EUROPEAN DATA PROTECTION SUPERVISOR

Orientations from the EDPS: Body temperature checks by EU institutions in the context of the COVID-19 crisis

Executive Summary

A number of European institutions, agencies and bodies (EUIs) have implemented body temperature checks as part of the health and safety measures adopted in the context of their "return to the office" strategy as an appropriate complementary measure, among other necessary health and safety measures, to help prevent the spread of COVID-19 contamination.

At the same time, systematic body temperature checks of staff and other visitors to filter access to EUIs premises may constitute an interference into individuals' rights to private life and/or personal data protection. The EDPS observes that body temperature checks can be implemented through a variety of devices and processes that should be subject to careful assessment. The EDPS has decided to issue the present orientations to help EUIs and Data Protection Officers (DPOs) meet the requirements of Regulation (EU) 2018/1725 (the Regulation), where applicable.

The EDPS considers that "basic body temperature checks", designed to measure body temperature only, operated manually and which are not followed by registration, documentation or other processing of an individual's personal data would, in principle, not be subject to the scope of the Regulation.

Conversely, the EDPS considers that systems of temperature checks, operated manually and followed by registration, documentation or further processing of an individual's personal data, or systems operated automatically with advanced temperature measurement devices would, in general, fall under the scope of the Regulation. The lawfulness of these processing operations could, in principle, be established by Article 1(e)(2) of the Staff Regulations supplemented with an executive decision of an EUI, agency or body providing for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject.

The EDPS notes that in compliance with Article 24 of the Regulation, temperature checks applied on a mandatory basis should not be based solely on automated processing. Meaningful human involvement should therefore be provided for at relevant stages of the check. The present orientations further provide a non-exhaustive list of technical and organisational recommendations that should be duly taken into account to ensure that appropriate safeguards are in place as well as specific recommendations concerning transparency towards individuals and the follow-up procedure in case of 'positive check'.

Finally, the EDPS advises EUIs implementing temperature checks to review the necessity and proportionality of such measures regularly in the light of the evolution of the epidemic and its scientific understanding.

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1 Introduction

Since the beginning of 2020, EUIs are faced with the emergence of the COVID-19 pandemic. Fever being one of the symptoms exhibited by an infected person, a number of Union institutions, bodies, offices and agencies (EUIs) have implemented body temperature checks adopted in the context of their "return to the office" strategy as complementary measures, among other necessary health and safety measures (masks provision, disinfecting gel, contact tracing by health authorities, etc.), to help prevent the spread of COVID-19 contamination. Other EUIs are either in the process or are considering implementing such body temperature checks.

The EDPS observes that body temperature checks of staff and other visitors to filter access to EUIs premises can be implemented through a variety of devices and processes. These should be subject to careful assessment in each case, given that they may constitute an interference into individuals' rights to private life and/or personal data protection.

In that context, the EDPS has decided to issue the present orientations on body temperature checks to help EUIs and their Data Protection Officers (DPOs) ensure appropriate protection of individual's privacy and personal data and meet the requirements of Regulation (EU) 2018/1725[1] (the Regulation), where applicable. These orientations are without prejudice to any possible future guidance by the European Data Protection Board on body temperature checks in the context of the COVID-19 crisis.

2 Basic body temperature checks are outside the scope of the Regulation

The EDPS considers it relevant to distinguish two situations:

1. "Basic body temperature checks" designed to measure body temperature only, operated manually and not followed by registration, documentation or other processing of an individual's personal data. Such checks would, in principle, not be subject to the scope of the Regulation.
2. Other systems of temperature checks, operated manually and followed by registration, documentation or other processing of an individual's personal data, or systems operated automatically with advanced temperature measurement devices. Such checks would in general fall under the scope of the Regulation.

2.1 Definition

"Basic body temperature checks" usually consist of a system where the security office at the entrance of a EUI building uses a basic temperature measurement device, such as a manual thermometer, to check the temperature of a person (employee, contractor, visitor, etc.), wishing to enter the premises. Such a system only provides an instantaneous temperature value, without

[1] Regulation (EU) 2018/1725 of the European Parliament and of 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 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018R1725)

any recording feature, and the process would not be followed by any registration of the measurement by the EUI.

However, under those specific circumstances, such measures do, in principle, not fall under the material scope of the Regulation as defined under Article 2(5): the EDPS considers that such basic body temperature checks do not involve a processing of personal data *wholly or partly by automated means*, and that in the absence of any registration of the temperature, such measurements cannot be considered as a *processing other than by automated means of personal data forming part of a filing system or are intended to form part of a filing system.*

'Processing (wholly or partly) by automated means' refers to all processing done by means of computer technologies. This is not the case here: the use by a security officer of an analogue or digital thermometer results only in displaying the temperature, allowing the security officer to read the temperature value with this eyes.

The processing 'other than by automated means' primarily refers to any manual data processing operation executed by humans, in a filing system. A 'filing system' means any structured set of personal data which are accessible according to specific criteria, whether centralised, decentralised or dispersed on a functional or geographical basis (Article 3(7) of the Regulation. The requirement that the set of personal data must be 'structured according to specific criteria' is simply intended to enable personal data to be easily retrieved.[2] Files or sets of files which are not structured according to specific criteria do not fall within the scope of the Regulation[3]. In the absence of any registration of the temperature value, it is impossible for the data to be easily retrieved for subsequent use. Therefore the body temperature collected manually does not form part of a filing system and is not intended to form part of a filing system.

To remain outside the scope of the Regulation, temperature measurements may not be followed by registration, documentation or other processing allowing to link such temperature checks to a data subject (such as an identity check that would form part of a filing system).

2.2 Legality

The systematic use of such "basic temperature checks" at the entrance of EUIs premises may however result in an interference into the fundamental right to private life protected under Article 7 of the Charter of Fundamental Rights of the European Union, and would therefore be subject to the *legality*, *necessity* and *proportionality* conditions laid down in Article 52(1) of the Charter.

The impact on individuals' privacy should be reduced to the strict minimum needed to reach the desired outcome.

3 Body temperature checks subject to the Regulation

3.1 Definition

When the body temperature checks operated manually are followed by the registration of the measurement or combined with an identity check, such temperature checks must be considered as forming part of a filing system subject to the scope of application of the Regulation. The use of automated digital means to detect body temperatures, such as the use of thermal cameras or

[2] See CJEU, Case C-25/17, *Jehovan todistajat*, para. 57.

[3] See Recital 8 of the Regulation.

thermal scans, also falls under the scope of the Regulation since the EDPS considers such checks as a processing of personal data *wholly or partly by automated means* within the meaning of Article 2(5) of the Regulation.

Such temperature measurement constitutes 'processing' of 'personal data', as the information regarding the body temperature is collected and it relates to a identified or identifiable specific person, as per Article 3(1) and (3) of the Regulation. The data in question is 'data concerning health', since it is used to reveal information about the person's health status regarding a possible infection with COVID-19 (or other health issues resulting in high temperature), as per Article 3(19) of the Regulation.

This processing would need to be lawful in accordance with Article 5(1) of the Regulation. In addition, the processing of health data is subject to the conditions laid down in Article 10(2) of the Regulation.

3.2 Lawfulness

The EDPS considers that the specific requirements for the processing of special categories of personal data provided under Article 10(2)(b), 10(2)(g) and 10(2)(i) of the Regulation are relevant in the current context of the Covid-19 outbreak. The application of the aforementioned Article(s) will depend on the context and the practical implementation of such body temperature checks. For example, Article 10(2)(b) could apply since EUIs as employers have a duty to protect the health and safety of their staff.

The EDPS considers that Article 1e(2) of the Staff Regulations providing that *"[o]fficials in active employment shall be accorded working conditions complying with appropriate health and safety standards at least equivalent to the minimum requirements applicable under measures adopted in these areas pursuant to the Treaties*" provides an appropriate legal ground to satisfy the requirement of lawfulness. Indeed, given the current health crisis caused by the COVID-19 epidemic, body temperature checks of employees and other visitors alike may be deemed necessary by a EUI in order to comply with its health and safety obligations as mentioned above.

The lawfulness of these processing operations could, in principle, be established by Article 1(e)(2) of the Staff Regulations supplemented with an executive decision of an EUI, agency or body providing for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject. It will enable the affected person to foresee the impact of the processing operations on its fundamental rights and the powers provided by the Regulation to protect such rights.

3.3 Temperature checks and automated individual decision-making

The EDPS observes that **certain types of temperature checks may, in the absence of meaningful human intervention in the checking process, qualify as an automated individual decision making subject to Article 24 of the Regulation.** Temperature checks based solely on automated processing, like a thermal scan or thermal camera, which might lead to prevent an individual from entering into a building, could be seen as an automated individual decision-making process with significant effects similar to legal effects.

In that regard, the EDPS notes that there is currently no Union Law, as per Article 24(4), authorising temperature checks based *solely* on automated processing to allow or deny access to EUIs premises on health and safety grounds. **Hence, a fully automated temperature checks system would only be lawful on a voluntary basis, with the data subjects' explicit consent under Article 10(2)(a) of the Regulation.**

Temperature checks applied on a mandatory basis should not be based solely on automated processing, and should therefore provide for meaningful human involvement at relevant stages of the check process. According to the EDPB guidelines on this matter, *"[t]o qualify as human involvement, the controller must ensure that any oversight of the decision is meaningful, rather than just a token gesture. It should be carried out by someone who has the authority and competence to change the decision."* [4]

In line with the EDPB Guidelines, **the EDPS advises controllers to identify and record the degree of any human involvement in the temperature check process and at what stage this takes place.** The EDPS considers human involvement particularly relevant in case of 'positive check' by the automated processing resulting in a denial of access. In those cases, a second or third check upon request by someone who has the authority and competence (e.g. a doctor or a nurse) to assess the specific situation of the data subject and to inform and advise him/her accordingly would, in general, be considered as a meaningful human involvement (see also hereunder section 4.2 on "Denial and follow-up"). This could also include the integration via human intervention of specific circumstances affecting the data subjects by using an exemption certificate or allowing exceptional/compassionate decisions.

3.4 Technical and organisational measures

The deployment of body temperature checks devices may call for specific and appropriate safeguards under Articles 10 and, where applicable, Article 24 of the Regulation.

In addition as for any data processing operation, the obligations of **data protection by design and by default** as set out in Article 27 of the Regulation should be applied: EUIs should design body temperature checks in such a way that the amount of collected personal data is minimised. EUIs should also ensure that the selected body temperature measurement devices employ privacy-friendly technology. Depending on the processing capabilities of the system used to carry out body temperature checks, additional **data protection safeguards** need to be implemented. Those measures should be documented in a specific policy document[5] and audited regularly.

The EDPS addresses below a non-exhaustive list of recommendations that should be duly taken into account to ensure that appropriate safeguards are in place where the temperature check system falls within the scope of the Regulation.

- Systems for carrying out body temperature checks should be **operating independently and not linked to any other IT system** and in particular should not be connected to the security system such as the CCTV network. Being independent also means that the system for carrying out body temperature checks is **not linked to any form of identity check**.
- It should be designed as **a real-time system and no recording should be made of the reading**. EUIs may place a remote viewing system close to the thermal scanner that does not allow the recording of the images.
- EUIs may want to use some industrial-grade electric thermal imagers that were not primarily designed for epidemic responses. In such cases, the **selected machine would**

[4] EDPB Guidelines on Automated individual decision making and profiling for the purposes of Regulation 2016/679 (WP251rev.01), 6 February 2018, p. 21.

[5] Since it is a security measure, the sample for the video-surveillance policy could be adapted for such system; available on https://edps.europa.eu/sites/edp/files/publication/10-03-17_video-surveillance_guidelines_en.pdf.

need to be adapted to comply both with technical and data protection requirements for its operation.

- As previously indicated and especially for automated system, **it must be verified that there is no recording of the thermal images and the results are only displayed on "live" screen**. If the system can transmit images remotely via a wired or wireless protocol (e.g.: ZigBee, Bluetooth, Wi-Fi, Ethernet), it needs to be isolated from other networks.
- The controller should **verify the data accessed by the manufacturer of a temperature measurement devices** if a telemetry system is installed for monitoring the correct operation of such apparatus.
- The full **data life cycle needs to be analysed**, in order to ensure that no recording or storage occurs. Furthermore, the use of the system should be limited to filter access to EUIs premises and not be deployed for another purpose. In order to ensure compliance with the purpose limitation principle: **the purpose of the system for carrying out body temperature checks must solely remain the detection of a person wishing to enter an EUI premise having high temperature compared to a pre-defined threshold**. The selection of a specific temperature threshold should be explained and documented.
- In addition, since there is approximately a difference of one degree Celsius between a regular temperature and the threshold, **the accuracy of the devices need to be verified and might involve regular calibration of the sensor.**
- Finally, the personnel who will be in charge of the checks need to be properly **trained** for the operation and interpretation of results (see also hereunder section 4.2 on "Denial and follow-up).

4 General considerations for both types of temperature checks

4.1 Transparency

The EDPS suggests that any person entering the building of an EUI should be clearly informed that a temperature check system is in place with a clear indication of the reason of such a check and by whom and when these checks were decided. Signs with information about the temperature checks should be placed at such locations and be large enough so that individuals can notice them and can read them without difficulty. The signs within the buildings should be in the language (or languages) generally understood by staff members and most frequent visitors. If there is any question on how the temperature measurement device works and what data are collected, individuals should be able to receive appropriate information from the EUI/data controller.

4.2 Denial and follow-up

In case of a 'positive' temperature check, a suitable follow-up procedure should be in place. At this stage, the person should be given the opportunity to benefit from a second measurement. The second measurement should make it possible to rule out a cause linked to a malfunction or calibration issue of the device. Following the second measurement, if the person's temperature is still above the defined threshold, the person should be given the opportunity to benefit from a third measurement performed by a healthcare professional using another device (see also section 3.3 on "Automated individual decision-making" and human involvement in the temperature check process).

If following the third measurement the person body temperature is still above the defined threshold, the person prevented from entering the building should be provided appropriate advice and information, including at minimum a leaflet with contact details of health authorities and COVID-19 testing locations.

If the person (staff, visitor and contractor alike) who is denied access requests a proof of that denial, the security staff should provide a receipt with the date, time and location of entrance with the indication that the holder of such receipt was denied entry because of a restriction currently in place at the EUI.

As regard its own staff, while EUI's employees may have to justify their absences at the office to their managers, such absence should be dealt with under normal procedure in place for such cases. The processing of personal data related to leaves and absences should remain clearly separated from the temperature check system put in place. The staff member concerned should be provided solutions, such as teleworking, that limit the disruption to its private life and like any other medical leave requests he/she should not be penalized or stigmatized as a result of a positive temperature check.

4.3 Review

During this crisis, it is essential to comply with the requirements set out in the Regulation and in the Charter of Fundamental Rights. Under the principle of accountability, there should be an evidence trail to document the decisions taken in relation to data protection issues.

The EDPS advises EUIs implementing temperature checks to continuously review the necessity and proportionality of such measures in the light of the evolution of the epidemic situation and its scientific understanding.