Draft 2012/0011 (COD) European 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)

Position Paper of the German Federal Association of Liberal Professions (BFB)

Brussels/Berlin, 22 February 2013
Key Points

- Restriction of the rights of data subjects under the special situation of liberal professionals bound to an obligation of professional secrecy. The draft Regulation, which includes ‘Information to the data subject’ under Article 14 and ‘Right of access for the data subject’ under Article 15, conflicts with German law under Section 203 of the Criminal Code (Violation of Private Secrets), giving rise to massive destabilisation of, if not damage to, the existing relationship of trust.

- No paternalistic treatment of data subjects. Those affected must have the right to give consent for disclosure of their data.

- Restricting the ‘right to be forgotten’ in order to ensure that the fulfilment and proper settlement of contractual relationship are not jeopardised.

- Upholding the requirement to appoint a company data protection officer for workforces comprising over 250 employees.

- The BFB calls for Member States to be granted the additional option to confer data protection supervision on those competent bodies already responsible for liberal professionals bound to an obligation of professional secrecy.

- Setting appropriate limits on the processing of personal health data. Measures serving to improve efficiency in the health care system can legally justify the processing of health data. The limits set out in Article 6 of the EU General Data Protection Regulation (GDPR), which result in a weighing up of interests, should therefore be restricted to what is absolutely necessary.
Opinion

I. General

The German Federal Association of Liberal Professions (Bundesverband der Freien Berufe, BFB) is an umbrella organisation of the liberal professional chambers and associations, representing almost 1.2 million self-employed liberal professionals. These liberal professionals employ over 3.1 million people, including roughly 125 thousand trainees. Together with their employees, liberal professionals generate an annual turnover (in the narrower sense) of at least 350 billion euros. They contribute around 260 billion euros to Germany’s gross domestic product, generating every one in ten euros.

The BFB principally supports the aim that the proposed draft Regulation hopes to achieve, i.e. harmonising European data protection law. The current Data Protection Directive from 1995 does not adequately live up to the challenges of our 21st century information society. The change brought about by information and communication technologies, which has had an impact on almost every sector of society, gives rise to significant legal uncertainty in light of the different laws and legal systems in individual Member States.

This initiative of the European Commission can in principal be welcomed as a positive one. Nonetheless, numerous rules and much of the content of the EU General Data Protection Regulation (GDPR) require critical analysis and revision.

The 15-year-old Directive was unquestionably unable to keep pace with the demands of the internet, particularly concerning the technological-social phenomena of social networks. The new Regulation responds to this legislative need.

However, the draft proposal prepared in January 2012 instead generates a comprehensive imbalance of informative self-determination, extending far beyond the sphere of privacy worthy of protection and constraining or even closing off vital communication environments. If this Regulation were to be implemented in its current form, it would be extremely detrimental to liberal professional activities.

Furthermore, the draft report presented in January 2013 by the responsible rapporteur, Philipp Albrecht MEP, more represents an intensification of regulation concerning data access, documentation and information obligations compared with the previous Commission proposal.

It also seems inconsistent and hardly inspires confidence at this point in that the new European data protection law will not apply to European authorities, who are exempt from these self-created standards.
Viable rules and regulations specific to the liberal professions must be incorporated in the Regulations. For this purpose, the BFB is introducing the following relevant key points in discussions about the GDPR.

II. Details

1. Obligation of confidentiality and liberal professionals subject to professional secrecy

Many liberal professionals are subject to an obligation of professional secrecy. Confidentiality for patients, principals, clients and customers is a unique selling point for liberal professionals and acts not only as a guarantee of their success but also as a guarantee for those seeking their assistance. A comprehensive consultation can only take place where there is full confidential disclosure. Every data protection measure should adhere to this established principle. Rules and regulations as set out in the draft Regulation in Article 14 (Information to the data subject) and Article 15 (Right of access for the data subject) on one hand represent a conflict with German law under Section 203 of the Criminal Code (Violation of Private Secrets); on the other hand, they represent a massive destabilisation of or damage to an existing relationship of trust. This carries with it the erosion of one of the fundamental pillars of the liberal professions. A possible solution could be provided through Section 33, par. 2, no. 3 of the German Federal Data Protection Act (BDSG), according to which there would be no information or access obligations if the person’s data is subject to an obligation of professional secrecy.

- The BFB calls for Member States to be allowed to create specific regulations beyond the rapporteur’s current proposal in his draft report, which would sufficiently take into account the specific data protection requirements of those subject to an obligation of professional secrecy.

2. Consent

Although the EU GDPR does generally recommend the data subjects’ full right of disposal of their data, this is inhibited by the Regulation in Article 7 para. 4 of the EU GDPR, which excludes consent as a legal basis for data processing where there is a significant imbalance between the position of the data subject and the data controller.

1 With the exception of the German Federal Chamber of Lawyers (BRAK), who have drawn up their own position paper (Position no. 53/2012)
According to recital 34, this in particular is a case where a situation of dependence (as in an employment context) is recognised. From a liberal professional view, the current wording allows for an analogous application which is delicate. In fact, there is always a structural situation of dependence between liberal professionals and their patients, clients or customers. According to this rule, all of these cases would invariably exclude the possibility to give consent for data processing. This general elimination of consent would mean – on top of the already inherently questionable paternalistic treatment of the data subject – that it would be impossible to process personal data. However, it is precisely this data which is absolutely essential for providing liberal professional services.

- The BFB calls for Article 7 Paragraph 4 to be deleted.

3. Right to be forgotten and to erasure

Against the backdrop of social networks, the BFB accepts the need for the right to be forgotten and to erasure as a matter of principal. Nonetheless, extensive data subject rights must not be allowed to jeopardise liberal professional activity or result in the activities of recognised and established service processes being hindered or seriously obstructed. Since Article 17 and the ‘right to be forgotten’ are accompanied by substantial obligations requiring action, it is also feared that high costs and heavy financial burdens will be generated. This would counteract the EU GDPR’s principal commendable objective of making the intended cost savings. It is stated that, in the case of immediate erasure, the data controller is also responsible for informing third parties about the erasure request, and must take steps to ensure erasure of all links to copies or replication of the personal data. In light of the huge extent of copying and linking on the internet, handling personal data will result in unnecessary administrative and financial burdens. The issue of feasibility remains unclear.

The introduction of a ‘right to be forgotten’ significantly extends the right to erasure of personal data. The BFB deems this as problematic, for example in relation to documentation obligations for doctors, which are contrary to the right to erasure. Clashes with copyright law remain likely. Expert reports and other works protected by copyright also rule out the obligation of erasure.

- The BFB calls for the ‘right to be forgotten’ to be restricted so that the fulfilment and proper settlement of contractual agreements will not be jeopardised.
4. Mandatory designation of a data protection officer

The approach for the mandatory designation of data protection officers as it is established in Germany should be recognised on a European level. However, the assessment threshold of 500 data records per year, as set down in the draft report, seems an unsuitable criterion with regard to the appointment of company data protection officers. In the draft Regulation, having a workforce of over 250 people was established as the basis for assessment. Even if the simple number of employees is not the ideal criterion, the quantity of data records is even less suitable for guaranteeing a practical, appropriate level of data protection.

From a liberal professional point of view, fixing the criterion of 500 data records would in reality mean that a data protection officer would have to be appointed for every doctor’s surgery or pharmacy, as well as for other small and medium-sized enterprises and for non-profit organisations.

There must be a differentiation made between businesses handling data in a professional capacity, with data processing being recognised as one of their main activities, and liberal professionals who already have a high level of protection and regulation in Germany and whose service model focuses on the welfare of their patients, clients or customers.

- The BFB calls for the current criterion of a workforce comprising over 250 people to be maintained as the basis for assessment with regard to the appointment of data protection officers.

5. Supervisory authority

Considering the specific situation with persons subject to an obligation of professional secrecy, Member States should also be granted the option to confer supervision of data protection legislation on those professional bodies already in place, if so desired by the relevant liberal profession itself. Rules and regulations on how Member States have to establish supervisory authorities are set out in Article 49 of the EU GDPR. The fact that liberal professionals and officials bound by an obligation of professional secrecy are already subject to comprehensive liberal professional supervision by their liberal professional chamber, should be taken into account here. In light of this, the option described above for an extension of competence for professional chambers seems a logical step to take. Such a step would bring the following advantages:

1. It would entail a reduction in the degree of State intervention
2. Supervision by professional chambers would also create opportunities to implement data protection rules and regulations as well as applying sanctions in the case of infringements.

- The BFB calls for Member States to be granted the option to confer data protection supervision on those competent bodies already available to persons subject to an obligation of professional secrecy.

6. Health Data

The BFB particularly welcomes the objectives in Article 81 of the EU GDPR, which addresses the processing of personal health data. The Commission proposal permits processing of personal health data on the basis of Member State law. This proposal is vital for liberal healthcare professions. It not only means that the service itself can be provided in the interest of the patient’s welfare, but it also makes subsequent settlement with third parties possible.

Extending the rules and regulations to this effect could be considered, so that measures aiming to increase efficiency in the health care sector could be used as justification for processing of health data.

- The BFB calls that the limits set out in Article 6 of the EU GDPR, which lead to a weighing of interests, should be limited to what is absolutely necessary. Unfortunately, these rules have been unnecessarily made more stringent in rapporteur Albrecht’s draft report.