EDPS - European Data Protection Supervisor
CEPD - Contrôleur européen de la protection des données

Opinion on a notification for prior checking received from the Data Protection Officer of the Court of Justice of the European Communities concerning "SUIVI: Sick leave of Translation Directorate"

Brussels, 15 November 2005 (Case 2004-279)

1. Proceedings

1.1. On 20 July 2004, the European Data Protection Supervisor (EDPS) sent a letter to all DPOs asking them to make an inventory of the cases likely to be subject to prior checking by the EDPS as provided for by Article 27 of Regulation (EC) 45/2001. The EDPS requested communication of all processing operations subject to prior checking, even those that started before the appointment of the EDPS and for which the Article 27 check could never be prior, but which had to be dealt with on an "ex-post" basis.

1.2. On 24 September 2004, the DPO of the Court of Justice of the European Communities (ECJ) listed the case of "SUIVI: sick leave of translation directorate" as a case for ex-post prior checking notably since it included health data (Article 27(2) sub a).

1.3. The EDPS identified certain priority themes and chose a number of processing operations subject to ex-post prior checking to be addressed. The case of "SUIVI: sick leave of translation directorate" is among these cases.

1.4. On 28 July 2005, the EDPS received the notification for prior checking of the case.

1.5. On 29 July 2005, the EDPS requested further information. This information was partially received by telephone from Mr MOAYEDI (assistant DPO) and Mr SCHAUSS on 8 September 2005. Further information was provided by e-mail on 13 September and on 16 September.

2. Examination of the matter

2.1. The facts

SUIVI is an oracle data base that is used to manage the entire workflow of the Translation Directorate.

The data base is used for various purposes. First, it allows each Division to manage its daily work efficiently (for example, by enabling the redistribution of an assignment with tight deadlines to another colleague). Secondly, it allows taking absences (among which absences for sick leave) into account when calculating the number of working days of a staff member in

order to assess his/her work (in a notation or promotion exercise). Finally, it allows general statistics for the purposes of sound management. No direct statistics on sick leave are generated, but statistics on the number of translated/revised pages include the number of working days, which take absences in general into account.

Data relating to sick leave are introduced into the SUIVI data base. With the help of a model memorandum (feuille rose), each Division of the Translation Directorate informs the nurse of the institution of a colleague's absence due to sick leave. All "Absences for illness" memoranda first go through the Translation Director's secretariat in order to insert into SUIVI the starting date of absence. When a colleague returns from sick leave his/her Division informs the nurse of the institution of the return date with the help of another model "back in office" memorandum (feuille verte). All "back in office" memoranda go through the Translation Directorate secretariat in order to insert into SUIVI the return date of the colleague. SUIVI then automatically calculates the number of days of absence.

The diagnosis of illness (medical certificate) is not known at the Translation Directorate and is never inserted into SUIVI. The Translation Directorate does not keep copies of the memoranda concerning absences, as they are sent immediately to the nurse of the institution and stored in the medical file of the person concerned.

The sick leave window in the SUIVI data base contains the following categories of data: year to which the absence relates, division concerned, initials, personal ID number, service entry data, service exit date, name of the person, starting date and ending date of absence, type of absence (in this case abbreviation MAL for sick leave), number of days of absence, working hours (part time or full time).

All absences of the Translation Directorate's staff are introduced into the SUIVI data base: Director, Deputy Directors, Heads of Division, Lawyer Linguists, Legal Revisers, Administrators, Management Assistants, Proofreaders and Secretaries.

Each member of staff can, on demand, access his/her personal information contained in the SUIVI database. If the person in question finds that (part of) the information is wrong, it can be corrected. For example, as concerns sick leave, this can be done on the basis of a corrected "Absences for illness" memorandum or "back in office" memorandum, a medical certificate or a confirmation from the nurse.

Access to SUIVI is limited only to staff working directly with the data base. A login and password are necessary to access the data base. It is forecast to give individual staff members access to his/her personal information contained in the SUIVI data base through the Intranet. Access will be protected through the use of a pass-word. The technical implications of such an access are currently being examined.

2.2. Legal aspects

2.2.1. Prior checking

SUIVI is a data base that allows managing of the entire workflow of the Translation Directorate. The data base constitutes a processing operation falling under the scope of Regulation (EC) No 45/2001 since it involves the collection, recording, consultation and organisation of personal data. Part of the procedure concerning sick leave is manual. However once data are introduced

into the data base, the processing is automated. The processing involves data relating to health and qualified as a "special" category of data, subject to the provisions of Article 10 (see below 2.2.3).

Article 27 (1) of Regulation (EC) 45/2001 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) of the Regulation contains a list of processing operations that are likely to present such risks such as processing of data relating to health (Article 27 (2) sub a). The record of absences for sick leave gives some indication as to the state of health of the data subject and therefore falls under Article 27 (2) of the Regulation[1].

The "Sick leave" data base of the Court of Justice (all staff) has already been the object of a prior check by the EDPS (2004-0278). Although the data in that case and the data in this prior checking case are the same as concerns staff of the Translation Directorate, they are introduced separately in both systems and the specific purpose of the SUIVI data base differs from that of the processing submitted for prior check under case 2004-0278.

Furthermore, the use of the system largely contributes to the evaluation of the members of staff of the Translation Directorate: it enables the taking into account of absences, among which sick leave, when calculating the number of working days of a staff member in order to evaluate his/her work. Despite the fact that the processing is not in itself intended to evaluate personal aspects of the data subject such as his/her ability, efficiency or conduct it largely contributes to such a purpose, so that Article 27(2) sub b) of Regulation 45/2001 must also be taken into account.

Therefore, the presence of medical data (although already prior checked in case 2004-280) and the main purpose of the system which is designed to contribute to the evaluation of members of staff of the Translation Directorate, justify the need for a separate prior check.

Since prior checking is designed to address situations that are likely to present specific 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. This is not a serious problem however as far as any recommendations made by the EDPS may still be adopted accordingly.

The notification of the DPO was received on 28 July 2005. A request for further information suspended the two months time frame within which the EDPS must render his opinion for 49 days. The present opinion must be delivered no later than 17 November 2005.

2.2.2. Legal basis for and lawfulness of the processing

The data base is intended for the organisation of daily work in each Division (redistribution of work in case of absence of a staff member) and for the needs of sound management. In this respect it is used notably when calculating the number of working days of a staff member in order to assess his/her works.

Apart from the obligation of sound financial management (Article 274 TEU), which implies efficient organisation of the work within the institution, the processing of the data in the data base can also be justified by Article 43 of the Staff Regulations according to which "The ability,

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[1] The actual content of the medical file as such has been the object of a separate prior check (2004-0280).

efficiency and conduct in the service of each official shall be the subject of a periodical report made at least once every two years as provided for by each institution in accordance with Article 110"[1].

Analysis of the legal basis and analysis of the lawfulness of the processing go together. Article 5, point (a), of Regulation (EC) 45/2001 stipulates that personal data may be processed only if the "*processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities... or in the legitimate exercise of official authority vested in the Community institution*". The recitals to the Regulation further specify that "processing of data for the performance of tasks carried out in the public interest of the Community institutions and bodies includes the processing of personal data necessary for the management and functioning of those institutions and bodies". The legal basis as provided for by the Staff Regulation support the lawfulness of the processing in accordance with Article 5 of Regulation (EC) 45/2001.

2.2.3. Processing of special categories of data

Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and data concerning health or sex life is prohibited unless grounds can be found in Article 10(2) and/or 10(3).

Even though we are not dealing with medical data in the strict sense, the processing does involve data relating to health of the data subject to the effect that the data reveal information concerning the health status of the person (absence for sick leave). Grounds must therefore be found in Article 10(2) in order to justify the processing of the data.

Article 10(2) sub b provides that sensitive data may be processed if 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 authorised by the Treaties establishing the Communities or other legal acts adopted on the basis thereof.

The Translation Directorate has justified the inclusion of information as to the nature of the absence (sick leave, for example) on the grounds that this information must be taken into account for the purposes of the notation exercise. To this effect, the notation guide joined to the decision of the ECJ of 18 October 2000 adopting the implementing rules as concerns notation of personnel, provides that if a person's deficient state of health, duly verified by the medical service, implies a decrease of performance during the person's presence at the office, the appraisal of the person must be based on the effective capacity of work of the person.

The Directorate has also justified the inclusion of this element in the data base on the grounds that, in a notation exercise or in view of promotion, it enables the persons involved in this exercise to have a more precise picture of the personal circumstances of data subjects and to take this into account when evaluating them or establishing proposals for promotion (e-mail of DPO of 13 September 2005).

Both justifications for the inclusion of such data in the data base are favourable to the data subject and are justified on the grounds of Article 10(2) sub b. However, the EDPS would like

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[1] As concerns other staff, the conditions of employment of other officials of the European Communities provide that "The provisions of Article 43 of the Staff Regulations, concerning reports, shall apply by analogy" (Article 15.2).

to underline the need for specific guarantees so as to ensure that this information is not held against the data subject. For example, the information provided to the data subject should clearly inform him/her of the presence of these data and the purposes for which they may be used. It must be ensured that the persons having access to the data do not use it for any other purposes than those for which it is intended.

2.2.4. Data Quality

According to Article 4(1) sub c, data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed. As previously mentioned, the purposes behind the processing of data in the SUIVI data base is to allow each Division to manage its daily work efficiently, to take absences (among which absences for sick leave) into account when calculating the number of working days of a staff member in order to assess his/her work and to establish general statistics for the purposes of sound management. The above mentioned provision in the implementing provisions justifies the mention of the nature of the absence (see 2.2.3).

The data must be "accurate and where necessary kept up to date" (Article 4(1) sub d). To this effect, every reasonable step must be taken to ensure that data which are inaccurate or incomplete are erased or rectified. For example, seeing that the same data are present in the general sick leave system and the SUIVI system of the Translation Directorate, it must be ensured that information contained in both systems is consistent.

The possibility for the data subject to request access to his/her data (see below 2.2.7), contributes to guaranteeing the exactitude of the data.

2.2.5. Conservation of data

Article 4(1) sub e) of Regulation 45/2001 provides that personal data may be kept in a form which permits identification of data subjects for not longer than is necessary for the purposes for which the data are collected and/or further processed. The data may be kept for longer periods for historical, statistical or scientific use, but either in an anonymous form or with the identity of the data subjects encrypted.

The notification received from the DPO provides that it is currently being examined how long the data should be stored in the SUIVI data base.

The EDPS would like to insist on the determination of a conservation period. This conservation period must be assessed on the basis of the purposes for which the data is collected and processed in the data base. Management of daily work implies that the data should not be stored for longer than the period of absence of the person at most, but the use of the data in the evaluation procedure (yearly notation reports for example) justifies the conservation of the data for the time necessary for the evaluation. The establishment of general statistics on the production of translated/revised pages should not imply that the data is kept in a form which permits identification of the data subject.

2.2.6. Unique identifier

According to Article 10(6) of the Regulation, the EDPS shall determine the conditions under which a personal number or other identifier of general application may be processed by a Community institution or body.

The SUIVI data base includes the personal identification number. However, since the unique identification number is used solely for administrative reasons it does not raise any specific risks justifying the adoption of particular guarantees in this case.

2.2.7. Right of access and rectification

According to Article 13 of the Regulation, the data subject shall notably have the right to obtain without constraint from the controller, communication in an intelligible form of the data undergoing the processing and any available information as to their source. He/she shall also have the right to obtain from the controller, the rectifications of inaccurate or incomplete data (Article 14).

Each member of staff can, on demand, access his/her personal information on sick leave contained in the SUIVI database. If the person in question finds that (part of) the information on sick leave is wrong, it can be corrected. This can be done on the basis of a corrected "Absences for illness" memorandum or "back in office" memorandum, a medical certificate or a confirmation from the nurse.

It is forecast to give individual staff members access to his/her personal information on sick leave contained in the SUIVI data base through the Intranet. This direct access can only be encouraged since it will facilitate the exercise of the rights mentioned in Articles 13 and 14 of the Regulation.

2.2.8. Information to the data subject

Articles 11 and 12 provide for information to be given to data subjects in order to ensure the transparency of the processing of personal data. Article 11 provides that when the data is obtained from the data subject, the information must be given at the time of collection. When the data have not been obtained from the data subject, the information must be given when the data are first recorded or disclosed, unless the data subject already has it (Article 12).

According to the information received, there is no specific procedure giving information to staff about the processing of their data in the SUIVI data base.

Since it is forecast to give individual staff members direct access to his/her personal information on sick leave in the SUIVI data base on the intranet, the EDPS recommends that the information provided for in Article 12 is given in the context of this direct access to the data base.

2.2.9. Security measures

According to Articles 22 and 23 of Regulation 45/2001, the controller and the processor shall 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.

After careful analysis by the EDPS of the security measures adopted, the EDPS considers that these measures are adequate in the light of Article 22 of Regulation (EC) 45/2001.

Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation (EC) 45/2001 providing the following considerations are fully taken into account:

- As concerns the inclusion of data relating to the state of health of the data subjects, the EDPS would like to underline the need for specific guarantees so as to ensure that this information is not held against the data subject. For example, the information provided to the data subject should clearly inform him/her of the presence of these data and the purposes for which they may be used. It must be ensured that the persons having access to the data do not use it for any other purposes than those for which it is intended.

- As regards data quality, every reasonable step must be taken to ensure that data which are inaccurate or incomplete are erased or rectified. For example, seeing that the same data are present in the general sick leave system and the SUIVI system of the Translation Directorate, it must be ensured that information contained in both systems is consistent.

- The EDPS would like to insist on the determination of a conservation period. This conservation period must be assessed on the basis of the purposes for which the data is collected and processed in the data base.

- Since there is no specific procedure giving information to staff about the processing of their data in the SUIVI data base and it is forecast to give individual staff members direct access to his/her personal information on sick leave in the SUIVI data base on the intranet, the EDPS therefore recommends that the information provided for in Article 12 is given in the context of this direct access to the data base.

Done at Brussels, 15 November 2005

Peter HUSTINX
European Data Protection Supervisor