

## **Opinion on the notification for prior checking from the Data Protection Officer of the Office for Harmonisation of the Internal Market concerning Control and Management of Sickness Leaves**

Brussels, 12 July 2011 (case 2010-263)

### **1. Proceedings**

On 19 April 2010, the European Data Protection Supervisor (**EDPS**) received from the Data Protection Officer (**DPO**) of the Office for Harmonisation in the Internal Market (**OHIM**) a notification for prior checking concerning "Control and Management of Sickness Leave".

On 6 May 2010, the EDPS sent a request for additional information to the DPO. The replies were received on 17 May 2010. The draft Opinion was sent to the DPO for comments on 24 June 2010. These were received on 6 July 2011.

### **2. Facts**

This prior checking Opinion deals with control and management of absences caused by sickness or accident at the OHIM. It involves the deployment of the respective new software by the Medical Service ("Medical Control"), as well as Human Resources ("Absence Management Service"). It has been adopted within the framework of the ex-post prior checking exercise addressing common procedures within agencies and is based on the EDPS Health Data at Work Guidelines of 28 September 2009<sup>1</sup>.

The controller is the OHIM, represented by the Head of Sector of the HR Department. Data subjects are all officials and temporary agents employed at the Office.

The following data can be processed for the purpose of sick leave control by the Medical Service:

- data contained in the medical certificate submitted by the absent staff member (name, home address, phone number, start date of absence and its probable length, diagnosis);
- data contained in the medical and administrative reports established after the respective control visit (the latter containing only information as to whether the sick leave is justified, as well as the possible steps to be taken<sup>2</sup>).

The new software to be used by HR Absence Management Service is called ALLEGRO and contains only the following data of administrative nature:

- names of the absent staff members;
- starting and ending dates of the respective sick leave.

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<sup>1</sup> EDPS Guidelines concerning the processing of health data in the workplace by EU institutions and bodies.

<sup>2</sup> in terms of deduction of the unjustified absence from annual leave (also referred to below as time management).

In the context of a possible review of a position of the Medical Control, the relevant data may be transferred to an EU based independent doctor.

Data processed within the sick leave control and management at OHIM are stored in the respective software applications, as well as in physical archives at Medical Service for 30 years. (...)

Rights of access and rectification may be granted upon request to the Medical Service.

Information to data subjects are provided in the "official notification informing about irregularity in the medical certificate" sent as "registered letter informing about the additional data required" (and not provided by a simple phone call).

### **3. Legal aspects**

**3.1. Prior checking:** The processing of personal data within management of sick leave by OHIM falls within the scope of Regulation 45/2001. It is subject to prior checking by the EDPS pursuant to its Article 27(2)(a) since it clearly involves processing of health relating data.

The notification of the DPO was received on 19 April 2010. According to Article 27(4) of Regulation 45/2001, the EDPS Opinion must be delivered within a period of two months. The procedure was suspended for a total of 388 days (11 + 377) to allow for provision of additional information, as well as comments on the draft Opinion. Therefore, the present Opinion must be delivered no later than on 13 July 2011.

**3.2. Lawfulness of the processing:** The processing of personal data is necessary for the performance of a public interest task, namely the management and functioning of OHIM within the meaning of Article 5(a) of Regulation 45/2001 (read together with its recital 27) and is based on Article 59 of the Staff Regulations, Article 16 of the Conditions of Employment of Other Servants, as well as the Implementing Provisions Regarding Absences on Grounds of Health or Accident (Commission Decision N° 92-2004 of 6th July 2004). Thus, the processing is lawful.

**3.3. Processing of special categories of data:** Processing of data concerning health is prohibited unless it can be justified on grounds mentioned in Article 10(2) and (3) of Regulation 45/2001. In principle, the processing of health related data must be either necessary in order to comply with the controller's obligation set out in legal instruments adopted on the basis of the Treaties or must be carried out by health professionals subjected to specific professional secrecy obligation for certain clearly defined purposes, such as medical diagnosis.

As it has been already mentioned, Staff Regulations, Conditions of Employment, as well as the respective Implementing Rules require processing of health related data for the purpose of sick leave control and management. Thus, the processing of health related data *stricto sensu* by Medical Service, as well as the processing of health related data of administrative nature by HR Absence Management Service is in full compliance with Article 10(2) of Regulation 45/2001. Also, all Medical Service staff is subjected to the specific professional secrecy obligation in terms of Article 10(3) of Regulation 45/2001.

**3.4. Data Quality:** Pursuant to Article 4(1)(a), (c) and (d) of Regulation 45/2001, personal data must be processed fairly and lawfully, be adequate, relevant and not excessive in relation to the purpose for which they are collected and further processed, as well as accurate.

As to the proportionality of the data processed, the EDPS welcomes the fact that only medical data of administrative nature necessary for organisation of substitutions, as well as the related time management can be processed by the HR Absence Management Service (and that no medical data *stricto sensu* are transmitted).

He also notes that the accuracy of the data processed is partly ensured by the fact that some data are provided by the data subjects. Also, the arbitration procedure set out in the last three subparagraphs of Article 59(1) of the Staff Regulations, as well as data subjects rights of access and rectification (cf. point 3.7 below) help to ensure that the processed data are accurate and up to date.

Lawfulness of the data processing has been already discussed (cf. point 3.2), whereas fairness has to be assessed in the context of information provided to data subject (cf. point 3.8 below).

**3.5. Data retention:** According to Article 4 (e) of Regulation 45/2001, personal data may be kept in a form enabling the identification of data subjects for no longer than necessary for the purposes for which they were collected or further processed.

The EDPS notes that Article 59(4) of the Staff Regulations could justify retention of sick leave related data for three years<sup>3</sup>. The only justification for keeping them any longer would be if a dispute or appeal were under way<sup>4</sup>.

In this respect, the general 30 years storage period should be reviewed in the light of the data protection principles.

**3.6. Transfer of data:** Transfer of health related data to the EU based independent doctors is necessary for the proper execution of the arbitration procedure launched by the data subject. Thus, it is justified in terms of Article 8(b) of Regulation 45/2001 allowing for external transfers within EU necessary for the recipient in case there is no reason to assume that the data subject's legitimate interests might be prejudiced.

**3.7. Right of access and rectification:** The access to and rectification of the personal data processed in this context can be granted upon request to the Medical Service ("Control doctor") in due compliance with Articles 13 and 14 of Regulation 45/2001.

**3.8. Information to the person concerned:** Articles 11 and 12 of Regulation 45/2001 require that certain information is provided to the data subject.

The EDPS notes that certain information may be provided to certain data subjects in the "official notification informing about irregularity in the medical certificate" sent in a form of a registered letter.

Nevertheless, he is concerned that not all data subjects are provided with all the necessary information, such as data subjects whose sick leave regularity was never questioned or data subjects who were just informed by phone about the possible irregularity of their sickness

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<sup>3</sup> for the purpose of a possible referral to the Invalidity Committee.

<sup>4</sup> cf. also the EDPS Opinion on Conservation Period for Medical Documents of 26 February 2007.

related absence. Therefore, he requests that appropriate means to inform all data subjects are being deployed, such as Privacy statement posted on the OHIM Intranet.

(...)

#### **4. Conclusion**

There is no reason to believe that there is a breach of Regulation 45/2001 provided that OHIM respects the following recommendations:

- an appropriate maximum data retention period should be established in terms of Article 4(1)(e) of the Regulation;
- it is ensured that all data subjects are provided all necessary information outlined in Articles 11 and 12 of the Regulation.

Done at Brussels, on 12 July 2011

**(signed)**

Giovanni BUTTARELLI  
Assistant European Data Protection Supervisor