



DATA PROTECTION LAW

Biometrics tools such as facial recognition: Data protection issues and practice of local DPAs

With the spread of biometric data processing tools, not only the public's awareness of them is increasing, but also that of the German data protection authorities. While companies are often enthusiastic and would like to use the new technology, data protection authorities are rather sceptical about it. The reason for this is that biometric data are special categories of personal data within the meaning of Article 9 (1) GDPR and their processing for identification purposes is therefore subject to particularly strict requirements.

Several German data protection authorities have already added the processing of biometric data to their blacklist under Article 34 (4) GDPR. The data protection authority of Bavaria stipulates the conduction of a data protection impact assessment even when the processing of biometric data is subject to a single additional criterion under the guidelines of the Article 29 Working Party.¹ The Berlin data protection authority seems to pursue a similar approach.² Typical fields of implementation of biometric data, such as access control systems or payments by fingerprint, are explicitly covered by the Berlin blacklist. Therefore, if biometric data is processed in Germany, a data protection impact assessment must usually be conducted, even when it is not explicitly required by GDPR.

The Hamburg Commissioner for Data Protection and Freedom of Information states in its 2019 activity report that biometric data is increasingly used for online and payment authentication.³ He indicates that such use often infringes the principle of data minimisation, and questions the reliability of authentication systems based on biometrical data. Since an exact match of the stored template with the (respective) scanned biometric characteristics of the data subject is not possible, the match depends exclusively on predefined tolerances. Identification of the data subject is therefore only possible with a certain degree of probability. In contrast, the risk of abuse is very high for the data subject. With only a few photos it is basically possible to reconstruct biometric

characteristics of a data subject's face. Additionally, if biometric data are lost, these data can never again be (safely) used by the data subject for identification purposes.

The German data protection authorities have already begun to take action against the processing of biometric data: The Hamburg police authority used to run an automatic facial recognition software which evaluates video and image data (stored on a database of over 32,000 files) to investigate crimes committed during the G20 summit in July 2017. The Hamburg Data Protection Commissioner reviewed the procedure, concluded there was no legal basis for the processing activities and ordered the deletion of the database.⁴ The Administrative Court, however, declared this order unlawful due to errors made by the data protection authority in the administrative procedure.⁵ The court did not declare the processing of biometric data to be admissible, though. The ruling is not yet final.

Nonetheless, there is already a legally binding court decision on the use of biometric tools. The Berlin Labour Court has ruled that the use of a fingerprint system to record the working hours of employees requires the employees' consent as it is not necessary for the purposes of the employment relationship.⁶ However, the court also indicated that the use of biometric data of employees for access control to specific office areas (e.g. where business secrets are stored) may be legitimate. In view of these first decisions and actions of the DPAs, it will always depend on the specific individual case in order to decide whether the use of biometric data processing systems is possible in a data protection-compliant manner and which data protection requirements have to be met.

TYPICAL FIELDS OF APPLICATION FOR BIOMETRIC DATA:

- Surveillance systems and CCTV
- Access control for offices/server rooms
- User authentication or payment by fingerprint
- Voice recognition
- Investigation of crimes

¹ https://www.datenschutz-bayern.de/datenschutzreform2018/DSFA_Blacklist.pdf

² https://www.datenschutz-berlin.de/fileadmin/user_upload/pdf/datenschutzfolgeabschaetzung/BlnBDI-2018-DSFA-nicht-oeffentlich.pdf

³ https://datenschutz-hamburg.de/assets/pdf/28_Taetigkeitsbericht_Datenschutz_2019_HmbBfDI.pdf (page 142)

⁴ https://datenschutz-hamburg.de/assets/pdf/28_Taetigkeitsbericht_Datenschutz_2019_HmbBfDI.pdf (page 98f)

⁵ <https://justiz.hamburg.de/aktuellepresseerklarungen/13105802/pressemitteilung/>

⁶ http://www.gerichtsentscheidungen.berlin-brandenburg.de/jportal/portal/t/hnm/bs/10/page/sammlung.psm!;jsessionid=9D87BBC2862239923F57C1651466402A.jp21?pid=Dokumentanzeige&showdoccase=1&js_peid=Trefferliste&documentnumber=1&numberofresults=1&fromdoctodoc=yes&doc.id=JU-RE190016085&doc.part=L&doc.price=0.0#focuspoint



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