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**THE LAWYER IN THE AREA OF TENSION
BETWEEN THE PUBLIC INTEREST-ORIENTED
ADMINISTRATION OF JUSTICE AND FREEDOM TO
EXERCISE THE PROFESSION, USING THE EXAMPLE
OF ADVISORY ASSISTANCE
– A PLEA FOR THE IMPORTANCE OF LEGAL FACT-
FINDING STUDIES TO OBTAIN EMPIRICAL DATA**

Abstract

As part of his public interest-oriented function of administering justice, a lawyer in Germany must grant advisory assistance (*Beratungshilfe*) to needy litigants with low incomes on the basis of the legal obligation under § 49a para. 1 of the Federal Code of Lawyers (*Bundesrechtsanwaltsordnung – BRAO*)¹ in accordance with the Advisory Assistance Act (*Beratungshilfegesetz – BerHG*).² In return, he receives a lower, statutory remuneration claim. The obligation to take over a case with a limited claim to remuneration imposed by law infringes on the lawyer's freedom to exercise his profession (*Berufsausübungsfreiheit*) pursuant to Article 12 para. 1 of the Basic Law

¹ Federal Code of Lawyers, at: https://www.gesetze-im-internet.de/englisch_brao/englisch_brao.pdf (last accessed: 6 April 2023).

² Act on Advisory Assistance and Representation for Citizens with a Low Income (Advisory Assistance Act), at: https://www.gesetze-im-internet.de/englisch_berathig/index.html (last accessed: 6 April 2023).

(*Grundgesetz – GG*).³ Such an infringement is only reasonable (*angemessen*) if the lawyer receives reasonable compensation and it thus becomes constitutional. Legal studies and representative empirical data are required to determine the reasonableness (*Angemessenheit*).

KEYWORDS

public interest orientation, lawyers' remuneration, obligation to contract, reasonable compensation, importance of empirical data, legal fact research/fact research in law, advisory assistance, legal aid

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ukierunkowanie na interes publiczny, wynagrodzenie prawników, obowiązek kontraktowania, rozsądna rekompensata, znaczenie danych empirycznych, badanie faktów prawnych, pomoc doradcza, pomoc prawna

1. INTRODUCTION

From his position as an independent organ of the administration of justice (*unabhängiges Organ der Rechtspflege*)⁴ (§ 1 BRAO), the lawyer must, within the framework of his professional practice, provide legal services (*Rechtsdienstleistungen*)⁵ which primarily serve the common good in the public interest. This also includes advisory assistance. In Germany, there are 160,438 lawyers,⁶ all of whom are obliged under professional law to provide advisory assistance. In recent years, the amounts spent by the state for advisory assistance have varied between just under 31.5 million euros (for the year 2021) to just under 85.5 million euros

³ Basic Law of the Federal Republic of Germany, at: https://www.gesetze-im-internet.de/englisch_gg/index.html (last accessed: 6 April 2023).

⁴ On the independent body of the administration of justice in detail: J. Lefèvre, *The professional profile of the lawyer in Germany: An approach to the innermost professional profile*, p. 37 *et seq.*, (in:) Franz von Liszt Institute Working Papers Legal Professions in Comparative Perspective: Poland-Germany. Part I, 1st edition, Gießen 2021, https://www.uni-giessen.de/de/fbz/fb01/fakultaet-institutionen/franzliszt/forschung/working-paper/copy_of_Legal.pdf (last accessed: 6 April 2023).

⁵ For the definition *Rechtsdienstleistung* see § 2 Act on Out-of-Court Legal Services (*Rechtsdienstleistungsgesetz*, RDG), at: https://www.gesetze-im-internet.de/englisch_rdg/index.html (last accessed: 6 April 2023).

⁶ M. Kilian, *Statistisches Jahrbuch 2021/2022*, 1st edition, Baden-Baden 2022, p. 63.

(for the year 2007).⁷ The legally prescribed remuneration entitlement for advisory assistance is in part many times lower than the lawyer's remuneration arising from other advice, although the legal services must be the same in terms of scope, content, and quality.⁸ The lawyer must perform the advisory assistance mandate *de lege artis*. He is, therefore, obliged to comply with all professional regulations even if he takes over the advisory assistance mandate.⁹ Within the framework of the lower remuneration claims for the advisory assistance, the lawyer makes a 'monetary special sacrifice',¹⁰ which is justified by the above-mentioned public interest oriented function of the lawyer as an organ of the administration of justice.¹¹

For example, within the framework of out-of-court advisory assistance for counselling pursuant to § 44 sentence 1 in conjunction with No. 2501 of the Remuneration Schedule (*Vergütungsverzeichnis, VV*) of the Act on the Remuneration of Lawyers (*Rechtsanwaltsvergütungsgesetz, RVG*), the lawyer receives a fixed fee of 38.50 euros^{13, 14}. When it comes to the fee, it is irrelevant how extensive and time-consuming the work is, because it arises independently and as a lump sum.¹⁵ Even a very high value of the matter does not affect the above-mentioned fixed fees. In comparison, in the case of an initial consultation with a consumer,¹⁶ who does not fall under the scope of application of the BerGH, the lawyer can charge a fee for a first consultation according to § 34 sentence 3 RVG. Comparatively, the lawyer can charge a fee for an initial consultation of up to a maximum of 190 euros or – based on a remuneration agreement (*Vergütungsvereinbarung*) – negotiate an hourly rate. The current average agreed hourly rate in the out-of-court area is 159 euros, with the highest average hourly rate being 246 euros and the average standard hourly rate being 190 euros.¹⁷ The monetary difference between

⁷ Bundesamt der Justiz, Federal Office of Justice, Beratungshilfestatistik 1981-2021, at: https://www.bundesjustizamt.de/SharedDocs/Downloads/DE/Justizstatistiken/Beratungshilfestatistik1981_2021.pdf?__blob=publicationFile&v=5 (as of 27 January 2023).

⁸ K. Lindemann, P. Trenk-Hinterberger, *BerHG*, 1st edition, München 1987, § 3 BerHG, marginal no. 7.

⁹ K. Nöker, (in:) D. Weyland, BRAO, 10th edition, München 2020, § 49a, marginal no. 21.

¹⁰ S. Offermann-Burckart, *Beratungshilfe: Was muss, das muss?*, Anwaltsbl. 2021, pp. 406 *et seq.*

¹¹ Bundesverfassungsgericht (BVerfG), NJW 2019, p. 3370.

¹² https://www.gesetze-im-internet.de/englisch_rvg/index.html (last accessed: 6 April 2023).

¹³ All amounts are net amounts excluding VAT.

¹⁴ On fees and remunerations as well as on the determination procedure according to § 55 RVG in detail: I.-M. Groß, *Beratungshilfe, Prozesskostenhilfe, Verfahrenskostenhilfe*, 14th edition, Heidelberg 2014, §44 RVG, marginal no. 1 *et seq.*, § 55 RVG, marginal no. 1 *et seq.*

¹⁵ S. Lissner, J. Dietrich, K. Schmidt, *Beratungshilfe mit Prozesskosten- und Verfahrenshilfe*, 4th edition, Stuttgart 2022, marginal no. 290.

¹⁶ For the definition of consumer, see § 14 German Civil Code (*Bürgerliches Gesetzbuch, BGB*).

¹⁷ C. Hommerich, M. Kilian, *Stundensätze der deutschen Anwaltschaft*, NJW 2009, p. 1570.

remunerations (advisory assistance versus other counselling remuneration) shows the actual service value of the legal services of advisory assistance and the savings the state achieves through the legally lower remunerations (according to § 44 RVG).

2. THE LAWYER'S OBLIGATION UNDER § 49A PARA. 1 BRAO

Lawyers have always been consulted for the granting of legal aid, especially for advisory assistance.¹⁸ Since the BerHG¹⁹ came into force, lawyers have been obliged to provide legal aid for needy legal seekers.²⁰ By doing so, they ensure equal access to justice for needy²¹ litigants, i.e., for citizens with low incomes and assets.²² There is a so-called genuine obligation to contract (*Kontrahierungszwang*), i.e., lawyers must accept a mandate for legal advisory assistance and conclude a contract with the person seeking legal advice according to § 49a para. 1 sentence 1 BRAO.²³ They may only do so in individual cases and for good cause under § 49a para. 1 sentence 1 BRAO in conjunction with § 16a of the Rules of Professional Practice (*Berufsordnung der Rechtsanwälte, BORA*²⁴).²⁵ If the lawyer refuses without good cause, he acts unlawfully.²⁶

¹⁸ On the history: H. Kawamura, *Die Geschichte der Rechtsberatungshilfe in Deutschland*, 1st edition, Berlin 2014.

¹⁹ § 49a para. 1 BRAO introduced by the BerHG on 18 June 1980 (BGBl. I p. 689, Zweiter Abschnitt p. 690 Änderungen von Bundesgesetzen) § 49 para. 2 was introduced by the Gesetz zur Neuordnung des Berufsrecht der Rechtsanwälte und Patentanwälte on 2 September 1994 (BGBl. I p. 2278).

²⁰ Law of 18 June 1980 – BGBl. I 1980, No. 29, 21 June 1980, p. 689.

²¹ Indigence is determined according to §§ 115 *et seq.* Code of Civil Procedure (*Zivilprozessordnung, ZPO*), for more details on the determination: I.-M. Groß, *Beratungshilfe, Prozesskostenhilfe, Verfahrenskostenhilfe*, 14th edition, Heidelberg 2014, § 1 BerHG, marginal no. 45 *et seq.*

²² M. Hessler, (in:) M. Henssler, H. Prütting, *BRAO*, 5th edition, München 2019, § 49a BRAO, marginal no. 1.

²³ S. Offermann-Burckart, *Beratungshilfe: Was muss, das muss?*, Anwaltsbl. 2021, p. 406.

²⁴ https://www.brak.de/fileadmin/02_fuer_anwaelte/berufsrecht/BORA_Stand_01.10.2022_en.pdf (last accessed: 6 April 2023).

²⁵ For possible reasons for refusal, such as time constraints/professional overload, disturbance of the relationship of trust, or illness of the lawyer, see in detail: R. Zuck, (in:) R. Gaier, C. Wolf, S. Wolf, S. Göcken, *Anwaltliches Berufsrecht*, 3rd edition, Köln 2020, § 16a BORA, marginal no. 1 *et seq.*

²⁶ On the consequences under civil and professional law: S. Offermann-Burckart, *Beratungshilfe: Was muss, das muss?* Anwaltsbl. 2021, pp. 406 *et seq.*

3. INFRINGEMENT ON THE FREEDOM TO EXERCISE ONE'S PROFESSION UNDER ARTICLE 12 PARA. 1 GG AND ITS PROPORTIONALITY (*VERHÄLTNISMÄSSIGKEIT*)

§ 49a para. 1 BRAO and the associated limited remuneration claim under § 8 BerHG, § 44 RVG restrict, to the detriment of the lawyer, the principle of freedom of contract (*Dispositionsfreiheit*) and thus also his freedom of price (*Preisfreiheit*) with regard to his remuneration options under Article 12 para. 1 GG.²⁷ The fundamental obligation has not been constitutionally challenged, even since the introduction of § 49a BRAO. However, there are concerns about the constitutionality of the reasonableness of the fee amount.²⁸

An infringement on Article 12 para. 1 GG may only be made by a law or on the basis of a law, in this case, by § 49a BRAO in conjunction with § 44 RVG. However, such a fee-based restriction is also only permissible and constitutional if it is justified by sufficient reasons of public interest. It also has to be necessary (*erforderlich*), suitable (*geeignet*) and proportionate (*verhältnismäßig*), i.e., it cannot go beyond what is necessary to achieve the purpose.

3.1. LEGITIMATE PURPOSE (*LEGITIMER ZWECK*) TO JUSTIFY THE INFRINGEMENT

The infringement on the lawyer's freedom of profession pursues a legitimate purpose, namely to protect the functioning administration of justice in the public interest but also to protect state expenditure through the commissioning of the lawyer and the associated limitation of remuneration.²⁹ According to Article 20 para. 1 GG, it is the very task and obligation of the state and the general public to implement and finance the social state (*Sozialstaat*) and, according to Article 20 para. 3 and Article 3 GG, to grant the needy party access to extrajudicial legal protection in the same way as the wealthy ones.³⁰ For this reason, the BerHG came into force on 1 January 1980,³¹ in order to grant assistance to needy litigants with low incomes and assets for the exercise of rights outside of court proceedings (§ 1 BerHG). Today, advisory assistance is an 'indispensable social benefit

²⁷ W. Hartung, (in:) H. Scharmer, *BORA/FAO*, 6th edition, München 2016, § 16, marginal no. 4.

²⁸ H. Euba, *Verfassungswidrigkeit der Regelungen über die Höhe der anwaltlichen Gebühren für Beratungshilfe*, NJOZ 2011, p. 1 *et seq.*; W. Hartung, V. Römermann, *Beratungshilfe zu Dumpingpreisen - verfassungswidrig!*, ZRP 2003, pp. 149 *et seq.*

²⁹ R. Zuck, (in:) R. Gaier, C. Wolf, S. Göcken, *Anwaltliches Berufsrecht*, 3rd edition, Köln 2020, § 16 BORA, marginal no. 19.

³⁰ BVerfGE 122, 39 = NJW 2009, p. 209.

³¹ Consultancy Assistance Act came into force on 1 January 1981 (BGBl. I p. 691).

within the administration of justice'.³² It serves the function of administration of justice and effective legal protection (*effektiver Rechtsschutz*) pursuant to Article 19 para. 4 sentence 1 GG by guaranteeing equality of legal perception in the out-of-court sphere for those seeking justice with low incomes and assets.³³ It is intended to ensure that access to professional advice and necessary representation does not fail for reasons of cost, even for people in need.³⁴ It is, therefore, one of the essential and indispensable components of a social state under the rule of law.³⁵ The use of the legal profession, which is legally standardized by § 49a para. 1 BRAO, precisely pursues the realization of the objectives envisaged by Article 20 para. 3 and Article 3 GG.³⁶ Constitutionally, therefore, the obligation to take on a non-negotiable, lower remuneration is rightly justified on sufficient grounds of the common good.

3.2. SUITABILITY (*GEEIGNETHEIT*) AND NECESSITY (*ERFORDERLICHKEIT*)

'The obligation to take over with limited entitlement to remuneration must be suitable for achieving the purpose'.³⁷ Suitable does not mean optimal, but it must be conducive to achieving the purpose.³⁸ The question of suitability for the purpose must be answered empirically.³⁹ It is assumed that the purpose can be achieved, even though the above-mentioned statistics on advisory assistance show a significant decline in expenditure and applications for advisory assistance by lawyers.⁴⁰ The decrease spares the state's expenditure. However, it is recommended that the reductions must be examined more closely. There is a lack of knowledge about possible actual connections and causes between the above-mentioned reductions

³² K. Nöker, (in:) D. Weyland, *BRAO*, 10th edition, München 2020, § 49a, marginal no. 2; cf. also BVerfGE 35, p. 355.

³³ R. Zuck, *Die verfassungsrechtlichen Rahmenbedingungen der Beratungshilfe*, NZS 2012, p. 441.

³⁴ K. Nöker, (in:) D. Weyland, *BRAO*, 10th edition, München 2020, § 49a, marginal no. 2.

³⁵ I.-M. Groß, *Beratungshilfe, Prozesskostenhilfe, Verfahrenskostenhilfe*, 14th edition, Heidelberg 2014, Einl. marginal no. 6.

³⁶ H. Euba, *Verfassungswidrigkeit der Regelungen über die Höhe der anwaltlichen Gebühren für Beratungshilfe*, NJOZ 2011, p. 29.

³⁷ H. Dreier, (in:) H. Dreier, *Grundgesetz*, 3rd edition, Tübingen 2013, before Art. 1, marginal no. 147.

³⁸ H. Dreier, (in:) H. Dreier, *Grundgesetz*, 3rd edition, Tübingen 2013, before Art. 1, marginal no. 147.

³⁹ H. Dreier, (in:) H. Dreier, *Grundgesetz*, 3rd edition, Tübingen 2013, before Art. 1, marginal no. 147.

⁴⁰ Bundesamt für Justiz, Federal Office of Justice, Beratungshilfestatistik 1981-2021, at: https://www.bundesjustizamt.de/SharedDocs/Downloads/DE/Justizstatistiken/Beratungshilfestatistik1981_2021.pdf?__blob=publicationFile&v=5 (as of 23 January 2023).

and the practice of lawyers providing advisory assistance. Since it appears from the above-mentioned statistics that many cases are still being processed, there is no obvious misuse of funds and, therefore, suitability can be assumed.

The above-mentioned infringement is necessary if no means exists that achieves the purpose just as effectively but interferes less intensively with the fundamental rights of those affected.⁴¹ The obligation to pay is basically necessary as a milder legitimate means,⁴² however, a more intensive view is required with regard to the amount of the fee. It can be discussed whether the legislator has to comply with its rationalization requirements (*Rationalisierungsanforderungen*) within the framework of its legislation when determining the amount of fees. In principle, the legislator is to be granted the right to decide on the extent to which it pursues legitimate ends and to choose the means by which these ends can be achieved most quickly, most optimally or most likely.⁴³ In principle, he is granted a margin of appreciation and prognosis.⁴⁴ However, independent of the substantive constitutionality, there may also be an independent obligation to clarify and justify the facts.⁴⁵ If necessary, also if the fee levels were not determined on the basis of well-founded (empirical) knowledge from facts and interrelationships of effects. Calculations for the assessment and determination of the amount of advisory assistance fees are not known and have apparently not been undertaken so far. Although the legislature has always expanded on the cost situation for the state budget and set out the average remuneration for lawyers per advisory assistance,⁴⁶ there is no consideration of the cost and time involved from the lawyer's point of view. The latter are, therefore, to be recommended. Whether this actually constitutes a violation of the rationalization requirements, however, requires further investigation, which cannot be undertaken here.

3.3. ADVISORY ASSISTANCE FEES AS REASONABLE COMPENSATION?

The infringement on Article 12 para. 1 GG must also be reasonable, i.e., the purpose of the infringement and the intensity of it must be in reasonable pro-

⁴¹ H. Dreier, (in:) H. Dreier, *Grundgesetz*, 3rd edition, Tübingen 2013, before Art. 1, marginal no. 148.

⁴² In detail: H. Euba, *Verfassungswidrigkeit der Regelungen über die Höhe der anwaltlichen Gebühren für Beratungshilfe*, NJOZ 2011, p. 29.

⁴³ L. Michael, M. Morlok, *Grundrechte*, 8th edition, Baden-Baden 2022, marginal no. 621.

⁴⁴ BVerfGE 102, 197; 115, 276, 126, 112.

⁴⁵ BVerfG, Beschl. v. 24.3.2021 – 1 BvR 2656/18, marginal no. 240.

⁴⁶ See, e.g., BT-Drucksache 17/2164, Gesetzesentwurf des Bundesrates zur Änderung des Beratungshilfegesetzes of 16 June 2010, pp. 8 *et seq.*; BR-Drucksache 648/08, Entwurf eines Gesetzes zur Änderung des Beratungshilferechts, pp. 7 *et seq.*

portion.⁴⁷ As long as the assumption of advisory assistance mandates does not endanger the lawyer's livelihood and does not pose a threat to his existence, or there is no fear of significant financial consequences for the operation of the law firm, these fees are to be considered reasonable and constitutional.⁴⁸ The intervention is justified insofar as the limit of the reasonableness of the lower fees is still maintained.⁴⁹ The intervention would no longer be reasonable if the limited fees for the lawyer's obligation to provide legal advice were to place an excessive burden on the lawyer⁵⁰ and if the state did not provide adequate compensation for the use of legal advice as compensation.⁵¹ Adequate compensation should at least cover the costs associated with the provision of advisory assistance.⁵² In order to determine cost coverage, data on turnover, variable and fixed costs of the lawyer, data on working hours, and, above all, data on the processing time of advisory assistance applications are needed. The latter in particular are not available in representative form.

3.3.1. EXAMPLE OF DETERMINATION

A study from 2009 pointed out a noteworthy attempt to determine reasonableness. This study analyzed six different studies on their respective statements on the cost, turnover, and profit structure of lawyers. From this, an average hourly turnover of the lawyer of 43.93 euros and a cost recovery of 22.59 euros, and thus a profit of 21.24 euros/hour were calculated. At the time, this calculation was based on a fixed fee for counselling of 30 euros per session,⁵³ so according to this calculation, the lawyer did not cover his costs for a counselling session of more than 1 hour and 36 minutes.⁵⁴ Lacking knowledge of the scope of advisory of these clients, the investigator at the time observed his own advisory assistance practice. From anecdotal evidence⁵⁵ for such consultations, he determined that he had to spend an average of 1 hour and 38 minutes of working time per advisory

⁴⁷ BVerfG, Decision of the First Senate of 15 December 1999 1 BvR 1904/95, marginal no. 1-120.

⁴⁸ BVerfG, Anwaltsbl. Online 2019, p. 859.

⁴⁹ BVerfGE 68, 255 = NJW 1985, p. 727.

⁵⁰ BVerfG 83, 1 = NJW 1991, p. 555.

⁵¹ BVerfGE 54, 271 = NJW 2008, p. 1063.

⁵² H. Euba, *Verfassungswidrigkeit der Regelungen über die Höhe der anwaltlichen Gebühren für Beratungshilfe*, NJOZ 2011, pp. 293 *et seq.* W. Hartung, V. Römermann, *Beratungshilfe zu Dumpingpreisen - verfassungswidrig!*, ZRP 2003, pp. 149 *et seq.*

⁵³ This is a former fee under No. 2501 VV RVG; the current fee under No. 2501 VV RVG since 1 January 2021 is 38.50 euros (net).

⁵⁴ H. Euba, *Verfassungswidrigkeit der Regelungen über die Höhe der anwaltlichen Gebühren für Beratungshilfe*, NJOZ 2011, p. 296.

⁵⁵ Anecdotal evidence refers to data that has been obtained without an inter-subjectively comprehensible selection criterion and is performed by the habits, presence, and abilities of the person who receives it (H. Hamann, *Evidenzbasierte Jurisprudenz*, 1st edition, Tübingen 2014, pp. 56 *et seq.*).

assistance consultation. According to his calculation, he came to a conclusion that, in the absence of cost recovery, this would constitute unreasonable compensation and exceed the limit of the reasonableness of the sacrifice to be borne if an advisory assistance mandate took up more than 1 hour and 36 minutes of his time.⁵⁶ This calculation cannot generate general validity due to the lack of representative data. However, it shows possible criteria that play a role in concretizing reasonableness.

3.3.2. INHOMOGENEITY IN THE LEGAL PROFESSION

With 293,166 applications for advisory assistance granted⁵⁷ and 160,438 lawyers,⁵⁸ each lawyer would have to process ‘only’ 1.8 applications for advisory assistance⁵⁹ per year if the number of applications for it and the number of admissions remained the same. With this *per capita* number, the reasonableness of taking on the limited remuneration claim does not seem to be overly burdensome and sustainable. In legal terms, however, the situation looks different. In fact, the practice of advisory assistance is different. A lawyer in Baden-Württemberg handles 1.1 cases per year, whereas a lawyer in Saxony-Anhalt handles 7.6 cases.⁶⁰ In addition, these figures may also differ because in another survey, 34% of the respondents stated that they do not even process advisory assistance mandates.⁶¹ Lawyers in individual and small law firms often handle a wide range of legal matters instead of specializing in a specific area. They handle most of the advisory assistance cases.⁶² In addition, it was found that the proportion of female lawyers who take on counselling is much higher than that of their male colleagues.⁶³

⁵⁶ H. Euba, *Verfassungswidrigkeit der Regelungen über die Höhe der anwaltlichen Gebühren für Beratungshilfe*, NJOZ 2011, p. 296.

⁵⁷ Bundesamt für Justiz, Federal Office of Justice, Beratungshilfestatistik 1981-2021, at: https://www.bundesjustizamt.de/SharedDocs/Downloads/DE/Justizstatistiken/Beratungshilfestatistik1981_2021.pdf?__blob=publicationFile&v=5 (as of 23 January 2023).

⁵⁸ Bundesrechtsanwaltskammer (BRAK) member statistics at: https://www.brak.de/fileadmin/04_fuer_journalisten/statistiken/2022/2022_brak-mg_statistik.pdf (as of 1 January 2022).

⁵⁹ Cf. in 2007 there were 7 advisory assistance mandates per lawyer/year, C. Hommerich, M. Kilian, *Zugang zum Recht: Die Diskussion um die Reform des Beratungshilferechts*, BRAK-Mitt. 2010, p. 106.

⁶⁰ Cf. M. Kilian, *Statistisches Jahrbuch 2021/2022*, 1st edition, Baden-Baden 2022, p. 229; In earlier studies, even greater disparities were evident cf. on this subject C. Hommerich, M. Kilian, *Zugang zum Recht: Die Diskussion um die Reform des Beratungshilferechts*, BRAK-Mit. 2010, pp. 107 *et seq.*

⁶¹ M. Kilian, M. Bertolino, *Das Berufs- und Privatleben von Rechtsanwälten*, 1st edition, Baden-Baden 2022, p. 62; C. Hommerich, M. Kilian, *Zugang zum Recht: Die Diskussion um die Reform des Beratungshilferechts*, BRAK-Mit. 2010, pp. 107 *et seq.*

⁶² C. Hommerich, M. Kilian, *Zugang zum Recht: Die Diskussion um die Reform des Beratungshilferechts*, BRAK-Mitteilungen 2010, p. 111.

⁶³ C. Hommerich, M. Kilian, *Zugang zum Recht: Die Diskussion um die Reform des Beratungshilferechts*, BRAK-Mitteilungen 2010, p. 111.

Furthermore, it is striking that different studies sometimes show great differences in the economic considerations of the legal profession. In 2020,⁶⁴ the average annual revenue per lawyer was 129,005 euros. In 2018,⁶⁵ it was 145,000 euros (higher in the old federal states – at 156,000 euros, than in the new federal states – at 120,000 euros).⁶⁶ Men still achieved significantly higher revenues of 169,000 euros than women did (with an average of 97,000 euros).⁶⁷ In addition, the degree of specialization played a decisive role with regard to the amount of revenue. Specialized lawyers reported (sometimes significantly) higher revenue.⁶⁸ In 2016, the cost ratio in German law firms was 50.7% on average, whereby the differences varied with regard to the main areas of activity.⁶⁹ Lawyers reported average working hours of 51 hours per week, with solo lawyers being the type of lawyers who worked the most, whereas half of all female lawyers reported a weekly working time of 30-50 hours per week.⁷⁰ As shown, there is a lack of empirically collected representative data for determining whether the current fees for advisory assistance place an excessive burden on lawyers as they do not cover costs and possibly threaten their existence. Therefore, an abstract reasonableness of the fee level cannot be determined.

4. CONCLUSION

It seems challenging to do justice to these differences with a fixed, flat fee rate. Nevertheless, it is and remains the task of the legislature not only to compensate the public interest-oriented legal profession through reasonable fee levels but also, and above all, to ensure equal access to justice for those in need. It is a legitimate and understandable goal that the expenses of the state must also be in a calculable proportion. However, this goal must not be at the expense of equal access to justice for those in need. Moreover, in 2020 the expenditure for advisory

⁶⁴ M. Kilian, *Statistisches Jahrbuch 2021/2022*, 1st edition, Baden-Baden 2022, p. 162 with reference to Umsatzsteuerstatistik des Statistischen Bundesamtes Fachserie 14, Reihe 8.1.

⁶⁵ The following data are all from the STAR Report 2020, at: https://www.brak.de/fileadmin/04_fuer_journalisten/star-2020/star2020_ergebnisbericht_02-2021.pdf (last accessed: 6 April 2023).

⁶⁶ STAR Report 2020, at: https://www.brak.de/fileadmin/04_fuer_journalisten/star-2020/star2020_ergebnisbericht_02-2021.pdf (last accessed: 6 April 2023), p. 19.

⁶⁷ STAR Report 2020, at: https://www.brak.de/fileadmin/04_fuer_journalisten/star-2020/star2020_ergebnisbericht_02-2021.pdf (last accessed: 6 April 2023), p. 19.

⁶⁸ STAR Report 2020, at: https://www.brak.de/fileadmin/04_fuer_journalisten/star-2020/star2020_ergebnisbericht_02-2021.pdf (last accessed: 18 March 2023), p. 20.

⁶⁹ M. Kilian, *Anwaltstätigkeit der Gegenwart*, 1st edition, Köln 2016, p. 219.

⁷⁰ M. Kilian, *Anwaltstätigkeit der Gegenwart*, 1st edition, Köln 2016, p. 311.

assistance *per capita* in Germany amounted to ‘only’ 0.50 euros,⁷¹ which seems very low when compared to other countries.⁷² There must be, therefore, a continued assurance that lawyers fulfill their obligation to assume responsibility in accordance with the law and thus provide equal access to justice for those in need. Subject to the recommended empirical surveys, the fulfillment of the objectives of the BerHG appears to be threatened without an adjustment of the fees for advisory assistance. If one considers the legal market and the structural change in the legal profession,⁷³ as well as further predicted declines in the number of lawyers admitted to the bar,⁷⁴ in the future, the advisory assistance mandates will, in fact, be in even greater competition with more lucrative mandates (and this is connected with partly increased cost pressure on lawyers). There must not be a two-tier society of the well-off and the needy, which could possibly arise. This could be the case, for example, if lawyers are no longer able to take on advisory assistance cases due to time constraints or overwork because of the continuously increasing cost pressure and a possible increase in demand due to the redistribution of mandates and the lack of lawyers.

Although the fees increased on 1 January 2021 by a linear adjustment of 10%,⁷⁵ this increase does not really seem to be able to absorb the additional costs caused by the current price increases.⁷⁶ For some time now, there have been calls for a dynamic adjustment of the fees to increased costs, and rightly so.⁷⁷ The increase was rejected in the last reform with the argument of the additional costs

⁷¹ M. Kilian, *Statistisches Jahrbuch 2021/2022*, 1st edition, Baden-Baden 2022, p. 240.

⁷² Cf. M. Kilian, *Securing access to justice: facts, requirements, problems and ideas for solutions*, Anwaltsbl. 2010, pp. 46 *et seq.*

⁷³ On the ‘war of talents’ in the legal market: C. Knipping, Der Fachkräftemangel ist auch bei den Juristen längst angekommen, at: https://www.haufe.de/recht/kanzleimanagement/der-war-for-talents-hat-die-juristen-erreicht/der-fachkraeftemangel-ist-auch-bei-den-juristen-laengst-angekommen_222_502354.html (last accessed: 6 April 2023); on the decline in admissions to the bar, see M. Kilian, *Statistisches Jahrbuch 2021/2022*, 1st edition, Baden-Baden 2022, p. 63.

⁷⁴ In 2030, there will only be around 122,000 to 133,000 practicing lawyers, which then means a decline of 20,000–34,000 professionals from 2017, cf. M. Kilian, Die aktuellen Anwaltszahlen – genauer betrachtet, Anwaltsbl. 2020, p. 416. On the developments of the legal profession in figures, see M. Kilian, *Statistisches Jahrbuch der Anwaltschaft 2021/22*, 1st edition Baden-Baden 2022, p. 42.

⁷⁵ Bundesrat kompakt, zur 998. Sitzung am 18.12.2020, at: <https://www.bundesrat.de/DE/ple-num/bundesrat-kompakt/20/998/998-node.html#top-8> (last accessed: 6 April 2023) with reference to Gesetz of 21 December 2020 BGBl. I p. 3229.

⁷⁶ See also BRAK Opinion No. 40/2020, August 2020, p. 3, at: https://www.bmj.de/Shared-Docs/Gesetzgebungsverfahren/Dokumente/RegE_Justizkostenrecht.pdf;jsessionid=F298CAE-54B45775169E0C8813D0C0538.1_cid289?__blob=publicationFile&v=2 (last accessed: 6 April 2023).

⁷⁷ BRAK and Deutscher Anwaltverein (DAV) statement of 28 October 2020, at: https://www.brak.de/fileadmin/newsletter_archiv/berlin/2020/2020_495anlage2.pdf (last accessed: 6 April 2023).

caused by the Covid-19 pandemic (under great protest by lawyers' lobbyists⁷⁸) and postponed until the year 2023.⁷⁹ It therefore remains to be seen whether this 'promise' will be kept this year. Even though the reasonableness of the fees could not be assessed in the context of this publication due to the lack of representative data, an appropriate and timely review must be carried out, particularly in the public interest with regard to the functioning of the administration of justice. Equal access to justice must continue to be guaranteed.

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⁷⁸ BRAK, at: <https://www.brak.de/newsroom/newsletter/nachrichten-aus-berlin/2020/ausgabe-19-2020-v-5112020/anwaltsgebuehren-brak-und-dav-vehement-gegen-verschiebung-der-gebuehrenanpassung/> (last accessed: 6 April 2023); also cf. BT-Drucksache 19/8266 of 12 March 2019 Antrag 'Rechtsanwaltsgebühren zukunftssicher gestalten', at: <https://dserver.bundestag.de/btd/19/168/1916884.pdf> (last accessed: 6 April 2023).

⁷⁹ Haufe Redaktion, at: https://www.haufe.de/recht/kanzleimanagement/anhebung-der-anwaltsgebuehren-um-durchschnittlich-10-geplant_222_525012.html (last accessed: 6 April 2023).

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