HAARMANN, HEMMELRATH & PARTNER

SOZIETÄT VON RECHTSANWÄLTEN, WIRTSCHAFTSPRÜFERN UND STEUERBERATERN

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The History of Deregulation of the German Legal Profession

What Lessons can be Learned as we Strive for Further Practice Liberalization in Japan ?

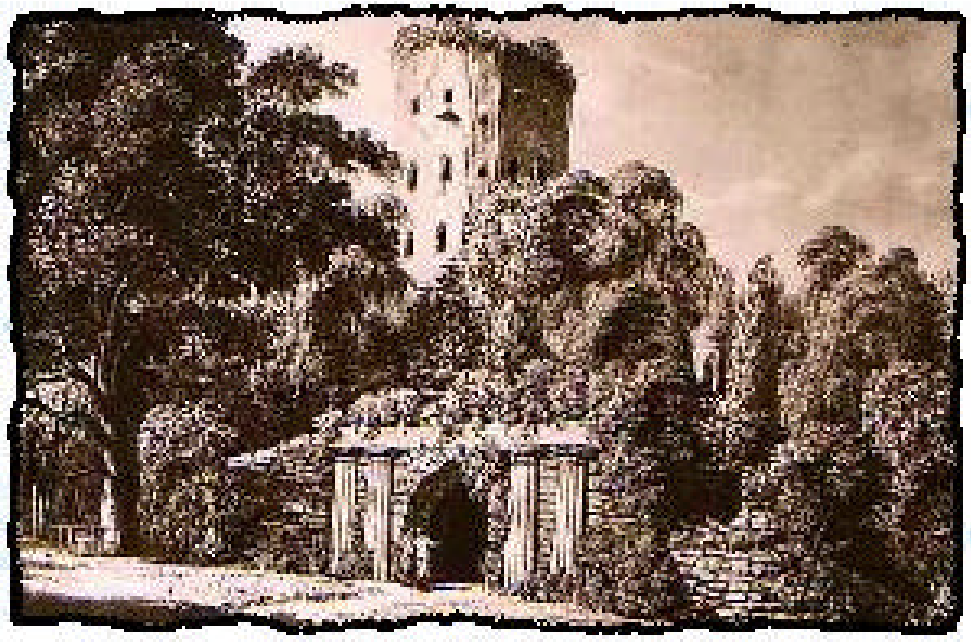
PART ONE

Back in the early ‘80s ...

German lawyers' everyday lives were quite calm ...

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

… and protected by numerous regulations and restrictions.



< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

The education of German lawyers was conservative ...

- Overemphasis on forensic training
- Consulting, drafting and negotiation skills were not taught
- No tax law and accounting training existed
- Management skills how to run a law firm were not developed

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

… and so was German lawyers working style.

- Focus on Litigation
- Lack of understanding of economical issues, little interdisciplinary knowledge
- Most lawyers worked as single practitioners, partnerships rarely consisted of more than 8-10 lawyers

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

German lawyers were subject to many restrictions

The establishment of **Multi-City-Partnerships** (MCP) was prohibited by guidelines drawn by the German Federal Bar Association

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

Restriction of Multi-City-Partnerships

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

German lawyers were subject to many restrictions

The establishment of **branch offices** was prohibited by the German Federal Bar Association

Lawyers were bound by a broadly applied **Principle of Localization** (Art. 78 Civil Procedure Act) and could only act before the municipal or district court they were admitted to

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

Principle of Localization

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

Traditional Legal Status of German Lawyers

Under the **Principle of Singularity** (Art. 25 of the Civil Procedure Act), lawyers admitted to municipal and regional courts were prohibited to act before appeal courts

German Lawyers were the quasi-exclusive holders of the right to deliver legal consulting services and to represent clients before courts (Art. 1 Lawyers Act, Art. 1 Legal Consultancy Services Act). Foreign lawyers were not allowed to practice in Germany. As a consequence, international alliances could not gain ground.

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Restriction of International Partnerships

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unich office)

< 1975	1977	1984	1987	1989	1994	1995	1998	2001

Consequences

- The Principle of Localization created a large number of small and isolated legal markets
- Due to a lack of competition these markets where overprotected and not forced to develop client oriented services
- Single practitioners could not satisfy the needs of corporate clients
- Small partnerships did not work economically nor were they very profitable (no leverage)

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

Consequences

- One-stop-shop service was an unknown concept
- Most lawyers were generalists and did not have a specialized knowledge in any particular legal field
- Only a small number of lawyers was qualified to handle complex business transactions
- Lawyers did not possess management or controlling skills and firms were poorly managed (simple income and expense accounting; no business plan, leverage concept unknown)

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

The German legal market was in need of deregulation

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

Such deregulation process was initiated by the European Community in 1977

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

Art. 43/47 Treaty of the European Economic Community (EEC-T, 1957)

- The **Freedom of Establishment** (Art. 43 EEC-T) is one of the five fundamental freedom rights stipulated in the EEC-T; freedom of establishment within the EU is thus a basic principle to assure the realization of the common market

- Art. 47 EEC-T prohibits any restriction of the **Freedom of Establishment** of nationals of a Member State by empowering the European Council to issue directives for the mutual recognition of diplomas etc.

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

European Council Directive 77/249/EEC (Freedom of Service Directive of 1977)

- The European Council Directive 77/249/EEC of March 22, 1977 entitled lawyers from EU Member States to temporarily represent clients in legal proceedings or before public authorities in another EU Member State subject to certain conditions

- Based on Art. 43, 47 EEC-T, the Directive 77/249/EEC facilitated the effective exercise of the freedom to provide legal services by EU lawyers in other Member States

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

European Council Directive 77/249/EEC: Consequences

- Lawyers from EU Member States were entitled to act as legal advisors (in questions related to the law of their own jurisdiction) in other Member States and temporarily represent their clients in another Member State before court
- After the Directive had been implemented into the German Legal Consultancy Services Act, foreign lawyers could enter the German legal market - but only to a limited extent

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

European Council Directive 77/249/EEC: Consequences

- EU lawyers or other foreign lawyers could not be admitted as lawyers or legal advisors in another jurisdiction without having passed the respective national bar exam, and ...
- EU lawyers or other foreign lawyers could not become members of local bar associations in another Member State

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

European Court of Justice “Klopp”- Case (1984)

- In the 1984 “Klopp”-Case, for the first time restrictions on bar admission where tested against Art. 43 EEC-T

- A German lawyer who was practicing in Germany and was qualified to be admitted in France, was refused admission to the bar in Paris. French authorities referred to the prohibition of branch office establishment which existed under French law as well

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

European Court of Justice “Klopp”- Case (1984)

The European Court of Justice found the restrictions set up by the French authorities to be of discriminative nature and incompatible with the principle of Freedom of Establishment under the EEC-Treaty

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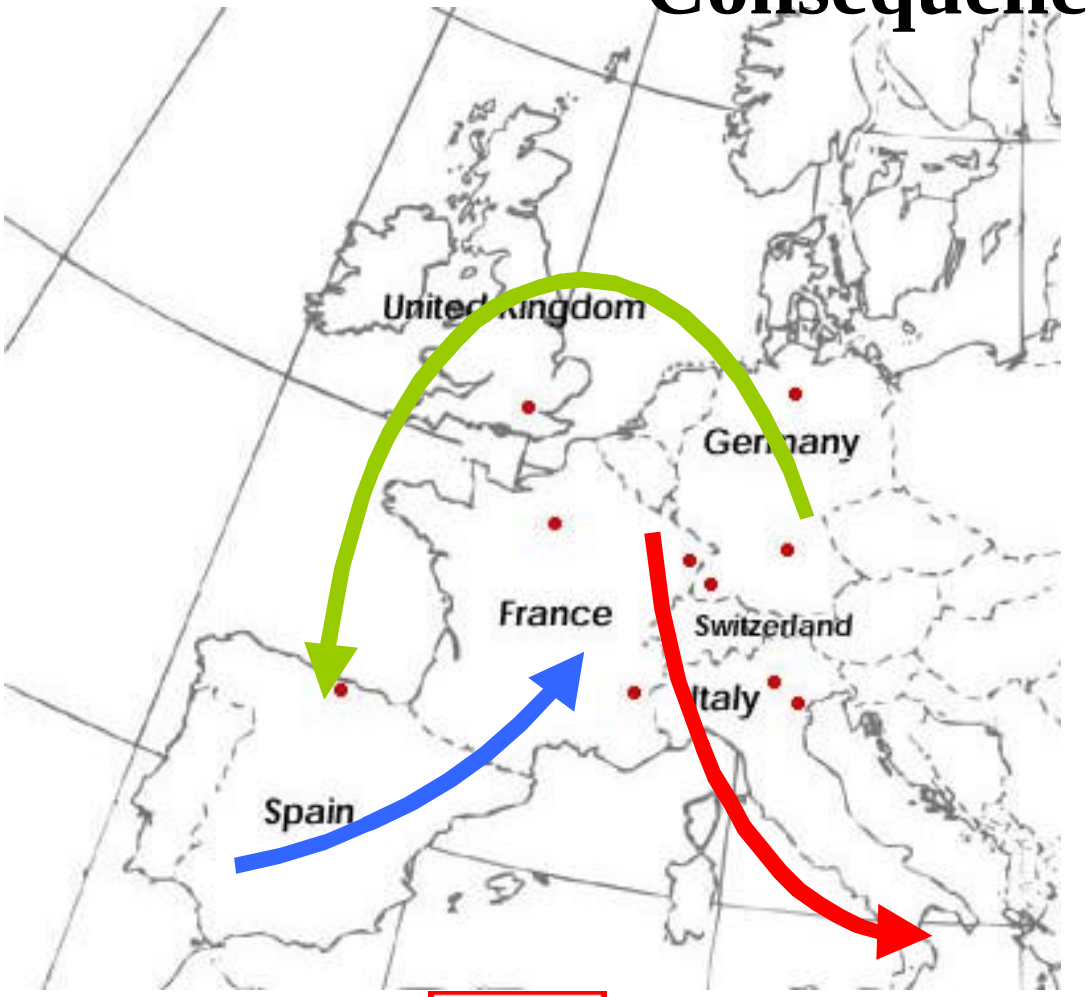
European Court of Justice “Klopp”- Case: Consequences



EU Lawyers were given the right of free movement and could freely establish branch offices in other EU Member States

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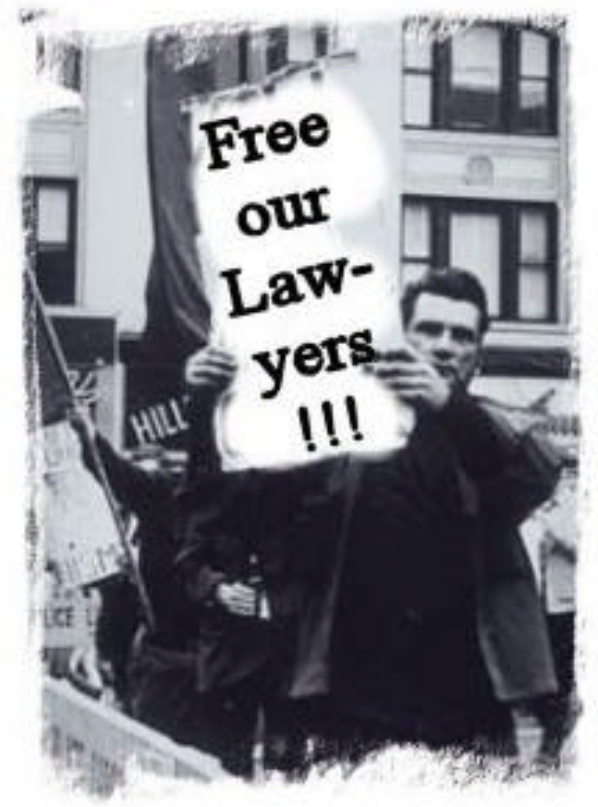
But restrictions still remained ...



The decision of the European Court of Justice did not directly affect the prohibition to establish Multi-City-Partnerships in Germany (Art. 28 of the German Federal Bar Association guidelines) and thus the existing restrictions in Germany still prevailed.

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

The abolition of the prohibition of Multi-City-Partnerships

- The “Klopp”-decision caused a lively discussion in Germany.
- German lawyers were now free to establish branch offices within the EU - but not within their own country!
- In 1987, the German Constitutional Court tested the prohibition to establish Multi-City-Partnerships against the constitutional right to freely choose a profession

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

The abolition of the prohibition of Multi-City-Partnerships

The starting signal for the abolition of the Guidelines of the German Bar Association had no direct relation to the attempts to establish Multi-City-Partnerships. In the 1987 Federal Constitutional Court "Guidelines" decision, a particular subsection of the Guidelines stating the rule of objectivity came under attack first.

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

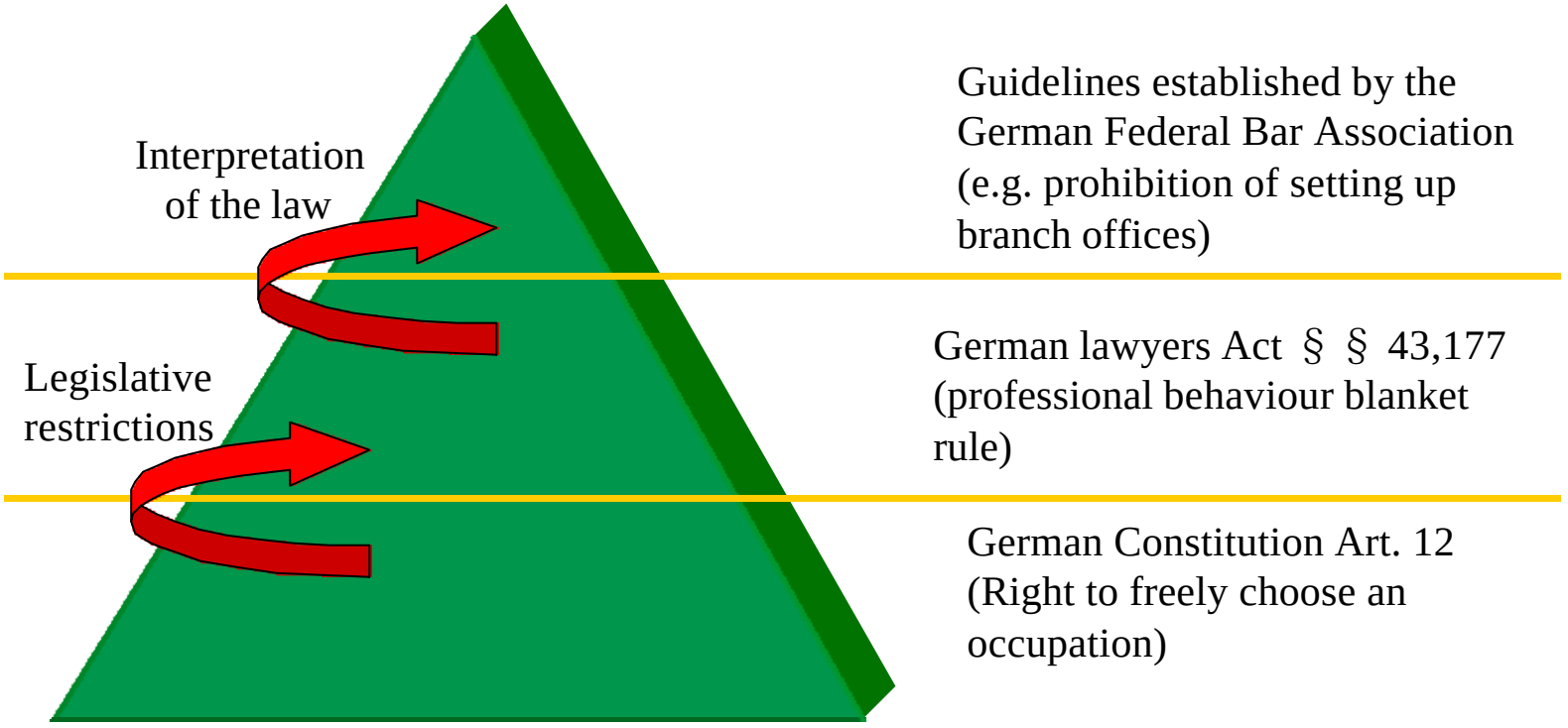
The Right to freely choose a Profession (Art. 12 Sec. 1 of the German Constitution)

"All Germans have the right to freely choose their profession, place of employment and professional education. The practice of a profession can be limited by or upon statute."

"Alle Deutschen haben das Recht, Beruf, Ausbildungsplatz und Ausbildungsstätte frei zu wählen. Die Berufsausübung kann durch Gesetz oder aufgrund eines Gesetzes geregelt werden."

< 1975 | 1977 | 1984 | **1987** | 1989 | 1994 | 1995 | 1998 | 2001

Hierarchical order of Restricting Provisions



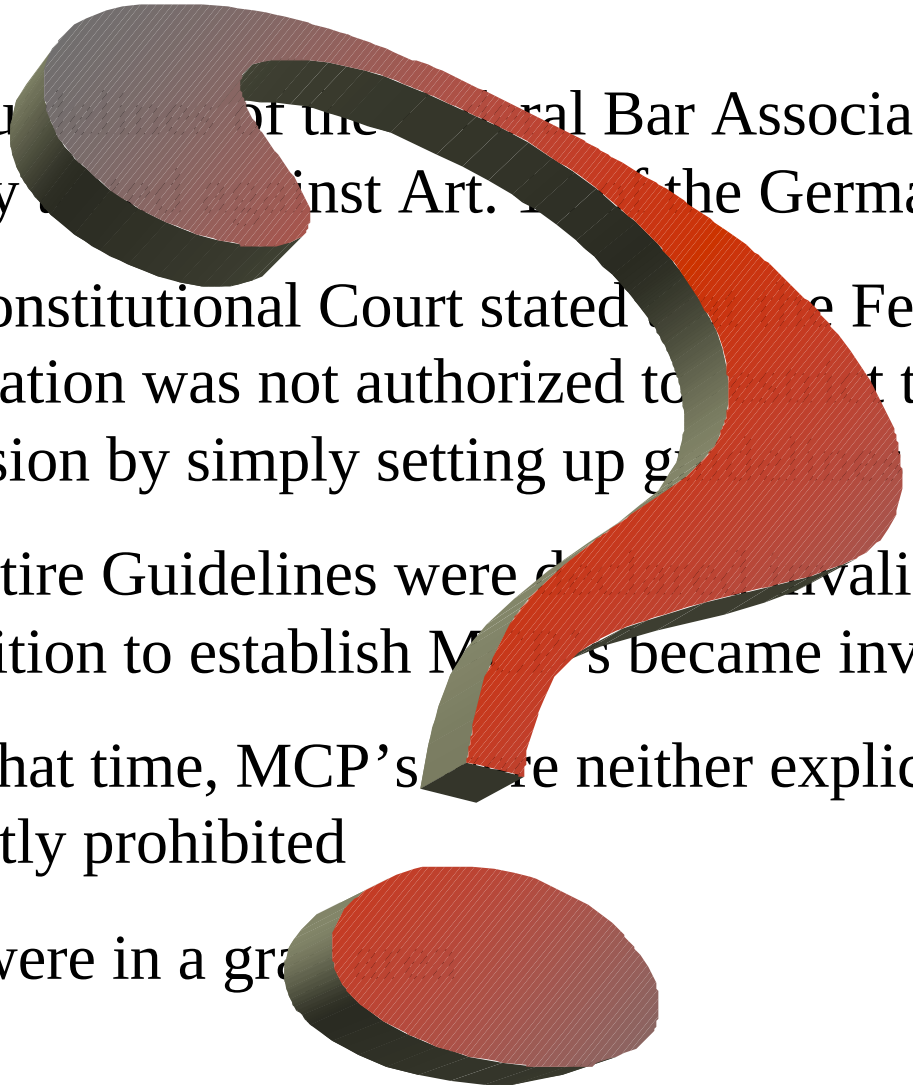
< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

1987 Federal Constitutional Court Decision

"The Guidelines established by the Federal German Bar Association do not provide a sufficient basis to restrict the legal profession in exercising its services. (…) The Guidelines do not constitute a statute in the sense of Art. 12, Sec. 1 of the German Constitution."

BVerfGE 76, 171 (184, 185)

- The Gu[illegible] of the [illegible]ral Bar Association were entirely [illegible]inst Art. [illegible] the German Constitution
- The Constitutional Court stated [illegible]e Federal Bar Association was not authorized to [illegible]t the legal profession by simply setting up g[illegible]
- The entire Guidelines were d[illegible]nvalid, and thus the prohibition to establish M[illegible]s became invalid as well
- From that time, MCP's [illegible]re neither explicitly allowed nor explicitly prohibited
- They were in a gra[illegible]



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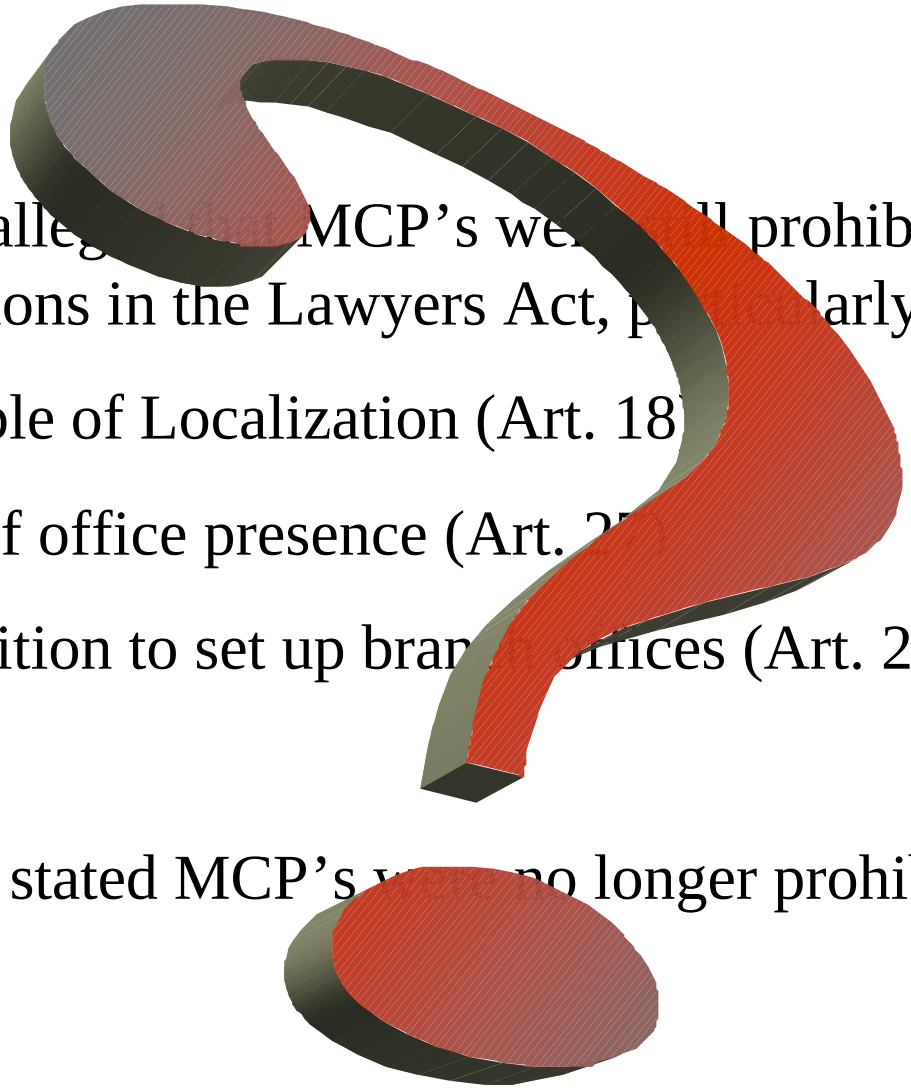

- Some alleged MCP's were held prohibited by the provisions in the Lawyers Act, particularly due to the

→ Principle of Localization (Art. 18)

→ Duty of office presence (Art. 2[illegible])

→ Prohibition to set up branch offices (Art. 28)

- Others stated MCP's were no longer prohibited

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

The abolition of the prohibition of Multi-City-Partnerships

In 1989, the Federal Supreme Court applied the 1987 decision by the Federal Constitutional Court. This case for the first time explicitly challenged the prohibition preventing a partnership from establishing offices in different cities. The court stated that the professional rule in question could no longer be used to specify the professional duties of lawyers and, furthermore, that the obligations established in the German Lawyers' Act regarding residence and the location of offices and branches do not prohibit Multi-City-Partnerships.

< 1975 | 1977 | 1984 | **1987** | 1989 | 1994 | 1995 | 1998 | 2001

1989 Federal Supreme Court Decision

The German Federal Supreme Court finally rendered a decision explicitly stating that ...

“The Lawyers Act does not prohibit the establishment of Multi-City-Partnerships.”

(BGH 108, 290 ff.)

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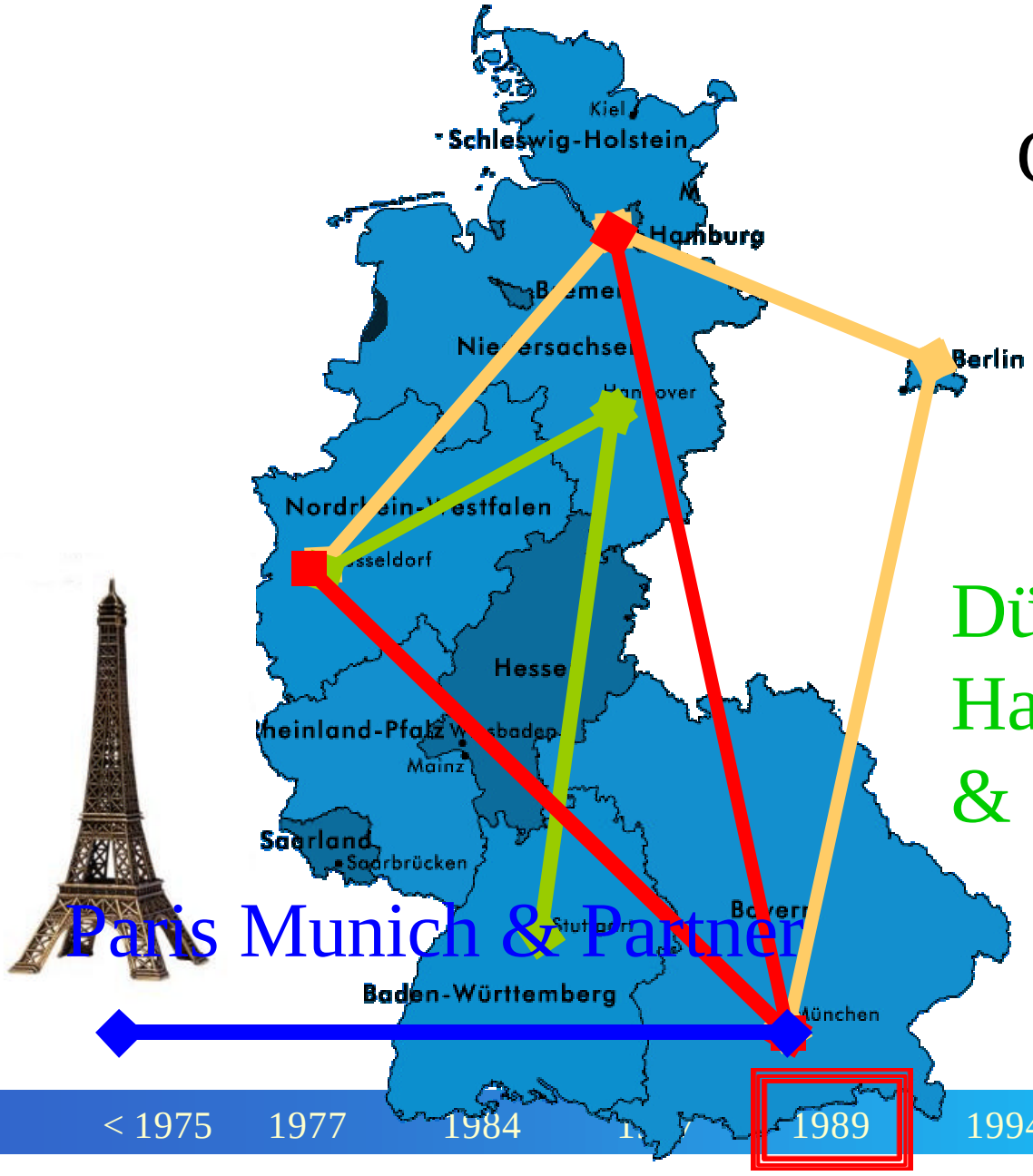
Consequences



Düsseldorf
Hamburg Berlin
Munich & Partner

Düsseldorf
Hannover Stuttgart
& Partner

Düsseldorf Munich
Hamburg & Partner

Paris Munich & Partner

< 1975 | 1977 | 1984 | 1989 | 1994 | 1995 | 1998 | 2001

What happened next?

The new court decisions gave a starting signal to the formation of numerous MCP's in Germany; their number was further increased by the 1990 German Reunification ...

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

Locations of Countrywide MCP Offices after German Reunification (1999)

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

Case Studies

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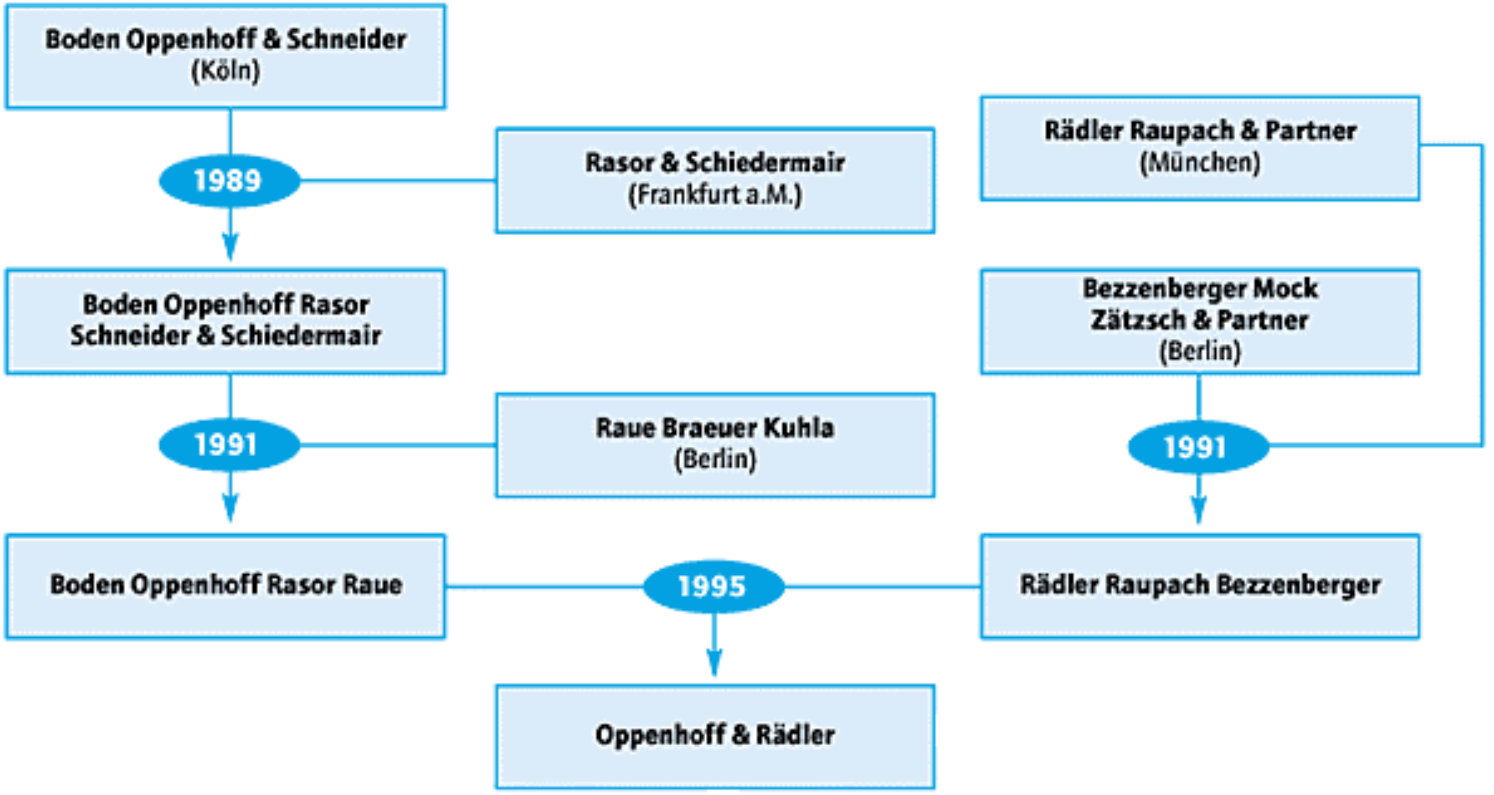
Oppenhoff & Rädler



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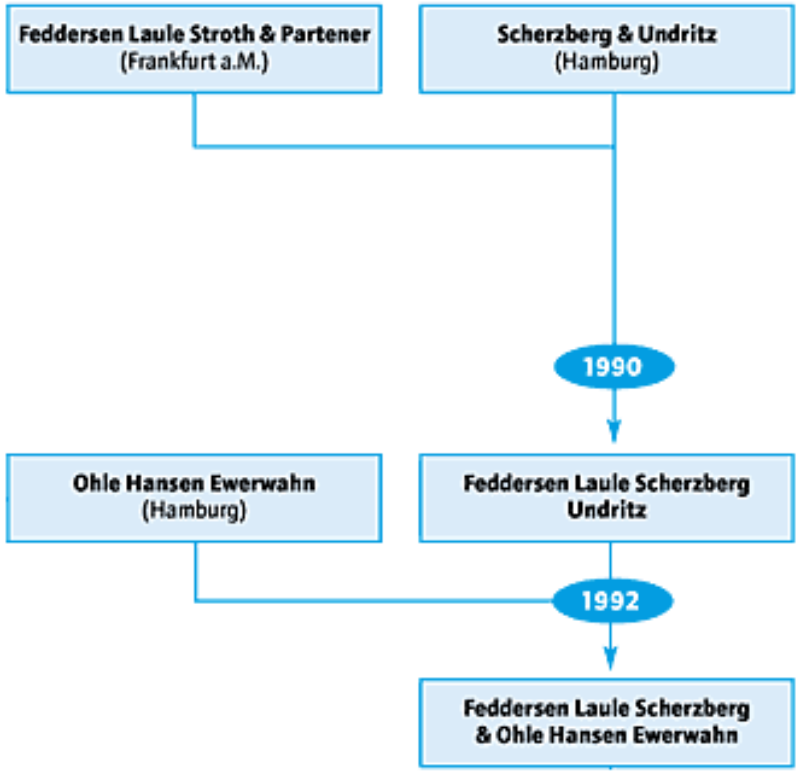
Feddersen Laule



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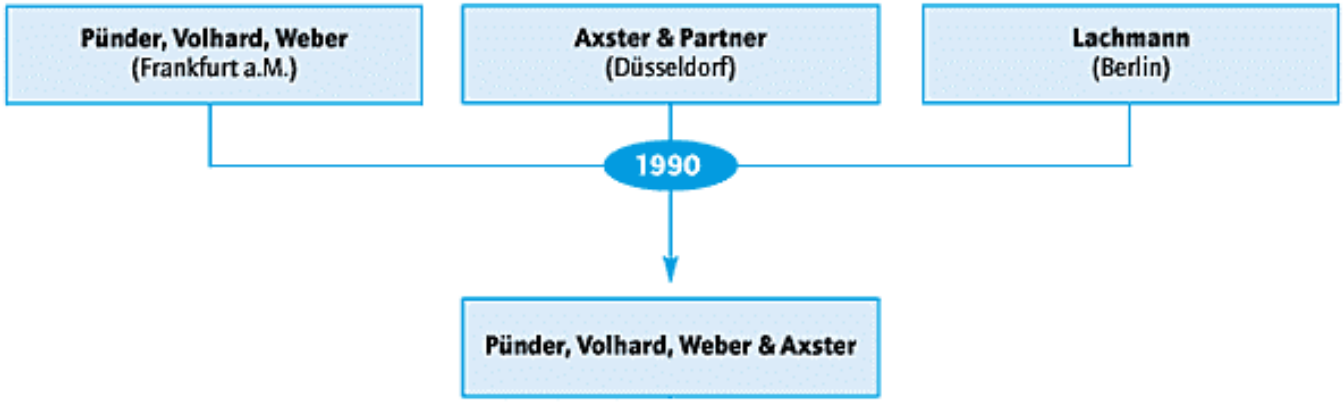
Pünder Volhard Weber & Axster



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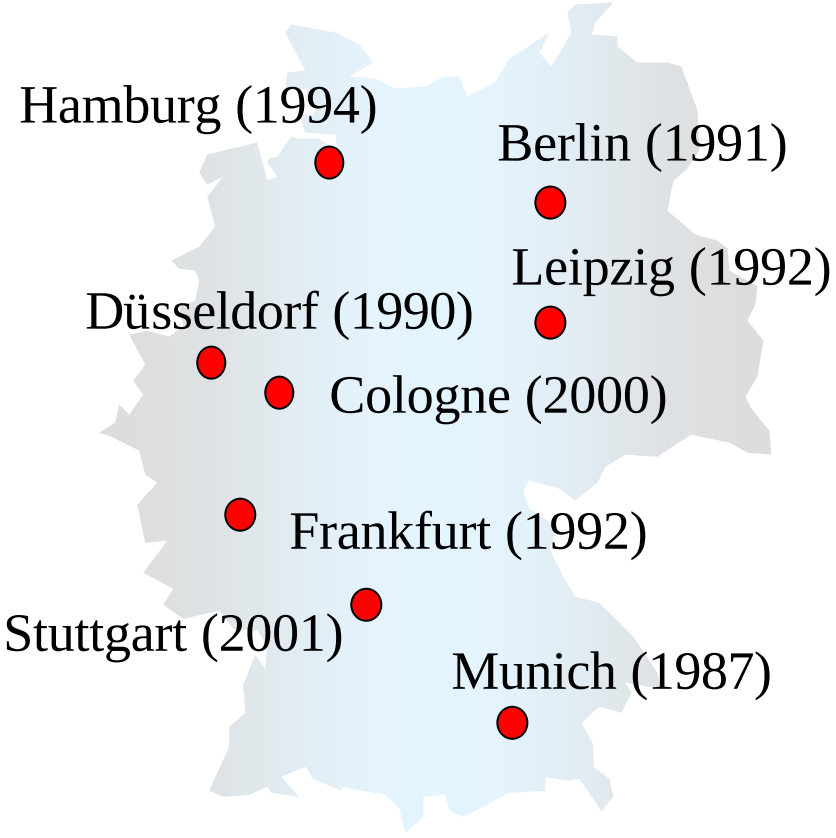
HAARMANN, HEMMELRATH & PARTNER



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European Council Directive 89/48/EEC (Mutual Recognition Directive of 1989)

- In 1989, the EU established a general system for the mutual recognition of higher-education diplomas within the EU
- To practice a regulated profession in another Member State generally requires the possession of the diploma required in the other Member State; such diploma can be obtained by means of: (i) adaptation period, or (ii) aptitude test

< 1975 | 1977 | 1984 | 1987 | **1989** | 1994 | 1995 | 1998 | 2001

European Council Directive 89/48/EEC (Mutual Recognition Directive of 1989)

- Subject to their recognition, EU lawyers were entitled to practice under the respective national professional title and be admitted to the other Member States' local bar association
- EU law school graduates could now become admitted as lawyers in every EU Member State

< 1975 | 1977 | 1984 | 1987 | **1989** | 1994 | 1995 | 1998 | 2001

Globalization Process in Germany

- First, German law firms undertook only weak efforts to establish foreign branch offices
- But the German legal profession had to change: clients requested a more service-oriented approach, but German lawyers were not regarded as service providers
- German corporate clients moved to UK and US law firms which had already begun to establish branch offices in Germany

< 1975 | 1977 | 1984 | 1987 | **1989** | 1994 | 1995 | 1998 | 2001

Globalization Process in Germany

- Some German firms started to employ UK and US lawyers to handle large-scale transactions
- Others established Multi-Disciplinary-Partnerships between lawyers, tax advisors and accountants (such as HAARMANN, HEMMELRATH & PARTNER) to offer one-stop-shop services

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

Impact of the 1994 (Uruguay) GATT Round:

- During the Marakesh (Uruguay) GATT round, member states entered into an agreement on trade in services
- This agreement made it generally possible for lawyers to act in other member countries under their own professional title

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

The 1994 BRAO Amendments

In the same year, the German Parliament adopted fundamental changes to the German Lawyers Act (BRAO)

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

The 1994 BRAO Amendments

- A new Art. 206 BRAO permitted lawyers from GATT/WTO member states to practice in Germany under their professional title and to give advice in their home country and international law
- The Principle of Localization was abandoned for the Municipal Courts with immediate effect
- In 2000, the Principle of Localization was abandoned for District Courts

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

The 1994 BRAO Amendments

- Multi-Disciplinary-Partnerships are explicitly permitted, Art. 59a BRAO (they never were explicitly prohibited; but the 1994 BRAO amendment stated for the first time that lawyers are free to form partnerships with members of other professions)

- Law firms can be established under the legal form of a limited liability company (GmbH)

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

And then…?

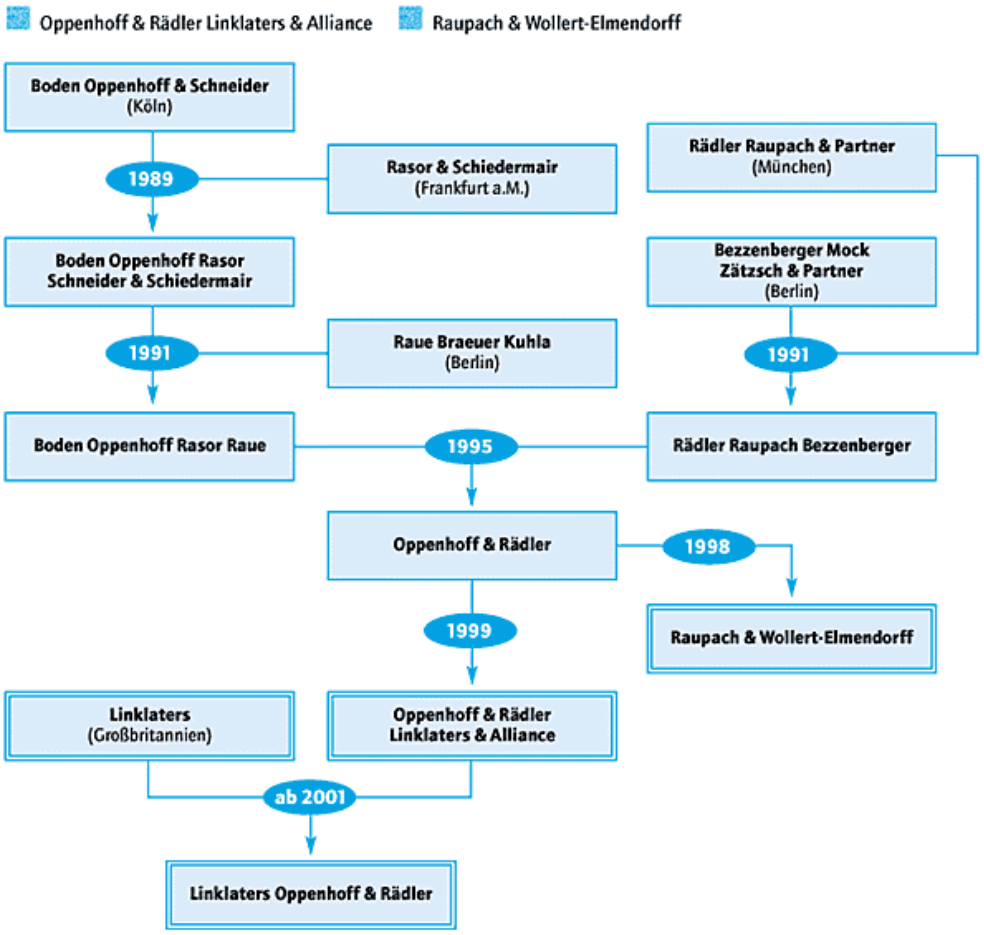
These circumstances gave another starting signal for German law firms to establish close links with international law firms ...

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

Case Studies

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

Oppenhoff & Rädler



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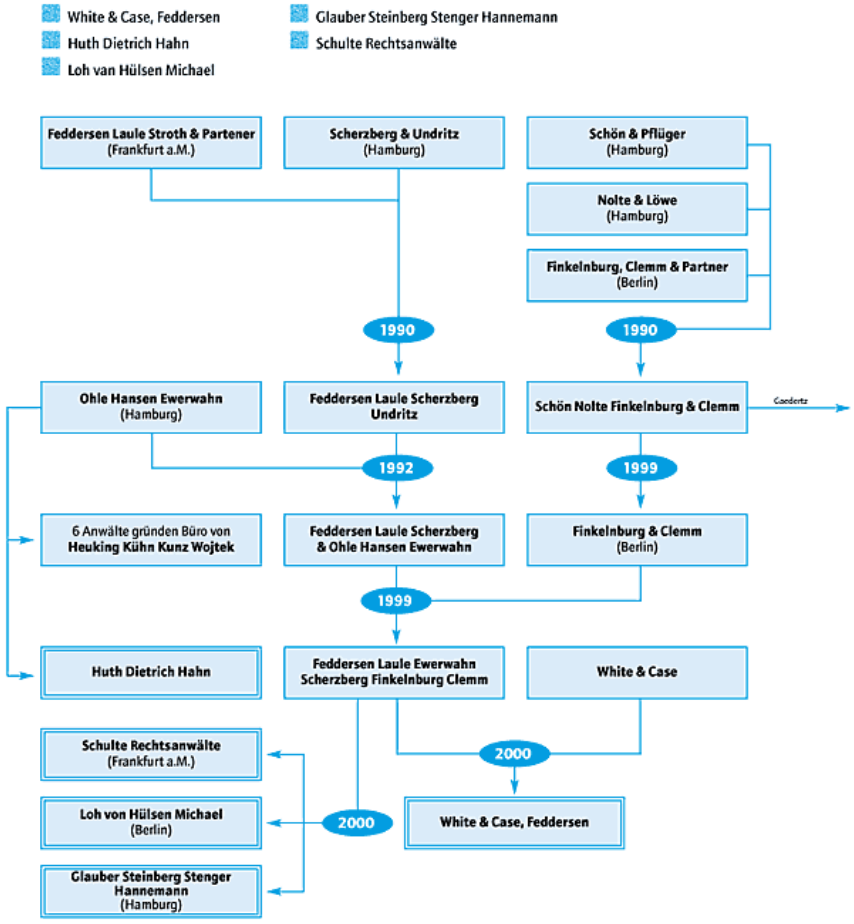

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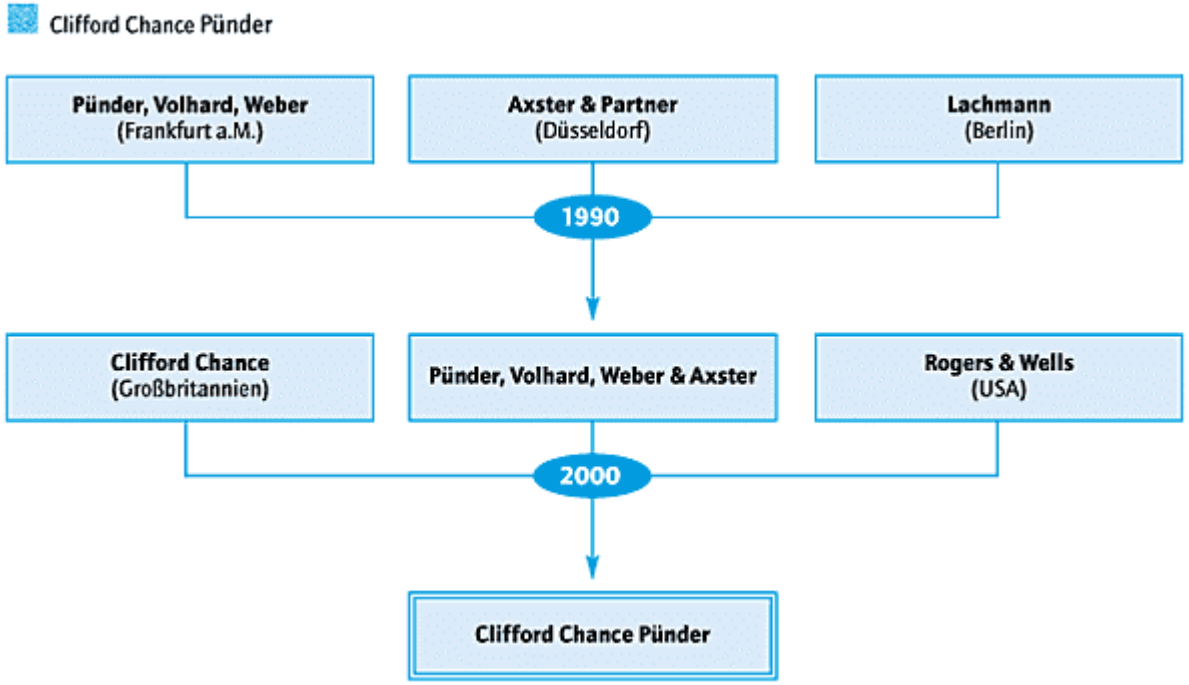

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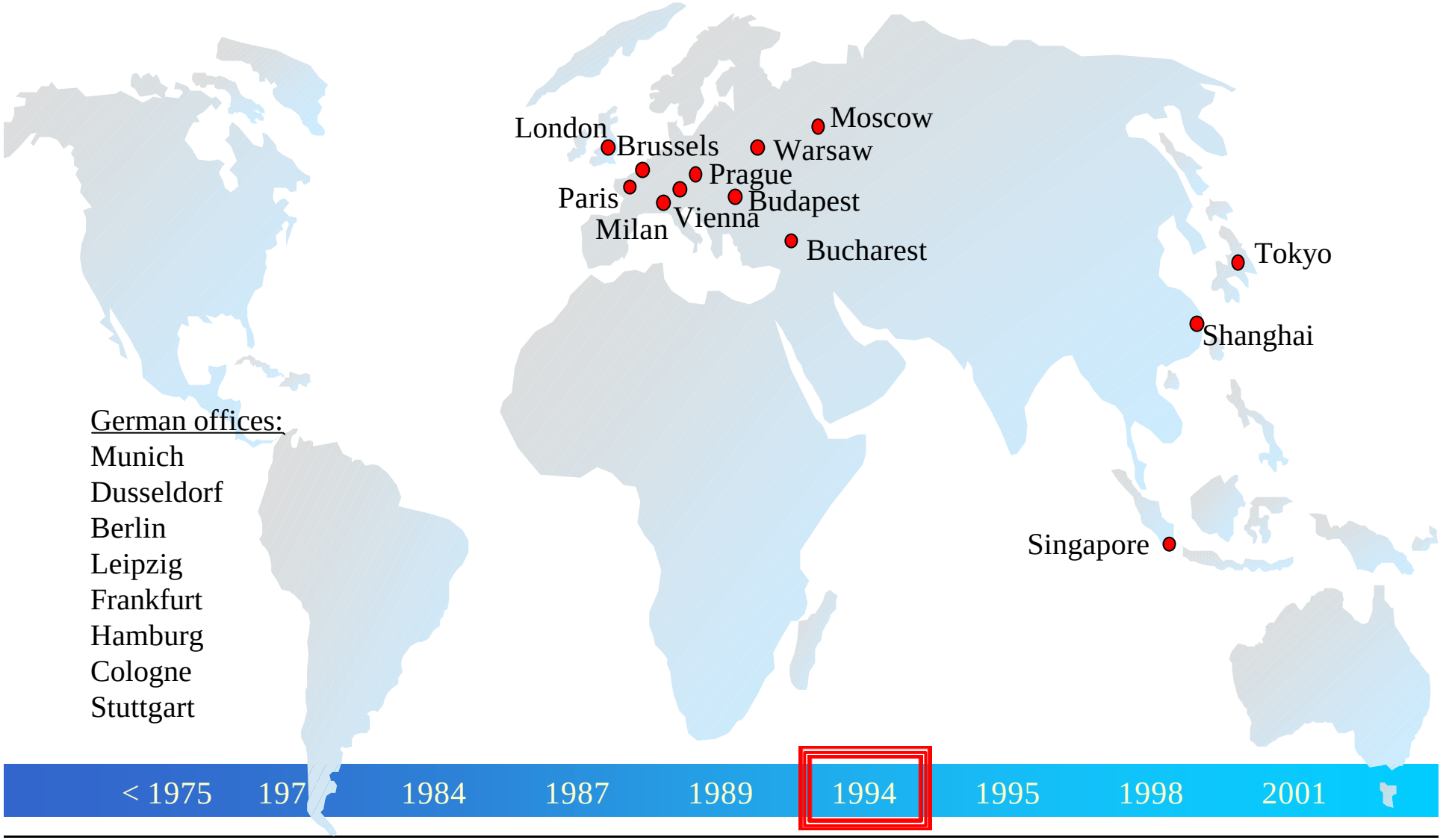
HAARMANN, HEMMELRATH & PARTNER



European Council Directive 98/5/EEC (Establishment Directive of 1998)

The Establishment Directive of 1998 basically allowed EU lawyers to practice in any Member State on a permanent basis regardless in which Member State the original qualification was obtained

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | **1998** | 2001

European Council Directive 98/5/EEC (Establishment Directive of 1998)

The Directive entitles a EU lawyer to practice under his home-country title on a permanent basis in any Member State, to carry out the same activities as a lawyer practicing under the relevant professional title in the host country, and to give advice in both home Member State and host Member State law

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | **1998** | 2001

European Council Directive 98/5/EEC (Establishment Directive of 1998)

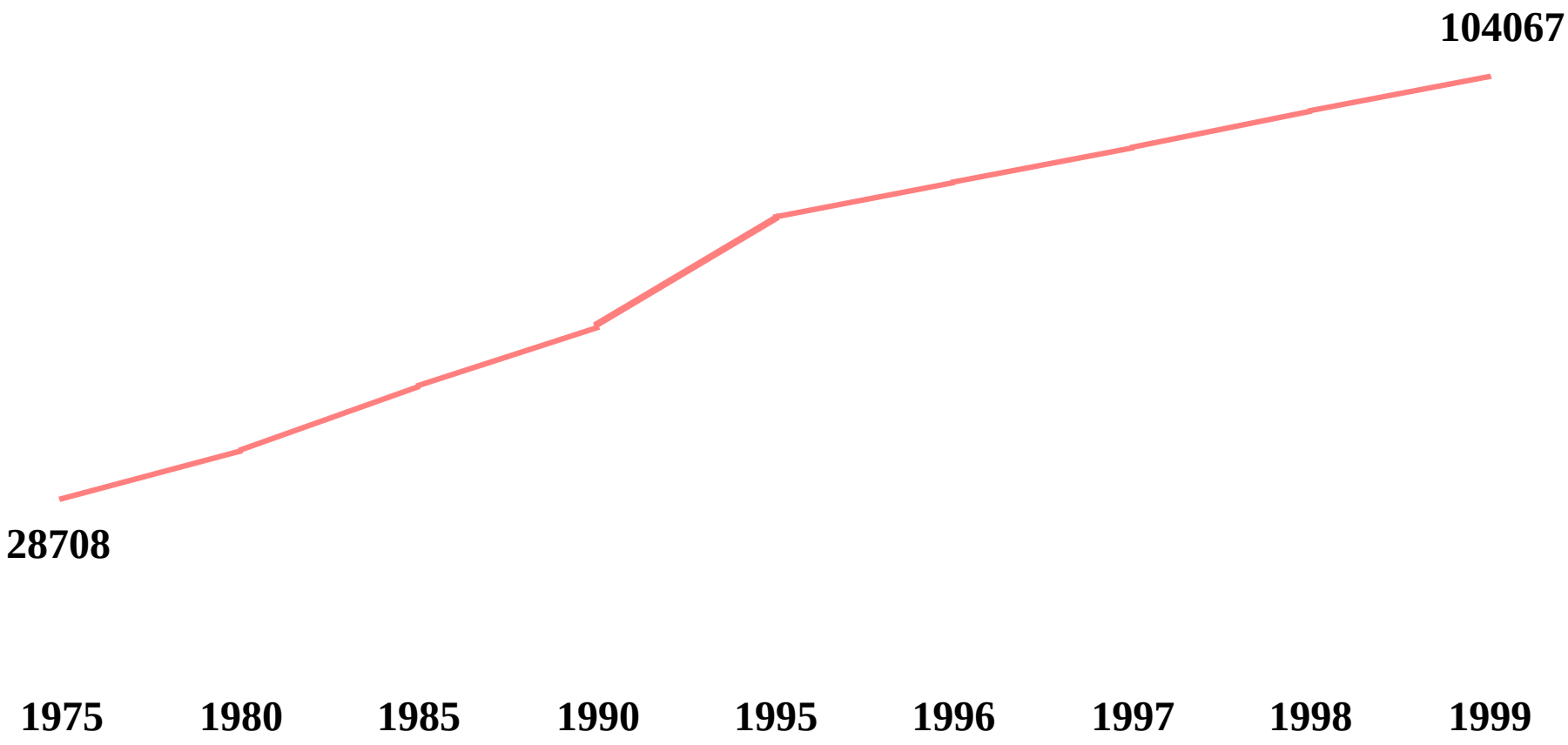
The laws implementing the former Directives 77/249 and 89/48 were integrated into the new European Lawyers Act. In the future, there is only one legal basis for the provision of services of EU Member States lawyers in Germany.

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

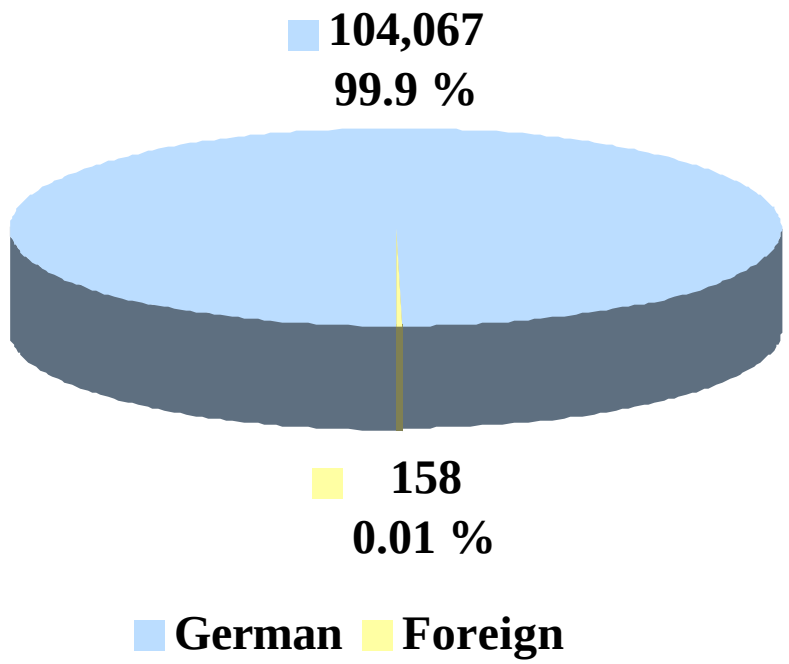
Where are German Lawyers today?

Most international firms and alliances have entered the German legal market

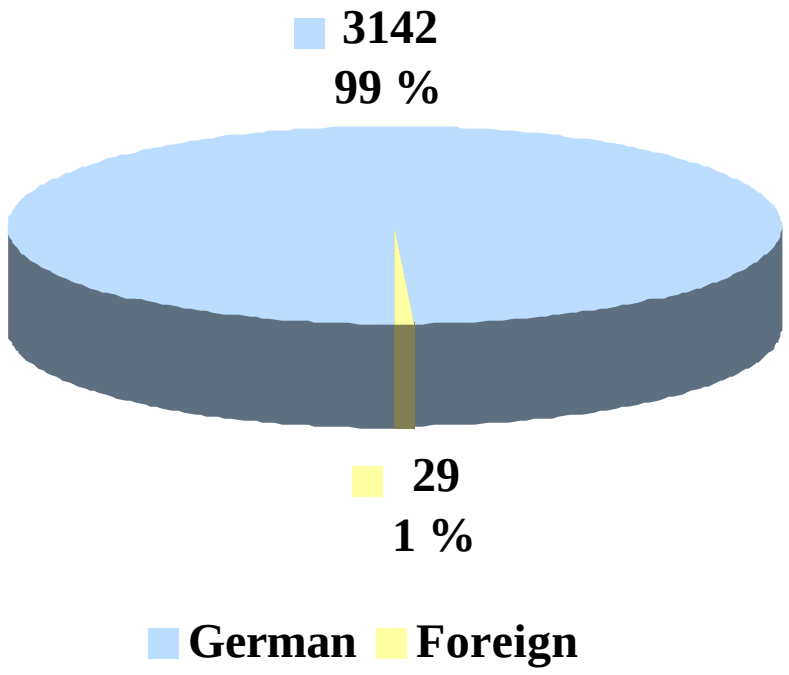
The number of lawyers has soared ...



Total Number of Lawyers admitted in Germany (2000)



Number of Lawyers in Germany's Top 25 Law Firms (2000)



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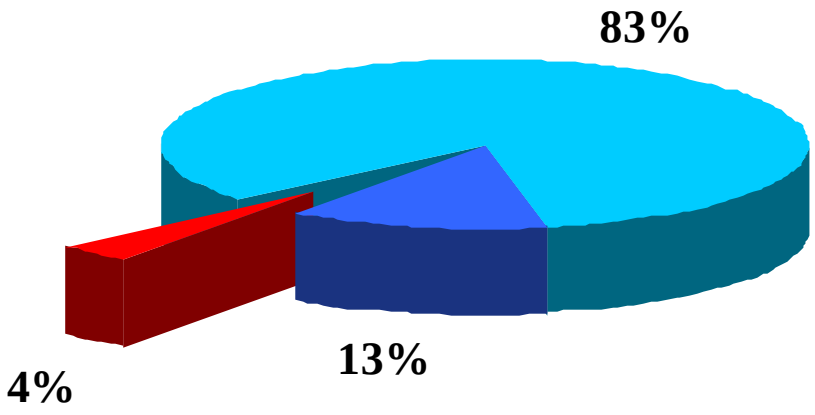
Number of Partners in German Law Firms (1997)



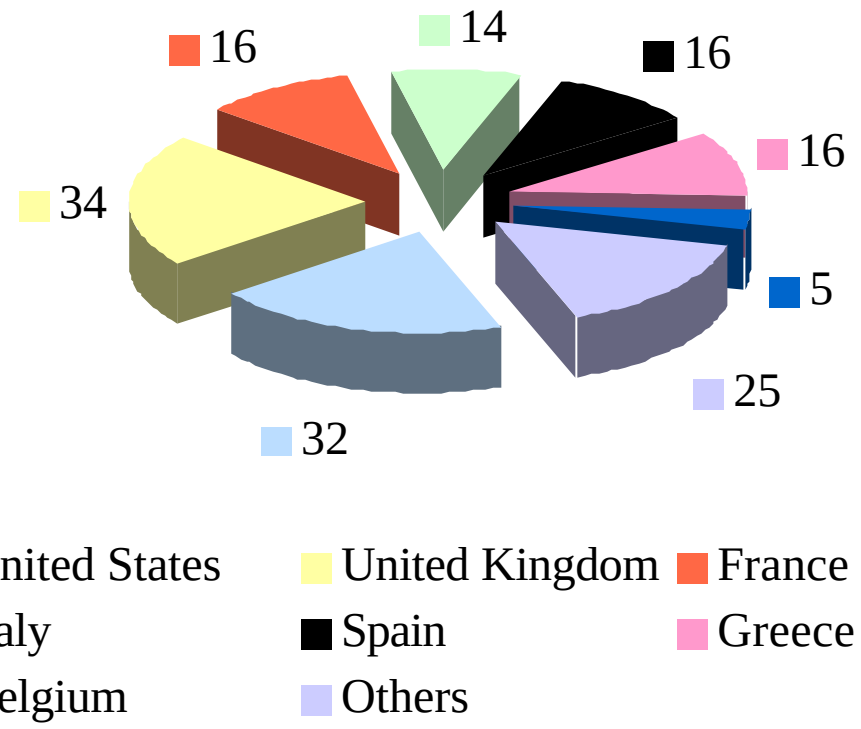
< 4 partners

5-10 partners

> 10 partners

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

Nationality of Foreign Admitted Lawyers in Germany (2000)



< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

PART TWO

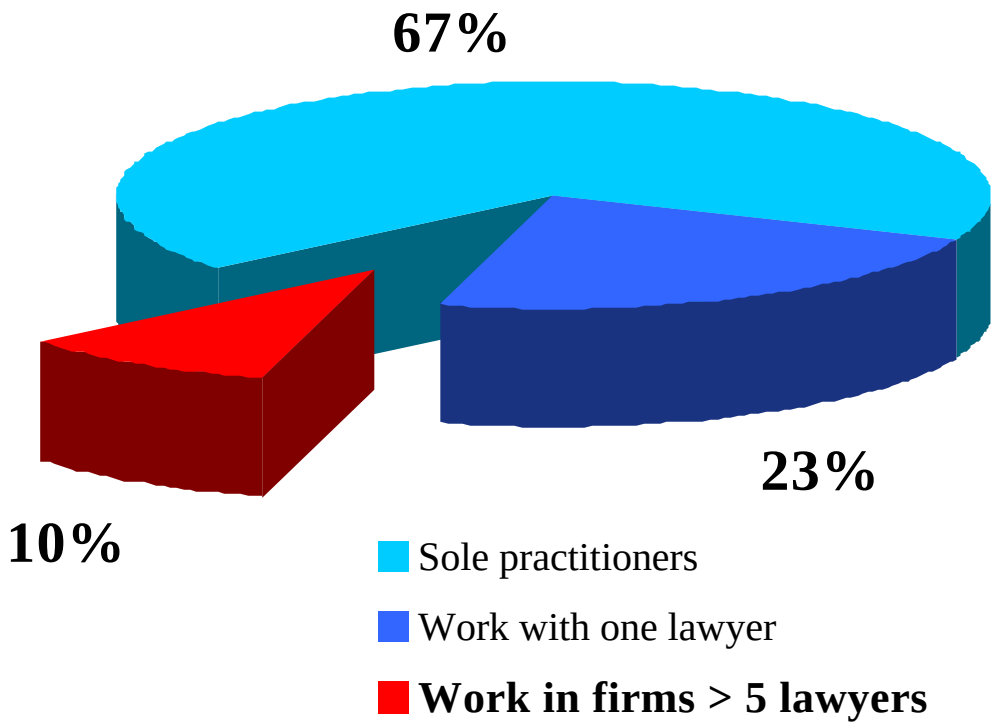
What lessons can be learned ?

Today's Japanese Legal Market is similar to Germany 15 years ago

- Japanese legal education is still traditional
- Most Japanese lawyers are sole practitioners, with practice focusing on litigation
- Japanese lawyers cannot join international law firms
- Only a small number of Japanese law firms has the capacity and is competent to handle international transactions
- Little interdisciplinary knowledge

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

Total Number of Japanese Lawyers (1999): 16,000



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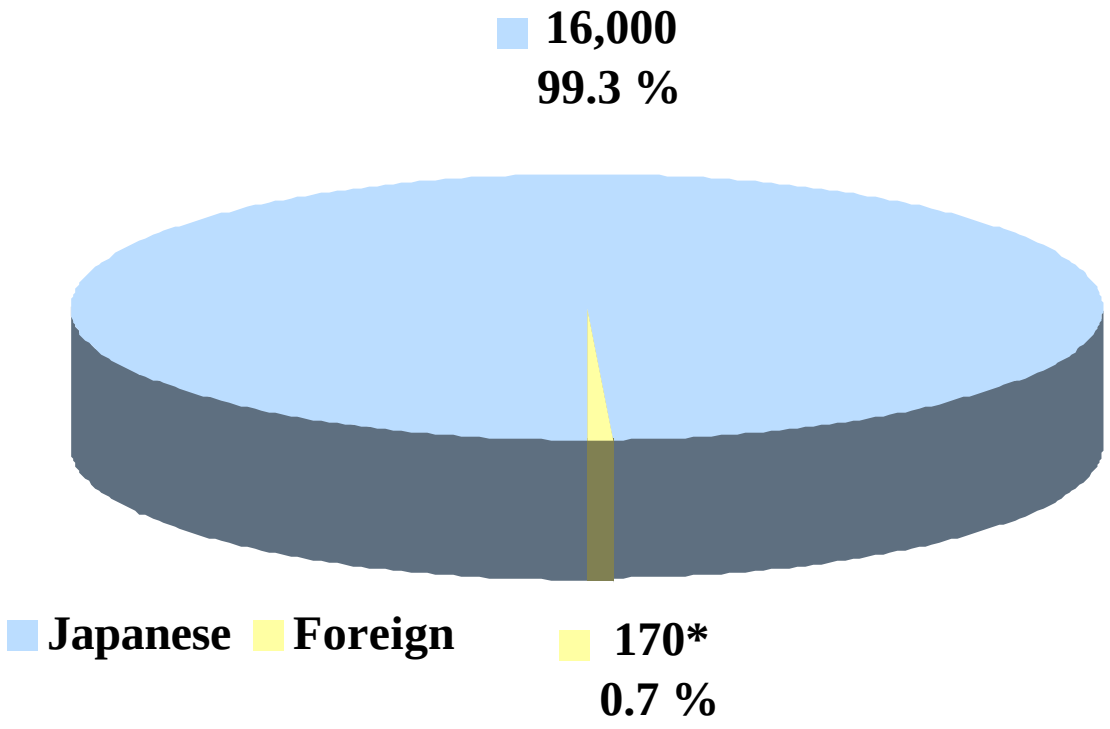
Total Number of Lawyers admitted in Japan (2000)



* Estimated total number of foreign legal consultants ~ 600.

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

How can the Japanese Market change ?

- Japan is not integrated in a strong multinational alliance similar to the European Union, thus the deregulation process needs to be powered by domestic forces
- Japanese legal market is forced to deregulate due to globalization
- Legal restrictions imposed on Japanese lawyers may be in conflict with the Japanese Constitution

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

Can the Development in Germany be transferred to the Japanese Situation?

German legal market deregulation was driven by:

→ European influence

→ Claims raised by individual lawyers

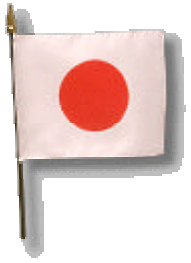
→ German Constitution (Right to choose profession; Art. 12 GG; “Grundgesetz” - German Constitution)

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

An interesting parallel ...

Art. 12 German Constitution

"All Germans have the right to freely choose their profession and their place of employment and professional education. The practice of a profession can only be limited by statute."



Art. 22 Japanese Constitution

"Every person shall have the freedom to choose its occupation to the extent that it does not interfere with the public welfare."

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

German Constitutional Court "Pharmacy Case" (1958)

- In the 1958 Pharmacy Case, the German Constitutional Court tested restrictions on the establishment of pharmacies against the right to choose an occupation, Art. 12 GG

- The Constitutional Court developed a rule stating that any restriction of the practice of a profession has to be in proportion to the purpose of such restriction

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

Japanese Supreme Court "Pharmacy Case" (1975)

- In the 1975 Pharmacy Case, the Japanese Constitutional Court decided a very similar case. Administrative restrictions (regarding the minimum distance for the establishment of a pharmacy) were tested against Art. 22 of the Japanese Constitution
- The Supreme Court adopted the ruling and the arguments of the German Constitutional Court
- Legal restrictions are only valid if legislators do not exceed their authority and as long as the limitation is reasonable and in the interest of public welfare

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001

What can be done ?

- Japanese lawyers (“bengoshi”) are prohibited to form partnerships with foreign lawyers.
- A Japanese lawyer may claim that this restriction of his professional rights is a violation of Art. 22 of the Japanese Constitution.
- Who will take this up?

< 1975 | 1977 | 1984 | 1987 | 1989 | 1994 | 1995 | 1998 | 2001