

# DIE ZEIT

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## Their Word is Law

**When lawmaking becomes too difficult for Ministry officials and parliaments, international law firms are eager to jump in**

*By Marcus Rohwetter*

The American billionaire Haim Saban hired them to manage the sale of his shares in ProSiebenSat.1 to the publishing group Axel Springer, and ensure that the Federal Cartel Office won't get in the way.

They are helping the Moscow government implement the Kyoto Protocols, helping Russia's industry get its emissions under control.

And when the collection of New York's Museum of Modern Art was to be temporarily moved to Berlin, they cajoled museum director Glenn Lowry until he agreed, making Berlin into a cultural capital as well as a political one.

Three jobs, one firm. Its name: Hogan & Hartson Raue L.L.P., Potsdamer Platz, the Berlin office of an American law firm which is over 100 years old. Transactions in the gray area between business and politics are the specialty of this law firm, and its attorneys are now becoming involved in the German legislative process as well. "Legal matters today are so complex that they can hardly be mastered with the resources available to Ministry officials and Deputies," said Kornelius Kleinlein, a partner at Hogan & Hartson. He assisted the SPD Bundestag delegation in the drafting of a law whose purpose is to help relieve the municipal finance crisis in Germany, with 700 billion euros in needed investments. In just three weeks, the bill was passed by the Bundestag and the Bundesrat, taking effect at the beginning of September.

A German law, shaped by an American law firm?

**New players have entered the arena in Berlin** and have begun to leave their mark in political life. They are international legal groups, of which a good two dozen have opened up offices in Germany. Their legal expertise is increasingly in demand, regardless of who is in power, and their fingerprints can be found in health care, energy, telecommunications and labor law.

While legislators have traditionally sought assistance from experts- scientists have been drafting expert opinions for decades, commissions develop reform proposals and the Federation of German Industries shaped anti-trust and competition law in the 1950's, the recent developments have given a new dimension to lawmaking since governments are involving legal consultants earlier and earlier in the process. So early, in fact, that in one case they were involved in the development of legislation from the very beginning, together with Ministry officials.

An "absolute novelty" is how Deputy Michael Bürsch describes the development of the Public-Private Partnership (PPP) Act, which took effect a few weeks ago. Bürsch led the responsible working group of the SPD delegation, where the traditional procedure was practically reversed. While Ministry officials used to draft bills and only then ask others for their opinion, the development of this legislation "was a reversed and entirely open process in which we asked our consultants for proposals."

This course of action involves risks. "Bills must be designed and written by Ministry officials" said Everhard Holtmann, a Professor of Political Science at the University of Halle-Wittenberg. "If they involve external consultants at the very beginning, they run the risk of giving away some of their legislative authority."

Nevertheless, policymakers continue to seek expert assistance and attorneys continue to seek proximity to policymakers. It is a mutually beneficial situation, and the example of the Public-Private Partnership Act shows how it works.

**The paths of attorney Kleinlein** and SPD Deputy Bürsch crossed a few years ago. They met in Berlin, including one time in the British embassy, where a lecture was given about experiences with public-private partnerships (PPPs). About how the government could save about ten percent of its costs if it were no longer the owner of courthouses, schools, roads and barracks, but merely a tenant. In Great Britain, one in five government projects today is executed as a public-private partnership. That figure is much lower in Germany, due primarily to legal obstacles. Nearly all parties have already called for the abolition of those obstacles, and, after the 2002 Bundestag elections, Bürsch wanted to finally draft a law which accomplished that object.

But how?

Attorney Kleinlein knew how. At the time he worked for the large Linklaters law firm, where he worked on a series of projects together with their PPP specialist, Jan Endler, and was therefore very familiar with the bureaucratic hurdles. He also had an idea of how to remove those obstacles, by taking out a paragraph here and changing a subparagraph there or adding a new paragraph. "As attorneys, we are constantly searching for legal solutions to problems," he said, "we speak the same language as lawmakers." So they found each other.

Kleinlein was convinced that the first step was to allow the federal government to sell its highways, barracks and buildings, something which was essentially prohibited at the time. In order to change that, Kleinlein proposed revising the Federal Budget Ordinance with the aid of the PPP Act. "This reflected a certain conception which had long been outdated: that the government will use administrative buildings, schools and other infrastructure most efficiently if it is the owner," he said. "In the private sector, this conception has long proven to be false. Why should it be any different for the government?"

**Thus the idea was born** to lift the general sales prohibition and allow the federal government to sell its assets and then lease them back. If it did so, it would no longer be responsible for costly maintenance, but could instead simply reduce its rent e.g. in the case of a street which falls into disrepair. Kleinlein's preliminary work on this essential passage is reflected in the official draft and, eventually, in the final law.

Bürsch calls the attorney "one of the engines behind the whole project," although Kleinlein is by no means the only person who helped create the law. The Ministry contributed about 40 people, and the private sector about 60, including the elite of the international law firms: from Freshfields to Norton Rose, from Clifford Chance to Linklaters.

From a legal perspective, this close collaboration with consultants is "hardly objectionable," says Martin Burgi, a Professor of Public Law at the University of Bochum who is researching the cooperation between the government and corporate consultants. "As long as the parliament makes the final decision, it is not objectionable."

Maybe not legally. But how about politically? The political scientist Holtmann believes that many policy decisions will be made before the public debate begins: "the more intensively the government collaborates with external consultants, the less transparent the policymaking process becomes."

**For law firms, involvement in the legislative process** is more than just a service. Especially in times of change, with the government giving away some of its services, in times of deregulation and privatization, legal gray areas (one could also say, "zones of opportunity") are created almost daily. What exactly is different than before? What are companies allowed to do now and what are they not allowed to do? Knowing their way around new laws is a competitive advantage for law firms in the fight for commercial mandates, and who knows his way around better than someone who was involved in developing them? "From a strategic perspective, it is becoming increasingly important for large law firms to be as close as possible to political decision-making processes" says Christoph Tillmanns of the legal industry service Juve.

American- and British-style law firms in particular are seeking proximity to the policymaking process. Freshfields is currently building up a public affairs department in Berlin; that firm is among the "magic circle": the five London law firms which are considered especially powerful. Others have recruited prominent politicians with law degrees: the CDU financial expert Friedrich Merz works for the US law firm of Mayer Brown Rowe & Maw, senior FDP politician Otto Graf Lambsdorff works for Taylor Wessing and Wilmer, Cutler & Pickering ("Your permanent representatives in Washington und Berlin") employs former Minister of Transportation Matthias Wissmann. During his term in office, Mr. Wissmann privatized Lufthansa, now a client of his law firm, although he is now concerned primarily with matters of energy law.

Kleinlein's firm, Hogan & Hartson, employs 1,000 attorneys worldwide, taking in a good 630 million dollars in fees each year. The firm opened an office in Berlin four years ago so that it could become there what it has long been in Washington: a political institution with the best connections. The conservative jurist John Roberts, who last week was named Chief Justice of the US Supreme Court, was a partner at Hogan & Hartson for many years, and Sandy Berger, Bill Clinton's National Security Advisor, also worked for the firm.

**Jurists know that every government** will face such problems sooner or later. That is, the point will eventually be reached when it is no longer enough for politicians to simply discuss what should be done, when it is time to write the highly complex legislation without which a modern society cannot function any more than a computer without an operating system. That is when things get specific, and that is when the law firms want to be on the scene. Discreet. Binding. Perfectly prepared.

The construction industry was overjoyed that the PPP reform was enacted so rapidly despite the election campaign. "We expect a jump in orders" commented Hans-Peter Keitel, President of the German Building Industry Association and management board chairman of the Essen-based Hochtief construction company. "The law came at just the right time."

Not only that, the law also offers other benefits to private companies. For example, companies no longer have to pay property taxes if they purchase e.g. a school from a municipal government and operate it. "The municipal associations were not thrilled with that at all, since property tax revenues go to the municipalities," Kleinlein remembers, "but the whole thing went through the legislative process so fast that they weren't able to organize any resistance at all."

**The property tax effect demonstrates** that small formulations can have a big impact, something which allows external consultants to influence the legislative process. After all, the specialists could try to insert a subparagraph into the bill which may appear harmless, but which ultimately serves the interests of their commercial clients, not that of the government. It would be difficult to prove this, since attorneys can generally invoke their attorney-client privilege.

In any case, Deputy Bürsch is satisfied with attorney Kleinlein, whom he calls "extraordinarily committed and competent." This is to be expected from an attorney who typically charges 350 euros an hour to think about other people's problems.

"How much did the SPD delegation pay you, Mr. Kleinlein?"

"Nothing."

"Who paid you then? The construction industry?"

"No, I didn't receive a fee from anyone."

"Then what were you working for? Or is your firm really a non-profit organization?"

"It is part of our Anglo-Saxon-influenced corporate culture to give something back to society, "pro bono" work, if you will. Moreover, there are no partisan preferences: we would advise anyone, in principal. Well, maybe not the Left Party."

"But you can't live off of that."

"Of course, such jobs also help expand our own expertise, which can be very helpful later when it comes to winning commercial mandates from companies planning PPP projects. Viewed from that perspective, the whole thing was a type of investment."

On 18 November, Kleinlein and a few other attorneys who worked on the legislation will be standing before the representatives of those very companies, at a seminar in Berlin, where they will explain to them what the new provisions mean and how to profit from them.

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