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Dear Ms Arsène, Mr Canoto Argüelles,

I am contacting you with regard to the two notifications for prior checking related to processing for the purpose of the "introduction of flexitime - test phase" that you sent on 15 and 16 July 2009 (Case 2009-0473 for the European Economic and Social Committee (EESC) and Case 2009-0476 for the Committee of the Regions (CoR)) pursuant to Article 27(1) of Regulation (EC) No 45/2001 (hereafter: "the Regulation").

The Committees have decided to combine the notifications within the context of the test phase of the processing operation envisaged, given that this is a joint, identical project. This test phase of the general processing operation is therefore envisaged as a phase shared by the two Committees. A single controller has been chosen with this in mind.

Following analysis of the notifications relating to the "introduction of flexible working hours - test phase" (hereafter Flexitime), the European Data Protection Supervisor (EDPS) concludes that, for the reasons explained below, this processing operation should not be subject to prior checking. However, the EDPS noted that Regulation (EC) No 45/2001 is not entirely complied with and the Committees must put the changes described below into practice.

Processing operation envisaged

In the cover letter for the processing operation at the CoR, a distinction is made between the two committees. It is stated that the only difference between the Flexitime systems of the two Committees is the fact that the EESC allows individuals not to use Flexitime (i.e. there is an opt-out), whereas the CoR, for reasons of fair treatment, aims to introduce the system for all members of its staff and to exclude some services from the Flexitime system in certain situations for reasons of practicality. This difference is reflected in the Committees' draft decisions, in that the CoR draft only allows for the possibility of encoding working hours via Flexitime (point 1(5) of the draft decision relating to flexible working hours).

According to the notification relating to the test phase and the documentation attached, the envisaged flexible working hours system is set up and managed via Centurio for staff members covered by the Staff Regulations of Officials or the Conditions of Employment of Other Servants and for seconded national experts. Recording and management of working hours is done entirely through the Flexitime module, developed for this purpose within the framework of the central software used by the Committees for the management of human resources (Centurio). The input of hours is done exclusively by the person concerned or, failing that, by their immediate superior. The monthly validation or manual correction by the immediate superior of the hours thus registered, and any corrections by the managers in the "Leave and overtime" sector of the administration are also carried out using this application.

The daily timetable data handled using the Flexitime module in Centurio are processed in order to allow staff members to record and manage their working time in a way that better reconciles work and private life in full compliance with the interests of the service and the requirements of the Staff Regulations concerning working hours in general. They are not intended to be part of the process of staff appraisal.

With this in mind, staff members are required to record their daily times of arrival, lunch break and departure in the Centurio Flexitime module, either in real time by means of a technical shortcut or manually later on. They have the option to do so until the end of the working day following the day worked. Should the need arise, at the request of the person concerned, the hours worked can then be recorded or altered by the immediate superior up until the end of the fifth working day of the month following the month of the time worked. Failure to record a lunch break will result in the automatic deduction of one hour. It is the responsibility of the immediate superior to validate the presences thus recorded not later than the fifth working day of the month following the month of the time worked.

Staff not working flexitime (thus, only in the case of the EESC) are obliged to observe the standard working hours in force at the Committee and are able to record these hours once a week.

In the framework of the Flexitime module, only the data relating to daily hours of arrival and departure are processed directly. However, in order to ensure that periods of regular absence (annual leave, special leave, parental or family leave, leave on personal grounds, professional training, mission, illness, etc.), which are encoded beforehand in the other relevant Centurio modules, can be cancelled out in the context of counting the flexitime hours worked, the information relating to these absences is also automatically collected in the Centurio Flexitime module. This avoids double encoding of these data in the various modules of the Centurio application. However, the data relating to such regular absences do not therefore undergo a full processing operation (for example, to assess their validity) within the context of the management of flexible working time.

Finally, it may be noted that in order to facilitate the input of data, to ensure the transparency and reliability of data and to promote the equal treatment for all colleagues across the institution (in the context of the CoR), a computerised application allowing the recording and management of working time has been developed internally within the framework of the central software used by the Committee for the management of human resources (Centurio). In order to verify both the merits of the draft rules that have been prepared and the capabilities of the Flexitime module developed in Centurio, before the eventual generalised introduction of flexible working time at the Committee, a test phase will be organised with a representative sample of staff members. The present notification is concerned with that test phase. Should the need arise, the final introduction of flexible working time following an evaluation of the test phase, could be the subject of an additional notification.

Legal basis

The process was notified in accordance with Article 27(1) of Regulation (EC) 45/2001 (*"processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes shall be subject to prior checking by the European Data Protection Supervisor"*).

More specifically, it is indicated under the specific risks which justify prior checking that *"data relating to private life could be processed, indirectly, by the immediate superior in the context of flexitime. This would be the case, for example, when a member of their team wishes time spent at a medical examination, which could not be arranged outside working hours, to be recognised as working time in the context of flexitime (within the annual limit of 36 hours fixed by the draft rules), without of course revealing the nature of the medical examination in question."*

With regard to the information provided and the risks set out in the notification, the EDPS considers that, in the present case, the envisaged processing operation does not present sufficient risks to bring it within the scope of Article 27(1) of Regulation 45/2001.

In the context of his analyses of Flexitime systems, the EDPS has established that, apart from compliance with certain conditions, a Flexitime system is not normally subject to prior checking. However, he considers that the introduction of technologies such as radio-frequency identification techniques (RFID) represent a specific risk regarding which a flexitime processing operation should be subject to prior checking¹.

Moreover, in the present case, the EDPS has also looked at whether the processing operation falls under the specific criteria of Article 27(2). The notification specifically states that data resulting from the processing will not be used for the purposes of staff appraisal. It also states that the data relating to absences, revealing possible health-related information, are not subject to a specific processing operation in the context of Flexitime at the Committees. The EDPS concludes that the processing operation cannot be covered by Article 27(2) of Regulation (EC) No 45/2001.

All the same, if you consider that other elements exist that justify prior checking of the notified processing operation, please feel free to contact the EDPS in cases where an analysis of the flexitime system would be justified with regard to other elements.

¹ See Cases 2007-218 (Flexitime specific to DG INFSO) and 2008-697 (ETF Flexitime)

Nevertheless, the EDPS wishes to draw the controller's attention to the following points arising from the notification received.

Notification of the pilot project

In the course of his contacts with the Data Protection Officers (DPO), the EDPS took part in a joint DPO and EDPS meeting in June 2008, during which he devoted a presentation to outlining his policy on pilot projects. The EDPS considers that every new notification of the processing of a pilot project in the context of prior checking should be made at the same time as the notification of the main processing operation and should contain information relating to aspects of both the main processing operation and the pilot project. In this context, the controller should be clearly specified. In reality, it is possible that the controller in the context of the pilot project is not the same as the person in charge of the main processing operation. What is more, other aspects, linked to data use, data storage and information from persons belonging to a pilot project focus group, must be taken into account. The EDPS finds that this procedure has not been entirely followed in the current cases by directly submitting the pilot project separately from the main processing operation.

While pleased that a joint notification has been made in the current case, the EDPS also observes that the notifications of the two Committees are too similar and do not sufficiently take into account the specific nature of each Committee. For example, the reference to the legal basis for the processing operation at the Committee of the Regions is incorrect, being based on the decision of the Economic and Social Committee. Consequently, the controller should ensure that the notifications are updated in the DPO registers.

Categories of data subjects concerned

The EDPS has analysed the draft specific privacy statements relating to the flexitime test phase and would like the duration of the test phase to be specified within them. Also, the notification makes clear reference to the selection of units participating in the test phase in each of the Committees. The EDPS wishes to underline that, once this selection has been made, the members of these units need to be informed of their participation in the test phase and of the consequences of the processing operations carried out. As indicated in the notification, this information should be provided in the amended specific privacy statement, as well as the intranet page concerning flexitime.

Categories of data

The notification provides that within the Flexitime module only the data relating to daily hours of arrival and departure are processed directly. However, in order to ensure that periods of regular absence (annual leave, special leave, parental or family leave, leave on personal grounds, professional training, mission, illness, etc.), which are encoded beforehand in the other relevant Centurio modules, can be cancelled out in the context of counting the flexitime hours worked, the information relating to these absences is also automatically collected in the Centurio Flexitime module. This avoids double encoding of these data in the various modules of the Centurio application. However, the data relating to such regular absences do not therefore undergo a full processing operation (for example, to assess their validity) within the context of the management of flexible working time.

In accordance with Article 4(1)(c) of the Regulation, personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed. From the point of view of this principle, the EDPS considers that the Committees

should reassess the necessity of keeping an exhaustive list of periods of regular absence within the Centurio Flexitime module. In fact, as the data relating to these absences are not and do not need to be subject to a full processing operation in the Flexitime module, it would be sufficient to limit use to more general categories such as: leave/training/mission/illness in the context of flexible working hours. For example, it is not necessary for the Flexitime module to show data that relate to the different types of leave concerned.

Data recipients

The notification provides for three categories of recipients of the data recorded in the Centurio Flexitime module. As well as the staff member concerned, the immediate superior and the managers of the "Leave and overtime" sector of the administration will also have access to the module. It is also planned that the data processing in the context of the flexitime test phase will be done entirely through the relevant module developed in the framework of the central computer software used at the Committees for the management of human resources (Centurio).

Access rights to the Centurio Flexitime module are accorded on the basis of the role and responsibility of the respective players and the needs of the processing operation (and therefore according to the principle "need to know"/"need to do"). The kinds of rights that are allowed (consultation, entry and validation) are considered as well as the number of rights that are granted (staff members only have access to the data that relate to them; the immediate superior only has access to data relating to members of their team and only the managers of the "Leave and overtime" sector of the administration have access to data relating to all staff members taking part in the flexible test phase). Access is protected by the means of an individual password.

In order to maintain the integrity of the data, the EDPS considers that a history-list system should be introduced showing the accesses and changes made to the Flexitime module. The EDPS also considers that staff members' requests to the immediate superior for the correction of hours worked should be the subject of a specific procedure in order to ensure that the right to rectify has been exercised.

Storage of data

The notification provides for the data concerning flexible working hours to be stored in the Flexitime module during the current calendar year and the year that follows. They will be automatically deleted at the end of the calendar year following that in which the hours were worked. This means that a storage period of two years can be applied to Flexitime data. Under Article 4(1)(e) of Regulation No 45/2001, personal data must be "kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed".

The EDPS regards the data storage period as excessive in view of the purpose of the processing operation. He would draw attention to the rule on data storage that was described in the context of various cases relating to flexitime². With regard to the storage of data, it should be underlined that data relating to flexitime must be stored for the current calendar year and deleted once the process of transferring unused leave to the following year has been completed, and no later than the end of March of the following year.

² Cases 2007-063 Sysper 2: Commission Time Management module, 2007-218 Flexitime DG INFSO (EDPS website).

The EDPS wishes to be informed by the Committees' Data Protection Officers of the implementation of these recommendations within three months of the adoption of this letter.

Yours sincerely,

[Signed]

Giovanni BUTTARELLI