



JOAQUIN BAYO DELGADO
ASSISTANT SUPERVISOR

M. Philippe RENAUDIÈRE
M. Louis GEORGES
European Commission
BRU BERL 08/180
B - 1049 BRUXELLES

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Dear Mr Renaudière,

I am contacting you about the notification for prior checking regarding "New flexitime AGRI" which you sent to the European Data Protection Supervisor (hereafter "*the EDPS*") on 12 November 2007 pursuant to Article 27(2)(b) of Regulation (EC) No 45/2001 (hereafter: "*the Regulation*").

The notification refers extensively to the notification for prior checking regarding SYSPER 2 - Time Management module, which was analysed by the EDPS¹. The notification under consideration introduces changes regarding the purposes of the processing as well as the data recipients, together with the notion of "trusted persons".

The EDPS analysis of the data processing operation connected with DG AGRI flexitime is based mainly on the "SYSPER 2 - Time Management module" prior checking. The purpose of the Time Management module (TIM) is to enable all the time-related aspects of the work environment of the holder of a post to be managed in a legal, uniform and centralised way. Flexitime is only one of the elements (the others are management of dossiers and applications relating to part-time work and parental and family leave; management of entitlements to annual and special leave and absences and production of the corresponding statistics).

The TIM, which includes flexitime, underwent prior checking because, structurally, the system as a whole processes data relating to health in certain TIM modules (27(2)(a)). The system also has evaluation elements in that it evaluates presence at the workplace and leave (27(2)(b)).

These criteria apply to the TIM system as a whole, analysed as a single unit without taking account of the fact that some modules could on their own meet the criteria mentioned.

¹ Opinion on the notification for prior checking received from the Data Protection Officer of the Commission regarding "SYSPER 2: Time Management module", 29 March 2007 (Case 2007-63).

The specific flexitime module included in the TIM does not as such meet these criteria. It is therefore not subject to prior checking.

Nevertheless, with the prior checking of the TIM, the EDPS had indicated he should be notified of any substantial change. This was the case as regards the notification for prior checking of DG INFSO's flexitime and it is also the case here.

As regards DG INFSO's flexitime, the addition of the chip was regarded as justifying prior checking pursuant to Article 27(1) on account of the particular additional risks presented by the system for the persons concerned (use of badges with integrated RFID technology).

In the case studied, the changes are in fact substantial and pose important questions. On account of the links between the TIM and DG AGRI's flexitime, the analysis of the changes made by DG AGRI needs to be added to what was said in the prior checking of the TIM.

Purpose of flexitime

The EDPS thinks it important to recall the primary purpose of the flexitime system, as laid down in the "Guide to Flexitime" (hereafter "*the Guide*") and which was analysed in the opinion on the prior checking for the SYSPER 2 Time Management module.

The Guide lays down that as one of the important aspects of its administrative reform is to make its working methods more flexible, the Commission has decided to encourage flexitime in its services by allowing its entire staff to benefit from the possibility.

The Commission regards flexitime as a particularly suitable instrument for reconciling the demands of private life and work. In applying the flexitime system, the Commission intends to increase the motivation of its staff by making them more responsible for organising their working time (point 1.1 of the Guide).

The purpose of the TIM is to process all data on working conditions (absences and leave, requests to work part-time, parental and family leave, flexitime) that are necessary for personnel management and the functioning of the Commission's services.

The flexitime system, which is an integral part of the TIM, is designed to let staff choose when they arrive at work, when they take their lunch breaks and when they leave the office, within a working week of 37½ hours. This flexibility is limited to the "flex periods" and must take into account the interests of the service. Compensation in the form of days or half-days of leave is granted subject to certain conditions.

As regards DG AGRI's flexitime, the purposes of processing are also to be found in the prior checking for the TIM. In addition to the purposes of the TIM, DG AGRI regards the possible transparency (= read-access for the entire unit) of flexitime within the administrative units as an instrument for complying with internal checking standard No 19 on the continuity of operations, since it enables processing recipients to establish quickly whether colleagues are present.

The purpose is to establish quickly whether a staff member is absent, with a view to replacing him by a colleague. To this end DG AGRI considers that the concept of "trusted persons" should be interpreted broadly, so that the administrative duties of the head of unit can be carried out.

In the opinion of the EDPS, the intended purpose of the processing notified by DG AGRI does not serve the purpose of flexitime as it emerges from the TIM analysis. The EDPS considers that the processing envisaged changes the purpose of the initial processing (Article 6 of Regulation No 45/2001) and it lacks a legal basis to justify the introduction of such a system. In fact, the legal basis underlying DG AGRI's data processing is Article 55 of the Staff Regulations and the "Guide

to Flexitime", SEC(2006) 1796 (Commission Decision of 19 July 2006 and final adoption on 19 December 2006). The purpose put forward by DG AGRI is absent from these legal instruments.

Necessity test

Under Article 5(a) of Regulation (EC) No 45/2001, the data processing operation must be "*necessary for the performance of a task*", as referred to above. Hence the relevance to the performance of a task of the data processing carried out in the context of DG AGRI's tasks needs to be evaluated.

Changing the initial purpose of the TIM flexitime processing as provided for by DG AGRI is contrary to the principle of necessity and is therefore unacceptable.

As envisaged by the notification under review, the purpose is in fact to carry out a rapid check on staff working hours so that absent colleagues can be replaced. In the context of the TIM, however, it was pointed out that timetables may be encoded only once a week by the persons concerned, as some staff cannot enter their hours on the day itself (e.g. when they are on mission); the system therefore relies primarily on trust rather than verification. A rapid check of staff timetables cannot therefore be regarded as feasible for DG AGRI's flexitime because it would conflict with the general system of flexitime based on the TIM.

In the light of the information provided and the analysis carried out, the EDPS regards the purpose put forward as incompatible with the way in which flexitime must be used and queries the underlying purpose of the processing operation submitted to him for prior checking.

Furthermore, the EDPS considers that the means used would be disproportionate and that there is no specific need to change the envisaged purpose, since DG AGRI's desired purpose could be achieved by less intrusive and more proportionate means (for example, by means of the outlook calendars issued to all those concerned). The administration's scope for discretion, emphasised in the prior checking opinion concerning the Flexitime of DG INFSO, does not apply in this case as DG AGRI's desired processing purpose is unreasonable.

To sum up, the EDPS believes there to be other means of achieving DG AGRI's desired purpose, but also considers that the purpose put forward by DG AGRI cannot be achieved by the proposed flexitime processing.

In conclusion, the EDPS is of the opinion that the introduction of the system proposed by DG AGRI would conflict with the provisions of Regulation No 45/2001.

I should be obliged if you would inform the controller of this opinion.

Yours sincerely,

(Signed)

Joaquín BAYO DELGADO