

**Franz von Liszt Institute Working Paper 2018/02**

Magdalena Jaś-Nowopolska, Hanna Wolska

**Women in legal services (as attorneys and legal advisors) in  
Poland and Germany**

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### **Comparative Legal Gender Studies-Network (CoLeGeŞ-Net): The Emilie Kempyn-Spyri of the past, present and future**

In January 2016, Prof. Dr. Thilo Maruhn, M. Phil. and Dr. Ayşe-Martina Böhringer launched a legal research project on women in the legal profession.

Over the project period of two years, a focal point of the project is the analysis of the role of law in women's career processes from university studies to the professional career. The project has a comparative approach analyzing the development and the current state of women in the legal profession in Germany, the United States of America and Turkey.

The project is supported by the Executive Board of Justus Liebig University Giessen (based upon an initiative launched by the Women's and Gender Equality Representative of Justus Liebig University Giessen).

Named after Emilie ("Emily") Kempyn-Spyri who, among others, opened the path to legal professions for women, the project aims at integrating women and gender issues into legal research and teaching at the Faculty of Law. In particular, the project seeks to raise awareness of gender issues in the legal profession among junior academics and students. It will identify career opportunities in academia and practice as well as related challenges by means of a comparative analysis. Making use of various dynamic and interpersonal means of communication, the project aims at establishing a network among a broad variety of actors.

The project contributes to the development of expertise in gender issues by identifying country-specific development stages and by demonstrating future options for governmental and non-governmental norm setting at the national as well as at the international level.

Seminars and colloquiums – as appropriate – are offered by visiting scholars and practitioners. Students and junior academics will benefit from frequent interaction with experts in the field of legal gender studies. Throughout the project, a broad spectrum of legal materials from selected countries – focusing upon Turkey, the United States of America and Germany – will be subject to comparative analysis.



## Index

Abstract .....	1
I. Legal practice of attorneys and legal advisors .....	2
1. Poland .....	2
2. Germany.....	4
3. Comparison .....	6
II. Practice of attorneys and legal advisors and economic activity .....	10
1. Poland .....	10
2. Germany.....	14
3. Comparison .....	15
III. Governing bodies of professional associations .....	16
1. Poland .....	16
2. Germany.....	17
IV. Conclusion .....	18
Bibliography.....	19



## Abstract

The current law in Europe does not provide a single, comprehensive regulation on provision of legal assistance. Polish law regulates this issue only partially, concerning legal professions of public trust. However, corporate acts do not provide any regulations as to when, to what extent and on which conditions individuals performing independent professions may provide legal assistance as entrepreneurs. Moreover, the acts do not regulate whether such legal assistance should be regarded as economic activity. It needs to be stressed that Poland is one of the few European Union member states, in which a so called duality of legal professions exists. Despite the fact that both professions (*attorney- adwokat and legal advisor – radca prawny*) provide legal assistance in similar scope<sup>1</sup>, the manner of conducting such assistance differs<sup>2</sup>. In other countries, legal assistance is provided by members of one profession. For example, in Germany legal assistance is provided by attorneys

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<sup>1</sup> Legal advisors are prohibited to appear before court in criminal cases if they are employed under a contract of employment. Until 1 July 2015, legal advisors could not act as lawyers in criminal and criminal and tax cases.

<sup>2</sup> It must be pointed out that the division of these two corporations mainly derives from historical reasons. The profession of legal counsel was established on 13 December 1961. On that day, the Council of Ministers passed a resolution about legal service of state-owned enterprises, banks and unifications. This particular regulation determined that people are to use legal counsels hired by the previously mentioned subjects. Two years later, these rights were taken away from the attorneys (whose existence originated from the patrimonial monarchy in the 11<sup>th</sup> century, i.e. the Reign of the first king of Poland – Bolesław the Brave). The next change took place in 1982, when Polish parliament introduced the regulation about legal counsels. However, legal counsel practice was still focused on providing legal service to state and cooperative organizational units and the councillor's self-government was deprived of two important authorisations: conducting preparation for the profession (because the application organized and conducted district arbitration commissions) and making decisions regarding the entry on the list of legal advisors (the entry was made by the president of the district arbitration commission).

The detachment of the legal counsellor's profession from the supervision of the State Economic Arbitration occurred with the regulation about the recognition of commercial courts on 24 May 1989. This regulation granted the right to the District Board of the Chamber of Legal Counsellors to conduct the application process, to make entries and keep the list of counsellors.

A strict framework for the legal counsel's profession was given by a so-called great amendment to the regulation about legal counsellors from 22 May 1997. It has been preceded by the Constitution of the Republic of Poland from 2 April 1997, of which Art. 17 sec. 1 has provided assurances for professional self-governments representing public trust professions.

(*Rechtsanwälte*).

The paper will discuss women as attorneys in Germany and women as attorneys and legal advisors in Poland. Since the Polish law does not provide any comprehensive regulation regarding this subject matter, this article will further discuss whether legal advisors' and attorneys' practice constitutes economic activity. It will also point out similarities and differences between the Polish and German legal systems with regard to practice of individuals performing legal professions of public trust in Poland and in Germany as well as provide a statistical overview of the number of women providing legal assistance and presiding in legal associations in Poland and Germany. This paper uses the following methods: the formal-dogmatic method, the comparative method and empirical research performed based on data received from authorities and trade associations.

## I. Legal practice of attorneys and legal advisors

### 1. Poland

A graduate of Polish legal studies, who wants to provide legal services, has the choice between an attorney and a legal advisor traineeship. In order to qualify for such traineeship, a graduate must meet all requirements defined by law and pass the traineeship examination.<sup>3</sup> It must be noted that the programs of the traineeships differ even though both start annually on 1 January and take three years to complete.<sup>4</sup> After the successful completion of the traineeship, both, legal advisors and attorneys, are authorised to provide legal assistance in almost identical scope.<sup>5</sup> However, their practices are regulated by separate legal acts and members of both professions belong to separate trade associations.

In Poland, attorneys and legal advisors may choose between several forms of conducting their occupation. According to Art. 4a of the Law on the Bar of 26 May 1982 (*Ustawa z dnia 26 maja 1982 r. prawo o adwokaturze*)<sup>6</sup>, an attorney may practice in a law firm, an attorney joint office or in a civil law partnership, general partnership, limited liability partnership or limited partnership. However, the partners in a civil law partnership, general partnership, limited liability partnership or limited partnership must be attorneys or attorneys and legal advisers or foreign lawyers practising permanently in Poland under provisions of the Act

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<sup>3</sup> The entrance examination for legal advisor traineeship and the final examination are conducted by examination bodies appointed by the Minister of Justice. Both examinations consist of 150 three-option multiple choice questions with only one correct answer.

<sup>4</sup> Art. 76 of the Law on the Bar of 26 May 1982, Journal of Laws of the Republic of Poland 2017 (hereinafter referred to as Journal of Laws) 2017, item 2368; Art. 32 of the Legal Advisers Act of 6 July 1982, Journal of Laws 2017, item 1870.

<sup>5</sup> Under the current law, the difference between the profession of a legal advisor and an attorney is minimal and therefore the division into two professions is questionable.

<sup>6</sup> Journal of Laws 2017, item 2368.



on Legal Assistance Provided by Foreign Lawyers in the Republic of Poland of 5 July 2002.<sup>7</sup> The sole service that can be provided by such partnerships is legal assistance. Moreover, Art. 8 of the Legal Advisors Act of 6 July 1982 (*Ustawa z dnia 6 lipca 1982 r. o radcach prawnych*)<sup>8</sup> stipulates that legal advisors may practice as persons employed under an employment contract or civil law contract in a law firm as well as in a civil law partnership, limited liability partnership or limited partnership, but the partners must be legal advisors or legal advisors and attorneys or foreign lawyers practising permanently in Poland under provisions of the Act on Legal Assistance Provided by Foreign Lawyers in the Republic of Poland of 5 July 2002. The sole service that can be provided by such partnerships is legal assistance. Legal advisors are permitted to provide legal assistance to natural persons only through law firms or partnerships mentioned above, while not employed under an employment contract. Based on the above acts, it may be concluded that forms of practice of legal advisors are more varied, since pursuant to Art. 8 item 2 of the Legal Advisors Act, legal advisers may practice as persons employed under an employment contract. On the other hand, Art. 4b of the Law on the Bar prohibits attorneys from practising as persons employed under an employment contract. There are no legal grounds for this difference between the two professions. Both legal advisors and attorneys should have access to identical forms of practice. Attorneys should be allowed to practice under employment contracts.

Moreover, it needs to be noted that in 2017, based on the statistical data received from the Polish Bar Council and the National Chamber of Legal Advisors, the number of legal advisors was higher than the number of attorneys. There were 38,970 legal advisors (20,913 women and 18,057 men)<sup>9</sup> and 20,171 attorneys (8,945 women and 11,226 men)<sup>10</sup>. Interestingly, there are more female legal advisors, while among attorneys providing legal services, there are more men.<sup>11</sup> The biggest number of legal advisors is registered in the District Chamber of Legal Advisors in Warsaw (11,078: 6,024 women, 5,054 men)<sup>12</sup> and the

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<sup>7</sup> Journal of Laws 2016, item 1874.

<sup>8</sup> Journal of Laws 2017, item 1870.

<sup>9</sup> Not included are legal advisors from the District Chamber of Legal Advisors in Szczecin.

<sup>10</sup> Letter from the Polish Bar Council, 8 August 2017, NRA.018-IP.9.2017, and letter from the National Chamber of Legal Advisors, 29 August 2017, 807/2017/W.

<sup>11</sup> It has to be noted that according to the report by Jane Ellis, Ashleigh Buckett, Women in Commercial Legal Practice, IBA Legal Policy & Research Unit (2017), Poland is an example of a country, in which women appear most prominently in the legal profession. More about women in the legal profession in the world in Ethan Michelson, Women in the Legal Profession, 1970-2010: A Study of the Global Supply of Lawyers, in: Indiana Journal of Global Legal Studies (2012), <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1531&context=ijgls>, last accessed 16 January 2018.

<sup>12</sup> Letter from the National Chamber of Legal Advisors, 29 August 2017, 807/2017/W.

lowest number of legal advisors is registered in the District Chamber of Legal Advisors in Lublin (705: 349 women, 356 men)<sup>13</sup>. There are 19 District Chambers of Legal Advisors and only in two of them the number of registered male legal advisors is higher than the number of female legal advisors - the District Chamber of Legal Advisors in Katowice (349 women, 356 men) and the District Chamber of Legal Advisors in Wałbrzych (478 women, 501 men).<sup>14</sup> The details are presented in Fig. No.1.

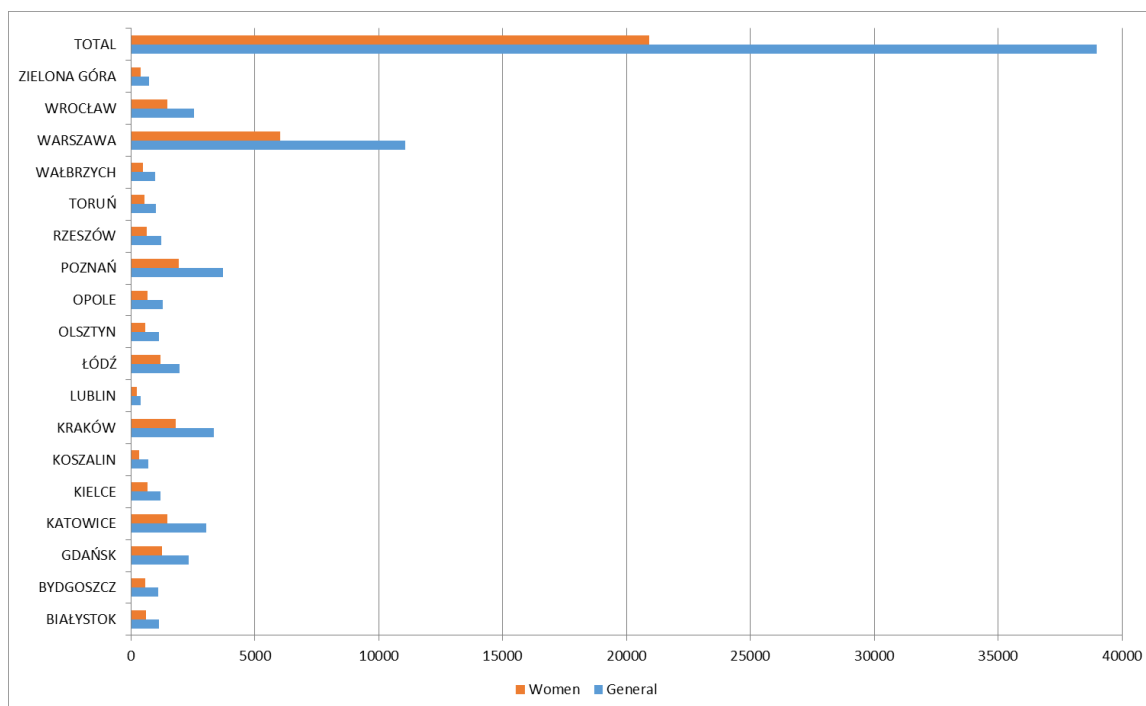


Fig. No. 1: Legal Advisors in Poland<sup>15</sup>

It is possible that this situation is a result of the fact that legal advisors may practice under employment contracts, which provide greater financial stability and more regular working hours in comparison with other available forms of practice. Moreover, 87 of 100 surveyed legal advisors registered in the District Chamber of Legal Advisors in Gdańsk declared that this form of practice enables women to balance their careers with family life.<sup>16</sup>

## 2. Germany

In order to become an authorised attorney, a graduate of German legal studies, who has passed the first State Exam (*1. Staatsexamen*), is also required to complete the professional training (*Rechtsreferendariat*). It needs to be noted that the traineeship is organised

<sup>13</sup> Ibidem.

<sup>14</sup> Ibidem.

<sup>15</sup> Ibidem.

<sup>16</sup> Survey of 100 legal advisors registered in the District Chamber of Legal Advisors in Gdańsk carried out in December 2017 by the authors of this article.

and financed mainly by the federal states.<sup>17</sup> The legal traineeship usually takes 2 years to complete, a period which is the same for all legal professions as judge, attorney or prosecutor. Any of the parts of the training may take longer, which depends on the law of the various federal states. Normally, legal training consists of 5 parts of training on the job: training with a civil law judge, training with a prosecutor (or a criminal law judge), training in an administration office, training with a lawyer, and training upon candidate's personal choice.<sup>18</sup> Only after passing the second State Examination (2. *Staatsexamen*), the graduate can be admitted to the German bar as an attorney at law.

German attorneys can choose between several forms of providing their services. They can provide legal assistance under an employment contract or share offices with other attorneys and work independently. Moreover, they are also allowed to form partnerships. One of the traditional partnerships entered into by attorneys is a civil law partnership (*Gesellschaft bürgerlichen Rechts - GbR*)<sup>19</sup>. According to § 59a BRAO, attorneys may associate in a partnership with members of the Bar and members of the Chamber of Patent Attorneys, with tax consultants (*Steuerberater*), tax agents (*Steuerbevollmächtigte*), auditors and certified accountants in order to jointly practise their professions within the framework of their own professional rights.

Other varieties of partnerships available to attorneys are a partnership company (*Partnerschaftsgesellschaft*) and a limited liability company (*Gesellschaft mit beschränkter Haftung*). The Act on Partnership Companies of Members of Independent Professions (*Gesetz über Partnerschaftsgesellschaften Angehöriger Freier Berufe*) regulates the partnership company. According to Art. 1 of the Act, the partnership shall be a company, in which members of independent professions join for the pursuit of their professions. It shall not engage in commercial trade and members of a partnership may only be natural persons.

Regulations regarding entering into a limited liability company (*Gesellschaft mit beschränkter Haftung*) by persons belonging to liberal professions are provided by the German Attorney Act (*Bundesrechtsanwaltsordnung – BRAO*). According to § 59 c BRAO, limited liability companies, whose objects include legal advice and representation in legal matters, may be admitted as *Rechtsanwaltsgesellschaften*. Moreover, the law also allows attorneys to set up joint-stock companies (*Aktiengesellschaft*).<sup>20</sup>

Regarding the information mentioned above, it seems that Polish and German laws offer different forms of practice for attorneys. Polish attorneys and legal advisers are not allowed

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<sup>17</sup> For example see *Juristenausbildungsgesetz Nordrhein Westfalen (JAG NRW)*, *Juristenausbildungsgesetz Hessen (JAG, Landesrecht Hessen)*.

<sup>18</sup> According to § 29 JAG, Landesrecht Hessen, training with a civil law judge, prosecutor (or criminal law judge) and in an administration's office takes 4 months each, training with a lawyer 9 months, and training upon candidate's personal choice 3 months.

<sup>19</sup> §§ 705 et seq. *Bürgerliches Gesetzbuch* (hereinafter referred to as *BGB*).

<sup>20</sup> Decision by the Federal Court (*Bundesgerichtshof, BGH*) from 10 January 2005 (*AnwZ (B) 27/03, 28/03*), *BGHZ* 161, 376.

to set up limited liability partnerships or joint-stock companies. Moreover, German attorneys, unlike Polish attorneys, are allowed to provide legal assistance based on an employment contract.<sup>21</sup>

According to § 46 BRAO, lawyers in Germany can work as in-house lawyers (*Syndikusrechtsanwalt*)<sup>22</sup> as well. It should be noted that in-house lawyers are a type of attorney (*Rechtsanwalt*) sui generis. The difference between an attorney working under an employment contract (*Angestellte Rechtsanwälte*) and an in-house lawyer (*Syndikusrechtsanwalt*) has to be shown.<sup>23</sup> We refer to in-house lawyer occupation if the employment contract is characterized by the following professionally independent and autonomously exercised occupation as well as the following features:

- “1. examining legal questions including the further clarification of the facts as well as developing and assessing solution possibilities,
2. the provision of legal advice,
3. the focus of the occupation towards shaping legal conditions especially by autonomously conducting negotiations or towards realizing legal rights and
4. the authorization to act responsibly externally”.<sup>24</sup>

According to § 46a BRAO, the in-house lawyer also has to get admitted to the legal profession. On a side note, in 2017 there were 164,393 attorneys (56,502 women, 107,891 men) in Germany.<sup>25</sup>

### 3. Comparison

Based on the information above and data provided by the Polish Bar Council and the National Chamber of Legal Advisors, it may be concluded that in 2017 there were less legal advisors and attorneys in Poland than in Germany (attorneys). It is necessary to emphasize

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<sup>21</sup> There is no single regulation in Polish law, that would serve as a legal basis as provided by § 611 BGB, which already emphasizes the bound by instructions.

<sup>22</sup> See also Volker Römermann, Tim Günther, in: Römermann, Volker (Hrsg.), Beck-OK BORA (München 2017), § 46 marginal number 11 et seq.

<sup>23</sup> More about the administrative practice of releasing in-house lawyers (*Syndikusanwälte*) from statutory pension insurance schemes, see judgements by the Federal Social Court (*Bundessozialgericht*, BSG) from 3 April 2014 (B 5 RE 3/14 R), BSGE 115, 267-288; 3 April 2014 (B 5 RE 9/14 R), WM 2014, 1883-1892.

<sup>24</sup> § 46 subsection 3 BRAO.

<sup>25</sup> Statistik über Fachanwälte zum 01.01.2017, Bundesrechtsanwaltskammer (2017), [http://www.brak.de/w/files/04\\_fuer\\_journalisten/statistiken/2017/fae\\_2017\\_ohne2016.pdf](http://www.brak.de/w/files/04_fuer_journalisten/statistiken/2017/fae_2017_ohne2016.pdf), last accessed 29 December 2017.

the fact that Germany has a bigger population than Poland<sup>26</sup> and the number of people per one attorney in Germany is lower than in Poland. However, Poland has a higher percentage of women providing legal services than Germany. In Poland 50.49% of attorneys and legal advisors are female opposed to only 34.37% in Germany. Hence, the number of women and men providing legal assistance in Poland is very similar.

It must be noted that the sizes of regional Bars in Germany also differ significantly. The largest number of attorneys is registered at the Munich Bar Association (21,173 attorneys: 13,335 men, 7,838 women) and the lowest number of legal advisors is registered at the Saarbrücken Bar Association (1,436 attorneys: 939 men, 497 women).<sup>27</sup> Besides that, the seven biggest German Bar Associations (Munich, Frankfurt, Berlin, Hamm, Cologne, Düsseldorf and Hamburg) comprising 103,077 member attorneys (including 35,944 women) account for more than 62% of all attorneys in the country. Interestingly, the proportion of women belonging to the seven biggest Bars is the same as the overall percentage of female attorneys in Germany. 63.60% of female attorneys belong to the seven biggest Bars. However, the data concerning separate Bars (Fig. No. 2) indicates that in all German Bar Associations the percentage of women is similar and accounts for 30-37% of all attorneys (the exception being Brandenburg with women accounting for 38% of all attorneys).<sup>28</sup>

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<sup>26</sup> Poland has approximately 38.4 million residents, Germany 82.8 million, Basic Data, Statistics Poland, <http://stat.gov.pl/podstawowe-dane/>; Liczba ludności Niemiec wzrosła do 82,2 mln za sprawą imigracji, pap, 26 August 2016, <http://www.pap.pl/aktualnosci/news,625857,liczba-ludnosci-niemiec-wzrosla-do-822-mln-za-sprawa-imigracji.html>, last accessed 29 December 2017.

<sup>27</sup> Statistik über Fachanwälte zum 01.01.2017, Bundesrechtsanwaltskammer (2017), [http://www.brak.de/w/files/04\\_fuer\\_journalisten/statistiken/2017/fae\\_2017\\_ohne2016.pdf](http://www.brak.de/w/files/04_fuer_journalisten/statistiken/2017/fae_2017_ohne2016.pdf), last accessed 29 December 2017.

<sup>28</sup> Ibidem.

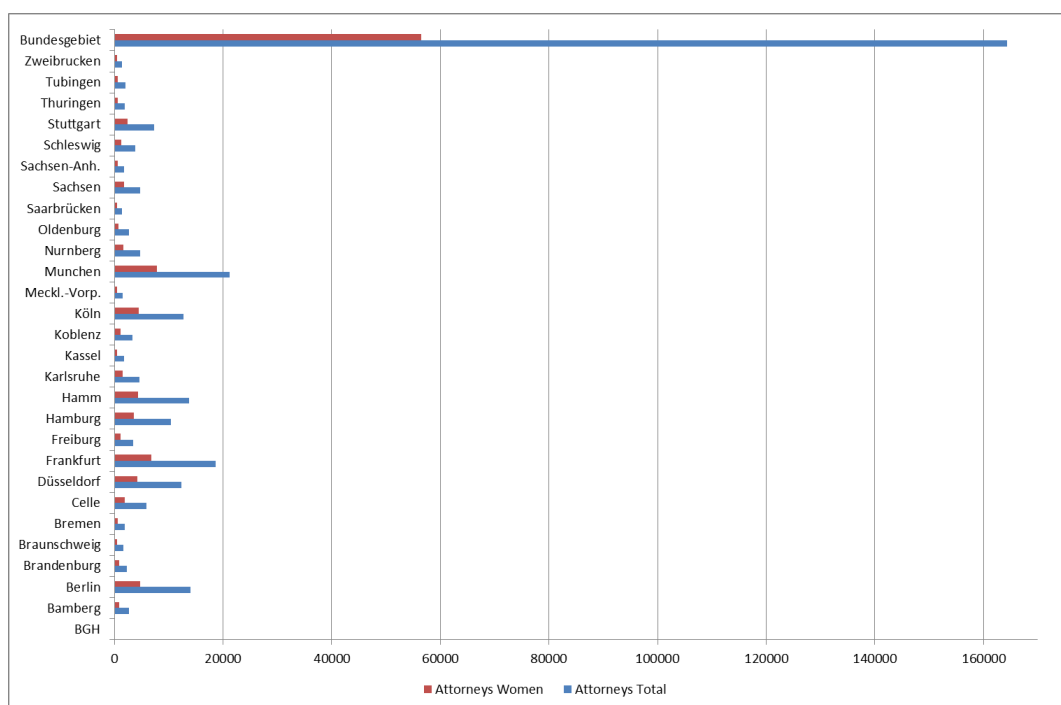


Fig. No. 2: Attorneys in Germany<sup>29</sup>

Furthermore, attorneys in Germany may choose their specialities, which is regulated by the Specialist Lawyers' Regulation (*Fachanwaltsordnung*). In Poland there are no specialities within the meaning of the German law<sup>30</sup>. German attorneys who have successfully completed a specialised, theoretical course and are able to prove that they worked on a specific number of cases in a given specialisation may be considered to be attorneys specialised in a given field of law. Initially, only the following specialisations were available: tax law, social law, administrative law and labour law.<sup>31</sup> However, after some time, other specialisations have been introduced, namely family law, criminal law, insolvency law, medical law, insurance law, tenancy law, construction and architectural law, law of succession, commercial law and company law, transportation and freight forwarding law, agriculture law, inter-

<sup>29</sup> Verteilung der Fachanwälte zum 01.01.2017, Bundesrechtsanwaltskammer (2017), [http://www.brak.de/w/files/04\\_fuer\\_journalisten/statistiken/2017/fa\\_verteilung-2017-1.pdf](http://www.brak.de/w/files/04_fuer_journalisten/statistiken/2017/fa_verteilung-2017-1.pdf), last accessed 16 January 2018.

<sup>30</sup> Attorneys and legal advisors can certainly specialize in one field of law. This is not regulated by law, but results from the practice of dealing with one kind of cases.

<sup>31</sup> § 43c BRAO; in 1960 there were 911 attorneys in Germany who specialised in tax law and administrative law. In 1989 there were 3193 attorneys who specialised in four specialisations: tax law, administrative law, labour law, social law, Entwicklung der Fachanwaltschaften seit 1960, Bundesrechtsanwaltskammer (2017), [http://www.brak.de/w/files/04\\_fuer\\_journalisten/statistiken/2017/fa-statistik-zum-1.1.2017-entwicklung-tabelle-1.pdf](http://www.brak.de/w/files/04_fuer_journalisten/statistiken/2017/fa-statistik-zum-1.1.2017-entwicklung-tabelle-1.pdf), last accessed 16 March 2018.

national economic law, copyright and media law, banking law, capital market law, procurement law, industrial protection rights, traffic law, IT law, and migration law.<sup>32</sup>

The analysis shows that the largest number of attorneys specialises in labour law (10,370) and family law (9,516). Having analysed the choices of female attorneys, it seems that most attorneys who choose to specialise in family law are female (more than 57% - overall there are 9516 attorneys specialising in family law, including 5475 women). The choice of specialisation is influenced by the many factors, including the specificity of the field of law and the possibility of combining it with private life (e.g. the possibility of a part time job and flexible working hours). It has to be noted that family law and labour law are specialisations in which attorneys work with individual clients. Fig. No. 3 indicates that no other specialisation is characterised by such a high percentage of female attorneys.<sup>33</sup>

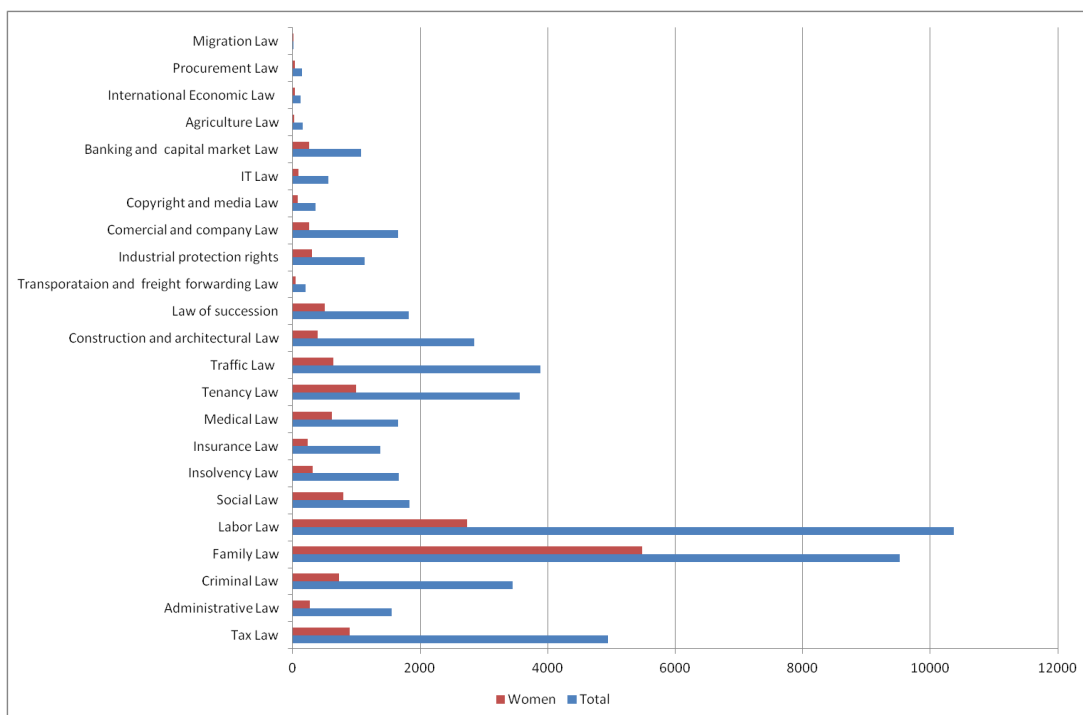


Fig. No. 3: Analysis of attorneys' specialisation in Germany<sup>34</sup>

When discussing the German legal market, it should be noted that the form of profession - the form of office in which the business is conducted - translates into the average income

<sup>32</sup> § 1 Fachanwaltsordnung.

<sup>33</sup> In this context it is not possible to get similar information about the choices of female attorneys in Poland. There are no specialisations and no dates about it.

<sup>34</sup> Fachanwälte zum 01.01.2017, Bundesrechtsanwaltskammer (2017), [http://www.brak.de/w/files/04\\_fuer\\_journalisten/statistiken/2017/fae\\_2017\\_ohne2016.pdf](http://www.brak.de/w/files/04_fuer_journalisten/statistiken/2017/fae_2017_ohne2016.pdf), last accessed 18 January 2018.

earned by attorneys.<sup>35</sup> Moreover, there is still a difference in salary in the eastern and western parts of Germany.<sup>36</sup> At this point, it should be also referred to the data on salaries of employed male attorneys (*Angestellte Vollzeit-Rechtsanwälte*) in relation to women. According to the data, in 2013, men working full-time earned more than women in the same position.<sup>37</sup>

## II. Practice of attorneys and legal advisors and economic activity

### 1. Poland

In Poland, the term “economic activity” is defined in Art. 2 of the Act on Freedom of Business Activity of 2 July 2004 (hereinafter referred to as FBA Act).<sup>38</sup> Pursuant to this Article, economic activity is defined as a profit-making activity related to manufacturing, construction, trade, provision of services and prospecting, identifying and mining of minerals, as well as a professional activity conducted in an organised and continuous fashion. Therefore, in order to determine whether the practice of legal advisers and attorneys constitute economic activity, it is necessary to prove that their activity is a professional, profit-making activity conducted in an organised, continuous fashion.

Given these points, the following part of the article will focus on the question whether the practice of legal advisers and attorneys constitutes a professional activity and meets the conditions listed above. During the analysis, attention will be also paid to the question whether the form of legal practice differs between women and men.

The term “professional activity” is not defined by the FBA Act. However, the definition may

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<sup>35</sup> See for more information about the income earned by attorneys: Umsatz nach Kanzlei-form im Jahresvergleich Ost, STAR-Bericht 2016, Bundesrechtsanwaltskammer (2016), [https://www.brak.de/w/files/04\\_fuer\\_journalisten/star-bericht2016/abb.-5.1.3\\_umsatz-nach-kanzleiform\\_ost.pdf](https://www.brak.de/w/files/04_fuer_journalisten/star-bericht2016/abb.-5.1.3_umsatz-nach-kanzleiform_ost.pdf), last accessed 20 March 2018; Bruttoeinkommen nach Kanzlei-form West, STAR-Bericht 2016, Bundesrechtsanwaltskammer (2016), [http://www.brak.de/w/files/04\\_fuer\\_journalisten/star-bericht2016/abb.-6.1.4\\_bruttoeinkommen-nach-kanzleiform\\_west.pdf](http://www.brak.de/w/files/04_fuer_journalisten/star-bericht2016/abb.-6.1.4_bruttoeinkommen-nach-kanzleiform_west.pdf), last accessed 20 March 2018.

<sup>36</sup> Ibidem.

<sup>37</sup> Durchschnittliches Bruttoeinkommen der angestellten Vollzeit-Rechtsanwälte, STAR-Bericht 2015/16, Bundesrechtsanwaltskammer (2016), <https://www.brak.de/fuer-journalisten/star-bericht/einkommen-angest-rechtsanwaelte/>, last accessed 20 March 2018.

The authors pay attention to the data concerning the employed attorneys. In case of self-employed attorneys – women's lower wages can be dictated for example by shorter working hours, less objections or other types of cases. In case of employed attorneys – the authors cannot find the reason.

<sup>38</sup> Journal of Laws 2016, item 1829 as amended.



be found in the Polish public commercial law doctrine. H. Gronkiewicz-Waltz and K. Jaroszyński note that the term “professional activity” may be understood in two ways: as professionalism of the entrepreneur and as an activity performed in the entrepreneur’s own name and for his/her own account.<sup>39</sup> The authors stress that the FBA Act refers to the second meaning of the term.

It should also be mentioned that in literature it is suggested that based on selected features, it may be concluded whether a given activity can be regarded as professional activity of a person belonging to a liberal profession. J. Jacyszyn states that a liberal profession is characterised by specialised education, professional independence, professional ethics, professional secrecy, specific criminal, civil and corporate liability, and responsibility in respect of order.<sup>40</sup> On the other hand, U. Promińska notes that a liberal profession is marked by specific professional training, personal and individual provision of services and high risk.<sup>41</sup> A. Kidyba lists the following as features of a liberal profession: “it’s performed professionally and entails provision of conventional services. The activity is performed for [the] entrepreneur’s own account, requires specific education or skills, and is performed individually and personally (or with help provided by subordinates)”<sup>42</sup>. A comparison of the features listed in the doctrine leads to the conclusion that liberal professions are characterised by special training and education. However, after performing an analysis of the list of liberal professions provided by Art. 88 of the Commercial Companies Code from 15 September 2000<sup>43</sup>, one may find that not all listed professions meet the criteria mentioned above<sup>44</sup>. For example, insurance brokers are required to complete only secondary education or secondary

<sup>39</sup> Hanna Gronkiewicz-Waltz, Krzysztof Jaroszyński, *Przedsiębiorca*, Chapter 9, in: Hanna Gronkiewicz-Waltz, Marek Wierzbowski (eds.), *Prawo gospodarcze. Zagadnienia administracyjnoprawne* (Warszawa 2015), 242.

<sup>40</sup> Jerzy Jacyszyn, *Spółka partnerska według przepisów ustawy Kodeks spółek handlowych. Komentarz* (Bielsko Biała 2000), 77, as cited in: Andrzej Kidyba, *Radca Prawny: zawód wolny, regulowany czy przedsiębiorca?*, *Radca Prawny, Zeszyty naukowe nr 1/2014* (Warszawa 2014), 13.

<sup>41</sup> Urszula Promińska, *Spółka partnerska* (Warszawa 2013), 99, as cited in: Andrzej Kidyba, *Radca Prawny: zawód wolny, regulowany czy przedsiębiorca?*, *Radca Prawny, Zeszyty naukowe nr 1/2014* (Warszawa 2014), 14.

<sup>42</sup> Andrzej Kidyba, *Radca Prawny: zawód wolny, regulowany czy przedsiębiorca?*, *Radca Prawny, Zeszyty naukowe nr 1/2014* (Warszawa 2014), 14.

<sup>43</sup> *Journal of Laws* 2017, item 1577.

<sup>44</sup> According to current law, the term liberal profession refers to those professions, in which members can form limited liability partnerships. According to Art. 88 k.s.h. (*Kodeks Spółek Handlowych*, the Polish Commercial Code) partners in a partnership may be persons who have the right to practice the following professions: advocate, pharmacist, architect, building engineer, certified auditor, insurance broker, tax advisor, securities broker, investment advisor, accountant, physician, dental surgeon, veterinary surgeon, notary, nurse, midwife,

professional education.<sup>45</sup> Therefore, it seems as if the requirement of specific education is not indicative of whether a given profession is considered to be a liberal profession.

Hence, professional activity as understood based on the provisions of the FBA Act refers to professionals performing activities individually and for their own account. Performing the activity for the benefit of any other entity does not constitute an economic activity. Consequently, legal advisors practising under employment or civil law contracts are not conducting an economic activity. They do not work individually, in their own name and for their own benefit.<sup>46</sup>

Based on the analysis above, it may be concluded that legal advisors and attorneys practising in law firms, joint offices or partnerships meet the conditions. Therefore, the following part of the article will discuss legal advisers and attorneys practising within the above mentioned forms of practice.

With regard to the condition of “operating in organised and continuous fashion” it must be noted that some authors stress that the term “organised” should be interpreted in a formal or substantive manner.<sup>47</sup> As a formal condition, “organised fashion” means that the individual registered his/her activity in the National Court Register - Register of Entrepreneurs or in the Central Registration and Information on Business. Besides that, as a substantive condition it means that the activity is performed in a form of an enterprise.<sup>48</sup>

Organisational and legal frames of economic activity under which legal advisors and attorneys are allowed to operate are subject to registration in the National Court Register - Register of Entrepreneurs<sup>49</sup> or in the Central Registration and Information on Business<sup>50</sup>.

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attorney-at-law, patent attorney, property appraisal expert and sworn translator.

However, the profession may be also practised in the form of other commercial partnerships or as business activity.

<sup>45</sup> Art. 28 subsection 3 item 1 lit. d of the Insurance Intermediaries Act of 22 May 2003; Journal of Laws 2016, item 2077.

<sup>46</sup> It must be noted that legal advisors practising under an employment contract are not considered to be members of a liberal profession by the Supreme Court of the Republic of Poland, decision of the Supreme Court from 23 October 2002 (II CZ 100/2), MoP NO 21/204, 990.

<sup>47</sup> Marek Szydło, *Swoboda działalności gospodarczej* (Warszawa 2005), 48, in: Marek Szydło, *Opinia prawna na temat istoty i charakteru prawnego „działalności leczniczej” w rozumieniu projektu ustawy o działalności leczniczej, druk sejmowy nr 3489, oraz zasadności jej normatywnego kwalifikowania jako „działalności regulowanej” w rozumieniu u.s.d.g.*, <http://orka.sejm.gov.pl/rexdomk6.nsf/Opdodr?OpenPage&nr=3489>, last accessed 8 November 2017.

<sup>48</sup> *Ibidem*.

<sup>49</sup> Art. 36 of the National Court Register Act from 20 August 1997; Journal of Laws 2017, item 700.

<sup>50</sup> Art. 14 subsection 2 of the Freedom of Business Activity Act.

Some authors note that the profession of an attorney constitutes a regulated activity.<sup>51</sup> However, the author of this article must disagree with this statement. Article 64 item 1 of the FBA Act stipulates that the question of whether a given type of activity is considered to be a regulated activity is regulated by other acts listed by the FBA Act. No acts listed in the Act mentioned above refer to attorneys or legal advisors, even though some other liberal professions referred to in Art. 88 of the Commercial Companies Code are mentioned.<sup>52</sup> Therefore, legal advisors and attorneys do not conduct regulated activities despite being subject to mandatory entry into the register of legal advisors or attorneys.

On a side note, legal advisors and attorneys providing legal assistance in law firms, joint offices and in civil law partnerships are subject to registration in the Central Registration and Information on Business (hereinafter referred to as CEIDG). They make up about 0,01% of all entrepreneurs entered into CEIDG (2,877,957 entrepreneurs in total, 45,038 are entered under the PKD 6910z type of activity).<sup>53</sup> It needs to be mentioned that the gender of the entrepreneurs is not recorded in CEIDG, therefore the data above does not provide for a gender breakdown.

As mentioned before, the term “organised fashion” understood in a substantive fashion means that the activity must be performed in a form of an enterprise as provided by civil law. Art. 55 of the Civil Code of 23 April 1964<sup>54</sup> stipulates that an enterprise is an organised set of tangible and intangible elements intended for conducting business activity. Such a set means facilities. In case of legal advisors and attorneys, the facilities consist of elements such as equipment used in a law firm, joint office or within a partnership.

Therefore, it may be concluded that legal advisors and attorneys providing legal services in law firms, joint offices or in partnerships meet the condition of “operating in organised fashion” both formally and substantially, and in consequence, their practice may be regarded as activity performed in an organised fashion. What is left is to decide whether their activities are performed in a continuous manner.

In this context, “continuous manner” means that activities are repetitive and performed regularly. Law stresses that economic activity is characterised by repetitiveness of the activity and its continuity as opposed to a one-off provision of a service.<sup>55</sup> Since legal advisors and attorneys provide legal assistance aimed at legal protection of their clients, their activities must be performed in a permanent and continuous fashion, not occasionally. The continuous manner of legal advisors’ and attorneys’ practice is also evident due to the fact that

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<sup>51</sup> Łukasz Drzewiecki, *Adwokat a wpis do ewidencji działalności*, 19.06.2015, [https://www.eporady24.pl/adwokat\\_a\\_wpis\\_do\\_ewidencji\\_dzialalnosci,artykuly,9,32,1405.html](https://www.eporady24.pl/adwokat_a_wpis_do_ewidencji_dzialalnosci,artykuly,9,32,1405.html), last accessed 9 November 2017.

<sup>52</sup> For example nurses, doctors.

<sup>53</sup> A letter from the Ministry of Development, 8 August 2017, BM-I.015.276.2017.AR.

<sup>54</sup> *Journal of Laws* 2017, item 459.

<sup>55</sup> Decision of the Court of Appeal Szczecin from 7 August 2006 (I ACz 441/06), LEX No. 279953.

they provide their services from one place (e.g. a law firm or a registered office of a partnership) and from the obligation to enter into a liability insurance agreement. Therefore, it may be stated that the practice of legal advisors and attorneys meets the criterion of continuity.

As far as concerning the last condition, in literature it is stressed that the profit-making nature of the activity means that the practice is profit-driven, it does not necessarily have to generate any real profits.<sup>56</sup> Economic activity may be loss-making and still be considered as activity of a profit-making nature. However, entities exercising only public tasks are not considered to be entrepreneurs.<sup>57</sup> Costs of public tasks are borne by the state and any income received from it is supposed to cover the costs of the undertaken task.

Some authors state that legal advisors' activity is special and specific and therefore doubt whether it may be considered to be an economic activity, since their professional activity is specific and is not always profit making (e.g. legal advisors acting as public defenders or their *pro bono* activity), which constitutes a criterion for economic activity.<sup>58</sup> However, it is impossible to agree with this conclusion. Legal advisors and attorneys are remunerated for their legal services even when they act as public defenders. The treasury bears the costs incurred by legal advisors and attorneys acting as public defenders. Such costs include fees and necessary and documented expenditures incurred by legal advisors or attorneys acting as public defenders. Moreover, the provision of services on *pro publico bono* basis (voluntary and unpaid) is voluntary. It helps legal advisors and attorneys to create a positive image of themselves among current and potential clients. Therefore, *pro publico bono* activity should be recognised as part of economic activities. In view of the above mentioned, it seems that legal advisors and attorneys meet the criterion of profit-making nature through their practice.

Based on the information above, it may be concluded that activities of legal advisors and attorneys providing legal assistance in law firms, joint offices and within partnerships constitute economic activity. The scope of activity of these entities does not constitute economic activity in a strict, conventional sense (e.g. activity related to manufacturing, construction, trade, provision of services), but nonetheless is a professional activity considered as economic activity. Therefore, legal advisors and attorneys conducting economic activities in the above mentioned forms constitute entrepreneurs within the meaning of Art. 4 of the FBA Act.

## 2. Germany

In Germany, the analysis of the notion of economic activity in context of the profession of

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<sup>56</sup> Gronkiewicz-Waltz, Jaroszyński (2015), 235.

<sup>57</sup> Ibidem, 237.

<sup>58</sup> Kidyba (2014), 20.

an attorney does not play the same role as in Poland.<sup>59</sup> The basic manner of conducting activities is economic activity established by the provisions of the German Commercial Code (*Handelsgesetzbuch*, hereinafter referred to as HGB). However, this Act does not provide a legal definition of economic activity (*Gewerbe*).<sup>60</sup> The definition of economic activity may be found in German legal doctrine, which defines it as professional and individual activities conducted with the aim of continuous profit-making.<sup>61</sup> Moreover, § 2 subsection 2 BRAO explicitly determines that an attorneys' practice does not constitute economic activity and directly indicates that an attorney practises a liberal profession.<sup>62</sup>

Therefore, legal assistance provided by German attorneys constitutes a professional activity, but is not to be seen as an economic activity. This means that German attorneys are not conducting commercial activities and are not subject to registration in the commercial register.<sup>63</sup> However, German attorneys are still considered to be entrepreneurs.<sup>64</sup>

### 3. Comparison

Based on the above mentioned, it may be concluded that Polish and German legal systems

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<sup>59</sup> More about economic activity in context of the profession of an attorney: Rolf Stürner, Jens Bormann, *Der Anwalt – vom freien Beruf zum dienstleistenden Gewerbe? Kritische Gedanken zur Deregulierung des Berufsrechts und zur Aushöhlung der anwaltlichen Unabhängigkeit*, in: NJW (2004), 1481-1491.

<sup>60</sup> § 1 subsection 2 HGB determines that commercial activity constitutes a business activity, unless this form of activity is not required for a given enterprise due to its nature and scope.

<sup>61</sup> Karsten Schmidt, *Handelsrecht (Köln 2002)*, 281; Günter Roth, *Handels- und Gesellschaftsrecht. Das Recht des kaufmännischen Unternehmens (München 1998)*, 45.

Based on this definition, it may be concluded that economic activity has three conditions: the aim of making profits and an individual and professional approach to the activity. If all the conditions are met, the activity may be regarded as economic activity. However, it needs to be stressed that some authors note that even if all these conditions are met, some specific entities will not be considered as individuals conducting economic activities.

<sup>62</sup> See about the liberal professions Konrad Redeker, *Der Rechtsanwalt: „Freier Beruf“ - "unreglementiert" - "dereguliert"*, in: NJW (2004), 2799-2800; Rüdiger Brüggemann, in: Wilhelm Feuerich, Dag Weyland (eds.), *Bundesrechtsanwaltsordnung (München 2016)*, § 2 marginal number 6.

<sup>63</sup> § 1 HGB.

<sup>64</sup> German literature stresses that the definition of an entrepreneur provided by § 14 BGB refers to entities conducting business activity, see Peter Kindler, in: Carsten T. Ebenroth, Karlheinz Boujong, Detlev Joost, Lutz Strohn (eds.), *Handelsgesetzbuch (München 2008)*, Vorbemerkungen zu § 1 - § 7 marginal number 27.

According to § 14 BGB, an entrepreneur (*Unternehmer*) is a natural person, legal entity or company with legal personality participating in legal (commercial) transactions through commercial, economic or professional activities.

differ in another regard. German attorneys, unlike Polish legal advisors and attorneys, are not conducting economic activities and are not subject to registration in the commercial register. Under German law, professional activity does not constitute economic activity. It is a separate form of operation. However, despite this difference, both German attorneys and Polish legal advisors and attorneys are entrepreneurs.

### III. Governing bodies of professional associations

#### 1. Poland

The main professional associations in Poland are the Polish Bar Council and the National Chamber of Legal Advisors. They ensure that good professional practices - in accordance with and for the purpose of protecting the public interest - are observed. Within the competence of the Polish Bar Council lies the representation of the Bar, supervision over the District Bar Councils and education of attorney trainees, examination of revocations of resolutions issued by District Bar Councils, presentation of opinions on projects of legislative acts, as well as motions and postulates within the domain of shaping and application of law, determining principles of attorneys' profession, education of attorney trainees and operations of District Bar Councils, and cooperation with foreign bars. The scope of activities of the National Chamber of Legal Advisors includes representation of the Chamber before courts, state and regional authorities, institutions and organisations, presentation of opinions on projects of legislative acts and motions regarding legal norms, coordination and supervision of operations of regional Legal Advisors Chambers, adoption of the National Chamber of Legal Advisors' budget, as well as preparation of reports on its implementation, and examination of the Review Panel.

The Polish Bar Council is comprised of the president, the attorneys elected by the National Bar Assembly and the deans of the District Bar Councils. Currently, the Polish Bar Council counts 49 members (6 women, 43 men).<sup>65</sup> There are 24 deans of the District Bar Councils (3 women, 21 men).<sup>66</sup> The chairmanship of the Polish Bar Council consist of 8 members (1 woman, 7 men).<sup>67</sup> Furthermore, the positions of president and vice-presidents are held by men only. The National Chamber of Legal Advisors is composed of the president, members elected by the Legal Advisors Assembly and members elected by Regional Chambers (one member from each regional chamber). Currently, the National Chamber of Legal Advisors counts 69 members (23 women, 46 men).<sup>68</sup> The Chairmanship of the National Chamber of

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<sup>65</sup> CZŁONKOWIE NACZELNEJ RADY ADWOKACKIEJ, <http://www.nra.pl/nra.php?id=118>, last accessed 16 December 2017.

<sup>66</sup> Ibidem.

<sup>67</sup> Prezydium NRA, <http://www.nra.pl/nra.php?id=329>, last accessed 16 December 2017.

<sup>68</sup> Krajowa Rada Radców Prawnych, <http://kirp.pl/o-samorzadzie/organy-ustawowe-i-regulaminowe/krajowa-rada-radcow-prawnych/>, last accessed 16 December 2017.

Legal Advisors consist of 16 members (4 women, 12 men)<sup>69</sup> and the positions of president and vice-presidents are held by men only as well. The largest number of female members of the National Chamber of Legal Advisors is registered in the District Chamber of Legal Advisors in Gdańsk (3 out of 4 representatives are female), the District Chamber of Legal Advisors in Kraków (3 out of 5 representatives are female) and the District Chambers of Legal Advisors in Koszalin and in Zielona Góra (2 out of 2 representatives of both chambers are female). In the National Chamber of Legal Advisors there are no female representatives registered in the District Chambers of Legal Advisors in Olsztyn, Toruń and Wrocław.

Based on the information provided, it can be concluded that there are more female legal advisors than female attorneys who are members of trade associations' governing bodies. It seems that this results from the fact that there are more female legal advisors than female attorneys. Nevertheless, despite the fact that most legal advisors are female, the National Chamber of Legal Advisors is comprised mainly of male members. Moreover, there are no women, who hold the position of a president or a vice-president in both trade associations.

## 2. Germany

The Federal Bar in Germany consists of 27 regional Bars and the Bar at the Federal Court of Justice.<sup>70</sup> The regional Bars register new attorneys and are responsible for monitoring attorneys' compliance with professional requirements, providing annual activity reports for their members at the Bar Assembly as well as giving account for their property management; drafting expert opinions when required by a federal state Administration of Justice, a court or an administrative authority of a federal state, admitting lawyers and, where required, withdrawing admission; advising and instructing lawyers in questions of professional obligations; mediating, on request, in disputes between lawyers or between lawyers and their clients; monitoring the fulfilment of professional obligations by lawyers and sanctioning offences; providing annual activity reports for their members at the Bar Assembly as well as giving account for their property management; drafting expert opinions when required by a Land Administration of Justice, a court or an administrative authority of a federal state.<sup>71</sup>

The Bar chairmanship is elected by presidents of these 28 Bars associated in the Bar Assembly. Pursuant to the German Attorney Act, the chairmanship should consist at least of

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<sup>69</sup> Prezydium Krajowej Rady Radców Prawnych, <http://kirp.pl/o-samorzadzcie/organy-ustawowe-i-regulaminowe/prezydium-krajowej-rady-radcow-prawnych/>, last accessed 16 December 2017.

<sup>70</sup> Organisation, Bundesrechtsanwaltskammer, <http://www.brak.de/die-brak/organisation/>, last accessed 27 December 2017.

<sup>71</sup> Unabhängig und frei. Die anwaltliche Selbstverwaltung, Bundesrechtsanwaltskammer (2009), [http://www.brak.de/w/files/02\\_fuer\\_anwaelte/Unabhaengig\\_u\\_Frei\\_BRAK\\_Brosch090908.pdf](http://www.brak.de/w/files/02_fuer_anwaelte/Unabhaengig_u_Frei_BRAK_Brosch090908.pdf), last accessed 27 December 2017.



a president, 3 vice-presidents, and a treasurer. The chairmanship is appointed for a period of 4 years. The members of the chairmanship do not receive any compensation for their functions. The current chairmanship is made up of four vice-presidents, one treasurer, and a president. In the current chairmanship there is only one woman, as a vice-president.<sup>72</sup> Among the presidents of 27 regional Bars there is only one woman as well. However, the office of the president of the Bar at the Federal Court of Justice is currently held by a woman.<sup>73</sup>

#### IV. Conclusion

Based on the information above, it may be concluded that Poland is among the few EU countries, in which duality of legal professions exists (which can be practised in a form of an economic activity). In Polish law, a professional, profit-making activity conducted in an organised and continuous fashion is considered to be an economic activity. It does not constitute a separate type of activity like it does in Germany. Polish and German laws offer different forms of practice for attorneys. Based on a thorough analysis of the concept of economic activity, it should be stated that the concept of economic activity and the acceptable organizational and legal forms of an attorney and legal advisor are not dependent on gender. In regard to the statistics it may be concluded that in 2017, there were less legal advisors and attorneys in Poland than in Germany. Compared to the different numbers of inhabitants of the two countries, in Poland there are less attorneys and legal advisors per inhabitant than in Germany. However, Poland has higher percentage of women providing legal services than Germany. In Germany, 34.37% of attorneys are female, in Poland 50.49% of attorneys and legal advisors are female. It needs to be noted that most women providing legal services in Poland choose to do so as legal advisors, not attorneys. Nevertheless, in both countries the number of women in governing bodies is extremely low. Access to both professions in Poland and in Germany is equal for both genders as no restricting regulations are in force.

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<sup>72</sup> Das Präsidium der BRAK, Bundesrechtsanwaltskammer, <http://www.brak.de/die-brak/organisation/praesidium/>, last accessed 27 December 2017.

<sup>73</sup> Präsident/Vorstand, RAK, <http://www.rak-bgh.de>, last accessed 20 May 2018.



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