DeutscherAnwaltVerein

Position paper

of the German Bar Association prepared by the Committee on Professional Practice

"US law firms in Germany and the independence of lawyers"

Position Paper No. 26/2025 Berlin, May 2025

Members of the Committee

- Rechtsanwalt Dr. Peter Bachmann, München
- Rechtsanwalt Dr. Jürgen Christoph, Ratzeburg
- Rechtsanwalt Prof. Dr. Wolfgang Ewer, Kiel
- Rechtsanwalt Dr. Joachim Frhr. von Falkenhausen, Hamburg
- Rechtsanwältin Dr. Clarissa Freundorfer, Berlin (Rapporteur)
- Rechtsanwalt Prof. Dr. Thomas Gasteyer, Frankfurt am Main (Chair)
- Rechtsanwältin und Notarin Silvia C. Groppler, Berlin
- Rechtsanwalt Markus Hartung, Berlin (Rapporteur)
- Rechtsanwalt Oliver Islam, Hamburg
- Rechtsanwältin Claudia Leicht, Hamburg
- Rechtsanwältin Ruth Nobel, Bochum
- Rechtsanwalt und Notar Eghard Teichmann, Achim
- Rechtsanwalt Prof. Dr. Dirk Uwer, Düsseldorf (Rapporteur)
- Rechtsanwalt beim Bundesgerichtshof Dr. Peter Wessels, Karlsruhe

In charge in the Berlin Office

- Rechtsanwältin Nicole Narewski, Geschäftsführerin, Berlin

Contact in Brussels:

- Rechtsanwältin Eva Schriever, LL.M., Geschäftsführerin, Brüssel

German Bar Association
Littenstraße 11, 10179 Berlin
Phone: +49 30 726152-0
Fax: +49 30 726152-190
Email: dav@anwaltverein.de

Brussels office
Rue Joseph II 40, Boîte 7B
1000 Brussels, Belgium
Phone: +32 2 28028-12
Fax: +32 2 28028-13
Email: bruessel@eu.anwaltverein.de
EU-Transparency register number:
87980341522-66

www.anwaltverein.de

1. The current situation and the question it raises

a) The attacks by the US administration against US law firms in the form of executive orders have raised the question whether these measures and the reactions of US law firms to avoid such measures have an impact on the professional status of US law firms operating in Germany – and, if this is the case, additionally the question regarding the nature of this impact. According to publicly available information, the President's measures are directed against law firms that have represented political opponents of President Trump in the past or were involved in investigations against him. The measures are said to include the withdrawal of security clearances, resulting in a loss of authorisation to access government buildings and a denial of contact with members of government agencies, as well as the exclusion from federal contracts. While several US law firms have – so far successfully – sought legal protection against these decrees, a number of larger law firms strive to avert or reverse such measures by committing to provide legal services each worth between USD 40 million and USD 125 million for projects designated by the Trump administration. According to numerous media reports, these law firms include Paul Weiss, Kirkland & Ellis, Latham & Watkins, Skadden, Milbank, Willkie and Simpson Thacher as well as others.[1] The total volume of legal services these law firms have agreed to provide to the Trump administration is now said to amount to around USD 940 million. The agreements are not yet publicly available.[2] It is not clear from the media reports whether and to what extent these agreements establish or imply an obligation to refrain from taking future legal action against the Trump administration, but this does not seem unlikely. Meanwhile, the law firm Perkins Coie has now been the first to prevail in proceedings on the merits: In a judgment ("Memorandum Opinion") dated May 2, 2025[3], the United States District Court for the District of Columbia (Judge Beryl A. Howell) granted Perkins Coie's lawsuit against the Executive Order 14230 of March 6, 2025 directed against the law firm. The court declared the Executive Order "null and

[1] For an overview with links to the respective reports, see: https://en.wikipedia.org/wiki/Targeting_of_law_firms_and_lawyers_under_the_second_Trump_administration
[2] See, however, the Bloomberg report from May 3, 2025: Trump's Big Law Deals Spell Out Broad enforcement Terms on https://news.bloomberglaw.com/business-and-practice/trumps-big-law-deals-spell-out-broad-enforcement-terms
[3] https://storage.courtlistener.com/recap/gov.uscourts.dcd.278290/gov.uscourts.dcd.278290.185.0.pdf

void"[4] and permanently prohibited the implementation of the measures in the Executive Order ("permanent injunction").[5]

b) A distinction must be made between the agreements reached with the Trump administration and the reactions of a large number of US law firms in connection (at least temporal, possibly also in terms of content) with the requests for information sent to at least 20 recipients by the US Equal Employment Opportunity Commission (EEOC) on March 17, 2025. These requests for information asked the recipients to provide comprehensive information on their recruitment criteria and informed them that they were under investigation for their diversity and inclusion efforts (Diversity, Equity, and Inclusion (DEI)). In this climate, a number of law firms have discontinued their DEI programs, concealed them or otherwise modified them in such a way that they offer no or less of a target for the Trump administration. According to information from Bloomberg, at least four of the law firms in question have committed to engage external lawyers to monitor their compliance with "federal anti-discrimination laws and with the terms of their agreement". From July 11, 2025 until January 2029 (i.e. the end of President Trump's four-year term of office), these monitoring contractors are obliged to submit "a confidential written certification" every six months, which "shall be shared only with the White House".[6]

c) In answering the question concerning the relevance of the conduct of these US law firms in the context of the German law on the lawyer’s profession, this position paper will focus on those law firms which, in response to or in order to avoid such executive orders as described above, have entered into an agreement with the US administration under which they have committed to perform pro bono activities on behalf of the government with a fee equivalent of USD 40 to 125 million each and have made other concessions (hereinafter referred to as "deals"). These Deals may cast doubt on the respective law firm’s independence from the government. Those US law firms with a presence in Germany that challenge these attacks in court, on the other hand, are defending

[4] Ibid. p. 96, 102.
[5] Ibid. p. 97 ff.
[6] Bloomberg, op. cit.

their independence by legal means and, therefore, cannot be subject of any doubts under the law on the lawyer's profession from the outset.

d) In addition, a distinction must be made between US law firms that operate in Germany through *legally independent* so-called professional practice companies – licensed directly under Section 59f of the German Federal Code for Lawyers (Bundesrechtsanwaltsordnung – BRAO) – on the one hand, and US law firms with a branch office in Germany that are licensed as *foreign* professional practice companies under Section 207a BRAO on the other hand. In the case of the former, an attribution of the conduct of the US shareholders to the German professional practice company is implausible in principle and should only be considered in exceptional cases, for example if the majority of the shareholders of both companies are congruent. Even in those cases, an in-depth examination would be required. In the case of US law firms licensed as foreign professional practice companies in Germany that have concluded deals with the Trump administration, however, the German law on the lawyer's profession is directly applicable. No questions of attribution of conduct across legal entities arise in this respect.

2. Scope of the lawyer's duty of independence according to Section 43a (1) BRAO

a) Section 43a (1) BRAO obliges lawyers not to enter into any commitments that jeopardize their professional independence. Despite all the vagueness inherent in the obligation of independence, the details of which are subject of intensive legal debate,[7] there is complete agreement that freedom from dependence on the government is at the core of this fundamental duty of a lawyer. The "freedom of the legal profession", which was painstakingly achieved in the 19th century, means above all independence from the government.
The German Federal Constitutional Court emphasizes in its established case law: "Lawyers fight professionally for the interests of their clients, who for their part are free to choose and to mandate the legal representative that suits them.

[7] See only Römermann, Die anwaltliche Unabhängigkeit - Entmythologisierung eines Core Value, NJW 2019, 2986 et seq.

This personal relationship of contract and trust concerns a profession that is, in principle, excluded from government control and paternalism (...)."[8] Section 43a (1) BRAO is therefore closely related to the content of Section 1 BRAO, which defines the position of the lawyer as an "independent agent of the administration of justice" and thus means first and foremost that the practice of the legal profession must not be subject to government control.[9] It is incompatible with the legal profession, "if, from the perspective of people who are seeking legal advice, the impression may arise that the lawyer's independence is impaired by ties to the government."[10] The freedom of the legal profession as a necessary precondition for safeguarding the rule of law is also firmly anchored at European level. The European Court of Justice has consistently emphasized that "the lawyer's task of representation, which is carried out in the interests of the sound administration of justice, consists above all in protecting and defending the principal's interests to the greatest possible extent, acting in full independence and in line with the law and professional rules and codes of conduct (…[11]). Lawyers are assigned the fundamental role in a democratic society of defending litigants, which entails, on the one hand, that any person is to be able, without constraint, to consult a lawyer whose profession encompasses, by its very nature, the giving of independent legal advice to all those in need of it and, on the other, the correlative duty of the lawyer to act in good faith towards his or her client (…[12])."[13] It is hardly possible to guarantee this good faith for those who submit to a large extent to the government by means of an agreement (especially one that is not yet public and therefore not known to the client). The European Court of Human Rights also emphasizes that it is "in the general interest that any person who wishes to consult a lawyer should be free to do so under conditions which favour full and uninhibited discussion and that it is for that reason that the lawyer-client relationship is, in principle, privileged. It has not limited that consideration to matters relating to pending litigation only

[8] BVerfG, Decision of the First Senate of 3.7.2003 - 1 BvR 238/01 -, BVerfGE 108, 150 para. 33 (Sozietäts wechsler) (emphasis added).
[9] BVerfG, Decision of the Second Senate of February 14, 1973 - 2 BvR 667/72 -, BVerfGE 34, 293, 302.
[10] BGH, judgment of November 26, 2007, NJW-RR 2008, 793 f.
[11] References to ECJ ECLI:EU:C:2020:73 para. 62= NJW 2020, 1277 - Uniwersytet Wrocławski and Poland/REA and ECJ ECLI:EU:C:2022:218 para. 64 = NJW 2023, 1709 - PJ and PC/EUIPO.
[12] Reference to ECJ ECLI:EU:C:2022:963 para. 28 with further references. = NJW 2023, 667 - Orde van Vlaamse Balies et al.
[13] See most recently ECJ ECLI:EU:C:2024:1037 para. 66 = NJW 2025, 425 - Halmer Rechtsanwaltsgesellschaft.

and has emphasised that, whether in the context of assistance for civil or criminal litigation or in the context of seeking general legal advice, individuals who consult a lawyer can reasonably expect that their communication is private and confidential (...[14])."[15] In view of the apparently agreed monitoring and reporting obligations to the White House, this expectation can certainly no longer be met.

b) Against this background, it appears possible and perhaps even probable that the respective law firms have violated the duty of independence by concluding these deals. Agreements by which lawyers relinquish their independence from the government are therefore likely to prove unlawful under the German law on the lawyer's profession. A lawyer must give weight to his "work for the client by exercising his profession in accordance with the rule of law, i.e. by providing an 'independent' and 'self-responsible' service (...)". The lawyer cannot, as the rule of law demands of him, 'contribute to a proper court decision' and cannot 'protect against miscarriages of justice', if he is not taken seriously by the opposing side and even less by the authorities and courts, because they only see him as a 'mouth for hire'. His voice needs the weight of a knowledgeable and unaffected outsider who represents the client's interests from an appropriate distance, a distance which the legal system must therefore also expect from him. In this respect, the rule of law also demands a certain degree of independence within a lawyer's relationship with clients."[16] Incidentally, in the opinion of many lawyers, professors and (former) judges, the deals are also illegal in the US under the relevant professional law.[17] In a detailed amicus curiae brief dated April 14., 2025 in the above-mentioned Perkins Coie proceedings, six renowned professors of legal ethics explained this in detail and referred to the inevitable conflicts of interest that arise when clients, courts and the other parties involved in legal transactions assume that a law firm is independent (from the government), while this law firm has signalled or even agreed to refrain from taking action against

[14] Reference to ECtHR, judgment of April 9, 2019 - 11236/06 No. 49 et seq. - Altay/Turkey (no. 2) with further references.
[15] ECtHR, judgment of 17.12.2020 - 459/18 (Saber v Norway), NJOZ 2022, 378.
[16] *Busse,* in: Henssler/Prütting, Bundesrechtsanwaltsordnung: BRAO, 6th edition 2024, Section 1 para. 51 with further references.
[17] Cf. Only Cynthia Godsoe, Ethical Issues Raised by Agreements Between Certain Law Firms and Donald Trump, https://www.law.com/newyorklawjournal/2025/04/29/ethical-issues-raised-by-agreements-between-certain- law-firms-and-donald-trump/

the public interest (as defined by the White House)[18].

c) The amendment or abolition of DEI programs, on the other hand, should not demonstrably violate the obligation of independence. German professional law does not oblige the legal profession to promote DEI beyond the general requirements of the General Act on Equal Treatment and the Severely Disabled Persons Act that apply to it. Conversely, the renunciation of DEI measures cannot be considered a breach of professional duty even if this renunciation does not occur on the lawyer's own initiative or conviction, but due to political pressure. However, the above-mentioned, apparently agreed monitoring and reporting obligations to the White House, where independence from the government could be jeopardized by the formal obligation to grant the government control over the waiver of DEI measures, may have to be assessed differently.

3. Scope of application of the lawyer's duty of independence pursuant to Section 43a (1) BRAO for domestic and foreign professional practice companies

a) The duty of independence pursuant to Section 43a (1) BRAO is set out in the law as an individual duty that applies to every lawyer. According to Section 59e (1) BRAO, it applies " analogously" to professional practice companies. Pursuant to Section 59e (2) sentence 1 BRAO, the professional practice company must also take suitable measures to ensure that breaches of the duty of independence are detected early on and put to an end. Section 59e (4) BRAO stipulates that the personal professional responsibility of the partners, board members and other employees of the professional practice company remains unaffected. The duty of independence of the individual professionals and their professional practice company therefore exist side by side. Accordingly, in the event of an infringement, Section 113 (5) BRAO allows the lawyers' court to impose measures against a lawyer and against the professional practice company to

[18] The document is available here: https://cdn.prod.website-files.com/67cf71f1f27ef68a8f5c5c70/67fd9c8587c8625cd34ce97f_Legal%20Ethics%20Professor%20Amicus%20Brief.pdf

which he belongs in parallel. The prerequisite for this is that one of the two criteria for the attribution of the lawyer's conduct to the professional practice company pursuant to Section 113 (3) BRAO is fulfilled.

b) US law firms that operate in Germany through legally independent professional practice companies with a license directly pursuant to Section 59f BRAO are thus subject to German professional law and thus to the duty of independence directly under Section 59e (1) BRAO, as are all their professionals working in Germany. Established European lawyers within the meaning of Sections 2 et seq. of the German Code on the Professional Practice of European Lawyers (Eu-RAG), are obligated according to Section 27 (2) Eu-RAG to adhere (inter alia) to the duty of independence set out in Section 43a BRAO; for foreign lawyers pursuant to Sections 206 et seq. BRAO, the same applies pursuant to Section 207 para. 3 sentence 1 no. 1 BRAO.

c) For US law firms that are licensed as foreign professional practice firms pursuant to Section 207a BRAO for their branch office in Germany, Section 207a para. 2 sentence 1 BRAO stipulates the application of (inter alia) Section 59e BRAO. This means that Section 43a para. 1 BRAO also applies to them without restriction. For their professionals, the same rules apply as set out above (b)).

4. Supervisory review of breaches of the duty of independence

a) If the competent local bar sees indications of a possible breach of the duty of independence by a professional practice company subject to its supervision, or if a respective allegation is lodged with the bar, the executive board of the bar shall initiate professional supervisory proceedings in exercise of its powers under Section 73 (2) No. 4 BRAO. Pursuant to § 59e (1) in conjunction with Section 56 (1) and (2) BRAO, the US law firm concerned is obliged to cooperate by providing information, appearing in person (usually the firm's managers as defined in Section 113a BRAO) and, if necessary, by submitting reference files. These obligations to cooperate are limited in accordance with Section 56 (1)

sentence 2 BRAO by the (mandate-related) attorney-client confidentiality obligation and the freedom from self-incrimination.

b) Reference files within the meaning of Section 56 BRAO are only those files pursuant to Section 50 BRAO that regularly relate to a lawyer's activities in a specific mandate. The obligation to submit files and a right of the bar's executive board to demand their surrender does almost certainly not include documents that are not related to a specific client relationship. It is therefore doubtful whether the executive board of a bar is entitled to demand the respective agreement between a law firm and the Trump administration.

c) If a US law firm refuses to fulfil its obligation to cooperate in accordance with Section 56 BRAO, the executive board of the respective bar may (repeatedly) threaten with and impose a penalty payment, Section 57 (1) and (2) BRAO. In this case, the law firm is entitled to seek legal protection against these measures under Section 57 (3) BRAO.

d) If the US law firm concerned is of the opinion that the executive board of the bar has illegally requested information, the submission of files or a personal appearance, it can submit a rescissory action to the Higher Lawyers' Court (AGH) pursuant to Section 112a BRAO. The orders issued by the executive board of a bar in this context are contestable administrative acts. The law firm can also seek provisional legal protection by the AGH in the form of a temporary injunction pursuant to Section 112c BRAO in conjunction with Section 123 of the German Code of Administrative Court Proceedings (VwGO). The request for information by the executive board must be based on a discretionary decision free of error.

e) After concluding the hearing of the US law firm concerned in accordance with Section 56 BRAO, the executive board of the bar has various options for action: 1) It may discontinue the proceedings for lack of a breach of professional law. 2) It may issue a reprimand to the US law firm under the conditions of Section 74 (1) and (6) BRAO if the breach of duty within the meaning of Section 113 (3) BRAO is of minor significance. 3) If the matter

cannot be resolved (e.g. due to the absence of investigative powers and coercive measures that go beyond Sections 56, 57 BRAO) or if the breach of duty is not just of minor significance, the executive board will hand over the proceedings to the Public Prosecutor's Office at the respective Higher Regional Court with the request to initiate a professional supervision investigation. The latter then decides on the initiation of proceedings before the Lawyers' Disciplinary Court by submitting a statement of accusation, Section 121 BRAO. Proceedings against a professional practice company are subject to the special provisions set out in Sections 118c – 118g BRAO. The punishment for a company's breach of duty is provided for in Sections 113 (3), 113a and 113b BRAO. If the judgment does not result in acquittal or termination of the proceedings (Section 139 (2) BRAO), one of the measures provided for in Section 114 (2) BRAO may be imposed. 4) The executive board of a bar may issue a (disapproving) instruction pursuant to Section 73 (2) sentence 1 no. 1 BRAO, which in turn may be challenged before the Higher Lawyers' Court.

f) Even in the event of the most severe sanction that could theoretically be imposed on one of the US law firms concerned for violating its independence obligation – the withdrawal of the authorization to provide legal services, Section 114 (2) no. 5 BRAO – the effects on the lawyers who are working in the law firm's German office would be limited to their economic and social freedom of association: Their individual admission and the possibility of working together in other professional associations would remain unaffected.

5. No revocation of license in the event of a breach of the duty of independence

a) A revocation of the license granted to a US law firm in the event of a breach of its duty of independence is probably impossible. Section 59h (3) sentence 1 no. 1 BRAO, which via Section 207a (2) sentence 1 BRAO also applies to the revocation of the license of a branch office of a US law firm, does not refer to Section 59e BRAO, which in turn obliges the professional practice company to comply with the duty of independence laid down in Section 43a BRAO (see above). It is unclear whether the impairment of independence constitutes an

obstacle in the admission procedure; in any case, independence is not one of the admission criteria under Section 207a (1) BRAO.

b) Even for individual professionals, the revocation of their license could only be considered in accordance with Section 14 (2) no. 8 BRAO. Working for a law firm that has made a deal with the Trump administration probably does not constitute “pursuing an activity which is incompatible with the profession of lawyer”. As for professional practice companies, Section 59h BRAO applies as a lex specialis to Section 14 (2) BRAO; and Section 59h BRAO does not contain a corresponding reason for revocation.

c) Dealing with violations of the duty of independence not by means of licensing law but rather by means of professional supervision, corresponds to constitutional requirements under Art. 12 (1) of the German Constitution (Grundgesetz – GG). The withdrawal of access to the profession or market constitutes an interference with the free choice of profession and as such is subject to a stricter proportionality test, whereas the sanctioning of conduct in breach of professional law only intervenes at the level of professional practice. However, also in the latter case, proportionality must be assessed in light of the punitive nature of the sanctions and the thus applicable limitations under Art. 103 GG.

***