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correspondence

Subject: Opinion on the notification for prior checking from the Data Protection Officer of the European Fisheries Control Agency concerning the Management of Leave, Sickness related Absences and other Absences

Dear Mr Savouret,

On 13 March 2013, the European Data Protection Supervisor ("EDPS") received from the Data Protection Officer ("DPO") of the European Fisheries Control Agency ("EFCA") a notification for prior checking concerning the management of leave, sickness related absences and other absences. Seven annexes were sent with the notification:

1. Annex I: Data protection and security agreement between EFCA and the company LUCCA (cloud service provider) of 20 December 2012;
2. Annex II: Risk assessment on the processing of leave management through FIGGo (cloud service provided by LUCCA);
3. Annex III: Global HR privacy statement (as published on the intranet of EFCA)
4. Annex IV: Note to staff with updated information on sick leave (as distributed to staff and published on the intranet of EFCA);
5. Annex V: HR procedural description for leave management;
6. Annex VI: IAB Decision No 11-W-4 of 23 June 2011 on the adoption of general implementing provisions to the Staff Regulations (leave);
7. Annex VII: Specific declaration of confidentiality for staff with access to information on health.

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 3 May 2013 and a reply was received from EFCA on 18 June 2013.

The Facts

The purpose of the processing operation covers the management of leave (annual, sick and special leave) and grant leave rights; in particular to make sure supporting documents are provided by EFCA statutory staff members (TA, CA) and SNEs.

Special categories of data, such as health related data (e.g. serious illness of spouse) or sexual orientation of the data subject and his/her partner (e.g. when the data subject applies for leave in the case of marriage) may be processed.

An automated system (Figgo application cloud service) is planned for introduction as from 2nd quarter of 2013. This system will be used for introduction and approval procedure of leave requests and is managed by the HR Section. It will, in part, replace the current paper-based processing. Before taking the decision to use the cloud service, EFCA states that he carried out a risk assessment. The risk assessment was provided as an annex to the notification as well as the agreement with the service provider.

As stated in the notification, with the introduction of the new processing system (Figgo application), annual leave requests will be introduced by the staff directly into the system and automatically forwarded to the leave authorizer. There will be no circulation of paper files for annual leave requests anymore, except for the supporting documents. For sick leave (medical certificates) and special leave, the registration in the application is made by the HR Section as "other justified absence", or "other absence" or "leave to be justified" within the Figgo application. The HR Section will be able to monitor the processing of annual leave in the application. Supporting documents will continue to be processed manually and separately from the Figgo application system. Finally, it is expressed that EFCA is exploring the possibility to use additional functionalities which could be enabled under the Figgo application. For instance, it is considered to specify "special leave" and "sick leave" as such within Figgo, replacing the current terminology.

Legal aspects

This Opinion deals with the already existing leave procedures at EFCA. It is based on the Guidelines, which allows the EDPS to focus on EFCA practices that do not seem to be compliant with the Data Protection Regulation n. 45/2001 ("the Regulation").

The EDPS notes that the processing in question is considered as lawful in terms of Article 5(a) of the Regulation¹.

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 it is not the purpose of leave management at EFCA to exclude individuals from a right, benefit or contract. Therefore only

¹ Based on Articles from the Staff Regulations, the Conditions of Employment of other servants of the European Communities and Decision No 11-W-4 of the Administrative Board of the Community Fisheries Control Agency of 23 June 2011 on the adoption of general implementing provisions to the Staff Regulations.

Article 27.2.a) should apply here. Furthermore, the EDPS notes that the procedure in place at EFCA as regards the processing of health related data or sexual orientation of the data subject and his/her partner is in line with Article 10 of the Regulation, on the basis of Article 10.2.b).

Based on the available information, the **data quality** principles appear to be respected. As regards the purpose limitation principle, it is specified that the HR Section processes all information necessary for the purpose of managing the different types of leave in compliance with the rules in place.

Besides, it appears that the **right of access and the right of rectification** are granted to the data subjects in accordance with Articles 13 and 14, and are also included in the Global HR privacy statement.

As to the list of **recipients**, the following recipients are listed in the notification:

- EFCA: The executive director, Head of Unit A-Resources and the HR Section staff have access to information on leave and supporting documents except sick leave certificates;
- European Commission through a Service Level Agreement: the Medical Service (for administrative documents containing data relating to health) and PMO (to process related entitlements and payments).

These recipients should be reminded that they may only process the data in accordance with the purposes for which they were transmitted.

The service provider of the application Figgo through a data protection and security agreement (Annex I) have access to the data uploaded by the EFCA users to the Figgo application. The EDPS notes in this respect the section 1.7 and 1.8 of the agreement regarding the obligations of the service provider's staff on their confidentiality obligations towards the data which may be processed in accordance with Article 23 of Regulation 45/2001.

As to the **information**, the EDPS notes that EFCA is using a "Global HR privacy statement" in order to state the rights and obligations of EFCA staff and SNE in the context of the processing of their data related to recruitment, personal files (including health and staff evaluation), leave, sickness related absences and other absences and salaries. He also notes that this privacy statement is constantly evolving as to reflect the various processing operations notified, as these processing operations were not all notified at the same time.

As a general practice, the EDPS would not recommend the adoption of a general HR privacy statement covering a number of processing operations. However, he may accept it provided that the agency ensures that information relating to the specific procedure being notified is provided fully and that the data subjects may easily find, for each processing operations the information foreseen by Articles 11 and 12 of Regulation 45/2001. This seems the case in the Global HR privacy statement which was provided. EFCA mentions the specific features of the different pieces of information linked to the processing operations concerned. The EDPS would nonetheless suggest listing the aspects of the legal basis and the list of recipients in a more apparent way (by using a bold font for instance) which would allow staff to directly view the information relevant to the specific processing operation.

As to the **retention** of data, the EDPS agrees with the three years for annual, special and sick leave and the corresponding supporting documents, except in case of appeal. Furthermore, he agrees with the retention for the entire career regarding data on leave on personal grounds, which is in line with the Guidelines in the area of leave and flexitime (Section 5).

Regarding the **security measures**, the EDPS notes the following.

EFCA ensures that data are not accessible or disclosed to anyone other than those specified as recipients on a need to know basis. As stated in the notification, the Head of Unit Resources regularly reminds all staff within the HR Section who are responsible for the processing information related to the staff members' health status to process it in accordance with the principles of medical confidentiality. The EDPS also notes that all staff with access to information on health data have to sign a specific declaration of confidentiality that they are subject to an obligation of professional secrecy equivalent to that of a health professional. These measures are in line with section 10 of the Guidelines and Article 10.3 of Regulation 45/2001.

Finally, a risk assessment on the use of the Figgo application has been conducted by EFCA, which resulted in the decision to use the application following the adoption of an agreement on data protection between EFCA and the service provider selected. The EDPS recognises that this agreement includes advice from the Article 29 Working Party (Opinion 05/2012 on cloud computing adopted on 1/7/2012) and takes into account requirements regarding subcontractors, liability provisions and the option of audits. The EDPS also notes that the data will be hosted in France and no transfer to third countries is foreseen.

The EDPS agrees with the approach taken by the EFCA, as regards the risk assessment and the specific agreement on data protection adopted.

Conclusion

In view of the above, the EDPS recommends that EFCA renders the elements of the Global HR privacy statement on the various processing operations more apparent so as to enable easier access to information relating to the specific processing operation.

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

(signed)

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Cc: Mr Wilhelm SCHERZER, HR Officer, EFCA
Mr Rieke ARNDT, Data Protection Officer, EFCA