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Subject: Opinion on the notification for prior checking from the Data Protection Officer of the European Research Council concerning Leave and Absence Management

Dear Ms Lenarduzzi,

On 26 March 2013, the European Data Protection Supervisor ("EDPS") received from the Data Protection Officer ("DPO") of the European Research Council ("ERCEA") a notification for prior checking concerning leave and absence management. The notification and cover letter was accompanied by the following documents:

1. Cover letter describing the leave management at ERCEA;
2. Decision of the Steering Committee of the European Research Council Executive Agency on the adoption of Implementing Rules to the Staff Regulations;
3. Note to ERCEA management on guideline for special part-time arrangements for breast-feeding;
4. Heads of Administration Conclusion 235/04 on special part-time arrangements for breast-feeding;
5. Memorandum of Understanding between the ERCEA and the European Commission's DG DIGIT on ICT Services;
6. Specific ERCEA Privacy Statement on time management;
7. ERCEA "Leaves and absences Quality Management Handbook";

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8. Quality management handbook on Leaves and Absences;
9. Service level Agreement between ERCEA and the Medical service of the European Commission;
10. Request for parental leave form;
11. Request for part-time work form.

The DPO sent this notification to the EDPS following the adoption on 20 December 2012 of the Guidelines on Leave and Flexitime (the "Guidelines") and before the deadline given to EU institutions and bodies to submit their notification (end of March 2013). The EDPS sent the draft for comments on 27 May 2013 and these were received on xxxx 2013.

The notification also contains the following statement as to the automated/manual processing operation: "Regular statistical reports including leave and absences are prepared for process monitoring. They can be anonymous or individual. These reports will be notified to the EDPS separately". The ERCEA notified on 29 April 2013 the processing operations relating to "HR Reports extracted from Business Objects". This is analysed separately from this notification, as the main aspect of the processing does not relate exclusively to leave aspects.

Legal aspects

This Opinion deals with the already existing leave procedures at the ERCEA. It is based on the Guidelines, which allows the EDPS to focus on ERCEA practices which do not seem to be in conformity with the leave and flexitime Guidelines and the principles of the Regulation 45/2001. The EDPS takes note that the ERCEA is making use of the Sysper2 system of the European Commission (EC)¹. ERCEA also makes reference to a second notification from the EC on Flexitime (DPO-1413.10). However, this notification has been withdrawn by the EC on 30 April 2013. The reference should therefore be removed from the ERCEA Article 25 notification. Finally, the ERCEA refers to its notification on "Processing of Health Data" which was prior checked by the EDPS in case 2009-0763. The EDPS focuses his analysis and comments on the procedural aspects which fall under the competence of the ERCEA in the context of the processing of leave requests. If some parts of the processing will be covered by the EC in the context of Sysper2, ERCEA remains the main controller of the processing operations covering ERCEA leave and absence management.

The purpose of the processing operation is to manage the rights and obligations of ERCEA staff members² relating to working times and conditions, including requests for the different types of leaves to ensure the continuous functioning of the ERCEA and the services it provides.

The medical certificates of the staff members are not processed at HR Unit level. They are processed by the Medical Service of the EC, subject to a Service Level Agreement which was provided by the DPO. Some health related data (with administrative aspects) are nonetheless processed by the ERCEA. As stated in cover letter, these situations were described in the ERCEA notification on "Processing of Health Data" prior checked by the EDPS.

¹ The European Commission has notified the Sysper2 system and had it prior checked by the EDPS in case n° 2007-063.

² ERCEA statutory staff members (Contractual and Temporary Agents (Commission Officials Seconded to the Agency and externally recruited Temporary Agents) and Seconded National Experts. Non-statutory staff-members: blue book trainees.

The joint Opinion related to the "processing of health data at the workplace"³, concerns the analysis of the processing operations on pre-recruitment procedures, annual check-ups and sick leave certificates (administrative aspects). In the general context of leave processing operations, other processing of health related data take place (for instance in the procedure of special leave). Taking into account the existing agreement with the Medical Service of the EC, which is responsible for the medical files of the individuals, there is no reason to believe that the handling of the medical data and of the health related data would be different than the one already analysed.

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. He considers that it is not the purpose of leave management at ERCEA to exclude individuals from a right, benefit or contract. Therefore only Article 27.2.a) should apply here.

The notification contains a description of the workflow of the processing operations concerned. They all but one (leave on personal grounds-CCP) follow the procedures established in Sysper2. As to this leave, the EDPS considers that the workflow respects standard procedures in this situation.

The EDPS notes that the notification states that "*in the case of supporting documents for special leaves that relate to medical certificate for sick child/spouse/partner, the certificate has to be sent to the leave manager directly and not to the Medical Service*". The data is then encoded in Sysper2. It is stated that depending on the specific nature of the document, the staff member may block out irrelevant or superfluous personal data (e.g. medical data not needed by the leave manager) as long as enough details remain for the appointing authority to establish the right. As stated in the cover letter, this procedure was also notified under Case 2009-0763 (Health related data).

The EDPS understands that the certificates would not, normally, contain medical data but that, in certain cases of special leave, it may happen. It is therefore important that the staff members are informed on the need to provide only the relevant information when providing the certificates to the leave manager, as medical data are normally dealt with only by the medical service. However, although quoted by the controller, the EDPS fails to see this information in the current privacy statement which was provided. He recommends adding a paragraph on this aspect in the privacy statement so that staff members are correctly informed about the categories of data that should or should not be provided to the leave manager in the context of special leave.

As to the **retention** period, ERCEA states that it is bound by the Common Commission-Level Retention List (SEC(2007) 970) when determining the retention period of data.

The EDPS notes that, as regards retention of data, the specific privacy statement of ERCEA contains the following statement: "Data relating to sick leave can be kept for at least three years pursuant to Article 59(4) of the Staff Regulations, but this time period is extended to five years in order to cover legal disputes". This wording may be misleading as to the acceptable three years retention of data underlined in the Guidelines. Therefore, as to be in line with the leave and flexitime Guidelines⁴, the EDPS would like the second part of the

³ Joint Opinion on Health data, published on 11 February 2011 (Case 2010-0071).

⁴ In this respect, the EDPS also refers to the EDPS Guidelines concerning the processing of health data in the workplace, page 12: "Article 59 (4) of the Staff Regulations could justify a conservation period of 3 years for

sentence to be modified as such: "but this time period can be extended in case of legal disputes".

The EDPS recognises that this wording used by the ERCEA is the one used in Sysper2 and he acknowledges that the implementation of such a recommendation should also be directed to the controller of the Sysper2 system. Discussions are ongoing with the controller of the system as to align the wording to the one of the Guidelines but these discussions are of a more horizontal approach, not dealt with in this Opinion. This does not remove the requirement for the ERCEA to respect the rules of data retention of the guidelines and principles of the Regulation 45/2001.

As to the **information**, besides the general privacy statement of Sysper2 available on the European Commission website, information is provided to the data subjects through a specific privacy statement on "Time management at ERCEA" complying with Articles 11 and 12. As stated above, it should be completed with the limitation of "relevant" information, especially in the case of special leave where certificates that may contain medical data could be sent to the leave manager.

As to the list of recipients, the EDPS considers that the IT department of the ERCEA should be considered as a recipient in its tasks of providing technical support to users of the system. It should therefore be added in the list of recipients.

As to the security measures, the procedures seems to be in line with the Guidelines.

Conclusion

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

- 1 - adopts a retention period for documents related to leave that are in line with the Guidelines;
- 2- adds references in the privacy statement to the staff as regards information that need to be provided in the context of special leave to ensure that data provided is limited to what is necessary;
- 3- completes the list of recipients as analysed above;

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

(signed)

Giovanni BUTTARELLI

Cc: Ms Nadine KOLLOCZEK, Data Protection Officer, ERCEA

data necessary to justify an absence due to sick leave. The only justification for keeping them any longer would be if a dispute or appeal were under way".