GDPR IN LABOUR RELATIONS - WITH OR WITHOUT THE CONSENT OF THE EMPLOYEE?

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Abstract: The presented scientific article focuses on the new legal framework for the protection of personal data, which brings fundamental changes also in the field of implementation of labour relations. The question is most up to date with regard to the obligation to implement changes to the practice of businesses and organizations. The creative team strives, not only on the basis of their own professional experience in application practice but also on the results of qualitative research, to show that employers - small and medium-sized enterprises have not managed to move on to new legislation. They continue to pursue employment relationships in accordance with the original privacy policy which may result in the imposition of a sanction by the control authorities and at the same time violating the right of employees to protect their privacy and personal data in the course of their work for the employer.

Keywords: employer, employee, personal data, GDPR, enterprise

1 Introduction

The new legal framework for the protection of personal data, established by the Regulation of the European Parliament and of the Council no. 2016/679 of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, repealing Directive No. 95/46 / EC (hereinafter referred to as the "General Data Protection Regulation") and in the Slovak Republic by the new Act no. 18/2018 on the protection of personal data and on the amendment of certain laws (hereinafter referred to as the "new law on the protection of personal data"), many small and medium-sized employers who should be managed by them are, unfortunately, still a relatively large unknown, namely even several months after its entry into force (Bencsik, 2018; Kho, 2018; Pauhofová & Stehlíková, 2018; Hitka et al., 2018). Given the nature of the general data protection regulation in question and its universal approach to the protection of personal data in the Member States of the European Union, we have similar application problems not only in the Slovak Republic, the Czech Republic but also in other European countries (due to the multinational composition of the authors' team, the problem in question was analyzed in the Slovak as well as in the Czech Republic).

The situation is all the more serious because insufficient knowledge of the new legal framework is dominant in the field of employment relationships, where not only small and medium-sized enterprises but also large employers often fail to take into account the legal principles underlying the General Data Protection Regulation in the implementation of the content of employment law (Cirnic et al., 2018; Glova et al., 2018; Mészáros, 2018). Legal disputes arising from the wrongful legal process of employers arise, in particular, in the field of acquiring employee consent in the event of an employment relationship contrary to Art. 6 section (1) letter (b) of the General Data Protection Regulation, the content of employment contracts of employees in relation to the disclosure of their birth registration number, the publication of employee photographs for the purposes of the employer's internal systems or for marketing purposes, or the attendance of employees through biometric facilities. Due to the relatively wide complexity of the problems associated with the practical application of the General Data Protection Directive to corporate practice, we have focused on the issue of getting employees' consent to the employee's "secure" employment. Although the General Data Protection Regulation provides a specific legal basis for the lawfulness of the processing of personal data of employees, 6 and later described employers' progress shows signs of inconsistency with applicable legislation. It potentially exposes employers to the danger of imposing a sanction on the part of the relevant state authorities - the Office for Personal Data Protection.

2 Objective, material and methodology

The main objective of the presented scientific article is to assess the compliance of legal and regulatory requirements with the new legislation on the protection of personal data in the application practice by small and medium-sized enterprises including the legal interpretation of the most frequent recurring misconduct in this area. Therefore, the authors' interest is the transnational context of the relevant legislation defined in particular by the General Data Protection Regulation and at the same time the theoretical and legal grounds, which should be the determinant of the behaviour of the affected persons - employers in the implementation of labour relations in the Slovak and Czech Republics. The partial objective was to identify the criteria and the possibilities for the application of the new legal framework for the protection of personal data, with an impact on the direction of the company's personnel management in the need to implement the relevant changes required by the new legal framework determined in particular by the general regulation on the protection of personal data. Primary data was obtained as part of the scientific project of the VEGA project no. 1/0708/18: "The Aspects of Using the SoLoMo Marketing Concept to Raise Eco-Innovation Awareness". We have obtained secondary data from partly domestic but especially foreign scientific literary sources. In designing the article it was necessary to focus the underlying material from primary and secondary sources. Due to the nature of the problem studied we have chosen a combined methodological approach based on the use of selected qualitative and logic-recognition methods. When processing the article, we have applied critical qualitative analysis of legal status, logic-recognition methods such as induction, deduction, analysis and synthesis. Based on quantitative methodologies we have applied descriptive statistics to assess the results obtained by primary research. The sample comprised 512 entities of different organizational and legal forms from different economic sectors with priority being given to small and medium-sized enterprises which accounted for 99% of the surveyed statistical set. Selection of subjects was carried out by stratified selection. The composition of the surveyed statistical set was 48% of the Czech Republic and 52% of the Slovak Republic. However in view of the territorial scope of the General Data Protection Regulation we examined the examined population as a whole without taking into account their nationality, given the transnational nature of the small and medium-sized enterprises and the universality of the obligations imposed on the protection of personal data resulting from the uniform legislation.

3 In general on the legal basis of personal data processing

In order for the employer to process the personal data of the employees in a lawful way, he must have so-called legal authorization, respectively. the relevant legal basis (Lazányi Fulop, 2017; Mura et. al, 2017; Cseh Papp et al, 2018, Wachter 2018). Each purpose of processing must have its legal basis unless the original purpose is compatible with the other purpose of the processing. The employer is authorized to process the personal data of the persons concerned because the employee agrees with it, or if it is allowed by other law-defined fact. The General Data Protection Act profoundly determines and changes the range of legal bases of processing compared to the original legislation.

According to Art. 6 of the General Data Protection Act and Section 13 of the new Personal Data Protection Act, the employer may process the personal data of the employees on the basis of at least one of the following legal bases:

a) employee consent;
b) processing for performance of the contract;
c) the processing required under a special regulation or an international treaty;
d) processing necessary to protect the life, health or property of employees, or other individual;
e) the processing necessary for the performance of a task carried out in the public interest or in the application of official authority entrusted to the employer;
f) processing necessary for the purpose of a legitimate interest.

For the most usable in industrial relations we consider the legal bases referred to in point (a) to (c) and f).

In addition to the provisions of Art. 6 of the General Data Protection Regulation and with reference to § 13 of the new Act on the Protection of Personal Data, the provisions of Section 78 of the Slovak New Data Protection Act express further specific legal bases for the processing of personal data of employees. Employers are authorized to process personal data without the consent of the employee even if the processing of personal data is necessary

a) for academic, artistic or literary purposes;
b) for the purpose of informing the public by means of mass media and if the personal data are processed by the employer resulting from the subject of the activity;
c) for the purpose of archiving, for scientific purposes, for the purpose of historical research or for statistical purposes when accepting adequate guarantees for the rights and freedoms of the employee (so-called privileged purposes);

For these purposes, the employer may not process the personal data of the person concerned without his/her consent, if the processing of personal data violates the employee's right to protection of his / her personality or the right to privacy, or such processing of personal data without the employee's consent excludes a special regulation or international treaty of the Slovak Republic (Hitka et al., 2017).

For the purpose of implementing labour relations, a correct assessment of the subject matter of the matter and which constitutes the content of a particular employment relationship is considered to be the key parameter for determining the appropriate legal basis. On the basis of its correct identification, the employers should then be able to distinguish whether or not they need to obtain the consent of an employee at that time or may process his personal data without his consent on the basis of another legal basis, 6 of the General Data Protection Regulation (Valentova et al., 2018; Jeřábek, 2016).

3.1 Employee approval

The employer is authorized to process the personal data of the person concerned if the employee has given his consent to the processing of his or her personal data for at least one particular purpose. The consent will then apply to all processing activities carried out for the same purpose, or related and close to one another. The consent may also be given for a number of expressly stated purposes, but in such a way that the employee may independently demonstrate his or her free will for each of the individual purposes stated in the agreement. The General Data Protection Regulation introduces new requirements specifying the content and formal terms of consent. It is a unilateral manifestation of the will of an employee to be freely given, informed, concrete, unambiguous and distinct from other statements (Goddard, 2017; Orlova et al., 2018).

Particular mention is made of the freedom of consent in employment relations, where the disparity between the contracting parties threatens a truly free expression of consent on the part of the employee. Consent incorporated into an employment contract indicates the employee's inability to refuse to grant consent. It is ideal to formulate the consent to the processing of personal data on a separate document in addition to a contract of employment (Merrel, 2018; Lindqvist, 2018; Hsu, 2018; Krajňáková & Vojtovič, 2017) with the assurance that refusal or revocation of consent will not be penalized in any way by the employer. If the employer agrees with the processing of personal data, he / she decides to enter into a contract of employment, at least do so in a separate article / provision of the employment contract. Consent to the processing of personal data should be clearly and distinctly distinguished from other facts (parts of the document) in order to prevent the person concerned from overseeing it in any available form. From the point of view of the formulation, attention needs to be drawn to ensuring that consent is expressed in a clear, easily understandable and easily accessible form.

The employer must be in a good position and at any time to prove that the employee has consented to the processing of his or her personal data. It is necessary to remember this when choosing a form of consent and to retain (or archive) the obtained consent for the entire processing of personal data. Failure to prove the existence of the employee's consent to a situation where the employer requires him to process personal data in the sense of the law may be considered a violation of the applicable law, with the assumption that the personal data will not be processed in the absence of a legal basis. The legal framework does not specify the form of consent explicitly, it is for the employer to choose what he / she chooses (written form confirmed by hand signature or guaranteed electronic signature, simple electronic form in the form of an email, telephone recording, oral approval expressed at a personal meeting, etc.). Silence, pre-marked boxes or employee inactivity are not considered as consent because they are not based on the active approach of an employee expressing consent to the processing of personal data. The consent can also be considered as a procedure if the job applicant sends a CV asking for a job offer if the employee sends / publishes his / her own photo on the intranet network used by the employer etc.

The fundamental problem of "economic" nature with regard to the possibility of imposing a sanction on the part of the competent state supervisory authorities lies in the aforementioned "secure" recruitment of employees' approvals. The general premise used by employers in application practice in the custody of the protection of personal data is based on the fact that the consent of the employee "sanctify" any handling of his or her personal data. The prevailing employers' practice is to enter specific articles expressing such approval into working contracts / agreements, sometimes general, sometimes more specific. For example - *"By signing this agreement, the Employee expressly agrees to the use of his / her personal data in accordance with the General Data Protection Regulation and Act No. 18/2018 Labour act on the Protection of Personal Data and on Amendments to Certain Acts for the Purposes and Obligations of Labour Relations Established by the Employment Contract and for the Purposes of the Employee and Employer to Comply with the Insurance pursuant to Act no. 580/1994 Coll. on health insurance as amended, Act no. 461/2003 Coll. on Social Insurance as amended and Act no. 595/2003 Coll. on Income Tax, as amended."* The problem of any processing of personal data of employees is solved by the fact that the person concerned agrees with the processing operation.

In this respect, the crucial question arises whether the consent of the employee may break the principle of minimizing data within the meaning of Art. (5) of the General Data Protection Regulation that *the processing of personal data is limited to the extent necessary for the purposes for which personal data are processed.* The processing of a specific personal data of an employee must be necessary to achieve the purpose of the processing on any legal basis of processing, even with the consent. By combining two legal bases of processing of personal data, employers are in violation of the legal regime for the processing of personal data. The processing of personal data on the basis of the employee's consent. If another legal basis for the processing of personal data is to be used, they are also exposed to confusing situations where the employee will seek legal protection which the general data protection regulation confers on the processing of personal data on the basis of consent

(Valentová, et al., 2016), in particular the right to appeal at any time. Please note that withdrawal of consent may not always be an obligation for an employer to dispose of personal information, as the consent was given for certain purposes. After withdrawal of consent the employer is obliged to cease processing of personal data for the purpose for which the consent was granted and subsequently revoked. Similarly, if the employer has used his consent to cases where the processing of personal data proves a different legal reason (in particular lawful processing); this does not mean withdrawal of consent (i.e. an act that was not necessary for processing) the operator's obligation to stop processing or liquidation of processed personal data.

3.2 Processing for performance of the contract or required under a special regulation or an international agreement

An alternative to obtaining the employee's consent for the processing of personal data of employees in employment relationships is the legal basis within the meaning of Art. 6 section (1) letter (b) of the General Data Protection Regulation for the processing of personal data of employees for the purposes of performance of the contract or the processing of personal data of an employee is necessary under a special regulation or an international agreement.

The employer is authorized to process personal data without the consent of the employee if the processing is necessary for the performance of the contract (in this case the employment contract) to which the employee is a party or for the implementation of the pre-contractual measure at the request of the employee. An employee is a contracting party, an initiator of the contract or a participant in pre-contractual relationships within the meaning of Section 41 of the Labour Code. The purpose of the processing of personal data is in this case the subject of a contract of employment within the meaning of §1 section 2 of the Labour Code in the performance of the dependent work of employees for wages or remuneration by the employer.

The employer is authorized to process the personal data of the employee if the processing of his or her personal data is necessary according to a special regulation (at least with legal force) or an international agreement binding on the Slovak Republic. In the processing of personal data under a special regulation, of an international agreement, the employer processes personal data about the employees without their consent (that is to say, it is authorized and empowered directly by a special regulation or an international treaty). When processing personal data on the basis of this legal basis, the employer is bound by the obligation to process personal data only in the scope and manner prescribed by this special regulation or international treaty. The employer is therefore entitled to process only personal data that are directly defined by a specific regulation or an international agreement (a list of personal data) or personal data that are necessary to achieve a specific law or international treaty of purpose (personal data scope). E.g. Art. 11 of the Labour Code (personal data related to the qualification and professional experience of the employee and data that may be significant in terms of the work that the employee is to perform, is performing or performed).

A particular legal regulation is relatively frequent, if not the most common legal basis for the processing of personal data of employees. The entitlement and the conditions for the processing of personal data in labour relations are governed by special laws, primarily the Labour Code, which also defines the scope or list of personal data that can be processed in the labour relations by way of adjustments to labour relations. The Labour Code, for the purposes of employment relations, constitutes a special regulation in the sense of Art. 6 section (1) letter (b) of the General Data Protection Regulation and Section 13 c) of the new Personal Data Protection Act, which entitles the employer to work with personal data, for purposes connected with the employment relationship.

The special case of the legal basis for the processing of personal data under the law is for employers expressed in the provisions of Section 78 3 of the new Act on the Protection of Personal Data. According to the cited provision, "*the operator who is the employer of the person concerned (employee) is entitled to provide his or her personal data or to disclose personal data in the scope of title, name, surname, job title, job title, function, employee's personal number or employee's employee number , the place of work, the telephone number, the fax number, the e-mail address of the workplace and the employer's identification data, if necessary in connection with the performance of the duties, duties or duties of the person concerned. The provision of personal data or the disclosure of personal data must not interfere with the seriousness, dignity and security of the person concerned.*" For the processing of personal data of an employee stated in § 79 section 3 of the new Act on Personal Data Protection the employer does not need the consent of the employee because the legal basis of the processing is directly the law on the protection of personal data. A prerequisite for the lawful processing of the employee's personal data is that the employer will keep the stated purpose; in case the provision or disclosure of personal data is necessary in connection with the performance of the work, service or function of the person concerned (Valentova, 2018).

4 The processing of personal data during the duration of the employment relationship and the most frequent mistakes of employers

The processing of personal data in employment relationships is already in the pre-employment phase. In accordance with Section 41 of the Labour Code, pre-contractual relationships whose purpose is to collect a summary of information (including personal data) about potential employees to facilitate the employer's decision-making process. At this stage, employers have a fundamental difficulty in distinguishing between the above-mentioned use of the legal basis of employee consent and whether it is necessary to obtain or use the other legal bases mentioned above.

In the context of pre-contractual relationships, it is therefore necessary to differentiate between individual types of personal data and consequently depending on such categorization to choose the corresponding legal basis. Incorrect judgment may lead to the sanction in question. The processing of data in pre-contractual relationships can thus take place

- on the basis of the consent of the person concerned, 6 section (1) letter (a) of the General Data Protection Regulation and Section 13 (1) letter a) of the new Personal Data Protection Act (personal data entered in the delivered biography) are processed on the basis of the consent of the job seeker;
- the processing of personal data is necessary for the performance of the contract to which the person concerned is a party or for the implementation of a pre-contractual measure at the request of the person concerned, 6 section (1) letter (b) of the General Data Protection Regulation and Section 13 (1) letter b) of the new Personal Data Protection Act (on this legal basis processing of personal data in the course of a job interview or a selection procedure);
- the processing of personal data is necessary to fulfil the statutory obligation of the operator under a special regulation or international treaty, which the Slovak Republic is bound under Art. 6 section (1) letter c) of the General Data Protection Regulation and § 13 section (1) letter c) of the new Personal Data Protection Act (this is the processing of all personal data that an employer needs to report an employee to the Social Insurance Company, the Health Insurance Company, for the purpose of keeping the payroll, etc.).

At the same time, the employer does not need to obtain the employee's consent to the processing of personal data as the employer as an operator processes the personal data of the employee for performance of the contract. It is therefore not

necessary for the employee to give the employer explicit and unconditional consent to the processing of his personal data for the purpose of processing the accounting documents and keeping the employer's accounts, keeping records of the employer's employees (past and present) and other operational purposes of the employer. Thus the length of time that an employee's personal data should be processed for the above purposes should generally correspond to the time at which the employer is required to keep personal data or to archive certain personal data in accordance with applicable law. After fulfilling the purpose of processing the employee's personal data, the employer is obliged to liquidate this data without delay. Despite the legal approach outlined above, however, employers in the vast majority (in terms of quoted qualitative research results) in their employment contracts or other types of employment contracts obtain employee approvals with the processing of personal data for the stated purposes.

With the conclusion of a contract of employment or one of the agreements on work done outside the employment relationship a common processing operation in the form of copying or scanning of the official documents of the employee exists (civil card, driving license, education document, health insurance card, birth certificate of employee's child, employee's marriage certificate, etc.). According to the original legal status, according to § 15 section 6 of the old Personal Data Protection Act *to obtain personal data necessary to achieve the purpose of processing by copying, scanning or otherwise recording the official documents on the information carrier only if the person concerned agrees in writing or the special law expressly allows without the consent of the person concerned. This is not the case when it comes to collecting personal data for the purpose of recording it from an official document by automated means of processing and obtaining personal data for the purpose of concluding a labour or similar relationship*. The copying and scanning of employees' documents was expressly permitted for employment purposes without the consent of the employee or without the existence of explicit legislation in a separate law, provided that such copying / scanning was necessary for the purpose of concluding a labour or similar relationship. However, the General Data Protection Act and the new Personal Data Protection Act explicitly do not deal with the situation of copying / scanning of official documents of employees for the purpose of concluding an employment relationship or similar relationship and do not provide a specific legal basis for the processing operation concerned. This means that employers need to draw attention to other legal titles that will require them to copy / scan employee's official documents, whether for the purpose of concluding employment relationships or wider for other employment purposes. Without the consent of the employee, it will be possible to copy / scan the official documents of the employee if a separate regulation (Article 6 (1) letter (c) of the General Data Protection Regulation and Article 13 (1) letter (c) of the new Personal Data Protection Act), or if the employer has a demonstrable legitimate interest (Article 6 (1) letter (f) of the General Data Protection Regulation and Section 13 (1) letter (f) of the new Act on the Protection of Personal Data) (Žuľová et al., 2018; Kubeš et al., 2018).

For example, according to Act no. 595/2003 Coll. on Income Tax, as amended, is the employer for the purpose of proving the entitlement, detection, verification and control of the correct procedure for demonstrating the right to deduction of the tax base, the employment bonus and the tax bonus for the purposes of protection and retention of the rights of the taxpayer, employer and tax administrator authorized to process the personal data of the persons concerned and is authorized for this purpose without the consent of the person concerned to obtain personal data by copying, scanning or otherwise recording official documents to the extent necessary to achieve the purpose of the processing. In practice, the provision cited empowers the employer to copy the child's birth certificate for the sole purpose of demonstrating the employee's right to claim the tax bonus and the marriage record of the employee for the purpose of applying the non-taxable portion of the taxable amount to the spouse. In addition with the obligation to allow copying, scanning or other recording of a citizen's card, the employee should count on completing supplementary pension savings under Act No. 650/2004 Coll. on supplementary retirement savings and on amendments and supplements to certain laws as amended. Similarly cited Article 11 of the Labour Code in connection with § 41 section 2 allows the employer to copy the documents proving the employee's education required for the performance of the agreed work, we believe that, if it were professional drivers, a copy of the driving license would also be lawful. As regards the legal basis under Art. 6 section (1) letter (f) of the General Data Protection Regulation and Section 13 (1) f) of the new Act on the Protection of Personal Data, j. processing on the basis of a legitimate interest of the operator, which empowers the employer to make copies of such documents which he is obliged to have at his disposal for example for the possible inspection of a competent state authority.

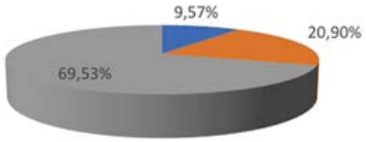
Since the General Data Protection Act and the new Personal Data Protection Act have been in force the legal bases for such processing operations have changed fundamentally with regard to the copying of official employee documents. The new data protection law provides for other legal bases for copying / scanning of official documents of the employee, but like the previous one, forces the employer to thoroughly re-evaluate whether the copying / scanning of official documents is really necessary and whether or not to obtain a personal data that they do not need for the intended purpose at all. If the demonstration of relevant fact can also be achieved by other means that interfere less with the privacy of the employee, the employer has to use this other means and not to copy / skip the official document of the employee (Žuľová et al, 2018).

Similarly, as already indicated by their own application experience, employers, or even the result of qualitative research, simply did not manage to move to new legislation in the area of labour relations. With regard to individual companies, this was mainly the reason for underestimating the situation when they considered that the new legal regulation would not fundamentally reflect their internal processes and that it did not request any significant changes in the internal documents. Due to a lack of understanding of the content of the new legal regulation they did not make any or all of the minor changes. Secondary reason was the high cost of the presented changes when companies that offered advice in these areas at high prices appeared on the market which made this service even becoming unavailable to small and medium businesses, although they knew they should implement it and in-house capacities do not realize it.

Table no. 1 Numbers of the surveyed population by category of one variable

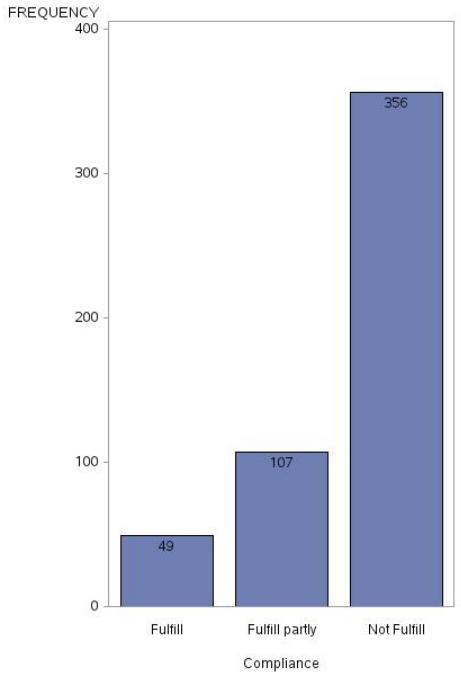
	Absolute abundance	Relative abundance
Fulfilled the conditions	49	9,57%
Partially fulfilled the conditions	107	20,90%
Did not meet the conditions	356	69,53%

Figure 1 Percentage representation of relative frequencies from the frequency table (meeting the requirements of the General Data Protection Regulation)



Source: own processing based on data

Figure 2 Graphical representation of the absolute frequency table frequency (meeting the requirements of the General Data Protection Regulation)



Source: own processing in statistical program

5 Conclusion

Taking into account the new legal framework in the field of personal data protection in application practice in the implementation of individual and collective labour relations requires a thorough assessment of all relevant contexts, in particular in relation to their procedural law (Wolters, 2017). The new terms of dealing with the employee's birth number or photograph, the issue of whistleblowing or employee monitoring and, in particular, the legal context of obtaining employee approvals, depending on the type of processed personal data through various telecommunication and audio-visual means represent a major cause for a new relationship between the subjects of labour relations.

In view of the fact that all changes had to be made by employers at the time of the general data protection regulation, i.e. on 25 May 2018, we must consider the reported results as alarming with a fundamental threat not only to the personal management of employers but also to the damage caused by the sanctions imposed by the control authorities. By the way, the results of qualitative research are also confirmed by the authors' own application practice which provides legal advice to the above-mentioned employers who have become part of qualitative research. Small and medium-sized enterprises have simply neglected the whole area of preparation for change of legal regime for various subjective or objective reasons, which is currently negatively reflected in the implementation of labour relations (we already record the first filing of employees to the supervisory authorities with applications for the review of employers' progress).

In this respect, employers can only recommend an urgent need to align their own procedural law procedures with excessive legislation and the general data protection regulation.

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