

## **GENERAL AND LABOR LAW ASPECTS OF THE GDPR**

GERGELY CSEH–RENÁTA ZELINA

Assistant lecturer, Department of Administrative Law

University of Miskolc

jogcseh@uni-miskolc.hu

Law student, University of Miskolc

zelina.renata@gmail.com

### **1. Introductory thoughts**

The Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (henceforward: Regulation or GDPR — General Data Protection Regulation — based on the abbreviation which was commonly used) the new regulatory of the European Union on data protection entered into force on 25 May 2018. The GDPR unifies the data processing rules of the EU Member States with the superseding of national legislation. The new regulation has generated a great interest in a society as a whole, which may be due to the fact that not only large companies are affected by regulation, but also all data processing organizations and, on the other hand the regulation may arise not only the interests of legal persons but individuals because they have greater insight and rights relation to the processing of their personal data. Thirdly, it is not negligible that any failure is being punished by a higher fine than ever before.<sup>1</sup> In the next few pages, we present the regulation of GDPR, furthermore what changes would occur in the Hungarian legal system in particular the labor law aspect.

### **2. The GDPR's scope of application**

The Regulation requires wider territorial and material scope than the previous data protection laws. Examining the material scope shall be applied to both the activities of the data controllers and processors. As regards the material scope the Regulation shall be applied to the processing of personal data in an automated manner and to the processing of personal data in a non-automated manner that are part of a registration system or which are intended to be part of a registration system.<sup>2</sup> Consequently, the Regulation shall not be applied if the personal data is handled for personal or household purposes. In terms of territorial scope it shall be applied to data processing in connection with the activities of data controllers or data processors in

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<sup>1</sup> *Amit a GDPR-ról tudni kell.* p. 1. [http://www.fmkik.hu/upload/fmkik/gdpr\\_szakanyag.pdf](http://www.fmkik.hu/upload/fmkik/gdpr_szakanyag.pdf) (23. 10. 2018).

<sup>2</sup> Article 2, point 1 of GDPR.

the Union. Furthermore, it shall be applied to the treatment of personal data of persons residing in the Union by a data controller or data processor not having an activity in the Union, Furthermore, it shall be applied to the treatment of personal data of persons residing in the Union by a data controller or processor not established in the Union if data processing activities are linked to the provision of goods or services to persons in the Union, regardless of whether the person has to pay for them or related to the behavior of the data subject, provided within the Union.<sup>3</sup>

### 3. Lawfulness of processing

It is important to determine the legal basis for data processing as an essential element of the lawfulness of processing. The controller must ensure the appropriate legal basis for the data processing.<sup>4</sup>

Article 6 of GDPR defines the legal bases for data processing:

- the data subject has given consent to the processing of his or her personal data,
- processing is necessary for the performance of a contract to which the data subject is party,
- processing is necessary for compliance with a legal obligation,
- processing is necessary in order to protect the vital interests of the data subject or of another natural person,
- processing is necessary for the performance of a task carried out in the public interest,
- processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party.<sup>5</sup>

These legal bases are essentially the same as those set out in Article 7 of Directive 95/46/EC.<sup>6</sup> What constitutes a significant change compared to the previous legislation is that due to the direct effect of GDPR, there will be no transposition into the Member States and thus avoiding the difficulties of applying the law when determining the appropriate legal basis.<sup>7</sup> At workplace processing may arise: the consent of the data subject, statutory authorization, performance of the contract of employment or processing based on the legitimate interest of the employer.

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<sup>3</sup> GDPR közérthetően — Part 1. <https://www.gdpr.info.hu/single-post/GDPR-k%C3%B6z%C3%A9rthet%C5%91en-1-r%C3%A9sz> (23. 10. 2018).

<sup>4</sup> Point 40. of the Preamble, GDPR.

<sup>5</sup> Article 6, point 1 of GDPR.

<sup>6</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (hereinafter: Data Protection Directive).

<sup>7</sup> PÓK László: *Mik lehetnek a jogszerű adatkezelés jogalapjai a GDPR alapján?* [https://gdpr.blog.hu/2018/05/22/mik\\_lehetnek\\_a\\_jogszeru\\_adatkezeles\\_jogalapjai\\_a\\_gdpr\\_alapjan](https://gdpr.blog.hu/2018/05/22/mik_lehetnek_a_jogszeru_adatkezeles_jogalapjai_a_gdpr_alapjan) (24. 10. 2018).

### 3.1. *The consent of the data subject*

The legal basis we have mentioned first, the consent may raise certain issues. Consent is considered to be a kind of priority, primary legal basis in practice. Therefore, significant number of controllers seek to obtain a consent whenever this is not necessary at all. This so-called “consent-centricity” can be related to the fact that the right of informational self-determination of the data subject may be exercised mostly with the consent.<sup>8</sup> In our opinion, GDPR also reaffirms the idea that if processing can legitimately be carried out in the light of a different legal basis, there is no need to obtain a consent.

The GDPR defines the concept of data subject’s consent: “consent of the data subject means any freely given, specific, informed and unambiguous indication of the data subject’s wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.”<sup>9</sup> Consequently, the conceptual elements are: voluntary, concrete, informed and unambiguous. In addition, Article 7 deals with the terms of the consent, accordingly, the controller’s obligation is to prove that the data subject has consent to the processing of personal data, so that the principle of accountability already appears here. Article 7 also states that the data subject is entitled to withdraw his consent at any time. The withdrawal of the consent should be allowed the same simple way as granting the consent. The withdrawal of consent also shows that in cases where another legal basis is available, it must be used, otherwise further processing will be impossible only because of the withdrawal of the consent or if the controllers suddenly set up a different legal basis for processing on the basis of the withdrawal it may even call into question the legality of the entire processing in the past.<sup>10</sup>

As we have already mentioned, the conceptual component of consent is volunteering, so it is independent from any outside influence. The question may arise that can we talk about a real voluntary consent in an employment relationship. In our view, we cannot speak of a purely voluntary consent in a hierarchical, sub-superior relationship.

Article 29 Working Party<sup>11</sup> also expressed its point of view on this issue and noted that the decision of the data subject could be affected by financial or emotional considerations.<sup>12</sup> Quite simply, the employee only decides whether to take the job or not. In this case the consent of the processing is a quasi-condition. From this it can be

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<sup>8</sup> PÓK László: *Az adatvédelem svájci bicskája – A hozzájárulás*. [https://gdpr.blog.hu/2017/07/17/az\\_adatvedelem\\_svajci\\_bicskaja\\_a\\_hozzajarulas](https://gdpr.blog.hu/2017/07/17/az_adatvedelem_svajci_bicskaja_a_hozzajarulas) (24. 10. 2018).

<sup>9</sup> Article 4(11) of GDPR.

<sup>10</sup> Article 7(1)–(3) of GDPR.

<sup>11</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data — Article 29 set up the Working Group.

<sup>12</sup> Article 29 data protection working party 01197/11/EN WP187 Opinion 15/2011 on the definition of consent [https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2011/wp187\\_en.pdf?fbclid=IwAR1RnMQYnImo0dRB1ZaD1anODxzitonXCioPoaKpO6DmHla93t7J6nXWrYE](https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2011/wp187_en.pdf?fbclid=IwAR1RnMQYnImo0dRB1ZaD1anODxzitonXCioPoaKpO6DmHla93t7J6nXWrYE) (24. 10. 2018).

deduced that in the legal relations of employment it is not possible to interpret the volunteering of the consent in the final analysis, if the employee refuses to grant his consent that may cause him or her financial or non-financial detriment.<sup>13</sup>

### **3.2. Statutory processing**

Regarding processing in the workplace, the statutory processing should also be mentioned, since most of the processing is based on this legal basis. We can talk about a statutory provision that makes processing compulsory or a legal basis that only allows processing. Within this we can make a distinction according to whether the details of the processing are determined by the law or left to the controller. Compulsory processing is ordered by tax liability and social security legislation. The above mentioned compulsory processing are also an obligation for the employer and the employee.<sup>14</sup>

### **3.3. Processing based on the legitimate interest of the employer**

Personal data can be processed even if workplace processing is required by the employer's legitimate interest. It is the limit of this type of processing if the right to the protection of personal data of the employee and right to privacy is higher than the employer's legitimate interest. The legitimate interest of the employer will be the legal basis of processing in the case of supervision of the employee's behavior during the employment relationship therefore, it will be necessary for the employer to elaborate in its internal rules the processing and the conditions of the processing, because the employees can make sure that processing actually limits their rights in a proportionate manner.<sup>15</sup>

In the face of the above-mentioned right's conflicts: the legitimate interest, the right to privacy and the right to the protection to personal data, a question may arise what we have to examine to give preference one of them. The test of the balance of interests gives us the answer. If necessary, the controller in this context the employer must demonstrate that his legitimate interest is above the employee's fundamental rights. This is a multi-step method, above all, the employer must determine what the purpose of processing and whether personal data is needed at all. Then we have to consider whether there is any solution that can be achieved without the need to personal data processing. It is important to ascertain as precisely as possible the legitimate interest motivated by the employer in the processing of personal data, in particular by taking into consideration Section 10(1) of Act I of 2012 on the Labor Code (hereinafter: Labor Code).<sup>16</sup>

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<sup>13</sup> Hungarian National Authority for Data Protection and Freedom of Information report on the basic requirements of workplace processing (hereinafter: NAIH Report) p. 7. [https://www.naih.hu/files/2016\\_11\\_15\\_Tajekoztato\\_munkahelyi\\_adatkezelesek.pdf](https://www.naih.hu/files/2016_11_15_Tajekoztato_munkahelyi_adatkezelesek.pdf) (29. 10. 2018).

<sup>14</sup> NAIH Report p. 8.

<sup>15</sup> NAIH Report p. 9.

<sup>16</sup> Labor Code 10. A worker may be requested to make a statement or to disclose certain information only if it does not violate his personal rights, and if deemed necessary for the conclusion, fulfill-

This is followed by the determination by the employer of employee rights that may hinder the employer's processing. Finally, the employer summarizes the balance, so it basically decides whether the restriction is proportionate or not.<sup>17</sup>

Article 29 Working Party has also expressed its views on the test of the balance of interest. Firstly, it recommended that legitimate interest-based processing be maintained as an independent legal basis in the Regulation, which is justified by the fact that, if used in the right context, its flexibility promotes the lawfulness of data management. In addition, it considers the maintenance of the test of the balance of interests to be of paramount importance as this increases the enforcement of the principle of responsibility. In our opinion, this actually enhances the effectiveness of this argument because, as mentioned earlier, conducting the test is also the duty and the interest of the employer, failure to conduct the test can result in disadvantages for both the employer and the employee in certain cases.<sup>18</sup>

#### 4. Rights of the data subject

The rights of the data subject are set out in Chapter III of the GDPR from which it can be concluded that the data subjects have extra rights due to the right of access and right to rectification and erasure, which explains in some details.

##### 4.1. Transparent information

Under the GDPR III. Chapter 1, Article 12(1)<sup>19</sup> the controller has an obligation to give a concise, transparent, intelligible and easily accessible form, clear and plain information to the entitled person about their personal data processing.

The information shall include:

- the identity and contact details of the controller,
- the data protection officer's (DPO) contact details,
- the purpose and duration of the proposed processing,
- the legal basis for the processing (in the case of processing based on legitimate interests, these legitimate interests),

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ment or termination of the employment relationship. An employee may be requested to take an aptitude test if one is prescribed by employment regulations, or if deemed necessary with a view to exercising rights and discharging obligations in accordance with employment regulations.

<sup>17</sup> „GDPR a HR-ben” – *Mi az „érdekmérlegelési teszt”?* <http://kamaraonline.hu/cikk/gdpr-a-hr-ben-mi-az-erdekmerlegelési-teszt> (29. 10. 2018).

<sup>18</sup> Opinion 06/2014 on the “Notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC” [https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp217\\_en.pdf](https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp217_en.pdf) (30. 10. 2018).

<sup>19</sup> Article 12(1) of GDPR “The controller shall take appropriate measures to provide any information referred to in Articles 13 and 14 and any communication under Articles 15 to 22 and 34 relating to processing to the data subject in a concise, transparent, intelligible and easily accessible form, using clear and plain language, in particular for any information addressed specifically to a child. The information shall be provided in writing, or by other means, including, where appropriate, by electronic means. When requested by the data subject, the information may be provided orally, provided that the identity of the data subject is proven by other means.”

- the recipients of the personal data,
- the adequate guarantees in case of data transferring outside the EU,
- the right of the data subject to request from the controller to access and rectification and erasure or limitation of access to the personal data and to object to the processing such personal data or his or her right to data portability,
- any automated decisions, furthermore profiling,
- the right to submit a complaint addressed to the supervisory authority,
- whether the conclusion of the contract is conditional upon the data being provided, and the possible consequences of the failure of data provision (in the case of an employment relationship, the existence of such possible consequences excludes the basis of the consent).<sup>20</sup>

The content of the information obligation in the above list is in the interest of the data subject, in that context employee. In fact, that it can be said that the transparent information is the first step of the upcoming right of access.

#### **4.2. Right of access**

At the second stage of the aforementioned theoretical step is the right of access under which the data subject is entitled to receive information from the controller that his personal data is being processed and, if so, is entitled to access such data. The obligations of the controller related to this are set out in Article 15(3) of the GDPR.<sup>21</sup>

On the one hand, the importance of the right of access is based on the fact that the data subject has the opportunity to collect information about his personal data processing and to know what the purposes of the processing. On the other hand, if the data subject has known, he has the opportunity to request the rectification of any defective or inaccurate data, or you can request the erasure of your data for certain reasons.

#### **4.3. Right to rectification and erasure ('right to be forgotten')**

By arriving at the third stage of the theoretical step, we must speak about the right to rectification and the right to erasure, which are governed by Articles 16 and 17 of Section 3 of the GDPR. In fact, the right to rectification means that the data subject shall have the right to obtain from the controller without undue delay the rectification of inaccurate personal data concerning him or her.<sup>22</sup>

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<sup>20</sup> GDPR közérthetően – 2. rész <https://www.gdpr.info.hu/single-post/GDPR-k%C3%B6z%C3%A9rthet%C5%91en-2-r%C3%A9sz> (29. 10. 2018).

<sup>21</sup> Article 15(3) of GDPR “The controller shall provide a copy of the personal data undergoing processing. For any further copies requested by the data subject, the controller may charge a reasonable fee based on administrative costs. Where the data subject makes the request by electronic means, and unless otherwise requested by the data subject, the information shall be provided in a commonly used electronic form.”

<sup>22</sup> Article 16 of GDPR.

On the basis of the right to erasure, the data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay where one of the following grounds applies:

- the personal data are no longer necessary in relation to the purposes for which they were collected,
- the data subject withdraws consent, and where there is no other legal ground for the processing,
- the data subject objects to the processing and there are no overriding legitimate grounds for the processing, therefore the right to protection of personal data cannot be restricted by the legitimate interest of the data controller, the result of test of the balance of interests is not for the benefit of the data controller,
- the personal data have been unlawfully processed.<sup>23</sup>

The question may arise that whether the “right to be forgotten” can be enforced in the context of an employment relationship as well. Of course, the answer is not. An employee shall not request the erasure of his or her personal data in any case. According to the GDPR, the right to be forgotten cannot be enforced if the employer process the data for a legal obligation, for example because of the National Tax and Customs Authority notification or proof of compliance with mandatory minimum wage rules.<sup>24</sup>

Regarding the right to forget, GDPR has two major changes. On the one hand, the burden of proof is reversed because the data controller must prove that data can not be erased and processing is still justified for a relevant reason. On the other hand, the extraterritorial scope of the Regulation ensures that its rules apply to non-EU data controllers when processing EU citizens’ data, irrespective of where the data processing company’s server is located. In the absence of this, the right to forgetting would be empty. The most obvious reason is that the GDPR would not be applicable to data controllers based in the United States.<sup>25</sup>

#### **4.4. Right to restriction of processing**

At the aforementioned theoretical step, the right to restriction the processing of data can be placed on the same level as the right to rectification and erasure. The difference is due to the reasons for its validation, duration and the basic outcome, as this is a simple restriction that exists in a certain time interval. This includes the fact that the data subject who has obtained restriction of processing pursuant to the

<sup>23</sup> GDPR közérthetően – 2. rész <https://www.gdpr.info.hu/single-post/GDPR-k%C3%B6z%C3%A9rthet%C5%91en-2-r%C3%A9sz> (01. 11. 2018).

<sup>24</sup> RÁTKAI Ildikó: *Mire terjed ki az „elfeledtetéshez való jog”?* [http://kamaraonline.hu/szakerto\\_valaszol\\_reszletes/mire-terjed-ki-az-elfeledteteshez-valo-jog](http://kamaraonline.hu/szakerto_valaszol_reszletes/mire-terjed-ki-az-elfeledteteshez-valo-jog) (01. 11. 2018).

<sup>25</sup> SCHUBAUER Petra: *Az elfeledtetéshez való jog az új adatvédelmi rendelet tükrében. Infokommunikáció és Jog, 2017/2, pp. 87–89.*

reasons stipulated in the Regulation<sup>26</sup> shall be informed by the controller before the restriction of processing is lifted.

#### **4.5. Right to data portability**

The data subject shall have the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller if the processing is based on consent or on a contract and the processing is carried out by automated means.<sup>27</sup> The question is whether the right to data portability can be exercised with regard to employment? Of course, yes, it should be noted that only in the case where data processing is made on the basis of a contract. As we have already mentioned that in the context of the employment relationship the employee's consent does not qualify voluntary and therefore can not be the legal basis.

### **5. Conclusion**

In this short study, we tried to describe the changes and provisions of GDPR that are relevant to labor law. In this article, there have been more words about the general innovations of GDPR, but less about the impacts of the Regulation on the domestic labor law. There are several simple reasons for this. After the entry into force of the GDPR, the Labor Code needs to be amended, modified and clarified. The amendment that is currently underway — due to the domestic strict rules — is unlikely to be major. In its resolution of 9 October 2018, National Authority for Data Protection and Freedom of Information did not find the draft legislative amendment appropriate and missed its consistency with GDPR.<sup>28</sup>

Another reason is that the domestic legislation on data protection has been amended and tightened by the legislator under the ePrivacy Directive. GDPR has therefore fundamentally changed the way for EU law-practitioners, envisaging a much tighter regulatory regime, but this does not have the same impact on our country as it is in other countries with a lighter regulatory environment. As we

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<sup>26</sup> Article 18(1) of the GDPR “The data subject shall have the right to obtain from the controller restriction of processing where one of the following applies:

- (a) the accuracy of the personal data is contested by the data subject, for a period enabling the controller to verify the accuracy of the personal data;
- (b) the processing is unlawful and the data subject opposes the erasure of the personal data and requests the restriction of their use instead;
- (c) the controller no longer needs the personal data for the purposes of the processing, but they are required by the data subject for the establishment, exercise or defence of legal claims;
- (d) the data subject has objected to processing pursuant to Article 21 (1) pending the verification whether the legitimate grounds of the controller override those of the data subject.”

<sup>27</sup> Article 20 of GDPR.

<sup>28</sup> NAIH: Az egyes törvényeknek az Európai Unió adatvédelmi reformjával összefüggő módosításáról szóló kormány-előterjesztés. [https://www.naih.hu/files/NAIH\\_2018\\_6123\\_2\\_J\\_2018-10-09.pdf](https://www.naih.hu/files/NAIH_2018_6123_2_J_2018-10-09.pdf) (10. 11. 2018).

mentioned, the Labor Code is being amended. On the basis of the recent materials it can be concluded that although there are and will be changes due to GDPR, but it is not nearly as serious as changes in labor law, such as the introduction of a tele-working institution.