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Fundamental Rights (FRA)
Schwarzenbergplatz 11
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Dear Mr Fikatas,

I am writing with regard to the prior check notification concerning the "Flexitime" processing operations at the European Fundamental Right Agency (FRA) which you notified to the EDPS on 26 January 2012. The European Data Protection Supervisor (EDPS) requested further information on 14 February 2012, which was received on 15 February 2012.

After an examination of the data processing operations as described in the notification and further information received from the Data Protection Officer (DPO), for the reason described below, the EDPS considers that the data processing that occurs in the context of the flexitime at FRA is **not subject to prior checking** under Article 27 of the Regulation (EC) No 45/20011.

FRA makes use of an information management system called Matrix. This system is composed of several modules, one of them being an Activity Based Budgeting (ABB) module. The processing of flexitime mainly relates to the personal related data processed within this ABB module.

Regarding flexitime, the ABB module is used to allow the calculation (as a time recording system) of available hours that can be used as flexitime within a period as defined by the Flexitime policy of FRA. It generates a report that aggregates the time worked each month and states whether a person is eligible for flexitime and how many hours can be used for flexitime.

Although not covered by this notification, which focuses on the flexitime aspects, ABB is also used by the staff members to report the time they spend on project and non-project related tasks. The ABB staff reports are also used to report on the time spent by each staff member

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throughout a calendar year on specific areas and check whether the actual allocation deviates with the planned time included in their Career Development Plan (CDP). This information is included in the CDP form where, based on previous year's time allocation, the expected time to be spent per activity is adjusted. As stated by the DPO, this information is reported in the Career Development Review (CDR).

The DPO of FRA stated that Flexitime information is not used to evaluate staff performance. Staff performance is evaluated based on the accomplishment of the objectives set. The EDPS received samples of CDP/CDR reports and found that they did not contain elements linked to flexitime data¹.

Article 27.1 of the Regulation (EC) No 45/2001 subjects to prior checking by the EDPS "*processing operations likely to present specific risks to the rights and freedoms of data subject by virtue of their nature, their scope or their purposes*". Article 27.2 of the Regulation contains a list of processing operations that are likely to present such risks. Of the various criteria listed by Article 27.2 the criteria that *a priori* could be met by the processing operations is Article 27.2 (b), which subjects to prior checking those processing operations which intend to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct.

In the context of the Flexitime, the criteria for prior checking would be met if the data processing *intended* to evaluate personal aspects relating to the data subject. For example, if the data processing intended to evaluate staff efficiency, competence, ability to work etc. However, as stated in the notification, this is not the case concerning the processing at stake.

As regards the other criteria listed as grounds for prior checking under Article 27, the EDPS did not see evidence that either "specific risks" (Article 27.1), "data relating to health" (Article 27.2.a), "processing operations allowing linkages not provided for pursuant to national or Community legislation between data processed for different purposes" (Article 27.2.c) or "processing operations for the purpose of excluding individuals from a right, benefit or contract" could qualify the processing operation as subject to prior checking by the EDPS.

If the purposes of the processing would change and FRA would decide to use the information for the purposes of evaluating individuals or the other criteria listed under Article 27, then, the processing would likely fall under Article 27 of the Regulation (EC) No 45/2001 and would need to be prior checked by the EDPS.

Without prejudice to the above considerations, the EDPS would nevertheless like to make some recommendations on issues which have come up in the information provided in the notification and by the controller during the procedure.

Purpose Limitation

As a matter of fact, the hierarchy may have access to individual data of their staff. In this case, even if the flexitime part of the ABB module is not designed for this purpose, managers may be tempted to use the data also for performance evaluation or other purposes that may individually affect data subjects, such as allocation of tasks, contract renewals or internal mobility. Considering the inadvertent spill-over and the risks of using data for incompatible purposes, compliance with the principle of purpose limitation will be a difficult task, to which the attention of all managers must be specifically drawn to.

¹ For a complete analysis of evaluation at FRA, see joint opinion in cases 2011-0938/954/1076/1077.

For example, it would be in conformance to the purpose of the processing, for a manager whose team is struggling with the accomplishment of a project, to request team members to explain why they failed to deliver results despite putting down a lot of time on that particular project. As a result, it may turn out that certain team members were responsible for the extra time, as they lacked the required specific expertise, and had to spend a disproportionate amount of time on background reading, which they assigned to the project. In this case, a manager may decide, for example, that he or she will adjust planning estimates, re-distribute tasks, or arrange for training of the struggling team members.

An example of a different, incompatible use of the data would be for the manager to make an assumption or a judgment on the efficiency or diligence of a particular team member compared to another, based on how much time each one put down for the project, and then use those results in connection with the annual appraisals.

FRA should therefore clearly state that the flexitime part of the ABB module cannot be used for purposes of performance appraisal, promotion, or assessing contract renewal, and that the use of the database should not lead to dismissal, exclusion from contract renewals, promotion, or training opportunities, exclusion when tasks are allocated or team leaders and managers are selected, or to other similar prejudices to staff members. This does not mean that staff members who are unable to account for a productive use of their time cannot be dismissed or excluded when tasks are distributed. However, these decisions must be made based on information other than the flexitime data in the ABB module.

Information

In order to ensure transparency and fairness of the processing, the information listed in Articles 11 and/or 12 of Regulation 45/2001 should be provided to data subjects. In this respect, the EDPS failed to receive any privacy statement. The information referred to in the notification does not refer to the information to data subjects.

The EDPS invites FRA to adopt such information notice for the staff members and demonstrate it has been provided to the staff. This information should refer to the:

- identity of the controller;
- purpose of the processing (underlining that it is not meant for evaluation purposes);
- data categories;
- whether replies to the questions are obligatory or voluntary, as well as possible consequences of failure to reply;
- possible data recipients;
- existence of rights of access, rectification and recourse to the EDPS;
- legal basis of the processing;
- applicable data retention periods.

I would appreciate if you could share this position with the relevant representative of the controller and inform us of the follow up measures taken concerning the information to be supplied to data subjects.

We remain at your disposal should you have any questions concerning this matter.

(signed)

Giovanni BUTTARELLI