

Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Commission regarding the "Coordination of medical, psychosocial and administrative support (COMPAS)"

Brussels, 4 December 2008 (Case 2008-428)

1. Proceedings

On 8 July 2008 the European Data Protection Supervisor (EDPS) received by electronic mail a prior checking notification for a *planned* processing operation "Coordination of medical, psychosocial and administrative support (COMPAS)" from the Data Protection Officer (DPO) of the European Commission.

The notification contained the following documents: 1) a draft Communication from the Commission: A management policy on absence for medical reasons and invalidity(SEC (2006)501/3); 2) Modus Operandi - Coordination of medical, psychosocial and administrative support (hereinafter referred to as: "Modus Operandi"); 3) a standard form for a Case journal for COMPAS; 4) a standard note to the Director General of DG ADMIN with recommendation of COMPAS for a staff member; 5) a case request form for COMPAS; and 6) a privacy statement for COMPAS.

On 31 July 2008 the EDPS extended the deadline for one month given the complexity of the case.

On 3 September 2008, the EDPS requested further information, which he received on 29 September 2008.

On 23 October 2008, the EDPS sent the draft opinion for comments to the Data Protection Officer of the European Commission. He received the comments on 25 November 2008.

2. The facts

The European Commission designed a system called "Coordination of medical, psychosocial and administrative support" (COMPAS) to coordinate in a multi-disciplinary fashion the provision of help to staff in active employment. COMPAS will be an *ad-hoc counselling* facility designed to help individuals who are encountering serious health problem or serious social difficulties due to private or professional reason which interferes with their presence or performance at work.

COMPAS will process a variety of personal data (see below) for **the purpose** of facilitating human resources management for the interest of the administration and also for assisting the staff member concerned. The COMPAS intervention should lead to preventing difficulties in maintaining work at a reasonable level and preventing that these difficulties turn into

problems. COMPAS will facilitate the return to work process with the perspective of enabling staff to continue their professional career within the Commission.

The **controller** of the processing operation is the President of COMPAS who was appointed by the Director General of DG ADMIN.

Regarding the **scope of COMPAS**, it is to be noted that COMPAS will not derogate from existing rules and procedures concerning invalidity, professional insufficiency, harassment or disciplinary matters. COMPAS will only be involved if a case has health or social implications. The COMPAS procedure is excluded once the Appointing Authority initiated a procedure for dismissal due to incompetence under Article 51 of the Staff Regulations.

The **categories of concerned data subjects** are officials and agents who are covered by the Staff Regulations and who encounter serious health problems or serious social difficulties.

COMPAS will affect broad **categories of personal data** which will be used by the services in the interdisciplinary approach: administrative, medical and/or social data.

- The *case request form* for a COMPAS intervention requires the description of the situation, including necessary detail of health concern, family and/or financial situation, etc. It describes whether other services had been consulted and the results thereof. It also leaves an open field for any comments.

- The *case journal form* for COMPAS describes the conclusions drawn and actions decided.

-The *note addressed to the Director General of DG ADMIN* specifies COMPAS recommendations made with reference to the services consulted and the special situation or medical condition of the person concerned. It also makes a reference whether other services responsible for the implementation had been consulted. With the recommendations made in that note, the COMPAS case is closed.

The "Modus Operandi" provides that: "The COMPAS is obliged to **search** and keep personal data relevant to the situation treated."

The EDPS distinguishes the following main phases in a COMPAS procedure:

- Detecting a problem,
- Initiating a procedure,
- Presenting a formal request,
- Assessment of the request,
- COMPAS meeting(s),
- Recommendations and
- Follow-up.

A COMPAS procedure can be opened if a case meet certain criteria.:

- 1) the staff member is experiencing serous health/social difficulties originating from professional or private reasons, which interfere with his/her performance or presence at work, or
- 2) due to the above reasons the staff member is absent from the office for a long time and/or has an irregular pattern of attendance, and
- 3) a multi-disciplinary approach via an inter-service collaboration is necessary.

The system is based on the *ad- hoc* cooperation of several services within the European Commission (for more details, see below under the heading "data recipients"). In principle COMPAS can only be seized for cases where all other single-service solutions and procedures have been properly tackled and exploited beforehand without success.

Detecting the problem: It is envisaged that a *monitoring mechanism* will be put in place in order to have an early warning about staff encountering difficulties. *Data from Sysper2* "could facilitate the management of difficult situations and assist COMPAS secretariat in setting criteria to identify officials in difficulty. One approach could be to establish *risk profiles* and an early warning system drawing attention to situations which should then actually be assessed on the ground. A critical first step is to ensure that absences are duly recorded, consistently and in a harmonised manner."¹ When fully operational, SYSPER 2 data could allow the establishment of risk profiles on the basis of recurrent absence patterns (e.g. recurrent short absences, regular absences before or after the weekend, etc). The intention was to establish anonymous statistical data to establish these kinds of risk profiles. However, this has to be understood in the context of a further stage of primary prevention. The primordial role of COMPAS is to assist staff in the framework of secondary or tertiary prevention.

As to the *currently available monitoring mechanism*, given the size and the structure of the Commission, it cannot be the role of the central services to detect staff members in difficulties. This is and has always been a central *task of line management*. Recent training modules of middle management take this role more and more into consideration, as it is part of modern human resources management. Staff in difficulty should be oriented as soon as possible to the competent central services, like the psychosocial counsellors, the confidential counsellors in the framework of the harassment procedure, the central career guidance function etc.

The control of absences is entirely in the responsibility of the *medical doctor in charge of control*. He/she is authorised to call in any employee absent due to illness or accident, according to Article 59 of the Staff Regulations². Data on absences at present is primarily drawn from medical certificates sent by the absent staff member.

ADMIN services of which COMPAS is composed of (see later under section "data recipients") and the Commission's Mediator can act as **requesting service**. This means launching the procedure formally by submitting a written request for a COMPAS procedure.

Initiating phase: The services which can formally submit a request for a COMPAS procedure may be contacted by various persons in order to ask the service to launch a procedure. The line manager, human resources or other relevant services dealing with the staff member or the person concerned himself/herself can contact those services which have the right to formally initiate a COMPAS procedure.

After the Secretariat made its **assessment of the case**, the President makes a decision on the admissibility of the case for the COMPAS procedure. Any refusal should be justified.

A **COMPAS meeting** (or if necessary several meetings) is convened by the Secretariat. The services concerned are identified by the Secretariat in agreement with the President,

¹ Point 3 of the draft Communication Policy on Absence for Medical Reasons and Invalidity

² Article 59(1) of the Staff Regulations provides that: "The official concerned shall notify his institution of his incapacity as soon as possible and at the same time state his current address. He shall produce a medical certificate if he is absent for more than three days. This certificate must be sent on the fifth day of absence at the latest, as evidenced by the date as postmarked. Failing this, and unless failure to send the certificate is due to reasons beyond his control, the official's absence shall be considered as unauthorised. The official may at any time be required to undergo a medical examination arranged by the institution. (...)"

depending on the nature of the case. The requesting service will be responsible for presenting the details of the case and the other services involved will contribute with their assessment.

Various **recommendations** may constitute the outcome of the COMPAS procedure, such as: adaptation of current post, intermediate working conditions (part-time work due to illness, working from home), finding a new post better adapted to the staff member's present situation and the need of the institution, return-to-work plans (preferential access to job-specific training courses), etc.

The recommendation of COMPAS itself does not contain any medical data (or sensitive information) and constitutes the final administrative act, after a case has been dealt with by COMPAS.

The Secretariat will specify the recommendation, which after being adopted by the Director General of DG ADMIN shall be sent to the services concerned, the requesting service and the person concerned. COMPAS is a consultative committee, thus there is *no access to any procedure of appeal*.

Follow-up actions in the framework of a COMPAS procedure have to be reported to the Secretariat. The services in charge shall be specified in the recommendation.

A number of individuals may become **data recipients** in a COMPAS procedure. The privacy statement notes that only the selected professionals who have been appointed and who participated in evaluating one's situation in the context of COMPAS have access to the file:

- COMPAS will be chaired by a *President* appointed by the Director General of DG ADMIN.
- The *medical service* will host the secretariat of COMPAS and it is composed of professionals subject to the obligation of professional secrecy. As the rules in "Modus Operandi" stipulate: "In performing its tasks, COMPAS will respect the professional secrecy as provided for in Article 287 of the EC Treaty³, Article 17 of the Staff Regulations⁴ and the Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by Community institutions and bodies and on the free movement of such data" The Modus Operandi further refines that, according to the opinion of the Legal Service of 15/6/2006 *Adonis no 45528* and in the case law of the Court of Justice of the European Communities, in *K/Commission I-176/94*, 13/7/1995, "le secret médical puisse (sic) connaître des tempéraments et des dérogations en raison de certains principes et dispositions statutaires...Rien s'opposerait à la communication de certaines informations médicales aux personnes dont les fonctions justifient voire exigent qu'elles les reçoivent (il s'agit en substance d'un "need-to-know basis")."⁵ The Modus Operandi notes also that "no detailed or irrelevant medical or psychosocial information shall be disclosed except from the professional assessment in the frame of the COMPAS procedure."

³ Article 287 of the EC Treaty provides that: "The members of the institutions of the Community, the members of committees, and the officials and other servants of the Community shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components."

⁴ Article 17 of the Staff Regulations stipulates that: "An official shall refrain from any unauthorised disclosure of information received in the line of duty, unless that information has already been made public or accessible to the public. 2. An official shall continue to be bound by this obligation after leaving the service."

⁵ Footnote 13 in "Modus Operandi"

The President and a member of the Secretariat shall be present in all formal COMPAS meetings.

- The *composition of COMPAS will depend on the nature of the case*: The services involved shall be identified by the COMPAS Secretariat among the following services (hereinafter referred to as "services concerned"):

- the direct hierarchy of the staff member in difficulty,
- the human resources (HR) units of the DG concerned,
- Admin C.2 the Medical Service and Psychosocial Interventions (Brussels)
- Admin C.3 the Medical Service and Psychosocial Interventions (Luxembourg)
- Admin A.2 the Central Career Guidance Service (SCOP),
- Admin A.4 "Officials and external staff" -Administrative procedures,
- Admin B.4 "Equal opportunities and non-discrimination
- the Mediator of the European Commission (whenever the person himself/herself addressed the Commission's Mediator or Mediation service).

These services are involved with the purpose of giving their professional assessment of the situation based on the information shared in the meetings. The COMPAS Secretariat will assure that medical/psychosocial information will only be shared between professionals subject to the obligation of professional secrecy. COMPAS aims at facilitating contacts between the different actors.

- The *head of unit or other direct hierarchy* as the line manager of the staff member is the key person to detect potential problems at an early stage and may help preventing the escalation of the situation. He/she is also involved in the return-to-work process including adapting the job profile to the person concerned.

- The *Head of Human Resources in the concerned Directorate General* and, depending on the case, *ADMIN A.4* may be involved in assisting to find a new post more adapted to the person concerned as recommended by COMPAS.

- The *Central Career Guidance Service (SCOP)* assesses the professional competence of the person concerned in relation with the profiles of the available posts. It should act pro-actively to facilitate the matching between the person and the job. SCOP is the responsible service for the reintegration of the persons after a period of temporary invalidity in cooperation with ADMIN A.4.

- *Medical doctors and psychologists* assess the physical and psychological health of the person concerned and evaluate the impact of this situation on his/her work activity. If a person is examined by medical doctors or psychologists as part of the COMPAS procedure they act in their capacity as experts in order to help finding the best solution for the colleague in difficulties. The health professionals shall disclose no medical or similar confidential information. The assessment will be restricted to whether the person concerned is able to work and which considerations need to be regarded in order to allow the person to perform (e.g. part time in a limited period of time due to medical reasons). The procedure to follow for the involvement of medical doctor or psychologist is the following: The doctor or psychosocial counsellor makes his/her statement during a COMPAS meeting where he/she is invited as a professional expert. The relevant information will be noted in the case journal kept by COMPAS Secretariat. The medical file of the staff member concerned will not be available for COMPAS.

- *Social workers* will make a professional assessment of the social circumstances of the situation. All social workers of the Commission hold a diploma as social workers and are employed as officials or contract agents. They have gone through an official concours (officials) or through a selection procedure (contract agents). They form part of the Commission's internal medico-psycho-social provisions for the benefit of the staff.
- A *mentor* will be assigned on some cases to assist the person concerned. For example, when the staff member returns to work from sick leave or invalidity leave, the mentor will be "a contact point" in the new services for any question that the person concerned might have.
- It is to be noted that COMPAS can consult *other services* in capacity of the ad hoc structure of necessary (e.g. ADMIN B.1 if legal questions relating to the Staff Regulations are to be solved).

A general privacy statement describes the purpose of COMPAS, identifies the controller, specifies the legal basis (only SEC(2006)501/3 is mentioned), lists the personal data concerned, describes in a very general fashion the data recipients, describes the basic security of the processing operations, the rights of data subjects (verify, modify or delete data), data storage period and the provides further information on contacting the data protection coordinator of DG ADMIN, the Data Protection Officer of the European Commission and the European Data Protection Supervisor. Point 2 warns the staff members that: "Your answers are made on a voluntary basis and only for the purpose of better understanding your situation. Lack of understanding by the COMPAS may lead to recommendation that is not quite appropriate."

This general **privacy statement** shall be attached to the letter sent to the staff member by the requesting service. The privacy statement is also available on the intranet of the European Commission on the sites dedicated to the Medical Service.

The staff member concerned **is informed** in writing that his/her situation is being presented to COMPAS at the time when the service requests a COMPAS intervention.

Further, the person concerned **receives information during the COMPAS procedure**. He/she shall receive in writing from the Secretariat which are the services concerned in his/her case. The requesting service shall assure the contact with the staff member concerned. It should inform the staff member in writing of the *main steps of the ongoing process*.

Some of the **information is obtained from the person concerned** during a COMPAS procedure on a voluntary basis for the purpose of better understanding the situation of that person. COMPAS may at any time request *the presence of the staff member concerned*. The staff member can be accompanied by a person of his/her choice (e.g. family member, general practitioner, specialist, friend, colleague, staff representative). The staff member is not obliged to participate. If the person does not wish to cooperate, COMPAS will have to conclude on the information available.

The concerned staff member has at any stage of the procedure **access to his/her COMPAS file**. The file can be consulted by the staff member concerned in the presence of the COMPAS Secretariat. The medical information contained in a COMPAS file falls under the same professional confidentiality as the medical file and can be consulted by the concerned staff member under the same conditions. The notification for prior checking explicitly states that the restrictions in Article 20 of Regulation (EC) 45/2001 will not apply.

The person concerned by the COMPAS procedure should contact via e-mail the COMPAS President who is responsible for the processing operation for **checking, modifying, correcting or deleting** any of his/her personal data. Assessments and recommendations can **not** be altered, but the person may **add his/her own comments**.

The Secretariat will **keep a nominative file of the proceedings**. The file will hold minutes of the meeting(s) and other relevant documents (COMPAS case request, record of meetings, case journal of the proceedings, decision and recommendations made, specific annexes related to the case). This file will be confidential.

An electronic file and an identical paper version is kept which contains the collected and used personal information. [...]

Point 5.2 of "Modus Operandi" and its footnote 16 states that: "Moreover, only professional subject to the obligation of professional secrecy may consult a file where they have personally been involved in COMPAS. Where a person involved transfers to another post or other obligations, their service may request access with this argument. The person who has been involved then seizes to have the right to access the file."

At the end of all COMPAS meeting it is the duty of the President to remind all participants for their obligation of secrecy under Article 17 of the Staff Regulations. The President will assure that cases are discussed without disclosing detailed medical, social or similar confidential information. The COMPAS case journal is not to hold medical/psychosocial data as such but conclusions and assessment of the participating professionals.

Personal data **are stored** for a maximum of three years after the treatment of the situation. The period of three years has been set in order to collect data to aid the establishing of risk profiles and if necessary for the reporting foreseen by the European Commission.

The time limit to implement a blocking of personal data is defined in 15 working days after a justified request to the President of COMPAS.

The COMPAS secretariat will provide a yearly activity report. As certain common patterns may occur among cases, an **anonymous analysis** of these patterns will enable COMPAS to identify certain risk profiles. These profiles may allow defining better under which circumstances the COMPAS secretariat should be contacted and which kind of intervention may be the most beneficial. These studies shall be done by COMPAS secretariat in collaboration with the services concerned.

COMPAS will be evaluated three years after coming into action.

3. Legal aspects

3.1. Prior checking

Regulation (EC) No 45/2001 of the European Parliament and of the Council 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 (hereinafter referred to as "the Regulation") applies to data processing activities by Community institutions and bodies. The Regulation applies to the data processing activities by the European Commission in the context of COMPAS procedure for the reasons enumerated below.

Personal data are defined as any information relating to an identified or identifiable natural person. An identifiable person is the 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. Identification data, data related to health or a particular social situation or to the work performance of the staff member are processed by the Commission services which are involved in a COMPAS procedure. Article 2(a) of the Regulation applies.

The processing of personal data within a COMPAS procedure by aiming at giving access to Commission's staff to social measures is carried out by a European institution in its activity, which clearly falls under Community law. Article 3(1) of the Regulation therefore applies.

The processing operation is mainly manual, where a normative paper file of the proceedings is kept, which hold a COMPAS request form, minutes of the meetings, case journal, decision and recommendations and specific annexes to a case. An electronic file identical to the paper version is also kept. The processing operation thus falls under Article 3(2) of the Regulation.

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, *inter alia*, processing of data related to health (27(2)(a) of the Regulation) and processing operations intended to evaluate personal aspects relating to the data subjects, including his or her ability, efficiency and conduct (27(2)(b) of the Regulation).

The COMPAS procedure is designed to help individuals who are encountering serious health problems or who are having serious social difficulties due to private or professional reasons which interfere with their presence or performance at work. COMPAS is intended structurally to collect and use data on health of the staff member facing serious medical problems, which makes the processing operations fall under Article 27(2)(a) of the Regulation. Further, the activities of COMPAS in some cases will involve evaluating personal conduct of a staff member in the context of examining the case whenever one's serious health or social difficulties interfere with their performance at work. Further, the Central Career Guidance Service (SCOP) assesses the professional competence of the person concerned by a COMPAS procedure in relation with the profiles of possible available posts. The processing operations by COMPAS thus fall under Article 27(2)(b) of the Regulation.

A monitoring mechanism is envisaged when SYSPER 2 will be fully operational. SYSPER 2 data could allow the establishment of risk profiles on the basis of recurrent absence patterns (short absences, regular absences before or after the weekends, etc) for the future purposes of primary prevention (see above in "facts" "Detecting the problem"). This prospective arrangement, which would certainly modify COMPAS procedures and the system itself, monitoring the conduct of staff members and also checking data on their absences (possibly including sick leave without medical certificates) is likely to fall under prior checking by the EDPS. The EDPS finds it essential that he is able to make his position on the foreseen "monitoring arrangement" under Article 27 of Regulation (EC) 45/2001. With due respect to the time frame of a prior check, the EDPS should be consulted before the modifications are put in place.

The notification of the DPO was received on 8 July 2008. According to Article 27(4) the present opinion must be delivered within a period of two months that is no later than the 9

September 2008. Due to the complexity of the case, the EDPS extended the deadline for one month. Further, the prior checking procedure was suspended for a period of 26 + 33 days. The opinion should therefore be issued not later than 8 December 2008 (7 December being a Sunday).

3.2. Lawfulness of the processing

Personal data can only be processed if grounds can be found in Article 5 of the Regulation. The notification for prior checking referred to Articles 5(a) and 5(e) of the Regulation as basis for lawfulness.

Article 5(a) of the Regulation allows for the processing of personal data if it is "necessary for 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". Article 5(e) of the Regulation permits the processing of data if it is "necessary in order to protect the vital interests of the data subject."

Article 5(a) of the Regulation requires three criteria for a processing operation to be met: 1) public interest, 2) necessity and proportionality and 3) appropriate legal basis.

The processing should be performed for a task carried out **in the public interest**. Recital 27 specifies that the "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." COMPAS will be a counselling facility designed to help individuals, who are encountering serious health problem or serious social difficulties due to private or professional reasons which interferes with their presence or performance at work. It can be concluded that COMPAS has two main aims: helping staff in difficult situation but also managing human resources in a more efficient way. Since one aim of COMPAS is to facilitate human resources management for the interest of the administration by assisting the staff member concerned, it can be regarded serving public interest as defined in Recital 27.

Article 5(a) requires that the **processing operation should be necessary** for the performance of the defined task which is carried out in the public interest. **The proportionality principle** as part of the necessity requirement demands that the measures taken by the European Commission should not exceed what can be seen necessary to achieve its objectives. A balancing exercise is needed between the privacy considerations of the staff members and the interest of the European Commission's public administration.

The COMPAS procedure has two purposes: one of the purposes relates to facilitating human resources management which is achieved by the mean of assisting staff members (second purpose) who encounter serious problems which have an impact on their presence or performance at work. The EDPS does not question the utility of the COMPAS procedure as such in achieving its double goals, but he can not approve such measures which do not take into regard the proportionality principle. According to the planned procedure of COMPAS, a procedure can be requested without the consent of the staff member concerned and can be carried out without his or her participation. The EDPS is of the opinion that, under the present legal basis, a COMPAS procedure, as a social measure, cannot be carried out without the express consent of the staff member concerned. One of the aim of the procedure is to accommodate the individual interest of integration back to work or finding feasible solutions within the Commission in response to the difficulty that staff member encounters. Subjecting the concerned staff members without their consent to a procedure, which otherwise aims at improving their own personal situation, would be an excessive administrative measure.

Therefore, the EDPS recommends that a COMPAS procedure relies on the express consent of the individual under Article 5(d) of the Regulation (see also below regarding the requirement for adequate legal basis).

Article 5(a) of the Regulation precisely lays down the **requirement for the legal basis:** Treaties establishing the European Communities or other legal instruments adopted on the basis thereof. In the present case the controller referred to three instruments as legal basis: 1) the new Article 1e of the revised Staff Regulations; 2) to the a draft Communication from the Commission: A management policy on absence for medical reasons and invalidity (SEC(2006)501/3); and 3) to the Modus Operandi - Coordination of medical, psychosocial and administrative support. COMPAS Secretariat also noted that the jurisprudence of the Court of Justice refers to the Institutions having a "duty of care"/"devoir de sollicitude" towards their staff.

Article 1e(1) of the revised Staff Regulations stipulates that: "1. Officials in active employment shall *have access to measures of a social nature adopted by the institutions* and to services provided by the social welfare bodies referred to in Article 9. Former officials may have access to limited specific measures of a social nature." A COMPAS procedure proposes to staff members a consultation involving several Commissions services to assist staff members in their health or social difficulties. This arrangement is of social nature. The creation of the ad hoc form of COMPAS consultations within the European Commission therefore can be seen as being based on Article 1e(1) of the Staff Regulations, a legal instrument adopted on the basis of the Treaties. The language of Article 1e(1) of the Staff Regulations, on which the Commission relies on deploying the system, uses the following language: "officials in active employment *shall have access.*" This language implies two actions: 1) it obliges the institutions to put in place arrangements of social nature and 2) it leaves it to the officials to use the available services for their own benefit should they wish to do so.

The formal request for a COMPAS procedure would always come from ADMIN services of which COMPAS is composed of or from the Commission's Mediator. They can be contacted by the line manager, human resources or the person concerned himself or herself. This is to say that it is always a service of the Commission who formally request the COMPAS procedure. But before reaching the formal request the driving force behind it is the person concerned himself/herself, the line manager or human resources. It is to be determined by the above referred ADMIN services having power to do so to decide whether they submit the formal request or not.

In any case, the EDPS can conclude that a COMPAS procedure, as planned, can be initiated in two ways: by the person concerned or "ex officio". In case of an "ex officio" procedure, as described above in the facts, it is possible that a COMPAS procedure is launched only at the initiation of the line manager or human resources without the agreement of the person concerned. It is also possible that even if the person was invited to take part in the COMPAS procedure he or she would object to do so. In these cases in principle, a COMPAS procedure could still be run.

This procedure is rather different from other social and welfare services put in place under Article 1e(1) of the Staff Regulations for the benefit of the staff in Community institutions, as in those cases the social or welfare services are always initiated by the staff member concerned. The COMPAS arrangement has certain consequences from a data protection perspective, thus it requires special attention (see below parts 3.3. and 3.4).

It needs to be noted that any other procedure which can be initiated by the institution itself regarding a staff member to which the individual should submit himself or herself is explicitly mentioned in the Staff Regulations (for example: the invalidity procedure, administrative and disciplinary proceedings and professional incompetence). COMPAS nevertheless is obviously not enumerated in that instrument.

Conclusions under Article 5(a) and 5(d) of the Regulation: In order therefore to be in compliance with the legal basis specified in Article 1e(1) of the Staff Regulations, the COMPAS procedure should be run with the consent of the staff member concerned.

The term "vital interests" in **Article 5(e) of the Regulation** is usually interpreted as a matter of "life and death." For example, in an opinion of the Article 29 Working Party explained this term in the medical context as "the processing must relate to *essential individual interests* of the data subject or of another person and it must (...) be necessary for a *life-saving treatment* in a situation where the data subject is not able to express his intentions."⁶ A COMPAS procedure would address situations where staff encounters serious health or social difficulties. Even if significant interests of the staff member might be at stake, the problems handled by COMPAS can not be regarded as "essential" in the above sense. Therefore, the EDPS does not consider that Article 5(e) of the Regulation could make the processing activities within COMPAS lawful.

3.3. Processing of special categories of data

The processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and data concerning health or sex life in principle is prohibited by the Regulation. Any exceptions are narrowly tailored in Article 10(2) of the Regulation.

In the present case, **health related data** would be processed in a COMPAS procedure. The staff member may go through a medical examination by the Medical Service of the European Commission or by a psychologist. This procedure concerns processing health related data, even if the diagnosis would not be communicated to the COMPAS Secretariat and/or members attending a COMPAS meeting, but only the information whether different working arrangements would be needed concerning the medical state of an individual. Further, data on absences drawn from medical certificates by the medical doctor in charge of control may also be used in the COMPAS procedure. Article 10(2)(a) of the Regulation may make lawful the processing of such data for the purposes of COMPAS where the staff member concerned has given his or her express consent to the processing of such data. This includes all those cases where the COMPAS procedure was initiated by the staff member.

Article 10(2)(b) of the Regulation can not apply to cases where a COMPAS procedure is run **without the express consent** of the staff member concerned. This article specifies that the processing of sensitive data can be lawful where the "processing is necessary for the purposes of complying with 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 in the basis thereof." As expounded above in part 3.2 on "Lawfulness," Article 1e(1) of the Staff Regulations, on which the processing is based, obliges the European institutions to provide measures of social nature, but leaves it for the staff members to use those facilities. One important criteria regarding the legal basis of Article 10(2)(b) is missing, which does not make the processing of sensitive data by

⁶ Working Document on the processing of personal data relating to health in electronic health records (EHR) of 15. 02.2007 (WP 131)

COMPAS lawful in cases where data subjects have not given their express consent to the processing operations.

COMPAS procedure allows for the individual to present himself/herself with a person of his/her choice on a COMPAS meeting. It can happen that this person is a representative of a trade union to which the staff concerned is a member. In this case personal data on **membership in trade union** could be disclosed before the participants of the COMPAS meeting. In such a case, data on membership in trade union would be disclosed by the person concerned. This can nevertheless be regarded as giving express consent by the staff member as it was his/her choice. Article 10(2)(a) would therefore be met.

3.4. Data Quality

Data must be **adequate, relevant and non excessive** in relation to the purposes for which they are collected and/or further processed (Article 4(1)(c) of the Regulation).

The documents submitted for prior checking reflect the intention of the controller to comply with this principle: 1) The "Modus Operandi" stipulates that the COMPAS is obliged to search and keep personal data *relevant* to the situation treated. 2) The Modus Operandi also states that "*no detailed or irrelevant medical or psychosocial information shall be disclosed except from the professional assessment in the frame of the COMPAS procedure.*" 3) COMPAS President should ensure that cases are discussed without disclosing detailed medical, social or similar confidential information. 4) The COMPAS case journal should not hold medical and/or psychosocial data. It should only include the conclusions and assessment of the participating professionals. 5) In case medical doctors or psychologists are involved in the COMPAS procedure, they should not disclose any medical or similar confidential information. The assessment will be restricted whether the person concerned is able to work and which considerations need to be regarded in order to allow the person to perform in his or her work. 6) The medical file of the staff member concerned will not be available for COMPAS.

The EDPS concludes that the requirement of *relevance and non excessiveness in abstracto* are therefore met. COMPAS nevertheless should always examine on a case by case basis in the various phases of a procedure (COMPAS meeting, recommendations, follow up) whether data collected and processed are relevant and not excessive for the purpose of assisting the individuals in need and help his or her work performance.

The EDPS notes that the **adequacy** of personal data always depends on the particular case. The controller should always consider whether the entering of personal data under the specific circumstances of a case in the COMPAS documents or discussing certain personal data on a COMPAS meeting is adequate for the purposes.

Personal data must be **accurate** and where necessary **kept up to date** (Article 4(1)(d) of the Regulation). The data subject has the right to access and the right to rectify his/her own data, so that the file can be as complete as possible. This also ensures the accuracy of data and the possibility to update them, but this issue will be addressed in part 3.7 of this opinion.

Article 4(1)(a) of the Regulation requires that personal data are processed fairly and lawfully. The lawfulness has already been discussed in part 3.2 and fairness relates to the information provided to data subjects (see point 3.8 below).

3.5. Conservation of data

Personal data can be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data are collected and/or further processed.(Article (4)(1)(e) of the Regulation).

The EDPS welcomes the fact that COMPAS Secretariat keeps the normative files of the proceedings (electronic file and identical paper versions) separate. The EDPS understands that this arrangement also includes that no documents originating from the COMPAS procedure are entered in the personal file of the staff member concerned. Should there be other arrangements regarding the entry of documents in the personal file of the concerned staff member, the EDPS needs to be consulted on that matter.

In the present case, personal data **are stored** for a maximum of three years after the treatment of the situation. The controller stated that the period of three years has been set in order to collect data to aid the establishing of risk profiles and if necessary for the foreseen reporting. The COMPAS secretariat will provide a yearly activity report. As certain common patterns may occur among cases, an **anonymous analysis** of these patterns will enable COMPAS to identify certain risk profiles. These profiles may allow defining better under which circumstances the COMPAS secretariat should be contacted and which kind of intervention may be the most beneficial. These studies shall be done by COMPAS secretariat in collaboration with the services concerned.

The EDPS draws the attention of the controller to Article 4(1)(e) of the Regulation which stipulates that personal data should 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. The Community institution or body shall lay down that personal data which are to be stored for longer periods for historical, statistical or scientific use should be kept either in anonymous form only or, if that is not possible, only with the identity of the data subject encrypted. In any event, the data shall not be used for any purposes other than for historical, statistical or scientific. Thus, an appropriate procedure should be considered to ensure that no identified or identifiable personal data remains in the paper or electronic file once a COMPAS case has been properly treated.

Further, it seems to be inevitable that during the COMPAS procedure certain correspondence takes place between the involved services and/or certain limited working documents are produced by the staff members involved in COMPAS on behalf of their services ("working documents"). The EDPS suggest that certain measures are made to ensure that all working documents which are not needed to be annexed to the normative COMPAS file are destroyed once a case is closed.

3.6. Transfer of data

Article 7(1) of Regulation 45/2001 states that *"personal data shall only be transferred within or to other Community Institutions or bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient"*.

As described in the facts , the selected professionals who participate in the evaluation of one's situation in the context of COMPAS can access the file. Depending on the nature of a case, representatives coming from various services may be involved in the COMPAS procedure: President of COMPAS, medical professionals of the medical service of the Commission,

direct hierarchy of the person concerned, human resources unit of the DG concerned, Admin C.2 the Medical Service and Psychosocial Interventions (Brussels), Admin C.3 the Medical Service and Psychosocial Interventions (Luxembourg), Admin A.2 the Central Career Guidance Service (SCOP), Admin A.4 "Officials and external staff" -Administrative procedures, Admin B.4 "Equal opportunities and non-discrimination, the Mediator of the European Commission, social workers employed by the European Commission and any other services whose action might be necessary in a particular case (e.g: ADMIN B.1- " Legal issues and questions relating to the staff regulations. Relations with the institutions).

Based upon the descriptions in the facts, *in abstracto* the EDPS can conclude that these recipients could have a legitimate task within their competence to access personal data in a COMPAS procedure. Giving access to personal data nevertheless should always be determined on a case by case basis.

Article 7(3) of the Regulation requires that the recipients should process the personal data only for the purposes for which they were transmitted. A COMPAS procedure may involve representatives from a number of services which means that the personal data of the staff member concerned can be transferred to them. The EDPS requires that appropriate measures are implemented to ensure that principle. Entering a text containing a reminder in that regard in every email and communication between COMPAS Secretariat and the services involved in the procedure might be an effective mean to ensure respect for Article 7(3) of the Regulation. It may also be an effective mean to ensure that working documents are not kept for any longer than necessary (see part 3.5 above).

3.7. Right of access and rectification

Article 13 of the Regulation provides for the right of access to one's own personal data being processed. Article 14 of the Regulation grants the right to rectification of inaccurate or incomplete personal data without delay.

The staff member concerned by the COMPAS procedure can send an email to COMPAS President to check his/her own data processed by COMPAS. The person concerned has access to his/her COMPAS file at any stage of the procedure. The file can be consulted at the presence of COMPAS Secretariat. The EDPS welcomes these procedures but would also like to make sure that the right of access of the person concerned to his/her file also includes the right to take copies of the data related to him/her.

The President can also be contacted by the person concerned for modifying, correcting or deleting his/her own personal data. Although the assessments and recommendations of COMPAS can not be altered, the person may add his/her own comments. The EDPS finds this procedure appropriate under Article 14 of the Regulation as making comments by the concerned staff member can assist updating the file and making it most accurate.

The EDPS also welcomes the statement in the notification for prior checking that no restrictions under Article 20 of the Regulation will be imposed during the procedure. On the other hand, section 5.2 of the Modus Operandi states that "the medical information contained in a COMPAS file underlies the same professional confidentiality as the medical file and can be consulted by the staff member under the same conditions." Article 26(a) of the Staff Regulations provides that: "Officials shall have the right to acquaint themselves with their medical files, in accordance with arrangements to be laid down by the institutions."

In the case of COMPAS, the EDPS would like to ensure that the person concerned will have access right to the maximum extent possible to the COMPAS file and its content. In one of his opinion⁷, the EDPS gave guidance related to accessing one's own medical file. In that case, the EDPS called the attention of the controller to "Conclusion 221/04" of 19 February 2004 of the Collège des Chefs d'administration, which aims at harmonizing certain aspects of access provision across the Community institutions. This document emphasises that access must be provided to health-related data to the maximum extent possible. The document provides, among others, that access should also be provided to data of psychological or psychiatric nature, although, in such cases, access may be granted indirectly, through the intermediary of a medical practitioner designated by the data subject. The document also specifies that access should also be given to the personal notes of the medical professional who carries out the medical check-up; provided that such access may be denied after examination of the circumstances of the given case if limitation of the disclosure is necessary to protect the interests of the person concerned or the rights of others. The EDPS, however, emphasises that this limitation must not be read to allow arbitrary restrictions on access."

Having said this, the EDPS welcomes the intention of the controller to grant access in every cases to the COMPAS file without limitations.

3.8. Information to the data subject

Article 11 of the Regulation provides for certain information to be supplied where the data have been obtained from the data subject. Article 12 provides for certain information to be given to data subjects when personal information has not been obtained from the person concerned.

In a COMPAS procedure some information may directly be supplied by the staff member concerned, while other information can be obtained from the services and medical professionals or social workers involved in the procedure. Therefore the privacy notice should contain all items envisaged in Articles 11 and 12.

Regarding the **content** of the privacy statement: As described in the facts, the privacy notice contains all items required in the Articles 11 and 12 of the Regulation. The EDPS in general is pleased with the content of the privacy note but would like to request the controller to make two further precision in it:

- Legal basis: At present only Commission Communication SEC (2006) 501/3 is referred to as legal basis in the text of the privacy statement. A reference to Article 1e(1) of the Staff Regulations should be added.
- Recipients of personal data: at present the text of the privacy statement makes a very general statement under point 5 "who has access to your information and to whom it is disclosed". A further precision, at least by listing the potential services involved in the COMPAS procedure should be added.

Regarding the **availability** of the privacy statement: The requesting service will attach the general privacy statement to the letter sent to the concerned staff member informing him/her in writing that his/her situation is being presented to COMPAS. This will take place at the time the service requests a COMPAS intervention. The privacy statement is also available on the intranet of the European Commission on the sites dedicated to the Medical Service. The EDPS welcomes the fact that the concerned staff member will receive the text of the privacy

⁷ Opinion on the notification for prior checking received from the Data Protection Officer ("DPO") of the European Food Safety Authority ("EFSA") on 17 July 2006 regarding EFSA's pre-employment and annual medical check-ups (2006/365). Available at: www.edps.europa.eu

statement at the time of requesting COMPAS intervention. This individualised form of informing data subjects about their rights and the processing operation itself is a user friendly and effective solution to enhance privacy protection.

Other information for reason of fairness: Articles 11 and 12 of the Regulation require that any further information is communicated to the data subjects insofar as such further information is necessary, having regard to the specific circumstances in which the data are collected, to guarantee fair processing in respect of the data subject (Article 11(1)(f) and Article 12(1)(f) of the Regulation).

In the framework of COMPAS data subjects receive additional information at various stages of the procedure: 1) The staff member concerned **is informed** in writing that his/her situation is being presented to COMPAS at the time when the service requests a COMPAS intervention. 2) Further, the person concerned receives information during the COMPAS procedure. He/she shall receive in writing from the Secretariat which are the services concerned in his/her case. The requesting service shall assure the contact with the staff member concerned. It should inform the staff member in writing of the *main steps of the ongoing process*.

The EDPS welcomes these steps in the procedure which have data protection relevance and which enhance fairness towards the staff member concerned.

3.9. Security measures

Article 22(1) of the Regulation requires that "Having regard to the state of art and the cost of their implementation, the controller shall implement appropriate technical and organisational measures to ensure the level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected. Such measures shall be taken in particular to prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and to prevent all other unlawful forms of processing."

In the present case, **health related information**, presenting special risk, can be processed.

From the notification and its annexes it is not evident what is the confidentiality requirement required from different professionals involved in the COMPAS procedure.

The EDPS recommends COMPAS to make clear distinction regarding the obligation of professional secrecy applicable to medical doctors and psychologists and between other forms of professional secrecy.

Medical doctors of the Medical Service of the Commission are bound by the professional secrecy obligation of health professionals. Nurses and the secretary (if any) of the Medical Service who can be involved in COMPAS should be bound by an **equivalent obligation of secrecy** to that of medical professionals. Measures should be put in place for that regard. For example, reminding the nurses or the secretary about their obligation of professional secrecy in their contract or signing a statement to that aim.

Any **other staff members of the Commission involved in COMPAS** who are not medical professionals are bound by professional secrecy under Article 287 of the EC Treaty and Article 17 of the Staff Regulations. It is a good procedure ensuring the principle if the President will remind all participants for their obligation of secrecy under Article 17 of the Staff Regulations at the end of all COMPAS meeting. A similar reminder but in written form

seems necessary regarding correspondence and communications between Commission services involved in the COMPAS procedure. It can be added, for example in the written reminder related to Article 7(3) of the Regulation and the requirement to destroy working documents (see above in parts 3.5 and 3.6).

The EDPS welcomes the practice that the access right of the professional who was involved in a COMPAS procedure and who changed post is restrained from the moment of his/her transfer. It is an appropriate organisation arrangement to ensure that only authorised persons can gain access to the COMPAS file. But in this context, the EDPS does not understand the reasoning laid down in footnote 16 of the Modus Operandi that "Where a person involved transfers to another post or other obligations, their service may request access with this argument. The person who has been involved then seizes to have the right to access the file". This should be clarified in the sense that "Where a person involved transfers to another post or other obligations, *the person replacing him/her in his/her former service.....* The person who had been involved then *ceases* to have..."

Apart from the concerns related to professional and medical secrecy, the EDPS does not see any other indicators to believe that the European Commission has not applied the security measures required in Article 22 of the Regulation.

Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 provided that all the above expounded considerations are fully taken into account, namely:

- 1) The COMPAS procedure should be run with the express consent of the staff member concerned.
- 2) COMPAS should always examine on a case by case basis in the various phases of a procedure (COMPAS meeting, recommendations, follow up) whether the personal data collected and processed are relevant and not excessive for the purpose of assisting the individuals in need and facilitating the human resources management.
- 3) The controller should always consider whether the entering of personal data under the specific circumstances of a case in the COMPAS documents or discussing certain personal data on a COMPAS meeting is adequate.
- 4) The EDPS should be consulted in case where COMPAS documents could be entered in the personal file of the concerned staff member.
- 5) If beyond the purpose of providing appropriate recommendation and following up a COMPAS case, the controller intends to use the personal data compiled for statistical and reporting purposes, personal data should be made anonymous. An appropriate procedure should be considered to ensure that no identified or identifiable personal data remains in the paper or electronic file once a COMPAS case has been properly treated.
- 6) Appropriate measures should be put in place to ensure that all working documents, not needed to be annexed to a COMPAS file, are destroyed by the persons involved from the concerned services once a case is closed.
- 7) Giving access to personal data under Article 7 of Regulation 45/2001 should always be determined on a case by case basis.
- 8) Appropriate measures should be implemented to ensure that Article 7(3) of Regulation 45/2001 is respected.
- 9) The right of access of the person concerned to his/her file also should include the right to take copies of the data related to him/her.
- 10) The content of the privacy statement should be revised as to the legal basis and the categories of data recipients.

11) COMPAS should make clear distinction related to the professional secrecy obligation of medical doctors/psychologist and any other professional involved in the COMPAS procedure. Measures should be put in place to ensure those principles.

In addition, before the monitoring mechanism using SYSPER 2 data for the establishment of risk profiles would be in production, the EDPS needs to be consulted on the necessity of a prior check and he should be able to make his recommendations regarding the data protection consequences of such arrangements.

Done at Brussels, 04 December 2008

(signed)

Joaquín BAYO DELGADO
Assistant European Data Protection Supervisor