Prior Checking Opinion

"Data processing for social media monitoring"
at the European Central Bank (ECB)

Case 2017-1052

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The ECB intends to monitor and track mentions of ECB related topics in different social media channels via an external contractor. The purpose of the processing is to perceive how internet users speak about the ECB in social media (for instance after press conferences, speeches, interviews, monetary policy decisions, European Parliament's hearings and other events) and improve the ECB's communication and reputation. In order to achieve this purpose, the ECB wants to collect information on what is being said about the ECB or related topics, in which tone, and how far this information is spread. The external contractor will conduct the monitoring and analysis with aggregated data regarding different groups of users. The ECB will analyse this information and elaborate reports. The identity of some internet users, who are not public persons, can be indirectly identifiable by their quotes, their likes or their native language.

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Postal address: rue Wiertz 60 - B-1047 Brussels
Offices: rue Montoyer 30 - B-1000 Brussels
E-mail: edps@edps.eu.int Website: http://www.edps.europa.eu
Tel.: 32 2-283 19 00 - Fax : 32 2-283 19 50

1. Proceedings

On 29 November 2017, the European Data Protection Supervisor (the EDPS) received a notification for prior checking under Article 27(2) of Regulation 45/2001 (the Regulation)[1] from the Data Protection Officer (DPO) of the ECB. The notification concerns the tracking and quantitative analysis of personal data of ECB mentions in social media by the Directorate General Communications -Global Media Relations Division (DG/C-GMR) of the ECB.

This is a new processing operation, hence the deadline of two months for the EDPS to issue his Opinion applies[2].

2. Facts

The ECB intends to procure a supplier for the provision of online social media monitoring services. The ECB plans to acquire an 'off-the-shelf' social monitoring tool/platform which will enable the Media Monitoring Team (MMT), part of the DG/C, to monitor and track mentions of ECB related topics in different social media channels (at least Twitter, Facebook, Instagram, YouTube, LinkedIn, Google+, Flickr) and other online sources including forums, blogs and online news sites, which are free of charge. The ECB aims at procuring a supplier located in the European Economic Area. However, should this prove impossible, all efforts will be undertaken to ensure the supplier is offering sufficient guarantees to comply with the data protection framework applicable to the ECB. The ECB would in this case share the necessary evidence provided by the supplier with the EDPS.

Purpose

The purpose of the processing is to:

- understand how the ECB is discussed in the social media and
- monitor the perception of ECB's communication and its reputation in the social media for a more effective and efficient public communication.

In order to achieve this purpose, the ECB wants to collect information on what is being said about the ECB or related topics, in which tone, and how far this information is spread.

Persons affected

All internet users whose posts etc. are analysed by the social monitoring tool: initiators of posts/tweets, influencers[3], journalists, academics, bankers and politicians.

Legal basis

The ECB Functions Paper of DG/C[4] provides in particular that the Global Media Relations Division "*Conducts a daily monitoring of communication issues raised in the media and conducts a regular analysis of communication gaps and challenges in the global media landscape*".

[1] OJ L 8/1, 12/01/2001.

[2] On 12 December 2017, the EDPS asked further questions to the ECB, the latter provided some clarifications on 20 December 2017 and on 12 January 2018 the ECB provided more information via teleconference. On 5 March 2018, the draft Opinion was sent to the ECB for comments and the ECB replied on 20 March 2018.

[3] Institutions or individuals with relevance, reach and resonance (multipliers) who write about the ECB.

[4] The Paper is formally an Executive Board decision (it was adopted by the ECB's Chief Services Officer, based on a delegation granted by the Executive Board).

Furthermore, the notification states that the data collected and processed are publicly available from posts by individuals who have agreed to the terms and conditions of the social media platforms, mentioned above. The notification refers to the implicit consent of the data subjects under Article 5(d) of the Regulation.

Procedure and data processed

The social monitoring platform will be available 24 hours a day, seven days a week throughout the full year for at least 50 ECB users, with an unlimited number of search queries. The results of search queries will cover media contributions dating back at least one month and the platform will provide for various analytic functionalities by which the following categories of aggregated data will be analysed:

- the volume of coverage, reach and popularity,
- sentiment (negative/positive),
- most frequent words and topics,
- engagement (amount of likes, favourites, comments, shares of users on a specific topic)
- contributors' demographics (native language, country of origin and gender),
- data and time of posts to see development over time.

In addition, individual tweets or posts originating from some influencers could be quoted in an analysis.

The communication specialists from DG/C will analyse the above information and prepare reports.

Recipients

Staff from DG/C on a need-to-know basis, members of the ECB's Executive Board, ECB's senior management and ECB's Chief Services Officer.

Right of information

According to the notification, the ECB will provide information on its website along the following lines: '*The ECB monitors activity related to topics covering its tasks in social media and related to the use of its own social media channels. Personal data of social media users might be collected if users comment on ECB related topics, or use the ECB's own media channels'*.

Rights of access and rectification

The notification states that in line with Article 20(2) of the Regulation, no specific procedures are foreseen given that the sole purpose of the processing is to compile statistics.

Retention policy

Personal data, which are analysed, will not be stored. Only the reports containing aggregated data and individual quotes will be kept for an indeterminate period.

Security measures

(...)

3. Legal aspects

3.1. Prior checking

An EU institution, the ECB, carries out the processing of personal data under analysis. Furthermore, the processing is both automatic (searches with a digital tool) and manual - which forms part or is intended to form part of a filing system (analysis and use of the results in the form of reports). The Regulation is therefore applicable.

The monitoring and analysis will be conducted with aggregated data regarding the above-mentioned categories of data. Many influencers who write about the ECB are public persons (journalists, professors, bankers etc.). Nevertheless, there can be some exceptions when single tweets or posts of not public individuals could be quoted in the reports. The identity of such individuals can be indirectly identifiable by their quotes, their likes or their native language. It follows that all the information monitored and analysed by the ECB are personal data related to individuals (public or not) within the meaning of Article 2(a) of the Regulation.

The processing operation entails different sources of personal data from social media users, which are extracted from different social media platforms. The purpose of the processing is to monitor what various social media users say and how they react about the ECB. The processing operation under analysis entails therefore linkages of different sources of data from different social media platforms and it is likely to present risks to the rights and freedoms of the users within the meaning of Article 27(2)(c) of the Regulation. The processing operation is subject to prior-checking by the EDPS because it falls within the category of risky processing operations[5].

3.2 Lawfulness

The lawfulness of a processing must be justified on the basis of one of the five legal grounds under Article 5 of the Regulation.

As the notification correctly states, the processing under analysis is considered to be lawful under Article 5(a) of the Regulation.

Article 5 (a) of the Regulation requires two elements: the processing must be based on the Treaties or on an EU legal instrument and it must be necessary for the performance of the ECB carried out in the public interest based on the Treaties. The EDPS considers that the mission of the ECB's DG/C to conduct a daily monitoring of communication issues raised in the media, as provided in the ECB Function Paper may justify the processing as long as adequate and specific safeguards are implemented in line with the Regulation (see below on data quality and other recommendations).

The notification states that the processing can also be based on the implicit consent of the data subjects under Article 5(d) of the Regulation.

[5] Article 27(2) of the Regulation contains a list of processing operations that are likely to present risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes, including point (c) processing operations allowing linkages not provided for pursuant to national or EU legislation between data processed for different purposes.

'Implicit consent' is not valid under the Regulation. Article 5(d) of the Regulation specifically requires that individuals will 'unambiguously' give their consent before the processing of their personal data. This means that the individuals' consent must be a freely given, specific and informed indication that they agree that their data are collected through all different steps of the processing[6]. Access to social network services is often subject to agreeing to different kinds of processing of personal data by the social network provider and its affiliates. This does not mean that users agree to other controllers, such as the ECB, which process their personal data.

Users are often prevented from using social media services if they do not consent to the use and/or transfer of their data by the provider of the service for other various purposes (e.g. behavioural advertising or reselling to third parties). This means that their free consent is doubtful. Independently of whether the users' consent to the processing of their data by the social media provider is valid, it appears that any such consent cannot cover the processing by the ECB.

Recommendation:
The ECB should remove references to Article 5(d) and references to 'implicit consent'. The processing operation at hand can only be based on Article 5(a) of the Regulation, as long as he ECB implements adequate safeguards (see below).

3.3 Quality of data

The EDPS recalls that the ECB is bound by the data quality principle under Article 4(1)(c) of the Regulation which states that *"personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed"*.

The ECB should ensure, through the contract (see paragraph 3.4) that the external contractor rigorously applies the principles of necessity and proportionality when it collects different categories of data of the users. The external contractor should limit the personal information it collects from the different social platforms to what is directly relevant and necessary to the purpose of the processing (data minimisation principle). The external contractor should use the least invasive means and the strictest privacy methods in order to mitigate the risk to breach the users' privacy. In concrete, the external contractor should avoid for instance collecting clearly identifiable quotes, posts and tweets from non-public individuals; as it was highlighted above, the identity of such non-public users can be directly or indirectly disclosed.

Recommendation:
The ECB should ensure that the external contractor collects only what it is necessary and proportionate to the social monitoring purpose of the processing without putting in peril the non- public users' privacy within the meaning of Article 4(1)(c) of the Regulation.

3.4 Controller and Processor

The ECB will conclude a contract with an external contractor in order to carry out the social media monitoring for the ECB's DG/C.

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6 Article 2(h) of the Regulation states that the data subject's consent shall mean '*any freely given specific and informed indication of his or her wishes by which the data subject signifies his or her agreement to personal data relating to him or her being processed.'*

In light of Article 23 of the Regulation, the external contractor will act on behalf of the ECB and is therefore to be regarded as processor, whereas the ECB is the controller of the processing operation. This means that the ECB is the EU institution responsible for determining the purposes and means of the processing (Article 2(d) of the Regulation) and the external contractor is obliged to carry out the processing only on instructions from the ECB (Article 23(2)(a)).

In particular, the ECB, being the controller (Article 4(2) of the Regulation), should set out in the contract the following terms and conditions:

i. the external contractor should process personal data only on documented instructions from the ECB;

ii. the ECB should indicate clearly the subject-matter and duration of the processing;

iii. the ECB should specify the nature and purpose of the processing;

iv. the ECB should refer to the type of personal data and categories of data subjects;

v. the external contractor should process data only for the purpose for which they are collected and not further process data for other incompatible purposes (e.g. transferred to other companies for marketing purposes);

vi. the external contractor should not be authorised to transfer any information processed or outsource a service to a subcontractor or third party service, unless the ECB agrees so;

vii. the external contractor should be able to guarantee the rights of access and rectification of the data subjects by adopting adequate mechanisms via which data subjects can exercise their rights (see paragraph 3.5 for more clarifications).

viii. the external contractor should implement the data retention period requested by the ECB (see paragraph 3.6);

ix. the external contractor may engage a sub-contractor only upon prior written authorization of the ECB and any sub-contractors should be subject to the same data protection obligations as the external contractor;

x. the external contractor should ensure that those authorised to process personal data are bound by confidentiality;

xi. the external contractor should assist the ECB to demonstrate compliance with the applicable data protection regulation and to comply with its obligations concerning data breach notifications.

As to the obligations of the external contractor regarding confidentiality, data protection and security measures under Article 23(2)(b) of the Regulation, the ECB should ensure that specific provisions are added in the contract regarding these obligations. As to the confidentiality and security obligations, considering that the external contractor will be based in one of the Member

States, it should in principle be subject to Article 28 and 32 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016[7].

The EDPS draws the ECB's attention to the upcoming changes[8] set out in Article 29 of the proposal for a new data protection Regulation for the EU institutions and bodies (EUIs)[9]. In particular, the EDPS strongly recommends that any requests for offer or procurement procedure already comply with the revised legal framework. This includes the terms of the contract. It is also in the interest of both the controller and the processor to set out clearly their respective obligations in the contract governing the processing operation.

Moreover, should the contract be awarded to an entity located in a non-EU/EEA country[10] without an adequacy decision, a level of data protection equivalent to the guarantees ensured by the current Regulation or the new Regulation applicable to EUIs should be ensured. To mitigate potential risks, the EDPS recommends that ECB examine the organisational, technical and IT measures of the contractor or subcontractors to prepare a fully-fledged security risk assessment.

Recommendation:
The ECB should ensure that all the above terms and conditions are set out in the contract with the external contractor in line with Article 23 of the Regulation.

3.5 Rights of access and rectification

In light of Article 4(1)(d) of the Regulation, the ECB should ensure that the internet users' data are accurate and kept up to date; it should therefore take every reasonable step to ensure that data which are inaccurate or incomplete with regard to the purpose of the processing, are erased or rectified. This means that the ECB is responsible for ensuring that the internet users are able to exercise their rights of access (Article 13 of the Regulation) and rectification (Article 14 of the Regulation).

The notification states that in line with Article 20(2) of the Regulation, no specific procedures are foreseen given that the sole purpose of the processing is to compile statistics.

The EDPS highlights that there are two phases in the processing: the first part concerns the initial analysis on the collection of the information for compiling statistics from the external contractor and the second part concerns the reports prepared by the ECB on the basis of those statistics which might contain identifiable quotes.

First part of the processing:

[7] http://eur-lex.europa.eu/eli/reg/2016/679/oj
[8] Please see also the letter of the EDPS sent to all EU institutions on 12 October 2017 (EDPS case 2016-1153) raising awareness on the changes related to data processors. To be noted that although the legislators have not yet concluded the negotiations on the proposed Regulation for EU institutions, the text of Article 29 is stable and the EDPS already invited the EUIs in that letter to start preparing for the changes foreseen.
[9] Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals 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, COM(2017)8 final.
[10] The same applies to entities having branches/offices in a non-EU country with access to the data collected or in case the contractor sub-contracts an entity located outside of the EU.

Under Article 20(2) of the Regulation, when data are processed solely for **statistical research,** the right of access and rectification do not apply, provided that i) there is clearly **no risk of breaching the privacy of the data subjects** and ii) the controller provides **adequate legal safeguards**, in particular to ensure that the data are not used for taking measures or decisions regarding particular individuals.

The external contractor will process data, on behalf of the ECB, for purely statistical purposes. Given the fact that the external contractor will extract aggregated data and the ECB will prepare reports on the basis of this extraction, there seems to be no risk of breaching the internet users' privacy, as long as no identifiable quotes appear in the reports

As to whether the controller (ECB) will provide adequate legal safeguards, the ECB should ensure that the data will only be processed for statistical purposes and they will not be used for taking individual decisions on the internet users. The ECB should ensure that the external contractor will take appropriate security measures (see further paragraph 3.8 on security).

Articles 13 and 14 are therefore not applicable during the phase of the processing when the external contractor, provided that the ECB ensures that the external contractor adopts adequate legal safeguards, as it is required under Article 20(2) of the Regulation.

Second part of the processing:
In case a data subject identifies their quote/post/tweet in the report and wishes to exercise their right of access and rectification, Articles 13 and 14 of the Regulation apply in this particular part of the processing. The ECB should therefore take every reasonable step to guarantee theses rights and ensure that the users' personal data are accurate and kept up to date.

Recommendation:
The ECB should ensure that:
i) for the first part of the processing (compiling information for statistics by the external contractor), internet users will be able to exercise their rights of access and rectification by contacting the external contractor directly and
ii) for the second part of the processing (reports which could contain identifiable quotes), internet users will be able to exercise their rights of access and rectification by contacting the ECB directly.

3.6 Data retention

As a general principle, Article 4 (1) (e) of the Regulation states that personal data must not be kept in a form which permits identification of individuals for longer than is necessary for the purposes for which the data were collected or for which they are further processed.

The notification states that personal data, which are analysed, will not be stored. Only the reports containing aggregated data and individual quotes.

There is no information about the retention period of the personal data stored by the external contractor or of the reports kept by the ECB (insofar as they contain personal data). Under Article 4(1)(c) of the Regulation, the ECB is obliged to set out in the contract with the external contractor a maximum retention period for the data processed, which is necessary to the purpose for which they were collected or further processed (see point 3.3 above). Moreover, the ECB should make an assessment, in light of Article 4(1)(e) of the Regulation, as to how long the

reports are necessary for present and future statistic purposes and establish a maximum retention period.

Recommendation:
The ECB should set up a maximum retention period for i) the data processed by the external contractor and ii) the reports (insofar as they contain personal data).

3.7 Information to be provided to the internet users

Articles 11 and 12 of the Regulation relate to the information to be given to data subjects in order to guarantee a fair and transparent processing of their personal data. In the present case, the personal data are not collected directly from the internet users, but via different social platforms. Article 12 of the Regulation hence applies.

The ECB indicated in the notification that it will provide information on its website. First of all, the EDPS highlights that simply publishing a privacy notice is not enough to comply with the information obligations under Article 12(1) of the Regulation. However, Article 12(2) of the Regulation provides for an exemption, stating that where, in particular for statistical purposes, providing information would prove impossible or would involve a disproportionate effort to inform the internet users, these obligations do not apply. In such cases, the controller should provide appropriate safeguards after consulting the EDPS.

In principle, the ECB will not have the contact details of the users whose posts will be analysed by the contractor, nor will it need them for the purposes of the processing. Collecting and processing additional personal data for the sole purpose of informing data subjects would run counter to the principle of data minimisation. In this sense, it would be disproportionate to collect contact details for the sole purpose of informing the data subjects directly. Therefore, the ECB can rely on the exemption in Article 12(2) of the Regulation in the present case.

When controllers rely on Article 12(2) of the Regulation in order not to inform data subjects directly, they have to establish appropriate safeguards. An appropriate safeguard would be for the ECB to prepare a privacy notice and publish it on its website.

As to the content of the privacy notice, the ECB should provide information in a clear and comprehensive way on all elements listed in Article 12 of the Regulation and in addition, should:

i) specify the role of the ECB and of the external contractor;

ii) mention the possibility for the internet users to exercise their right of access to and rectification of their data by contacting the external contractor directly, as explained in paragraph 3.5 and

iii) indicate the retention period of the data kept by the ECB and by the external contractor, as explained in point 3.6.

In view of the application of Article 12(2) of the Regulation and in order to ensure fairness and transparency, the EDPS recommends that the ECB indicate in the privacy notice that it is impossible or it involves a disproportionate effort to inform the internet users directly, since the ECB in principle does not have their contact details.

Recommendation:
The ECB should include all the above recommendations in the privacy notice and publish it on its website in an easily visible manner before the processing is launched.

3.8 Security

Article 22 of the Regulation obliges the controller to implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing.

Even if the ECB is not processing personal data directly, it is bound by Article 23 of the Regulation: '*Where a processing operation is carried out on its behalf, the controller shall choose a processor providing sufficient guarantees in respect of the technical and organisational security measures required by Article 22 and ensure compliance with those measures'*. The external contractor should hence demonstrate to the ECB the information security risk analysis performed and the security measures chosen to address the risks identified for the social monitoring platform. For that purpose, the ECB should obtain formal guarantee (e.g. security certification) that the external contractor indeed complies with its obligations regarding confidentiality and security of the personal data entrusted to it.

Recommendation:
The ECB should ensure that the external contractor will implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks of the processing operation in hand.

4. Conclusion

There is no reason to believe that there is a breach of the provisions of the Regulation provided that the following considerations are taken into account. In particular the ECB should:

- erase the provision Article 5(d) from the notification and any reference to implicit consent. The processing operation in hand can only be based on Article 5(a) of the Regulation, as long as he ECB implements adequate safeguards (paragraph 3.3);

- set out all the terms and conditions, as outlined in paragraph 3.4, in the contract with the external contractor in line with Article 23 of the Regulation;

- ensure that internet users can exercise their rights of access and rectification by contacting the external contractor and the ECB directly (paragraph 3.5);

- set up a maximum retention period for i) the data processed by the external contractor and ii) the reports (paragraph 3.6);

- include all the recommendations, as provided in paragraph 3.7 in the privacy notice in a clear and comprehensive manner and publish it on its website in an easily visible manner before the processing is launched and

- ensure that the external contractor will implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks of the processing operation at hand (paragraph 3.8).

In the context of the follow-up procedure, please send to the EDPS a copy of the privacy notice, and of the security documents for the processing in hand within a period of three months, to demonstrate that the above EDPS recommendations have been implemented.

Done at Brussels, 21 March 2018

(signed)

Wojciech Rafał WIEWIÓROWSKI