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ASSISTANT SUPERVISOR

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WW/XK/sn/D(2016)0423 C 2013-0839  
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correspondence

**Subject: Prior-check Opinion on the management of health data at SESAR Joint Undertaking, case 2013-0839**

Dear Mr Guillermet,

We have analysed the notification and privacy notice you have provided to the European Data Protection Supervisor (EDPS) for prior-checking under Article 27(2)(a) of the Regulation (EC) n° 45/2001 (the Regulation) on the management of health data at SESAR Joint Undertaking (**SESAR JU**). The purpose of this processing is to ensure compliance with the requirements for recruitment, annual mandatory medicals visits and specific medical check-ups, sick leave and special leave in conformity with the Staff Regulations.

On 12 March 2014, the EDPS requested further information on the processing operations under analysis and a reminder was sent on 7 October 7 2015 due to SESAR JU's silence. SESAR JU has not sent any reply hence the EDPS has decided to issue his Opinion on the basis of the available information. As this is an ex-post case, the deadline of two months for the EDPS to issue his Opinion does not apply.

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The notification and relevant documents will be analysed in light of the EDPS Guidelines on health data in the workplace (the Guidelines)<sup>1</sup>. The EDPS Joint Opinion related to the processing of health data by 18 agencies<sup>2</sup> is also applicable in the present case.

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<sup>1</sup> Issued in September 2009 and published on the EDPS website.

<sup>2</sup> Issued on 11 February 2011 and it concerned 18 agencies, case 2010-0071.

The EDPS notes that the notification refers briefly to the invalidity procedure. The Guidelines do not cover the processing operation related to the invalidity procedure. SESAR JU should therefore submit for prior-checking a separate notification with a privacy notice and other relevant documents under Article 27(2)(a) of the Regulation.

The EDPS will identify SESAR JU's practices which do not seem to be in conformity with the principles of the Regulation and the Guidelines, and then provide SESAR JU with relevant recommendations.

### **1) Legal basis**

#### **Legal basis for special leave**

The legal basis is one of the conditions for a processing operation to be lawful under Article 5(a) of the Regulation.

SESAR JU has not stated the relevant legal basis of the processing related to special leave and the requirements that a staff member should fulfill in order to be granted a special leave.

The notification should therefore be updated accordingly.

### **2) Services of a private practitioner**

The privacy statement is silent on the possibility for staff members to have their annual check-up visit carried out by a private practitioner.

The EDPS reminds SESAR JU that a declaration from the staff member's private practitioner should be considered sufficient in terms of the preventive purpose of the annual check-up. This declaration can confirm that the medical exams were carried out and if necessary, it can also specifically mention any special accommodations or working conditions the staff members might need.

SESAR JU should therefore inform staff members of their entitlement to choose the private practitioner who will perform their annual medical check-up and of the practical steps they must take to have the check-up carried out by the private practitioner of their choice.

### **3) Recipients and processors**

SESAR JU lists in the notification the Commission's medical service as recipient.

SESAR JU has concluded a Service Legal Agreement (SLA) with the Commission's medical service for carrying out the pre-recruitment medical visits and annual check-up visits. In light of Article 23 of the Regulation, the Commission's medical service is acting on behalf of the agency and is therefore classified as processor rather than recipient. This is because it is obliged to carry out the processing only on instructions from the controller - SESAR JU (Article 23(2)(a)). Their obligations regarding confidentiality and security measures are also laid down in the SLA (Article 23(2)(b)).

The EDPS therefore recommends that SESAR JU clarify that the Commission's medical service acts as processor on behalf of SESAR JU in light of the requirements of Article 23 of the Regulation.

#### **4) Quality of data**

Staff members are required to send their medical certificates to the HR Department of SESAR JU to justify their absences or special leaves. The notification states that medical certificates indicate the name and the specialization of the doctor providing the certificate. No information is provided about the diagnosis or details of examinations.

Medical certificates on sick-leave and some on special leave are considered to be data concerning health. Although the exact type of illness or diagnosis is not indicated, staff members can be identified as having been absent due to a short or long term illness on medical treatment or due to special sick leave of a medical nature. Furthermore, the illness of the staff members can also be identified by the doctor's specialization.

The HR Department of SESAR JU should, under Article 4(1)(c) of the Regulation, keep information which is only adequate, relevant and necessary for the purpose of the medical certificates' collection, that is, to be able to manage the absences of the agency's staff members. HR should therefore only collect administrative data related to an absence of a staff member (name, surname and duration of absence) and not the medical certificate as such.

The EDPS recommends that SESAR JU changes its policy and requires its staff members to send their medical certificates directly to the Commission's medical service. The Commission's medical service will then inform the HR Department about the administrative related data, such as the name, surname and duration of absence of the staff member.

#### **5) Retention periods**

Both the notification and the privacy notice state that *"maximum retention period of medical data is 30 years; maximum retention period for administrative health data is 3 years except if a dispute and appeal is underway (e.g. sick leave, annual leave); maximum retention period for medical data of non-recruited candidates is the period for challenging the data."*

The EDPS recalls that **medical data** of the pre-recruitment and annual visits (if the staff member chooses to carry out the medical check-ups with the Commission's medical service) should be kept for a maximum period of **30 years after the last document has been inserted to the medical file**. The underlined sentence, which determines a maximum retention period, should be added to the notification

SESAR JU should also make reference to the pre-recruitment **aptitude certificates**. They should be kept in the personal files for a maximum period of **ten years after the end of the period during which a staff member is in active employment or the last pension payment**.

The notification should be updated accordingly.

#### **6) Security measures**

SESAR JU's HR officers process personal data related to health, namely aptitude certificates and administrative information on sick leave and special leave.

Due to the sensitive nature of such data, the EDPS recommends that the HR officers sign confidentiality declarations mentioning that they are subject to an obligation of professional

secrecy equivalent to that of a health professional. This organisational measure aims at maintaining the confidentiality of personal data and at preventing any unauthorized access to them within the meaning of Article 22 of the Regulation.

## **7) Information to be given to the data subject**

### **Privacy notices on pre-recruitment and annual check-ups**

The privacy notice provided to the EDPS concerns only the management of medical certificates. SEASR JU should prepare two clear privacy notices on the pre-recruitment medical visits and on annual check-ups including all information required under Articles 11 and 12 of the Regulation. All EDPS recommendations in the present opinion should be included.

The privacy notice on pre-recruitment medical visits should be attached to the invitation letter sent to the successful candidate to carry out the pre-recruitment medical visit.

As to the privacy notice on annual check-ups should be easily accessible to all staff members as soon as they request to carry out their annual check-up either with the Commission's medical service or with a private practitioner.

### **Legal basis of the processing operation**

On the basis of Articles 11(1)(f)(i) and 12(1)(f)(i) of the Regulation, IMI should indicate to all privacy notices the specific legal basis of all processing operations including the EDPS recommendation on point 1.

### **The recipients of the data**

In light of Articles 11(1)(c) and 12(1)(d) of the Regulation, SESAR JU should list the medical service as a processor (see point 3 above).

### **Rights of access and rectification**

On the basis of Articles 11(1)(e) and 12(1)(e), SESAR JU should provide more specific information as to the meaning of the rights of access and rectification in the context of the processing operations under analysis, so that affected individuals fully understand their rights. SESAR JU should mention that affected individuals can have indirect access - instead of direct access - to their psychiatric and psychological reports via a doctor appointed by them<sup>3</sup>.

As to the right of rectification, SESAR JU should mention that affected individuals are entitled not only to correct administrative errors in their medical file but also to supplement it by adding opinions of other doctors to ensure completeness of the file.

### **The time-limits for storing the data**

In light of Articles 11(1)(f)(ii) and 12(1)(f)(ii), SESAR JU should clearly indicate in the relevant privacy notices the different retention periods of medical data and of pre-recruitment aptitude certificates (see point 5 above).

### **The right to recourse to the EDPS**

In light of Articles 11(f)(iii) and 12(f)(iii) of the Regulation, SESAR JU should indicate that data subjects have a right to recourse to the EDPS at any time. The mere reference to its contact information is not sufficient.

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<sup>3</sup> In that regard, SESAR JU should refer to the Conclusion 221/04 of the Board of Heads of Administration of 19 February 2004.

SESAR JU should revise both the privacy notices and the notification accordingly including all the above recommendations.

The EDPS regrets the lack of cooperation from SESAR JU in this specific file and expects that SESAR JU adopt all EDPS recommendations to comply with the Regulation. In the context of the follow-up, SESAR JU should send all updated relevant documents (notification and privacy notices) within a period of three months, to demonstrate that SESAR JU has implemented the above recommendations.

Yours sincerely,

**(signed)**

Wojciech Rafał WIEWIÓROWSKI

Cc: Mr José Antonio CALVO FRESNO, Chief Administration Affairs  
Ms Daniella PAVKOVIC, Data Protection Officer