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**Subject: Consultation on the new model medical certificate
(Introduction in all the institutions)**

1. Reasons given by the institutions for introducing a new model medical certificate

The Interinstitutional Medical Board (IMB) has decided to introduce a new model of certificate establishing unfitness for work due to illness or accident, as part of the measures adopted to simplify and modernise the Commission's Medical Services.

This new document is the fruit of detailed discussion by the examining doctors of all the institutions. For some institutions, the great advantage of the certificate is that it can be optically scanned into the database, thereby avoiding transcription errors and simplifying the Medical Service's work, so that it has more time to deal with colleagues' enquiries.

For staff, too, the new certificate offers many advantages:

- it will be available on the Intranet for printing out, blank or with personal particulars already completed, to be taken home and used as needed when consulting a doctor;
- it will be for the doctor consulted to complete all the data required for validation of the certificate;
- the certificate will be available in French, English, German and Dutch;
- it will be compulsory for all staff in all the institutions.

The IMB's plan was to put the certificate on the Intranet as of 1.6.2008, and for its use to become compulsory on **1.12.2008**. During a six-month transitional period all certificates would continue to be accepted, but from **1.12.2008** only the new certificate of unfitness for work due to accident or illness would be permissible.

The aim of the new medical certificate is twofold :

- to avoid causing resentment by making checks on people who are clearly ill;
- to target checks more effectively and thus increase efficiency.

Following informal consultation of the office of the European Data Protection Supervisor (EDPS) by DG ADMIN's Data Protection Coordinator (DPC), the IMB decided at its meeting on 5 June 2008 to submit the new medical certificate for staff of all the institutions to the EDPS. Until the EDPS's opinion has been received, there will be no further notification of the procedure for checking absences at the Commission and in the meantime the model medical certificate will not of course apply.

Given the very many doubts and questions raised by the draft certificate, a meeting between members of the EDPS secretariat and the medical officers of the Parliament (Dr DI PAOLANTONIO) and the Commission (Dr ADAM-GERARD) was held on 7 October 2008.

2. Prior checking aspects

The EDPS wishes the controller of processing operations to send the Data Protection Officer further notifications as and when new features are to be implemented. The processing operation submitted for analysis corresponds to the initial part of the prior check made by the EDPS on monitoring of absences due to illness at the Commission but, since the EDPS has already issued his opinions (opinion 2004-232 of 10 September 2007 on the management of the activities of the Commission's Medical Service – SERMED – and opinion 2004-226 of 11 October 2007 on checks on absences due to illness at the Commission), there seems no need to submit these two processing operations to the EDPS again, provided that the IMB implements the recommendations made below and that no other substantial element is added to the existing draft.

3. The facts

The (draft) new medical certificate contains the following data:

To be completed by the patient

- Surname, forename, personnel number, administrative status
- Address during the sickness/accident leave, with phone, mobile and fax numbers and e-mail address

To be completed by the doctor

- Doctor's name
- Patient's name
- Dates of absence from work
- Rate of incapacity
- Dates of hospitalisation
- Reason:
 - Illness
 - Accident on ... (date)
 - Surgery on ... (date)
- Nature of the condition:
 - Psychiatry
 - Cardiology
 - Orthopaedics/Rheumatology
 - Oncology
 - Neurology

- Gynaecology
- General (internal) medicine
- Other
- If pregnancy, expected birth date
- Check by examining doctor desirable: no/yes
- Precise diagnosis and/or ICD10-CIM code (international classification of disease and related health problems, 10th revision).
- Initial sick leave, extension, may/may not go out
- Expected date of resuming work
- Rate of resumption
- Doctor's contact telephone number
- Doctor's stamp with national medical register number and address
- Date and signature

A note at the bottom of the certificate states that it will be read only by the doctor responsible for checks.

4. Regulatory framework

A. Article 59(1), second subparagraph, of the Staff Regulations

Absences due to illness or accident must be covered by a medical certificate as of the fourth day of absence. Otherwise, the absence is considered unauthorised unless there are reasons beyond the official's control.

B. Article 59(1), third subparagraph, of the Staff Regulations

An official on sick leave may at any time be required to undergo a medical examination arranged by the institution. This aspect of medical checks has already been covered in an EDPS opinion of 11 October 2007¹.

C. Commission Decision of 6 July 2004 introducing implementing provisions on absences as a result of sickness or accident (C(2004)1597).

The Decision establishes the following basic rule:

The medical certificate must be legible and MUST contain the following information:

- *patient's surname and forename,*
- *patient's current place of residence,*
- *expected duration of the patient's unfitness for work, with starting and finishing dates.*

It also states that:

- *an absence will not be considered sick leave until the Medical Service has been able to assess the validity of the medical certificate.*

The Medical Service section of the Intracomm.Pers Admin website stipulates the following procedure:

¹ See EDPS website for opinion of 11 October 2007 on checks on absences at the Commission due to illness (Case 2004-226)

*"Send by mail, e-mail or fax a medical certificate, **clearly stating your personnel number** to the Medical Service. In the case that you are prevented from doing this, you must inform the Medical Service by phone."*

5. Legal analysis

5.1. Purpose of the processing operation and arrangements for checks

A. Distinction between medical checks and medical supervision by the medical officer of the institution:

In its opinion² on the management of the activities of the Medical Service at the Commission, particularly via the SERMED application, the EDPS emphasised the following point: *"As regards recording the absence covered by the medical certificate, the Medical Service defends the inclusion of a reference to the "specialisation of the doctor" who has issued the certificate as part of medical follow-up in an annual medical check-up, for instance, or after a consultation at the request of the person concerned. According to the Medical Service, the medical officer who sees a person for a an annual check-up does not have access to that person's medical certificates, since they are kept in the examining doctor's files³. Thus SERMED provides him with access to the information on the certificate. The EDPS takes the view that a medical certificate is submitted as a supporting document for an absence, not to provide medical supervision of the data subject. It follows, then, that periods of absence are the only relevant information required for inclusion in SERMED."*

That was in a context of medical supervision, not medical checks

B. Medical checks:

In the context of medical checks, the purpose of the medical certificate is twofold:

1. to justify a period of absence
2. to show that the absence has been examined and deemed justified by a doctor.

In addition, medical checks enable each institution to verify that an absence based on a medical certificate is justified and that the time allowed is consistent with the nature of the condition.

Medical checks are carried out on the basis of two criteria:

1. a cumulative absence of 20 days or more over a period of two months
2. verification that the length of the absence is consistent with the nature of the condition.

That point can only be properly verified (in the examining doctors' opinion) if, and only if, the nature of the diagnosis is indicated from the outset, because the absence of such an indication leads to mistakes in making checks, e.g. asking someone to come for examination when they have a leg in plaster or have just come out of hospital after surgery.

At present a quarter to a third of medical certificates indicate the precise diagnosis.

² See EDPS website for opinion of 10 September 2007, Case 2004-232

³ See footnote 1

Where the diagnosis is indicated on the medical certificate, the Medical Service's administrative staff (who are bound by professional secrecy) enter the diagnosis in the secure area of SERMED, access to which is restricted to the medical checks service⁴.

According to the information received, the aim of the new medical certificate is to make it possible to:

- simplify validation of the certificate (clear and precise data in a certificate that is easy for the doctor to complete and the same for all staff);
- initiate a check to verify whether the period of absence tallies with the nature of the condition, while protecting staff from pointless checks (broken limbs, cancer, or other serious illnesses).

The purpose of collecting the data included in the new medical certificate is therefore, firstly, to validate absence and, secondly, to ensure that the period of absence is consistent with the nature of the condition. The EDPS notes this and emphasises the need to provide the fullest possible information on this dual purpose (see below, point 5.4).

5.2. Lawfulness of the processing operation and special categories of data

The proposed processing may be carried out on the basis of Article 5(a) of Regulation 45/2001 (*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 or in a third party to whom the data are disclosed*). Thus the management of medical certificates and medical checks takes place in the context of the management and operation of the institutions, but is also based on the above provisions in the Staff Regulations.

In addition, since the draft medical certificate contains data concerning health, it must comply with Article 10 of Regulation 45/2001, which prohibits the processing of personal data concerning health unless it is justified by the reasons set out in Article 10(2) and (3) of the Regulation.

Article 10(2)(b) states that "*Paragraph 1 (prohibition of the processing of data concerning health) shall not apply where 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 (...)*".

Since Article 10(2)(b) is an exception to the principle that processing is prohibited, it must be interpreted restrictively.

1. Firstly, the rights and obligations of the controller must be "*specific*". Thus the processing of sensitive data is permitted only if it is relevant to the purpose of the processing.

The legal basis for medical checks is the third subparagraph of Article 59(1) of the Staff Regulations. The specific nature of this processing operation rests partly on the data in the certificate but also on the procedure set out in the Commission Decision.

⁴ See footnote 1

The current medical certificate is sufficient as regards covering the period of absence, but would not serve the purpose of medical checks. A more detailed medical certificate containing medical data would be required to enable the controller to fulfil his obligations.

2. Secondly, the fact that the processing must be "*necessary*" for that purpose adds further constraints as regards data quality (see below, point 5.3). In this instance the processing of health data is justified because it is necessary to comply with the specific rights and obligations of the institutions, acting as employers in the field of employment law, as provided for in Article 10(2)(b). Processing of the medical certificate for the purposes of medical checks is necessary inasmuch as the certificate is the sole basis on which the examining doctor can initiate a check. It is the sole initial document on which the doctor's analysis is based.
3. If the medical certificate contains medical data other than simple indication of the length and cause of the absence (illness, surgery or accident), the patient could explicitly give his consent to processing. The EDPS therefore requests the insertion of a specific heading for that purpose in the draft new medical certificate. Even if the processing is already covered by Article 10(2)(b), the fact that data subjects were asked to consent to it would make indication of the precise diagnosis more acceptable to them.

5.3. Data quality

The principles of adequacy, proportionality and relevance of data

Article 4(1)(c) of the Regulation stipulates that personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed.

A distinction must be made between medical data and data concerning health.

In terms of Article 4(1)(c), the data to be completed by the patient and by the doctor concerning:

- doctor's name, patient's name, dates of absence from work, incapacity rate, dates of and reason for hospitalisation (illness, accident, surgery), pregnancy and expected birth date, initial sick leave or extension, permission or not to go out, expected date of resumption of work, rate of resumption, doctor's stamp with national medical register number and address, doctor's contact phone number, date and signature,

are clearly data concerning health and appear adequate, relevant and not excessive in relation to the purpose of the basic medical certificate covering a period of absence. They clearly enable the medical checks service to manage the length of the absence. They are also relevant in terms of Article 10(2)(b) of Regulation 45/2001.

The other data mentioned in the draft medical certificate, i.e.:

- the nature of the condition (psychiatry, cardiology, orthopaedics/rheumatology, oncology, neurology, gynaecology, general (internal) medicine, other), check by the examining doctor desirable: no/yes, precise diagnosis and/or ICD10-CIM code (international classification of disease and related health problems, 10th revision),

appear necessary and not excessive for the purpose of enabling the examining doctor to carry out a check, but could usefully be reconsidered.

It is possible that a patient could learn of the existence of a psychiatric condition from the medical certificate, in breach of the principle of protection of persons concerned by such a diagnosis. The inclusion of such data must therefore be reconsidered.

The EDPS also wonders whether it would not suffice to indicate the precise diagnosis, omitting the nature of the condition.

The EDPS would also ask what is to happen if the doctor and the patient jointly refuse to complete the headings concerning the nature of the condition and the precise diagnosis. Is the certificate as such to be rejected as cover for the absence on sick leave, or will it simply mean that a check will be carried out?

Lastly, the question of the value of this document in the event of the doctor's diagnosis being disputed needs to be considered.

The EDPS recommends that the medical data to be included in the medical certificate be reconsidered in the light of the principles of adequacy, relevance and proportionality and that the certificate contain only the data strictly necessary.

5.4. Information

On the back of the medical certificate all the information referred to in Articles 11 and 12 of Regulation 45/2001 should be explicitly set out, so that both patients and doctors are perfectly aware of the consequences of the medical certificate as presented and completed. They should also be informed of the consequences of not fully completing the certificate. This information should also be given in the note introducing the new certificate.

5.5. Storing of data

It will be important to determine the most appropriate length of time for storing data in the light of the purposes of the certificate. This point should also be covered in the information note accompanying the new medical certificate and on the back of the certificate.

5.6. Security

The EDPS recommends that the greatest care be taken in the forwarding of the medical certificates, (with the revised medical data) under the medical checks procedure. He welcomes the fact that the medical certificate must be sent **directly to the Medical Service (checks on absences section)** without going to the DG. This unit is set apart from the central Medical Service and involves only a few people – the examining doctor and secretaries – and only they have access to the fax and e-mails. The new certificate also states that it will be read only by the examining doctor (bound by medical secrecy). For administrative purposes (entering and filing data) three secretaries, all of whom sign a declaration of confidentiality, could have access to the data. The data given on a certificate are therefore protected both by medical secrecy and by a declaration of confidentiality.

Lastly, it is clear that the new certificate as such cannot be used by agencies which do not have a medical service, for obvious reasons of security and compliance with medical secrecy. The existing medical certificate should be used until a medical service has been put in place, or specific relations established with a subcontracted medical service.

6. Conclusion

The EDPS considers that the draft new medical certificate as such cannot be accepted as standard practice until all the questions raised above have been answered.

The EDPS recommends that the content of the medical data in the draft certificate be reconsidered, and that an information note be drawn up giving particularly specific information on processing and exhaustive information on the rights of access and rectification and on data storage under Articles 11 and 12 of the Regulation. This information should also be given on the back of the medical certificate so that both patients and doctors are aware of their rights.

The EDPS wishes the controller of processing operations to send the Data Protection Officer further notifications as and when new features are to be implemented.

It seems unnecessary to submit processing operations relating to the management of the activities of the Commission's Medical Service – SERMED – on checks on absences due to illness at the Commission to the EDPS again, provided that the IMB implements the recommendations made below and that no other substantial element is added to the existing draft.

Brussels, 3 November 2008

(Signed)

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