

Opinion on the notification for prior checking received from the Data Protection Officer (“DPO”) of the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) on 31 May 2007 regarding EMCDDA's pre-employment and annual medical check-ups

Brussels, 13 September 2007 (Case 2007-348)

1. Proceedings

1.1. On 31 May 2007, the EDPS received a prior checking notification under Article 27 by e-mail from the Data Protection Officer (DPO) of the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) relating to the EMCDDA's pre-employment and annual medical check-ups.

1.2. On 5 June 2007, the EDPS raised a number of questions concerning the processing operation to the DPO. On 26 June 2007, the DPO and the controller of the processing operation provided an answer to these questions. The final draft was sent to the DPO for comments on 5 September 2007; they were received on 13 September 2007.

2. Examination of the matter

2.1. The facts

As will be discussed in greater detail below when addressing the legal aspects of the case, 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.

At the EMCDDA, the medical check-ups are carried out by a qualified medical doctor, carrying out the medical examination on behalf of the EMCDDA. The results of these medical check ups are communicated by the doctor to the medical officer, member of staff at the EMCDDA. The medical files are kept by the EMCDDA medical officer. The purposes, content, and procedures for the medical check-ups are described below.

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

Pre-employment medical check-up at EMCDDA

As required by the Staff Regulations, candidates for employee positions at the EMCDDA participate in a pre-employment medical check-up before recruitment.

Article 33 of the Staff Regulations provides that "Before appointment, a successful candidate shall be medically examined by one of the institution's medical officers in order that the institution may be satisfied that he fulfils the requirements of Article 28(e)" according to which "An official may be appointed only on condition that (...) he is physically fit to perform his duties".

The pre-employment medical check-up is carried out only after the candidate has already received a formal offer of employment. To this effect these candidates receive a standard letter convening them to a pre-employment medical examination with the medical doctor carrying out the examination on behalf of the EMCDDA. A medical questionnaire is attached to this letter, to be completed in part by the candidate and duly signed by him/her.

The candidate is informed at the beginning of the questionnaire that any inaccuracy or omission will render the results of the recruitment medical check-up null and void.

The questionnaire contains standard administrative information (surname, forenames, sex, marital status, address, date and place of birth). It also raises questions relating to the position applied for (nature of the work, competition number and category) and the place of employment. The questionnaire asks whether the person has already undergone a medical examination for a European institution in the past and if he/she has already been employed by a European institution and if so when, the position and status.

Questions are raised relating to the medical history of the person, but also relating to his/her family (parents, brothers and sisters, spouse and children). These questions concern the physical and mental condition of the family members.

Candidates are required to give details of any medical condition for which they are currently being treated.

Candidates are also requested to specify if they have ever been hospitalised and if so where, when and for what reason; if they have undergone surgery and if so must specify the nature of the operation(s) and the dates; if they have ever been absent from work for more than one month because of illness and if so when and for what illness; if they have been in partial permanent incapacity for work following an accident or illness and if so when and the nature of the disability; if they have consulted a neurologist, psychiatrist, psychoanalyst or psychotherapist and if so must specify their name and address and the reason for the consultation. They must further specify if they have undergone courses of radiotherapy or chemotherapy and if so must specify the treatments or if they have undergone radiological or nuclear medicine examinations.

Certain questions relating to the lifestyle of the candidates are raised notably about regular medication taken, smoking habits, alcohol consumption, narcotic or other non-medical drug consumption, sporting activities. A question is also raised as to whether or not the person has lost weight over the past three years and if so, how much; if the candidate has ever spent time in a tropical country and if so, for how long and if the person is tired for long reasons and/or for no apparent reason?

Candidates must answer a question as to whether they have ever been turned down for a job for health reasons and if so, what were the reasons. They must also state whether they have been declared unfit for military service on medical grounds.

Candidates must specify if their doctor or dentist has told them that they need medical or surgical treatment in the near future and give any other important information about their health.

Candidates must state their current occupation, if they have suffered medical problems when working on screen; if they have ever had an industrial accident or suffered from an occupational disease, suffered any after-effects or from any occupational or other hazards to which they have been exposed.

Women candidates must specify if their period is regular, painful; the date of their last period, whether they take an oral contraceptive and if so for how many years they have been taking it.

Candidates are requested to sign this part of the medical questionnaire.

In addition, the medical doctor carrying out the medical examination on behalf of the EMCDDA, performs a direct physical examination and completes the 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.

The medical doctor, in turn, 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. An ophthalmologic test is also carried out.

The candidate's blood is tested for a number of items and notably the following: blood count + leukocytic formula, glucose, cholesterol (total cholesterol, LDL, HDL), triglyceride, total proteins, iron uric acid, HBsAg and anti-HBc. The candidate's urine is tested for the following: appearance, pH, density, bilirubin, kenotic bodies, bilirubin, haemoglobin, proteins, glucose and sediments.

The medical doctor writes the conclusion of the medical exam and signs it. The document is also signed by the medical officer of the EMCDDA.

The results of the medical exam are communicated to the person concerned and to the medical officer of the EMCDDA. The HR Management sector only receives a medical certificate stipulating the person's ability or inability or ability with a reserve clause.

Annual medical check-up at EMCDDA

As provided in Article 59.6 of the Staff Regulations, all "Officials shall undergo a medical check-up every year either by the institution's medical officer or by a medical practitioner chosen by them. In the latter case, the practitioner's fees shall be payable by the institution up to a maximum amount fixed for a period of no more than three years by the Appointing Authority after consulting the Staff Regulations Committee".

As in the case of the pre-employment medical check-up, during the annual medical check-up, the medical doctor carries out a direct physical examination. There is also an ophthalmologic screening.

The medical doctor, as in the case of the pre-employment medical check-up, performs physical examination of the person. An electrocardiogram test is carried out only for those officials over 40 years of age. The candidate's blood is tested less comprehensively than at the pre-employment check-up. Only the following tests are carried out: haemogramme, glycaemia, transaminases, creatinine, urea, cholesterol (total cholesterol, HDL), triglycerides. No HIV test is carried out routinely at the annual medical check-up. Urine screening is carried out with strips. Blood in stools is tested for those officials above 40. A gynaecological exam is also carried out for women including Pap.

Should a member of the staff decide to have the annual medical check-up performed by a doctor of his choice he will receive the list of exams to be carried out from HR and go for the tests and the visit. The EMCDDA only reimburse the costs against presentation of an invoice up to a set maximum amount. The staff member is requested to send a copy of the outcome to the EMCDDA, not the results of the specific tests that remain with him/her. The only information circulated to the financial services is the list of the exams and the relative costs as invoiced for the tests.

Information provided to data subjects

Prior to the pre-employment, the EMCDDA HR sends the candidate an invitation letter specifying the time and date of the medical check-up and requesting him/her to fill in parts of the medical questionnaire.

Staff members are invited to the annual medical check up by email reminding staff of this possibility and requesting them to manifest their interest so as to be able to take the necessary practical arrangements. Staff are also informed via the Intranet of the possibility of having their annual check-up at a place of their preference.

The following statement has been introduced recently in the information circulated to the new staff members for the pre-employment medical visit and is posted in the Intranet concerning the annual medical check up:

"Declaration of confidentiality and data protection:

The information you furnished will be processed in accordance with Regulation (EC) 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

This Regulation does safeguard your right to access your data and to require the Controller to rectify without delay any inaccurate or incomplete personal data. You do also have the right to require the Controller to erase data if the processing is unlawful.

Please contact the DPO if you have further questions concerning the protection of personal data and how to exercise your rights".

Access rights

The staff member concerned receives orally all information about the outcome of the exam from the examining doctor and he/ she is invited to receive additional clarifications/ information from the medical officer if he/ she so desires and he/ she can access his/ her file when desired. Human Resource Management has no access to these files.

Conservation period

Data are retained in the medical file of the person concerned for as long as the concerned person is in active service at the EMCDDA. They are kept for 15 years following the termination of the service.

Recipients and data transfers

In addition to the doctor carrying out the medical examination and the medical officer of the EMCDDA, and the staff member/future staff member no medical data is transmitted to any third parties. The HR management sector only receives the certificate of aptitude/inaptitude of the candidate for pre-employment check-ups.

Should the staff member choose to carry out his/her annual medical examination with a doctor of his/her choice, the EMCDDA financial service will receive a list of exams carried out and the respective costs as invoiced for those tests.

Should a staff member be transferred to another EU institution or body, the medical file of the person concerned will be sent to that institution or body.

Security measures

[...]

2.2. Legal aspects

2.2.1. Prior checking

Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of personal data by Community institutions and bodies and on the free movement of such data (hereinafter Regulation 45/2001) applies to the processing of personal data by Community institutions and bodies.

Personal data is defined as any information relating to an identified or identifiable natural person. An identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity. The procedures of pre-employment and annual medical visits clearly involve the processing of personal data.

The processing of the data is carried out by a Community body and is carried out in the exercise of activities which fall within the scope of Community law.

The Regulation applies notably to the processing of personal data wholly or partly by automatic means, and to the processing of personal data otherwise than by automatic means

of personal data which form part of a filing system or are intended to form part of a filing system. The results of the medical examinations are placed in a file kept by the EMCDDA medical officer.

Regulation 45/2001 therefore applies.

Article 27(1) of the 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.

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.

The scope of the notified processing operation, and thus, also the scope of this Opinion, is expressly limited to EMCDDA's pre-employment and annual medical check-ups. The EDPS points out that if the EMCDDA will provide additional medical services 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.

The Notification was received on 31 May 2007. According to Article 27(4) of the Regulation this Opinion must be delivered within a period of two months, not including suspensions. Thus, the Opinion must be rendered no later than 28 September 2007 (20 days suspension + 8 days suspension for comments + August).

2.2.2. Lawfulness of the processing

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 EMCDDA, 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 pre-employment medical check-up is based on Article 33 of the Staff Regulations.² 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. In addition, it 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.³

With respect to fitness for service, Article 28(e) of the Staff Regulations⁴ requires that candidates be appointed for office only if they are physically fit to perform their duties. Article 33 of the Staff Regulations⁵, 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.

With respect to invalidity or death benefits, Article 1 of Annex VIII of the Staff Regulations⁶ 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.

The Staff Regulations do not foresee that the pre-employment medical examination also serves for prevention purposes. Having said this, the EDPS recognises that the data collected during this medical examination could serve to alert a future member of staff of a specific issue concerning his/her health and therefore could also serve for prevention purposes. This does not, however, imply that additional data should be requested for the purpose of prevention. We will come back to this point (see point 2.2.4 Data Quality).

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 would 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 for work (or limits to invalidity or death benefits within the first five years of service). 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.

² 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.

³ Similar provisions apply for temporary agents and contractual agents pursuant to Articles 32 and 100 of the Conditions for Employment.

⁴ Article 12 of the Conditions of Employment in case of temporary agents, and Article 82 in case of contractual agents.

⁵ Article 13 of the Conditions of Employment in case of temporary agents, and Article 83 in case of contractual agents.

⁶ Similar provisions apply for temporary agents and contractual agents pursuant to Articles 32 and 100 of the Conditions for Employment.

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.⁷ The Staff Regulations do not specify the purpose of the annual medical check-up. One can deduce a priori from this lack of specification of the purpose that the annual medical check-up does not serve to determine the physical aptitude of the person concerned as is the case for pre-employment medical visits. Furthermore, no procedure for revision of the conclusions of an annual medical visit has been put into place. Finally, the data requested during the annual visit are more limited indicating that the purpose is not the same.

If the annual medical visit does not pursue the same purpose as the pre-employment medical examination, the processing of data can still be considered as necessary and thereby legitimate for other purposes, notably for the purpose of setting up a joint sickness insurance scheme (Articles 72 and 73 of the Staff Regulations). A medical service at work can be seen as beneficial for the employer as it helps maintain human resources in better health. It also serves staff members who benefit from a medical service at their disposal. In order to ensure a correct balance between these two interests, it is important to intervene as little as possible in the self-determination of each person as regards their health. In this respect the EDPS is satisfied that the staff member concerned receives orally all the information about the outcome of the exam from the examining doctor and is invited to receive additional information/clarifications from the medical officer if he or she so desires. The EDPS also welcomes the fact that HR Management has no access to these files.

The legal basis of the pre-employment and annual medical exam is therefore Articles 28.e and 33 (pre-employment examination), Article 59, 72 and 73 (annual medical visit) of the Staff Regulations.

The processing of personal data in the frame of these medical examinations is therefore considered as lawful.

2.2.3. 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 2.2.4 discussing "data quality".

⁷ 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.

2.2.4. Data Quality

A. 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.⁸ 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 death or invalidity benefits should be limited during the first five years of service 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, 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.

Medical questionnaire:

First, it must be ensured that the medical questionnaire completed by successful candidates 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 during the pre-employment medical check-up.

Family history: Medical history of a spouse or adopted children, lacking any genetic link, has no place on the medical questionnaire. Although the state of health of blood relatives such as parents, siblings, and children may indicate predisposition to certain genetic disorders or increased probability of developing certain conditions in the future (e.g., cancer, cardiovascular problems, certain mental illnesses), the predicative information thus obtained is not a legitimate tool for determining fitness for service.⁹ In addition, responding to the questionnaire with respect to family members would also disclose sensitive personal data of

⁸ The type of data may vary according to the type of position.

⁹ In cases T-121/89 and T-13/90 the Court of First Instance found that "the medical officer of the institution may base his finding of unfitness not only on the existence of present physical or psychological disorders but also on a medically justified prognosis of potential disorders capable of jeopardizing the normal performance of the duties in question in the foreseeable future". Even though the ruling was subsequently annulled by the Court (C-404/92), this interpretation of the concept of "fitness" was not challenged. EDPS notes that terms such as "potential disorders" and "foreseeable future" must be interpreted restrictively, the prognoses must be medically justified, and a clear link between a potential disorder and fitness to carry out one's duties will need to be demonstrated. Collection of genetic information or examination of family history in view of identifying potential hereditary diseases that the candidate might develop in the future with a lesser or greater degree of probability, in particular, appears to be problematic.

those persons without their consent. For the above reasons, the EDPS recommends that these questions should be eliminated altogether from the pre-employment medical questionnaire.

Pregnancy: Article 1d of the Staff Regulations prohibits sex discrimination. This prohibition extends to discrimination against an employee or potential employee based on pregnancy. The scope of the prohibition covers asking a potential employee in an application or during an interview whether or not she is, or is planning to become, pregnant; asking an applicant if she is using birth control; and not hiring a candidate because she is, or is planning to become pregnant.

Information on the periods of female candidates (regularity, if painful, date of last period) and their intake of oral contraception are asked in the EMCDDA medical questionnaire.

Considering the highly sensitive nature of this information and its potential for discrimination, the EDPS recommends that the EMCDDA reassesses whether there is a genuine need, from the medical point of view, to indicate this information, considering that the purpose of the medical check-up, after all, is to ascertain fitness for service, and that pregnancy, in any event, cannot be considered as a factor that would prevent employment.¹⁰ This evaluation should go beyond the simple mention of the fact that some forms of contraception (in particular, oral contraception) constitute pharmacological treatment. 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.¹¹ Unless this assessment suggests otherwise, these questions should be eliminated.

The EDPS notes that this does not preclude the EMCDDA from asking female candidates whether they are pregnant, for purposes of ensuring that any examinations are safe to take, waive certain tests (e.g. chest-X-ray) or prescribe alternative, safer test methods. However, if safety of tests is the only reason to record pregnancy in the medical file with respect to a certain candidate or staff member, the EDPS suggests that the EMCDDA reassesses whether there is a genuine need to record or retain this information in the medical file.

Lifestyle-questions such as those related to the amount of alcohol or tobacco consumed or sport undertaken, although they may prove to be useful for prevention, also appear to be excessive for purposes of ascertaining fitness for service.¹² Again, the EDPS recommends that any such question 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 is indicated that the data so obtained will only be used for purposes of prevention.

Prior job refusal due to health reasons: Finally, the information whether or not the candidate at any time was turned down a job for reasons of health is overly intrusive, and thus, disproportionate. Therefore, it should be eliminated.

¹⁰ Collecting information regarding pregnancy from all female candidates, could be, for example, proportionate, if pregnancy had, as a general rule, a significant effect on the results of the various blood tests and urine tests listed, and therefore, the tests could not be reliably evaluated without knowing whether the staff member is pregnant.

¹¹ Collecting of this information could be, for example, proportionate, if the contraception had, as a general rule, a significant effect on the results of the various blood tests and urine tests, and therefore, the tests could not be reliably evaluated without knowing whether the staff member takes contraceptive pills.

¹² 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).

The EDPS, thus, recommends that the data in the medical questionnaire are re-assessed in the light of the principles of adequacy, relevance, and proportionality for purposes of assessment of fitness for service.

Medical overview and urine and blood tests: The medical overview form evidencing the results of physical examination and the list of required tests (including detailed breakdown of blood and urine tests) provided must also be assessed in the light of the principles of adequacy, relevance, and proportionality.

The EDPS is satisfied that there is no HIV test at pre-employment stage.

Annual medical check-up: Should a member of the staff decide to have the annual medical check up performed by a doctor of his choice he will receive the list of exams to be carried out from HR and go for the tests and the visit. The EMCDDA only reimburse the costs against presentation of an invoice up to a set maximum amount. The staff member is requested to send a copy of the outcome to the EMCDDA, not the results of the specific tests that remain with him/her. The EDPS is satisfied that this respects the principle of adequacy of the data.

B. 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 medical examinations carried out by the EMCCDA medical officer, results of the physical examination carried out by the EMCCDA medical officer 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 EMCDDA 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.

Furthermore the EDPS insists that in the medical form to be filled in by the person concerned, no comment or annotation be added by any third party.

In this respect Article (4)(1)(d) of the Regulation is respected, the rights of access and rectification also contribute to guaranteeing the accuracy of the data (see below, 2.2.7)

C. 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 2.2.2). The issue of fairness is closely related to what information is provided to data subjects (see Section 2.2.8 below).

2.2.5. 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 mentioned above, data relating to the medical examinations are retained in the medical file of the person concerned for as long as the concerned person is in active service at the EMCDDA. They are kept for 15 years following the termination of the service. The EDPS recommends that the EMCDDA evaluates to what extent and for what purposes the content of a medical file needs to be kept.

In this respect, the EDPS calls the EMCDDA'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.

Furthermore, the conservation period concerning data relating to persons who have been submitted to a medical exam, but who then refuse employment must be determined.

2.2.6. Data transfers

Medical files containing the data collected and processed in the frame of the pre-employment visit and the annual visit are communicated to other institutions/bodies in the event of a transfer of a staff member to another institution/body. This transfer must be examined in the light of Article 7(1) of the Regulation. Indeed, personal data shall only be transferred within or between Community institutions and bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient. This requirement is fully respected as concerns the transmission of a medical file in the event of a transfer of a staff member.

The HR management sector only receives the certificate of aptitude/inaptitude of the candidate for pre-employment check-ups. The EDPS is satisfied that no medical data as such is placed in the personal files of the staff members.

Should the staff member choose to carry out his/her annual medical examination with a doctor of his/her choice, the EMCDDA financial service will receive a list of exams carried out and the respective costs as invoiced for those tests. In the light of Article 7 according to which personal data may only be transferred if "necessary for the legitimate performance of tasks carried out by the recipient", the EDPS questions the transfer to the financial services of the list of exams carried out. This type of information could reveal extremely sensitive information to the financial service. The EDPS therefore invites the EMCDDA to reconsider the procedure of communication of this data to the financial services with the aim of reconciling the data subject's right to privacy and the obligations of the financial services.

2.2.7. Right of access and rectification

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 where 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 staff member concerned receives orally all information about the outcome of the exam from the examining doctor and he/ she is invited to receive additional clarifications/ information from the medical officer if he/ she so desires and he/ she can access his/ her file when desired. Human Resource Management has no access to these files.

The EDPS is satisfied that this fulfils the right of access provided for in Regulation (EC) 45/2001.

Right of rectification

Article 14 of the Regulation provides the data subject with a right to rectify inaccurate or incomplete data. This right is somewhat limited as concerns medical data as it is difficult to ensure the accurateness and completeness of medical information. The right of access does however apply to any other type of data such as any administrative data which figures in the medical examination report. As mentioned above (2.2.4. Quality of data), staff members may request, so as to ensure the completeness of the file, that any other medical opinions submitted by them also be kept in the medical files.

2.2.8. Information to the data subject

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 data contained in the medical questionnaire filled in by the person concerned, whereas Article 12 applies to the data collected and processed by the doctor and medical officer and to the test results.

As concerns the timing of the information to be given relating to the processing of personal data, the EDPS is satisfied that a declaration of confidentiality and data protection has been introduced recently in the information circulated to the new staff members for the pre-employment medical visit and is posted in the Intranet concerning the annual medical check up.

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.

As concerns information on the purposes of the processing of personal data, the EMCDDA informs the persons concerned in the invitation to the pre-employment medical check-up that the medical examination serves to determine physical fitness to perform his/her duties. Reference is made in this respect to Article 28(e) of the Staff Regulations. This is good practice. The EDPS additionally recommends that a reference should be made to the secondary purpose of the medical check-up: the possible use of the data for purposes of limiting guaranteed benefits in respect of invalidity or death for the period of the first five years of service according to Article 1 of Annex VIII of the Staff Regulations.

The EDPS regrets that no information is provided in declaration on the identity of the controller of the processing operations, i.e. the medical officer at the EMCDDA. Neither does the declaration inform of the possible recipients of the data (other institutions or bodies in case of transfer) or results of the pre-employment medical exam (EMCDDA HR).

The pre-employment medical questionnaire specifies that any inaccuracy or omission when filling in the questionnaire may render the verdict of the medical fitness null and void. The person concerned is therefore informed, in accordance with Article 4(1)(d) about whether questions are obligatory or voluntary, as well as the possible consequences of a failure to reply.

The EDPS is satisfied that the declaration on confidentiality and data protection informs data subjects of their right of access and rectification. It does not however mention the time limits for storing the data and the right to have recourse at any time to the EDPS. The EDPS therefore recommends that these items be added.

2.2.9. Processing data on behalf of controllers

The EMCDDA is the controller of the processing operation in the meaning of Article 3(1) of the Regulation. The medical doctor carrying out the medical examinations should be considered as "processor" within the meaning of Article 2(e) of the Regulation who processes personal data "on behalf of the controller".

Article 23 of the Regulation requires that the controller must choose a processor providing sufficient guarantees in respect to the technical and organisational security requirements. It also requires that the processing operation must be governed by a contract binding the processor to the controller. The contract must specify that the processor shall only act on instruction from the controller and that security aspects incumbent on the controller also apply to the processor unless he is already subject to these security requirements according to

national law implementing Directive 95/46. The EDPS would like the EMCDDA to ensure that these requirements of Article 23 of the Regulation are included in the contract linking the EMCDDA to the medical doctor.

2.2.10. 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 EMCDDA 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 medical doctor and EMCDDA medical officer or the person concerned. 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.

Conclusion

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

- in the pre-employment medical check-up, no data should be collected solely for purposes of prevention and therefore, the data in the medical questionnaire (such as information relating to the medical history of a spouse or adopted children, lacking any genetic link or information on the periods of female candidates and their intake of oral contraception, amount of alcohol or tobacco consumed or sport undertaken, prior job refusal due to health reasons) be re-assessed in the light of the principles of adequacy, relevance, and proportionality for purposes of assessment of fitness for service and assistance in determination of limitations with respect to death or invalidity benefits for the first five years of service;
- the EMCDDA evaluates to what extent and for what purposes the content of a medical file needs to be kept and determines a conservation period concerning data relating to persons who have been submitted to a medical exam, but who then refuse employment;
- the EMCDDA reconsiders the procedure of communication of data relating to the medical exams undertaken with a private doctor to the financial services with the aim of reconciling the data subject's right to privacy and the obligations of the financial services;

- the EMCDDA adds information in the declaration on confidentiality and data protection on the identity of the controller of the processing operations, the possible recipients of the data, the time limits for storing the data and the right to have recourse at any time to the EDPS;
- the EMCDDA ensures that the requirements of Article 23 of the Regulation are included in the contract linking the EMCDDA to the medical doctor.

Done at Brussels, on 13 September 2007.

Peter HUSTINX
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