

What do we recommend to bars and lawyers in relation to GDPR?

8 September 2017, Peter Homoki, Chairman of IT Law Committee of CCBE

1. CCBE at a glance

CCBE represents the **Bars and Law Societies** of 32 member countries and 13 further associate and observer countries, and through them more than **1 million European lawyers**.

Is recognised as the voice of the European legal profession by the national bars and law societies and by the EU institutions.

We started work in 2010, on COM(2010) 609: „A comprehensive approach on personal data protection in the European Union”, with a response, then worked with the Reform Package proposals to formulate a position, submitted proposals to the Parliamentary committee ...

Finally, following the publication of GDPR, we have issued

- recommendations regarding the implementation of the GDPR, 2/12/2016
- guidance on the main new compliance measures for lawyers regarding the GDPR, 19/05/2017

In relation to enhancing lawyers data security capabilities, we have also accepted a document

- Guidance on Improving the IT Security of Lawyers Against Unlawful Surveillance

Our main objective: to protect our values

Our work was not about making data privacy laws easier to understand to lawyers, it was to ensure that we can still act as lawyers the same as we have acted before the GDPR ...

The work as a lawyer has always involved **processing of personal data**

- that of the client, its opponent and third parties
- inside and outside court rooms or other procedures

The lawyer collects and processes such information to ensure the **functions of the profession**, to protect

- the clients' interests and
- the interests of justice and the rule of law.

The **values** most affected by **regulations on data protection**

- the independence of the lawyer
- to keep matters confidential and respect professional secrecy
- avoidance of conflict of interest
- self regulation of the profession

Problematic provisions of the Reform Package (GDPR and Council Framework Decision 2008/977/JHA)

A) Supremacy of professional secrecy over rights of non-client third parties (including supervisory authority)

- Rights of opposing or third party (Art. 14-20 vs. (52), (65), Art. 9.2. f), Art. 14.5.d), Art. 17.3.e), 18.1.c), 18.2, 21.1, Art. 34); piecemeal exceptions, not airtight ⇒ national competence (Art. 23)

confidentiality

- Rights of supervisory authority:
right of information (Art. 58.1.a),f)), correction (58.2.c),f),h)), bars acting as supervisory authority

confidentiality, self-regulation

B) Same level protection of personal data in police and judicial cooperation in criminal matters (2008/977...)

- increase in the risks of unlawful governmental surveillance (Prakken d'Oliveira), incl. cross-border

confidentiality

C) Administrative formalities that can be met by solo practitioners

independence

D) Lawyers acting as data protection officers (DPO) for clients

conflict of interest

Recommendations on the implementation of GDPR

- A) Clarifying the legal basis for processing of personal data in the course of the activities of lawyers
- providing an explicit basis (cf. Art. 6.2) for the work of *lawyers*, on the basis of interest of the administration of justice, interests of those whose rights we defend
 - also referring to non-contentious work (term of „legal claims“)
- B) Filling out powers of Art. 23 – „*Member State law to which the data controller or processor is subject may restrict by way of a legislative measure the scope of the obligations ...*“ 1.g
- Based on the restrictions of the scope of obligations and rights provided for in Article 12 to 22, Bars and Law Societies recommend to the Member States applying restrictions to these articles in order to protect information covered by professional secrecy and legal professional privilege.
- C) Restrictions of the power of supervisory authorities
- According to Art. 90, „*Member States may adopt specific rules to set out the powers of the supervisory authorities laid down in points (e) and (f) of Article 58 (1).*“ Bars and Law Societies wish that ***the powers of the national supervisory authorities cannot be exercised without the consent of the relevant Bar or Law Society in each Member States.***
- D) Sanctions of lawyers
- Bars and Law Societies recommend to the national governments limiting the upper amount of exposure faced by law practices (which could be fined up to 20,000,000 EUR or 4% of the total worldwide annual turnover in the preceding financial year).

Guidance on the main compliance measures for lawyers

A) Security breach notification

- Notification is **not required** if the data breach is unlikely to result in any harm to the data subject.

B) Right to be forgotten

- **Data subjects** have the **right to obtain** from the lawyers the erasure of personal data concerning them without undue delay.
- The erasure of personal data is also **an obligation** for the lawyers if any of the grounds described in Art. 17. paragraph 1 point (a) to (f) applies.
- Provisions of the right to be forgotten shall not be applied if **processing is necessary for the establishment, exercise or defence of legal claims**.

C) Lawyers acting as DPOs: **don't!** *Bars and Law Societies may wish to recommend lawyers to assume such a responsibility of a DPO for an external client **only if they have neither acted as a lawyer in matters which might fall within the DPO's responsibility nor will act, during their term as DPO, as a lawyer in matters they were or are involved in as DPO***

D) Impact assessment

- There is no clear history on how impact assessments should be conducted by law firms. A Commission funded privacy impact assessments study (**PIAF** – Privacy Impact Assessment Framework) is working on the **general background of privacy impact assessments**, which may be a guidance to lawyers .

E) Data portability: *what is your structured format for handing over information from case and document management systems ≠ handing over files/documents!*

F) Be able to track recipients of data subject's personal data (who and what contact details)