



EUROPEAN DATA
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GB/MG/mjs/D(2014) 2032 C 2014-0496
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Subject: Prior checking notification concerning "Processing of leave and flexitime"

Dear Mr Mifsud,

On 30 April 2014, the European Data Protection Supervisor (EDPS) received from the European Banking Authority (EBA) the notification for prior checking concerning "Processing of leave and flexitime" (case 2014-0496).

The notification, accompanied by a "Specific Privacy Notice - Leave and Flexitime", contains the declaration that processing of personal data in the context of leave and flexitime by EBA is conducted in compliance with the EDPS guidelines concerning the processing of personal data in the area of leave and flexitime¹.

The organizational part of EBA entrusted with the processing of personal data is the "Operations Department/Human Resources staff in charge of administration of flexitime"; the concerned data subjects are temporary agents, contractual agents, seconded national experts working at EBA; and the purpose of the processing is "to monitor and measure the presence/absence of staff more effectively".

¹ Guidelines concerning the processing of personal data in the area of leave and flexitime adopted on 20 December 2012 (EDPS 2012-0158), available at:
https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/12-12-20_Guidelines_Leave_Flexitime_EN.pdf

Legal aspects

1. Prior checking

EBA states that the need for the prior checking notification under Article 27 of Regulation (EC) No 45/2001² (the Regulation) in this case is triggered by the intended use of a specific system (referred to at section 2 of this opinion) for the monitoring of the leave and absence of the staff (clock in/clock out). If such monitoring system had not been envisaged, "EBA flexitime system would in principle not be subject to prior checking" due to the fact that it does not explicitly include the evaluation of staff (conduct, efficiency) and that the data processed shall not be used in the staff appraisal procedure.

The EDPS recalls that the use of a certain technology as such is not, in principle, a reason to subject processing operations to prior checking pursuant to Article 27 of the Regulation. The EDPS does not prior check a data processing technology (a tool) as such but procedures implementing specified related purposes.

Hence, the EDPS concludes that the processing operations do not fall under the cases specifically laid down under the Regulation and therefore the data processing in question is **not subject to prior-checking**.

Without prejudice to the above considerations, the EDPS makes in this opinion a first assessment of compliance with the Regulation of the notified processing operations.

2. Processing of personal data: the Flexitime monitoring system (FMS)

As indicated in the notification, the Flexitime monitoring system (FMS) consists of "*a technology similar to fingerprints reader for the purpose of measurement of flexitime (clock-in, clock-out). The technology shall ensure that the fingerprints of the data subjects are neither read nor stored (...)*". (...) *the reader technology measures the change in electrical conductivity at a number of places across the reader surface and translates these readings into a unique 125 digit number. It is this unique number alone that is stored in the database for use when the data subject places his/her finger on the reader. (...) it shall not be possible to 'reverse engineer' the number into any form of finger pattern or fingerprint.*"

As first basic - and general - remark in view of the possible impact on data protection, the EDPS points out to the special sensitivity of (in this case, EBA staff members') biometric data³.

² Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, published in the Official Journal of the European Union, 12.01.2001, L 8/1, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:008:0001:0022:en:PDF>

³ Biometric data are peculiar in nature, being univocally linked to the individual, whose body is made 'readable'. See, in this regard, the Opinion of the WP29 of 27.04.2012, WP193 on developments in biometric technologies, available at: http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2012/wp193_en.pdf

3. Lawfulness of processing

The lawfulness of the processing as regards the FMS must be considered in the light of Article 5(a) of the Regulation which reads: “personal data may be processed only if processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority vested in the Community institutions or body or in a third party to whom the data are disclosed”. In this regard, Recital 27 of the Regulation also states that “Processing of personal data for the performance of tasks carried out in the public interest by the Community institutions and bodies includes the processing of personal data necessary for the management and functioning of those institutions and bodies”.

Based on its practice on supervision (where biometric-based systems have been accepted only in a limited number of cases, referring to the scenario – different than the one for which you consulted us – of access control for *security* purpose), the EDPS warns that the use of fingerprints-based systems for the monitoring of working time of staff members is **not** considered as **necessary**, and therefore, **not legitimate** pursuant to the aforesaid Article 5.

The requirement of the processing of personal data being necessary in relation to the purpose⁴ obliges the controller to **assess whether the purpose of the processing could be achieved with less intrusive means**.

Indeed, **instead of opting** for a system using biometric data, other systems should have been considered by EBA in this context, such as: signing in, using attendance sheets, or using clocking in systems via magnetic badges.

4. Data quality

Article 4(1)(c) of the Regulation states that personal data must be “adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed.”

The required data and their processing must be **proportionate** in the light of the purpose of the system (in this case, registering working time presence).

Since the requirement of the necessity of the processing of personal data for the aforesaid purpose is not fulfilled, the requirement of proportionality - laid down under the Article 4 of the Regulation - is also not met in this case.

⁴ See, in this regard, on the use of biometric data, the Opinion of the WP29 of 27.04.2012, WP193: “*In analysing the proportionality of a proposed biometric system a prior consideration is whether the system is **necessary** to meet the identified need, i.e. is essential for satisfying that need rather than being the most convenient or cost effective. A second factor to take into consideration is whether the system is likely to be effective in meeting that need by having regard to the specific characteristics of the biometric technology planned to be used. A third aspect to weigh is whether the resulting loss of privacy is proportional to any anticipated benefit. If the benefit is relatively minor, such as an increase in convenience or a slight cost saving, then the loss of privacy is not appropriate. The fourth aspect in assessing the adequacy of a biometric system is to consider whether a less privacy intrusive means could achieve the desired end.*”

Conclusion

In the light of the above, the EDPS considers that the use of a biometric-based system for working time control (in this case, FMS) would **not** be compliant with the Regulation.

Yours sincerely,

Giovanni BUTTARELLI

A handwritten signature in blue ink, appearing to read "G. Buttarelli".

Cc: Mr Adam FARKAS, Executive Director, EBA