CHSHCEE Newsletter

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Austria

ECJ preliminary ruling on JV notification criteria in Austrian merger control matter

Stefan Hirner and Johannes Frank analyse a recent preliminary ruling procedure about the European Merger Regulation and its impact on future transactions. **>> Read full article**

Belarus

New Law on Public-Private Partnership

Sergei Makarchuk explains the new law on Public-Private Partnership and why it is a progressive step towards a free market economy in Belarus. **>> Read full article**

Bulgaria

Amendments to the Offshore Companies Act

Boyko Guerginov summarizes the recent amendments to the Offshore Companies Act and how it aims at reducing the restrictions for activities and investments of offshore companies and their affiliates in Bulgaria. **>> Read full article**

Czech Republic

Cross border element in employment relationships

Being an integral part of employment relationships, cross border elements raise many issues that need to be handled. Jiři Salač discusses a few aspects with regard to Czech law. **>> Read full article**

Hungary

Case law on the enforceability of comfort letters, guarantee declarations in the new Civil Code and their relationship

András Fenyőházi outlines the new Civil Code and explains why the newly introduced “guarantee declaration” might be a suitable option. **>> Read full article**

Romania

New regulation on the application of a reduced VAT rate of 9% in agriculture

Anca Stingã highlights the key aspects of the new regulation and discusses its consequences on the Romanian agricultural sector. **>> Read full article**

Slovak Republic

The General Data Protection Regulation – a new approach to data protection in the EU

Ľudmila Dohnalová analyses the General Data Protection Regulation and explains why it constitutes a fundamental and important change in the EU data protection framework. **>> Read full article**

CHSHCEE | Austria

ECJ preliminary ruling on JV notification criteria in Austrian merger control matter

A merger of an Austrian asphalt mixing plant has led to a preliminary ruling procedure dealing with the interplay between Article 3(4) and Article 3(1)(b) of the European Merger Regulation ("**EUMR**"). The ECJ has been asked whether the creation of a non-full-functioning joint venture ("**JV**") can be considered as a concentration under the European merger control regime (C-248/16).

Pursuant to Article 3(4) EUMR, the creation of a JV is to be considered as a concentration provided that it performs "*on a lasting basis all the functions of an autonomous economic entity*". In contrast, Article 3(1)(b) EUMR states that a concentration arises in such cases where an undertaking acquires "*direct or indirect control of the whole or parts of one or more other undertakings*." In the present case, the Austrian Supreme Court (*Oberster Gerichtshof*) decided to refer the following question to the ECJ:

"*Must Article 3(1)(b) and Article 3(4) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ('the Merger Regulation') be interpreted to mean that a move from sole control to joint control of an existing undertaking, in circumstances where the undertaking previously having sole control becomes an undertaking exercising joint control, constitutes a concentration only where the controlled undertaking has on a lasting basis all the functions of an autonomous entity?*"

The preliminary ruling procedure results from a transaction involving Austria Asphalt GmbH & Co OG ("**Austria Asphalt**"), a subsidiary of STRABAG SE, and Teerag-Asdag Aktiengesellschaft. Austria Asphalt filed a merger control notification to the Austrian Federal Competition Authority ("**FCA**") as it intends to acquire 50% of the shares in an Austrian asphalt mixing plant from its previously solely controlling parent company Teerag-Asdag ("**Transaction**"). Since the plant only has an auxiliary function of the production of asphalt for its shareholders and does, in general, not provide any services to third parties, the future JV may not be regarded as a full-functioning JV in the meaning of the EUMR. The Transaction was notified to the FCA (according to Austrian law, an

acquisition of a stake of more than 25% qualifies as a concentration) and the FCA also intended to clear the Transaction in Phase I. However, the Federal Cartel Prosecutor (*Bundeskartellanwalt*) applied for an in-depth Phase II review and, thus, triggered proceedings before the Cartel Court (*Kartellgericht*). The Cartel Court ruled that the Transaction needs to be notified to the European Commission ("**EC**").

Austria Asphalt challenged the ruling before the Austrian Supreme Court, arguing that the Transaction has to be reviewed by the FCA only. In its reasoning, the argumentation was supported by a so called "comfort letter" from the EC confirming that such a Transaction does, in the EC's opinion, not amount to a concentration under the EUMR.

The ECJ will have to decide whether Articles 3(1)(b) and 3(4) are to be read and interpreted as two different definitions of what amounts to a concentration under the EUMR or whether these provisions complement each other. In case that the ECJ rules that the Transaction must be notified to the EC (against the opinion of the EC and Austria Asphalt, respectively), the volume of transactions notified to the EC would notably increase, since (provided that the respective thresholds are met) any acquisition of joint control over an undertaking would have to be filed to the EC.

In any event, the ruling will have a lasting impact on future transactions and will undoubtedly constitute a landmark decision with regards to European merger control.

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CHSHCEE | Belarus

New Law on Public-Private Partnership

On 30 December 2015, the new Law of the Republic of Belarus No. 345-Z "On Public-Private Partnership" ("**PPP Act**") was adopted. It entered into force on 2 July 2016. The PPP Act was adopted in the course of realization of the State Program for Innovation Development of the Republic of Belarus and was long anticipated.

What is public-private partnership?

Public-private partnership ("**PPP**") is a form of cooperation between the Republic of Belarus (or its regions) and a private partner, which allows such private partner to invest into infrastructure projects and to share the profits and risks. The PPP is arranged between the parties in form of a relevant PPP agreement.

Compared to other forms of cooperation with the Belarusian State (e.g. investment agreements), the PPP can provide investors with access to infrastructure which normally constitutes a State monopoly, e.g. construction and management of roads, public utilities, healthcare, education, culture, military, police service, telecommunications, energy, oil and gas industries, agricultural production, scientific research, etc.

Who may act as a private partner in PPP?

Any foreign or local Belarusian company (except for the companies, in which the Belarusian State holds at least 50 percent of the shares) or individual entrepreneur may be a private partner in the PPP. However, in order to qualify as a private partner a candidate shall be selected on the basis of a public tender.

What are the main provisions of PPP agreements?

Upon selection of a candidate, the State and such candidate shall enter into a PPP agreement.

The PPP agreement shall be governed exclusively by the Belarusian law and shall envisage certain material terms stipulated by the PPP Act. In particular, the PPP agreement shall specifically provide for the infrastructure object, which will be

constructed and/or modernized and/or exploited by the private partner, rights and obligations of the parties, sources and schedule of financing, sources of the private partner's profits, settlement between the parties, etc.

In addition, in case the realization of the PPP project requires a land plot, the State partner may provide such a land plot to the private party on terms of a lease or temporary or permanent use.

How shall the disputes be resolved under PPP agreements?

As a default rule, a dispute between a private partner and a State partner shall be resolved by virtue of negotiations. If the parties do not manage to settle the dispute amicably within three months, then the dispute shall be resolved:

- by a Belarusian State court - in case of a dispute between the State and a Belarusian private partner;
- at sole discretion of a foreign private partner by (i) an ad hoc arbitration body in accordance with the UNCITRAL Arbitration Rules or (ii) International Centre for Settlement of Investment Disputes (ICSID) - in case of a dispute between the State and a foreign private partner.

Summary

The PPP mechanism has been used all over the world for decades. Thus, its implementation in Belarus is undoubtedly a progressive step towards a free market economy. The PPP provides investors with the possibility to invest in the objects of the State monopoly which previously were unavailable for private business. Therefore, the PPP Act is welcomed by the business community as it will potentially create more investment opportunities and contribute to improving the investment climate in Belarus.

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CHSHCEE | Bulgaria

Amendments to the Offshore Companies Act

Recent amendments to the Offshore Companies Act[1] entered into force in July 2016. The amendments aim at reducing the restrictions on the activities and investments of offshore companies and their affiliates, as Bulgaria was one of the few EU countries applying strict restrictions to such companies. Ever since it was adopted in 2014, the act was criticized by the business and legal community for being too restrictive. The amendments were also provoked by the alleged noncompliance of the act with certain economic rights and freedoms provided by EU law.

New exceptions

Prior to the amendments, the offshore companies were generally restricted from participating in certain key industries such as banking, insurance, social security and pension funds, etc. In relation to many of the restricted industries, the amendments introduce thresholds of shareholding under which offshore companies will be allowed to invest in entities involved in the restricted businesses. The thresholds are either determined by the specific laws of the industries (such as Insurance Code, Credit Institutions Act, etc.) or directly in the Offshore Companies Act which provides for a 10% shareholding threshold with respect to some industries. The provided thresholds are aggregated, i.e. they also apply if two or more offshore companies participate in an entity operating in a restricted industry where the involved offshore companies are either under common control or one of the companies controls the others.

The amendments to the Offshore Companies Act also introduce new exceptions where offshore companies and their controlled affiliates could participate in restricted industries even if their participation exceeds the above mentioned thresholds.

New registration requirements

[1] The full name of the act is: "Law on the economic and financial relations with companies registered in jurisdictions with preferential tax regime, the persons controlled by them and their actual owners".

In addition to the existing registration requirements the offshore companies need to provide information about all entities under their control if they also participate in the restricted industries and have to register in the commercial register before participating in activities governed by the Offshore Companies Act.

All affected offshore companies are obliged to adjust their activities according to the new requirements within 6 months following these amendments.

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CHSHCEE | Czech Republic

Cross border element in employment relationships

Today's employment relationships generally include a so called cross border element which often raises certain issues, considering that labour law is traditionally considered to be national in scope rather than an international legal framework. The cross border element in employment relationships might occur in several situations. It can be tied to the parties of the relationship, i.e. the employee is a foreign national, living abroad or the employer himself is a company seated in a different country. It can also be related to the content of the relationship, i.e. the rights and duties ensuing from it. Additionally, it applies to cases where a certain matter of fact takes place abroad or has a specific connection to a different country.

This contribution discusses a few aspects of cross boarder elements of group companies with regard to Czech law. This typically relates to cases where Czech companies are part of an international group structure. Individual employees might be sent to other companies within the group depending on use or they have parallel employment relationships with several different companies at the same time. Against this background, it can be difficult to align the employment contract so that it corresponds with the needs of the diverse, dynamically evolving, international structures.

Posting of workers

Czech employers have the option of sending workers to different member states, subject to the conditions of the Directive 96/71/EC, on its own account and retain the employment relationship. The terms and conditions of employment of the posted workers have to meet the minimum criteria of the destination country. It is, generally speaking, necessary to alter the employment contract so that the employee's activities correspond to the contract throughout the entire duration of his posting. The employee is entitled to maintain his Czech health insurance and social security for up to two years, pursuant to filing an A1 form provided by the Czech Social Security Administration.

Cross border transfer of employer's activities or tasks

In cases where employer's tasks or activities are (partly) transferred to a different employer, the employment relationships of the affected workers are transferred

automatically under the Czech Labour Law. The employment relationship consequently changes as a new employer replaces the original one, whereas the rest of the employment relationship remains unchanged.

Whenever an employee does not agree with the new employer regarding the new place of work, the employer is entitled to terminate the employment relationship on the basis of redundancy resulting from an organizational change. The employee is then entitled to a severance payment under the Czech Labour Code.

Language of the contract of employment

According to Czech law employment contracts can also be concluded in foreign languages. However, general rules regarding the validity of legal acts still apply and there must not be any doubt about its content. In case of multiple interpretation possibilities, the act needs to be interpreted in its most favourable way for the employee. As a result, this rule protects the employee against the random interpretation of the law.

Conclusion

The cross border element in employment relationships is an important legal factor. The current practice of international business structures results in many issues that need to be handled thoroughly. The goal is to find a solution that is both in accordance with Czech law and with the needs of today's dynamic corporate practice.

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CHSHCEE | Hungary

Case law on the enforceability of comfort letters, guarantee declarations in the new Civil Code and their relationship

Comfort letters

Comfort letters (also known as letters of comfort) are often used as a security for corporate lending transactions and for long-term liabilities of project companies established by company groups. A comfort letter usually includes a unilateral promise by a highly capitalised parent company to maintain the ability to meet its payment obligations of its affiliate involved in the relevant transaction.

The language of comfort letters can range from highly abstract promises of "*best efforts*" to "*irrevocable*" commitments to ensure that an affiliate will remain solvent. Accordingly, the enforceability of payment obligations existing on the basis of these documents shows a similar mixed picture in the international practice.

A mixed bag of Hungarian case law

The global economic crisis that started in the second half of 2008 and the processes that triggered it led to disputes concerning the enforcement of comfort letters in Hungary. Hungarian state and arbitration courts soon formed their interpretations about this issue in the light of Hungarian law.

In its judgement No. BDT2011.2410, the Budapest Court of Appeals held that "*comfort letters do not represent a recognised concept under current Hungarian law, and, therefore, they may only be evaluated under the general rules of civil law.*" The judgment went on to say that on the basis of Section 199 of the old Civil Code, only a unilateral declaration creates a right to demand a payment in cases that are specifically defined in regulations. Such regulations do not exist with respect to comfort letters. Therefore, the existence of a liability to make a payment cannot be established on the basis of these documents.

An earlier resolution in 2008 by an arbitration court adopted a more lenient approach to the possible existence of payment liabilities. On the one hand, the resolution stated that the case described in Section 199 of the Civil Code should not apply to comfort letters, i.e. they have not created an obligation to make a payment. On the other hand, the tribunal argued that the conditions of an award of damages in tort existed on the basis of the

comfort letter, because "*... a causal relationship existed between the respondent's declarations that were given in the comfort letter in order to make the drawdown of the loan possible and the loss that the claimant suffered when the loan was not repaid. The respondents were aware of the debtor's need for loan financing and had an interest in its operations; therefore, they assured the claimant that lending money to the debtor would not carry any risk. In the judgement of the Arbitration Court, the comfort letter represented a definite and clear promise by the respondents to the claimant.*"

"Guarantee declarations" in the new Civil Code

While the new Civil Code still does not recognise comfort letters per se, Section 6:431 introduces "guarantee declarations" as instruments for general commercial practice. Such instruments were previously available to banks only. They are defined as "*a promise by the guarantor on the basis of which he must make a payment to the beneficiary if the conditions specified in the declaration are met.*"

For guarantee declarations to be enforceable they must be in writing. Thus, they are much clearer compared to comfort letters with their chequered interpretative past. In terms of content, guarantee declarations can be considered as an adequate substitute - and in some cases even as analogous with comfort letters. In addition, a guarantee declaration is statutorily enforceable independently from the underlying debt.

Besides the requirement that the guarantee must be concluded in a written form, a guarantee declaration, in order to be valid, must also include (i) an expressed promise and (ii) specific conditions that must be met to trigger its enforceability. It might also be reasonable to state the term of its validity in the declaration, because under Section 6:437 of the new Civil Code, a guarantee granted for an indefinite period may be cancelled by the guarantor after three years. The statement of the maximum amount guaranteed is a possible element but not obligatory. Therefore, it can be sufficient if the declaration only identifies the legal relationship that is secured by the guarantee.

Conclusion

Generally, comfort letters have represented an unwanted compromise in commercial transactions when a stronger commitment by a parent company (usually in the form of suretyship) was not a suitable option. Now that the new form of guarantee discussed above has formally been codified, an advisable solution might be to obtain a guarantee

declaration within the meaning of Section 6:431 of the Civil Code in cases where comfort letters, essentially unenforceable under Hungarian case law, would have been the only available option in the past.

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CHSHCEE | Romania

New regulation on the application of a reduced VAT rate of 9% in agriculture

The Romanian Ministry of Public Finance and the Ministry of Agriculture and Rural Development issued on 25 July 2016 the Order no. 1155 on the application of the reduced VAT rate of 9% for the delivery of fertilizers and pesticides used in agriculture, for seeds and other agricultural products for sowing or planting and for specific agricultural services (Order no. 1155/2016).

The Order expressly provides that the reduced VAT rate of 9% only applies for (i) the specific supply of goods and (ii) providing agricultural services.

The following goods are covered by the reduced VAT rate: (i) fertilizers, (ii) pesticides and (iii) seeds and other agricultural products for sowing or planting. In order to benefit from the reduced VAT rate, the products need to be identified by specific codes provided by the Romanian Fiscal Code.

With regard to services, Order no. 1155/2016 provides a list of specific agricultural services which benefit from the reduced VAT rate of 9% such as, *inter alia,* fertilizing, plowing, sowing, preparing the seedbed, spraying (for the combat of diseases and pests), seed treatment, harvesting, etc.

The new regulation has entered into force on 1 August 2016. The relevant authorities for the implementation and supervision of the implementation of these new provisions are: the Regional General Department of the Public Finance [*Direcţiile generale regionale ale finanţelor publice*], its subordinated territorial structures and the General Department for the administration of the significant contributors [*Direcţia generală de administrare a marilor contribuabili*].

The issuing of the new regulation aims at stimulating activities in the agricultural sector, at increasing the accessibility of specific agricultural goods and services and at enabling new investments in agriculture. The Romanian public authorities estimate that this important fiscal regulation will diminish the tax fraud relating to VAT and agriculture in general.

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CHSHCEE | Slovak Republic

The General Data Protection Regulation – a new approach to data protection in the EU

After a long-term effort, many discussions and years of preparations, a General Data Protection Regulation 2016/679 ("**GDPR**") has finally been adopted, which constitutes a new data protection framework in the EU.

The current EU legislation on data protection has been effective since 1995 and is based on the Data Protection Directive 95/46/EC ("**Directive**") which allowed member states to regulate various issues in a different way leading to inconsistencies, legal uncertainty and high administrative costs. Moreover, at the time of the adoption of the Directive, modern online businesses, services and related challenges did not exist at that time.

The discussions about the EU Data Protection Reform were initiated by the European Commission in 2012 with the aim to prepare Europe for the digital age. The wording of the GDPR was agreed at the so-called "trilogue" meetings between the European Commission, the European Parliament and the Council. More than 4000 wordings were changed before the final version was adopted; this makes it the most altered legislation in the history of the EU. The final wording was published in the EU Official Journal on 4 May 2016. While the GDPR entered into force on 24 May 2016, it shall apply from 25 May 2018, which gives companies and business some preparation time to comply with its provisions.

The GDPR focuses on reinforcing individuals' rights, strengthening the EU internal market, ensuring stronger enforcement of the rules, streamlining international transfers of personal data and setting global data protection standards. These aims should be achieved by the following **main changes** in the EU data protection legislation **adopted by the GDPR**:

Due to the fact that the new EU data protection legislation was adopted in form of a regulation (instead of a directive), it will be **directly applicable** in all member states without the need for implementing it into national legislation. Therefore, the data protection standards will be identical in the entire EU.

Moreover, the GDPR will also apply to data controllers and data processors domiciled outside the EU whose processing activities relate, on the one hand, to the offering of goods and services, even if free of charge, or, on the other hand, to the monitoring of the behaviour of EU data subjects within the EU. Based on the conditions set in the GDPR, data controllers and data processors domiciled outside the EU shall appoint a representative in the EU.

The GDPR introduces the concept of a so-called **"One-Stop-Shop"** meaning that businesses will only have to deal with one supervisory authority in the member state where they have their main seat and not with supervisory authorities of other states where they also have established branches. The GDPR contains a regime of a cooperation between the Lead Authority and other Concerned Authorities in cases where (i) the subject matter only relates to an establishment in another member state than the state of the seat of Lead Authority or (ii) substantially affects data subjects only in another member state than the state of the seat of Lead Authority. The data subjects shall be entitled to address the complaint to any supervisory authority in their language.

In cases stipulated by the GDPR, data controllers as well as data processors shall appoint a **Data Protection Officer** ("**DPO**"). Such cases include: (i) processing of data by a public authority, (ii) cases where the core activities of the data controller or data processor consists of processing operations which require a regular and a systematic monitoring of data subjects on a large scale and (iii) cases where the core activities consist of processing of special categories of data on a large scale. In other words, small and medium enterprises are exempt from the obligation to appoint a DPO if data processing is not their core business activity. The DPO may be employed by the entity or cooperate with the entity under a service contract. A group of undertakings may appoint a single DPO on the condition that the DPO will be accessible to all. The contact details of the DPO shall be published and communicated to the supervisory authority. The data controller and data processor shall ensure that the DPO does not receive any instructions regarding the exercise of those tasks and is bound by secrecy.

The GDPR places **numerous obligations on data controllers** to demonstrate that they comply with the new EU data protection standards. These obligations contain, among others (i) the maintaining of required documentation, (ii) the implementation of data protection by default and by design or (iii) the conduct of a data protection impact

assessment for risky processing. Data controllers will bear the burden of proof to comply with the new EU data protection standards. They will no longer have to provide data protection authorities with general notifications on data processing. However, they shall conduct a data protection impact assessment which shall show potential risks. Subsequently, the data protection authority shall be consulted in advance in case the results of the assessment indicate a high risk. The uncertainty of these new provisions (the assessment of what is considered as a high risk) and the potential of imposition of onerous fines may in practice prove as not really beneficial to data controllers.

A **consent of a data subject** with processing of his/her personal data shall be free, specific, informed and should be an unambiguous indication of the data subject's wishes. The data controller must be able to demonstrate that the consent was given. Moreover, a data subject can withdraw the given consent at any time and should be informed about this possibility by the data controller in advance. The GDPR introduces a parental consent which shall be required for processing the data of a child by information society services. The age of threshold is defined by the member states within a range of 13 to 16 years. Therefore, this will create inconsistencies between respective member states.

The GDPR governs the **"right to be forgotten"** which means that a data subject decides that his/her data is no longer being processed, provided that there are no legitimate reasons for retaining it and the purpose of processing of the personal data finished. The data shall be deleted without undue delay. Except for that, data subjects may request information about their data being processed by a certain data controller. The data controllers shall provide such information in a stipulated period and free of charge unless the request is manifestly unfounded or excessive. Moreover, data subjects will have a right of the correction of wrong data.

The new right to **data portability** will allow individuals to move their data from one service provider to another and the service provider shall not be entitled to retain such data. The data portability concerns the processing performed by automatic means of processing. In other words data subjects shall have an option to change the service provided including the transfer of their data from one provider to another without necessity of their repeated entry.

The GDPR aims for stronger enforcement of the data protection rules by introducing **strict sanctions**. In certain cases data protection authorities will be able to fine

companies for a breach of EU data protection rules with up to 4% of their global annual turnover.

Pursuant to the GDPR, data controllers are obliged to **notify certain data breaches** to the data protection authority. Such notification shall be undertaken without undue delay and if possible within 72 hours after they became aware of the breach. Moreover, in some cases they shall also notify affected data subjects.

The profiling includes any form of automated processing of data such as the use of data in order to assess certain personal aspects related to individuals. Particularly, analysing or forecasting aspects of a data subject related to the performance at work, property relations, health, personal preference, interest, behaviour, location or movement shall be stricter regulated by GDPR. The data subject shall have the right not to be subject to any decision based solely on automated processing including profiling. The data controller shall provide the data subject with information on the existence of automated decisions including profiling and meaningful information on the used procedure as well as envisaged consequences of such processing for the data subject.

For the first time **data processors** will have **direct obligations under the GDPR** such as the maintenance of written records of their processing activities carried out on behalf of each controller or designation of a DPO.

Intra-group international data transfers may be legitimised by **binding corporate rules of data controllers or data processors** enforced by every member of the group of undertakings engaged in a joint economic activity.

The regulation of **international transfers of personal data** essentially stays the same under the GDPR. Transfers to third countries, territories or international organizations considered by the European Commission as having adequate level of data protection shall not require any specific authorisation. In the absence of such decision of the European Commission, the transfer shall be undertaken only on condition that the data controller or data processor has provided appropriate safeguards and on condition that enforceable data subject rights and effective legal remedies for data subjects are available. The appropriate safeguards may or may not be subject to the authorisation from the competent supervisory authority depending on the nature of the safeguards. The GDPR also stipulates derogations for certain specific situations.

Generally speaking, the new GDPR constitutes a fundamental and important change in the EU data protection framework and all data controllers and data processors should prepare for its application in the following two years. It aims at strengthening the EU internal market and at lessening the bureaucracy. However, it creates some uncertainties which may undermine these aims. Moreover, it seems that the GDPR was adopted mainly for online businesses. The needs of businesses in different areas were slightly omitted. All in all, the future will show the pros and cons of the GDPR, but we should do our best to prepare for its application.

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