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Subject: Opinion on the notification for prior checking from the Data Protection Officer of the European Maritime Safety Agency concerning leave management

Dear Ms Romay Lopez,

By e-mail dated 30 April 2013, the Data Protection Officer of the European Maritime Safety Agency (EMSA) submitted a notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 ('the Regulation') concerning leave management at EMSA. A request for clarification was sent on 19 July 2013. The response was received on 24 July 2013.

The DPO sent this notification to the EDPS following the adoption on 20 December 2012 of the Guidelines in the area of Leave and Flexitime (the "Guidelines")¹. The EDPS sent the draft Opinion to EMSA on 1 October 2013 and the reply was received on the same day.

1. Legal aspects

This Opinion deals with the already existing (ex-post) leave procedures at EMSA. It is based on the Guidelines, which allows the EDPS to focus on EMSA practices that do not seem to be compliant with the leave and flexitime Guidelines and the principles of the Data Protection Regulation n°45/2001.

The EDPS takes note that, as explained in the notification, the general implementing rules of the Staff Regulations on leave, as adopted by the European Commission, apply by analogy to the staff of the Agency following EMSA Administrative Board Decisions of 24 November 2006 (leave on personal grounds for officials and unpaid leave for temporary and contract

¹ Guidelines concerning the processing of personal data in the area of leave and flexitime adopted on 20 December 2012 (EDPS (2012-0158)).

staff of the European Communities) and 10 November 2011 (Leave, Parental leave and Family Leave).

The processing has, as its objective, the management and recording of various types of leave of:

- Staff members (Annual leave; Special leave as defined in the implementing rule on leave; Sickness related absences; Flexible holiday; Time compensation for missions; Parental/family leave and leave on personal grounds (CCP));
- Seconded National Experts and National Experts in professional training (Annual leave; Special leave and Sickness related absences);
- Trainees (Annual leave and Sickness related absences).

As regards the processing of health related data in the context of leave management at EMSA, the EDPS recalls that EMSA's processing operations were analysed under the joint Opinion on health data (Opinion on notifications for prior checking received from the Data Protection Officers of certain EU agencies concerning the "processing of health data in the workplace", case 2010-0699).

As to the **information** of the data subjects, according to the notification, a clause on data protection has been put on the HR section of the EMSA Intranet. Reviewing its content, the EDPS considers that this clause is too general as it applies to "the operations performed by the Human Resources" and not specifically to the management of leave. Therefore, EMSA should adopt a specific data protection clause relating to leave management in light of Articles 11 and 12 of Regulation 45/2001 that should take into account the following comments:

- the clause should describe more precisely the purpose of the specific processing operations covered and not simply be a general reference to processing of personal data;
- the clause generally refers to the Human Resources, although the identity of the controller (Article 11 .1 of Regulation 45/2001) should be more clearly identified;
- the clause does not refer to the conservation period of the data. This is even more important as depending on the categories of leave (sick leave, annual leave, etc), the conservation periods would be different. The EDPS suggests adding to the clause the conservation periods which are mentioned in the notification, under the heading retention policy, taking into account the comments below;
- the clause does not contain a sufficiently clear reference to the recipients of the data. Also, the reference in the notification to the existence of an automatic absence calendar cannot be considered similar to identifying the recipients of the leave data;
- the clause should contain references to the legal basis of the processing operations covered;

Regarding the **conservation periods**, the EDPS notes that the notification refers to different periods depending on the categories of leave concerned. Regarding annual leave, the notification states that "*so far, EMSA has no time limit as to how long this data should be kept as this data is required to justify untaken leave or carry over for auditing purposes*". In the light of Article 4(1)(e) of Regulation 45/2001, the EDPS took the view in the Guidelines

that there is no justification for keeping the data indefinitely, given the initial purpose of collecting it. In this regard, the EDPS recalls point 5.2 of the Guidelines where he states that *"Keeping data on days of annual leave can be justified if leave is carried over from one year to the next. Moreover, it is possible that an institution/body gives consideration to other leaves taken by a person in the immediately preceding years in view of better management and coordination. Therefore, as a reasonable conservation period and in view of aligning retention periods, the EDPS accepts a retention period that would not exceed three years for annual leave"*.

Therefore, the EDPS invites EMSA to adopt a retention period and to limit this retention to a maximum of three years in the light of the Guidelines.

2. Conclusion

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

- 1 - adopts a specific data protection clause on the management of leave and completes it in the light of the comments above;
- 2 - clarifies the list of recipients, if any, in the light of the comment above;
- 3 - adopts a conservation period covering the management of annual leave data.

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

Yours sincerely,

(signed)

Giovanni BUTTARELLI

Cc : - Ms Malgorzata NESTEROWICZ, Data Protection Officer, EMSA.