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**Subject: Opinion on notification for prior checking from the Data Protection Officer of the Committee of the Regions concerning management of absences and time off and of working hours**

Dear Mr Haenebalcke,

On 27 March 2013, the European Data Protection Supervisor ('the EDPS') received a notification concerning the **management of absences and time off and of working hours** from the Data Protection Officer ('the DPO') of the Committee of the Regions of the European Union ('the CoR').

The types of leave concerned are: annual leave, special leave, training, leave on personal grounds, sick leave, parental leave, family leave, leave for military service, unpaid leave, maternity leave, adoption leave, time off for breast-feeding, overtime and time off for health reasons. The people concerned at the CoR are officials, temporary and contract staff as well as, in part, experts seconded from national services. The members of their families (children, spouses, civil partners, relatives in the ascending line, brothers, sisters) are also concerned in some cases.

The CoR uses Centurio, a computerised application used for management of human resources. Centurio is a database which is also used by the European Economic and Social Committee, which has already notified this processing. It was the subject of an opinion by the EDPS on 5 March 2010 (case 2009-0702). However, the CoR is proposing to change shortly to the Sysper2 system managed by the Commission for general management of human resources.

In his email, the DPO also stated that the CoR has submitted a notification covering the flexitime arrangements and that he has implemented the recommendations contained in the EDPS opinion (case 2009-0396). Consequently, the current notification does not cover the flexitime aspects.

The DPO emphasised the special features of the processing of absences at the CoR. He points out that, when implementing the EDPS opinion in case 2007-004 with regard to the processing of medical data, the CoR made changes to the processing of special leave where data relating to health may be processed. Currently, all medical data, medical examinations for the purpose of checks on sick leave, or even the name or specialisation of the doctor who issued a certificate, are sent, stored and processed solely by the staff of the medical service, and the other administrative services are only informed of the favourable or negative opinion of the doctor from the institution.

In order also to keep a record of this within the CoR, the data controller would prefer to retain the data (the hard copies and the computerised data) for the whole of the person's career within the CoR.

## **1. Legal aspects**

The DPO submitted this notification following the adoption on 20 December 2012 of the Guidelines concerning the processing of personal data in the area of leave and flexitime ('the Guidelines')<sup>1</sup> and before the deadline given to the institutions and agencies of the European Union to do this (end of March 2013). The EDPS sent the draft opinion to the DPO of the CoR for comments on 27 May 2013. The DPO replied on 13 June 2013.

This opinion is based on the Guidelines, which allows the EDPS to concentrate on the practices of the CoR which do not seem to be in accordance with the Guidelines in the area of leave and flexitime and the principles of Regulation No 45/2001 on data protection. As emphasised above, the data processing carried out by the CoR medical service was the subject of a separate notification of processing (2007-0004). That notification covered, among other things, the processing of medical data in connection with sick leave and special leave. The current analysis of the processing supplements that analysis and covers only the processing carried out at administrative level by the CoR.

The purpose of the processing is to establish and manage the rights to leave and absences of staff under staff regulations and legislation, and also to enter in the accounts, record and compensate for their work which is deemed to be overtime.

The EDPS notes that the notification provides only for the applicability of Article 27(2)(d) (processing of data for the purpose of excluding individuals from a right, benefit or contract) of the Regulation. The EDPS takes the view that the management of leave as such within the CoR is not intended to exclude individuals from a right, benefit or contract. On the other hand, Article 27(2)(a) should be applied here. As explained in the Guidelines, even if medical information is kept separate from administrative information, where sick leave is recorded for example, the EDPS' position has been to consider that processing of personal data relating to health occurs nonetheless. Thus the respective processing operations have to be prior checked by the EDPS.

Indeed, as emphasised in the Guidelines, '*Health data generally refers to personal data that have a link with the health status of a person. This would normally include medical data (e.g. doctor referrals and prescriptions, medical examination reports, laboratory tests, radiographs), as well as administrative and financial data relating to health (e.g. medical appointments scheduling, invoices for healthcare service provision, indication of the number of days of sick leave, sick leave management)*'. It is this second aspect that is analysed here and justifies the prior checking carried out.

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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 C-2012-0158).

As regards the **retention** of data, the CoR makes a distinction between the types of absences and leave which are the subject of a formal decision by the appointing authority/authority empowered to conclude contracts of employment (leave on personal grounds, parental leave, family leave, unpaid leave, leave for military service) and those which do not require a formal decision (annual leave, special leave, sick leave, maternity leave, time off for breast-feeding).

For the former types, a retention period throughout the career and up to 10 years from the date on which the official or his/her legal successors may claim the right to pension benefits applies to hard copies of documents, and such data may be consulted in Centurio for the duration of the individual's career. For the latter types, retention for 5 years at the Working Conditions unit is laid down, and also they may be consulted in Centurio for the duration of the individual's career. According to the CoR, the data retention period is explained by the potential pecuniary events linked to the absences and leave (time-limit laid down in the Financial Regulation) and to allow a record of sick absences to be kept for a long enough period so that it can be used by an Invalidity Committee.

As regards the principles attached to data retention, the EDPS takes the view that retention in paper form should be similar to that laid down for electronic retention. Consequently, there should not be any distinction, whether the data are kept in the Working Conditions Unit or in the Centurio electronic system (currently used) or Sysper2 (in the future). Furthermore, the EDPS would like to point out that, with respect to the disposal of financial data, under Article 49 of the Implementing Rules to the Financial Regulation *'personal data contained in supporting documents shall be deleted where possible when those data are not necessary for budgetary discharge, control and audit purposes'*.

As established in the Guidelines, the EDPS has considered that a conservation period of three years for administrative data relating to sick leave can be justified for HR by the implementation of Article 59(4) of the Staff Regulations (that article relates to the conservation of data used by an Invalidity Committee; this looks at the cases of officials whose accumulated sick leave exceeds twelve months over a period of three years). Thus, a longer conservation period by HR could only be applied in order to cover periods during which a dispute or an appeal is in progress. This retention period should apply, therefore, to the administrative data managed by the CoR and not to the medical data managed by the medical service and for which a different retention period is laid down (cf. the joint conservation lists).

Consequently, the EDPS invites the CoR to revise its retention policy so that it conforms to the Guidelines. The switch to the Sysper2 system in the future has also increased the need to bring the retention periods within the CoR into line. However, the EDPS recognises that implementation of such a recommendation must also be addressed to the manager responsible for the Sysper2 system, with a view to making provision in the application for the possibility of deleting the data which would no longer be necessary under the Guidelines. Therefore, this question regarding the implementation of data retention in Sysper2 is not dealt with in this opinion but will form part of a more horizontal approach directly with the European Commission. This does not remove the obligation for the CoR to comply with the rules on retention of data in order to conform to the guidelines and principles of Regulation No 45/2001.

As regards the possibility of retaining data in the case of proceedings relating to exposure to asbestos, mention should be made of the conservation of medical certificates retained by the medical service. Such conservation is different from that laid down for the administrative aspects relating to health, which are managed by the HR unit.

As regards **information**, the DPO provided a specific privacy statement. This statement covers mainly the ‘flexitime’ application within Centurio. Nevertheless, the DPO has pointed out that the Centurio flexitime module displays not only the days taken as compensation for overtime, but also other types of absences (annual leave, sick leave, missions). The flexitime module is used essentially as an indicator of presence or absence, and that is why the privacy statement focuses mainly on ‘flexitime’.

Although it contains certain aspects relating to management of absences, the EDPS regards the current statement as incomplete. It proposes that the CoR either completes the current statement or adopts a more specific statement linked to the management of absences and working hours.

In view of the changeover from the Centurio system to Sysper2 for the management of absences and working hours, the EDPS would like to point out that Article 23 of the Regulation will have to apply and that the CoR will therefore have to establish a contract or legal act (SLA) stipulating in particular that the processor is to act only on instructions from the controller. At present, this document has not been produced, as the system is not yet in force.

## **2. Conclusion**

In the light of the analysis set out above, the EDPS recommends that the Committee of the Regions:

- 1 – amend its policy on data retention with a view to handling data in paper form in the same way as electronic data and brings its retention periods into line with the Guidelines;
- 2 – complete the privacy statement supplied, or adopts a new statement in the light of the data processing operations described;
- 3 – make provision to comply with the obligations referred to in Article 23 of the Regulation.

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

**(signed)**

Giovanni BUTTARELLI

Cc: Mr Spac, Data Protection Officer, Committee of the Regions of the European Union