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Subject: Opinion on the notification for prior checking from the Data Protection Officer of the Research Executive Agency concerning work patterns, leave and presence management

Dear Mr De Meyere,

On 1 November 2012, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) of the Research Executive Agency (REA) a notification for prior checking concerning work patterns, leave and presence management. The notification was accompanied by the following documents:

1. Cover Letter-Notification for ex-post prior checking of the processing operation in the frame of work patterns, leave and presence management at REA
2. Memorandum of Understanding (MoU) of 15 July 2011 on ICT Services between the REA and the Directorate-General for Informatics of the European Commission (DG DIGIT)
3. Service-Level Agreement (SLA) of 22 December 2010 concerning the collaboration of the REA with the Office for Administration and Payment of Individual Entitlements (PMO)
4. Service Catalogue DIGIT for Executive and Regulatory Agencies, Institutes, Joint Undertakings
5. SLA for Sysper2 (29 November 2010)
6. (Declaration of Confidentiality (processing operations involving health-related data)
7. Specific Privacy Statement.

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The DPO sent this notification while the draft Guidelines in the area of Leave and Flexitime (The "Guidelines")¹ had been sent for comments to all the DPOs of the European institutions and bodies. Furthermore, the DPO underlined that the REA had adopted the recommendations provided in the draft Guidelines of the EDPS and he highlighted in a cover letter "any critical issues regarding the processing operation "vis-à-vis" the position and guidelines (draft) of the EDPS in this field".

The procedure was suspended between 1 November 2012 and 31 March 2013 for adoption and implementation of the Leave and Flexitime Guidelines.

1. Legal aspects

This Opinion deals with already existing work patterns, leave and presence management processing operations and is based on the Guidelines, which allows the EDPS to focus on the practices that do not seem to be fully compliant with the Data Protection Regulation 45/2001. The DPO underlined that the processing operation involving the processing of health-related data at the REA is covered by a notification analysed by the EDPS (Case 2010-0012). In any case, this analysis does not cover all the cases of processing of personal data relating to health in the context of leave. Therefore, this Opinion needs to be read together with the Opinion on health related data as regards the leave processing operations.

In the cover letter, the DPO of REA explains that the human resources sector of the REA has been entrusted with the processing of personal data in the context of this processing operation. However, a large part of the collected data is processed (e.g. via Sysper2) directly by the units (line managers, heads of unit, etc.). Therefore the REA believes that the heads of unit of the REA should be considered as co-controllers but is asking for the EDPS' view on this point.

Regarding controllership, the policy of the EDPS is to consider the institution/agency as a whole as the controller of the processing operations. This controller can be represented by a service (HR, Security departments, etc.) but ultimately, it is the institution/agency which bears the responsibilities as controller. In this case, even if the REA would consider that the heads of unit have some responsibilities, the REA would remain the controller of the processing operations taking place.

As to the data retention, the EDPS notes that, in most of the cases, the REA has aligned its retention policy within the timeframes established in the Guidelines. However, the EDPS does not see a sufficient justification for which the REA has decided to establish that the Flexitime data of staff members who opt-out of the flexitime scheme should be kept until the end of the calendar year. Stating that its retention is in line with the retention period under Sysper2 only applies to data subjects actually using the Flexitime scheme through Sysper2. Data subjects that do not use or do not wish to use anymore the Flexitime scheme would not fall under the same category of users and therefore, the need to keep the data will not be justified. This conclusion is underlined in the Guidelines, where the EDPS considered that "Flexitime data on staff members who leave the institution/body or of those members who wish to opt out of the flexitime scheme should be deleted within one or two months, as there is no justification for retaining them any longer, subject to the rights of the data subjects mentioned in the flexitime rules of the institution/body."

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

In the case where a staff would move from REA to another institution/agency, he/she could transfer the accumulated time for the previous month, but there would be no need, also in this case, to keep the data more than one or two months after his/her departure.

The EDPS acknowledges, however, that the implementation of such a recommendation should also be directed to the controller of the Sysper2 system as to provide within the application, the possibility of deleting data that are no longer necessary in the light of the Guidelines. The issue of the implementation of data retention in Sysper2 is therefore not treated in this Opinion, but will be part of a more horizontal approach directly with the European Commission. This does not remove the responsibility for the CoR to respect the rules of data retention to comply with the guidelines and principles of the Regulation 45/2001.

2. Conclusion

In view of the above, the EDPS only has one recommendation to make to the REA, which relates to the retention of the data within the Sysper2 system.

In the light of the comments above on the need to address this recommendation specifically with the controller of the Sysper2 system, the EDPS has decided to close this case without prejudice to ongoing discussions with the controller of Sysper2 on the retention periods of data.

Thank you for your collaboration.

(signed)

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Cc: Vangelis Tsavalopoulos, Data Protection Officer, REA