

**Opinion on a notification for prior checking received from the Data Protection Officer of the European Monitoring Centre for Drugs and Drug Addiction on the management of leave and flexitime.**

Brussels, 20 June 2008 (Case 2008-158)

**1. Proceedings**

On 11 March 2008, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) of the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) a notification for prior checking relating to the processing of personal data in the time management (recording of the leave and flexitime) of staff members.

The following documents were attached to the notification:

- Declaration of confidentiality and data protection;
- EMCDDA Flexitime Guide;
- Sample of the flexitime timesheet to be filled in by a staff member.

Following a further information request a "Sic Congés (leave) - absences quick guide" was provided by the DPO.

The case was suspended while further information was sought on 10 April 2008 and this was provided on 30 April 2008 and on 5 May 2008. The case was suspended again pending comments on facts of the case on 23 May 2008 and these were provided on 30 May 2008. The case was suspended again pending comments on the draft opinion from the DPO on 6 June 2008 and these were provided on 18 June 2008.

**2. Facts**

The EMCDDA records all leave taken by its staff on an in-house database "Sic Congés". The EMCDDA's "Sic Congés" system is designed to:

- enable every member of staff to enter, amend or cancel data necessary for a leave application and make a summary estimate in order to find out how many days of leave he/she has left in the current year and which supplementary documents to justify a special leave are eventually missing;
- enable managers (head of units, director) to monitor leave for their administrative entities;
- enable leave administrators (HR staff) to manage basic entitlement;
- enable administrators to register and monitor documentation submitted in connection with special leave;

- enable managers (head of units, director) or leave administrators (HR staff) to manage staff absences (other than absence on leave);
- send leave application forms for approval electronically, via the approval chain;
- print out leave application forms so that they can be filled in by hand if necessary;
- carry forward excess leave at the end of the year, if appropriate.

Leave record includes:

- annual leave;
- travelling time to/ from place of recruitment/place of origin;
- EMCDDA public holidays;
- special leave<sup>1</sup> (see below);
- leave for training;
- sick leave;
- unpaid leave;
- maternity leave;
- parental leave;
- compensation with time off (Flexitime) leave;
- medical and antenatal appointments;
- absences because of mission and
- leave for national service.

Special leave covers the following circumstances:

- Family reasons:
  - marriage of applicant,
  - marriage of a child,
  - birth of a child,
  - serious illness of spouse,
  - serious or very serious illness of a dependent child,
  - serious illness of a relative in the ascending line,
  - death of a spouse,
  - death of wife on maternity leave,
  - death of a child,
  - death of a relative in the ascending line,
  - death of a brother or sister,
  - adoption
  - maternity leave, with additional allowances for premature birth, multiple birth and if the child is disabled.
- Other reasons:
  - court summons as witness in cases involving third parties,
  - short-term military obligations,
  - jury service,
  - annual medical examination,
  - medical consultation abroad,
  - removal at place of employment,
  - training,

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<sup>1</sup> cf. Article 57 (2) and Annex V of the Staff Regulations read together with Articles 16, 58 and 91 of the Rules applicable to other servants of the European Communities

- election,
- Community examinations/competitions,
- application for national insurance number, and
- job-seeking at the end of a contract.

Regarding flexitime, staff members who wish to use the system, register the time of the beginning and end of the working activity in the calculation sheet provided on the EMCDDA intranet. The calculation sheet will record all hours worked during a given whole calendar month and will show the total number of hours worked in excess of normal working hours which will give the right to compensation. Most of the operations are done manually (registration of working time) and are registered by the staff member concerned. Once the form for a given month is filled in and printed out, is signed for approval by the head of the unit or the director concerned and then circulated to the Human Resources Management Sector (HRMS) for storage.

The retrieval of hours is linked to the management of absences and shall, therefore, be introduced into "Sic Congés" database as special leave following the usual procedure for leave.

The data collected are: name and personnel number, number of hours worked, dates and number of days of annual and other leave taken, dates and number of days of absences for any reason (medical, missions, etc.), justifying documents in particular medical certificates of the staff member concerned or his/her family members.

When a person accesses the "Sic Congés", he or she does so in a particular role. Each of the roles defined in the application is associated with different consultation and updating rights. There are three roles assigned in the "Sic Congés" system:

- *authors*, who can consult and amend data concerning their own leave and make new leave applications for themselves (but they cannot enter absences). Any person (official, temporary staff member, etc.) can have the role of an author except interims and trainees.
- *managers (hiérarchie)*, who can consult any data on leave and absence in their unit/directorate.
- *administrators (gestionnaires)*, who are responsible in the HR Management Sector for managing the leave, absences, entitlements, etc. of all the staff and for updating the general information in the database. They have the right to consult all data on leave and absences. Therefore, the administrator does not amend data, when it is already signed by the managers. If there is a change, the author cancels the leave application and then it follows the circuit again through the manager. The administrator has also the role of approver. He/she can consult the leave already approved by the managers and sign the applications for leave/absence & carryover after checking the supporting documents.

The information given on supporting documents for special leave, for instance medical certificates is not included in the "SIC Congés" database. These documents are not seen by the hierarchy of the person concerned and they are processed only by the leave administrators (HR staff). The leave administrator checks the dates and the names mentioned on the medical certificates, but not the medical data (if present). If the medical data have to be checked, for instance in case of special leave for medical consultation abroad, the medical advisor of the EMCDDA gives authorization for the leave together with the manager. The manager is not

informed about the specific medical data but receives only general information from the medical advisor about the seriousness of the medical condition.

Members of the IT service also have maintenance access to the database.

Data subjects will include all staff members employed by EMCDDA, except interims and trainees. It will also include their families, where information on relatives who are ill or a spouse who is pregnant is provided.

The data subjects are informed by a description of the process posted in the EMCDDA Intranet ("Sic Congés - absences quick guide" and "EMCDDA Flexitime Guide"). A declaration of confidentiality and data protection is also posted on the Agency's intranet and available for all staff. It includes information about the legal basis of the processing, right to access and rectify the data, the purpose of the processing, the identity of the controller and the recipients of the data, the conservation periods, right to address the DPO and the EDPS at any time.

Regarding the access to data, each member of the EMCDDA staff may have access to his/her data via the "Sic Congés" system or the relevant flexitime time-sheet. This allows the staff member to verify that the data is correct and should this not be the case, to correct it him/herself or request correction to the HR staff. Some data indeed shall be validated by HR staff namely in the case this data is relevant to pecuniary rights of the staff concerned.

The recipients of data are: hierarchy of the concerned person (head of unit or director) and the HR officer in charge. Other EU institutions can receive the data in case of interinstitutional transfer of officials, pursuant to article 29 of the Staff Regulations.

Data will be stored in the EMCDDA files for all the whole length of service of the particular agent and for five more years after termination of service. After this period only anonymised data necessary for macro-reporting of the time management of staff (number of days of absences from work, total number of sick leave days taken, etc.) will be kept for statistical reasons.

Regarding the security measures, [...].

### **3. Legal aspects**

#### **3.1. Prior checking**

Regulation (EC) 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 are 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 data processed in connection with recording of the leave and flexitime of EMCDDA staff members therefore qualify as personal data according to Article 2(a) of Regulation 45/2001.

The processing of personal data is carried out by EMCDDA, a body whose activities fall within the scope of Community law.

Regulation 45/2001 shall apply to the processing of personal data wholly or partly by automatic means and to the processing 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. In this case, the personal data are held as part of a paper filing system and electronically.

Regulation 45/2001 therefore applies.

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. This list includes Article 27(2)(a) *"processing of data relating to health..."*.

In the case of recording leave, processing of personal data concerning health occurs. Thus the respective processing operations have to be prior checked 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 operations. In this case however the processing operations have 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 notification of the DPO was received on 11 March 2008. According to Article 27(4) the present opinion must be delivered within a period of two months, which is no later than 25 June 2008 taking into account suspensions for a total of 44 days.

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

Article 5(a) of Regulation EC 45/2001 stipulates that personal data may be processed 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 other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority vested in the Community institution or body"*.

The Staff Regulations of Officials of the EC (Articles 57-60) provide rights to leave and specify the applicable conditions. Article 16, 58 and 91 of the Rules applicable to other servants of the European Communities provide rights to leave for those who are not covered by the Staff Regulations, but are still employed as temporary, auxiliary and contract agents. It is necessary for effective records to be kept to ensure that staff members are provided with the leave to which they are entitled.

Management of budget, including planning, monitoring and evaluating the efficient deployment of human resources is necessary in any Community body including EMCDDA to ensure the proper management and functioning of the organization. To fulfil these tasks, it is also within the discretion of EMCDDA management to introduce a flexitime system based on a working time recording.

The EDPS is therefore satisfied that the processing of personal data in relation to leave and flexitime management is necessary for the performance of EMCDDA's obligations and is therefore lawful in accordance with Article 5(a) of Regulation (EC) 45/2001.

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

Article 10(1) of Regulation 45/2001 states that *"the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, and of data concerning health, or sex life are prohibited"*.

Article 10(2) of Regulation 45/2001 provides a list of circumstances in which Article 10(1) shall not apply. In particular, Article 10(2)(b) states that *"processing is necessary for the purposes of complying with the specific rights and obligations of the data 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, or, if necessary, insofar as it is agreed upon by the European Data Protection Supervisor, subject to adequate safeguards"*. In addition, pursuant to Article 10(2)(d), sensitive data may be processed *"if the data subject has unambiguously given his or her consent"*.

In this instance, health-related data are processed in connection with sick leave, leave for medical, dental and antenatal appointments, maternity leave, as well as various types of special leave. The processing of these special categories of data is necessary in order to comply with legal obligations imposed on EMCDDA with respect to its staff as laid down in Articles 57-60 of the Staff Regulations as well as in Articles 16, 58 and 91 of the Rules applicable to other servants of the European Communities.

Data are also processed which could reveal the religious beliefs of a staff member where he/she asks for the substitution of one EMCDDA public holiday for one of his/her own religious holidays. The processing of this special category of data is based on the consent of the data subject.

In the view of the above, the EDPS is satisfied that the processing of personal data concerning sensitive personal data is in accordance with Article 10 of the Regulation.

### **3.4. Data Quality**

Article 4(1)(c) of Regulation 45/2001 states that personal data must be *"adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed."*

As for the various pre-defined categories included in the database and the working hours sheet, there is no entry which appears to be *prima facie* inadequate, irrelevant, or disproportionate, considering the purposes of the processing and the mission of EMCDDA.

Article 4(1)(d) of Regulation 45/2001 states that personal data must be *"accurate and, where necessary, kept up to date; 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."*

The EDPS is satisfied that the procedure used by EMCDDA for recording of the leave and working time helps to ensure accuracy of the personal data processed. In fact the data are entered to the database/flexitime sheet by the data subject.

In addition, Articles 13 and 14 of Regulation 45/2001 provide that the data subject has the right to access and the right to rectify data, so that the file can be as complete as possible. This also makes it possible to ensure the quality of data (see section 3.9).

Article 4(1)(a) provides that personal data must be "*processed fairly and lawfully*". Lawfulness has been dealt with in 3.2 and fairness will be dealt with in 3.10.

### **3.5. Conservation of data/ Data retention**

Article 4(e) of Regulation 45/2001 states that personal data must 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*".

Data will be stored in the EMCDDA files for the whole length of service of the particular agent and for five more years after termination of service.

The EDPS takes the view that there is no justification for such a long conservation of data, given the initial purpose of collecting it. The initial purpose of the database is to be found in the Articles on officials' leave allowances in the Staff Regulations.

Keeping data on days of annual leave can be justified if leave is carried over from one year to the next, but not beyond the year after that.

Keeping data on sick leave for at least three years is justified by the implementation of Article 59(4) of the Staff Regulations. The EDPS considers that the sick leave related data can indeed be kept for the initial three years since they are necessary for the establishment of an eventual invalidity on a basis of Article 59(4) of the Staff Regulations. This view is confirmed by the fact that, when a person is transferred to another institution, only data on sick leave in the previous three years are forwarded. After these three years, data should be deleted.

Regarding data related to some particular categories of special leave (i.e. family, maternity or parental leave) a longer conservation period could be justified by the Community rules applicable to the disposal of records with financial link. In fact, Article 49 of the Implementing Rules to the Financial Regulation<sup>2</sup> states that the original supporting documents are to be kept for up to seven years after the budgetary discharge<sup>3</sup>. The EDPS recognises the need to keep files for the purposes of a budgetary control. Nevertheless, he would like to bring EMCDDA's attention to the recently added last paragraph of Article 49 of the Implementing Rules to the Financial Regulation stating that "*personal data contained in supporting documents shall be deleted where possible when those data are not necessary for budgetary discharge, control and audit purposes*".

Concerning the working time registration sheets, there appears to be no need for viewing the development of any particular employee's working hours over the course of time. Therefore, the EDPS recommends that all working time data would be deleted at least once a year. Concerning staff members whose employment relationship with EMCDDA comes to an end, all their flexitime related data should be immediately deleted.

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<sup>2</sup> Commission Regulation 2342/2002 laying down detailed rules for the implementation of Council Regulation 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities as amended by Commission Regulations 1261/2005, 1248/2006 and 478/2007.

<sup>3</sup> Five years provided for in Article 49(d) plus two years by virtue of the fact that "*documents relating to operations not definitely closed shall be kept for longer than provided for in point (d) of the first subparagraph, that is to say, until the end of the year following that in which the operations are closed*".

If EMCDDA wishes to preserve any data to help management develop strategies, or for historical, scientific, or statistical purposes, the data must be aggregated and kept only in anonymous form. In this respect, EMCDDA must take into account that merely deleting names does not necessarily render data anonymous. For example, staff members could be identified indirectly, by reference to their job functions and the dates during which they carried out those functions.

### 3.6. Compatible use / Change of purpose

Article 4(1)(b) of Regulation 45/2001 states that personal data must be "*collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes*".

According to the notification, the processing is not intended to have any other purpose than management of flexitime and leave, in particular it is not intended to use collected data in order to evaluate staff members on how efficiently they accomplished tasks, or how much time they spent at the office dealing with specific matters. In other words, the purpose of the processing does not include the evaluation of staff, their conduct, efficiency, etc.

As a matter of fact, the hierarchy may have access to individual data of their staff. In this case, even if the flexitime and "SIC Congés" are not designed for this purpose, managers may be tempted to use the data also for performance evaluation or other purposes that may individually affect data subjects, such as allocation of tasks, contract renewals, or internal mobility. Considering the inadvertent spill-over and the risks of using data for unlawful purposes, compliance with the principle of purpose limitation will be a difficult task, to which the attention of all managers must be specifically drawn to.

Therefore, EMCDDA should clearly state that the database cannot be used for purposes of performance appraisal, promotion, or assessing contract renewal, and that the use of the database should not lead to dismissal, exclusion from contract renewals, promotion, or training opportunities, exclusion when tasks are allocated or team leaders and managers are selected, or to other similar prejudices to staff members. This does not mean that staff members who are unable to account for a productive use of their time cannot be dismissed or excluded when tasks are distributed. However, these decisions must be made based on information other than data in the database.

### 3.7. Transfer of data

**Internal transfers:** The transfers within the Agency (to the Head of Unit and/or Director of the data subject; the HR staff responsible for the management of the database, eventually the IT maintenance staff), as well as the transfers to the IAS, the Court of Auditors, the European Ombudsman, the Civil Service Tribunal and the EDPS should be examined in light of Article 7 of the Regulation 45/2001.

This Article provides that "*personal data can 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*" (paragraph 1) and that "*the recipient can process the data only for the purposes for which they were transmitted*" (paragraph 3).

The EDPS notes that the above referred internal transfers fall, in principle, within the legitimate performance of the tasks covered by the competence of the respective recipient. In



particular, he notes that the transfers to the applicant's hierarchy, to the HR staff, as well as to the IT staff are necessary for administrative/maintenance purposes. The potential transfers to the IAS, Court of Auditors, European Ombudsman, Civil Service Tribunal, as well as EDPS are necessary for the performance of the respective supervisory task. Consequently, Article 7(1) of the Regulation is being complied with.

However, the EDPS would like to point out that in principle all certificates containing medical data to be provided in connection with leave request shall be submitted directly to a medical service and not to the administration. An exception from this rule could be envisaged in case of small Agencies or bodies with no medical service, like EMCDDA. In this case, the medical data should be submitted directly by the person concerned to the authorised person in the HR service and processed with strict confidentiality and exclusively for the purpose for which they are submitted. The hierarchy of the person concerned should in any case not have access to the medical data. In this context, the EDPS would like to invite the EMCDDA to reconsider whether all medical certificates containing medical data could be directly submitted for validation/review to the external medical advisor avoiding analysis by HR staff.

**External transfers:** The transmission of the data contained in the medical certificates to the Portugal based external medical advisor should be examined in light of Article 8 of Regulation 45/2001. This Article allows for transfers to recipients subject to (the national law adopted for the implementation of) Directive 95/46/EC *"if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority"* (Article 8(a) of Regulation 45/2001).

The EDPS considers that the transfer of the medical data to the external medical advisor is necessary for the performance of a task carried out in the public interest since it occurs on behalf and upon instructions of the controller. The purpose of this transfer is to review the data subject's or his/her family member's medical certificate in case the EMCDDA's HR staff has doubts or uncertainty about its content. Article 8(a) of Regulation 45/2001 is therefore duly complied with.

### **3.8. Processing of personal number or unique identifier**

Article 10 (6) of the Regulation provides that *"the European Data Protection Supervisor determines the conditions under which a personal number or other identifier of general application may be processed by a Community institution or body"*.

Each staff member must add its personnel number when making an application in "SIC-Congés" database. The EDPS considers that the personal number can be used in this context since it allows for the identification of the staff member and facilitates the follow-up in an appropriate way. There is no reason to determine any further conditions in this case.

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

Article 13 of Regulation 45/2001 grants a data subject the right of access to personal data held about him. Article 14 provides a right of rectification of personal data.

As mentioned in section 2, each member of the EMCDDA staff may have access to his/her data via the "Sic Congés" system or the relevant flexitime time-sheet. This allows the staff member to verify that the data are correct and should this not be the case, to correct them him/herself or request correction to the HR staff. When the rectification has to be done directly by the HR staff, the notification and the supporting documents do not mention the

procedure to follow and the time limits applicable. As to blocking and erasure, the time limit of one calendar year following a justified request from the data subject is excessively long. The EDPS recommends setting up a procedure and time limit for rectification as well as fixing a reasonable time limit for blocking and erasure of data.

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

In order to ensure transparency and fairness of the processing of personal data, Regulation 45/2001 provides for certain information to be supplied to the data subjects. In the present case, both Articles 11 and 12 are applicable since personal data processed are essentially provided by the respective data subjects and certain personal data may be obtained from other sources.

Articles 11 and 12 of Regulation 45/2001 require certain information to be provided to the data subject. In this instance, EMCDDA staff members are informed through the "Sic Congés (leave) - Absences Quick Guide", "EMCDDA Flexitime Guide" and the "Declaration of confidentiality and data protection" specific for the processing. They are published on the EMCDDA website and provide considerable information on data protection.

However, in order to comply with Articles 11 and 12 of the Regulation, the EDPS recommends that the information provided in the "Declaration of confidentiality and data protection" be amended as follows:

- There should be a clear legal basis for the processing. The statement that the processing complies with the specific provisions of the Regulation (EC) 45/2001 is not sufficient in this respect;
- The statement that the processing is not subject to prior checking by the EDPS should be corrected;
- The identity of the controller and his/her contact details (at least an email address) should be added. The statement that the "controller of the data is the Administration Unit" is not precise enough;
- The list of potential recipients and the categories of data that they can receive should be updated; in particular restriction in processing of medical data and the transfers to the external medical advisor should be mentioned;
- The conservation periods should be updated according to section 3.5.

### **3.11. Security measures**

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 45/2001.

## **4. Conclusion**

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 provided the above considerations are fully taken into account. In particular, EMCDDA should:

- Modify the conservation periods as recommended in section 3.5;
- Draw attention of all managers to the principle of purpose limitation, in particular to unlawful use of leave/flexitime data for evaluation purposes;

- Ensure that, in accordance with Article 7(3), each of the recipients of personal data relating to leave is made aware that they shall process the personal data they receive only for the purposes of recording leave;
- Reconsider whether all medical certificates containing medical data could be directly submitted for validation/review to the external medical advisor avoiding analysis by administrative staff;
- Set up a procedure and time limit for rectification of data as well as a reasonable time limit for blocking and erasure of data;
- Amend the information provided to data subjects as recommended in section 3.10.

Done at Brussels, 20 June 2008

(signed)

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