

# CCBE Recommendations regarding the implementation of the General Data Protection Regulation (GDPR)

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## Introduction

The GDPR<sup>1</sup> was published on 4th May 2016 in the Official Journal of the European Union, with an implementation deadline of 6th May 2018. Even though it is a regulation, there could arise important national differences affecting how lawyers should work. Therefore, the Council of Bars and Law Societies of Europe (CCBE)<sup>2</sup> offers the present Guidance Note with the intention of assisting Bars and Law Societies to prepare to mitigate the negative results of these differences.

This paper addresses the various measures that Bars and Law Societies are invited to consider regarding the national implementation of the new GDPR in order to ensure compliance with the principles of professional secrecy and legal professional privilege (PS/LLP).

## Recommendations regarding the national implementation of the GDPR

### A. Legal basis for processing of personal data in the course of the activities of lawyers

Bars and Law Societies are advised to take steps to ensure that their national regulatory system provides an explicit legal basis for the general processing of personal data by lawyers. According to the GDPR, the processing of personal data is allowed only where either the data subject has given consent to the processing or the processing can be based on any other of the legal bases listed in Article 6. This Article does not contain an explicit legal basis for the processing of personal data in the

<sup>1</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), available [here](#).

<sup>2</sup> The CCBE (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.

course of the activities of lawyers. However, according to Article 6 paragraph (1) (e) and Article 6 paragraph (2), Member States may adopt provisions specifying under which circumstances the processing of personal data may take place “for the performance of a task carried out in the public interest”:

- Article 6(1)(e): *“Processing shall be lawful only if and to the extent that at least one of the following applies: [...] processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.”*
- Article 6(2): *“Member States may maintain or introduce more specific provisions to adapt the application of the rules of this Regulation with regard to processing for compliance with points (c) and (e) of paragraph 1 by determining more precisely specific requirements for the processing and other measures to ensure lawful and fair processing including for other specific processing situations as provided for in Chapter IX.”*

It is widely recognized that activities undertaken by lawyers, especially as regards contentious legal work, serve the interest of the administration of justice as well as the interests of those whose rights and liberties need to be asserted and defended. It is therefore in the public interest to introduce specific provisions setting out the legal basis and requirements for the processing of personal data in the course of the activities of lawyers related to contentious legal matters. Activities of lawyers involving non-contentious legal work might not be covered by such a public interest exception. Therefore, Bars and La Societies are advised to inform their members to seek consent from their clients when processing personal data in the context of non-contentious legal work.

It is assumed that for the processing of special categories of personal data, article 9(2) point (f) provides a sufficient legal basis for lawyers in relation to contentious legal work:

- Article 9(2)(f): *“Paragraph 1 shall not apply if one of the following applies: [...] (f) processing is necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity;”*

## **B. Restrictions to information and access to personal data protected by PS/LPP**

Paragraph 5 of Article 14 provides for an explicit exception to the information requirements of the controller where personal data have not been obtained from the data subject in the event that the data are covered by PS/LLP. In particular, Paragraph (5) restricts the application of the first four paragraphs of Article 14 (regulating information to be provided where personal data have not been obtained from the data subject) “where the personal data must remain confidential subject to an obligation of professional secrecy regulated by Union or Member State law, including a statutory obligation of secrecy”. Therefore, when a lawyer in the course of his professional activities has, for example, collected data from a client about a third party, he or she is not required to fulfil the information requirements set out in Article 14 paragraph (1) to (4).

Furthermore, Article 23 restricts the scope of the obligations and rights provided for in Articles 12 to 22 “when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard: [...] (g) the prevention, investigation, detection and prosecution of breaches of ethics for regulated professions”.

This article may be relied upon by Bars, Law Societies and others as a basis for seeking to ensure that Member States, in order to protect information covered by PS/LPP, apply adequate restrictions to the following articles:

- Article 13: "Information to be provided where personal data are collected from the data subject"
- Article 15: "Right of access by the data subject"
- Article 16: "Right to rectification"
- Article 17: "Right to erasure ('right to be forgotten')". In this regards it is important to note that paragraph 3(e) already includes a restriction which may be invoked by lawyers in relation to processing activities that are necessary "for the establishment, exercise or defence of legal claims". Bars and Law Societies may wish to seek to ensure that this exemption is broadened to the extent that it also covers non-contentious legal activities of lawyers involving the processing of data covered by PS/LLP.
- Article 18: "Right to restriction of processing"
- Article 19: "Notification obligation regarding rectification or erasure of personal data or restriction of processing"
- Article 20: "Right to data portability"
- Article 21: "Right to object"
- Article 22: "Automated individual decision-making, including profiling"

### **C. Restrictions of the powers of supervisory authorities**

Bars and Law Societies are invited to consider the option of seeking to urge their national authorities to restrict the power of supervisory authorities to access data held by lawyers, including data held on their premises, in accordance with Article 90 GDPR (see also recital 164). This provision enables Member States to adopt specific rules setting out the powers of the supervisory authorities (as laid down in Article 58 GDPR) in relation to lawyers, as follows:

#### **"Article 90**

##### Obligations of secrecy

*1. 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) in relation to controllers or processors that are subject, under Union or Member State law or rules established by national competent bodies, to an obligation of professional secrecy or other equivalent obligations of secrecy where this is necessary and proportionate to reconcile the right of the protection of personal data with the obligation of secrecy. Those rules shall apply only with regard to personal data which the controller or processor has received as a result of or has obtained in an activity covered by that obligation of secrecy.*

*2. Each Member State shall notify to the Commission the rules adopted pursuant to paragraph 1, by 25 May 2018 and, without delay, any subsequent amendment affecting them."*

Bars and Law Societies may therefore wish to urge their governments to ensure that the powers of the supervisory authority under Article 58 paragraph (1) (e) and (f) cannot be exercised without the consent of the relevant Bar or Law Society, as follows:

***Where the controller or the processor is a lawyer and the supervisory authority seeks to use its powers under article 58 paragraph (1)(e) and (f) to obtain access to personal data and other information necessary for the performance of its tasks, or to obtain access to any premises of or under the control of the controller and the processor, including to any data processing equipment and means, the supervisory authority is obliged to seek consent from the lawyer's relevant Bar or Law Society. When seeking consent, the supervisory authority must set out the reasons for its request, including the measures it will take to reconcile the right of the protection of personal data with the obligation of secrecy. Without the consent of the Bar or Law Society, the supervisory authority may not exercise its powers under Article 58(1) (e) (f) of the GDPR.***

#### **D. Sanctions and enforcement**

Article 83 includes sanctions with higher amounts and percentages than provided for in the current privacy framework. These administrative fines can be up to 20,000,000 EUR, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover in the preceding financial year, whichever is higher. The imposition of such fines can have an especially significant impact on individual lawyers or small law practices.

Therefore, with regard to the national execution of the GDPR, Bars and Law Societies are invited to seek to urge national governments to limit the upper amount of exposure faced by law practices.