



GIOVANNI BUTTARELLI  
ASSISTANT SUPERVISOR

Mr Ray COMERFORD  
Head of Human Resources  
European Foundation for the  
Improvement of Living and  
Working Conditions  
Wyattville Road, Loughlinstown,  
Dublin 18  
IRELAND

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Please use [edps@edps.europa.eu](mailto:edps@edps.europa.eu) for all  
correspondence

**Subject: Opinion on the notification for prior checking from the Data Protection Officer of the European Foundation for the Improvement of Living and Working Conditions concerning Special leave.**

Dear Mr Comerford,

On 8 March 2013, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) of the European Foundation for the Improvement of Living and Working Conditions (Eurofound) a notification for prior checking concerning the application and granting of special leave. The notification was accompanied by the following documents:

- Cover letter from the DPO describing the specificities of the processing operation;
- Annex 1 Employee Data Protection Policy;
- Annex 2 Special Leave Procedure note;
- Annex 3 Special Leave Rules;
- Annex 4 Special Leave Rules (parental leave).

The DPO sent this notification to the EDPS following the adoption on 20 December 2012 of the Guidelines in the area of Leave and Flexitime (the "Guidelines")<sup>1</sup> and before the deadline given to EU institutions and bodies to submit their notifications (end of March 2013). The EDPS sent the draft Opinion to Eurofound on 11 April 2013 and the comments were received on 19 April 2013.

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<sup>1</sup> Guidelines concerning the processing of personal data in the area of leave and flexitime adopted on 20 December 2012 (EDPS 2012-0158).

## 1. Legal aspects

This Opinion deals with the already existing (ex-post) special leave procedure at Eurofound. It is based on the Guidelines, which allows the EDPS to focus on Eurofound practices that do not seem to be compliant with the leave and flexitime Guidelines and the principles of the Data Protection Regulation 45/2001.<sup>2</sup>.

The DPO stated in the cover letter that prior to detailing the processing operation itself, two points should be noted:

- this Prior check follows a first notification and its annexes sent on 30 June 2011 to the EDPS (HP TRIM reference GR-11-30159). A follow up with the EDPS in April 2012 showed that the EDPS had never received such notification.
- as stated in the notification, in 2013 Eurofound will run a pilot whereby supporting documents for special leave will be digitised. The purpose of the pilot is to strengthen electronic records management in Eurofound and to guarantee that originals are promptly returned to the data subjects.

As to the **categories of data subjects** and **categories of data being processed**, the notification covers the processing of data collected from any Eurofound staff members requesting special leave. Personal data of third parties (e.g. children/spouse/partner of staff members) may in this context be processed. Special leave is granted in exceptional circumstances and on the basis of a duly substantiated application.

The EDPS notes that the processing in question is **lawful** in terms of Article 5(a) of the Regulation<sup>3</sup>.

Special leave data appear to be processed in compliance with the **data quality** principles set out in Article 4(1). For instance, the marital status would be processed in the context of marriage-related leave requests; birth or adoption certificates would be processed for birth or adoption-related leave requests. For illness-related leave requests in the context of special leave (for instance illness of a child or spouse), the EDPS notes that a receipt from the doctor containing no specific medical data would be processed. Although agreeing with this aspect of the procedure, the EDPS has a doubt as to the use of the word "receipt" in this context and would favour the use of "medical certificate". Indeed, such certificate will have to be processed by the Human Resource department and should not contain as such medical data.

The EDPS notes that the notification foresees not only the applicability of Article 27.2.a) (health related data) but also of Article 27.2.d) (excluding individuals from a right, benefit or contract) of the Regulation. The EDPS considers that special leave management does not have as its primary purpose to exclude individuals from a right, benefit or contract. Therefore only Article 27.2.a) should be considered here.

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<sup>2</sup> As to the other leave procedures, these were analysed in other procedures:

- *Annual leave* was addressed in an Article 25 notification to the DPO on 27/04/2011 within the notification named "Attendance Records";

- *Sick leave* was addressed in an Article 27 notification to the EDPS on 28/05/2010 within the notification "Health Data" (EDPS 2010-0467).

<sup>3</sup> Based on Articles from the Staff Regulations (such as Chapter 2 of Title IV) and the Implementing rules of the Commission (Commission Decision C(2010) 7495 dated 5 November 2010 - Section II and Commission Decision C(2010) 7572 dated 5 November 2010 ) applied in Eurofound by analogy on the basis of Article 110 of the Staff Regulations. Furthermore, Eurofound has a special leave Policy and an internal procedure for implementing the policy.

The EDPS notes that, according to the cover letter of the DPO, Eurofound does not process any "special categories of data". The EDPS considers this statement as incorrect. While the EDPS understands that not all cases of special leave would require justifying the absence through the processing of special categories of data, such data will be processed at least in some cases, for instance special leave relating to maternity leave, illness of a child/partner/relative, etc. Furthermore, the categories included in the special leave procedure note of Eurofound show that various categories of leave may indeed relate to special categories of data (trade union leave, political office, etc).

The EDPS notes that this statement only appears in the cover letter and not in the notification but would nonetheless draw the attention of Eurofound that it is indeed processing special categories of data in the context of special leave procedure. This being said, the procedure in place at Eurofound as regards the processing of special categories of data is authorised on the basis of the exemption of Article 10.2.b).

As regards **recipients**, the EDPS takes note of the clarifications made in the notification and privacy statement as to the reasons why each of the recipients needs the data and the limits of this access. The procedure appears to be in line with the Guidelines. The indicated recipients will only use the data for the purposes needed. However, the EDPS considers that the IT department of Eurofound should be considered as a recipient in its tasks of providing technical support to users of the system.

As to the **information** that is provided, according to the notification, there are two channels of information:

- Staff are informed about the rules for special leave in the Commission Decision of 5 November 2010 on implementing provisions on leave (available on the staff intranet).
- Information about the retention of supporting documents for granting special leave is included in Eurofound's *Employee Data Protection Policy* which is given to all staff members.

Furthermore as regards the **rights of access and rectification**, reference is also made in the notification to the "Employee Data Protection Policy" which is given to all staff members and seconded by a Privacy statement within the special leave policy.

The EDPS notes that there are various sources of information to the individuals and finds the multiple sources cited in the notification not very clear for the individuals. A specific reference to the privacy statement that would refer to the existence of the main Data Protection Policy should be made more visible in the notification as to the information provided. In any case, the EDPS notes that the specific privacy statement adopted by Eurofound and relating to special leave includes the relevant information complying with Articles 11 and 12. Furthermore, Eurofound ensures that the rights of access, rectification, blocking and erasure are provided in line with Articles 13 to 16 of the Regulation.

**Transfers** are limited to the information necessary for the competent entities to carry out their tasks and recipients are reminded of the purpose limitation obligation in terms of the Article 7(3) of the Regulation.

As to the **retention** periods, the EDPS considers that the retention period of 3 years for the documents supporting special leave requests and 10 years for documents retained for the purposes of allowances and benefits (e.g.: birth or adoption certificate) in the personnel file are in line with the Guidelines. In his Guidelines, the EDPS insisted that clear retention periods apply to both on-line data and hard-copies or supporting documents. Therefore, the

digitisation planned in the framework of the pilot project should not affect the current retention of personal data.

Finally the **security measures** appear to be in line with Article 22. Furthermore, Eurofound specified that the same level of security measures would apply in the context of the implementation of the digitisation pilot project. The EDPS received confirmation as to the existence of a specific declaration of confidentiality that should be adopted and signed in line with section 10 of the Guidelines. This declaration was first provided in the context of the follow-up to the analysis of the Opinion on health data (2010-0467).

## **2. Conclusion**

In view of the above, the EDPS recommends that Eurofound:

- 1 - amends the notification as regards the basis for prior-checking;
- 2 - modifies in the notification the way it refers to information provided to the individuals.
- 3 - amends the list of recipients in the light of the comment above;

The EDPS would like to invite Eurofound to inform him about the implementation of these recommendations within three months after receipt of this letter.

Done at Brussels, 8 May 2013

**(signed)**

Giovanni BUTTARELLI  
Assistant European Data Protection Supervisor