Berlin, 8th of March 2024

Statement
of the Legal Tech Association Germany

On the evaluation of the law to improve consumer protection in debt collection law by the Federal Ministry of Justice (Az. 752522#00002#0008)

The Legal Tech Association Germany (hereinafter referred to as the "Association") is committed to creating a progressive and innovation-friendly regulatory environment that creates legal certainty for legal tech companies within and outside law firms. We would like to thank you for the opportunity to participate in this evaluation.

1. Background

The Federal Ministry of Justice (BMJ) is currently conducting an evaluation of the Act to Improve Consumer Protection in Debt Collection Law, which came into force in October 2022.

The reason for the evaluation is the request made at the time by the Committee on Legal Affairs and Consumer Protection of the German Bundestag to evaluate the law after two years, in particular on the question of "whether the reduction of collection costs to an appropriate level, which was the main aim of the draft law, has been achieved without significantly impairing the economic basis for the activities of debt collection service providers" (cf. BT-Drs. 19/24735 of 25.11.2020, p. 12, No. I. 1.).

In a letter dated September 27, 2023, the BMJ gave the justice and consumer protection ministries of the federal states and the associations the opportunity to comment on the above-mentioned question as well as on other aspects of the above-mentioned law. Specific questions were asked, which differed depending on the recipient. The Legal Tech Association Germany was asked to comment on the remarks made by the German Bar Association (DAV) and the Federal Bar Association (BRAK); these in turn were asked to focus on the following questions in their comments: (...) The German Federal Bar Association (BRAK) and the German Bar Association (DAV) had already suggested in another context that the scope of application of

paragraph 2 of number 2300 of the Schedule of Fees under the RVG should be limited to contractual claims on the one hand and to claims against consumers on the other. In this respect, BRAK and DAV are requested to provide a more detailed description (if possible also supplemented by examples of cases and existing case law) of the problems resulting from the current legal situation from their point of view.

2. Comments of the BRAK

As far as can be seen, the DAV has not (yet) issued a statement. The BRAK, on the other hand, commented on a number of specific fee law issues as well as general questions in its Opinion No. 4/2024 of January 2024. In doing so, it recalled its previous protest against the new regulation, which the legislator had ignored. It has now expressed its "great request to the legislator" to "reconsider the regulations in their entirety". Essentially, the BRAK is seeking to revoke the extension of the authority to collect debts as a result of the case law of the Federal Court of Justice and the law to be evaluated. The argument put forward is that the new regulation weakens the position of the legal profession, leads in many cases to problems of demarcation that are difficult to overcome and also has a negative impact on consumer protection.

3. Demands of the Legal Tech Association Germany

Our demands at a glance:

- The current regulation of debt collection authority must be retained, as it creates more legal certainty for consumers and providers of debt collection legal services than before.

- The nullity consequence of exceeding the authority to collect must be eliminated or adapted to the case law of the Federal Court of Justice (see BGH, judgment of 27.11.2019 - VIII ZR 285/18, NJW 2020, 208, 218 para. 90 (Lexfox/wenigermiete I). This is because the commissioning of legal service providers is still subject to the sword of Damocles of Section 134 BGB if complex legal risks materialize that are not comprehensible to legal laypersons. The differentiated handling of the BGH is hardly taken into account in practice. This is a burden for consumers, as they lose rights due to circumstances that they themselves were unable to understand or incorporate into their risk management.

However, if this also had the consequence of making the constitutionally protected activity of debt collection service providers more difficult by means of this threat, this would constitute disproportionate interference.

- The extrajudicial legal service authorizations of non-lawyer legal service providers must be extended beyond the catalog in Section 10 RDG (the facilitations already granted in Sections 6 et seq. RDG must be retained or adapted to the extension). This is because the catalog of Section 10 RDG is a collection of different activities that have nothing to do with each other and can only be understood historically. In view of the constantly growing influx of legal tech legal service providers, there is an irrefutable need among consumers for low-threshold legal advice services and products alongside or below the legal profession. This need is not being met by the legal profession, which in turn is economically understandable in view of the often low amounts in dispute. Neither the BRAK nor the DAV offer a solution to this shortfall on the part of the legal profession, although their aim is to eliminate these alternative service providers. As a result, access to justice would deteriorate considerably if the alternative service were to be eliminated.

4. Explanations

In addition to the reasons given in the demands, we explain our demands and proposals as follows:

a) Legal Tech Legal Services Provider and Consumer protection

Non-lawyer legal tech legal service providers play an important role in the structure of legal services for consumers. As lawyers are prohibited under Section 49b (2) sentence 2 BRAO from offering consumers litigation financing models, only non-lawyer legal tech legal service providers can offer consumers legal services without cost risk ("no win, no fee"). However, the offer of such "free" legal services on the consumer legal market is absolutely essential for enabling the enforcement of all consumer claims. This is because non-lawyer legal service providers can only offer high-quality services on the "narrow-margined" con-

sumer rights market by leveraging efficiencies and pooling know-how. The necessary investments in technology are possible in particular because - unlike the legal profession - they can raise outside capital. The activities of non-lawyer legal service providers therefore serve to protect consumers. The BRAK's assertion to the contrary is without evidence and incorrect. In an expert opinion for the Federal Association of Consumer Advice Centers, which is certainly closer to the interests of consumer protection, it states the role of legal tech providers:

> Legal tech service providers fulfil a useful function in the enforcement of consumer law, where they cover areas that are not fully served by other actors, in particular the legal profession, arbitration, but also consumer organizations with their limited resources. Overall, customers - consumers and non-consumers alike - seem to be largely satisfied with the services, which is not to say that there have not been problems in individual cases.
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> (Rott, Verbraucherpolitischer Handlungsbedarf bei Legal Tech? - Gutachten vom 2.12.2023 für die "verbraucherzentrale Bundesverband" (vzbv), VII. summary, p. 75).

Despite the problems that arise in individual cases, which are highlighted in the report, the report does not propose a restriction of the debt collection permit, but rather complains that many courts of first and second instance do not follow the case law of the Federal Court of Justice in too many individual cases. The report also calls for the creation of legal certainty and clarity as well as an expansion of the areas in which legal tech legal service providers are permitted to operate.

> (Rott, Verbraucherpolitischer Handlungsbedarf bei Legal Tech? - Gutachten vom 2.12.2023 für die "verbraucherzentrale Bundesverband" (vzbv), p. 32, 34).

The problems addressed by the vzbv include, in particular, inadequate communication between providers and their customers. These communication problems, including a lack of explanation of decisions made by legal tech service providers, are not only found among non-lawyer legal service providers. Lawyers also regularly have to justify themselves to the chambers when clients contact the chambers with complaints about infringements under Section 11 BORA. Violations of Sections 11 and 12 BORA as well as violations of Section 43a (4) BRAO are among the most common client complaints. It would never occur to anyone to restrict the scope of section 3 BRAO because of such mistakes by lawyers. So if such issues also exist among legal service providers - exceptionally, as the expert opinion shows - then this is nothing that could justify an overall restriction of authority. The first conclusion to be drawn from this is that there are no consumer protection reasons for restricting debt collection powers. The opposite is the case. It is possible that many disputes about the scope of debt collection authorization arise precisely because there is no general non-lawyer legal service authorization, which

leads to a certain creativity in product design, but which has been approved by the BGH in several decisions of various civil divisions. A general non-lawyer authorization to provide legal services below the level of the legal profession would eliminate this.

b) Importance of claim assignment in case of override of income authorization

If a legal service provider acts outside of its authority, this is a violation of Section 3 RDG. This could even lead to the assignment of the claim to the legal service provider being null and void. Some scholars argue that the legal consequence of nullity is independent of the question of whether a service provider has intentionally or (slightly) negligently exceeded its authority, or whether it is a slight or far-reaching violation.

This means that the commissioning of a legal service provider is always risky for a consumer who knows or suspects nothing of the background, but is nevertheless the one who ultimately loses his rights because they are time-barred due to the void assignment. The BVerfG had already criticized this legal consequence of nullity without exception in its decision Inkasso I and in particular demanded that a nullity of the agreement under the law of obligations should not affect the assignment level. The BGH also agreed with this criticism in the Lexfox decision and stated:

> "This does not mean, however, that every - even minor - violation of the authority to provide debt collection services (Section 10 I 1 No. 1 RDG) always results in the nullity of the legal transactions based on the violation of the RDG in accordance with Section 134 BGB. Thus, there may be cases in which the violation of the authority to provide debt collection services is so minor that there is not even a violation of Section 3 RDG. In addition, there may be cases in which such a violation exists, but where, due to a constitutional interpretation and application of Section 134 BGB, the legal transactions underlying this violation cannot be assumed to be null and void for reasons of proportionality (cf. BVerfG NJW 2002, 1190 [1192]). (emphasis added)
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> (BGH, judgment of 27.11.2019 - VIII ZR 285/18, NJW 2020, 208, 218 marginal no. 90 (LexfoxI)

This differentiated view is often ignored by the case law of the courts or rejected on hardly convincing grounds (which are then overturned on appeal by the Federal Court of Justice).

> (Examples of case law in Rott, Verbraucherpolitischer Handlungsbedarf bei Legal Tech? - Gutachten vom 2.12.2023 für die "verbraucherzentrale Bundesverband" (vzbv), p. 31 ff.; Hartung, Inkasso und Forderungsabwehr - Überlegungen zum Inkassobegriff anläss-lich des Urteils des BGH vom 19.1.2022, VIII ZR 123/21, in LRZ vom 17.2.2022, Rn. 476 ff.).

If the authorization of non-lawyer service providers to provide legal services were to be extended, the problem of overstepping the law would not be solved, as there are also decisions in which courts rule that certain areas of law are not eligible for debt collection - an interpretation not covered by the wording of the provisions in question and thus a free judicial creation of law that bypasses the law. This dilemma for consumers can only be countered by deleting the consequence of nullity. On the contrary: legal service providers who act outside of their powers risk a fine from January 1, 2025 in accordance with Section 20 (1) No. 1 RDG. There are also competition law and other compensation risks. However, it is not clear that consumers are also being penalized. Therefore, there is no need for the nullity consequence, which would be less damaging for service providers than for consumers.

However, it would make sense - in view of the existing problems - to require special expertise from non-lawyer legal service providers with regard to the scope of the provisions of the RDG within the framework of Section 11 (1) RDG.

c) Relationship between lawyers and Non-Lawyers

The coexistence of the legal profession and legal tech service providers may lead to demarcation problems in individual cases. The BRAK has not substantiated this claim, but even if one were to assume it to be true, it would still be a matter of a few exceptions that in no way justify a restriction of the rights of non-lawyer service providers because it would be disproportionate. The fact that, once again, debt collection service providers are "allowed to do more" than lawyers is as correct as it is irrelevant, because conversely, lawyers are allowed to do considerably more than debt collection service providers.

This pretended equality by the lawyers' associations on the one hand, while at the same time complaining that debt collection service providers are "allowed more" in terms of success fees and ownership structure, is hypocritical: because the restrictions of the legal profession in terms of fees and ownership structure are homemade. The corresponding legal restrictions are in line with the express wishes of the DAV and BRAK, which already put up massive resistance when the authority to agree contingency fees was slightly opened up. The situation is similar with regard to the participation of non-lawyer partners for financing purposes ("prohibition of third-party ownership of law firms").

d) Restrictions of § 2 Abs. 2 RDG would be disproportionate

The BRAK's complaints about impairments to the legal profession are based on self-imposed restrictions that are ideological but not evidence-based. The concern about consumer protection is a pretext, as the expert opinion for the vzbv proves the opposite: according to this, a complete deletion or restriction of the authority is not necessary. It proposes individual tightening of the law with regard to communication between consumers and service providers.

However, if there is no evidence of systemic risks, on the contrary, minor corrections are sufficient, then it would not be justifiable in terms of proportionality to restrict rights. This is also and precisely because consumers clearly demonstrate their need through the numerous and constantly increasing use of existing services.

The extension of the authority of non-lawyer service providers by case law and legislators has led to consumer needs being better served than before. If this is the case, subsequent restrictions are not justifiable. Rather, it would be the task of the legal profession to provide itself with a professional law that enables it to meet current and future consumer needs itself.

5. Conclusion

The BRAK's statement is not convincing insofar as it calls for the debt collection authorization to be restricted again or even further in order to protect the legal profession. Consumer interests are better protected by the activities of legal service providers with a far greater understanding of their powers than vice versa. This is also evident from the aforementioned report by the Federation of German Consumer Organizations. As the name of the underlying law already implies, consumer rights are to be improved - and not restricted again. The use of the services offered on the market is the best indication that consumers feel that they are being met and that they are asserting rights that they would not otherwise have asserted (access to justice). Restricting non-lawyer service providers would therefore be disproportionate and unconstitutional. Furthermore, the BRAK's demand would largely cut off consumers' access to legal services without cost risk ("no win, no fee"). If protection of the legal profession is deemed necessary, this could be achieved much more efficiently by resolving or at least weakening the existing asymmetry of opportunities between the legal profession and non-lawyer legal tech service providers (for example in the area of litigation financing and third-party participation).

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