A suggestion ...
... for a modern legal framework for the legal profession

Observations on the decision of the Federal Court of Justice of 27/11/2019 on the extent of the monopoly on legal services

By Markus Hartung

The BGH decision is critical for the legal profession.

There are few countries in the world where the provision of legal services is not regulated. In many countries, lawyers have a so-called monopoly on legal advice - i.e. it may only be given by lawyers, not by other service providers. This is intended to ensure that the quality level of legal advice is maintained and that the professionals are also subject to certain fundamental core values - e.g. confidentiality, or the ban on representing conflicting interests. Furthermore, lawyers should be independent, both from the state and from their clients.

Prologue I

Although such monopolies of lawyers can be found in many countries of the world, the range of such monopolies varies considerably. In Germany it is very extensive, as it also is in the USA, for example. In England, on the other hand, there are only a few areas of law that are exclusively reserved for lawyers. Other European countries have different rules, and in some cases non-lawyer service providers are also allowed to operate there.

The legal market is a very lucrative market. Many want to have access to it. In recent years, the conflict between the legal profession and the so-called alternative legal service providers has become more intense, as many of these companies are pushing into the legal market. Very often they offer services supported by technology, and: they are cheaper than lawyers.

In Germany, a long-awaited decision has recently been handed down by the Federal Court of Justice (Bundesgerichtshof, or BGH for short) on the question of which legal services may be provided by non-lawyer service providers. The following article is not a scientific discussion of the ruling, but outlines the conflict in the legal market and deals with the consequences for the legal profession.

Prologue II

The law governing the legal profession in Germany, which includes the Federal Lawyers' Act (BRAO) and the Professional Code of Conduct (BORA) as well as the Legal Services Act (RDG), is in its current form the result of a permanent conflict between the interests of the profession on the one hand and the constitu- →

tionally oriented jurisdiction on the other. The self-regulation of lawyers is regarded as an important achievement and essential for the Rule of Law. Important part of the self-regulation is the fact that lawyers are partly able to set their own rules and can have a considerable influence on the legislative process. In short: the legal profession does not legislate against itself. The problem is that the essential checks and balances are apparently lacking, because it has been an embarrassing tradition for years that the judiciary has had to remind the legal profession that self-government does not mean living in an unconstitutional environment. This began with the Bastille cases of the Federal Constitutional Court (Bundesverfassungsgericht or BVerfG for short) of 14 July 1987, and the Horn ruling of January 2016 will not be the latest decision with which the BVerfG intervenes here. Actually, the entire legal framework would have to be overhauled from the ground up. The German Bar Association (DAV) has submitted a very far-reaching reform proposal, which, however, does not deal with the continued existence of the monopoly. It does not seem like a realistic prospect if the legislator is responsible for implementing the reform proposal.

Presumably, large parts of the legal profession regard the rulings of the BVerfG and BGH in recent years as hostile actions. But this is not true; they are actually guidelines, or suggestions. They are suggestions on how to create a modern professional law for a modern legal profession, aligned with the constitution. Perhaps it does not even have to be modern - contemporary would suffice. Of course, court decisions can declare something void that many people have somehow come to love, they penetrate regulations and allow things that the legal profession flatly rejects. But they remain guidelines, sometimes only suggestions for something new, aligned with the constitution. The legal profession, however, refuses.

The decision of the BGH, which is the subject of this article, is without doubt part of the canon of decisions that will shape the development of the legal services market in the coming decade. It is in line with the Masterpat case and the Debt-Collection cases of the BVerfG of 2002 and 2004. The BGH has opened a wide avenue for innovative legal services. This may hurt the traditionalist. But the same applies here as above: It is a suggestion for the modern and constitutional shaping of the legal market.

What's it all about?

The decision was prompted by a tenancy lawsuit, and in this context the question arose as to what competences a collection agency has with the help of which one can assert claims due to violation of the so-called "rent brake". This rent brake is a legal means of protecting tenants and is intended to prevent excessively high rents from being charged when new tenancies are agreed. Unfortunately, many landlords do not adhere to this restriction and ignore the ban. There are now non-legal service providers who make it very easy for tenants to check the permitted rent level and make claims for repayment.

The claims include not only repayment claims for overpaid rent, but also claims for information ("Auskunftsklagen"), as well as legal defence claims - all this combined with an "online rent calculator", which can be used to calculate whether one is paying too much rent. In general, this debt collection company uses a lot of new technology and can therefore handle high case numbers, which is why it is considered a legal tech company.

These claims brought forward by a non-lawyer-based company led to the situation in Berlin (where there are several local courts, each of which is responsible for rental matters within its district) that these local courts had different opinions as to whether this combined offer was still a permissible collection/legal service. The crux of the dispute was not so much tenancy law, although this was of course also the issue. The main issue was whether the company was allowed to bring such claims forward. The judges of the Berlin district court were as divided as the Berlin local courts. One of these decisions against the debt collection company was appealed to the BGH, which in its remarkable decision considered the debt collection company's activities to be "still lawful".

The Legal Issues

In short, this case raises three issues which are in turn linked to the business model of these companies. This is because these companies offer a risk-free service in cases where claims are largely identical and can be executed in a standardised manner. This applies to flight delay claims, rental cases, but also claims for damages arising from the Volkswagen diesel scandal. It is risk-free for consumers because there is an obligation to pay compensation only in the event of success, but then with a comparatively high success fee of up to 33%. If the enforce-→

ment of claims remains unsuccessful, the consumer pays nothing, the cost risk remains with the service provider.

The business model thus combines debt collection (namely the enforcement of third-party payment claims) with elements of litigation financing. This is also the approach taken in cases where it is often clear that the matter is contentious and goes to court, where debt collection companies are not allowed to operate. In this respect, the first question that arises is whether this is actually still debt collection: the critics argued that debt collection is only the mass assertion of claims that are actually uncontested. Furthermore, it was objected that one cannot do both, i.e. debt collection and litigation financing, because one gets into unsolvable internal conflicts, which according to sec. 4 RDG (German Legal Services Act) has the consequence that one is not allowed to provide legal services. Finally, the legal consequences of a once assumed violation of the RDG were at issue: Does this mean that the transfer of the customers' claims to the collection agency are void due to violation of sec. 134 BGB? Can consumers rely on the authority of the debt collection agency, even if it is publicly announced? If this is not the case, there is always the risk that consumer claims will become statute-barred if at some point in a lawsuit it turns out that the claim transfer was null and void, in which case people will think twice before engaging the services of a collection agency.

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The main reasoning of the BGH

The BGH did not accept any of the objections to the activities of the collection agencies. It based its decision on a broad concept of debt collection and also recognised that the interests of a debt collection company and those of a litigation financier are largely the same. With regard to the concept of debt collection, the Federal Court of Justice referred to the fact that the legislator had wanted to make new business models possible. The activity of wenigermiete.de was deemed to be "still legal" - the "still" refers to the fact that not only payment claims, but also accompanying claims are asserted.

Only on the question of nullity did the BGH hold that if the collection authorisation is clearly exceeded, a collection assignment can be null and void, even in the case of a registered collection company (in the case of the activity of non-registered collection companies this has always been undisputed). However, if one takes into account the broad interpretation of the concept of debt collection, this part of the decision is not particularly important.

The immediate consequences of the decision

The fierce discussion about the authority of the collection companies actually originated from a completely different case, namely the trial of MyRight against VW before the Braunschweig Regional Court. In this law suit MyRight represents more than 15,000 plaintiffs against VW. Under German procedural law, there are no class actions, but this is a very innovative virtual class action. There has not yet been such a trial in Germany. VW, represented by Freshfields, had commissioned four experts to examine the business model, and all four experts came to the conclusion that MyRight was in flagrant breach of the RDG. MyRight again defended itself with four expert opinions (I was amongst the experts, by the way). Most of these expert opinions were published in professional journals. The expert opinions had been available since the beginning of 2019, but the Braunschweig Regional Court decided to wait for the BGH, in whose proceedings all these issues also played a role.

After the BGH's decision was announced, the Regional Court of Braunschweig informed the parties that they intended to decide in the same way as the BGH, hence in favour of MyRight and against Volkswagen. The Braunschweig decision consisted mainly of literal quotations from the BGH decision. Presumably other courts where similar legal disputes are pending will also proceed in this way.

What was it not about?

The decision was awaited with such excitement because it was described as the decision on the admissibility of legal tech companies. This is as true as the assumption that the Internet can be deleted. The decision had nothing to do with legal tech, or at least only marginally. The fact that wenigermiete.de is →

a company that uses innovative technology to enforce its claims has nothing to do with the legal issues mentioned above. The BGH decision only states that such business models of risk-free claim enforcement are permissible, regardless of whether it is carried out manually or with IT.

The legal admissibility of other non-lawyer service providers is still unclear. This applies, for example, to the question of whether the automated creation of legal documents has to be regarded as "UPL" (unauthorized practice of law) - if this were the case, such providers could pack up, because the RDG does not even provide for any approval for such service provisions. Also unclear is the business model of platform operators, where there is criticism that user fees are in reality prohibited referral fees (this is not true, but it does create uncertainty, and there is no decision by the BGH).

Consequences for the Legal Profession

The BGH decision is critical for the legal profession. It significantly changes the monopoly of the legal profession and the balance between lawyers and non-lawyer-service-providers. The debt collection companies are so successful because they can make simple, convenient and risk-free offers to consumers. One way of doing this is through contingency fees. Under German law, lawyers are only allowed to charge contingency fees in a few exceptional cases. Well – had the legal profession accepted the offer made by the BVerfG in the Success-Fee-case, the situation would be different. Back in 2007 the BVerfG ruled that there is no constitutional requirement for maintaining the ban on success fees, but the legal profession preferred to stick to their old fee model. Today lawyers are hopelessly behind because they cannot compete with innovative legal service providers. This is due in part to an antiquated professional and fee system that is firmly rooted in the last century. The legal profession is ill-equipped for what consumers expect today. A new legal framework is needed, including a modern professional understanding, something like a new job description. However, large parts of the legal profession and many representatives of the regional bars are still thinking in terms of the last century. Hence the discussions will not be easy. But the legal profession should understand the suggestions made by the case law of the BVerfG and the BGH as helpful assistance (and a little push) on the way to a modern professional legal framework.

Epilogue

If the German legislature needs another argument for amending or adapting the law governing the legal profession, we refer to two rulings issued following the decision of the Federal Court of Justice (BGH), which seem to take an opposing view. In two decisions (Munich Regional Court and Braunschweig Regional Court), claims were dismissed, with the argument that the debt collection company filing the claim was acting beyond its authorisation.

So, even if the BGH decision was fundamental in principle, it did not cover all conceivable case constellations, but that is the way things work in German law: even the highest court rulings only regulate the individual case, but are not regarded as binding precedents for other courts. So there will be further decisions, and further uncertainty. This is hardly an acceptable state of affairs. <–

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Markus Hartung,
lawyer und mediator, Senior Fellow at the Bucerius Center on the Legal Profession at Bucerius Law School, member of the Committee on Professional Regulation of the German Bar Association (DAV), Berlin

markushartung@me.com

www.markushartung.com