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The principle of proportionality in biometrics: Case studies from Norway

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ABSTRACT

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The principle of proportionality is a decisive factor in the legal review of biometric systems by the Data Protection Authorities (DPA) in EU member states. However, in the working document on biometrics the Data Protection Working Party gives little guidance on how the purpose and proportionality principle must be applied to biometrics. There remain uncertainties as to the specific criteria and factors that are used for evaluating the proportionality of processing biometric information. This sometimes leads to contradictory decisions by different national DPAs on similar biometric related issues. This paper aims to discuss the legal factors and parameters that are generally adopted to address the proportionality issue in the biometric context. After a brief analysis of the legal notion of the principle of proportionality, the paper analyses and discusses the European organisations' interpretation of the recent Norwegian cases on biometrics. The paper then concludes with a summary of the interpretation of the proportionality principle within the biometric context and gives specific recommendations of several important factors that need to be taken into account.

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1. Introduction

Biometrics and biometric technology are the automated measurement of behavioural or physiological characteristics of a human being to determine or authenticate their identity. (Dennis, 2002). The term “biometrics” is used alternatively to describe two different aspects of the technology – characteristics and processes.¹

- Biometrics as “characteristics” refers to measurable biological or behavioural aspects of the person that can be used for automated recognition.
- Biometrics as “process” refers to automated methods of recognising an individual based on measurable biological and behavioural characteristics.

The deployment of biometric technology has raised debates upon several legal issues, among which the interpretation of proportionality is at the centre. The principle for proportionality is a basic principle in European Community law which is manifested in a wide range of legal instruments and judicial decisions (Craig and Burca, 2008 p. 544–51). It is a decisive factor in the legal review of biometric systems by the Data Protection Authorities (DPAs), because the use of the biometrics affects the freedom of individuals as it can generate personal data which can be used to control the behaviour of individuals. Although the Data Protection Working Party (DPWP) has emphasised the value of the proportionality principle when biometric data is being collected, DPWP gives little guidance in the working document on biometrics as to how the purpose of the proportionality

¹ NSTC Subcommittee on Biometrics, “Biometrics Overview” 7 February, 2006.
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principle should be applied to biometrics (Article 29 Data Protection Working Party, 2003 p. 6). There remain uncertainties as to the specific criteria and factors that are used for evaluating the proportionality in relation to processing biometric information. This sometimes leads to contradictory decisions by different national data protection authorities on similar biometric related issues.

This contribution aims to discuss the legal factors and parameters that are generally adopted to address the proportionality issue in the biometric context. It begins with a brief elaboration of the notion of proportionality, and then it points to some interpretation difficulties. It continues with a discussion about the European organisation's opinion on proportionality within the biometric context. The focus of the paper is an analysis of the recent Norwegian cases on biometrics and the Norwegian Data Protection Authority's interpretation of the principle of proportionality in case decisions. Attention is also given to the issue of consent and its relevance to proportionality. In the final part of the paper, the main findings will be summarised and recommendations will be provided for the interpretation of the proportionality principle within the biometric context.

2. The notion of proportionality in data protection

Within the context of European data protection law, the principle of proportionality implies that data collected may not include more than is required to fulfil the purpose for which they were collected. According to this principle, personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and further processed.²

The notion of proportionality is involved in the concept of fairness which is a constituent of the primary principle of data protection laws – i.e., that personal data should be processed fairly and lawfully (Bygrave, 2002 p. 58). “Fairly” could indicate that the data processing shall not intrude unreasonably upon the individual's privacy, autonomy and integrity and shall be transparent (Bygrave, 2002 p. 58). According to Bygrave, in the EC Law, the proportionality principle is generally recognised as having three parts: suitability, necessity and non-excessiveness (Bygrave and Schartum, 2009). Suitability encompasses the notion of suitability and relevance. Hence, provisions that incorporate the criteria of “not excessive” and

² Article 6 of the Data Protection Directive provides that: “(a) personal data must be processed fairly and lawfully, and (b) personal data must be collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. In addition, personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and further processed (purpose principle).” A similar provision also appears in Article 5, paragraph C of Convention 108, which states that personal data undergoing automatic processing, shall be “adequate, relevant and not excessive in relation to the purposes for which they are stored”. The OECD guideline also requires that “Personal data should be relevant to the purposes for which they are to be used and, to the extent necessary for those purposes”. Although the wording is slightly different, the basic meaning is the same.

“relevant”, such as in Article 6(1) (c) of the Data Protection Directive, and “necessity”, such as the European Convention of Human Rights (ECHR) Article 8(2), all embody a requirement of proportionality. The trouble with this is the ambiguity latent in the terms “not excessive”, “relevant” and “necessary” and therefore in the term “proportional” itself. As has been pointed out, “the precise content of the principle of proportionality is far from settled; not only does it appear to apply in different contexts, but it seems to mean different things to different courts and it also develops over time” (Ellies, 1999 introduction).

The notion of proportionality has been used to decide upon interests of private parties that are in conflict. Article 7(f) of the Data Protection Directive mentions in a limiting way the legitimate ground on which data is permitted. The last mentioned ground for processing personal data is as follows:

Processing is necessary for the purpose of the legitimate interests pursued by the controller ... except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1 (The Consultative Committee established by the Council of Europe's Convention for the protection of individuals with regard to automatic processing of personal data of, 1981).

This may indicate that the most relevant explanation of the word “proportional” may be reserved for actions whose benefits exceed their costs by a considerable margin, or put differently, outweigh them “too far”. In contrast to the other objective content of Article 7, this provision is distinguished by its lack of any objective content; it could refer to any specific meaning arising out of a particular situation under consideration (Tranberg, 2007b p. 353). If this *balancing test* is taken to mean the weighing against one another of competing considerations, then it would seem to address the problem of proportionality in data protection law more directly than other abstract terms. When the measure chosen passes the balancing test, then it may be regarded as “suitable”, “necessary” and “not excessive”.

However an interest test can require a good deal more than balancing. A particular restraint may be justified in cost-benefit terms and still not be necessary under this test if a lesser restraint would have served the purpose as well. This actually brings us to another important standard of proportionality.

The proportionality principle aims to enjoin the data controllers from compromising important interests any further than is strictly necessary to attain its legitimate purpose. Treating the data controllers' action as excessive or unnecessary when it goes beyond such a minimum would give the proportionality principle precisely that effect. This is affirmed in the Europa portal,³ which interprets the proportionality principle as follows:

When various forms of intervention are available to the Union, it must, where the effect is the same, opt for the

³ The European Union On-line, Europa provides access to information (press releases, legislation, fact-sheets) published by the European Union and its institutions. See <http://europa.eu/>.

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