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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)
Additional remarks supplementing BRAK position paper no. 30/2012

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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.

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.

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I.

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 private third parties, the authorities, the courts and other state organisations.

The relationship of trust between a lawyer and his/her client requires special and particular protection by the State in order to guarantee independent legal advice that is free from State interference as stipulated by European law and by the German Constitution. No country committed to the principles of a free and democratic State governed by the rule of law can nor must evade this task. Therefore, this relationship is not only protected under criminal law (in Germany by § 203 Criminal Code, *Strafgesetzbuch*, StGB). It 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 and in order to protect this basic right, a lawyer's original activities in particular must be exempt from supervision through State supervisory authorities.

In detail:

1. Article 47 (2) of the Charter of Fundamental Rights of the European Union describes the basic procedural conditions which have to be fulfilled with respect to every case in order to guarantee a fair trial and effective legal protection (Blanke, Calliess/Ruffert, *EUV/AEUV, Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta 2011*, 4. Auflage, Art. 47 Rn. 10). It applies to all types of procedure (Alber, *Kölner Gemeinschaftskommentar zur Europäischen Grundrechte-Charta* 2006, Art. 47 Rn. 71). Paragraph (2) corresponds to Article 6 (1) ECHR; its scope, however, is more comprehensive (Streinz, 2. *EUV/AEUV*, 2. Auflage, Art. 47 Rn. 1).

a. Even before the Fundamental Rights Charter entered into force, the possibilities for advice, defence and representation were recognized by the ECJ as fundamental legal principles (ECJ Case C-7/98, ECR 2000, I-1935, para 38 – Dieter Krombach v André Bamberski). The ECJ explicitly safeguarded the confidentiality of written communications between lawyer and client (ECJ Case C-155/79, ECR 1982, page 1575, para 21 - AM & S Europe Limited v Commission of the European Communities). Nor must a lawyer be obliged, in the context of judicial proceedings or the preparation for such proceedings, to pass on information obtained in the course of related legal consultations to the authorities (ECJ Case C-305/05, ECR 2007, I-5305, para 32 - Ordre des barreaux francophones and germanophone and Others v Conseil des ministres):

"*Lawyers would be unable to carry out satisfactorily their task of advising, defending and representing their clients, who would in consequence be deprived of the rights conferred on them by Article 6 of the ECHR, if lawyers were obliged, in the context of judicial proceedings or the preparation for such proceedings, to cooperate with the authorities by passing them information obtained in the course of related legal consultations*." (ECJ Case C-305/05, ECR 2007, I-5305, para 32 - Ordre des barreaux francophones and germanophone and Others v Conseil des ministres).

In this context, the ECJ stated that “fundamental rights form an integral part of the general principles of law” whose observance the Court has to ensure. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights. In that regard, the ECHR has special significance. The right to a fair trial, as derived from Article 6 of the ECHR, thus constitutes a fundamental right respected by the European Union as a general principle.

In the judgment quoted above, the ECJ had been seized with a question for a preliminary ruling under Article 234 EC concerning the legality of certain articles of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering. The articles in question provided for an obligation of notaries and independent legal professionals to report certain suspicious transactions bearing an evident risk of money laundering. The Directive thus aimed at combating organised crime. At the same time, however, the recitals already called for a mandatory exemption of these professions from the obligation to report information received from or obtained on a client before or after judicial proceedings, or in the course of ascertaining the legal position for their client (Article 6 of the Directive).

Furthermore, the Directive provided that in the case of notaries and independent legal professionals, the Member States shall designate an appropriate self-regulatory body of the respective profession as competent authority which has to be notified of the facts underlying the suspicion of money laundering. The reason for this is clear: If a government authority which is not subject to the legal profession’s obligation of secrecy were able to view a lawyer’s data, the client’s opposing party, for example, would be able to claim access to this information from that authority on the basis of their right to information from public authorities. Effective client representation would thus no longer be possible.

Ultimately, the ECJ did not declare the provisions regarding reporting obligations invalid, but only because they contained the aforementioned exemptions. Also, the case concerned the obligation to notify/report a crime in order to combat organised crime in the event of a lawyer personally taking part in the money laundering. This cannot be compared with a general obligation to report information without the support of a concrete suspicion.

A complementary note: The German Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG*) decided that tapping conversations between a defence lawyer and his/her client in cases where money laundering is suspected, tapping is only admissible if there is a concrete suspicion (BVerfG NJW 2006, 2974). The BVerfG also postulated that, as a matter of principle, the special relationship of trust between a lawyer and his/her client must be protected against any kind of interference, in particular interference from the State. State control over lawyer-client communications would have a deterrent and prohibitive effect.

b. According to the jurisprudence of the European Court of Human Rights (ECtHR) the term “fair trial” of Article 6 ECHR comprises various elements, including e.g. defence rights, the equality of arms principle, the right of access to the courts and the right to a lawyer in civil as well as criminal matters.

Article 48 of the Fundamental Rights Charter is the same as Article 6 (2) and (3) ECHR (Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), Official Journal of the European Union of 14.12.2007). The right of the accused to communicate with his/her defence counsel in private and without surveillance flows from Article 6 (3) (c). This right is effective from the start of investigative procedures (Meyer-Ladewig, *NK zur EMRK*, Abschnitt I, Art. 6 Rn. 238). The right to confidential consultations with the defence lawyer is an essential element of the right to defend oneself (ECtHR judgment of 25.3.1992, Series A, vol. 233 no. 46 = ÖJZ 1992, 593 - Campbell v. The United Kingdom).

2. The precept of confidentiality is one of the pillars of the legal profession in Europe. According to no. 2.3 CCBE (Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers, 2.3 – "*Confidentiality*") professional secrecy is one of the fundamental duties and rights of every European lawyer. With respect to Principle (b), the commentary provides:

Principle (b) – the right and duty of the lawyer to keep clients' matters confidential and to respect professional secrecy:

> *"It is of the essence of a lawyer's function that the lawyer should be told by his or her client things which the client would not tell to others - the most intimate personal details or the most valuable commercial secrets - and that the lawyer should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there can be no trust. The Charter stresses the dual nature of this principle - observing confidentiality is not only the lawyer's duty, - it is a fundamental human right of the client. The rules of "legal professional privilege" prohibit communications between lawyer and client from being used against the client. In some jurisdictions the right to confidentiality is seen as belonging to the client alone, whereas in other jurisdictions "professional secrecy" may also require that the lawyer keeps secret from his or her own client communications from the other party's lawyer imparted on the basis of confidence. Principle (b) encompasses all these related concepts - legal professional privilege, confidentiality and professional secrecy. The lawyer's duty to the client remains even after the lawyer has ceased to act".*

3. The details of the legal framework conditions for effective advice, defence and representation are at the discretion of the individual states (Alber, *Kölner Gemeinschaftskommentar zur Europäischen Grundrechte-Charta* 2006, Art. 47, Rn. 72). In the Federal Republic of Germany the lawyer's duty to observe confidentiality has always been an indispensable constituent element of a case. A statutory rule, however, was only introduced into the Federal Lawyers' Act (*Bundesrechtsanwaltsordnung, BRAO*) with § 43 (a) (2) in 1994 by the Law on the reorganisation of the rules and regulations governing the legal profession. Details regarding this rule are contained in § 2 of the Rules of Professional Practice (*Berufsordnung für Rechtsanwälte, BORA*) which was adopted by the lawyers' parliament, the *Satzungsversammlung*. At no time have there been doubts, though, that the lawyer has a duty of professional secrecy. The earlier § 42 RichtlRA (directives regulating the legal profession) even presupposed the existence of professional secrecy (Hartung, *Kommentar BORA/FAO*, 5. Aufl. § 2 BORA Rn. 1).

The lawyer's fundamental duty of confidentiality which is essential in determining every lawyer's status, finds its legal basis in the Constitution through the constitutionally safeguarded right of informational self-determination (Article 2 (1) in connection with Article 1 (1) of the Basic Law (*Grundgesetz, GG*); Hartung, *Kommentar BORA/FAO*, 5. Aufl. § 2 BORA Rn. 13; Henssler, Prütting-Henssler § 43a BRAO Rn. 42; Kleine-Cosack § 43a BRAO Rn. 4, with reference to BVerfGE 65, 1). This duty protects the client's right to decide for himself/herself when and to what extent the facts entrusted with the lawyer are disclosed. Therefore – with respect to data protection - § 1 (3) of the Federal Data Protection Act (*Bundesdatenschutzgesetz*) excludes the legal profession's secrecy obligation from its scope and provides the basis for an extended protection of data which is subject to this obligation in § 39.

The opposing party or witness on whom a lawyer gathers information, does have the right to informational self-determination on the basis of Article 2 (1) in connection with Article 1 (1) GG. Article 2 (1) GG is in principle limited by the constitutional order, i.e. its limits are also determined by the rights of the others. However, the secrecy obligation as an indispensable condition of a lawyer's

professional activity is part of the protection of Article 12 (1) GG (Feuerich/Weyland, BRAO 7. Auflage, § 43a BRAO Rn. 12).

4. The provisions contained in § 43a (2) BRAO, no. 2.3 CCBE and § 2 BORA are thus based on the ancient wisdom that a lawyer can only exercise his activity - an activity which is also in the general interest - as independent advisor and representative in all legal matters effectively if the client trusts him/her. A lawyer can only claim the client's trust if he/she observes secrecy in return. The secrecy obligation instructs the lawyer to refrain from passing on data that becomes known to him or her in the context of his/her mandate 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 certain professions, so that these members can appropriately fulfil their tasks which serve the public interest without interference from third parties and State control.

II.

As one of the supporting pillars of the legal profession's occupational image, the secrecy obligation must be given precedence over any data protection rule for the aforementioned reasons.

As described above, the ECJ conceded that in its efforts to safeguard fundamental rights and general legal principles it would let itself be guided by the common tradition of the Member States. The secrecy obligation, as demonstrated above, is the subject-matter of such a legal principle and furthermore anchored in German constitutional law through Article 2 (1) in connection with Article 1 (1) GG. The fact that it also applies to the other Member States results not least from the CCBE's Charter of Core Principles of the European Legal Profession. Elaboration of the details has to be left to the Member States. The General Data Protection Regulation would cancel this right to further elaborate the rules with regard to the secrecy obligation as a core element of the lawyer's activity. The ECJ furthermore explains in its decisions that lawyer/client communication in the framework of legal advice is protected and that it is inadmissible to oblige a lawyer to cooperate with public bodies and to pass on information obtained in the framework of legal advice. The draft General Data Protection Regulation contains various rules which are a glaring contradiction to this finding.

When elaborating data protection rules for lawyers it has also 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. In case of doubt, the latter has to take precedence.

According to the General Data Protection Regulation, a lawyer would have to inform every person concerned about the fact that he/she is collecting their personal data. Since this right to information could ultimately also be invoked by the data subject in the framework of data protection supervision, the situation – with respect to the characteristic of "public body" – is entirely comparable. With regard to the lawyer/client relationship it does not make a difference whether the lawyer passes on information to a public body or to the opposing party. The latter would probably have an even more devastating effect on the lawyer/client relationship of mutual trust (e.g. divorce cases) and/or the successful outcome of proceedings.

The obligation to provide information as it is contained in the General Data Protection Regulation is thus tantamount to non-stop surveillance without any reason.

III.

In order to protect the special relationship of trust between the lawyer and the client it is necessary to add complementary provisions to the present Draft Regulation. The German Federal Bar suggests such amendments to be included in Articles 14, 15 and 49 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:

A new point (e) should be added after Article 14 (5) (d):

> *„(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) (e) 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 (Article 14 (5) (a)). 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. 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.

Such a provision does not, by the way, 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). In order to protect a lawyer's client (the same applies *mutatis mutandis* to other professionals who are subject to secrecy by the State) the aforementioned additions are to be included in Articles 14 and 15.

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, 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 (Article 2 (2) (d)). But if the client him/herself is under no obligation to provide information or grant access to data used for personal data processing purposes, such obligations must not be triggered by hiring a lawyer. All the more so since this would cancel the legal profession's advice and filter function.

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 who are subject to professional secrecy, and particularly on lawyers (cf. e.g. Article 47 sentence 3 of the EU Charter of Fundamental Rights), sectoral supervisory bodies should be introduced 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 Bars who are competent for professional supervision. A data protection officer for the legal profession could be established at The German Federal Bar, for example. 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 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. These possibilities go far beyond data protection powers. In addition, taking the client's perspective, the data which the client entrusts to a third party remains within the professional sector of that client's person of trust and will not be assessed by a State body, which ensures expert interpretation of the data. Finally, professional secrets and confidentiality obligations remain unaffected since control is exclusively performed by professionals who are subject to professional secrecy.

The provision in Article 84 of the Draft Regulation indicates that the Commission has taken note of the problems regarding professionals subject to an obligation of professional secrecy. However, the

proposed rule, which transfers the problem to the Member States, does not suffice to effectively protect the lawyer's legal privilege.

According to the requirements set out in the General Data Protection Regulation, the institution of a future data protection officer of the legal profession would have to be an independent institution. This can be easily achieved. The data protection officer's appointment could be modelled on the Federal Data Protection Commissioner, pursuant to § 22 of the Federal Data Protection Act (BDSG). The German Federal Bar could propose to the *Bundestag* one or up to three suitable candidates who satisfy the professional and personal criteria that should characterise a data protection officer for the legal profession. Parliament could then decide on the officer's appointment.

In order to safeguard the officer's personal independence, the officer's term of office could be twelve years and non-renewable, like the term of office of a judge at the Federal Constitutional Court. Following the election requirements applied to judges at the Federal Constitutional Court, eligibility criteria could be a minimum age of 40 years and professional practice as a lawyer of at least five years, so as to guarantee lawyer-specific expertise. The data protection officer of the legal profession would not be allowed to practice as a lawyer during his term of office. In this respect, a strict incompatibility rule should apply. Furthermore, an age limit of 68 years should be introduced in accordance with § 4 of the Federal Constitutional Court Act (*Gesetz über das Bundesverfassungsgericht, BVerfGG*).

Furthermore, it would be possible to include a guarantee that the office has to be given up in exceptional cases only. Following the rules applying to judges at the Federal Constitutional Court, it should only be possible to remove the data protection officer of the legal profession from office by way of a procedure laid down by law. In analogy with § 105 BVerfGG, in cases of permanent incapacity for work, the President of the BRAK could be authorized to order the officer's retirement. Furthermore, a judgment which has the force of *res judicata* or a serious breach of duties could be reasons to justify a dismissal.

By including the aforementioned elements, an independent expert body within the meaning of European case-law could be established efficiently and on a national basis. At the same time data protection control which safeguards the special requirements of professional secrecy could be ensured. In addition, this concept is not alien to the draft Regulation since the Regulation already mentions certain fundamental rights areas, e.g. churches and the press, which are exempt from data protection control. Just as the protection of sources of the press requires an exemption, the relationship of trust between a lawyer and his/her client, a relationship which is also protected by the Basic Law, has to be exempt, too. For lawyers, however, this does not open up an area which is devoid of data protection control, but installs appropriate sectoral control of data protection.

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