

## **Opinion on the notification for prior checking received from the Data Protection Officer (“DPO”) of the Community Plant Variety Office (“CPVO”) on 16 March 2007 regarding CPVO's pre-employment and annual medical check-ups**

Brussels, 4 June 2008 (Case 2007-176)

### **1. Proceedings**

On 16 March 2007 the European Data Protection Supervisor (“**EDPS**”) received the CPVO's prior checking notification (“**Notification**”) about its data processing operations related to its pre-employment and annual medical check-ups. On 19 March 2007, the EDPS also received an email copy of the Notification.

On 4 April 2007 the EDPS requested further information from the CPVO. The CPVO replied on 22 May 2007. On the same day, the EDPS requested further clarifications. The CPVO replied the next day, on 23 May. On 28 June 2007 the EDPS requested additional information. The CPVO responded on 20 May 2008. Finally, on 26 May 2008 the EDPS sent the draft opinion for comments, which were received on 3 June 2008.

### **2. The facts**

The Notification concerns the annual and pre-employment medical check-ups at the CPVO.

#### **2.1. Medical check-up under the Staff Regulations and Conditions of Employment**

As will be discussed in greater detail in Section 3.2, both the pre-employment and the annual medical check-ups are mandatory pursuant to the provisions of the Staff Regulations of Officials of the European Communities (“**Staff Regulations**”) and the Conditions of Employment of other servants of the European Communities (“**Conditions of Employment**”)¹. The obligation to undergo the medical check-ups extends to officials, temporary agents, and contractual agents, as well as to candidates to these positions.

#### **2.2. Medical check-up at the CPVO**

Due to its small size, the CPVO decided to outsource the tasks of carrying out the pre-employment and annual medical check-ups for its employees. The medical check-ups are carried out by a qualified occupational physician (“**CPVO Physician**”), a medical centre (“**CPVO Medical Centre**”), which offers testing facilities, and an ophthalmologist (“**CPVO Ophthalmologist**”). The medical files are kept by the CPVO Physician. The CPVO Physician, the CPVO Medical Centre and the CPVO Ophthalmologist are independent contractors. The purposes, content, and procedures for the medical check-ups are described below.

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¹ For the sake of brevity, these two documents together will sometimes be referred below as “**Staff Regulations**”.

## **2.3. Pre-employment medical check-up at CPVO**

**2.3.1. Introduction.** As required by the Staff Regulations, candidates for positions as officials as well as candidates for temporary or contractual agent positions at the CPVO all participate in pre-employment medical check-ups before recruitment.<sup>2</sup>

**2.3.2. Purpose of the pre-employment medical check-up.** The purpose of the pre-employment medical check-up is to ascertain whether the candidates are fit to perform their duties, as provided in the Staff Regulations.

The medical results are not used to assess health insurance risks: in particular, they are not used to determine whether the candidates will be entitled to health insurance benefits, or what will be the amount of health insurance payable. This is with two exceptions:

First, the CPVO may apply to candidates Article 1 of Annex VIII of the Staff Regulations (Articles 32 and 100 of the Conditions of Employment for temporary and contract agents), which allow the appointing authority to limit, for a maximum of five years, the benefits in case of death or invalidity due to a pre-existing condition.

Second, the CPVO may invoke the second paragraph of Article 28 of the Conditions of Employment. This provision is applicable to temporary and contractual agents (but not to officials). It allows the appointing authority to deny any medical coverage for pre-existing illnesses from the temporary or contractual agent. As a practical result, the agent, then, will be constrained to arrange for medical insurance for these conditions elsewhere, or run the risk of remaining uninsured.

Upon further EDPS enquiry, the CPVO explained that it has no policy to address what happens if either of these provisions needs to be invoked. For now, the CPVO president decides on a case by case basis. The CPVO further confirmed that up until now, the president decided only upon a single case in which the issue whether to invoke Article 28 arose. In that particular case, the decision was not to limit the staff member's medical coverage. The CPVO also confirmed that there have also been no cases where the CPVO would have been considering the limitations pursuant to Article 1 of Annex VIII of the Staff Regulations.

The CPVO also noted that the procedures in respect of limitations of benefits will be subject to a separate notification to the EDPS if and when the CPVO establishes its own policies and procedures.

Finally, the EDPS notes that the CPVO did not designate "prevention" as a specific ancillary purpose of the pre-employment medical check-up.

**2.3.3. Content of the pre-employment medical-check up.** As part of the pre-employment medical check-up, the CPVO Physician carries out a direct physical examination and completes a medical overview form. This form evidences the results of the examination (weight, height, blood pressure, reflexes, status of tongue, tonsils, lungs, etc.), and describes the candidate's current state of health based on the examination. There is no separate medical history questionnaire to be completed by candidates. However, the medical overview form itself requests certain additional information about medical problems since previous check-up, menstruation, "family situation" and eventual problems of a psychological or psychiatric nature ("psychisme"). The CPVO explained that under "psychisme", the CPVO Physician may note issues such as the death of someone close, problems with children, or post-maternity depression. Certain "lifestyle" questions

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<sup>2</sup> Currently the CPVO only employs officials and temporary agents. However, it noted that in the future it may possibly also employ contractual agents.

are also included in the questionnaire, including on consumption of alcoholic beverages and tobacco, as well as sporting activities. Finally, under "conclusions" the CPVO Physician may give his views for a possible treatment or follow-up.

Although the forms themselves do not indicate that giving any of the information would be optional, the CPVO confirmed that completing all entries is not compulsory. Neither is there a check as to the accuracy of the answers. Instead, the entries are listed for guidance to help the CPVO Physician collect the data necessary to assess the health of the candidate.

The CPVO emphasised that the "lifestyle" questions and questions related to "psychisme" or "family situation" are included only to give the possibility to a candidate to take-up discussion of an eventual problem with the CPVO Physician in case he or she wants to. With respect to family situation, the CPVO also mentioned that this information helps the CPVO Physician have a global view of the health situation of the candidate taking into account that a recent change in a given situation may influence his or her health parameters (e.g., a divorce, serious illness of someone close).

The CPVO Medical Centre performs a chest X-ray and an electrocardiogram test, as well as a series of laboratory examinations on the candidate's blood and urine samples, and - starting from age 45 - also on stool samples. The candidate also visits the CPVO Ophthalmologist.

The candidate's blood is tested for the following: complete blood count, thrombocytes, erythrocyte sedimentation rate (ESR), urea, serum, uric acid, creatinine, potassium, fasting blood sugar, gamma glutamyl transferase (if levels are elevated, also for transaminase, SGOT and SGPT), total cholesterol, HDL, calculated LDL, triglyceride, total bilirubin, GGT, ASAT, ALAT, protein electrophoresis, syphilis, hemoglobin, red blood cells, blood count, leukocyte, leukocytic formula. Men over 50 are also tested for prostate specific antigens (PSA). Testing for HIV is subject to the candidate's written consent and may be carried out only after an obligatory discussion of the subject.

The candidate's urine is tested for the following: albumin, sugar, microscopic examination, ph. There is no screening for substance abuse or pregnancy. Stool samples are tested for blood.

In addition to the standard medical check-up, if necessary, the CPVO Physician may require that the candidate takes complementary exams.

**2.3.4. Organization of the pre-employment medical-check up.** The detailed procedure for the pre-employment medical check-up is the following:

**Invitation and scheduling.** The pre-employment medical check-up is carried out only after both parties signed a contract of employment. Article 6 of the standard CPVO employment contract provides that "the contract is concluded under the suspensive condition of a positive result of the pre-employment medical visit". That is to say, employment is conditional on the outcome of the medical check-up. In case of a negative result, candidates have the right of recourse pursuant to Article 33 of the Staff Regulations.

The medical check-up is scheduled by the CPVO Human Resources Department ("**CPVO HR**"). CPVO HR, simultaneously, sends the candidate an official invitation letter specifying the time and date of the medical check-up. The invitation letter does not contain a detailed description of the medical exams to be taken.

**Communicating test results to the CPVO Physician and to the candidate.** The CPVO Medical Centre sends one copy of the medical results to the CPVO Physician and another copy to the home address of the candidate.

The CPVO Physician retains the copy of the medical results and the medical overview form in the medical file of the candidate. None of these documents (test results and medical overview form) are disclosed to CPVO HR.

With respect to the eye examination, the CPVO explained that the exam by the CPVO Ophthalmologist is carried out much later than the examination by the CPVO Physician due to an overbooking of ophthalmologists in France. Once the exam is carried out, the CPVO receives a bill from the Ophthalmologist but not the actual medical results of the eye examination. The CPVO Ophthalmologist also does not issue a certificate of "eye-fitness". Neither does he forward the results of his examination to the CPVO Physician. This means that, as a matter of fact, unless the problem is apparent, the CPVO Physician, when issuing the certificate, will not be able to take into account any possible eye problem.

**Certification.** Once all results (except, as explained above, the results of the eye examination) are available and have been analysed, the CPVO Physician certifies whether or not the candidate is physically fit to perform his/her duties, by issuing a so-called "certificate of fitness". Candidates are scheduled to have two visits with the CPVO Physician: the second takes place once the results of the blood, urine (and, if applicable, stool) tests are available. The ECG test is also carried out on the occasion of this second visit.

Rather than merely stating whether "the candidate is physically fit/unfit to perform his/her duties," the form submitted to the EDPS by the CPVO also offers a third option, indicating that the candidate is fit to perform his/her duties, "on condition that Article 1 of Annex VIII of the Staff Regulations (or Article 32 of the Conditions of Employment) applies" (the provision relating to limitations on death and invalidity benefits due to a pre-existing conditions).

The CPVO has not provided specific guidelines to the CPVO Physician on the method to assess a candidate's fitness for service. The CPVO is also not planning to set different fitness requirements for different types of positions in the organization, or guidelines to the CPVO Physician what should be the consequences if a candidate/staff member refuses to take certain tests or respond to certain questions on the medical overview form. Regarding these aspects, it relies on the professional capacity and the expertise in occupational health of the CPVO Physician.

The CPVO Physician retains a copy of the certification on the medical file of the candidate and sends another copy (not including medical data) to CPVO HR. CPVO HR retains its copy on the personal file.<sup>3</sup>

**Certification by the medical officer of another Community institution or body.** If requested, a candidate may be authorized to undergo the pre-employment medical check-up by the "medical examiner" (usually the medical officer, other times the outsourced occupational physician) of any Community institution or body. This is sometimes requested for logistical reasons if the candidate lives closer to another Community institution or body than the one that employed him.

**Reimbursement for complementary exams.** If complementary exams need to be carried out in connection with the pre-employment medical check-up, it is the candidate who pays for such exams. However, he or she will subsequently get reimbursed by the CPVO. In order to be

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<sup>3</sup> In addition to the certificate issued following the pre-employment medical check-up, the Notification submitted by the CPVO initially stated that after a candidate successfully passes a competition for a position but before the pre-employment medical check-up is organized, the candidate is already requested to provide a recent medical certificate to CPVO HR. During the prior checking procedure, upon further enquiry by the EDPS about the content and purpose of this additional certificate, the CPVO confirmed, before the EDPS would have made any recommendations of his own in this regard, that it has revised its policy since the submission of the Notification and it is of the view now that this document is not necessary. The CPVO also confirmed that it will modify its procedures and this additional certificate will no longer be required in the future.

reimbursed, the candidate must present to CPVO HR a copy of the invoice paid. This invoice must mention that the exam has been requested by the CPVO Physician. The CPVO explained to the EDPS that it may be possible, from the stamp on the invoice, to see what kind of exam was carried out. However, the exact type of examination is always coded according to the French Caisse Primaire d'Assurance Maladie and the meaning of the coding system is not obvious to a person not trained medically or in medical insurance matters.

## **2.4. Annual medical check-up at CPVO**

**2.4.1. Introduction.** As provided in the Staff Regulations, each year, all officials, temporary agents and contractual agents working for the CPVO are required to participate in an annual medical check-up.

**2.4.2. Purpose of the annual medical check-up.** The CPVO defined the purpose of the annual medical check-up as prevention.

**2.4.3. Content of the annual medical check-up.** As in the case of the pre-employment medical check-up, during the annual medical check-up, the CPVO Physician carries out a direct physical examination and completes a medical overview form. The medical overview form is identical to the one used during the pre-employment medical check-up. No medical history form needs to be filled in by the candidate. The CPVO Medical Centre, as in the case of the pre-employment medical check-up, performs a series of laboratory examinations on the candidate's blood, urine, and in some cases, stool samples. The candidate's blood, urine, and stool samples are tested for the same indicators as during the pre-employment medical check-up except that syphilis test is carried out every five years only. There is also an examination by the CPVO Ophthalmologist.

Chest X-ray test is carried out only (i) in case other examinations show its necessity or (ii) during the last annual visit before retirement. Electrocardiograms are carried out every two years after the age of 40. Above the age of 25, a gynaecological exam is carried out for women, including a physical examination and Pap smear. Mammography is carried out starting from the age of 40 if there is medical reason to do so. From the age of 45, men are also systematically screened by examination of their reproductive organs, and by rectal examinations. Men also undergo prostate ultrasound examination from the age of 50 if there is a clinical indication to do so. Rectoscopy is carried out from the age of 45 for both genders if there is an indication. Eye pressure examinations are carried out every year for those with high blood pressure or with diabetes. These exams are also carried out every two years for everyone over the age of 40.

Special exams are also carried out depending on the type of work carried out by the staff member. Those working with video-displays, for example, will have an eye examination every two years.

In addition to the standard medical check-up, if necessary, the CPVO Physician may require that the candidate participates in complementary exams.

**2.4.4. Organization of the annual medical check-up.** The procedure for the annual medical check-up is nearly identical to the procedure for the pre-employment check-ups.

**2.4.5. Private testing.** The CPVO informs its staff members of the possibility under Article 59(6) of the Staff Regulations to take the annual medical check-up privately and has put in place the reimbursement scheme for private testing. In practice, an email is sent around each year by CPVO HR asking staff members to indicate whether they will undertake the annual medical check-up with the providers contracted by the CPVO. Staff members are also informed that in case of private testing they will have to use the same forms (medical overview form and eye examination form) and will be reimbursed, on request, in accordance with Article 59(6) of the Staff Regulations. In case of private testing, the medical results are not communicated to the CPVO or to the CPVO Physician. Instead, CPVO HR only receives a certificate from the private

practitioner certifying that the annual exam has been carried out. In the framework of reimbursement, invoices are submitted to CPVO HR by the staff member, and subsequently are transferred to CPVO Finance.

Besides the emails, no information is provided regarding private testing in other forms, such as on the CPVO intranet.

## **2.5. Conservation period**

**2.5.1. Certificates of fitness.** Certificates of fitness of employed staff are kept for an indefinite period, even after termination of employment or death. After the end of employment, the certificates are archived using CPVO's general archiving system. No data are stored for historical, statistical or scientific purposes.

Although CPVO has not specified any reason to justify the need for indefinite retention of the certificates of fitness, it emphasized that it believes that there is no need for a retention policy "because the information that a person is fit cannot harm the integrity of the person".

In case of a "negative report" from the CPVO Physician, the retention period is 24 months.

**2.5.2. Medical files.** As for the retention period of the medical files themselves held by the contracted medical practitioners, the CPVO explained that it did not give them any specific instructions in this respect. In its Notification, the CPVO noted that French law applies for the retention of data kept by the CPVO Physician, the CPVO Medical Centre and the CPVO Ophthalmologist. The CPVO subsequently explained that Article 4 of the contracts concluded with the CPVO Physician, the CPVO Ophthalmologist and the CPVO Medical Centre provides that they each will be subject to the provisions of the medical code of conduct ("cadre de déontologie médicale en vigueur") applicable to them. According to the CPVO, the French medical code of conduct establishes that medical data must be kept for 30 years after the patient's death.

With that said, the CPVO confirmed that when a staff member moves, for example, to another town or to another job, if he or she so requests, the medical files kept by the CPVO Physician may be transferred to a medical professional of the staff member's choice.

## **2.6. Recipients and data transfers**

In addition to the processors (the CPVO Physician, the CPVO Medical Centre and the CPVO Ophthalmologist) and - with respect to a certain limited range of data and documents as noted above - CPVO HR and CPVO Finance, no other recipients or transfers are foreseen.

## **2.7. Access rights**

Staff members, on request, have the right of access to their personal files, in accordance with Article 26(a) of the Staff Regulations. This includes their certificates of fitness. For medical files, staff members must ask directly and individually the CPVO Physician and the CPVO Ophthalmologist. The CPVO did not give any specific information or instructions in this respect to any of the contracted medical professionals but it is understood that staff, as well as candidates, must be given access to their medical results upon request. In addition, the results of the laboratory tests carried out by the CPVO Medical Centre (blood, urine, stool samples) are sent directly to the candidate's home address.

## **2.8. Information provided to data subjects**

The CPVO explained that at the moment, the CPVO does not provide data protection notice to candidates concerning the treatment of their medical data, but it is in a process of drafting such a notice.

As for the annual medical check-up, staff members receive in advance the following documents: (i) list of exams, including details of blood test and urine tests, (ii) medical overview form, (iii) eye examination form, (iv) chest X-ray form, and (v) certificate of attendance. The documents are given in a hard-copy to the staff member, at the time when the annual medical check-up is scheduled.

In case of the pre-employment check up the empty forms are sent to the CPVO Physician rather than to the candidate.

**2.9. Security.** Data are processed manually. None of the processing operations are automated. No data are stored electronically.

The certificates of fitness are kept in a locked filing cabinet with CPVO HR. Only two persons have access to this cabinet, the HR officer and his/her secretary.

As for the medical files held by the contracted medical practitioners, the CPVO has not given them any specific instructions and relies on their professionalism and on the code of medical practice that they are subject to.

## **3. Legal analysis**

### **3.1. Prior checking**

**3.1.1. Scope of Notification.** The scope of the notified processing operation, and thus, also the scope of this Opinion, is expressly limited to CPVO's pre-employment and annual medical check-ups. The EDPS points out that if the CPVO Physician, the CPVO Medical Centre or the CPVO Ophthalmologist will provide additional medical services to the CPVO in the future, or if the data obtained from the medical check-ups will be used for additional purposes, then these additional data processing operations may need to be submitted for prior checking.

**3.1.2. Grounds for prior checking.** Article 27(1) of the Regulation (EC) 45/2001 (“**Regulation**”) subjects to prior checking by the EDPS all "processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes". Article 27(2) contains a list of processing operations that are likely to present such risks. This list specifically includes, under paragraph (b), the processing of data relating to health. The data collected in connection with the medical check-ups constitute health-related data, and therefore, requires prior checking by the EDPS.

**3.1.3. Notification and due date for the EDPS Opinion.** The Notification was received on 17 March 2007. According to Article 27(4) of the Regulation this Opinion must be delivered within a period of two months. The procedure was suspended for a total of 384 days. Thus, the Opinion must be rendered no later than 4 June 2008.

**3.1.4. Ex-post prior checking.** The processing operations had started before the EDPS was notified. Indeed, the Notification refers to activities which have been already in force in the CPVO for several years. Therefore, the prior checking should be considered "ex-post" prior checking.

Since prior checking is designed to address situations that are likely to present certain risks, the opinion of the EDPS should be given prior to the start of the processing operation. In this case however the processing operation has already been established. In any case, this is not a serious problem in that any recommendations made by the EDPS may still be adopted accordingly.

### **3.2. Lawfulness of the processing**

**3.2.1. Introduction.** Article 5(a) of the Regulation provides that personal data may be processed if "processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties ... or other legal instrument adopted on the basis thereof".

The first issue under Article 5(a) is to determine whether the processing is instituted to serve a specific task provided for in a Treaty provision or another legal instrument adopted on the basis of the Treaties. The second issue is to determine whether the processing operation is indeed necessary for the performance of such a task.

To address the first issue in the present case, Recital 27 of the Regulation needs to be taken into account, which specifies that "processing of personal data for performance of tasks carried out in the public interest includes the processing necessary for the management and functioning of those institutions and bodies". Taken together, the issue in the present case is whether the processing is necessary for the management and functioning of the CPVO, and in particular, whether it is necessary for the performance of the tasks set forth in the Staff Regulations regarding the organization of the medical-check ups.

The requirement to undergo the annual and pre-employment medical check-ups is based on the provisions of the Staff Regulations. Thus, a specific legal instrument adopted on the basis of the Treaties permits, and in fact, mandates, the check-ups. The Staff Regulations, as it will be shown below, also clearly designate the purposes of the pre-employment check-up. However, they fail to designate the purposes of the annual check-up.

The fact that the medical check-ups are mandated by a longstanding and directly applicable Council Regulation suggests, although does not conclusively determine, the lawfulness of the organization of the medical check-ups. Similarly, the fact that the Staff Regulations clearly define the purposes of the pre-employment check-up suggests the lawfulness of the use of data for such purposes. At the same time, the fact that the Staff Regulations fail to designate the purpose of the annual check-up suggests that the lawfulness of any implied purposes must be carefully assessed to determine whether the processing is necessary for the management and functioning of the CPVO.

Under the two headings immediately following (Sections 3.2.2 and 3.2.3), the EDPS first discusses the relevant provisions of the Staff Regulations. Subsequently (in Sections 3.2.4, 3.2.5, 3.2.6 and 3.2.7), the EDPS will assess the lawfulness of the purposes of the CPVO's processing operations on the facts of the case. The CPVO designated several purposes for its data processing operations, as discussed in Sections 2.3.2 and 2.4.2 above. The EDPS will discuss whether these purposes are lawful for each of the two types of medical check-ups. Finally, Section 3.2.8 provides conclusions on the issue of lawfulness.

**3.2.2. Pre-employment medical check-up under the Staff Regulations.** The pre-employment medical check-up is based on Article 33 of the Staff Regulations.<sup>4</sup> The primary purpose of the pre-employment medical check-up is to satisfy the appointing authority that the candidates are physically fit to perform their duties.

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<sup>4</sup> Articles 13 and 83 of the Conditions of Employment also require temporary agents and contractual agents to undergo a similar medical-check-up. In both cases, Article 33 of the Staff Regulations applies, by analogy.



Secondarily, the pre-employment medical check-up may, in the circumstances set forth in Article 1 of Annex VIII of the Staff Regulations, help determine whether candidates will receive benefits in case they become invalid or die during the first five years of their employment.<sup>5</sup>

Further, the pre-employment medical check-up may also help the CPVO determine whether to deny medical coverage for pre-existing illnesses from the temporary or contractual agent pursuant to the second paragraph of Article 28 of the Conditions of Employment.

First, with respect to fitness for service, Article 28(e) of the Staff Regulations<sup>6</sup> requires that candidates be appointed for office only if they are physically fit to perform their duties. Article 33 of the Staff Regulations<sup>7</sup>, therefore, provides that before appointment a successful candidate must be medically examined in order that the institution may be satisfied that he/she fulfils the requirements of physical fitness.

These provisions must be read together with the anti-discrimination provisions set forth in the Staff Regulations. In particular, Article 1d provides that any discrimination based on disability is prohibited in the application of the Staff Regulations, and that "a person with a disability meets the conditions laid down in Article 28(e) if he can perform the essential functions of the job when reasonable accommodation is made".<sup>8</sup>

Second, with respect to invalidity or death benefits, Article 1 of Annex VIII of the Staff Regulations<sup>9</sup> provides that if the medical examination shows that the candidate is suffering from sickness or invalidity, the appointing authority, insofar as risks arising from such sickness or invalidity are concerned, may decide to admit that candidate to guaranteed benefits in respect of invalidity or death only after a period of five years from the date of his entering the service of the Communities. The pre-employment medical check-up, thus, to this limited extent, may also contribute to the determination of guaranteed benefits in respect of invalidity or death.

Third, with respect to limitations on medical coverage, Article 28 of the Conditions of Employment, provides the following: "If, however, the medical examination provided for in Article 13 shows the servant to be suffering from sickness or invalidity, the authority referred to in the first paragraph of Article 6 may decide that expenses arising from such sickness or invalidity are to be excluded from the reimbursement of expenditure provided for in Article 72 of the Staff Regulations." The pre-employment medical check-up, thus, to this extent, and only with respect to temporary agents and contractual agents, may also contribute to the determination of whether a staff member is entitled to medical coverage with respect to sickness arising out of certain pre-existing conditions.

Finally, pursuant to Article 33 of the Staff Regulations, where a negative medical opinion is given as a result of the pre-employment check-up, the candidate may, within 20 days of being notified of this opinion, request that his/her case be submitted for the opinion of a medical committee composed of three doctors chosen by the appointing authority from among the institution's medical officers. The medical officer responsible for the initial negative opinion shall be heard by the medical committee. The candidate may refer the opinion of a doctor of his choice to the medical committee.

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<sup>5</sup> Similar provisions apply for temporary agents and contractual agents pursuant to Articles 32 and 100 of the Conditions for Employment.

<sup>6</sup> Article 12 of the Conditions of Employment in case of temporary agents, and Article 82 in case of contractual agents.

<sup>7</sup> Article 13 of the Conditions of Employment in case of temporary agents, and Article 83 in case of contractual agents.

<sup>8</sup> These provisions also apply to temporary agents pursuant to Article 10 of the Conditions of Employment. Article 82 of the Conditions of Employment provides similar, although less specific anti-discrimination provisions with respect to contractual agents.

<sup>9</sup> Similar provisions apply for temporary agents and contractual agents pursuant to Articles 32 and 100 of the Conditions for Employment.

**3.2.3. Annual medical check-up under the Staff Regulations.** The annual medical check-up is based on Article 59(6) of the Staff Regulations, which requires officials to undergo a medical check-up every year either by the institution's medical officer or by a medical practitioner chosen by them.<sup>10</sup> The Staff Regulations do not specify the purpose of the annual medical check-up.

**3.2.4. Ascertaining fitness for service during the pre-employment medical check-up.** As noted above, in the case of the pre-employment medical check-up, the Staff Regulations make it clear that its primary purpose is to ascertain fitness for service. Processing health data for this purpose can be considered necessary "for the management and functioning" of the CPVO, and inasmuch as data processing is limited to what is necessary for purposes of ascertaining fitness for service, the EDPS considers that the processing operation is lawful.

The EDPS, however, emphasizes the importance of safeguards to prevent that the data obtained during the pre-employment medical check-up will be used to discriminate against candidates based on disability, chronic illness, health conditions, or life-style.

In this respect, the EDPS welcomes the practice of the CPVO that the pre-employment medical check-up is carried out only after both parties signed a contract of employment and that the standard CPVO employment contract provides that "the contract is concluded under the suspensive condition of a positive result of the pre-employment medical visit", that is to say, employment is conditional on the outcome of the medical check-up. The EDPS views this chronological order as an important guarantee that disability, chronic illness, other medical conditions, or lifestyle (so long as the candidate remains fit to perform his/her duties) do not interfere with the selection of the candidate. Indeed, to reduce the risks of discrimination based on disability or other medical conditions, the recommended practice is to inform candidates that they hold at least a valid offer (conditional only on the results of the medical tests) prior to the time they undergo the medical check-up. CPVO HR should assess all other conditions of employment (e.g. requisite educational background, professional experience, criminal records, etc.) before the medical tests take place.

For the same reason, in order to limit the possibilities of discrimination, EDPS also recommends that during the pre-employment check-up no data should be collected solely for purposes of prevention. This applies especially to life-style questions, such as the amount of regular exercise or alcohol and tobacco consumption.<sup>11</sup> With that said, the EDPS acknowledges that data collected for purposes of ascertaining fitness, can, secondarily, be used for purposes of prevention, subject to the limitations discussed in Section 3.2.6 below.

**3.2.5. Limitation of benefits as a result of the pre-employment medical check-up.** In addition to ascertaining fitness, the Staff Regulations also clearly specify that data obtained during the pre-employment medical check-up can also be used to limit benefits with respect to death or invalidity during the first five years due to pre-existing conditions. The Conditions of Employment allow further limitations of the medical coverage for pre-existing conditions in case of temporary and contractual agents. These purposes are also lawful from the data protection perspective, provided that adequate data protection safeguards are taken, as recommended in this Opinion.

In respect of safeguards, the CPVO informed the EDPS that it has not yet developed a policy as to the implementation of these specific provisions of the Staff Regulations and Conditions of Employment. The EDPS recommends that pending the development of a more complete policy on this issue, should these provisions need to be invoked, the CPVO should implement at least the following data protection safeguards:

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<sup>10</sup> Article 59(6) of the Staff Regulations also applies by analogy to temporary agents and contractual agents pursuant to Articles 16 and 91 of the Conditions of Employment.

<sup>11</sup> These issues will be discussed in more detail in Section 3.4 discussing adequacy, relevance, and proportionality.

As a minimum, the CPVO should ensure that the appointing authority decides whether to invoke these provisions without undue delay, and in any event, before the employment contract becomes binding on the employee. The information disclosed to the appointing authority regarding the nature of the illness or other medical condition should also be limited to what is strictly necessary to carry out an assessment. In addition, it must also be carefully considered whether the decision can be delegated to the CPVO Physician or other medical professionals, thus avoiding the need to disclose sensitive health-related data to CPVO HR, the appointing authority, or others within the CPVO. Further, it should also be ensured that candidates are not treated discriminatorily, that is, comparable conditions will lead to comparable limitations on benefits. Finally, the notice provided to data subjects should clearly specify these additional purposes for the pre-employment medical check-up, and should describe these minimum safeguards.

**3.2.6. Annual medical check-up: prevention.** Processing is lawful for purposes of prevention, as permitted in Article (10)(3) of the Regulation (see Section 3.3 below).

An efficient occupational health service can be advantageous to the employer, as it helps maintain a healthier, and thus, more productive workforce. At the same time, employees also enjoy the benefits of a free service offered to them. These goals, in a well-managed occupational health service, are complementary.

To keep this balance, from the data protection and privacy perspective, it is essential that the employer should limit interference with the medical self-determination of staff members to the extent strictly necessary. As a general rule, following receipt of the test results and hearing the advice of the CPVO Physician, staff members should remain free to decide what additional medical checks or treatments they wish to undertake, and no information about their choices should be communicated to CPVO HR or third parties. The fact whether or not they have any medical problems, and if so, what are those medical problems should, subject to a very narrow set of exceptions, remain between the CPVO Physician and the staff member concerned.

In addition, to achieve the purpose of prevention, staff members and candidates must also receive meaningful feedback from the CPVO Physician about the results of the medical check-up, rather than merely receive a copy of the test results.

If used solely for purposes of prevention, subject to the limitations as described above, and further provided that staff members are allowed to take the medical exams entirely privately, as required under Article 59(6) of the Staff Regulations, and as is the CPVO's current practice, the EDPS considers this processing operation necessary "for the management and functioning" of the CPVO, and thus, lawful.

**3.2.7. Pre-employment medical check-up: prevention.** The Staff Regulations do not specifically mention that the pre-employment medical check-up can be used for purposes of prevention. Neither does CPVO claim this as an additional purpose of the pre-employment medical check-up. Nevertheless, from the medical point of view, the earlier a patient is alerted to any potential health issue, the better it is. For this reason, the EDPS acknowledges that the CPVO is justified to use the information obtained during the pre-employment check-up for purposes of prevention. For example, the medical check-up may indicate that the cholesterol level of a candidate is moderately higher than normal. This would not, itself, have a negative impact on his fitness for service. Nevertheless, once this test has already been made, it is helpful to alert the candidate (and the candidate alone) that he should consider consulting a medical practitioner to see whether he may need medical treatment or life-style changes.

However, this does not mean that additional data, which are not necessary to ascertain fitness or determine limitations on benefits, should be collected during the pre-employment medical check-up for purposes of prevention or for other occupational health reasons. The EDPS calls the

CPVO's attention to the dangers that broadening of the scope of data collection may pose. In particular, the danger that data collected for purposes of prevention (for example, data obtained about smoking habits, contraception use, or family medical history, which should, in themselves, be irrelevant to determine fitness for service) may be used to discriminate against employees based on their life-style, their increased potential for certain diseases, or the need to care for family members.

From the data protection perspective, the principle of purpose limitation set forth in Article 4(b) of the Regulation requires that "personal data must be collected for specified, explicit and legitimate purposes and *not further processed in a way incompatible with those purposes.*" If additional data, which are not necessary for assessment of fitness for service, were to be collected during the pre-employment check-up specifically for purposes of prevention only, it would be very difficult to ensure that such data could not, additionally, be also used to unlawfully discriminate against employees.

For this reason, the EDPS recommends that no data should be collected for purposes other than determination of fitness (or limits to invalidity, death benefits or medical coverage due to pre-existing conditions). However, once data have already been obtained during the pre-employment medical check-up for purposes of ascertaining fitness or determining whether any temporary limitation on benefits are necessary, such data may, secondarily, also be used for purposes of prevention, provided that data subjects are clearly informed of such secondary use.

Finally, and importantly, the data obtained may also be used to determine whether any accommodations are needed to be made in the working conditions of the employee. The data subjects should be clearly informed of this additional purpose as well.

**3.2.8. Conclusion on lawfulness.** To conclude, the EDPS considers that the notified processing operations are lawful, so long as the data obtained from the pre-employment check-up are used strictly only to ascertain fitness for service (and additionally, to determine limitation of benefits with respect to medical coverage, death or invalidity), and that the annual check-ups are offered and used only as a preventive tool to alert staff members to any potential medical problems, but leaving it up to them what course of action they will take to protect their health. Data obtained during the pre-employment check-up may be similarly and secondarily also used for purposes of prevention. However, during the pre-employment check-up no data should be collected solely for purposes of prevention. Further, the data obtained during both check-ups can serve to help determine what accommodations need to be provided to the employees at the workplace.

### **3.3. Processing of special categories of data**

Processing of personal data concerning health is prohibited unless grounds can be found in Articles 10(2) and 10(3) of the Regulation.

As explained above concerning the legal basis, the justification for processing health data in connection with medical check-ups can be found in the Staff Regulations. Therefore, the processing falls under Article 10(2)(b) of the Regulation, according to which the prohibition shall not apply where the processing is "necessary for the purposes of complying with the specific rights and obligations of the controller in the field of employment law insofar as it is authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof".

As it is an exception to the general prohibition, Article 10(2)(b) must be interpreted strictly. First, the rights and obligations of the controller are qualified as "specific". Thus, the processing of sensitive data is permissible only insofar as it is relevant for the specific purposes described above when discussing lawfulness. Second, as the data processing has to be "necessary", there are

additional constraints when applying Article 4(1)(d) of the Regulation, as will be explained in Section 3.4 discussing "data quality".

In addition, and subject to the additional guarantee that data must only be processed by a health professional subject to the obligation of professional secrecy (or by another person also subject to an equivalent obligation of secrecy), the data obtained during the medical check-ups may also be used for purposes of preventive medicine, pursuant to Article 10(3) of the Regulation. As this is an exception to the general prohibition, Article 10(3) must also be interpreted strictly. In particular, any processing is only permissible insofar as it is "required" (in other words, necessary), for purposes of prevention.

Based on these provisions, the EDPS considers that the CPVO's data processing operations are permissible, provided that they are limited to the purposes as described in Section 3.2.8 above. In particular, the pre-employment check-ups fall under the exception provided under Article 10(2)(b) of the Regulation, while the annual check-ups will fall under both Article 10(2)(b) and Article 10(3) of the Regulation.

### **3.4. Data Quality**

**3.4.1. Adequacy, relevance, and proportionality.** According to Article 4(1)(c) of the Regulation personal data must be "adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed."

The primary purpose of the pre-employment check-up is to determine whether or not the candidate is fit for service. The main issue, thus, is what health-related data are likely to have an impact on the performance of the duties of the employee.<sup>12</sup> If the employee is fit for service only subject to certain reasonable accommodations made in the workplace, then the medical check-up may also help determining what accommodations are necessary.

The secondary purpose of the pre-employment medical check-up is to determine whether medical coverage, death or invalidity benefits should be limited due to a pre-existing medical condition. Any information requested during the pre-employment medical check-up should, therefore, only serve the purpose of determining whether or not a person is physically fit to perform his/her duties, needs certain accommodations at the workplace, or to assess whether a limitation on benefits is necessary.

To minimize the risks of discrimination based on health conditions, family situation or lifestyle, as discussed in Section 3.2.7, the EDPS recommends that during the pre-employment medical check-up no data should be collected solely for purposes of prevention.

The principles of adequacy, relevance, and proportionality must be ensured with respect to all categories of data collected at all stages of the procedure for the pre-employment medical check-ups.

In addition, these principles must also apply to data collected during the annual check-up. The purpose of the annual medical check-up is prevention. This, however, should not mean interference with the employee's medical self-determination, and should not include collection of excessive data. As a matter of good practice, the EDPS recommends that during the annual medical check-up, in cases where the proportionality of the collection of certain data is

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<sup>12</sup> The type of data may vary according to the type of position. For example, drivers need to see well enough to drive, telephone operators need to hear well enough to handle phone calls. CPVO is not planning to set different fitness requirements for different types of positions in the organization and regarding these aspects, it relies on the professional capacity and the expertise of the CPVO Physician. Considering that CPVO is a small organization, EDPS finds this approach adequate.

questionable, the risk of discrimination based on health conditions, family situation, or lifestyle is present, and the data provide only limited preventive benefits (for example, consider data regarding contraception use), the questions should be eliminated altogether. Should the CPVO decide for medically justified occupational health reasons that it nevertheless wishes to collect some such data during the annual medical check-up, the candidate should be offered the choice whether or not to provide the information. Collection of such data should be permissible only if the employee gives his/her informed consent with a clear understanding that (i) the provision of the information is entirely optional, and (ii) the data so obtained will only be used for purposes of prevention, that is, for alerting the candidate to any possible health-problems, or recommending a course of action, and, in any event, will have no effect on determination of the employee's continued employment, prospects for promotion, etc.

**3.4.2. Medical overview form.** First, it must be ensured that the medical overview form completed on the occasion of the pre-employment medical check-up does not attempt to collect non-relevant or excessive data. The EDPS questions the relevance and proportionality of certain information requested, in particular, during the pre-employment medical check-up.

**Family situation.** Information about the family situation of the staff member may provide some added value for prevention in special situations (e.g. to help diagnose post-natal depression). However, considering the risks of discrimination regarding employment based on family situation, especially, but not exclusively, during the pre-employment medical check-up (for example, the need to care for young children), the EDPS recommends that this question should be eliminated altogether. If found useful for purposes of prevention, questions relating to family situation may be raised during the annual medical check-up, provided that they are clearly marked as optional, and it will be indicated on the questionnaire that the data so obtained will only be used for purposes of prevention.

**Problems of a psychological or psychiatric nature ("psychisme").** The EDPS is of the view that whereas it is generally legitimate to request information about pre-existing diagnosed psychiatric illnesses, the pre-employment medical exams should not, in any event, serve more broadly to evaluate the candidate's psychological profile (e.g. whether he is short-tempered or moody) or particular psychological problems it struggles with at the time (e.g. divorce, bereavement). Therefore, the information gathered under the heading "psychisme" should be more limited and more clearly specified on the form.

**Menstruation.** The EDPS suggests that the CPVO reassesses whether there is a genuine need, from the medical point of view, to indicate in the medical files information relating to the menstrual period of female candidates. The assessment should show a genuine need for or benefit derived from collecting this type of information in the context of the pre-employment medical check-up. Unless this assessment suggests otherwise, this question should be eliminated.

**Lifestyle.** Lifestyle-questions such as those related to the amount of alcohol or tobacco consumed or physical exercise undertaken, although they may prove to be useful for prevention, also appear to be excessive for purposes of ascertaining fitness for service.<sup>13</sup> Again, the EDPS recommends that any such question on the medical overview form would be eliminated. If found useful for purposes of prevention, the questions may be completed during the annual medical check-up, provided that they are clearly marked as optional, and it will be indicated on the questionnaire that the data so obtained will only be used for purposes of prevention.

**3.4.3. Medical tests: potential age discrimination.** Next, the medical overview form evidencing the results of physical examination and the list of required tests (including detailed breakdown of

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<sup>13</sup> The EDPS notes that this Opinion does not address the issue whether, and to what extent, data can be collected in cases where there may be an increased risk to public safety if persons addicted to alcohol or drugs are employed (e.g. the Opinion does not address the issue of drug testing of armed security guards).

blood and urine tests) provided must also be assessed in the light of the principles of adequacy, relevance, and proportionality. In this respect, the EDPS has one specific recommendation which is aimed at eliminating potential age discrimination.

Certain tests are not carried out with respect to all candidates, only above a certain age-limit. This makes sense for purposes of prevention because from a certain age the risk of having such a disease increases.

However, such practice during the pre-employment medical check-up may lead to age-discrimination as an unintended collateral effect. In particular, two persons, one slightly below, one slightly over the age limit may unknowingly suffer from the same serious illness. For the older person, the tests will detect the problem, while the younger will remain ignorant of it. This may lead to significant consequences. First, the older candidate may be rejected due to unfitness for service. Second, the older candidate or his surviving family members may be deprived of medical coverage or benefits in case of death or invalidity whereas the younger one will receive those.

The CPVO explained that it uses forms developed by the Commission, presumably by medical practitioners. The CPVO also noted during the prior checking procedure that if necessary, the CPVO could, for the pre-employment medical check-up, carry out those tests irrespective of the age group. This is not done for the moment, but can be done, if necessary. The EDPS welcomes the CPVO's initiative to remedy this potential problem and issues no further recommendations in this respect.

**3.4.4. "Certificates of fitness".** Finally, the principles of adequacy, relevance and proportionality must also be ensured in the "certificates of fitness" that the CPVO Physician provides to CPVO HR and that will be kept in the personal file.

As noted above, rather than merely stating whether "the candidate is physically fit/unfit to perform his/her duties," the form submitted to the EDPS by the CPVO also offers a third option, indicating that the candidate is fit to perform his/her duties, "on condition that Article 1 of Annex VIII of the Staff Regulations (or Article 32 of the Conditions of Employment) applies".

The EDPS finds it acceptable – indeed it appears to be unavoidable – that the CPVO Physician communicates this much to CPVO HR. However, the EDPS suggests that CPVO reassess whether any limitations should necessarily be indicated on the certificates themselves. The certificate will be placed on the personal file, and as part of the file, it will be available to a broader group of recipients than what may be strictly necessary to achieve the purpose of the communication. As part of the personal file, it will also be retained for a considerable length of time, which may also not be necessary for the purpose of the communication. During this assessment, the CPVO should consider that any information relating to medical conditions should be kept confidential as much as possible, with a strict limitation of disclosure on a need-to-know basis.

In addition, when the CPVO Physician considers that any disclosure needs to be made to CPVO HR regarding these limitations, the EDPS also recommends that the CPVO Physician discusses individually with the employee concerned the form and content of the disclosure that the CPVO Physician will make to CPVO HR, in order to ensure that no more health-related data will be disclosed than what is strictly necessary and acceptable to the employee.

Finally, as described in a footnote to Section 2.3.4 above, the EDPS notes that the CPVO undertook to discontinue its practice to require an additional, prior medical certificate before the organization of the pre-employment medical check-up. Therefore, the EDPS finds it unnecessary to make additional recommendations in this respect.

**3.4.5. Data transfers to the CPVO Physician in the framework of private testing.** Article 59(6) of the Staff Regulations allows the annual medical check-up to be carried out by a medical practitioner chosen by the official.

In this context, the EDPS welcomes that the private practitioners chosen by the employees are under no obligation to send to the CPVO and the CPVO Physician the test results or any other health-related information. The EDPS is indeed of the opinion that the preventive purpose of the medical check-up can be achieved by a statement by the medical practitioner confirming that the exams have been carried out.

**3.4.6. Fairness and lawfulness.** Article 4(1)(a) of the Regulation requires that data must be processed fairly and lawfully. The issue of lawfulness was analysed above (see Section 3.2). The issue of fairness is closely related to what information is provided to data subjects (see Section 3.8 below).

**3.4.7. Accuracy.** According to Article (4)(1)(d) of the Regulation, personal data must be “accurate and, where necessary, kept up to date”, and “every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified.”

In this case the data include the results of complex medical examinations carried out by the CPVO Medical Centre, results of the physical examination carried out by the CPVO Physician and the information relating to the employee's clinical history. Given the nature of most of these data, it is not easy to ensure, assess, or prove accuracy. However, the EDPS emphasises that the CPVO nevertheless must take every reasonable step to ensure that data are up to date and relevant. For example, so as to ensure the completeness of the file, any other medical opinions submitted by the data subject must also be kept in the medical files.

### **3.5. Conservation of data**

The general principle in the Regulation is that personal data may be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed (Article (4)(1)(e) of the Regulation).

As for the data of candidates whose certificates of fitness were negative, the EDPS finds that the 24 months period following the issue of the negative certificate is acceptable. The EDPS, additionally, calls the attention of the CPVO that a similar conservation period should also be established for the data of those candidates whose certificates of fitness were positive, but who, for any reason, did not join the service after all.

As for the data of staff members, the EDPS recommends that the CPVO evaluates to what extent and for what purposes the content of a medical file needs to be kept. The EDPS also recommends that a definitive time-limit is set for keeping the data, rather than allowing the CPVO to keep the data indefinitely. This is especially important in case of those certificates which may include “qualifications” such as those pointing out to the possibility to limit benefits due to a pre-existing condition. However, a conservation period needs to be established with respect to the “unconditional” certificates as well.

In this respect, the EDPS calls the CPVO's attention to his recommendations issued on 26 February 2007 in case 2006-532 in response to the request of the Collège des Chefs d'administration to comment on the Collège's proposal of a uniform 30-year conservation period for all medical data across the Community institutions. In his recommendations, the EDPS invited the Collège to reassess its initiative and examine, on a case by case basis, what conservation periods are necessary for specific medical documents, considering that Article 4(e)



of the Regulation requires that data should be kept no longer than is necessary for the purposes for which they are processed. The recommendation is available on the EDPS website.

With respect to the medical data held by the CPVO Medical Centre and the CPVO Physician, the EDPS welcomes that upon request of the data subject, these data may be transferred to the medical practitioner chosen by the candidate in case he/she ceases to work for the CPVO or moves to another location. The EDPS additionally recommends that such possibility should be open to the staff member even if he continues to live at the same place or continues to work for the CPVO.

### **3.6. Recipients and data transfers**

**3.6.1. Introduction.** As described below in Section 3.9, the CPVO Physician and the CPVO Medical Centre act as processors, under contract with the CPVO, while the CPVO remains the controller of the data. The medical files, including the test results and the medical overview form are kept under lock and key by the CPVO Physician.

**3.6.2. Data transfers to CPVO HR and CPVO Finance.** The EDPS welcomes that CPVO HR made sure that it receives the certificate from the CPVO Physician without the background information contained in the medical file.

The EDPS has the following specific recommendations to further improve the procedures:

First, the EDPS recommends, as discussed above in Section 3.4, that the certificate of fitness should not contain health-related information beyond what is strictly necessary.

Second, the EDPS would welcome further streamlining of the procedures of invoicing of complementary exams, in particular, by the CPVO Medical Centre and by private practitioners.

The potential risk in such cases is due to the fact that the invoice itself may indicate the type of exam or the speciality of the physician or medical establishment carrying out the exam. This information may in itself be highly sensitive in some cases (for example, consider mention of “syphilis test” “oncologist”, “mental health institute”).

One option would be for the candidate/staff member to submit such an invoice to the CPVO Physician rather than to CPVO HR or CPVO Finance. In this case, the CPVO Physician could alert the candidate to the possibility that such information will be incidentally disclosed to CPVO HR and CPVO Finance, and request consent of the candidate/staff member or that the invoice would be resubmitted without the sensitive mentions, while offering other alternatives, such as obliterating parts of the invoice by the CPVO Physician, before forwarding to CPVO HR. However, in the present case, taking into account, especially, that less privacy-intrusive alternatives are available, the EDPS does not consider it as a sufficient guarantee to simply impose confidentiality requirements on the staff processing the invoices within CPVO HR and CPVO Finance.

**3.6.3. Ad hoc data transfers.** Third, the EDPS also recommends that in case the data transfer is not systematic, whenever possible, the consent of the employee should be sought for any *ad hoc* disclosure of health-related data by the CPVO Physician to CPVO HR or others within or outside the CPVO. If such consent cannot be obtained, the CPVO must assess case by case whether the CPVO Physician can nevertheless disclose the requested information. This is possible in certain cases, for example, in case of a highly contagious disease that poses risks to health and safety of others. In case of doubt, the EDPS recommends that the CPVO Physician consults the DPO before he makes the requested disclosure.

With respect to data transfers to third parties, as a general guidance, the EDPS calls the CPVO's attention to the following:

Article 7 of the Regulation provides that personal data may be transferred within or to other Community institutions or bodies if the data are necessary for the legitimate performance of the tasks covered by the competence of the recipient.

Further, Article 8 of the Regulation provides that personal data can be transferred to recipients other than Community institutions and bodies, subject to Directive 95/46/EC, if (i) the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority or (ii) if the data are otherwise necessary and if there is no reason to assume that the data subject's legitimate interests might be prejudiced.

Based on the foregoing, when a request for transfer of information contained in the medical file is made pursuant to Article 7 or 8, the consent of the staff member is not always mandatory. However, in absence of consent, CPVO HR, as controller, together with the CPVO Physician, as processor, will be required to verify the competence of the recipient and to make a provisional evaluation of the necessity of the transfer of the data. For example, transfers to the medical committee reviewing the decision to issue a negative certificate of fitness, or transfers to the Invalidity Committee are provided for in the Staff Regulations and are within the competence of the recipient. Other transfers, such as transfers to the legal counsel of the CPVO may also be permissible in the context of a case taken by a staff member against a decision in this field.

Finally, data transferred to a third country or international organisation must follow the rules of Article 9 of the Regulation. Therefore, "personal data shall only be transferred to recipients, other than Community institutions and bodies, which are not subject to national law adopted pursuant to Directive 95/46/EC, if an adequate level of protection is ensured in the country of the recipient or within the recipient international organisation and the data are transferred solely to allow tasks covered by the competence of the controller to be carried out."

If the recipient country does not ensure an adequate level of protection, the exceptions foreseen by Article 9(6) may be considered. Of these, paragraphs (a) and (e) are particularly relevant here: "By way of derogation from paragraphs 1 and 2, the Community institution or body may transfer personal data if: (a) the data subject has given his or her consent unambiguously to the proposed transfer, ... or (e) the transfer is necessary in order to protect the vital interests of the data subject, ...."

The recipient shall only process the data for the purposes for which they were transmitted.

### **3.7. Right of access and rectification**

**3.7.1. Right of access.** According to Article 13(c) of the Regulation, the data subjects have the right to obtain from the controller, without constraint, communication in an intelligible form of the data undergoing the processing and any available information as to their source. Article 20 provides for certain restrictions to this right including the case when such a restriction constitutes a necessary measure to safeguard the protection of the data subject or of the rights and freedoms of others.

By virtue of Article 26(a) of the Staff Regulations, staff members also have the right to acquaint themselves with their medical files, in accordance with arrangements laid down by the institutions.

The Notification confirms that the CPVO provides access to the medical files to staff members. During the procedure, the CPVO also referred to Article 26(a) of the Staff Regulations, but did

not establish any specific arrangements. The CPVO also did not give any specific instructions to the CPVO Physician or the CPVO Medical Centre in this respect.

The EDPS welcomes that the CPVO allows access to the medical files without setting any specific restrictions. However, the EDPS recommends that the CPVO sets safeguards to ensure that any access requests will be dealt with in a timely fashion and without constraints. This may include, for example, setting a reasonable timeline for the CPVO Physician in which to schedule an access visit, or provide copies of documents, and an obligation on the CPVO Physician to consult the CPVO DPO should he wish to limit access to any data requested. When establishing these safeguards, it must also be ensured that access cannot be limited to "justified cases" and must be allowed for any or no reason at all. Data subjects also cannot be required to specify the purpose of the request.

The EDPS also calls the CPVO's attention to "Conclusion 221/04" of 19 February 2004 of the Collège des Chefs d'administration, which aims at harmonizing certain aspects of access provision across the Community institutions. This document emphasises that access must be provided to health-related data to the maximum extent possible. The document provides, among others, that access should also be provided to data of psychological or psychiatric nature, although, in such cases, access may be granted indirectly, through the intermediary of a medical practitioner designated by the data subject. The document also specifies that access should also be given to the personal notes of the medical professional who carries out the medical check-up; provided that such access may be denied after examination of the circumstances of the given case if limitation of the disclosure is necessary to protect the interests of the person concerned or the rights of others. The EDPS, however, emphasises that these limitations must not be read to allow arbitrary or routine restrictions on access and must be evaluated on a case-by-case basis.

Further, the EDPS points out that not only staff members, but also candidates must be granted access to their data pursuant to Article 13 of the Regulation.

*Additional recommendations.* Finally, the Notification provides that a copy of the CPVO Medical Centre test results is provided to the candidate. The EDPS would recommend, as a good practice, to provide candidates also with a copy of the medical overview form automatically without the data subject having to specifically request this document. This can be done, for example, by providing a copy to the candidate/staff member immediately at the end of the medical check-up. Alternatively, a copy of the document can be placed in the same sealed envelope in which the medical tests are communicated to the candidates/staff members.

**3.7.2. Right of rectification.** Article 14 of the Regulation provides the data subject with a right to rectify inaccurate or incomplete data. As mentioned above when discussing data quality, the data subject should be able to request that opinions by another medical officer or a Court decision are placed in the medical files so as to ensure that the files are complete and up-to-date. The same rules should apply to the medical certificates kept in the recruitment file.

### **3.8. Information to the data subject**

**3.8.1. Introduction.** Articles 11 and 12 of the Regulation require that certain information be given to data subjects in order to ensure the transparency of the processing of personal data. Article 11 is applicable to data obtained from the data subject, whereas Article 12 is applicable to cases where the data have not been obtained from the data subject. On the facts of the case, Article 11 is applicable to some of the data contained in the medical overview form, whereas Article 12 applies to the data contained in the certificate of fitness, to the parts of the medical overview form completed by the CPVO Physician, and to the test results.

**3.8.2. Timing and format of the data protection notice.** Article 11 provides that when the data are obtained from the data subject, the information must be given at the time of collection. For the

case when the data have not been obtained from the data subject, Article 12 provides that the information must be given when the data are first recorded or disclosed, unless the data subject already has it.

The CPVO explained to the EDPS that while it currently only provides a relatively limited set of information to the data subjects, it is currently working on a draft data protection notice.

The EDPS welcomes the CPVO's intentions to provide a specific notice related to the processing of medical data within the CPVO.

The EDPS recommends that this notice would be made available in an easily accessible form and in a timely manner. Best practices include, among others, (i) posting the privacy notice on the intranet (ii) posting the privacy notice from the CPVO's recruitment page for viewing by candidates who has no access to the intranet yet, and (iii) linking to these notices from initial correspondence regarding these tests with the candidates and from the annual email alert to staff members inviting them to the tests. This allows data subjects to arrive at the medical check-up with the reassurance that their medical data will be processed fairly and lawfully.

The EDPS would also welcome (i) informational sessions for staff members (especially newcomers) regarding the annual medical check-up, which also includes information about data protection, and (ii) provision of a detailed description of the procedures for the annual medical check-up on the intranet and extranet, again, including data protection aspects of the processing.

**3.8.3. Content of the data protection notice.** Articles 11 and 12 of the Regulation provide a detailed list of information that needs to be provided to data subjects. In essence, the controller must inform data subjects about who processes what data and for what purposes. The information must also specify the origins and recipients of data, must specify whether replies are obligatory or voluntary and must alert the data subjects to the existence of the right of access and rectification. Further information, including the legal basis of processing, the time limits for storing the data, and the right of recourse to the EDPS must also be provided if necessary to guarantee fair processing. This may depend on the circumstances of the case.

Finally, both Articles 11 and 12 allows exceptions from the notification requirement in case when the data subject already has the information. Article 12 allows for further exceptions in a limited number of cases, including when the provision of information proves impossible or would involve disproportionate effort.

Considering that (i) none of the Article 11 or 12 exceptions apply to the facts of the case (data subjects do not already have the required information available to them, and the provision of information would not involve disproportionate efforts), and that (ii) all items listed in Articles 11 and 12 (including the legal basis of processing, time-limits for storing the data, and the right of recourse to the EDPS) are necessary to guarantee fair processing, the EDPS is of the opinion that all items listed under Articles 11 and 12 respectively must be provided in the data protection notice.

#### ***3.8.4. Additional recommendations***

**Information about the purpose of the processing.** The data protection notice regarding the pre-employment medical check-up should clearly designate the purpose of the visit to be ascertainment of physical fitness to perform duties. The EDPS additionally recommends that a reference should be made to the anti-discrimination provision in the Staff Regulation (Article 1d) and that it be clearly stated that disabilities or other medical conditions will not disqualify candidates so long they are able to perform the essential job functions when reasonable accommodation is made.

The data protection notice should also refer to the secondary purposes of the medical check-up: the possible use of the data for purposes of limiting medical coverage or guaranteed benefits in respect of invalidity or death for the period of the first five years of service due to a pre-existing condition.

With respect to the purposes of the annual check-up, the EDPS suggests that these should be designated and characterized as a free preventive service offered to employees.

**Information about the categories of data concerned.** Article 12 (but not Article 11) also requires that information be given to data subjects about the categories of data concerned. This information enables candidates to assess whether the data collection is proportionate to the purpose of the medical check-up. In particular, candidates, when their blood or urine samples are taken, should know for what indicators, thus, for what purposes, these samples are tested for. The EDPS welcomes the CPVO's practice to provide a detailed breakdown of the various indicators that blood and urine samples are tested for in the framework of the annual medical check-up. Similar breakdown should also be provided for the pre-employment medical check-up, to reassure candidates that they are not tested for non-disclosed purposes (e.g., for pregnancy, or substance abuse).

Candidates must also be informed about the content of the certificate of fitness.

**Consequences of failure to reply.** Article 11 requires that data subjects should be informed whether replies to questions are obligatory or voluntary as well as what will be the possible consequences of failure to reply. This provision is relevant with respect to both the responses to the medical overview form and the right to object to taking any particular tests.

As for the HIV tests, candidates are clearly advised that the HIV test is optional. As for the medical overview form, as noted above in Section 3.4, certain information should, as a matter of good data protection practice, not be requested at all during the pre-employment check-up. If the CPVO concludes that the information should be nevertheless requested for overriding medical reasons, it must be clearly indicated on the form that the information provision is optional and not mandatory, and that there are no adverse consequences of failing to reply to them.

**Information about access rights.** Data subjects must also be informed about the existence of the right of access to, and the right to rectify the data concerning them. The EDPS also recommends that information should go beyond merely mentioning the existence of this right, and should explain how, in practice, data subjects can exercise such rights.

**Information about the legal basis.** The data protection notice should provide references to the specific legal basis of the processing, that is, to the provisions of the Staff Regulations relating to the pre-employment and annual medical check-ups.

**Information about the time-limits for storing the data.** The data protection notice should clearly designate the applicable retention times for the various different categories of data, including (i) the test results and medical overview forms produced during each of the pre-employment and annual medical check-ups, and both in cases of successful or unsuccessful candidates, (iv) as well as the retention times for the medical certificates, again, both in cases of successful or unsuccessful candidates.

**Information about right of recourse to the EDPS.** The data protection notice should mention that the data subject has the right of recourse to the EDPS. The EDPS additionally recommends that the CPVO adds that such right of recourse can be exercised "at any time". This information may also be accompanied by a recommendation to contact the CPVO DPO first, before filing any complaint with the EDPS, while at the same time making it clear that this procedural step is not legally required.

**Possibility of arranging for the annual check-up privately.** Article 59(6) of the Staff Regulations provides that the annual medical check-up may either be carried out by the institution's medical officer or by a medical practitioner chosen by the staff member. CPVO employees are advised of such possibility in an email each year.

The EDPS welcomes this practice. In addition, and although this right is set forth in the Staff Regulations, as a good practice, the EDPS further recommends that employees be also advised via other means, in particular, via information posted on the intranet and during information sessions. The information provided should not only state that they can choose the doctor who will carry out the annual medical check-up, but also inform employees what practical steps they need to take to take the exams privately. Information should cover, in particular, the rules for reimbursement, as well as the rules for certification that the medical check-up has been carried out. It should also be clearly provided that the medical practitioner chosen will not need to forward the staff member's medical records to the CPVO Physician.

**Reference to this prior checking Opinion.** The EDPS also recommends that the data protection notice should provide reference to this prior checking opinion and contain a link to a location where it can be found (e.g. on the EDPS website or on the CPVO intranet and extranet).

### **3.9. Processing data on behalf of controllers**

The CPVO is the controller of the processing operation in the meaning of Article 3(1) of the Regulation. The CPVO Physician and the CPVO Medical Centre should be considered as "processors" within the meaning of Article 2(e) of the Regulation who "process personal data on behalf of the controller".

Article 23 of the Regulation requires that the processing operation must be governed by a contract binding the processor to the controller. The CPVO submitted three contracts to the EDPS with each of the CPVO Physician, the CPVO Ophthalmologist and the CPVO Medical Centre.

The EDPS calls the CPVO's attention to the fact that for purposes of data protection, the processor can act only on instructions from the controller while at the same time the professional discretion of the medical adviser has to be respected in medical matters. The obligations set out in Articles 21 and 22 of the Regulation on security are also incumbent on the processor. Article 23 requires that these two requirements must be clearly specified in the contract. The EDPS recommends that the contracts be modified to include the requirements set forth in Article 23 of the Regulation.

More detailed instructions, for example, those regarding retention periods, ad hoc transfers and modalities of rights of access could be given in the contract itself, in a set of written instructions to the processors, or in any other effective form, with general applicability, as well as on a case by case basis as needed.

### **3.10 Security measures**

According to Articles 22 and 23 of the Regulation, the controller and the processor must implement the appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected. These security measures must in particular prevent any unauthorized disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and to prevent all other forms of unlawful processing.

The EDPS considers that the security measures adopted by the CPVO are adequate in the light of Article 22 of the Regulation, provided that confidentiality of communications is guaranteed when transferring information from and to the CPVO Physician and the CPVO Medical Centre. In this

respect, the EDPS finds it a good practice and an appropriate measure to mark the term "confidential," "to be opened by addressee only" or similar, on the sealed envelop whenever it contains medical information.

#### **4. Conclusion**

There is no reason to believe that there is a breach of the provisions of the Regulation provided that the considerations noted in Sections 3.2 through 3.10 are fully taken into account. The recommendations of the EDPS include, most importantly, the following:

- Data Quality:
  - The scope of data collected on the medical overview form and the information included on the certificate of fitness should be revised to comply with the principles of relevance and proportionality.
- Conservation of the data:
  - A reasonable, definite time frame must be established by the CPVO for the conservation of each category of employee and candidate medical data held by the CPVO.
- Information to data subjects:
  - Clear and specific information needs to be provided to data subjects regarding all items listed under Articles 11 and 12 of the Regulation. With respect to the pre-employment medical check-up, the EDPS also recommends the additional information on anti-discrimination referred to in point 3.8.4.
- Processing data on behalf of controllers:
  - The service contracts concluded with the CPVO Physician and the CPVO Medical Centre should be modified to address data protection aspects pursuant to Article 23 of the Regulation. Instructions should be provided to the processors to comply with the minimum data protection safeguards recommended in this Opinion.

Done at Brussels, on 4 June 2008

(signed)

Peter HUSTINX  
European Data Protection Supervisor