



BUNDESRECHTSANWALTSKAMMER

Country Paper The German Federal Bar for the meeting of legal representatives on the topic:

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„Security and Hate Speech. Personal Safety and Data Security: Rights in the Age of Social Media“

As the topic of today's discussion is the role of the Bar Associations in the protection and promotion of people's rights on the Internet, one first has to understand how a particular Bar works.

Germany has a federal system where regulatory supervision of the profession is exercised by the regional Bars. Every lawyer in Germany has to become a member of one of the 27 regional Bars or the Bar at the Federal Court of Justice. The regional Bars are in charge of admission to the profession. They verify whether a lawyer exercises his rights and duties properly and have disciplinary powers. The regional Bars can issue warnings and even impose sanctions on a lawyer who violates his professional obligations.

The German Federal Bar represents the interests of the 27 regional Bars and the Bar at the Federal Court of Justice and thus the interests of all 165,000 German lawyers. Its role is purely representative; it has no regulatory function. The German Federal Bar must perform the duties assigned to it by law. These include ascertaining the majority opinion of the regional Bars and putting forward this opinion to the relevant courts and authorities as well as representing the profession vis-à-vis authorities, organisations and bodies, such as the parliaments in Berlin and Brussels. The German Federal Bar has no general political mandate. It therefore needs to concentrate its work on the interests of the legal profession as a whole and the interests of the administration of justice. All activities need to be of a general interest to the regional Bars and the legal profession.

Every lawyer must fulfil the regular duties and responsibilities which are no different with regard to the protection of citizen's rights on the Internet from any other legal matter. Two of the core principles German lawyers are required to fulfil are independence and the duty to observe professional secrecy.

Firstly, lawyers are not only the free and independent advisers and representatives of their clients in all legal matters. They are also independent organs of the administration of justice. Independence means, not only, but primarily, independence from the state. It means that the lawyer must be able to work without interference from the state in order to represent the client's interests effectively and to achieve the best possible legal advice and representation for his client. This is safeguarded by an independent self-regulation which, at its very core, is characterised by obligatory membership on the one hand and, on the other hand, by the fact that the profession's administration, supervision, disciplinary control and

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representation of interests are performed by the profession itself. Apart from this, lawyers must also act independently from third-party instructions and financial interests.

Secondly, a lawyer is under a particular duty to observe professional secrecy. This is the indispensable basis of the relationship of trust between a lawyer and his client and includes any information that the lawyer obtains within a legal mandate. The obligation instructs the lawyer to refrain from passing on data that becomes known to him in the context of his mandate without the client's consent. It is 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. A lawyer can only claim the client's trust if he observes secrecy in return. 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 lawyer. On the other hand, it plays a central role in society where it safeguards the general trust in the secrecy observed by the members of certain professions, so that these members can appropriately fulfil their tasks.

At the national level, The German Federal Bar has recently - within the tasks I just explained - monitored an important legislative procedure that intends to protect the freedom of expression on the Internet by improving law enforcement in social networks. In this initiative, which was published in March 2017, the Federal Ministry of Justice suggested compliance rules for social networks in order to urge these to develop a faster and more effective procedure for complaints concerning hate speech. Social networks will be required to remove obvious illegal content within a limited time frame depending on the complexity of the content in question. The law also foresees a legal obligation to report on their measures dealing with complaints about illegal content on platforms and a duty to name a domestic authorised recipient. Any non-compliance with these obligations can be sanctioned with a fine for the company or the supervising entity.

During the legislative process, The German Federal Bar criticised that the proposal solely provided for a domestic authorised recipient for civil proceedings, but not for out-of-court proceedings. The problem in this regard is that the European rules for the service of documents do not provide any solution if the company that the document is serviced upon does not sign-off a registered letter. The German Federal Bar, thus, suggests to include a provision according to which every company has to name a responsible person in every country where the network is present. Alternatively, the authorisation for the service of documents could be expanded to lawyers.

Additionally, The German Federal Bar takes the opinion that the legislative proposal should provide for the possibility for lawyers to receive data from the operators of platforms in cases where users infringe rights. Without such a rule it is, in each case, necessary to file for criminal investigation procedures.

This law has recently passed the German parliament and will enter into force in October this year. In the final text the scope of application was changed to exclude messaging services such as Whatsapp. Social networks will be required to remove content within a determined time frame. However, in more complicated cases they can transfer the case to an independent authority financed by the operator of the social network, but this authority needs to be recognised by the Federal Office of Justice. The service of documents to a domestic recipient will now also be possible for documents that initiate a civil proceeding and not just for documents within a legal proceeding.

The law has received much criticism not only in Germany, but also internationally from citizens' rights groups and the UN Special Rapporteur for freedom of expression. It is especially feared that the relatively short time frames and the possibility of severe sanctions will lead to more content being removed than necessary. This would, in turn, jeopardise the freedom of expression.

Not only on a national, but also on a European level The German Federal Bar works to protect the rights of citizens, especially the right to confidentiality. In the last four years, the European Union negotiated a new data protection regime. The German Federal Bar put a lot of effort into the protection of the confidentiality between lawyer and client by proposing changes to the initial draft that assured a confidential handling of data on third parties collected by the lawyer through his client. In the initial draft it was provided for that even lawyers have to inform the data subject about the processing of their data. In practice, this would have meant that as soon as the client makes available details about a third party, for example his or her opponent, the lawyer would have been obliged to inform the third party about the collected data.

Most of the data lawyers deal with is sensitive data and needs to be handled with care. To ensure effective, high-level data protection The German Federal Bar already proposed at European level to establish a data protection officer within the self-regulation system of the bars. This would safeguard the lawyers' independence and the right of confidentiality of the client concerning his data. The General Data Protection Regulation unfortunately does not ask for such an independent data protection officer within the profession, but gives Member States the opportunity to establish such an office. Therefore, at national level, The German Federal Bar supports a law that provides for a data protection officer within the legal profession and thus ensures that no external person or the state has access to confidential client data.

Lawyers will also be in charge of the enforcement of the clients' right to be forgotten, which the General Data Protection Regulation introduces to the national regimes. Every citizen now has the right to ask for the deletion of his data on the Internet. Providers like Facebook, Google, Yahoo and others are obliged to delete the data upon request except if this data is of public interest.

To conclude, the protection of citizen's rights on the Internet is a very complex and relatively young area of legal activity. It is only at the beginning of its development. The German Federal Bar together with its regional Bars, within its tasks assigned to it by law, will put in all the necessary effort to protect and promote the citizen's rights on the Internet.