Improving access to justice in Germany through the use of new providers
- The 2005 white paper of a law on the provision of legal services (Rechtsdienstleistungsgesetz – RDG-E)

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I. Introduction

Following the publication of a green paper in September 2004, the German Department of Justice in late April 2005 published a white paper containing proposals for a reform of the regulation of legal services. With the aim of tabling a bill later in the year and the law coming into force in late 2006/early 2007, the white paper suggests the abolition of the Law On Legal Advice ("Rechtsberatungsgesetz - RBerG") that has regulated the legal services market in Germany since 1935 and its replacement by a more liberal Legal Services Act ("Rechtsdienstleistungsgesetz - RDG"). The white paper takes a number of recent decisions of Germany's Constitutional Court ("Bundesverfassungsgericht") that have challenged the constitutionality of the comprehensive monopoly rights for lawyers as the starting point of a reform that aims at opening up the legal services market. However, the white paper acknowledges the importance of the lawyers' profession as the main - and specifically trained - provider of legal services and suggests only such changes to the existing regulatory regime that will guarantee the dominant position of lawyers on the legal services market.

This paper will give an overview of the upcoming reform. It will first chart the historical development of the de facto monopoly of lawyers (II.) before analysing the status quo and the reasons for the proposed reform (III.). The paper will then focus on the main aspects of the white paper and explain its likely impact on access to justice and legal aid (IV.).

II. Historical Background

1. Lawyers, Pettyfoggers and the Law in the German Reich

To better understand the upcoming reform, it is helpful to take the historical background of the status quo into consideration. The regulation of the provision of legal services in Germany has undergone a number of changes in the past 150 years. When the German Reich was formed in 1871, the freedom of trade also covered legal services. No specific requirements existed for those wishing to provide legal services except for a general "test of untrustworthiness" which all trades-people had to pass. Codes of procedure, however, prevented non-lawyer advisers from doing court work before the higher courts as only lawyers enjoyed a right of audience before those courts. Despite this privileged situation, most lawyers had to compete with others professionals – dismissed as pettifoggers ("Winkeladvokaten") – as lawyers were not simultaneously admitted before the lower and the higher courts. The majority that was only admitted before the lower courts did not benefit from the requirement of a exclusive right of audience and thus had to compete with pettifoggers. In the 19th century, in some areas of Prussia pettifoggers were well organized, even forming a kind of local bar, and were able to capture a fair size of the legal services market. Although

widely regarded as a nuisance by lawyers, judges and other professionals with an academic background, they enjoyed the support of many ordinary people who felt it easier to access a pettifoggers than lawyers as members of the upper class. Also, lawyers mainly practiced in larger cities, leaving the countryside without readily accessible legal services. At the beginning of the 20th century, the code of civil procedure was changed to allow the lower courts to bar pettifoggers pleading before them and to disallow costs if a party was represented by a non-lawyer. However, the results of this reform were generally felt to be dismal. Well into the 1920s, lawyers had to compete with the unloved "lower class" of legal professionals.

2. The creation of the monopoly for lawyers under the Nazi rule

After the First World War, a growing number of lawyers and an ailing economy resulted in calls for a better protection of the lawyers' profession against competitors without regulated training and professional rules. During the 1920s, for the first time plans were submitted to create a legal services monopoly for lawyers. These plans were not realized until the Nazi regime took power in 1933 and quickly adopted the idea not only in the interest of lawyers' profession, but also to drive legal advisers and claims collectors out of business who, to a very high percentage, were Jewish. It also brought an end to advice bureaux which were run by interest groups, political parties and self-help organizations which often followed a political agenda in stark contrast to the Nazi movement. In June 1933, the code of civil procedure was changed and barred non-lawyers from pleading before all courts. In December 1935, the Nazi regime finally enacted a "law against the abuse of legal advice" ("Gesetz zur Verhütung von Mißbräuchen auf dem Gebiet der Rechtsberatung"), later renamed "law on legal advice" ("Rechtsberatungsgesetz"). This new law barred everybody from practising law and offering legal services with the exception of those who were licensed by the state to do so. Lawyers ("Rechtsanwälte") were, by virtue of their admission to the bar, exempted from the requirement to obtain such a licence. Others could apply for a licence and, if granted, were allowed to practice law as "legal advisers" ("Rechtsbeistand"). This licensing system put an end to the unregulated practice of law. Combined with racist laws that removed Jewish lawyers from the bar, the Rechtsberatungsgesetz allowed the Nazi regime to limit the practice of law by Jews, although technically, the law as such had no racist bias (only by-laws based on it and a "law on the admission of lawyers" had a direct impact on Jewish legal professionals). Because of this, the Rechtsberatungsgesetz was deemed to be non-racist after the Second World War and remained in force, determining the development of the legal services industry in the Federal Republic Of Germany.

3. The tightening of the monopoly in the post-WWII war era

After the German constitution had come into force in 1949, the law was subjected to a test of constitutionality as the de facto monopoly restricted the constitutional right of free exercise of trade and profession. The restrictions were found to be constitutional on three grounds:

- the protection of the consumer: The law intends to safeguard the consumer against unqualified legal advice by service providers who have not undergone legal training or who might be unreliable on other grounds.
- the protection of the administration of justice: Those appearing before courts and tribunals on behalf of citizens need to be properly trained and subject to professional rules to be able to interact efficiently with the institutions of justice.
- the protection of a functioning legal profession: A democratic legal system requires a functioning legal profession that can only act independently and in the best interest of the law if it is guaranteed sufficient income

and protection from other service providers who are, in contrast to lawyers, able to cherry-pick cases.

With regard to those aims, the legislator even tightened the law over the years: While the law originally allowed the licensing of non-lawyer legal advisers in general (so-called "Vollrechtsbeistände"), this possibility was restricted in 1980: Licences could no longer be obtained for the practice of law in general, but only for a few areas of law, the most important of those insurance law, pension law, claims collection and foreign law, creating the profession of specialist legal advisers ("Teilrechtsbeistände"). Together with a very strict interpretation of the law by the courts who, for example, have held that legal advice by the media, by insurance companies or by pro bono organizations was unlawful, the legal services industry has become a de facto monopoly of Germany's 132.000 lawyers. The number of non-lawyer legal advisers, all licensed before 1980, had dwindled to 382 on January 1, 2003. In addition, approx. 1.000 specialist legal advisers are licensed: 650 claims collectors, 50 advisers for insurance law and 300 advisers for pension law (the other groups of licence-holders have only a handful of members).

III. The Status Quo Ante

1. The de facto monopoly for legal services

The law and its rather strict application by the courts has determined the system of access to justice for many decades: While in many jurisdictions there is some kind of monopoly for the provision of forensic legal services, the Rechtsberatungsgesetz has kept alternative providers completely out of the legal services market. The only market segment where there is competition to some extent is claims collection with a couple of hundred claims collectors offering their services as licensed specialist legal advisers. Although a few exemptions for lawful non-licensed legal advice exist, most notably for legal advice through state-funded consumer organizations and for recognised interest groups (such as trade unions, tenants' rights associations, employers' associations etc. – legal services are strictly limited to the purpose for which the group is officially recognised), service providers playing an important role in other countries are non-existent in Germany. Groups that traditionally have been in conflict with the comprehensive monopoly rights for lawyers are:

- fully qualified law graduates without a bar certificate
- legal advice centres (if not providing services through a lawyer)
- self-help organizations (e.g. for asylum seekers, immigrants etc.)
- charities
- family care centres
- public welfare organizations (with the exception of advice on benefits)
- church organizations
- the media
- executors of wills
- genealogists
- non-lawyer mediators
- architects
- property developers
- realtors
- legal expenses insurers
- banks (mainly in the context of real estate transactions and the execution of wills)
- legal hotlines (if not run by lawyers)
- automobile associations
- tax advisers and accountants
- insurance agents
- brokers
- managers of sports professionals
- antenatal advice centres (mainly in the context of abortion and maintenance)
- financial/estate planners
- management consultants
- car dealers and car rental companies (dealing with issues of accident insurance)

Although according to Art. 1 § 5 *Rechtsberatungsgesetz* all professions are free to provide legal advice as an

ancillary service to their main professional service if it cannot be provided properly without a certain legal content, this “ancillary legal services” clause has not been able to make an inroad into the monopoly rights of lawyers. In contrast, its strict interpretation and application by the courts has given rise to an large number of court proceedings, resulting in the popular belief that lawyers are fiercely protecting their monopoly rights in the selfish interest of a highly protected profession. The profession has not always acted prudently when enforcing its monopoly rights, more than only occasionally initiating court proceedings against pro bono service providers, self-help groups or the media. This has resulted in a rather negative image of lawyers who are believed to be fat cats, too lazy and too expensive (at least according to a German TV talk show with that title).

The following chart gives an overview of those professions most often involved in court proceedings because of an alleged unauthorized practice of law (or, alternatively, a violation of their limited right to practice law as(specialist) legal advisers). The numbers reflect the cases that have been reported since 1952, not all cases heard before German courts (this number probably being much higher) or cases that have been settled after an injunction:

profession	court proceedings
claims assessors	179
car dealers and car rental companies	161
legal advisers	146
Tax advisers	131
Banks	89
Organizations	81
Consultants	60

2. Turning Tides

The German Constitutional court repeatedly has held that the Rechtsberatungsgesetz does not violate the German constitution in general (BVerfG 1 BvR 275/74, February 25, 1976; 1 BvR 1000/81, May 5, 1987). The European Court Of Justice also has approved the law as being justified by sensible considerations in the public interest (ECJ C-3/95, December 12, 1995 – Reisebüro Broede ./. Sandker; C-76/90, July 25, 1991 – Saeger ./. Dennemeyer).

Nevertheless, the Rechtsberatungsgesetz has come under increasing pressure by a wide variety of decisions by the German constitutional court. While the court approves of the rationale of the law – protection of the consumer and of the legal system -, it has repeatedly expressed a growing concern about the constitutionality of certain provisions in the law and the strict application of the law by the courts. As a result, the constitutional court has cut back the scope of the law considerably over the past years, narrowing down the monopoly rights of lawyers further and further. The court has held, for example, that

- the exclusion of fully-trained jurists who are not members of the bar cannot be justified with considerations of consumer protection (BverfG 1 BvR 737/00, July 29, 2004).
- claims collectors must be allowed to advise their clients on legal matters (BVerfG 1 BvR 117/02, May 16, 2002) and also discuss legal matters with the debtor (BVerfG 1 BvR 725/03, August 14, 2004).
- TV stations must be allowed to broadcast shows in which reporters accompany parties involved in a legal dispute to meet their opponents and discuss the legal dispute with the aim to resolving it (BVerfG 1 BvR 313/99, March 11, 2004 and 1 BvR 1807/98, January 15, 2004).
- genealogists must be allowed to assist a relative of a deceased person in locating an estate and proving her status as a legitimate heir even if this professional services includes, to some extent, legal advice (BVerfG 1BvR 2251/01, September 27, 2002).

- companies monitoring the life of patents and filing applications for patent renewals mainly with the help of computerized programmes do not practice law in the sense of the RBerG (BVerfG 1 BvR 780/87, October 29, 1997).

In addition, the Supreme Court has recently held that

- consultants advising on the availability of subsidies only provide lawful ancillary legal services as the focus of their work is on economical and not on legal issues (BGH I ZR 128/02, February 24, 2005).
- a bank acting as an executor of a client's will does not provide an unlawful legal service but merely ancillary legal services in the context of property administration (BGH I ZR 213/02, November 11, 2004).
- a tax adviser acting as an executor of a client's will does not provide an unlawful legal service but merely ancillary legal services to advice on tax issues (BGH I ZR 182/02, November 11, 2004).

The increasing number of court decisions narrowing down the scope of the RBerG and the substantial number of court proceedings that are still being initiated before the lower courts - targeting, among others, altruistic providers of legal services and non-profit organizations who have been lobbying against the RBerG quite successfully – led to the government's decision for a reform of the law regulating legal services. This development was undoubtedly also influenced by growing pressure from the European Commission that, in the wake of the notorious study "Regulation In The Field Of Liberal Professions", has vowed to scrutinize monopoly rights in the members states (COM(2004) 83 final). One underlying aim of the reform project thus is also to minimize risks that the European Commission will label the German regulatory regime as anti-competitive.

IV. Dawn Of A New Era ?

1. The reform law

The Social-Democrat/Green coalition re-elected to power in September 2002 pledged in their coalition agreement dated October 16, 2002, to bring about a reform over the four-year parliamentary term, adjusting the Rechtsberatungsgesetz to the "requirements of a modern society". A green paper was presented in August 2004, in time for the bi-annual German law conference ("Deutscher Juristentag") which discussed the need of a reform of the Rechtsberatungsgesetz in late September. While the Deutsche Juristentag with an overwhelming majority voted against a change of the status quo – with commentators remarking that the vast majority of delegates were lawyers who were more than unlikely to open the doors for new competitors -, the government pushed ahead with its reform initiative. After a consultation period in which a number of pressure groups and individuals submitted more liberal and conservative proposals to the government's green paper ("Diskussionsentwurf"), a white paper ("Referentenentwurf") was finally published in March. The following section will give an overview of the main features of the proposed law.

2. Liberalization

a) A new starting point: "substantial review of the law"

Taking the case law of the German Constitutional Court and the Supreme Court as the starting point, the RDG-E takes a new regulatory approach as it defines the need for a substantial legal review of a non-abstract case as the triggering event for the applicability of the law (and consequently the need for a licence to practice law). To answer the question whether or not a "substantial legal review" is required, the point of view of the average consumer is decisive.

If there is no need for a "substantial review of the law", legal advice can also be given by non-licence holders. Also

exempted from the licence requirement is legal advice of a “general nature” as provided by the media. The new distinction also guarantees that it will be necessary in the future to prove that a licence requirement for a certain legal service is necessary for the protection of the consumer and the administration of justice.

As a result of this new approach, a number of services currently deemed unlawful if provided by non-licence holders can be offered by everybody in the future. Examples are the handling of contracts by property developers, legal factoring or the handling of undisputed claims by car dealers or car rental companies on behalf of their customers. Also the media will be able to provide legal advice as they typically deal with abstract legal problems which are only exemplified with the help of an individual case.

If a “substantial review of law” is required, non-licence holders can give legal advice in a number of cases explained below.

b) Ancillary legal services

According to the new law, it will be possible for a non-licence holder to provide legal services if this provision of legal services is ancillary to the adviser’s main professional service. This requirement is a subtle departure from the old law which required that the ancillary service was required to provide the main professional service “properly”, i.e. that the main professional service could not be provided without the ancillary legal service. While the current law requires a secondary function of the legal service, the new law will allow it to have a bigger significance as long as the overall professional service can be regarded as non-legal.

c) Legal services offered on behalf of a non-licence holder by a licence holder

It is possible for a non-licence holder to provide legal services if the legal service is provided in cooperation with a lawyer. In contrast to the current situation, a non-licence holder is free to offer non-ancillary legal services as long as he does not provide them in person, but through a licence holder. The co-operation can be arranged on ad-hoc basis - with the non-licence holder selecting a licence holder to provide the legal service in question on his behalf – or in a permanent multi-disciplinary practice. To allow the formation of such multi-disciplinary practices, the legal profession act (“Bundesrechtsanwaltsordnung” – BRAO) will be amended accordingly. While currently § 59a BRAO only allows multi-disciplinary practices between lawyers, tax advisers, accountants and/or foreign lawyers, this provision will in the future allow multi-disciplinary practices of lawyers with all “compatible professions”. A compatible profession is defined in § 7 Nr. 8 BRAO and covers all professions a lawyer is allowed to practice simultaneously with his legal practice.

d) Free Legal Services (§ 6 RDG-E)

In the future, it will also be lawful to provide legal services if the legal service is provided free of charge. This is one of the main changes of the law as in the past the question whether or not the legal service was provided for free was irrelevant for the requirement of a licence as long as legal services were provided more than once. The old law resulted in absurd consequences, the paradigm of which were a number of court cases dealing with the lawfulness of legal advice given by spouses. Under the new law, it will be possible to provide legal services pro bono publico without a licence. However, the supervision of those providing legal services by a licence holder is necessary in all cases except those where the service is provided to a relative, a friend or a neighbour. The legislator stresses that those seeking free legal services should be guaranteed a quality service. Consequently, all organizations and individuals offering free legal services on an institutionalised basis will need to implement a supervision system. The requirements are not too strict; it is sufficient that the staff members are instructed by a licence holder at one

point and that a licence holder is available for feed-back if legal question should arise. One possible model mentioned in the white paper is a co-operation with a lawyer in private practice who supervises the free legal services provided s.

e) Legal services for members of associations, societies and clubs (§ 7 RDG-E)

Under the new law, societies, clubs, unions and other associations can lawfully provide legal services to their members. In the past, only "professional groups" were allowed to give legal advice to their members, although the courts interpreted the term "professional groups" beyond its literal meaning to also cover, for example, associations of tenants or house-owners. Other groups, such as automobile associations, were not covered. The new law will allow all groups that pursue a common goal in the interest of their members to provide legal services as long as the provision of legal services is not the main service offered by the organization. Like in organizations providing free legal services (see above), a supervision system has to be in place. In addition to that, such associations are required to provide personnel, infrastructure and funds that guarantee a quality service.

3. Conservation

While the new law will bring new opportunities for a number of potential service providers, others that had hoped to gain access to the legal services market will not benefit from the reform, or, even worse, are driven out of the legal services market. Also, the reform is strictly limited to non-forensic legal services as the exclusive right of audience for lawyers before the higher courts will remain unchanged.

Most notably legal expenses insurers will, in contrast to the situation in most other countries, still be unable to provide legal advice to their clients. The white paper states that there is an inevitable conflict of interest if an insurer advises in a case he might ultimately be forced to fund.

Another group that has lobbied hard but unsuccessfully to be covered by the reform are law graduates of polytechnics. As only a university degree gives access to state-sponsored additional training to become a lawyer, the white paper stresses that it would be impossible to allow graduates of polytechnics to provide legal services while graduates of universities are still required to undergo an additional two year practical training after graduation. Thus, law graduates of polytechnics will still be restricted to work as employed jurists as the lawfulness of the provision of legal services to an employer is not subject to a licence.

Moreover, although non-lawyers can still be licensed as specialist legal advisers, licences will only be available for the most important groups of specialist legal advisers, those providing legal services in the areas of pension law, claims collection and foreign law. No new licences will be available for areas of law available in the past, such as insurance law advisers or auctioneers. The legislator believes that there will be much less demand for specialist legal advisers in the future as ancillary legal services by other professionals and associations will be able cover the needs of the public. For the remaining specialist legal advisers, a public registry is to be created that will be accessible to all consumers.

4. The "hidden treasure"

The reform will also bring a substantial change to the legal profession act. This change has mostly been overlooked so far as most people view the RDG-E as a simple replacement of the RBerG. Quite to the contrary, the RDG-E will also lead to changes of several codes of procedure and the law regulating lawyers, the Bundesrechtsanwaltsordnung (BRAO).
§59 BRAO will be amended to allow lawyers to associate themselves not only with tax advisers and auditors – the German form of MDP in existence since the 1950s -, but also with a wide variety of other professions. The aim is to

encourage professions currently excluded from the legal services market to co-operate with lawyers on a permanent basis and offer multi-disciplinary services through a common platform, e.g. a partnership or a limited company. The white paper explicitly mentions partnerships of lawyers with non-lawyer professionals, doctors or business consultants. The white paper argues that such professionals currently can be employed by lawyers or co-operate on an ad hoc-basis and there is no reason why, under such circumstances, lawyers should be excluded from forming permanent associations with other professionals. However, as has been explained above, the new provision in the BRAO will not allow multi-disciplinary practices of lawyers with all professions, but only with "compatible professions". A compatible profession is defined in § 7 Nr. 8 BRAO and covers all professions a lawyer is allowed to practice simultaneously with his legal practice – the prerequisite for compatibility is that no conflict of interest can arise between the provision of a legal service and another professional service because of the latter's nature. Additionally, the amended section of the BRAO will allow lawyers to provide legal services on behalf of a non-lawyer for a third party.

If a lawyer forms an association with the member of a compatible profession, only the lawyer will be bound by his professionals rules. However, he must ensure that all non-lawyers in the firm abide by professionals rules promulgated for lawyers if their own professional rules are less strict. The lawyer can be forced to leave the association if his associates do not follow those rules although he will not be held responsible in person for the conduct of others. There is no requirement that would guarantee a majority of shares or voting rights is held by lawyers. This new approach to some extent resembles the Incorporated Legal Practice created in New South Wales a couple of years.

Until now, it has not been fully appreciated by most observers that the amendment might cause some quite dramatic changes to the legal services market: While the RDG itself more or less scratches at the edges of the monopoly currently enjoyed by lawyers, mainly attracting new providers in areas where lawyers are reluctant to provide services, the amendment of the BRAO will allow the emergence of firms offering legal services majority-owned by non-lawyers for whom lawyers are allowed to provide the service "on behalf". This will allow, for example, the creation of what is widely referred to as "TESCO law"-style firms – even more so as lawyers in the future will also be able to be a member of more than one professional organization.

5. The reform, access to justice and legal aid

a) Impact On Access To Justice

One of the goals of the upcoming reform is to satisfy legal needs currently unmet in a market monopolized by lawyers. The white paper explicitly blames lawyers for not offering sufficient expertise in areas of law which often effect the underprivileged – asylum seekers, refugees, unemployed, debtors, disabled etc. One of the main reasons why very few lawyers specialize in these areas of law is that very little money can be earned because of the German fee system which is based on ad valorem fees. Additionally, barriers to access to justice not only exist because of a lack of interested lawyers, but also because underprivileged clients often are reluctant to consult a lawyer. Experience shows that they are much more at ease when they contact a familiar organization already well-known to them or others. It is hoped that the current lack of readily available legal services will be a problem of the past once pro bono organizations can offer free legal services.

The new opportunities for associations to provide ancillary legal services for members will have a similar impact. The organization benefiting the most form the new law will undoubtedly be ADAC, Germany's largest automobile association. With more than 15 million

members, it has been in conflict with the RBerG regularly in the past as it had tried to provide legal advice to its members. Other associations likely to benefit from the liberalized law are associations of stockholders or investors
More difficult to assess is the likely impact of the possibility to operate non-lawyer owned MDPs. If the provision of legal services through new distribution channels such as “legal supermarkets” or “McLaws” is accepted by the public, access barriers could diminish as currently there is no market segment that is comparable to English “high street solicitors” or American-style branded law firms that operate nationwide through a chain of offices.

b) Impact On Legal Aid

While the upcoming reform will undoubtedly improve access to legal services, its impact on the current legal aid system will be insignificant. More than 90 per cent of the German legal aid budget goes into legal aid for court proceedings. As the reform only covers non-forensic legal services, it will not take away pressure from the public purse. The expenditure for “legal aid for legal advice”, which is the area covered by the reform, in 2004 was approx. 42 million EUR or just 0,50 EUR per capita. As one of the reasons for the reform is that in areas which are insufficiently covered by lawyers - despite the availability of “legal aid for legal advice” – new providers should have the opportunity to enter the market, the aim of the reform is to widen access rather than to shift (state-financed) work form lawyers to (free) non-lawyers.

V. Outlook

The future of the reform project is in doubt since May 22, 2005. Before that day, it was planned to table the bill in Parliament before the annual summer recess. After a disastrous defeat in Germany’s largest state North-Rhine Westphalia, the Social-Democrat/Green government on May 22, 2005 announced early general elections for September 2005 (the parliamentary term originally would have ended not before September 2006, leaving sufficient time to bring the bill through the different stages of the law-making process). Consequently, the current government as a “lame duck” will be unable to table the bill this year as planned. As, according to opinion polls, the re-election of the government is not very likely, a change of government could put the whole reform project in doubt. A new government formed by the Conservatives and the Liberal-Democrats might take a more conservative approach as those parties traditionally support a tighter regulation of the legal services market. It can be expected, however, that a reform will eventually take place because of numerous court decisions by the Constitutional Court that at one point need to be implemented into the regulatory regime. It could very well be that a revised bill by a new government will water down the proposals explained in this paper.