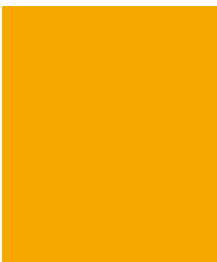




Federal Ministry for
Family Affairs, Senior Citizens,
Women and Youth

Report

by the Federal Government
on the **Impact**
of the Act Regulating
the Legal Situation of Prostitutes
(Prostitution Act)



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A.

Introduction

A.I. Mandate for the report

On 19 October 2001 the German Bundestag passed the Act Regulating the Legal Situation of Prostitutes (Prostitution Act). The Act entered into force on 1 January 2002.

On the occasion of the adoption of the Prostitution Act and by resolution of 19 October 2001, the German Bundestag called on the Federal Government

- “1. After a period of three years to report on the impact of the new legal situation created by the Act;
2. In consultation with the *Länder*, to review whether Sections 119, 120 Administrative Offences Act are necessary in light of the fact that prostitution is no longer considered immoral.”

(cf. Minutes of Bundestag Plenary Proceedings 14/196, p. 19204 C; for text see Bundestag Printed Papers 14/7174 (Recommendation for a Decision), p. 3).

As requested, the Federal Government hereby submits its report on the impact of the Prostitution Act. The report also covers item 2. of the Resolution, namely a review, carried out in consultation with the Federal *Länder*, of whether Sections 119, 120 Administrative Offences Act are still necessary.

A.II. Bases for the Federal Government’s report

The Federal Ministry for Family Affairs, Senior Citizens, Women and Youth commissioned and analysed a total of three scientific reports in preparation for the Federal Government’s report:

- A study on the impact of the Prostitution Act carried out by the *Sozialwissenschaftliche FrauenForschungsInstitut (SoFFi K) der Kontaktstelle praxisorientierte Forschung e. V., Evangelische Fachhochschule Freiburg*; Prof Dr Cornelia Helfferich (project manager); Prof Dr Barbara Kavemann et al. (implementation) (hereinafter: *SoFFi K I*);
- An in-depth study on factors influencing those wishing to leave prostitution (hereinafter: *SoFFi K IIa*) and the combating of crime (hereinafter: *SoFFi K IIb*), also carried out by *SoFFi K*, Prof Dr Cornelia Helfferich, Prof Dr Barbara Kavemann, among others;

- I “Regulation of Prostitution: Goals and Problems – A Critical Assessment of the Prostitution Act”, a report compiled by Prof Dr Joachim Renzikowski (hereinafter: *Renzikowski*).

These reports have been posted on the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth’s website at:

<http://www.bmfsfj.de/Kategorien/forschungsnetz.html>.

Other material which was taken into consideration included a study commissioned by the Federal Ministry of the Interior and the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth and carried out by Annette Herz and Eric Minthe. The study is entitled “The Offence of Trafficking in Human Beings – Procedural Statistics and Determinants of Criminal Prosecution” (hereinafter: *BKA 2006*; published by the Federal Criminal Police Office at: http://www.bka.de/kriminalwissenschaften/veroeff/band/band31/band31_straftatbestand_menschenhandel.pdf).

A. III. Regulation of prostitution in Germany and Europe

A.III.1. Discussion process on the regulation of prostitution in Europe

The Prostitution Act was adopted following a difficult political process which had, over a period of around 30 years, received various stimuli on various occasions. However, no broad, conclusive social consensus had been reached on how to address the social realities of prostitution. The debate that accompanied the legislative process was very much influenced by different basic ethical attitudes; various different opinions also prevailed within the political parties.

Other European countries are and have over the past few years been wrestling with the question of how the state should treat prostitution. They have reached very different conclusions, and the policies adopted in Sweden and the Netherlands will be outlined below by way of example to indicate the range of possibilities.

A few years ago Sweden decided to make the purchasing of sexual services a criminal offence, i.e. to punish the prostitute’s client. The prostitutes themselves still go unpunished. The Swedish reforms of the regulations governing prostitution came into force in 1998 and they define prostitution in the general sense as violence inflicted by men on women and children. The reforms were preceded by many years of debate. In 1977 the Prostitution Committee rejected the idea of criminalising prostitution. However, more and more people began supporting this idea. They placed the issue of prostitution in the wider context of gender equality. The legislative package concerning violence against women, into which the new Swedish regulation on prostitution was incorporated, still means prostitutes go unpunished, but does punish the prostitute’s client. In addition, the criminal offences of promotion of prostitution and benefiting from prostitution were expanded. These proposals were based on the idea that prostitution – regardless of each individual prostitute’s attitude to her job – has a negative impact on social relations between the sexes. Accepting prostitution meant accepting that sexuality could be bought, that the female body could be bought, which was not reconcilable with equality of the sexes, the culture the legislative was attempting to foster.

The Netherlands has adopted a different policy: The ban on brothels imposed in 1912, which was in practice hardly enforced, has been rescinded. At the same time, the punishability of forced prostitution and sexual abuse of minors was tightened and efforts to prosecute trafficking in human beings and illegal employment of foreigners were stepped up. Prostitution is seen as legal employment. The Netherlands now defines brothels as commercial businesses which require a licence and which are subject to strict controls by the police and local agencies responsible for public order. Local authorities are responsible for issuing the licences, for carrying out a background check on operators and for laying down conditions. For example, certain standards pertaining to hygiene, facilities and working conditions must be met. Several authorities are involved in monitoring prostitution and inspecting establishments: the police, health authorities, planning departments, local authorities, public prosecution offices, tax offices and labour protection authorities. The police controls whether the brothels fulfil the licensing conditions on behalf of the local authority, and thus work on behalf of both the local authority and the public prosecution office. The police monitors whether regulations are being complied with and inspects the establishments to see whether they are employing immigrants without legal residency, minors or those forced into prostitution.

The Swedish and Dutch models triggered controversial debate in other countries (in Scandinavia and the Baltic States as well as, for example, in France); in most countries this debate is still ongoing.

However, each debate very clearly reflects the very different underlying situation which exists in each country, which is characterised by different traditions, different legal framework conditions and different prosecutorial practice.

The range of models applied in Europe reflects the different legal/ethical premises on which the regulations governing prostitution are based, as well as their implications for legal policy.

Four attitudes to prostitution can be made out (cf. *Renzikowski* § 26 ff.):

- Prostitution is a violation of human dignity,
- Prostitution is (merely) a violation of moral principles or an offence against common decency,
- Prostitution is an autonomous decision to work in a risky profession,
- Prostitution is an occupation like any other.

This Report will endeavour to show that the path Germany has been pursuing since the adoption of the Prostitution Act defines prostitution as an autonomous decision that is to be respected by the law but which is typically associated with considerable dangers and risks. These include, for example, the psychological and physical impacts on those working in prostitution. These risks and dangers are not associated with all forms of prostitution to the same extent, but are primarily determined by the conditions under which the prostitutes are working.

A.III.2. Germany: The Prostitution Act

By passing the Prostitution Act the German Bundestag chose to adopt a narrowly delimited approach to regulating one aspect of the social phenomenon of prostitution.

Prostitution itself was taken as a given; the Act intended neither to abolish prostitution nor to enhance its status.

Rather, the emphasis was placed on improving conditions under which prostitutes work so as to benefit those women and men who voluntarily earn their living by prostitution.

The Act aims to improve the legal and social situation of prostitutes. The legal disadvantages of considering prostitution immoral and thus an invalid legal transaction, which in the past above all had negative impacts on the prostitutes themselves, were to be eliminated and prostitutes' access to social insurance facilitated.

The aim of the regulations set out in Sections 1 to 3 Prostitution Act and of simultaneously restricting criminal liability to the promotion of prostitution in cases involving exploitation of prostitutes (by amending Sections 180a, 181a Criminal Code) was to enable the prostitutes to conclude proper employment contracts and thereby to reduce their dependency on, for example, pimps and to improve the prostitutes' health and hygiene conditions at work.

It was also expected that the Act would help to curb prostitution-related crime and that it would become easier for prostitutes to leave the industry.

However, prostitution was not to become a "job like any other".

The employer's right to issue instructions was largely restricted in favour of prostitutes' right to sexual self-determination. No prostitute is to be obliged to serve a particular client or to engage in certain sexual practices against her will.

The Prostitution Act by and large disregarded the legal and social situation of immigrants without a valid residence permit, the situation of minors engaged in prostitution and drug-related prostitution.

At best these areas were addressed in the Prostitution Act to the extent that it was assumed that by concentrating on the criminal prosecution of actually punishable matters and shedding light into the grey area of prostitution, as was the intention, it would become easier to combat violent and degrading forms of prostitution such as trafficking in human beings, forced prostitution, prostitution by minors, exploitation of prostitutes and violent crime in the "scene".

A social and political consensus has been achieved on the fact that trafficking in human beings, forced prostitution and sexual abuse are to be vigorously combated.

At federal level this approach, which goes beyond the limited scope of the Prostitution Act, has had consequences, for example as regards measures to combat trafficking in

human beings, which have over the past few years been successfully developed and consistently expanded.

Other desirable measures, such as safeguarding the work of special consultation services for the affected target groups, fall within the purview of the *Länder*.

A.III.3. Change in focus of discussions since the Prostitution Act entered into force

In Germany, the debate did not end once the Prostitution Act entered into force. In some respects, though, the focus of these continuing discussions has changed.

For example, the criminal offences referring to trafficking in human beings were revised in 2005 as part of the 37th Criminal Law Amendment Act to implement the EU Council Framework Decision on combating trafficking in human beings and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children Supplementing the United Nations Convention Against Transnational Organized Crime.

In the context of this legislative procedure the question of criminal responsibility on the demand side in relation to victims of trafficking in human beings gained in importance.

In April 2005 the CDU/CSU Parliamentary Group and the Bundesrat submitted a proposal for the creation of the criminal offence of “sexual abuse of victims of trafficking in human beings”. The initiative came from Bavaria and, among other things, also included the proposal to rescind the amendments to Sections 180a, 181a Criminal Code that were introduced as part of the Prostitution Act.

In 2006 the issues of trafficking in human beings and forced prostitution drew great media attention in the context of the FIFA Football World Cup. At home and abroad, not least on account of the distorted reporting on the matter, supporters of a general ban on prostitution criticised both Germany’s attitude to prostitution and the Prostitution Act.

For example, the Prostitution Act was accused of not having improved prostitutes’ social and legal position, and of promoting prostitution and favouring brothel operators and pimps. In addition, the Prostitution Act, it was claimed, made it more difficult to combat trafficking in human beings and forced prostitution.

These discussions – along with its obligation to report to the German Bundestag – provide the Federal Government with the opportunity to take a closer look at the underlying thinking on which the current legal situation is based.

As outlined in the above, one cannot assume that a social consensus currently exists in Germany as regards what moral/ethical standard to apply to prostitution and what action the state should take based on that. The political debate reflects the different standards of morality which exist in society, according to which human dignity, freedom of each individual, sexual self-determination and gender equality are defined differently and weighed up against each other differently.

The characteristic feature of a free democratic state ruled by law is its respect for each individual's autonomous decisions, as long as these do not violate another person's legally protected interests. In a state which is neutral as regards *weltanschauung*, as reflected in the German Basic Law, the law must respect a person's voluntary, autonomous decision to engage in prostitution as long as it does not violate any rights of others. Engaging in prostitution on one's own authority does not automatically violate a prostitute's human dignity. Since free self-determination is an expression of human dignity, individuals first and foremost decide for themselves what "dignity" means for them. Even morally reprehensible action does not lead to the loss of human dignity. Individual freedom only reaches its limitations when the legally protected interests of others or those of the general public are interfered with.

It is not the task of the state to protect people from the consequences of their own decisions if these are based on free self-determination. Freedom in the context of the right to sexual self-determination means that each individual is freely able to decide "whether", "when" and "how" to engage in sexual relations.

Today, prostitution, like any other occupation to build up and sustain one's livelihood, is thus protected under Article 12 para. 1 Basic Law.

By contrast, it is beyond all question that prostitution-related crime as well as socially damaging forms of prostitution and those that violate human rights (such as forced prostitution, trafficking in human beings and sexual abuse of minors) must be combated by all means available to a state ruled by law, i.e. by means of criminal prosecution, monitoring by local public order agencies (*Ordnungsämter*), preventive and repressive measures, as well as by protecting and providing assistance to victims.

However, the principle that the state should exercise restraint in matters pertaining to *weltanschauung* on the other hand does not mean that prostitution must be treated by the state as a desirable form of economic activity which should be treated neutrally in every respect. Moreover, a finely differentiated treatment of the social forms and consequences of prostitution is also a dictate of the values expressed in the Basic Law.

Within the framework of its gender equality policy, the Federal Government thus also sees it as its task to take countermeasures against those implications of prostitution that are problematical as regards gender equality policy.

For example, one cannot ignore the empirical findings that show that those working in this industry are subject to considerable, empirically verifiable, psychological and physical threats.

Prostitution is generally a physically and psychologically demanding, risky and dangerous business in which particularly vulnerable groups frequently engage. This was confirmed by a survey of a sub-population of prostitutes during a study into the situation, safety and health of women in Germany that was commissioned by the Federal Ministry of Family Affairs, Senior Citizens, Women and Youth. This group suffered considerably more childhood violence, sexual violence, violence in relationships and violence in the workplace (cf. "Situation, Safety and Health of Women", available at: <http://www.bmfsfj.de/Kategorien/Forschungsnetz/forschungsberichte,did=20560.html>).

Thus, as well as the aspect of poor hygiene and conditions that pose a health risk to those voluntarily engaging in prostitution, more attention must be paid to the fact that violence represents a stress factor for women working as prostitutes.

It is, moreover, a social reality that many prostitutes find themselves in a social and psychological situation in which it is questionable whether they are really able to decide freely and autonomously whether to practice this profession or not. Against this background it must be the goal of gender equality policy to enable women and girls and men and boys in prostitution to earn their living by other means and to prevent them drifting into dependencies which make prostitution appear to be the lesser evil or an acceptable way out. It is the task both of state-funded assistance programmes and education and labour market policy to create such alternatives.

Experience from practical social work has shown that high moral demands alone are not particularly helpful in this respect when they lead to those affected being further excluded by society. It is easier to establish contact to people in socially marginalised situations if those offering assistance adopt an accepting stance.

In a free democratic state ruled by law, the risks, disadvantages and problematical implications associated with prostitution cannot be countered by forcing prostitution into the shadows using repressive measures. Rather, it must be possible to limit the problematical aspects associated with it by taking prostitution out of the shadows and monitoring the conditions under which it is practised in a manner that is based on the principles of the rule of law.

It is, furthermore, the task of all social forces to also address the problematical impact which the commercialisation of sexuality has in terms of the images of gender roles portrayed in society and the negative impact in terms of achieving the goal of equal partnerships, as well as to raise boys' and men's awareness for their responsibility in this respect within the context of a debate on values.

B. The direct and indirect impacts of the Prostitution Act

B.I. Prostitute's right to the agreed remuneration; immorality

Section 1 Prostitution Act contains the key regulation which aims to rectify the legal imbalance that previously existed to the detriment of prostitutes. The starting point from the legislator's point of view in 2001 was the previous categorisation of prostitution, namely that it offended against good morals, which in turn led to serious consequences as regards prostitutes' ability to secure their own livelihood and as regards their social situation.

The direct consequence of the attitude that prostitution was immoral was the invalidity of any agreements regarding the performance of sexual acts in accordance with Section 138 German Civil Code and, in consequence, that prostitutes did not have the right to claim counterperformance for services rendered.

The legislator's intention in this regard was to enable prostitutes to have a legally enforceable claim to payment of remuneration and to eliminate the categorical legal value judgement that prostitution was immoral because of the far-reaching negative consequences such a legal classification had.

The following questions must thus be answered before an assessment can be made of the impact of the Prostitution Act:

- Has the creation of an enforceable right to payment of remuneration been successful in legal terms?
- Are prostitutes making use of this possibility in the manner in which it was intended?
- Is the legislator's idea as regards the question of immorality being accepted in practice?

Section 1 first sentence Prostitution Act states that agreeing on payment of remuneration for the performance of sexual acts constitutes a legally effective claim. According to the explanatory memorandum for the draft legislation, the legal relationship between the prostitute and her/his client is thus regulated as a contract with unilateral obligations. After rendering their services, prostitutes thus have the right to claim payment of the agreed remuneration.

Sentence 1 second sentence Prostitution Act states that a legally effective claim also arises when a person, in particular within the context of an employment relationship, makes

himself/herself available for a certain period of time to perform such acts for a previously agreed remuneration. As a result, agreements made between a prostitute and the operator(s) of brothels and brothel-like establishments, in particular those based on an employment relationship, constitute a contract with unilateral obligations. Prostitutes thus have a right to claim payment of their previously agreed wages if they make themselves available for a specified period of time to perform sexual acts.

These claims are enforceable in court. However, clients or brothel operators, as their employers, do not have any enforceable claim to the performance of (specific) sexual services based on any agreement reached.

Section 2 Prostitution Act determines that the right to payment of remuneration cannot be assigned to another. Furthermore, also under Section 2, by and large, objections to a claim for payment of the remuneration are not possible.

A direct impact of the Prostitution Act has thus been to create the legal conditions for prostitutes to enforce their claim to payment of remuneration.

However, both an analysis of the case law and a survey of prostitutes carried out as part of the empirical investigation into the impact of the Prostitution Act (*SoFFIK I*) have shown that only an extremely small number of prostitutes have made use of the possibility of enforcing their claims in court.

The most important reason for the practical insignificance of the regulation seems to be the general practice amongst female prostitutes of demanding payment in advance. In addition, the fact that clients are usually anonymous and possibly also the fact that prostitutes lack information about or are unaware of their own rights has a role to play. It may also be the case that prostitutes are unwilling to take a case to court because they will thereby have to forfeit their anonymity.

For the aforementioned reasons one can assume that in the foreseeable future there will not be many civil-law actions filed against clients.

Even though up until now only very few prostitutes have made use of their right to take a client to court to demand payment of remuneration (which they also do not need to on account of their demanding payment in advance), most of the prostitutes (62.5%) who took part in the written interview stated that they would, in principle, be prepared to do so in the future. The mere fact that a prostitute can inform clients who are unwilling to pay that they can be taken to court may make them see sense and thus make it unnecessary to actually file an action.

Overall, the survey of prostitutes and consultation services thus also indicates that the knowledge that prostitutes are no longer without rights vis-à-vis clients who are unwilling to pay can give prostitutes more self-confidence vis-à-vis these clients.

The legislator's intention in choosing the wording of Section 1 Prostitution Act was to link it to the legal consequence that Section 138 German Civil Code can no longer be applied to the claim for payment of remuneration based on an agreement to perform sexual

acts. In the explanatory memorandum for the draft legislation, the legislator stated that this would lead to prostitution no longer being categorically judged to be immoral by the law. However, the Prostitution Act has not yet led to that judgement being rejected as unequivocally as was hoped for in the explanatory memorandum for the Act. The question of immorality is still disputed.

Accordingly, it is still a matter of controversial debate whether Section 1 Prostitution Act will have any knock-on effects on public law, especially those regulations applicable to restaurants, pubs and bars and to trade law, which up until now linked the value judgement attached to prostitution (as indecent or immoral) to legal consequences (cf. Section B.IX.1. below).

The legislator intended that the change in the attitude towards prostitution expressed in Section 1 Prostitution Act would automatically lead to sexual acts performed for money no longer being considered immoral by the entire legal system. However, the legislator's intention has not yet been entirely realised.

Nevertheless, a clear trend is now discernible in the case law in that it is being recognised that the legislator's intention was to put an end to the general immorality verdict. The legislator intended the Prostitution Act to take into account the fact that society now considered prostitution differently. In consequence, prostitution can no longer automatically be judged to be socially unacceptable and immoral even beyond the direct scope of application of the Prostitution Act (cf. e.g. Decision of the Federal Administrative Court of 6 November 2002, ref. 6 C 16.02 *GewArch* 2003, p. 122-124 and Section B.IX.1. below).

As was already the case during consultations on the Prostitution Act, there are still some in the specialist legal literature who express the opinion that only the legal form of an agreement on the performance of sexual services for money in the sense of a mutually binding contract can guarantee that the legal objectives pursued by the legislator will actually be achieved in legal terms. The civil-law regulations in the Prostitution Act are also criticised for their unilateral exclusion of objections. It is claimed that this creates an imbalance in the prostitutes' legal position vis-à-vis their clients, which leads to inconsistent weighting and to the fact that the rule is inconsistent with the legal system.

By contrast, however, reference must be made to the protective function of the provisions contained in Sections 1 to 3 Prostitution Act.

The idea behind Section 1 Prostitution Act stipulating a contract with unilateral obligations and the fact that Section 2 limits the legal position of clients and third parties (by prohibiting the assignment of claims and to a large extent excluding objections) is to protect prostitutes vis-à-vis employers, brothel operators, pimps, etc. Prostitutes are to be given the legal right at any time to refuse to perform certain sexual acts, or to perform them for a certain client, or to completely leave prostitution altogether (cf. Section B.V. below for ways of leaving prostitution). These regulations are an expression of the high value placed on the right to sexual self-determination, which is not to be restricted unnecessarily through contractual obligations.

The Federal Government is of the opinion that the legislator's basic decision of 2001, namely not to make prostitution a "job like any other", should be adhered to.

Irrespective of that, the prostitutes' possibility of taking a client to court to claim payment of remuneration has abolished an existing wrong. Even though not many prostitutes have made use of this right so far, the possibility of filing a civil-law action represents one way of eliminating unfair disadvantages and has strengthened prostitutes' legal position.

The Federal Government currently sees no reason to amend Sections 1 to 3 Prostitution Act.

B.II. The conclusion and format of contracts of employment

One of the legislative goals of the Prostitution Act was to enable prostitutes to conclude contracts of employment in order, by founding an employment relationship subject to social insurance contributions, to give them access to social insurance and very generally to improve their social protection.

The regulation in Section 1 second sentence Prostitution Act in particular serves this purpose. It rules out the nullity under civil law of contracts of employment in accordance with Section 138 German Civil Code.

It was also necessary to rule out the previous consequences under criminal law of concluding such contracts of employment. The previously applicable Section 180a (1) No. 2 Criminal Code was therefore deleted; the punishability of the "promotion of prostitution" was replaced by the punishability of the "exploitation of prostitutes". Section 181a (2) Criminal Code was revised and restricted to cases involving the restriction of the prostitute's personal or financial independence (cf. Bundestag Printed Papers 14/5958).

However, because the employee/employer relationship has been constructed as a legal transaction with unilateral obligations (Section 1 second sentence Prostitution Act), and because objections are not possible (Section 2 second sentence Prostitution Act), and on account of the criminal-law provisions under Section 181(1) No. 2 Criminal Code, it has specific features which make it different from other typical employment relationships. In particular, the employer's authority to issue instructions under Section 181a(1) No. 2 Criminal Code has been restricted.

According to Section 3 Prostitution Act, the restricted authority to issue instructions does not constitute an obstacle to concluding an employment relationship that is subject to social insurance contributions.

In order to qualify as an employment relationship that is subject to social insurance contributions, the explanatory memorandum for the draft legislation states that it is sufficient for an activity which a prostitute engages in to have the following characteristics:

- The restricted right of the employer to give directions plus the highest level of self-responsibility on the part of the prostitute,

- A certain amount of integration into an operation,
- The work must be voluntary.

It has, thus, largely been possible to overcome the legal obstacles which previously prevented employment contracts being concluded and employment relationships being registered with the social insurance authorities. However, in reality only very few of those affected have made use of this possibility.

The results of the empirical study SoFFIK I provide corroboration of that fact:

Of the prostitutes who completed the written interview (N = 305), three (1%) stated that they had a contract of employment, which in two cases the operator had arranged for. However, some of the statements made were contradictory. Eight of those interviewed (2.6%) had a contract of employment for some other type of work, for example barkeeper, hostess, housekeeper, telephonist. Eight of those interviewed (2.6%) stated that they had a so-called mini job, another nine (2.9%) said they were employed in some form or other in the field of prostitution. The overwhelming majority (72.8% = 222) worked on a freelance basis (or on commission).

Of those prostitutes who were interviewed personally, none had a contract of employment as a prostitute.

This result corresponds to statements made by those working in consultation services, who are aware of only very few contracts or mini jobs or who stated that prostitutes were working quasi as “sub-contractors with the duties of an employee”.

Of the 22 brothel operators who completed the written interview, 17 stated that the prostitutes working for them worked on a freelance basis. Only one from Baden-Württemberg was employing prostitutes both as employees based on a contract of employment and with basic pay plus commission. In both cases, prostitutes were registered with a social insurance fund either as an employee of an artists' agency or as a prostitute, depending on what they themselves wanted. Two had prostitutes working in mini jobs as night-club hostesses or temps.

Personal interviews with 10 operators presented a similar picture. At the time the survey was carried out, none of the prostitutes in these establishments had signed a contract of employment.

The main reason quoted by the brothel operators for this state of affairs was that the prostitutes did not wish to sign a contract. This was confirmed in the interviews with the prostitutes.

Of the 292 prostitutes interviewed in writing, only a very small proportion (17) definitely wanted a contract of employment as a prostitute. Many of them said the terms and conditions were important (85). More than 60% (178), however, more or less rejected the idea of a contract of employment. Of these, 93 definitely did not want such a contract of employment and 85 could hardly imagine concluding a contract.

These results clearly show that, at the time the survey was carried out, the conclusion of contracts of employment seemed attractive neither for the operators nor for the prostitutes. It appears that many of those interviewed could hardly imagine having social protection by entering into a dependent employment relationship as a prostitute and that, in the light of the financial deductions made on account of that, it seems to be a rather unattractive option.

The key argument against concluding contracts of employment was, from the point of view of the operators, the restricted right to issue instructions. They felt that they alone bore the economic risk. A contract of employment would obligate them to pay a salary without having the right to issue instructions to their employees to provide a service to clients.

The operators expressed some uncertainty as to whether and under which conditions the stipulating of place of work, hours of work and prices for certain services went beyond what was legally possible and made them liable to punishment for exploitation of prostitutes (Section 180a(1) Criminal Code) or pimping (Section 181a(1) No. 2 Criminal Code, “dirigiste pimping”). Regional differences in criminal prosecutorial practice added to this uncertainty. For example, the Public Prosecutor’s Office in Munich in 2003 stated that “the one-sided stipulation of working hours by brothel operators is to be classed as so-called dirigiste pimping within the meaning of the aforementioned provisions and thus to be prosecuted” (cf. *SoFFIKI*, Section II.2.1.4.4).

A decision by the Federal Court of Justice of 1 August 2003 (Federal Court of Justice, ref. 2 StR 186/03; Decision of the Federal Court of Justice 48,314 and *NJW* 2004, p. 81 ff.) created legal clarity by stating that the operator of a brothel may not stipulate the type and extent of prostitution to be engaged in. However, as long as a prostitute was voluntarily working in a brothel or brothel-like establishment, the mere fact that he/she was integrated into an organisational structure on account of the stipulating of fixed working hours, places of work and prices did not make it punishable (cf. also B.VIII.1 below, and *Renzikowski* §§ 83, 89).

At the time of the survey, the potential employers were not sufficiently aware of this fact.

In practice, even after the introduction of the Prostitution Act, operators of clubs and brothels still act more as landlords, although in some cases internal working conditions are specified in great detail and thus de facto ought to fulfil the conditions for dependent employment. In practice, operators of eros centres and hotels that rent rooms by the hour merely conclude a rental agreement with prostitutes, although this is closely linked to the fact that in trade regulatory practice this is still classified as “commercial room rental”. Depending on the trade regulations actually applied locally, the establishments still do not need to be legally registered as brothels or brothel-like establishments.

In practice, up until now, in most brothels prostitutes – *pro forma* – worked for their own account. This may possibly be a consequence of the former threat of punishment in the old Section 180a (1) No. 2 Criminal Code. Continuing this practice enables operators to continue to earn the maximum profits without having any of the duties of an employer. To compound matters, in the past hardly any external monitoring authorities were actively involved in inspecting existing working relationships (cf. *Renzikowski* §§ 87, 89, 91).

According to the results of the empirical study *SoFFIKI*, there is another obvious reason for employment relationships subject to social insurance contributions not gaining acceptance, namely the rather more marginal risk from a business management perspective of being called to account during an audit or similar control measures for not registering employment relationships with the social insurance authorities (possibly going as far as punishability in accordance with Section 266a Criminal Code).

Permitting legal employment relationships in brothel-like establishments must thus be balanced out by corresponding monitoring mechanisms since it is not to be expected that entrepreneurs in the “scene” will desist from old, tried and tested routines in a legal grey area without an external incentive and then fulfil the new duties of an employer imposed upon them (e.g. continued payment of wages, paid holidays, social insurance contributions) without any problems in the future (cf. *Renzikowski* §§ 89, 91).

The Prostitution Act links social protection and improved working conditions to the conclusion of a contract of employment. Based on the results of the survey, it appears doubtful whether this close link to the performance of prostitution as part of an employment relationship corresponds to the wishes and interests of prostitutes. After all, around 60% of the prostitutes interviewed did not feel that a contract of employment was a desirable option. It seems that the majority of prostitutes prefer to continue working on a freelance basis.

The prostitutes interviewed as part of an empirical study feared that if they concluded a contract of employment they would lose their sexual autonomy as well as their ability to themselves determine when and where they want to work. Prostitutes said other obstacles were the fear that they would lose their anonymity and the negative social consequences that would possibly arise if their line of work was revealed. Another factor which had a role to play was that many women viewed their work as a prostitute as of a short-term nature and they considered prostitution to be a temporary episode in their life.

As surprising as this may seem, the previous grey area nevertheless also had certain advantages for the prostitutes. Creating a legal framework is always also linked to obligations which thereby become manifest, for example the prostitutes’ duty to pay tax and social security contributions.

Prostitutes and brothel operators felt that financial losses linked to the founding of an employment relationship subject to social security contributions was a problem.

Furthermore, the majority of the prostitutes had more or less solved the problem of social security cover without having to be in dependent employment, and most of them were thus not motivated to conclude a contract of employment.

Prostitutes, consultation services for prostitutes and operators thus agreed that it is difficult to realise the underlying intention of the Prostitution Act, namely of concluding contracts of employment.

Trade unions share this opinion. There have been a few attempts to actively support the discussion process initiated by the Prostitution Act and some attempts to attend to the interests of prostitutes. For example, the services trade union *ver.di* has supported the

development of contracts of employment in prostitution by drawing up a sample contract. However, *ver.di* sees this sample contract of employment more as a basis for discussions on preparing standards in the field of prostitution. It was, the union said, important that the idea of contracts of employment gained a foothold in prostitution and the discussion concerning “prostitution as a place of work” was driven forward.

The empirical investigation *SoFFi KI* comes to the conclusion that the possibility of dependent employment relationships should be further pursued in order to improve prostitutes’ social and financial security even if, at present, the majority of prostitutes prefer to work on a freelance basis. The majority of prostitutes wish to retain their independence (and self-determination) and this should be taken seriously. This wish is no doubt linked to the very specific nature of the work, which is very personal, very intimate and very physical.

In the Federal Government’s opinion, further deliberation of the issues involved should include looking at how to define prostitution within the legal context of freelance work and how, given the legal preconditions, freelance work could guarantee prostitutes social protection and how their working conditions as freelancers could be improved.

In addition, efforts should be made to improve the actual frequency of controls regarding compliance with social insurance and tax duties in the field of prostitution in order to get those who de facto have the role of employer to actually take on that role in the legal sense. One will have to be careful not to allow (criminal-)law regulations (so-called landlord’s privilege, cf. *Renzikowski* § 120f.) to afford privileges to those employee/employer relationships in which the employer avoids taking on any functions of an employer. The rather unsatisfactory “landlord’s privilege” (Section 180a (2) No. 2 Criminal Code) means that exploitation by the owner of a dwelling carries a more lenient threat of punishment than exploitation by a pimp under Section 181a (1) No. 1 Criminal Code. However, all forms of exploitation of prostitutes from which the victim cannot extricate himself/herself deserve the same punishment.

B.III. Prostitutes’ access to social insurance

B.III.1. Legal preconditions

Even before the entry into force of the Prostitution Act prostitutes were not without social insurance rights. Nevertheless, the Prostitution Act has played an important role in terms of clarifying various issues.

In principle, social insurance legislation is value-free and benefits cannot be refused or cut on account of a “discredited” profession. In order to qualify for social insurance it is sufficient for a *de facto* employment relationship to exist. For example, in its decision of 10 August 2000 (ref. B 12 KR 21/98 R), the 12th Panel at the Federal Social Court found that, in the case of an employee of a company offering online chats of a sexual nature via a viewdata system, the employee was subject to compulsory insurance and liable to pay social insurance contributions. The Court found that there was no reason why even immoral employment relationships should in principle be excluded from social insur-

ance protection, especially since they were tolerated by the legal system. Therefore, access to social insurance would in principle have been possible in prostitution even before the entry into force of the Prostitution Act if prostitutes had registered as dependently employed.

However, up until the entry into force of the Prostitution Act, leading social insurance organisations held the legal opinion that, despite the case law of the Federal Social Court mentioned in the above, the fact that such contractual relationships violated moral principles constituted an obstacle to the finding that prostitutes were in an employment relationship and social insurance contributions had to be paid. Since the Prostitution Act came into force, however, this opinion has no longer been tenable.

Nevertheless, prostitutes did not in practice have access to social insurance because a brothel owner for whom prostitutes were working under conditions which constitute an employment relationship subject to social insurance could be punished under the old Section 180a(1) No. 2 Criminal Code. To avoid the risk of criminal prosecution, brothel operators therefore often chose to employ prostitutes in something similar to pseudo self-employment (*Scheinselbstständigkeit*); they also failed to report existing *de facto* dependent employment relationships to the social insurance authorities. The legislator therefore also chose to delete Section 180a(1) No. 2 Criminal Code to insure that prostitutes could enjoy social protection.

The consequences of the Prostitution Act as regards social insurance law were the topic of a statement issued jointly by leading social insurance organisations on 18 November 2002, in which they outlined in greater detail the impact of the Prostitution Act on matters relating to insurance, contributions and registration.

The statement also described the criteria applied to differentiate between freelance work and dependent employment in prostitution, which had been modified since the entry into force of the Prostitution Act.

Accordingly, since the Prostitution Act came into force the generally applicable “criteria used to define ‘prostitute’” have been qualified in that the law stipulates that the prostitutes’ employer’s restricted right to issue instructions does not constitute an obstacle to the founding of an employment relationship. According to the explanatory memorandum for the draft legislation, the employer has no right to demand that the prostitute carry out sexual acts and has no right to any claims on account of “bad performance”. The prostitutes are thus able to freely choose their clients and to decide what type of sexual services to perform. The employer’s (e.g. brothel operator’s) right to issue instructions is thus limited to determining the place and time for performance of this work. The result is that in order to found an employment relationship in prostitution it is sufficient to reach agreement on being at the employer’s disposal for a previously agreed remuneration and at a predetermined location for a specific period of time, and that the remuneration is paid irrespective of whether the sexual acts are actually performed. The agreement to pay basic remuneration plus a flexible pay component depending on the actually performed sexual services (e.g. mixed employment as a prostitute and barmaid) does not represent an obstacle to assuming that an employment relationship has been entered into.

Dependent employment, therefore, exists when the employer has the restricted right to issue directions and the prostitutes have the highest level of self-determination and are to a certain extent integrated into an operation (Bundestag Printed Papers 14/5958).

In objective cases of doubt, according to Section 7a Social Security Code, Book IV, it is possible to apply to the Federal Insurance Institution for Salaried Employees to establish one's status as a prostitute. The contractual partners do not need to agree on the filing of this application (statement by leading social insurance organisations, 18 November 2002).

The statement also makes it clear that the duty to be insured, to pay contributions and to be registered on the part of those in dependent employment in prostitution (i. e. prostitutes) became effective as of 1 January 2002 at the earliest.

The social insurance companies' stance is consistent in light of the fact that, according to their interpretation of the law, the Prostitution Act actually created the possibility of founding an employment relationship as a prostitute for which social insurance contributions must be paid.

It is to be welcomed that this statement has clarified a matter which was initially unclear after the Prostitution Act entered into force, namely whether supplementary claims for insurance contributions for employment relationships which existed prior to the entry into force of the Prostitution Act could be made. The matter has been settled by introducing a cut-off date: Supplementary claims for insurance contributions on account of dependent employment as a prostitute can, accordingly, only be backdated to 1 January 2002.

Concerns voiced by prostitutes and brothel operators in this regard can, therefore, be seen as unfounded. Nevertheless, they do have a certain role to play in practice.

If the prostitute is working on a freelance basis, then all social insurance regulations applicable to other freelancers also apply to the prostitute. Regardless of the fact that some jobs may have been subject to social insurance contributions, prostitutes had the possibility, just like any other freelancer, of paying voluntary contributions into the state pension system or of applying to be treated as a compulsorily insured person and then paying compulsory contributions. However, the latter presupposes that the freelance work is not only of a temporary nature and that the application to be treated as a compulsorily insured person is lodged within five years after taking up self-employment. The fact that the person is classified as an entrepreneur under tax law is sufficient, since the tax classification of a job is an important indication of the existence of either dependent or freelance employment. Those who are paying voluntary state pension contributions, however, do not have access to other social insurance systems. For prostitutes, the five-year deadline for applications in accordance with Section 4(2) Social Code, Book VI for compulsory pension insurance upon application commences at the earliest on 1 January 2002 (cf. statement by leading social insurance organisations, 18 November 2002).

Prostitutes working on a freelance basis would therefore in principle have had the possibility, before the Prostitution Act came into force, of paying voluntary contributions or, upon application, compulsory contributions into the state pension system.

Access to statutory health, unemployment and pension insurance as a prostitute has been legally guaranteed for prostitutes at the latest since the Prostitution Act came into force if it is established that he/she is in an employment relationship in a brothel or brothel-like establishment.

B.III.2. Statistics quoted by social insurance agencies

On account of the registration procedure involved, it is impossible to say how many prostitutes are officially registered as such in the statutory pension system or in a statutory health insurance system since the entry into force of the Prostitution Act. The Federal Employment Agency has not introduced a separate occupational code for prostitutes; they are included with other very diverse groups under the code “913”, which covers a total of 101 jobs. Apart from two terms referring to prostitutes (*Liebesmädchen and Prostitutierte*) they all describe jobs in the hotel/restaurant/pub/bar sector.

The only information which the insurance companies receive from employers regarding the type of work carried out by an employee is the occupation code used to register the employee for social insurance purposes.

Based on an analysis of persons registered under these codes in the period 2001 to 2003, the Federation of German Pension Insurance Institutions concludes that it can still be assumed that up until late 2003 there was no significant number of prostitutes who were subject to insurance contributions. “Nevertheless, based on the currently available analysis of pay receipts for employment relationships in the period 2001 to 2003, it is possible to comment on the impact of the Prostitution Act. Whilst in 2001 367,797 jobs were registered under the code “913”, 382,297 were registered as such in 2002, but only 364,848 in 2003. Since the new regulations of the Prostitution Act were introduced, the number of jobs registered as “913” has thus even dropped slightly. It thus does not seem to be the case that many prostitutes have entered into employment relationships, at least not until late 2003” (Federation of German Pension Insurance Institutions, letter of 14 December 2004).

This corresponds to the aforementioned finding that only a few employment contracts have been concluded.

In the end, however, based on the statistics provided by social insurance companies it is impossible to draw any conclusions regarding the – positive or negative – developments in terms of the number of prostitutes who are registered with a social insurance agency.

B.III.3. Empirical findings

However, the results of the survey carried out as part of the *SoFFIKI* empirical study into health insurance and pension insurance confirm that as yet hardly any prostitutes have registered as an employee with a social insurance agency.

Thus, the aforementioned finding regarding a lack of acceptance of contracts of employment has also led to consequences regarding the level of social protection.

Nevertheless, many prostitutes have sickness cover and – to a lesser extent – pension cover.

B.III.3.a) Health insurance

The results of the interviews with prostitutes carried out as part of the *SoFFIKI* study show that the majority of prostitutes have health insurance, but not on account of their work as prostitutes.

Of the prostitutes who completed the written interview, the majority (86.9%) had some form of health insurance. Only a small proportion did not have health insurance; the figure was, however, considerably higher than in the population overall. For comparison: 87.5% of the population overall are covered by statutory, 9.3% by private health insurance (micro census May 2003; in *Statistisches Taschenbuch Gesundheit 2005*, www.bmg.bund.de).

	All those interviewed	Main job¹	Sideline¹
With health insurance	265 (86.9%)	145 (84.8%)	119 (89.5%)
Without health insurance	40 (13.1%)	26 (15.2%)	14 (10.5%)
Total	305	171	133

1 304 prostitutes specified whether this was their main job or a sideline.

The fact that slightly more of the prostitutes for whom prostitution was a sideline have health insurance is primarily due to the fact that they have health insurance on account of their main job or on account of the fact that they are receiving social security benefit. One quarter (25.2%) of those surveyed for whom prostitution was a sideline were otherwise employed as a salaried employee or civil servant or were still at school or in vocational training. Another eighth (12.5%) were on either employment or social security benefit and thus had health insurance cover. Those prostitutes for whom prostitution was a sideline were, firstly, more likely to be insured with the *AOK* state health insurance fund, a substitute health insurance fund or a company health insurance scheme than those working full-time (79.0% compared to 63.0% of those with health insurance) and, secondly, considerably more often themselves compulsorily insured than those whose main job was in prostitution (39.8% compared to 10.1% of those with health insurance).

Those without health insurance were distributed across all age and income groups. Age and level of personal income from prostitution had no decisive influence on whether the person interviewed had health insurance or not.

Of those who took part in the personal interviews who were working in prostitution plus another job, all had health insurance through their main employment.

Previous surveys into the situation of prostitutes had in some cases revealed that considerably fewer of those questioned had health insurance cover. For example, of the 250 subjects in the so-called EVA Study (Leopold/Steffan, *EVA-Projekt*, 1997) only 64% had health insurance. An analysis of the work done by two consultation services in North Rhine-Westphalia assisting prostitutes who want to leave prostitution (Leopold 2001) showed that 76.8% had health insurance, of whom, however, numerous had left prostitution and were equal before the law to those with statutory health insurance on account of the fact that they were receiving social benefits.

A real comparison of the situation before and after the entry into force of the Prostitution Act is not possible on account of the different structures of these surveys.

In the opinion of the researchers, the larger number of prostitutes with health insurance in the present survey points more towards an increased awareness of the need to have health insurance cover. It appears that the efforts of the consultation services to motivate their clients to take out health insurance has borne fruit.

Along with the more positive picture which emerges from statements made by prostitutes interviewed, the study, however, also indicated that there are still some problems.

For instance, the Ministry for Women's Affairs, Labour, Health and Social Affairs in Saarland declared that only a few of the prostitutes in Saarland have health insurance cover. The reasons for this, it said, were, along with not fulfilling criteria for membership of a statutory health insurance fund, the private health insurance companies' refusal to insure prostitutes. The Ministry of Social Affairs, Health, Women, Youth and Senior Citizens in Schleswig-Holstein reported a rising trend in Lübeck for prostitutes not to have health insurance. Of 191 clients visiting the Consultation Service for Sexual Health and AIDS at Lübeck Public Health Authority, only 59% had health insurance.

Nearly three quarters (71.5%) of those interviewed who had health insurance cover were with a statutory health insurer; just over one quarter was insured privately. There are thus more prostitutes who are privately insured than in the population overall.

Health insurer	All those interviewed ¹	Main job ¹	Sideline ¹
AOK state health insurance fund	91 (37.0%)	44 (32.4%)	47 (43.1%)
Substitute health insurance fund	50 (20.3%)	22 (16.2%)	28 (25.7%)
Company health insurance scheme	35 (14.2%)	21 (15.4%)	14 (12.8%)
Private health insurance company	70 (28.5%)	49 (36.0%)	20 (18.3%)
Total	246	136	109

¹ Details regarding the health insurer or employment status were not available for all those with health insurance.

More than two thirds of those included in the survey who had health insurance were themselves insured (68.2%); nearly one third were dependants insured through a single wage earner (*mitversicherte Familienmitglieder*).

Insurance cover	All those interviewed ¹	Main job ¹	Sideline ¹
Prostitutes with voluntary health insurance	110 (44.9%)	80 (58.8%)	30 (27.8%)
Prostitutes with compulsory health insurance	57 (23.3%)	14 (10.3%)	42 (38.9%)
Dependants insured through another wage earner	78 (31.8%)	42 (30.9%)	36 (33.3%)
Total	245	136	108

¹ Details regarding the type of health insurance or employment status were not available for all those with health insurance.

Being insured as a dependent through another wage earner is problematical. According to Section 9 Social Code, Book V, those who are insured free of charge in a statutory health insurance fund through a family member are not permitted to work on a full-time freelance basis. Furthermore they are not allowed to earn, on a freelance basis, more than € 345 themselves or up to € 400 as a casual employee (*geringfügig Beschäftigte(r)*). In such cases they must take out insurance themselves. A small proportion of those surveyed who were co-insured through another family member could, theoretically, fulfil the income criterion. Most of those insured via other family members, however, clearly exceeded these income thresholds. Although they did have health insurance, they were insured on the basis of erroneous information. If such cases come to light, then those affected can suffer legal and financial consequences, possibly in some cases going as far as the health insurers demanding compensation.

175 of those interviewed stated what type of health insurance they had: 13 were officially working and insured as a full-time prostitute. Of these 13, eight were insured privately and five in statutory health insurance funds. Twelve stated that they had had no problems being accepted by the health insurer on account of being prostitutes.

How insured	All those interviewed	Main job	Sideline
As a prostitute	13 (7.4%)	13 (13.1%)	–
Under another job title	162 (92.6%)	86 (86.9%)	76
Total	175	99	76

Reasons quoted for being insured under another job title included the wish to remain anonymous as well as the fear that the insurance company would otherwise not accept them. Even after the Prostitution Act came into force many prostitutes preferred not to quote “prostitute” as their job title because “no-one needs to know how I earn my money” (*SoFFIKI*).

Those insured voluntarily in substitute health insurance funds are not obliged to state their job title. The members of both associations “have no reservations whatsoever against insuring employees from some professions” (letter from the Association of Sala-

ried Employees' Health Insurance Funds/Association of Workers' Substitute Health Insurance Funds, 20 December 2004).

When applying to a private health insurer one must always state one's profession on account of the individual risk assessment that is carried out and the fact that the contributions for certain services are calculated on the basis of the risk assessment. Private health insurance companies are not obliged to insure everyone, i. e. they may exclude individuals or entire professions.

According to reports from special consultation services, there are indications that in actual fact only a very small number of private health insurers is prepared to accept prostitutes who openly admit to their profession, whilst other insurers attempt to exclude them on account of the negative risk assessment associated with working as a prostitute. This is corroborated by information provided in interviews with private insurance companies.

Only a few private health insurers will thus take on prostitutes working on a freelance basis who cannot become members of a statutory health insurance company, and they must openly state their profession.

If they can provide evidence of relevant previous periods of insurance, they could also insure themselves on a voluntary basis in a statutory health insurance company in accordance with Section 9 Social Code, Book V. However, experience has shown that only a few prostitutes working on a full-time basis fulfil these criteria. In practice, many prostitutes fail to take out voluntary statutory health insurance because they lack the previous periods of insurance.

B.III.3.b) Old-age pensions

The results of the survey show that it is more difficult to get old-age pension cover than it is to get health insurance cover.

Of the 292 prostitutes who filled in the detailed questionnaire, only just under half had any form of pension provision. Nearly the same amount were not paying into any pension scheme and would thus, in all probability, be dependent on state support later on.

	Number	%
Voluntarily insured ¹	41	14.0
Compulsorily insured	40	13.7
Otherwise insured	56	19.2
I with old-age pension provision	137	46.9
No old-age pension provision	133	45.5
N.A.	22	7.5

¹ It is not clear whether those who ticked "Yes, I am making voluntary payments" understood "pension" to mean a statutory pension insurance or a private pension insurer, i. e. whether they are paying voluntary contributions into the state pension scheme or into a private pension fund. Based on the interviews, it must thus be assumed that both are possible.

Those surveyed who were working as full-time prostitutes were significantly less frequently paying old-age pension contributions than those for whom prostitution was a sideline. The risk of having no old-age pension provision is thus considerably higher for full-time prostitutes than for those for whom prostitution was a sideline.

Table 7: Old-age pension provisions (those for whom prostitution is a main job vs. sideline)*		
	Main job	Sideline
With pension provisions	68 (43.3%)	69 (61.1%)
No pension provisions	89 (56.7%)	44 (38.9%)
Total	157	113

* $\chi^2 = 8.282$, $P = 0.004$

However, those working on a full-time basis clearly wished to be entitled to draw a pension from their time working as a prostitute.

Those prostitutes for whom prostitution was a sideline who had no pension provision were on social benefit, housewives, in full-time education or at university. The latter two, however, are no different from others in full-time education or students.

The assumption that seems to suggest itself (i. e. that it is above all those with little income from prostitute who have no old-age pension provision) was not confirmed either for those for whom prostitution was their main job or a sideline. Those interviewed who had no pension provision were found in roughly the same proportions in all income groups. The assumption that it is above all younger interviewees who have no pension provision because they are still a long way off thinking about such matters only proved true for those for whom prostitution was a sideline. Their attitude to prostitution as their profession as well as the length of time they had been working as a prostitute did not have a role to play as regards pension provision.

However, what did have a decisive influence on whether a full-time prostitute had old-age pension provision was the length of time the prostitute still intended to stay in the industry. The longer term the prostitutes' prospects of staying in the profession, the earlier they took out pension cover. It appears that full-time prostitutes with longer term prospects in prostitution take out pension provision earlier than those who do not feel they have any future in the profession. However, existing pension provisions may also contribute to prostitutes feeling they have longer term prospects in prostitution, whilst those with no pension provision are more likely to want to leave prostitution sooner.

Statements made by those interviewed personally lead to the assumption that the question of old-age pension provision is more likely to be connected to each person's individual need for security.

For example, interviewees for whom prostitution was a sideline said the pension and social security contributions they were paying through their main job were an important reason for not giving up that job and working full-time as a prostitute. Other interviewees took out additional insurance in order to have comprehensive cover.

There were also clear differences as regards the type of pension provision between those for whom prostitution was their main job and those for whom it was a sideline. Most of the prostitutes for whom prostitution was a sideline were compulsorily insured; the majority of the full-time prostitutes had made other provisions for old age.

	Main job	Sideline
Voluntary contributions to statutory pension scheme¹	18 (26.5%)	23 (33.3%)
Compulsorily insured	10 (14.7%)	30 (43.5%)
Otherwise insured	40 (58.8%)	16 (23.2%)
Total	68	69

¹ As mentioned in the above, it is not clear whether those interviewed understood “pension insurance” to mean a statutory pension fund or a private pension provider, i. e. whether voluntary contributions are being paid into the statutory pension system or to private insurers.

The prostitutes for whom prostitution was a sideline who are compulsorily insured included salaried employees, civil servants, those on unemployment benefit or unemployment assistance, housewives, a few freelancers, those in full-time, vocational or university education, and those on social security benefit. Those receiving benefits from the employment agencies are compulsorily insured whilst they are on benefit. Housewives may be compulsorily insured if they are, for example like one interviewee, on parental leave.

The majority of prostitutes who were paying into (other) private old-age pension schemes were working full-time as prostitutes. These include various types of pension provision. For instance, those interviewed personally had a private pension or life insurance and had made other types of financial investments. Some also had minimal pension claims from employment relationships that had existed a long time ago.

It is, however, doubtful whether the existence of other pension provision (as well as entitlements to a statutory pension) can actually cover living costs after retirement. It cannot be ruled out that those who have made pension provisions will still be dependent on state support once they retire or if they stop working as prostitutes.

Overall, thus, it is clear that the Prostitution Act has in principle improved the legal situation as regards social protection.

However, the Prostitution Act has so far apparently not had any real impact on the type and extent of prostitutes’ social protection.

B.IV. No job placement in prostitution

Since the Prostitution Act entered into force on 1 January 2002, prostitution may no longer be considered immoral. Since then, a person may not automatically refuse to accept a job in prostitution in accordance with Section 36 (1) Social Code, Book III.

Contrary to diverse articles in the press which claimed the opposite, the Federal Employment Agency does not find jobs for people in prostitution. After giving due consideration to the matter, the Federal Employment Agency decided to make it a principle not to find jobs for the unemployed in this field. Otherwise, this would lead to the Federal Employment Agency promoting prostitution, to which it is not obligated.

In practice, that means that employment agencies do not accept announcements of job vacancies and applications in prostitution. Such job vacancies which are entered into the virtual job market on the internet are deleted.

By contrast, the agencies do accept announcements of job vacancies for jobs closely associated with the erotic industry, for example dancers and barmaids, if there is no obvious or explicit reference to prostitution. These job vacancies are only handed out if someone approaches an employment agency with the express wish of finding a job in this industry.

A decision by Speyer Social Court of 4 May 2006 (ref. S 10 AL 1020/04) can be seen to confirm the Federal Employment Agency's practice. According to the decision, a brothel operator, in his capacity as an employer, has no right to demand that the Federal Employment Agency find him prostitutes to enter into an employment relationship. The Court found that the entry into force of the Prostitution Act has not changed that, since the Act pursues a completely different objective and does not aim to reduce unemployment or promote prostitution enterprises by actively finding jobs for people in prostitution. The legislator had made no statements in the Prostitution Act, the Court found, regarding the fact that prostitution was now to be condoned as regular employment which the state had to actively promote.

In another decision by Dresden Social Court of 6 June 2005 (ref. S 23 AL 1207/03), the Court dismissed an action on account of the lack of need for legal protection after the plaintiff wanted to force the Employment Agency to find nine hostesses for erotic services for his club and the Agency had declined.

The Federal Employment Agency's decision not to find jobs for people in prostitution has ensured that the unemployed will not be asked to consider job vacancies in this field against their will. In the opinion of the Federal Employment Agency, an individual's personal rights are to be given priority over any legally permissible form of employment.

Neither does the possibility of refusing such work give rise to the question of the consequences for claims for benefit. Reports that women who refuse to take on jobs in prostitution will forfeit rights to claim Unemployment Compensation I and Unemployment Compensation II (*ALG-I and ALG-II*) are thus incorrect. Furthermore, the Federal Employment Agency has issued internal instructions to ensure that prostitutes who drop out because they no longer wish to work in the field are to be recognised (without the need for further review) as having an important reason for leaving their job within the meaning of Section 144(1) Social Code, Book III. This can also not lead to any consequences as regards claims for benefits. According to an internal directive issued by the Federal Employment Agency, the same applies to the area covered by Social Code, Book II.

The tightened conditions for taking on “reasonable work” in accordance with Section 10 Social Code, Book II do not mean that the unemployed will be placed in jobs or measures to integrate them in prostitution.

Based on the regulations set out in the Prostitution Act and the idea of providing protection associated with it, the Federal Employment Agency is tasked with offering prostitutes the means of leaving the profession by making its full range of services available to them. Prostitutes who wish to leave prostitution can use the services of the Federal Employment Agency both to find a job and to get advice.

The Federal Government shares the Federal Employment Agency’s interpretation of the law and expressly welcomes the basic decision taken by the Federal Employment Agency not to find jobs for people in prostitution. The legalisation of employment relationships in prostitution does not mean that prostitution has become a “job like any other”.

The legislator has ensured, especially on account of the provisions of the Prostitution Act, that no person will be offered a job in prostitution either indirectly or contractually or that they will be legally obliged to continue working in prostitution. This thus takes into account the fact that greater value is attached to the right to sexual self-determination.

In the Federal Government’s opinion, the Federal Employment Agency’s current practice is backed by applicable law.

However, the Federal Government will closely observe whether the Federal Employment Agency’s current practice continues to ensure that no-one will be offered a job in prostitution.

B.V. Possibilities for leaving prostitution

B.V.1. Legal implications of leaving prostitution

As shown in the above, as the legislator intended, prostitutes can leave prostitution at any time without facing labour law consequences. The correct legal appreciation of the Prostitution Act in the practical work of the Federal Employment Agency also ensures that, either on account of the Federal Employment Agency’s practice of finding jobs for people or possibilities for imposing sanctions as set out in Social Code, Books II and III, people are not *de facto* being tied to a job in prostitution.

Nevertheless, the Federal Government also does not have any indications that any legal consequences are being drawn in any legal area whatsoever since prostitution is no longer considered immoral and thus women are *de facto* being stuck or involved in prostitution.

The Federal Government is not aware of a single case in which courts had assumed, on account of the Prostitution Act, that prostitution was now to be legally classified as “reasonable employment” or had used other means to keep a person working as a prostitute despite the fact that they had declared they wished to leave prostitution.

A case in Bad Iburg (ref. 5 F 578/05 UE; confirmed by Oldenburg Higher Regional Court, ref. 3 WF 92/06) cited in the press is not an example of the negative legal consequences of prostitution no longer being considered immoral. This case did not refer to a post-marital claim for maintenance, but merely to an application for legal aid for a forthcoming court case pertaining to maintenance payments. Contrary to reports in the press, the decision concerning the application for legal aid did not force the plaintiff to continue working as a prostitute, but rather required that she draw on her own resources which derived from, among other things, having in the past worked as a prostitute.

In a judgement of 10 February 2003 (ref. 17 UF 1523/02) regarding maintenance proceedings, Munich Higher Regional Court would not allow a man to refer to his ex-wife's having worked as a prostitute while they were married. Accordingly, there is no requirement to seek remunerative occupation in prostitution as far as maintenance law is concerned. It is not permissible to exert pressure on anyone to work in prostitution. The Court found that that also applied to indirect pressure on account of the "requirement to seek remunerative occupation". Rather, prostitution was always to be classed as unreasonable employment in terms of maintenance law which could be terminated at any time without suffering disadvantages as regards maintenance.

Thus, in legal terms, the objective of the Prostitution Act, namely that it is to be possible for prostitutes to drop out at any time, has been achieved.

However, that says nothing about how many women who wish to drop out of prostitution actually manage to do so. That goes for women who have decided to work in prostitution without recognisable external pressure, and, naturally, all the more so for women who find themselves in what seems to be a hopeless situation on account of debt or drug-addiction in which they subjectively feel prostitution to be the only alternative available to them.

The issue of developing measures to provide to those wishing to drop out and the possible influences of the Prostitution Act on this area will thus be dealt with in the following.

B.V.2. Assistance offered to those wishing to leave prostitution

The question as regards what assistance is offered to those wishing to opt out of prostitution, developments over the past few years and the current situation were the subject of one of the studies commissioned by the Federal Ministry of Family Affairs, Senior Citizens, Women and Youth in preparation of the Federal Government's report (*SoFFIK IIa*).

The analysis was based firstly on information on the promotion of programmes for those wishing to leave prostitution provided by the *Länder* during the first survey carried out by the *SoFFiK* on the Prostitution Act (*SoFFiK I*) and, secondly, on additional telephone and personal interviews which were carried out across Germany in the period between August and October 2006 in co-operation with special consultation services.

Conceptually the reorientation/drop-out programmes latched onto the idea on which supportive measures were increasingly based in Germany towards the end of the 1980s and which helped prostitutes to leave the industry.

This development was influenced by the public debate on HIV/AIDS that was current at the time. The work of prostitutes' self-help groups, professional consultation services organised by churches, as well as employees in consultation services on sexually transmitted diseases (STDs) in health authorities led to some cities, for example Berlin, Dortmund and Frankfurt/Main, launching what became known as "drop-out programmes".

The central idea of these measures was to give prostitutes low-threshold access to state assistance in co-operation with social and employment authorities. Dedicated contacts in the respective authorities and the principle of not involving family members when calculating social assistance reduced the fear involved in taking this step and enabled prostitutes to take part in some measures, in some cases by including the time they had worked as a prostitute when examining whether they fulfilled the required conditions to be able to take part in measures carried out by the Federal Employment Agency.

However, other assistance available is based on individual needs, since each prostitute's individual situation (school education and/or vocational training, debt, psychological and physical state, drug problems, etc.) form the basis for further plans and steps to be taken.

The widely held assumption at the time that prostitutes were per se the main group affected by HIV/AIDS, or rather the main risk group, has not been substantiated by more recent scientific findings. Along with the main goals of the health policy pursued in the 1980s (i. e. HIV prevention), however, the goal of social policy (supporting women who look for alternatives to prostitution in what is often an extremely stressful situation) must be viewed as at least equally as important.

Even after the entry into force of the Prostitution Act, it must still be assumed that target group-specific measures to support those who wish to leave prostitution will be needed.

The surveys carried out involving consultation services for prostitutes indicate the need for personal support and low-threshold access. Contact to the target group is mainly established via outreach work. The special consultation services need sufficient human and financial resources to do streetwork with prostitutes and in red-light districts in order make contact with prostitutes and to give them information and support early on as regards how to leave prostitution or change jobs and thereby to secure their livelihood.

When prostitutes make the decision to leave prostitution they often find themselves confronted by a multitude of problems. Along with financial and/or family problems, health problems linked to prostitution and stress from violence, in some cases experienced early in life, nearly half of those wanting to leave prostitution find themselves in a situation that is further compounded by the fact that they have little school education or vocational training. The preconditions for leaving the profession are not favourable.

Where the prostitutes also have other problems, for example drug addictions or high levels of debt, these first need to be dealt with to give prostitutes a new perspective. Special consultation services need staff trained in debt counselling (especially knowledge of private bankruptcy proceedings) in order to find individual solutions to debt problems. Close co-operation with drug counselling services is also necessary, especially to support those prostitutes working on the streets.

Thus, seen overall, the Federal Government believes there can be no doubt as to the importance of providing adequate, low-threshold, target group-specific assistance.

Even though it may not be possible to view the analysis as complete on account of the difficulties involved in getting hold of information, the *SoFFIK IIa* study into services that are currently available to those who wish to leave prostitution revealed a rather sobering picture as regards the number and distribution of programmes and the total number of women who have access to them, although some projects have produced some very encouraging results.

The majority of assistance available to those wishing to leave prostitution is provided by special consultation services. Employment agencies sometimes have an important role to play as contacts and co-operation partners at local level, although the employment agencies have no separate measures or procedures for dealing specifically with this target group.

As shown in the above, based on the Prostitution Act, the Federal Employment Agency assumed that it is its task to make its services available to prostitutes to help them leave prostitution. Prostitutes who wish to leave the industry can use the Federal Employment Agency's services to find jobs and get advice.

Over the past ten years the *Länder* have provided funding for only few drop-out projects (training measures). The overview below also includes measures which were promoted by institutions other than the *Länder*, for instance through funding from the EU or private initiatives.

Table 9: Training measures available to prostitutes (1997–2006)			
Measure	Period	Project headquarters	Advice centre/ no. of participants
<i>ACT</i> (up-to-date PC and job application techniques)	2004	Bavaria	Kassandra e. V./15
<i>ACT AGAIN</i>	2005		Kassandra e. V./15
<i>ANAKO</i> (training course to analyse prostitutes' skills to integrate them into the "first job market")	2000 – 2001	North Rhine-Westphalia	Madonna e. V./23
"Setting up a business" for prostitutes	1998 – 2000	North Rhine-Westphalia	Madonna e. V./ Deutsche Angestellten Akademie/60
<i>Cafe Kober</i> (help developing new career prospects outside of prostitution)	1997 – now	North Rhine-Westphalia	Kober e. V./N. A.
<i>KOBRA</i> (job-related business management training)	2001 – 2004	Bavaria	Kassandra e. V./36

Measure	Period	Project headquarters	Advice centre/ no. of participants
NEUSTART	1997 – now	North Rhine-Westphalia	Madonna e. V./N. A.
PEP (project to help prostitutes set up a business) Call centre agent training	17 months up to 2002	North Rhine-Westphalia	Sozialdienst Katholischer Frauen Dortmund/unknown
<i>ProFridA</i>	24 months since 2006	North Rhine-Westphalia	Diakonisches Werk Westfalen in Kooperation/50 (currently 63)
Specialist word processing training	2002 – 2003	Lower Saxony	Phoenix e. V./VHS/12
Social skills training courses (8) <i>TAG-Arbeit</i> (measure under Social Code, Bk II) – psychosocial stabilisation, job application training and finding internships	2003 Since May 2005	Hamburg	Kaffeekluppe e. V./25

An example of an ongoing training measure developed specifically to retrain prostitutes to work in another field is the *ProFridA* (Getting Prostitutes and Women Affected by Violence onto the Job Market) Network (January 2006 – August 2007). The project is receiving funding from the state of North Rhine-Westphalia and the European Social Fund. The Network has a total of seven funding bodies and is co-ordinated by the *Diakonisches Werk Westfalen* (the welfare agency of the Protestant Church in Westphalia). A wide range of measures are being implemented in the context of *ProFridA* over the 20-month period. The Network supports prostitutes and women suffering violence who want to change or improve their professional situation or learn a new skill to help them find a job. Measures are tailor-made to suit the skills and needs of the women. After a three-month period of basic training to prepare them for the job market, they will be receiving specialist training between August 2006 and June 2007, either in the caring/home economics sector or in marketing/sales. Where needed, *ProFridA* supports women in integrating into the job market in other ways, either by directly starting a job, looking for a training vacancy or taking part in other training measures (for details go to: www.profrida.de).

In addition to the aforementioned programmes, some *Länder* fund consultation services for prostitutes at *Länder* or local level in order to provide advice and support to prostitutes willing to leave prostitution. The following *Länder* have such consultation services: Bavaria, Berlin, Brandenburg, Hessen, Lower Saxony, North Rhine-Westphalia and Saarland.

Consultation service	Help and support available
<i>Kassandra</i> , Nürnberg	Advice and support leaving the profession Mixed financing: City of Nuremberg, Franken district: 1.5 members of staff for the prevention of drug addictions/drug-related prostitution and HIV/STDs streetwork Funding from the state of Bavaria: (peer-consulting project)
<i>Hydra</i> , Berlin	Advice and support leaving the profession Institutional funding from the Berlin Senate
<i>Nitribitt</i> , Bremen	Advice and support leaving the profession Institutional funding from the Bremen Senate
<i>Belladonna</i> , Potsdam	Training project for victims of trafficking in human beings: German and PC lessons, placement as intern in companies and public authorities aimed at making it easier to restart work after returning home Funding from EU Equal Project "Wychod"
<i>Kaffeeklappe</i> , Hamburg	Advice and support leaving the profession Tagarbeit: measures in accordance with Social Code, Book II Section 16(2): Focus on psychosocial stabilisation, max. of 12 months/participants; job-related advice, placements as interns via the Association of Training Institutions in Hamburg; Mixed financing: Diakonie, Mitternachtsmission St. Pauli, public funding (via employment agencies) for the Tagarbeit project
<i>Tamara</i> , Frankfurt/Main	Advice and support leaving the profession, sheltered accommodation Mixed financing: City of Frankfurt, <i>Land</i> welfare association, Diakonie, Innere Mission
<i>Madonna</i> , Bochum	Neustart (advice and support leaving the profession) Mixed financing: City of Bochum, funding from the state of North Rhine-Westphalia
<i>Kober</i> , Dortmund	Streetwork, advice and support leaving the profession Financing: church donations, City of Dortmund and funding from the state of North Rhine-Westphalia for Cafe Kober "Help developing new career prospects outside of prostitution"
<i>Dortmunder Mitternachtsmission</i>	Follow-up assistance for those who have left the profession and work with former prostitutes Mixed financing: City of Dortmund, Protestant Church, state of North Rhine-Westphalia
<i>Hurenselbsthilfe Saarbrücken</i>	Advice and support leaving the profession Institutional funding from the state of Saarland: 1 member of staff
<i>Phoenix e. V.</i> <i>La Strada</i> , Hanover	Advice and support leaving the profession Financing: City of Hanover, state of Lower Saxony

* This list does not claim to be complete

Along with the programmes specifically oriented to those leaving the profession mentioned in the above, other forms of individualised advice and support is available through self-help groups for prostitutes, special consultation services funded by churches, and staff at STD consultation services in local health authorities.

Individualised assistance to those wishing to leave prostitution is the most widely available form of help today, although the boundaries between different types of consultation services are fluid. Different people also have access to different advisory services. Consultation services look at the women's personal situation and jointly try to find the best possible solution. The advisors look for possible jobs, employment, internships and ways of finding a job, offer help paying off debts and support prostitutes in re-establishing social contacts or in finding therapies. Staff in special consultation services describe this work

as very time-consuming. A tailor-made concept needs to be developed based on the different problems and individual situation which the prostitute finds herself in.

An example of special, low-threshold access which focuses on prostitutes addicted to drugs is the “Relocating streetwalking” project run by the City of Cologne. This drug-related and health-promoting intervention by the *Sozialdienst katholischer Frauen* (SkF, Social Services by Catholic Women) and the local health authority seeks to stabilise the prostitutes’ health, to prevent violence and STDs, to improve prostitutes’ working conditions and social situation. These measures help increase motivation and opportunities for leaving prostitution. Close co-operation with *Casablanca*, a job testing project run by the SkF, has already helped those willing to leave prostitution test out jobs and integrate into the job market (for details, cf. Steffan/Kersch, *Abschlussbericht der wissenschaftlichen Begleitung*, SPI 2004).

Comparison of the various concepts mentioned in the above is possible only to a very limited degree on account of the very different conditions and the varying availability of data.

Overall, the *SoFFI KIIa* study also showed that deficiencies still exist in the level of scientific evaluation of different approaches adopted by these drop-out projects and findings into the factors which influence the process of leaving prostitution.

For several years now special consultation services have been complaining about the cut-backs in public funding at *Länder* and local authority level, as a result of which the work done in this area has been made considerably more difficult.

However, the survey of special consultation services has made it clear that one cannot hold the Prostitution Act responsible for the deterioration in assistance available to those wishing to leave prostitution, but rather that Germany’s overall economic situation and the restructuring of the legal basis of Social Code, Book II linked to the reforms of unemployment and social welfare benefit (known as “Hartz IV”) are to blame for this.

Staff in the special consultation services were in agreement that the increased difficulties in leaving the profession were linked to the new regulations set out in Social Code, Book II (and Social Code, Book XII) and the resulting fewer training and support opportunities. They do not hold the Prostitution Act in any way responsible for the worsening of the situation.

Those prostitutes who leave prostitution and receive Unemployment Compensation II (*ALG-II*) are, theoretically, also directly entitled to take part in measures offered by the Employment Agency.

The impact of *ALG-II* on a prostitute’s options for leaving prostitution are, however, different depending on which *Land* she/he is living in, although they tend to be described as very negative everywhere. The introduction of *ALG-II* on 1 January 2005 has, in some cases, led to drastic cut-backs in the amount of assistance available. Not all cities have managed to continue sticking to commitments on previous co-operation with social services and employment agencies. For example, many members of staff complain that

since *ALG-II* was introduced the Job Centres no longer have any dedicated contacts for their clientele.

The breaking up of existing co-operations and the loss of employment options has, in the view of the consultation services, contributed to those women who want to leave prostitution finding their prospects after dropping out or the road to dropping out difficult and unattractive. As a result, they stay in prostitution although they long ago pushed themselves beyond their personal limits.

Along with the introduction of Social Code, Book II, staff in the special consultation services quoted further developments which had had a negative impact on prospects for prostitutes who wished to leave prostitution, for example the reduction and abolition in 2004 of the “*Arbeit-statt-Sozialhilfe-Stellen*” (ASS, Jobs Not Social Benefit) project, as well as the more general worsening of the situation on the job market. It is thus becoming more and more difficult for prostitutes wanting to leave prostitution to find another job. Especially women who have not completed any vocational training are difficult or impossible to place in the first and second job markets.

Dropping out and switching profession are processes that do not progress linearly, that are often at risk and are in danger of failing. These processes must be supported over a longer period of time by means of flexible, low-threshold and needs-oriented advisory services. Assistance offered to those wishing to leave prostitution cannot pick up the thread when a prostitute has already reached an impoverished state in which she has no more resources to draw on. Prostitutes need confidence and energy to make these decisions, to overcome the obstacles generated by red tape and to start afresh. The process of leaving prostitution takes time, and the decision-making process runs parallel to working in prostitution.

According to findings from research carried out as part of the *SoFFI K IIa* study, the Prostitution Act has had a positive effect: Prostitutes who have no concrete plans to leave prostitution are now turning to special consultation services because they wish to find out more about the new legal situation. Attention can thus be drawn at an early stage in a preventative manner to the possibilities of leaving prostitution. This preventative approach should be further expanded.

Overall, the Federal Government is of the opinion that the results of the *SoFFI K IIa* study clearly show how important the work of special consultation services is for prostitutes and how important it is that properly qualified staff are available to support those prostitutes wishing to leave prostitution.

It is primarily the *Länder* which bear responsibility for putting safeguards in place to ensure the special consultation services can continue their work, since they have the necessary skills and experience to deal with the multiple problems which prostitutes face. They are in a position to establish contact to the target groups as part of their outreach services and to offer individual support in the process of leaving the profession by establishing long-term counselling relationships.

A further important condition for successfully counselling someone who wishes to leave prostitution is the availability of dedicated contacts in the employment agencies who can offer tailor-made, suitable training measures, either as part of group measures or through one-to-one support. All options that are available within the legislative framework should be utilised to build bridges for women to leave the dependency of prostitution as a means of making their living.

In the light of findings on the strengths and weaknesses of different types of drop-out projects, which could be improved, the Federal Government will examine to what extent it can, within the framework of its competencies, promote model approaches and improve the level of scientific findings available.

B.VI. Influences of the new legal situation on the work of special consultation services in general

Various institutions are active in advising and supporting prostitutes in Germany. Special consultation services are especially available to prostitutes in big cities. The focus of their advice and support varies, but primarily focuses on female prostitutes. Others focus on specific target groups, such as male prostitutes or rentboys, immigrants working in prostitution, sometimes also under-age prostitutes or those with drug addictions. Services for the specific target group of prostitutes with drug addictions are generally available in specialist institutions (e. g. help available to drug addicts), primarily in the form of advice and support. Consultation services for immigrants in prostitution mainly concentrate on work with victims of trafficking in human beings. The majority of staff in these special consultation services are social workers, as well as psychologists, sociologists or lawyers. Men with relevant training only work in those centres which provide services to male prostitutes/rentboys.

The consultation services are funded by various organisations and the focus of their work is thus based on the specific *weltanschauung* of the respective organisation. Some have grown out of self-help groups for prostitutes, a large proportion are funded by churches (*Diakonie*, SkF). Alongside the special consultation services for prostitutes funded by independent bodies, the state-run consultation services for sexually transmitted diseases and AIDS (STD consultation services), which often have their offices in local health authorities, are an important point of contact for prostitutes. The advice they provide is generally based on the principle of acceptance. Outreach work in the form of streetwork, along with other approaches, have an important role to play in gaining access to this target group.

Despite target group-specific differences in each individual case, important goals of this work are, among other things, improving prostitutes' living conditions, stabilising their health, preventing violence and STDs, as well as supporting those who wish to leave prostitution.

Overall, the Prostitution Act seems to have had no far-reaching impact on the core nature of advisory services provided by these facilities.

Nevertheless, staff in consultation services specifically for prostitutes and in STD consultation services in local health authorities have in some cases also reported positive changes in their work and an increased work load on account of the Prostitution Act. The range of tasks has above all changed on account of the information they have been asked to provide on the Prostitution Act.

To some extent the special consultation services' clientele has expanded on account of the need for information on the Prostitution Act and the fact that many prostitutes wishing to have legal certainty as regards the nature of their work. Their clientele now includes groups which had up until then not had any contact with them. Interviews with advisors indicate that, since the entry into force of the Prostitution Act, prostitutes are also visiting these centres to find out about their legal options and not just for psychosocial advice.

The focus of interest of prostitutes' enquiries regarding the Prostitution Act is in particular the matter of access to statutory health insurance, tax returns and advice on working on a freelance basis. However, the prostitutes' visits also provide the opportunity to give them advice on other important topics, such as health risks and leaving prostitution.

Not only prostitutes have been informed about the Act and the new options available: co-operation partners in other facilities and authorities require information from the special consultation services. Since the entry into force of the Prostitution Act, many consultation services have also extended their range of co-operation partners and have made contact with institutions and authorities with whom they had previously not had any contact (e. g. trade unions). In some cities (e. g. Dortmund) co-operations have clearly developed further following the entry into force of the Prostitution Act. This can be seen as a positive effect of the Prostitution Act.

The consultation services' situation as regards funding and staff has not changed on account of the Prostitution Act. Some consultation services reported that their work was put at risk on account of uncertainty regarding their financial situation, but no link to the Prostitution Act can be established here.

As regards the need to safeguard the work of the consultation services, please refer to the above.

The special consultation services are of the opinion that other factors, along with the Prostitution Act, have influenced the change in the nature of their work, for instance general social legislation following the reforms of Social Code, Book II and Social Code, Book III (cf. above), as well as the fact that the former Venereal Diseases Act was replaced in 2001 by the Protection Against Infection Act. This is what the work of local health authorities for the target group in question (prostitutes) is based on.

As part of the first survey into the impact of the Prostitution Act, namely *SoFFIKI*, those interviewed in the consultation services and the *Land* ministries also mentioned that the changes on account of the Protection Against Infection Act were an important factor influencing the work of the consultation services in the local health authorities. The reason is, firstly, that it came into effect around the same time as the Prostitution Act and, secondly, that the debate on the Prostitution Act also makes reference to the content of the Protection Against Infection Act.

Up until late 2000, the Venereal Diseases Act formed the basis for the structure and type of services provided to combat venereal disease. The public health service was clearly and primarily entrusted with the task of monitoring and controlling venereal diseases. Practically speaking, monitoring of individuals was nearly exclusively restricted to prostitutes. It was only they who had to provide health certificates and only they who were under the obligation to undergo regular check-ups. The legislative scope, however, enabled the *Länder* and local authorities to structure their services in different ways. Since the mid-1980s some health authorities have no longer insisted on prostitutes needing to produce health certificates and they have established voluntary and anonymous services.

The Protection Against Infection Act entered into force on 1 January 2001. The title of Section 3 – “Prevention through education” – fits in with the guiding principle on which the entire law was based: The focus is no longer on controls, but on promoting each individual’s health awareness. A study commissioned by the Federal Ministry of Health (Steffan/Rademacher/Kraus, *Gesundheitsämter im Wandel*, Federal Ministry of Health and Social Affairs, FB 296, 2002) argued that the work of the local health authorities, which has changed following the entry into force of the Protection Against Infection Act and which is based on voluntary consultations, was positive overall.

There have, over the past few years, been various reports that since the Protection Against Infection Act was introduced prostitutes have had less contact with the local health authorities. Especially those cities where prostitutes had to undergo check-ups have observed less contact since the Protection Against Infection Act was introduced. During the survey of experts (*SoFFiKI*), answers provided by the ministries of health of Saxony, Baden-Württemberg and Bavaria indicated that the Protection Against Infection Act had had an impact on health services provided to prostitutes. The frequency of check-ups had decreased dramatically; in particular the situation of immigrants had worsened.

As regards the question of reintroducing monthly, obligatory check-ups for prostitutes by local health authorities that was put by the Standing Conference of Ministers of the Interior of the *Länder*, the 79th Standing Conference of Ministers of Health of the *Länder* on 4 May 2006 concluded as follows:

“The Standing Conference of Ministers of Health of the *Länder* is concerned about general developments regarding sexually transmitted diseases, even outside of the field of prostitution. It advocates supporting and further promoting outreach work, which has proved its worth in many areas as a preventive measure. It has not been observed that obligatory check-ups for prostitutes have had a positive influence and the idea is thus rejected. The Standing Conference asks the Standing Conference of Ministers of the Interior of the *Länder* to do all in its power, within its administrative policy mandate, to combat criminal structures in illegal prostitution.”

The impact of the Prostitution Act and of the Protection Against Infection Act on the health of prostitutes will have to be further observed in context.

B.VII. Impact on the combating of crime

B.VII.1. Impact of the amendments to Sections 180a, 181a Criminal Code

As outlined in the above, the legislator's intention in deleting the old Section 180a (1) No. 2 and amending Section 181a Criminal Code was to enable legally effective employment relationships to be established by mutual agreement in prostitution in order to thus improve the legal preconditions for giving prostitutes access to social insurance cover.

Section 180a (1) Criminal Code in its amended version serves to protect prostitutes from exploitation in prostitution. According to the provision, those in charge of a prostitution establishment are liable to punishment if they keep prostitutes personally and financially dependent on the operation.

At the same time the offence known as "procuring pimping" (*kupplerische Zuhälterei*) in accordance with the old Section 181a (2) Criminal Code was revised. The promotion of prostitution on a commercial basis by finding clients for sexual intercourse is now only punishable if it thereby restricts the prostitute's "personal or financial independence". The revised provision aims to ensure that the mere finding of clients for voluntary sexual intercourse itself is not punishable.

The Prostitution Act has also had an impact on the highest courts' interpretation of Section 181a (1) No. 2 Criminal Code (so-called dirigiste pimping – "*dirigistische/dirigierende Zuhälterei*"). The Prostitution Act has not made any amendment to this alternative offence as per Section 181a. Accordingly, it is punishable, among other things, "for material benefit [to] supervise another person's engagement in prostitution, to determine the place, time, extent or other circumstances of the engagement in prostitution...". Attempts were already made during the legislative procedure to point out that "supervise" and "determine the place, time" here referred to actions on the part of the employer which, if they remained punishable, would contradict regulations under civil law and the legislator's intention of protecting prostitutes by enabling them to enter into employment relationships. In the explanatory memorandum for the Act the legislator stated that "a voluntary agreement on the time and place for the exercise of prostitution, i. e. a consensually founded, legally effective employment relationship" did not constitute the offence of dirigiste pimping. Subsection (1) served to protect prostitutes' financial and personal freedom of movement and was thus to be interpreted restrictively. For that reason it was not deemed necessary to amend Section 181a (1) No. 2 Criminal Code.

By decision of the 2nd Criminal Panel of 1 August 2003 (ref. 2 StR 186/03; Decision of the Federal Court of Justice 48, 314 and *NJW* 2004, p. 81 ff.), the Federal Court of Justice re-adjusted the standards against which Section 181a (1) No. 2 Criminal Code was to be interpreted in consequence of the entry into force of the Prostitution Act:

"Where a prostitute is working voluntarily in a brothel or brothel-like establishment, the mere fact that she is integrated into an organisational structure by rules governing fixed working hours, place of work and prices does not constitute "determining" her work within the meaning of Section 181a(1) No. 2, second alternative Criminal

Code. This not only applies to legal employment relationships within the meaning of Section 1 Prostitution Act, but also if the employment relationship infringes other legal provisions, such as foreigners law, tax law or the law concerning social insurance. (...) The brothel operator may not determine the nature and extent of the prostitute's work. The prostitute must have the right to terminate her employment relationship at any time, she must be permitted to refuse to perform sexual acts and may also not be subject to the employer's right to issue directives to the effect that she must accept certain clients."

In the opinion of the Federal Court of Justice, when interpreting Section 181a(1) No. 2 Criminal Code, the connection to the provisions in Sections 180a (1), 181a (2) Criminal Code, which have been amended with the introduction of the Prostitution Act, and the legislator's objective of legalising prostitution as a job that is subject to social insurance and, at least in part, making it comparable to normal employment relationships, must be taken into consideration.

This case law ensures that the founding of employment relationships in prostitution by mutual agreement will go unpunished at the same time as restricting the employer's right to issue directives.

A further objective of the law was to eliminate the attendant crime by creating the legal framework for the pursuance of the profession (cf. Bundestag Printed Papers 14/5958).

Before attempting to answer the question concerning the extent to which this objective has been achieved, one must define more precisely which crimes are "attendant crimes" and the possible causal relationship with matters relating to the Prostitution Act.

The objective behind introducing regulations to govern prostitution must in any case be to protect prostitutes from criminal attacks and to get those forced into prostitution out of their coercive situation.

Crimes that are typical of the world of prostitution thus in any case include those which prostitutes are especially at risk of suffering on account of the specific conditions under which they work. Typical risks of victimisation can be observed to varying degrees in prostitution, depending on the conditions under which prostitutes work. Those prostitutes, for example, who work for themselves and engage in street prostitution, are at risk from clients and their competitors, as well as third parties for whom the remote localities represent an ideal place, for example to commit robbery. All forms of prostitution carry the risk of an attack by the client. These risks are often the deciding factor in a prostitute's decision to seek the protection of a pimp or a brothel operator. This then makes her/him susceptible to numerous types of pressure. It also leads to another typical vulnerability to various forms of exploitation and violence from persons involved in the "scene", including physical injury, sexual and violent crime, and crimes against property.

It is perfectly plausible to expect that creating a legal framework for prostitution will have a positive influence on these types of crimes, especially since the lack of legal rules and legal protection in the "scene" lead to the prostitutes relying on other people for protection.

By strengthening prostitutes' legal position they are to be put in a position to get themselves out of their dependency on such problematical infrastructures. If social – and above all legal – isolation leads to the prostitutes needing protection which in turn means they become dependent on pimps and brothel operators, then by making prostitution legal it may be possible to reverse this trend. Protection by the law or the police can reduce the need for protection from extralegal institutions.

However, during the legislative process it was clear that this would be an indirect, long-term effect of the Prostitution Act. Furthermore, certain groups, such as prostitutes working illegally in Germany, or those with drug addictions, can hardly benefit from the improved legal situation.

In addition, it was hoped that by making legal prostitution more transparent this would enable it to be more clearly delimited from forced prostitution and trafficking in human beings, and thus the field of organised crime. Ideally, this could lead to the following development: crime no longer pays in the “scene” because the cost of avoiding prosecution is higher than the profit to be made from legal prostitution. “Good” brothel operators dissociate themselves from the “black sheep” in order to show how respectable their establishments are and thus to increase turnover. This could also lead to an increase in their willingness to report others in the scene. Indications that the legalisation is having such an effect have been reported to varying degrees, among others from experts in the Netherlands.

These are also very indirect consequences.

In this context it was also expected that, if the numbers of less punishable crimes were reduced or the petty crimes of the promotion of prostitution were no longer prosecuted, then resources would be released and made available to prosecute trafficking in human beings. Also, attention could turn to prosecuting medium to serious crimes, in particular trafficking in human beings and forced prostitution, leading to an increase in prosecutorial efficiency.

Fears have, however, increased in the context of the current debate that the amended definitions of crimes under Section 180a, 181a Criminal Code could have made it more difficult to fight crime in the world of prostitution, in particular trafficking in human beings and organised crime.

This fear is based, in part, on the fact that greater demands are being made in order to furnish evidence of dirigiste pimping in accordance with Section 181(2) Criminal Code and of exploitation of prostitutes in accordance with Section 180a (1) Criminal Code (formerly the promotion of prostitution) following the revision of the offence and its interpretation in case law. It is claimed that the police and public prosecution offices are now mainly responsible for supplying evidence (which is difficult) that the prostitute was not working voluntarily. In the past it was possible to fall back on objective indicators such as the determining of prices, working time and place of work. Furthermore, the old definitions represented a key point of entry for investigations into organised crime.

On account of the decriminalisation of the promotion of prostitution, the police is no longer able to monitor the “scene” to the extent that is necessary, it has been claimed. If the police were able to enter brothels like they were in the past, then they would be able to uncover more signs of forced prostitution and trafficking in human beings (cf. Schmidbauer, *NJW* 2005, p. 872 f.).

Some have thus called for the old Sections 180a, 181a Criminal Code to be reinstated, thereby revoking the Prostitution Act in part. For example, in April 2005 the Bundesrat, based on an initiative put forward by Bavaria, proposed a draft law which (along with a proposal for introducing the crime of sexual abuse of victims of trafficking in human beings (Section 232a Criminal Code), cf. B.VII.2.b below)) reinstated the old version of Sections 180a(1), 181a(2) Criminal Code (cf. Bundestag Printed Papers 140/05, 15/5657).

In the light of the above, the question of what empirical evidence there is for this thesis will be addressed in the following.

It is difficult to find statistical evidence to either prove that the Prostitution Act has reduced crime or promoted criminal prosecution or that it has instead promoted crime and hindered criminal prosecution, since no statistical investigations have been carried out which provide evidence of the detailed relationships between prostitution and concomitant crime and which could reliably provide evidence for either of the two developments.

Neither crime statistics compiled by the police at federal level nor statistics on criminal prosecutions in this area provide any valid data as to the impact of the Prostitution Act on criminal prosecution. There are no indications of any statistical link between the numbers of cases prosecuted under Sections 180a, 181a Criminal Code and those referring to trafficking in human beings under Sections 232 ff. and the former Sections 180b, 181 Criminal Code. Although statistics do indicate a downward trend after 2002 as regards the number of convictions under Sections 180a, 181a Criminal Code, this trend corresponds to the outcome that is to be expected after narrowing the scope of application of both provisions. However, no trend can be observed regarding the number of cases of trafficking in human beings (the former Sections 180b, 181 Criminal Code) following the amendment to the Prostitution Act. For methodological reasons it is also not possible to draw any conclusions regarding which of the possible factors are responsible for which proportion of cases.

Table 11: Federal police crime statistics, 1997–2004

(source: website of the Federal Criminal Police Office, as at May 2005)

	Cases under Section 180a Criminal Code	Cases under Section 181a Criminal Code	Cases under Section 180b Criminal Code	Cases under Section 181 Criminal Code
2004	194	476	377	443
2003	326	578	359	491
2002	620	667	400	427
2001	929	1010	416	330
2000	1365	1104	592	424
1999	1228	791	348	330
1998	1272	685	533	478
1997	1187	784	538	552

The Federal Government thus believes that when analysing the impact of the Prostitution Act on investigations and criminal prosecution one must refer to the experience of experts in prosecutorial practice. This has been incorporated as follows:

- The question of the impact of the Prostitution Act on practical aspects of criminal prosecution has been the subject of empirical investigations into the impact of the Prostitution Act. During a first partial study (*SoFFI KI*), 52 public prosecution offices and 20 police stations completed a written questionnaire. In addition, a discussion on criminal law and the Prostitution Act was held with those involved in criminal investigations and criminal prosecution in police stations, *Land* offices of criminal police, the Federal Criminal Police Office and public prosecution offices.
- A more in-depth investigation into the combating of crime (*SoFFI KI Ib*) was carried out to supplement and underpin the results of the *SoFFI KI* study. The results of this study were based on a total of 31 questionnaires which were completed by representatives from 10 *Land* criminal police offices and 21 police stations, mainly focusing on the combating of crime associated with prostitution. The study only drew on a certain number of experts and offices working in this area in Germany. However, since they were distributed across 13 *Länder* and 31 police stations and a selective comparison with the survey mentioned below was carried out, one can draw conclusions from these results that go beyond those of a sample survey and permit more generalised statements.
- As regards the various factors which have an influence on the criminal prosecution of trafficking in human beings, one should refer to the results of a study published by the Federal Criminal Police Office in 2006 entitled “The Offence of Trafficking in Human Beings – Procedural Statistics and Determinants in Criminal Prosecution” (Minthe/Herz, *BKA 2006*). This broad-based survey likewise investigated experience gained in criminal prosecutorial practice. A selective comparison of the results of the *SoFFI KI Ib* study with these results also supports the conclusions drawn in the *SoFFi KI Ib* study.

The studies came to the following conclusions:

SoFFIKI results:

The criminal prosecution authorities' view of the multifaceted area of prostitution is based on their specific perspective on this type of work. They focus on the specific subsection of criminal prosecution of pimping, smuggling of persons and trafficking in human beings, as well as forms of organised crime such as the illegal trade in arms and drugs. This is also the perspective from which they assess the impact of the Prostitution Act.

The number of investigative proceedings based on Sections 180a(1), 181a(2) Criminal Code has, in the opinion of around half the criminal prosecution authorities, police and public prosecution offices interviewed, dropped since the Prostitution Act entered into force. The other half stated that the number of proceedings was already low before the entry into force of the Prostitution Act. The overwhelming majority of police and public prosecution office representatives interviewed said the new Act had not brought about any great changes in their area of work.

Criminal prosecution based on Section 180a(1) Criminal Code, they said, no longer had a role to play in police and public prosecutorial practice since the Prostitution Act entered into force.

60% (33) of the representatives from public prosecution offices who volunteered an assessment of the situation said they saw no link between the Prostitution Act and the legal possibilities for prosecuting crimes.

34.5% (19) believed that the abolition of the promotion of prostitution made their work in prosecuting trafficking in human beings and pimping more difficult. But these people also stated that acts which fulfilled the criteria of the promotion of prostitution had often not been considered worth prosecuting even before the Prostitution Act entered into force; the old version was seen as "out of touch with reality". By contrast, the provision was seen to act as a kind of vehicle: The old Section 180a (1) No. 2 Criminal Code had in some cases in the past helped initiate investigations, had legitimised the ordering of further measures such as searches and, finally, had made it possible to convict someone if evidence of more serious crimes could not be provided.

However, it was also clear that criminal prosecution authorities who pursued a different path had not based their investigations on the old Section 180a (1) No. 2 Criminal Code and thus assessed its deletion as irrelevant to their work. The development in terms of the number of proceedings and the assessment of the criminal-law changes on account of the Prostitution Act thus also seemed to depend on the particular work routine and the recognition of alternatives in each region.

In the end, only one of the 52 public prosecution offices and one of the 20 police stations called for the old Section 180a (1) No. 2 Criminal Code to be reinstated.

Otherwise, even those representatives of the public prosecution offices and of the police who said that the loss of the promotion of prostitution had made their work more difficult also unanimously agreed that they were not in favour of the provision being rein-

stated. Abolishing that criminal offence was a step in the right direction to improving working conditions for prostitutes, they said.

The police and public prosecution offices also believe that criminal prosecution under Section 181a (2) Criminal Code no longer has a role to play since the entry into force of the Prostitution Act. The amended definition of the crime of “procuring pimping” had lost its scope. Representatives believed there were overlaps to the crime of “dirigiste pimping”.

Four of the 16 police representatives interviewed believed that the Prostitution Act made it more difficult to prosecute pimping.

The qualitative material shows that the interpretation of dirigiste pimping in Section 181a(1) No. 2 Criminal Code made by the Federal Court of Justice in its judgement of 1 August 2003 is relevant for the prosecution of pimping. Some of those questioned complained that it was more difficult to provide evidence in this area of pimping.

The line of argument that criminal prosecution of pimping and trafficking in human beings has been made more difficult on account of the criminal-law changes based on the Prostitution Act can not be confirmed in so generalised a manner based on the results of the study.

Several aspects must be differentiated here. The survey showed that this link is decisively influenced by the work routine which the authorities had established prior to the entry into force of the Prostitution Act and how the criminal prosecution authorities defined their mandate in the area of prostitution. Differences were observed in the assessment of the Prostitution Act in those regions in which prostitution is monitored and restricted compared to those which saw their sole task in the area of prostitution as the prosecution of trafficking in human beings and pimping.

Another aspect refers to the appraisal of this link. Where representatives believed that their investigations had been made more difficult and police and public prosecution offices also had a positive attitude towards the Prostitution Act, it was not felt that these difficulties could not be overcome, the link was thus accepted and other legal means of getting information, solving crimes and monitoring were being discussed.

In addition, the survey provided clear indications that when ascribing cause and effect, factors that are independent of the Prostitution Act, for example EU enlargement to the east and the Immigration Act, have a role to play and often overlap with experts' opinions of the matter.

Half of the police representatives surveyed called for the Trade Regulation Act (*Gewerbeordnung*) and the Licensing Act (*Gaststättengesetz*) to be applied differently or restructured. This was based on the wish for additional means of controlling the scene, which stands in contradiction to the practically unanimous opinion that the Prostitution Act has led to no changes in the police's raids in and monitoring of the world of prostitution. This could be an indication of monitoring deficiencies that exist independently of the impact of this Act (cf. Section IX.1. below).

This example also shows that as regards the debate concerning the impact of the Prostitution Act on criminal prosecutorial practice, there are certain aspects which can be ascribed to general difficulties in the criminal prosecution of prostitution which are independent of the entry into force of the Prostitution Act.

SoFFI K IIb results:

The results of the more in-depth study into the link between criminal-law changes introduced in the Prostitution Act and the means of prosecuting crimes in prostitution had confirmed the trend established in the first study. In addition, it was possible to more clearly establish the complexity of the reasons for the changes in police prosecutorial practice which some had claimed.

The survey again uncovered an old problem in the area of the criminal prosecution of exploitation of prostitutes, pimping and trafficking in human beings. The fragility of the witnesses' evidence and the instability of the witnesses combined with the lack of alternative means of providing evidence are key problems in criminal prosecution in this field – and not merely since the Prostitution Act entered into force.

However, it is clear that making sweeping statements regarding the fact that the Prostitution Act is to blame for this does not go far enough towards pin-pointing the problem.

In the second survey the majority of those interviewed also said that there had been no relevant changes in police practice. The question of whether the Prostitution Act was to blame for this is thus irrelevant here.

However, it is obvious that around one quarter of the police representatives interviewed (the number varies depending on the question asked) said that things had changed, in terms of restrictions regarding investigative proceedings and prosecution referring to pimping, exploitation of prostitutes and trafficking in human beings. They also in part held the Prostitution Act responsible for this.

The changes which they viewed as being to their detriment are again reflected in the police's various fields of activity, ranging from controls to launching investigations to the detectability of crimes.

Police representatives who believed there was a link between this and the entry into force of the Prostitution Act were unanimous in that the cause was the elimination of the objective criteria in the old Sections 180a, 181a (2) Criminal Code regarding the demonstrability of crimes. Before the Prostitution Act entered into force, merely organising and supporting prostitution and fixing prices or working hours could lead to a conviction for pimping. These aspects could, in some cases, be proved irrespective of statements made by victims and now, based on the new legal situation, are not of themselves sufficient for a charge to be brought. The empirical findings confirm the criticism of the criminal-law changes made with the introduction of the Prostitution Act that is expressed in some of the specialist literature.

The following aspects can also be differentiated within the context of the negative changes to police practice:

- The police units interviewed usually carry out controls in brothels and private accommodation when a suspicion arises. These controls are usually carried out to establish the identity of those present. The Prostitution Act was found to have had only little impact on these controls.
- Various assessments are made as regards the impact of the Prostitution Act on the criminal prosecution of pimping/exploitation of prostitutes on the one hand and on trafficking in human beings on the other. When asked specifically about links to the Prostitution Act, those interviewed said they saw no link to trafficking in human beings.
- There are various reasons for the adverse effect on the police's means for prosecuting crimes. EU enlargement to the east is one key aspect. It is quoted as the primary reason for negative impacts on investigations in the context of the criminal prosecution of trafficking in human beings.

The overwhelming majority of police representatives interviewed in the second study said that they did not believe reinstating the old law would be sensible. 23 (82%) of those interviewed said that reintroducing the old Section 180a (1) No. 2 Criminal Code was not very sensible or not sensible at all; 22 (79%) said the same of the old Section 181a (2) Criminal Code. Those who believed the old provisions were sensible lament the deletion of the punishability of conduct in the field of the organisation of prostitution where there is no reference to compulsion or exploitation.

As regards the issue of future measures for prosecuting crimes in prostitution, it is clear that representatives did not wish to tighten criminal prosecutorial means, but proposed other solutions.

For example, practically all those interviewed (93%) were in favour of new strategies for dealing with victimised witnesses. Police representatives favoured new means of gaining access to victims by being able to carry out more raids (79%), additional monitoring by authorities and the increased use of scouts in the scene (*Milieuauflärer*) (89%). Police are in particular increasingly discussing the use of such "scouts"; only a few cities and regions are as yet making use of these "scouts".

This is essentially corroborated by the Federal Criminal Police Office's analysis of findings into trafficking in human beings/forced prostitution (feedback from the *Land* criminal police offices) in regard to the 2006 FIFA Football World Cup in Germany. By way of example, the Bavarian Criminal Police Office raised the fundamental question of whether legislative changes could force brothel operators to apply for a licence, making them easier to monitor and ensuring they appoint someone who was responsible and who would have to be subject to a background check.

The very heterogeneous and in some cases contradictory assessment made by police representatives regarding key issues is one aspect which became evident in the Federal

Criminal Police Office's survey entitled "The Offence of Trafficking in Human Beings" (BKA 2006). Possible developments in the area of combating the trafficking in human beings were seen completely differently, for instance.

The reasons for these contradictory opinions cannot be revealed in a survey based on a quantitative questionnaire. A comprehensive, qualitative survey of different police practices with regard to fighting crime in prostitution would be required. The survey would have to draw on police statistics, files, as well as the legal, political and personnel situation on which the police's work is based.

However, regardless of that, it was shown very clearly that, firstly, all the police representatives interviewed are now reliant on new investigative strategies and, in particular, better access routes to the victims in order to be able to combat crimes in the field of prostitution and that, secondly, other solutions have been proposed which could be put into practice without first having to make legislative changes.

Renzikowski

Renzikowski ("Regulation of Prostitution: Goals and Problems – A Critical Assessment of the Prostitution Act") analysed the question of whether investigations were possibly being restricted on account of the changes to criminal law following the entry into force of the Prostitution Act and the call for the reinstatement of the old Sections 180a, 181a Criminal Code. The analysis was carried out from the perspective of the legal system.

Renzikowski concludes that the old versions of these provisions should not be reinstated, for the following reasons:

The goal of the old Section 180a (1) No. 2 Criminal Code was to protect women from exploitation in prostitution, but not to protect them in the exercise of this profession. Given this objective, the interpretation of this offence in case law was not restricted to the strict organisation of brothels on account of actions which at least reasonably suggested that the prostitutes' independence was in danger of being compromised.

Sanctions could also possibly be imposed for providing "better opportunities for earning money", "being uncommonly financially accommodating" or other measures, such as building a sauna to facilitate contacts, external advertising or selling alcoholic beverages – even if these measures do not affect the freedom of each prostitute in the slightest.

Section 180a(1) No. 2 Criminal Code was also intended to counteract the positive incentives for working in prostitution since, as the Federal Court of Justice (Federal Court of Justice, *NJW* 1986, p. 596) put it, "clearly, it is especially pleasant 'working' conditions for prostitutes which reduce those inhibitions that are still present and which could provide an incentive to continue with this activity." According to the case law, only "hostels for prostitutes" were to be excluded from the punishable promotion of prostitution.

However, brothel operators and pimping were not consistently prosecuted.

Renzikowski points out that, in police practice, the old version of Section 180a (1) No. 2 Criminal Code above all served to monitor a pacified scene and to prosecute the "black

sheep” among the pimps. The claim that pimps had – only – conformed to the law under the pressure of criminal prosecution was not correct because the applicable Section 180a (1) No. 2 Criminal Code did not provide a legal framework for the operation of a brothel. The permanent initial suspicion against each brothel operator had, in a pragmatic sense, been highly effective because, from the police’s point of view, it had effectively regulated prostitution in a quasi-unlegislated area.

In light of the principle of mandatory prosecution, *Renzikowski* believes this practice is highly problematic and does not believe the old legislation should be reinstated.

Reinstating the old legislation would also fail to protect sexual self-determination because the prostitute’s independence (which is difficult to prove) is not supposed to be relevant to the offence.

Decriminalisation was, in the end, the necessary consequence of the law recognising that prostitution is a voluntary activity.

If, by contrast, the complaint is raised that it has not been possible to furnish evidence of a crime because the prostitutes wishing to make a statement would first have to extricate themselves from the involuntary dependence on their pimp, then this does not justify reinstating to the old legislation. Rather, the consultation services, whose staff provide intensive support to the victims of human trafficking and support them during criminal proceedings, should be given more funding.

In light of the above, the Federal Government concludes that:

There is, as yet, no firm evidence that more light has been shed into the shady world of prostitution, which many had hoped would occur after the provisions on the promotion of prostitution were relaxed (only some positive feedback has been given from police practice in some cities, e. g. in connection with the so-called Dortmund Model, cf. B.VIII. below).

On the other hand, the hypothesis that amending Sections 180a, 181a Criminal Code would make the prosecution of trafficking in human beings and other serious crimes more difficult has not been confirmed by empirical evidence.

It cannot be disputed that, legally speaking, the conditions for an initial suspicion of exploitation of prostitutes (old version of Section 180a (1)) are stricter than those underlying the old version of Section 180a Criminal Code, namely the promotion of prostitution. This is, therefore, theoretically linked to the provision restricting investigations to a certain degree.

Before the entry into force of the Prostitution Act, the police in some cases used the low-threshold conditions for an initial suspicion of the promotion of prostitution as the “ticket” or “key” into the world of prostitution, to varying degrees in different regions.

However, empirical evidence speaks in favour of the fact that this has not become significant in practice and has not irreconcilably and de facto been to the detriment of investigations, but rather that it has led to a change in *modus operandi*.

For instance, a broad majority of police practitioners interviewed in both surveys did not feel that the new definitions of an offence had had any negative impact on their work.

Of those (around one quarter to one third) who said that the Prostitution Act had had a negative impact on criminal prosecution, only a very few were in favour of reinstating the old legislation.

It is clear that the changes to investigations and the prosecution of trafficking in human beings crimes noted by practitioners are a result of complex, interrelated matters. The interrelatedness between effective prosecution of trafficking in human beings and changes following EU enlargement to the east must be borne in mind. These are often mixed up when discussing this issue. By contrast, it does not go far enough to hold the changes to criminal law following the introduction of the Prostitution Act responsible for these changes.

There is no viable evidence to back up the claim that raids in the “scene” can no longer be carried out to the extent that they were in the past. The complex of provisions under criminal law concerning the protection of minors, crimes of trafficking in human beings, pimping, exploitation of prostitutes, smuggling under foreigners law, illicit work (Section 266a Criminal Code, *inter alia*) are so closely interlinked that they provide sufficient basis for close monitoring of the world of prostitution in line with criminal law.

For reasons based on the rule of law it is wholly unsatisfactory to continue punishing behaviour that is no longer considered punishable merely because it may, in some isolated cases, be used to provide indications for much more serious crimes, such as forced prostitution and trafficking in human beings. It is the goal of criminal law based on the rule of law to protect legal interests, not to provide the means to take action to avert threats. This speaks against reinstating the old versions of Sections 180a (1) and 181a (2) Criminal Code.

Nevertheless, it is legitimate to claim that authorities need to be provided with a “key” which gives them access to places where prostitution is engaged in. However, the majority of investigative authorities and the specialist literature do not share the assessment that effective monitoring is only possible by criminal-law means. Criminal law cannot fill a gap in regulations governing prostitution; it can (only) safeguard existing regulations.

When adopting the Prostitution Act the legislator did not bear in mind that alternative monitoring measures would need to be implemented if criminal-law interventions are reduced. Regulations applying to brothels and brothel-like establishments can be regulated by means of occupational health and safety regulations, under trade law or licensing law, thereby subjecting their compliance to closer controls through criminal law and administrative regulations.

Regardless of this fact, the current legal situation already provides many opportunities for carrying out targeted controls. Investigations have thus only shifted to some extent. The focus should here in particular be on possibilities for carrying out trade inspections and those means available under police law, namely the authority to control persons and objects in dangerous places. These regulations, which have been enshrined in the police

laws of all the *Länder*, provide the possibility of an “investigative intervention” in these places. The system of regulations for the public aversion of threats therefore already provides the authorities with a sound basis for carrying out controls.

The Federal Government does not currently see the need for legislative action to reinstate the old Sections 180a (1), 181a (2) Criminal Code.

B.VII.2. Discussion concerning the need to take further criminal-law and other action in relation to prostitution and trafficking in human beings

As already outlined in the introduction, consistently fighting prostitution-related crime (especially sexual abuse of minors through prostitution by minors, trafficking in human beings and forced prostitution) must be a fixed component of a broad-based concept and it cannot merely be restricted to regulations governing voluntary prostitution.

B.VII.2.a) Protection of minors

The question of whether existing criminal-law and other instruments are appropriate to offering sufficient protection to minors was investigated, among other things, as part of *Renzikowski*, (“Regulation of Prostitution: Goals and Problems – A Critical Assessment of the Prostitution Act”), one of the studies commissioned in preparation of this Report.

Among other things, *Renzikowski* points out that the existing criminal provisions on the protection of young people against sexual abuse partly seem to contradict themselves in terms of their judgements, in particular the age of consent. Criticism is especially expressed of the fact that sexual acts committed on minors for compensation (Section 182(1) No. 1 Criminal Code) and the exploitation of a coercive situation (Section 182 (1) No. 2 Criminal Code) are only punishable if the victim is under 16 years of age. Along with adjusting the age of consent in Section 182 (1) Criminal Code, *Renzikowski* also proposes extending Section 182 to cover sexual acts that do not involve physical contact, including sexual abuse of young people in accordance with Section 182 Criminal Code in the limitation period stipulated in Section 78b (1) Criminal Code, and introducing more comprehensive sanctions for the promotion of prostitution of minors beyond those for providing accommodation and finding clients.

The Federal Government’s draft of the Act Implementing the Council Framework Decision on combating the sexual exploitation of children and child pornography (Bundestag Printed Papers 16/3439) already addressed the most important demand for raising the age of consent in Section 182(1) Nos. 1, 2 Criminal Code to 18 years of age.

By implementing Council Framework Decision 2004/68/JI of 22 December 2003 on combating the sexual exploitation of children and child pornography (OJ L 13, 20 January 2004, p. 44) and increasing the age of consent in Section 182(1) Criminal Code, as required, contradictions in German criminal law will be eliminated:

One contradiction is that it is a punishable offence for a perpetrator to promote the committing of sexual acts for money between 16- and 17-year-olds and third parties (Section 180(2) Criminal Code), although, according to Section 182(1) Criminal Code, it is not a punishable offence if he/she himself commits sexual acts for money with the same victim, because under that provision the age of consent is 16 years.

As regards Section 184(1) No. 1 Criminal Code (Dissemination of pornographic writings to persons under 18 years of age) there is a contradiction in that non-violent sexual acts with 16- and 17-year-olds are not punishable under Section 182 Criminal Code, whilst the showing of pornographic films depicting such sexual acts to those under 18 is punishable under Section 184(1) No. 1 Criminal Code.

Furthermore, in order to fully implement the Council Framework Decision, it seems necessary to relinquish the requirement of a minimum age for the perpetrator. The previous minimum age of 18 years as regards the perpetrator also no longer makes sense after the age of consent has been raised from 16 to 18 years, since it gives rise to a difference in experience and power between the perpetrator and victim on account of the age difference. As a result, one of the demands for legislative action which *Renzikowski* rightly pointed out will already have been met.

This draft legislation, which will shortly be passed into law, closes previous loopholes in the protection of minors under criminal law and improves conditions for consistently prosecuting perpetrators in the field of prostitution of minors.

As a follow-up to this current amendment, the Federal Government will first carefully observe developments in practice regarding Section 182 Criminal Code. In addition, given the fundamental reform of the law applicable to sexual crimes agreed in the Coalition Agreement and based on other thoughts put forward in *Renzikowski*, the Federal Government will have to examine whether there is any need for the legislator to eliminate further contradictions and terminological uncertainties.

However, there must be other ways other than strictly combating the prostitution of minors by criminal prosecutorial means and monitoring by local public order agencies of places where prostitutes work.

Outreach social services with minors (inter alia streetwork) are very important in this context. Supportive psychosocial work with minors working as prostitutes and young people at risk of entering the industry makes specific demands of social workers.

For instance, the principle of acceptance and voluntariness reaches its limit in the field of prostitution of minors. In contrast to adults, one cannot (yet) generally assume that minors are aware of the consequences of their (in)action and that they themselves bear responsibility for the consequences thereof. Thus, the goal of work with minors working in prostitution cannot merely be to ensure they are not exposed to threats or only to forms of prostitution that pose fewer health risks. Rather, the goal must be to prevent prostitution of minors as far as possible. This work must, therefore, be especially sensitive, since it is often a balancing act between showing acceptance, giving support and, where necessary, implementing official measures.

With the exception of drug-related prostitution, prostitution of minors essentially takes place even more covertly than adult prostitution. This makes it more difficult for those providing help and support to get access to the girls, boys, young women and men.

Prostitution of minors represents a very heterogeneous grey area that touches various scenes. It touches various prostitution scenes, the drug scene, the “station” scene and the homeless scene. Links to other sub-cultures are conceivable, such as the fairground scene, as well as young cliques and groups in which sexual services are offered in exchange for certain privileges or an increase in status.

The above problem is also reflected in the level of assistance available. On the one hand, consultation services for prostitutes often focus more on the problems of adult prostitutes. On the other hand, the diverse youth assistance programmes available all too frequently ignore the fact that the youngsters may be engaging in prostitution, because of the approach they take.

In addition, prevention is especially significant in the context of prostitution of minors. Practical work with young people who are at risk needs to stop them (further) drifting into the world of prostitution. At the same time, however, the reasons why girls and young women offer their sexual services must be taken seriously.

According to the analysis of a project on prostitution of minors carried out by the Dortmund Mitternachtsmission, as yet there seem to be only few projects aimed specifically at under-age prostitutes, both in the context of youth assistance and consultation services for prostitutes, as well as deficiencies in the networking of existing individualised assistance (cf. Leopold/Grieger, “Prostitution of Minors” Project, *Mitternachtsmission Dortmund e.V., Abschlussbericht der wissenschaftlichen Begleitung*, 2004).

In order to further develop assistance available to under-age prostitutes, the Federal Government feels that it is necessary to improve the level of exchange on various models in the field of youth assistance and consultation services provided to prostitutes, and to foster continuous co-operative structures at local and regional level.

Finally, as regards the long-term prevention of prostitution of minors, it must be pointed out that numerous academics have indicated that a large proportion of minors engaged in prostitution have already experienced sexual abuse or violence at home or in their closer social environment. Thus, all efforts to prevent and combat sexual abuse and violence in close social relationships and any measures to support victims also contribute to preventing the prostitution of minors.

B.VII.2.b) “Landlord’s privilege” (Section 180a(2) No. 2 Criminal Code)

The different penal sanctions threatened under Section 180a(2) No. 2 Criminal Code and under Section 181a(1) No. 1 Criminal Code are also seen in the literature as contradicting each other.

Section 180a(2) No. 2 Criminal Code refers to the exploitation of prostitutes by the owner of a dwelling by that owner furnishing that dwelling for use in the exercise of prostitu-

tion for excessive rent. Thus, more lenient sanctions are imposed for exploitation by the owner of a dwelling than for exploitation by a pimp under Section 181a(1) No. 1 Criminal Code. This has become known as the “landlord’s privilege”. In fact, victims of trafficking in human beings often do not work as prostitutes in brothels, but in private accommodation. The “landlord’s privilege” could prove to be counterproductive in this context, too.

Renzikowski calls for this provision to be deleted, since all forms of exploitation of prostitutes which the victim cannot escape deserve the same punishment.

The Federal Government will carefully examine whether to abolish the “landlord’s privilege”.

B.VII.2.c) Trafficking in human beings and forced prostitution

As already outlined in B.VII.1. above with reference to the impact of amending Sections 180a(1), 181a(2) Criminal Code, the impact of the Prostitution Act following its entry into force has been greatly discussed in terms of the purported and actual consequences for the criminal prosecution of trafficking in human beings. During this debate, the question of the criminal responsibility of the demanders, i. e. the so-called clients, those using the services of the victims of trafficking in human beings and forced prostitution, has gained in importance.

After the Prostitution Act was adopted, the discussion in late 2004 took on more concrete form in the legislative procedure concerning the 37th Criminal Law Amendment Act, by means of which the trafficking in human beings offences were revised and brought into line with the rules of EU Council Framework Decision of 19 July 2002 on combating trafficking in human beings (OJ L 203, 1 August 2002, p. 1) and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children Supplementing the United Nations Convention Against Transnational Organized Crime of 15 November 2000 (so-called Palermo Protocol). However, clarification of this issue was first delayed in order not to endanger the implementation of EU measures into German law.

In April 2005 the Bundesrat, on the initiative of Bavaria, put forward a draft law which, among other things, sought to introduce the offence of sexual abuse of victims of trafficking in human beings (Section 232a Criminal Code; Bundesrat Printed Papers 140/05 and Bundestag Printed Papers 15/5657, with a statement from the Federal Government). In the new legislative term, this draft law was again launched into the legislative process in an unamended version and is currently being debated in the Bundestag (cf. Bundestag Printed Papers 16/1343, including a statement from the Federal Government, p.10 f.).

The Federal Government in principle welcomes the objective of the draft law put forward by the Bundesrat, namely to improve the protection of victims of trafficking in human beings under criminal law.

The Federal Government also in principle shares the Bundesrat’s opinion that it may be the case that matters which are deemed punishable are not in fact covered by applicable criminal law.

Under applicable law, requesting the services of a prostitute is not a punishable offence. The client of a prostitute who has been forced into such work or is the victim of trafficking in human beings can generally not be prosecuted as an accessory to the offences of exploitation of a prostitute, pimping and trafficking in human beings (Sections 180a(1), 181a, 232, 27 Criminal Code) as this presupposes he/she has contributed to the main offence, which is generally not the case. The provision set out in Section 233a Criminal Code (Promoting the trafficking in human beings) is also not generally relevant. Often the preconditions for Section 177(1) No. 3 Criminal Code (Sexual coercion; rape by exploiting a situation in which the victim is unprotected and at the mercy of the perpetrator's influence) are also not fulfilled. In some cases, however, regardless of the circumstances of the individual case, prosecution may be possible under Section 177 Criminal Code (Sexual coercion; rape), Section 232 Criminal Code (Trafficking in human beings) or even Section 323c Criminal Code (Failure to render assistance). Bodily harm offences can, in some cases, also be relevant, as can other offences, although these do not properly document the degree of unlawfulness that is typical for the conscious use of the services of those forced into prostitution.

Thus there is a gap in punishability, which is hardly tenable given the values associated with and signals sent by criminal law.

The Federal Government is thus also of the opinion that this gap should be closed.

The Coalition Agreement also stipulates that the victims of forced prostitution should be better protected by criminal law and that it should be possible to punish the clients of those forced into prostitution.

According to *Renzikowski*, there are systematic reasons why the so-called punishability of a prostitute's client is to be seen within the context of regulations governing the punishability of offences against sexual self-determination, since it is not the violation of personal freedom in general which is to be punished, but more specifically the violation of sexual self-determination by a client who knows that the victim is in a situation in which she/he cannot extricate herself/himself from any sexual advances.

The Bundesrat's draft bill, by contrast, suggests introducing a new offence in the field of trafficking in human beings offences.

Several solutions are conceivable as regards the form of a provision for punishing the clients who wilfully exploit the helpless situation of a victim of trafficking in human beings or someone forced into prostitution.

The Federal Government is currently examining how to introduce a statutory offence that is so finely differentiated that it meets the aforementioned requirements.

Along with closing the gap in the criminal law, however, other measures must be taken to improve the human and organisational resources necessary to combat trafficking in human beings.

For instance, the Federal Criminal Police Office points out that the EU's enlargement to the east has led to considerable changes in terms of the conditions for identifying victimised witnesses. Dealing with this situation means changing strategies for raising an initial suspicion. This can only be done in co-operation with all the *Länder*.

In the opinion of the Federal Criminal Police Office, licences for prostitution establishments (cf. below) and the use of "scouts" in the scene should be included in this debate.

Reference is here made to the need (as already outlined in B.VII.1. above) of better using (preventive) police and local public order agency mechanisms for monitoring prostitution establishments – quasi as "keys" into the world of prostitution.

Improving the range of tools available to prosecute trafficking in human beings must, in the opinion of the Federal Government, be accompanied by providing comprehensive victim protection.

Suitable protective mechanisms, medical care for and psychological stabilisation of the victims of trafficking in human beings is not only a dictate of humanitarianism.

Rather, in criminal proceedings dealing with trafficking in human beings, the victims are the most important witnesses, since only they can provide authentic information on how they were recruited and subsequently exploited. That is why they need to be present up until such point as the criminal proceedings are brought to a conclusion by a final decision.

The overarching importance of witness evidence for the success of criminal proceedings against those who traffic in human beings is uncontested in the specialist literature and criminal prosecutorial practice, and was recently again underlined in the study commissioned by the Federal Criminal Police Office entitled "The Offence of Trafficking in Human Beings" (*BKA 2006*).

An important conclusion which this study reached is that the support provided to victims by special consultation services has a positive impact on whether those affected cooperate in criminal proceedings. The reason given for this was primarily the psychological stabilisation of those affected, in particular by giving them safe accommodation and support, as well as preparing them for the proceedings (cf. *BKA 2006*, p. 205 ff.). However, the study also found practical deficiencies in the treatment of victimised witnesses.

It is thus also in the interests of criminal prosecution to provide and safeguard effective measures to protect, stabilise, provide therapy and care for victimised witnesses of trafficking in human beings.

In this context, *Renzikowski* identifies the weak points which still exist today as regards the protection given to the victims of trafficking in human beings, namely the residence law and benefit law on which victim support is based.

Renzikowski finds fault with the fact that the residence status of victims of trafficking in human beings has not been sufficiently clarified. Along with introducing a residence

permit granting temporary residence up until the end of the proceedings and the introduction of an at least four-week reflection and recovery period in which the victims may consider their situation and stabilise themselves prior to making a decision (which needs to be introduced anyway based on EU Directive 2004/82, the Victim Protection Directive), *Renzikowski* recommends granting a humanitarian residence permit after the end of the proceedings, as is done in Italy or the US as part of victim protection programmes. He furthermore believes that Section 15a Residence Act needs amending. According to this provision, victims of trafficking in human beings are under the charge of the Federal Office for Migrants and Refugees until their residence has been clarified. The Federal Office may allocate such victims to various *Länder* based on quotas – regardless of their personal need for psychosocial supervision and reliable protection from the perpetrators and without due consideration for the requirements of the criminal proceedings. Such needs must be met during the reflection period afforded to the victims. Special consultation services have reported negative experience of victims being accommodated in collection centres.

Renzikowski furthermore believes the legislator needs to take action with regard to the care provided to the victims, which is currently based on the provisions of the Act on Benefits for Asylum-Seekers.

The recommendations made in *Renzikowski* follow on from practical experience gained in the special consultation services, which often reported of the difficulties they have in caring for the victims of trafficking in human beings.

The report thus claims that it is necessary to change the provisions applicable to benefits so that funding can be provided for the medical care needed to stabilise the victims in order, in turn, to encourage them to co-operate, including by providing appropriate psychological and psychotherapeutic treatment. Furthermore, the special needs, for example of pregnant women or victims of sexual violence, must be taken into consideration. The principle of providing benefits in kind in accordance with Section 3 Act on Benefits for Asylum-Seekers, would also need to be amended, because it does not permit the victims to be accommodated in women's refuges, for example. In *Renzikowski's* opinion, these changes need to be made on account of the provisions of EU Directive 2004/81, the Palermo Protocol and Council of Europe Convention on Action Against Trafficking in Human Beings of 16 May 2005 (Council of Europe Treaty Series No. 197). Article 7 para. 1 and Article 9 para. 1 of Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who co-operate with the competent authorities ("Victim Protection Directive", OJ L 261, p. 19) provide that the victims of trafficking in human beings should have access to the necessary medical and psychotherapeutic care during the time when they are considering co-operating with the criminal prosecution authorities as victimised witness and during any subsequent period of residence up until the end of the proceedings. Article 6 para. 3 of the Palermo Protocol contains similar provisions.

The Federal Government is currently preparing a draft law to implement the EU's directives on residence and foreigners law in order, among other things, to give the victims of trafficking in human beings the residence rights required by Directive 2004/81.

This includes introducing into law a “reflection period” of at least one month in which alleged victims of trafficking in human beings can think things over. This reflection period also serves to stabilise the victims, so that they can make a decision on whether they are willing to testify in the criminal proceedings. If they are willing to co-operate in the proceedings, then, in certain circumstances, a residence permit can be issued for temporary residence up until the end of the criminal proceedings.

The draft legislation is currently with the relevant ministries for final deliberations and is to enter into force in 2007. It would implement Directive 2004/81 and the Council of Europe Convention mentioned in the above.

In addition, the Federal Government will at a later stage examine to what extent – also as regards Article 7 para. 1, Article 9 para. 1 Victim Protection Directive – there is any further need to take action to ensure that the necessary medical and psychotherapeutic care is provided to victimised witnesses.

Moreover, the Federal Government will vigorously pursue and further develop its existing, comprehensive activities on combating the trafficking in human beings.

The Federal Working Group on Trafficking in Women has been under the leadership of the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth since 1997 and has proved a successful co-operation committee. The Working Group includes representatives from the responsible federal ministries, *Land* ministries, the Federal Criminal Police Office, non-governmental organisations and the German nationwide activist co-ordination group combating trafficking in women and violence against women in the process of migration (*KOK e. V.*). The tasks of the co-ordination group include continuously exchanging information on various activities in the *Länder*, as well as in national and international committees, analysing concrete problems in combating trafficking in women, preparing recommendations and, where required, joint campaigns in the field of combating trafficking in women.

One important result of previous work has been the preparation of a co-operation model for a special victim protection programme for women who cannot or do not wish to take part in a witness protection programme. Several *Länder* now use this co-operation model and it has proved its worth wherever it is put into practice. Police practitioners in the *Länder* and the Federal Criminal Police Office feel that these co-operations between the police and special consultation services are positive.

A key factor for the successful criminal prosecution of trafficking in human beings is the stabilisation of victimised witnesses. As already outlined in the above, feedback from criminal prosecutorial practitioners and empirical studies (cf., inter alia *BKA 2006*, p. 205 ff.) has provided sound evidence that the support given to victimised witnesses by special consultation services advising the victims of trafficking in human beings has been effective in terms of efficient criminal prosecution.

In order for special consultation services to successfully support victimised witnesses and to guarantee continuous co-operation, those special consultation services providing assistance to the victims of trafficking in human beings must have reliable sources

of funding. The Federal Government assumes that the *Länder*, who are competent in this regard, meet this requirement. The Federal Ministry for Family Affairs, Senior Citizens, Women and Youth funds the work of *KOK e. V.* and will continue to do so.

B.VIII. Working conditions in prostitution

One of the goals of the Prostitution Act was to improve working conditions in prostitution. In particular, it was anticipated that the conditions under which prostitutes work would improve if the previous criminal-law obstacles to improving their working environment were eliminated.

For example, the previous punishability of the promotion of prostitution under the old Section 181a(1) Criminal Code was viewed as a factor contributing to the bad hygiene, health and social conditions in the prostitutes' workplaces.

However, the Prostitution Act does not contain any positive regulations governing working conditions; it merely aims to eliminate criminal-law obstacles on the one hand and, on the other hand, trusts that the fact that prostitution is no longer considered immoral will pave the way for other, existing legal means being applied to prostitution.

The intention was that the requirements made of operators and establishments in applying the Licensing Act and trade regulations would make the world of prostitution more transparent and thus contribute to making sustainable improvements to prostitutes' working conditions (cf. B.IX.1. below). For instance, the application of Section 5(1) No. 2 Licensing Act would enable the introduction of provisions governing the protection of employees against threats to life, health and moral principles. Furthermore, the idea was that taking prostitution establishments out of a legal grey area would also mean that occupational health and safety and accident prevention standards could be applied.

It has become clear that in order to assess whether the Prostitution Act has actually had an effect by improving working conditions in prostitution, one must differentiate between the different forms of prostitution. For example, different approaches can be taken to improving conditions for prostitutes working in fixed rooms than can be applied to those working on the streets or those working for so-called escort services. In addition, fewer protective regulations are applicable to prostitutes working on a freelance basis (as they are wholly responsible for themselves) than to those in dependent employment.

SoFFI KI describes the links between working conditions and the situation in which the prostitutes are working as follows:

- “As regards prostitution in residential accommodation, in clubs, in smaller brothels, debate is more likely to concentrate on criteria for ensuring hygienic conditions and a safe environment; hygiene and protection against violence are the most important factors in streetwalking.
- Large establishments are also interested in criteria such as structural conditions and facilities, such as access to daylight, private rooms, separate work and living areas.

- As regards rentboys who only meet their clients in pubs and clubs inside prohibited zones or prostitutes who work on the streets in prohibited areas, there are hardly any means of improving working conditions.
- The working conditions of immigrants working in brothels and residential accommodation without a legal residence permit are not an issue, unless the police find evidence for exploitative pimping or trafficking in human beings.
- When drug-addicts are in a weakened physical and psychological state and are in desperate need of money quickly, they are themselves only little interested in how they are going to get hold of their drugs and thus for their safety and health.
- Women and men who would not describe themselves as prostitutes but as someone who occasionally “goes on the game” when they are in difficulty are also not interested in the problems associated with their working conditions.”

One can thus only reasonably expect the Prostitution Act to have any impact on working conditions in the area of legal prostitution in brothels.

However, all in all, the results of the empirical study show that only little has been done up until now to improve working conditions.

Those operating brothel-like establishments have in the past shown little initiative themselves to improve working conditions. In some cases structural improvements have been made, for example to sanitary installations, which the prostitutes also benefit from.

Since those operating brothel-like establishments make business decisions like other traders or businessmen/women based on business management criteria, it is not surprising that working conditions are not improved unless they also fulfil the economic interests of the operator.

The interviews carried out with operators during *SoFFIKI* indicate that factors influencing their previous reticence to invest in better working conditions also include the still wide-spread uncertainty on how to apply trade and licensing law and, initially, uncertainty as to what is legal and what is not. As a result, they continued to operate and act in a tried and tested manner.

It may be possible to motivate operators more to make changes by monitoring more closely whether certain minimum standards (structural, hygiene, labour law) are being complied with. However, since the Prostitution Act entered into force only few impulses have been discernible in this direction.

There are various reasons for this.

For example, existing mechanisms for monitoring working conditions, such as state and professional association health and safety laws, are largely not applied in prostitution because only few prostitutes have in the past signed a contract of employment.

As regards trade and licensing law, the different approaches applied in practice by the trade supervisory authorities in the *Länder* (cf. B.IX.1.) have proved an obstacle.

Finally, lack of experts' experience of and findings into which standards could be appropriate, as well as lack of relevant sub-legal norms have a role to play. How specialist legislation, for example Building Inspectorate Law, could be used to improve working conditions was, according to the results of the study, to a great extent dependent on individuals' commitment. Initiatives on the part of the authorities were reported in Munich and Hanover, for instance.

SoFFIK reports that staff in Munich City Council Planning Department began to look very carefully into the issue of working conditions after they received applications for large brothels to be established. They looked into the Prostitution Act, made contact with the competent criminal police department and went to visit establishments to talk to prostitutes working there about their working conditions. This work resulted in applications being denied because the working conditions were found to be unacceptable. This authority criticised shortcomings in the planning of establishments: lack of private rooms, lack of separate bathrooms and toilets for clients and prostitutes, etc.

SoFFIKI found that positive signs of improvements being made to prostitutes' working conditions were more likely to be in evidence when different authorities at local level were co-operating, for example the local public order agency, the local health authority and criminal police plus special consultation services and operators, and those working in prostitution were involved in discussions at local level. According to *SoFFIKI*, such approaches have been adopted in various forms in Hanover, Dortmund and Frankfurt, among other places.

The aim of such co-operation is to create transparency in prostitution and to combat attendant crime by improving controls.

The so-called Dortmund Model is one example of how prostitution could be regulated, in which co-operation and controls are combined in a targeted manner, bringing together trade law and other public-law instruments. The model is based on good and well-established co-operation between the local public order agency, local health authority, criminal police office and special consultation services. Authorities and consultation services seek to enter into dialogue with operators and prostitutes. The City of Dortmund treats freelance prostitution as a trade or business. Prostitutes must therefore be registered with the tax office and are given a pass which they must present during inspections by the customs administrations (to combat illegal work and social benefit fraud). Brothels or residential accommodation used by prostitutes must be registered as a business with the local public order agency. This opens up the possibility of setting certain standards to protect the general public, the prostitutes' clients and the prostitutes themselves (e. g. standards of hygiene). The City of Dortmund publishes an information leaflet on working conditions in prostitution and lists contacts in authorities.

B.IX. Impact of the Prostitution Act on the legal classification of prostitution and prostitution establishments

B.IX.1. Trade and licensing law

Since the entry into force of the Prostitution Act, one of the main focuses of debate among experts has been the question of what impact the Act has had in the area of trade and licensing law.

The Prostitution Act does not contain any immediate regulation of trade law. In legal terms the issue under debate is thus whether the provisions of the Prostitution Act will have a knock-on effect on public-law matters, in particular trade and licensing law.

The main questions being debated are whether, after the entry into force of the Prostitution Act, brothels, brothel-like establishments and other establishments which make a profit from providing sexual services are to be classified as a trade or business within the meaning of the Trade Regulation Act and thus become subject to trade inspections and monitoring mechanisms, and to what extent previous practice outlined in Section 4(1) first sentence Licensing Act should be continued, according to which it is not possible to issue a permit to establishments in which sexual services are available.

The question is also raised of how prostitution is to be classified under trade law and thus of whether freelance prostitutes should need to register their trade or business.

As already described in B.I. above, when adopting the Prostitution Act, the legislator made reference to Berlin Administrative Court's decision of 1 December 2000 (ref. 35 A 570.99, *NJW* 2001, p. 983), believing that subsequent amendments to those parts of the Licensing Act which refer to "indecent" were not necessary. Article 1 of the draft law made it clear that sexual acts for money are no longer automatically assumed to be "indecent".

This without doubt shows that the legislator intended the Prostitution Act to have a knock-on effect on trade and licensing law and that this was seen as an explicit legal consequence of the Prostitution Act.

Nevertheless, since the Prostitution Act entered into force those involved in practical aspects of trade law and the specialist literature have only partly adopted the same view. Rather, these groups first claimed that prostitution was still classified as indecent and socially unacceptable under trade and licensing law.

Before the law entered into force, working as a prostitute and the operating of prostitution establishments, for example brothels and clubs, did not fall within the scope of application of trade law. This was based on the definition that a trade or business comprises any permissible independent activity that is not socially unacceptable that is carried on for profit and not merely temporarily. In consequence, these establishments were also by and large not subject to trade inspections.

This definition meant that it was firstly not possible and secondly also not necessary to register a brothel as a trade or business. Operating brothels and similar establishments was often merely tolerated by authorities in practice, in that brothels were officially classified as the “letting of rooms on a commercial basis”.

As regards the law concerning restaurants, pubs and bars, the case law and the literature were largely in agreement before the entry into force of the Prostitution Act that a proprietor who operates a restaurant, pub or bar in such a manner as to provide conditions conducive to initiating sexual intercourse between prostitutes and clients is classed as unreliable because he/she is encouraging immoral conduct within the meaning of Section 4(1) first sentence Licensing Act. The case law on the Licensing Act regarding the element of “aiding and abetting immoral conduct” was based on the prevailing opinion that prostitution was a socially unacceptable activity. No licence could, thus, be issued to establishments in which the rooms in the restaurant, pub or bar were linked to those rooms used by prostitutes but also those which merely served to establish contact between the prostitutes and clients. This led to various types of establishments in which the rooms in the restaurant, pub or bar were kept separate from that part of the building in which sexual services were initiated and performed.

Even before the Prostitution Act entered into force, the Berlin Administrative Court reversed the decision to withdraw a licence for an establishment initiating contact between prostitutes and clients (*Anbahnungsgaststätte*) in its decision of 1 December 2000 (ref. 35 A 570.99, *NJW* 2001, p. 983). The decision aroused great public attention. In its comprehensively justified decision, the Court rejected the majority of the case law, which continuously reached the same decision. It found that prostitution “practised voluntarily by adults and without attendant crime is no longer to be seen as immoral based on today’s social/ethical values within the meaning of administrative law”.

After the entry into force of the Prostitution Act, the Federal Administration-*Länder* Committee on Trade Law on 18/19 June 2002 considered the question of whether the Prostitution Act, which had entered into force on 1 January 2002, had had an impact on trade law and, if so, what impact. Normally this Committee reaches its decisions by consensual agreement, but in this case no agreement could be reached as regards how to classify brothels under trade law and how to interpret Section 4(1) No. 1 Licensing Act.

In the end, unanimity was only reached regarding the fact that the activity prostitutes engage in is not to be classified as a trade or business even after the entry into force of the Prostitution Act. The grounds put forward vary: some denied that the Prostitution Act had had any impact on trade law in general; some argued that the service performed was of a highly personal nature, or that monitoring in accordance with trade law was neither sensible nor practicable. Freelance prostitutes must thus neither register their trade nor apply for an itinerant trader’s licence for the performance of sexual acts with third parties. Applications for registration as a trade or business would thus have to be rejected.

As regards brothels, Baden-Württemberg, Bavaria, Bremen, Thuringia and Saxony also did not feel that there was a duty to register or a possibility of registering a trade or business, whilst the other *Länder* and the Federal Administration believed that brothels

should be classified as commercial businesses, with all the consequences under trade law that entailed. Likewise, there were different assessments as to what constituted “aiding and abetting sexual relations” under Section 4(1) No. 1 Licensing Act in the case of establishments initiating contact between prostitutes and clients.

The majority of representatives on the Federal Administration-*Länder* Committee were thus of the opinion that the Prostitution Act led to the following consequences:

Brothel operators should be recognised as “persons engaged in a trade or business” and they should register their trade.

In the case of establishments initiating contact between prostitutes and clients or brothels with an attached restaurant/bar/pub, a licence may not in principle be denied or withdrawn merely on account of their “aiding and abetting sexual relations” within the meaning of Section 4(1) No. 1 Licensing Act.

A licence is to be denied or withdrawn or a prohibition in accordance with Section 35 Trade Regulation Act to be imposed if the operation of this restaurant/bar/pub or brothel poses the risk that prostitutes will have to carry out their work against their will or be stuck in other dependent circumstances. Placing the protection of young people at risk, causing a nuisance to guests and residents can in specific cases justify denying or withdrawing a licence as well as imposing conditions.

The different opinions put forward indicate the different practice subsequently applied by trade authorities in the different *Länder*. From the beginning some local authorities reached different decisions, however. For example, some local authorities did accept applications from freelance prostitutes to register as a trade or business.

In the meantime the case law indicates that there is a clear tendency towards acknowledging that the Prostitution Act has had a knock-on effect on trade and licensing law. Actions brought before the administrative courts in this area have up until now nearly exclusively dealt with conflicts arising from a denial or withdrawal of a licensing permit on account of “aiding and abetting immoral conduct”.

Attention should here be drawn to what has become known as the Federal Administrative Court’s “swinger club decision” (Federal Administrative Court, 6 November 2006, ref. 6 C 16.02, *GewArch* 2003, p. 122-124):

The Federal Administrative Court argued that the goal of Section 4(1) first sentence Licensing Act was not to promote morality as such or to educate people in moral values. The provision served to avert threats and this limited its scope of application to those matters which go against generally accepted attitudes, those which are prohibited on account of criminal norms or are seen as socially/ethically degrading on account of their public nature.

The interpretation of the term “immoral” must do justice to each individual’s right to free development of his/her personality in accordance with Article 2 para. 1 Basic Law. This includes the right to freedom of one’s private life. Individuals, the Court found, in

principle had the right to self-determination as regards their sex life, so far as the Basic Law, norms or rights of others were not thereby violated.

When adopting the Prostitution Act the legislator had been guided by the idea that, according to the majority opinion, prostitution was no longer to be considered immoral. In particular, by deleting the old Section 180a(1) No. 2 Criminal Code the legislator had also removed the creation of good working conditions for prostitutes, for example in high-class brothels and sauna clubs, from the offence defined in Section 180a Criminal Code. For that reason, merely generating income from the sexual conduct of third parties could not be seen as immoral. The legislator had, the Court found, not included making subsequent changes to licensing law in the Prostitution Act, but had been guided by the idea that (even) sexual acts performed for money can no longer “automatically” be seen as immoral.

That gave expression to the change in social/ethical values. In consequence, the objective of the Section 4(1) first sentence No. 1 Licensing Act as regards regulatory law was not to protect someone against sexual activity as such or to prevent the generation of income from sexual activity, but primarily to protect against unwelcome confrontation with such matters.

As a result of this decision by the Federal Administrative Court, the lower courts have (in line with the already discernible trend) begun classifying establishments which initiate contact between prostitutes and clients and brothel-like establishments as a trade or business within the meaning of the Trade Regulation Act and allowing licences to be issued under certain conditions.

In everyday licensing and trade practice, this has in part already led to some restructuring, even where no changes had previously been made.

As a result one can assume that doubts regarding licensing law have now essentially been removed. Since the reform of the federal structure of Germany has placed licensing law within the exclusive competence of the *Länder*, it is down to the *Länder* to examine whether there is any need to taken any action to amend their licensing regulations.

Meanwhile, at federal level there may be a need to take legislative measures in terms of the range of tools available under trade law to monitor brothels, brothel-like establishments and other commercial businesses whose purpose is to generate income from the offering of sexual services.

In principle even the application of existing monitoring instruments and licensing enterprises engaged in prostitution under trade and licensing law may open up important opportunities for and provide control mechanisms to the regional administrative bodies responsible for licensing such enterprises.

For instance, as described in B.VIII. above, there are some examples from local government practice which show how authorities can use the means available to them under trade and licensing law both to improve prostitutes' working conditions and to monitor them closely in order to be able to combat those forms and effects of prostitution which,

according to unanimous opinion, require further combating (e. g. exploitation of prostitutes, trafficking in human beings and other attendant crime).

Overall, however, far too little use is as yet being made of these options. They quickly also reach the legal limitations regarding controls imposed by the Trade Regulation Act on trades and business which need to be registered. Experts have raised the question of whether it is necessary to firmly establish more far-reaching means of monitoring and controlling enterprises under trade law.

Thus, over half of the trading authorities interviewed as part of the *SoFFIKI* study felt that special regulations should be introduced in the Trade Regulation Act and the Licensing Act for brothel-like establishments and other prostitution-like establishments. The majority of representatives of special consultation services also felt this was sensible.

Some of those working in trade regulation, including some trade supervisory authorities in the *Länder*, which had previously not recognised such establishments as a trade or business, explicitly called for brothels to be required to apply for a permit.

Those in favour of introducing the need for a permit for commercial prostitution establishments believed this model provided various means for improving prostitutes' situation in brothels, establishments where rooms are rented by the hour, clubs etc. In their opinion, an area could be created in which prostitutes were able to work legally in every respect and where hygiene regulations, as well as regulations governing building, trade and foreigners law could be imposed, reviewed and enforced.

Introducing the need for a permit among other things opens up the possibility of taking another step towards creating a distinction between legal and illegal prostitution and for improving transparency in the world of prostitution.

In this respect the suggestion corresponds to what representatives of the police have often called for (cf. B.VIII. above).

It is especially the Federal Criminal Police Office and some *Land* Criminal Police Offices which are also in favour of introducing the need to apply for a trade or business licence. For example, during the Federal Criminal Police Office's analysis of trafficking in human beings/forced prostitution in the context of the 2006 FIFA Football World Cup, the Bavarian Criminal Police Office also raised the basic question of whether legislative changes (granting a licence) could force brothel operators to remain within easier reach of the authorities and to appoint someone who would be subject to a background check.

Factors which speak in favour of introducing trade licences for brothels and brothel-like establishments are the positive experience which the Netherlands has gained in requiring brothels to apply for a licence and the attendant increase in monitoring of brothels by local public order agencies and the police. This experience should be taken into consideration in future discussions on improving trade inspection mechanisms.

Finally, a simple comparison of the current legal situation of brothel operators and the number of regulations governing other commercial businesses in view of the potential

risk to individual legally protected interests and to the legally protected interests of the general public from prostitution establishments indicate that there is a gap in legislation.

The Federal Government, in consultation with the *Länder*, will examine whether or not and which instruments under trade law can serve to introduce more efficient controls of commercial establishments offering sexual services.

Especially the matter of whether to introduce a licensing requirement for brothels, brothel-like establishments and other establishments offering sexual services will have to be examined in this context.

In order for inspections to be as efficient and as comprehensive as possible, the *Länder* should, for their part, examine to whom responsibility for these inspections is to be transferred as well as practical aspects of these inspections so that, along with the necessary expert knowledge of licensing law, the police's perspective can also be incorporated. Some models are already in operation in which the police carry out these duties (e. g. in Berlin).

B.IX.2. Planning and building law

As yet, the Prostitution Act has not had any far-reaching consequences on planning and building law in practice, since the social/ethic value judgements attached to prostitution have much less of an impact on this area than on, for example, trade law.

Building planning law does not refer to persons but rather to property in the sense that it permits the construction and use of individual properties in specific building zones that is compatible with the local situation and the neighbourhood and aims to prevent or balance out any possible conflicts in use. Thus the case law pertaining to building law as regards the question of the permissibility of a certain form of use does not make reference to a social/ethical value judgement of this use (in a more general sense or that prevalent in certain population groups) – at least that is not the decisive criterion.

Thus, for instance the key condition for finding that prostitution in apartments and brothel-like enterprises is generally not permitted in a general residential area does not constitute a value judgement – in any shape or form – of the prostitution industry as such, but rather the attendant disturbance caused to the residential environment. This is also influenced by prostitution, although not primarily by the prostitutes themselves, but rather by their potential clients.

The Prostitution Act, it is claimed, has not led to any changes as regards planning law in that prostitution in residential apartments and brothel-like establishments is still seen to have a negative impact on the residential environment and thus that it stands in contradiction to the principle on which urban planning is based, namely that a particular area should primarily be residential (cf., e. g., the decision of Osnabrück Administrative Court of 7 April 2005, ref. 2 B 14/05).

As regards the disruptive influence of prostitution, case law applies the label “disturbance due to prostitution”. According to the case law, this arises on account of typical nuisances associated with “prostitution-related violence”, nuisances such as noise in the stairwell from dissatisfied clients or those under the influence of alcohol, clients ringing the wrong doorbell, littering, clients arriving and leaving by car, indecent behaviour of clients towards young people and female residences. This has not changed on account of the Prostitution Act.

Even since the Prostitution Act entered into force, the case law has regularly found brothels disruptive on account of the typically held view of brothels. Building planning has not permitted prostitution establishments to open up in general residential areas or in mixed areas; they have mostly only been authorised to operate in trading and industrial estates.

The majority of building authorities base their approval of prostitution establishments on the case law. In practice, however, the authorities varied their approach. For example, in some cases prostitution in residential accommodation was also tolerated in residential areas and authorised in exceptional cases.

Up until now the working conditions of prostitutes have had practically no role to play as regards licensing procedures under planning and building law.

The *SoFFIKI* study did, however, observe that in some regions there was legal room for manoeuvre, which was being utilised within the context of planning and building inspections to improve prostitutes’ working conditions, in that authorisation for prostitution establishments was made dependent on structural measures, for example, daylight access, private rooms for prostitutes and separate sanitary installations for prostitutes and clients. In some cases those responsible have begun looking into standards for acceptable working conditions (cf. also B.VIII. above).

B.IX.3. Taxing income from prostitution

The Prostitution Act clearly has an effect on tax law. Based on the Prostitution Act, prostitution is no longer classed as immoral. As a result, income from prostitution is now in practice classed in the same way as income from other commercial enterprises.

According to practically all those tax offices interviewed, the income of prostitutes working on a freelance basis has, since the Prostitution Act entered into force, been classified as “income from a commercial business” in accordance with Section 15 Income Tax Act and not as “other income” in accordance with Section 22 No. 3 Income Tax Act, as was previously the case.

Despite the standardised procedure, in practice various procedures are applied to the taxing of income from prostitution. Along with the standard practice of making an individual tax assessment, simplified tax prepayment procedures (so-called Düsseldorf Procedure) are also applied.

The tax authorities interviewed generally did not feel that special regulations needed to be introduced for prostitutes. In the interests of treating all those liable to tax equally, it would also not be justifiable to introduce special regulations exclusively for prostitutes and the field of prostitution. However, that does not rule out considering introducing a national, standardised procedure for taxing prostitutes based on applicable law. Some of the tax offices interviewed said they had had more freelance prostitutes registering with the tax office. Targeted information campaigns launched by tax offices and the flexible treatment of subsequent tax claims within the bounds of what was possible had, they claimed, made it easier for many prostitutes who had previously not been taxing their income to register with the tax authorities.

Taxation of prostitutes is a question of the practical implementation of tax legislation. According to the financial constitution of the Federal Republic of Germany, the individual *Länder* are responsible for that. In order to improve and standardise the implementation of taxation of prostitution, the Federal Finance Ministry has now suggested that the highest financial authorities in the *Länder* each introduce their own procedure based on the Düsseldorf Procedure.

The Düsseldorf Procedure is a simplified administrative procedure based on which brothel operators and operators of brothel-like establishments currently pay a fixed sum of up to 25 euros for each prostitute working in the establishment (the sum to be paid is agreed on a case by case basis, taking local conditions into account). This fixed sum only represents a tax prepayment which is to provide security against the tax assessment which is made later on. Those treated in this manner must still hand in a tax return and must also pay those taxes which actually accrue. This fixed sum of money is offset against the actual tax to be paid based on individual tax liability.

The Düsseldorf Procedure has already been introduced across Baden-Württemberg and across large parts of North Rhine-Westphalia. In Berlin preparations are already underway to introduce the Düsseldorf Procedure. At a meeting (Income Tax VII/06) held from 6 to 8 December 2006, the highest federal and *Länder* financial authorities agreed by a majority to permit the Düsseldorf Procedure in their subordinate departments as an appropriate method for taxing prostitutes.

B.IX.4. Areas in which prostitution is not permitted (prohibited areas)

Article 297 Act Introducing the Criminal Code authorises *Land* governments to introduce ordinances prohibiting prostitution entirely or at certain times of the day “for the protection of young persons or of public decency” across an entire municipality or parts of it, or along public roads, paths, in squares, parks and other locations visible from there.

Some *Länder* have made use of the possibility of transferring this power to their highest *Land* authorities or to other authorities.

The *Länder* continue to pursue different paths at regional level as regards these prohibited areas, which in some cases go as far as not zoning off any areas in which prostitution is not prohibited (e. g. in Berlin). It has not become apparent that this has led to any

noteworthy reduction in the protection of young persons or other considerable harmful influences for citizens of the city in comparison to other cities of a similar size (cf. also the Response of the Federal Government to a minor interpellation by Christina Schenk, Member of the Bundestag and the ALLIANCE 90/The Greens, Bundestag Printed Papers 12/5518, p. 8).

Nevertheless, there have been those who have for a long time rightly been emphasising the possible negative impact of ordinances on prohibited areas (cf. Leopold/Steffan/Paul, *Dokumentation zur rechtlichen und sozialen Situation von Prostituierten in der Bundesrepublik Deutschland*. ed.: Federal Ministry for Family Affairs, Senior Citizens, Women and Youth. Series Vol. 143, 2nd ed. 1997, p. 97).

For that reason, for years some special consultation services and some legal and other experts have been calling for Article 297 Act Introducing the Criminal Code to be deleted (including *Renzikowski* §143, with further references. *Renzikowski*, however, is not in favour of the general abolition of local regulations, but refers to the instruments available under building planning and building use law).

In practice it is only very seldom possible to prevent prostitution in areas in which it is prohibited on the basis of ordinances on prohibited areas, since many prostitutes ignore these prohibitions and violations are in practice not consistently enforced, but only selectively.

All in all, ghettoisation can not only lead to more stigmatisation and criminalisation, but also to the exploitation of prostitutes by their pimps. The ambivalence between tolerance and prosecution of prostitutes in prohibited areas which has been observed in practice leads to increased legal uncertainty for prostitutes.

During the empirical investigation into the impact of the Prostitution Act (*SoFFIKI*), staff in the special consultation services for prostitutes were often in favour of relaxing existing ordinances on prohibited areas; the majority were in favour of a general abolition. The majority of prostitutes and brothel operators interviewed on that occasion were also in favour of abolishing prohibited areas. At least one third in both these groups were in favour of keeping them, for example to protect the justified interests of local residents. In cities with prohibited zones, the police sometimes put forward the argument that keeping prohibited zones means they can better monitor the world of prostitution.

In the light of the negative impact of prohibited zones on the working situation of prostitutes, one should bear in mind that abolishing ordinances on prohibited areas or relaxing existing ordinances could, depending on local conditions, help to improve prostitutes' working conditions.

Nevertheless, it does not currently seem sensible to take this instrument for introducing local rules on prostitution entirely out of the purview of the *Länder* and local authorities. Based on the principle of protection set out in Article 297 Act Introducing the Criminal Code, in particular the protection of young persons and the justified interests of local residents, such rules governing times and places are also legitimised even after the entry into force of the Prostitution Act.

The permissibility of prohibited areas based on Article 297 Act Introducing the Criminal Code has been confirmed by case law since the entry into force of the Prostitution Act (cf. Federal Administrative Court, 20 November 2003, ref. 4 C 6/02, *NVwZ* 2004, p. 743 f., which makes reference to Lüneburg Higher Administrative Court, 24 Oct. 2002, ref. 11 KN 4073/01, *NdsVBl.* 2003, p. 154 ff. among others).

Since the entry into force of the Prostitution Act, prostitution is classed as a permissible commercial activity subject to the protection of Article 12 (and 14) of the Basic Law. That fact has no implications for this assessment.

Article 12 Basic Law does not grant the right to unrestricted pursuance of a profession, but permits regulations to govern the practice of a profession that are in the public interest. In the opinion of the Federal Government, the Basic Law therefore does not require the abolition of local regulations governing prostitution.

Nevertheless, when evaluating the question of which spatial and temporal restrictions are needed for the protection of young persons and “public decency” (Article 297 Act Introducing the Criminal Code), the change in social opinion must be borne in mind. This has also found expression in the Prostitution Act and, prior to its entry into force, in case law.

The Federal Government will continue to observe developments as regards case law and practice in this area. The Federal Government does not currently see any need to make any changes to the authorisation to introduce regulations as set out in Article 297 Act Introducing the Criminal Code.

B.X. Statement regarding Sections 119, 120 Administrative Offences Act

Item 2. of the Bundestag Resolution of 19 October 2001 called on the Federal Government “in consultation with the *Länder*, to review whether Sections 119, 120 Administrative Offences Act are necessary in light of the fact that prostitution is no longer considered immoral.”

The Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, with the agreement of the Federal Ministry of Justice, in November 2006 asked each *Land* justice ministry for a statement. The responses from the *Land* justice ministries have been incorporated into the Federal Government’s response to the question concerning the need for Sections 119, 120 Administrative Offences Act.

B.X.1. Regarding the advertising bans under Sections 119, 120(1) No. 2 Administrative Offences Act

B.X.1.a) Regarding Section 119 Administrative Offences Act (Grossly indecent acts and acts that cause a nuisance)

Section 119 Administrative Offences Act serves to protect individuals or parts of the population from unintentional confrontation with sexual acts, depictions or objects.

In order to fulfil the offence under Section 119 Administrative Offences Act it is (in contrast to Section 120(1) No. 2) not necessary for sexual acts to be offered for remuneration. The action in question must be suited to causing a nuisance or must be grossly indecent.

Section 119(1) Nos. 1, 2 and Section 119(3) Administrative Offences Act thus, depending on the individual circumstances, also cover various forms of advertising for prostitution if they fulfil the respective conditions for the offence, i. e. they are grossly indecent or publicly displayed in a way suited to causing a nuisance.

Acts that are “suited to causing a nuisance” are those which interfere with the physical and psychological well-being of others to a not inconsiderable degree. The mere offering of sexual services (e. g. including so-called “streetwalking”) does not generally constitute causing a nuisance. Rather, behaviour or circumstances must also occur which make the advertising and announcing appear conspicuous or attention-grabbing. The decisive factor in this is the value judgement which all those interested in prevailing practice make in this regard (cf. briefly in: Karlsruhe Commentary on the Administrative Offences Act, 3rd ed., Section 119, § 11, with further references).

Acts that are grossly indecent are those which are so intrusive that they no longer appear reasonable, even given the change in social values, or which the majority of the population believes clearly exceed the required level of restraint (cf. briefly in: Karlsruhe Commentary on the Administrative Offences Act, 3rd ed., Section 119, § 15, with further references).

The interpretation of both provisions thus offers sufficient scope for accommodating a change in social value judgements when applying these regulations and thus also does justice to the value judgements on which the legislator based the Prostitution Act.

However, the Federal Government is of the opinion that the legal rights of individuals and the justified interests of the general public, as protected under Section 119 Administrative Offences Act, still deserve the same level of protection even after the Prostitution Act explicitly confirmed that prostitution is a legally permissible economic activity.

As regards the pursuance of prostitution, the prohibitions set out in Section 119 Administrative Offences Act constitute permissible regulations on the exercise of a profession.

Section 119 Administrative Offences Act should, in the Federal Government’s opinion, not be amended.

B.X.1.b) Regarding Section 120(1) No. 2 Administrative Offences Act (Prohibition of advertising for prostitution)

According to Section 120(1) No. 2 Administrative Offences Act, all forms of advertising for sexual services for remuneration are prohibited.

The administrative fine can not only be imposed upon those persons who actually advertise the services, that is prostitutes or brothel operators, but also upon those persons who are responsible for the advertising material, for example including newspaper publishers.

According to the local public order agencies, in practice Section 120(1) No. 2 Administrative Offences Act only had a subordinate role to play before the entry into force of the Prostitution Act. Based on the principle of discretionary prosecution, the numerous advertisements of this nature which appear in daily newspapers have in many cities been tolerated for many years. In some cases agreements have been reached between newspaper publishing houses, the responsible local public order agencies and the police, specifying very closely what content is deemed acceptable (e. g. in Munich in the rule that only a first name and a telephone number should be included in the advert, but no other details). Only those cases are prosecuted which exceed the agreed rules and, for instance, can be viewed as problematical from the point of view of the protection of young people.

No significant changes to this practice have been observed since the Prostitution Act entered into force.

In the opinion of the overwhelming majority of the case law and literature, in legal terms the prohibition in Section 120(1) No. 2 Administrative Offences Act covered all advertisements for sexual acts for money without any additional criterion needing to be fulfilled. It did not matter whether any concrete nuisance was being caused or whether there was any other threat, specifically as regards the protection of young people (cf. *BGHZ* 118, 182, 184 f.; briefly in: Karlsruhe Commentary on the Administrative Offences Act, 3rd ed., Section 120, § 23 f.).

Nevertheless, in judgements of 13 July 2006 (ref. I ZR 231/03, I ZR 241/03 and I ZR 65/05) the 1st Civil Panel of the Federal Court of Justice found that this interpretation was no longer tenable since the entry into force of the Prostitution Act.

In adopting the Prostitution Act the legislator had done justice to the change in moral values in large parts of the population, according to which prostitution was no longer considered immoral *per se*.

In the opinion of the 1st Civil Panel, this new general attitude and the new legal situation must be taken into account when interpreting this provision. Therefore, one should not hold fast to an absolute ban on all forms of advertising for sexual acts for money, as has previously been the case when interpreting Section 120(1) No. 2 Administrative Offences Act and in line with previously prevailing opinion. Rather, the ban should be restricted to cases where the advertisement constitutes a concrete interference with the legally protected interests of the general public, in particular the protection of young persons. In the opinion of the 1st Civil Panel, a concrete interference with legally protected interests which constitutes a violation against Section 120(1) No. 2 Administrative Offences Act arises when, for example, the advertisement is not restrained in terms of its presentation, content and size or the type of advertising material and its dissemination may possibly pose a risk to legally protected interests. For Section 120(1) No. 2 Administrative Offences Act to be applicable it is not necessary for the advertisement to be suited, within the meaning of Section 119(1) Administrative Offences Act, to causing a nuisance to others or to being grossly indecent.

The provision set out in Section 120(1) No. 2 Administrative Offences Act, which refers to advertisements for sexual acts for money, therefore already applies below the thresh-

old of Section 119(1). However, the prohibition assumes that the advertisement is in fact suited to interfering with the protection of the general public, especially of children and young persons, against the risks and offences generally associated with prostitution.

Given this case law, Section 120(1) No. 2 Administrative Offences Act will thus retain its – albeit somewhat narrower – scope of application.

When interpreting administrative regulations, the case law of the highest courts has thus fulfilled the legislator’s intentions in enacting the Prostitution Act.

In the light of these developments, the Federal Government currently does not see any need for the legislator to act, but it will closely observe developments in the case law.

Section 120(1) No. 2 Administrative Offences Act should, in the Federal Government’s opinion, not be amended.

B.X.2. Regarding Section 120(1) No. 1 Administrative Offences Act (Illegal pursuance of prostitution)

According to Section 120(1) No. 1 Administrative Offences Act, any person who violates a ban imposed by an ordinance against pursuing prostitution in certain places or at certain times of the day is considered to be committing an administrative offence.

The provision thus ensures that the ordinances on prohibited areas based on Article 297 Act Introducing the Criminal Code “for the protection of young persons or public decency” are complied with.

In principle, however, even after the entry into force of the Prostitution Act, it still seems sensible and necessary to provide the legal possibility of at least imposing restrictions regarding time and place for certain forms of prostitution, in particular in the interests of protecting young persons, as well as protecting the justified interests of local residents.

Along with the other available instruments, for example building use law or trade and business administration law and general administrative rules, which can have a similar function in some respects, the ordinances based on Article 297 Act Introducing the Criminal Code can also be used to that end.

In the light of the possibly negative impacts of prohibited areas on prostitutes’ working conditions, one should, however, bear in mind that deleting or relaxing existing ordinances on prohibited areas may, depending on the local situation, improve prostitutes’ working conditions. However, it is impossible to assess the different regional practices without taking into account the local and regional situation; this is the responsibility of the *Länder*, which are competent in this matter, and the authorities to whom they pass on this responsibility.

The Federal Government is of the opinion that it is currently not advisable to entirely abolish the instrument of ordinances on prohibited areas for the regulation of prostitution at local level and sanctions in the form of an administrative offence (cf. above).

Since the entry into force of the Prostitution Act, prostitution is classed as a permissible commercial activity subject to the protection of Articles 12, 14 of the Basic Law. That fact has no implications for this assessment.

Section 120(1) No. 1 Administrative Offences Act should, in the opinion of the Federal Government, not be amended.

As a result, pertaining to item 2. of the Bundestag Resolution, the Federal Government believes that there is no need for the legislator to act to amend Sections 119, 120 Administrative Offences Act.

The *Länder* all share the Federal Government's opinion.

C.

Conclusions and need for further action

The Federal Government believes that the Prostitution Act has only to a limited degree achieved the goals intended by the legislator. These goals were:

- For prostitution to no longer be considered immoral,
- To ensure that prostitutes can take legal action to enforce their pay,
- To facilitate access to social insurance,
- To remove the breeding ground for prostitution-related crime,
- To make it easier for prostitutes to leave prostitution, and
- To improve working conditions (which pose as few health risks as possible).

Although it has been possible to create the legal framework to enable contracts of employment to be concluded that are subject to social insurance, few have as yet made use of this option. The Prostitution Act has thus up until now also not been able to make actual, measurable improvements to prostitutes' social protection.

As regards improving prostitutes' working conditions, hardly any measurable, positive impact has been observed in practice. At most there are first, tentative signs which point in this direction. It is especially in this area that no short-term improvements that could benefit the prostitutes themselves are to be expected.

The Prostitution Act has not recognisably improved the prostitutes' means for leaving prostitution.

There are as yet no viable indications that the Prostitution Act has reduced crime. The Prostitution Act has as yet contributed only very little in terms of improving transparency in the world of prostitution.

On the other hand, the fears that were partly linked to the Prostitution Act have not proved true, in particular in the area of fighting crime. The Prostitution Act has not made it more difficult to prosecute trafficking in human beings, forced prostitution and other prostitution-related violence.

Since the Prostitution Act only represents a very limited approach, the new Act can only be a first step towards achieving the intended goals of repressing attendant criminality, improving working conditions, helping those wishing to leave prostitution and increasing transparency in the world of prostitution.

In the Federal Government's opinion, a more broad-based approach to regulating prostitution is required. In particular this approach should incorporate the consistent combating of trafficking in human beings, forced prostitution and prostitution of minors, and it should aim to protect prostitutes as best as possible from violence and exploitation and should clearly address the responsibility demanders have, not least by making the clients of those forced into prostitution liable to punishment.

In particular, the existing legal instruments of licensing, trade, police and administrative law need to be used more efficiently and, where necessary, they need to be expanded in order to subject prostitutes' working conditions to legal controls to protect those working in prostitution and to prevent attendant crime.

The Federal Government is of the opinion that especial priority should be given to the following:

1. The Federal Government will examine to what extent the protection of victims of trafficking in human beings and forced prostitution can be improved. In particular, a suitable solution in terms of a regulation on the criminal liability of clients of those forced into prostitution will need to be introduced.
2. In this context the Federal Government will also examine whether the so-called landlord's privilege should be abolished.
3. To better protect young persons against sexual abuse, the age of consent in Section 182(1) Nos. 1, 2 Criminal Code will be raised to 18 years. The Federal Government's draft law on this issue is already being debated in parliament.
4. The Federal Government, in consultation with the *Länder*, will examine whether and, if so, using which trade law instruments it may be possible to more efficiently monitor commercial enterprises providing sexual services. In this context it will be examined whether to require brothels, brothel-like establishments and other establishments to apply for a licence to offer sexual services.
5. The Federal Government will examine how to better support those wishing to leave prostitution through assistance and drop-out programmes and how, possibly, existing models can be promoted and access to training and promotional measures can be made more flexible.
6. Prostitution should not be considered to be a reasonable means for securing one's living. It must be ruled out that the Federal Employment Agency offers people work in prostitution. The Federal Government will therefore closely observe whether the Federal Employment Agency's current practice can continue to reliably prevent people being offered jobs in prostitution.

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