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Michał Biliński, Joanna Kiraga, Magdalena Jaś-Nowopolska, Armin Klüter, Julia Lefèvre, Hanna Wolska, Maximilian Roth

Legal Professions in Comparative Perspective: Poland-Germany

Part I

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Financing of tasks carried out by professional self-governments in light of the Public Finance Act

Michał Biliński/Joanna Kiraga

Professional self-governments serve two main functions. Their first function is to oversee the proper performance of professions of public trust and thus to protect the public interest. The second function is to represent persons of public trust, and its aim is to protect the interests of a given profession. This division determines the double-sided character of the tasks undertaken by professional self-governments. Consequently, we can distinguish two types of tasks: public tasks and tasks related to the internal affairs of a self-government. Financing of the tasks undertaken by each of the professional self-governments is not based on uniform principles Professional self-governments can be financed by members' contributions, donations, inheritance, bequest and by funds transferred from the state budget. The analysis of the types of members' contributions leads to the conclusion that they cannot be directly compared to public levies and cannot be seen as public finances which are described in the Public Finance Act. Similar conclusions were reached with regard to the other sources of financing of professional self-governments. Having the functions of professional self-governments in mind, it must be noted that they should be able to carry out their tasks independently, regardless of whether a task is related to internal corporate matters or whether it constitutes a public task (overseeing proper performance of the profession). Since professional self-governments are tasked with safeguarding the public interest, they cannot refrain from executing such tasks, therefore professional self-governments which do not receive funds from the state budget should secure financing from their own funds.

I. Introduction

The ideas of the state and exercising public authority adopted under the Constitution of the Republic of Poland are based on the principle of decentralisation, therefore execution of public tasks is delegated to numerous non-state actors.[1] It should be stressed that such decentralisation is not only territorial - it also refers to decentralisation of tasks which are consequently delegated to competent public-law associations.[2] Professional self-

[1] See: Wojciech Sokolewicz, in: Leszek Garlicki, Marek Zubik (eds.), Konstytucja Rzeczypospolitej Polskiej. Komentarz. Vol. I (Warszawa 2016), commentary on art. 12, Lex-online.

[2] See: Maria Karcz-Kaczmarek, Marek Maciejewski, Samorządy zawodowe i zakres ich samodzielności w świetle doktryny oraz orzecznictwa, Studia Prawno-Ekonomiczne vol. XCV (2015), p. 60 [as cited in:] Marek Wierzbowski, Aleksandra Wiktorowska, in: Jerzy Służewski (ed.), Polskie prawo administracyjne (Warszawa 1995), p. 35.

governments fulfil a significant role in this regard, which is stipulated by article 17 (1) of the Constitution. Literature points out that the main purpose of establishing professional self-governments is the execution of these public tasks which are not undertaken by the state or local government.[3] It is also mentioned that by creating such structures, the state limits its administrative regulatory activities related to authoritative functions, connected with the activity of appropriate public administrations in authoritative forms and obliges the self-government to undertake them for the purpose of the public interest and for its protection.[4]

At the same time it should be noted that professional self-governments also serve roles other than the execution of public tasks. Such a conclusion can be made on the basis of the above-mentioned article 17 (1) of the Constitution only, which lists two main, separate functions of professional self-governments. The first function entails ensuring the proper performance of a given profession of public trust. In general, it should include the obligation to undertake all activities aimed at ensuring the proper performance of the professions, but such actions should always be undertaken within the boundaries of public interest and they should serve to protect it. It needs to be stressed that public tasks exercised over individuals performing a profession of public trust should be categorised as this particular function of professional self-governments. In other words, decentralisation of public tasks assigned to professional self-governments concerns such tasks which are defined by the constitutional concept of ensuring proper performance of professions.[5] It is worth noting that the literature recognises the specificity of the term "custody" and assigns it a meaning that is not identical to the concept of supervision.[6] For the purposes of this article, it needs to be stressed that the definition of the above term should include authoritative functions such as disciplinary jurisdiction, formulating deontic and ethical professional practices, as well as determining the right to perform a profession.[7] The above was also pointed out by the Constitutional Tribunal. The reasoning of the judgement of 22 May 2001 points out “the necessity to entrust

[3] See: Piotr Tuleja, Konstytucja Rzeczypospolitej Polskiej. Komentarz (Warszawa 2019), commentary on art. 17¸ Lex-online.

[4] Małgorzata Stahl, Chapter VIII Inne podmioty administrujące, in: Roman Hauser, Zygmunt Niewiadomski, Andrzej Wróbel (eds.), System prawa administracyjnego,Vol.6, Podmioty administrujące (Warszawa 2011), p. 509.

[5] Maria Karcz-Kaczmarek, Marek Maciejewski (2015), p. 63.

[6] For more information on the term ‘custody’ see Paweł Sarnecki, in: Leszek Garlicki, Marek Zubik (eds.), Konstytucja Rzeczypospolitej Polskiej. Komentarz. Vol. I (Warszawa 2016), commentary on art. 17, Lex-online; Maria Karcz-Kaczmarek, Marek Maciejewski (2015), p. 63 et seq.

[7] Compare, among others: Cezary Banasiński, Chapter VII Samorząd gospodarczy i samorząd zawodowy, in: Hanna Gronkiewicz-Waltz, Marek Wierzbowski (eds.), Prawo Gospodarcze. Zagadnienia administracyjnoprawne (Warszawa 2015), p. 159-160.

professional self-governments with public tasks and competences, including authoritative functions, exercised towards all individuals practising a given profession of public trust, regardless of other social or public roles performed by such persons"[8].

The second function of professional self-governments based on article 17 (1) of the Polish Constitution, entails representing individuals practising a "profession in which the public repose confidence". It needs to be noted here that such tasks are considered to be inner corporate tasks serving interests of a given professional group.[9]

Having this in mind, it may be concluded that the tasks of professional self-governments include public tasks and non-public tasks.[10] The above conclusion does not contradict the doctrine which states that professional self-governments undertake tasks serving the public interest while also addressing their own corporate needs and having administrative and corporate authority which operates only within the self-governments.[11] The above is also confirmed by the jurisprudence of the Constitutional Tribunal. In the judgement of 14 December 2010, the Tribunal drew attention to the fact that among the tasks undertaken by professional self-governments, there are public tasks and tasks related to the internal organisation of self-governments.[12] A similar view is expressed in the judgement of the Supreme Administrative Court of 12 November 1991.[13] The Court states that "the activities of the self-government of attorneys-at-law need to be divided into to two groups: tasks related to public administration and corporate tasks".

The above description of tasks undertaken by professional self-governments may give rise to some legal uncertainties regarding the financial management of self-governments. Firstly, since some tasks assigned to professional self-governments are described as public tasks, it raises a question whether such activities should be governed by the provisions of the Public Finance Act of 27 August 2009 (consolidated text, Journal of Laws of 10 May 2019, No. 2019.869). In particular, the question is whether the funds allocated for specific tasks undertaken by professional self-governments should be understood as public funds defined in article 5 of the Public Finance Act. Secondly, taking

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[8] See: Judgement of the Constitutional Tribunal of 22 May 2001, K 37/00, OTK 2001/4/86.

[9] Małgorzata Stahl (2011), p. 509 [as cited in:] Magdalena Tabernacka, Zakres wykonywania zadań publicznych przez organy samorządów zawodowych (Wrocław 2007), p. 52.

[10] Dobrosława Antonów, Charakter prawny składki na rzecz samorządu zawodowego radców prawnych - wybrane problemy, Radca Prawny ZN no 3/2016 (2016), p. 14.

[11] Sławomir Pawłowski, Ustrój i zadania samorządu zawodowego w Polsce (Poznań 2009), p. 22.

[12] See: Judgement of the Constitutional Tribunal of 14 December 2010, OTK-A 2010/10/129.

[13] See: Judgement of the Supreme Administrative Court of 12 November 1991, II SA 773/91.

into account the important role of professional self-governments, a question arises whether the allocation of funds for corporate tasks only (without allocating funds for public tasks) should be permitted. In other words, it must be decided whether current regulations allow establishing the "priority" of constitutional tasks of professional self-governments.

II. Funds available to professional self-governments

Having analysed provisions regarding professional self-governments, it may be concluded that the adopted means of financing tasks for professional self-governments are not uniform.

Firstly, in some regulations resources from the budget are not specified as the main source of financing for professional self-governments. Examples include the Act on Attorneys-at-Law of 6 July 1982[14], particularly article 63 (1). According the above Act, self-governments shall be financed from contributions paid by attorneys-at-law and trainee attorneys-at-law, from fees connected with the proceedings of entering new members on the list of attorneys-at-law and trainee attorneys-at-law, as well as from fines. On the other hand, article 63 (2) of the Act on Attorneys-at-Law refers to income deriving from other sources, in particular from grants and subsidies. This means that financing self-governments of attorneys-at-law from public funds is not excluded, however, it needs to be stressed that the Act does not specify any tasks which should be financed from such funds. Article 63 of the Act on Attorneys-at-Law leads to a conclusion that public funds have only a very marginal role in financing tasks of professional self-governments of attorneys-at-law. This is further confirmed by article 36^1 (13) of the Act on Attorneys-at-Law which requires self-governments to provide administrative and technical services for the examination board, including organisation of attorney-at-law's examinations. Although those tasks are financed with state funds by the Ministry of Justice, article 36^1 (13) of the Act still clearly states that such tasks are regarded as tasks of governmental administration. Therefore they should not be included within the function of professional self-governments defined in article 17 (1) of the Polish Constitution. Thus this article does not refer to those tasks.

Financing of professional self-governments of patent attorneys[15] (article 55 of the Act on Patent Attorneys of 11 April 2001), psychologists[16] (article 50 of the Act on the

[14] See: Article 63 of the Act on Attorneys-at-Law of 6 July 1982, consolidated text, Journal of Laws of 2020, item 75, as amended.

[15] See: Article 55 of the Act on Patent Attorneys of 11 April 2001, consolidated text, Journal of Laws of 2019, item 1861, as amended.

[16] See: Article 50 of the Act on the Psychologist Profession and the Professional Self-government of Psychologists of 08 June 2001, consolidated text, Journal of Laws of

Psychologist Profession and the Professional Self-government of Psychologists of 08 June 2001), physiotherapists[17] (article 83 of the Act on the Physiotherapist Profession of 25 September 2015), laboratory diagnosticians[18] (article 54 of the Act on Laboratory Diagnosis of 27 July 2001), architects and civil engineers[19] (article 58 of the Act on Architects and Construction Engineers Professional Self-governments of 15 December 2000) follows a similar approach. The common feature of the above regulations is, at most, the fact that the state budget constitutes a marginal form of financing for professional self-governments. It also needs to be noted that all the above-mentioned acts specify member fees as the primary funding source of professional associations.

Importantly, the acts also do not specify how the funds should be delegated to each of the tasks of professional self-governments. For example, in the Act on Attorneys-at-Law, there is no provision that would specify how the professional self-government should act depending on the task or the interest served by a specific task. Consequently, unless separate regulations provide otherwise, all financial resources at the disposal of a professional self-government should be dedicated to all its tasks.[20] An example which confirms such a scheme is financing professional trainings of attorneys-at-law from member fees, which lies within the scope of public tasks.[21]

It needs to be noted that when it comes to specifying the principles of financing the tasks of professional self-governments, it is rather common to refer to normative acts passed within the self-governments. For example, such practice can be found in article 40, item 3 of the Law on the Bar of 26 May 1982[22], and in article 30 (1), item 6 of the Notary Public

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2019, item 1026, as amended.

[17] See: Article 83 of the Act on the Physiotherapist Profession of 25 September 2015, consolidated text, Journal of Laws of 2019, item 952, as amended.

[18] See: Article 54 of the Act on Laboratory Diagnosis of 27 July 2001, consolidated text, Journal of Laws of 2019, item 849, as amended.

[19] See: Article 58 of the Act on Architects and Construction Engineers Professional Self-governments of 15 December 2000, consolidated text, Journal of Laws of 2019, item 1117, as amended.

[20] See: Dobrosława Antonów (2016), p. 20.

[21] The exceptions are fees incurred by applicants to cover the costs of their education. The funds accumulated in the trainee training budget may not be used to finance activities other than those aimed at the proper preparation of trainees for the vocational examination and independent practice of the profession of a legal advisor. It should be noted, however, that these funds are intended only to cover the expenses related to the implementation of the trainee training program. Therefore, if the local government organizes additional training courses for applicants, they are financed from the contribution budget of legal advisers to the extent that exceeds the capacity of the applicant's contribution budget.

[22] Journal of Laws of 2019, item 1513, as amended.

Law of 14 February 1991[23]. Therefore, in case of some of the professional self-governments, basic rules of financial management are regulated by internal acts. Moreover, the Act on Tax Advisory[24] of 5 July 1996 (article 61) and the Act on Statutory Auditors, Audit Firms and Public Oversight[25] of 11 May 2017 (article 45), specify the method of financing by referring to the Statute of the National Chamber of Tax Advisers[26] and the Statute of the Polish Chamber of Statutory Auditors[27]. Based on those statutes, it may be concluded that the National Chamber of Tax Advisers finances its activities from member fees, donations, inheritances, bequests, subsidies, income from statutory activities, income from the use of the Chamber's property and property used by the Chamber, including the use of the Chamber's logo by legal persons authorised to provide tax consultancy and entered into the register - on the terms specified by the Council, registration fees, payments for covering the costs of disciplinary proceedings on the basis of final judgements of the Disciplinary Court or the Higher Disciplinary Court, and other fees charged by the Council under the powers granted in this regard by the Congress. 29 of the Statute of the Polish Chamber of Statutory Auditors specifies that the Chamber finances its statutory activities from membership fees, from part of the supervision fees, donations, inheritances, bequests, income from its own activities and from other revenues.

What is more, in the national legal system there are also acts which refer directly to the "state" sources of financing tasks of professional self-governments. Particularly, the self-governments financed for specific tasks by the state funds are: professional self-government of nurses and midwives[28] (article 90 of the Act on Self-government of nurses and midwives of 1 July 2011), professional self-government of physicians and dentists[29] (articles 114 and 115 of the Physicians Chambers Act of 02 December 2009), and the professional self-government of pharmacists[30] (articles 64 and 65 of the Act on Pharmaceutical Chambers of 19 April 1991). The professional self-government of nurses and midwives uses the state funds to finance e.g. keeping registers of nurses and

[23] Journal of Laws of 2019, item 540, as amended.

[24] See: Article 61 of the Act on Tax Advisory of 5 July 1996, consolidated text, Journal of Laws of 2020, item 130, as amended.

[25] See: Article 45 the Act on Statutory Auditors, Audit Firms and Public Oversight of 11 May 2017, consolidated text, Journal of Laws of 2020, item 1421, as amended.

[26] See: www.kidp.pl (last accessed 30 May 2020).

[27] See: www.pibr.org.pl (last accessed 30 May 2020).

[28] See: Articles 90 and 91 of the Act on Self-government of nurses and midwives of 1 July 2011, consolidated text, Journal of Laws of 2018, item 916, as amended.

[29] See: Articles 114 and 115 of the Physicians Chambers Act of 02 December 2009, consolidated text, Journal of Laws of 2019, item 965, as amended.

[30] See: Articles 64 and 65 of the Act on Pharmaceutical Chambers of 19 April 1991, consolidated text, Journal of Laws of 2019, item 1419, as amended.

midwives, confirming and granting the right to practice the profession, conducting proceedings related to suspending and withdrawing the right to practice the profession and restricting the practice of the profession, or issuing the right to practice the profession. The professional self-government of physicians and dentists may use state funds to cover the costs of, among others, administrative activities related to: granting the right to practice and recognising the qualifications of physicians who are citizens of the European Union Member States who intend to practice the profession of a physician on the territory of the Republic of Poland; conducting proceedings regarding the professional liability of physicians, as well as conducting or participating in the organisation of professional training for physicians. On the other hand, Pharmaceutical Chambers may receive subsidies from the state budget in order to cover the costs of certifying the right to practice the profession and issuing the document. The right to practice the profession of a pharmacist, keeping the register of pharmacists and the Central Register of Pharmacists of the Republic of Poland, conducting cases related to professional liability, performing the activities of the screener for professional liability, and activities of the Pharmaceutical Court. There should be no doubt that the above-mentioned tasks fall within the essential, constitutional function of professional self-governments focusing on overseeing the proper performance of the profession of public trust (in accordance with, and for the purpose of protecting the public interest).

III. Guidelines for spending funds by professional self-governments. Conclusions

Taking into account the above findings, a position should be taken on the possibility of subordinating the rules of spending funds collected by professional self-governments to the provisions of the Public Finances Act. In particular, there is a need to discuss the character of member fees paid to professional self-governments. Firstly, they can be described as compulsory and non-refundable. Secondly, such fees, in a substantial part, are collected in order to perform public tasks. Taking into account article 5, (2), item 1 of the Public Finances Act, there is a question whether such fees should be considered as “public levies”. Public levies are primarily taxes, contributions (it should be noted that this in particular refers to social security contributions which are obligatory for employers and employees), fees and other cash benefits which are to be paid to the state, local government units, state-run specific purpose funds and other units of the public finance sector specified by separate acts. The doctrine emphasizes that the sine qua non condition for defining a given monetary benefit as a public levy is, firstly, demonstrating that it furthers the achievement of public goals by the state; and secondly, the determination of the relationship between the levy and the aim of obtaining budget revenues, which are necessary for the proper functioning of public authorities[31]. It is also

[31] See: Zbigniew Ofiarski, Ustawa o finansach publicznych. Komentarz (Warszawa 2019),

noted that public revenues are introduced in an authoritative manner (as a rule, by statute or, if the constitution allows it, by a resolution of a body constituting a local government unit) and should be accompanied by a separate legal regime (regarding the amounts, collection and execution), based on state authority and the priority of satisfying public-law obligations over private-law obligations.[32] The above described characteristics of public levies do not allow to categorise member fees paid to professional self-governments as public levies. Although they are used for the purpose of undertaking specific public tasks, they are not governed by the rules of collecting for the state budget, and they are neither specified nor established by any public authority. There are also no specific execution rules in place for such fees. However, failure to pay such fees has effects only on the intra-organisational level of the self-government (e.g. disciplinary liability).[33] With regard to the membership fee paid to the self-government of attorneys-at-law, the above conclusion is confirmed in the jurisprudence. In the judgment of 12 June 1995[34], the Supreme Administrative Court noted that the membership fee for the self-government of attorneys-at-law is not a benefit that is subject to administrative enforcement.

It should be noted that there are also several regulations which provide for the application of the provisions on administrative enforcement proceedings to collect unpaid membership fees. Such a solution was used, among others in article 116 of the Act on Medical Chambers and article 92 of the Nurses and Midwives Self-Government Act. However, it should be emphasized that the above regulations cannot be treated as decisive for assigning contributions collected on their basis to the category of public levies. The contributions in question belong to the category covered by article 2 (1), item 5 of the Act of 17 June 1966 on enforcement proceedings in administration (cash receivables transferred for administrative enforcement under other acts). On the other hand, the literature has expressed the position that this group includes, in principle, receivables of a non-administrative and legal nature, as it is precisely such obligations that require an express transfer to this path.[35] It should be noted that membership fees paid to professional self-governments do not constitute a category identical to public levies, and at the same time cannot be perceived as public funds within the meaning of article 5 of the Public Finances Act. A similar conclusion should be applied to other

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commentary on art. 5, Lex-online.

[32] See: Cezary Kosikowski, Ustawa o finansach publicznych. Komentarz, (Warszawa 2011), commentary on art. 5, Lex-online.

[33] With reference to the legal character of a fee for the self-government of attorneys-at-law, for more information see: Dobrosława Antonów (2016), p. 20.

[34] See: Judgement of the Supreme Administrative Court of 12 June 1995, SA/Wr 1040/95, ONSA 1996/3/127.

[35] See: Dariusz Kijowski, in: Dariusz Kijowski (ed.), Ustawa o postępowaniu egzekucyjnym w administracji. Komentarz (Warszawa 2015), commentary on article 2, Lex-online.

sources of financing of professional self-governments (e.g. income from inheritances or donations), whereas, the most important aspect here is that professional self-governments are not considered to be public finance sector units.[36] In the light of the jurisprudence of the Court of Justice of the European Union, the above issue is not controversial at the moment. In the judgement of 12 September 2013[37], CJEU emphasised, inter alia, that the use of public funds does not prejudge the status of professional self-governments as entities of the public finance sector. Professional self-governments do not meet the criterion of being financed mainly by public authorities, if these entities are financed to a large extent with their members' contributions, the amount of which is determined and which are collected by these entities in accordance with the applicable laws.

Moreover, this conclusion cannot be changed by the fact that some professional self-governments (e.g. of nurses and midwives) receive funds from the state budget for the purpose of execution of certain public tasks. Such self-governments can only be considered as administrators of public funds that do not have the status of public finance sector entities, as referred to in article 4 (1) point 2 of the Public Finances Act. The indicated provision specifies a heterogeneous category of natural persons, as well as legal persons, who receive public funds on the basis of the Public Finances Act, separate acts or international agreements, in order to perform public tasks imposed on them or accepted for implementation.[38] However, they do not have the status of units of the public finance sector, which is confirmed in the literature.[39]

The above observations regarding the financing of the activities of professional self-governments lead to yet another important legal dilemma. While in the case of the above-mentioned "medical" self-governments, the costs of executing a significant part of their tasks regarding overseeing the proper performance of the profession of public trust remain secured in the state budget, in the case of, for example, self-governments of legal professions, the funds are primarily collected independently by these organisations, in particular in the form of collecting membership fees.

Taking into account the observations made in this publication, with conclusion that it is

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[36] In the case of other public revenues, the legislator associates this feature with qualifying the addressee into the category of public finance sector entity. For example, article 5, (2), item 5 of the Public Finances Act, public revenues are defined as "inheritances, bequests and donations in the form of money to the public finance sector units".

[37] Judgement of the Court of Justice of the European Union of 12 September 2013 in case C-526/11, IVD GmbH & Co. KG v. Ärztekammer Westfalen-Lippe, Official Journal of the European Union C.2013.325.4/1.

[38] See: Ludmiła Lipiec-Warzecha, Komentarz do ustawy o finansach publicznych (Warszawa 2011), commentary on art. 4, Lex-online.

[39] Ibidem.

impossible to attribute the characteristics of public funds within the meaning of the Public Finances Act to these contributions, a fundamental doubt may arise as to the principles of allocating these funds for specific purposes. It should be stated here that the constitutionally designated functions of professional self-governments include both public tasks (keeping custody) and those with an intra-organisational profile. Taking into account the fact that the characteristic feature of the financial management of most professional self-governments in Poland is the availability of all funds to cover the entirety of the tasks performed, a question arises as to the legitimacy of granting public purposes a specific "priority" in terms of financing. In other words, a question may be asked whether the heterogeneous scope (public tasks and corporate tasks) of the constitutional functions of professional self-governments may affect the degree of independence granted to such structures.

Most of all, it should be emphasized that the very essence of "self-government" implies that it carries out a certain category of tasks independently and at its own responsibility. The literature emphasises that the independence of decentralised entities is manifested in the fact that the tasks delegated by the legislator, as own tasks, are performed independently, without hierarchical subordination and, what follows, without the interference of higher authorities.[40] Upon the establishment of a specific professional self-government by statute, it is entrusted at the same time with certain public tasks and a certain degree of freedom in their implementation, while the independence of these organisations should only be limited by the criterion of legality.[41] The above is confirmed by the statutory provisions dedicated to individual professional self-governments. For example, according to article 40 (1) of the Public Finances Act, the self-government of attorneys-at-law is independent in the performance of its tasks and is subject only to legal provisions. At the same time, it should also be emphasised that it would be unreasonable to decide on the importance of the tasks of self-governments based on their purpose. Article 17 (1) of the Constitution lists both tasks demonstrating a public purpose and those serving the interests of corporations, which makes it impossible to assign the former a "superior" value. The above-mentioned view was also expressed by the Supreme Administrative Court in the judgement of 29 August 2017[42] citing the Constitutional Tribunal (judgement K 37/00 quoted above), that in the current system, both functions of professional self-governments are equally important, since in a democratic and pluralist society there is no reason to prioritise any of them. However, it is worth noting that in the jurisprudence of the Constitutional Tribunal, one can also find slightly different positions. In particular, the judgement of 18 February 2004[43] (P21/02)

[40] See: Maria Karcz-Kaczmarek, Marek Maciejewski (2015), p. 61 [as cited in:] Sławomir Pawłowski (2009), p. 38.

[41] Ibidem, p. 62.

[42] Judgement of the Supreme Administrative Court of 29 August 2017, II GSK 3308/15.

[43] Judgement of the Constitutional Tribunal of 18 February 2004, P 21/02, OTK-

should be cited here, in which the Tribunal emphasised "the primacy of the public interest over the environmental interest". However, in the further part of the justification it was indicated that "the professional self-government is not so much to eliminate the environmental interests of persons performing public trust professions, but to seek to reconcile them with the public interest".

At the same time, it should be emphasised that the assignment of public functions to professional self-governments that justify their legal existence must lead to a certain restriction of freedom of their activity. In particular, the tasks of self-governments, the performance of which is subordinated to the public interest and its protection, may not be abandoned in any case. Such a conclusion should apply not only to those organisations which receive funding from the state budget for the above purposes, but also those that ensure their implementation with funds collected independently. The compliance of the activities performed in the public interest with the law is also verified by supervision to which the activities of professional self-governments are subject.

Summarising the above observations, it is necessary to take a position that assumes the same “importance” of all functions performed by professional self-governments. Regardless of whether a given task of a self-government is located within the "corporate" functions or within public tasks (ensuring the proper performance of the profession), these organisations should have independence in their implementation. However, subordinating some of the tasks of professional self-governments to the need to protect the public interest must also burden them with the inability to refrain from performing them. If, in the above scope, professional self-governments do not receive financing from the state budget, it should simultaneously entail the obligation to secure appropriate sources of financing from their assets.

A/2004/2/9.

Tasks and financing of the bar associations

Magdalena Jaś-Nowopolska/Armin Klüter

I. Structure of the bar associations

1. History

In the literature, the enactment of the Prussian Ordinance on the Formation of the Council of Honour among the Judicial Commissioners, Advocates and Notaries (*Verordnung über die Bildung des Ehrenraths unter den Justizkommissaren, Advokaten und Notaren*) of 1847 is regarded as the beginning of bar associations.[1] However, the first association „German Lawyers Association" (DAV) was founded in Bamberg on 25 March 1871. On 1 October 1879 the Lawyers Code (*Rechtsanwaltsordnung* – RAO) of 1 July 1878 came into force, which led to the establishment of chambers of lawyers throughout the German Reich.[3] It established the professional self-administration of the German legal profession.[4]

A regional bar was then established for each judicial district at the seat of the respective Higher Regional Court (*Oberlandesgericht*). Furthermore, the Bar at the Imperial Court (*Reichsgericht*) was set up, whose members were the lawyers admitted to the bar[5]. With the bar associations established by the RAO, the bar system expanded with the German legal profession, since their competence was no longer limited to the professional but henceforth also extended to participation in admission and self-administration[6]. Despite the changes in the regulation, the regional bars existed institutionally until 27 September 1944 (they were abolished by the "2nd War Measures Ordinance"). The establishment of a uniform bar system after 1945 began in the British occupation zone.[7]

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[1] Reinhard Hendler, Selbstverwaltung als Ordnungsprinzip, Berlin 1st ed. 1987, p. 103 et seq.

[3] More: Wolfgang Hartung: in Martin Henssler/Hanns Prütting, BRAO, München 5th ed. 2019, preliminary remark to § 60, p. 822 et seq.

[4] Dag Weyland, Bundesrechtsanwaltsordnung: BRAO, 10th ed. 2020, § 60, marginal no. 1.

More about the history: Michael Kleine-Cosack, Berufständige Autonomie und Grundgesetz, Baden-Baden 1st ed. 1986, p. 43 et seq.

[5] Reinhard Hendler, Selbstverwaltung als Ordnungsprinzip, Berlin 1st ed. 1987, p. 104 et seq.

[6] Fritz Ostler, Der Deutsche Rechtsanwalt. Das Werden des Standes seit der Reichsgründung. Vortrag, gehalten vor der Juristischen Studiengesellschaft Karlsruhe am 12.12.1962, Juristische Studiengesellschaft Karlsruhe, Heft 56/57, p. 1.

[7] Wolfgang Hartung, in: Martin Henssler/Hanns Prütting, BRAO, preliminary remark to § 60, marginal no. 12 et seq.

On 1 October 1959, the Federal Lawyers' Act (*Bundesrechtsanwaltsordnung* – BRAO) came into force. The new Federal Lawyers' Act brought the legal profession a uniform federal professional law. For the bar associations, little did change against the Lawyers' Code for the British zone. The Act is also nowadays a legal framework for the German legal profession – together with the Rules of Professional Practice (*Berufsordnung* – BORA) and Specialist Lawyers' Code of Conduct (*Fachanwaltsordnung* – FAO) – is decisive for the professional life of every lawyer. Some aspects of legal profession are also regulated by i.a. Act on the Remuneration of Lawyers (*Rechtsanwaltsvergütungsgesetz*), Act on Out-of-Court Legal Services (*Rechtsdienstleistungsgesetz* – RDG), Law regulating the activity of European lawyers in Germany (*Gesetz über die Tätigkeit europäischer Rechtsanwälte in Deutschland* – EuRAG).

2. Regional bar associations and the German Federal Bar Association

The Federal Lawyers' Act was established in 1959 by the German legislator who had the exclusive competence to modify these provisions. The Federal Constitutional Court in his decision in 1987[8] decided that the German legislator gave the profession the power to decide upon, and issue, professional practice regulations within its competences laid down in the BRAO.[9] Pursuant to § 191a BRAO, a Statutory Assembly (*Satzungsversammlung*) shall be established at the German Federal Bar Association (*Bundesrechtsanwaltskammer*, hereinafter referred to as BRAK). The Statutory Assembly shall adopt, as a statute, professional rules for the practice of the profession of lawyers, taking into account professional duties and in accordance with § 59b BRAO.

In the particular state (*Bundesland*) the regional bar associations (*Rechtsanwaltkammer*) were formed which are regulatory bodies supervised by the Ministry of Justice of the particular state (*Bundesand*). The ministry must not enforce any actions on the RAKs. They are not obliged to follow any professional or content-related instruction or order. The supervision is limited to ensure that the law and the by-laws are observed (*Rechtsaufsicht),* in particular that the duties assigned to the regional bar associations are performed (§ 62 (2) BRAO). This dual system (regional bar associations and German Federal Bar Association as an umbrella organisation) has been in place since 1 October 1959.

According to § 60 BRAO, a regional bar association shall be established for the district of a Higher Regional Court *(Oberlandesgericht*). The members of a bar association can be divided into 3 groups:

[8] BVerfG NJW 1988, 191 et seq.

[9] § 59b BRAO – Rule-making competence, § 191a BRAO – Establishment and duties.

1. Persons admitted to the bar or admitted by it: attorneys admitted to the bar by the bar association (§ 4 BRAO) or admitted to the bar by the new bar association in the event of a transfer of the office to another bar association district (§ 27 BRAO); in-house lawyers (*Syndikusrechtsanwälte*) – § 46a BRAO; foreign lawyers, if they are established according to § 4 EuRAG (§ 206 BRAO); European lawyers and Chamber Counsel.
2. Law societies admitted by it, and
3. Managing directors of law firms under no. 2 who are not already members of a bar association under no. 1.

Membership in a bar association is compulsory by law. Pursuant to § 209 (1) BRAO, natural persons who are in possession of a license to provide legal services on a professional basis, either without restriction or with the exception of social security or social insurance law, are to be admitted to the bar competent for the place where they are established.

At the moment, Germany has 28 regional bars (The details are presented in Fig. No.1). The number of the bars is related to the history of Germany. Therefore, the bars located in the old Federal States (*Bundesländer)* were all established at the same time as the Lawyers' Act of 1978 came into force. Only when the Higher Regional Court was established did the Bar come into being at a later date. The Bar in Düsseldorf can be mentioned as the Example. It was established in 1906 after the Düsseldorf Higher Regional Court had been founded at the expense of the Cologne and Hamm Higher Regional Courts. A different situation was found in the new Federal States, where after 1990 five bars were established. Pursuant to § 174 BRAO, all lawyers practicing at the Federal Supreme Court (*Bundesgerichtshof)* constitute a separate regional bar.

1.	Bar Association Freiburg	Freiburg im Breisgau	Baden-Württemberg	3,421 Members
2.	Bar Association Tübingen	Tübingen	Baden-Württemberg	2,000 Members
3.	Bar Association Karlsruhe	Karlsruhe	Baden-Württemberg	4,582 Members
4.	Bar Association Stuttgart	Stuttgart	Baden-Württemberg	7,768 Members
5.	Bar Association Bamberg	Bamberg	Bayern	2,622 Members
6.	Bar Association München	München	Bayern	22,482 Members
7.	Bar Association Nürnberg	Nürnberg	Bayern	4,805 Members
8.	Bar Association Berlin	Berlin	Berlin	14,573 Members

9.	Bar Association Brandenburg	Brandenburg an der Havel	Brandenburg	2,186 Members
10	Bar Association Bremen	Bremen	Bremen	1,824 Members
11	Bar Association Hamburg	Hamburg	Hamburg	10,919 Members
12	Bar Association Frankfurt	Frankfurt am Main	Hessen	19,549 Members
13	Bar Association Kassel	Kassel	Hessen	1,729 Members
14	Bar Association Mecklenburg-Vorpommern	Schwerin	Mecklenburg-Vorpommern	1,417 Members
15	Bar Association Braunschweig	Braunschweig	Niedersachsen	1,715 Members
16	Bar Association Celle	Celle	Niedersachsen	5,757 Members
17	Bar Association Oldenburg	Oldenburg	Niedersachsen	2,697 Members
18	Bar Association Düsseldorf	Düsseldorf	Nordrhein-Westfalen	12,881 Members
19	Bar Association Hamm	Hamm	Nordrhein-Westfalen	13,559 Members
20	Bar Association Köln	Köln	Nordrhein-Westfalen	12,816 Members
21	Bar Association Koblenz	Koblenz	Rheinland-Pfalz	3,276 Members
22	Bar Association Zweibrücken	Zweibrücken	Rheinland-Pfalz	1,359 Members
23	Bar Association Saarbrücken	Saarbrücken	Saarland	1,423 Members
24	Bar Association Sachsen	Dresden	Sachsen	4,543 Members
25	Sachsen-Anhalt Bar Association	Magdeburg	Sachsen-Anhalt	1,570 Members
26	Schleswig-Holstein Bar Association	Schleswig	Schleswig-Holstein	3,775 Members
27	Bar Association Thüringen	Erfurt	Thüringen	1,805 Members

28	Bar at the Federal Supreme Court	Karlsruhe		38 Members [44]

Fig. No.1: Regional bar associations in Germany[10]

Pursuant to § 62 BRAO, the bar association (Rechtsanwaltskammer) is qualified as a public corporation (*Körperschafts des öffentlichen Rechts*). Their right to self-administration is not expressly regulated, but results from the absence of rights to issue directives (§ 62 (2) BRAO orders pure legal supervision of the States Administration of Justice) and the autonomous regulatory powers assigned by law. Since it is organised as a membership body, it is a staff corporation, which in turn is a member of the Federal Bar Association as an umbrella organisation.

3. Organisation of the bar associations

The organs of the bar are the Executive Board (*Vorstand*) consisting of at least seven members (§s 63 et seq. BRAO)[11], the Presidium (*Präsidium*) elected from among the members of the Board (§s 78 et seq. BRAO) and the Assembly of the Bar (*Kammerversammlung* – § 85 BRAO). All members of the chamber belong to the chamber assembly. Pursuant to § 85 (1) BRAO, the convening of the Assembly of the Bar is the responsibility of the president.

The Federal Lawyers' Act distributes the tasks between the Assembly of Bar, the Executive Board and the Presidium according to the classic principle that the Assembly is designed as a legislative and control body, whereas the Board and the Presidium are designed as executive bodies.

According to § 77(1) BRAO, the rules of procedure may allow the executive board to form the so-called departments. These departments, which according to § 77 (2) BRAO must consist of at least three members of the Executive Board and must appoint a department chairperson, secretary and deputy, may be entrusted with individual business matters for independent management. According to § 77 (5) BRAO, the departments have the rights and duties of the Executive Board within the area of responsibility assigned to them. Pursuant to § 77 (6) BRAO, the (entire) Executive Board has the right to call back and make decisions at any time by resolution. The Executive Board elects a Presidium from

[44] https://www.rak-bgh.de/ (last accessed 27 August 2021).

[10] https://brak.de/w/files/04_fuer_journalisten/statistiken/2021/2021_brak-mg_statistik.pdf (last accessed 10 August 2021).

[11] All bar associations have made use of the possibility to increase the minimum number of seven board members. The bar associations in Munich (34), Frankfurt (31), and Düsseldorf (20) have the highest number of Board members, whereas the Bar Associations of Saxony (9), Braunschweig (11) and Saarbrücken (11) have the least. More: Wolfgang Hartung, in: Martin Henssler/Hanns Prütting, BRAO, § 63 BRAO, p. 837.

among its members (§ 78(1) BRAO), which at least consists of the president, the vice-president, the secretary and the treasurer.

The Presidium shall handle the affairs of the Executive Board as assigned to it under this Act or by virtue of a resolution of the Executive Board. The Presidium shall also take a decision concerning the administration of the assets of the bar association. The president shall represent the bar association both in and out of court. He shall arrange the business transactions of the bar and of the Executive Board and also shall execute the resolutions taken by the Executive Board and by the Assembly of the Bar (§ 80 (2) BRAO).

The Assembly of the Bar shall be convened by the President (§ 85 (1) BRAO). The president must convene the Assembly of the Bar if one tenth of its members make a written application indicating the matter is to be discussed at the Assembly. The Assembly of the Bar must perform the duties assigned to it by law. It must discuss matters that are of general importance for the legal profession. According to § 89 (2) BRAO, the Assembly shall be under a particular duty:

1. to adopt the rules of procedure of the Assembly of the Bar,
2. to determine the dues, the charges to be levied and the administration fees and the dates when these monies are due for payment;
3. to establish welfare institutions for lawyers and their surviving dependants;
4. to approve the funds that are necessary in order to pay the costs in matters which concern the general interests of the community;
5. to prepare guidelines for compensation of expenses and the reimbursement of travelling expenses to the members of the executive board and of the Lawyers' Disciplinary Court and to the court recorders in the main proceedings at the Lawyers' Disciplinary Court;
6. to audit the statement of the Executive Board regarding the income and expenditure of the bar association and the administration of its assets and to pass a resolution regarding the exoneration of the Executive Board.

4. Bar associations in comparison with other chambers

Analysing the issue of the chamber system, one can certainly speak of a 'German chamber system', but on the other hand one must also distinguish between different types of chambers in terms of the details of their structure and tasks. As unifying and systematising elements of the development of the chamber system one can include:

- the principles of decentralisation and
- the principle of subsidiarity
- the principle of cooperation
- the principle of self-administration.[12]

[12] More: Winfried Kluth, Handbuch des Kammerrechts, 3. ed. 2020, marginal no. 18 et seq.

The diversity can result from the area of the respective professions and the peculiarities of the professional profiles and professional rights covered. The large thematic range of the forms of commercial activity recorded by the Chambers of Industry and Commerce leads to such a large variety of interests that they can only be divided into electoral and interest groups.[13] In the case of notaries and lawyers or medical professions, the professions and interest are very homogeneous. There is no need for further subdivision and the reconciliation of interests relates solely to the positioning in concrete factual issues. Another factor that creates diversity is the distribution of legislative powers. Only some of the chambers are based on federal law and are therefore structured uniformly, while the chambers of the medical professions in particular are based on state law.

The literature points out the problem of low regulatory density of chamber laws or legal regulations on chambers. It is indicated that they are characterised by their brevity and restriction to the essential questions. This is particularly noticeable if one compares, for example, the regulations in the chamber laws on the organs, the internal distribution of tasks and on the right to vote with the corresponding regulations in the municipal laws of the States (*Bundesländer*).[14] The question that arises in this aspect is whether it is possible to refer to more detailed and unambiguous regulations in other areas, for example supervisory instruments or election audits, in order to fill in the gaps in chamber law. Case law and literature have dealt with the application of municipal law in such situations.

The Federal Administrative Court has spoken out in its jurisprudence[15] against an analogous application of provisions of municipal law, since, above all, the set of tasks of the municipalities is not comparable with the chambers based only on simple statutory law due to their constitutional anchoring as a territorial body in article 28 of the Basic Law. However, the literature indicates that the Federal Administrative Court's argumentation proves to be abridged insofar as it does not distinguish with sufficient precision between those provisions of municipal law that are an expression of general corporate law and those that are a specific expression of the status of municipalities as territorial authorities.[16]

The question that is raised is whether the chambers really need such detailed and extensive regulation on the formation of organs and on the responsibilities of organs, and regulate the right to vote in their own extensive laws and ordinances as in the municipal law. In case of regional bar associations there seems to be no need for such a solution. In this case, in order to clearly distinguish between the state and the legal profession, the bar association must have freedom. The tasks of the bar association are carried out

[13] Martin Will, Selbstverwaltung der Wirtschaft, 2010, p. 239 et seq.; Winfried Kluth, Handbuch des Kammerrechts, 3. ed. 2020, marginal no. 3-4.

[14] Winfried Kluth, Handbuch des Kammerrechts, marginal no. 29.

[15] BVerwG 31.3.2004 – 6 C 25/03.

[16] More: Winfried Kluth, Handbuch des Kammerrechts, 3. ed. 2020, marginal no. 33-34.

through the commitment of many individual lawyers. That is the way it should be. If more rules were made, administrative officials could be employed who would then perform the tasks currently assigned to the bar association less effectively.

II. Tasks of the bar association

According to § 73 (1) sent. 2 BRAO, the executive board shall protect and promote the interests of the bar association. The regulation of § 73 (2) BRAO lists the tasks of the Executive Board, in particular the above-mentioned tasks. In contrast to § 177 (Task of the Federal Bar Association), the tasks of the bar association are not directly defined, only the tasks of the Executive Board of the bar association are specified. However, the Executive Board is an organ of the bar association. Since legal persons cannot act on their own, but must use their organs, the action of the organs is attributed to the legal person.[17] Accordingly, tasks of the Executive Board are also tasks of the bar association. It is to be noted that the task standards shall be interpreted narrowly and with due regard to constitutional requirements. § 73 (2) BRAO is to be understood as a general clause-like assignment of tasks in such a way that the promotion and protection of the interests of the entirety of the members is the task of the bar. According to § 73 (2) BRAO, the Executive Board is under a particular duty:

1. to advise and instruct the members of the bar association in matters of professional ethics;
2. to mediate disputes among members of the bar association upon request, present settlement proposals;
3. mediate disputes between members of the bar association and their clients upon request, this includes the authority to present settlement proposals;
4. to supervise the fulfilment of duties incumbent upon the members of the bar association and handling the right to reprimand;
5. to propose lawyers to be appointed as members of the lawyer's court;
6. to make proposals to The German Federal Bar Association in accordance with §§ 107 and 166 BRAO;
7. to issue yearly financial reports regarding asset management to the Assembly of the Bar;
8. submit expert opinions which a state's administration of justice, a court, or a state's administrative authority requested;

[17] Comparison: § 34 sent. 1 of the Basic Law. More in: Dirk Ehlers/Marc Lechleitner, Die Aufgabe der Rechtsanwaltskammern. Rechtsstellung der Rechtsanwaltskammern und der Bundesrechtsanwaltskammer in der Verfassungs- und Verwaltungsrechtsordnung der Bundesrepublik Deutschland, Dt. Anwaltverl., Berlin 2006, p. 78 et seq.

9. to assist in the training and examination of students and trainee lawyers, in particular to propose qualified working group leaders and the lawyer members of the legal examination boards.

As the legal education in Germany aims towards training all-round legal professionals, it is of great importance to include practicing lawyers and law firms in the curriculum. The resulting influence of bar associations on the education deserves some attention as it can be seen as a German particularity. The legal education differs slightly between the states. However, the basic outline and also the involvement of bar associations remains structurally the same. The first educational stage is at the university, which teaches legal fundamentals and ends with the first state exam. It's followed by the "*Referendariat*", a traineeship with the state in which various future job opportunities in the public and private- sector have to be worked in, while also completing several mandatory classes.[18] It ends with the second state exam which qualifies to practice as a judge, prosecutor, lawyer or alike and therefore likely best equates to a bar-exam. Lastly, any qualified lawyer may obtain up to three[19] titles as a specialist lawyer (*Fachanwalt*). This optional additional education is offered by various entities. However, the awarding and supervision of specialist lawyer titles is one of the bar association's key competences.

According to § 73 (2) no. 9 BRAO, the executive board shall participate in the education and examination of university students and trainees (*Referendare*). Although this is seen as a general authorization to act,[20] in practice, the participation is negligible. Although most law faculties will have some cooperation with law firms or possibly even the local bar association, participation in the offered lectures and the like is generally neither compulsory nor graded. Only when it comes to correcting the written exams of the first state exam and orally examining the students, may the board of examiners be composed of judges, prosecutors, university professors and, what is more, practicing lawyers may be appointed. Each bar association therefore provides a list of suitable examiners who volunteer for those functions. An additional financial incentive may be offered by the bar association to encourage lawyers to those tasks.[21]

The bar association's impact increases during the following traineeship. Out of the 24-month period, one or two sections of accumulated 9 months[22] have to be completed

[18] For a list of covered contents see: Bundeseinheitliche Anwaltsausbildung der Bundesrechtsanwaltskammer in JuS 2003, p. 830-832.

[19] Limit set out in § 43c (1) sent. 3 BRAO. Although, more courses may be completed.

[20] Dirk Ehlers/Marc Lechleitner, Aufgaben der Rechtsanwaltskammern. Ausgewählte Ergebnisse eines Gutachtens, AnwBl. 2006, p. 363.

[21] For example, the Bar Association Düsseldorf offers €40 per hour for lecturing and €300 for participating in an oral exam, www.rak-dus.de/wp-content/uploads/bsk-pdf-manager/2020/01/Jahresbericht-2019.pdf, p. 42 et seq. (last accessed 10 August 2021).

[22] 10 months in the state of Saarland. The period commonly has an inactive-phase to give

under the supervision of a practicing lawyer. § 59 BRAO states that the lawyers themselves are to participate in the education. However, through this codification, the bar associations have an indirect method of control on the trainees' education. Also, compulsory lectures and additional, optional trainings are offered by the bar associations to prepare for this section of the traineeship. Lecturers are suggested by the local bar associations. Once again, the bar association suggests suitable members to examine the trainees. Some bar associations even formulate tasks for the written exams and suggest them to the respective higher regional court.[23] Also, the regional and German Federal Bar Association actively participate in reform discussions of the traineeship as it constitutes an educational key element for practicing lawyers. Hence, the BRAK regularly publishes suggestions regarding legislative proposals governing the legal profession and education.[24] The German Lawyers Association (DAV) used to urge the legislator to shift responsibility in the practical education to legal professionals.[25] However, organization, admission and examination during the traineeship is still overseen by the higher regional courts and the trainees only enter contractual obligations with the corresponding state.

Trainings for the currently 19 official specializations[26] are offered by various competitors ranging from universities[27], private academies, the German Lawyers Association (DAV), and the German Federal Bar Associations Academy (*Deutsches Anwaltsinstitut*)[28] or even regional bar association's academies.[29] Eventually, a specialized committee appointed by the bar association's executive board examines each candidate upon which

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the trainee more time to focus on their written exams which follow this section of the traineeship.

[23] E.g the Bar Association Frankfurt through a “consulting agreement” with the higher regional court Frankfurt, https://www.rak-ffm.de/fileadmin/user_upload/Dokumente/Über_Uns/Taetigkeits-Berufsbildungsberichte/Taetigkeitsbericht2020.pdf, p. 27 (last accessed 5 August 2021).

[24] Most recently “Opinion No. 20” of February 2021, https://brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2021/februar/stellungnahme-der-brak-2021-20.pdf (last accessed 5 August 2021).

[25] Hirte, Mock, Die Juristenausbildung in Europa vor dem Hintergrund des Bologna-Prozesses, JuS-Beil. 2005, p. 3 and p.13.

[26] See: § 1 Specialized Lawyers Rules (FAO).

[27] E.g. in Employment Law offered by the public WWU Münster, or the Hagen Law School, a faculty of Germany’s public distance-learning-University (Fernuni Hagen).

[28] Dirk Ehlers/Marc Lechleitner, Aufgaben der Rechtsanwaltskammern. Ausgewählte Ergebnisse eines Gutachtens, AnwBl 2006, p. 365 even state that this institute does most of the work.

[29] E.g. the Bar Stuttgart, see www.rak-fortbildungsinstitut.de (last accessed 1 August 2021).

the corresponding title is awarded. Organising this process and compensating the examiners is a task solely entrusted to the bar associations. Also the bar associations check that each specialized lawyer completes the compulsory annual advanced training according to § 15 Specialized Lawyers Rules (*FAO*). Trainees are also able to attend any courses for specialized lawyers, commonly at reduced rates.[30]

Lastly, the bar associations are tasked with the education of legal assistants/secretaries according to § 71 (4) Vocational Training Code (*Berufsbildungsgesetz*). Each bar association oversees the education and examination and together with the German Federal Bar Association makes suggestions to the precise structuring of the three-year apprenticeship.[31] The role of bar associations parallels the one of other chambers in this regard. However, anyone educated in a legal profession under the Vocational Training Code is not trained to become a lawyer and therefore generally must not become a member of the bar association, whereas anyone trained in trade and commerce may eventually be a member of the relevant chamber.

III. Financing

1. Income

A significant result of a bar association's self-administering nature is its freedom to acquire and distribute its funds. Some bar associations have shown a decent level of creativity in generating income and – quite literally – consuming it throughout the fiscal year. Most bar associations publicize their annual financial reports. This is not only done to satisfy the need for information of its members but often paired with a report of the bar association's activities as part of its public outreach. A closer look into several bar associations' financial reports reveals that the financial structure is fundamentally the same. Although varying in percentage, significant items of income and expenses can be found in all reports. Keeping in mind the legal nature of a bar association as a public corporation, no significant profits may be obtained.[32] The major share of a bar association's income is generated through compulsory membership dues. According to

[30] Dirk Ehlers/Marc Lechleitner, Aufgaben der Rechtsanwaltskammern. Ausgewählte Ergebnisse eines Gutachtens, AnwBl. 2006, p. 364.

[31] Regarding payment see: https://brak.de/w/files/newsletter_archiv/berlin/2019/2019_542anlage.pdf (last accessed 1 August 2021).

[32] For cases regarding chambers of commerce which follow the same legal structure see: OVerwG Hamburg 20.2.2018 – 5 Bf 213/12; VG Köln, 16.6.2016 – 1 K 1188/15; Martin Schmitz/Christian Möser, Unterliegen Mitgliedsbeiträge/Gebühren/Entgelte/Zuschüsse an Kammern nach dem BFH-Urteil vom 20.3.2014 der Umsatzsteuer?, MwStR 2015, p.120-129.

§ 89 (2) no. 2 BRAO, each bar's Assembly determines the amount of the yearly dues. Depending on each bar association's needs, the amount varies between €290[33] and €400[34] per year. No particular correlation between size of the bar association or its location and the amount of dues can be noticed. Given that membership is compulsory depending on which bar association's district the lawyer established his or her office, membership dues are not rarely enforced by law.[35] Out of a bar association's total income, between 60 %[36] and 90%[37] is generated through membership dues.

Another notable source of revenue are fees. § 192 BRAO states that a bar association may charge fees to cover its costs when carrying out official acts. Hence, profit may not be generated through fees.[38] However, through reference to the Administrative Cost Act (*Verwaltungskostengesetz*), it is stated that all costs may be covered through those fees including the shares in cost of personnel and other. Therefore, the Assembly of the Bar will usually implement a statute of fixed fees. Those fees generally make up for around 7% of a bar association's revenue.

Other minor income sources are manifold. All bar associations collect fines which might be awarded by the lawyers' courts (§ 114 (1) no. 3, BRAO) for violating laws governing the legal profession, by courts of the general jurisdiction (§ 153a StPO)[39] for violating the Criminal Code, or by the executive board (§ 57 BRAO) for failing to comply with certain special obligations. Furthermore, revenue might be generated from anything between

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[33] €290 in 2021 for the Frankfurt Bar Association, www.rak-ffm.de/ueber-uns/beitragsordnung (last accessed 17 August 2021).

[34] €398 in 2021 for the Oldenburg Bar Association www.rak-oldenburg.de/fuer-anwaelte/kammerbeitrag (last accessed 17 August 2021).

[35] E.g. the Sachsen Bar had to enforce dues in 26 cases in 2019, around 0.5 % of its members, www.rak-sachsen.de/documents/2020/08/materialien-kv-2020.pdf, p. 19 (last accessed 17 August 2021).

[36] 59% in 2019 for the Sachsen Bar, www.rak-sachsen.de/documents/2020/08/materialien-kv-2020.pdf, p.24 (last accessed 1 August 2021).

[37] 91% in 2020 for the Berlin Bar, www.rak-berlin.de/download/rak_berlin_pdfs_jahresberichte/2020_Jahresbericht.pdf, p. 29 (last accessed 17 August 2021).

[38] For implications in case profit is generated see also: Martin Schmitz /Christian Möser, Unterliegen Mitgliedsbeiträge/Gebühren/Entgelte/Zuschüsse an Kammern nach dem BFH-Urteil vom 20.3.2014 der Umsatzsteuer?, MwStR 2015, p. 120-129.

[39] Criminal Procedure Code. Fines under this rule are issued as an obligation-to-pay in order to evade a criminal trial. Although being a rather rare occasion e.g. the Berlin Bar includes such fines in their annual budget plan, www.rak-berlin.de/download/rak_berlin_pdfs_jahresberichte/2020_Jahresbericht.pdf, p. 29 (last accessed 17 August 2021).

renting out robes[40] to donations or selling beverages at the office or events. However, those funds are usually directly linked to expenses and rarely amount to more than 1% of the total revenue.

Income generated through seminars is of special significance as the goal of most bars would be to balance expenses and income originating in seminars and alike.[41] Therefore, a share of up to 20%[42] of revenue cannot be used to cover general expenses but rather contributes to a separate seminar-budget.[43]

To sum up, a bar association's income shows great similarities to that of any regular club or association. The major share is compromised by membership dues, followed by income generated through hosted „events“ and fees for cost intensive operations. However, some differences stand out. Firstly, there is no competition between bar associations to offer cheaper membership deals. Any legal practitioner has to be a member of the single regional bar association in whose district the office is set-up and has to accept the dues collectively set by the Assembly of the Bar. Secondly, the framework for the fees is laid out in the legal code and my not be derived from. And lastly, the events hosted by bars are largely also prescribed in the law (BRAO), which lists a bar's intended activities.

2. Expenses

When focusing on the expenses, no surprises are to be encountered. Once more, similarities to regular clubs and associations can be seen. Given that the functions and therefore main actions of bar associations are laid out in the legal code, the funds have to be used and distributed accordingly.[45]

The main share of between 30% to 40 % is consumed by salaries of employees who are employed to administer the bar association's activities. Another share of up to 10% might be added as compensation for the executive board's work. Bar associations usually boast

[40] As for example done by the Berlin Bar.

[41] As explicitly stated by the München Bar, www.rak-muenchen.de/fileadmin/downloads/04_RAKMuenchen/Organisation_Gremien/Kammerversammlung/RAK_Muenchen_Haushaltsplan_2019.pdf, p. 13 (last accessed 17 August 2021).

[42] Due to the Covid-pandemic, revenue through seminars and alike has substantially decreased.

[43] As done for example by the Sachsen Bar, www.rak-sachsen.de/documents/2020/08/materialien-kv-2020.pdf, p. 20 and 27, (last accessed 17 August 2021).

[45] Dirk Ehlers/Marc Lechleitner, Aufgaben der Rechtsanwaltskammern. Ausgewählte Ergebnisse eines Gutachtens, AnwBl. 2006, p. 363.

themselves with office spaces which are rented or maintained for around 10% of its revenue. Few costs for running errands have to be added, too. Those costs can be seen as the vital backbone for the bar association to pursue its official mission and keep up all essential work.

Seminars and alike are, as said, generally balanced and paid for with adequate fees.

Another share of around 5% is used to support the legal education. This might be by awarding scholarships or enumerating members of the bar who hold lectures for trainees or students or by awarding additional compensation for correcting exams and participating in oral examinations. Mainly, those payments are an addition to the rather low remuneration offered by the state as the authority governing the legal education, and are therefore an incentive for practicing lawyers to get involved in the legal education.[46] What is more, those funds thereby remain within the bar association or rather between its members. With this supporting argumentation, and with stating hat "participation" includes some degree of financial commitment, an additional levy has been deemed lawful.[47]

Another major expense is the financing of the federal umbrella organization, the BRAK according to § 178 (1) BRAO. Between 10% and 20% of all expenses are funds forwarded to the BRAK to cover their financial demands. Another fee of around €60 per member per year has to be paid to maintain the official "special electronic lawyers PO box" (*Besonderes elektonisches Anwaltspostfach – beA*). This fee is often separately collected by the bar associations as a levy or indirectly cross-funded through membership dues. The legality of collection of the fee has been excessively and unsuccessfully challenged by lawyers unwilling to pay for and even use the new electronic system.[48]

IV. Summary

Regional bar associations are the core element in the German framework governing the legal profession. The tasks carried out, are of high importance and could well be executed by government authorities as well, which is what mostly sets them apart from being just any association of legal professionals. Their impact on education and supervision of (future) lawyers as well as the establishment of compulsory legislative statutes resemble sovereign tasks. However, those are tasks which can possibly be best executed by practicing lawyers. They feature professional expertise and understand trials and tribulations of practicing legal professionals better than any government authority might.

This therefore well-earned independence through self-administration is also reflected in their finances. As the tasks carried out are in the interest of all legal professionals

[46] For more details on how bars are involved in the legal education see II of this essay.

[47] BGH 18.4.2005 – AnwZ (B) 27/04, BB 2005, p. 1357.

[48] BGH 25.5.2019 – AnwZ 15/19, NJW-RR 2019, p. 1391; BGH 11.1.2016 – AnwZ 33/15; BVerfG 20.12.2017 – 1 BvR 2233/17, NJW 2018, p. 288.

governed by the BRAO, it seems only right to let those individuals fund bar associations. This is their obligation as bar associations will generally not and are not meant to engage in economic activities and it is particularly laid out in the BRAO. On the other hand, one would expect greater financial governmental support in exchange for the bar association's contribution to sovereign tasks. To some it may seem unjust that individual lawyers have to fund an organisation which they might structurally oppose or that lawyers substantially contribute to the maintenance of electronic infrastructure (like the beA) or to the education of trainees employed by the state. However, the legal profession will eventually profit from all tasks carried out by a bar association, individually or as a whole. Keeping this in mind, the structural framework of the BRAO seems the right tool for bar associations to tackle future challenges.

The professional profile of the lawyer in Germany: An approach to the innermost professional profile

Julia Lefèvre

I. Introduction and initial situation

For professionals[1], the professional profile and image of the lawyer seem to be clearly defined. Both, the term "professional profile"[2] and lawyer related professional profile, are used as a matter of course, clearly understood, as examples show[3].

The term “professional profile of a lawyer” is often used as a specific legal term. A look at the law and the case law on the legal profession, especially that of the Federal Constitutional Court, as well as at the literature, shows that the above-mentioned terminology and its meaning are not as clear and unambiguous from a scientific point of view as they appear to some professionals. In the literature, one often finds undefined types of usage and different understandings of the "professional profile of the lawyer.”[4]

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[1] For reasons of better readability, the language forms male, female and diverse (m/f/d) are not used simultaneously. All references to persons apply equally to all genders.

[2] Professional profile stands for the German word Berufsbild. Berufsbild can be translated to job/occupational/professional profile/image. In this elaboration, professional profile is considered the most appropriate translation for Berufsbild.

[3] In the self-conception of the German lawyer Jens Kreiber, the latter assumes on his website an apparently clear definition and derivation of the lawyer's professional profile. On his Website, the professional profile is mentioned and described in relation to the standardizations §s 1-3 Federal Lawyers´ Act (BRAO/Bundesrechtsanwaltsordnung). It is literally formulated there: "*The regulations of §s 1-3 contained therein should therefore be placed in front of the information about my activity as an introduction:*" Jens Kreiber, https://www.kanzlei-kreiber.de/berufsbild/ (last accessed 17 July 2021). In contrast to that, the law firm website of WILDE BEUGER SOLMECKE Rechtsanwälte Partnerschaft mbB, https://www.wbs-law.de/karriere/rechtsanwalt/ (last accessed 17 July 2021), their website heading “Berufsbild des Rechtsanwalts” (mentioned as career option), shows, among other things, the tasks and areas of responsibility of a lawyer without referring to any §s.

[4] Thus, Hans-Jürgen Ahrens, Anwaltliches Berufsrecht, 1st ed. 2017, p. 28, uses the aforementioned term as a chapter heading (§ 5). In this chapter, he reports on personal service provision according to § 613 German Civil Code (BGB), the pressure of competition and, among other things, in a comparative law manner, on the uniform status of lawyers. He concludes by writing briefly on the broad spectrum of lawyers' activities. Volker Römermann/Wolfgang Hartung, Anwaltliches Berufsrecht, 2nd ed. 2018, p. 39,

Ambiguities and subsequent explanatory approaches are also seen and worked out within the framework of scientific discussion of the topic.[5] In addition to these exemplary explanatory approaches, it is indisputable that the legal profession has changed in recent decades and that further trends of change are to be expected. This is often attributed to new professional contents and working methods[6] that (would) change the legal profession.[7] In addition, the lawyer advice/legal services market is in perspective undergoing a deeper demographic change: Among other things, away from the formerly male-dominated professional field to a future one, dominated by women, in the medium to long term. Furthermore, with the prospect of fewer future professionals.[8] In 2019, the Frankfurter Allgemeine Zeitung (F.A.Z.) headlined on the increasing femininity in the legal profession: "For the first time, more women than men are becoming lawyers — the professional profile facing change." They pointed out that in Germany there is still a need for small and medium-sized law firms to make the legal profession more attractive for women.[9]

Stürner already warned in 2005 that the legal profession was a "profession without its

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also choose the term as the heading of the 1st chapter in the 3rd part "Berufsbild des Rechtsanwalts" they deal there in more depth with the lawyer as an independent organ of the administration of justice and the profession of the lawyer as a free, non-commercial profession.

[5] Rainhard Gaier, Berufsrechtlichen Perspektiven der Anwaltstätigkeit unter verfassungsrechtlichen Gesichtspunkten, BRAK-Mitt. 2006, p. 1 et seq.; Rüdiger Zuck, Das innere Berufsbild: Hürde und Hilfe für das anwaltliche Selbstverständnis?, AnwBl. 2000, p. 3; Cornelius, Wefing, Der Wandel im Berufsbild der Anwaltschaft, 1st ed. 2021, p. 18 et seq.; more detailed discussion of the explanatory approaches under II.

[6] Here, the advancing industrialization and other digitalization aspects of the legal service market are also increasingly mentioned as having an influence on working methods, above all the debate about legal tech, which has been increasingly conducted in Germany since around 2015/2016. On the development of legal tech sector in Germany, see also: Stephan Breidenbach/Florian Glatz, Rechtshandbuch Legal Tech, 2nd ed. 2021, p. 1 et seq.

[7] Matthias Kilian, Wandel des juristischen Arbeitsmarkts — Wandel der Juristenausbildung?, AnwBl. 2016, p. 698.

[8] Matthias Kilian, Juristenausbildung, 1st ed. 2015, p. 100. In 2019, of the 162,240 lawyers applied to practice in Germany, 57,999 were female (Matthias Kilian/René Dreske, Statistisches Jahrbuch der Anwaltschaft 2019/2020, 1st ed. 2020, p. 27 + 34). Of 4,752 lawyers admitted to the Bar in 2018, 2,429 were female (ibidem, p. 41). Of the law students in Germany in 2018/2019, 56.2% were female, namely 65,677 students (ibidem, p. 168).

[9] Frankfurter Allgemeine Zeitung, Erstmals werden mehr Frauen als Männer Anwälte, edition of 17 May 2019, p. 17.

own basic concept."[10] Due to the changing of the legal profession, Hellwig called for "redefining the professional image" and "concentrating forces on a modern professional profile. He stated it is time to "throw off ballast"[11] and demanded: "The profession must redefine its professional image."[12] Prütting sees a change in the professional profile of the lawyer from the litigator to the extrajudicial conflict solver. However, in his opinion alternative conflict solutions will not completely replace the ways of classic litigation before state courts.[13]

With regard to the German Federal Bar Association (BRAK)[14], no definition for using the term "professional profile of the lawyer" can be found in its external communication. In its statements/position papers, the Bar increasingly refers to the "professional profile of the lawyer" and then usually refers to the term "organ of the administration of justice."[15] Organ of the administration of justice is regulated in § 1 of the BRAO[16], as explained later

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[10] Rolf Stürner, Die Anwaltschaft -— ein Berufsstand ohne eigene Grundkonzeption?, Festschrift Busse, 2005, p. 297 et seq.

[11] Hans-Jürgen Hellwig, Das Konzept des anwaltlichen Berufsbilds Worauf die Anwaltschaft eine Antwort finden muss — und warum Standesrichtlinien nicht helfen, AnwBl. 2008, p. 652.

[12] Hans-Jürgen Hellwig, Das Konzept des anwaltlichen Berufsbildes: Was auf die Anwaltschaft eine Antwort finden muss — und warum Standesrichtlinien nicht helfen, StudZR 2009, p. 13.

[13] Hans Prütting, in: Recht ohne Grenzen, Festschrift für Athanassios Kaissis zum 65. Geburtstag, 2012, p. 797 et seq.

[14] According to its own statements, among others, used in Opinion No. 15, February 2021, p. 1 found at: https://www.brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2021/februar/stellungnahme-der-brak-2021-15.pdf (last accessed 17 July 2021) BRAK describes itself as follows: "The Federal Bar Association is the umbrella organization of the lawyers' self-administration. It represents the interests of the 28 bar associations and thus of the entire legal profession in the Federal Republic of Germany with approximately 166,000 lawyers vis-à-vis authorities, courts and organizations – on a national, European and international level."

[15] For example, in the statement of the BRAK no. 2021/15, https://www.brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2021/februar/stellungnahme-der-brak-2021-15.pdf (last accessed 26 July 2021). In the statement, no. 2021/10, the BRAK speaks several times of the professional profile of a lawyer, but never defines it properly: https://www.brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2021/februar/stellungnahme-der-brak-2021-10.pdf (last accessed 26 July 2021).

[16] The Federal Lawyers' Act (BRAO) is the professional law for lawyers and includes status-forming regulations, such as admission, organization in bar associations, legal

under III. 2. a.

Due to the partly different and undefined use of the term (lawyer's) professional profile, it is questionable what the so frequently used term comprises and how it can be understood. The subject of this study is therefore to first approach the concept of the professional profile from an abstract point of view, in order to then come closer to the lawyer's professional profile in concrete terms from this definitional approach.

II. The term "professional profile" in the jurisprudential sense

There is no legal definition of the term "professional profile" in written German law. A general definition of the term describes the concept of a professional profile as "the totality of all characteristics and activities that constitute a profession"[17]. The Duden[18] formulates as follows: Professional profile is the "image that someone has of a profession, especially with regard to training, activity and opportunities for advancement."[19] According to these word definitions, the concept of profession is mentioned in both and seems to be the point of origin to the former definitions of the professional profile.

The term "profession" is constitutionally protected in article 12 of the Basic Law (Grundgesetz) for the Federal Republic of Germany. It protects the freedom of profession. From a lawyer's point of view, therefore, the protection of the individual lawyer's freedom of occupation is of particular significance in terms of constitutional law. Contrary to the text of article 12 (1) Basic Law, the provision guarantees a uniform fundamental right that encompasses the choice and practice of the profession.[20] It is fundamentally subject to the free and regulated self-determination of the individual.[21] Therefore, the choice and practice of a lawyer's profession is protected by article 12 Basic Law.

According to the traditional and generally accepted definition, a profession is "any activity of a permanent nature that serves to create and maintain a livelihood."[22] *The* term

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status, and the rights and duties of lawyers.

[17] https://www.wortbedeutung.info/Berufsbild/, (last accessed 15 June 2021).

[18] One well-known dictionary with Thesaurus in Germany, see.

[19] Duden Online, https://www.duden.de/rechtschreibung/Berufsbild, (last accessed 14 July 2021).

[20] Joachim Wieland, in: Horst Dreier, Grundgesetzkommentar, 3rd ed. 2013, article 12, marginal no. 48.

[21] BVerfGE 50, 16 (29); 76, 171 (188, 192); 108, 150 (158).

[22] BVerfGE 7, 377 (397); 54, 301 (313); 102, 197 (212); 105, 252 (265).

"occupation" is to be interpreted broadly.[23]

The Federal Constitutional Court recognizes the legislature's basic authority to fix professional profiles.[24] According to unanimous opinion, this can be understood in such a way that the legislator can determine certain professional profiles by law and, on the basis of the qualification requirements provided for, may narrow the free choice of profession under article 12 of the Basic Law in this area or exclude it by means of objective requirements regulations.[25] Objective or subjective admission requirements set by the legislature fix professional profiles. According to the prevailing opinion, this interferes with the scope of protection of article 12 (1) Basic Law.[26] In principle, the legislator is entitled to create professional profiles by means of behavioral, training, licensing and examination requirements and regulatory provisions, among other things, so that these regulations can then be perceived in their entirety as a normatively prescribed, ideal occupational profile.[27] This leads to a monopolization and classification of professional activities[28] — in this case of the lawyer. Which means that the legislator is allowed to regulate the profession of the lawyer by[29] or on the basis of a law[30]. Thus, he imposes certain requirements on the profession of the lawyer with regard to the choice of profession and the practice of the profession. Prohibitions on practicing certain other activities in addition to the profession of lawyer (so-called incompatibilities[31]) can also be part of this, because they serve to clarify the characterization of the profession and they

[23] BVerfGE 14, 19 (22); 68, 272 (281).

[24] BVerfGE 13, 97, (106); 17, 232, (241); 54, 301, (314); 59, 302, (315); 75, 246, (265 et seq.); 78, 179 (193).

[25] Cf. BVerfGE 59, 302 (316), Gerrit Manssen, in: Hermann v. Mangoldt/Friedrich Klein/Christian Starck, Grundgesetzkommentar, 7th ed. 2018, article 12, marginal no. 45 et seq.

[26] Joachim Wieland, in: Horst Dreier, Grundgesetzkommentar, 3rd ed. 2013. article 12, marginal no. 68.

[27] Jörn Axel Kämmerer, in: Ingo v. Münch/Philip Kunig, Grundgesetzkommentar, 7th ed. 2021, article 12, marginal no. 29.

[28] Gerrit Manssen, in: v. Hermann Mangoldt/Friedrich Klein/Christian Starck, Grundgesetzkommentar, 7th ed. 2018, article 12, marginal no. 46.

[29] I.e. by parliamentary act.

[30] I.e. by way of norm setting delegated by the parliamentary legislator to a legislator of ordinances or statutes, see also Matthias Kilian/Ludwig Koch, Anwaltliches Berufsrecht, 2nd ed. 2018, p. 13, marginal no. 31.

[31] On this, see: Julia Lefèvre/Maximilian Roth, Zur Zulassung als Rechtsanwalt bei (un)vereinbaren weiteren beruflichen Tätigkeiten, in: Freiheit der wirtschaftlichen Tätigkeiten in der Polnischen und Deutschen Rechtskultur – eine rechtsvergleichende Perspektive, 1st ed. 2021, p. 283 et seq.

can clearly delimit the professional profile.[32] This serves precisely to protect the professional profile and thus also the profession itself from interpenetration and mixing with characteristics of other professional activities.[33]

In Germany, the central point of reference for regulation by professional law has always been the individual lawyer, which is historically justified[34]: This follows from the fact that national professional law is status-related law. It chooses the lawyer as a member of a state-regulated profession as the point of reference for the rights and duties affecting only this professional.[35] This also means that the lawyer's normatively regulated professional profile as such only results from the tasks which in turn result from the normative rights and duties of the regulated professional law and which are attributed to the lawyers by the legal system under the respective social framework conditions.[36]

With a view to constitutional jurisprudence, a definitional approach to the job description can be taken within the framework of the so-called “Berufsbildlehre” (professional profile doctrine) of the Federal Constitutional Court. In its so-called “Apotheken-Urteil” (pharmacy ruling), the Federal Constitutional Court distinguishes between a legally fixed and a traditional professional profile,[37] whereby "the concept of a professional profile serves to clarify the specific content and contours of a profession."[38]

The legally fixed professional profile (or normative professional profile) shall be the professional profile that is based on the legal classification or fixations. The traditional professional profile should be the professional profile that is based on certain traditions or certain sociologically ascertainable professional developments.[39]

This distinction and definition can be seen as too narrow and misleading.[40] Therefore, it is more appropriate, that "the concept of the professional profile is the implicit prerequisite that the concept of the profession and freedom of the profession are in fact based on a

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[32] Helge Sodan/Jan Ziekow, Grundkurs Öffentliches Recht, 9th ed. 2020, § 40, marginal no. 12.

[33] BVerfGE 21, 173 (181).

[34] Matthias Kilian/Ludwig Koch, Anwaltliches Berufsrecht, 2nd ed. 2018, marginal no. 39, there also on the historical justification of the connecting factor to the individual lawyer as a professional.

[35] Matthias Kilian/Ludwig Koch, Anwaltliches Berufsrecht, 2nd ed. 2018, p. 17, marginal no. 40.

[36] BVerfGE 87, 287 (320).

[37] BVerfGE 7, 397 with reference to BVerwGE 2, 89 (92); 4, 250 (254 et seq.)

[38] Rupert Scholz in: Theodor Maunz/Günther Dürig, Grundgesetz-Kommentar, Werkstand: 94. Ergänzungslieferung Januar, 2021, article 12, marginal no. 281.

[39] Rupert Scholz in: Theodor Maunz/Günther Dürig, Grundgesetz-Kommentar, Werkstand: 94. Ergänzungslieferung Januar 2021, article 12, marginal no. 281.

[40] Rupert Scholz in: Theodor Maunz/Günther Dürig, Grundgesetz-Kommentar, Werkstand: 94. Ergänzungslieferung Januar, 2021, article 12, marginal no. 284.

variety of professional types that are just as predetermined as they are legally structured. These professional concepts or professional profiles concretize the respective professional content, whereby the broad (open) concept of the profession in article 12 (1) of the Basic Law guarantees the factually necessary elasticity in order to do justice to every professional profile (both typical and atypical) as far as possible." However, it must be noted that the concept of professional profile has a "basic sociological quality," i.e., it is primarily sociological and not legal in nature.[41] Therefore, the differentiation made by the Federal Constitutional Court in the above-mentioned judgment between legal (normative) and traditional professional profile is too narrow. The reason for this is that it apparently recognizes extra-legal professional profiles only on the basis of tradition, i.e. the development or shaping of extra-legal professional profiles in the future is (apparently) not included in the consideration. In addition, the differentiation is also misleading "because it does not clarify the potential contrast between extra-legal-liberty-constituted professional profiles and legal-liberty-limiting professional profiles."[42] Therefore, it is better to distinguish between autonomous and heteronomous professional profile**.** The autonomous professional profile is the one based on the liberal self-realization of the professionals involved. Their autonomy, which freely forms and shapes the profession, (primarily) determines the respective professional content or the respective professional profile.[43] In addition, there is the heteronomous professional image, which is already legally constituted or ordered by certain legislation, jurisdiction, etc.[44]

Some critical voices have been raised against the “Berufsbildlehre” with the objection that the power granted to the legislature to fix professional profiles threatens to render article 12 of the Basic Law idle.[45] However, it must be countered that such an outlined and undertaken fixation of professional profiles is in many cases appropriate and unavoidable. "In view of the great importance of the professional system for the community, not only provisions concerning certain modalities of exercise, but also differentiated and appropriate regulations of subjective prerequisites of professional admission are downright necessary as part of the legal order of an occupational profile.”[46]

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[41] Rupert Scholz in: Theodor Maunz/Günther Dürig, Grundgesetz-Kommentar, Werkstand: 94. Ergänzungslieferung Januar 2021, article 12, marginal no. 284.

[42] Rupert Scholz in: Theodor Maunz/Günther Dürig, Grundgesetz-Kommentar, Werkstand: 94. Ergänzungslieferung Januar, 2021, article 12, marginal no. 284.

[43] Rupert Scholz in: Theodor Maunz/Günther Dürig, Grundgesetz-Kommentar, Werkstand: 94. Ergänzungslieferung Januar, article 12, marginal no. 284.

[44] Rupert Scholz in: Theodor Maunz/Günther Dürig, Grundgesetz-Kommentar, Werkstand: 94. Ergänzungslieferung Januar, article 12, marginal no. 284.

[45] Michael Kleine-Cosack, Grundrechtsdefizite in der Judikatur zu den freien Berufen – Bedeutungsverlust des BVerfG, DVBl. 2016, p. 487, spoke of a "mothballed“ case of traditional professional jurisprudence.

[46] Helge Sodan/Jan Ziekow, Grundkurs Öffentliches Recht, 9th ed. 2020, § 40, marginal

In the literature, as briefly reported at the beginning, other definitional approaches can be found. Some of which are congruent with the above-mentioned approach.

Zuck distinguishes between inner and outer professional image, whereby these two are mutually dependent. Historically, he shows that the development of a professional profile, in the absence of a normative definition[47] resulted from the inner professional profile, i.e. from the ideas of the lawyers but also from the expectations of society towards a lawyer, plus the traditional guidelines determining the respective time, certain interests, and conclusions from professional standards, professional ethics and policy. It was not until 1959 that the professional profile of the lawyer was defined by the legislator, essentially in §s 1-3, 43 et.seq. BRAO, in its choice and practice of the profession. However, this is not sufficient for the purpose of a comprehensive definition of the profession. Therefore, Zuck compares the (external) professional profile from §s 1-3, 43 et seq. of the BRAO with the internal (inner) professional profile of the lawyer. The latter is formed from the expectations, ideas on the one hand of the legal profession itself but also of those seeking advice, what one can expect from a good lawyer, and develops as a self-image of what a lawyer does. This happens from a self-determined force from the legal profession as a body.[49] However, this developed self-image and inner professional profile also has consequences, because it has an effect on the external professional profile and thus also on the legal system. Therefore, the relationship between freedom and order is being redefined.[50]

Gaier presents the Federal Constitutional Court's view and criticizes the fact that a clear professional profile cannot be found; it has yet to be developed.[51] He sees in the case law of the Federal Constitutional Court the distinction between a functional and an organizational professional profile, whereby the court in the "sometimes" most (with one exception[52], which is not suitable for a comprehensive description of the legal profession) of its cases always uses the organizational professional profile to justify its decisions. Gaier, however, does not explain the two distinctions in more detail. He derives his comprehensive professional profile from the relationship of the lawyer's activity to the rule of law, in the context of which he discusses the lawyer's tasks in safeguarding justice,

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no. 12; Hans-Jürgen Papier, Das anwaltliche Berufsrecht im Lichte der Rechtsprechung des Bundesverfassungsgerichts, BRAK-Mitt., 2005, p. 50.

[47] Note: until the Federal Lawyers' Act, BRAO, 1959, no external/normative professional profile was defined, as it is today in the above-mentioned §s.

[49] Rüdiger Zuck, Das innere Berufsbild: Hürde oder Hilfe für das anwaltliche Selbstverständnis?, AnwBl. 2000, p. 3 et seq.

[50] Rüdiger Zuck, Das innere Berufsbild: Hürde oder Hilfe für das anwaltliche Selbstverständnis?, AnwBl. 2000,p. 3 et seq.

[51] Reinhard Gaier, Berufsrechtliche Perspektiven der Anwaltstätigkeit unter verfassungsrechtlichen Gesichtspunkten, BRAK-Mitt. 2006, p. 2.

[52] BVerfGE 38, 105 (119) = NJW 1975, 103.

and he includes independence, understood in the sense of free advocacy, as a decisive significance (for the professional profile). According to Gaier, the above-mentioned reference to the rule of law can also explain the important role of the lawyer within the framework of the administration of justice and the basic values of the lawyer (independence, confidentiality, straightforwardness).[53] His view encompasses the constitutional (normative) perspective; an inner professional image as mentioned by Zuck or an autonomous image as defined by Scholz remains absent due to the focused consideration on the constitutional basis.

Wefing differentiates between three perspectives, "which in their synopsis should approximate the current professional profile of the legal profession."[54] These three perspectives are interdependent and, according to Wefing, "essentially interrelated."[55] He distinguishes between the normative professional profile, which is determined by the law, the self-image of the legal profession, and the factual professional profile, which emerges from society in order to make use of a derivation of a comprehensive professional profile of the legal profession.[56] "The change in the professional profile of the legal profession, however, is not limited to its normative configuration, but is also perceived as a fact by the lawyers themselves and, not least, by society."[57] It is true that normatively, i.e., the "law establishes certain regulations that deal with the position of the lawyer and prescribe a normative professional profile. Such regulations are necessarily general and lose binding force and enforceability with increasing abstraction. (...) Furthermore, the (lack of) enforceability of such regulations is related to the question of the actual perception of a profession or the acceptance of a legally prescribed professional profile. In this respect, a completely different picture may emerge if the societal perspective is chosen, which in the last part of the explanations is intended to enable conclusions to be drawn about the de facto professional profile. Finally, the legal profession itself plays a special role: Its (remarkably heterogeneous) self-image stands, as it were, between the legal claim of the normative professional profile on the one hand and the social reality of the de facto professional profile on the other.[58] His three professional profile perspectives include legislators (normative), society (factual), and the legal profession itself (self-image), which then condense into a comprehensive professional profile.

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[53] Reinhard Gaier, Berufsrechtliche Perspektiven der Anwaltstätigkeit unter verfassungsrechtlichen Gesichtspunkten, BRAK-Mitt. 2006, p. 4.

[54] Cornelius Wefing, Der Wandel im Berufsbild der Anwaltschaft, 1st ed. 2021, p.18 et seq.

[55] Cornelius Wefing, Der Wandel im Berufsbild der Anwaltschaft, 1st ed. 2021, p. 18.

[56] Cornelius Wefing, Der Wandel im Berufsbild der Anwaltschaft, 1st ed. 2021, p. 18 et seq.

[57] Cornelius Wefing, Der Wandel im Berufsbild der Anwaltschaft, 1st ed. 2021, p.17.

[58] Cornelius Wefing, Der Wandel im Berufsbild der Anwaltschaft, 1st ed. 2021, p.17.

Interim conclusion:

All of the above explanatory approaches complement each other to form a condensed or comprehensive abstract concept of the professional profile, which is based on the concrete professional profile of the lawyer (see III.). The approaches show different perspectives, all of which comprehensively determine the professional profile as such and condition each other in the process. All approaches assume several dimensions or components of a comprehensive professional profile, except for Gaier, who is mainly concerned with the normative professional profile from a constitutional law perspective. All approaches start from a normative one. The normative (or, according to Zuck, external, according to Scholz, heteronomous) professional profile is determined "from outside", "externally", by the legal provisions as well as the case law (which concretizes them). This normative professional profile also includes the functional as well as the organizational professional profile. That is if one understands as functional the same activities and tasks of the professional and as organizational the same roles, status and legal positions.

The inner professional profile of the profession is shaped by the self-image of the professionals, their expectations as well as ideas. In addition, the inner professional profile is shaped by societal influences and is co-determined by the power of self-determination of the legal profession.

The understanding of the job description underlying this study can therefore be formulated as follows:

A professional profile can develop autonomously, from tradition and experience and needs of the realities of life. It is then normatively regulated if the necessity occurs. These normative regulations, which usually develop from the above-mentioned empirical values or from cases of conflict judged by case law, are intended to provide orientation for the professionals and to distinguish and protect them from other professions. These normative specifications are to be seen as a guideline for the individual, ideal professional action and behavior of the individual professional. In addition, however, there are also rules and attitudes that influence the professional profile due to the lived tradition of practicing the profession: In this case created by lawyers themselves, traditional rules or rules and attitudes that develop due to new and future realities of life (comparable to an operational practice or customary law). An inner professional profile is formed from the self-image of the lawyers and the influences of society.

Figuratively speaking, it can be assumed that there is an inner core (the inner professional profile), which is influenced by multifactorial factors or factors that form the professional profile. The inner professional profile can be condensed from several into an overall inner one, since there are several perspectives and actors that determine the inner professional profile. Precisely because the inner professional profile can be so diverse due to the heterogeneity of the professionals, it is necessary to adhere to a uniform (normative) professional profile externally that is determined by common (normative) values and expectations of the actors of the inner professional profile. It is

important, precisely for the sake of uniformity, to create a normative professional profile, which is used as an orientation for the respective professionals (i.e. as a guideline for the behavior of the professionals with regard to their function, role and activities as well as rights and duties). However, the normative professional profile must be accepted by the professionals. Too great a divergence between the internal (inner) and external (normative) professional profile can lead to "idling"/evasion of the regulations of the normative professional profile in practice.

Only through acceptance and identification with the rights and duties standardized therein will lawyers be able and willing to perform their roles in accordance with the standards. In this case, a professional profile as a model or program will also be "viable"/enforceable. A comprehensive professional profile is therefore also dynamic[59], changing like society itself, in order to be able to do justice to the different realities of life, the respective spirit of the times and technical changes or other challenges (e.g. through the occurrence of a pandemic).

III. The professional profile of a lawyer in concrete terms

In order to take a closer look at the lawyer's professional profile, it is therefore advisable to first concentrate on the normative provisions that standardize the position, function and tasks as well as the rights and duties of the lawyer in Germany. In addition to the constitutional considerations, the professional regulations of §s 1-3, 43 et seq. BRAO, which, according to the prevailing opinion, are regarded as standards that define the profession. First, the fundamental legal status of the lawyer will be examined.

1. Constitutional considerations and influences on the legal profession and the professional profile

a. Fundamental legal status of the lawyer

There is no explicit, specific and precise constitutional provision in the Basic Law concerning the profession, position or role of the lawyer. The lawyer also does not find a literal entry into the Basic Law. The legal profession as a concept is merely enumerated as a subject of concurrent legislation in articles 70, 74 (1) no. 1 of the Basic Law. So far, this has not led to any legal standardization. This is in contrast to the profession of judges, whose independence and legal status are standardized in the Basic Law in articles 97, 98 and whose constitutional quality can also be seen in articles 20 (2), 33, 22.

[59] Cf. Felix Busse, in: Martin Henssler/Hanns Prütting, BRAO, 5th ed. 2019, Einleitung, marginal no. 65.

According to prevailing opinion, it is undisputed that the lawyer is legally institutionalized within the framework of the principle of the rule of law[60] and by the provisions of articles 2 (1), 3, 12, 19 (4) and 103 (3) of the Basic Law.[61] The above-mentioned provisions in the aforementioned articles are the common basis for the constitutional safeguarding of the position of the lawyer in Germany.[62] The Basic Law presupposes the fact, that the profession of the lawyer and thus the chance of its use by the population is considered indispensable.[63]

b. Free advocacy as an outcome of the principle of the rule of law

The free advocacy ("Freie Advokatur") as a concept goes back to R. von Gneist. This resulted in the transformation of the "unfree" state-servant-like advocates into a free profession independent of the state.[64] The efforts for the freedom of the advocacy aimed at lifting the advocacy from the status of a civil servant and at standardizing the free access to the profession of a lawyer. The latter was achieved in 1878 within the framework of the Lawyers' Code adopted by the Reichstag[65] (this came into force in the German Reich on October 1, 1878[66]). One of the main principles was the independence

[60] The principle of the rule of law is a recurring principle that characterizes the Constitution and has found expression in several articles of the Basic Law, including articles 1, 19 (4), (20), (97), (103). Its purpose is to establish justice, the validity of the law and respect for human dignity, with regard to state authorities. The principle of the rule of law therefore also includes a functioning administration of justice. More about this subject: Katharina Wind, Der Rechtsanwalt als Arbeitnehmer, 1st ed. 2018, p. 39 with further references.

[61] Gerhard Hartstrang, Der deutsche Rechtsanwalt, 1st ed. 1986, p. 61; Michael Kleine-Cosack, BRAO, 8th ed. 2020, Einleitung, marginal no. 105.

[62] Gerhard Hartstrang, Der deutsche Rechtsanwalt, 1st ed. 1986, p. 62.

[63] Michael Kleine-Cosack, BRAO, 8th ed., Einleitung, marginal no. 105.

[64] Rudolf v. Gneist, Die freie Advokatur, Die ersten Forderungen aller Justizreform in Preußen, 1867.

[65] Former parliament.

[66] With the entry into force, the legislator also decided in favor of the conceptual orientation of the legal profession on the concept of the lawyer, which then also overcame the dichotomy of the legal profession into procurators and advocates that had prevailed in large parts of Germany (and Europe); moreover, the legal recognition that the legal profession is regarded as a profession independent of the state dispensed with the needs test that had existed until the entry into force. cf. Matthias Kilian/Ludwig Koch, Anwaltliches Berufsrecht, 2nd ed. 2018, Einleitung, marginal no. 8.

of lawyers from the state.[67]

The free advocacy is also described as an iridescent term and partly politically charged, which is thus actually unsuitable for a legal concept.[68] According to its essence and reason, it is of decisive importance for the profession of the lawyer. Especially since through it, the independence of his doing and being can be seen in the core of his activity: "In order for a lawyer to be able to contribute to a functioning constitutional state, it is necessary that he actually represents the interests of his clients. Ensuring this is the very task of lawyer independence."[69] “In the German Basic Law, the allocation of functions for the practice of the legal profession is not simply left to the legislature. Rather, it is overarched by the constitutional principles of the rule of law and the free advocacy, which is not at the simple disposition of the ordinary legislator, much less the legislator of statutes."[70]

The Federal Constitutional Court[71] was also described as the "driving force and liberalization engine” for lawyers' for the professional law[72]. It accorded "fundamental objective importance"[73] to free advocacy and stated that the lawyer "exercises a free profession which in principle excludes state control and paternalism.”[74]

The principles of free advocacy are a necessary component of the administration of justice in a democratic state. Effective legal protection can only be guaranteed by and with an independent legal profession free from state influence. I.e. the German constitutional state cannot function without independent lawyers.[75]

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[67] Cf. Volker Römermann/Wolfgang Hartung, Anwaltliches Berufsrecht, 3rd ed. 2018, p. 6, marginal no. 5 et seq.

[68] Kai v. Lewinski, Grundriss des Anwaltlichen Berufsrecht, 3rd ed. 2021, p. 29.

[69] Reinhard Gaier, Berufsrechtliche Perspektiven der Anwaltstätigkeit unter verfassungsrechtlichen Gesichtspunkten, BRAK-Mitt. 2006, p.3.

[70] Felix Busse, in: Martin Henssler/Hanns Prütting, BRAO, 5th ed. 2019, Einleitung, marginal no. 65.

[71] Which was initiated by parts of the legal profession due to the so-called Bastille decisions, the end of previously prevailing professional codes of conduct; on the so-called Bastille decisions: BVerfGE 76, 171 see also Matthias Kilian/Ludwig Koch, Anwaltliches Berufsrecht, 2nd ed. 2018, p. 7, marginal no. 15 et seq.

[72] Hans-Jürgen Papier, Das anwaltliche Berufsrecht im Lichte der Rechtsprechung des Bundesverfassungsgerichts, BRAK-Mitt. 2005, p. 50.

[73] BVerfGE 110, 226 (253 et seq.).

[74] BVerfGE 34, 293 (302).

[75] Reinhard Gaier, Berufsrechtliche Perspektiven der Anwaltstätigkeit unter verfassungsrechtlichen Gesichtspunkten, BRAK-Mitt. 2006, p.7.

2. The normative professional profile

The norms that value-fill or concretize the profession of the lawyer are initially considered to be §s 1-3 BRAO. These are intended to "make a programmatic statement and describe the lawyer's professional profile or model"[76]. In this context, §s 1-3 BRAO do not constitute a basis for intervention on the basis of which courts, bar associations or authorities can limit the lawyer's freedom to exercise his profession.[77] They can, however, be included in the interpretation of those norms, which regulate the activities of the lawyer.[78] However, the meaning of §s 1-3 BRAO, which have remained unchanged in their wording and position in the law since 1959, is the subject of much debate[79], since the provisions do not appear to be clear and unambiguous.

[76] Felix Busse, in: Martin Henssler/Hanns Prütting, BRAO, 5th ed. 2019, § 1, marginal no. 21. Christian Wolf, describes the meaning of § 1 BRAO "*together with §s 2 and 3 BRAO, the provision contains a programmatic approach that should shape the image of the legal profession and provide the basic telos of interpretation of the professional code*", in: Reinhard Gaier/Christian Wolf/Stephan Göcken, Anwaltliches Berufsrecht, 3rd ed. 2020, § 1 BRAO; marginal no. 1. Michael Kleine-Cosack sees the above-mentioned §s as a playground for idealistic but non-political interpretations of the professional image and considers these provisions to be controversial and overestimated provisions on the lawyer's professional image, which are contradictory, hardly to be surpassed in vagueness, out of touch with practice and completely outdated, in: BRAO, 8th ed. 2020, Vorbemerkung § 1, marginal no. 1.

[77] Christian Wolf, in: Reinhard Gaier/Christian Wolf/Stephan Göcken, Anwaltliches Berufsrecht, 3rd ed. 2020, § 1, marginal no. 2; Michael Kleine-Cosack, BRAO, 8th ed. 2020, Vorbemerkung § 1, marginal no. 1.

[78] Christian Wolf, in: Reinhard Gaier/Christian Wolf/Stephan Göcken, Anwaltliches Berufsrecht, 3rd ed. 2020, § 1, marginal no. 2.

[79] E.g. according to Michael Kleine-Cosack these regulations are "a playground for idealistic, but non-political professional image interpreters, (...) controversial as well as overestimated provisions on the lawyer's professional image, (…) which are contradictory and not to be surpassed in indeterminacy, and are out of touch with practice and completely outdated"; Michael Kleine-Cosack, BRAO, 8th ed. 2020, Vorbemerkung § 1, marginal no. 1.

a. The lawyer as an independent organ[80] of the administration of justice

The formula "independent organ of the administration of justice" that is mentioned in § 1 BRAO is an undefined legal term. Over the years and through the eventful history of the legal profession, this term has undergone a change of meaning and has been the subject of much discussion ever since.[81]

The term "independent agent of the administration of justice" is specific to German law and has only been mentioned in the BRAO since 1959, but historically it was already a formula used[82] before that, whose development can be traced back to the liberalization of the legal profession in the mid-19th century. Although the term "organ of the administration of justice" is not used in the RAO of 1878 itself, it was not unknown even then.[83] In the historical context, the development of the legal status of the lawyer as an independent organ of the administration of justice goes back to freeing the legal profession from state ties and control.[84] There is much debate about the meaning of the term organ of the administration of justice. The interpretation of the term has varied considerably over the past decades.

In older literature, it was argued, that the lawyer holds a public office due to the public law component of the lawyer's activity.[85]

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[80] The German term is organ, the BRAK translated it to agent, see: Federals Lawyer´s act (2011) https://brak.de/w/files/02_fuer_anwaelte/berufsrecht/brao_stand_1.6.2011_englisch.pdf (last accessed 12 August 2021); there is no current translation of the currently applicable BRAO. Because the word “organ” is important for the latter explanation in this chapter, the organ term will be used. Agent can be used as a synonym for organ, see: https://www.merriam-webster.com/dictionary/agent#other-words (last accessed 12 August 2021).

[81] For the legal-historical and legal-dogmatic derivation of the organ position as well as the non-legally standardized or undefined concept of the administration of justice, see: Martina Kunze, Der Rechtsanwalt als unabhängiges Organ der Rechtspflege, 2018, p. 93 et seq.

[82] On the early history of the organ formula and the history of the origin of § 1 BRAO see: Felix Busse, in: Martin Henssler/Hanns Prütting, BRAO, 5th ed. 2019, preliminary note § 1; Matthias Kilian, Der Rechtsanwalt als Organ der Rechtspflege – eine Spurensuche, AnwBl. 2019, p. 662 et seq.

[83] Mattias Kilian, Der Rechtsanwalt als Organ der Rechtspflege – eine Spurensuche, AnwBl. 2019, p. 662 et seq.

[84] Katharina Wind, Der Rechtsanwalt als Arbeitnehmer, 1st ed. 2018, p. 37.

[85] Evidence in: Werner Beulke, Der Verteidiger im Strafverfahren, 1980, p. 172, marginal

In a case law dating back to 1975, the Second Senate of the Federal Constitutional Court ruled that the lawyer held an "office-like position" due to his position as a member of a public body, although it later distanced itself from[86] this in a ruling by the First Senate of the Federal Constitutional Court.[87] Similar terms, which gave the appearance that the Federal Constitutional Court saw the legal profession as approximating the civil service, were, for example, that the lawyer was performing an "original task of the state"[88]. The number of judicial decisions in which the organ formula is used in, a largely popular manner is incalculable, and the different statements in the respective decisions[89] might suggest that the organ formula has been used as an all-purpose weapon in the case law of the courts of instance.[90]

Therefore, the use of the organ formula found criticism in the literature[91] and was described, for example, as "more than misleading[92]" "questionable" and "dark"[93].[94] These critical voices must be seen in context and above all also against the background of the above-mentioned case law.

From a historical point of view and with regard to the mentioned differences in the use of the term in case law, there is an objection to this concept that "hardly any term of the lawyer's professional law has been so misused in history" and that the position of an

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no. 83 et seq. For a historical account of the lawyer's position as a civil servant, see Jochen Taupitz, Standesordnungen der freien Berufe, 1st ed. 1991, p.114 et seq. and p. 24.et seq.

[86] BVerfGE 38,105 (199).

[87] BverfGE 63, 266 (284): According to this, duties of loyalty similar to those of a civil servant cannot be expected of a lawyer, thus the classification of the lawyer as an organ of the administration of justice does not constitute an element of intervention according to which a lawyer could be sentenced if he did not comply with the general model.

[88] BVerfGE 17, 376.

[89] See some examples in: Matthias Kilian, Der Rechtsanwalt als Organ der Rechtspflege – eine Spurensuche, AnwBl. 2019, p. 66 et seq.

[90] Matthias Kilian, Der Rechtsanwalt als Organ der Rechtspflege – eine Spurensuche, AnwBl. 2019, p. 666.

[91] Especially in the historical consideration of its use, cf. Felix Busse, in: Martin Henssler/Hanns Prütting, BRAO, 5th ed. 2019, § 1, marginal no. 25 et seq.

[92] Michael Kleine-Cosack, BRAO, 8th ed. 2020, § 2, marginal no. 22.

[93] Konrad Redeker, Freie Advokatur heute, NJW 1987, p. 2612.

[94] In contrast: Reinhard Gaier, Berufsrechtliche Perspektiven der Anwaltstätigkeit unter verfassungsrechtlichen Gesichtspunkten, BRAK-Mitt. 2006, p. 5, who pleads for understanding organ of the administration of justice in terms of the rule of law, because when the formula was included in the BRAO of 1959, the Basic Law was already in force, thus the term was neither obscure nor iridescent.

organ represents a danger for the free advocacy.[95] It has "turned into an independent legal justification and for interventions in the practice of the legal profession" in order to discipline the lawyer.[96] It is a formula with no content, which means nothing and consequently cannot limit anything.[97] Due to its obscure content, it could be used by anyone for any purpose, which is shown by historical observation.[98]

Contrary to these voices, it must be objected that even if it proves difficult to concretize the formula as an indeterminate legal term, this does not lead to a lack of content. At least on the basis of the reference to the rule of law in the activities of lawyers and the case law of the Federal Constitutional Court, a meaning of the term can be inferred and the formula is to be used only in this context.[99] I.e. the formulation characterizes the rule of law function of the activities of lawyers.[100]

The function of the organs of § 1 BRAO is therefore to be understood to mean "that the lawyer is a tool (Greek: organon) of the administration of justice and as such performs a purpose-related service in the special interest of an individual party, the reflex of which is to serve the administration of justice as such."[101] In this regard, the lawyer bears a joint responsibility for the concrete application of the law and for the proper development of the law.[102] The lawyer therefore fulfills a double function: on the one hand, in relation to the rule of law, to serve it in the realization of the law, therefore fulfills an objective and rule of law function.[103] On the other hand, in relation to his client, he is the person of trust and his task of acting as the client's representative in the administration of justice involves a subjective function.[104]

This double function as a party representative and an organ of the administration of

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[95] Franz Salditt, in: Eckhart Müller/Reinhold Schlothauer, Münchener Anwalts-Handbuch Strafverteidigung, 2nd ed. 2014, § 1, marginal no. 28.

[96] Renate Jaeger, Rechtsanwälte als Organ der Rechtspflege – Notwendig oder überflüssig – Bürde oder Schutz?, NJW 2004, p. 2.

[97] Konrad Redeker, Freie Advokatur heute, NJW 1987, p. 2612; Franz Salditt, in: Eckhart Müller/Reinhold Schlothauer, Münchener Anwalts-Handbuch Strafverteidigung, 2nd ed. 2014, § 1, marginal no. 28.

[98] Konrad Redeker, Freie Advokatur heute, NJW 1987, p. 2612.

[99] Felix Busse, in: Martin Henssler/Hanns Prütting, BRAO, 5th ed. 2019, § 2, marginal no. 33.

[100] Reinhard Gaier, Berufsrechtliche Perspektiven der Anwaltstätigkeit unter verfassungsrechtlichen Gesichtspunkten, BRAK-Mitt. 2006, p. 5.

[101] Matthias Kilian/Ludwig Koch, Anwaltliches Berufsrecht, 2nd ed. 2018, marginal no.11.

[102] Christof Bernhart, Die professionellen Standards des Rechtsanwalts, 1st ed. 2011, p. 14.

[103] Michael Kleine-Cosack, BRAO, 8th ed. 2020, § 1, marginal no. 6.

[104] Michael Kleine-Cosack, BRAO, 8th ed. 2020, § 1, marginal no. 6.

justice creates a tension, but it is not a contradiction[105], it only seems to collide[106]. The possibility ofusing a non-partisan lawyer[107], who represents the interests of the client in a competent manner, based on a high professional level, and ensures a legal dispute at a high level, within which all arguments of one side and the other can be presented and exchanged, corresponds to an appropriate balance of conflicting interests.[108] The lawyer serves both the interests of the parties and the administration of justice for the common good, in which he provides for legal control and balanced development of the law.[109] The lawyer acts for his client on an equal footing, i.e. on an equal footing with judges, public prosecutors and authorities.[110]

It is understandable that criticism arises with regard to the use of the misleading term "organ."[111] Even if one can recognize, as shown above in the sense of the function of the use and the meaning of the supporting role of the lawyer and his indispensable role in the constitutional state[112], one could have worked in the course of a BRAO reform for a conceptual disentanglement. More appropriately said, "the organ formula is after all well-meant, but badly made"[113], and/or simply formulated in a misunderstanding way.

In order to counter the invitation to the criticized and discussed misappropriation of the

[105] Stefan Peitscher, Anwaltsrecht, 2nd ed. 2017, p. 42, marginal no. 51.

[106] Matthias Kilian/Ludwig Koch, Anwaltliches Berufsrecht, 2nd ed. 2018, p. 23, marginal no. 11.

[107] Mandatory in proceedings with compulsory attorney.

[108] Stefan Peitscher, Anwaltsrecht, 2nd ed. 2017, p. 42, marginal no. 52.

[109] Stefan Peitscher, Anwaltsrecht, 2nd ed. 2017, p. 42, marginal no. 52 et seq. However, the role of the lawyer with regard to the further development of the law or in the formation of the law also seems to be still unclear, as there is too little academic discussion of this topic, see also Christian Wolf, in: Reinhard Gaier/Christian Wolf/Stephan Göcken, Anwaltliches Berufsrecht, 3rd ed. 2020, § 1, marginal no. 17.

[110] BVerfGE 34, 293.

[111] Felix Busse, in: Martin Henssler/Hanns Prütting, BRAO, 5th ed. 2019, § 1, marginal no. 25 et seq. who would have said goodbye to the term in the 1959 law due to the bad historical experience with it and the negative attitude from the literature. According to Michael Kleine-Cosack, BRAO, 8th ed. 2020, § 2, marginal no. 22: The lawyer exercises a free and independent profession not as an organ, but in the service of the administration of justice.

[112] For the protective function of the term clearly Renate Jaeger, Rechtsanwälte als Organ der Rechtspflege – Notwendig oder überflüssig – Bürde oder Schutz?, NJW 2004, p. 1 et seq.

[113] Matthias Kilian, Der Rechtsanwalt als Organ der Rechtspflege – eine Spurensuche. DstR-Beih 2019, p. 38; Kleine-Cosack therefore speaks of the lawyer exercising a free and independent profession not as an organ, but in the service of the administration of justice, Michael, Kleine-Cosack, BRAO, 8th ed. 2020, § 2, marginal no. 23.

wording of the organ[114], preference should be given to the term "legal profession as an organ of the administration of justice[115]"[116] or the wording used by the ECJ of the lawyer as co-creator of the administration of justice[117]. Alternatively, however, the respective norm user could still delete the term from the vocabulary in everyday business[118] or, however, these could then also be used with the understanding of the term as an explanation.

Whether a change of the norm from "organ" of the administration of justice to "services" of the administration of justice as Kleine-Cosack[119] mentions would be legally meaningful and helpful with regard to the determination, the better comprehensibility and the meaning of the norm remains to be discussed. Certainly, it would partly correspond to the factual existence and the reality of life of the self-image of individual lawyers in the current time (note: if they see themselves as service providers). However, the aspect that the lawyer stands and acts at eye level and on an equal footing with the state organs of the administration of justice would thus be omitted. It remains to be considered, if one should not and does not want to hold on to the term "organ" any longer, which terminology can reflect just this equality and eye level to judges and public prosecutors. Because if the lawyer is to be regarded as an equal object to judges and public prosecutors, the wording should also be equal to them, at eye level.

b. Concept of administration of justice, status and function of the lawyer as a part of administration of justice

The term "administration of justice" is also not legally defined. The Lawyers' Court of Cologne defined: "The administration of justice in the broader sense is the care for an orderly course of legal relations between people and in the narrower sense is a collective term for tasks and matters performed by courts and other organs of the administration of justice."[120] From this definition, no reference to the function of the lawyer and his activities in this regard is apparent.

An approving definition can be found in Brüggemann, who understands the administration

[114] "Who, in complete independence and in their primary interest, must provide the client with the legal assistance that the client requires," ECJ, NJW 2010, p. 3559.

[115] Rechtsanwaltschaft als Organ.

[116] So also mentioned in the drafts of 1958, BT-Drs. III/120.

[117] ECJ, NJW 2010, p. 3559.

[118] Matthias Kilian, Der Rechtsanwalt als Organ der Rechtspflege – eine Spurensuche, AnwBl. 2019, p. 667.

[119] Michael Kleine-Cosack, BRAO, 8th ed. 2020, § 2, marginal no. 23.

[120] Cologne Lawyers' Court, judgment of 25.8.2014, 10 EV 113/12, NJW 2015, p. 3383.

of justice as "the care of the law, its realization and execution."[121] He states: "In addition to the administration of justice as a partial aspect of the administration of justice and the participation of the lawyer in this, the conflict- and process-avoiding advisory activity of the lawyer as well as his work in various functions and offices, such as executor,(...). As a commissioned advisor and representative of those seeking justice, the lawyer has the task of helping to bring about a proper decision and to protect his client from the wrong decisions by the court and the public prosecutor's office or the authorities. In particular, he shall protect the party ignorant of the law from the danger of losing the right".[122]
In the past, it was mainly assumed that the lawyer was a member of an institution in relation to his forensic activity.[123] Today, the non-forensic sphere of activity (also referred to as preventive administration of justice[124]) is also undisputedly meant. Therefore, the extrajudicial activity of providing legal advice, which is exclusively performed by lawyers, is also assigned as part of the administration of justice.[125] With the task of administering justice, lawyers are to be seen as equal to judges and prosecutors.[126]

Interim conclusion:

It should be noted that the term "organ of administration of justice" seems to be relatively unclear, as can be seen from the above statements. The example of the interpretation[127] of the term "organ of administration of justice" also shows how the social developments and the pulse of time/spirit of the times (Zeitgeist) as well as the possibly resulting different views of different judicial bodies can have an effect. In summary, it can be stated, that the position of the lawyer as an organ of the administration of justice serves to view and classify the lawyer's activities from the perspective of the rule of law. This endows the lawyer with an extraordinary legal position and associated rights of freedom. This derivation or this understanding leads to the fact that the lawyer is to be seen more than a lobbyist, service provider or other free profession. The lawyer performs tasks for a

[121] Thus Rüdiger Brüggemann, in: Dag Weyland, BRAO, 10th ed. 2020, § 1, marginal no. 5. In this regard, however, see also the comments of Wolf with regard to the still unclear, since not yet extensively scientifically researched, significance and function of the lawyer on the finding of law cf. Christian Wolf, in: Reinhard Gaier/Christian Wolf/Stephan Göcken, Anwaltliches Berufsrecht, 3rd ed. 2020, Einleitung, marginal no. 275 and § 1, marginal no. 17.

[122] Rüdiger Brüggemann, in: Dag Weyland, BRAO, 10th ed. 2020, § 1, marginal no. 5.

[123] Konrad Redeker, Freie Advokatur heute, NJW 1987, p. 2612.

[124] Christian Wolf, in: Reinhard Gaier/Christian Wolf/Stephan Göcken, Stephan, Anwaltliches Berufsrecht, 3rd ed. 2020, § 1, marginal no. 16.

[125] Cf. Rüdiger Brüggemann, in: Dag Weyland, BRAO, 10th ed. 2020, § 1, marginal no. 6.

[126] Rüdiger Brüggemann, in: Dag Weyland, BRAO, 10th ed. 2020, § 1, marginal no. 6.

[127] For a detailed and deeper consideration with the interpretation of the legal term organ, see also Katharina Wind, Der Rechtsanwalt als Arbeitnehmer, 1st ed. 2018, p. 57 et seq.

constitutional administration of justice and is an independent part of the administration of justice. Both judicial and extrajudicial activities are included in the functions of the administration of justice. He acts on an equal footing with judges and public prosecutors.

c. Independence

To this day, the concept of (lawyerly) independence also shows unclear contours.[128] Busse rightly says: "Independence is difficult to grasp", although its high importance for the legal profession is clear, it is less clear what independence really means.[129].
Independence can be seen as a central concept of the lawyer's professional law and the professional practice of the lawyer, because in addition to § 1 BRAO it can be found again in § 3 (1) BRAO "independent advisor in all legal matters" also still in the provisions of the BRAO relevant for the admission and revocation of admission (§ 7 (1) no. 8, 14 (2) no. 8) as well as in the § 43a (1) BRAO described as basic values of the lawyer).
Independence is the prototype of an indeterminate legal concept[130], which is difficult to define from a legal point of view when looking at reference works[131] and uses.[132] In

[128] Matthias Kilian/Ludwig Koch, Anwaltliches Berufsrecht, 2nd ed. 2018, p. 21, marginal no.3; Volker Römermann/Wolfgang Hartung, Anwaltliches Berufsrecht, 3rd ed. 2018, p. 40, marginal no.1 et seq.

[129] Felix Busse, in: Martin Henssler/Hanns Prütting, BRAO, 5th ed. 2019, § 1, marginal no. 3, who nevertheless regards independence as a core element of the constitutional principle of free advocacy.

[130] Hanns Prütting, Die Unabhängigkeit als konstitutives Merkmal rechtsberatende Berufe, AnwBl. 2013, p. 684.

[131] E.g. to the term dependent is listed as meaning: "conditioned by something, determined; decisively influenced by something", "dependent", "falling away, inclined" and synonymously is called conditioned, influenced, determined, instructed, addicted, unfree, subaltern, subject, serf, falling away. https://www.duden.de/rechtschreibung/abhaengig,
(last accessed 2 August 2021): Independence thus means not being dependent on someone, something for one's political, social position, freedom of action); sovereign, free from the command of another state; being autonomous; existing for oneself; being detached from someone, something. Synonyms for independent are used, for example: autonomous, self-governing, independent, self-reliant, emancipated, free, self-determined, independent, self-responsible, and sovereign. https://www.duden.de/rechtschreibung/unabhaengig#Bedeutung-1a (last accessed 2 August 2021).

[132] It is used differently in different disciplines, e.g. in mathematics as algebraic independence.

addition, with regard to possible legal professional comparison groups, it must be noted that almost every legal profession requires independence.[133]

The independence of lawyers from the state derives from the concept of free advocacy[134] and was first stated in the Lawyers' Code of 1878.[135] This independence is to be understood as personal and financial independence from the state[136], as external independence[137] from the state. Legal independence in the sense of independence from the state is seen as an "unchallenged, self-evident characteristic of practicing the profession of a lawyer."[138] The lawyer is supposed to protect precisely the court from erroneous decisions and the party from excess of power by the state.[139] Therefore, the paraphrase of the basic norm is accepted to the effect that lawyer independence means freedom, essentially independence from the state.[140]

If one takes the statements of the legislator on the basis of the history of the origin of the BRAO and § 1 BORA, the members of the liberal professions of the lawyer should also in principle not establish any dependency relationships vis-à-vis third parties that go beyond independence from the state. According to prevailing opinion, the independence of the lawyer regulated in § 1 BRAO goes beyond independence from the state.[141]

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[133] Hanns Prütting, Die Unabhängigkeit als konstitutives Merkmal rechtsberatender Berufe, AnwBl. 2013, p. 684: exemplary list, not exhaustive: Judicial independence according to article 97 Basic Law; § 1 Courts Constitution Act (Gerichtsverfassungsgesetz), § 25 German Judiciary Act (Deutsches Richtergesetz); arbitrator according to § 1036 Code of Civil Procedure (Zivilprozessordnung), university professor in the context of freedom of research and teaching according to article 5 (3) Basic Law, lawyer according to §s 1, 3 (1), (7) no. 8, 43a (1), 59b (2) no. 1b BRAO; mediator according to §s 1 (2), 3 (1) Mediation Act (Mediationsgesetz); notary according to §s 1, 14, 16 Federal Code for Notaries (Bundesnotarordnung); tax consultant according to § 57 Tax Consultancy Act (Steuerberatungsgesetz), insolvency administrator according to § 56 (1) and (3) Insolvency Statute (Insolvenzordnung).

[134] Barbara Grunewald, Die Unabhängigkeit des Rechtsanwalts, AnwBl. 2004, p. 46.

[135] German text see at: https://histox.de/wp-content/files/1878-07-01G_Rechtsanwaltsordnung.pdf (last accessed 3 August 2021).

[136] Volker Römermann, Wolfgang Hartung, Anwaltliches Berufsrecht, 3rd ed. 2018, p. 40, marginal no. 2.

[137] Hans Gerhard Ganter, in: Matthias Kilian/Susanne Offermann-Burkhard/Jürgen vom Stein, Praxishandbuch Anwaltsrecht, 2nd ed. 2010, § 1, marginal no. 13.

[138] Matthias Kilian/Ludwig Koch, Anwaltliches Berufsrecht, 2nd ed. 2018, p. 21, marginal no. 3.

[139] Hans-Jürgen Ahrens, Anwaltliches Berufsrecht, 1st ed. 2017, § 4, p. 23.

[140] Matthias Kilian/Ludwig Koch, Anwaltliches Berufsrecht, 2nd ed. 2018, p. 21, marginal no. 3.

[141] Cf. Rüdiger Brüggemann, in: Dag Weyland, BRAO, 10th ed. 2020, § 1 marginal,

For the independence of the lawyer, social independence, party independence and economic independence are therefore also discussed, the respective contours of which have remained unclear in anticipation. The starting point are the existing various dependencies in which the lawyer finds himself, e.g. to his client, in the context of a partnership to professional colleagues as partner, employee or freelancer and/or to society.

Thus, in the context of the discussion on social independence, it was questioned whether a lawyer was allowed to use a practice sign with the inscription "Socialist Lawyers' Collective" or whether the lawyer who used this sign was "in a narrowed, tendentious, committed to a certain ideology, thus unable to exercise his profession independently in the sense of the order of the free, democratic, social legal system."[142] In principle, every lawyer is free to follow his subjective conviction and to join a certain ideologically, religiously or economically oriented group. There are some professionals who are permissibly politically or religiously active. However, there is a danger of dependency "if he dedicates himself with skin and hair to one of the existing currents, if he becomes a zealot and fanatic, who then finally also completely orients his professional activity and practice as a lawyer– precisely no longer freely, independently and objectively – but only according to a certain ideology, party-political guidelines, religious and sectarian rules, etc. (...) A lawyer, who does not exercise the profession as a legal aid for everyone, but with his professional activity only represents the interests of a few, who want to impose their ideas on the other citizens, does not belong to the profession of the legal profession." In the above case, the sign could create the impression among a part of the population that the lawyers in question do not practice their profession independently.[143] "Tangentially, this independence in such cases can at most be in a concrete situation in which another party to the proceedings is in such a strongly equal or contrary position that legal concerns may arise in the individual case. Here we are then dealing with cases such as are codified in the case of the judge within the framework of the grounds for exclusion and rejection (§s 41, 42 Code of Civil Procedure)."[144]

Independence from the client (also called as independence from a party) is also part of

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no. 16; Felix Busse, in: Martin Henssler/Hanns Prütting, BRAO, 5th ed. 2019, § 1, marginal no. 47; Reinhard Gaier, Berufsrechtliche Perspektiven der Anwaltstätigkeit unter verfassungsrechtlichen Gesichtspunkten, BRAK-Mitt. 2006, p. 6 et seq.; Christian Wolf, in: Reinhard Gaier/Christian Wolf/Stephan Göcken, Anwaltliches Berufsrecht, 3rd ed. 2020, § 1, marginal no. 48; different: Michael Kleine-Cosack, BRAO, 8th ed. 2020, § 1, marginal no. 1 and 15.

[142] BGH NJW 1972, 297.

[143] Gerhard Hartstrang, Der deutsche Rechtsanwalt, 1st ed. 1986, p. 91.

[144] Hanns Prütting, Die Unabhängigkeit als konstitutives Merkmal rechtsberatende Berufe, AnwBl. 2013, p. 685.

the lawyer's independence.[145] The lawyer is obliged to maintain his professional and personal independence in all respects.[146] According to § 3 BRAO, this independence refers to the respective client. This means that the lawyer must maintain a certain degree of objective and personal distance.[147] This is "an expression of stature and strength of character as well as a trademark and quality mark of his personality"[148]. If the lawyer cannot guarantee this, to accept mandates with the necessary objectivity and impartiality, his independence from parties is endangered.[149] It can lead to a tension between representation of interests and independence. The obligations resulting from the lawyer's contract do not fundamentally impair independence[150], even if the client can in principle issue instructions under the contract with the lawyer pursuant to § 665 of the German Civil Code (BGB). This right to issue instructions is, however, limited by general laws and, above all, by the lawyer's professional duties under §s 43a, 2 et seq. BRAO. Even if conflicts arise beyond this scope and the lawyer cannot identify with them, he can nevertheless follow such instructions of the client after due clarification without coming into conflict with § 43a (1) BRAO. In this case, he acts on his own responsibility, since he could also decide the opposite, e.g. to free himself from the conflict situation by giving notice.[151]

In addition, the lawyer's independence from the client also includes an economic independence aspect. Economic independence is given when "in legal terms there is a chance for the individual to secure his economic existence."[152] This means that the lawyer can handle the mandate uninfluenced by economic constraints.[153] Economic independence can be endangered, for example, by a lawyer's agreement in debt collection cases, in which not only lower than the legal fees, but inappropriately low fees are agreed upon, or by insufficient remuneration of the lawyer.[154] Loan agreements between the client and the lawyer can also pose a threat to the lawyer's independence.[155]

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[145] Rüdiger Brüggemann, in: Dag Weyland, BRAO, 10th ed. 2020, § 1, marginal no. 18a.

[146] Hans-Jürgen Ahrens, Anwaltliches Berufsrecht, 1st ed. 2017, § 4, marginal no. 78.

[147] Hans-Jürgen Ahrens, Anwaltliches Berufsrecht, 1st ed. 2017, § 4, marginal no. 77.

[148] Rüdiger Brüggemann, in: Dag Weyland, BRAO, 10th ed. 2020, § 1, marginal no. 19.

[149] Hans-Jürgen Ahrens, Anwaltliches Berufsrecht, 1st ed. 2017, § 4, marginal no. 77.

[150] Markus Weber, in: Matthias Kilian/Susanne Offermann-Burkhard/Jürgen vom Stein, Praxishandbuch Anwaltsrecht, 2nd ed. 2010, p. 56.

[151] Felix Busse, in: Martin Henssler/Hanns Prütting, BRAO, 5th ed. 2019, § 1, marginal no. 48.

[152] Hanns Prütting, Die Unabhängigkeit als konstitutives Merkmal rechtsberatende Berufe – Unabhängigkeit im rechtlichen Sinne und tatsächliche Unabhängigkeit – was zählt?, AnwBl. 2013, p. 685.

[153] Cf. BT-Drucks. 12/4993, S. 31.

[154] Rüdiger Brüggemann,in: Dag Weyland, BRAO, 10th ed. 2020, § 1, marginal no. 18a.

[155] Barbara Grunewald, Die Unabhängigkeit des Rechtsanwalts, AnwBl. 2004, p. 464;

A lawyer may also work as an employee or freelancer for other lawyers in compliance with the professional standards. The law does not contain a fundamental prohibition of employed or freelance work of a lawyer for another lawyer. However, it must be ensured that the employed lawyer or freelancer receives contractual conditions that do not endanger his independence.[156]

The law governing lawyers in Germany is based on a strict prohibition of outside participation (so called Fremdbeteilungsverbot) in law firms, i.e. the purely capital-based participation of persons outside the profession is prohibited.[157] This strict prohibition of outside participation is, however, subject to vehement criticism[158] in some cases and has been the subject of intense discussion[159] (also under European influence and from a comparative law perspective), particularly in the course of the last BRAO reform[160]. This old point of contention in the legal profession can be misleading with regard to the concept of outside ownership, because in fact it is a question of whether capital can be

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Martin Henssler, in: Martin Henssler/Hanns Prütting, BRAO, 5th ed. 2019, § 43a, marginal no. 26.

[156] See also § 26 BRAO, which stipulates that lawyers may only be employed on reasonable terms; See further on this topic, also with further references and explanations: Rüdiger Brüggemann, in: Dag Weyland, BRAO, 10th ed. 2020, § 1, marginal no. 22 et seq.

[157] This has become controversial, see Felix Busse, in: Martin Henssler/Hanns Prütting, BRAO, 5th ed. 2019, § 1, marginal no. 69; Matthias Kilian, Das Fremdbeteiligungsverbot im Spannungsfeld von Berufs-, Gesellschafts- und Unionsrecht, AnwaltBl. 2014, p. 111 et seq.

[158] See in this regard, inter alia: Dirk Uwer, Die Anwaltschaft und das vermeintliche Fremdbesitzverbot, Legal Tribute Online (LTO), 17 October 2019, https://www.lto.de/recht/juristen/b/eckpunkte-brao-reform-venture-capital-legal-tech-fremdbesitzverbot-kapitalbeteiligung/ (last accessed 3 August 2021); Matthias Kilian, Das Fremdbeteiligungsverbot im Spannungsfeld von Berufs-, Gesellschafts- und Unionsrecht, AnwaltBl. 2014, p. 111 et seq.

[159] On the discussions, see, among others: Matthias Kilian, Das Fremdbeteiligungsverbot im Spannungsfeld von Berufs-, Gesellschafts- und Unionsrecht, AnwBl. 2014, p. 111 et seq. See also opinions of the experts on the legislative procedure of the BRAO reform (draft of a law on the reorganization of the professional law of the legal and tax consulting professional practice companies as well as on the amendment of further regulations in the area of the legal consulting professions BT-Drucksache 19/27670), e.g. opinion of Markus Hartung, p. 8 et seq. https://www.bundestag.de/resource/blob/834122/c6fbde6de8e46cc3bc43220f1c3ec06e/stellungnahme-hartung-data.pdf (last accessed 7 August 2021).

[160] Regarding the latest BRAO reform, the new passages of the law have passed the Bundesrat and will come into force on 1 August 2022.

raised from lawyers who are not active in the company or from third parties who are then no longer strangers as shareholders (such as banks as lenders). With regard to possible capital investments by persons outside the profession, the changes to the BRAO that will come into force on August 1, 2022 have not resulted in any liberalization.[161] The prohibition to participate in law firms solely with capital remains. The discussion will certainly continue due to the aforementioned increasing competitive pressure.

The lawyer's independence is not jeopardized even if he joins forces with members of the profession mentioned in the context of § 59a BRAO (note: this § rules the professional collaboration). Cooperation in other forms is also possible under certain conditions.[162] The above-mentioned BRAO reform liberalizes inter-professional cooperation in law firms and office partnerships and reorganizes the law on lawyers' companies. As of August 1, 2022, lawyers will be allowed to practice their profession jointly with all members of the liberal professions as defined in § 1 (2) PartGG (§ 59c (1) no. 4 BRAO-E). This leads to an expansion of the existing circle of professions capable of practicing as professionals (§ 59a (1) BRAO). In addition, the GmbH & Co. KG will become permissible when the amendments to the law come into force (from 1 August 2022).[163]

To this end, independence is a central concept within the framework of the regulations on admission and revocation to the legal profession (§s 7 (1) no. 8; 14 (2) no. 8 BRAO). If a further professional activity**,** which the lawyer pursues in addition to the profession of lawyer, endangers the independence of the lawyer, it is incompatible with the profession of lawyer. In this case, an application will be rejected or, in the case of an application was granted, it can be revoked. In this respect, following a large number of individual case decisions, a certain classification of secondary professions has emerged which, according to case law, may jeopardize independence.[164]

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[161] On the so-called “Great BRAO Reform”, see also Nicolas Lührig, on the Great BRAO Reform, 14 July 2021 at: https://anwaltsblatt.anwaltverein.de/de/anwaeltinnen-anwaelte/berufsrecht/grosse-brao-reform (last accessed 3 August 2021).

[162] In addition: the Rechtsanwalts-AG (cf. Martin Henssler, Freie Fahrt für die Anwalts AG, AnwBl. 2005, p. 374 et seq.; Rüdiger Brüggemann, in: Dag Weyland, BRAO, 10th ed. 2020, Vorbemerkung (Vor § 59c), marginal no. 8 et seq.), the Rechtsanwalts-KGaA (cf. Rüdiger Brüggemann, in: Dag Weyland, BRAO, 10th ed. 2020, Vorbemerkung (Vor § 59c), marginal no. 16) and the Limited (cf. Rüdiger Brüggemann, in: Dag Weyland, BRAO, 10th ed. 2020, Vorbemerkung (Vor § 59c), marginal no. 19) are admitted as law firms.

[163] On the above mentioned BRAO reform, see also: Nikolas, Lüring, Große BRAO-Reform gilt ab 1. August 2022: Mehr Freiheit für Anwaltschaft, https://anwaltsblatt.anwaltverein.de/de/anwaeltinnen-anwaelte/berufsrecht/grosse-brao-reform (last accessed 3 August 2021).

[164] On this topic see: Julia Lefèvre/Maximilian Roth, Zur Zulassung als Rechtsanwalt bei (un)vereinbaren weiteren beruflichen Tätigkeiten, in: Freiheit der wirtschaftlichen

Independence and freedom do not preclude compulsory membership in the Bar, a special disciplinary law and a professional jurisdiction that watches over compliance with professional duties.[165]

Interim conclusion:

In conclusion, independence means freedom, but this must not be confused with lack of restraint.[166] The lawyer is independent because, like any other person, he is bound by law and the state legal system.[167] The lawyer is obliged to maintain his personal as well as professional independence in all respects. A comparison of the examination of state independence with independence in the private or economic sphere reveals that for state independence there is a much higher density of regulation as well as clarity about the content and limits of independence. Here, too, due to the indeterminate legal term of independence, it can be observed that, as in the context of the investigation into the concept of organs, there are a large number of individual case decisions that embody the pulse of the times/spirit of the times. It can also be expected that the discussions on further inter-professional cooperation with non-independent professions will continue, since e.g. especially large law firms that (want to) cooperate with computer scientists in the legal tech sector demand inter-professional cooperation with these free professions.[168]

d. The lawyer as a liberal profession not practicing a trade

Pursuant to § 2 (1) BRAO, a lawyer exercises a liberal profession and distinguishes his activity from a trade.[169] The BRAO does not define what is to be understood by this.

However, a legal definition can be found, for example, in § 1 (2) sent. 1 of the German Partnership Act (PartGG), which states that liberal professions are "based on special

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Tätigkeiten in der Polnischen und Deutschen Rechtskultur – eine rechtsvergleichende Perspektive, 1st ed. 2021, pp. 283 et seq.

[165] BVerfGE 26, 186 (205 et seq.).

[166] Rüdiger Brüggemann, in: Dag Weyland, BRAO, 10th ed. 2020, § 1, marginal no. 13.

[167] Rüdiger Brüggemann, in: Dag Weyland, BRAO, 10th ed. 2020, § 1, marginal no. 13.

[168] Statements by expert Thomas Gasteyer at the hearing “Neuregelung des anwaltlichen Berufsrechts” (on the above-mentioned BRAO reform) on 14 April 2021 in the Bundestag Legal Affairs Committee from 1:15 h https://www.youtube.com/watch?v=nN0kZS4SfOc (last accessed on 11 August 2021); Further documents on the hearing at: https://www.bundestag.de/dokumente/textarchiv/2021/kw15-pa-recht-anwalt-831772 (last accessed 11 August 2021).

[169] Pursuant to § 6 of the Trade, Commerce and Industry Regulation Act (Gewerbeordnung), this does not apply to the activities of a lawyer.

professional qualifications or creative talent and involve the personal, autonomous and professionally independent provision of services of a higher nature in the interest of the client and the general public." However, there are other provisions that mention the term "liberal profession"[170] or other regulations that define the term, e.g. § 6 (1) sent. 1 of the Trade, Commerce and Industry Regulation Act (Gewerbeordnung), § 1 (5) sent. 2 PartGG and § 18 (1) sent. 1 income tax law (Einkommenssteuergeseetz), but in each case only for the individual area of application of the relevant law. In view of these regulations, however, a uniform picture of the liberal profession cannot be considered to exist.[171]

According to prevailing opinion, the term liberal profession is not a clearly contoured legal term, but a sociological designation. This can be classified as a type concept, i.e. "that not all conceptual features must be present in every detail, but that it is sufficient if an activity, taking into account the features, has the character of a liberal profession as a whole. The concept of type thus contains an elastic structure of characteristics, which groups properties according to characteristics (topoi), whereby not all of them have to be fulfilled at the same time. In individual cases, some of them may be less pronounced or even absent, without the membership in the type therefore ceasing to exist."[172]

Characteristic qualities for the liberal profession as a lawyer are considered to be, above all: Provision of idealistic services, provision of personal services and results of personal services, in that the lawyer comprehensively assists his client, and protects his interests independently, freely and disinterestedly. The prerequisite for the fulfillment of this task is a special relationship of trust and confidence in the lawyer's personal and professional qualifications and professional economic autonomy and independence.[173] The lawyer's duty of confidentiality[174] is a basic prerequisite for this trust to develop. For lawyers, in the course of the liberal profession, it must be emphasized that the lawyer, due to his personal responsibility and his independence, primarily provides intellectual services, which are not only oriented to the interest of the respective client, but also have the common good in mind.[175]

The activity as a liberal profession is precisely not a commercial activity. According to the regulation in § 2 BRAO and § 6 Trade, Commerce and Industry Regulation Act (Gewerbeordnung), trade and free profession are mutually exclusive. The lawyer should

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[170] Detailed analysis in: Jörn Axel Kämmerer, Die Zukunft der Freien Berufe zwischen Deregulierung und Neuordnung, Gutachten für den 68. DJT, 2010, Manuskript p. 2 et seq.

[171] Thomas Mann, Was bleibt heute vom Feien Beruf?, AnwBl. 2010, p. 551.

[172] Thomas Mann, Was bleibt heute vom Feien Beruf?, AnwBl. 2010, p. 552.

[173] BVerfGE 16, 286 (294), 63, 266 = NJW 1983, p. 1535.

[174] Which also belongs to the basic values of lawyers (according to § 43a BRAO), see also under III. 2. f.

[175] Rüdiger Brüggemann, in: Dag Weyland, BRAO, 10th ed. 2020, § 2, marginal no. 3.

not be guided in his professional practice exclusively by the profit motive, although he may also have the resulting material profit in mind. After all, this should serve to secure his existence.[176] Since the lawyer does not exercise a trade, he is also subject to an advertising restriction, according to which advertising is only permitted insofar as it provides factual information about the professional activity in form and content and is not directed towards the award of a contract in an individual case (§ 43b a. E. BRAO).[177]

In view of also increasing competitive pressure on the legal advice market[178] and increasing commercialization[179], critical voices have emerged which regard the liberal profession of lawyers as "fragile" and the special status as a liberal profession as problematic.[180]

e. Right to provide legal advice and right of representation as a sphere of activity of the lawyer from § 3 BRAO

The lawyer is seen as an appointed representative of interests by § 3 BRAO, which complements the programmatic approach of §s 1 and 2 BRAO. § 3 BRAO circumscribes the lawyer's sphere of activity, regulates his right of representation and guarantees the free choice of a lawyer by everyone. Correspondingly, according to § 3 (1) BRAO, the lawyer is the appointed independent advisor and representative in all legal matters, the § thus states the area of legal diligence.[181] What is meant by this is that the lawyer may act in all areas, but does not have to. Exceptions to this can be seen in counseling assistance and legal aid, in which lawyers could theoretically be forced to provide representation.[182]

Pursuant to § 3 (2) of the BRAO, a lawyer has the right to appear before courts, arbitration tribunals or authorities in legal matters of all kinds. This right can only be

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[176] Rüdiger Brüggemann, in: Dag Weyland, BRAO, 10th ed. 2020 § 2, marginal no. 3.

[177] See also the article on the "Advertising by lawyers: An area of conflict between constitutional and professional law" by Maximilian Roth, in this paper, p. 77 et seq.

[178] On the one hand, among the professionals they, but also on alternative dispute resolution options that may compete with the lawyer's activities in the out-of-court area.

[179] Hans Gerhard Ganter, in: Matthias Kilian/Susanne Offermann-Burkhard/Jürgen vom Stein, Praxishandbuch Anwaltsrecht, 2nd ed. 2010, p. 7, marginal no. 22.

[180] First and foremost: Michael Kleine-Cosack, BRAO, 8th ed. 2020, Einleitung, marginal no. 22 et seq., § 2 marginal no. 4 et seq.; other view see e.g. Christian Wolf, in: Reinhard Gaier/Christian Wolf/Stephan Göcke, Anwaltliches Berufsrecht, 2014, § 2, marginal no. 3 et seq.

[181] Stefan Peitscher, Anwaltsrecht, 2nd ed. 2017, p. 45, marginal no. 61.

[182] Volker Römermann/Wolfgang Hartung, Anwaltliches Berufsrecht, 3rd ed. 2018, p. 46, marginal no. 27.

restricted by federal law.[183] Pursuant to § 3 (3) BRAO, everyone has the right to be advised and represented in legal matters of all kinds by a lawyer of his choice. The right is subject to statutory provisions, which would be, for example, § 142 (1) of the Code of Criminal Procedure (StPO), according to which the public defender to be appointed pursuant to §s 140 and 141 of the StPO is selected by the presiding judge. In principle, the free choice of counsel cannot be restricted by contractual agreement. As a rule, such agreements are void.[184]

f. Core values of the lawyer

The function of the lawyer for the administration of justice results in basic conditions or framework conditions of the lawyer's duties (note: also called core values or functional requirements of the lawyer's activity[185]).[186]

These include the lawyer's independence, duty of confidentiality and right to secrecy, the principle of objectivity, the prohibition of conflicting interests and access to justice irrespective of the value of the dispute.

The independence of lawyers is standardized in §s 1 and 3 of the BORA; therefore, we refer to III. 2. c. for these remarks.

Pursuant to § 43a (2) BORA, the lawyer is obliged to maintain confidentiality; he has the duty to observe professional secrecy. As shown above, the duty of professional secrecy is essential for the relationship with the client and a basic condition for trust to develop. It is therefore also rightly described as the supporting pillar of the legal profession par excellence.[187] It is concretized[188] by § 2 BRAO pursuant to § 59b (2) no. 1 lit. c BRAO.

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[183] E.g. by §s 43a (4), 45, 46, 114 (1) no. 4, 114a (3), 155, 156 BRAO.

[184] Stefan Peitscher, Anwaltsrecht, 2nd ed. 2017, p. 46, marginal no. 63.

[185] Christian Wolf, in: Reinhard Gaier/Christian Wolf/Stephan Göcken, Anwaltliches Berufsrecht, 3rd ed. 2020, Einleitung, marginal no. 77.

[186] Christian Wolf, in: Reinhard Gaier/Christian Wolf/Stephan Göcken, Anwaltliches Berufsrecht, 3rd ed. 2020, Einleitung, marginal no. 77.

[187] Monika Träger, in: Dag Weyland, BRAO, 10th ed. 2020, § 43a, marginal no. 12.

[188] Pursuant to § 59b (1) BRAO, the task of the Statutory Assembly is established by the Federal Bar Association pursuant to § 191a BRAO is the specification of lawyers' rights and duties, which are restricted in terms of competence by § 59b (2) BRAO. The scope of regulation of the statute competence of the statute assembly is conclusively determined in § 59b BORA (cf. BT-Drs. 12/7656, 50.) The statute enacted pursuant to § 191a (2) BRAO as a professional regulation for the practice of the legal profession, taking into account the professional duties and in accordance with § 59b, is the Berufsordnung (BORA). However, the regulations contained in the BORA do not have a normative character, since the above-mentioned statute assembly has no authority to create

Restrictions may result from the client's release from the duty of professional secrecy and from reasons of general interest. The latter are present, for example, if it is a matter of combating the most serious criminal offenses and a weighing of legal interests shows that the public interest in preventing and combating the criminal offense outweighs the right and duty to maintain secrecy.[189] The duty of professional secrecy refers to everything that became known to him for the exercise of his profession. This does not apply to matters which are obvious or which, according to their importance, do not require secrecy.[190] This duty continues to exist even after termination of the mandate. Under criminal law, a breach of the duty of professional secrecy is sanctioned by § 203 (1) no. 3 of the German Criminal Code (Strafgesetzbuch,StGB) according to which a person is punished if he discloses in an unauthorized way another's secret, namely a secret belonging to the personal sphere of life or a trade or business secret, which has been entrusted to him or otherwise become known to him as a lawyer. This obligation protects the client's individual sphere from disclosure to third parties that is not intended or controlled by the client, and it ensures the orderly administration of justice.[191]

Pursuant to § 43a (3) BRAO, a lawyer must not behave with lack of objectivity in professional practice**.** According to S § 43a (3) sent. 2 BRAO, his conduct is not objective in particular if he utters criminal insults, deliberately disseminates untruths or makes disparaging statements to which other parties or the course of proceedings have not given rise. Only if such improper conduct on the part of the lawyer exists, does it exceed the threshold § 43a (3) sent. 1 BRAO. Only then are justiciable violations present. According to prevailing opinion, however, this is only the case in exceptional circumstances. In principle, the exercise of the legal profession is subject to the free and regulated self-determination of the individual lawyer. "The performance of his duties as an independent organ of the administration of justice does not permit him, like the judge, always to deal with the parties to the proceedings in such a gentle manner that they do not feel that their personalities are impaired. According to general opinion, in the "fight for justice" he may also use strong, forceful expressions and meaningful catchwords, practice distant judgment scolding or argue ad personam."[192]

According to § 43a (4) BRAO, the lawyer may not *represent conflicting interests*. Via § 59b (2) no.1 lit. e BRAO, § 3 BORA specifies the regulations in this regard. "The relationship of trust between the client, the preservation of the lawyer's independence and the public interest in a functioning administration of justice depend on the

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attorney rights and duties with a status-forming character (Rüdiger Brüggemann, in: Dag Weyland, BRAO, 10th ed. 2020, § 1 BORA, marginal no. 5).

[189] Monika Träger, in: Dag Weyland, BRAO, 10th ed. 2020, § 43a, marginal no. 12.

[190] Monika Träger, in: Dag Weyland, BRAO, 10th ed. 2020, § 43a, marginal no. 17.

[191] Volker Römermann/Wolfgang Hartung, Anwaltliches Berufsrecht, 3rd ed. 2018, p. 60 marginal no. 21.

[192] Monika Träger, in: Dag Weyland, BRAO, 10th ed. 2020, § 43a, marginal no. 33.

straightforwardness of the lawyer's professional practice, i.e. on the fact that a lawyer serves only one cause."[193] In order to ensure that the lawyer serves only one side, this prohibition was established to safeguard the relationship of trust between the lawyer and the client. The client must be able to trust the lawyer he has instructed that he will provide advice and representation exclusively in the interests of the client and not in the interests of third parties or perhaps even the opposing party. It is not a matter of the occurrence of a damage here, but the abstract possibility is decisive here for the assessment.[194] "It refers to the individual attorney who may not represent parties with conflicting interest in the same matter. The prohibition of representing conflicting interests also applies to the associates of a lawyer, unless a weighing of all interests that does justice to the individual case, with particular consideration of the concrete interests of the client, shows otherwise."[195]

With the above-mentioned BRAO reform, the prohibition of representation of conflicting interests is now comprehensively regulated in the BRAO for the first time. The rudimentary § 43a (4) BRAO becomes a differentiated provision that also regulates partnership cases. The conflict of interests is regulated for the professional partnership in the BRAO. The new provision now also covers professional practice companies and there not only the partners of professional practice companies, but their employed lawyers. Paragraphs4 to 6 now no longer refer to the "practice of the profession in the professional practice company" but to the "joint practice of the profession". According to the explanatory memorandum, this change is intended to clarify that not only the partners of professional practice companies are covered, but also their employed lawyers. In addition, the standard now also applies to the salaried attorneys of individual attorneys and the freelance employees of law firms. The office partnership is expressly excluded. They are not to be covered by the extension of the partnership.[196]

In addition to these legally standardized basic values, the lawyer's relationship to the rule of law and the lawyer's function in relation to access to the courts (access to the justice[197]) are also seen in part as the effective legal protection of which may require the

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[193] BVerfG, decision of July 3, 2003 – 1 BvR 238/01 in BRAK-Mitt. 2003, p. 234.

[194] Volker Römermann/Wolfgang Hartung, Anwaltliches Berufsrecht, 3rd ed. 2018, p. 66, marginal no. 42.

[195] Monika Träger, in: Dag Weyland, BRAO, 10th ed. 2020, § 43a, marginal no. 54.

[196] Nikolas Lürig, Große BRAO-Reform gilt ab 1. August 2022: Mehr Freiheit für Anwaltschaft, https://anwaltsblatt.anwaltverein.de/de/anwaeltinnen-anwaelte/berufsrecht/grosse-brao-reform (last accessed 3 August 2021).

[197] Whereby even this term is not defined and therefore it must be assumed here in this usage that access to justice means access to the court, i.e. to enable everyone to have the right of access to the courts in the sense of the right to justice, see: Christian Wolf, in: Reinhard Gaier/Christian Wolf/ Stephan Göcken, Anwaltliches Berufsrecht, 3rd ed. 2020, Eineitung, marginal no. 89.

use of a lawyer.[198] It counts to these above-mentioned core values "the protection of the dispute-independent access to the right, because the lawyer is imposed over §s 48, 49a BRAO the obligation to take over process representation in certain situations and to carry out consulting assistance."[199]

Interim conclusion:

As described, the normative professional profile is regulated. It results primarily from §s 1-3 BRAO with regard to the legal function of the lawyer. The professional duties regulated in §s 43 et seq. BRAO, first and foremost the above-mentioned so-called core values, are the functional prerequisites for the fulfillment of the function of the lawyer as an independent organ of the administration of justice. These standardizations are to be seen as an ideal picture, because a purely normative consideration of a professional profile is not sufficient for the consideration of a comprehensive professional profile, as shown under II. Rather, it is still necessary to outline the inner professional profile, which complements the normative one, but which can also be changed in the event of too great a discrepancy between the two through lobbying and impetus from the legal profession with the aim of reforming professional law.

3. The inner professional profile

The inner professional profile results from the lawyers' self-perception and self-image. Various factors influence the attitudes, opinions and values of lawyers with regard to their self-perception and self-image. These can have an impact, for example, from the family/friendship environment, through the addressees of the professional practice (mandate/citizens), through other professional colleagues or also through associations. In addition, the factual image, i.e. society's image of the lawyer, is part of the inner professional profile. This, too, can influence, consciously or unconsciously, the lawyer's self-image.

a. Self-perception and self-image of the lawyer(s)

Self-perception and self-understanding can be examined in the best possible way by means of legal fact research methods to research the law in action for empirical research in the field of law. This examines the actual forms of appearance and realization of law in

[198] Christian Wolf, in: Reinhard Gaier/Christian Wolf/Stephan Göcken, Anwaltliches Berufsrecht, 3rd ed. 2020, Einleitung, marginal no. 89.

[199] Christian Wolf, Zugang zum Recht durch Liberalisierung des Berufsrecht bei Erfolgshonorar und Fremdkapital? BRAK-Mitt. 2020, p. 2.

social life.[200] It is therefore important to investigate how lawyers themselves see their professional profile and themselves, how they perceive and understand it, what they expect and want, and whether they are satisfied with their profession as it currently appears and can be practiced.

Therefore, the first step is to obtain an overall picture of self-perception and self-image, which will first be done by collecting secondary data from existing studies and texts. The overall view of this analysis can then provide a possible statement about the self-image and self-perception of the lawyer and the legal profession as a whole. It would be important, especially with regard to the self-image and self-perception of lawyers, to learn not only who these people are, but how they behave and what attitudes they have towards certain situations and things. In short, research should be conducted on meaningful questions such as the following: How do lawyers in Germany view their role as an organ of the administration of justice that is supposed to be public-spirited, free, and independent in ensuring access to justice on a par with judges and prosecutors? Are they aware of their role and function in safeguarding the rule of law? Do they know about the above-mentioned core values, and do they adhere to them? How do lawyers behave with regard to compliance with their legal obligations? How responsible, independent, free and self-determined do the lawyers perceive themselves to be? Are they satisfied with their above-mentioned normative professional profile? Do they see a need for adaptation or change? Are they interested in this topic at all? How satisfied are they with their own performance and professional practice, where do they see hurdles or challenges? How do they see their share in the common good, or what contribution do they each make to the common good (also, but not only, in the sense of consulting assistance[201] and legal aid[202])? What makes a good lawyer from the lawyers'

[200] Christoph Weischer, Sozialforschung, 1st ed. 2007, p. 15 et seq. Empirical social research comprises a fund of techniques that, starting from the clearly defined and theoretically reflected questions, enable the rule-governed, systematic production of empirically founded (literally: gained from observation or experience) social science knowledge. This includes the collection and analysis of data so that specific answers can be given to the questions posed at the beginning.

[201] This means the German Beratungshilfe as counseling assistance is legal advice for citizens with low incomes; in order to preserve equal opportunities for all citizens to obtain legal assistance and access to the courts, the Counseling Assistance Act provides for legal counseling as part of the preventive administration of justice. The Rechtspfleger (judicial officer) at the Amtsgericht (local court) decides on the granting of counseling assistance. The person seeking legal assistance can then visit a lawyer for advice or representation with a certificate of entitlement. The costs are borne by the state treasury. Gunnar Groth, Creifelds kompakt, Rechtswörterbuch, 4th ed. 2021, Legal Advice for Low-Income Citizens.

[202] On form of legal aid in Germany is Prozesskostenhilfe (PKH), it is the full or partial

perspective?

Looking at existing studies in Germany[203], it can be seen that the profession and the nature of the lawyer as well as the law of the lawyer as a target to be investigated is not really in the focus of (empirical) (legal) science. In the meantime, there are data surveys, some of which are also conducted and updated on a regular basis. However, these often refer mainly only or mostly to the collection of measurable "hard facts" such as data on the economic situation, e.g., income structures and turnover. They reflect less, if only isolated, attitudes, ideas, opinions, perceptions or self-reflections of the individual professionals.[204] In addition, it is striking that the chosen methodology of these surveys is usually a quantitative survey, mostly by means of questioning, but there are hardly any qualitative empirical studies on lawyers.[205] How and on which motivations lawyers act has not been empirically proven so far. In order to give an insight into the existing data collection on the legal profession, some study results will be mentioned in extracts.

A study from 2009, conducted by the Institute for Liberal Professions Nuremberg (IFB)[206], which included 479 evaluable questionnaires, came to the conclusion that 67% of the respondents at that time felt an increasing competitive pressure that their law firm would be exposed to. Ninety-five percent of the respondents saw the continuously increasing number of lawyers as the reason for this competitive pressure. In addition, 82% saw the difficult economic situation as the reason; 77% of the respondents saw the increase in pressure due to the increasing legal services offered by other providers. 72% were

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exemption of a party (a participant) of lesser means from the costs of litigation. PKH or legal aid is provided for in most procedural codes – often by reference to §s 114 et seq. ZPO, is provided for. Gunnar Groth, Creifelds kompakt, Rechtswörterbuch, 4th ed. 2021, Prozesskostenhilfe.

[203] The actors of these regularly recurring studies, which usually collected data on the legal services or lawyer market in Germany by means of quantitative primary research, are the Federal Bar Association within the framework of the so-called STAR (Statistical Reporting System for Lawyers) https://brak.de/fuer-journalisten/star-bericht/ (last accessed 5 August 2021), the Soldan Institute within the framework of the Statistical Yearbook, of further research projects and within the framework of the so called Berufsbarometer, https://soldaninstitut.de (last accessed 5 August 2021).

[204] In this context, the Soldan Institute should be mentioned, which conducts legal research within the framework of several research reports https://soldaninstitut.de/forschungsberichte-galerie/ (last accessed 5 August 2021) and tries to find out the opinion of the legal profession on certain issues with the Professional Law Barometer https://soldaninstitut.de/barometer/ (last accessed 5 August 2021).

[205] Cf. Susanne Baer, Rechtssoziologie, 4th ed. 2021, p. 180, marginal no. 31.

[206] See: Kerstin Eggert/Irina Kreider/Willi Oberländer, Der Wandel im anwaltlichen Berufsbild – Eine empirische Untersuchung im Auftrag der Selbsthilfe der Rechtsanwälte e. V., 1st ed. 2010.

concerned about the increase in legal services provided by new types of law firms (e.g., legal advice via the Internet or telephone). With regard to the threat to their legal independence posed by the introduction of the Legal Services Act, 12% saw very negative effects on legal independence, while 53% saw somewhat negative effects. The time of the survey was after some new legislation, including the then fairly new Legal Services Act, which has allowed non-lawyer providers to provide legal services under certain conditions since 2008. This survey is already several years old, so that it should not be used to determine a current self-image of the professional profile, if then for a comparison of the statements from then to those still to be collected today. Moreover, it is questionable whether this survey can be said to be representative, since 150,377[207] lawyers were admitted to the Bar in 2009, so that 479 respondents reflect a very small proportion of them.

As part of the research project Legal Services Market 2030 (Forschungsprojekt Rechtdienstleistungsmarkt 2020) conducted by Prognos AG on behalf of the German Bar Association[208] (DAV), an online survey of a sample of 7,202 lawyers was conducted in mid-2012 on the legal services market and over 5,000 of them were asked about their current strategies in law firm management to date. The objectives of the study were primarily to identify and present significant trends for the legal profession, their evaluation and their potential impact on the framework conditions of legal practice. The study was conducted in several modules and with different research instruments: Baseline and market structure analysis using desk research, expert delphi, surveys and workshops.[209] All data resulted in the following study findings. It was found that the competitive pressure and stronger competition from non-lawyer providers has increased, that also due to this competition, the lawyers are increasingly dealing with marketing measures and saw the professional specialization as the most important competitive strategy until now. Networking was seen as an essential acquisition tool. The law firms are very heterogeneous in terms of area of expertise, clientele, geographic catchment area and degrees of specialization. The lawyers were also confronted with the issue of work-life balance; however, a need for action is seen there for the future.[210] As a forecast for the

[207] Matthias Kilian/René Dreske, Statistisches Jahrbuch der Anwaltschaft 2019/2020, 1st ed. 2020, p. 27.

[208] In the German Bar Association (DAV), a good 62,000 lawyers have already joined together in more than 250 local lawyers' associations in Germany and abroad in order to work together for the protection of interests of the same kind, https://anwaltverein.de/de/interessenvertretung/anwalt-der-anwaelte (last accessed 7 August 2021).

[209] For the detailed procedure, see: Prognos AG/DAV, Der Rechtsdienstleistungsmarkt 2030, 2012, p. 31 et seq., https://anwaltverein.de/de/anwaltspraxis/dav-zukunftsstudie (last accessed 10 August 2021).

[210] Prognos AG/DAV, The Legal Services Market 2030, 2012, p. 11 et seq.

future, the study reported on trends and resulting consequences that will arise by 2030 under constant professional rules. The study found that demographic change would lead to changes within the legal profession in the long term. In addition, the proportion of women in the legal profession is rising significantly and steadily. It was also predicted that competitive pressure would increase significantly by 2030. The group of lawyers in precarious income situations would become larger. The knowledge monopoly of lawyers would continue to shrink, in part due to the digital and public provision of free know-how. In addition, technological change would greatly alter the work processes and market situation of the legal profession. Likewise, access to law would change, as the dismantling of judicial infrastructure would significantly limit it geographically. In addition, a reduction in demand for legal services is to be expected due to a real decline in income, which will, however, be compensated for by increased pro bono activities.

The Statistical Reporting System for Lawyers (Statistische Berichtsystem für Rechtsanwälte, STAR)[211], which provides data on the German legal profession, has been collected at regular intervals by the Institute for Liberal Professions on behalf of the BRAK since 1993. STAR 2020 is already the 18th edition of the professional survey, which, in addition to the recurring core economic topics, also covers aspects such as legal tech or the professional situation in law firms.[212] The objective of the data collection by means of a survey is to obtain current data on the economic situation and structural composition of the legal profession. Sociodemographic characteristics as well as assessments of the future development of the profession and opinions on specific topics are also collected.[213] The current STAR Report 2020 is for fiscal year 2018, so the results available from it are for well before the onset of the Covid-19 pandemic. It shows that advocacy is not a homogeneous entity. Compared to recent years, it is undergoing a more profound change (especially in terms of more female professionals).[214] Therefore, it can be assumed that changes might occur. However, little is known about the perception and attitude of the legal profession with regard to this (predicted or possible) change, except for the opinion

[211] The reporting system was launched by the Institute for Liberal Professions (IFB) in Nuremberg in 1993 on behalf of the German Federal Bar Association, see also: https://www.brak.de/fuer-journalisten/star-bericht/star-bericht-2020/ (last accessed 5 August 2021). The aim of this empirical survey is to find out about the professional and economic situation in the German legal profession and to identify new developments in the legal profession.

[212] See on STAR 2020: BRAK Magazin 2/2021 as special issue; Nicole Genitheim, STAR 2020, BRAK-Mitt. 2021, p. 64 et seq.

[213] STAR Report 2020, https://www.brak.de/w/files/04_fuer_journalisten/star-2020/star2020_ergebnisbericht_02-2021.pdf, p. 4. (last accessed 5 August 2021)

[214] STAR Report 2020, https://www.brak.de/w/files/04_fuer_journalisten/star-2020/star2020_ergebnisbericht_02-2021.pdf, Fig. 10.3.9 et seq. (last accessed 5 August 2021).

on the lifting of the ban on contingency fee agreements. Although the lawyers were also asked about their general satisfaction with the profession as lawyers[215], detailed reasons and knowledge about what led to this satisfaction are needed for determining the reasons and for interpreting connections with statements regarding the professional profile.

With the Soldan Professional Law Barometer (Berufsbarometer), the Soldan Institute for Lawyer Management determines the opinion of the legal profession on current topics of professional law. The Professional Law Barometer introduces the professional law issues of the topics and presents the empirical findings obtained by surveying the legal profession on how lawyers evaluate changes to their professional law that have already been passed or are being discussed in legal and professional policy.[216] A current new survey has been running since May 2021. There is no updated data on this yet.[217] The topics of the surveys are always selected topically, so they are usually different and examined as individual topics. A comparison with previous years, as may be the case with the above-mentioned STAR, is generally not intended or clearly possible. The topics of the current study are not yet apparent. Also from existing surveys, no suitable topic for the above-mentioned determination can be seen. It therefore remains to wait for the new survey results of the current 2021 survey.

Other surveys and analyses on the professional satisfaction of lawyers, which could be used to determine the inner professional profile of the legal profession, are also not apparent. In some cases, isolated questions on satisfaction or on an opinion are asked in more extensive, usually quantitative surveys.[218] However, as stated above, these cannot contribute to the determination.

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[215] According to the 2018 overall survey there, only 5 percent of respondents are not satisfied or not at all satisfied with their profession as a lawyer, while in contrast, a total of two-thirds of participants are satisfied or very satisfied with it. Male attorneys are more satisfied with their profession overall than women. Moreover, satisfaction with the profession increases with age. STAR Report 2020, https://www.brak.de/w/files/04_fuer_journalisten/star-2020/star2020_ergebnisbericht_02-2021.pdf , Fig. 10.3.9 et seq. (last accessed 5 August 2021).

[216] See: Soldan Institute Berufsbarometer, including survey topics from recent surveys, https://soldaninstitut.de/barometer/ (last accessed 6 August 2021).

[217] Matthias Kilian, Brennpunkte des anwaltlichen Berufsrechts, NJW 2018, p. 1656, footnote 4: The last survey evaluated was conducted in 2017, with a sample of all lawyers practicing the profession that was representative according to their own statements. Lawyers falling within this sample were invited to participate in the survey by fax and could participate by fax or online via an access-protected survey platform. In the period from March 31 to June 15, 2017, a total of 2,318 attorneys participated in the survey. Due to the large number of topics to be covered in the 2017 Professional Law Barometer, the questions were divided into two questionnaires, as in previous years.

[218] In the 2020 STAR Report above, the question "How satisfied are you with your job as

In the course of the onset of the pandemic, the German Federal Bar Association conducted three online surveys (BRAK Surveys on Corona 2020-2021), which were primarily intended to reflect their respective current (mainly economic) situations. BRAK's main purpose was to determine their support needs during this time of crisis.[219] After the third survey[220], the legal profession is still in a difficult situation, according to BRAK's evaluations. Two-thirds of all lawyers have considerably fewer mandates and thus have to cope with severe losses in turnover. 44.6% have applied for emergency aid. Whether this situation causes dissatisfaction or any other change in attitude towards the profession was not asked in these surveys. It can therefore be stated that the situation exists this way, but it does not provide a picture of opinion and mood that can be used to determine self-image and self-perception.

Interim conclusion:

The above mentioned surveys show who makes up the legal profession from a demographic point of view, i.e. how old the lawyers are, which specializations and organizational forms of the legal profession are predominant, which gender the professionals have, in which temporal extent they work, how turnover and profit are distributed. In addition, one can see how this legal profession has developed as a whole, in the market of legal services. Assumptions can be made as to how this might look economically in a few years. According to the question on professional satisfaction in the STAR Report 2020, it could be conjectured that lawyers are (or at least were in 2018) satisfied with their being and doing and the related professional regulations of the normative professional profile. Therefore, from their point of view, there would be no need to change and adapt the normative professional profile. However, for such an interpretation, more knowledge is needed about the background of the motivations, opinions, moods and attitudes of the legal profession, from which one could then derive a more comprehensive picture and thus conclude their satisfaction. From such a general satisfaction survey, an interpretation of a supposed approval of the normative professional image cannot be supported.

The above-mentioned surveys can only provide a rudimentary insight into the opinions[221], expectations and perceptions lawyers have of their inner life/self-image or inner

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a lawyer?" was asked.

[219] For surveys, see: BRAK – Corona Survey, https://www.brak.de/die-brak/coronavirus/corona-umfrage/ (last accessed 6 August 2021).

[220] At the end of May to the beginning of June, BRAK conducted a third survey on the impact of the Corona crisis on the German legal profession, in which 5,014 lawyers participated in full (https://www.brak.de/die-brak/coronavirus/corona-umfrage/#Ergebnisse, last accessed 6 August 2021).

[221] Topic-related, e.g., through the surveys of the Soldan Berufsbarometer or through an opinion poll on the contingency fee in the 2020 STAR Report.

professional profile. In addition, no survey is evident that deals with the current ethical-moral basic mood and the resulting lawyerly behavior of the individual professionals, so that no statement could be made about the professional ethos of the lawyers.
Therefore, in addition to the analysis of secondary data, it is recommended to conduct a primary data collection with a mixed method/instrument approach. This survey should take place by means of a qualitative and quantitative anonymous online survey, and should ask the above-mentioned meaningful research questions about the inner professional profile, attitudes, opinions and behaviors of the legal profession, in order to obtain a more comprehensive and up-to-date inner professional profile of the legal profession.

b. Social influences on the inner professional profile and external perception/image of the public

After looking at the normative professional profile and the self-image of lawyers, the final question is what the image of the lawyer looks like in the actual perception of society. There are even fewer (especially current) studies on the image of the lawyer in public, from the perspective of citizens or the media than on the self-image of lawyers.
With regard to the reputation and prestige of certain professions, the Allensbach Institute for Public Opinion Research examines the reputation of certain professions.[222] This scale of the Allensbach Institute, which has been published for more than 50 years, had slightly decreasing percentages in the last surveys, which was often titled in the media as a declining reputation of the legal profession. However, a comparison of the scales is only possible to a limited extent, since the lawyer is always evaluated and ranked, but otherwise the composition of the scale is always changing.[223]
Within the framework of a citizen survey Public Service[224] conducted by Forsa in 2019, lawyers were attested a high reputation, with 52% (compared to the previous year 2018 plus 1%, but compared to the year 2007 minus 7%).[225] It can be assumed that the

[222] iFD Allensbach, Allensbach Berufsprestige Skala 2013.

[223] For evidence see: Matthias Kilian/Stefanie Lange-Korf, Berufszufriedenheit von Rechtsanwälten, BRAK-Mitt. 2014, p. 185.

[224] Since the first "dbb Bürgerbefragung Öffentlicher Dienst" (dbb Public Sector Citizens' Survey) in 2007, the public has been asked every year to rate the standing of individual occupational groups.

[225] dbb Beamtenbund, Bürgerbefragung Öffentlicher Dienst 2019, p. 21, https://www.dbb.de/fileadmin/user_upload/globale_elemente/pdfs/2019/forsa_2019.pdf (last accessed 6 August 2021). It is striking that the lawyer is no longer found in the 2020 citizens' survey and that the judge in the 2020 survey lost minus 7% in reputation compared to the previous year, see under dbb Beamtenbund, Bürgerbefragung

profession of lawyer is nevertheless with high social prestige – even the percentage point drops slightly compared to the previous surveys[226].

The media influence factor on the image of the lawyer in the public has not yet been researched today under the achievement of digital platforms such as YouTube, social media such as Facebook, Instagram, etc. Before social media[227] and the market penetration of smartphones[228], in 2006 and 2007 Kilian/Hommerich[229] looked at the public's perception of the legal profession. In cooperation with the opinion research institute "Forsa Gesellschaft für Sozialforschung und statistische Analysen mbH" (Forsa), they conducted a telephone survey that initially targeted 1,000 people using a screening procedure. They were asked to name their direct associations with the term "lawyer." The most frequently mentioned association (35%) was the lawyer as a "competent and trustworthy legal advisor and solver of legal problems". In view of the common clichés of the lawyer and the partial media distortion of the lawyer's professional image, *Hommerich* and *Kilian* conclude from this that the lawyer is far less characterized by stereotypes than is commonly assumed.[230] Whether this statement is still relevant today is a matter of conjecture due to the lack of current studies.

The current Roland Legal Report 2021 from Allensbach[231] sees the great trust of citizens in the legal system. This has remained high for years: 71 percent of citizens have a great

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öffentlicher Dienst 2020, p. 11, https://www.dbb.de/fileadmin/user_upload/globale_elemente/pdfs/2020/forsa_2020.pdf (last accessed 6 August 2021).

[226] Susanne Bear, Rechtssoziologie, 4th ed. 2021, p. 180, marginal no. 33.

[227] For example: Facebook launches in German in 2008.

[228] The first smartphones from Samsung and Apple came onto the market in 2007, https://www.chip.de/news/Vor-iPhone-und-Galaxy-S8-Wie-hiess-das-erste-Smartphone_109438746.html (last accessed 6 August 2021). Due to these technical developments and the omnipresence of these communication media, it is possible that through the use of these contents are transported, which may have affected the reputation of the lawyer in the public, since the information society and also the mechanisms of information acquisition as well as dissemination have changed fundamentally since the entry of the increasing digitization of the media, however, there are also no representative current surveys on this.

[229] Christoph Hommerich/Matthias Kilian/Thomas Wolf, Mandanten und ihre Anwälte, AnwBl. 2007, p. 445; Christoph Hommerich/Matthias Kilian, Assoziationen der Bevölkerung zum Begriff "Rechtsanwalt," AnwBl. 2007, p. 705.

[230] Christoph Hommerich/Matthias Kilian, Assoziationen der Bevölkerung zum Begriff "Rechtsanwalt," AnwBl. 2007, p. 705.

[231] The survey is based on a total of 1,286 interviews with a representative cross-section of the population aged 16 and older. The interviews were conducted orally in person (face-to-face) between November 1 and 11, 2020.

deal or quite a lot of trust in the law, 66 percent in the courts.[232] The legal profession and lawyers are not surveyed nor is data collected on this. Only in the question on criticism of the legal system does the lawyer appear verbatim in an answer option. 62% of respondents see better chances of a favorable verdict for those who can afford a well-known lawyer.[233]

All in all, although an exemplary list, an empirical study or representative statement regarding the image of the lawyer in society is currently not possible for lack of sufficient data collection. Secondary data in the form of media reports on lawyers could certainly be processed within the framework of a content analysis (from print and digital media as well as social media channels), which, however, exceeds the scope of this publication. It remains to be said that the public image, i.e. the image of the lawyer in the eyes of the public, has not yet been sufficiently researched. It remains to be seen whether a study currently underway in Berlin, which deals with access to justice for citizens in Berlin, will yield[234] usable and representative statements also about the image of the lawyer in society. An announced unmet-legal-needs study[235] could also shed light in certain respects, perhaps also on how the role of the lawyer is perceived by citizens.

IV. Conclusion

At present, it can be stated that the normative professional profile is regulated as described under III. 2. The inner professional profile, however, has not yet been sufficiently researched and is therefore still unclear. Nevertheless, the concept of the professional profile as a self-image is (too) frequently used in jurisprudential discourse. Larger research projects that provide empirical, usable data in a timely manner are also

[232] Roland Rechtsreport 2021, p. 10, https://www.roland-rechtsschutz.de/media/roland-rechtsschutz/pdf-rr/042-presse-pressemitteilungen/roland-rechtsreport/roland_rechtsreport_2021.pdf (last accessed 6 August 2021).

[233] Roland Rechtsreport 2021, p. 16, https://www.roland-rechtsschutz.de/media/roland-rechtsschutz/pdf-rr/042-presse-pressemitteilungen/roland-rechtsreport/roland_rechtsreport_2021.pdf (last accessed 6 August 2021).

[234] E.g. a project of the Social Science Research Center Berlin is currently investigating how actual access for citizens to the law and justice is guaranteed in Berlin. See also at: https://www.wzb.eu/de/forschung/forschungsgruppe-der-praesidentin/forschungsgruppe/zugang-zum-recht-in-berlin (last accessed 24 June 2021).

[235] A research project commissioned by the Federal Ministry of Justice and Consumer Protection (BMJV) in 2020 is to determine the unmet-legal-needs, i.e., the causes of the decline in civil law suits in Germany (see also at: https://www.bmjv.de/SharedDocs/Artikel/DE/2020/092520_Forschungsvorhaben_zivilgerichtliche_Verfahren.html, last accessed 25 June 2021).

not apparent. Furthermore, current qualitative surveys that could inquire about self-perception and self-image, e.g., in the context of qualitative (expert) interviews, do not exist yet. It is therefore highly recommended to conduct a two-stage or parallel survey consisting of qualitative expert interviews and quantitative anonymous online surveys. In addition, citizens, i.e. society, should also be surveyed. Through this survey, findings can be obtained that are essential for some projects. For example, one could try to discuss why client and incoming numbers at the courts are declining, or why citizens prefer digital conflict resolution via legal techs (such as www.geblitzt.de or www.flightright.de) to legal advice. While an unmet-legal-needs study is currently announced, as indicated above, it does not yet provide results. There should be more research projects in the future, for example, on the role of the lawyer in the term of access to justice and in the formation of the law. Thinking of the discussion about the modernization of the civil procedure in Germany, this investigation of the citizen/consumer will also be highly advisable. Before creating structures and processes that are perceived to be distant from the mandate and the citizen, and thus contradict the actual goal of the reform efforts, namely to create a more efficient and citizen-oriented civil procedure.

If, after collecting the relevant data, it is determined that there is a major divergence between the normative and inner professional profile, the inner professional profile of the legal profession should first be redefined from within it, i.e. by the lawyers themselves. A redefinition of the inner professional profile opens up "momentous opportunities", as Zuck has already formulated.[236] "It is about a self-determining force from the bottom up[237], with which the lawyers themselves, beyond all interest politics, develop their self-understanding of what a good lawyer is and does."[238] This intrinsic process has consequences: "A newly formulated inner professional image also has an outward effect by changing the outer professional image and thus at the same time the legal system."[239]

The creation of an inner professional profile in this sense does not mean[240] the creation of soft law/code of ethics or similar written "guidelines." Rather, it is about raising awareness

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[236] Rüdiger Zuck, Das innere Berufsbild: Hürde oder Hilfe für das anwaltliche Selbstverständnis?, AnwBl. 2000, p. 8.

[237] Rüdiger Zuck, Das innere Berufsbild: Hürde oder Hilfe für das anwaltliche Selbstverständnis?, AnwBl. 2000, p. 8.

[238] Rüdiger Zuck, Das innere Berufsbild: Hürde oder Hilfe für das anwaltliche Selbstverständnis? ,AnwBl. 2000, p. 8.

[239] Rüdiger Zuck, Das innere Berufsbild: Hürde oder Hilfe für das anwaltliche Selbstverständnis?, AnwBl. 2000, p. 8.

[240] Jochen Taupitz, Anwaltsrecht und Anwaltsethik – komplementär und dennoch defizitär?, AnwBl. 2015, p. 737 et seq.; for the long-standing debate on ethics, see numerous references at: https://anwaltverein.de/files/anwaltverein.de/downloads/praxis/ethik/Literaturliste%20Anwaltsethik%20Stand%2023.08.2016.pdf (last accessed 10 August 2021).

of one's own attitudes, self-expectations of the legal profession as well as of the other professionals and of the legal system. The legal profession itself must consider who they want to be and according to which (professional ethical) principles they want to act and then finally (normatively determined) act. Their task is to fill out the professional profile (also of the future) in such an attractive way that the potential new professionals are happy to assume personal responsibility, grant access to justice and want to act as a co-creator of the administration of justice on an equal footing with judges and public prosecutors.

Therefore, among other things, an early formation of the professional profile and the ethical-moral basic principles should be worked towards among potential professionals. The socialization of future lawyers in terms of professional law and ethics begins at the latest when they start studying law, or even earlier, e.g. during their school years**.** Professional ethics are not formed by normative determination, but must be lived and experienced. I.e. it should take place at an early stage and must be anchored as an obligatory element within the framework of legal education.

It is therefore necessary to introduce the special features of the legal position of the lawyer, the roles and function assignments to the (potential, but also current) professionals at an early stage through education, further education and training and to create awareness of this professional profile there.

In the legal university education there is still enormous potential and an acute need for action. For example, basic subjects such as morals and ethics, psychology, and (professional) methodology could be made compulsory in the curriculum.

A small, very welcome approach with regard to further training efforts can be the introduction of § 43f BRAO, which was pushed through with the current BRAO reform. According to this regulation, lawyers must acquire knowledge of professional law in the future. As of August 1, 2022, at least ten hours of professional law must be heard by the end of the first year of admission at the latest. It remains to be hoped and observed whether this supposedly small number of hours, which according to this new rule could also simply be heard 7 years before entering the profession, will then also bring a real educational value, which in turn will also be reflected in professional practice.

It is therefore all the more important to draw the attention of the legislator to this need for action and the unused potential within the framework of the current legal education at the universities. There is a lack of the above-mentioned subjects, which could fertilize an early education and include the relevant professional knowledge as well as professional ethics and social skills. It should not be forgotten that the "seeds" of relevant professional knowledge, professionalism and attitudes are already "sown" at universities. That also applies to the professional profile of a lawyer. Within the framework of education, skills such as decision-making, independent thinking and acting, professional appearance should be trained and the future lawyer's personalities should be developed, who later, when entering the profession, will face the role and the tasks as well as duties of the legal profession on their own responsibility and who feel the vocation to do so. Only with a

conscious self-image and self-confidence plus a proven competence and professionalism, it is possible to deal successfully with judges and public prosecutors at eye level in a dialogical process and thus – because that is what it is all about in the end – helping the citizens/society to get (access to) justice.

The profession of an advocate as a profession of public trust against the background of Polish jurisprudence

Hanna Wolska/Michał Biliński

The aim of the publication is to present the initial terminological dilemmas regarding the concept of the "profession of public trust", which can be found in article 17 (1) of the Constitution of the Republic of Poland. The study emphasizes the key role of the jurisprudence of the Constitutional Tribunal in the scope of filling the above term with content due to the lack of an appropriate legal definition. The position of the Constitutional Tribunal, presented in subsequent judgments, allows for the specification of a number of key features describing the essence of the profession of public trust. In particular, they include high substantive requirements regarding professional qualifications, a unique bond between the service provider and the recipient based on, inter alia, the obligation to maintain professional secrecy, membership in an appropriate professional self-government and submission to the regime of disciplinary liability. The article also highlights the practical doubts concerning the qualification of representatives of certain professional groups to the category of the profession of public trust. Using the example of the advocate profession considered in the jurisprudence, a position was taken according to which the assignment of the above attribute does not have to be determined by the norm expressed directly in the act, but by the analysis of the decisive features for a given profession.

I. Introduction

The term "profession of public trust" is a specific Polish creation and is not known in most European countries.[1] In Poland, this term was introduced by article 17 (1) of the Constitution of the Republic of Poland of 2 April 1997, which binds the performance of the profession of public trust with the existence of a professional self-government. Article 17(1) of the Constitution of the Republic of Poland stipulates that professional self-governments may be established by law, representing persons performing professions of public trust and keeping custody over the proper performance of these professions within the limits of public interest and for its protection.

The Constitution of the Republic of Poland does not define the concept of the "profession of public trust" and does not mention entities included in its circle. Polish law also lacks a legal definition of the term "profession of public trust". It should be noted, however, that Polish courts established the content of this term in their jurisprudence by examining legal norms and statements of the doctrine, as well as by analysing legal professions (including

[1] Paweł Antkowiak, Polskie i europejskie standardy wykonywania wolnych zawodów, Przegląd Politologiczny, nr 1/2013, p. 135.

the profession of an advocate, attorney-at-law[2] and notary).

II. Jurisprudence

In the judgment of 26 November 2003 The Constitutional Court, referring to the definition developed in the literature, pointed out that "the profession of public trust is a profession consisting in serving personal human needs, involving the receipt of information concerning personal life and organized in a way that justifies the public belief that the use of this information by service providers is appropriate for the interests of the individual"[3]. In turn, in the judgments: of 8 December 1998, K 41/97, OTK 1998/7/117; of 22 May 2001, K 37/00, OTK 2001/4/86; of 7 May 2002, SK 20/00 OTK ZU No. 3 / A / 2002; of 18 March 2003 , K 50/01 , OTK ZU No. 3 / A / 2003, of 26 November 2003, SK 22/02, OTK-A 2003/9/97; of 18 February 2004, P 21/02, OTK ZU No. 2 / A / 2004; of 2 July 2007, K 41/05 OTK-A 2007/7/72, and of October 2010, K 1/09, OTK-A 2010/8/76, the Constitutional Tribunal paid special attention to the role, importance and characteristics of the professions of public trust, including the legal professions. It stated that:

Firstly, the performance of a profession of public trust is additionally determined by the standards of professional ethics, the specific content of the oath, the tradition of a professional corporation, or the specific nature of higher education and specialization obtained (e.g. training). The legislator has the right to make the performance of the profession of public trust dependent on the fulfillment by the interested party of certain conditions concerning, for example, his professional and moral qualifications, including the requirement of the "impeccable character" and "warranty of proper performance of the profession".

Secondly, restrictions on certain freedoms, with regard to professions of public trust, must be within the standard of restrictions on constitutional freedoms and rights, as set out in

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[2] Incidentally, it is worth noting that Poland is one of the few European Union countries where we can observe dualism within the legal professions that provide legal assistance. Apart from the profession of an advocate, the profession of an attorney-at-law is also distinguished. It should be noted that the scope of legal protection enjoyed by the representatives of these professions, as well as professional rights, is almost identical at present. The difference is that an attorney-at-law cannot be a defence lawyer in a criminal case if he is employed under an employment contract. Until 1 July 2015, an attorney-at-law could not act as a defence attorney in criminal and penal-fiscal proceedings. See more on this topic: Magadalena Jaś-Nowopolska/Hanna Wolska, Women in legal services in Poland and Germany, Franz von Liszt Institute Working Paper (2018), p. 1-19.

[3] Judgment of the Constitutional Tribunal of 26 November 2003, SK 22/02, OTK-A 2003/9/97; Paweł Sarnecki, Pojęcie zawodu zaufania publicznego (art. 17 ust. 1 Konstytucji) na przykładzie adwokatury, in: Leszek Garlicki (eds.), Konstytucja-Wybory-Parlament. Studia ofiarowane Zdzisławowi Jaroszowi (Warszawa 2000), p. 155 et seq.

article 31 (3) of the Polish Constitution.[4] These limitations should, in turn, comply with the principle of proportionality and, moreover, with the formal conditions for their introduction "by law", as defined in article 31 (3) and - in the case of freedom to choose and perform a profession - in article 65(1) of the Constitution of the Republic of Poland.[5]

Thirdly, the attribute of the profession of "public trust", which characterizes the professions subject to the provisions of article 17 (1) of the Constitution of the Republic of Poland, consists not only in including the scope of their keeping custody over the conduct of affairs or the protection of values (goods) of fundamental and (most often) personal importance for people using services in the field of professions of public trust. It is also not exhausted in taking up publicly important professional activities that require professional preparation, experience, discretion as well as tact and personal culture.

Fourthly, professions of public trust are performed in an assumed and socially approved manner, provided that their performance is accompanied by real "public trust". This trust consists of a number of factors, among which the most important are: the belief that the person performing this profession has good will, appropriate motivation, due professional diligence and the belief in adherence to the values important for the profile of a given profession. As regards the performance of the legal professions of public trust, essential values include full and integral respect for the law, involving in particular the observance of constitutional values and procedural directives.

Fifthly, the purpose of the functioning of professions of public trust, which is to keep custody within the limits of the public interest and for its protection, entails compulsory membership in a self-government of all those who consider themselves to be practicing this type of profession. The professional self-government is not so much to eliminate or neutralize the particular interests of persons performing professions of public trust, but to make sure they comply with the public interest by the interested parties themselves. As a consequence, this may entail the necessity to introduce a whole range of restrictions, both in terms of the freedom to practice a profession and the freedom to undertake economic activity, if such activity is to be associated with the performance of a profession.

Sixthly, the separation of disciplinary liability procedures and, first of all, attributing them with extrajudicial character can be based on the specific nature of the various professional groups and the protection of their autonomy and self-government. The

[4] Pursuant to article 31(3) of the Constitution of the Republic of Poland, restrictions on the exercise of constitutional freedoms and rights may be established only by law and only if they are necessary in a democratic state for its safety or public order, or for the protection of the environment, public health and morality, or the freedoms and rights of others people. These limitations cannot affect the essence of freedoms and rights.

[5] Pursuant to article 65(1) of the Constitution of the Republic of Poland, everyone is guaranteed the freedom to choose and perform a profession and to choose a workplace. Exceptions are defined by law.

catalogue of professional duties established in corporate acts and the adopted model of disciplinary liability are clearly confirmed in the norm of constitutional rank, namely in article 17 (1) of the Constitution of the Republic of Poland which stipulates that it is possible to establish professional self-governments that represent persons performing professions of public trust and keeping custody over the proper performance of these professions within the limits of the public interest and for its protection. This constitutional norm is implemented by stipulating disciplinary liability in law, which also creates a protective function and thus provides members of a given corporation with the necessary freedom and independence in the performance of their profession. This allows for a different determination of the scope of judicial control, because this control should be perceived not only in the context of the protection of individual rights, but also as an instrument of state supervision over professional self-governments.

In the seventh place, disciplinary proceedings conducted by the bodies of a professional self-government of public trust are an element of their fulfilment of the constitutional function of keeping custody over the proper performance of these professions. Therefore, both the conduct of the procedure and the penalties imposed therein (and their further consequences - such as the prohibition of applying for re-entry on the corporate register) must be within the limits of public interest and its protection (article 17(1) of the Constitution of the Republic of Poland), without prejudice to article 31 (3) of the Constitution of the Republic of Poland.

In the eighth place, an inherent feature of the profession of public trust is the obligation (and not an attribute) to keep secret the information obtained by an attorney-at-law in the course of providing legal aid. The essence of an advocate's professional secrecy is to create a thread of trust between a professional attorney and his client. The existence of trust is beneficial both for the client, who entrusts his secrets to the advocate, and for the general public, because it allows the realization of the right to defence, fair justice and disclosure of the truth. Professional secrecy of advocates exists in most Member States of the European Union, having the status of a fundamental right and the status of a rule of public order, although its scope differs in individual legal systems. Fundamental importance is attached to the right to a fair trial as the basis for the protection of advocates' professional secrecy in the community legal order (article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms in conjunction with article 6 of the Treaty on European Union) and the fundamental right to the protection of private life. The dual nature of the protection of professional secrecy of an advocate means that it does not have to be preserved only within the framework and for the purpose of the right of defence, but it can also extend to a wider range of information entrusted to the professional by the client.

In the ninth place, a literal and systemic interpretation of article 17 (1) of the Constitution of the Republic of Poland leads to the conclusion that the set of regulations provided for in this provision refers to "persons practicing the profession of public trust", while the "custody" of a self-government concerns the proper "performance of these professions".

In the subjective aspect, in addition to advocates and attorneys-at-law performing their professions, exercising custody under and pursuant to article 17(1) of the Constitution of the Republic of Poland applies in an accessory way to trainee advocates performing professional activities (under the supervision of a patron). Candidates for trainings are individuals who are not yet "practicing the profession of public trust". They do not remain within the organizational range of professional self-governments associating them - as expressed explicitly by article 17 (1) of the Polish Constitution "persons performing professions". In relation to them, until they are entered on the list of trainees, the "custody over the proper performance of the profession" cannot be exercised, as defined in article 17 (1) of the Constitution of the Republic of Poland. They cannot apply for admission to practice or, even more so, to perform at least some professional activities.[6]

In turn, in the justification to the judgment of 24 March 2015, K 19/14, OTK-A 2015/3/32, the Constitutional Tribunal, approving the previous jurisprudence, as well as taking into account the views expressed in the legal doctrine, listed the features of the profession of public trust. Stating that these include:

a) the need to ensure the proper performance of the profession in accordance with public interest, due to the importance of a given field of professional activity in society;
b) providing services and contacting natural persons by representatives of the professions in question in the event of a potential or real threat to the rights of a special nature (e.g. life, health, freedom, dignity, good name);
c) diligence and care of the representatives of the professions in question for the interests of people using their services, care for their personal needs, as well as ensuring the protection of the subjective rights of individuals guaranteed by the Constitution of the Republic of Poland;
d) requiring specific qualifications to perform the professions in question, including not only appropriate, formal education, but also experience gained, as well as providing a guarantee of performance of the profession which is proper and consistent with the public interest, taking into account specific standards of professional deontology;
e) obtaining personal information and information concerning the private life of people using the services of representatives of the public trust profession; this information constitutes professional secrecy, and the release from it may take place on the terms specified in the provisions of the Act of 6 June 1997 - Code of Criminal Procedure;
f) relative independence of the profession.

In addition to the issue of the very essence of the profession of public trust, which was

[6] Paweł Kuczma, Adwokat jako zawód zaufania publicznego w orzecznictwie Trybunału Konstytucyjnego, Palestra 3-4/2012.

discussed in the jurisprudence of the Constitutional Tribunal, the discernible direction of the Supreme Court's jurisprudence was also the issue of placing the profession of advocate within this category. In the jurisprudence of the Supreme Court in this respect, two opposing positions can be encountered.

In the judgment of 29 May 2001, I CKN 1217/98, the Supreme Court stated that the bar self-government is not a self-government representing persons practicing the profession of public trust within the meaning of article 17 (1) of the Constitution of the Republic of Poland. In the opinion of this court, such a status may be granted to a professional self-government only by a specific norm contained in the act, as is the case with the self-government of notaries (the Act of 14 February 1991 - Notary Public Law).[7] The Act of 26 May 1982 - The Law on the Bar does not give advocates this status. Such a status cannot be derived from the content of this Act, if only because an advocate is not an impartial participant in the administration of justice. Thus, in the opinion of this court, the advocates' self-government is therefore only a (ordinary) professional self-government, as defined in article 17 (2) of the Polish Constitution[8] which does not associate people performing professions of public trust.

On the other hand, in the decision of 13 December 2017, SDI 87/17, the Supreme Court did not share the opinion based on the thesis that a given profession is a profession of public trust only if it is so defined by an act. The court decided that this approach to the issue was too formal, and it did not take into account the necessity of a broader analysis of the features of a given profession, the results of which may strongly support recognition of a profession as the one of public trust, even if the Act does not explicitly provide for it. According to that court, it is obvious that the profession of an advocate is characterized by all the features which characterize the profession of public trust. As a consequence, it leads to the conclusion that the professional self-government of advocates must be perceived not through the prism of paragraph 2, but paragraph 1 of article 17 of the Constitution of the Republic of Poland. It should also be pointed out that in that decision the Supreme Court referred to the judgments of the Constitutional Tribunal[9] and the judgment of the administrative court[10], in which the profession of

[7] Pursuant to article 2 (1) of the Act of 14 February 1991 - Notary Public Law, notary in the scope of his powers referred to in article 1, acts as a person of public trust, taking advantage of the protection enjoyed by public officials.

[8] Article 17 (2) of the Polish Constitution states that other types of self-government may also be established by law. These self-governments may not violate the freedom to practice a profession or limit the freedom to undertake economic activity.

[9] Judgment of the Constitutional Tribunal of 19 October 1999, SK 4/99, OTK 1999/6/119; judgment of the Constitutional Tribunal of 26 November 2003, SK 22/02, OTK-A 2003/9/97; judgment of the Constitutional Tribunal of 2 July 2007, K 41/05 , OTK-A 2007/7/72, judgment of the Constitutional Tribunal of 24 March 2015, K 19/14, OTK-A 2015/3/32.

advocate has been recognized as a profession of public trust.

In view of article 17 (1) of the Polish Constitution, the second opinion should be considered accurate. Pursuant to the provision referred to above, a professional self-government which represents persons performing professions of public trust and supervising the proper performance of these professions within the limits of the public interest and for its protection, may be established by law. However, it does not stipulate that the statutory regulation must *expressly* indicate that a given professional self-government represents persons performing professions of public trust. In other words, the lack of literal endowment of a given professional group with the attribute of public trust cannot exclude such a status if it results from all legal norms addressed to a given profession. Therefore, if statutory norms allow for the reproduction of a set of features specified in the jurisprudence of the Constitutional Tribunal, such a circumstance should be considered sufficient to qualify a given profession to the category of the profession of public trust.

III. Conclusion

The Act of 26 May 1982 - Law on the Bar and the Code of Professional Ethics and Dignity (Code of Bar Ethics)[11] unequivocally confirms the features of the profession of an advocate - as a profession of public trust. These regulations ensure a high level of advocates' qualifications, professional secrecy, protection of the professional title of "advocate", as well as autonomy and independence in the course of providing legal assistance, which in turn translates into a special type of relationship between the advocate providing legal assistance and the client for whom the legal aid is provided. In addition, the advocates' self-government, through the regulations contained in the Act of 26 May 1982 - The Law on the Bar, not only represents a given professional environment (advocates), but also keeps custody over the proper performance of professional duties by its members. It must therefore be concluded that the profession of an advocate should be seen as a profession of public trust.

[10] Judgment of the Supreme Administrative Court of 29 August 2017, II GSK 3308/15, Lex No. 2381092.

[11] The Code of Ethics for Attorneys-at-Law and the Dignity of the Profession (consolidated text - announcement of the Presidium of the Supreme Bar Council of 27 February 2018) (The Code of Ethics for Attorneys-at-Law of 2019, item 23).

Advertising by lawyers: In the context of conflict between constitutional and professional law – The inconsistency with advertising by legal tech based legal service providers

Maximilian Roth

It is undisputed that advertising has always been an area of conflict for lawyers in the Federal Republic of Germany. The cornerstone of the legal admissibility of lawyers' advertising lies in constitutional law (I.), although the historically developed professional law is always restrictive in character (II.). Against this background, a central question behind this paper is the definition of advertising in the legal sense (III.) Finally, the paper outlines the inconsistent application of law with the example of the still advancing legal tech companies that also offer legal services like lawyers without falling under the professional law of lawyers (IV.). The last chapter addresses the need for a consistent application of the law (in this case the UWG[1]) for legal services providers, like the above mentioned legal tech providers, as well as for the advertising by lawyers to abandon the restrictive professional law of lawyers in this respect (V.).

I. Constitutional principle

Article 12 (1) of the constitution protects the freedom to exercise the profession. This includes not only professional practice itself, but also any activity that relates to and serves the exercise of the profession. For this reason the external presentation (and thus advertising) of lawyers is also included in the scope of protection of article 12 (1) of the constitution.[2] Because of this, lawyers are also dependent on informing potential clients about the services they offer. State measures restricting business or professional advertising are infringements on the freedom to exercise a profession. However, these measures require a legal basis and are only compatible with article 12 (1) of the Basic Law if they are justified by sufficient reasons in the public interest and comply with the principle of proportionality[3].[4] In exceptional cases, the freedom of opinion or freedom of press under article 5 (1) of the constitution may also be relevant, either in competition

[1] Gesetz gegen den unlauteren Wettbewerb, Act against Unfair Competition, http://www.gesetze-im-internet.de/englisch_uwg/index.html (last accessed 10 August 2021).

[2] Fundamental BVerfGE 94, 372 (389) = NJW 1996, p. 3067.

[3] Accordingly, the infringement is proportionate if the means chosen are suitable and necessary to achieve the purpose pursued and, in an overall weighing of the severity of the infringement and the weight of the reasons justifying it, the limit of reasonableness is still respected, i.e. appropriate.

[4] BVerfGE 76, 196 (207) = NJW 1988, p. 194.

with the ideal or as a lex specialis.[5]

The legal basis that can legitimize the restriction[6] can be found in §s 43b, 59b (2) no. 3 of the German Federal Lawyers' Act (*Bundesrechtsanwaltsordnung – BRAO*) in conjunction with §s 6 et seq. of the Professional code for lawyers (*Berufsordnung für Rechtsanwälte – BORA*).[7] In addition to this formal legal basis, there is a substantive need for justification by a public interest.[8] In the abstract, these interests include the functioning of the administration of justice and the confidence of those seeking justice in the legal profession, i.e. a body of the administration of justice (§ 1 BRAO).[9] What this means in detail depends on the respective case constellation. It can, for example, be shaped in such a way that a distortion of the professional image through advertising methods is to be prevented, that the lawyer, for example, advises on lawsuits for the sake of profit or directs the handling of the case to fee interests.[10] In this conjunction, it should be mentioned, that the regulation of lawyers' advertising as part of the exercise of the profession requires justification, but that a lawyer's advertising measure that does not run counter to any permissible regulation does not require justification.[11] A self-image under professional law cannot be taken as a guiding principle for the proper exercise of the profession, irrespective of any concrete impairment of public interests. The lawyer must be able to present himself to clients and potential clients, especially in view of the increasing competition in the legal service market. In addition, the clients' need for information can be better satisfied by lawyers´ advertising.[12] An attempt to resolve this conflict is made with the following legal regulations.

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[5] On shock advertising on mugs of a lawyer BVerfG (2nd Chamber of the First Senate), decision of 5/3/2015 – 1 BvR 3362/14, NJW 2015, 1438. On Art. 10 ECHR, decision of 7/3/1991 – No. 14622/89, NJW 1992, p. 963.

[6] Above all in article 12 (1) of the Constitution.

[7] See in detail II. 2.), 3.) and 4.).

[8] In addition, the perspective of European law can still be taken into account, in particular the freedom to provide services according to article 49 TFEU. According to article 24 of the Services Directive 2006/123/EC, restrictions on commercial communications for regulated professions must not only be non-discriminatory. They must also be justified by an overriding reason relating to the public interest and be proportionate. On the Services Directive in detail Gerhard Ring, Anwaltliches Werberecht, 2nd edition 2018, ch. 1. marginal no. 13 et seq.

[9] BVerfG (2nd Chamber of the First Senate), decision of 25/4/2001 – 1 BvR 494/00, NJW 2001, p. 1926.

[10] BVerfGE 76, 196 (207 f.) = NJW 1988, p. 194.

[11] BGH, decision of 23/9/2002 - AnwZ (B) 67/01, NJW 2003, p. 346.

[12] Monika Träger, in: Dag Weyland (ed.), BRAO, 10th ed. 2020, § 43b, marginal no. 1.

II. Restriction by law

1. Historical development

Until the fundamental decisions of the BVerfG[13] in 1987, a fundamental ban on advertising had been the prevailing legal view for centuries:[14] In 1775, for example, the "*Fuldische Advocatenordnung*" made it a punishable offence to "roam the countryside, solicit lawsuits, find peasants and carouse with them". Through the general clause of § 28 of the Lawyers' Code (*Rechtsanwaltsordnung – RAO*), which came into force in 1879, the lawyers' courts of honour established in a series of decisions that advertising for practice was incompatible with the dignity of the lawyer and therefore inadmissible.[15] Later, the first Code of Professional Conduct of 1929 ("*Vademecum*") contained detailed regulations on the prohibition of advertising in §s 20 et seq.; new versions under the Reich Lawyers' Act (*Reichsrechtsanwaltsordnung – RRAO*) of 1936 and the BRAO of 1959 essentially did not change this.[16] The 1973 Principles of the Legal Profession (*Richtlinien der Bundesrechtsanwaltskammer*), which were based on § 177 (2) no. 2 BRAO (old version), still stated: "The lawyer acts in breach of his profession if he solicits practice". This total ban could only be attributed to established lawyers who wanted to protect themselves from unwelcome competition by making other, younger lawyers known through their achievements and qualifications.

With decisions from 1987, the BVerfG took the ground out of the rigid advertising ban for lawyers and specified it in later decisions. The guidelines of the Federal Bar Association did not suffice as a legal basis[17] and a ban on advertising could only be assumed in two exceptional groups:[18] in the case of misleading or intrusive advertising.[19]

After all, the legislator was forced to act. With the so-called amendment of professional law in 1994, advertising was regulated in § 43b, which was newly introduced into the BRAO as a lex specialis versus § 43 BRAO.[20] The legislative motive behind § 43b BRAO

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[13] BVerfG = Bundesverfassungsgericht = Federal Constitutional Court.

[14] For historical developments Cornelius Wefing, Der Wandel im Berufsbild der Anwaltschaft - am Beispiel der Liberalisierung des anwaltlichen Werberechts, 2021, p. 84-295.

[15] Fundamentally already EGH 1, 28 (32).

[16] Kai von Lewinski, in: Wolfgang Hartung/Hartmut Scharmer , BORA/FAO, 7th ed. 2020, in front of § 6 BORA, marginal no. 7 et seq. On the history of the advertising ban, cf. also BGHSt 26, 131 (133 f.) = NJW 1975, p. 1979.

[17] Explicitly: BVerfGE 76, 171 (184) = NJW 1988, p. 191.

[18] Kai von Lewinski, in: Wolfgang Hartung/Hartmut Scharmer (eds.), BORA/FAO, 7th ed. 2020, § 6 BORA, marginal no. 3.

[19] BVerfGE 76, 196 (205) = NJW 1988, p. 194; BVerfG (3rd Chamber of the First Senate), Decision of 17/9/1993 --1 BvR 1241/88, NJW 1994, p. 123.

[20] Law on the Reorganisation of the Law Governing the Legal Profession of 2/9/1994,

was to take action against excesses such as those that occurred in the U.S. after the poison gas disaster at a chemical plant in 1984. In the context of this catastrophe, U.S. attorneys flew to India to obtain assignments for damage claims, paid for each signed power of attorney form, and thus attracted more than 24,000 mandates with the equivalent of around 75 billion euros in damages and compensation for pain and suffering, of which the attorneys had been promised 35% as a contingency fee.[21]

Furthermore, § 6 BORA, which is based on § 59b (2) no. 3 BRAO[22] and was adopted by the Statutory Assembly[23] at the end of 1996, contains more specific statements on the prohibition of advertising. Closely related to this are §s 7-10 BORA, which contain additional provisions on the designation of partial areas of professional activity (§ 7), on the designation as "mediator" (§ 7a), the announcement of joint professional practice and other professional cooperation (§ 8), the abbreviated designations for joint professional practice (§ 9) and on the design and content of letterheads (§ 10).

2. Facts of § 43b BRAO

§ 43b BRAO sets out three requirements for the admissibility of advertising for legal services.

a. Relation to the professional practice

This constituent element is interpreted very broadly. Professional advertising exists if the lawyer draws the public's attention to his professional activity, the lawyer's conduct may play a role in the decision of potential clients as to whether and, if so, which lawyer they should instruct, based on reasonable and relevant considerations.[24]

b. Objectivity

The interpretation of the criterion of objectivity leads to considerable problems in practice.

Federal Law Gazette I, p. 2278.

[21] Volker Römermann in: BeckOK, BRAO, 12th ed. 2021, § 43b BRAO, marginal no. 6 et seq.; Christian Dahns, Umstrittenes Verbot der Werbung um ein konkretes Einzelmandat, NJW-Spezial 2004, p. 141.

[22] According to this, the Statutory Assembly is authorized to regulate in more detail “the special professional duties in connection with advertising and information about self-designated focal points of interest”.

[23] The nature and tasks of the Statutory Chamber, which is established at the Federal Bar Association, are determined by §s 191a et seq. of the Federal Lawyers' Act (BRAO).

[24] BGH, decision of 1/3/2001 - I ZR 300/98, NJW 2001, p. 2087.

Admittedly, the concept of objectivity has not been generally concretized and positively circumscribed to date.[25] It is recognized that the lawyer is free to choose the form; the occasion, number, place and size of the advertising are irrelevant in this respect.[26] Otherwise, however, the case law is limited to individual cases. There is probably only agreement on the purpose of the criterion of objectivity: The needs of the law-seeking public for transparency of the service are to be sufficiently taken into account so that the danger can be countered that the law-seeking public is misled by quality advertising and gains incorrect ideas about the efficiency of a lawyer.[27] In any case, this objective is missed if there is completely exaggerated, clumsily intrusive, puffery, harassing or misleading advertising.[28] However, what form of advertising can be considered completely excessive in this respect, for example, is subject to change over time. Also because the audience's ability and willingness to perceive changes.[29] The mere fact that a professional group designs its advertising differently than has been customary up to now does not mean that this is inadmissible advertising.[30]

Therefore, objectivity requires that the lawyer only advertises with facts and values judgements that can be checked for their truthfulness.[31] A negative distinction can also be made here for the purpose of concretization: Advertising is objective if the focus is not on conveying facts about one's own professional activity that can be clearly checked for their truth content, but rather on evaluations, quality praise and self-assessments.[32] Above all, these must not be misleading, and they are if they give false information about legally relevant circumstances, e.g. the indication of titles or academic degrees without being entitled to do so.[33]

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[25] Monika Träger, in: Dag Weyland, BRAO, 10th ed. 2020, § 43b, marginal no. 18.

[26] Michael Kleine-Cosack, BRAO, 8th ed. 2020, § 43b marginal no. 10 with numerous references from case law.

[27] OLG Düsseldorf, decision of 17/7/2007 - 20 U 54/07, DStR 2007, 2347 on inadmissible legal advice in a café as “Coffee and Law”; LG Nuernberg-Fuerth, decision of 8/11/2000 – 3 O 4973/99, AnwBl. 2001, 364; Hanns Prütting, in: Martin Henssler/Hanns Prütting, Bundesrechtsanwaltsordnung, 5th ed. 2019, § 43b BRAO, marginal no. 16.

[28] Overview Monika Träger, in: Dag Weyland, BRAO, 10th ed. 2020, § 43b, marginal no. 21.

[29] BVerfGE 94, 372 (398 f.) = NJW 1996, 3067 on advertising print on tracksuits.

[30] BVerfG (2nd Chamber of the First Senate), Decision of 24/7/1997 – 1 BvR 1863/96, NJW 1997, 2510.

[31] Kerstin Wolf, in: Ludwig Kroiß/Claus-Henrik Horn/Dennis Solomon, Nachfolgerecht, 2nd edition 2019, 4th professional law, marginal no. 52.

[32] Fundamental BGH, decision of 1/3/2001 – I ZR 300/98, NJW 2001,p. 2087.

[33] From the perspective of the competition law: OLG Stuttgart, decision of 18/3/2014 – 12 U 193/13, BRAK-Mitt 2015, p. 50.

c. No direct marketing

Finally, the advertising or marketing must not be directed to the individual in order to obtain the placing of an order. This is intended to protect the person seeking legal advice from being taken by surprise as to whether a mandate should be given to the advertising lawyer.[34]

However, this characteristic is interpreted broadly due to the fundamental permissibility of advertising, which is important under constitutional law. An infringement does not necessarily exist if the lawyer personally writes to a potential client in the knowledge of a concrete need for advice and offers his services. The addressee is then, on the one hand, neither harassed, coerced nor taken by surprise by the letter and, on the other hand, he is in a situation in which he is dependent on legal advice and an objective advertisement tailored to his need can be helpful to him.[35]

3. Facts of § 6 BORA

§ 6 BORA is divided into three paragraphs. While § 6 (1) BORA does not make any further statement compared to § 43b BRAO, § 6 (2) BORA in its current version[36] states that it is not permissible to state success and turnover figures if they are misleading (sentence 1); references to mandates and clients are only permissible if the client has expressly consented (sentence 2). While with regard to misleading information, reference can be made to the principles already outlined above and the examination of individual cases, a detailed consideration is required with regard to § 6 (2) sent. 2 BORA.

§ 6 (2) sent. 2 BORA only allows the naming of clients if they have expressly consented beforehand; however, the express consent already results from § 43a (2) BRAO. According to the wording, the naming of companies or persons *against* whom a client has given a mandate to the (advertising) lawyer is not covered by this, but the BVerfG has clarified that the publication of a list of opponents is also covered by the protection of article 12 (1) of the constitution.[37]

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[34] Details: Wolfgang Hartung, Werbung um einen Auftrag im Einzelfall – Ein weiterhin ungelöstes Problem?, MDR 2003, p. 485.

[35] BGH, decision of 13/11/2013 – I ZR 15/12, NJW 2014, p. 554.

[36] For the old version, according to which "information other than that permitted under § 7 as well as explanations of the main areas of interest and activity" could only be given in practice brochures, circulars and other comparable information media, see Hanns Prütting, in: Martin Henssler/Hanns Prütting, Bundesrechtsanwaltsordnung, 5th ed. 2019, § 6 BORA, marginal no. 2.

[37] BVerfG (3rd Chamber of the First Senate), decision of 12/12/2007 – 1 BvR 1625/06, NJW 2008, p. 838; in detail also Gerhard Ring, Anwaltliches Werberecht, 2nd edition

§ 6 (3) BRAO regulates the prohibition of the so-called indirect advertising (third-party advertising) as a prohibition of circumvention, according to which the lawyer may not cooperate in third parties carrying out advertising on his behalf, which in turn is prohibited to him.

4. Regulations in detail: §s 7-10 BORA

a. § 7 BORA

§ 7 (1) sent. 1 BORA allows that, irrespective of a specialist lawyer designation, partial areas of professional activity may also be designated, but only those which can prove knowledge corresponding to their designation, acquired during training, through professional activity, publications or in any other way. Those who use qualifying additions must also have theoretical knowledge and have worked in the designated field to a considerable extent. However, such designations are inadmissible if they give rise to a risk of confusion with specialist lawyers or are otherwise misleading, § 7(2).

b. § 7a BORA

Pursuant to § 7a BORA, the lawyer who calls himself a mediator must fulfil the requirements of § 5 (1) Mediation Act regarding education and training, theoretical knowledge and practical experience.

c. § 8 BORA

Pursuant to § 8 of the Federal Code of Professional Conduct (BORA), reference may only be made in connection with professional practice if it takes place in a partnership or in any other way with the professionals named in § 59a of the Federal Lawyers' Act (BRAO). The announcement of any other form of professional cooperation is permissible, provided that the impression of joint professional practice is not created.

d. § 9 BORA

If abbreviated designations are used, it is mandatory that they be used uniformly.

2018, ch. 2, marginal no. 225.

e. § 10 BORA

§ 10 BORA regulates in detail and extensively the requirements for letterheads to protect against misleading actions.[38]

5. Competition Law, §s 3 et seq. UWG

Advertising by lawyers is also subject to competition law, because § 43b BRAO has the necessary reference to competition law for the application of § 1 UWG, in that § 43b BRAO also has a protective function related to the fairness of competition and regulates the market conduct of lawyers among themselves.[39] Misleading statements are prohibited under § 5 (1) in conjunction with § 3 UWG. A violation of § 43b BRAO is an indication of anticompetitive behavior pursuant to § 3 UWG.

6. Legal consequences

A violation of the lawyer's advertising restrictions may result in sanctions under professional law in addition to those under competition law. In addition to a disapproving instruction by the bar association pursuant to § 73 BRAO, a reprimand pursuant to § 74 BRAO or sanctions by the lawyers' court pursuant to § 114 BRAO may be considered. In detail, these can be a warning, a reprimand, a fine, a ban on practicing a particular field of law for a period of one to five years, as well as exclusion from the bar.

III. Definition of advertising

Against this mentioned background, a central question that motivates this paper has to be clarified**:** What does the term “advertising” in § 43b BORA in the legal sense mean? According to the established view in case law and literature, advertising exists when behavior is planned to attract others to use one's own services.[40] Advertising is more than the factual information about the type and place of a professional activity, but it aims in particular at gaining customers at the expense of the competition, which is to be determined according to objective criteria[41] of the public's perception, i. e. what

[38] Gerhard Ring, Anwaltliches Werberecht, 2nd edition 2018, ch. 1. marginal no. 51.

[39] Hanns Prütting, in: Martin Henssler/Hanns Prütting, Bundesrechtsanwaltsordnung, 5th ed. 2019, § 43b BRAO, marginal no. 95.

[40] Fundamental already BVerfGE 111, 366 (378) = NJW 2004, p. 3765 on the tax adviser.

[41] BVerfGE 76, 196 = NJW 1988, p. 194.

impression the public gains from the conduct.[42] It is irrelevant whether the aim is to win new customers or to maintain or expand existing business relations. The term advertising also includes not only the traditional forms of advertising, such as advertisements and brochures, but also marketing and the public relations work of a lawyer in general.[43]

Targeted advertising must be distinguished from “merely promotional behavior”.[44] This can be seen in entries in telephone and fax directories, participation in television discussions stating the professional title. According to today's understanding, these activities also fall under the advertising law provisions of § 43b BRAO and §s 6 et seq. BORA.[45]

From a regulatory point of view, advertising as a lawyer includes not only § 43b BRAO, but also §s 6 et seq. BORA, in which the second § of the BORA is referred to as "Special professional duties in connection with advertising". This is because, irrespective of the intensity of the advertising effect associated with letterheads, the indication of abbreviated designations or qualifications, these constitute advertising conduct, which aims to attract the public to use the services of this particular lawyer or law firm.[46]

IV. Legal tech companies[47]

Legal companies experience a high level of popularity; since 2015, the scene has experienced enormous growth, which is reflected in the competition between legal service providers and lawyers. Three prominent examples are given here, where companies have (alleged) claims assigned to them and then assert them: MyRight[48] helps consumers enforce their rights, especially with regard to the VW emissions scandal and associated claims for damages against VW, Audi, Seat, Skoda and Porsche.

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[42] Monika Träger, in: Dag Weyland, BRAO, 10th ed. 2020, § 43b, marginal no. 2.

[43] Martin W. Huff, in: Reinhard Gaier/Christian Wolf/Stephan Göcken, Anwaltliches Berufsrecht, 3rd ed. 2020, § 43 b BRAO, marginal no. 10.

[44] This is the prevailing opinion in case law (BVerfGE 85, 248 = NJW 1992, p. 2341; BVerfG (2nd Chamber of the First Senate), decision of 17.4.2000 - 1 BvR 721/99, NJW 2000, p. 3195) and literature (Michael Kleine-Cosack, BRAO, 8th ed. 2020, § 43b, marginal no. 4).

[45] Kai von Lewinski, in: Wolfgang Hartung/Hartmut Scharmer, BORA/FAO, 7th ed. 2020, § 6 BORA, marginal no. 17 et seq.

[46] On letterheads expressly BGH, decision of 17/4/1997 – I ZR 219/94, NJW 1997, p. 3236.

[47] Legal-tech companies in the understanding of this essay shall only be those companies that fall under the RDG as debt collection companies.

[48] https://www.myright.de (last accessed 10 August 2021). The website says: "Over 95% success rate! In just 2 minutes we will tell you if your vehicle is affected and what we recommend you do!”.

Flightright[49] supports air passengers in enforcing refunds and compensation for flight cancellations, rebookings or delays under the EU Air Passenger Rights Regulation. Via wenigermiete.de[50], the tenants receive help in matters of tenancy law (e.g. to enforce the so-called "Mietpreisbremse" ("rent control")[51]. These companies advertise that they enforce claims by way of debt collection without any cost risk, and they only demand remuneration if they are successful.

The starting point for their activity is § 10 (1) no. 1 RDG[52]. This provision allows the provision of legal services in the field of debt collection services based on special expertise. The registration required for this (cf. § 12 RDG) does not require a degree in law, but only a successfully completed course in special knowledge of at least 120 hours, §s 2 (1), 4 (1) RDG.[53] This already raises the question of whether the above-mentioned activities still belong to the permitted debt collection services. According to § 2 (2) sent. 1 RDG, this only applies to the collection of third-party claims or claims assigned for the purpose of collection on behalf of third parties if the collection of the claim is conducted as an independent business. In one of its decisions in 2019, the Bundesgerichtshof (BGH[54]) stated: The concept of debt collection services should not be understood too narrowly. This is because the legislator's goal of fundamentally reorganizing the law governing extrajudicial legal services must be taken into account. The concept of collection service must therefore be oriented to the aspects of deregulation and liberalization and allow for the development of new professional profiles. Against the background of the protective purpose pursued by this law, which is to protect those seeking legal assistance, the legal system and the legal system from unqualified legal services (§ 1 (1) sent. 2 Legal Services Act (*Rechtsdienstleistungsgesetz – RDG*), a rather generous view is required overall.[55] Based on this, the BGH affirmed the compatibility of wenigermiete.de's activity with the RDG. The decision was described by

[49] https://www.flightright.de (last accessed 10 August 2021). The website says: "We get your money back - Even in case of flight problems due to Corona. Money instead of vouchers. Choose your flight problem.".

[50] https://www.wenigermiete.de (last accessed 10 August 2021). The website says: "Moved in during or after summer 2015? Then you are subject to the so called Mietpreisbremse (real estate rent control by law), which was even tightened on 1 April 2020. On average, our customers can reduce their rent by 200 euros per month.".

[51] The rent brake is intended to put a stop to the increased rents in major German cities.

[52] RDG = Rechtdienstleistungsgesetz = Gesetz über außergerichtliche Rechtsdienstleistungen= Act on Out-of-Court Legal Services, https://www.gesetze-im-internet.de/englisch_rdg/index.html (last accessed10 August 2021).

[53] Susanne Hähnchen/Paul T. Schrader/Frank Weiler/Thomas Wischmeyer, Legal Tech – Rechtsanwendung durch Menschen als Auslaufmodell?, JuS 2020, p. 632.

[54] BGH = Bundesgerichtshof = Federal Court of Justice.

[55] BGH, decision of 27/11/2019 – VIII ZR 285/18, NJW 2020, p. 208.

the BGH itself as a "fundamental decision"[56] on which activities are permitted to a company based on its registration as a debt collection service provider under the RDG. This ruling was also seen in the literature as a key decision to rubber-stamp the business policy structure of many legal tech providers.[57] In response to this decision, the legislator redefined the concept of debt collection by expanding § 2 (2) RDG: Debt collection only includes legal examination and advice that relates to the collection. Further legal services can only be permissible if they are ancillary to the main service within the meaning of § 5 RDG.[58]

For legal tech companies, the law governing the legal profession and thus the restrictive provisions of § 43b BRAO, §s 6 et seq. BORA are not relevant, not even in analogous application.[59] They are (merely) subject to the limits of competition law, in particular §s 3 et seq. UWG: The general clause of § 3 (1) UWG determines the inadmissibility of unfair business acts; it has a catch-all function if a business act does not fulfil any of the special unfairness criteria of §s 3 (2), (3) in conjunction with the Annex to the UWG and §s 3a to 6 UWG and these do not constitute a conclusive regulation.[60] Specifically, § 3a UWG provides that a person acts unfairly if he contravenes a statutory provision which is also intended to regulate market conduct in the interest of market participants and the contravention is likely to have a noticeable adverse effect on the interests of consumers, other market participants or competitors. § 4 UWG protects competitors from disparagement, denigration and targeted obstruction; concretized in § 4a UWG by the prohibition of aggressive commercial acts. Finally, § 5 UWG determines the prohibition of misleading advertising and, by codifying case groups developed in case law, does not conclusively specify which statements can be misleading.[61] § 5a UWG also specifies forms of omission in certain situations as misleading. § 6 (2) UWG defines comparative advertising as unfair in certain case constellations and § 7 UWG classifies unreasonable harassment as unlawful. If these requirements are fulfilled, the company is liable under civil law for injunctive relief and, if applicable, for damages.

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[56] Press release no. 153/2019 of the BGH dated 27/11/2019.

[57] Hans-Jürgen Hellwig/Wolfgang Ewer, Keine Angst vor Legal Tech – Kurze Antworten auf aktuelle Fragen, NJW 2020, p. 1783.

[58] Cf. BT-Drs. 19/27673, p. 20.

[59] Cf. in general: Volker Römermann/Tim Günther, Legal Tech als berufsrechtliche Herausforderung – Zulässige Rechtsdurchsetzung mit Prozessfinanzierung und Erfolgshonorar, NJW 2019, p. 551.

[60] Helmut Köhler, in: Helmut Köhler/Joachim Bornkamm/Jörn Feddersen/Christian Alexander, UWG, 39th ed. 2021, § 3, marginal no. 2.3 and 2.5.

[61] From a lawyer's perspective Matthias Kilian/Susanne Offermann-Burckart/Jürgen vom Stein, Praxishandbuch Anwaltsrecht, 3rd edition 2017, § 7, marginal no. 4.

V. Evaluation

While special rules of conduct on advertising are laid down for lawyers in §s 43b and §s 6-10 BORA and, in addition, the general provisions of §s 3 et seq. UWG apply, legal tech companies are only subject to the provisions of the UWG. The view that lawyers' advertising behavior today is only subject to the general restrictions of the UWG[62] cannot be accepted. On the contrary, professional law provides for a wide range of specific rules on unfair conduct by lawyers, which are intended to do justice to the specifics of practicing as a lawyer.[63] This is shown in particular by §s 6-10 BORA with their detailed regulations (see above), which above all concretize the prohibition of misleading conduct in § 5 UWG.[64]

At the outset, lawyers and legal firms are united by the fact that they offer legal services which are legally defined in § 2 (1) and (2) RDG. However, the opening of the legal services law has created an asymmetry in the legal market: non-lawyers can provide services like lawyers without falling under the professional restrictions of the BRAO.[65] Legal tech companies were thus able to agree contingency fees and finance proceedings for their clients in such a way that they did not have to take any cost risks, which was generally prohibited for lawyers under § 49b (2) BRAO. Two amendments[66] have now also allowed lawyers to charge contingency fees in debt collection and thus also to finance proceedings in out-of-court debt collection and in judicial dunning proceedings (§ 4a RVG in the upcoming version).[67]

The advertising regulations, nevertheless, remained untouched by these latest amendments to the law. In this respect, there is de facto unequal treatment of lawyers

[62] OLG Naumburg, decision of 8/11/2007 – 1 U 70/07, NJW-RR 2008, p. 442.

[63] Gerhard Ring, Anwaltliches Werberecht, 2nd edition 2018, ch. 1, marginal no. 80.

[64] Gerhard Ring, Anwaltliches Werberecht, 2nd edition 2018, ch. 1, marginal no. 35 et seq.

[65] Philipp Hammerich, Die Anwälte sollten besser fragen "Warum dürfen wir das nicht?", LTO, 4/1/2019, online: https://www.lto.de/recht/juristen/b/legal-tech-rechtsdienstleistungsgesetz-anwaelte-inkassounternehmen-fremdfinanzierungsverbot-provisionsverbot-erfolgshonorar-1/ (last accessed 26 July 2021).

[66] Act on the Reorganization of the Professional Law of Lawyers' and Tax Consultants' Professional Practice Companies and on the Amendment of Other Provisions in the Area of the Legal Professions of 7 July 2021, Federal Law Gazette I, p. 2363 and Act to Promote Consumer-Oriented Offers in the Legal Services Market.

[67] Details: Nicolas Lührig, Gesetz zum Legal-Tech-Inkasso gilt ab 1. Oktober 2022: Erfolgshonorar auch für Anwaltschaft, online: https://anwaltsblatt.anwaltverein.de/de/anwaeltinnen-anwaelte/berufsrecht/erfolgshonorar-legal-tech-inkasso-gesetz (last accessed 26 July 2021).

compared to legal tech companies. If the lawyer, as an organ of the administration of justice (§ 1 BRAO), is the guarantor in the sense of free advocacy who asserts and enforces the rights of citizens in court, he must at the same time be allowed to advertise in the same way as his competitors licensed under the RDG who are also fighting for the enforcement of these rights. The freedom to exercise the profession in the form of the fundamental advertising possibility by the lawyer, for which § 43b BRAO, §s 6 et seq. BORA as a restriction legitimizing the public interest in the reputation of and trust in the legal profession can no longer exist if it disadvantages the lawyer vis-à-vis competitors in the field of legal services without substantive grounds. This applies all the more if the lawyer is to continue to be regarded as a guarantor of the path to justice.

If legal tech companies are not subject to the restrictions that apply to lawyers at the level of professional and advertising law (in particular §s 6 et seq. BORA), this diminishes the lawyer - even if he is not the sole guarantor of the enforcement of civil rights - in his position as an organ and the criterion of indispensability. The fact that the BVerfG has repeatedly expressed constitutional concerns about a number of professional regulations[68] should be a reason for legal policy to take a consistent step further after the liberalization of the legal services market and abolish the restrictive regulations on lawyers' advertising and subject them only to the general provisions of the UWG. This is because the extensive detailed regulations of §s 6-10 BORA no longer correspond to today's zeitgeist and are relics from the time of the transition from the total ban on advertising to today's freedom of advertising.[69]

VI. Conclusion

The legal framework for advertising by lawyers is subject to a strong change. This has not been consistently pursued in legal policy after the liberalization of the legal services market, which leads to a shift of legal services away from the legal profession to new competitors, in particular through legal companies - because the unjustified disadvantage of lawyers compared to advertising legal tech companies, which has been pointed out, has not been eliminated. The fact that a (further) liberalization of advertising could lead to individual lawyers vehemently pestering or harassing potential clients and that the reputation of the legal profession as a whole would be damaged in the process is hardly likely, because the provisions of the Unfair Competition Act (UWG) adequately put a stop to such advertising measures.[70]

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[68] For example BVerfGE 101, 312 = NJW 2000, p. 347 on § 13 BORA and BVerfGE 108, 150 = NJW 2003, p. 2520 on § 3 (2) BORA or BVerfG (2nd Chamber of the First Senate), Decision of 12/9/2001 – 1 BvR 2265/00, NJW 2001, 3324 on § 7 BORA.

[69] Applicable: Michael Kleine-Cosack, BRAO, 8th ed. 2020, in front of § 6 BORA, marginal no. 1.

[70] BT-Drs. 16/2460, p. 408; Matthias Ringer, Anwaltswerbung in Deutschland und

The spectre of the commercialization of the legal profession[71] is a chimera and it is repeatedly invoked when individual measures are to be made amenable to liberalization, but it does not seem to be in accordance with facts. There is no reason to fear that this would change significantly if only the provisions of the UWG applied to *all* legal service providers within the meaning of § 2 RDG. If only because past experience has taught us that in today's practice - which can be seen on a daily basis - the alleged dangers of commercialization have not occurred, despite several liberalization pushes.[72] Moreover, a return to professional freedom will do the reputation of the legal profession greater benefit than harm.

England, 2008, p. 311 et seq.; Thomas Möllers/Daniela Mederle, Werbung von Rechtsanwälten – Moderne Marketingkonzepte und einzelne verfassungs- und europarechtswidrige Normen der BRAO, WRP 2008, p. 882.

[71] Hans-Jürgen Ahrens, Anwaltsrecht für Anfänger, 1996, marginal no. 314 says that it is still necessary to prevent targeted advertising because it amounts to disinformation and otherwise commercial marketing strategies would enter the legal profession.

[72] See also Martin W. Huff, in: Reinhard Gaier/Christian Wolf/Stephan Göcken, Anwaltliches Berufsrecht, 3rd ed. 2020, § 43 b BRAO, marginal no. 2.

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