Speculative Fees and their Impact on Access to Justice: German Experiences

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I. Introduction

Germany as one of the largest legal services markets in the world[1] – and the second largest in Europe behind England and Wales[2] – is governed by a regulatory regime that has some unique features, distinguishing Germany from many jurisdictions across the globe in how the market operates and legal professionals[3] practice. For example, multi-disciplinary partnerships between lawyers and certified accountants, auditors, tax consultants, tax agents or patent attorneys have been allowed in Germany for many decades.[4] Lawyers' fees are regulated in a federal Lawyers' Remuneration Act (Rechtsanwaltsvergütungsgesetz – RVG)[5] that applies by default in the absence of an individual fee agreement between lawyer and client.[6] Criminal

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[1] SeeTheCityUK, UK Legal Services 2015, p. 23. The report estimates that 53 per cent of legal services fee revenue is generated in the US, with the remaining 47 per cent shared between almost 200 other countries.

[2] Yarrow/Decker, Assessing the economic significance of the professional legal services sector in the European Union, 2012, p. 4: „Based on 2010 estimates , the UK had the largest share of the European legal services market followed closely by Germany . In total the UK and German legal services markets accounted for just under 50% of the total estimated revenues of the lega l services sector in Europe."

[3] The German term for a member of the bar is „Rechtsanwalt". There is no other lawyers' profession and members of the bar enjoy comprehensive monopoly rights. Germans therefore use the English terms „member of the bar" and „lawyer" synonymously, whereas law graduates are referred to as „Juristen".

[4] BRAO s.59a(1): „Lawyers may associate with members of the Bar and members of the Chamber of Patent Attorneys, with tax consultants, tax agents, auditors and certified accountants in order to jointly practise their professions within the frame work of their own professional rights." Despite this, Germany has not embraced the world-wide trend of opening up law firms to external ownership. For a discussion of the impact of the ABS phenomenon on Germany, see Weberstedt, English Alternative Business Structures and the European single market, [2014] 21:1 International Journal of the Legal Profession, p. 103-141; Passmore, What is happening to the regulation of the legal market in England and Wales?, Anwaltsblatt 2014, p. 140-145.

[5] Gesetz über die Vergütung der Rechtsanwältinnen und Rechtsanwälte vom 5. Mai 2004 (BGBl I S. 718, 788).

[6] A common misunderstanding is that the Lawyers' Remuneration Act stipulates binding fees and covers all areas of legal practice. The fees are only binding for cost-shifting purposes, i.e. in relation to a third party. Lawyer/party costs can be agreed individually. The statutory fees only apply should lawyer and client decide against entering into an agreement as the statutory fees are then deemed to be agreed under s. 611(2) of the German Civil Code (Bürgerliches Gesetzbuch – BGB): „If the amount of remuneration is not specified, then if a tariff exists, the tariff remuneration is deemed to be agreed." Fees also exist for court work and for out of court representation. For advice work, drafting documents, legal opinions or mediation work fees no longer exist. If no fee agreement is entered into, then the „usual remuneration is deemed to be agreed" under BGB s. 611(2) , although the remuneration is capped at 250 EUR if the client is a consumer (RVG s. 34).

legal aid in the traditional sense[7] is absent from Germany's legal aid system[8], but Germany is by far the largest legal expenses insurance market in the world with almost half of the population enjoying stand-alone insurance cover.[9] Future lawyers undergo the same state-organized and funded legal training (the so-called Referendariat) that future judges, public prosecutors and government lawyers have to pass[10], but there is no formalized training of lawyers as such – passing the second state exam at the end of the Referendariat gives a statutory right for admission to the Bar.[11]

Another feature of its regulatory system that traditionally distinguished Germany from most other countries was the strict prohibition of any form of output-based or speculative remuneration for lawyers.[12] While most jurisdictions have allowed some form of success-based remuneration for lawyers for a long time[13], professional practice rules and more recently the Federal Lawyers' Act (Bundesrechtsanwaltsordung – BRAO)[14] prohibited conditional fee agreements ("no win no fee", "no win, less fee") or damages-based agreements between German lawyers and their clients. Courts had a tight grip on lawyers who creatively tried to circumvent that prohibition. This all changed on December 12, 2006 when the German Constitutonal Court ruled the relevant section of the Federal Lawyers Act to be unconstitutional insofar it prevented output-based remuneration agreements even with clients without means – clients who would be denied access to a lawyer if they were not allowed to fund his services with a speculative fee agreement. The lawmaker had to change the law within 18 months and did so with a reform law that came into force in 2008. Since July 1, 2008, German lawyers are

[7] Under the German Code of Criminal Procedure (Strafprozessordnung – StPO) „forced representation" in the trial phase is guaranteed for unrepresented defendants depending on the severity of the crime. The assignment of a defender is not means-tested and the costs for the defender have to be met by the defendant if he is convicted (the public purse will pay in case of an acquittal). This system is also different from traditional legal aid as it primarily is aimed at allowing a quick and uniterrupted trial as the presence of a defender is guaranteed.

[8] For an overview of German legal aid, see Kilian, Legal Aid And Access To Justice In Germany, in: ILAG (ed.), The Challenge Of The New Century, Volume 1, Melbourne 2001, p. 77 – 114.

[9] Kilian, Alternatives To Public Provision: The Role of Legal Expenses Insurance In Broadening Access to Justice: The German Experience, [2003] 30 Journal of Law and Society, p. 31-48; Regan/Kilian, Legal Expenses Insurance And legal aid - Two Sides Of The Same Coin? [2004] 11 Journal Of The Legal Profession p. 233-256.

[10] The concept is based on the idea of the „Einheitsjurist", for details see Keulmann, The Einheitsjurist: A German Phenomenon, [2006] 7:3 German Law Journal, p. 293-312.

[11] For a comprehensive overview on legal education in Germany see Kilian, Juristenausbildung: Die Ausbildung künftiger Volljuristen in Universität und Referendariat, Bonn 2015.

[12] This paper uses the term „speculative fee" to describe a remuneration model in which the remuneration for the provision of legal services completely or partially depends on the outcome of the case the lawyers has taken on. The paper avoids the more common terminology of contingency fee or conditional fee as this terminology, although being descriptive by nature, also refers to a specifically regulated type of success fee in the United States (contingency fee, Rule 1.5 MRPC) or England and Wales (conditional fee, Conditional Fee Agreements Order 2013).

[13] For an A-Z overview of the regulation of speculative fees in 50 jurisdictions, see Kilian, Der Erfolg und die Vergütung des Rechtsanwalts, Bonn 2003, p. 453 – 489.

[14] Bundesrechtsanwaltsordnung vom 1. August 1959 (BGBl I S. 565). An (inofficial) English translation is available on the German Federal Bar's website: http://www.brak.de/w/files/02_fuer_anwaelte/berufsrecht/brao-stand-6-12-2011-mit-korr-191f-2014.pdf (accessed May 29, 2015).

allowed, subject to certain conditions, to enter into output-based remuneration agreements with clients.

This paper explores the long road to the Federal Constitutional Court's 2006 landmark decision, analyzes the court's ruling and outlines the regulation of speculative fee agreements that is now in place in Germany. Another focus of the paper will be an analysis of how the change has affected the German legal services market, drawing on empirical research on the subject carried out between 2006 and 2014.

II. The traditional prohibition of speculative fees

1. Early case law

Soon after the creation of the German Reich in 1871 had resulted in the enactement of the first German „Lawyers' Act" (Rechtsanwaltsordnung – RAO)[15], speculative fees for German lawyers became unlawful.[16] Starting in 1887[17], in a long string of decisions the profession's disciplinary court – back then called "Court of Honour" (Ehrengerichtshof) – deemed speculative fee agreements with clients as being unethical.[18] What remained unanswered for almost three decades was whether such an unethical agreement was enforceable in a civil dispute under contract law. In 1914, the Reichsgericht, back then the highest German court, held that entering into a speculative fee agreement by a lawyer was such a grave violation of ethical rules that the underlying contract had to be regarded as contrary to public policy and thus be void pursuant to German Civil Code s.138(1).[19] As this decision was not widely reported[20]

[15] The Deutsche Reich brought together 25 member states, 22 of them monarchies, under the lead of Prussia. All of them had acts regulating the lawyers' profession on their territory. Like in other areas of law, an initial challenge for lawmakers of the new German Reich was to enact a Lawyers' Act for the whole new Deutsche Reich. After almost a decade of consultations, the Rechtsanwaltsordnung passed parliament (Rechtsanwaltsordnung vom 1. Juli 1878, RGBl. Nr. 23, p. 177).

[16] The regulation of speculative fees in the states differed considerably prior to German unification. Some states allowed them, others prohibited them explicitly. During the consultation for the Lawyers' Act it was thus agreed not to regulate the issue but leave the decision to the disciplinary court system established under the new Lawyers' Act. For an overview of the regulation on state level prior to 1871, see the stock-taking research by Fenner, Über eine neue Gebührenordnung für die deutschen Rechtsanwälte, Berlin 1874. Interestingly, only one of the 24 Bar Associations that participated in the consultation voted for a prohibition of speculative fees in the future law. There more were against damaged-based fees, but not against speculative fees as such; see Fenner, op. cit., p. 24.

[17] Ehrengerichtshof March 8, 1887, Case 7/86 = EGH 3, pp. 244.

[18] Ehrengerichtshof March 8, 1887, supra note 17; November 22, 1887, Case 32/86 = EGH 3, pp. 146; September 29, 1890, Case 4/90 = EGH 5, pp. 72; November 4, 1890, Case 8/90 = EGH 5, pp. 140; May 2, 1891, Case 26/90 = EGH 5, pp. 132; June 28, 1894, Case 8/94 =, EGH 7, pp. 117; May 20, 1911, Case 22/10 = EGH 15, pp. 194; November 25, 1911, Case 33/11 = EGH 15, pp. 208; November 9, 1912, Case 45/12 = EGH 16, pp. 237; January 28, 1912, Case 32/12 = EGH 16, pp. 296; January 23, 1915, Case 63/14= EGH 17, pp. 339; April 13, 1918, Case 33/17 = EGH 17, pp. 192.

[19] Reichsgericht February 10, 1914, Case X 354/13, Seufferts Archiv 69, p. 471.

[20] The decision was not included in the official collection („RGZ") of Reichsgericht judgements.

and somewhat apodictic in nature[21], a decision of the Reichsgericht dated December 17, 1926[22] is regarded as the landmark decision. It received considerable attention also because of the fact that the defendant was a well-known member of the board of the German Bar Association.[23] The court held: „A lawyer is an independent agent in the administration of justice. In this function, when advising and representing his client he must only consider the legal matter as such. To guarantee this, he must remain independent from the party he is representing. He would risk his independence and devalue his position if, in the interest of receiving an adequate compensation for his services, he would align his economic interests with the client's interests in winning the case."[24] The court went on: „The violation [of his professional duty not to enter into a conditional fee agreement] will be regarded by all righteous observers as objectionable and immoral" [25], resulting in the invalidity of the fee agreement under contract law.[26] Following this landmark decision, speculative fee agreements increasingly were dealt with not by the regional bars or in the discplinary court system, but by civil courts.[27] Often this was the result of a former client having second thoughts about a speculative fee agreement he had happily entered into - but was unhappy to honour once the lawyer had completed his work successfully and sent his bill.[28] Taking the matter through the civil court system promised the client an economic gain, while there was little incentive for a client to report the lawyer to the authorities instead of or in addition to suing him.

One interesting aspect of the case law up until this point was that almost all cases were about speculative fee agreements which granted the lawyer a share of the proceeds of his services („pactum de quota litis"). For the courts, such an agreement was a partnership-like structure with the client contributing his claim and the lawyer his services and both agreeing to share

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[21] It was merely 17 lines long. The legal assessment simply stated: „If a retainer violates professional duties of a lawyer, it is also contrary to public policy" [under contract law and thus void].

[22] Reichsgericht December 17, 1926, Case III 21/26 = RGZ 115, pp. 141.

[23] Following the decision, the German Bar Association's board published a „statement of honour" on the front page of the leading German law journal of the time, criticizing the court decision and portraying their colleague as a highly respected member of the profession and a man of honour (Juristische Wochenschrift 1927, p. 497). This statement triggered in a war of words with further statements by, for example, the Association of Judges at the Reichsgericht defending the court (Deutsche Juristen-Zeitung 1927, p. 498) and the President of the German Bar Association defending the lawyer (Drucker, Deutsche Juristen-Zeitung 1927, p. 595). Following the decision of the Reichsgericht, the lawyer concerned took the matter further and self-reported himself to the disciplinary authorities. Interestingly, in the disciplinary proceedings he was acquitted by the Ehrengerichtshof in a decision dated May 5, 1928, Case 71/27 = EGH 22, pp. 111.

[24] Reichsgericht, supra note 22, p. 143.

[25] Ibid.

[26] Ibid.

[27] Infra note 30.

[28] Usually, in this type of litigation the lawyer was the defendant as the lawyer deducted his remuneration from monies received on behalf of his client, forcing the client to sue the lawyer for paying out the balance by arguing that the fee agreement was void and keeping the fee therefore amounted to unjust enrichment.

the proceeds by a pre-determined quota.[29] Joining forces with a client in such a way was regarded by the courts as particularly objectionable. Strikingly, there were hardly any decisions about „no win no fee" or „no win less fee" agreements, with some decisions even parenthentically mentioning that the legal assessment might have been different if lawyer and client had not shared the proceeds of the lawyer's successful services.[30] Courts of lower instance that dealt with such agreements from time to time therefore regarded them to be lawful.[31] This ended in 1933 when a case came up to the Reichsgericht again: Blatantly replacing jurisprudence with Nazi propaganda[32], in a decision from October of that year the Reichsgericht simply stated that the courts must put an end to „a selfish practice by lawyers … now that the national movement has led to a more ethical legal thinking again". In the years that followed, only one further decision was published.[33] That speculative fees were still an issue in everyday practice, however, is reflected by the fact that even in the final months of the Second World War the Ministry of Justice concerned itself with the issue of speculative fees of lawyers. For the first time in history, by way of a statutory instrument, an outright prohibition of such agreements was established.[34] Not the Lawyers' Act (RAO), but the Lawyers' Remuneration Act (RAGebO[35]) was amended accordingly.[36] Little is known about the background, but the scarce material available suggests that the lawmaker was concerned that lawyers would take advantage of clients in times of hardship caused by the war.[37]

2. Post-War Ambiguities

The statutory prohibition of speculative fee agreements introduced in 1944 remained in force until 1957 when the old Lawyers' Remuneration Act (RAGebO) was replaced by a Federal

[29] See Ehrengerichtshof March 8, 1887, supra note 17, p. 250; June 28, 1894, supra note 18, p. 117.
[30] See, for example Ehrengerichtshof May 20, 1911, supra note 18, p. 202.
[31] Kammergericht, March 9, 1928, Case 25 U 13935/28 = Juristische Wochenschrift 1928, p. 1146; Oberlandesgericht Köln, January 26, 1928, Case 9 U 125/27 = Juristische Wochenschrift 1928, p. 1515; Kammergericht, May 17, 1930, Case 25 U 19142/28 = Juristische Wochenschrift 1930, p. 180.
[32] At the time of the decision in October 1933, the „Gleichschaltung" of the legal profession was already well advanced. „Gleichschaltung" was the process by which the Nazi regime successively established a system of totalitarian control over the individual and tightly coordinated all aspects of society and commerce. For lawyers, it meant the dissolution of the German Bar Association and of the regional bars, the establishment of a single centralized bar and a newly defined role of the lawyer who became a „keeper of the law" who also had to act in the interest of the state. For details, see Dölemeyer, Gleichschaltung und Anpassung der Anwaltschaft, in: Deutscher Anwaltverein (ed.), Anwälte und ihre Geschichte, Tübingen 2011, pp. 265.
[33] Reichsgericht November 25, 1938, Case III 31/38 = Juristische Wochenschrift 1939, pp. 411.
[34] Verordnung vom 21. April 1944 (RGBl. I 1944, 104, 107). The statutory instrument added a sentence to RAGebO s.93(2) that dealt with lawyers' fee agreements in general. The added sentence prohibited agreements to the effect that the remuneration of the lawyer was dependent on the outcome of the services rendered.
[35] Gebührenordnung für Rechtsanwälte vom 7. Juli 1879 in der Fassung vom 5. Juli 1927 (RGBl. I S. 162).
[36] Inserting the prohibition in the RAGebO (rather than the Lawyers' Act or the Code of Professional Conduct) guaranteed that a violation had a direct effect on the validity of the contract pursuant to German Civil Code s.134 („A legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion").
[37] See Kilian, supra note 13, p. 71.

Tariff for Lawyers (Bundesgebührenordnung für Rechtsanwälte – BRAGO)[38]. The lawmaker was reluctant to include an explicit prohibition in the new law as speculative fees had become somewhat popular in the post-war period as a result of a federal act for compensating victims of the Nazi regime coming into force in 1953.[39] Most victims claiming compensation under the new law had migrated overseas. Often living in jurisdictions like the United States where speculative fees were quite common and also without sufficient means to pay a German lawyer a non-speculative fee, they sometimes tried to convince a lawyer to work for them against a share of the proceeds from the compensation.[40] While the German government and courts did not like the idea that compensation payments were diminished by speculative lawyers' fees, they usually shied away from taking action as they did not want to risk bad publicity resulting from Nazi victims being unable to press compensation claims because of the unlawfulness of speculative funding of their lawyers' services. As a matter of policy, it was therefore (once again) decided to not regulate the issue but to leave it to the courts to find a more flexible solution than would have been possible with black letter law.[41] When the Federal Lawyers' Act (Bundesrechtsanwaltsordung – BRAO)[42] came into force in 1959, it lacked, like the 1957 Federal Tariff for Lawyers, any explicit rule on speculative fees. The profession itself, however, had promulgated a professional conduct rule in the first post-war Principles of Professional Conduct (Standesrichtlinien - RiLi) in 1957[43]. These principles were formally enacted as guidelines by the German Federal Bar with effect August 1, 1959 when the Federal Lawyers Act came into force.[44] s.52 of the Principles of Professional Conduct prohibited speculative fee arrangements in principle (RiLi s.52(1)), but allowed exemptions under certain circumstances (RiLi s.52(2) as long as no share of the proceeds was agreed as the remuneration (RiLi s.52(3)).[45]

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[38] Bundesgebührenordnung für Rechtsanwälte vom 26. Juli 1957 (BGBl I S. 907).

[39] Bundesgesetz zur Entschädigung für Opfer der nationalsozialistischen Verfolgung vom 18. September 1953 (BGBl. I S. 1387).

[40] Scheffen, Zum Erfolgshonorar-Urteil des BGH, Anwaltsblatt 1961, pp. 57; Oswald, Erfolgshonorare in Entschädigungssachen, RzW 1961, pp. 150.

[41] BT-Drucks. 2/2545, p. 227 (Printed Matters of the First Chamber of Parliament for the 2nd legislative period).

[42] Bundesrechtsanwaltsordnung vom 1. August 1959 (BGBl I S. 565).

[43] Richtlinien zur Ausübung des Rechtsanwaltsberuf vom 11. Mai 1957, festgestellt von der Bundesrechtsanwaltskammer.

[44] BRAO s.177 gave the German Federal Bar the power to „restate the general consensus of the profession on the professional conduct of lawyers in guidelines". Restatements of these guidelines, later renamed as „principles of professional conduct", were promulgated in 1963, 1973 and 1986 before the Federal Constitutional Court declared them to be unconstitutional in 1987. For details, see Taupitz, Standesordnungen der freien Berufe, Berlin 1991, pp. 383.

[45] The 1959 Principles of Professional Conduct contained no statutory prohibitions pursuant to BGB s.134 (German Civil Code). Professional misconduct therefore did not invalidate a fee agreement under contract law.

In 1963, the first case to which the new legal framework applied reached the Federal Supreme Court (Bundesgerichtshof).[46] The court tied in with the case law of the Reichsgericht from the 1920s and 1930s and invalidated the speculative fee agreement in question as being contrary to the public interest.[47] The court added some additional lines of thought: It argued that a success fee created an undue incentive for the lawyer to tamper with evidence or to distort the legal analysis in order to ensure a successful outcome on which his remuneration depended.[48] Even if a lawyer in general resisted such a temptation, the profession would not be above suspicion in the public eye without a prohibition of such agreements. The court was also concerned that success fees carried the risk of disproportionately high fees[49] and suggested that lawyers who wanted to help their clients by agreeing to work for a speculative fee could just as well enter into a non-speculative agreement and waive some of the fees when concluding the work for the client.[50]

The decision of the Bundesgerichtshof clarified the validity of speculative fee agreements from a contract law perspective, while the profession's Code of Conduct adressed the issue distinctly from a disciplinary perspective. For the next 30 years, the legal situation did not change. Occasionally, fee agreements reached the civil or disciplinary courts which were thinly veiled attempts at hiding output-based elements in a fee agreement that at first glance appeared to be of a non-speculative nature.[51]

3. 1994: Affirmation of the status quo

1987 changed the legal framework: On July 14, 1987, the Bundesverfassungsericht, the Federal Constitutional Court, declared the Principles of Professional Conduct to be unconstitutional as the German Federal Bar lacked the authority to more or less informally promulgate rules on which disciplinary sanctions including a disbarment could be based by the disciplinary courts.[52] As a result, s. 52 of the Principles of Professional Conduct was no longer applicable. The Federal Constitutional Court instructed the Federal Parliament to enact a set of professional conduct rules by statute and to properly confer legislative powers to a newly-created rule making body made up of democratically elected representatives of the profession.[53] This

[46] Bundesgerichtshof February 26, 1963, Case VII ZR 167/61, BGHZ 39, pp. 142.
[47] Ibid.
[48] Ibid.
[49] Ibid.
[50] Ibid.
[51] For a discussion of such cases, see Kilian, supra note 13, pp. 75.
[52] Bundesverfassungsgericht July 14, 1987, Cases 1 BvR 537/81, 1 BvR 195/87 = BVerfGE 76, pp. 171.
[53] For details of the judgment, see Kilian, Bastille day - the German way, [2012] 15 Legal Ethics pp. 123.

led to the 1994 reform of the Lawyers' Act.[54] Rules relating to lawyers' fee agreements that hitherto were part of the Principles of Professional Conduct were added to the Lawyers' Act in a new section 49b. Subsection 2 of that section adressed the issue of speculative fees. It stated: „Agreements under which remuneration or the amount of fees depend on the outcome of the case or on the success of the *Rechtsanwalt*'s work or under which the *Rechtsanwalt* keeps a part of the award made by the court as a fee …are not permitted." In contrast to the earlier conduct rule, the new statutory provision tightened the prohibition as it no longer contained an exception to the general prohibition of speculative fees: All types of speculative fees were now prohibited under all circumstances. The legislative materials[55] were rather short-spoken on the matter – in only 35 words the lawmaker explained that the prohibition of speculative fees served the protection of the independence of the lawyer that would be endangered if economic considerations could determine how a case is handled.[56] No explanation was given why the former distinction between contingency style success fees and „no win, no/less fee" was no longer adhered to, no consideration was given to the different view taken on the matter of speculative fees by most other jurisdictions. The new provision also meant that the validity of a speculative fee agreement no longer had to be tested against BGB s.138 (legal transaction contrary to public policy): Henceforth, such an agreement was in violation of a statutory prohibition and thus void (BGB s.134).[57] At a time when Europe's „other" large legal services market, England and Wales, cautiously embraced speculative funding agreements for the first time[58] by enacting the Conditional Fee Agreements Order 1995[59] and the Conditional Fee Agreements Regulations 1995[60] which overrode the century-old common law doctrines of maintenance and champerty[61] by legislative act, Germany went in the opposite direction and further cemented a strict prohibition of speculative fees.

4. The realities of legal practice

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[54] Gesetz zur Neuordnung des Berufsrechts der Rechtsanwälte und der Patentanwälte vom 2. September 1994 (BGBl. I 2278).
[55] BT-Drucks. 12/4993, available at http://dipbt.bundestag.de/doc/btd/12/049/1204993.pdf
[56] Ibid. p. 31.
[57] See Kilian, in Henssler/Prütting (ed.), Bundesrechtsanwaltsordung, 4th ed., Munich 2014, s. 49b para 144.
[58] For the development in England and Wales in the mid-90s, see for example O'Mahony/Ellson/Marshall/Bennett, Conditional Fees, London 1999; Levin, No Win, No Fee, No Costs, [1999] New Law Journal pp. 48; Levin, Solicitors Acting Speculatively And Pro Bono [1996] 15 Civil Justice Quarterly, pp. 44.
[59] Statutory Instrument 1995, No. 1674, July 4, 1995.
[60] Statutory Instrument 1995, No. 1675, July 4, 1995.
[61] For the historical development of those doctrines see Winfield, The History of Maintenance And Champerty, [1919] 35 Law Quarterly Review pp. 50; for an analysis of the case law Walters/Peysner, Event-Triggered Finance of Civil Claims: Lawyers, Insurers And The Common Law, [1999] 8 Nottingham Law Journal pp. 1; specifically forspeculaitve fee agreements Walters, Contingency Fee Arrangements At Common Law,[2000] 116 The Law Quarterly Review pp. 371.

The proverbial wisdom that one can say what one likes on paper is, as any practicing lawyer will admit, quite true for many rules relating to the professional conduct of lawyers – particularly those that are difficult to supervise for an oversight body like a bar. The occasional decision by German courts on fee agreements that contained more or less thinly veiled output-based remuneration models[62] provided some anecdotal evidence that in the past not all Germany lawyers obeyed BRAO s.49(2) absolutely. An empirical study carried out with 1.021 German lawyers in 2005[63] therefore analyzed to what extent German lawyers were entering into speculative fee agreements despite the unlawfulness of such agreements, the risk of fees being not enforceable in case of a dispute with a client and the lawyer potentially being subject to disciplinary sanctions. 17 per cent of respondents admitted that they had not obeyed the strict prohibition unreservedly in the past[64]: 4 per cent said that they had entered into output-based fee agreements in the past in writing, 4 per cent orally.[65] 10 per cent said that a speculative fee had been the result of an informal agreement with the client (multiple answers were possible).[66] If controlling by the percentage of business and private clients, the data showed that lawyers were the more inclined to disobey the prohibition the more business clients they served[67]: 24 % per cent of all lawyers with a majority of corporate clients admitted to having disobeyed the prohibition in the past, but only 14 per cent of those with 20 per cent or less corporate clients.[68] In line with those findings 47 per cent of all lawyer with a majority of business clients mentioned that they were asked often or at least occasionally about their willigness to work for an output-based remuneration, but only 38 per cent of all lawyers with up to 1/5 business clients.[69] Only 20 per cent of the respondents did not remember clients asking for a speculative fee. [70] The study came to the conclusion that the empirical findings hinted at a practical need for output-based remuneration as a significant percentage of all lawyers had felt compelled to breach their professional duty and had exposed themselves to potential disciplinary action by entering into formal or informal speculative fee arrangements.[71]

III. The Constitutional Court's 2006 decision

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[62] Supra note 51.
[63] Hommerich/Kilian, Vergütungsvereinbarungen deutscher Rechtsanwälte, Bonn 2006.
[64] Ibid., p. 103.
[65] Ibid.
[66] Ibid.
[67] Ibid. p. 104.
[68] Ibid. p. 108. The finding that speculative fees were particularly attractive for the corporate bar was further supported by a survey of the German business daily „Handelsblatt" that found out that 52 per cent of Germany's 50 largest law firms had given in to requests by clients to be paid output-based (Lichter/Tödtmann, Handelsblatt, April 7, 2006, p. K01).
[69] Ibid.
[70] Ibid., p. 108.
[71] Ibid., p. 105.

On December 12, 2006, the century old status quo changed over night. On that day the Federal Constitutional Court delivered a landmark ruling[72] on the constitutionality of a prohibition of speculative fee arrangements of lawyers. It held that a comprehensive prohibition of speculative fees for lawyers[73] was a violation of the occupational freedom of art. 12(1)[74] Basic Law[75] and the provision to that effect in the Federal Lawyers' Act – BRAO s.49b(2) - was thus void and had to be re-written accordingly by the lawmaker.[76] The decision put an end to a case that had started seventeen years earlier in the heady days of German re-unification.

1. The Prelude

In 1990, the year when the Federal Republic of Germany (FRG – "West Germany") and the German Democratic Republic (GDR – "East Germany) re-unified, Hanna N., a U.S. citizen, contacted a German law firm, asking for representation in an administrative proceeding. Hanna N.'s Jewish family was a victim of the Nazi regime, with the survivors having migrated to the U.S. decades ago. Hanna N. wanted to claim damages for a piece of land in the East German city of Dresden that had belonged to her grandfather who had been disowned by the Nazi regime. Before 1990, the family had been unable to claim restitution or damages as the property concerned was in the then-German Democratic Republic.[77] Hanna N. was without means and could not obtain legal aid.[78] She asked the German law firm to take on the case for a US style contingency fee agreement that would grant the firm one third of the proceeds from the

[72] Bundesverfassungsgericht, December 12, 2006, Case 1 BvR 2576/04 = BVerfGE 117, pp. 163.

[73] Mutatis mutandis it also applies to certified accountants, tax consultants and patent attorneys. The acts governing the professions of certified accountants (the Wirtschaftsprüferordnung – WPO), tax consultants (the Steuerberatungsgesetz – StBerG) and patent attorneys (the Patentanwaltordnung – PatO) are traditionally modelled after the Lawyers' Act as these professions are much younger than the lawyers' profession, but from a regulatory perspective share the same roots. BRAO s.49b(2) therefore had and still has the same content as StBerG s. 9a WPO s. 55a and PatO s. 43b.

[74] Basic Law Art. 12(1): „All Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law."

[75] The Basic Law („Grundgesetz") is the German constitution. In its first part (art. 1-19), it contains fundamental rights of citizens. For historic reasons, the term constitution was not used in 1949 as the drafters regarded the Grundgesetz as temporary for the provisional West German state and that a constitution be formally enacted under the provision of Article 146 of the Basic Law for an ultimate reunified Germany. After German reunification in 1990, this did not happen as the German Democratic Republic simply accessed the Federal Republic of Germany.

[76] Depending on the severity of an infringement, the court can either rule that an unconstitutional law or provision must not be applied any longer with immediate effect or can allow a transition period during which it can remain in force (if necessary, subject to certain conditions set by the court).

[77] Unlike the Federal Republic of Germany (FRG - "West Germany"), the GDR never had laws and mechanisms in place that would have rectified the injustice groups like German jews had suffered in the Nazi years, partly because after the end of the war expropriation continued in a different context by the Soviet occupying power.

[78] Restitution is claimed in a (usually complicated and time-consuming) administrative procedure, so Hanna N. could not claim legal aid for court work. Legal aid for out-of-court work according to the Beratungshilfegesetz (Law on Legal Aid for Advice and Representation) only pays a lump sum between 50 and 100 EUR for an indefinite amout of work so no lawyer could be retained on that basis (in the case in question, it took the lawyer eight years to be able to close the file).

case. On October 10, 1990, the law firm accepted the mandate, including the suggested fee agreement. Subsequently, the law firm worked on the case for almost a decade. Since September 1998, the firm also represented Hanna N.'s brother Joseph S. In October 1998, the state's competent financial authority granted the siblings a sum of 262,000 DM (former German currency) pursuant to the "Bundesgesetz zur Entschädigung für Opfer der nationalsozialistischen Verfolgung", a federal act for compensating victims of the Nazi regime dating back to the 1950s that had become applicable to the area of the former German Democratic Republic after German re-unification. In December 1998, a further 50,000 DM were awarded. As agreed with the client, the law firm deducted 104,000 DM from the overall compensation of 312.000 DM as remuneration.

While with this payout the case was closed for Hanna N. and Joseph S., it was far from over for their lawyer who had successfully handled their case. In 2002, the lawyer was disciplined for entering into the contingency fee agreement.[79] The legal basis for disciplinary action against her was quite complicated as the agreement with Hannah N. dated back to 1990 when the legal framework was different from the situation in 1998 when Joseph S. had retained the firm. In 1990, no explicit statutory prohibition of speculative fee agreements existed as the profession's Code of Professional Ethics that had been declared unconstitutional in 1987 by the German Constitutional Court had yet to be replaced by a set of professional duties in the Federal Lawyers' Act. This did not occur until 1994 when BRAO s.49b for the first time introduced a statutory prohibition of speculative fees.

The *Anwaltsgericht*, the disciplinary court of first instance[80], held that the lawyer had acted in violation of her professional duties as a lawyer.[81] Interestingly, for none of the two fee agreements the *Anwaltsgericht* based its findings on BRAO s. 49b(2). In doing so, it conveniently avoided addressing the lawyer's main line of defence that the statutory prohibition of speculative fees was not applicable as it unconstitutionally infringed the free practice of her profession as guaranteed by Basic Law art. 12(1).[82] Instead, the court argued that such an agreement

[79] The official reporting of the case history is somewhat sketchy. Although this has never been offically confirmed, it appears that the lawyer representing Hannah N. and Joseph S. reported herself to her regional bar once she had entered the agreed remuneration into the law firm's books (as the clients were happy how things had turned out and did neither complain nor had to be sued for the remuneration by the firm, there would have been no other way for the bar to become aware of the remuneration agreement other than a self-report of the bar member).

[80] The Anwaltsgericht acts at the request of the public prosecutor. The prosecutor will indict a member of the bar who has breached professional duties – either because the public prosecutor has been informed by the regional bar or by a member of the public.

[81] Anwaltsgericht Sachsen, October 8, 2002 , Case SAG II 24/01 - EV 4/00 (not published).

[82] A basic right guaranteed by the Basic Law is unconstituionally infringed if the law in question infringes the scope of freedom guaranteed by the basic right and the infringement cannot be justified.

was in conflict with BRAO s. 43a (1) that requires a lawyer to maintain her professional independence at all times[83] and also in violation of a criminal offence (StGB s. 352(1)[84]).[85] The lawyer was sentenced to pay a fine of 25,000 €.[86]

Upon appeal, the *Anwaltsgerichtshof*, the disciplinary court of appeal, reduced the fine to 5,000 €, but otherwise upheld the conviction. The *Anwaltsgerichtshof* took a different approach. It based its findings on BRAO s.49b(2) as far as Joseph S.'s mandate was concerned, and on BRAO s.43 in the case of Hannah N.[87] In doing so, the court rejected the defendant's argument that the prohibition of speculative fees as stipulated in BRAO s.49b(2) was unconstitutional. The court held that even though the prohibition limited the occupational freedom of the German Basic Law Art.12, it served the common good and was therefore justified.

An appeal to the Federal Supreme Court of Justice's Lawyers Senate as the final instance in the disciplinary court system was not allowed. The lawyer's application for leave to appeal was rejected. This opened up the door to a constitutional complaint to the German Federal Constitutional Court as any person alleging that one of her basic rights has been infringed by public authority can file a constitutional complaint (Basic Law Art. 93(1) Nr. 4a) when no further legal recourse is available. The lawyer accordingly filed a complaint. Various stakeholders were invited by the court in April 2005 to comment on the prospects of the constitu-

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[83] BRAO s. 43(1): „A Rechtsanwalt may not enter into any ties that pose a threat to his/her professional independence." BRAO s.49b(2) is usually understood to be a concretion of the more general duty of a lawyer to remain independent so that the lex specialis doctrine applies.

[84] StGB s. 352 (1): "If a…Rechtsanwalt… charges fees or compensation which he knows are not due to him at all or only to a lesser amount shall be liable to imprisonment not exceeding one year or a fine." The court argued that s. 352 (1) was violated because the lawyer had collected a fee that was not „due to him" as it was unlawful and the remuneration agreement thus void.

[85] From a disciplinary perspective, any criminal offence is also a disciplinary offence as committing a crime violates the lawyer's professional duty to „practise his profession conscientiously" and to „show that he/she is worthy of the respect and the trust that his/her status as Rechtsanwalt demands." (BRAO s. 43). In practice, disciplinary proceedings are not instigated or are suspended as soon as a lawyer is indicted for a criminal offence because the principle of *ne bis in idem* does allow additional discplinary sanctions only in exceptional circumstances (BRAO s. 115b: „If a punishment, a disciplinary sanction, a sanction imposed by a disciplinary court for a profession or a disciplinary action has been imposed by a court or an authority, no proceedings shall be instituted before a Lawyers' Disciplinary Court on grounds of the same conduct as long as no additional sanctions are necessary from the Lawyers' Disciplinary Court in order to compel the Rechtsanwalt to perform his/her duties and to protect the standing of the legal profession" (the so-called requirement of „berufsrechtlicher Überhang").

[86] 25.000 € is equivalent to 50.000 DM, so the fine amounted to roughly 50 per cent of the fee collected. BRAO s. 114(1) stipulates a maximum fine in disciplinary proceedings of 25.000 €, so the court maxed out its disciplinary powers by setting the fine at the upper limit of the range. Such a fine is extremely unusual in discplinary proceedings, so it appears as if the court aimed at skimming off the profit the unlawful fee agreement had generated.

[87] As explained earlier, the statutory prohibition of speculative fees s. 49b(2) only came into force in 1994 so that Hannah N.'s mandate pre-dated the professional duty not to enter into such agreements. The court therefore derived somewhat creatively a similar professional duty from the blanket clause in s.43 BRAO that requires a lawyer to „practise his profession conscientiously" and to „show that he/she is worthy of the respect and the trust that his/her status as Rechtsanwalt demands."

tional complaint.[88] The Federal Ministry of Justice, State Ministries of Justice, the Federal Supreme Court of Justice, the Federal Bar, the Federal Chamer of Tax Advisers, the Federal Chamber of Chartered Accountants, the Federal Chamber of Patent Lawyers, the Federal Centre of Consumer Organizations, the Federation of German Industries and the Association of German Chambers of Commerce and Industry unanimously took the view that the prohibition of speculative fee arrangements was constitutional and in the best interest of the administration of justice, clients and the profession itself.[89] Only the German Bar Association, the voluntary member organization of German lawyers, took a different view. It argued that the prohibition was disproprotionate as a congruence of the interests of lawyer and client was an intrinsic element of any retainer and not only an issue when the lawyer was paid a speculative fee.[90]

2. The Court's reasoning

In its judgement, the court came, in a first step, to the conclusion that the prohibition of speculative fee agreements interfered with the occupational freedom guaranteed by GG art.12(1) as it prevented lawyers from making their remuneration dependent on a condition – the success of their services – agreed with their clients. More specifically, the court identified that the prohibition affected the freedom of practice of a profession (as opposed to the freedom of choice of a profession)[91] as this freedom also includes the right to bargain for one's remuneration.[92] While the infringement of the basic right by BRAO s.49b(2) was pretty obvious and not disputed by anyone, whether or not the infringement could be justified on constitutionally acceptable grounds was less clear.

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[88] The Constitutional Court's Code of Procedure (Bundesverfassungsgerichtsgesetz – BVerfGG) requires the court to invite stakeholders to submit their views on constitutional complaints (BVerfGG s.94). The court often sends out a list of specific questions. The professional organizations of lawyers (the German Federal Bar as the umbrella organization of the 28 regional bars in Germany and the German Bar Associaiton as the voluntary membership organization of the profession) usually submit comprehensive and thoroughly researched assessments written by specialized committees.

[89] The Federal Constitutional Court's decision provides a short summary of all submissions by stakeholders, see Bundesverfassungsgericht, supra note 72, paras 32 – 55. For the full text of the German Federal Bar's submission, see http://www.brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2005/september/stellungnahme-der-brak-2005-23.pdf

[90] For the full submission, see Deutscher Anwaltverein, Stellungnahme 55/2005, www.anwaltverein.de

[91] This distinction is important as the more fundamental free choice of profession enjoys more comprehensive constitutional guarantees than the free exercise of a profession. Or to put it differently: The lawmaker can more easily justify an infringement of the free practice of a profession than an infringement of the free choice of a profession (the landmark ruling is Bundesverfassungsgericht June 11, 1958, Case1 BvR 596/56 = BVerfGE 7, pp. 377). For the lawyers' profession it means, for example, that rules on the admission to the bar have to pass a stricter test of constitutionality than rules relating to the practice of the profession, e.g. on advertising or remuneration.

[92] Supra note 72 para 59.

Under German constitutional law, any infringement of GG art.12(1) guarantee of free practice of a profession can be justified on constitutional grounds if it is based on a law, serves a common good and is proportionate.[93] As the constitutional court cannot place itself in the position of the lawmaker, it has to respect a wide margin of discretion by the legislator when assessing the common good.[94] Therefore, the court is constitutionally required to accept any common good considered by the legislator, unless its consideration was so apparently wrong that it cannot reasonably be a basis for an infringement of the basic right in question and a subsequent assessment of its proportionality.[95] Within this legal framework, the Federal Constitutional Court analyzed BRAO s.49(1).

The court accepted three common goods as legitimate justifications for an infringement: Safeguarding the lawyer's independence, client protection and equality of opportunities of parties in a court proceeding. One common good traditionally brought forward to justify BRAO s.49(2) is the protection of the lawyers' independence as this is an important requirement for the functioning and status of lawyers in the legal system. Another legitimate aim is the litigant's protection from being charged excessive fees. This is seen as a reflection of consumer protection and also strives to sustain the population's trust in the profession's integrity. Additionally, the prohibition of speculative fees protects the equality of opportunities in court proceedings. The rule of law (GG art.20(3)) and the principle of equality (GG art.3) provide inter alia for equality of opportunities of the parties before a judge. All other reasons of public good traditionally brought forward to justify a prohibition of speculative fees did not withstand the court's scrutiny.[96]

In a next step, the court then measured those legitimate aims against the test of proportionality and checked whether or not the prohibition was suitable, necessary and adequate to protect the common good as envisaged. Respecting the legislator's wide margin of discretion, the court found the prohibition to be suitable and necessary to protect the public goods of lawyer independence, consumer protection and equality of opportunities. However, the Federal Constitutional Court held that BRAO s.49b(2) was inadequate in some respects. Generally, an infringement of a basic right is only adequate (also called proportionate in a narrower sense), if a balancing off of the conflicting interests that need to be taken into consideration shows that

[93] Ibid. para 60.
[94] Ibid. para 64.
[95] Ibid. para 64.
[96] From the court's point of view, keeping away speculatively funded cases from the court system was no constitutionally relevant common good as under the rule of law access to court must not be impeded by the state. As speculative funding leaves the cost-shifting principle of German law untouched and the risk of remaining unpaid incentivizes careful selection of cases by a lawyer, the court saw no basis for the assumption that speculative fees encourage frivolous litigation, ibid. para 71.

the interest protected by the law infringing the basic right outweighs the individual's interest protected by the basic right in question.[97]

While in general the prohibition of speculative fees was found to be adequate in a constitutional sense, the court criticised that there was no opening clause for exceptional cases like the one that had led to the constitutional complaint[98]: In a situation where a client has no means, is not entitled to legal aid and has no insurance cover, a speculative fee can be the only option for funding the services of a lawyer and alleviating the risk that a person with a legal need is denied access to justice with the result that one's individual rights cannot be pursued. The court pointed out that such a situation cannot only arise for indigent clients. As legal aid is subject to a stringent means test, applicants can be denied legal aid if they are not - in a legal sense - poor enough to qualify but nevertheless do not have sufficient means to readily fund a lawyer or litigation out of their own pocket. They might therefore refrain from pursuing their rights as they are deterred by the financial risk.[99] This problem, the court pointed out, was not limited to private individuals, but also extended to businesses: The court referred to research that every year in Germany claims of a total value of up to 6bn Euro are not pursued by businesses because of the cost risks involved.[100] It went out to highlight that neither before-the-event litigation insurance nor after-the-event litigation funding can fully eliminate costs barriers as insurance not only requires a continuous investment, but is also not available for all areas of law and all types of disputes.[101] Commercial litigation funding, on the other hand, is limited conceptually to a relatively small percentage of claims that have a relatively high chance of a sizeable monetary award.[102] The court also referred to the empirical evidence that a significant percentage of lawyers was willing to enter unlawfully into speculative fee agreements[103] and interpreted this as proof that there was a need for this type of funding concept. Summarizing, the court came to the conclusion that in some cases the well-intentioned protection of common goods by BRAO s.49b(2) actually hindered access to justice. Because of that, the court characterized BRAO s.49b(2) as "dysfunctional"[104] and blamed the lawmaker for having created, although with the best of intentions, a prohibition that indirectly regulates access to justice subject to the financial means of an individual.[105]

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[97] Ibid. para 60.
[98] Ibid. para 95.
[99] Ibid. para 100.
[100] Ibid. para 101.
[101] Ibid. para 101.
[102] Ibid. para 101.
[103] Supra note 63.
[104] Ibid. para 104.
[105] Ibid. para 104.

Taking the analysis under constitutional law further, the court reasoned that it would not be adequate in a constitutional sense to allow the common goods of protecting the lawyer's independence, the client's interests not to pay excessive fees or the equality of opportunites to take precedence over the common good of access to justice.[106] The court dispelled some of the concerns often brought forward against speculative fees by explaining that duties to supply information or a specific test of reasonableness, but also the well-established principles of lawyer liability and criminal accountability for overcharging[107] would allow to minimize the risks traditionally associated with a speculative fee.[108]

Therefore, the Federal Constitutional Court found s.49b(2) to be unconstitutional insofar as it also prohibited a speculative fee agreement in a situation when such an agreement would guarantee access to justice for the client.[109] The court set an 18 month time limit for the lawmaker to change the law accordingly.[110] It pointed out that the lawmaker could take a minimalistic approach by keeping a general prohibition of speculative fees by simly adding an exemption clause, but was also free, as a matter of policy, to abolish the prohibition completely.[111] The court did stop short of making an outright recommendation in order to respect the separation of powers, but it did little to hide its belief that most of the arguments brought forward against speculative fees were unconvincing. The court provided, however, guidance relating to some specific issues: It took the view that there was only a gradual difference between a contingency fee style agreement and a simple "no win no fee"-agreement so that prohibiting the former while allowing the latter was no option for the lawmaker.[112] The court also pointed out that keeping the prohibition for areas of law in which the services of the lawyer usually do not generate funds that in turn can be used to pay him – e.g. in criminal, family or public law where most disputes are of a non-monetary nature – would be a policy option for the lawmaker.[113]

IV. The reform debate

1. The profession's expectations

As the Federal Constitutional Court's decision gave the lawmaker considerable leeway to rewrite the prohibition of speculative fee agreements, an empirical study conducted in spring

[106] Ibid. para 101.
[107] Ibid. para 89.
[108] Ibid. para 102.
[109] Ibid. para 110.
[110] Ibid. para 111.
[111] Ibid. para 110
[112] Ibid. para 108.
[113] Ibid. para 110.

2007 sought to evaluate the profession's view on this policy issue. The study was part of the bi-annual "Professional Regulation Barometer", an omnibus study that explores the profession's view on a wide range of policy issues relating to the lawyers' profession. In that study, the respondents were asked which decision by the lawmaker they hoped for.[114] The answers revealed a sharply divided profession: 45% said they wished that the lawmaker would only allow speculative fees to the extent required for constitutional reasons, i.e. they were in favor of a general prohibition with an exemption clause only for access to justice cases.[115] 55 % were in favor of an abolishment of the prohibition.[116] 80 per cent of those were happy if that also included damages-based agreements, while 20 per cent would have preferred if such agreements continued to be prohibited and only simple no win no/less fee agreements became lawful[117] (such a distinction was, as the Federal Constitutional Court had clarified, not an option for the lawmaker[118]).

When asked whether or not they were willing to enter into speculative fee agreements in suitable cases in the future, 36 per cent of the respondents said that they were likely to abstain from entering into such an agreement.[119] The remainder was more welcoming to the looming changes: 30 per cent said they would be open to such an agreement at the request of a prospective client's, 24 per would suggest a speculative fee proactively and 10 per cent in both cases[120]. Compared to the 2005 study, there was literally no change in the attitude towards speculative fees.[121] The research also corroborated the earlier findings that lawyers working mainly for commercial clients were more open to speculative fees: 64 per cent of them favored a complete abloishment, but only 40 per cent of those with a majortiy of private clients. Another interesting finding was that the more specialized lawyers were more open to speculative fees: Only 30 per cent of accredited specialists said they would not enter into speculative fee agreements, compared to 44 per cent of non-specialists. This was an early indication that specialized lawyers generally are more confident to be able to do an reliable risk assessment.[122]

2. The policy debate

[114] Hommerich/Kilian, Berufsrechtsbarometer 2007, Essen 2007, pp. 41.
[115] Ibid., p. 43.
[116] Ibid.
[117] Ibid.
[118] Supra note 72, para 108.
[119] Ibid. p. 43
[120] Ibid.
[121] Supra note 63.
[122] Supra note 114, p. 43.

In fall 2007, both the German Federal Bar (Bundesrechtsanwaltskammer - BRAK) and the German Bar Association (Deutscher Anwaltverein- DAV) published proposals how the law-maker should, from their view, regulate speculative fees in the future.

The German Bar Association came forward with a proposal in August 2007.[123] It suggested to amend BRAO s.49(2) to an effect that speculative fee arrangements would have remained unlawful in principle, but been permissible depending on the circumstances of an individual case, particularly but not exclusively if such an agreement guaranteed access to justice.[124] The German Bar Association's proposal therefore was a compromise between abolishing the prohibition completely and only allowing speculative fees to guarantee access to justice. It also discussed whether certain areas of law should be excluded, but came to the conclusion that there were no clean-cut areas of law in which speculative fees could not improve access to justice.[125]

The German Federal Bar published its proposal in September 2007.[126] It suggested a minimalistic approach not going beyond what the Federal Constitutional Court had identified as the minimum constitutional requirements.[127] The BRAK proposed to make speculative fees lawful provided that, based on subjective information submitted by the client on his economic situation[128], only such an agreement would allow the client to afford the services of the lawyer.[129] In case of a partial success, the client should be under an obligation to pay the statutory fees (but not more than the monies received).[130] The proposal did not exclude certain areas of law.

V. The regulation of speculative fees

1. The relevant body of law

Following a draft published by the Ministry of Justice in October 2007, the government tabled a bill of a "Law for the Revision of the Prohibition of Speculative Fee Agreements" in De-

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[123] Deutscher Anwaltverein, Stellungnahme Nr. 39/2007 des Deutschen Anwaltvereins zum Gesetzesvorhaben des Bundesministeriums der Justiz für eine Änderung des strikten Verbots der Vereinbarung eines Erfolgshonorars, § 49b Abs. 2 BRAO aufgrund der Entscheidung des Bundesverfassungsgerichts, Beschluss vom 12. Dezember 2006 - 1 BvR 2576/04.
[124] Ibid. pp. 6.
[125] Ibid. pp. 7.
[126] Bundesrechtsanwaltskammer, Vorschlag der Bundesrechtsanwaltskammer zur Neuregelung des anwaltlichen Erfolgshonorars, available at http://www.brak.de/w/files/stellungnahmen/GV_Erfolgshonorar-2007.pdf
[127] Supra note 126, p. 6.
[128] The BRAK stressed that the information submitted by the client prior to entering the agreement should be binding to guarantee that the client cannot influence the lawfulness of an agreement by submitting different information at a later stage to void the agreement, ibid. p. 10.
[129] Ibid. pp. 9.
[130] Ibid. p. 11.

cember 2007. It was a combination of the proposals of the German Bar Association and the German Federal Bar. After expedited parliamentary proceedings the bill passed the first chamber of parliament (Bundestag) on April 25, 2008 and the second chamber (Bundesrat) on May 23, 2008. It came into force on July 1, 2008. BRAO s.49b(2) was slightly re-written by adding an exemption clause as required by the Federal Constitutional Court's ruling: "Agreements under which remuneration or the amount of fees depend on the outcome of the case or on the success of the Rechtsanwalt's work or under which the *Rechtsanwalt* keeps a part of the award made by the court as a fee… are not permitted, *unless the Lawyers' Remuneration Act provides otherwise*."[131] The exemption itself was regulated in a new section in the Lawyers' Remuneration Act.[132] RVG S.4b reads:

> "*A speculative fee agreement can be entered into for an individual case if the client would be, from the perspective of an average prudent individual, denied the pursuit of his/her legal rights because of his/her economic situation. For court proceedings, the payment of an amount less than the statutory fees in the event of an unsuccessful outcome can only be agreed if for the event of a successful outcome a reasonable uplift to the statutory fees is agreed.*"

Compared with the proposals of the professional organizations, the lawmaker thus opted for an in-between solution. The exemption clause is not as far reaching as the proposal of the German Bar Association, but more flexible than the proposal of the German Federal Bar.

2. Substantive Legal Requirements

a) Speculative Fee Agreements and "Guaranteeing Access to Justice"?

The draft bill of the Ministry of Justice did not limit the lawfulness of a speculative fee to access to justice scenarios, but more generally to "specific circumstances of the case".[133] This wording was changed by the Legal Committee of the parliament that criticized the draft bill for going beyond the requirements of the Federal Constitutional Court's decision without reason.[134] The rationale behind the last minute change became apparent in the plenary discussion when a couple of members of the parliament explained the change with a rather crude analysis

[131] According to the wording of s.49b (2) sentence 1, the prohibition only concerns "agreements" between the lawyer and the client. Not affected by the prohibition are therefore output-based statutory fees (e.g. a fee granted by law for the participation of a lawyer in a settlement) or non-bindung promises by a client to pay the lawyera reward in the event of success.
[132] Supra note. 5.
[133] Referentenentwurf des Bundesministeriums der Justiz eines Gesetzes zur Neuregelung des Verbots der Vereinbarung von Erfolgshonoraren, published October 18, 2007.
[134] BR.-Drucks. 6/1/08, p. 1 (Printed Matters of the Second Chamber of Parliament, Nr. 6/1 for 2008),

of the proverbial "Amerikanische Verhältnisse" [135], the (alleged) effects of contigency fees on litigation culture in the United States. The Ministry of Justice argued against a change of wording[136], but was unsuccessful. Nevertheless, the wording that ultimately entered into force is a typical compromise: The reference to "refraining from the pursuit of legal rights for economic reasons" at second glance allows a much more liberal interpretation of the exemption clause than initially thought. Commentators quickly suggested that in practice much depends on the creativity of lawyer and client to come up with an explanation why the client would not pursue his rights if forced to pay a fee regardless of the outcome of the matter.[137] It has been suggested, for example, that following a risk analysis businesses understandably often decide against litigation because of the overall costs that can result from a negative outcome, but would be more inclined to start litigation if at least no costs for the own lawyer are at stake.[138] Such a scenario has little in common with the "Hanna N." case decided by the Federal Constitutional Court, but is a typical application of the exemption clause – and there has been no case law so far that would conflict with this interpretation of the statute.

One major concern of the professional organizations during the deliberations about the reform was its potential impact on legal aid. Many lawyers were worried that in the future government could use the availability of speculative fees as an excuse to cut back legal aid and refer those with legal needs and no means to speculative funding instead, thus shifting the responsibility for guaranteeing access to justice to some extent from the public purse to the profession. During the parliamentary debate members of parliament adressed those concerns and committed their parties to not pit legal aid against speculative fees.[139] In 2013, the lawmaker clarified this issue by amending the Law on Advice and Representation for Citizens With Limited Means (Beratungshilfegesetz - BerHG).[140] As a general principle of state-funded legal aid in Germany is that an applicant must have no other reasonable alternative to obtain legal help, BerHG S.1(2) now explicitly stipulates that the services of lawyer working for a speculative fee are no such reasonable alternative an applicant can be referred to.

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[135] BT-PlPr 16/158, pp. 16708 (Plenary Protocols of the First Chamber of Parliament for the 158th session of the 16th legislative period).
[136] BT-Drucks. 16/8384, p. 24 (Printed Matters of the First Chamber of Parliament for the 16th legislative period, Nr. 8354).
[137] Kilian, Das Gesetz zur Neuregelung des Verbots der Vereinbarung von Erfolgshonoraren, NJW 2008, 1905, Neue Juristische Wochenschrift 2008, p. 1905, 1907; Kleine-Cosack, Kommentar zur Bundesrechtsanwaltsordnung, 6th ed. , Munich 2009, s.49 b paras 15, 31; Kleine-Cosack, Freigabe des Erfolgshonorars wider Willen, BB 2008, p. 1406, 1407; Blattner, Die output-basierte Vergütung - worauf es beim Erfolgshonorar ankommt, Anwaltsblatt 2012, p. 562, 564.
[138] Kilian, supra note 57, para 113.
[139] BT-PlPr 16/158, supra note 135.
[140] Gesetz zur Änderung des Prozesskostenhilfe- und Beratungshilferechts dated August 31, 2013 (BGBl I 3533).

b) Speculative Fee Agreements in Individual Cases

The emphasis put on speculative fee agreements for "individual cases" in s.4a(1) sentence 1, clarifies that it is neither allowed for a lawyer to generally accept cases on the basis of speculative fee agreement nor to agree with one client that all of his cases will be handled for a speculative remuneration.[141] This requirement also has practical ramifications for the way a lawyer can advertise his services and the fees he charges: If a lawyer wants to signal potential clients his willingness to accept cases on the basis of a speculative fee agreement, he must clarify that this will only be possible on the basis of a case-by-case assessment for those cases which meet the statutory requirements for lawful speculative fee agreements.[142]

c) Speculative Fee Agreements and Court Work

The rather complicated clause in RVG s. 4a detailing speculative fees for court work is owed to a distinctive feature of the regulation of lawyers' fees in Germany: While in general, the statutory fees are default in nature and only apply in the absence of a fee arrangement, in one scenario they are binding: According to BRAO s.49b(1) a lawyer can charge more, but must not charge less than the statutory fees for court work. The rationale of this requirement can only be understood when taking the German cost-shifting principles into consideration: Germany follows the "loser pays"-principle. The amount for which the losing party is liable is calculated based on the statutory fees. Agreeing to charge less than the statutory fees for court work would therefore results in a de facto speculative fee: If the outcome is a success, the losing opponent will pay the statutory fees as party/party costs despite an agreement between lawyer and client that the lawyer/client costs owed are less than the statutory fees. If the lawyer is allowed to pocket the party/party costs, he is effectively earning a success fee. To avoid this, the law prohibits to charge less than the statutory fees for court work. As an unfettered application of BRAO s.49b(1) would have it made impossible to do court work for a speculative fee once the reform law entered into force[143], RVG s.4a stipulates that by way of exception a lawyer may agree a success fee that falls short of the statutory fee provided that, as a trade-off, he will charge more than the statutory fee in the event of a successful outcome.

d) Speculative Fee Agreements vs. Litigation Funding

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[141] Mayer, Die Vereinbarung eines Erfolgshonorars nach §4a RVG n.F., Anwaltsblatt 2008, p. 473, 474

[142] Kilian, supra note 138 para 108. Some commentators argue that it is impossible to communicate the availability at all, e.g. Hänsch, Das anwaltliche Erfolgshonorar, 2008, p. 17; Vogeler, Das anwaltliche Erfolgshonorar, Juristische Ausbildung (JA) 2011, p. 321, 323. Given that lawyers are always required by law to set their fee depending on the circumstances of the individual case, such an argument would only be convincing if no price communiation at all would be regarded as lawful.

[143] See BT-Drucks. 16/8384, supra note 136, p. 14.

One concern of the lawmaker was to prevent lawyers from entering into the litigation funding business as a result of the Federal Constitutional Court's ruling.[144] BRAO s.49(2) was therefore further amended. The second sentence of the provision now reads: "Agreements under which the *Rechtsanwalt* takes on the obligation to cover court costs, administrative costs or costs incurred by other parties are not permissible." From the perspective of managing the risk to be liable for legal costs, speculative fee agreements are of limited value for a client particulaly in a litigation scenario: Litigation costs in Germany consists of three more or less equally sized cost pools: Fees (and expenses) of the client's own lawyer, court fees (including costs for taking evidence, e.g. expert witnesses)[145] and, because of the principle of two-way cost-shifting under German law[146], the costs of the opponent. None of these have to be met by the winning party, all have to be paid by the losing party.[147] A speculative fee agreement between lawyer and client under German law therefore covers only approximately one third of the overall cost risk of litigation. Other funding concepts are more comprehensive: Legal expenses insurance and commercial litigation funding cover all three cost pools, legal aid at least two of the three (one's own lawyer's costs and court fees).[148] The practice of contingency fee agreements in the United States shows that it is not unheard of that law firms also assume additional risks and are not just speculating on the firm's remuneration.[149] The lawmaker did not want German lawyers to go down that road and therefore strictly limited the scope of speculative fee agreements to the costs of the client's lawyer. Whether or not this (new) prohibition is constitutional is open to discussion as the case before the Federal Constitutional Court did not concern comprehensive litigation funding: Hanna N. needed representation by a

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[144] BT-Drucks. 16/8384, supra note 136, p. 11.

[145] Court fees, like the statutory lawyers' fees, are value-based and calculated according to a sliding scale. They are regulated in the Act on Court Costs (Gerichtskostengesetz – GKG), a federal law. Costs for witnesses and experts are regulated in a separate law, the Justizvergütungs- und entschädigungsgesetz (JVEG).

[146] The cost-shifting applies to all court proceedings with the exception of those in employment law courts (Arbeitsgerichte). This exception to the rule rests on the assumption that employees could be deterred from suing their employer if faced with the risk of having to meet the employer's legal costs as a result of an unsuccesful outcome.

[147] This principle is established in the Code of Civil Procedure (Zivilprozessordnung – ZPO). ZPO s.91(1) and (2) stipulates: „(1) The party that has not prevailed in the dispute is to bear the costs of the legal dispute, in particular any costs incurred by the opponent, to the extent these costs were required in order to bring an appropriate action or to appropriately defend against an action brought by others. The compensation of costs also comprises compensation of the opponent for any necessary travel or for time the opponent has lost by having been required to make an appearance at hearings; the rules governing the compensation of witnesses shall apply mutatis mutandis. (2) In all proceedings, the statutory fees and expenditures of the attorney of the prevailing party are to be compensated…." By way of reference, the cost-shifting principle as established in ZPO s. 91 for litigation under the Code of Civil Procedure also applies to other proceedings.

[148] For details, see Kilian, supra note 9.

[149] As in most scenarios the so-called „American Rule" applies under which party has to pay for the own lawyer regardless of the outcome of the matter, when entering into a contingency fee agreement there are usually only two cost pools at stake. Because of the high costs of pre-trial discovery , however, the overall costs can be much higher than under German law.

lawyer in an administrative proceeding. No court fees were payable by her and there was no legal basis for the administrative body to demand payment of legal costs in the event of Hanna N.'s application being turned down. Her financial predicament would have been much bigger if funding litigation instead of an administrative proceeding had been at stake.[150]

3. The small print: Formal requirements

In its 2006 decision, the Federal Constitutional Court had hinted at the problem that asymmetrical knowledge between lawyer and client can be disadvantageous for a client when entering into a speculative fee agreement.[151] The court had held, however, that this problem could not justify a prohibition of speculative fee agreements as establishing duties for the lawyer to provide sufficient information on all relevant issues to the client would be a less severe and thus more proportionate infringement of GG art. 12(1) by the lawmaker. The lawmaker followed up on those leads[152] by re-writing RVG s. 3a – a section that deals with remuneration agreements in general – and included a couple of rather detailed formal requirements in the new section of RVG s. 4a:

RVG s.3a (1) sentence 1 requires textual form pursuant to the German Civil Code (BGB) s.126b. Textual form means than an agreement can be made in writing, but also in electronic form or via telefax. As per RVG s.3a (1) sentence 2 the agreement has to be entitled "remuneration agreement" (or with a title of a similar meaning) and be visually separated from other agreements between lawyer and client (e.g. the powers of attorney).[153] Additionally, the lawyer has to inform the client that any fee exceeding the applicable statutory fee will not be refunded as damages or by way of cost-shifting.[154]

RVG s. 4a(2) and (3) establishes further formal requirements for speculative fee agreements. The agreement has to provide an estimate of the statutory fees that are hypothetically applicable in the case in question and the non-speculative fee for which the lawyer is willing to take on the case (if at all). The agreement also has to detail the event which will trigger the lawyer's entitlement to remuneration and outline how the speculative fee has been calculated by

[150] Commercial litigation financing as an alternative funding mechanism was not available on the German market until the late 1990s.
[151] Supra note 72, para 89.
[152] See BT-Drucks. 16/8384, supra note 136, p. 15.
[153] Feuerich/Weyland, Bundesrechtsanwaltsordnung, Commentary, 8th ed., Munich 2012, BRAO s.49b para 68b.
[154] Ibid, para. 68c

the lawyer.[155] Additionally, the agreement must give information that the client may remain liable for costs of courts, administrative bodies or opponents that may arise (RVG s. 4a(3)).

VI. The impact of speculative fees on the legal services market: Empirical Evidence

1. One year after: Interest by clients and incidence of agreements

In 2009, an empirical study analyzed the impact of the reform one year after speculative fees had become lawful.[156] The study, conducted in May 2009 with 1.400 practicing lawyers, explored how often lawyers entered into speculative fee agreements and how often they were asked by clients to provide services on that basis.

The findings suggested a limited impact in the months immediately after the reforms coming into force: In the first ten months after the reform, 80 per cent of all respondents had yet to enter into a speculative fee agreement under the new regulatory regime.[157] Those 20 per cent who had already signed such agreements were asked how often this had been the case. Of those, a quarter each had entered into just one or two such agreements. Only 24 per cent reported five or more such agreements, i.e. less than five per cent of all lawyers.[158] Assuming that a speculative fee can only be considered a relevant pricing tool in a law firm if it is used at least once a month (i.e. in the time-frame analyzed more than 10 times in total), only 0.6 per cent of all lawyer fell into that category.[159] Controlling the findings by gender, type of clients and law fim size showed significant variation: Female lawyers were less likely to enter into speculative fee agreements[160] as were lawyers with a high percentage of private clients and lawyers from smaller firms.[161] All of those findings hinted at a bigger impact of the reforms mainly in an area of the legal services market that had not been the primary concern of the Federal Constitutional Court: Business clients represented by larger firms. The finding that women were less likely to enter into speculative fee agreements was ambiguous: One explanation is that this reflects that female lawyers traditionally work in smaller firms and in areas of law in which the percentage of private clients is higher. Another explanation is that women lawyers are more risk averse than male lawyers and are less likely to take chances with their remuneration.

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[155] This requirement can be met by a short description of the underlying facts on which the agreement based; there is no need for a comprehensive legal assessment. It can suffice to state that there is no precedent for a relevant question of law, that evidence is scanty or that case like the one in question generally have limited prospects of success; see Kilian, supra note 57, para 112.
[156] Hommerich/Kilian, Berufsrechtsbarometer 2009, Bonn 2009, pp. 25.
[157] Ibid. p. 30.
[158] Ibid. p. 31
[159] Ibid. p. 30.
[160] Ibid. p. 31.
[161] Ibid. p. 32.

To find out if the limited incidence of speculative fee agreements was caused by a lack of interest of clients or an unwillingness of lawyers to work for a speculative fee, the responding lawyers were also asked how often prospective clients inquired into the availability of speculative fees. 46 per cent reported that there were no inquiries of that kind. 36 per said this was infrequently the case, 15 per cent occasionally and 3 per cent often.[162] The higher the percentage of business clients, the more often a lawyer was asked whether he was willing to work for a speculative fee.[163] Lawyers from national or international law firms were asked significantly more often about the availability of speculative funding of their fees (38 / 27 per cent often or occasionally) than lawyers from local firms or solo practitioners (23 / 14 per cent).[164] Overall, the findings showed that there was relatively little interest in speculative fees from the clients' side.

2. Three years after: Types of speculative fee agreements

In spring 2011, another empirical study looked into the impact of speculative fees, this time three years after the reform coming into force.[165] This study tried to identify the popularity of different types of speculative fees by asking 1.200 lawyers how often they used different types of speculative fee agreements.

As the Federal Constitutional Court had ruled that any kind of speculative fee should be permissible, all three standard models of speculative fees can be lawfully agreed in Germany: In a damages based agreement[166], the lawyer agrees to accept a fixed percentage (e.g. one third) of the recovery. Under such an agreement, not only the „if" of a lawyer's remuneration depends on the result of his work, but also the amount of his remuneration. Under a „no win no fee" agreement, the lawyer will forego a time based fee, a flat fee or the statutory fees if his services are unsuccessful. In a „no win less fee" agreement, the lawyer will charge a lower time-based or flat fee or reduced statutory fees if he is unsuccessful and more if he is unsuccessful.[167]

Three years after the reforms, 71 per cent of all respondent had not entered into a „no win, less fee" agreement", 84 per cent not into a „no win, no fee" agreement and 87 per cent not

[162] Ibid. p. 28.
[163] Ibid. p. 29.
[164] Ibid. p. 29.
[165] Kilian, Berufsrechtsbarometer 2011, Essen 2011, pp. 27.
[166] „Contingency fee" is the standard US terminology, „damages based agreement" is terminology used in England and Wales.
[167] „Conditional fee" is the generic term for „no win, no fee" and „no win, less fee" agreements in England and Wales.

into a damages-based fee agreement.[168] Of those relatively few with some experience with speculative fees, three quarters said they used them infrequently. Only 2 per cent said that they used „no win, less fee“ agreements often, 4 per cent „no win no fee agreements“ (and nobody contingency fees).[169] All three types of speculative were used more often the higher percentage of business clients and the bigger the size of the law firm.[170] Controlling by specialization showed that non-specialized lawyers were less likely to use speculative fees than specialized lawyers.[171]

3. Five years after: Reasons for limited use of speculative fees

Based on the earlier results that three years after speculative fees agreements becoming lawful in Germany they were still relatively seldom entered into, a further empirical study analyzed the reasons for those findings.[172]

In a study conducted in spring 2013, 800 lawyers were asked why they did not enter into speculative fee agreements more often. Based on anecdotal evidence, a couple of possible reasons were suggested and the respondents were asked to benchmark them on a scale from "1 = very true" to "5 = not true at all". With a value of 2.1, "clients are not asking for speculative fees" received the biggest approval rating (45 per cent this was very true, only 8 per cent that it was not true at all).[173] The next important reason is, based on the experience of the respondents, the unwillingness of clients to pay an uplift in the event of a successful outcome (2.6).[174] The legal requirement that without a speculative fee agreement the economic situation of the client would deny him the pursuit of his legal rights was of slightly lesser importance (2.8).[175] The least important reason is the refusal of a lawyer to work for a speculative fee as a matter of principle (3.1).[176]

Once again, the data showed that the most significant effect on the use of speculative fees was the client structure: Lawyers with a higher percentage of business clients reported a lack of requests for such an agreement significantly less often than lawyers mainly working for pri-

[168] Supra note 165, p. 32.
[169] Ibid. p. 33.
[170] Ibid. p. 34.
[171] Ibid. p. 35.
[172] Kilian, Berufsrechtsbarometer 2013, Essen 2013, pp. 31.
[173] Ibid, p. 41.
[174] Ibid, p. 38.
[175] Ibid, p. 39.
[176] Ibid, p. 39.

vate clients.[177] An interesting detail is that older lawyers are less often asked to work for a speculative fee than younger lawyers (50 years and older: 72 per cent (very) true / up to 50 years: 60 per cent (very) true). [178] This suggests that clients are more reluctant to expect a more experiencied lawyer to forego his remuneration if he is unable to complete the case successfully, probably because of his greater professional authority. The data also revealed that business clients appear to be much more appreciative of the economic necessity that a lawyer must charge an uplift to his regular fee in case that he is successful when entering into an agreement that carries the risk to provide services without a financial return. Only 29 per cent of lawyers who are working almost exclusively with business clients say that the unwillingness of clients to pay an uplift is a reason for not entering into speculative fee agreements – but 50 per cent of those who have a majority of private clients.[179] Also, the less formal expertise a lawyer has to offer, the less willing are clients to pay an uplift: 55 per cent of non-specialized lawyers say this is true or very true, but only 37 per cent of those who are highly specialized as specialists for the legal needs of a specific target group in certain areas of law.[180]

VII. Concluding Remarks

The introduction of speculative fees to the German legal system was, like many reforms before, not policy driven, but the result of a ruling of the Federal Constitutional Court.[181] Once again, the Federal Constitutional Court demonstrated that the traditional driver for regulatory change in matters concerning the lawers' profession is not the legislative branch, but the judiciary.[182] The decision by the Federal Constitutional Court is typical for the reactive nature of lawmaking in Germany as far as the law of legal profession is concerned. This contrasts with a more proactive approach other jurisdictions, most notably England and Wales, have taken over the past two decades.

Despite the best efforts of the Ministry of Justice to pave the way for more far reaching reforms of the prohibition of speculative fees, the lawmaker opted for a minimalistic approach - not least because the professional organizations were not supportive of more far reaching changes. As a result, the traditional prohibition was not abolished, but merely eased. Techni-

[177] Ibid, p. 38.
[178] Ibid, p. 41.
[179] Ibid, p. 42.
[180] Ibid, p. 43.
[181] While politicians tend to blame the court for acting like a substitute lawmaker, the court sometimes expresses ist exasperation about the poor quality of lawmaking by the legislative branch. See, for example, Kampen/Limbach (ed.), Der Richter als Ersatzgesetzgeber: Im Bundesverfassungsgericht in Karlsruhe, Baden-Baden 2002.
[182] Other examples are decisions on lawyer advertising, limited rights of audience, impertinent behaviour of lawyers, legal aid for legal advice, limited lawyers' companies of lawyers and patent attorneys or on the right of lawyers to exercise another profession in parallel with being a lawyer.

cally, speculative fees are still unlawful except under certain conditions. Nevertheless, the solution found is to some extent rather far-reaching: There is neither a restriction to certain types of speculative fee nor are certain areas of law excluded from the scope of the reform introducing speculative fees to the German legal system. On the other hand, speculative fee agreements are lawful only in those cases where they are entered into to guarantee the client access to the services of his lawyer and are in conformance with a number of formal requirements. The wording of the exemption clause, however, means that in legal practice the scope of speculative fee agreements is not limited to access to justice scenarios as clients do not need to pass a means test. An unusually high cost risk, limited chances of success or a lack of precedent can deter even those who cannot be regarded as indigent from pursuing their legal rights. They now have the option to enter into a speculative fee agreement – and those who could potentially use alternative funding mechanisms like an insurance, commercial litigation or legal aid are not denied to enter into a speculative fee agreement as the lawmaker has not designed such fee agreements as a "last resort". That those who have access to other funding mechanisms will usually opt against speculative fees is the result of the decision of the lawmaker that a lawyer may only speculate on his own remuneration, but cannot lawfully agree to assume court fees or the opponent's fees should his services be unable to render a positive outcome. At least for court work of lawyers, cost-shifting principles mean that other funding mechanisms, such as legal expenses insurance or commercial litigation funding, cover more potential costs – a competitive disadvantage speculative fees cannot compensate. On paper, they may therefore be more attractive for non-contentious work than for contentious work, i.e. in areas of legal practice where no court fees need to be paid, where there is no risk of liability for the opponent's costs as a result of cost-shifting rules and where alternative funding mechanisms are not as readily available as for court work.[183]

Before that background, it is not surprising that speculative fees have not make significant inroads into the German legal services market so far. Only a minority of German lawyers use them and if so, only very infrequently. There are hardly any lawyers who use speculative fees systematically as a pricing tool. Those who have no anxieties are more open to the (from a lawyer's perspective) least hazardous type of speculative fee, a no in less fee agreement, while damages-basd remuneration is the least popular. This is not mainly because lawyers have refused to adapt to the new regulatory regime as a matter of principle of professional self-esteem: The most important reason is that clients do not ask for speculative funding of

[183] Legal aid for advice and representation and legal expenses insurance only provide limited coverage for non-contentious cases.

legal services. No research has been carried out so far to identify the reasons for this reluctance. One reason could simply be a lack of knowledge as, because of the existence of a Lawyers' Remuneration Act, the matter of paying for one's lawyer's service can be rather complex. While lawyers' are, by law, under a duty to inform clients who would likely qualify for legal aid about this type of funding, lawyers are under no general professional duty to inform about all different types of funding that are potentially available on the legal services market. It is therefore up to the client to ask for and not to the lawyer to offer funding by way of specualtive fees.

Probably the most interesting development since the introduction of speculative fees has been the limited uptake by those who were the prime concern of the Federal Constitutional Court – and the popularity of those fees with others that were not on the radar of the court. While speculative fees had to be legalized to improve access to justice for those who would not have access to a lawyer without such a funding mechanism, i.e. private individuals without means to fund legal services, lawyers mainly serving this clientele are among those who make the least use of speculative fees. The fact that the scope of the reform law is somewhat broader than the constitutionally required minimum has resulted in speculative fees being particularly popular with business clients and larger law firms. They make use of the new pricing opportunities more often than small firms mainly dealing with private clients. In large firms, a speculative fee is typically used as a pricing model than as a funding mechanism as business clients usually have access means to funds to pay for the services of a lawyer when necessary. For them, a speculative fee is more about incentivizing and rewarding good work like it is common practice also when dealing with other service providers. For those in need of a funding mechanism, the limited interest in speculative fees is only surprising at first glance. It can easily be explained by the fact that for clients a speculative fee often will be a last resort as it is, unlike, in other jurisdictions, not a comprehensive funding concept, but merely covers a third of the costs typically associated with litigation. In a litigation scenario, legal expenses insurance that many Germans have, legal aid or commerical litigation funding are the more attractive options. Speculative fees are therefore in theory more attractive for non-contentious work where the main risk are the costs of the own lawyer. The existence of value-based statutory fees that are not binding, but de facto widely used in cases involving private clients instead of time-based billing, make it more affordable in many cases to pay fees regardless of the outcome without diminishing the award. As the scope for legal aid for advice and representation is rather limited, speculative fees for that type of work offer very little cost-aving potential. What appears to be even more significant is that a significant percentage of clients

would only be happy with a speculative if it did not involve an uplift compared to the non-speculative-fee of the lawyer. That clients appear to have difficulties appreciating and accepting the economic model behind speculative fees is most likely not an issue in Germany alone. But the problem may very well be exercabated by the existence of statutory fees as the traditional remuneration model as these are only loosely linked to the economics of an individual case. Limiting access to legal aid by refering those with legal needs to speculative funding would most likely result in a reduction of access to justice: Because of the limited coverage of the relevant cost pools by speculative fees and the apparent unwillingness of many client to pay an uplift, those with a legal would often rather not pursue a legal claim if their funding options were limited to a speculative fee. The German lawmaker therefore anticpated the problem correctly by committing government not to make the availability of speculative fees a criterion for refusing a person legal aid. Overall, the development in Germany shows that the introduction of speculative fees has had little impact on the legal services market so far and has not negatively affected legal aid.