



EDPS  
EUROPEAN DATA PROTECTION SUPERVISOR

# EDPS SUPERVISORY OPINION ON THE IMPLEMENTATION OF THE EDPS RECOMMENDATIONS ON THE MEP BIOMETRIC ATTENDANCE REGISTER (Case 2022-1318)

## 1. INTRODUCTION

1. This Supervisory Opinion relates to the implementation of an automated attendance control system for the attestation of the presence of Members of the European Parliament (MEPs), which seek to digitalise the European Parliament's Central Attendance Register for MEPs by replacing the existing system based on handwritten signature with a solution based on the use of biometrics.
2. This Supervisory Opinion follows up on the Supervisory Opinion of the EDPS of 29 March 2021<sup>1</sup> 'on the use of a computerised system by the European Parliament (**Parliament**) for the digitalisation of the Plenary and central attendance registers through biometric technology' and its implementation by the Parliament.
3. The EDPS issues this Supervisory Opinion in accordance with Article 58(2)(a) of Regulation (EU) 2018/1725<sup>2</sup>, ('the Regulation').

## 2. BACKGROUND INFORMATION

4. On 17 June 2019, the EP Bureau decided to implement a computerised system for the digitalisation of the Central Attendance Registry (CAR) through biometric technology. The system seeks to **digitalise the** existing, paper-based **Parliament's Central Attendance Register** (CAR) for MEPs by using a solution based on the use of biometrics. The system would attest MEPs' attendance under Article 12 of the Implementing Measures of the MEPs' Statute ('**IMMS**'<sup>3</sup>) and would facilitate the payment of the corresponding daily allowances under Article 24 of the IMMS.

<sup>1</sup> [https://edps.europa.eu/system/files/2021-03/21-03-29\\_edps\\_opinion\\_ep\\_computerised\\_system\\_biometrics\\_en.pdf](https://edps.europa.eu/system/files/2021-03/21-03-29_edps_opinion_ep_computerised_system_biometrics_en.pdf)

<sup>2</sup> Regulation (EU) 2018/1725 of the European Parliament and the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ, L 295, 21.11.2018, pp. 39-98.

<sup>3</sup> Implementing Measures for the statute of Members of the European Parliament, Bureau Decision of 19 May and 9 July 2008, OJ, C 159, p. 1 (consolidated version: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02009D0713\(01\)-20220101&qid=1671201317801&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02009D0713(01)-20220101&qid=1671201317801&from=EN), OJ, C 159, p. 1.

5. Under this new system, MEPs would scan their fingerprint onto the fingerprint reader, which would record their presence in the system by means of a timestamp. This system may replace the current attendance control system, which involves handwritten signatures (i.e. it will not digitalize the signing requirement) and will not rely on any other information item such as a password.<sup>4</sup> The envisaged process starts by the fingerprint enrolment of MEP's in order to generate encrypted biometric templates

Each time an MEP places his/her finger on a Local Fingerprint Reader, that reader scans the fingerprint to extract the necessary elements in order to create a new biometric template to be compared with the biometric templates already stored-

If the system finds a matching template, the reader displays a green light, records the time stamp, and the system can send an email notification to the MEP if the system is programmed to do so; otherwise, the reader displays a red light and a human-review procedure is triggered.

6. In his **Supervisory Opinion of 29 March 2021** (the 'EDPS Opinion'), the EDPS put forward **seven recommendations** to the Parliament to ensure compliance of the intended attendance verification system with the applicable data protection rules, as follows:

- i. rely on Article 5(1)(a) (and not on Article 5(1)(b)) of the Regulation as a **ground for lawfulness**, provided that the processing is necessary for the performance of a task in the public interest and its basis is laid down on Union law. Additionally, the EDPS recommended the Parliament to amend its internal rules, in order to be able to rely on them as **legal basis** for the processing of biometric information as the primary means for attesting MEPs attendance.
- ii. clarify the exception the Parliament would rely on for its processing of **special categories of personal data** under Article 10 of the Regulation, such as Article 10(2)(g); provide a more detailed substantiation of why this exception would be applicable.
- iii. set up an alternative attendance attestation procedure to ensure that the MEPs whose fingerprints are not recognised can still attest their attendance.
- iv. document the feasibility of **other available alternative options** that would not require the use of sensitive data, compare all options and document its conclusions.
- v. to the extent that the envisaged processing does not involved any meaningful human intervention, complement its **internal rules** on the use of biometrics to attest Members' attendance, by adding **suitable measures** to safeguard the data subject's rights and freedoms and legitimate interests (Article 24(2)(b) of the Regulation).
- vi. further look into whether it is necessary for the proposed system to be established with all additional biometric personal data<sup>5</sup>, taking into account the population size that will be enrolled; If the system could be adequately established with less additional

<sup>4</sup> Nevertheless, the European Parliament foresees to keep the paper signature as a fall back procedure; page 50 of the DPIA (Annex 4)

<sup>5</sup> Such as information on pores and ridge frequency, due to the contractor's proprietary algorithm and template format.

information, engage its contractor in order to effectively **minimise** the amount of personal data used.

- vii. update the data protection notice on attendance registration and ensure that MEP's are **specifically informed** about the new system and all its modalities before starting the processing. If the processing involves automated decision-making, include meaningful information on the logic involved as well as the significance and the envisaged consequences of the processing.
7. By letter of 19 July 2021, the Parliament service in charge of the project<sup>6</sup> explained how they would implement the EDPS recommendations and provided several supporting documents.
  8. Following a meeting at staff level on 11 November 2021 and further requests from the EDPS, the Parliament provided additional documents and pieces of information on 16 November 2021, 6 April and 24 May 2022.

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<sup>6</sup> Directorate for Members' Financial and Social Entitlements, Members' Travel and Subsistence Expenses Unit.

### 3. LEGAL AND TECHNICAL ASSESSMENT OF THE IMPLEMENTATION OF THE EDPS RECOMMENDATIONS

#### 3.1. Recommendation 1: Ground for lawfulness under Article 5(1)(a)

*The EDPS considers that **Article 5(1)(a) of the Regulation** should be relied on **as a ground for lawfulness** of this project provided that the processing is necessary and proportionate for the performance of a task in the public interest and its basis is laid down on Union law.*

*As to the latter, the EDPS believes that the current wording of the European Parliament's internal rules is insufficiently clear as a **legal basis** for the processing of biometric information as the primary means for attesting attendance and recommends that the European Parliament amend these rules accordingly.*

*(...)*

9. Following the EDPS Opinion, the Parliament changed the ground for lawfulness for the data processing operation under analysis. The Parliament now relies on Article 5(1)(a) (and not on Article 5(1)(b)) of the Regulation as a ground for lawfulness of the processing operation.
10. However, in spite of having updated Chapter 3 of the Data Protection Impact Assessment (DPIA)<sup>8</sup> by including the Bureau minutes of 17 June 2019 as legal basis for the processing<sup>9</sup>, the Parliament should **further update other chapters of the DPIA on the ground for lawfulness** (i.e. Article 5(1)a) instead of Article 5(1)(b) of the Regulation).<sup>10</sup> If not yet done, the data protection notice should also be updated accordingly.
11. The Parliament invokes as legal basis for the MEPs biometric register attendance Rule 156 of Parliament's Rules of Procedure, Article 20 of the Members' Statute, Articles 12(1) and 24 of

<sup>7</sup> The last paragraph relates to automated-decision making under Article 24 and refers to recommendation 5.

<sup>8</sup> The Parliament provided an updated DPIA with its first follow-up correspondence in July 2021.

<sup>9</sup> *Page 7 of the DPIA*: "The legal basis for this processing are Rule 156 of Parliament's Rules of Procedure, Article 20 of the Members' Statute, Articles 12(1) and 24 of the IMMS, and the Decision of the Bureau of the European Parliament of 17 June 2019, which require Parliament to attest Members' presence in Parliament and, based on this presence, inter alia also to pay their respective subsistence allowances (Article 24). Processing of the personal data collected for these purposes is thus lawful for the purpose of Article 5 (a) of Regulation 2018/1725, as it is considered necessary and proportionate for the performance of a task carried out in the public interest and in the exercise of official authority vested in the EP." *See also page 10 of the DPIA*: "The processing is necessary for the performance of a task carried out in the exercise of official authority vested in the Union Institution pursuant to Art. 5 (a) of Regulation (EU) 2018/1725." *The EDPS notes that the references to Article 5 of the Regulation appear to contain a typo ("Article 5(a)" instead of "Article 5(1)(a)").*

<sup>10</sup> *See Chapter 7.3 (page 57) and data protection notice (Annex 4), which still refers to Article 5(1)(b)*: "as for the right to erase their data, set out in Article 19 of Regulation 2018/1725, and the right to object to the processing of their data, set out in Article 20 thereof, these rights will not apply to data subjects, pursuant to the fact that **processing is done in compliance with a legal obligation to which the controller is subject** (as allowed for in point b) of Article 19(3) thereof)" and "The right to erase their data, as set out in Article 19 of Regulation (EU) 2018/1725, and the right to object to the processing of their data, as set out in Article 20 thereof, are not applicable to data subjects, pursuant to the fact that **processing is done in compliance with a legal obligation to which the controller is subject**" (*emphasis added*), respectively.

the IMMS and the Bureau minutes of 17 June 2021, the latter being referred to as a decision of the Bureau.

12. These rules read as follows:

- Article 156 of the Rules of Procedure<sup>11</sup> (adopted by virtue of Article 223(2) TFEU, former Article 190(5) of the Treaty establishing the European Community)<sup>12</sup>

*‘1. An **attendance register** shall be open for signature by Members at each sitting. 2. The names of the Members recorded as being present in the attendance register shall be indicated in the minutes of each sitting as "present". The names of the Members excused by the President shall be indicated in the minutes of each sitting as "excused".’*<sup>13</sup>

- Article 20 of the MEPs Statute<sup>14</sup> (also adopted under Article 223(2) TFEU):

*‘1. **Members shall be entitled to reimbursement of expenses** incurred in the exercise of their mandate.  
2. Parliament shall reimburse the actual expenses incurred by Members in travelling to and from the places of work and in connection with other duty travel.  
3. Others expenses incurred by Members in the exercise of their mandate may be reimbursed by means of a flat-rate sum.’*<sup>15</sup>  
*4. **Parliament shall lay down the conditions for the exercise of this right.**’*<sup>16</sup>

- IMMS (adopted by the Bureau)<sup>17</sup>:

*‘Article 12*

*Attestation of attendance*

*1. A Member’s attendance shall be attested by his or her signature in the record of attendance available in the Chamber or meeting room or by his or her signature in the central attendance register entered during its opening hours as laid down by the Bureau. **An electronic attestation of a Member’s attendance may be used instead of his or her signature.**’*<sup>18</sup>

*‘Article 24*

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<sup>11</sup> Rules of Procedure of the European Parliament, 9th parliamentary term, July 2019, OJ, L302, 22.11.2019, p. 1 ([https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019Q1122\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019Q1122(01)&from=EN))

<sup>12</sup> Art. 223 TFEU (ex Art. 190(5)) **‘2. The European Parliament**, acting by means of regulations on its own initiative in accordance with a special legislative procedure after seeking an opinion from the Commission and with the consent of the Council, **shall lay down the regulations and general conditions governing the performance of the duties of its Members.** (...)’ (we underline).

<sup>13</sup> We underline.

<sup>14</sup> Decision 2055/684/EC, Euratom of the European Parliament of 28 September 2005 adopting the Statute for Members of the European Parliament, OJ, L 262/1 (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32005Q0684&from=EN>)

<sup>15</sup> 7.10.2005 EN Official Journal of the European Union L 262/7

<sup>16</sup> We underline.

<sup>17</sup> Implementing Measures for the statute of Members of the European Parliament, Bureau Decision of 19 May and 9 July 2008, OJ, C 159, p. 1 (consolidated version: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02009D0713\(01\)-20220101&qid=1671201317801&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02009D0713(01)-20220101&qid=1671201317801&from=EN), OJ, C 159, p. 1.

<sup>18</sup> We underline.

### *Subsistence allowance*

1. Members shall be entitled to a **subsistence allowance for each day's attendance**:

(a) in a place of work or at a meeting venue, **duly attested in accordance with Article 12**, involving travel covered by the provisions governing reimbursement of ordinary travel expenses; (...)'.<sup>19</sup>

- Bureau Minutes of 17 June 2019<sup>20</sup>

“The Bureau... - decided to proceed with a computerised system for the **digitalisation of the central attendance registry through biometric technology**; - authorised the Secretary - General to launch the procedures for the purchasing and implementation of a **digital system for the attestation of Members' attendance based on biometric technology**, which shall replace the system based on manual signatures by the end of 2019.”<sup>21</sup>

13. It is necessary to ascertain whether these provisions are capable of constituting, either alone or in combination, ‘Union law’ in the meaning of Article 5(1)(a) of the Regulation.
14. Recital 23 of the Regulation provides that ‘*The Union law referred to in this Regulation should be **clear and precise** and its application should be **foreseeable** to persons subject to it, in accordance with the requirements set out in the Charter and the European Convention for the protection of Human Rights and Fundamental Freedoms*’ [we underline].<sup>22</sup>
15. According to case law, any legislation which entails interference with the individual rights to privacy and personal data protection must be ‘**clear and precise rules governing the scope and application of the measure in question**’.<sup>23</sup> The law must ‘*meet quality requirements: it must be accessible to the person concerned and foreseeable as to its effects*’ to guarantee that the ‘law’ permitting for an interference with fundamental rights is compatible with the **rule of law**<sup>24</sup> and that the individuals are protected from arbitrariness of public authorities.<sup>25</sup>
16. In the first place, the question arises whether Article 12 IMMS can be independently relied on as a legal basis under Article 5(1)(a) of the Regulation. Article 156 of the Rules of Procedure, Article 20 of the Statute and Article 24 IMMS constitute the legal basis for maintaining an attendance register in order to establish MEPs entitlement to some expense reimbursement. However, these rules are silent as to the modalities of the attendance

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<sup>19</sup> We underline.

<sup>20</sup> The decision made by the Bureau as laid down in the minutes of the meeting of 17 June 2019 was not published. The Parliament provided the text of the minutes with its reply of 19 July 2021.

<sup>21</sup> We underline.

<sup>22</sup> See also the case law of the CJEU: CJEU judgment of 22 June 2021, *Latvijas Republikas Saeima (Penalty Points)*, C-439/19, ECLI:EU:C:2021:504, para 105 (‘**Penalty Points**’), as well as case General Court judgment of 24 February 2022, *SIA*, C-175/20, ECLI:EU:C:2022:124 (‘**SIA**’), para 55.

<sup>23</sup> *Penalty Points*, *op.cit.*, para 105, as well as *SIA*, *op.cit.*, para 55.

<sup>24</sup> *Roman Zakharov v. Russia*, *op.cit.*, para 228: The Court notes from its well-established case-law that the wording “in accordance with the law” requires the impugned measure both to have some **basis in domestic law** and to be **compatible with the rule of law**, which is expressly mentioned in the Preamble to the Convention and inherent in the object and purpose of Article 8. The law must thus meet **quality requirements**: it must be accessible to the person concerned and foreseeable as to its effects (see, among many other authorities, *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V; *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 95, ECHR 2008; and *Kennedy*, cited above, § 151).

<sup>25</sup> CJEU judgment of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, para 81.

register. These modalities are to be found in Article 12 IMMS and in the Bureau minutes of 17 June 2019.

17. A legal base permitting an interference with the fundamental right to personal data protection, as in the present case, must itself **define the scope of the interference** with that right.<sup>26</sup> Hence in order to serve as a legal basis for the envisaged processing operation, the internal rules of the Parliament **should clearly and specifically indicate that biometric registration (and not only ‘electronic attestation’) are to be used (and not ‘may be used’) as a rule to attest attendance.** In the present form, the EDPS maintains that Article 12 IMMS does not adequately define the scope of the interference with the fundamental rights of MEPs. Failure to specify the use of biometric technologies in **Article 12 IMMS** renders this legal base **too generic** to rely on in the present case under Article 5(2) of the Regulation.
18. In the second place, the question arises whether the Bureau minutes can be independently relied on as a legal base under Article 5(1)(a) of the Regulation. The Bureau minutes of the Ordinary meeting of 17 June 2019 (the Bureau Minutes)<sup>27</sup> indicate [we underline] that: *‘The Bureau... - decided to proceed with a computerised system for the **digitalisation of the central attendance registry through biometric technology**; - authorised the Secretary - General to launch the procedures for the purchasing and implementation of a **digital system for the attestation of Members’ attendance based on biometric technology**, which shall replace the system based on manual signatures by the end of 2019.’*
19. Whilst the Bureau minutes do not refer expressly to ‘biometric registration’, it does provide for *“the implementation of a digital system for the attestation of Members’ attendance based on biometric technology”* which *“shall replace”* the current system used. In the present form, the Bureau minutes appear to define more precisely than Article 12 IMMS the scope of the interference with the fundamental right to personal data protection of the MEPs. Nevertheless, the question arises whether these Bureau minutes can be considered as meeting the requirements of precision, clarity and foreseeability in order for them to have the attribute of the ‘**Union law**’ (Article 5(2) of the Regulation).
20. In this regard, **the EDPS considers that the Bureau minutes are not precise and clear enough to allow the concerned MEPs to ascertain the legal rules applicable to the attestation of their attendance.**<sup>28</sup> These minutes fail to indicate their legal interaction with the IMMS, which it in fact seeks *de facto* to amend or supplement without *formally* amending them though.
21. Moreover, **the Bureau minutes do not fulfil the requirement of foreseeability.** According to the information provided by the Parliament, there is no indication in the IMMS that this act could be amended or supplemented via the means of minutes. Hence, even though both the IMMS and the minutes are formally adopted by the Bureau, MEPs cannot reasonably expect that the IMMS can be amended or supplemented, in particular by

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<sup>26</sup> SIA, para 54, and CJEU judgment of 6 October 2020, Privacy International, C-623/17, ECLI:EU:C:2020:790, para 65 (**‘Privacy International’**).

<sup>27</sup> Provided by the Parliament with its reply of 19 July 2021.

<sup>28</sup> Cf. ECHR judgment of 26 April 1979, Sunday Times v. the UK, ECLI:CE:ECHR:1979:0426JUD000653874, para 49.

permitting a more serious interference with the MEPs' fundamental rights<sup>29</sup>, by an act of a lower rank not specifically previewed in the IMMS. In addition, while the IMMS were published in the Official Journal of the EU, the Bureau minutes were not, which further limits the foreseeability of the Bureau minutes for the MEPs.

22. In light of the foregoing, **neither Article 12 IMMS nor the Bureau minutes can be independently relied on** by the Parliament as a legal basis under Article 5(1)(a) of the Regulation for the processing in question.
23. As a result, the question arises whether the Parliament, as it seeks to do, may jointly rely on these two acts for the purposes of meeting the requirements of Article 5(1)(a) of the Regulation. In that context, **the Parliament should not seek to remedy the insufficiencies of Article 12 IMMS under Article 5(1)(a) of the Regulation by the means of an unforeseeable act of a lower rank**, as explained above, such as the Bureau minutes. To accept such a practice would be to erode the rights of the MEPs to be able to ascertain, to a reasonable degree, their legal situation, and in particular the planned interference with their fundamental right to personal data protection.
24. The requirement that the processing must also be **necessary and proportionate** for the performance of a task in the public interest (first paragraph of Recommendation 1) is addressed under Recommendations 2 and 4 below.
25. The legal basis to be adopted by the Parliament must be **foreseeable** and **accessible** for its addressees, as explained in the earlier part of the Opinion. In addition, that legal basis should be clear about **the purpose of the processing, categories of personal data, categories of data subjects, minimum safeguards, specification of the controller and storage periods**.
26. In view of the above, **the Parliament has failed to implement Recommendation 1** as regards the **requirement of a basis in Union law**. Consequently, the Parliament lacks sufficient legal basis for the processing of biometric data as the primary means for attesting attendance of MEPs and the EDPS deems necessary that the Parliament implement the EDPS recommendation on the matter this before starting any processing of this kind.

### 3.2. Recommendations 2 and 4 - Lawfulness, necessity and proportionality of the processing of biometric data<sup>30</sup>

27. EDPS Recommendation 2 (special categories of personal data):

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<sup>29</sup> The use of biometric technologies processing biometric data allowing for a unique identification of an individual is processing of special categories of personal data in the meaning of Article 10 of the Regulation, and hence constitutes a greater interference with the fundamental right to data protection than processing of the non-special categories.

<sup>30</sup> These two recommendations are analysed together as both of them relate to the necessity requirement under Article 52 of the Charter.



*As Article 10(2)(d) of the Regulation is not applicable to the processing operation, the European Parliament should clarify which other exception it would rely on for its processing of **special categories of personal data** under Article 10 of the Regulation, such as **Article 10(2)(g)**, and to provide a more detailed substantiation of why this exception would be applicable.*

### 3.2.1. Ground for lawfulness

28. As to the lawfulness of the processing of special categories of data, the Parliament does no longer rely on Article 10(2)(d) of the Regulation, which the EDPS Opinion considered as inappropriate. The Parliament now mentions Article 10(2)(g) of the Regulation as ground for processing biometric data. The DPIA<sup>31</sup> now explicitly refers to this provision and adds that *“Processing of biometric templates is needed in order for Members to be able to digitally attest their attendance in accordance with Article 12(1) of the IMMS and Rule 156(1) of the Rules of Procedure of the European Parliament, and to enable Parliament’s administration to pay them the legally owed daily allowances.”*<sup>32</sup>
29. **Consequently, the first part of recommendation 2 has been implemented.**

### 3.2.2. Substantial public interest

30. The EDPS Opinion<sup>33</sup> considers that **financial fraud prevention**, including the necessity for democratically elected individuals to lead by example, can be considered a substantial public interest that may justify the processing of biometric data, provided that the other requirements of Article 10(2)(g) of the Regulation are fulfilled (i.e. legal basis in Union law; necessity and proportionality, suitable safeguards).
31. The criteria of substantial public interest justifying the processing under Article 10(2)(g) of the Regulation is not elaborated in the updated DPIA<sup>34</sup>. At the request of the EDPS, the Parliament further explained the substantial public interest as follows: the project is an initiative of some MEPs (i.e. members of the Bureau).<sup>35</sup> The concern is one of finances and reputation, using technology that is less invasive. The main driver is the **promotion of ethics and of democracy** in the Parliament. MEPs are under high public scrutiny and [REDACTED]  
[REDACTED] The goal is to be able to demonstrate how MEPs use public money when participating in parliamentary activities.

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<sup>31</sup> pp. 12-13.

<sup>32</sup> DPIA p. 14.

<sup>33</sup> EDPS Opinion p. 6.

<sup>34</sup> *“the processing of biometric templates is needed “in order for Members to be able to digitally attest their attendance in accordance with Article 12(1) of the IMMS and Rule 156(1) of the Rules of Procedure of the European Parliament, and to enable Parliament’s administration to pay them the legally owed daily allowances.”* Updated DPIA, p. 14.

<sup>35</sup> See answer to question 14 of the 11 of November 2021 EP-EDPS meeting minutes, p. 8.

### 3.2.3. Basis in Union law

32. The assessment stated in section 3.1 of this Opinion regarding the Parliament not being able to rely on the Bureau's minutes as the legal basis for this processing operation is still applicable, since the minutes do not meet the requirements for Union Law under 5(2) of the Regulation as better detailed in that section.

### 3.2.4. Necessity and proportionality

33. **Necessity** implies the need for a combined, fact-based assessment of the effectiveness of the measure for the objective pursued and of whether it is less intrusive compared to other options for achieving the same goal. The main reference when assessing the necessity of measures that limit the exercise of the rights guaranteed under Article 8 of the Charter is Article 52(1) of the Charter and the case law of the Court of Justice of the EU. In addition, the criteria in Article 8(2) of the European Convention on Human Rights - and specifically the condition for a limitation to be necessary in a democratic society, as interpreted in the case-law of the European Court for Human Rights, should also be taken into account in the analysis.

34. Annex 2 to the DPIA contained an updated assessment, which compared the current attestation system against **two alternative systems**, one using the MEPs personal access badge and badge-reading devices (Solution A) and another based on one-time passwords or a similar confirmation feature that would not require the use of sensitive data (Solution C). Solution B is the current paper-based system.

35. The Parliament explained that the risks and disadvantages of the **use of the badge system** identified by the EDPS as an alternative

[REDACTED]

36

[REDACTED]

37. [REDACTED]

38. Parliament conducted a test of the badge-based solution. The test demonstrated, in view of the Parliament, that the system could not solve impersonation attempts.

39. Solution C is also subject to impersonation as one **time passwords or authentication tokens** could easily be communicated by a user to a third party to register the attendance of the MEP.

40. [REDACTED]

41. [REDACTED]

42. In this respect, the Parliament understands that the envisaged biometric system addresses better than the other alternatives the principle of sound financial management when processing the payment of the respective daily allowances to the MEP. In the Parliament's view, '... neither as it is shown under Annex 2 of the DPIA the current paper system, nor its alternatives [REDACTED] represent an effective internal control system in the sense of Article 36 of the Financial Regulation.'<sup>37</sup>

43. Without an effective control system, the provision of figures in the sense of a percentage of errors/fraud, is simply not possible. For instance, an *ex post* control on signatures cannot demonstrate if those have been forged or not, [REDACTED]

44. [REDACTED]

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[REDACTED]

<sup>37</sup> Parliament's reply to the EDPS of 19.07.2021, p.5.

[REDACTED]

45.

[REDACTED]

46. In light of the Parliament's explanations, the EDPS agrees that the current system presents a **risk of impersonation** that can be mitigated with the biometric register of attendance.

47. Thus, this personal data processing might be **necessary** for reasons of substantial public interest, provided that there is **no less intrusive, just as effective, measure**<sup>39</sup> and it is proportionate to the objective pursued. In that regard, case law recognises that the processing of biometric data, subject to strict safeguards for the protection of data protection principles, including purpose limitation, can be proportionate and necessary to combat identity and document fraud.<sup>40</sup>

48. In this regard, Annex 2 to the DPIA provides for the evaluation of three systems in relation with the registration of MEPs' attendance. The updated Annex 2 contains an introduction to the approved risk assessment methodology of the Parliament, which explains in detail *inter alia* how a differentiation is made between "*unlikely*" and "*possible*".

49.

[REDACTED]

Regarding the necessity and proportionality assessment, **the Parliament provided an assessment of less intrusive alternative available options and concluded that none of them offers the efficiency of the biometric register of attendance.**

50.

[REDACTED]

51. In view of the additional information provided, the EDPS notes the Parliament's view that the risks to impersonation are still significant with the alternative studied solutions. The EDPS takes notes that the Parliament has not identified other unexploited and less intrusive alternatives equally effective to biometric registration that might reach the purpose of combating fraud. Therefore, **the EDPS is led to conclude that the biometric register of attendance for MEPs is necessary.**

52. Based on the EDPS Guidelines regarding the **proportionality** assessment<sup>42</sup>, this assessment must be performed step by step, having in mind that necessity is a precondition for proportionality.

<sup>39</sup> EDPS necessity toolkit, step 4 of the necessity assessment: [https://edps.europa.eu/sites/default/files/publication/17-06-01\\_necessity\\_toolkit\\_final\\_en.pdf](https://edps.europa.eu/sites/default/files/publication/17-06-01_necessity_toolkit_final_en.pdf)

<sup>40</sup> CJEU judgment of 3 October 2019, *Staatssecretaris van Justitie en Veiligheid v A and Others*, C-70/18, ECLI:EU:C:2019:823 paras 53-70.

<sup>42</sup> [https://edps.europa.eu/sites/default/files/publication/19-02-25\\_proportionality\\_guidelines\\_en.pdf](https://edps.europa.eu/sites/default/files/publication/19-02-25_proportionality_guidelines_en.pdf).

53. Step 1: Assess the importance ('legitimacy') of the objective and whether and to what extent the proposed measure would meet this objective (effectiveness and efficiency). When describing the steps of the proportionality test, the DPIA stated that "... *the actual objectives of the proposed solution are as follows*:
- *registering MEPs' attendances automatically and in real time, thus removing occurrences of human-related errors (see also point ii) of section 6.1.4.1);*
  - *avoiding irregularities and fraud on the registration of those attendances and therefore on the subsequent payments;*
  - *reducing the waiting time for payment of MEPs' daily allowances (the new iTEMS system will allow for daily payments if data on attendances is available on a daily basis);*
  - *removing occurrences of incorrect payments that can happen due to human-related errors;*
  - *redeploying staff from low-value manual paper treatment activities to tasks of high-value for MEPs;*
  - *better assisting MEPs in exercising their mandates by allowing them to attest presences at multiple locations in the Parliament.*"<sup>43</sup>
54. In view of the substantial objective of public interest to combat financial fraud [REDACTED], the presence register of MEPs in the different Parliament locations with a reliable system and in real time seems legitimate, effective (e.g. removing fraud possibilities, as well as elimination of errors in relation to payments) and efficient (reduction of time for the attestation of presence, staff dealing with paper registers being deployed to tasks of higher value for the MEPs) through a biometric process operation.
55. Step 2: Assess the (scope, extent and intensity of the) interference in terms of effective impact of the measure on the fundamental rights to privacy and data protection. Regarding the interference of such processing on the fundamental rights to privacy and data protection of the data subjects (705 MEPs), and having into account the security measures envisaged, the scope (limited number of data subjects), extent (amount of information collected, for how long and special categories of data involved) and intrusiveness (no profiling and no automated decision-making) of the interference are not excessive. The interference on the right to privacy and data protection does not encompass any harmful effect associated with this processing operation.
56. Step 3: Proceed to the fair balance evaluation of the measure. As regards the fair balance evaluation of the measure, it is necessary to conduct a complete assessment of the importance/effectiveness/efficiency of the envisaged processing operation and its interference on privacy and personal data. In the case at issue, there is no information asymmetry and the conflicting interests at stake (data protection of the MEPs vs public interest of an accurate and efficient presence registration at the Parliament) are fairly balanced.

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<sup>43</sup> See section 6.1.2 of the DPIA.

57. Step 4: Analyse the conclusions on the proportionality of the proposed measure. If the conclusion is 'not proportionate', to identify and introduce safeguards which could make the measure proportionate, provided that those safeguards, **once** implemented, reduce the impact of the biometric register on the fundamental rights at stake , the deployment of a biometric system as proposed by the Parliament is proportionate.

58. To mitigate the risks identified in the DPIA, the Parliament plans to implement the following safeguards:

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

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- [Redacted]
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59. The EDPS shares the view of the Parliament that the biometric processing operation for the MEPs register attendance is necessary and proportionate, as long as the necessary safeguards are put in place.
60. The EDPS Opinion asked that the Parliament further substantiate the other conditions of Article 52 of the Charter of Fundamental Rights as further outlined in Article 10(2)(g) of the Regulation, i.e. that the use of a biometric system is **necessary** to fight financial fraud, **proportionate** to the aim pursued, **respect the essence of the right** and provide for **suitable and specific measures** to safeguard the fundamental rights and the interests of the data subjects,
61. The criteria of the proportionality of the system chosen in comparison to the aim pursued in accordance with Article 10(2)(g) of the Regulation are mentioned in the updated DPIA.<sup>52</sup> The requirements of a risk analysis, as well as the assessment of suitable and specific measures to safeguard the data subjects' interests pursuant to Article 10(2)(g) of the Regulation, are also dealt with under the DPIA.<sup>53</sup>
62. Regarding necessity and proportionality, the case law<sup>54</sup> put forward arguments justifying the appropriateness of the use of biometric data for preventing and combating identity and document fraud, provided that the safeguards and the retention period are adequate.
63. As mentioned by the Court of Justice of the European Union in the 'Penalty Points' case: *'(...)in order to determine whether public disclosure of personal data relating to penalty points, such as the disclosure at issue in the main proceedings, is necessary for the performance of a task carried out in the public interest or in the exercise of official authority, within the meaning of Article 6(1)(e) of the GDPR [equivalent of Article 5(1)(a) of the Regulation], and whether the legislation authorising such disclosure provides for appropriate safeguards for the rights and freedoms of data subjects, within the meaning of Article 10 of that regulation [equivalent of Article 11 of the Regulation], it should be ascertained in particular whether, having regard to the seriousness of the interference with the fundamental rights to respect for private life and to the protection of personal data caused by that disclosure, the latter is justified, and in particular proportionate, for the purpose of achieving the objectives pursued.'*<sup>55</sup>
64. As indicated above, in the case of MEPs of the processing of biometric data, can be *'justified by the objective of preventing and combatting identity and document fraud'*<sup>56</sup>.
65. However, the EDPS notes that while biometric templates allow for efficient identification, its use also contributes to amplify fundamental rights risks, including for the protection of

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<sup>52</sup> Updated Chapters 6 and 7 of the DPIA.

<sup>53</sup> Updated Chapter 7 of the DPIA.

<sup>54</sup> CJEU judgment of 3 October 2019, *Staatssecretaris van Justitie en Veiligheid v A and Others*, C-70/18, ECLI:EU:C:2019:823 paras 53-70.

<sup>55</sup> CJEU judgment of 22 June 2021, *Latvijas Republikas Saeima (Penalty Points)*, C-439/19, ECLI:EU:C:2021:504, para 106.

<sup>56</sup> CJEU judgment of 3 October 2019, *Staatssecretaris van Justitie en Veiligheid v A and Others*, C-70/18, ECLI:EU:C:2019:823 paras 53-70. the CJEU has also found that the collection and retention of fingerprints when issuing passports in order to prevent the falsification of passports and the fraudulent use of passports pursues an objective of public interest recognised by the European Union, namely prevention of illegal entry into its territory (see, to that effect, judgment of 17 October 2013, *Schwarz*, C-291/12, EU:C:2013:670, paragraphs 36 to 38).

personal data. Thus, in order to mitigate those risks in an efficient manner, strong **safeguards must be put in place so a level of security in line with the requirements of the Regulation is ensured at any time.** This need for reinforced protection of biometric information is widely recognised, including through the adoption of technical standards on the protection of biometric information both in transit and at rest<sup>57</sup>.

66. Both Article 27 (Data protection by design and by default) and Article 33 (Security of processing) of the Regulation require a controller to take into account the “**state of the art**” when implementing appropriate technical and organisational measures. The reference to “state of the art” imposes an obligation on controllers, when determining the appropriate technical and organisational measures, to take account of the current progress in technology that is available in the market. The requirement is for controllers to have knowledge of, and stay up to date on technological advances; how technology can present data protection risks or opportunities to the processing operation; and how to implement and update the measures and safeguards that secure effective implementation of the principles and rights of data subjects taking into account the evolving technological landscape.<sup>58</sup> The “state of the art” is a dynamic concept that cannot be statically defined at a fixed point in time, but should be assessed continuously in the context of technological progress. In the face of technological advancements, a controller could find that a measure that once provided an adequate level of protection no longer does.<sup>59</sup> Neglecting to keep up to date with technological changes could therefore result in a lack of compliance with Articles 25 and 33 of the Regulation.

67. After careful consideration of the mitigation measures envisaged by the Parliament, **the EDPS considers the remaining data protection risks as substantial.** An explanation of the remaining substantial risks follows.

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<sup>57</sup> See e.g. ISO/IEC 24745:2022, Information security, cybersecurity and privacy protection - Biometric information protection, available at <https://www.iso.org/standard/75302.html>.

<sup>58</sup> European Data Protection Board, Guidelines 4/2019 on Article 25 Data Protection by Design and by Default, (version 2.0 adopted on 20 October 2020), para. 19.

<sup>59</sup> European Data Protection Board, Guidelines 4/2019 on Article 25 Data Protection by Design and by Default (version 2.0 adopted on 20 October 2020), para. 20.





70. [Redacted]

71. [Redacted]

72. [Redacted]

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[REDACTED]

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■ [REDACTED]

■ [REDACTED]

89. EDPS Recommendation 4 (alternative less intrusive options):

*While the EDPS does not in principle oppose or require any particular technology, controllers should ensure that a necessity and proportionality assessment provides a thorough assessment of **less intrusive alternative options** that are available. Therefore, the EDPS recommends that the European Parliament document the feasibility of other available alternative options that would not require the use of sensitive data, compare all options and document its conclusions.*

90. The Parliament provided the EDPS with an updated assessment of other solutions to attest MEPs presence, which included a necessity and proportionality analysis. However, in spite of trying to address Recommendation 4, the Parliament did not include the appropriate safeguards to pass the necessity and proportionality test.

91. In addition to the requirements of substantial public interest and legal basis in Union law, the use of biometric data to attest MEPs attendance, must be necessary and proportionate to the abovementioned objective, i.e. it must not go beyond what is necessary in order to achieve the justified objective.<sup>71</sup> Hence, the ‘*requirement of necessity is not met where the objective of general interest pursued can reasonably be achieved just as effectively by other means less restrictive of the fundamental rights of data subjects, in particular the rights to respect for private life and to the protection of personal data [...]*’.<sup>72</sup> To this end, the EU institutions should take note of and consider alternative measures, including those adopted by other similar institutions in the Member States.<sup>73</sup> The more sensitive the personal data in question and hence the more serious the interference with the fundamental rights, the more apparent and established it must be that there are no other alternative less restrictive measures which could reasonably achieve the justified goal just as effectively.<sup>74</sup>

92. As regards recommendations 2 and 4, in order to **provide sufficient safeguards, the EDPS deems necessary that the Parliament :**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

<sup>71</sup> Penalty Points, op.cit., para 109.

<sup>72</sup> Penalty Points, op.cit., para 110.

<sup>73</sup> By analogy: Penalty Points, op.cit., para 111.

<sup>74</sup> Penalty Points, op.cit., para 113.



### 3.3. Recommendation 3 - Alternative attendance verification procedure

*In case the European Parliament finally implements the biometric attendance system, the EDPS recommends the European Parliament to set up an alternative attendance attestation procedure to ensure that the MEPs whose fingerprints are not recognised can still attest their attendance.*

93. The Parliament confirmed that the MEPs whose fingerprints may not be recognised will benefit from the same case-by-case assessment for the application of alternative attendance attestation procedure already given to MEPs who cannot sign due to injuries, accidents, health conditions or some other temporary or permanent conditions.
94. In the unlikely event of a major incident that disrupts the functioning of the computerised register [REDACTED], Parliament will have recourse to the alternative system of a paper register that will be set up in the usual place of the current register. MEPs will be informed in due time before the go-live of the biometric register about this alternative system and then again in real-time via Parliament's crisis management operation should the alternative system ever become necessary<sup>75</sup>.
95. In view of the above, the biometric system to be implemented by the Parliament encompasses alternatives to data subjects that cannot attest their presence through biometric data.
96. The EDPS concludes that **the Parliament has implemented recommendation 3.**

### 3.4. Recommendation 5 - Automated decision-making

*To the extent that the envisaged processing does not involve any meaningful human intervention, complement its internal rules on the use of biometrics to attest Members' attendance, by adding suitable measures to safeguard the data subject's rights and freedoms and legitimate interests (Article 24(2)(b) of the Regulation).*

97. The reference to the full automation in the DPIA concerned exclusively the management of data of a part of the system. The DPIA<sup>76</sup> now reflects with more detail the level of automation of the different systems.

<sup>75</sup> See answer to question 5 of the 11 November 2021 meeting minutes.

<sup>76</sup> Chapter 5.2.2., section (h) of the DPIA.

98. The Parliament emphasised in its reply that “*there is no registration of presence, nor payment of daily allowances without daily human intervention*”<sup>77</sup>. [REDACTED]

99. [REDACTED]

100. [REDACTED]

101. Parliament explained that it has updated the data protection notice<sup>82</sup>, which now provides that data subjects may request and obtain human intervention and obtain explanations in respect of a decision and challenge that decision. MEPs will be able to contest the registration of their presence, or request that a specific daily allowance be not paid. In the Parliament’s view, “*the fact that part of the system works with automatic procedures does not mean that human intervention is not possible: it is possible at any time in all IT systems, in order to erase or correct data manually at any time of the process of data treatment, from the*

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<sup>77</sup> See Parliament’s reply to EDPS Opinion and recommendations of 19 July 2021, p.6.

[REDACTED]

<sup>82</sup> Annex 4 to the DPIA.

*registration of the finger templates until the payment of the daily allowance and the registration of presence in the correspondent presence records.”<sup>83</sup>*

102. In view of the above, there is no automated decision-making regarding the envisaged MEPs biometric register of attendance.

103. **The EDPS concludes that the Parliament has implemented recommendation 5.**

### 3.5. Recommendation 6 - data minimisation

*The EDPS recommends that the European Parliament further look into whether it is necessary for the proposed system to be established with all additional biometric personal data, taking into account the population size that will be enrolled.*

*If the system could be adequately established with less additional information, engage its contractor in order to effectively minimise the amount of personal data used.*

104. The Parliament has deepened its assessment of the necessity of including additional information in the biometric templates. It provided the following technical explanations:

[REDACTED]

[REDACTED]

105. [REDACTED]

<sup>83</sup> See Parliament’s reply of 19 July 2021, p.6.

██████████ the EDPS takes note of the Parliament’s willingness to test a solution that favours data minimisation.

106. ██████████  
██████████

107. The EDPS takes note that **the Parliament will conduct a study** ██████████ ██████████ in order **to comply** with Recommendation 6. Under the principle of accountability, the Parliament should keep the study and must be able to demonstrate and substantiate that the processing will be performed in accordance with the Regulation and notably the data minimisation principle. Thus, **the EDPS deems necessary that the Parliament conduct the study and keep its results available for the EDPS.**

108. **In light of the above, the EDPS concludes that the Parliament has not yet implemented Recommendation 6.**

### 3.6. Recommendation 7 - Information to MEPs

*In accordance with Articles 14-16 of the Regulation, the EDPS recommends that the European Parliament update the data protection notice on attendance registration and ensure that the Members are specifically informed about the new system and all its modalities before starting the processing.  
If the processing involves automated decision-making, include meaningful information on the logic involved as well as the significance and the envisaged consequences of the processing (Article 15(2)(f) and 16(2)(f) of the Regulation).*

109. Parliament explained that MEPs are informed of governing bodies’ administrative decisions by means of Quaestors’ Notices. On 9 September 2020, the Quaestors endorsed the planning relating to the introduction of the new system.

110. It was agreed that a Quaestors’ Notice containing all relevant information about the new system would be sent to MEPs. It will contain a timeline for implementation, data protection issues and the possibility that an alternative system be used in case of a general disruption or impossibility of a MEP to use his or her fingerprints.

111. The Parliament has concluded the procurement procedure but has not yet purchased any hardware or software from the contractor. The Parliament will send information to data subjects after the EDPS concludes his analysis of Parliament’s reply and implementation of

██████████  
██████████



his recommendations. If the EDPS finds it useful, the Parliament can provide the relevant documentation beforehand.

112. The EDPS takes note of this information and of the improvement of the data protection notice. However, to the EDPS understanding following the analysis of the revised data protection notice, the alternative modalities to the scanning of fingerprints when it is not possible are still not described.

113. Therefore, the EDPS deems necessary that the Parliament include all the modalities of the presence register for MEPs in the data protection notice, in accordance with Articles 14, 15 and 16 of the Regulation.

114. The EDPS therefore concludes that **recommendation 7 has not yet be implemented.**

#### 4. CONCLUSION

115. In light of the above, the EDPS concludes that the Parliament has implemented recommendations 3 and 5. However, the Parliament has failed to implement recommendations 1, 2, 4, 6 and 7.

116. As regards recommendation 1, the EDPS deems necessary that the Parliament adopt the necessary **legal basis** fulfilling the clarity, precision and foreseeability requirements.

117. As regards recommendations 2 and 4, in order to provide **sufficient safeguards** and to fulfil all the steps of the **proportionality** assessment, the EDPS deems necessary that the Parliament:

- █ [REDACTED]
- █ [REDACTED]
- █ [REDACTED]
- █ [REDACTED]
- █ [REDACTED]
- █ [REDACTED]

118. As regards recommendation 6 on **data minimisation**, the EDPS deems necessary that the Parliament conduct a study on [REDACTED] and keep its results available for the EDPS.

119. As regards recommendation 7, the EDPS deems necessary that the Parliament describe in the **data protection notice** the alternative modalities to the scanning of fingerprints when it is not possible.
120. The EDPS deems necessary that the Parliament **implement recommendations 1, 2, 4, 6 and 7 before any deployment of the intended digitalised attendance system.**

Done at Brussels on 11 May 2023

Wojciech Rafał WIEWIÓROWSKI  
(*e-signed*)