Le Président
The President

To the attention of:

Ms Andrea Jelinek
Chair of the Article 29 Working Party
JUST-ARTICLE29WP-SEC@ec.europa.eu

Brussels, 29 March 2018

Re: CCBE comments WP29 Guidelines on Article 49 GDPR – Transfer necessary for important reasons of public interest (49 (1) (d))

Dear Ms Jelinek,

We write to you regarding the *Guidelines on Article 49 of Regulation 2016/679 (wp262)* which were adopted on 6 February 2018 and which are currently open for comments.

The Council of Bars and Law Societies of Europe (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. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

With this letter, we would like to highlight the particular concerns that lawyers have regarding transfers on the basis of Article 49(1)(d) of potentially privileged material held on email and data servers throughout Europe.

(a) Underlying Principle

EU Member States – and other countries around the world – regulate the circumstances under which private correspondence may be disclosed to law enforcement, impose professional secrecy obligations on various professions (including lawyers), or recognize the existence of professional privilege, including legal professional privilege, and restrict the ability of private parties to transfer various categories of information abroad.

There is abundant jurisprudence by the European courts both in Luxembourg and Strasbourg that deals with professional secrecy and legal professional privilege and which highlights the importance of these principles. European legal instruments have also enshrined legal professional privilege and professional secrecy. Additionally, all EU Member States recognise professional secrecy or legal professional privilege as one of the major objectives and principles of regulation for the legal profession, the violation of which constitutes in some EU Member States not only a professional violation, but also a criminal offence.

Material which is potentially privileged will enjoy the protection of article 8 of the European Convention on Human (ECHR) rights. Additionally, legally privileged material in relation to contentious proceedings will enjoy protection under article 6 ECHR concerning the right to a fair trial. Article 6 rights (unlike article 8 rights) are absolute.

(b) Lack of proper supervision

Under the present proposals, a client (or, in relevant cases, a lawyer) whose privileged correspondence stored on a European server is seized by a third country would have no redress – he/she would likely not have an opportunity to intervene because the third country authority might not be required to provide notice of the seizure, and the procedure would not be supervised by a judicial authority that is obliged to respect the privileges or professional secrecy obligations that may attach to the materials seized.

This may entail an infringement of both article 8 and article 6 ECHR rights, without the possibility of any kind of cross-check by an appropriate judicial authority.

In this respect, the mechanism of mutual legal assistance cooperation allows the necessary cross checking and provides the possibility for a thorough public scrutiny as to the legality of the third country request. As is already stipulated in relation to article 48 GDPR, the CCBE therefore proposes to also indicate in relation to Article 49(1)(d) that: "In situations where there is an international agreement, such as a mutual legal assistance treaty (MLAT), EU companies should generally refuse direct requests and refer the requesting third country authority to existing MLAT or agreement."

(c) Definition of public interest

The CCBE has a general concern over the lack of definition of "public interest" which is an amorphous term and might be interpreted differently by different authorities,seeking transfer, thereby introducing an element of uncertainty, especially as Article 8 ECHR rights are qualified rights and it may be possible that an authority seeking transfer might seek to justify a transfer of privileged material on the basis of "public interest". If there is no clear definition of that phrase, it opens the door to different interpretations and a lack of clarity.

A specific concern of the CCBE is also, however "public interest" is understood, it begs the question: of *whose* public interest – the public interest of the state seeking the transfer, or of the state where the data is stored? What if those respective interests conflict with each other, or, at least, do not coincide?

(d) Recommendations

In order to mitigate these risks, the CCBE suggests that, by analogy with article 8 ECHR, a transfer necessary for important reasons of public interest may only take place if it is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. The CCBE also tentatively suggests adding the rider "provided also that it is not contrary to the public interest of the state where the data is kept."

Where *potentially* privileged material is protected also by article 6 rights (or analogous rights) of the ECHR on the right to a fair trial, it ought not to be recoverable otherwise than by appropriate judicial procedures such as those recommended in the CCBE recommendations on the protection of client confidentiality within the context of surveillance activities (see attachment).

In case of doubt, parties should not comply with the request and in the event that this refusal is not accepted, parties should seek a decision from a court or other relevant authority.

Yours sincerely,

Antonín Mokrý
President