

SCOPE AND LIMITS OF THE GERMAN LEGAL SERVICES ACT FOR LEGAL TECH SERVICE PROVIDERS

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ABSTRACT

In contrast to as in other jurisdictions, such as the United States or the UK, out-of-court legal services in Germany are strictly regulated by a statute, the Legal Services Act, which came into force nearly a decade ago and superseded the former Legal Counsel Act (Rechtsberatungsgesetz). According to this act, out-of-court legal services must be expressly permitted and are, in principle, reserved to lawyers. Consequently, there are certain legal restrictions for tech providers offering legal services in Germany that must be observed. The following article deals with the scope and limits for offering legal services by legal tech providers in Germany according to the German Legal Services Act. The author explains why some legal tech business solutions offering legal services may be in conflict with this act, which is a significant issue of compliance for both legal tech start-ups and their investors. Entrepreneurs, stakeholders of legal tech start-ups and capital investors should weigh the economic opportunities and legal risks carefully before placing a legal tech start-up on the German market.

TABLE OF CONTENTS

I.	INTRODUCTION	61
II.	THE REGULATORY FRAMEWORK IN GERMANY	63
III.	COMPARATIVE LEGAL OVERVIEW	64
IV.	THE SCOPE OF THE LEGAL SERVICES ACT 2008	64
	A. General remarks	64
	B. Territorial scope	65
	C. The definition of “legal services”	66
	D. Further requirements according to the Act	67
V.	CLASSIFICATION OF LEGAL BUSINESS MODELS	67
VI.	CONFLICT WITH THE LEGAL SERVICES ACT	68
IV.	CONCLUSION AND OUTLOOK	70

I. INTRODUCTION

Nothing is more constant than change.¹ This assertion by Heraclitus more than 2,500 years ago has never been truer – at least in the German legal market. The new phenomenon of legal tech has already brought about major changes in the market for legal services in recent years. And this is just the beginning. Traditionally, the concept of legal tech referred to the application of technology and software to help law firms make their office work easier and more efficient (“office tech”). In the past few years, a new dimension of legal tech has been emerging with technology start-ups disrupting the practice of law by giving clients access to online software that reduces and, in some cases, eliminates the need to consult a lawyer, or by connecting people with lawyers more efficiently with digital platforms and marketplaces, and lawyer-matching websites.² With no doubt, legal services are becoming more and more digitized.³ This development is the result of a rapidly growing demand among many consumers for cost-effective and price-predictable “standardized” (or “commoditized”) legal services rather than the costly “bespoke” legal solutions provided by lawyers.⁴ Consumers are demanding more choice, transparency, price-predictability and direct access to providers.⁵ According to the legal tech pioneer *Richard Susskind*,⁶ the strongest drivers are the following: more-for-less-challenge,⁷ liberalization and digitization. These drivers have resulted in a new kind of technology-based, consumer-oriented legal service provider and changed the legal market in the United States decades ago.⁸ With a time lag, this trend has affected the German legal market as well. Germany’s legal tech scene is said to be roughly 5 – 10 years behind the one in the United

¹ HERACLITUS OF EPHEBUS (Ἡράκλειτος, Herakleitos; c. 535 BC – 475 BC).

² *Legal technology*, WIKIPEDIA (Mar. 29, 2018, 05:09 PM), https://en.wikipedia.org/wiki/Legal_technology.

³ Marc Cohen, *Legal delivery is becoming digitized. What does that mean?*, (May 21, 2017) FORBES (Mar. 29, 2018, 05:10 PM), <https://www.forbes.com/sites/markcohen/2017/05/21/legal-delivery-is-becoming-digitized-what-does-that-mean/#4bedc5914e62>; see for the process of digital transformation in the German legal market: Zoë Andrae, *The Role of Legal Tech Startups in the Digital Transformation of the German Legal Industry*, ESADE BUSINESS SCHOOL, (Mar. 29, 2018, 05:13 PM), <http://dd.lecare.com/legaltech.pdf>; brief survey Zoë Andrae, *The Digital Transformation of the German Legal Industry*, LEGAL TECH BLOG (Mar. 29, 2018, 05:13 PM), <http://legal-tech-blog.de/the-digital-transformation-of-the-german-legal-industry>.

⁴ RICHARD SUSSKIND, *TOMORROW’S LAWYERS*, 23 et seq. (2013).

⁵ Marc Cohen, *Differentiation in the New Legal Marketplace and Why It Matters*, LEGALMOSAIC (Mar. 29, 2018, 05:18 PM), <https://legalmosaic.com/2018/01/05/differentiation-in-the-new-legal-marketplace-and-why-it-matters/>.

⁶ RICHARD SUSSKIND, *TOMORROW’S LAWYERS*, 23 et seq. (2013).

⁷ Richard Susskind, *A Response to the More for Less Dilemma*, 1, THE PRACTICE - HARVARD LAW SCHOOL, (Mar. 29, 2018, 05:20 PM), <https://thepractice.law.harvard.edu/article/speakers-corner-richard-susskind/>.

⁸ See for the history of digital legal services in the United States: Chris Johnson, *Leveraging Technology to Deliver Legal Services*, 23, HARVARD JOURNAL OF LAW AND TECHNOLOGY, 259, (Mar. 29, 2018, 05:20 PM), <http://jolt.law.harvard.edu/articles/pdf/v23/23HarvJLTech259.pdf>.

States but has more speed and dynamics.⁹ This ongoing digital transformation of the German legal market is still a central driving force for change in the market. At a relatively early stage, in 2013, the DAV¹⁰ predicted that, by 2030, standardized consulting services will be taken over by online providers and the internet will facilitate the process of lawyer referrals.¹¹ These assumptions have occurred much earlier than predicted. Last year, 2017, is considered the year with the most rapid growth in the legal tech market in Germany.¹² Many experts predict a disruption effect in the German legal service market making legal services more efficient, transparent, affordable and accessible.

However, there are certain legal restrictions for tech providers offering legal services in Germany that must be observed. In contrast to as in other jurisdictions, such as the United States or the UK, legal services are strictly regulated by a German statute titled the Legal Services Act (RDG).¹³

The following article deals with the scope and limits for offering legal services by legal tech providers in Germany according to the Legal Services Act,¹⁴ a subject that is often neglected or even underestimated by many legal tech entrepreneurs. The article also provides an overview of recent developments in the law of legal services with respect to tech-enabled business models.

Last but not least, this subject is also a compliance issue for legal tech start-ups, its stakeholders and domestic and foreign capital investors,¹⁵ business angels and financial institutions supporting new business models in the field of alternative legal services in Germany.¹⁶

⁹ Zoë Andreae, *Legal Tech Startups in Germany*, LEGAL TECH BLOG (Mar. 29, 2018, 05:24 PM), <http://legal-tech-blog.de/legal-tech-startups-in-germany>.

¹⁰ DAV = Deutscher Anwaltverein.

¹¹ *The Legal Services Market 2030*, DEUTSCHER ANWALTS VEREIN (Mar. 29, 2018, 05:30 PM), <https://anwaltsverein.de/de/service/dav-zukunftsstudie>.

¹² *Legal Tech 2017: Ein Rückblick in 10 Punkten*, LEGAL TECH BLOG (Mar. 29, 2018, 05:32 PM), <http://legal-tech-blog.de/legal-tech-2017-ein-rueckblick-in-10-punkten-teil-1>; *Legal Tech 2017: Ein Rückblick in 10 Punkten (Teil 2)*, LEGAL TECH BLOG (Mar. 29, 2018, 05:32 PM), <http://legal-tech-blog.de/legal-tech-2017-ein-rueckblick-in-10-punkten-teil-2>.

¹³ RDG = Rechtsdienstleistungsgesetz.

¹⁴ See also Frank R. Remmert & Nico Kuhlmann, *Legal Tech und das Rechtsdienstleistungsgesetz*, LEGAL TRIBUNE ONLINE (Mar. 29, 2018, 05:32 PM), <https://www.lto.de/recht/legal-tech/l/legal-tech-rechtsdienstleistungsgesetz-legal-chatbots-vertragsgeneratoren/>.

¹⁵ See for recent developments in the U.S. legal tech market: *Legal Tech Startup Financings Take Off As Automation Hits White-Collar Industries*, CBINSIGHTS (Mar. 29, 2018, 05:36 PM), <https://www.cbinsights.com/research/legal-tech-funding-white-collar-automation/>.

¹⁶ The number of venture-capital-based legal tech startups in 2016 compared to 2011 increased by a factor of 10 and is steadily rising, see Zoë Andreae, *Legal Tech Startups in Germany*, LEGAL TECH BLOG (Mar. 29, 2018, 05:24 PM), <http://legal-tech-blog.de/legal-tech-startups-in-germany>.

II. THE REGULATORY FRAMEWORK IN GERMANY

The legal services market in Germany has been regulated for many decades. In summer 2008, the Legal Services Act superseded the former Legal Counsel Act (Rechtsberatungsgesetz = RberG) of 1935.¹⁷ The original aim of the Rechtsberatungsgesetz was to suspend Jewish people from offering legal services and to reserve this right to German advocates (Rechtsanwälte). This illegal and inhuman purpose was excluded by the legislative authorities after the 2nd World War but, in principle, the monopoly of lawyers to provide legal services has been upheld. Since the mid-90s, the statute has come more and more under criticism. It is no longer updated and both the Federal Supreme Court and the Federal Constitutional Court have made several corrections.¹⁸ In the important judgment “MasterPat,” the Federal Constitutional Court stated, *inter alia*, that the aim of the statute is to protect consumers rather than to guarantee a monopoly for lawyers. However, the court also upheld that the main principle of prohibition legal services with permission reservation is in the public interest.¹⁹ This important principle was adopted in the Legal Services Act in 2008.

The German Legal Services Act regulates the legitimacy of legal services. The aim of the Act is to protect consumers, legal relations and the legal system against unqualified legal services (section 1 (1)). In this regard, it is important to note that the Legal Services Act is a consumer protection act, not an act to guarantee the monopoly of lawyers.²⁰ Despite pressure from EU institutions to deregulate the German legal market, the European Court of Justice held that the principle of prohibition legal services with permission reservation is justified in the public interest and therefore compatible with the freedom to provide services in the EU.²¹ The Court of Justice held that the German legislation²² is clearly intended to protect the recipients of the services in question against the harm they could suffer as a result of legal advice given to them by persons who did not possess the necessary professional or personal qualifications. This is justified in the public interest.²³ The same applies to the succeeding law, the Legal Services Act.

¹⁷ GESETZ ZUR VERHÜTUNG VON MIßBRÄUCHEN AUF DEM GEBIET DER RECHTSBERATUNG, December 13, 1935 (RGL I S. 1478, BGBl. III 303-12).

¹⁸ For more details, see Frank Remmert, *in* Rechtsdienstleistungsgesetz, § 1 note 1 (Michael Krenzler, 2nd ed. 2017).

¹⁹ Federal Constitutional Court (= BVerfG); BVERFG JUDGMENT OF OCTOBER 29, 1997 – 1 BvR 780/87, BVerfGE 97, 12, 26ff. = NJW 1998, 3481 (MasterPat).

²⁰ As stated in section 2 of the UKlaG (Unterlassungsklagengesetz); see Frank Remmert, *in* Rechtsdienstleistungsgesetz, § 1 note 68 (Michael Krenzler, 2nd ed. 2017).

²¹ See COURT OF JUSTICE, Judgment of July 25, 1991 – C-76/90 – Säger ./ . Dennemeyer & Co. Ltd, with respect to the former RBerG.

²² With respect to the former RBerG.

²³ COURT OF JUSTICE, Judgment of July 25, 1991 – C-76/90, notes 16, 17; this statement has been confirmed by the COURT OF JUSTICE in its judgment of December 17, 2015 – C-342/14 – X-Steuerberatungsgesellschaft ./ . Finanzamt Hannover-Nord, note 53 and the case-law cited.

III. COMPARATIVE LEGAL OVERVIEW

In Europe, the law regulating legal services is handled differently depending, inter alia, on the membership of each country in the common law or civil law legal system.²⁴ In some countries, the legal restrictions for offering legal services are less strict than in Germany. Especially in the UK,²⁵ for out-of-court legal services, there is no monopoly for lawyers and the market has been more liberalized by the UK Legal Services Act 2007 introducing ABS (“Alternative Business Structure”) enabling non-lawyers to own and run the company.²⁶ It is allowed for outside investors from private equity or venture capital to invest in an ABS and become a partner of the firm. ABSs allow businesses other than law firms to offer legal services. This development is a contrast to the more conservative regulation in Germany, which still strictly prohibits foreign capital in law firms.

In this context, it is worth noting that although the legal situation in some EU member states is less strict than in Germany, this is compatible with EU law, particularly with the freedom to provide services in the EU. As the Court of Justice stated, the fact that some member states impose less strict rules than other member states does not mean that the latter’s rules are disproportionate and hence incompatible with EU law.²⁷ In the absence of specific Community rules, each member state is free to regulate the exercise of legal services in its territory.²⁸

IV. THE SCOPE OF THE LEGAL SERVICES ACT 2008

A. General remarks

The Act only governs out-of-court legal services such as legal advice and legal representation of clients in out-of-court disputes and before public authorities. Legal representation before a court is regulated by other specific rules of procedure and – save in exceptional cases – reserved for lawyers. Therefore, legal tech service providers must observe the Legal Services Act when they offer out-of-court legal services. Litigation services are not permitted for them.

In principle, all legal services must be performed exclusively by either (a) lawyers or (b) non-lawyers explicitly permitted by law to provide legal services (section 3). In other

²⁴ An overview is given in the explanatory memorandum for the Legal Services Act: BT-Drs. 16/3655, 28 et seq.

²⁵ The landscape of legal tech start-ups is illustrated on (Mar. 29, 2018, 05:47 PM), <https://www.legalgeek.co/startup-map/>.

²⁶ See also Crispin Passmore, *What is happening to the regulation of the legal market in England and Wales?*, ANWALTSBLATT, 140 (2014) et seq.; Joanna Goodman, *The UK legal tech scene*, in *Legal Tech – Die Digitalisierung des Rechtsmarkts* 67 (Markus Hartung, Micha-Manuel Bues, Gernot Halbleib et al eds., 1st ed. 2018).

²⁷ COURT OF JUSTICE, judgment of December 12, 1996 – C-3/95 – note 42 – Broede vs. Sandker, with respect to the former RBerG.

²⁸ COURT OF JUSTICE, judgment of December 12, 1996 – C-3/95 – note 37 – Broede vs. Sandker.

words: A legal service provider must either be a fully qualified lawyer or another person with the legal authority to do so. This legal authorization may be either stipulated in the Act itself or regulated elsewhere by law (section 3). For example, tax advisors may provide legal tax services based on the Tax Consultancy Act.

An important permission to provide legal services in the Act itself is regulated in section 5, which allows legal services as complementary services. The legal services must then be provided in connection with another non-legal activity. Examples are legal advice provided as a supplementary service by consultants, tax advisors or accountants. For legal tech solutions offering legal services as the key or main business, this statutory permission in section 5 is not an option.

According to the Legal Services Act, legal services may also be provided by a “registered person.” According to section 2 (2), regardless of whether the service fulfils the definition of “legal services” in section 1, the collection of third-party claims is a legal service if the debt collection is conducted as a stand-alone business (collection service). In the legal tech market in Germany, registered providers for collection services according to section 2 (2) are of significant relevance. In fact, many legal tech providers are registered as collection service providers enabling them to pursue outstanding debts including compensation claims on behalf of their clients. However, the permission is restricted to monetary claims. Other claims such as the cancellation of an agreement or the defense against claims do not fall within the scope of “collection services.”

B. Territorial scope

The territorial scope of the Legal Services Act has been modified due to a recent legal reform in 2017.²⁹ For legal tech service providers acting from outside of Germany, section 1 (2) of the Act stipulates the following: “Where a legal service is provided exclusively from another state, this Act only applies where its subject matter is German law.” Therefore, if legal tech service providers are offering their services via the internet across the border, the Act only applies if legal advice is given / legal services are offered in German law.³⁰ This applies, in principle, irrespectively of whether the foreign state is a member of the European Union or not (such as the United States).

If legal tech service providers situated in an EU member state³¹ are offering digital services via the internet to German consumers, it is controversial as to whether they can benefit

²⁹ GESETZ ZUR UMSETZUNG DER BERUFSANERKENNUNGSRICHTLINIE UND ZUR ÄNDERUNG WEITERER VORSCHRIFTEN IM BEREICH DER RECHTSBERATENDEN BERUFE v. 12.5.2017, BGBl. I, 1121, 1143.

³⁰ For further details see Frank Remmert, *in* Rechtsdienstleistungsgesetz, § 1 note 81 (Michael Krenzler, 2nd ed. 2017).

³¹ The e-commerce directive is not applicable for U.S. legal tech companies. After the Brexit, UK may also be regarded as a third-party state.

from the privileges granted by the e-commerce directive,³² particularly if the directive also applies to legal services by replacing the principle of prohibition in the German Legal Services Act. According to the e-commerce directive, the law of the country of origin applies if the services are provided exclusively by electronic means. However, the recitals and the interpretation of the directive as well as the implementing German Telemedia Act indicate that, for legal services, the laws of the country of destination (such as Germany) shall prevail.³³ Otherwise, any economic activity could theoretically fall within the scope of the directive 2000/31/EC because all traders and service providers are able to offer services by electronic means.³⁴ Therefore, there are good reasons for why the privileges granted by the e-commerce directive apply to the means of electronic communication and not to services as such. Furthermore, the e-commerce directive allows that member states may take measures that are necessary to protect consumers (Art. 3, section 4a of directive 2000/31/EC).³⁵ The German Legal Services Act is such a legislative measure to protect consumers against unqualified legal service providers. The Court of Justice stressed that the protection of consumers is an objective that may be regarded as an overriding reason in the public interest capable of justifying a restriction of the freedom to provide services.³⁶ Consequently, legal services are not per se privileged only because they are offered by electronic means. Therefore, if legal tech service providers are offering their services from abroad via electronic means to German consumers, the Act applies when its subject matter is German law (section 1 (2) of the Legal Services Act).

C The definition of “legal services”

The Legal Services Act is only applicable if a service can be regarded as a “legal service” according to the definition in section 2 (1) of the Act. This is always the key question when applicability of the Act is concerned and plays a major role for legal tech service providers in assessing whether their service is permitted or not. According to section 2 (1) of the Act, a “legal service” is defined as “any service provided to a third person that requires a legal assessment of the particular case.” The “legal assessment” must reach a certain threshold: Every matter requires a legal assessment of the individual case if it goes beyond the purely schematic application of the law. A legal assessment does not cover a sole repetition or schematic application of legal reading. However, according to established case law of the Federal Supreme Court (BGH), there is only a low level for the assumption of a “legal

³² Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (Directive on electronic commerce).

³³ For further details see Frank Remmert, *in* Rechtsdienstleistungsgesetz, § 1 note 98 (Michael Krenzler, 2nd ed. 2017).

³⁴ See Opinion of Advocate General Szpunar of May 12, 2017, C-434/15 – Asociación Profesional Elite Taxi ./ Uber Systems Spain SL, note 87.

³⁵ FEDERAL SUPREME COURT, Judgment of October 5, 2006 – I ZR 7/04 – note 13 – Schulden-Hulp.

³⁶ COURT OF JUSTICE, Judgment of December 17, 2015 – C-342/14 – X-Steuerberatungsgesellschaft ./ Finanzamt Hannover-Nord, note 53 and the case-law cited.

assessment.”³⁷ It does not matter if the rights issues are simple or difficult. Therefore, even when the legal matter is simple and can be standardized and automated on digital platforms, the low level of a “legal assessment” can be achieved. For tech-enabled legal services, it is important to note that there is only a low level of the threshold to fulfill the requirements of the definition of a “legal service” specified in section 2 (1) of the act.

On the other hand, general information given about the law on the internet is not covered by the definition and therefore allowed. Furthermore, the mere connection between consumers and lawyers via legal tech platforms or the referral to / recommendation of a specific lawyer does not fulfil the requirements of a legal service.

D Further requirements according to the Act

According to the Legal Services Act, there are further requirements that should be observed. Firstly, the legal tech company offering legal services must in itself be qualified to provide legal services. It is neither sufficient if the managing director of the company is qualified as a lawyer³⁸ nor if the company has employed lawyers who do the legal work. Secondly, the prohibition cannot be eluded if a legal tech company instructs independent lawyers as subcontractors. The subcontractors must then be regarded as servants of the company.³⁹ If the company itself is not qualified and permitted to provide legal services, the services are forbidden.

V. CLASSIFICATION OF LEGAL BUSINESS MODELS

In Germany, there are different categories and types of legal tech service providers.⁴⁰

In a study conducted by the Boston Consulting Group and the Bucerius Law School, Germany,⁴¹ the legal tech business models were categorized into 3 general groups: “enabler

³⁷ FEDERAL SUPREME COURT, Judgment of January 14, 2016 – I ZR 107/14 – Schadensregulierung durch Versicherungsmakler, note 43; Judgment of March 31, 2016 – I ZR 88/15 – Rechtsberatung durch Entwicklungsingenieur, note 23.

³⁸ FEDERAL SUPREME COURT, Judgment of February 22, 2005 – XI ZR 41/04.

³⁹ FEDERAL SUPREME COURT, Judgment of July 29, 2009 – I ZR 166/06 – Finanz-Sanierung.

⁴⁰ Zoë Andrae, *Legal Tech Startups in Germany*, LEGAL TECH BLOG (Mar. 29, 2018, 05:24 PM), <http://legal-tech-blog.de/legal-tech-startups-in-germany>; A list of companies can be found on (Mar. 29, 2018, 05:55 PM), <http://tobschall.de/legaltech/>. A landscape of the German legal tech scene is illustrated by Dominik Tobschall, *German Legal Tech Overview* (Mar. 29, 2018, 05:55 PM), <http://tobschall.de/2016/06/25/german-legaltech-overview/>; An international overview is published on (Mar. 29, 2018, 05:58 PM), <https://techindex.law.stanford.edu/> (Stanford CodeX, the Stanford University Center for Legal Informatics).

⁴¹ Christian Veith, Michael Wenzler, Markus Hartung et. al., *How Legal Technology Will Change the Business of Law*, FINAL REPORT OF BUCERIUS LAW SCHOOL AND THE BOSTON CONSULTING GROUP ON IMPACTS OF INNOVATIVE TECHNOLOGY IN THE LEGAL SECTOR, (Mar. 29, 2018, 05:58 PM), http://www.bucerius-education.de/fileadmin/content/pdf/studies_publications/Legal_Tech_Report_2016.pdf.

technologies facilitating the digitization of legal data (1), support-process-solutions infusing new efficiencies into case management and back-office work (2), and substantive law solutions supporting or replacing lawyers in executing core legal tasks in transactions and litigation cases”⁴² (3). The third category contains several subcategories.⁴³ A similar study was conducted in 2015 by Professor Oliver R. Goodenough⁴⁴ who divides the legal tech landscape into 1.0, 2.0 (which can be compared to category 3) and 3.0 stages. Today, we are rapidly approaching the 3.0 level including the implementation of smart contracts, artificial intelligence and machine learning.⁴⁵

VI. CONFLICT WITH THE LEGAL SERVICES ACT

Particularly the category (3) – replacing (traditional) lawyers in providing legal advice and services – can be in conflict with the German Legal Services Act.

Traditionally, giving legal advice or representing clients in legal cases fully complies with the requirements of the definition of “legal services” in section 2 (1) of the Legal Services Act. It does not matter if the legal advice is given personally, by telephone, e-mail or via the internet by using a software. Therefore, the requirements of the definition of “legal services” can be fulfilled if the legal advice or legal assessment of a legal case is the result of a software. Using a software is only a technical tool enabling the provider to offer the legal service. According to the explanatory memorandum of section 2 of the Legal Services Act, it is irrelevant if the legal service is provided with technical assistance (and which) or not.⁴⁶ Software must be regarded as technical assistance for providing legal services. Hence, a software enabling the consumer to find the right legal solution by using a question-and-answer tool must be regarded as a legal service provided by the person offering these services. The sometimes heard objection that the developer (provider) of the software cannot be responsible for usage by the consumer is not convincing because the result of the usage is the result of the programming of the software.⁴⁷ In this context, legal chatbots will become relevant. Legal chatbots⁴⁸ are text-based dialog systems characterized by a question-

⁴² See footnote 44, page 4 and 5.

⁴³ See footnote 44, page 5.

⁴⁴ Oliver R. Goodenough, *Legal Technology 3.0*, HUFFPOST (Mar. 29, 2018, 05:59 PM), https://www.huffingtonpost.com/oliver-r-goodenough/legal-technology-3_0_b_6603658.html.

⁴⁵ See Ron Friedman with critical remarks: *Bots, Big Data, Blockchain, and AI – Disruption or incremental change?*, BUCERIUS EXECUTIVE EDUCATION (Mar. 29, 2018, 06:08 PM), <http://www.bucerius-education.de/home/news-termine/blog/article/bots-big-data-blockchain-and-ai-disruption-or-incremental-change/>.

⁴⁶ Explanatory memorandum for the Legal Services Act: BT-Drs. 16/3655, 47 et seq.

⁴⁷ FEDERAL SUPREME COURT, Judgment of May 14, 2013 – VI ZR 269/12 – Autocomplete, note 17, with regard to the autocomplete function of Google.

⁴⁸ Nico Kuhlmann, *Legal Chatbots – The next frontier of transformation in law*, LEGAL TECH BLOG (Mar. 29, 2018, 06:09 PM), <http://legal-tech-blog.de/legal-chatbots-the-next-frontier-of-digital-transformation-in-law>;

and-answer session incorporated in a software and resulting in concrete legal advice, a legal document or another specific legal service. All these services may be regarded as legal services within the meaning of the Act if the (low) level of threshold for legal examination is reached.

Furthermore, companies offering tech-enabled, easily accessible, user-friendly and low-cost access to legal documents and contracts with standardized legal texts can also conflict with the Legal Services Act if individualized documents or contracts are the result of a tech-enabled interaction between service provider and client that meets the needs of the client in his/her individual case. These services must also be regarded as legal services because it is irrelevant if, for example, a will, a managing contract or a purchase agreement is drafted by a lawyer or generated by a software.

Currently, it is controversial whether legal process outsourcing models offering legal services to lawyers, tax consultants or in-house lawyers etc. are compatible with the Legal Services Act, i.e. if an external service provider offers the drafting of written submissions, contracts or other legal documents to lawyers. Although the service definitely fulfils the requirement of the definition of a “legal service” pursuant to section 2 (1), it is doubtful if the addressee of the legal service, a lawyer or a tax consultant, must be “protected” in the same way as other consumers against unqualified legal services according to section 1 (1) of the Act.⁴⁹ Also, if legal services are to be provided to non-lawyers, the activity must be restricted to support services. For example, the Federal Constitutional Court⁵⁰ decided in 1997 that the surveillance of patent annuity fees does not require the full qualification of patent attorneys or lawyers and can also be provided by private firms. Therefore, legal services going beyond comparable support services are not permitted if they are offered by private firms. This result has been confirmed by the Federal Supreme Court.⁵¹ The court decided that the application of intellectual property rights (trademarks, designs or patents) requires the qualification of a lawyer or patent attorney and cannot be outsourced and provided by non-lawyers. The same must apply to other legal documents such as contracts and written submissions.

Many legal tech companies are specialized in the examination and procurement of outstanding claims such as compensation claims.⁵² In order to obtain a permission to provide

Robert Ambrogi, *This Week In Legal Tech: Everyone’s Talking About Chatbots*, ABOVE THE LAW (Mar. 29, 2018, 06:11 PM), <https://abovethelaw.com/2017/04/this-week-in-legal-tech-everyones-talking-about-chatbots/>.

⁴⁹ For further details see Frank Remmert, *in* Rechtsdienstleistungsgesetz, § 1 note 68 (Michael Krenzler, 2nd ed. 2017).

⁵⁰ FEDERAL CONSTITUTIONAL COURT (=BVerfG), BVerfG, decision of October 29, 1997 – 1 BvR 780/87, BVerfGE 97, 12, 26ff. = NJW 1998, 3481 (MasterPat).

⁵¹ FEDERAL SUPREME COURT, Judgment of March 31, 2016 – I ZR 88/15 – Rechtsberatung durch Entwicklungingenieur.

⁵² A prominent example is “flightright,” see (Mar. 29, 2018, 06:16 PM) <https://www.flightright.co.uk/>.

legal services, a significant part of them obtained registration according to section 2 (2) of the Act (collection services). As a registered legal service provider, they are also allowed to give legal advice connected with the collection services.⁵³ However, the collection services must be restricted to monetary claims. It is not allowed to pursue other claims such as the defense of third-party claims or the revocation of an agreement.

In principle, legal platform business models connecting clients to lawyers do not conflict with the Legal Services Act. The placement or recommendation of lawyers is not a legal service within the meaning of section 2 (1) of the Act. However, legal platform providers cooperating closely with external lawyers can be in conflict due to the above-mentioned⁵⁴ rule that a lawyer may not act as subcontractor for the service provider. Even if there will formally be a separate mandate between client and lawyer, the lawyer may be regarded as a sole subcontractor if the service provider controls the instruction and procedure of the mandate.⁵⁵

IV. CONCLUSION AND OUTLOOK

In summary, legal tech business solutions offering legal services may be in conflict with the German Legal Services Act if they provide “legal services” within the meaning of section 2 (1) of the Act. The simple fact that legal services can be automated and provided with the support of a software cannot justify another conclusion. The consumer must also be protected against unqualified automated, tech-enabled legal services, i.e. wrong software results or untrustworthy legal tech providers, in the same way as against unqualified traditional legal services. In this context, it is important to note that, under current German law, non-lawyers offering legal services are neither obliged to have a professional liability insurance nor subject to professional rules such as the duty to observe professional secrecy and to avoid representing conflicting interests.

Legal solutions based on AI (Artificial Intelligence) and the use of self-executing contracts (smart contracts) will most likely be enabled in the near future.⁵⁶ Due to the nature of blockchain technology and its reliance on transparency and security for content, the significance of blockchain technology in the legal sector will probably increase significantly.⁵⁷

⁵³ FEDERAL CONSTITUTIONAL COURT, Judgment of February 20, 2002, 1 BvR 423/99 – Inkasso I, note 31.

⁵⁴ See Chapter VI. D. (above).

⁵⁵ FEDERAL SUPREME COURT, Judgment of July 29, 2009 – I ZR 166/06 – Finanz-Sanierung.

⁵⁶ Christian Veith, Michael Wenzler, Markus Hartung et. al., *How Legal Technology Will Change the Business of Law*, FINAL REPORT OF BUCERIUS LAW SCHOOL AND THE BOSTON CONSULTING GROUP ON IMPACTS OF INNOVATIVE TECHNOLOGY IN THE LEGAL SECTOR (Mar. 29, 2018, 05:58 PM), http://www.bucerius-education.de/fileadmin/content/pdf/studies_publications/Legal_Tech_Report_2016.pdf.

⁵⁷ See recently Kayla Matthews, *Blockchain and How It Will Benefit the Legal Industry*, LAW TECHNOLOGY TODAY (Mar. 29, 2018, 06:21 PM), <http://www.lawtechnologytoday.org/2018/02/blockchain-and-how-it-will-benefit-the-legal-industry/>; Jasmine Ye Han, *How Blockchain technology is transforming the legal industry*, BIG LAW BUSINESS (Mar. 29, 2018, 06:19 PM), <https://biglawbusiness.com/how-blockchain-technology-is->

Like tech-enabled contract drafting (Vertragsgeneratoren), offering self-executing contracts in individual cases based on blockchain technology (smart contracts) also requires permission according to the Legal Services Act. From a legal standpoint, there is no difference between providing contracts by a lawyer and automated contract drafting.

Last but not least, the permission to provide legal services under the German Legal Services Act is a significant issue of compliance: Entrepreneurs, stakeholders of legal tech start-ups and capital investors should weigh the economic opportunities and legal risks carefully before placing a legal tech start-up on the German market. Offering legal services without permission must be regarded as an illegal commercial practice according to the Act Against Unfair Competition. As a result, competitors and certain associations may file injunctions and sue for damages.

Irrespective of the undoubted advantages of legal tech service models, especially the ability to enable consumers to pursue low-budget claims against big companies (access to justice), it seems necessary to regulate the legal tech market, either on the national level by implementing a permission clause in the Legal Services Act or on the European level. The EU Commission made it clear that digital platforms will be promoted but the rights of consumers must also be protected.⁵⁸ Regulation would also lead to legal security with advantages for investments for both legal tech start-ups and their investors.

transforming-the-legal-industry/; an example of a transfer agreement based on blockchain technology is illustrated by Dean Sonderegger, *Blockchain: Can Smart Contracts Replace Lawyers?*, ABOVE THE LAW (Mar. 29, 2018, 06:22 PM), <https://abovethelaw.com/2018/02/blockchain-can-smart-contracts-replace-lawyers/>.

⁵⁸ “Online Platforms and the Digital Single Market – Opportunities and Challenges for Europe,” Communication from the EU Commission COM (2016) 288 final (Mar. 29, 2018, 06:23 PM), <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016DCo288&from=EN>.