

## **Opinion on a notification for Prior Checking received from the Data Protection Officer of EUROFOUND regarding the "Invalidity Committee procedure".**

Brussels, 20 November 2012 (Case 2011-0643)

### **1. Proceedings**

On 30 June 2011, the European Data Protection Supervisor ("the EDPS") received a notification for prior checking within the meaning of Article 27(3) of Regulation 45/2001 ("the Regulation") concerning the "Invalidity Committee procedure" from the Data Protection Officer ("the DPO") of EUROFOUND.

On 28 July 2011, the EDPS requested further information on the basis of the notification. The replies were provided on 26 March 2012. On 2 May 2012, the EDPS sought some clarifications from the DPO and the answers were given on 28 September 2012. On 18 October 2012 the EDPS asked more questions and received the answers on 2 November 2012.

The draft Opinion was sent to the DPO for comments on 14 November 2012. The EDPS received a reply on 20 November 2012.

### **2. Facts**

On the basis of Article 59(4) of the Staff Regulations of Officials of the European Communities (Staff Regulations), the Director of EUROFOUND "*may refer to the Invalidity Committee the case of any official whose sick leave totals more than 12 months in any period of three years*".

#### **Data subjects and Purpose**

The Human Resources Unit (HR Unit) of EUROFOUND has established a procedure in order to obtain a decision from the Invalidity Committee as to whether the official, temporary member of staff or contract member of staff concerned should be granted invalidity or should resume professional activities.

#### **Legal basis**

The legal basis of the processing consists of:

- Articles 53, 59 and 78 of the Staff Regulations;
- Article 33 of the conditions of employment applicable to other servants, for temporary members of staff;
- Article 102 of the conditions of employment applicable to other servants, for contract members of staff, and
- Articles 7, 8 and 9 of Annex II to the Staff Regulations regarding the invalidity procedure.

## **Procedure**

According to EUROFOUND's note on the invalidity procedure, it may be launched either at the request of the person concerned or at the request of the HR Unit. Where the invalidity procedure is launched by the HR Unit, a referral note is sent by the HR Unit, signed by the Director, to EUROFOUND's external medical advisor.

The HR Unit sends the person concerned an official letter of referral to the Invalidation Committee asking them to appoint a doctor to represent them on the Invalidation Committee.

The Invalidation Committee consists of three doctors:

- the first is appointed by EUROFOUND's external medical advisor<sup>1</sup>;
- the second is appointed by the person concerned;
- the third is appointed by agreement between the first two doctors.

When a date has been set for the meeting of the Invalidation Committee, EUROFOUND's medical advisor sends requests to appear to the doctors and to the data subject.

The proceedings of the Invalidation Committee are secret and are covered by medical confidentiality. All HR Unit staff members and the Director sign a letter of confidentiality.

The Invalidation Committee has a threefold task:

- to determine whether or not the person is fit to work;
- to determine the causes of unfitness to work;
- to indicate whether follow-up examinations are required and how frequently they should be carried out.

The third doctor draws up an opinion setting out the medical grounds, which is signed by all three doctors. The opinion is then placed in the medical file of the data subject kept by EUROFOUND's medical advisor.

The Invalidation Committee delivers a conclusion to the Director, which does not mention any medical grounds for its decision.

At the end of its proceedings, the Invalidation Committee may decide either:

- (i) that the data subject fulfils the conditions for recognition of "invalidity" under the Staff Regulations, in which case the medical advisor sends the HR Unit a copy of the conclusions of the Invalidation Committee. The decision to grant invalidity is taken by the Director and a signed copy of the decision is sent to the person concerned by the HR Unit, by post;
- (ii) that the data subject does not fulfil the conditions for recognition of "invalidity" under the Staff Regulations, in which case the HR Unit, in agreement with EUROFOUND's medical advisor, determines the date on which work must be resumed, and any necessary arrangements. The decision on the resumption of work and the necessary arrangements, signed by the Director, is sent by mail to the person concerned.

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<sup>1</sup> The EDPS already analysed the processing of medical data by EUROFOUND's medical advisor in his Joint Opinion of 11 February 2011 regarding the *"processing of health data in the workplace"*, case 2010-0071.

It might be the case that the state of health of the data subject concerned might improve. The Staff Regulations therefore allows the data subject to return to the institution or body if he no longer satisfies the requirements for payment of an invalidity allowance. The Invalidity Committee delivers an opinion on a possible return to work on the basis of medical examinations carried out by them.

### **Recipients**

According to the above procedure, the recipients of the data processed are the following:

- the doctors of the Invalidity Committee (including the external medical advisor of the agency), who deliver their medical opinion on invalidity or not;
- the Director of EUROFOUND, who receives only the conclusions of the Invalidity Committee, without any medical grounds and decides accordingly to grant invalidity or not;
- the HR staff, who receive a copy of the conclusions of the Invalidity Committee in order to make all necessary arrangements;
- the PMO staff, who receive only the name of the person on invalidity.

### **Right of access and rectification**

Both the notification and information note state that data subjects may consult the agency's medical advisor at any stage of the procedure and request access to their medical file in writing.

### **Right of information**

An information note is attached to the standard letter sent to the data subject by the Director requesting the data subject to appoint a doctor. The information note makes reference to the invalidity procedure and contains the following information:

- identity of the data controller,
- purpose of the data processing,
- recipients and to which data they have access
- existence of the right of access and rectification,
- legal basis of the processing,
- retention periods of data,
- right of data subjects to have recourse at any time to the EDPS.

### **Retention policy**

The notification states that, if the Committee gives a **favourable opinion**, the Invalidity Committee files (containing medical reports and opinion) are kept for 30 years, "starting at the first month after the date issuing the Invalidity Committee decision". The procedure note adds "or starting at the date of the last pension payment".

In case of an **unfavourable opinion**, documents concerning health related data are stored for 5 years in order to allow for a possible appeal.

Documents relating to the conclusion of the Invalidity Committee and the Director's Decision (without any medical data) are kept in the personal file for 10 years after then termination of employment or until the last pension payment.

Administrative files of the Invalidity Committee, which contain all correspondence related to the invalidity procedure, are retained for 10 years after the termination of employment or the last pension payment of the data subject.

Administrative files are kept for 5 years from the data of the unfavourable opinion.

Annual statistics are compiled by EUROFOUND's medical advisor for the Head of HR Unit. They include figures relating to invalidity procedures, such as the number of Invalidity Committees, percentages of invalidity, distribution according to age, gender, category and illness.

### **Security measures**

Medical reports in paper form are filed in the medical files which are kept by EUROFOUND's medical advisor in a secure location.

Electronic medical reports issued by the medical advisor are stored in a dedicated computerised register (MedTech). Only the medical advisor, the medical assistant and the staff of the medical secretariat can access to this register through protected password.

Administrative files of the Invalidity Committee are held in the HR Unit folder in EUROFOUND's document management system which is secured by password.

Any document related to the Invalidity procedure, at the exception of medical reports, received by the HR Unit in paper format is safely stored in the personal file of the data subject in a locked cupboard of the Unit.

## **3. Legal aspects**

### **3.1 Prior checking**

**Applicability of Regulation 45/2001 ("the Regulation"):** The processing of data under analysis constitutes a processing of personal data ("*any information relating to an identified or identifiable natural person*"-Article 2 (a) of the Regulation). The data processing is performed by an agency of the European Union, EUROFOUND, in the exercise of activities which fall within the scope of EU law<sup>2</sup>. The processing of the data is both manual (the launching of the procedure, medical reports) and automatic (medical advisor's electronic documentation register MedTech). The Regulation is therefore applicable.

**Grounds for prior checking:** Article 27 (1) of the Regulation subjects to prior checking 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*" by the EDPS. Article 27(2) of the Regulation contains a list of processing operations that are likely to present such risks. According to Article 27(2)(a) of the Regulation "*the processing of data relating to health*" is subject to prior checking by the EDPS, which is the case here as the data fall within the scope of data concerning health.

**Ex-post prior checking:** Since prior checking is designed to address situations that are likely to present certain risks, the Opinion of the EDPS should be given prior to the start of the processing operation. In this case, the EDPS regrets that the processing operation has already been established prior his prior-checking Opinion. However, the EDPS underlines that all his recommendations given in the present Opinion should be duly implemented in all future invalidity procedures carried out by EUROFOUND.

**Notification and due date for the EDPS Opinion:** The notification of the DPO was received on 30 June 2011. According to Article 27 (4) of the Regulation, the EDPS Opinion must be

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<sup>2</sup> The concepts of "Community institutions and bodies" and "Community law" can not be any longer used after the entry into force of the Lisbon Treaty on 1st December 2009. Article 3 of Regulation 45/2001 must therefore be read in light of the Lisbon Treaty.

delivered within a period of two months. The procedure was suspended for a total of 412 days for further information from the controller and 6 days for comments. Consequently, the present Opinion must be delivered no later than on 20 November 2012.

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

According to Article 5 of the Regulation, data may be processed only on one of the grounds specified.

Of the five grounds listed in Article 5, the processing under analysis satisfies the conditions set out in Article 5(a) of the Regulation, to the effect that data may be processed if '*processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities (...)*'.

In the present case, **the legal basis** for the processing is found in the legal provisions of the Staff Regulations and Conditions of employment of other servants indicated in the facts.

**The necessity** for processing is also mentioned in paragraph 27 of the preamble to the Regulation, which states that "*Processing of personal data for the performance of tasks carried out in the public interest by the Community institutions and bodies includes the processing of personal data necessary for the management and functioning of those institutions and bodies*". The processing of personal data at stake is necessary in order to obtain the Invalidity Committee's conclusions as to whether the data subject should be granted invalidity or should resume professional activities. This processing therefore contributes to the sound management and functioning of EUROFOUND.

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

Article 10(1) of the Regulation states that the processing of personal data on health is prohibited, except where it is justified by reasons provided in Articles 10(2) and 10(3) of the Regulation.

Article 10(2)(b) applies in this case: "*Paragraph 1 (prohibition of the processing of data on 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...*". The processing under analysis is necessary in order to comply with the specific obligations and rights of EUROFOUND, as an employer, under labour law. EUROFOUND therefore carries out this processing in accordance with the provisions of the Staff Regulations pursuant to Article 10(2)(b) of the Regulation.

In addition, according to the notification medical data are only processed by EUROFOUND's medical advisor and the members of the Invalidity Committee. It follows that the medical data are communicated to health professionals, who themselves are bound by professional secrecy, for the purpose of concluding a medical diagnosis. Article 10(3) of the Regulation is therefore respected.

### **3.4 Data Quality**

**Adequacy, relevance and proportionality:** According to Article 4 (1) (c) of Regulation 45/2001, personal data must be "*adequate, relevant and non excessive in relation to the purposes for which they are collected and/or further processed*". It should therefore be

verified that the data collected are relevant in relation to the purpose for which they are being processed.

The EDPS considers that the data as described in this Opinion satisfy these conditions regarding the purpose of the processing explained above.

**Accuracy:** Article (4)(1)(d) of the Regulation provides that data must be "*accurate and, where necessary, kept up to date*". According to this Article, "*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*".

Invalidity is an inability to work for a fixed or indeterminate period. Depending on the case, the Invalidity Committee may decide to set a special timetable for a re-evaluation of the person's situation (unfit/fit to work), taking into consideration that the data subject must be re-examined periodically (Article 15 of Annex VIII to the Staff Regulations).

In the present case, the procedure in place enables one to conclude that the system itself gives a reasonable guarantee of data quality. Furthermore, the rights of access and rectification are available to the data subject, in order to make the file as comprehensive as possible. These rights constitute the second means of ensuring that data concerning the data subjects are accurate and updated (see section 3.7 on "the right of access").

**Fairness and Lawfulness:** Article (4)(1)(a) of the Regulation provides that personal data must be '*processed fairly and lawfully*'. The lawfulness of the processing has already been discussed in section 3.2 of this Opinion. As to fairness, this is linked to the information that must be provided to the data subject (see section 3.8 on "the right to information").

### **3.5. Conservation of data**

Article 4 (1) (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*".

The EDPS notes that EUROFOUND makes a distinction between the cases of a favourable opinion (30 years) by the Invalidity Committee and the cases of an unfavourable opinion (5 years). Both retention periods appear to be reasonable and in line with Article 4(1) of the Regulation.

However, the EDPS draws the attention to the following inconsistency: whilst the notification states that the Invalidity Committee files (containing medical reports and opinion) are kept for 30 years, "starting at the first month after the date issuing the Invalidity Committee decision", the procedure note adds "or starting at the date of the last pension payment". This element has already been discussed with the DPO of EUROFOUND and it has been agreed to delete the sentence in the procedure note. The EDPS therefore recommends that the procedure note is updated accordingly.

As to the retention periods of the administrative data, as described in the facts, the EDPS notes that they are considered as reasonable and necessary in conformity with Article 4 (1) (e) of the Regulation.

Furthermore, EUROFOUND processes some specific categories of data, as mentioned in the facts, for a year for statistical reasons. The EDPS considers that due to the small size of the

agency, the further processing of data such as age, gender, category and illness of staff members may lead to their possible identification within the agency. Consequently, the EDPS recommends that EUROFOUND processes only a restrictive category of data for statistical purposes in order to ensure their anonymisation, in line with Article (4)(1)(e) of the Regulation. Indeed, as it has already been discussed with the DPO, the number of the Invalidation Committees or the percentage of invalidity seem to be reasonable and necessary data which can ensure the anonymous form of the statistics.

### **3.6 Transfer of data**

Articles 7, 8 and 9 of the Regulation set forth certain obligations that apply when data controllers transfer personal data to third parties. The rules differ depending on whether the transfer is made (i) to or within Community institutions or bodies (based on Article 7), (ii) to recipients subject to Directive 95/46 (based on Article 8), or (iii) to other types of recipients (based on Article 9).

#### ***Internal transfers***

In accordance with Article 7(1), EUROFOUND is required to verify both that all the recipients possess the appropriate competences and that the transfer of the personal data is necessary to the performance of these competences. In this instance, the case is one of a transfer both within the EUROFOUND in particular within the various departments responsible as indicated above and between the EUROFOUND and other E.U. institutions and bodies. Each recipient has its own specific competence and the data transferred to each one appear to be necessary to the lawful performance of their assignments. The EDPS points out, however, that only the data they require for the performance of their missions must be transferred. It will be a matter of verifying the lawfulness of the transfer case by case.

The EDPS notes that EUROFOUND prepared a confidentiality declaration which should be signed by all persons processing data in the context of an invalidity procedure. The confidentiality declaration is in conformity with Article 7(3) of the Regulation.

#### ***External transfers***

In the context of the invalidity procedure, health data are also communicated to the doctor appointed by the data subject, and to a doctor appointed by agreement between the EUROFOUND's medical advisor and the data subject's doctor. These external recipients are health professionals subject to the obligation of professional secrecy, which takes into consideration of the particular nature of the data communicated and satisfies the conditions of Article 10(3) of the Regulation.

If either of these doctors is in a Member State which is subject to Directive 95/46/EC, Article 8 of the Regulation is applicable. The data related to health may only be transferred once the necessity for such transfer has been established in light of Article 8 of the Regulation.

If either of these medical doctors is in a country that is not subject to Directive 95/46/EC, Article 9 of the Regulation is applicable. Pursuant to this provision, the data may be transferred only to a country of an adequate level of protection. If this is not the case, the exceptions stated in Article 9(6) must be taken into account. In the present case, paragraph (a) of Article 9(6) is particularly relevant: "*By way of derogation from paragraphs 1 and 2, the Community institution or body may transfer personal data if: (a) the data subject has given his or her consent unambiguously to the proposed transfer ...*".

### **3.7 Right of access and rectification**

Article 13 of the Regulation provides for the principle of the right of access to the data – and the procedures thereof – at the request of the data subject. Article 14 of the Regulation provides for the data subject's right of rectification.

Both the notification and information note make reference to the right of access of the data subjects to have access to their medical file by submitting a request to the agency's medical advisor at any stage of the procedure.

#### ***Right of access***

The existence of the right of access is in accordance with Article 13 of the Regulation.

Nevertheless, the EDPS draws the attention of EUROFOUND to Article 20 of the Regulation, which lays down certain restrictions on this right, in particular where such restrictions constitute a necessary measure for the protection of the data subject or of the rights and freedoms of others. The right of access to the medical file is the subject of Decision n°221/04 of 19 February 2004 by the Head of Administration. This Decision states that data subjects have the right of direct access to their medical file, to be exercised on the premises of the medical service in the presence of a person designated by the medical service. Provision is also made for indirect access in order to consult psychiatric/psychological reports through the intermediary of a doctor appointed by the data subject. It is also laid down that data subjects may not have access to personal notes by doctors if, under the terms of Article 20(1)(c) and on the basis of a case-by-case examination, this restriction is necessary to guarantee the protection of the data subject or the rights and freedoms of others.

The EDPS therefore recommends that EUROFOUND make reference to the above Decision in the information note as well as to the possibility of the application of Article 20 of the Regulation. The EDPS invites EUROFOUND to ensure that a restriction on access to medical files is examined on a case-by-case basis in accordance with the principle of proportionality. Article 20 of the Regulation must not be allowed to result in a general refusal of access to the personal notes of doctors in the medical file.

#### ***Right of rectification***

With regard to the right of rectification, EUROFOUND should explain to data subjects, for example in the information note, that their right of rectification in the context of medical data means the addition of other medical opinions of doctors to their medical file.

### **3.9 Information to the data subject**

Articles 11 and 12 of the Regulation relate to the information to be given to data subjects in order to ensure transparency in the processing of personal data. These articles list a series of compulsory and optional items of information. The optional items are applicable insofar as, having regard to the specific circumstances of the processing operations, they are required to guarantee fair processing in respect of the data subject. In the present case, some of the data are collected directly from the data subject and others from other persons.

In the present case, the information note sets out most of the items included in Articles 11 and 12 of the Regulation. However, the EDPS draws the attention of EUROFOUND to the following information that should supplement the note:



- include external medical doctors among the possible recipients of processing, as mentioned in section 3.6 of this Opinion and
- provide clarification on the rights of access and rectification, as analysed in section 3.7 of this Opinion.

The EDPS recommends, therefore, that the above information be provided to data subjects by means of the information note.

### **3.10 Security Measures**

According to Article 22 of the Regulation concerning the security of processing, *"the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected"*. These security measures should in particular prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration and prevent all other forms of unlawful processing.

After review of the security measures described in the notification, there is no reason to believe that the measures implemented by EUROFOUND do not comply with Article 22 of the Regulation.

## **4. Conclusion**

There is no reason to believe that there is a breach of the provisions of the Regulation, provided that the following considerations are taken into account. In particular EUROFOUND should:

- delete the sentence "or starting at the date of the last pension payment" from the procedure note and update it accordingly;
- further process only a restrictive category of data in order to ensure the anonymous form of the annual statistics;
- make reference to the Decision n°221/04 of 19 February 2004 by the Head of Administration, in the information note, and to the possibility of the application of Article 20 of the Regulation regarding the right of access to the medical file. EUROFOUND should ensure that restrictions on access to medical files are examined on a case-by-case basis in accordance with the principle of proportionality;
- explain to data subjects that their right of rectification in the context of medical data means the addition of other medical opinions of doctors to their medical file.
- include in the information note the information as explained in section 3.8 of this Opinion.

Done at Brussels, 20 November 2012

**(signed)**

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