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Suggestions by the Bundesrechtsanwaltskammer (The German Federal Bar) regarding the Proposal for a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)

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The Bundesrechtsanwaltskammer (The German Federal Bar) is the umbrella organisation of the self-regulation of the German *Rechtsanwälte*. It represents the interests of the 28 German Bars and thus of the entire legal profession in the Federal Republic of Germany, which currently consists of approximately 160,000 lawyers, vis-à-vis authorities, courts and organisations at national, European and international level.

I.

The German Federal Bar appreciates the Commission's approach to create a single data protection law in Europe by means of the present Proposal for a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation). However, a Regulation applying throughout Europe must not compromise the relationship of trust that prevails between lawyers and their clients.

Lawyers have a duty to keep confidential all information that becomes known to them in the framework of a case. This duty does not serve the lawyer's interests, but protects the client. If the lawyer's obligation of confidentiality were weakened or transgressed, clients would no longer be able to trust

their lawyer without reservation. Lawyers would then no longer be able to represent their clients' interests adequately vis-à-vis the authorities, the courts and the State. The relationship of trust between a lawyer and his/her client requires special protection by the State in order to guarantee independent legal advice that is free from State interference as stipulated by the German Constitution. No country committed to the principles of a free and democratic State governed by the rule of law can evade this task. Therefore, this relationship is not only protected under criminal law (e.g. § 203 Criminal Code, *Strafgesetzbuch*, StGB), but is also guaranteed under the EU Charter of Fundamental Rights as a basic judicial right. Article 47 sentence 3 of the Charter provides: "Everyone shall have the possibility of being advised, defended and represented." In order to ensure the special personal relationship of trust which is necessary to do so, and in order to protect this basic right, genuine activities of lawyers must be exempt from supervision through State supervisory authorities.

When applying data protection rules to lawyers, it has to be taken into account that a lawyer's professional activity requires the processing of personal data in a variety of ways. Not only does it affect his/her own client's data protection interests, but also the interests of the opposing party and possibly the interests of third parties, e.g. witnesses. This creates tensions between the data subject's data protection interest and the lawyer's obligation of secrecy.

As one of the supporting pillars of the legal profession, the secrecy obligation must be given precedence over any data protection rule for the aforementioned reasons. The lawyer, as the unilateral representative of his/her client's interests, cannot be obliged to take into consideration a third party's (e.g. a witness's or an opposing party's) data protection interests. The professional secrecy obligation instructs the lawyer to refrain from passing on data that becomes known to him or her in the framework of a case without the client's consent. On the one hand, this obligation serves the individual client interest in keeping data confidential and thus creates the indispensable basis for mutual trust between the client and his/her lawyer. But on the other hand, the secrecy obligation also plays a central role in society in general. It safeguards the general trust in the secrecy observed by the members of a particular profession, so that these members can fulfil their tasks which serve the public interest.

The German Federal Constitutional Court (*Bundesverfassungsgericht*) has ruled in many instances that the special lawyer-client relationship, which is based on mutual trust, must be protected against interference. This means that in case of doubt, the lawyer's secrecy obligation must always take precedence over a data subject's data protection interests. State control over lawyer-client communication would have a deterring and prohibitive effect.

II.

In order to protect the special relationship of trust between the lawyer and the client, The German Federal Bar presents the following suggestions regarding Articles 14, 15, 49 and 51 of the Proposal for a General Data Protection Regulation:

Suggestions regarding Article 14 (Information to the data subject) and Article 15 (Right of access for the data subject):

Articles 14 and 15 of the Proposal should be supplemented by the following provisions:

In Article 14 (5) (d) the full stop should be replaced by a semicolon followed by “or”, and a new point (e) should be added:

> „(e) the data are processed by, are entrusted or become known to a person subject to professional secrecy regulated by the State or to a statutory obligation of secrecy in the exercise of his/her profession”.

In Article 15 a new paragraph 3 should be added after paragraph 2:

> „3. There shall be no right of access in accordance with paragraphs 1 and 2 where data within the meaning of Article 14 (5) (d) are concerned”.

Explanatory statement:

Article 14 sets out the principle that a data subject shall be informed about the fact that his/her data are being collected. There are exceptions to this rule, including e.g. cases where a data subject is aware of the collection of data. The list of exceptions however fails to include a specific provision for professionals subject to professional secrecy. A lawyer, for example, would thus have to provide a client’s opposing party with information and grant this party access to their data which was made known to him, provided the lawyer has recorded this data. This is clearly not appropriate. The lawyer would destroy his/her client’s trust and would also make himself liable to prosecution on a regular basis. This is why the German Data Protection Act (*Bundesdatenschutzgesetz, BDSG*) contains a special provision in § 33 (2) (3). According to this provision, notification shall not be required if the data must be kept secret due to the overriding legal interests of a third party (i.e. the client). A similar rule should therefore be included in Article 14 of the Proposal. The additions to Articles 14 and 15 are absolutely essential in the client’s interest. On the other hand they do not impair the interests of the opposing party concerned. Because the opponent will find out during proceedings – at the latest – about the data available on him (because they are presented in the procedural documents, for example).

Furthermore, the suggested provisions also protect the very own position of the person subject to professional secrecy since he or she will not be forced to violate the obligation of confidentiality and to supply data to the client’s opponent. Finally, our proposal also gives effect to Article 47 sentence 3 of the Union's Charter of Fundamental Rights, according to which every person shall have the possibility of being advised, defended and represented. If professionals subject to professional secrecy were obliged to inform the opponent pursuant to Article 14, clients would no longer mandate lawyers, but collect the data themselves; for the Regulation does not apply to the processing of personal data by a natural person in the course of its own exclusively personal or household activity (Article 2 (2) (d)). But if a client himself has no obligations to provide information or grant access in the course of his/her personal data processing purposes, these must not be triggered by hiring a lawyer.

Suggestions regarding Article 49 (Rules on the establishment of the supervisory authority)

The existing provisions in Article 49 should be summarized under paragraph 1 and a new paragraph 2 should be added:

„2. Insofar as competent professional supervisory bodies for professionals subject to professional secrecy exist at the time of the entry into force of the present Regulation, these bodies may establish the supervisory authority".

Explanatory statement:

Article 49 sets out the establishment of supervisory authorities by the Member States. In Article 46 (2) the Proposal provides for the possibility to establish several authorities. In order to meet all the European legal requirements imposed on professionals which are subject to professional secrecy, and particularly on lawyers (cf. e.g. Article 47 sentence 3 of the EU Charter) – requirements which are also consistent with the German Constitution – sectoral supervisory bodies should be allowed alongside or instead of territorial data protection control bodies. With regard to regulated professions governed by the respective professional laws, the Proposal should provide for the possibility to establish sectoral supervisory authorities that are suitably specialized.

On the basis of the amendment suggested above, a supervisory function regarding membership compliance with data protection laws could be added to the tasks of the competent professional supervisory bodies such as the Bars. This would offer many advantages. Firstly, State influence or intervention would be largely eliminated. No State supervisory authority can, under the premise of data protection, control e.g. a defence lawyer's files or lawyer-client correspondence. Furthermore, supervision of data protection performed by the Bars or similar professional bodies also offers additional possibilities which relate specifically to a certain profession - apart from the instruments provided under the EU Data Protection Regulation – to enforce data protection rules and to sanction violations. Normally these possibilities go far beyond data protection powers. In addition, taking the client's perspective, the data which the client entrusts to a member of a particular profession remains within the professional sector of that client's person of trust (patient data held by a physician, for example, will remain in the medical sector and will not be evaluated by a government authority), which ensures an assessment of data processing in accordance with the specificities of a particular profession. Finally, professional secrets and confidentiality obligations remain unaffected since control is also exclusively performed by professionals who are subject to professional secrecy.

Suggestions regarding Article 51 (Competence)

Article 51 (3) of the current version of the Proposal for a General Data Protection Regulation provides:

„The supervisory authority shall not be competent to supervise processing operations of courts acting in their judicial capacity".

We suggest adding the following sentence to Article 51 (3):

„The same shall apply to the activities of lawyers".

Explanatory statement:

The exemptions provided for courts acting in their judicial capacity must be extended to the respective activities of lawyers. In accordance with Article 51 (3) courts shall not be supervised by the supervisory authorities with respect to their genuine judicial activities (this does not cover purely administrative activities, for example) (cf. also recital 99). Where there is no control of the activities of a judge, there must be no control or supervision of the respective preparatory or accompanying

activities of the lawyer through bodies of the State. It is not acceptable that a defence lawyer's files and correspondence, for example, may be inspected by data protection supervisory authorities. The relationship between a lawyer and his/her client is a special relationship based on trust, as described earlier. It is protected under criminal law (e.g. § 203 Criminal Code, *Strafgesetzbuch*, StGB) and also guaranteed under the EU Charter of Fundamental Rights as a basic judicial right (Article 47 sentence 3 of the Charter). In order to ensure the special personal relationship of trust which is necessary to do so, and in order to protect this basic right, genuine activities of lawyers must be exempt from supervision through State supervisory authorities.

The exclusion of a particular area of activities in favour of the State courts, as provided in Article 51 (3), is (only) legitimate and comprehensible if it reflects the special situation of judicial proceedings (in particular the process of restoring the balance between State and individual interests). If this is the case, it must inevitably follow that the same must also apply to the lawyer as the citizen's advisor and representative before the courts. Under the rule of law the representation of the citizen's interests before the courts must not be given *a priori* a weaker position than jurisprudence by the State courts (notion of "fair trial").

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