HEADNOTE:

On the significance of the freedom to practice an occupation for lawyers when changing partnerships.

Order of the First Senate of 3 July 2003

– 1 BvR 238/01 –

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RULING:

1. The order of the Federal Court of Justice (Bundesgerichtshof) of 6 November 2000 - AnwZ (B) 3/00 - violates the applicants' fundamental rights under Article 12.1 of the Basic Law (Grundgesetz – GG). The ruling is rescinded. The proceedings are referred back to the Federal Court of Justice (Bundesgerichtshof).
2. § 3.2 of the Professional Code of Solicitors (Berufsordnung für Rechtsanwälte - BORA) of 29 November 1996 (Communications of the German Federal Bar (BRAK-Mitteilungen) 1996 p. 241) is incompatible with Article 12.1 of the Basic Law and is void. This also applies to versions of this provision with identical content in subsequent proclamations.
3. The Federal Republic of Germany has to refund to the applicant the necessary expenses incurred in the constitutional complaint proceedings.

EXTRACT FROM GROUNDS:

A.

With the constitutional complaint, the applicants, who operate a law firm together, oppose the obligation handed down by the competent Bar and confirmed by the Federal Court of Justice in the impugned ruling to lay down mandates after having employed a lawyer who was previously employed by another firm representing the opposing side with regard to these mandates. 1

I.

Laying down mandates is to serve to avoid conflicting representation of interests. The prohibition of the representation of opposing interests is governed by § 43 a of the Federal Regulations for Practising Lawyers *(Bundesrechtsanwaltsverordnung - BRAO)* … and expressed in greater detail in § 3 of the Professional Code of Solicitors …. The provisions read as follows: 2

§ 43 a of the Federal Regulations for Practising Lawyers Fundamental duties of lawyers 3

(1) to (3) … 4

(4) Lawyers may not represent opposing interests.

(5) and (6) …

§ 3 of the Professional Code of Solicitors

Opposing interests, prohibition of professional activities

(1) Lawyers may not act if they have already advised or represented another party in the same legal matter in an opposing interest, in whatever function, or were otherwise professionally involved in this legal matter within the meaning of §§ 45 and 46 of the Federal Regulations for Practising Lawyers.

(2) The prohibition shall also apply if another lawyer or member of another occupation within the meaning of § 59 a of the Federal Regulations for Practising Lawyers with whom the lawyer is or was linked in a partnership, to jointly practice an occupation in another manner (employment, freelance) or in a shared office, is advising or representing or has already advised or represented the opposing interest in the same legal matter, in whatever function, or is or has been involved in this legal matter in another manner.

(3) Whoever recognises that they have been or are acting in contravention of subsections 1 or 2 shall without delay inform their client thereof and terminate all and any mandates in the same legal case.

…

The issuance of § 3 of the Professional Code of Solicitors was preceded by long, controversial discussions, in particular with regard to the status of freelance workers and employee lawyers … In the version of 22 March 1999 … § 3 of the Professional Code of Solicitors reads as follows:

Opposing interests, prohibition of professional action

(1) and (2) …

(3) The prohibitions of subsections 1 and 2 shall not apply if a link to joint practice of the occupation has been terminated and the lawyer during the time of joint practice of the occupation was neither a partner nor appeared to third parties as such, and also was not personally involved in the legal matter.

(4) …

II.

1. The applicants operate a law firm as partners under civil law in the town of R. From 1 October 1999, lawyer Dr. L. was employed and also named in the letterhead adjacent to the three partners. Previously, Dr. L. was employed as a lawyer in the firm of W. D. & M, also in R., and mentioned on the letterhead. At the time of the change, the two firms were working on nine cases in which they represented the opposing

parties as contractor. In his previous firm, lawyer Dr. L. dealt personally with none of these mandates prior to his change. In his new firm, it was ensured by means of internal instructions that he did not deal with these legal matters. …

The competent Bar found that the continuation of the mandates where the previous firm was on the opposing side was in breach of § 3 of the Professional Code of Solicitors, and imposed an obligation on the applicant … to lay down the mandates … the Court of Practising Lawyers *(Anwaltsgerichtshof)* … rescinded … the decision of the Bar. … With the impugned order, the Federal Court of Justice rescinded the decision of the Court of Practising Lawyers and confirmed the ruling of the Bar … As grounds, it stated that the obligation to renounce the mandates emerged directly from § 43 a.4 of the Federal Regulations for Practising Lawyers. § 3.2 and 3 of the Professional Code of Solicitors were allegedly also to be interpreted in this meaning. Each lawyer in a partnership acted on behalf of the partnership as a rule, even if they did not deal with the mandate in person. … Whilst this did make it more difficult to change firms; the protection of client confidence in the independence of their lawyers and in the integrity of the administration of justice nevertheless took precedence. 19

2. With their constitutional complaint, the applicants complain mainly of a violation of Art. 12.1 of the Basic Law. § 43 a.4 of the Federal Regulations for Practising Lawyers was allegedly not relevant as a legal basis for the encroachment since this provision according to its wording only addressed individual lawyers. … [The] legislature [had] … not … wished to counter the appearance of representing opposing interests. For this reason, § 3 of the Professional Code of Solicitors was allegedly not covered by the provision related to empowerment. Such an incisive prohibition was allegedly also of major significance for the lawyers' practice of their occupation, and therefore should have been taken by the legislature itself. 20

… 21

4. The Federal Ministry of Justice, as well as the President of the Federal Court of Justice, have refrained from making a statement with regard to the case. The Federal Bar, the Federal Chamber of Notaries, the German Association of Judges, the German Lawyers' Association and the Republican Lawyers' Association, as well as the defendant of the initial proceedings, have submitted statements on the constitutional complaint. 22

… 23

B.

The constitutional complaint is well-founded. 24

… The call on the applicant by the Bar to lay down the mandates has no basis in the constitution on the merits in accordance with the law. The interpretation of § 43 a.4 of the Federal Regulations for Practising Lawyers by the Federal Court of Justice violates the applicants' freedom to practice an occupation under Art. 12.1 of the Basic 25

Law (I.). The provision of § 3.2 of the Professional Code of Solicitors used as confirmation by the Federal Court of Justice is void for this reason (II.); by contrast, § 43 a.4 of the Federal Regulations for Practising Lawyers facilitates an interpretation and application in compliance with the constitution.

I.

1. Representation of clients is a major portion of the practice of the occupation of a lawyer protected by Art. 12.1 of the Basic Law. 26

By occupation, lawyers intercede in the interest of their clients, who in turn are free to select and commission legal representatives as they wish. The personal contractual and trust-based relationship relates to an occupation which on principle is not subject to state control and guardianship (see Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 34, 293 <302>) and under the authority of the Basic Law is entrusted to the free and unregulated self-determination of the individual where it is not restricted by constitutional provisions (see BVerfGE 50, 16 <29>). … 27

The relationship with the client, which is primarily characterised by provision of a service in person and in a personally-responsible manner, is not rescinded or significantly changed by professional associations (for instance for defence counsel BVerfGE 43, 79 <91 and 92>). Statutory restrictions of professional activity affect the individual lawyer personally, and are primarily owed to the interests of the clients. This lawyer-client relationship is served by the fundamental obligations of the lawyer laid down in § 43 a of the Federal Regulations for Practising Lawyers. These include in particular the duty of discretion in accordance with § 43 a.2 sentence 1 of the Federal Regulations for Practising Lawyers, to which a penalty clause applies (§ 203.1 No. 3 of the Criminal Code *(StGB)*) and which is protected by a right to refuse to give testimony (§ 383.1 No. 6 of the Code of Civil Procedure *(ZPO)*, § 53 of the Code of Criminal Procedure *(StPO)*, § 84.1 of the Rules of Procedure of the Finance Courts *(Finanzgerichtsordnung – FGO)* in conjunction with § 102 of the Tax Code *(AO)*), as well as the prohibition in § 43 a.4 of the Federal Regulations for Practising Lawyers to represent opposing interests which in certain forms of commission is also subject to a penalty clause (see § 356 of the Criminal Code). In conjunction with the principle contained in § 43 a.1 of the Federal Regulations for Practising Lawyers that the lawyer may not enter into obligations which place their professional independence at risk, these fundamental obligations guarantee to clients that they receive support as parties seeking justice from independent lawyers working as appointed advisors and representatives against the State or against third parties (see §§ 1 and 3 of the Federal Regulations for Practising Lawyers). 28

2. The encroachment on the applicants' freedom to practice an occupation in the shape of the obligation to terminate a mandate may only take place by means of a statute or on the basis of a statute (see § 3.2 of the Federal Regulations for Practising Lawyers) which meets the requirements of Art. 12.1 of the Basic Law. 29

a) There is no explicit statutory provision relating to the obligation to terminate mandates for partnerships. § 43 a.4 of the Federal Regulations for Practising Lawyers refers to the individual lawyer, who may not represent parties with opposing interests in the same case. The wording is highly significant because the same statute in another place provides in the wording for prohibitions to cover the lawyers linked with the lawyer in a partnership or by other means for the joint practice of the occupation (§ 45.3 and § 46.3 of the Federal Regulations for Practising Lawyers). 30

b) The lack of an explicit regulation however does not necessarily mean that an order restricting the practice of an occupation and a court ruling confirming this are counter to the requirements of Art. 12.1 sentence 2 of the Basic Law. … Also the binding by law and justice ordered in Art. 20.3 of the Basic Law does not lead to a prohibition for the judge to close any loopholes which may exist in the law, where appropriate by refining the law in the manner open to the judiciary. 31

The specialist courts in interpreting and applying the law must however adhere to the significance of the fundamental right concerned and the scope of the area protected by it. They must avoid disproportionately restricting the fundamental rights of freedom. Where they consider restrictions of the fundamental free practice of an occupation to be necessary, the courts are bound by the same standards which restrict the scope open to the legislature in accordance with Art. 12.1 of the Basic Law (see BVerfGE 54, 224 <235>; 97, 12 <27>). 32

3. The impugned decision does not satisfy this by obliging lawyers or law firms to terminate a mandate although they themselves have not previously represented the opposing interests on the opposing side, and they also do not intend to represent them. Such a restriction on the practice of an occupation which is reasoned by lawyers associating to practice their occupation with a lawyer who was previously employed on the opposing side can only stand in the face of Art. 12.1 of the Basic Law if the prohibition is justified by adequate reasons of the public good, and the encroachment does not go further than required by the justifying interests of the common good (see BVerfGE 54, 301 <313>). The purpose and intensity of the encroachment must be suitably proportionate to one another (see BVerfGE 101, 331 <347>). 33

a) Manifestly, § 43 a.4 of the Federal Regulations for Practising Lawyers serves to maintain the relationship of trust with one's own client and to ensure independence in that a lawyer making him/herself the servant of opposing interests loses any independent administrator status in the service of those seeking justice. 34

… If the clients affected by the change of partnership on both sides do not regard the relationship of trust with their respective lawyers as being impaired, and consent to the continuation of both their mandates and those of the opposing parties, the protection of lawyers' independence and maintenance of the concrete relationship of trust with the client may not be listed as reasons related to the common good. 35

b) § 43 a.4 of the Federal Regulations for Practising Lawyers however serves not 36

only the protection of the individual relationship of trust between lawyer and client and the maintenance of the independence of the lawyer, but over and above this it serves the common good in the shape of the administration of justice relying on a straight line of practice of occupation by lawyers …, in other words on a lawyer serving only one side. All these interests are interconnected, and are conditional on one another.

aa) As an independent body of the administration of justice, and as an appointed advisor and representative of those seeking justice, lawyers have the task of creating proper conflict solutions, taking action in court in favour of their clients for justice, and in doing so at the same time where possible protecting state agencies from taking erroneous decisions against their clients (see BVerfGE 76, 171 <192>). The performance of the tasks of a lawyer is dependent on the lawyer being independent, acting confidentially and only being obliged to safeguard the interests of their own client. These characteristics are not at the disposal of the client. Legal transactions must be able to rely on the canon of obligations of § 43 a of the Federal Regulations for Practising Lawyers being followed so that the desired equality of opportunities and weapons of citizens among themselves and as against the State is maintained and the administration of justice remains functional (see BVerfGE 63, 266 <284>; 93, 213 <236>). 37

This however does not mean that the definition of what serves the interests of one's own client, and hence at the same time the administration of justice, may be handed out abstractly and bindingly by Bars or courts without accommodating the specific view taken by the clients affected thereby. If by changing partnerships, in general terms a danger may occur for confidentiality and the straight line of representation of interests, the assessment of whether an encroachment on rights is specifically threatened is primarily a matter for the clients of both firms, who for this reason are to be informed truthfully and comprehensively. Additionally, it is in the statute-led responsible assessment of the lawyers concerned to decide whether the conflict situation, or at least the goal of avoiding future disturbances of the relationship of trust, requires the mandate to be renounced (see the institution of "délicatesse" in French law, mentioned in the statement by the German Delegation to the Council of the Bars and Law Societies of the European Community (CCBE), which describes the degree of personally-responsible self-assessment by lawyers). Dealing responsibly with such a situation can be expected from a lawyer, and equally from a judge, if reasons for self-disqualification are disclosed (see § 19.3 BVerfGG and on this BVerfGE 46, 34 <41 and 42>). 38

The professional law of lawyers is not based … on the presumption that a situational opportunity to violate a duty as a rule actually leads to conduct that is in breach of duty. 39

bb) From a factual point of view, the case constellations to which the prohibition provision contained in § 43 a.4 of the Federal Regulations for Practising Lawyers refers may be highly varied … For instance, the division of tasks within the previous firm 40

may guarantee by means of spatial separation (with nationwide partnerships and with shared offices), by organisational measures (Chinese Wall), by designing the contractual relationship (partner, employee or freelance), by the sheer size or the specialist departmentalisation of the various areas within a firm (for instance construction law, family law, patent law) that the duty of confidentiality is already not at risk because there is nothing for the lawyer changing firms to maintain confidentiality about.

The statutory obligation to maintain confidentiality and client trust in the confidentiality of the individual lawyer only apply when the lawyer has information requiring to be kept confidential. This may remove from the lawyer the inner independence or cause concern to the client, and hence lead to termination of the mandate by the contractor or client. A client of the previous firm may however regard such information on the facts and framework or on individual problems to be non-deleterious in the specific case where the lawyer changing firms is not involved in any legal advice in the accepting firm (in the sense of advising, supporting, representing). Clients rely on the confidentiality of their lawyers when the latter change partnerships in the same way as in cases where their own lawyer is mandated by the opposing side in later and other conflicts. 41

cc) In the interest of the administration of justice, as well as of clear, straight legal defence, § 43 a.4 of the Federal Regulations for Practising Lawyers only requires that the representation of opposing interests is avoided in a concrete case. Where the clients affected by the change of partnership on both sides have been informed and do not fear such a conflict and show trust in the precautions taken and the confidentiality of their lawyers, there is only reason to intervene in the interest of the administration of justice if other indications exist thereof which are not evident to the client, or which the clients have assessed incorrectly. The Bars are entitled and obliged to pursue all indications in this respect. However, they may not use a presumption or an appearance of conduct in breach of duty as the basis for their measures. … 42

c) The interpretation of § 43 a.4 of the Federal Regulations for Practising Lawyers by the Federal Court of Justice, orientated in line with § 3.2 of the Professional Code of Solicitors, does not meet these principles. It restricts the freedom to practice an occupation in the accepting firm over and above the protection of the legal interests affected because it blocks the possibility to accommodate the particularities of the case in question. § 43 a.4 of the Federal Regulations for Practising Lawyers provides an assessment of all interests in an individual case, taking particular account of clients' specific interests. 43

II.

For this reason both the original version of § 3.2 of the Professional Code of Solicitors, which does not leave scope for an individual assessment, as well as the version of subsequent proclamations, is incompatible with Art. 12.1 of the Basic Law, and is void. The provision neglects not only the interests of clients; it also fails to adequately accommodate … either the freedom to practice an occupation of lawyers changing 44

partnerships, or that of the members of the accepting partnership.

1. a) Art. 12.1 of the Basic Law protects any professional activity, irrespective of whether it is self-employed or dependent (see BVerfGE 7, 377 <398 and 399>; 54, 301 <322>). The practice of an occupation includes the right to form professional alliances (see BVerfGE 80, 269 <278>), as well as the right to accept, retain or renounce a job chosen freely (see BVerfGE 85, 360 <372 and 373>; 97, 169 <175>). An encroachment also exists if the economic consequences of legal norms make it much more difficult to enter into employment. 45

b) The possibility to change firms is of increasing importance to lawyers. 46

The occupation of lawyer is no longer almost exclusively practised in an individual own office or together with only a small number of self-employed partners … Roughly 7,000 lawyers work in large firms of 30 to 500 lawyers; almost 20,000 lawyers practice their occupation in partnerships with 4 to 30 lawyers … Many of them work as employees or on a freelance basis … Medium-sized firms enter nationwide partnerships or name established cooperation partners in other regions or in other European countries. … At the same time, lawyers have become more specialised. … A change of firm is [hence] no longer a rare thing. The picture of cooperation between a small number of lawyers covering a working life is strongly characterised by situations which belong to the past. Not only employee lawyers, but even partners now increasingly try to increase their earnings or career opportunities by changing firms … The possibility of mobility has hence taken on additional significance for individuals. 47

2. Already when the partners themselves restrict one another's professional freedom to act by concluding a contract, by making it much more difficult for one of the parties to the contract to change jobs (competition clauses), the legal consequences are to be examined against the standard of Art. 12.1 of the Basic Law (see BVerfGE 81, 242). Comparable weight attaches to a provision in statutes such as § 3.2 of the Professional Code of Solicitors, which independently of the personal influence of those acting makes it more difficult to change jobs because the accepting firm on principle is required to renounce mandates, and hence to forego income. The concomitant impairments of the freedom to practice an occupation may not go further than what is indispensable to meet the purpose of the encroachment. 48

3. § 3.2 of the Professional Code of Solicitors does not restrict the disadvantages for the accepting partnership to the minimum required to protect interests of the common good. The provision does not contain regulations facilitating an examination in an individual case of whether securities exist to maintain trust with regard to the duty of confidentiality. 49

… 50

It is unreasonable to link an obstacle to mobility in an undifferentiated manner to … formal … external relationships because the opposing mandates are to be renounced in the event of changing to another firm when a freelancer has only carried out 51

narrowly-defined individual tasks, possibly even in their home office or in the shared office community, and no transfer of knowledge has taken place. The provision contained in § 3.2 of the Professional Code of Solicitors does not adequately accommodate the typical characteristics of nationwide partnerships and Europe-wide cooperations, in particular the manner of contracting with office communities, as well as the theoretical and practical possibilities of departmentalisation in the accepting firm. The change of partnership may not be made more difficult if it is adequately ensured that violations of duty are not to become a source of anxiety. …

As a result, it follows from this that there is a disproportionate hindrance of the change of firm because the accepting office will only accept a financial loss if it has a very specific interest in gaining the new employee. Worse still is the impact when the change of partnership is not voluntary and planned in the long term because the partners separate in an unforeseen manner, the firm is dissolved or split up or there are economic difficulties in the firm that is letting an employee go. In such cases, the regulation on the practice of an occupation may for a time have consequences which come close to a regulation on choice of occupation. … Incisive … consequences for the practice of occupation demand a sufficiently momentous interest on the part of the clients or of the administration of justice which according to the statement above at B. I. may not be presumed without exception and without accommodating characteristic case variants. 52

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Judges: Papier, Jaeger, Haas, Hömig, Steiner, Hohmann-Dennhardt, Hoffmann-Riem, Bryde

Bundesverfassungsgericht, Beschluss des Ersten Senats vom 3. Juli 2003 - 1 BvR 238/01

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