AZR 69/18, Previous Instance Regional Labor Court (Landesarbeitsgericht) Hamburg, Judgment of 30 August 2017, Case 5 Sa 21/17

Abstract. On 24 October 2018, the Federal Labor Court ruled that a "legal protection secretary" employed by a trade union who advised trade union members on labor law issues could not be admitted to the bar. He lacked the professional independence required by the Federal Lawyers' Act because, according to his employment contract, he had to respect the ideals of the trade unions. Although the employer had never given the legal protection secretary any instructions as to how he was to advise clients, the employer was also not obliged to confirm to the bar association that the legal protection secretary was carrying out his advisory work independently.

The ruling, which is much discussed in Germany, raises the fundamental and still unresolved question of under what circumstances a legal advisor is "professionally independent." This not only concerns the German legal landscape, but is particularly difficult to answer under German law because the legal situation is paradoxical: the German legislator itself allows employees access to the legal profession. The fact that a legal advisor is hired as an employee therefore does not automatically eliminate their professional independence. But what else? This gloss aims to contribute to this discussion.

Keywords: Employed lawyer – admission to the bar – professional independence – employer's duty of consideration.

* Justus Liebig University Giessen, Germany | Uniwersytet Justusa Liebiga w Giessen, Niemcy, https://orcid.org/0000-0002-1554-898X, e-mail: Carsten.Schirrmacher@recht.uni-giessen.de.

SPP 1(49), 2025: 127–138.

Thesis

An employed legal professional who, according to his employment contract, is obliged to observe the "basic values and objectives" of his employer, lacks the professional independence required for admission to the bar. The employer is therefore not obliged to support the employee's efforts to gain admission.

1. Facts

Can an employee who is obliged to follow instructions also be an independent organ of the judiciary? This question is too general to be answered with a simple "yes" or "no," and it is precisely for this reason that both the labor courts and the lawyers' courts have repeatedly had to address it. This was also the case in the judgment commented on here:

The plaintiff had been employed for several years by DGB Rechtsschutz GmbH, a subsidiary of the German Trade Union Confederation (Deutscher Gewerkschaftsbund, DGB) as a "legal protection secretary." According to his employment contract, it was his task to advise trade union members in labor and social law disputes and to represent their interests in and out of court. Over the many years of his professional life, the employer had never laid down any rules as to how he was to advise and represent clients. However, the plaintiff could not refuse any mandate falling within the scope of his responsibility. According to point no. 5 of his employment contract, he was also "obliged to observe the political principles and objectives of the DGB as expressed in the statutes and resolutions of the organs of the DGB." A further provision of the employment contract stated: "The employee undertakes to fulfill his contractual obligations in the offices of DGB Rechtsschutz GmbH (…) as instructed by the employer" (no. 1 para. 2 of the employment contract).

The plaintiff applied for admission as an in-house lawyer. However, the employer refused to certify the plaintiff's professional independence because of its decision not to support the admission of "legal protection secretaries" to the bar. Without this certificate, the Bar Association did not admit the plaintiff to the bar, referring to Section 46 (4) BRAO.[1]

[1] German Federal Lawyers' Act (Bundesrechtsanwaltsordnung), BGBl. III/1959, no. 303-8.

With his lawsuit, the plaintiff wanted to force his employer to provide the certification and invoked the duty of loyalty under labor law: The employer, in the plaintiff's opinion, was required to pay attention to the interests of its employees and therefore had to support the admission to the bar, as this admission would be associated with considerable financial advantages for the plaintiff.

The Federal Labor Court dismissed the claim, as had the previous instances.[2] It stated that the employer was obliged to show consideration. In principle, the employer could also be required on this basis to actively safeguard the interests of the employee *vis-à-vis* third parties – in this case, towards the Bar Association, which decides on admission to the bar.

However, in the opinion of the court, this does not oblige the employer to prioritize the employee's interests over their own. Accordingly, the employer has an interest in denying its employees access to the bar. If the plaintiff were admitted to the bar, the employer would be obliged to provide the plaintiff with the necessary technical infrastructure to enable him to communicate electronically with authorities and courts ('special electronic lawyer's mailbox'). This would create an additional expense for the employer, which the employer could not be forced to bear.

Secondly, according to the court, the employer is also not obliged to certify the professional independence of the plaintiff in exercising his advisory activities by virtue of his duty of consideration, as such a certificate would be incorrect. Finally, the plaintiff was not professionally independent in the performance of his duties due to the provisions no. 1 (2) and no. 5 in his employment contract, but was required to adhere to the political ideas of the DGB. Moreover, the submission of an incorrect declaration fell outside the scope of what the plaintiff could expect in terms of consideration.

In the opinion of the court, in order for the plaintiff to be able to prove the professional independence required for admission to the bar, his employment contract would therefore first have to be amended by deleting provisions no. 1 (2) and no. 5. However, the plaintiff was not entitled to this either.

[2] Judgment of Hamburg State Labor Court (Landesarbeitsgericht Hamburg) of 30 VIII 2017, Case 5 Sa 21/17; Judgment of Hamburg Regional Labor Court (Arbeitsgericht Hamburg) of 21 XII 2016, Case 15 Ca 260/16.

2. Assessment of the court's opinion

Some background is required: A lawyer is an "independent organ of the judiciary" (Section 1 BRAO). Accordingly, anyone who "engages in activities that are incompatible with the lawyer's profession, in particular, their position as an independent organ of the administration of justice, or that may jeopardize confidence in their independence" (Section 7 no. 8 BRAO), may not be admitted as a lawyer. This ensures that the lawyer does not fully adopt the client's interests as their own. In this way, they achieve the credibility required to be able to act as a respectable representative for the interests of their client.[3]

On the foundation of these basic legal decisions, the superior courts long advocated the 'dual profession theory', which required an employed legal professional only to be admitted as a lawyer if they had their own law firm in addition to their dependent activity.[4] This dichotomy was based on a professional concept that did not meet the requirements for the work of company counsels. Based on this realization, the BRAO was amended in 2016 to include provisions on "in-house lawyers" ("Syndikusrechtsanwälte"), abandoning the dual-profession theory:[5] since then, Section 46 (2) BRAO has defined in-house lawyers as follows: "Employees […] practice their profession as lawyers insofar as they act as lawyers for their employer within the scope of their employment relationship (in-house lawyers)". Anyone admitted as an in-house lawyer may provide legal advice and representation to the employer and its members in the same way as a regular (independent) lawyer (Section 46 (5) BRAO).

Section 46 (3) BRAO specifies that only those who act in an "independent and autonomous" advisory function may perform the profession

[3] C. Knauer, *Zur Wahrheitspflicht des (Revisions-)Verteidigers*, in: *Strafverteidigung, Revision und die gesamten Strafrechtswissenschaften. Festschrift für Gunter Widmaier zum 70. Geburtstag*, ed. H. Schöch et al., Hürth 2008, p. 305.

[4] Judgment of German Federal Constitutional Court (Bundesverfassungsgericht) of 4 XI 1992, Cases 1 BvR 79/85 et al.; Judgment of German Federal Court of Justice (Bundesgerichtshof) of 7 XI 1960, Case AnwZ (B) 4/60; Judgment of German Federal Social Court (Bundessozialgericht) of 3 IV 2014, Cases B 5 RE 3/14 R, B 5 RE 9/14 R, and B 5 RE 13/14 R. The Court of Justice of the European Union (CJEU) also seems to approve of the dual-occupation theory, cf. Judgment of CJEU of 14 IX 2010, Case C-550/07 (*Akzo Nobel Chemicals Ltd.*).

[5] German Federal Parliament (Deutscher Bundestag), printed matter no. 18/5201, p. 27.

of lawyer. Finally, Section 46 (4) BRAO states: "A professionally independent activity within the meaning of paragraph 3 is not exercised by anyone who has to adhere to instructions that exclude an independent analysis of the legal situation and case-by-case legal advice. The professional independence of the in-house lawyer must be contractually and actually guaranteed".

Legal professionals who are employed by companies or associations such as trade unions, political parties or consumer protection associations operate in this area of conflict. But why do they seek to be admitted to the bar in the first place? Firstly, admission to the bar opens up the possibility of appearing at higher courts, where lawyers are required. However, in most cases, social security considerations are the primary factor: as the bar association runs its own pension scheme, lawyers are exempt from contributing to the state pension scheme (see Section 46a (4) BRAO). Since it is generally the case that the retirement benefits from the lawyers' pension scheme significantly exceed the state pension, in-house legal professionals therefore have not only an idealistic, but above all, a financial interest in being admitted to the bar.

As described above, the prerequisite for admitting an employed legal professional to the bar is that they act "autonomously and independently" as legal advisors. In order to prove this, as part of the procedure for granting admission, the employer usually issues a declaration stating which activities the in-house legal professional performs and confirming their independence from instructions in this respect.[6]

The decision of the Federal Labor Court is neither dogmatically consistent nor convincing on the merits.

However, the second consideration presented by the court is, of course, correct, i.e. that the employer cannot be forced to make false statements to third parties, due to its duty to take the employee's interests into consideration (Section 241 (2) BGB[7]). This must apply all the more because the submission of the declaration by the employer leads to the employee's admission to the bar, which automatically results in their exemption from the obligation to contribute to the state pension scheme and obliges the employer to report the relevant pension-scheme-related

[6] The bar associations request this certificate on the basis of Section 46a (3) BRAO, C. Wolf, *§ 46a BRAO*, in: *Anwaltliches Berufsrecht*, ed. R. Gaier et al., 3rd ed., Cologne 2020, para. 33. Cf. also German Federal Parliament (Deutscher Bundestag), printed matter no. 18/5201, p. 27.

[7] German Civil Law Code (Bürgerliches Gesetzbuch), BGBl. I/2002, pp. 42, 2909.

circumstances on their own initiative (Section 28a SGB IV[8]). Put simply, the submission of an incorrect declaration by the employer ultimately leads to a reduction in the social security contributions to be paid and is therefore subject to a fine (Section 111 SGB IV)[9]. Against this background, it is immediately obvious that a duty of consideration under civil law cannot compel the employer to commit administrative offenses.

However, this assertion should not have been presented as the second point, but should have formed the starting point for further considerations. If it were true that the plaintiff was not professionally independent, any kind of obligation on the part of the employer to certify the plaintiff's independence would be out of the question. It would then simply be irrelevant whether the plaintiff's admission to the bar could generate a burden for the employer that would have to be weighed against the plaintiff's primarily financial interest in being admitted to the bar. The court nevertheless undertook this balancing exercise, even though it could have dispensed with it. This is because the employer who issues a false certificate faces a fine, and this penalty cannot outweigh the employee's interests, regardless of how understandable they may be.

It would therefore have been logical to carry out an examination in a different order, in which the initial question, on which the further examination program depends, should have been expressed thus: Would an employer's certification of the plaintiff's independence actually be incorrect? Or to put it more precisely: Do the stipulations in the employment contract actually compromise the plaintiff's professional independence? This leads to a fundamental question of the in-house lawyer's profession: an in-house lawyer is by definition employed by an employer that is not a professional practice company, otherwise said lawyer would be an "employed lawyer" ("angestellter Rechtsanwalt") within the meaning of Section 46 (1) BRAO. The employer's business model is therefore necessarily geared towards not only offering legal advice as such, but also pursuing other purposes, whether of an entrepreneurial or non-material nature.

Therefore, the purpose of the advisory service is not to generate profits with the advice itself, but rather, the in-house lawyer is integrated into an overarching unit, which as a whole is intended to generate profits or

[8] German Forth Social Security Code (Viertes Buch Sozialgesetzbuch), BGBl. I/2009, pp. 3710, 3973.

[9] Cf. in detail C. Wolf, *§ 46 BRAO*, in: *Anwaltliches Berufsrecht*, op. cit., para. 72.

promote a non-material purpose. The employer bears the operational and economic risk. This means that the employer must continue to pay the in-house lawyer even if the lawyer's work cannot be used in a meaningful way, for example, because there is currently no work for the in-house lawyer. It would therefore be, *prima facie*, less risky for the employer not to hire legal advisors as employees, but instead to obtain legal advice from external (self-employed, i.e. personally and economically independent) lawyers. This would even have the advantage of the employer not always having to rely on legal advice from the same in-house lawyer, but could always consult an expert for the respective legal issue.

Nevertheless, if the employer decides to hire a legal professional on the basis of an employment relationship, other advantages must be expected from this, primarily related to planning security: the employee is always available to the employer and can provide better assessment than an external legal advisor, thanks to their ongoing cooperation. For similar reasons, some legal professionals prefer to work as dependent employees rather than opening their own law firm: they are entitled to a fixed salary regardless of the market situation, which also gives them planning security. In return, they accept not to be free to choose their clients.

This in itself gives rise to a certain dependency on the part of the employed legal professional: unlike an independent lawyer, who can turn down work, they cannot simply refuse to work on a particular case. In doing so, they would be in breach of their contractual obligations and therefore risk losing their job, i.e. their sole source of income. This alone results in a certain dependency on the part of the employed legal professional, which is further amplified by the fact that employers usually find ways to dismiss employees. At the very least, an employer who does not agree with particular legal opinions offered by a hired legal professional can only assign him cases to work on where such controversial legal opinions are not important.

For these reasons, the rules expressed in Section 46 BRAO on the independence of in-house lawyers are widely described as paradoxical: the legislator is evidently aware that employees are to some extent personally dependent on their employers. Nevertheless, the employer permits the admission of employees to the bar under the premise of their professional independence, which can never be achieved in its pure form (the "labor law paradox").[10] In order to take account of the

[10] C. Wolf, *§ 46a BRAO*, op. cit., para. 27 et seq.

legislative intention to permit the in-house lawyer profession to exist at all, the concept of independence in Section 46 (4) BRAO must therefore not be understood too narrowly; that said, there is still a lack of clear demarcation criteria, although there are now a large number of court decisions.[11] The materials accompanying the Federal Lawyers' Act are relatively unhelpful in this respect: the explanatory memorandum to the law contains an indication that only "requirements regarding the manner in which certain legal issues are dealt with and assessed" call independence into question.[12] Against this background, the employment contract provision in no. 1 para. 2, according to which the plaintiff should perform his work on the employer's premises, does not conflict with his independence, because the employer has no influence on the professional handling of the mandates by determining the work location.

The question remains whether provision no. 5 of the employment contract, according to which the plaintiff must "observe the political principles and objectives of the DGB […]," eradicates the plaintiff's professional independence. The court affirms this in just one sentence. This does not do justice to the complexity of the labor law paradox. Rather, there would be good reason here to define the concept of professional independence in more detail. It is in the nature of things that an in-house lawyer can never achieve the same degree of independence as a self-employed lawyer. There is at least some reason not to expect a higher degree of independence from an employed lawyer than from a comparable self-employed lawyer with their own law firm. This idea could have formed the starting point for a clearer formulation of the requirements constituting "professional independence."

Based on this, the court could have acknowledged that even a self-employed lawyer is never entirely independent. Their perspective is inevitably shaped by various aspects, such as their political convictions and the experience they have gained in non-legal fields or

[11] See (among many other decisions), for example, Judgment of German Federal Court of Justice (Bundesgerichtshof) of 12 III 2018, Case AnwZ (Brfg) 15/17 (on a claims handler for an insurance company); Judgment of German Federal Court of Justice (Bundesgerichtshof) of 2 II 2018, Case AnwZ (Brfg) 49/17 (on a data protection officer in a large company); Judgment of Bavarian Bar Court (Anwaltsgerichtshof Bayern) of 9 IV 2018, Case III-4-8/17 (on an editor and writer for a legal news site). For a current larger collection of cases cf. I. Jähne, § 46, in: *BRAO*, ed. D. Weyland, 11th ed., München 2024, para. 28 et seq.

[12] German Federal Parliament (Deutscher Bundestag), printed matter no. 18/5201, p. 31.

during their legal training. A self-employed lawyer incorporates all of these aspects – whether consciously or unconsciously – into their professional activities.[13] Similarly, one cannot expect an in-house lawyer to completely disregard their experience and political convictions when providing legal advice. In the case in question, the plaintiff had committed to observing the "political principles and objectives" of the German Trade Union Confederation. There is some evidence to support the assumption that these convictions were his own anyway and that provision no. 5 of the employment contract therefore had no influence on his legal advisory activities.

This presumption is supported above all by the fact that the plaintiff had voluntarily made himself economically dependent on a subsidiary of the German Trade Union Confederation. It must have been clear both to him and his employer any that fruitful and trusting cooperation within the framework of an employment relationship can only be achieved if the employee identifies with their employer, at least to some extent, in terms of ideals.[14] This can also be an important motive for a legal professional to commit to an employer through an employment contract rather than running their own, economically independent law firm. This is likely to be particularly true for association lawyers: anyone who voluntarily decides to work for a trade union or an employers' association, a political party or a consumer or tenant protection association or a similar non-profit organization generally already identifies with the basic values represented there of their own accord.[15] In this case, an employment contract provision such as no. 5 of the employment contract, which requires the employee to observe these basic values, does not suffice to influence their behavior. After all, they would have heeded the values of the association even without such a provision in their employment contract for their work as a legal advisor. Things

[13] There are numerous empirical studies on such influences on the judicial decision-making behavior of judges, such as G.C. Sisk, M. Heise, A.P. Morriss, *Charting the Influences on the Judicial Mind*, "New York University Law Review" 1998, vol. 73, no. 5, p. 1377 and comprehensively and most recently B.M. Barry, *How Judges Judge*, London 2021, pp. 91–110. On theoretical considerations regarding the influence of such aspects on the work of lawyers cf., for example, M. Bauckmann, *§ 1*, in: *BRAO*, op. cit., para. 16.

[14] On this connection and its impact see, inter alia, H. Stuart, *Employee Identification with the Corporate Identity – Issues and Implications*, "International Studies of Management & Organization" 2002, vol. 32, no. 3, p. 28 et seq.

[15] For evidence see, inter alia, M. Weisberg, E. Dent, *Meaning or money? Non-profit employee satisfaction*, "Voluntary Sector Review" 2016, vol. 7, no. 3, pp. 305–306.

might have been different if the employee had been required not only to observe the basic values of the association, but also to adopt every position of the association in detail. However, the employment contract (and especially its provision no. 5) did not require the plaintiff to do so.

Despite provision no. 5 of his employment contract, there is much to suggest that the plaintiff should be considered "professionally independent" within the meaning of Section 46 (4) BRAO. An employer's attestation to this effect would therefore be in no way false, meaning that they would not have to fear being prosecuted for an administrative offense. At the second stage, this raises the question of whether the employer was also obliged to sign the certificate by virtue of their duty of consideration. In order to come to a decision here, the opposing interests must be weighed against each other in the individual case.[16] In this case, the court believes that the employer's interests prevail because it is not obliged to subordinate its own interests to those of the employee. Moreover, the employer's interest in denying the plaintiff access to the legal profession should certainly be taken into account. This may be ultimately true, but the argument put forward by the court seems somewhat artificial. Given that the employer is a company offering legal advice to trade union members on a large scale, it is reasonable to assume that the employer itself has the technical infrastructure for electronic communication with courts and authorities. In this case, it would not be a significant effort for the employer to provide the plaintiff with corresponding access. Under these circumstances, the plaintiff's considerable financial interest in being admitted to the bar, which is based on the savings in social security contributions, should clearly outweigh the resulting minimal effort on the part of the employer. Hence, an obligation on the part of the employer to cooperate by virtue of its duty of consideration (Section 241 (2) BGB) is plausible.

The employer's best reason for refusing to allow the plaintiff to participate in his admission as a lawyer could be sought in the basic political orientation of the DGB, which the plaintiff has promised to observe. The DGB has repeatedly stated that it stands up for the solidarity of all employees. It therefore rejects the idea that individual employees (especially high-earning ones) should withdraw from the community of solidarity and instead operate their own social welfare schemes.[17] If

[16] This is the established case law of the German Federal Labor Court (Bundesarbeitsgericht), cf. inter alia Judgment of 20 IV 2017, Case 3 AZR 179/16 with further references.

[17] For example, see DGB, *Bericht zur Rentenpolitik in Deutschland*, 2019, p. 27.

one recognizes a basic political conception of the DGB in this (which does not seem at all compelling[18]), it could be argued that the employer would betray its own political ideals by cooperating in admitting the plaintiff to the bar. This could justify the employer's refusal to grant the plaintiff a certificate of independence. However, if it wishes to rely on this, the employer must proceed consistently. If, on the other hand, the employer has already supported other employees in their admission to the bar and has thus expressed that their political ideals are not so important to him after all, they must therefore also support other legal professionals employed by him on their way to the bar and issue corresponding certificates of independence, as the Federal Labor Court ruled in a later decision.[19]

BIBLIOGRAPHY

Barry B.M., *How Judges Judge: Empirical Insights into Judicial Decision-Making*, London 2021.

Bauckmann M., *§ 1*, in: *BRAO*, ed. D. Weyland, 11th ed., München 2024, paras. 1–24, pp. 22–31.

DGB (Deutscher Gewerkschaftsbund, German Trade Union Federation), *Bericht zur Rentenpolitik in Deutschland*, 2019.

Jähne I., *§ 46*, in: *BRAO*, ed. D. Weyland, 11th ed., München 2024, paras. 1–38, pp. 662–679.

Knauer C., *Zur Wahrheitspflicht des (Revisions-)Verteidigers*, in: *Strafverteidigung, Revision und die gesamten Strafrechtswissenschaften. Festschrift für Gunter Widmaier zum 70. Geburtstag*, ed. H. Schöch et al., Hürth 2008, pp. 291–310.

Sisk G.C., Heise M., Morriss A.P., *Charting the Influences on the Judicial Mind*, "New York University Law Review" 1998, vol. 73, no. 5, pp. 1377–1500.

Stuart H., *Employee Identification with the Corporate Identity – Issues and Implications*, "International Studies of Management & Organization" 2002, vol. 32, no. 3, pp. 28–44.

Weisberg M., Dent E., *Meaning or money? Non-profit employee satisfaction*, "Voluntary Sector Review" 2016, vol. 7, no. 3, pp. 293–313.

[18] At least Section 2 of the statutes of the DGB, of which numerous objectives and tasks of the association are formulated, do not contain any position on pension policy (unlike on numerous other issues), cf. https://www.dgb.de/fileadmin/download_center/Satzung_des_Deutschen_Gewerkschaftsbundes-_Stand_Mai_2022.pdf. This could be taken as an indication that the DGB's positions on pensions are not among its "political principles," the observance of which the plaintiff has agreed to by signing the employment contract.

[19] Judgment of German Federal Labor Court (Bundesarbeitsgericht) of 27 IV 2021, Case 9 AZR 662/19.

Wolf C., *§ 46 BRAO*, in: *Anwaltliches Berufsrecht*, ed. R. Gaier et. al., 3rd ed., Cologne 2020, paras. 1–99, pp. 802–814.
Wolf C., *§ 46a BRAO*, in: *Anwaltliches Berufsrecht*, ed. R. Gaier et. al., 3rd ed., Cologne 2020, paras. 1–71, pp. 829–845.

STUDIA PRAWA PUBLICZNEGO
2025 • NR 1 (49) ISSN 2300-3936
https://doi.org/10.14746/spp.2025.1.49.9

Eva-Maria Thierjung*

Gloss on the Judgment of the Higher Court of Lawyers (Anwaltsgerichtshof) of the Land of North Rhine-Westphalia of 11 November 2015, Case 1 AGH 23/15

Abstract. The gloss refers to a judgment of the Higher Court of Lawyers (Anwaltsgerichtshof) of North Rhine-Westphalia Land of 11 November 2015 (1 AGH 23/15), in which the Court ruled upon the decision of a bar association to revoke the permission to use the professional title of "Fachanwalt" (specialist lawyer) due to a breach of the professional obligation to undergo compulsory continuing professional development. The Court correctly recognized that, firstly, the Bar had made its decision on the wrong basis and, secondly, that there was nevertheless no reduction of its discretion to zero, since despite the existence of the reason for revocation – at least in this specific case – discretion still had to be exercised by the Bar. In this way, the Court corrected the Bar's doubly erroneous decision.

The law applicable in this case has been reformed since the decision with the aim of harmonizing the way the bars use their discretion by issuing decisions concerning the revocation of permissions to use the title "Fachanwalt" – the harshest sanction in this context. By these means, erroneous decisions such as the one at hand shall be minimized. However, the new regulation is also fraught with uncertainty and the extent to which it will provide a remedy will only become apparent with time.

Keywords: obligation of professional training – compulsory continuing professional development – specialized lawyer – revocation – discretionary decision

Theses

1. Discretion misapplied and reformed: Unlawful decision to revoke the permission to use the "Specialist Lawyer" title by Bar associations based

* University of Greifswald, Germany | Uniwersytet w Greifswaldzie, Niemcy, https://orcid.org/0000-0002-8818-8516, e-mail: eva-maria.thierjung@uni-greifswald.de.

SPP 1(49), 2025: 139–147.

upon missing further professional training and subsequent amendment of the law.
2. If an authority's discretionary decision is based on incorrect facts or an erroneous legal interpretation, and provided its discretionary power is not reduced to zero, the Court has to repeal it and refer it back to the authority, which in turn must deliver a new decision, even if it ultimately reaches the same conclusion.

1. Facts

The judgment commented upon[1] was issued as a consequence of the action of annulment filed on 2 June 2015 by the plaintiff, in which he challenges the defendant's revocation order of the plaintiff's permission to use the professional title of "Fachanwalt" (specialist lawyer) for social law.

The plaintiff is a lawyer and mediator and also works as a lecturer at the University of N. Until spring 2015, he was permitted to use two specialist lawyer titles: "Specialist lawyer for medical law" and "Specialist lawyer for social law." By the decision dated 28 April 2015, the defendant – the competent regional Bar – revoked the plaintiff's permission to use the latter title, justifying the decision with the lack of 0.5 hours of compulsory continuing professional development for specialist lawyers according to § 15 of the Law pertaining to Bar-approved Specialist Lawyers[2] in 2013 and no training at all in 2014. The legal basis for the revocation was § 43c para. 4 of the Federal Code for Lawyers (Bundesrechtsanwaltsordnung, BRAO[3]) under which this permission may be revoked upon failure to undertake a course of continuing professional development (§ 43c para. 4 S. 2 BRAO). In particular, the defendant did not recognize as sufficient the other evidence submitted by the

[1] 1 AGH 23/15.

[2] Fachanwaltsordnung as last revised on 1 X 2023, hereinafter: "FAO." The FAO is a statute of the German Federal Bar (BRAK), which is adopted by the so-called 'Statutory Assembly' and published in the *BRAK-Mitteilungen* under "official announcements." Amendments have to be submitted to the Federal Ministry of Justice for review (§ 191e BRAO). If the Ministry does not raise any objections, the statutes enter into force after three months (§ 191e para. 3 sentence 2 BRAO). The current version is available online at https://www.brak.de/fileadmin/02_fuer_anwaelte/berufsrecht/BORA_Stand_01.10.2023.pdf (accessed: 30 X 2024).

[3] Act of 1 VIII 1959 BGBl. I p. 565; last amended by Art. 13 of the Act of 23 X 2024 BGBl. 2024 I no. 323.

plaintiff for the purpose of recognition as suitable evidence of further development in accordance with § 15 FAO, namely, his publications, lectures and records documenting his mediator training. This decision of the defendant was based upon the assessment according to which the plaintiff's publications and lectures, on the one hand, do not relate specifically to social, but to medical law, and, on the other, do not reach, from the defendant's point of view, the scientific level of necessary further training in accordance with § 15 para. 1 FAO too, because they were intended for doctors and dentists. Again, from the defendant's point of view, mediator training does not correspond to the further training requirements that apply to a specialist lawyer for social law. As a result, and taking into account the discretion granted to it, the defendant decided that the plaintiff's absences could only be sufficiently sanctioned by revoking his permission to practice as a specialist lawyer for social law. The plaintiff appealed against the revocation to the Higher Court of Lawyers and challenged the defendant's assessment that his other evidence was insufficient within the meaning of § 15 FAO.

The Higher Court of Lawyers (Anwaltsgerichtshof) of the Land of North Rhine-Westphalia followed the opinion of the Bar and judged the defendant's publications and lectures in question either not subject-specific or in any case not corresponding to the level required for the further training of a specialist lawyer for social law. Likewise, the mediator training did not, in the opinion of the Court, meet the requirements of the law, and thus cannot be seen as fulfilment of the requirements concerning the further training of a specialist lawyer for social law. Nevertheless, the action was upheld and the Court ruled in favour of the plaintiff.

The Court based its judgment on the opinion that (at least according to the law in force at the time of the decision) it was not permissible under the FAO to make up for absences from one calendar year in the following year and to compensate for this missing time with further training in the following year. With this assessment, the Court followed the established case law of the Federal Court of Justice (Bundesgerichtshof, BGH), which ruled already in 2014 that a retroactive cure of the breach of the training obligation of § 15 FAO by catching up is not provided for by law[4]; the Court expressly referred in its judgment to this decision.

[4] BGH NJW-RR 2014, 1083 et seq.

In consequence, the defendant's calculation of the absences of the plaintiff were incorrect: the correct calculation without inadmissible reactive crediting of absences should result in an amount of 5 – and not only 0.5 – missing hours of further vocational training for the 2014 calendar year. Consequently, the Bar's decision, having been made on the wrong basis (the existence of 5 instead of 0.5 missing hours), was an error of judgment and as such unlawful. Hence, it should be annulled, regardless of the fact that the law recognizes absences expressly as a reason for revocation without specifying their scope in detail.

2. Assessment of the AGH opinion

At first glance, the ruling of the Court seems to be rather strange, not to say abstruse: The Bar's assessment was confirmed insofar as the plaintiff's failure to demonstrate the required further vocational training as a specialist lawyer is concerned and yet it was ordered to reverse its revocation of the permission to use the title of specialist lawyer, as it had, due to the incorrect application of § 15 FAO, a calculation error was made in favour of the plaintiff regarding the extent of its absences. According to this judgment, the Bar is obligated to reverse its decision based on the finding presented, but at the same time, as might be the first cursory assessment of the legal situation, it is authorized to issue the same decision in terms of outcome with the sole difference that the new decision would be based on 5 missing hours instead of 0.5.

Therefore, the Court's decision calls for some commentary and a closer examination of the main provisions – namely § 43c para. 4 and § 15 FAO – as well as an in-depth analysis of the most important doctrines in German administrative law, that of discretionary error (Ger. *Ermessensfehlerlehre*).

According to § 43c para. 4 sentence 2 BRAO, the permission to use the professional title of "Fachanwalt" "may be revoked upon failure to undertake a course of continuing professional development as prescribed in the rules of professional conduct." Whereas § 43a para. 8 BRAO merely prescribes a general obligation "to engage in continuing professional development" to every lawyer, the FAO, which is exclusively aimed at specialist lawyers in the sense of § 43c BRAO, formulates far more concrete requirements.

Under § 15 para. 1 sentence 1 FAO, specialized lawyers are obliged to publish academically in the specialist field concerned each calendar

year or participate as a lecturer in subject-specific training or events concerning continuing professional development. Thereby, § 15 para. 1 sentence 1 FAO defines a concrete timeframe for this duty, which is supplemented by para. 3, which specifies the scope of the obligation: "The total duration of the continuing professional development must be no less than 15 hours per specialist area; the fulfilment of the training obligation must be proven to the Bar by means of certificates or other suitable documents without a request to do so" (§ 15 para. 5 sentence 1 FAO). According to the old legal situation, which was relevant in the case at hand, no legal provision regulated the question of whether missing hours in the legally described volume of continuing professional development may be made up or not. The opinions in the literature on this issue vary[5]; therefore, the case law[6] of the Federal Court of Justice (Bundesgerichtshof, BGH) was crucial in this context. The BGH made a significant differentiation: Firstly, it ruled that the calendar-based obligation of continuing professional development for the specialist lawyer according to § 15 FAO in its old version, cannot be fulfilled retroactively. In other words, subsequent fulfilment was according to the old legal situation not possible.[7] The background to this interpretation of the law was that § 15 FAO was regarded as a kind of time-based quality safeguard intending to ensure that specialist lawyers are always equally well qualified over time.[8] But, secondly, the BGH held that one single violation of the duty of § 15 FAO does not necessarily entail the revocation the professional title of "Fachanwalt,"[9] a decision which assumes such an quasi-automatism has to be regarded as incompatible with the wording of § 43c para. 4 sentence 2 BRAO ("may").[10] For instance, the temporary inability to participate in events of continuing professional development through no fault on his/her part, e.g. due to illness or an insufficient range of suitable events, may not lead to revocation.[11] Thereby, the failure to provide evidence of the fulfilment

[5] S. Offermann-Burckart, in: *Fachanwaltsordnung: FAO. Kommentar*, eds. M. Henssler, H. Prütting, 6th ed., München 2024, § 15, marg. no. 66 et seq.

[6] BGH NJW 2001, 1945; BGH NJW 2013, 2364; NJW-RR 2014, 1083.

[7] BGH NJW-RR 2014, 1083, marg. no. 9.

[8] S. Offermann-Burckart, in: *Fachanwaltsordnung*…, § 15, marg. no. 66.

[9] H. Scharmer, in: *Berufs- und Fachanwaltsordnung: BORA/FAO. Kommentar*, eds. W. Hartung, H. Scharmer, 8th ed., München 2022, § 43c BRAO, marg. no. 80.

[10] BGH NJW 2001, 1945, marg. no. 9; A. Vossebürger, in: *Bundesrechtsanwaltsordnung: BRAO. Kommentar*, ed. D. Weyland, 11th ed., München 2024, §43c, marg. no. 42.

[11] BGH NJW 2001, 1945.

of continuing professional development alone "does not necessarily mean that the permission to practice as a specialist lawyer must be revoked if this evidence is not provided once."[12] This applies all the more if a corresponding "deal," as in this given case, has been made between the specialized lawyer and the Bar.[13]

Thereby, non-compliance with the obligation to undergo professional training in the sense of § 15 para. 1 sentence 1 FAO or the obligation to provide full evidence about this does not lead, in the language of the doctrine of discretionary errors,[14] to a situation where the Bar's discretion is regularly assumed to be reduced to zero (Ger. *Ermessensreduktion auf Null*).[15] In such situations, the bar must rather exercise its discretion under § 43c para 4 sentence 2 BRAO and take into due consideration the behaviour of the lawyer concerned, especially any action of "subsequently catching up on the obligation."

So, summing up: Failure to undertake or to provide full evidence of 15 hours of continuing professional development required by law indeed constitutes a reason (or is more precisely the only reason) for revoking permission to use the professional title of "Fachanwalt." Nevertheless, the decision to actually revoke this permission remains a discretionary one. In other words, the bar still has to exercise its discretion and thereby take into account the behaviour of the lawyer concerned, possibly his efforts to fulfil his obligation post hoc, and the question of whether he can be accused of fault.[16] Hence, even if formally there has not been, according to the BGH, such a thing as making up for missing hours, *de facto* this possibility already existed.[17] Nevertheless, the affected party had no entitlement to be given the opportunity to fulfil his obligation retroactively, and the Bar might still, upon comprehensive evaluation of the circumstances and in compliance with the principle of proportionality, ultimately arrive at the conclusion of revoking the lawyer's permission to use the title.

This situation has changed now: with the new version of para. 5 of § 15 FAO, the bar in charge must give the specialist lawyer the

[12] BGH NJW-RR 2014, 1083, marg. no. 10 (own translation).

[13] S. Offermann-Burckart, *Fortbildung – eine Pflicht nur für Fachanwälte und Spezialisten?*, "Neue Juristische Wochenschrift" 2017, vol. 70, no. 23, p. 1656.

[14] Comprehensive on this: J. Ruthig, in: *Verwaltungsgerichtsordnung: VwGO. Kommentar*, eds. F.O. Kopp, W.-R. Schenke, 30th ed., München 2024, § 114, marg. no. 7 et seq.

[15] See also J. Ruthig, op. cit., § 114, marg. no. 6.

[16] S. Offermann-Burckart, in: *Fachanwaltsordnung…*, § 15, marg. no. 83.

[17] H. Scharmer, op. cit., § 43c BRAO, marg. no. 84.

opportunity to make up for missing hours of continuing professional development within a reasonable period of time, if this professional training cannot be proven or cannot be proven in full.

If the given case is considered in the light of the above, the following emerges: although the Court did not set out all these aspects of the relevant case law of the BGH in its judgment, the decision is fully in line with it and also highlights the fundamental principle inherent in the legal concept of discretionary decisions, namely, that administrative discretion must be grounded on a sound factual basis and correct interpretation of the law for the decision to be lawful.

Although the lawyer in the present case violated his obligation of continuing professional development not only once but in two consecutive years, the Bar contributed significantly to these circumstances by granting the plaintiff's requests for an extension of the deadline for the fulfilment of the professional training obligation. By doing so, the defendant created a situation, in which the plaintiff may have assumed that such a "subsequent fulfilment" of his professional training duties was possible under the current law. However, as illustrated above, this was not the case; at least not formally. Consequently, it cannot be stated that the plaintiff's failure to fulfil his obligation under § 15 FAO was due to his sole fault.

Thus, in the language of the doctrine of discretionary errors,[18] the Bar's decision contains a discretionary error in the form of a misuse of the discretion: it based its decision on a misinterpretation of the legal requirements[19] concerning the possibility to make missing hours up in the next calendar-year. Since, as a result, one cannot claim the reason for the revocation was solely due to the fault of the plaintiff, there is no situation in which a reduction of discretion to zero is given; in such situations, only the Court could decide instead of the Bar. If this were the case and only one substantively correct decision could be made, the Court could have taken the revocation decision in lieu of the Bar – something that would otherwise constitute a violation of the principle of the separation of powers. Since this was not the case here, the Court had to annul the decision and refer the case back to the Bar, which in turn is required to issue a new decision based on a correct interpretation of the legal situation and by taking due account of its own erroneous

[18] Comprehensive on this: J. Ruthig, op. cit., § 114, marg. no. 7 et seq.
[19] Ibidem, § 114, marg. no. 12.

previous assessment of the legal situation. However, nothing in the judgment prevents the Bar from reaching a decision with the same outcome, but this time accounting for all relevant facts and interpreting of the law correctly.

The legal situation has now changed: since 2023, § 15 para. 3 FAO contains a new sentence three. It provides that if proof of continuing professional development cannot be provided or cannot be provided in full, the bar must give the specialized lawyer the opportunity to make up the missing hours within a reasonable period of time (§ 15 para. 5 sentence 3 FAO). Thus, under the current law, in cases such as the one at hand, the bar is obliged to give the lawyer concerned the opportunity to catch up on their missed training obligations. Granting this opportunity is no longer at the discretion of the competent bar.[20] The amendment was motivated by the fact that the practice of different Bar associations in Germany in exercising their discretion when applying § 43c para. 4 BRAO was not uniform, on one hand, and the judgments of Higher Courts of Lawyers assumed in cases like the one analysed here a reduction of discretion to zero on regular basis on the other. In view of the fact that the revocation of a permission is the most severe sanction, the amendment may be regarded as a welcome harmonization in this matter, although it remains questionable to which extent the new provision will lead to more legal clarity and certainty. Even though the bars are now obliged by law to somewhat enter into "negotiations" with the lawyer in question about possibilities to "catch up" with his training within a "reasonable period" of time, surely, it will take some time before it is sufficiently clear which specific period is meant by this indeterminate legal term. Moreover, it is also questionable how the bars will in the future fulfil their obligation to exercise discretion in comparable cases, on one hand, and make a binding decision by giving the lawyer in question the opportunity to "make up" for his absences, on the other.[21]

The first, cursory assessment of the judgment thus proves to be incorrect; its understanding only becomes apparent on a second reading. The decision is in line with applicable law, as well as the relevant case law of the BGH. This is worth noting, as the Court succeeded in "not falling into the trap" and recognizing the lack of a reduction in discretion

[20] S. Offermann-Burckart, in: *Fachanwaltsordnung*…, § 15, marg. no. 68a et seq.

[21] In this sense, see also: S. Offermann-Burckart, in: *Bundesrechtsanwaltsordnung: BRAO. Kommentar*, eds. M. Henssler, H. Prütting, 6th ed., München 2024, § 43c, marg. no. 82.

to zero. However, it can be argued that, by these means, the Court merely applied the law correctly and thus simply fulfilled its own task. But by doing so, one has to take into account that so many courts have apparently failed to do so that the legislator decided to reform the law.

Nonetheless, a persistent sense of irritation remains. The decision illustrates the intricate interplay between errors in law and errors in fact, on one hand, and the exercise of discretion, on the other. Although the plaintiff did indeed fail to satisfy the professional training requirements, the Bar's decision proved untenable, as it was predicated on an erroneous foundation. Consequently, the plaintiff's appeal against the revocation of his title was successful. However, the Bar might still issue an identical decision based on a correct interpretation of the facts and the law.

This risk in respect thereof may have been mitigated: the amendment to § 15 FAO now imposes an obligation on the bars to provide affected lawyers with the opportunity to compensate for missed professional training. This may lead to a reinterpretation of when a "failure to undertake continuing professional development" exists (cf. § 43c para. 4 sentence 2 BRAO), potentially affecting the practice of revocation. Whether this will ultimately be the case will become clear over time. In any case, this legal amendment constitutes a significant advancement in harmonizing legal practice with the legal framework, thereby enhancing legal certainty.

BIBLIOGRAPHY

Offermann-Burckart S., in: *Bundesrechtsanwaltsordnung: BRAO. Kommentar*, eds. M. Henssler, H. Prütting, 6th ed., München 2024, pp. 395–396.

Offermann-Burckart S., in: *Fachanwaltsordnung: FAO. Kommentar*, eds. M. Henssler, H. Prütting, 6th ed., München 2024, pp. 1935–1940.

Offermann-Burckart S., *Fortbildung – eine Pflicht nur für Fachanwälte und Spezialisten?*, "Neue Juristische Wochenschrift" 2017, vol. 70, no. 23, pp. 1654–1656.

Ruthig J., in: *Verwaltungsgerichtsordnung: VwGO. Kommentar*, eds. F.O. Kopp, W.-R. Schenke, 30th ed., München 2024, pp. 1609–1614.

Scharmer H., in: *Berufs- und Fachanwaltsordnung: BORA/FAO. Kommentar*, eds. W. Hartung, H. Scharmer, 8th ed., München 2022, pp. 961–963.

Vossebürger A., in: *Bundesrechtsanwaltsordnung: BRAO. Kommentar*, ed. D. Weyland, 11th ed., München 2024, pp. 323–325.

STUDIA PRAWA PUBLICZNEGO
2025 • NR 1 (49) ISSN 2300-3936
https://doi.org/10.14746/spp.2025.1.49.10

Maria Lewandowicz*, Agnieszka Piwowarczyk**

Gloss on the Judgment of Court of Justice of the European Union of 19 February 2002, Case C-309/99, *J.C.J. Wouters, J.W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten*, Intervener Raad van de Balies van de Europese Gemeenschap

Abstract. In its judgment of February 19, 2002, in Case C-309/99 (*Wouters*), the Court of Justice of the European Union (CJEU) sanctioned the permissibility of the ban on the establishment of companies by lawyers together with chartered accountants. At the same time, the provisions of the 1993 Dutch Samenwerkingsverordening, which prohibits any kind of integrated cooperation between attorneys and chartered accountants, were found not to be in conflict with Article 101 TFEU (then Article 81 TEC). This is because a prohibition of this nature has been recognized by the CJEU as necessary for the proper practice of the legal profession as it is organized in a member state – in this case, the Netherlands. In Poland, chartered accountants are a profession of public trust, and thus there are no grounds for maintaining a prohibition on the establishment of partnerships of attorneys and chartered accountants.

Keywords: legal advisors – advocate – legal companies – chartered accountant – professional ethics

Theses

1. Prohibition of multi-disciplinary partnerships between members of the Bar and accountants in the Netherlands.

* University of Gdansk, Poland | Uniwersytet Gdański, Polska, https://orcid.org/0000-0002-0777-5154, e-mail: maria.lewandowicz@prawo.ug.edu.pl.

** University of Silesia in Katowice, Poland | Uniwersytet Śląski w Katowicach, Polska, https://orcid.org/0000-0002-4490-4330, e-mail: agnieszka.piwowarczyk@us.edu.pl.

SPP 1(49), 2025: 149–162. © The Author(s). Published by: Adam Mickiewicz University Press, 2025.

2. The unjustifiability of the prohibition of the foundation of partnerships of attorneys and auditors in Poland.

Introduction

The judgment addressed an extremely important issue for legal corporations, namely the applicability of competition rules under EU law to the legal profession. At issue in the *Wouters* case was a rule established by the Dutch Bar Council prohibiting attorneys from forming partnerships with non-lawyers (with chartered accountants, partners of the Dutch branch of the then-existing Arthur Andersen). The Court of Justice of the European Union (CJEU) found that the ban imposed restricts competition, but is objectively justified by the need to ensure that a lawyer acts fully independently, loyally, with professional secrecy, and respect for the rules on avoiding conflicts of interest.[1]

1. Core issues addressed in the case

The C-309/99 ruling addresses the question of whether the existence of a rule of reason can be accepted under EU competition law, in particular whether – in determining whether an agreement or decision falls within the scope of Article 101 of the Treaty on The Functioning of the European Union (TFEU) (formerly Article 81 (1) of the Treaty Establishing the European Community [TEC]) – both economic and non-economic considerations may be relevant, and if so, which considerations play a role (whether, for example, professional ethics may play a role).[2]

Underlying the ruling under comment is a regulation adopted by the Samenwerkingsverordening of 1993 (resolutions of the Dutch Bar Association), which stipulates that lawyers interested in cooperating

[1] A. Bolecki, *Porozumienia zakazane ze względu na cel lub skutek – aktualne tendencje orzecznicze w Unii Europejskiej*, "Internetowy Kwartalnik Antymonopolowy i Regulacyjny" 2012, no. 3, p. 11; L. Mella Méndez, M. Kurzynoga, *The Presumption of the Employment Relationship of Platform Workers as an Opportunity to Eliminate Obstacles Arising from Competition* Law *in the Conclusion of a Collective Agreement: The Example of Spain*, "Białostockie Studia Prawnicze" 2023, vol. 28, no. 4, pp. 202–203.

[2] A.J. Vossestein, *Case C-35/99, Arduino, Judgment of February 19, 2000, Full Court; Case C-309/99, Wouters et al. v. Algemene Raad van de Nederlandse Orde van Advocaten, Judgment of February 19, 2002*, "Common Market Law Review" 2002, vol. 39, no. 4, pp. 841–863.

with members of another professional category must obtain permission from the Supreme Bar Council. Article 4(c) of the 1993 Samenwerkingsverordening stipulates that a lawyer may undertake and conduct cooperation only with members of other professional groups recognized by the supreme council in accordance with Article 6 of the regulation.[3] It is also worth noting the importance of the guidelines issued by the Dutch Bar on cooperation between attorneys and members of other professions (authorized). The aforementioned guidelines oblige attorneys to respect ethical and deontological rules, stipulating that when entering into cooperation with a representative of another liberal profession, the attorney may not restrict or impede compliance with the ethical or deontological standards to which he is subject.

The 1993 Samenwerkingsverordening in question prohibits attorneys practising in the Netherlands from entering into multidisciplinary partnerships with persons in the professional category of accountants. As a result, the governing bodies of the Dutch Bar Council concluded that it would be contrary to the Samenwerkingsverordening of 1993 for an attorney to collaborate with non-attorneys and practise under the name "Arthur Andersen & Co., advocaten en belastingadviseurs." The decision of the governing bodies of the Dutch Bar Council was challenged due to the claim that it was contrary to the competition provisions of the TFEU, as well as the freedom of establishment and the free provision of services.

2. Applicability of EU competition law to legal professions

The preliminary ruling, C-309/99 (*Wouters*), raised the question of the application of EU competition law to professions. The first key question

[3] According to Article 6 of the 1993 Regulation: (1) The authorization referred to in Article 4(c) may be granted on condition that: (a) the members of that other professional category practise a profession, and (b) the exercise of that profession is conditional upon possession of a university degree or an equivalent qualification; and (c) the members of that professional category are subject to disciplinary rules comparable to those imposed on members of the Bar; and (d) entering into partnership with members of that other professional partnership is not contrary to Articles 2 or 3. (2) Accreditation may also be granted to a specific branch of a professional category. In that case, the conditions set out in (a) to (d) above shall be applicable, without prejudice to the General Council's power to lay down further conditions. (3) The General Council shall consult the College of Delegates before adopting any decision as mentioned in the preceding subparagraphs of this Article.

was whether the concept of an association of undertakings applies to a professional association of lawyers. The concept of an association of undertakings is not defined in the Treaty. As a general rule, an association is composed of enterprises of the same type and is responsible for representing and defending their common interests *vis-à-vis* other business entities, government bodies and the general public.[4] Referring to the question posed, the Court ruled that a decision issued on the basis of the Samenwerkingsverordening 1993 should be considered a decision of an association of undertakings within the meaning of Article 101 (1) TFEU (former Article 81 (1) TEC). Thus, the concept of an association companies applies to a professional association of lawyers, such as the Nederlandse Orde van Advocaten.

Another issue raised in the preliminary questions concerned the restriction of competition or the distortion of competition within the internal market by the Samenwerkingsverordening 1993 regulations. The Court found that the regulation, despite entailing restrictive effects on competition, was necessary for the proper practice of the legal profession as it operates in the Member State concerned. In recital 107, the Court acknowledged that "the 1993 regulation may … reasonably be regarded as necessary in order to ensure the proper practice of the legal profession as it is organized in the Member State concerned."

The prohibition on multidisciplinary cooperation between members of the bar and accountants, as established by the resolution adopted by the Bar in the Netherlands, is therefore likely to restrict competition within the internal market. Similarly, in his opinion, Advocate General Léger stated that the effect of the contested regulation is to restrict competition in the common market. In Léger's view, the restriction imposed by the regulation affects an important element of competition because it directly affects the services that lawyers can offer on the market, and the regulation therefore has the effect of restricting competition to a perceptible degree. It is worth noting the CJEU's observation in Recital 99 of the judgment under review, which emphasizes that (in the absence of Community standards in the field in question) each Member State remains free, in principle, to organize the practice of the legal profession in its territory. Consequently, the rules on the practice

[4] Opinion of Advocate General Leger delivered on 10 VII 2001 in Case C-309/99, *Wouters, J.W. Savelbergh, Price Waterhouse Belastingadviseurs v. Algemene Raad van de Nederlandse Orde van Advocaten*. Opinion available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61999CC0309.

of the profession of lawyer may vary considerably from one Member State to another, which in practice means that different provisions may also be encountered in each Member State to guarantee the practice of the profession in a correct manner and in the public interest.[5] Moreover, in Recital 108 of the judgment in Case C-309/99, it was made clear that even if possibly different rules are applied in another member state, the Dutch Bar, taking into account the existing regulations to which attorneys and chartered accountants are subject, respectively, is fully entitled to adopt the rules arising from the Samenwerkingsverordening 1993 and this does not imply a contradiction with EU law.

In the judgment under discussion in Case C-309/99, the CJEU stressed that, according to the concept prevailing in the Netherlands, the basic rules accompanying the practice of the profession of a lawyer include the duty to defend the client under conditions of complete independence and in the client's sole interest, the avoidance of conflicts of interest and the duty to strictly observe professional secrecy. These rules dictate that a lawyer must remain in a situation of independence from public authorities, other businesses and third parties, whose influence he should not be subject to.[6]

It is worth noting that the statements adopted in the voted ruling are seen as a manifestation of the Court's application of the rule of reason under the current Article 101 (1) TFEU.[7] The assessment of whether an agreement restricts competition within the meaning of Article 101 (1) TFEU requires an examination of what the state of competition, actual or potential, on the relevant market would have been had the agreement not been concluded, taking into account internal competition, i.e. between the parties to the agreement, and external competition, i.e. between the parties to the agreement and a third party and between third parties.[8] It must be established whether the agreement has a significant effect on competition, i.e., whether it falls within the scope of the de

[5] M. Biliński, M. Jaś-Nowopolska, H. Wolska, *Dopuszczalność posiadania udziałów majątkowych przez osoby niewykonujące zawodów prawniczych w działalności podmiotów świadczących pomoc prawną (adwokatów) w prawie polskim i niemieckim*, "Przegląd Ustawodawstwa Gospodarczego" 2024, vol. 77, no. 6, pp. 43–49.

[6] Recitals 100 and 102 of Judgment C-309/99.

[7] M. Grzelak, *Glosa do wyroku w sprawie Wouters*, in: *Orzecznictwo sądów wspólnotowych w sprawach konkurencji w latach 1964–2004*, eds. A. Jurkowska, T. Skoczny, Warszawa 2007, pp. 727–738.

[8] See Guidelines on the Application of Article 101 (3) TFEU (former Article 81 (3) TEC), OJ 2004, C-101/97, paras. 17–27.

minimis rule.[9] In light of Article 101 (3) of the TFEU, it must be stated that certain restrictive agreements may produce objective economic benefits that outweigh the negative effects of the restriction of competition, and exempted these agreements from the scope of the prohibition.

Another issue the Court had to decide was whether attorneys are undertakings. As is clear from the ruling voted on, the Court found that the Member State Bar is not an undertaking within the meaning of Article 102 of the TFEU (former Article 82 of the TEC) because it is not engaged in an economic activity. Nor can it be classified as a group of undertakings for the purposes of that provision, since the registered members of the Member State Bar are not sufficiently linked to each other to adopt the same behaviour on the market that would have the effect of eliminating competition between them. According to the position of the Court of Justice of the European Union, the very concept of "enterprise" belongs to the autonomous concepts of EU law, independent of the laws of the Member States.[10] It should be recognized that the purpose of this treatment of the undertaking is to ensure that EU competition rules can be uniformly applied in all member states, regardless of the definition of the concept under national legislation.[11] Taking into account previous CJEU case law, it can be assumed that an undertaking within the meaning of EU competition law is "any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed."[12]

---

[9] D. Kostecka-Jurczyk, *Porozumienia kooperacyjne w polskim i europejskim prawie konkurencji*, Wrocław 2014, p. 95.

[10] Judgment of Court of Justice of the European Communities (CJEC) of 23 IV 1991, Case C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron GmbH*, ECR 1991, p. I-1979, para. 21; Judgment of CJEC of 11 XII 1997, Case C-55/96, *Job Centre coop. arl.*, ECR 1997, p. I-7119, para. 21; for more detail on this subject, J.L. Buendia Sierra, *Exclusive rights and state monopolies under EC law: Article 86 (formerly Article 90) of the EC Treaty*, trans. A. Read, Oxford – New York 1999, p. 30; C. Koenig, *Determining*, p. 240.

[11] *System Prawa Administracyjnego*, vol. 8B, *Publiczne prawo gospodarcze*, eds. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2018, p. 831 and literature cited therein.

[12] Judgment of CJEC of 23 IV1991, Case C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron GmbH*, ECR 1991, p. I-1979, para. 21; Judgment of European Court of Justice (ECJ) of 17 II 1993, joined Cases C-159/91 and C-160/91, *Christian Poucet v. Assurances générales de France and Caisse mutuelle régionale du Languedoc-Roussillon*, ECR 1993, p. I-637, para. 17; Judgment of CJEU of 16 III 2004, joined Cases C-264/01, C-306/01, C-354/01, C-355/01, *AOK Bundesverband, Bundesverband der Betriebskrankenkassen (BKK), Bundesverband der Innungskrankenkassen, Bundesverband der landwirtschaftlichen Krankenkassen, Verband der Angestelltenkrankenkassen eV, Verband der Arbeiter-Ersatzkassen, Bundesknappschaft and See-Krankenkasse v. Ichthyol-Gesellschaft Cordes, Hermani & Co., Mundipharma GmbH, Gödecke GmbH*

Since there are insufficient structural links between the lawyers, they cannot be considered to be in a jointly dominant position within the meaning of Article 102 of the Treaty,[13] and therefore an institution such as the Dutch Bar constitutes neither an undertaking nor a group of undertakings.

The next issue that was considered within the framework of the ruling in question concerned the compatibility of the prohibition of integrated cooperation between attorneys and certified public accountants provided for in the Samenwerkingsverordening 1993 with the provisions of Articles 49 and 56 TFEU (former Articles 43 and 49 TEC). The Court was tasked with resolving the question of the application of the treaty provisions on the right of establishment and freedom to provide services to a regulation of the Samenwerkingsverordening 1993 type. It should be noted that the obligation to comply with the provisions of Articles 49 and 56 TFEU also applies to regulations of a non-public nature, which are intended to regulate independent work and the provision of services in a collective manner. It follows from the CJEU's established case law that a restriction on the freedom of establishment may be permissible only if it is justified by overriding reasons of general interest. It should, moreover, be appropriate to guarantee the achievement of the objective in question and not go beyond what is necessary to achieve it.[14] The essence of the freedom to provide services is expressed in Articles 56 and 57 TFEU. These provisions remove restrictions and constitute a prohibition of discrimination in the free provision of services. Pursuant to Article 56 TFEU, "restrictions on the free provision of services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the recipient of the service."[15]

---

and Intersan, Institut für pharmazeutische und klinische Forschung GmbH, ECR 2004, p. I-2493, para. 46.

[13] See, similarly, the judgment of 31 III 1998 in joined Cases C-68/94 and C-30/95, *France and Others v. Commission*, ECR 1998, p. I-1375, para. 227, and of 16 III 2000 in joined Cases C-395/96 P and C-396/96 P, *Compagnie maritime belge transports SA and Others v. Commission*, ECR 2000, p. I-1365, paras. 36 and 42.

[14] Judgment of the CJ of: 13 XII 2005, Case C-446/03, *Marks & Spencer v. David Halsey (Her Majesty's Inspector of Taxes)*, ECR 2005, p. I-10837, para. 35; of 25 X 2017, Case C-106/16, *Polbud – Wykonawstwo*, EU:C:2017:804, para. 52; of 25 IV 2024, Case C-276/22, *Edil Work 2 and S.T.S.r.l v STE S.a.r.l.*, ECLI:EU:C:2024:348.

[15] See M. Etel, *Normatywna koncepcja usług ukształtowana w dorobku Unii Europejskiej*, "Forum Prawnicze" 2020, no. 1(57), pp. 22–35.

As the Court ruled, the provisions of Articles 49 and 56 of the TFEU do not preclude a legal regulation such as the Samenwerkingsverordening 1993, which prohibits any kind of integrated cooperation between attorneys and certified public accountants, as this regulation may be considered necessary for the proper practice of the legal profession under the rules according to which it operates in a Member State.

3. Restrictions on competition in the legal market is a global issue

The issues raised by the TUSE ruling in the *Wouteres* case are essentially universal and transcend EU borders. In the United States, the largest legal market in the world, as well as in most European countries, there is a ban on the joint practice of lawyers and accountants in order to protect the basic legal obligations of independence and the impermissibility of representing conflicting interests. After a heated debate, the American Bar Association opposed an attempt to lift this ban.[16]

Although the governments of the Netherlands, Denmark, Germany, France, Austria, Portugal, Sweden and the government of the Principality of Liechtenstein took part in the proceedings in question, the conclusions of this judgment also directly affect the rules of the legal profession in Poland. The structure of the Dutch and Polish legal professions is largely the same. Both legal professions are organized in a two-tier system of chambers, in which all attorneys are grouped by law. Chambers (Orde) are public-law corporations to which the state legislature has delegated the power to govern themselves. The organs are composed exclusively of representatives of the profession elected by representatives of the legal profession, while the State exercises legal supervision over their activities.

In the Wouters ruling, the CJEU first confirmed that lawyers are entrepreneurs. This is not surprising and is a logical consequence of the Court's 1974 ruling on the matter. At that time, the CJEU denied that lawyers are an emanation of the state, to which the prohibition of discrimination and the freedom to provide services and freedom of establishment do not apply because of their participation in the performance of public functions, even if they are cornerstones of the rule

[16] H. Weil, *Der Rechtsanwalt – ein Unternehmer besonderer Art*, "BRAK-Mitteilungen-Fachzeitschrift der Bundesrechtsanwaltskammer" 2002, no. 2, p. 50.

of law[17] (cf. also Case C-33/74, *van Binsberghen*, 1975). In this context, it is not surprising that the Court of Justice considered lawyers to be entrepreneurs within the meaning of 101 TFEU. However, the Court recognized that their activities are hybrid in nature with all the consequences that this dual role entails. On the one hand, they act as an organ of the judiciary, and on the other, as entrepreneurs, hence they can enjoy the freedoms of the treaty, but only to the extent that this does not contradict the dignity and ethics of their profession.

As the Court has argued, under the concept prevailing in the Netherlands, where, under Article 28 of the Advocatenwet, the Dutch Bar is responsible for establishing rules to ensure the proper practice of the legal profession, the basic rules are: the obligation to defend the client under conditions of complete independence and in the client's sole interest, the avoidance of conflicts of interest, and the obligation to strictly observe professional secrecy. The above ethical obligations have a considerable impact on the structure of the market for legal services, including, in particular, the possibility of joint practice of the lawyer's profession with representatives of other liberal professions operating in this market. They require the lawyer to remain in a situation of independence from public authorities, other businesses and third parties, whose influence he should not be subject to. He must ensure that the actions he takes in a case are determined solely by the interests of the client. The profession of certified public accountant, on the other hand, is not subject (particularly in the Netherlands) to similar deontological requirements.

In this regard, as the Advocate General rightly pointed out in paragraphs 185 and 186 of the opinion, there is the possibility of some sort of contradiction between the "advice" activity, performed by a lawyer, and the "audit" activity, performed by a certified public accountant. As can be seen from the letter filed by the defendant in the main case, the task of an expert accountant in the Netherlands is to approve financial statements. For this purpose, he analyses and checks the accounts of his clients in an objective manner in order to be able to provide interested third parties with his personal opinion on the reliability of the accounting data. It follows from the above that in the Netherlands, unlike Germany or Poland, for example, an expert accountant is not

[17] Judgment of CJEU of 21 VI 1974, Case 2/74, *Jean Reyners vs. État belge*, ECR 1974, p. 00631.

subject to the obligation of professional secrecy, analogous to that to which a lawyer is subject.

The concepts developed in the Wouters ruling as well as the regulatory direction adopted in the Netherlands are to a great extent in line with Polish regulations on the practice of the advocacy profession. Pursuant to § 9 of the Collection of Principles of Advocacy Ethics and Dignity of the Profession (Code of Advocacy Ethics) dated October 10, 1998, as amended,[18] it is forbidden to combine with the profession of an advocate any occupation the performance of which would offend the dignity of the advocacy profession or limit its independence and undermine confidence in the Bar. Combining activities may not lead to a decrease in the quality of legal assistance provided by an advocate or to a loss of confidence that is the basis of the relationship binding an advocate with a client. Practising as an attorney means assuming a special responsibility to the public for the protection of their rights.

With registration as an attorney, members of the Bar accept certain restrictions in the professional sphere that do not bind those in other professions.[19] The literal wording of § 9 of the Code of Ethics does not provide a clear picture of extra-legal professions, activities or functions that could violate the ethics of the profession. Some interpretive support is offered by the earlier wording of this provision, as seen in the 2018 Code.[20] Pursuant to it, occupations that interfere with the practice of the profession of advocacy were considered, in particular, of a position of manager in another person's enterprise, holding the

[18] Pursuant to Resolution No. 93/2023 of the NRA of 26 V 2023, the consolidated text of the Collection of Principles of Bar Ethics and Dignity of the Profession (Code of Bar Ethics) adopted by the Supreme Bar Council on 10 X 1998 (Resolution No. 2/XVIII/98) with amendments introduced by Resolution of the Supreme Bar Council No. 32/2005 of 19 XI 2005 is announced, Resolutions of the Supreme Bar Council No. 33/2011 – 54/2011 of 19 XI 2011, Resolution No. 64/2016 of the Supreme Bar Council of 25 VI 2016, Resolution No. 66/2019 of the Supreme Bar Council of 21 VIII 2019, Resolution No. 66/2022 of the Supreme Bar Council of 10 VIII 2022, and Resolution No. 93/2023 of the Supreme Bar Council of 26 V 2023.

[19] J. Naumann, *Zbiór Zasad Etyki Adwokackiej i Godności Zawodu. Komentarz*, Warszawa 2023, p. 154.

[20] Pursuant to Resolution No. 52/2011 of the NRA of 19 XI 2011, the unified text of the Collection of Principles of Bar Ethics and Dignity of the Profession (Code of Bar Ethics) adopted by the Supreme Bar Council on 10 X 1998 (Resolution No. 2/XVIII/98) with amendments introduced by Resolution of the Supreme Bar Council No. 32/2005 of 19 XI 2005 is announced, Resolutions of the Supreme Bar Council No. 33/2011 – 54/2011 of 19 XI 2011, and Resolution 64/2016 of the Supreme Bar Council of 25 VI 2016.

position of a member of the board of directors, proxy in commercial law companies (this does not apply to companies engaged in the provision of legal assistance), undertaking professional mediation in commercial transactions, running a law office in the same premises with a person engaged in another activity, if such a situation were contrary to the rules of advocacy ethics.

4. Wouters case vs. Polish regulations

Analogous to the duty of Dutch attorneys, Polish attorneys are obliged to strictly observe the duty of professional secrecy. Pursuant to § 19 of the Code of Ethics, an advocate is obliged to keep secret and protect from disclosure or unwanted use everything he learns about in connection with the performance of his professional duties (para. 1). The materials in the attorney's file are covered by attorney-client privilege (para. 2). Secrecy is further covered by all messages, notes and documents concerning the case obtained from the client and other persons, regardless of where they are located (para. 3). The obligation to observe professional secrecy is unlimited in time (para. 7).

In relation to the Dutch provisions on the rules of practising law, the Polish legislator went even further and explicitly provided for the impossibility of practising law in Poland in a partnership with expert accountants (chartered accountants). Pursuant to Article 4a of the Law on Advocacy,[21] an advocate may practise in an advocate's office, in an advocate's team and in a civil, general or partnership in which the partners or partners, respectively, are advocates, legal advisers, patent attorneys, tax advisers or foreign lawyers. The same rule applies to the performance of activities in a limited partnership or limited joint-stock partnership in which the general partners are attorneys, legal advisors, patent attorneys, tax advisors or foreign lawyers. The exclusive object of all the above-mentioned companies is to provide legal assistance.

However, what significantly differentiates the regulatory conditions of Dutch law analysed in the Wouters ruling from the regulatory conditions of Polish law are the provisions of the Act on Statutory Auditors,

[21] Act of 26 V 1982 – Law on Advocacy (Journal of Laws of 1982, No. 16, item 124 as amended).

Audit Firms and Public Supervision.[22] Under its provisions, auditors in Poland enjoy the privilege of a profession of public trust, giving the guarantee to practise their profession with a sense of responsibility, with all integrity and impartiality, in accordance with the law and applicable standards. Statutory auditors are obliged to act in accordance with their oath,[23] constantly improve their professional qualifications, including by undergoing mandatory in-service training each calendar year, comply with national standards of practice, independence requirements and principles of professional ethics, regularly pay their membership fee, and comply with the resolutions of the bodies of the Polish Chamber of Statutory Auditors insofar as they relate to statutory auditors.

Statutory auditors also form a professional self-government, which is the Polish Chamber of Statutory Auditors. The chamber's tasks include controlling the fulfilment of mandatory professional development obligations by auditors and conducting disciplinary proceedings for violations of mandatory professional development obligations, as well as conducting disciplinary proceedings against auditors for misconduct other than that arising in the performance of attestation services and related services in accordance with national professional standards (Article 23 in conjunction with Article 25 of the Law on Certified Public Accountants).

Finally, the auditor and the audit firm are obliged to keep confidential all information and documents to which they had access in the course of providing attestation and related services. The obligation of professional secrecy is not limited in time (Article 78 (2) of the Law on Certified Public Accountants).

---

[22] Law of 11 V 2017 on auditors, audit firms and public supervision (Journal of Laws of 2024, item 1035), hereinafter: "the Law on Auditors."

[23] Article 7 of the Law on Statutory Auditors: "1.The oath of office taken by a certified public accountant reads as follows: «I swear that as a certified public accountant I will practise my profession with a sense of responsibility, with all integrity and impartiality, in accordance with the provisions of the law and the applicable standards for the practice of the profession. In my conduct I will be guided by the principles of professional ethics and independence. I will keep the facts and circumstances learned in the course of my work as a certified public accountant secret from third parties.» The oath may be taken with the addition of the words «So help me God.» 2. The oath shall be taken by the President of the National Council of Certified Auditors or another authorized member of the National Council of Certified Auditors."

Conclusions: should Polish law regarding legal professions be amended

Looking at the shape of Polish regulations on auditors through the prism of the CJEU's Wouters ruling, there is no rational argument why the prohibition on practising law in Poland should be maintained in regard to partnership with auditors. Any objections to the principles of the auditing profession raised in the Wouters ruling are not covered by Polish legislation. In the Polish reality, auditors practise a profession of public trust, are subject to public supervision, and operate within the framework of a professional self-government, which establishes common standards of ethics in the practice of the profession and rules of disciplinary responsibility. Finally, auditors are obliged to maintain professional secrecy, which, like that of the legal profession, is unlimited in time.

Therefore, taking into account the needs of modern business in terms of obtaining highly specialized comprehensive services from both the legal and financial spheres, it seems reasonable to claim that in Poland it would be appropriate to start a discussion on expanding the possibilities of inter-corporate cooperation between attorneys and auditors.

BIBLIOGRAPHY

Biliński M., Jaś-Nowopolska M., Wolska H., *Dopuszczalność posiadania udziałów majątkowych przez osoby niewykonujące zawodów prawniczych w działalności podmiotów świadczących pomoc prawną (adwokatów) w prawie polskim i niemieckim*, "Przegląd Ustawodawstwa Gospodarczego" 2024, vol. 77, no. 6, pp. 43–49.

Bolecki A., *Porozumienia zakazane ze względu na cel lub skutek – aktualne tendencje orzecznicze w Unii Europejskiej*, "Internetowy Kwartalnik Antymonopolowy i Regulacyjny" 2012, no. 3, pp. 5–25.

Buendia Sierra J.L., *Exclusive rights and state monopolies under EC law: Article 86 (formerly Article 90) of the EC Treaty*, trans. A. Read, Oxford – New York 1999.

Etel M., *Normatywna koncepcja usług ukształtowana w dorobku Unii Europejskiej*, "Forum Prawnicze" 2020, no. 1(57), pp. 22–35.

Grzelak M., *Glosa do wyroku w sprawie Wouters*, in: *Orzecznictwo sądów wspólnotowych w sprawach konkurencji w latach 1964–2004*, eds. A. Jurkowska, T. Skoczny, Warszawa 2007, pp. 727–738.

Kostecka-Jurczyk D., *Porozumienia kooperacyjne w polskim i europejskim prawie konkurencji*, Wrocław 2014.

Mella Méndez L., Kurzynoga M., *The Presumption of the Employment Relationship of Platform Workers as an Opportunity to Eliminate Obstacles Arising from Competition Law in the Conclusion of a Collective Agreement: The Example of Spain*, "Białostockie Studia Prawnicze" 2023, vol. 28, no. 4, pp. 197–216.

Naumann J., *Zbiór Zasad Etyki Adwokackiej i Godności Zawodu. Komentarz*, Warszawa 2023.

System Prawa Administracyjnego, vol. 8B, *Publiczne prawo gospodarcze*, eds. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2018.

Vossestein A.J., *Case C-35/99, Arduino, Judgment of 19 February 2000, Full Court; Case C-309/99, Wouters et al. v. Algemene Raad van de Nederlandse Orde van Advocaten, Judgment of 19 February 2002*, "Common Market Law Review" 2002, vol. 39, no. 4, pp. 841–863.

Weil H., *Der Rechtsanwalt – ein Unternehmer besonderer Art*, "BRAK-Mitteilungen-Fachzeitschrift der Bundesrechtsanwaltskammer" 2002, no. 2, pp. 50–59.

STUDIA PRAWA PUBLICZNEGO
2025 • NR 1 (49) ISSN 2300-3936

IV. RECENZJE

Julia Lefèvre, *Eine explorative Untersuchung der anwaltlichen Beratungshilfe: Das Berufsbild des Rechtsanwalts und seine Pflicht aus § 49a Abs. 1 BRAO als Instrument der Sicherung des gleichen Zugangs zum Recht in Recht und Praxis* [An Exploratory Study of Legal Advice: The Professional Profile of a Lawyer and His Duty Under Section 49A Paragraph 1 Brao as an Instrument for Ensuring Equal Access to the Law in Law and Practice], Duncker & Humblot, Berlin 2024, pp. 295, ISBN 978-3-428-19147-5

This monograph was written as part of the author's dissertation.[1] Julia Lefèvre set herself the goal of determining the possible causes of the falling statistics regarding counseling assistance. To this end, she developed her own survey, which she sent to lawyers in Germany. The responses contributed to an evidence-based study into the reasons why counseling assistance may not be provided in accordance with legal requirements. This included a combination of dogmatic basic work and empirical investigation.

The judicial statistics in Germany do not offer regular help with providing answers to the questions regarding the mobilization of law. Above all, they show certain types of proceedings, the areas of law affected, and the plain number of lawsuits or lawsuits settled. There are relatively few statistical surveys available on access to justice.

The question posed in the dissertation is not just related to studies but ultimately concerns the implementation of a general guarantee of various human rights and constitutional systems. In international law, but also in European and national law, these guarantees are anchored in various international treaties and constitutional systems. The German Constitutional Court has extended the guarantee of access to justice to include the preliminary stages of a court-related referral. It first emphasized the requirement to "extensively equalize the situation of those with means and those without means when providing legal protection" for legal aid, and then extended this to the area of advisory assistance.

In Germany, research in this field slowed down after peaking in the 1970s. Lefèvre places her empirical study in the context of legal profession. In Germany, it is primarily lawyers who have to provide legal advice, although they do not have

[1] The author of the review was the supervisor of the dissertation and as such the first to evaluate this work.

SPP 1(49), 2025: 163–167. © The Author(s). Published by: Adam Mickiewicz University Press, 2025.

a monopoly in this area. If they do not fulfill the mandate given to them by law, there appears a risk of significantly limited access to justice for the poor. In view of the current upheaval in German society due to migration and the parallel changes in the legal services market, among other things, it seems appropriate to also examine this question empirically.

The dissertation is divided into 5 parts. Lefèvre begins with a relatively comprehensive introduction highlighting the problem dealt with by the present work. Part 2 is devoted to the profession of a lawyer and his role in ensuring equal access to law. The requirements for providing legal advice are presented, with the main focus placed on the reasons for rejection of this activity. Part 3 contains an overview-like presentation of advisory assistance, which, after a historical presentation of the development, explains individual requirements for this assistance. Part 4 presents the empirical investigation of the current situation. Lefèvre explains her research design and its methodological foundations. She addresses the design of her questionnaire and other content-related questions, and then moves on to data analysis and the evaluation methods used.

In Part 5, Lefèvre ultimately determines the gaps in application or different application practices between the written law and practice. In particular, the reasons for rejection are not applied in accordance with the legal requirements. Part 6 then provides recommendations and offers a forward-looking conclusion. The author formulates optimization approaches for legal advice. Among other things, she addresses a new version of reasons for rejection, improved accessibility of legal applicants but also questions of digitalization and involvement of young lawyers in legal advisory services.

In her introduction, the author presents the basics of advisory assistance, including the introduction of the Advisory Assistance Act 1980. In addition, statistics on advisory assistance are provided, which show the status up to 2021. According to the statistics, there was a significant decline in the number of cases where counseling assistance was provided, from just under 82,000 cases in 2011 to just under 32,000 cases in 2021. The coronavirus pandemic also appears to have had a significant impact on the statistics. The author cites differences of up to a 25% decline. Given the available statistical figures on the density of lawyers, Lefèvre determined an average number of legal advice services of 2.2 cases per lawyer for 2020. A year later, that number had dropped below 2 cases. However, these national average numbers vary greatly across federal states. The author has identified an average of 7.6 cases per lawyer in Saxony-Anhalt in 2020, but only one case in Bavaria. In addition, there appears to be a clear shift between individual lawyers and large law firms in cities that focus on commercial law. The latter seem to hardly play a role in providing legal advice.

In Part 2, the author turns to the profession of lawyer and its role in ensuring equal access to the law. To define the legal profession, the author primarily uses the professional regulations of the Federal Lawyers' Code. In addition, she also takes into account constitutional requirements, professional regulations for lawyers (BORA) and the Lawyers' Remuneration Act (RVG). The following is a presentation of the term 'access to law' both in national law and in international conventions, as well as in European law. This section continues with a presentation of

Article 49a BRAO. It is important that a lawyer may only reject a request for advice in individual cases and for important reasons. The details of the reasons for rejection in Article 16a Paragraph 3 BORA are presented. It should be emphasized that the failure to present a counseling assistance certificate by the district court is not a reason to reject counseling assistance. This seems to have become common practice for many lawyers because they expect considerable bureaucracy and time to be involved in the subsequent liquidation before the district court. The consequences of violations of Article 49a BRAO i. V. with § 16, § 16a BORA are primarily related to professional law but also civil law.

Part 3 presents the law of legal advice. After an instructive presentation of the historical development of advisory assistance, the author addresses individual legal questions such as jurisdiction, requirements for advisory assistance and need. It is important to emphasize that currently lawyers no longer have the privilege of providing advice. However, the dissertation focuses on advice from lawyers. It should also be emphasized that in individual cities (Berlin, Bremen and Hamburg), public legal advice is also provided, which displaces legal advice according to the Advice Aid Act. Advice is primarily provided by obtaining an advisory assistance certificate from the local court; in such a case, a judicial officer is functionally responsible. However, it is also possible to submit this application at a later time. It is then carried out by the lawyer who has previously provided legal advice. The lawyer is not obliged to participate in the application itself, but is only obliged to accept and cooperate with requests for advice. The following description of the need suggests that requests for advice are complex from a factual perspective alone. It is important to note that an examination of the prospects of success, which is central to granting legal aid, is not performed when it comes to advisory assistance. This issue is followed by a description of legal fees for advisory assistance. At present, it is unclear whether the current fees for advisory assistance are still appropriate. The author claims that the legislature should conduct its own investigation into such appropriateness. The following presentation serves to discuss possible barriers in obtaining access to legal advice. It becomes clear that in many cases the legal application points are apparently difficult to reach and, in some cases, too distant in larger states. The bureaucratization of the procedures also appears to pose a significant problem; the corresponding advisory assistance form contains an 8-page information sheet for a 4-page form. This is the precisely the case with other compulsory forms. Even for people with an academic background, some of these forms are difficult to understand. If you then imagine an asylum seeker in Germany, who may have a lower level of education, you might ask yourself if the legislator has taken such situations into consideration. It is also important to present cultural differences that stand in the way of those seeking advice. In some cultures, it is highly uncommon to disclose your financial circumstances and explicitly seek legal advice.

In Part 4, the current situation is empirically examined. The author then presents her research design and the research status, in addition to explaining her methodological approach. From a qualitative point of view, it has been found that the advisory mandates represent a significant expenditure of time and work for lawyers. They also involve considerable bureaucratic effort. The applicants are also

frequently perceived as unreliable, which, in conjunction with the 4-week deadline in Article 6 Paragraph 2 of the Counseling Assistance Act for the subsequent issuance of a counseling assistance certificate, appears difficult and is discussed by the author later on. The main problem seems to be the low fees on the part of the lawyers. When it comes to those seeking legal advice, there are cultural and linguistic hurdles as well as their behavioral patterns. On the part of the local court, the requirement to complete the forms and the proof of the requirements for legal advice constitute a clear barrier to access. Added to this is the accessibility of the legal application offices and long waiting times. The responsible legal officers appear to be inconsistent in handling such applications.

A survey on ideas for improving advisory assistance is presented in the next part. The lawyers primarily demand an increase in fees. In addition, they focus on simplifying and streamlining or reducing bureaucracy in the application process.

The final part of the dissertation contains recommendations and an outlook, in which the author emphasizes the need for further legal research. After this reference to further investigations, the author refers to her own optimization approaches for advisory assistance and initially wants to supplement the rejection catalog in § 16a BORA with a negative catalog. A separate standardization proposal is presented. She also advocates further training in professional law. The author wants to determine the question of accessibility of legal application points by actually examining accessibility. Supervisory measures are also suggested here. In order to better inform those seeking legal advice, the creation of a central website and an advisory assistance portal is proposed. The author also wishes to introduce improvements to the written application and would like to extend to two months the deadline for subsequent application for cases in which a lawyer provided advisory assistance before an advisory assistance certificate was issued. The fees should be increased appropriately; in the short term, the author advocates a dynamic fee adjustment. The author advocates involving young lawyers in providing advice. She also wants to set up a digital complaint management system at bar associations.

The value of this dissertation lies in the combination of a qualitative and quantitative study of the significance of the Legal Advice Assistance Act. In addition, this combination also includes the professional profile of the lawyer. The empirical study has deliberately not been designed to be representative and its results do not serve to provide a definitive, reliable assessment of the questions asked. However, they are at least suitable for indicating useful follow-up investigations. It is also worth mentioning that the author is not satisfied with abstract considerations but would rather supplement Section 16a BORA with a negative catalog, i.e. submits her own proposal. The need for further follow-up investigations is highlighted. Possible approaches to criticism, such as the fees being too low and the formalization of the application process, are mentioned but not decided in advance. Although it is obvious that the fees are far too low and that the processing, especially in the district courts, is overly formalistic, the author ultimately refrains from providing a definitive assessment, which is certainly not yet feasible with the data available.

Overall, the dissertation may also fit into a new approach that examines civil procedural issues more empirically. As shown in this work, the study commissioned by the Federal Ministry of Justice (BMJ) on the decline in the number of cases in

civil courts is now available (https://www.bmj.de/SharedDocs/Downloads/DE/Fachinformation/Finalreport_Eingangszahlen_Zivilgerichte.html?nn=110490). Other questions, such as the competition between civil courts and arbitration, were also examined empirically in the past. In this respect, the dissertation makes an important contribution to improving the area of German judicial statistics.

*Jens Adolphsen**
https://doi.org/10.14746/spp.2025.1.49.11

* Justus Liebig University Giessen, Germany | Uniwersytet Justusa Liebiga w Giessen, Niemcy, https://orcid.org/0000-0001-5062-0118, e-mail: Jens.Adolphsen@recht.uni-giessen.de.

STUDIA PRAWA PUBLICZNEGO
2025 • NR 1 (49) ISSN 2300-3936

V. PRZEGLĄD PIŚMIENNICTWA

Laurent Adatto, *Enjeux et prospectives du développement des technologies quantiques* (Challenges and Prospects in the Development of Quantum Technologies | Wyzwania i perspektywy w rozwoju technologii kwantowych), „ISTE OpenScience" 2023, vol. 23-8, s. 1–15.

Autor opracowania wyraźnie znaznaczył, że jego celem jest wyjasnienie elementów fizyki kwantowej, które są niezbędne do rozwoju nowych technologii głównie z perspektywy dydaktycznej. W dalszej części opracowania skupia się na na francuskim planie kwantowym oraz elementach porównawczych dotyczących głównych międzynarodowych planów na dużą skalę i rozwoju specyficznego dla cyfrowych gigantów. W opracowaniu wyjaśniono także potencjalne zagrożenia i pułapki związane z rozwojem kwantów, ze szczególnym uwzględnieniem aspektów cyberbezpieczeństwa technologii kwantowych.

W ocenie Autora technologie kwantowe wdrażają właściwości fizyki kwantowej, które są nieodłącznie związane z materią w „nieskończenie małym" wymiarze, tj. w skali atomów i poniżej na poziomie cząstek subatomowych, takich jak elektrony. Koncepcja fizyki kwantowej pojawiła się w 1900 r., w następstwie pionierskich prac Maxa Plancka nad promieniowaniem ciała doskonale czarnego i drganiami cieplnymi generowanymi zgodnie z prawem skorelowanym ze stałą, znaną jako stała Plancka. W późniejszych badaniach nad tą skalą wymiarową oczywiste stało się, że niepodzielna wielkość może generować zmianę stanu. Właściwość ta w ocenie Autora jest kluczem do fizyki kwantowej. Ukształtowała ona związaną z nią etymologię: ta niepodzielna wielkość nazywana jest po łacinie *quantum*, w liczbie pojedynczej od *quanta*. Jest ona powiązana z nowym wymiarem fizyki, tj. z fizyką kwantową, która różni się od odkrytej wcześniej fizyki klasycznej.

W fizyce klasycznej przejście z jednego stanu do drugiego jest progresywne i nie jest ograniczone *minimalnymi* wartościami.

Z fizyką kwantową zintegrowana jest mechanika kwantowa, której głównymi gałęziami są dualizm falowo-korpuskularny, podwójna forma materii w nieskończenie małej skali (w przypadku światła – korpuskularna forma fotonu i forma długości fali), superpozycja kwantowa (na razie rozumiana tylko teoretycznie i matematycznie, biorąc pod uwagę, że cząstka lub zestaw cząstek może znajdować się jednocześnie w różnych miejscach z różnymi powiązanymi prawdopodobieństwami) oraz splątanie (dwie cząstki lub zestaw cząstek skorelowanych ze sobą przez ich stan kwantowy niezależnie od odległości, jaka je dzieli).

SPP 1(49), 2025: 169–174. © The Author(s). Published by: Adam Mickiewicz University Press, 2025.

Splątanie kwantowe doskonale łączy stany dwóch odległych cząstek (mogących znajdować się w znacznych odległościach), które są połączone niewidzialną nicią fotoniczną, tworząc pojedynczy system kwantowy. Kryptografia kwantowa czerpie z tej charakterystyki splątania. W rezultacie możliwe będzie wygenerowanie absolutnych kluczy kodujących.

Splątanie kwantowe ma potencjał do radykalnych innowacji w kryptografii, informacji i informatyce. Jako przykład tego, w jaki sposób właściwość splątania kwantowego może być wykorzystywana do kształtowania technologii bardzo wysokiego poziomu, Unia Europejska niedawno zaplanowała uruchomienie systemu satelitów wykorzystujących technologię splątania kwantowego. Podobnie, teleportacja poprzez integralną transmisję informacji w kwantowym stanie materii staje się możliwa i została już pomyślnie przetestowana na poziomie cząstek i tutaj ponownie jest znana jako teleportacja kwantowa. Jeśli chodzi o kryptografię kwantową, splątanie i jego agregaty skorelowanych cząstek, niezależnie od odległości, umożliwią absolutne bezpieczeństwo podczas działania. Jednocześnie potencjalna moc komputera kwantowego pozwoli odszyfrować wszystkie obecne klucze bezpieczeństwa kryptograficznego, które nie są oparte na mechanice kwantowej. Wyzwania te pokazują poziom radykalnej innowacji związanej z postępem w technologiach kwantowych.

Fizyka kwantowa w ocenie Autora już doprowadziła do znaczących innowacji w losach świata. Te pionierskie wynalazki obejmują tranzystory, układy scalone, lasery i systemy pozycjonowania typu GPS.

Kwantowa charakterystyka superpozycji oznacza, że cząstki (materia, foton) mogą być przypisane do dwóch jednoczesnych stanów, a moc obliczeniowa komputera kwantowego wynika właśnie z superpozycji, podczas gdy klasyczne komputery implementują instrukcje binarne.

Tak więc u podstaw obliczeń kwantowych, jak wskazuje Autor, leży zachowanie materii w skali nieskończenie małej, w której cząstki nie przestrzegają już praw fizyki klasycznej, analogicznie do tych, które rządzą działaniem tradycyjnych komputerów w trybie binarnym (stan 1 lub 0 obraźliwej jednostki bitu), ale tych z fizyki kwantowej, w których dedykowana jednostka – kubit może jednocześnie przyjmować stany 1 i 0, a poza tym probabilistyczne kombinacje tych dwóch stanów. Jest to zastosowanie podstawowej zasady superpozycji kwantowej do rozwoju obliczeń kwantowych. Kubit jest zatem podstawowym elementem, który przenosi mechanizmy leżące u podstaw działania komputerów kwantowych. Jednocześnie jest to również jednostka do pomiaru kwantowej mocy obliczeniowej.

Autor wyraźnie zaznacza, że komputery klasyczne i komputery kwantowe zasadniczo różnią się od siebie. Ta dychotomia jest obecna na wielu poziomach. Dotyczy struktury, architektury, komponentów, procedur operacyjnych i algorytmów. Oznacza to, że moc obliczeń kwantowych, z ich optymalnymi algorytmami opartymi na procesach probabilistycznych, jest niewspółmierna do mocy obliczeń tradycyjnych. A będzie ona jeszcze większa, gdy komputery kwantowe, lub początkowo częściowo kwantowe, będą w stanie integrować coraz większą liczbę kubitów.

Zastosowanie technologii kwantowych w obliczeniach oznacza, że mogą one być wykonywane równolegle, co prowadzi do wykładniczego wzrostu dostępnej mocy. Co więcej, stale rosnąca masa danych generowanych przez *Big Data*

wymaga coraz większej mocy obliczeniowej, która może wkrótce pokazać granice najbardziej wyrafinowanych superkomputerów w konwencjonalnej technologii obliczeniowej i prawa Moore'a, które się wyczerpuje. Niespotykana moc obliczeń kwantowych to innowacja, która pozwoli ograniczyć masowość obliczeń danych, a także umożliwi niespodziewany dotąd postęp w wielu obszarach obliczeń i zastosowań obliczeniowych. Oczekuje się, że wraz z postępem w dziedzinie komputerów kwantowych i obliczeń kwantowych możliwe do wykonania operacje będą stawały się coraz bardziej złożone. Począwszy od operacji na akcjach, przepływach i sektorze finansowym, dotyczących *Big Data*, przez ultraskomplikowane obliczenia związane z zachowaniem i przewidywaniem ruchów nieskończenie małych cząstek, do chemii i biochemii w perspektywie bezprecedensowego wyrafinowania, które w szczególności zrewolucjonizują dziedzinę medycyny, a w powiązany sposób – długowieczność ludzkiego życia.

W odniesieniu do tego przejścia od badań podstawowych do procedur operacyjnych technologii kwantowych kluczowe znaczenie będzie miało ustanowienie dominujących i standardowych projektów, z których będą mogli korzystać konkurenci i, co będzie bardziej korzystne dla wspólnego dobra, kooperanci. Mogłoby to wygenerować synergie i pomosty w tego typu badaniach, pomagając obniżyć bardzo wysokie koszty. Wśród elementów, których standaryzacja mogłaby przyspieszyć proces badawczy, znajdują się kubity, kluczowe elementy opisane powyżej.

Autor, odnosząc się do cyberbezpieczeństwa i tehcnologii, wskazuje, że główny sektor technologii kwantowych dotyczy kwestii cyberbezpieczeństwa. Wiąże się z tym walka z cyberprzestępczością poprzez rozwój technologii kwantowych, wzmocniona przez rozwój środków zaradczych zaprojektowanych w celu ochrony przed potencjalnymi atakami cyberprzestępczymi przeprowadzanymi, przynajmniej częściowo, przy użyciu elementów technologii kwantowych o fenomenalnej mocy, w szczególności tych zdolnych do łamania najbezpieczniejszych kluczy kryptograficznych opartych na tradycyjnych obliczeniach.

France Digitale i Wavestone wezwały do wzmocnienia rozwoju kwantowego, w miarę możliwości promowanego i uzgodnionego na skalę europejską, w celu ochrony przed niebezpieczeństwami związanymi z wrogim wykorzystaniem technologii kwantowych dla podważania cyberbezpieczeństwa, nawet w dziedzinie niezależności politycznej.

Nadejście „kwantowej supremacji" spowodowanej zaprojektowaniem uniwersalnego komputera kwantowego może nastąpić w ocenie Autora tylko w ramach czasowych zgodnych ze stopniowym postępem tych ultraskomplikowanych technologii, tj. co najmniej w ciągu najbliższych 10 do 20 lat. Wyścig w tym obszarze toczy się między „mieczem" (postępami w technologiach kwantowych wpływającymi na kwestie cyberbezpieczeństwa) a „tarczą" (środkami ochrony przed nimi poprzez ochronę instalacji cybernetycznych, w szczególności instalacji strategicznych, kluczy i bezpiecznych algorytmów szyfrowania).

W rezultacie finansowanie rozwoju cyberbezpieczeństwa (opartego na technologiach kwantowych i niekwantowych) zdolnego do przeciwstawienia się cyberprzestępczości opartej na obliczeniach kwantowych, które stale się rozwijają, powinno być ogromne.

Co ważne, Autor zwraca uwagę, że oprócz rozwoju technologicznego cyberbezpieczeństwa odpowiednie polityki powinny promować kształcenie profili ekspertów, w szczególności poprzez szkolenia na wysokim poziomie w szkolnictwie wyższym (specjalistyczne studia magisterskie, doktoranckie, habilitacyjne, kursy badawcze) i szkołach inżynierskich. Jest to cena, którą trzeba będzie zapłacić, jeśli polityka mająca na celu zapewnienie bezpieczeństwa w obliczu cyberprzestępczości opartej na technologiach kwantowych ma mieć decydujący wpływ. Szkolnictwo wyższe w połączeniu z klastrami badawczymi, w tym CNRS, stanowi integralną część Planu Kwantowego. W szczególności należy wykorzystać potencjał rozwoju klastrów i ekosystemów łączących badania, szkolnictwo wyższe, laboratoria uniwersyteckie, szkoły inżynierskie, interdyscyplinarność i powiązania z przedsiębiorstwami, zwłaszcza start-upami. W tym obszarze Quantum Engineering Grenoble (QuEnG) jest jedną z pionierskich francuskich sieci klastrów kwantowych opartych na tych elementach. Centrum nanonauki w kampusie Saclay ma również wysoki poziom wiedzy specjalistycznej w zakresie technologii kwantowych.

Utworzona w 2014 r. federacja badawcza CNRS Paris Centre for Quantum Computing (PCQC) zrzesza CNRS, Uniwersytet Paryski i Sorbonę, a wkrótce także nowe podmioty, w tym Inria, w celu poszukiwania symbiozy i interdyscyplinarności między ekspertami w dziedzinie nauk fizycznych i informatyki.

W dalszej części opracowania Autor opisuje francuski program kwantowy, tzw. Quantum Plan. W dniu 21 stycznia 2021 r. prezydent Emmanuel Macron przedstawił tzw. Plan Quantique – 5-letni program inwestycyjny o wartości 1,8 mld euro mający na celu rozwój sektora technologii kwantowych. Francuski plan kwantowy ma szczególny związek z francuską polityką odbudowy oraz potrzebą wykorzystania badań w przemyśle. Istotne w tej mierze pozostawało podjęcie takich kroków, które miałyby na celu zapobieżenie przejęcia patentów finansowanych w ramach francuskiego planu Quantum przez podmioty zewnętrzne. Wymagało to uwzględnienia aspektów cyberbezpieczeństwa technologii kwantowych. Chodziło głównie o to, aby przyszły uniwersalny komputer kwantowy i jego możliwości obliczeniowe „dały możliwość posiadania prometejskiej mocy". Wdrożenie Planu Quantum jest koordynowane głównie przez trzy ministerstwa – Badań, Sił Zbrojnych i Gospodarki – a także Państwowy Sekretariat Technologii Cyfrowych, Sekretariat Generalny Inwestycji i Publiczny Bank Inwestycyjny Bpifrance. Projekt, oficjalnie znany jako „Quantum Plan", jest również powiązany z badaniami publicznymi za pośrednictwem CNRS, Inria i CEA[1].

Jeśli spojrzeć na szczegóły alokacji, fundusze państwowe na Plan Kwantowy wynoszą 1 mld euro. Publiczne instytucje badawcze, w tym CNRS, Inria i CEA, znajdą się wśród uczestników programu. Fundusze mają być przeznaczone w szczególności na wewnętrzne badania kwantowe i programy rozwojowe. Laboratoria związane z tymi organami są uważane za główny atut Planu Kwantowego, ze względu na ich synergiczny potencjał dla postępu kwantowego. Do tego dochodzą zyski z sektora

[1] CEA, *Research at the heart of the quantum plan*, oficjalna strona internetowa CEA, Francuska Komisja Energii Atomowej, 2021; CNRS, La recherche française au cœur du Plan Quantique, Publication officielle du CNRS – Centre national de la recherche scientifique, 2021; Inria – Institut national de recherche en informatique et en automatique.

prywatnego (firmy i fundusze inwestycyjne) – łącznie w wysokości 550 mln. Wśród firm uczestniczących w Planie Quantum znajdują się francuskie firmy zaangażowane w technologie kwantowe, zarówno w ramach swojej podstawowej działalności, jak i peryferyjnie, w szczególności w odniesieniu do technologii zamieszkujących: urządzeń, które nie są kwantowe, ale które wspierają postęp w rozwoju kwantowym. Do francuskich liderów związanych z Quantum Plan należą Air Liquide, Airbus, Atos, STMicroelectronics, Total i Thalès. Unia Europejska przeznaczyła 200 mln euro na wsparcie finansowe.

Zaanagażowanie sektora prywatnego we francuski program kwantowy zostało opisane w oparciu o casus Atos. Francuski gigant globalnych usług cyfrowych Atos, zatrudniający ponad 110 tys. pracowników na całym świecie i osiągający roczne obroty przekraczające 10 mld euro, jest głównym francuskim graczem sektora prywatnego w kwantowych badaniach i rozwoju. Atos opracował symulatory kwantowe, które są znane na całym świecie ze swojej jakości, także w Dolinie Krzemowej.

Plan został bardzo pozytywnie przyjęty przez bezstronny „francuski ekosystem", który obejmuje instytucje badawcze i laboratoria, przemysł, innowacyjne firmy związane z sektorem kwantowym, od start-upów, czasem bezpośrednio z laboratoriów badawczych, po najbardziej innowacyjne firmy na świecie.

Plan Kwantowy jest również powiązany z inspirowanymi keynesizmem procesami ożywienia gospodarczego, które stają się jeszcze bardziej istotne w czasach kryzysu. Plan jest powiązany z projektem France Relance 2030, ogłoszonym we wrześniu 2020 r., z przewidywanym rekordowym budżetem w wysokości 100 mld euro. Jest on również powiązany z 4. Programem Inwestycji w Przyszłość (PIA 4) przedstawionym w tym samym miesiącu, z budżetem w wysokości 20 mld euro, przeznaczonym na innowacje, z czego ponad połowa jest bezpośrednio związana z ożywieniem gospodarczym.

Plan Quantum można porównać z podobnym rządowym projektem cyfrowej zaawansowanej technologii z 2018 r. czy Planem Sztucznej Inteligencji.

W związku z Planem Quantum utworzono system monitorowania wniosków patentowych składanych przez francuskich graczy w tym sektorze. Istnieje obawa, że patenty związane z kwantami mogą zostać przejęte przez zagraniczne firmy, zwłaszcza te inwestujące we francuskie firmy zaangażowane w Plan Quantum. Dekret IEF (Investissements Étrangers en France – Inwestycje zagraniczne we Francji), który umożliwia badanie charakteru i kontrahenta takich inwestycji, będzie miał zastosowanie do sektora technologii kwantowych.

Odnosząc się do polityki unijnej, Autor zwraca uwagę, że w październiku 2018 r. Unia Europejska wprowadziła inicjatywę Quantum European Flagship, przeznaczając na nią 1 mld euro w ciągu pięciu lat. Plan europejski dotuje już około 20 projektów, w tym projekty francuskie. Z kolei Stany Zjednoczone uruchomiły plan o nazwie National Quantum Initiative Act w grudniu 2018 r., ponownie na okres 5 lat o puli 1,25 mld dolarów, oraz otworzyły trzy ultranowoczesne centra poświęcone technologiom kwantowym. Wielka Brytania rozpoczęła badania nad technologiami kwantowymi już w 2013 r. i w 2019 r. przeznaczyła 1 mld funtów na rozwój tych urządzeń. W grudniu 2019 r. Rosja uruchomiła swój plan kwantowy z budżetem w wysokości 750 mln euro. Pod koniec 2019 r. Izrael i Japonia zrobiły

to samo, z zapowiedzianymi kwotami odpowiednio 350 i 200 mln dolarów. Będąc świadkiem nowej współpracy między państwami i dużymi firmami, Japonia podpisała umowę z IBM w sprawie technologii kwantowych, jedną z dwóch najbardziej zaawansowanych firm w tej dziedzinie wraz z Google, jak wspomniano wcześniej. W lutym 2020 r., Indie przeznaczyły 1,12 mld dolarów na swój plan kwantowy.

Niniejsze opracowanie ukazuje, jak istotną rolę w przyszłości odegrają technologie kwantowe. Ich rozwój jest nieunikniony. Staną się one największym czynnikiem postępu technologicznego w XXI w. Prawidłowe ich funkcjonowanie oparte na koncepcji miecza i tarczy, o której była mowa powyżej, wymaga badań interdyscyplinarnych, w tym także badań w obszarach nie tylko fizyki, informatyki, ale także prawa.

*Hanna Wolska**
*Anna Trela***
https://doi.org/10.14746/spp.2025.1.49.12

* University of Gdansk, Poland | Uniwersytet Gdański, Polska, https://orcid.org/0000-0002-9806-6336, e-mail: hanna.wolska@prawo.ug.edu.pl.

** Adam Mickiewicz University, Poznań, Poland | Uniwersytet im. Adama Mickiewicza w Poznaniu, Polska, https://orcid.org/0000-0002-2014-5579, e-mail: atrela@amu.edu.pl.

STUDIA PRAWA PUBLICZNEGO
2025 • NR 1 (49) ISSN 2300-3936

VI. SPRAWOZDANIA I INFORMACJE

Report from the Chambers of Commerce – 3rd International Conference entitled "Looking to the future from an interdisciplinary social sciences perspective," Warsaw, 14–15 November 2024

Introduction

The international scientific conference was co-organised on the 14th and 15th of November 2024 in Warsaw by the Institute of Law Studies of the Polish Academy of Sciences and the Institute of Economics, Faculty of Economics and Sociology at the University of Łódź. Its main theme was "Looking to the future from an interdisciplinary social sciences perspective."[1]

The conference took place in the headquarters of the Institute of Law Studies, Polish Academy of Sciences, in the Staszic Palace, located in the heart of Warsaw. The event was the third and the largest edition of our annual conferences dedicated to chambers of commerce in Poland and Europe. The conference was organised in hybrid format, on-site and online. It was attended in person by nearly 70 participants from 11 countries, who represented various European universities, research centres, business environment organizations, and chambers of commerce. Additionally, several dozen people watched the conference online. It is worth noting that one of the main advantages of the conference was the participation of both practitioners and academics dealing with chambers of commerce in Europe from different perspectives.

The event was held under the honorary patronage of the Ministry of Development Funds and Regional Policy (Ministerstwo Funduszy i Polityki Regionalnej). The conference's main sponsors were the Ministry of Science and Higher Education[2] and Orange Poland. The other partners of the conference were the Polish Chamber of Commerce (Krajowa Izba Gospodarcza), West University of Timişoara and four scientific publishers: "Business Law Journal" ("Przegląd Ustawodawstwa Gospodarczego"), "Studies in Law and Economics" ("Studia Prawno-Ekonomiczne"), "Studies in Public Law" ("Studia Prawa Publicznego"), and "Contemporary Central and East European Law."

The principal objective of the conference was to discuss theoretical models and practical solutions to more effectively support business and the economy

[1] See https://chambers.pl/chambers-of-commerce-3rd-international-conference/.

[2] The project was co-financed by funds from the state budget awarded by the Minister of Science within the framework of the Excellent Science II Programme.

SPP 1(49), 2025: 175–185. © The Author(s). Published by: Adam Mickiewicz University Press, 2025.

in the dynamic and turbulent 21st century. It was decided to expand the multidisciplinary (law, economics, sociology, political science, history) Chambers of Commerce Research Group to the international level, to create a unique group of European researchers who study critical issues of institutions and organizations in the business environment. The conference format offered a unique insight into comparative research on chambers of commerce, enabling a deeper understanding of their activities, organisation, and missions across different countries within the European Union and the United Kingdom.

The current state of the business environment often reflects priorities other than supporting effective and efficient organizations. Entrepreneurs, in turn, rarely trust their ability to exert effective influence on political decisions. Moreover, in many countries, the business organisation ecosystem is frequently in crisis – fragile, overly bureaucratic, or lacking a coherent vision for constructive change. Meanwhile, global transformations are occurring at an ever-accelerating pace. The complexity of contemporary and future economic dynamics undeniably requires knowledge, meaningful dialogue, significant decentralization, support for bottom-up initiatives, and proportional opportunities for businesses of all sizes. Without these elements, the economy risks deeper stagnation and economic instability – a trend already visible globally – that benefits only a narrow elite of the largest corporations and very few countries. These patterns have been evident since the 1980s at least, and are intensifying, rendering the world increasingly unstable and unpredictable.

In this dynamic, evolving and volatile world of business and politics, there is a need to rethink thoroughly and perhaps even remodel the tasks, services and operations of chambers of commerce. The third edition of our conference brought together practitioners and researchers who, as speakers and discussants, presented a variety of approaches to the topic, including international, constitutional, administrative, and interdisciplinary perspectives. The discussions were organized into six expert panels, spread over two days, with three panels on each. The presentations focused on both the latest projects implemented with regard to chambers of commerce, and on extremely interesting aspects of how lesser-known European chambers rarely analysed in the literature function.[3] This format offered the opportunity to listen to an extremely diverse range of presentations. The highlight of the conference was the invitation for its participants to join the work of the Chambers of Commerce International Research Group.[4]

1. 1st day of the Conference

1.1. Opening of the Conference

The first day of the event started at 9 am in the Hall of Mirrors in the Sztaszic Palace. The Conference was opened by Prof. Celina Nowak, Director of the Institute of Law Studies of the Polish Academy of Sciences. She emphasized the importance

[3] See https://chambers.pl/3rd-conference-agenda/.

[4] See https://chambers.pl/group/.

of chambers of commerce and the crucial element of cooperation between academics and practitioners, which could help implement the research conducted by scientists. She also expressed thanks to the University of Łódź for co-organising, and to the conference sponsors – the Ministry of Science and Higher Education and Orange Poland.

Following this, Prof. Wojciech Woźniak, Vice-Dean of the Faculty of Economics and Sociology for Research Development from the University of Łódź, thanked the Institute of Law Studies of the Polish Academy of Sciences for co-organising the conference and expressed his confidence in the fruitful discussion that would take place during the event.

The third speaker in the opening panel was Prof. Tomasz Dorożyński from the Faculty of Economics and Sociology at the University of Łódź, who is also Head of the Institute of Economics and one of the founders of the Chambers of Commerce International Research Group. He emphasised two major issues related with this conference: firstly, the unique opportunity of exchanging knowledge between researchers from different areas of science, the interdisciplinary character of the event, and the participation of young scientists and decision-makers; secondly, the possibility of broadening the International Research Group. Prof. Dorożyński thanked Dr Piotr Marciniak and introduced him as the key figure and organiser of the conference.

The opening panel was summarised by Dr Piotr Marciniak from the Institute of Law Studies at the Polish Academy of Sciences and the other founder of the Chambers of Commerce International Research Group. He briefly presented the history, common directions and limitations of research in the field of chambers of commerce and changes in the economy of Europe, then went on to explain the history of establishing the International Research Group 2 years ago and two previous conferences. Dr Marciniak highlighted the need to develop chambers as a unique platform for discussion between business and public authorities. However, he also drew attention to the lack of connections and cooperation between representatives of chambers and scientists, which limits the potential of these organizations and shows important research gaps. Finally, he highlighted the diversity of the chambers of commerce ecosystem, such as differences in their organization, powers, social perception, and tasks that can be observed in each country. He concluded his speech by noting that representatives of 11 countries were taking part in the conference, and by thanking the sponsors.

1.2. 1st panel: Keynote speakers

The moderator of the first panel, Prof. Tomasz Dorożyński, introduced the keynote speakers: Prof. Detlef Sack from the Institute of Political Science of the University of Wuppertal (Germany) and Prof. Robert Bennett from the University of Cambridge (Great Britain). The first presentation entitled *Chambers of Commerce in European comparison* was delivered by Prof. Sack, who began his presentation with the examples of the natural disaster in Valencia and flood in Wuppertal, and also the role of chambers of commerce in helping businesses and local entrepreneurs to assess

and repair the damage. He then presented the agenda of his presentation, in which he introduced the definitions of chambers of commerce, the types of chambers, the basic assumptions of conditions of chambers, and his research interests in this area. Chambers of commerce can be defined as general business associations, sub-national organisations on the local and/or regional level; they can also include companies from different economic sectors and different sizes. There are different types of chambers such as public-law, private-law, and hybrid chambers. Prof. Sack presented the institutional changes in the European chambers system from 1995 to 2021, exemplifying these changes, especially in France, Italy, Germany, and Austria. He then defined the basic conditions for the definition of chambers, which are as follows: type of economy, political regime, political entrepreneurship, population economy and other competitive business associations.

The second presentation during this panel, entitled *Business associations and services: relation between supply and demand for services*, was delivered by Prof. Robert Bennett. He discussed the division of the market into different types of associations, distinguishing between sectoral, local, and national associations. He then outlined the typical range of services provided by market-based associations, such as lobbying, standard-setting and self-regulation, arbitration and dispute resolution, advice, consultation, meetings, networking, marketing, discount market services, and contract and delegated services. Prof. Bennett explained the motives of companies when joining chambers, listing the following: seeking useful services, establishing contacts, providing assistance with marketing, community or self-interest activities, and lobbying. He then focused on smaller companies and highlighted how small businesses have less managerial capacity. He concluded his presentation by stating that the services of the chambers have a relatively large impact on the operations of companies and a high satisfaction rate compared to other business service providers such as banks, consultants, government agencies, business supplier affiliations, and accountants. He also stressed that chambers can improve the implementation of public services by providing an alternative to public administration. There is also no need for the government to create new business organizations.

After Prof. Bennett's presentation, Prof. Tomasz Dorożyński opened the floor for the discussion. The first question came from Prof. Janusz Świerkocki from the University of Łódź. He asked Prof. Sack what benefits the existence of the chambers bring to consumers. He also pointed out that Prof. Bennett had provided some information from old research from one generation ago, and asked whether this topic is not very popular among researchers, in view of such a gap existing between 2005 and the present time. Is there no new research or information?

Prof. Bennett replied that the theory and models are going to be exactly the same. He also explained that there is a tendency among academics called "come and go," which he himself has done as well. Prof. Bennett also explained that the number of academics interested in the chambers is very limited. The chambers should then collaborate with other organisations and academics more intensively.

Prof. Sack replied that chambers of commerce are not consumer organisations. They do not have the same interest as consumers, who should organise themselves in their own associations.

The second question was asked by Katrina Zarina from the Latvian Chamber of Commerce. She pointed out the differences between the chambers all around Europe, as well as the different challenges and different approaches to solving the existing problems. She asked the speakers how this all works together in today's world, where the chambers are now in the system, and how they need to move forward to be present in the future.

Prof. Sack referred to the current energy crisis in Germany and described a possible way for SME entrepreneurs to develop solutions to problems within the framework of chambers of commerce. Prof. Bennett added that chambers have the ability to engage with government and agencies. They can therefore influence them, which can provide effective interface for addressing modern challenges.

1.3. 2nd panel: Researchers' perspective

The moderator of the second panel was Dr Ewa Feder-Sempach from the University of Łódź. This panel was dedicated to academic research.

The first speaker was Dr Péter Krisztián Zachar, Associate Professor, Vice-Dean of the Faculty of Public Governance and International Studies at the Ludovika University of Public Service in Hungary, and also Head of the Department of International Relations and Diplomacy. He delivered the presentation entitled *The Consultative Forum of Hungarian Chambers of Economy – can it play a real advisory and advocacy role alongside the government?* Dr Zachar presented a case study of new Hungarian framework of cooperation – the consultative forum of Hungary's Chambers of Economy – whose purpose is to serve as an advisory and consultative body on economic policy for the government. He outlined the historical background and context of how chambers of commerce function in Hungary. Currently, they have a hybrid form as public law organizations fulfilling selected public tasks, but are based on a system of voluntary membership with mandatory registration. Dr Zachar listed six members of the forum – different chambers and associations. The main goal of this institution is to assist the government with information and suggestions from market participants and to support the process of making informed decisions regarding economic policy. The Consultative Forum of Hungarian Chambers of Commerce also provides a framework for presenting the most important government measures and enables the parties to review the economic situation jointly. He pointed out the current challenges and limitations related to the functioning of the forum, for example, the fact that the forum does not issue official recommendations and has limited formal influence.

The second speaker was Prof. Johan Eklund, Chief Economist of the Chamber of Commerce and Industry of Southern Sweden, who delivered a presentation entitled *Policy work of the Chamber of Commerce and Industry of Southern Sweden*. In Sweden, there are only three chambers which have the strength and capacity for policy making (others are too small). They are all private-law. The main issues that these chamber work on include expanding the local labour market, energy and supply security, infrastructure, and the integration of refugees. Prof. Eklund presented the structure of the Southern Sweden Chamber, which has approximately

2,500 members. Among the main issues currently being worked on by the chamber, he mentioned: expanding the local labour market, energy and supply security, infrastructure, integration of refugees, and decarbonisation through fossil-free steel. He also introduced the issues related to the Scandinavian Policy Institute. The aim of this organisation is research and public policy. It prides itself on strong academic and research excellence and has a significant impact on policy making.

The third presentation entitled *Chambers of Commerce and War; their functions in the process of reporting and compensating damage suffered in connection with the aggression of the Russian Federation on the territory of Ukraine* was presented by Prof. Aleksandra Mężykowska from the Institute of Law Studies of the Polish Academy of Sciences. She discussed three aspects of the chambers' activity – their greater involvement in various sectors of the economy, the involvement of chambers after the floods in Spain and Germany, and the expectations and reality of the chambers' functioning. Prof. Mężykowska proceeded to describe the Register of Damages for Ukraine (RD4U) and provided an overview of the current activities carried out by RD4U, the legal basis for the functioning of such an institution and the categories of claims that can be filed by legal entities. She also drew attention to the possible role of chambers of commerce in registering damages that have occurred as a result of Russian aggression against Ukraine.

The final presentation in this panel, entitled *Does the quality of institutions matter? An economic perspective*, was delivered by Prof. Tomasz Dorożyński from the University of Łódź. He considered how to face the current challenges and overcome the barriers with the idea of 5 Is, which means Internalization, Investment, Incentives, Integration and Institutional quality. He emphasized the role of the institution quality in attracting potential investments and he demonstrated the relation between economic growth and governance quality. In his conclusions, he expressed how the regulatory quality, effectiveness of the government and the rule of law are of extreme importance and have a huge impact on the economy of the state.

In the discussion following the second panel, the first question from Mr. Jonas Pupius, representing Lithuania, touched on the role of trust in cooperation between chambers, especially in post-socialist countries such as Poland. His second question concerned the mechanisms for integrating immigrants in Sweden in terms of two scenarios – their concentration in one place or their location in different communities.

The speakers agreed that trust has a huge impact on how the chambers function and it is a statistically significant factor for investors. It was also noted that informal institutions based on trust are necessary for the effective functioning of formal institutions. In his response to the second question, Prof. Johan Eklund pointed out that Sweden had faced a challenge with immigrants around 10 years ago and he had drafted the regulations in this area, such as subsidies and free housing. He added that the Swedish immigration policy is currently subject to rapid change.

1.4. 3rd panel: Chambers' perspective

The moderator of the third panel was Marek Kłoczko, the President of the Polish Chamber of Commerce.

The first presentation, entitled *The role of Eurochambres in building and sustaining a network of Chambers of Commerce*, was given by its representative Giulia Rocchi. Eurochambres was established in 1958 as a direct response to the creation of the European Economic Community. Eurochambres acts as the eyes, ears and voice of the business community at EU level. It brings together members not only from the European Union but also from Turkey, Norway, Switzerland and Balkan countries. The institution has competencies in advocacy, delivering EU policy and connectivity. The presentation given by its representative, Giulia Rocchi, dealt with current priorities related to sustainability, single market, skills and entrepreneurship, economic policy, international trade and the enlargement of EU community.

The second speaker was Wouter Van Gulck, General Manager of the Federation of Belgian Chambers of Commerce, who presented *A story of impact through accreditation, mergers and alliance*. He traced the history of chambers in Belgium, pointing out that 1875 was a milestone in their foundation. In the 21st century, the Belgium chambers became stronger, bigger, and more respected by the government. He also stated, in contrast to Prof. Bennett, that Belgium regards advocacy is an important driver of membership for companies. He summarized that only 5% of all companies are affiliated with Belgium's chambers of commerce.

The third presentation, entitled *Latvian Chamber of Commerce and Industry*, was delivered by Katrina Zarina from Latvia. She presented the largest business support organisation in Latvia, established in 1934 and currently bringing together around 6,000 companies. The main priorities of this organisation are improving the business environment of Latvia (advocacy), increasing the competitiveness of business, and promoting exports. She also discussed the main challenges that the Latvian Chamber faces, one of the most important of which is the growing number of companies leaving the chamber.

Alexander Auböck, the representative of the Austrian Federal Economic Chamber (WKÖ), presented *The election system of the Austria Chamber of Commerce*. WKÖ is a public-law chamber of commerce. The WKÖ is a national umbrella organization and is divided into 9 regional chambers (Ger. *Landeskammer*) and 7 service sectors (Ger. *Fachorganisationen*): crafts and trades, industry, retail, banking and insurance, transport, tourism and leisure, and information and consulting. Elections are held every 5 years in a complex electoral system. Each company has one vote, and the representatives are the entrepreneurs themselves, who are organized in lists (parties).

The last presentation in this panel and the final one on the first day of the conference was delivered by Dr Piotr Marciniak from the Institute of Law Studies of the Polish Academy of Sciences. He discussed the *Representation of SMEs in the bodies of chambers of commerce*, noting that the main task of the chambers is to represent business in dialogue with public authorities. The term "chamber of commerce" can be applied to various organisations – from mandatory public-law chambers to voluntary private-law associations. They are different in each country and the way chambers operate depends on their operating model. In the case of private-law chambers, their activity is influenced by their membership structure: these organisations represent their members first and foremost. In turn, mandatory public-law chambers should represent all enterprises. In each of the models, the balanced representation of enterprises of all sizes in dialogue with public institutions poses a particular challenge. Depending on

the regulatory solutions, this may be formally ensured at different levels. Unfortunately, a search of the law and internal regulations of chambers in selected countries revealed only individual examples of formal guarantees of SME parity in the chambers' bodies.

During the discussion, Prof. Detlef Sack asked about the need for individual entrepreneurs to be involved in chambers and be represented there. Dr Marciniak responded that this constitutes a complex problem, which should be considered from different perspectives. It also depends on the composition of the board of the chamber. Wouter van Gulck added that not always the micro entrepreneurs have their representation in the boards and agreed with Dr Piotr Marciniak that chambers should focus more on representing the interests of micro and small entrepreneurs than medium-sized and large companies. Katrina Zarina from Latvia pointed out that in Latvia small and micro entrepreneurs are the most numerous in chambers. Gulia Rocchi noted that in Belgium there is no clear differentiation between public- and private-law chambers; rather, mandatory or voluntary membership is the focus.

Lars Pettersson from Sweden next asked if there is a minimum or maximum limit of members in chambers. Wouter van Gulck answered that according to the academic research, one thousand members was the minimum to provide valuable services. Alexander Auböck, in discussing the Austrian example, noted that having too many members can cause difficulties in representing the common interest of the entrepreneurs. On the other hand, chambers with such a large membership exert a huge influence on the government. Dr Piotr Marciniak highlighted that everything depends on each country, its history, roots of the chambers and commons. He agreed, however, with Wouter van Gulck that too small membership (fewer than 1,000 companies) significantly limits the operational possibilities of chambers.

The last question concerning the dynamics of participation in chambers came from Prof. Bennett. He also inquired about the motivation for joining and leaving chambers. Katrina Zarina replied that there is an ongoing campaign in Latvia promoting the activities of Latvia's chambers, which is aimed at boosting the number of members. She added that an important reason for small entrepreneurs leaving the chambers is that due to their size and very limited human resources they cannot be present during the work of the chambers, and therefore leave the organisation. With that, the first day of the conference came to an end.

2. 2nd day of the Conference

The second day of the conference took place on 15th of November in Maria Skłodowska-Curie Hall at the Staszic Palace. This day was dedicated to further discussions, networking and expansion of the International Chambers of Commerce Research Group. Dr Piotr Marciniak together with Prof. Tomasz Dorożyński opened the discussion.

2.1. 4th panel: Chambers – review, updates, and new initiatives

The moderator of the 4th Panel was Prof. Grzegorz Materna from the Institute of Law Studies of the Polish Academy of Sciences.

The first presentation, entitled *The current state of UK chambers of commerce*, was given by Prof. Robert Bennett. UK chambers are based on private law: there is no dedicated state support. They are founded as limited companies (Ltd.) run by directors or trustees and there is no compulsory membership. The British Chambers of Commerce (BCC) is an independent legal entity association accredited regional chambers. He concluded that the key role of chambers of commerce in the UK is working with the government to develop business support policy.

The second presentation in this panel, entitled *Current state of affairs of the German chambers of commerce*, was delivered by Prof. Detlef Sack. He described the German public-law chambers of commerce and characterized the specifics of their membership, as well as presenting the anti-chamber movement in Germany since 1995 and the transition process of chambers from private- to public-law organisations.

In the third presentation, Dr Piotr Marciniak discussed the *Current state of affairs of the Polish chamber of commerce*. He presented statistical data showing how Poland has a growing number of micro companies and a decreasing number of small companies. Dr Marciniak described an extremely complex ecosystem of Polish chambers of commerce, in which we find 447 private-law chambers of commerce (50/50 local and industry-specific), the Polish Chamber of Commerce, and 2 public-law chambers. A typical Polish chamber comprises from several dozen to around 300 companies, which limits its activities. He also listed the legal acts constituting the basis on which chambers function: the Act on Economic Chambers of 1989, two acts dedicated to public-law chambers and the Constitution of the Republic of Poland.

The next presentation, *Chambers of commerce and EU Law*, was delivered by Prof. Dawid Miąsik from the Institute of Law Studies of the Polish Academy of Sciences. He explained how EU law impacts the activities of chambers of commerce across Europe, also delivering a few comments on the jurisdiction of CJEU related to chambers.

The fifth speaker was Dr Lars Pettersson from Scandinavian Institute for Public Policy, Sweden. During his presentation entitled *Scandinavian Policy Institute*, he introduced the organisation and main goals of the Institute. Inaugurated in November 2023, the SPI is a research institute privately founded by Chamber of Commerce and Industry of Southern Sweden, which formulates policies collaborating with business, entrepreneurs and researchers.

Dr Daunis Auers, Director and Chairman of the Board of LaSER think tank in Latvia, was the sixth speaker. He focused on *Shaping the future? Launching a new think tank in Latvia*. He introduced four future scenarios for developing the Latvian economy – Baltic Tiger, Nordic Latvia, Listless Latvia and Lonely Latvia. He also described in brief other examples of the current activities of the organisation (LaSER), such as work on reforming Latvian's health sector or measuring the economic impact of international students in Latvia.

During the discussion, Dr Auers answered a question about the organisation and forms of financial support for LaSER. He listed 5 sources of financing, including chambers of commerce in Latvia, sponsors, private entrepreneurs, and the president of the Latvian Employees Confederation. LaSER is a private body, private financing and independent legal entity but cooperates with other institutions.

2.2. 5th panel: Expanding of the International Research Group

The moderators of the fifth panel were Dr Piotr Marciniak and Prof. Tomasz Dorożyński. They presented the origins of the International Research Group concept. Dr Marciniak noted that most publications in Poland about chambers of commerce are prepared by lawyers, thus there is a huge interdisciplinary research gap in this area, especially from different scientific perspectives. The Group started in 2022 with 5 researchers and Dr Marciniak invited the participants of the conference to join the International Research Group on Chambers of Commerce as Corresponding Members.

Prof. Gratiela Georgiana Noja from West University of Timoşoara (Romania) delivered a presentation entitled *Global Perspectives on Chambers of Commerce: Identifying Research Gaps through a Bibliometric Lens*. She confirmed the small number of publications about chambers of commerce, and also identified three critical research gaps, namely, digital transformation, global crisis resilience, diversity and inclusion.

2.3. 6th panel: Chambers – selected studies

During the last panel of the conference, several additional studies on chambers of commerce were presented. In reference to the Barcelona Chamber of Commerce, Prof. Ivan Medina (University of Valencia, Spain) discussed the possible and necessary evolution of chambers of commerce in Spain. The second presentation was delivered by Alexander Auböck and concerned Austria's Internationalisation and Innovation Agency. The third comparative study dealt with chambers of commerce in the Baltic states and was presented by Jonas Pupius from the Lithuanian Centre for Social Sciences, Institute of Economics and Rural Development. Following this, Patrycja Piasecka, PhD candidate from the Institute of Law Studies of the Polish Academy of Sciences, presented her research entitled *Constitutional framework for the establishment of public law chambers of commerce and conditions for the delegation of administrative law tasks*. The final speaker during this panel was Mr Tomasz Miś from the Polish Chamber of the Utility Industry, who presented the role of the Polish Chamber of the Utility Industry in defending the competitive waste collection market in Warsaw.

Conclusions

The economic processes of today and the future are becoming increasingly complex. Tackling these challenges requires expertise, open and constructive dialogue, real decentralization, space for grassroots initiatives, and a fair balance between businesses of all sizes. Without these factors, the economy risks falling into stagnation, statism (etatization), and the loss of balance in business ecosystems, which require diversity and competitiveness among market participants for proper functioning. In such a scenario, only the largest corporations, and in some cases, entire nations,

stand to gain. These dynamics have been evident at least since the 1980s but have only accelerated over time, making the world less safe and predictable.

The aim of the conference was to explore new theoretical approaches and practical solutions that can better support businesses and the economy in this fast-moving, turbulent 21st-century business and political environment. The participants agreed the need to expand an international research network that brings together experts from various fields, including law, economics, sociology, and political science. This unique group will be able to undertake multi-level research on the most pressing issues faced by European business organizations.

Economic processes are never one-dimensional and each country has its own specific circumstances that require tailored solutions. In some parts of the world, we can already see efforts to improve economic conditions. While these approaches may not work everywhere, they provide valuable lessons and inspiration. Business organizations, especially chambers of commerce, play a key role in supporting the economy. However, global discussions on their modernization or restructuring remain limited. Instead, most attention is focused on identifying problems or analyzing historical trends. There is a clear need for more forward-looking and practical conversations to support the necessary evolution. The challenges (and chambers of commerce themselves) are diverse and multidimensional. Therefore, research must take a broad, international perspective.

*Karol Bieńkowski**
*Tomasz Dorożyński***
*Piotr Marciniak****
https://doi.org/10.14746/spp.2025.1.49.13

* Polish Academy of Sciences, Poland | Polska Akademia Nauk, Polska, https://orcid.org/0000-0002-0471-4639, e-mail: k.bienkowski@inp.pan.pl.

** University of Lodz, Poland | Uniwersytet Łodzki, Polska, https://orcid.org/0000-0003-3625-0354, e-mail: tomasz.dorozynski@uni.lodz.pl.

*** Polish Academy of Sciences, Poland | Polska Akademia Nauk, Polska, https://orcid.org/0000-0002-4201-9311, e-mail: p.marciniak@inp.pan.pl.

ISSN (Online) 2720-2445
ISSN (Print) 2300-3936