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WW/XK/sn/D(2016)0424 C 2013-0934
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correspondence

**Subject: Prior-check Opinion on the management of health data at CLEAN SKY
Joint Undertaking, (case 2013-0934)**

Dear Mr. Dautriat,

We have analysed the updated notification and revised documents you have provided to the European Data Protection Supervisor (EDPS) for prior-checking under Article 27(2)(a) of the Regulation (EC) n° 45/2001 (the Regulation) on the management of health data at CLEAN SKY Joint Undertaking (**CLEAN SKY JU**). The purpose of this processing is to ensure compliance with the requirements for recruitment, annual medicals visits and specific medical check-ups as well as for special leave and sick leave

As this is an ex-post case, the deadline of two months for the EDPS to issue his Opinion does not apply.

The notification and relevant documents will be analysed in light of the EDPS Guidelines on health data in the workplace (the Guidelines)¹. The EDPS Joint Opinion related to the processing of health data by 18 agencies² is also applicable in the present case.

The EDPS will identify CLEAN SKY JU's practices which do not seem to be in conformity with the principles of the Regulation and the Guidelines, and then provide CLEAN SKY JU with relevant recommendations.

¹ Issued in September 2009 and published on the EDPS website.

² Issued on 11 February 2011 and it concerned 18 agencies, case 2010-0071.

1) Lawfulness

The processing operations in the context of pre-employment examinations, annual medical visits, specific medical check-ups, special leave and sick-leave are necessary for assessing the aptness of CLEAN SKY JU's staff members and for managing their absences in the workplace. The processing operations in question are therefore necessary for the performance of CLEAN SKY JU's mission carried out in the public interest on the basis of the EU Staff Regulations and CEOS in conformity with the requirements under Article 5(a) of the Regulation.

Legal basis for special leave

CLEAN SKY JU has not stated the relevant legal basis of the processing related to special leave and the requirements that a staff member should fulfill in order to be granted a special leave. The notification should be updated accordingly.

2) Services of a private practitioner

The privacy statement is silent on the possibility for staff members to have their annual check-up visit carried out by a private practitioner.

The EDPS reminds CLEAN SKY JU that a declaration from the staff member's private practitioner should be considered sufficient in terms of the preventive purpose of the annual check-up. This declaration can confirm that the medical exams were carried out and if necessary, it can also specifically mention any special accommodations or working conditions the staff members might need.

CLEAN SKY JU should therefore inform staff members of their entitlement to choose the private practitioner who will perform their annual medical check-up and of the practical steps they must take to have the check-up carried out by the private practitioner of their choice.

3) Recipients and processors

CLEAN SKY JU lists in the notification the Commission's medical service as recipient.

CLEAN SKY JU has concluded a Service Legal Agreement (SLA) with the Commission's medical service for carrying out the pre-recruitment medical visits and annual check-up visits. In light of Article 23 of the Regulation, the Commission's medical service is acting on behalf of the agency and is therefore classified as processor rather than recipient. This is because it is obliged to carry out the processing only on instructions from the controller - CLEAN SKY JU (Article 23(2)(a)). Their obligations regarding confidentiality and security measures are also laid down in the SLA (Article 23(2)(b)).

The EDPS therefore recommends that CLEAN SKY JU clarify that the Commission's medical service acts as processor on behalf of CLEAN SKY JU in light of the requirements of Article 23 of the Regulation.

4) Quality of data

The EDPS notes that staff members are required to send their sick leave certificates to the HR Department of CLEAN SKY JU to justify their absences. Sick leave certificates only include the name of the staff member and the duration of the absence certified by the doctor.

Sick-leave and some special leave certificates are considered to be data concerning health. Although the exact type of illness is not indicated, staff members can be identified as having been absent due to a short or long term illness on medical treatment or due to special sick leave of a medical nature.

The HR Department of CLEAN SKY JU should, under Article 4(1)(c) of the Regulation, keep information which is only adequate, relevant and necessary for the purpose of the sick leave certificates' collection, that is, to be able to manage the absences of the agency's staff members. HR should hence collect only administrative data related to an absence of a staff member and not the sick-leave certificate as such.

The EDPS recommends that CLEAN SKY JU modifies its policy and requires its staff members to send their sick leave certificates directly to the Commission's medical service. The Commission's medical service will then inform the HR Department about the administrative related data, such as the name, surname and duration of absence of the staff member.

5) Retention periods

The retention periods in the notification and the privacy statement do not coincide

The notification states that *"maximum retention period of medical data is 30 years; maximum retention period for administrative health data is 3 years except if a dispute and appeal is underway (e.g. sick leave, annual leave); maximum retention period for medical data of non-recruited candidates is the period for challenging the data."*

The privacy statement states that *"health data is stored for three years except if a dispute and appeal is underway; and for the period for challenging the data in case of health data of non-recruited candidates."*

Medical data of the pre-recruitment and annual visits (if the staff member chooses to carry out the medical check-ups with the Commission's medical service) should be kept for a maximum period of **30 years after the last document has been inserted to the medical file.**

Pre-recruitment aptitude certificates should be kept in the personal files for a maximum of **ten years after the end of the period during which a staff member is in active employment or the last pension payment.**

As to the retention periods of **sick leave as well as special leave certificates**, the HR should only keep the administrative related data of the certificates for a maximum **three-year period.**

Finally, the health data of non-recruited persons should be kept only for the period of time during which it is possible to challenge the data or the negative decision taken on the basis of the data.

Both the notification and the privacy statement should be updated accordingly.

6) Security measures

CLEAN SKY JU's HR officers process personal data related to health, namely aptitude certificates and administrative information on sick leave.

Due to the sensitive nature of such data, the EDPS recommends that the HR officers sign confidentiality declarations mentioning that they are subject to an obligation of professional secrecy equivalent to that of a health professional. This organisational measure aims at maintaining the confidentiality of personal data and at preventing any unauthorized access to them within the meaning of Article 22 of the Regulation.

7) Right of access and rectification

The notification does not make reference to the rights of access and rectification of the data subjects in the context of the processing operations under analysis. In light of Articles 13 and 14 of the Regulation, CLEAN SKY JU should indicate whether data subjects (including non-recruited candidates and trainees) are entitled to exercise their right of access and rectification to their data related to health and how these rights may be exercised.

8) Information to be given to the data subject

Legal basis of the processing operation

On the basis of Articles 11(1)(f)(i) and 12(1)(f)(i), CLEAN SKY JU should add to the privacy statement the legal basis of the processing operation in the context of a special leave (see point 1 above).

The recipients of the data

In light of Articles 11(1)(c) and 12(1)(d), CLEAN SKY JU should list the medical service as a processor (see point 3 above).

Rights of access and rectification

On the basis of Articles 11(1)(e) and 12(1)(e) of the Regulation, CLEAN SKY JU should explain the privacy statement how data subjects (staff members, non-recruited candidates and trainees) are entitled to exercise their rights of access and rectification so that they fully understand their rights (see point 7 above).

Furthermore, CLEAN SKY JU should mention that data subjects can have indirect access - instead of direct access - to their psychiatric and psychological reports via a doctor appointed by them³.

As to the right of rectification, CLEAN SKY JU should mention that data subjects are entitled not only to correct administrative errors in their medical file but also to supplement it by adding opinions of other doctors to ensure completeness of the file.

The time-limits for storing the data

In light of Articles 11(1)(f)(ii) and 12(1)(f)(ii) of the Regulation, CLEAN SKY JU should clearly indicate all different retention periods of medical data, pre-recruitment aptitude certificates and sick leave as well as special leave certificates (see point 5 above).

³ In that regard, CLEAN SKY JU should refer to the Conclusion 221/04 of the Board of Heads of Administration of 19 February 2004.

The right to recourse to the EDPS

In light of Articles 11(1)(f)(iii) and 12(1)(f)(iii), CLEAN SKY JU should indicate that data subjects have a right to recourse to the EDPS at any time. Mere reference of its contact information is not sufficient.

CLEAN SKY JU should revise both the privacy statement and the notification accordingly.

In light of the accountability principle, the EDPS trusts that CLEAN SKY JU will duly implement the above recommendations so that the processing operations under analysis are in conformity with the Regulation.

We have therefore decided to close the case.

Should you have any doubts, please do not hesitate to contact us.

Yours sincerely,

(signed)

Wojciech Rafal WIEWIÓROWSKI

Cc: Mr Bruno MASTANTUONO, Data Protection Officer.
Ms Lilla TAKACS-DAROCZI, Legal Assistant.