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Subject: Opinion on the notification for prior checking from the Data Protection Officer of the European Environment Agency concerning leave management

Dear Ms Marigo,

On 20 September 2011, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) of the European Environment Agency (The EEA) a notification for prior checking concerning leave management. The notification was accompanied by the following documents:

1. Cover Letter - Notification for prior checking on leave management
2. Annex 1: Privacy statement
3. Annex 2: Declaration of confidentiality.

The DPO sent this notification while the Guidelines in the area of Leave and Flexitime (The "Guidelines") were being drafted. Therefore, the procedure was suspended between 20 September 2011 and 31 March 2013 for adoption and implementation of the Leave and Flexitime Guidelines¹.

¹ Guidelines concerning the processing of personal data in the area of leave and flexitime adopted on 20 December 2012 (EDPS 2012-0158).

The EDPS would like to make the following comments about the notified processing operations.

1. Legal aspects

This Opinion deals with already existing annual and special leave entitlements at the EEA. It is based on the Guidelines, which allows the EDPS to focus on the EEA practices that do not seem to be compliant with the Guidelines and the principles of the Data Protection Regulation 45/2001.

The notification states that the processing is based on both Article 27.2(a) and (d). However, in the framework of leave, the EDPS considers that only Article 27.2(a) should apply. Indeed, the EDPS considers that leave management does not have as its primary purpose to exclude individuals from a right, benefit or contract.

The EDPS invites the EEA to clarify **the name and purpose** of the processing operation. The notification states that "the purpose of the processing is to collect and manage data related to annual and special leave entitlements in compliance with the Staff Regulations and the implementing provisions on leave". In the light of the processing operations that are described in the notification, the EDPS considers that sick leave processing operations should also be included in the notification. Indeed sick leave is also one purpose of the processing operations.

The EDPS finds it useful to remind the EEA what he understands by health related data. This was already explained in the EDPS Guidelines concerning the processing of health data in the workplace by (EU) institutions and bodies adopted on 28 September 2009: "*The notion of health data in the context of the guidelines mainly refers to two different forms of data. First, it refers to medical files that are kept at a doctor's practice or at the medical service of an EU institution. Medical files include medical reports, laboratory tests, medical questionnaires (e.g. at the pre-recruitment medical examination phase). Second, it refers to administrative documents that include personal data relating to the health status of a person. Amongst those documents are medical certificates (e.g. documents certifying medical aptitude for work), forms concerning sick leave or the reimbursement of medical expenses*". Therefore, it is important to separate the retention of medical data from the one of administrative documents that include personal data relating to health. This has consequences in the analysis of the notification, as it is analysed below.

Regarding sick leave, the notification foresees that "the health data related to absence due to sickness are kept by ADS1 Group for a maximum period of 30 years after the last medical document is inserted in the file in the light of Article 4(1)(e) of the Regulation". The EDPS would like the EEA to clarify this **retention**.

Indeed, as concerns the conservation of medical data as such (as expressed in the EDPS Guidelines concerning the processing of health data in the workplace), the EDPS considers that a period of 30 years can in most cases be considered as the absolute maximum during which data should be kept in this context².

² The conservation of medical data by medical services is also covered by the guidelines on health data at the workplace. If, however, an institution or body intends to keep for a longer period sick leave records that could relate to medical cases where the medical consequences of prolonged exposure to certain substances occurs after a rather long period (as can be the case for asbestos or radiation exposure), this should be specifically foreseen in the health data procedure submitted.

But the EDPS also considered in these Guidelines and in the Guidelines on leave and flexitime that it is a conservation period of at least three years for administrative data relating to sick leave that can be justified for the HR by the implementation of Article 59 (4) of the Staff Regulations.

In the Guidelines, the EDPS considered that the proportionality of a retention period exceeding the three years is to be considered to be appropriate only where this would be strictly required in order to cover periods when a dispute or an appeal is underway.³

Therefore, the EDPS invites you to revise your notification regarding the retention period in the light of these comments:

- regarding annual leave, the notification specifies that “personal data shall be kept for a maximum period of 10 years as from the leave occurrence”. However, and as stated in the Guidelines, “keeping data on days of annual leave can be justified if leave is carried over from one year to the next. Moreover, it is possible that an institution/body gives consideration to other periods of leave taken by a person in the immediately preceding years in view of better management and coordination. Therefore, as a reasonable conservation period and in view of aligning retention periods, the EDPS accepts a retention period that would not exceed three years for annual leave”. Therefore, the EDPS invites you to reconsider the retention period for annual leave and revise the notification accordingly.

- as to the storage for historical, statistical or scientific purposes, the notification differs on this point from the privacy statement, as it does not foresee specifically the anonymisation of the data. Indeed, although the privacy statement foresees that "anonymous data related to leave and absence is kept for statistical purposes (leaves, special leaves and absences)", the notification only states that "Personal data related to leave and absence is kept for statistical purposes (leave; special leave and absences, broken down by quarters and by programmes). Only senior management (Heads of Programmes and Executive Director) can have access to the data; Heads of Programmes have only access to the data of their own programme". The EDPS invites the EEA to complete the notification on this point.

General **information** on leave and absence is provided to all new staff members as part of the newcomer programme. In addition, the notification states that information sessions and presentations on leave and absence are given to all EEA staff on a regular basis. Moreover, a privacy statement available on the EEA intranet provides information as requested by the Regulation 45/2001. However, the EDPS would like to make the following comments about the privacy statement:

Point 2: Recipients of the data processed

- Information about the categories of recipients should be revised. Indeed, the privacy statement makes reference to "data subject (for consultation, modification and rectification)" as recipients of the data. However, in the context of the processing operations, data subjects are not to be considered as recipients of their data being processed in the sense of the definition of Article 2(f) of Regulation 45/2001. The EEA should therefore remove this category from the current list of recipients.

³ See also the EDPS Guidelines concerning the processing of health data in the workplace, page 12: "Article 59 (4) of the Staff Regulations could justify a conservation period of 3 years for data necessary to justify an absence due to sick leave. The only justification for keeping them any longer would be if a dispute or appeal were under way".

- The EEA should clarify why it includes under recipients of the processing operations "all other EEA staff members (for consultation)". Indeed, in the light of the processing operations at stake, such access seems justified only for the hierarchy, human resources department and a limited number of staff in accounting. EEA staff members should not have access to these data.

Point 4: Obligatory or optional data

- The privacy statement states that "Staff members are free to give their data on a voluntary basis". The EDPS finds this wording misleading. Based on the legal basis for the processing operations, staff members may indeed be required to provide the data (i.e. in some cases, absence from job may need to be covered by a medical certificate). Furthermore, the use of consent as a legal basis in working relationships is controversial. The EDPS recommends therefore the removal of this statement from the privacy statement.

2. Conclusion

In view of the above, the EDPS recommends that the EEA:

- 1) clarifies the notification so that its name matches the processing operations which were submitted for notification;
- 2) reconsiders the existing data retention period regarding sick leave and annual leave;
- 3) modifies the privacy statement and notification in the light of the above comments.

The EDPS invites the EEA to inform him about the implementation of these recommendations within three months after receipt of this letter.

(signed)

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Assistant European Data Protection Supervisor

Cc: Mr Olivier CORNU, Data Protection Officer, EEA