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DATA PROTECTION REQUIREMENTS
FOR THE USE OF AI TOOLS

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Introduction

The use of artificial intelligence (AI) is becoming increasingly important for most companies. Applications include translation tools or applications such as ChatGPT, as well as various products in the HR area that, for example, support the recruiting process or resource planning. If personal data, such as that of employees, applicants, customers, or business partners, is also processed in the context of the use of AI-based software applications, the data processing must take into account not only the requirements of labor law, but also the requirements of data protection law, in particular the General Data Protection Regulation (GDPR) and the Federal Data Protection Act (BDSG). In addition, The European Parliament, with its provisions of the Regulation, and The Council of the European Union, working together, are laying down harmonized rules for artificial intelligence. These new AI rules, while still undergoing the legislative process, will be applied in the future.

Definition artificial intelligence

What exactly is meant by the term "artificial intelligence" has not yet been generally clarified. This will change when the AI Regulation comes into force. The most recently published draft of the Council of the European Union defines AI systems according to Art. 3 (1) AI Regulation as those systems that receive machine and/or human-based inputs, infer how to achieve a given set of human-defined objectives using "learning", "reasoning", or modelling and generates outputs in the form of content, predictions, recommendations, or decisions. According to this, it can be assumed with some certainty for the time being, that an application is AI-based in the sense of the design, if it automatically recognizes patterns in data sets such as image, text, or audio files, and this is done to a certain degree independently, or with a view to self-optimization, imitating human intelligence performance, in order to produce a result specified by the user – such as a recommendation, a selection decision, a text, or a translation.

Data protection requirements

If personal data are processed in the context of the use of AI applications, a legal basis is required for the respective data processing. In addition, Art. 13 GDPR imposes various information obligations that must be implemented by the company that uses the AI application to process personal data. If the AI tool is used in connection with a decision and has legal relevance for the data subject, the requirements for automated individual decisions must also be taken into account. In addition, the conclusion of a data processing agreement with the provider of the respective tool, may be required. Due to the sometimes high intensity of the intrusion and the high risk for the data subjects, it may also be necessary, in certain cases, to conduct a data protection impact assessment in advance of using an AI tool.

Legal bases

As for any other data processing, the data protection principle of "prohibition with reservation of consent" enshrined in Art. 6 GDPR applies to the processing of personal data by means of an AI-based software application. Accordingly, any data processing is only permissible if it can be based on a legal basis. In principle, different legal bases can be considered in this respect: the consent of the person concerned, the purpose of the employment relationship, or the fulfillment of the contract, the legitimate interest of the company, and any existing works agreement.

Consent

According to Art. 6 (1) (1) (a) GDPR, data processing is lawful if and to the extent that the data subject has effectively given his/her consent to the specific processing for a specific purpose. If an employee, customer, applicant, or business partner declares his or her consent to the processing of his or her data by an AI tool, this can provide sufficient justification for the data processing that takes place.

However, according to Art. 4 No. 11 GDPR, effective consent requires that the data subject has declared voluntarily, for the specific case, in an informed manner, and unambiguously, in the form of a statement or other affirmative action, that he or she consents to the processing of personal data relating to him or her. In the context of AI tools, the effective fulfillment of the requirements "informed" as well as – especially in the case of consenting employees and applicants – "voluntary" is particularly problematic.

Providing transparent information to data subjects, which is always a prerequisite for effective consent, usually poses practical challenges for companies that want to use AI tools. One reason for this is that, especially in the case of complex applications, the data processing procedures are not always comprehensible in detail, even for the tool provider, and thus cannot be explained. On a further point, providers of such products are sometimes rather reluctant to disclose specific data processing procedures, since they regard the respective decision-making logic, in part, as their trade secret, which should not be made public.

With regard to the aspect of voluntariness, it must be taken into account that in employment relationships, there is a special economic dependency of the employee (or the applicant) on his (poten-

tial) employer. According to Section 26 (2) (2) BDSG, the criterion of voluntariness can nevertheless be met, for example, if a legal and/or economic advantage is achieved for the data subject through the use of the tool, or if the employer and (potential) employee pursue similar interests in connection with the data processing by the tool. The latter is conceivable, for example, if the use of the AI tool – for example in recruiting – leads to time and/or cost savings for both parties, or if processes are made less burdensome and/or fairer by the AI tool. Ultimately, the voluntary nature of consent still presupposes that the data subject is provided with a genuine alternative to the processing of his or her data by the AI-based software, which he or she can choose without negative consequences. Thus, a company that wants to invoke the consent of the data subjects for justification purposes is required to have other processes in place, in addition to the use of the AI tool, with which the data subjects' data is processed in a way that is precisely not AI-based.

The fact that data subjects have the option of revoking their consent at any time under Art. 7 (3) (1) GDPR, as well as the challenge of meeting this revocation option in the context of a system designed for self-optimization, make consent, as a legal basis, seem unattractive, especially for AI applications used over a long term, that also use the data fed in for training purposes.

Purposes of the employment relationship or fulfillment of the contract

If data processing is to be justified by purposes of the employment relationship, this requires the necessity of the data processing for the commencement, performance, or termination of the employment relationship in accordance with Section 26 (1) (1) BDSG. Consequently, it must be examined whether the company has an equally suitable means of achieving the purpose pursued, but one that is less onerous for the employee or applicant.

Within the framework of the necessity test, the size or resources of the company and the scope of the tasks to be processed – in the personnel area, for example, the number of applications received, the number of positions to be filled or eliminated, or the number of employees to be evaluated, and the respective scope of the audit – must be taken into account. If a company wants to use an AI tool, for example, in connection with the automatic viewing and evaluation of application documents, it could be argued, for example, that it is not possible for the employees of the human resouces (HR) department of a global corporation, where a large number of applicants apply for a wide variety of positions, to evaluate all applications personally. Therefore, the company is absolutely dependent on the support of the AI tool in its hiring process.

From a proportionality perspective, it must also be examined whether the data processing by the AI tool is appropriate in relation to the effects on the data subject. In this respect, the scope of the processed data and the level of detail of the analyses are of importance. As a guideline, the following principle applies: the more intensively the personal rights of the persons concerned are interfered with – for example, because meaningful personality profiles are created from them – the better the company's justification for the use of the tool must be. In order to be able to prove that the conflicting interests have been properly addressed, the balancing process should be documented.

The above considerations also apply to the legal basis of contract performance pursuant to Art. 6 (1) (1) (b) GDPR. This applies when data of persons outside the scope of Section 26 BDSG – for example customers or business partners – is processed in the context of a contractual relationship.

Legitimate interests

If a company comes to the conclusion in the context of the proportionality test that its own interests in the use of the AI tool outweigh the interests, fundamental rights, and freedoms of the persons affected by the data processing, the legitimate interest pursuant to Art. 6 (1) (1) (f) GDPR may also be considered as a legal basis. However, a decision must always be made on a case-by-case basis, taking into account all the circumstances. Even taking into account the fact that AI-based applications in the personnel area are classified as high-risk by the AI Regulation, a premature assumption of an alleged overriding legitimate interest is not advisable.

Works agreement

Depending on the scope and quality of the integration of AI-based applications into the company's everyday work, it may also be worthwhile to conclude a works agreement between the Works Council (elected employee representatives) and the employer. In this way, a contractual framework can be created that takes into account both employee interests and the needs of the company. On an additional basis, the agreement pursuant to Section 26 (4) (1) BDSG can be used as a legal basis. It should be noted, however, that only the processing of employee data can be based on the works agreement. In this respect, the processing of employee data for training purposes, for the provision of feedback, or for promotion recommendations may be considered. In contrast, neither the processing of applicant data nor the processing of data of other parties can be based on a corresponding agreement, as the Works Council does not have the right to represent these parties or their interests.

Data processing agreement

If, in the course of using the AI tool, personal data is also transferred to the provider of the tool and processed by the latter on behalf of the company, for example because the tool is a software as a service application that is not operated by the company itself, this may constitute a case of commissioned processing that requires the conclusion of a corresponding data processing agreement.

Automated individual decisions

If the AI application makes decisions that have legal effect for the data subjects, for example because the recommendation of the AI is taken into account when deciding on the conclusion of a contract, the requirements of the GDPR on automated individual decisions must also be taken into account. According to Art. 22 (1) GDPR, data subjects have the fundamental right not to be subject to decisions that have legal effect on them that were not taken by a human being. According to Art. 22 (2) GDPR, something else applies if, among other things, the AI-based decision is necessary for the conclusion, or fulfillment of a contract, or the data subject has expressly consented.

Whether the use of an AI tool has legal effect depends on the specific use of the application. While the translation of a document, or the design of a job advertisement by an AI tool, which should be as target group-specific as possible, should not normally fall within the scope of Art. 22 GDPR. However, the provision may very well apply in the case of preliminary recommendations for hiring or promotion decisions made by the AI.

Information requirements

The data processing carried out in the context of the use of AI-based applications must be made transparent for data subjects in accordance with Art. 12, et seq. GDPR. In this respect, companies must above all, comply with their duty to provide information pursuant to Art. 13 (1) GDPR. In this respect, data subjects must be provided with comprehensive information about the data processing in question. If there is a case of automated individual decision-making, the

far-reaching information requirements of Art. 13 (2) (f) GDPR must also be observed. According to this, affected persons must be informed, for example, about how the AI tool works, what effects the AI has on the decision-making processes, and what consequences this has for the applicant.

As in the context of informed consent, the fulfillment of these transparency obligations can be difficult in practice, given the partial classification of the decision-making logic as a trade secret and the data processing procedures, which are sometimes difficult to understand in detail. In order to be able to meet the applicable requirements as far as possible, this topic should be clarified and contractually regulated with the respective provider before licensing the tool.

Data protection impact assessment
Before using certain AI tools – especially in the area of human resources – it may also be necessary to conduct a data protection impact assessment pursuant to Art. 35 GDPR. The so-called must-do list of the Data Protection Conference on data protection impact assessment mentions, for example, the use of AI to assess personal aspects of the data subjects.

Application examples
The use of AI-based applications is conceivable in many areas of everyday work. Examples include tools for text creation and translation, as well as tools from the human resources sector.

Text creation and translation
AI-based services such as ChatGPT or DeepL can be used to generate texts, or translate them into another language. The information entered into the application is also partly used by the providers to train and improve the AI.

Accordingly, personal data should only be entered into the application if the data processing operations carried out in the context of the use of the tool, including the transfer of data to, and the processing of data by the provider, can be based on one of the legal bases mentioned above. Various translation tools also now offer the conclusion of a data processing agreement to safeguard data processing. If none of the legal bases resulting from data protection law is relevant, personal data may not be fed into the tool. However, it is conceivable to enter anonymized information, provided this does not actually allow any conclusions to be drawn. In doing so, the data protection information requirements must also be taken into account.

Tools from the human resources area
The uses of AI tools in HR range from determining a job profile, creating and disseminating job postings, and the selection process to onboarding and performance evaluation, promotion, and termination of employees. In addition, the systems are often trained using employee data.

In principle, personal data in this area may also only be entered into the AI system and processed by it, if there is a corresponding legal basis. When processing employee and applicant data, the special features resulting from the dependency relationship must also be taken into account.

Data subjects must also be informed about the data processing procedures to the extent necessary. If decisions are prepared or recommendations are made by the AI tool – e.g., with regard to hiring, promotions, or terminations – the applicability of the requirements from automated individual decisions within the meaning of Art. 22 GDPR must generally be assumed due to the proximity to the final decision that has legal effect. In the case of an evaluation of

personal aspects of the data subject, a data protection impact assessment must also be carried out.

Requirements of the AI Regulation
The AI Regulation follows a risk-based approach, according to which the legal requirements for the design, distribution, and use of AI tools are integrated, that is based on the risk posed by the application. AI systems that are used in the area of personnel selection, for example in the advertising of jobs, the filtering of applications and the evaluation of applicants and employees, are classified by the AI Regulation according to Art. 6 (3) in conjuction with Annex III No. 4 (a) AI Regulation as high-risk. The same applies pursuant to Art. 6 (3) in conjunction with Annex III No. 4 (b) AI Regulation for AI applications that are to be used to decide on promotions or the termination of employment relationships, as well as for, the assignment of tasks and the monitoring and evaluation of the performance and behavior of persons in employment relationships, and, pursuant to Art. 6 (3) in conjunction with Annex III No. 5 (b) AI-Regulation for the performance of credit checks.

This categorization entails obligations both for the entities that place such systems on the market and for companies that use the AI systems. The requirements to be met by companies using high-risk AI tools are essentially derived from Art. 29 AI Regulation:

> The respective application may only be used in accordance with its instruction for use. Companies must accordingly familiarize themselves with these to the necessary extent.

> If an application poses an unacceptable risk to the health or safety or the protection of the fundamental rights of individuals, the provider of the tool must be notified of this fact. In order to meet this requirement, companies must establish a monitoring procedure, and design their internal processes in such a way that the use of the tool can be suspended at short notice.

> The usage logs generated by the application must be retained in order to be able to clarify any undesirable developments. Insofar as the logs also contain personal data, companies must take into account the data protection principles of data economy and necessity, as well as, any existing deletion obligations when retaining the documents.

Conclusion
As a result, the data protection assessment of AI tools depends on the individual case; a blanket assessment is not possible. In order to be able to make an assessment, an understanding of how the application works and of the data processing procedures triggered by the input of data is required. The extent to which the use of a particular AI-based tool and the data processing that takes place in this context is permissible must always be critically questioned and examined on a case-by-case basis, taking into account the specific circumstances and data processing procedures. The same applies to the question of whether the use of AI is sufficiently transparent for the persons affected by the data processing. The requirements arising from other areas of law, such as labor law, and in the future from the AI Regulation, must also be kept in mind.

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A detailed article by the authors on the subject of "Artificial intelligence in recruiting – legally compliant use in the company" was recently published in issue 3 of the journal Kommunikation & Recht.

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