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Uncertainties regarding the processing of biometric data persist; experts' opinions on their processing differ

In recent months, the Office for Personal Data Protection (the "Office") has attracted the attention of both the professional and non-professional public with its decisions or statements on the processing of biometric data, specifically in relation to dynamic biometric signature and attendance systems. As there are a number of open issues with regard to the new data protection legislation, the opinions and approaches of experts regarding the conditions under which data may be processed differ as well. What does the professional debate currently deal with?

The Office commented on the issue of biometric data processing in Opinion No. 2/2014 (dealing with dynamic biometric signature from the perspective of the original Data Protection Act) and Opinion No. 1/2017 (dealing with biometric identification and authentication of employees, which is an update of earlier Opinion No. 3/2009 on this topic). In relation to this opinion, in spring 2018, the Office issued a statement that with the effectiveness of the General Data Protection Regulation (the "GDPR") the legal view of personal data processing technologies will have to be changed.

A quarter million penalty for breach of the data minimisation principle in concluding credit agreements

Nearly a year after the above-mentioned opinion had been updated, the Office issued a relatively controversial decision imposing a fine of CZK 250,000 on a branch of a foreign bank for breaching the data minimisation principle in concluding credit agreements with its clients using a dynamic biometric signature which was assessed by the Office as a collection of sensitive data. In this case, the Office concluded that the scanning of biometric signatures, despite the consent given by the client, is superfluous and for the purposes declared by the bank it is sufficient to record the image of the client's signature.

The processing of sensitive data, referred to in the GDPR terminology as "special category data", is generally prohibited, unless specific exceptions to this rule may be applied, which can be understood as specific legal titles whose application is generally more difficult than in the case of one of the legal titles pursuant to Art. 6 of the GDPR, on the basis of which the processing of "conventional" personal data may take place.

Debate topic no. 2: the Office's comment on the proposed amendment to the Labour Code issued in June

Further debate was then triggered by the Office's comment on the proposed amendment to the Labour Code from the end of June of this year. While the purpose of the amendment (which should also apply to the Employment Act) was to transpose the EU Directive on the assignment of workers in the framework of the provision of services, as one of the points of comment, the Office proposed to amend the Labour Code with a completely new and with the stated amendment unrelated provision in the Czech law to anchor the employer's authorisation pursuant to Art. 9 (2) (b) of the GDPR, on the basis of which biometric data of employees could be processed (for the purpose of unique identifiers - see below) for the purpose of attendance systems.
The question is whether the amendment proposed by the Office in the framework of the legislative process as a legislative rider has a chance to succeed. However, it is important that with the proposed amendment to the forthcoming amendment to the Labour Code, the Office indicated that from its legal point of view, the processing of employees' biometric data (for the purpose of their unique identifiers) has currently no legal basis within attendance systems.

Unacceptable: Consent to data processing for the purpose of an attendance system

The Office concluded that the practice of employers collecting employees' consents to the processing of personal data for the purpose of attendance systems is unacceptable. These are considered by both the European Data Protection Board and the Office a priori as unfree as a result of the employee's dependent relationship with the employer; therefore, the legal title of explicit consent pursuant to Art. 9 (2) (a) of the GDPR is not applied.

The professional public expressed an opinion that the legal title of processing also includes the determination, exercise or defence of legal claims or the exercise of jurisdiction by the court (refer to Art. 9 (2) (f) of the GDPR). However, this legal title implies the commencement of a legal dispute (in this case, for example, a dispute over the presence of an employee at the workplace), i.e. it is inherently a secondary legal title which may only apply in certain situations.
The processing must be based on a different legal title before the actual dispute arises. Moreover, if the Office acknowledged the latter legal title, the aforementioned amendment would have not been needed and it would have been sufficient to state that the practice of collecting consents is incorrect. In view of the above, the Office proposed just an amendment to the Labour Code, which, in its view, is intended to solve the "legislative gap" in the Czech law so that the processing of employees' biometric data (for the purpose of attendance systems) can be based on the aforementioned Art. 9 (2) (b) of the GDPR (in simplified terms, it is a legal title of the performance of duties and an exercise of special rights of an administrator in the field of labour law).

Academics vs. professional public: Can biometric data be treated as any conventional data?

In addition to discussing the appropriate legal title, there is another open question (which, strangely, remains largely unnoticed abroad), i.e. The purpose of the texting of Art. 9 (1) of the GDPR as it only includes, in the special category data, those biometric data that are processed for the purpose of a unique identifier of an individual. Some academics and the professional public assign great importance to this formulation and interpret it from a purely linguistic point of view. Therefore, it appears that if biometric data are processed for "mere" authentication, Art. 9 does not need to be taken into consideration at all and biometric data can be treated as any conventional data and the processing can be based on one of the legal titles of Art. 6 of the GDPR since Art. 9 (1) refers only to identification and not authentication.

Such an approach, however, rather neglects the intended purpose of protecting biometric data as such and is particularly favourable from a business perspective, but not in terms of the protection of such data themselves. Indeed, if such data are leaked, the consequences will be equally negative, whether authentication (i.e. verification of the identity of an individual by comparing data 1:1) or identification (i.e. direct recognition of an individual by comparing data 1:n) takes place.

Consequently, there are a number of open questions on the issue of biometric data processing and the above text is only a brief outline of the current professional debate. It is expected that with the technological progress the issue of biometrics and the processing of these data will be increasingly addressed. We have no other choice but to hope that the current confusing situation and inconsistent interpretation will soon be clarified by the Office (or other authority) and the Office will thus fulfil its promise to issue a completely new opinion in which it will unambiguously comment on the current debate.

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Posting employees within the EU – half-time in the implementation of the new directive

Free movement of services as the basic principle of the internal market of the European Union has brought the necessity to coordinate conditions under which companies in one member state can assign their employees to another member state to provide services.

These regulatory efforts first led to the adoption of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services ("**Directive**"). However, after more than twenty years of effectiveness of the Directive, it has proved necessary to assess whether the existing rules for posting workers within the EU are sufficient in the light of the current reality and whether the protection of the rights of the posted workers is set up adequately and free movement of services is sufficiently guaranteed.

The result of these considerations was the adoption of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services ("**New Directive**"). The New Directive, which came into force on 30 July 2018, modifies and deepens the existing rules arising from the Directive.

Two possible ways of posting workers

The first essential change compared to the current treatment is the distinction of two categories of posting of workers, namely long-term and short-term. Posting of a worker for less than 12 months is a short-term posting according to the New Directive and in justified cases this short-term posting may be extended by up to six months (in this case, the total length of the posting would be 18 months); a posting for a longer period of time represents a long-term posting. For long-term postings, all working conditions apply that are generally applicable in the member state where work is performed, with certain exceptions (e.g. the conditions for concluding an employment relation). This approach is based on the idea that the posting of an employee should be by definition temporary and it should not be a means of abusing the rules ensuring free movement of services. A rule has been set for this reason that stipulates adding up posting periods of workers if one worker is replacing another (assuming that the new worker is to perform the same work at the same location as the previous worker). Aside for monitoring the posting period of each individual employee, which is now standard, employers will have to keep record of the sum of postings of various employees if they perform the same activity at the same location.

All minimum compensation components to be guaranteed

In addition, the New Directive **expands and deepens the scope of comparable conditions** applicable to posted employees (if these conditions are more advantageous for them) to include new salary or wage components related to the posting of an employee. Unlike the Directive, the New Directive assumes that instead of minimum wage (guaranteed

wage in the Czech context) and extra pay for overtime work, the worker will be guaranteed **all minimum components of compensation**. A specification of this rule was necessary due to the divided approach of the individual member states regarding the legislative determination of which components are included under minimum wage in the relevant state. In the case of posting to the Czech Republic, it will be necessary to take into account (in addition to extra pay for overtime work, which is already applicable now) extra pay for work at night or extra pay for work on Saturdays and Sundays. This measure will place significantly higher demands on the employer sending an employee abroad to ensure comparable conditions in the country of posting.

Pay attention to various rules in other countries

In fact, the situation may be much more complicated than it seems at first glance, because certain countries use various rules not just based on current legislation, but they also apply e.g. commitments arising from collective agreements or commitments differing by canton or constituent states on certain activities or fields. In practice, a situation may occur where the minimum components of compensation are easy to find on the official portals of state administration, but in addition to this information the employer will have to look up additional remuneration rules based on the locality or field of activity. It may be assumed that even in the case of a Czech entity receiving employees posted from abroad, the administrative demands will increase and lead to the need for closer cooperation between the posting and receiving entities, or close cooperation with professional companies specialising in the relevant matters in the individual countries.

In addition, the New Directive states that it will be necessary to take into account reimbursement for travel expenses which the employee is entitled to for travel for the purpose of or in relation to the performance of work.

It is also necessary to realise that the matter of comparable remuneration and reimbursement of travel expenses will have to be assessed not just from the perspective of the Directive but also with respect to the taxation of the individual expenses or income, both for the employee and the employer.

Implementation of the New Directive

Member states are obliged to implement the new rules for posting employees based on the New Directive within two years of the effective date. In relation to the implementation the Czech Ministry of Labour and Social Affairs has already prepared a draft bill amending two legal regulations concerning the posting of workers, namely Act No. 262/2006 Coll., Labour Code, as amended, and Act No. 435/2004 Coll., on Employment, as amended. The consultation procedure regarding this bill has recently been concluded. The draft bill projects all the new elements in the Czech legal system and based on the proposed wording, it should come into effect on the last date by which the New Directive has to be implemented, i.e. as of 30 July 2020.

Since adherence to the rules concerning posted workers is always the responsibility of the posting entity, employers should adjust or set up their company processes in advance and take into account the new rules for posting workers. In addition, some states have already implemented certain processes and non-compliance or circumvention may entail very significant sanctions that could lead even to the prohibition of the entity's activity in the relevant territory.

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