



Opinion on a notification for prior checking received from the Data Protection Officer of European Central Bank on "Recording of the absences of ECB staff members unable to work because of illness or accident"

Brussels, 23 September 2005 (Case 2004-277)

1. Proceedings

- 1.1. On 20 July 2004, the European Data Protection Supervisor (EDPS) sent a letter to all DPOs asking them to make an inventory of the cases likely to be subject to prior checking by the EDPS as provided for by Article 27 of Regulation (EC) 45/2001. The EDPS requested communication of all processing operations subject to prior checking, even those that started before the appointment of the EDPS and for which the Article 27 check could never be prior, but which had to be dealt with on an "ex-post" basis.
- 1.2. On 15 September 2004, the DPO of the European Central Bank (ECB) inventoried the case "record of absences" as likely to be within the scope of Article 27 for prior checking as it contains data related to health.
- 1.3. On 30 November 2004 the EDPS identified the case "record of absences" as a case of consultation on the need for prior checking. The EDPS identified certain priority themes. The case "record of absences" is among these cases.
- 1.4. On 20 December 2004, the EDPS made a request for information to the DPO of the ECB in order to examine whether the case "record of absences concerning sick leave" falls within the prior checking scope or not.
- 1.5. On 10 January 2005 the DPO of the ECB sent the information requested by regular mail. Due to postal problems, the mail never arrived at the EDPS office. The DPO from the ECB sent it again by e-mail on 15 April 2005 following a request from an EDPS staff member.
Annexed were:
 - ECB Staff Rules extract on sick leave, annex 1
 - A medical certificate, annex 2
 - ECB Staff Rules extract on personal file, annex 3
 - An extract of the electronic database Personal Information System (PERBIT), annex 4
 - A report containing the data from the PERBIT sent on a quarterly basis for information to the local management, annex 5.
- 1.6. On 13 May 2005, the EDPS concluded that the case 2004-277 falls under the scope of Article 27(2)(a) of the Regulation 45/2001 as it contains data relating to health. Being within the priority matters of *ex post* prior checking the EDPS requested notification of the processing operation.

1.7. The DPO sent notification of the case for prior checking on 30 June 2005 by e-mail.

Attached were:

- ECB Conditions of Employment
- ECB Conditions of Short-term Employment
- ECB Staff Rules
- ECB Staff Rules of Short-term Employment

1.6. A request from the EDPS for further information was made on 2 August 2005. The DPO replied to this request on 2 August 2005. A further request for information was made on 25 August 2005. The DPO replied to this request on 20 September 2005.

2. Examination of the matter

2.1. The facts

The absences of ECB staff members unable to work because of illness or accident are recorded in order to implement the legal provisions on sick leave as laid down in the ECB Conditions of Employment and the ECB Staff Rules (including Short-term Employment). According to the aforementioned rules there is a distinction between sick leave without medical certificate and sick leave with medical certificate provided. This data processing operation takes place as part of the human resource management of the ECB. It allows the leave manager or hierarchical superiors to manage staff member absences due to illness or accident. For instance, according to the ECB Staff Rules (Article 5.13) the uncertified absences cannot exceed ten working days per annum.

All staff members, whatever their contract, are potential data subject for the processing operation.

The data collected can be divided into three categories:

- 1) Data related to “sick leave” without medical certificate provided: the printed e-mail, sent by the local manager to the human resources manager, contains the basic data of the staff member and the date(s) of absence.
- 2) Data related to “sick leave” with medical certificate provided: the certificate contains the basic data of the staff member, the date(s) of absences and the doctor.
- 3) “Secondary” data concerning all kinds of absences: data deriving from both aforementioned categories are stored in electronic format in the Personal Information System (PERBIT), where all kinds of absences (including annual leave, special leave etc.) are recorded in different coloured icons per absence category (annexe 4 of the notification form).

Staff members are informed about the most important provisions laid down in the Conditions of Employment for staff of the ECB and the ECB Staff Rules or in the Conditions of Short-term Employment and the Rules of Short-term Employment, which describe the rules and procedures concerning all kind of absences, when they start working at the ECB in specifically organized “induction seminars”. The relevant documents are also published on the ECB’s intranet website. Staff members can contact the controller, the human resources manager, for any additional information falling under the scope of Articles 11 and 12 of the Regulation (EC) 45/2001.

The original medical certificates are incorporated in the personal file. The general rules set out in Article 7 of the ECB Conditions of Employment and Article 1.3 of the ECB Staff Rules (Article 12 of the ECB Conditions of Short-term Employment and Article 1.3 of ECB Rules of

Short-term Employment) on personal file apply. According to these articles each staff member has the right at any time, even after leaving the ECB, to access his/her personal file and consequently to the information concerning medical certificates. For accessing the data in the separate file (kept centrally by the controller) where printed e-mails with the business areas notifications of staff members uncertified sick leaves are stored, the data subject has to contact the controller. For accessing the data contained in the PERBIT database where all kinds of absences are recorded in electronic format, the data subject has to contact the controller and request a printout of the data relating to his/her absences.

As to the exercise of all other rights laid down in Section 5 of the Regulation (EC) 45/2001, the data subject has to contact the controller.

Personal data related to sick leave undergoes both automated and manual processing operations depending on the category they belong to. Manual processing operations take place in personal files where the medical certificate signed by the respective doctor is filed as an original (category 2) and in a separate file where printed e-mails of staff members uncertified sick leaves are filed (category 1). Automated processing operations take place in the PERBIT database, where all kinds of absences are recorded (category 3).

As regards data contained in the personal file, the recipients are: members of the Executive Board; members of staff who, for professional reasons, need to have access to the information contained in the file and whose access is authorised by the Director Human Resources; a staff member may authorise the Directorate Human Resources - subject to the approval of the Executive Board - to make his/her personal file available to third parties. As regards the data contained in the PERBIT database: quarterly reports are produced for each individual (annex 5 of the notification form) and sent to the local managers for information/reconciliation (checking) purposes. As regards data contained in the separate file containing e-mails and in the PERBIT system, access is granted only to a limited group of staff members working in the field of human resources.

As regards data contained in the personal files, files shall be destroyed 10 years after staff members have left the ECB if there are no pending claims or any other issues still open concerning their ECB employment relationship. The personal file of pensioners will be destroyed 10 years after the end of the year in which the last ECB pension payment was made to either the pensioner or one of his entitled dependants, respectively, provided that there are no pending claims or other issues still open. Data contained in the separate file containing e-mails will be erased after 3 years. Data contained in the Personal Information System (PERBIT) will be erased 10 years after the staff member has left the ECB.

Security measures have been adopted for the personal file, the separate file and for the PERBIT database.

The DPO has initiated an ECB-internal discussion on the current wording of the ECB Staff Rules in Section 5.13.2. In this context, the DPO recommended to amend the Staff Rules in order to request staff members to send the medical certificate directly to the controller rather than via their immediate manager.

In 2002, the ECB's DPO recommended to inform ECB managers that all retrospective sick leave data should be removed from local absence planners (usually accessible by all staff in a business area via shared drives) on a regular basis, at the latest once the quarterly reconciliation exercise with the controller's PERBIT report has been completed. On 4 December 2002 the

responsible Division in Directorate Human Resources sent a note with the relevant instructions as regards the handling of historic information to all ECB Management.

2.2. Legal aspects

2.2.1. Prior checking

The prior checking relates to the processing of personal data related to sick leave. The PERBIT database which processes all kinds of leave is not subject to prior checking here.

The present processing of personal data falls within the scope of Regulation (EC) 45/2001 since the processing is partly operated by automatic means and when operated manually, the processing forms part of a filing system or is intended to form part of a filing system (Article 3 (2) of the Regulation 45/2001).

Article 27 (1) of Regulation (EC) 45/2001 subjects to prior checking by the EDPS all "processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes". Article 27 (2)(a) of the Regulation contains a list of processing operations that are likely to present such risks such as processing of data relating to health. The sick leave may reveal elements about the health status of the data subject and the medical certificates contain data related to health as it provides information on the specialization of the doctor signing the form. The processing involves data relating to health and qualified as a "special" category of data, subject to the provisions of Article 10 of the Regulation (see below 2.2.3).

Since prior checking is designed to address situations that are likely to present certain risks, the opinion of the EDPS should be given prior to the start of the processing operation. In this case however the processing operation has already been established. This is not a serious problem however as far as any recommendations made by the EDPS may still be adopted accordingly.

The notification of the DPO was received on 30 June 2005. According to Article 27(4) the present opinion must be delivered within a period of two months that is no later than 30 August 2005. The requests for information suspended the delay for a period of 26 days extending the date to 26 September 2005.

2.2.2. Legal basis for and lawfulness of the processing

The processing of data related to sick leave is based on Article 31 of the ECB Conditions of Employment and on Article 28 of the ECB Conditions of Short-term Employment. The provisions of those Articles are developed in Article 5.13 of the ECB Staff Rules and in Article 5.10 of the ECB Staff Rules for Short-term Employment.

In order to implement those legal provisions the controller has to record the absences of ECB staff members related to illness or accident.

The lawfulness of the processing is to be found in the Article 5 (a) of the Regulation (EC) 45/2001, as the processing is necessary for the performance of a task carried out in the public interest on the basis of legal instruments adopted on the basis of the Treaties establishing the European Communities and in the legitimate exercise of an official authority vested in the Community institution. Moreover the preamble (§ 27) of the Regulation (EC) 45/2001 provides that it "includes the processing of personal data necessary for the management and functioning

of those institutions and bodies". The legal basis found in the ECB Conditions of Employment and in the ECB Staff Rules supports the lawfulness of the processing operation.

2.2.3. Processing of special categories of data

According to Article 10 of the Regulation 45/2001, processing personal data concerning health is prohibited unless grounds can be found in Article 10(2) or 10(3).

This case deals with the processing of personal data related to health as the sick leave may reveal elements relating to the health status of the data subject. Moreover, when a medical certificate is provided, the specialization of the doctor potentially provides additional information on the health of the data subject.

As has been explained above concerning the legal basis, the justification for processing of such data is to be found in the ECB Conditions of Employment and is therefore compliant with Article 10(2)(b) according to which the prohibition shall not apply where the processing is "necessary for the purposes of complying with the specific rights and obligations of the controller in the field of Employment law insofar as it is authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof". As the processing of data related to health is based on the ECB Staff Rules (5.13), it can be considered necessary to comply with rights and obligations of the controller.

2.2.4. Data Quality

According to Article 4 (1) (c), data must be adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed. The data collected in the case of sick leave with or without medical certificates seems to be adequate, relevant and non excessive for the sick leave management.

Article 4(1) (d) provides that the data must be accurate and where necessary kept up to date. This Article further provides "that every reasonable step must be taken to ensure that the data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified". The system described ensures a reasonable accuracy of data. The rights of access and rectification of the data subject to his/her own data are also a means of guaranteeing the accuracy and to ensuring that his/her data is kept up to date (see right of access 2.2.10).

2.2.5. Conservation of data/ Data retention

The general principle in the Regulation (EC) 45/2001 is that personal data may be kept in a form which permits identification of data subjects for no longer than is necessary for which the data are collected and/or further processed (Article 4(1) (e) of the Regulation).

In the present case, the three categories of data are kept for limited period of time. The EDPS welcomes the establishment of a time frame within which the data may be kept.

For the category 1, the e-mails kept in the separate file must be destroyed after three years. This conservation period allows to a large extent the management of the number of uncertified absences per annum (Article 5.13.2 of the ECB Staff Rules).

For the category 2 the medical certificate shall be destroyed ten years after staff members have left the ECB as the rules applicable to the conservation of the personal file apply. There seems to be no reason for such a long period of sick leave management and no further processing is described. A new time limit period should be introduced. The original medical certificates should be erased at the latest a few years after the period within which the data could be disputed or revised.

The data related to health stored in the PERBIT database shall be destroyed ten years after staff members have left the ECB. This period of conservation seems to also exceed the necessary period for sick leave management. The EDPS is of the opinion that the data should be erased at the latest a few years after the period within which the data could be disputed or revised.

The EDPS is of the opinion that a reasonable time limit should be also established for the conservation of the quarterly reports produced by PERBIT and sent to the local managers for information.

2.2.6. Compatible use / Change of purpose

The Article 4 (1) (b) provides that purposes for which the data are further processed must be compatible with the initial purpose. After being processed manually by the local management the data are processed automatically and stored in the electronic database PERBIT where all kinds of absences are recorded. The purpose of the secondary processing is fully compatible as it allows the implementation of the legal provisions on sick leave.

2.2.7. Transfer of data

Article 7 of the Regulation provides that personal data shall only be transferred within or to other Community institutions or bodies if the data are necessary for the legitimate performance of the tasks covered by the competence of the recipient.

The recipients vary according to the category of data. In category 2 (sick leave with medical certificate), according to the ECB Staff Rules on sick leave, the medical certificate must be sent to the staff member's immediate manager as soon as possible. The EDPS is of the opinion that there is no need for the immediate manager to see the medical certificate for the legitimate performance of his/her tasks. The staff member's immediate manager is informed before 10 a.m. of the absence of his/her staff member (Article 5.13.1, ECB Staff Rules) and is so able to manage the internal organisation of his/her service. Therefore the EDPS welcomes the ECB internal discussion initiated by the DPO who recommends sending the medical certificate directly to the controller rather than via their immediate manager. The original medical certificate is stored afterwards in the personal file. Nevertheless, according to Article 5.13.2 of the ECB Staff Rules, the medical certificate should be kept in a sick leave record. The EDPS is of the opinion that the medical certificate should be removed from the personal file and should be kept in the medical file in order to be compliant with Article 1.3.1 of the ECB Staff Rules, which is based on the principle of keeping data relating to health as separate as possible from other administrative data. In the future the medical certificate should be placed directly in the medical file.

The data contained in the PERBIT database (category 3) are transmitted on a quarterly basis to the data subject's local manager. This transfer might be considered as necessary for the legitimate performance of the tasks covered by the competence of the recipient that is for the

checking of all absences in his/her service provided that the leaves manager and his/her direct secretary remains the only recipient.

The EDPS considered that this sharing of information is necessary for the legitimate performance of the tasks covered by the competence of the recipient. Nevertheless it should be ensured that the recipient only processes the data for the purposes for which they have been transmitted which is the sick leaves management.

2.2.8. Processing of personal number or unique identifier

The ECB uses the personal number. While the use of an identifier is, in itself, no more than a means (and a legitimate one in this case) of facilitating the task of the personal data controller, its effects may nevertheless be significant. This was why the European legislator decided to regulate the use of identifying numbers under Article 10(6) of the Regulation (EC) 2001, which makes provision for action by the European Data Protection Supervisor. Here, it is not a case of establishing the conditions under which the ECB may process the personal number, but rather of drawing attention to this point in the Regulation. In this instance, the ECB's use of the personal number is reasonable because it is a means of facilitating the processing task, in particular archiving.

2.2.9. Right of access and rectification

According to Article 13 of the Regulation, the data subject shall notably have the right to obtain without constraint from the controller, communication in an intelligible form of the data undergoing the processing and any available information as to their source.

According to the general rules of the personal file (Article 1.3.4 of the ECB Staff Rules), once the original medical certificates are incorporated in the personal file each member staff has the right at any time, even after leaving the ECB, to access his/her personal file and consequently to his/her medical certificates. As mentioned above the EDPS considers that the medical certificates should not be kept in the personal file but in the medical file. Therefore the EDPS underlines that measures to ensure the right of access to the medical certificate stored in the medical file should be taken.

For accessing the data in the separate file containing e-mails (kept centrally by the controller) and the data contained in the PERBIT database the data subject has to contact the controller and ask for a printout. The EDPS is of the opinion that the right of access is therefore granted. The right of access to the quarterly report sent to the local management should be guaranteed in the same way to the data subject.

2.2.10. Information to the data subject

Articles 11 and 12 of the Regulation 45/2001 provide for information to be given to data subjects in order to ensure the fairness of the processing of personal data. Article 11 provides that when the data is obtained from the data subject, the information must be given at the time of collection. When the data have not been obtained from the data subject, the information must be given when the data are first recorded or disclosed, unless the data subject already has it.

In this case, information is at first obtained from the data subject through the medical certificate provided or through the information provided on his/her absence. The data subject can find the adequate information on the processing of his/her data in the Conditions of Employment and in

the Staff Rules, except for the storing of the medical certificate. The EDPS remarks that Articles in the Staff Rules on the personal file and the sick leave mean that the certificate will be kept in the medical file and not in the personal file. The data subject should have been well informed on the storage of his/her medical certificate as it entails different recipients from those following from the medical file. Indeed, to be compliant with Article 11 (c) of the Regulation the data subject should know who the recipients or the categories of recipients of his/her data are. As mentioned above the EDPS is of the opinion that the medical certificate should be kept in the medical file. In the future the data subject should be informed on the new recipients of his data.

The information is then provided by the local management who forwards e-mails related to uncertified sick leave and medical certificates to the controller who in turn enters it into the PERBIT database. The EDPS is of the opinion that the data subject should be informed on the further processing of his/her data in the PERBIT database, the quarterly report and the separate file containing e-mails in one way or another.

Information on the recommended changes of data conservation periods should also be given to data subjects.

The Articles 11 (e) and 12 (e) provide also that information on the existence of the right of access and rectification should be supplied to the data subject in order for him/her to be able to rectify inaccurate or incomplete data (Article 14 of the Regulation 45/2001). The EDPS underlines that the data subject should be informed on his/her right of access and rectification to the PERBIT database, the quarterly report and the separate file containing printed e-mails in order to be able to exercise his/her right of access and, for instance, to rectify inaccurate or incomplete data.

2.2.11. Security measures

According to Articles 22 and 23 of the Regulation 45/2001, the controller and the processor shall implement the appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected. These security measures must in particular prevent any unauthorized disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and to prevent all other forms of unlawful processing.

After careful analysis by the EDPS of the security measures adopted, the EDPS considers that these measures are adequate in the light of Article 22 of Regulation (EC) 45/2001.

Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing the following considerations are fully taken into account:

- The medical certificates should be kept in the medical file and not in the personal file as is presently the case, according to Articles 1.3.1 of the ECB Staff Rules.
- As regards conservation of data/data retention:
 - The data contained in the PERBIT database should be erased at the latest a few years after the period within which the data could be disputed or revised.

- A reasonable time limit should be established for the conservation of the quarterly reports produced by PERBIT and sent to the local managers for information.
- The original medical certificates should be erased at the latest a few years after the period within which the data could be disputed or revised.
- As regards transfer of data:
 - In line with the proposal of the DPO of ECB, the Staff Rules (Article 5.13.2) should be amended in order to request staff members to send the medical certificate directly to the controller rather than via their immediate manager.
 - The only recipient of the quarterly reports produced by PERBIT and sent to the local manager for information, should be the local manager and his/her secretary. The EDPS underlines that the recipient should only process the data for the purposes for which they have been transmitted that is the leave management.
- As regards right of access of the data subject:
 - The right of access to the quarterly report sent to the local management should be ensured to the data subject.
- As regards information of the data subject
 - The data subject should be informed on the further processing of his/her data in the PERBIT database, in the quarterly report and in the separate file containing printed e-mails in one way or another.
 - The data subject should be informed on the change in the storage of medical certificates and on the measures ensuring the right of access, which should be taken.
 - Information should be provided to the data subject on his/her right of access to and rectification of the PERBIT database, to the separate file containing printed e-mails on sick leave without a medical certificate being provided and to the quarterly report sent to the local management.
 - Information on the recommended changes on data conservation periods should also be given to data subjects.

Done at Brussels, 23 September 2005

Joaquín BAYO-DELGADO
Assistant European Data Protection Supervisor