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Subject: Prior-checking Opinion regarding OHC Pregnancy Self-Assessment Data at EIB (EDPS case 2016-0614)

Dear [...],

On 4 July 2016 the European Data Protection Supervisor (EDPS) received a notification for prior checking under Article 27 of Regulation (EC) No 45/2001¹ ('the Regulation') on Occupational Health Centre (OHC) Pregnancy self-assessment data from the Data Protection Officer (DPO) of the European Investment Bank (EIB).

The EDPS has issued Guidelines concerning the processing of health data in the workplace by Community institutions and bodies² ('the Guidelines'). Therefore, this Opinion analyses and highlights only those practices which do not seem to be in conformity with the principles of the Regulation and with the Guidelines. In the light of the accountability principle guiding his work, the EDPS would nonetheless like to highlight that *all* relevant recommendations made in the Guidelines apply to the processing operations put in place for the OHC Pregnancy self-assessment data at the EIB.

1. Facts of the case

The *purpose* of the OHC prenatal self-assessment is to evaluate any degree of risk during EIB employees' pregnancy and to adequately advise in the context of the working environment.

¹ OJ L 8, 12.1.2001, p. 1.

² Available on the EDPS website: https://edps.europa.eu/sites/edp/files/publication/09-09-28_guidelines_healthdata_atwork_en.pdf

It is the responsibility of all pregnant staff to inform the OHC about their condition as early as possible. Upon receipt of the pregnancy notification, a ‘prenatal self-assessment’ document is sent to the staff member, and upon voluntary completion, the Occupational Health Nurse will meet the staff member in order to complete a risk assessment action-plan, resulting in an ‘Occupational Health Service Assessment’ document. Following such procedure, with the staff member’s agreement, the Occupational Health Physician will provide the line manager/business partner with written recommendations.

This processing activity involve processing of *health data*, in particular medical data relating to the pregnancy. This information can be provided in the self-assessment form or during the meeting with the nurse and the recommendations in the action-plan could for example concern adaptation in the work environment and advice not to undertake missions to malaria zones. Medical certificates from gynecologists and other doctors will not be processed for this purpose.

Regarding *information to data subjects*, the notification states that the Policy on pregnancy and the maternity period (‘the Policy’) will be published and available through the EIB intranet. The EIB has furthermore explained that there is no specific privacy notice for this processing activity but for the purpose of such notice serves at the moment the general notification covering all services handled by the medical service. This notification is on display in the OHS reception.

Concerning *data retention*, records will be kept on file for the duration of the staff’s employment at the EIB. Upon request the EIB has explained that the documents are only kept in the medical file and the same conservation period applies as for all medical information in those files. Records older than ten years will be kept by the EIB’s central archives, instead of at the OHC. However, only OHC authorised personnel will have access to the files. At the end of employment, staff members will have a copy of their personal medical record, while the original documents will be kept for 30 years upon termination of employment. Records relating to the management of the OHC, such as timetables of reservations, will be kept for a period of five years. Only OHC authorised personnel have access to such data.

2. Analysis

2.1. Legal basis and lawfulness

The EIB has explained that they consider several documents/internal rules as legal basis for this processing activity. In accordance with article 30 of the EIB Staff Regulations³ staff are entitled to paid maternity leave on production of a medical certificate. Furthermore, the EIB mentions articles 3⁴, 5⁵, 7⁶ and annex VI⁷ of the EIB Staff Rules regarding part-time work and section 2.1.2 of annex X⁸ on non-mandatory medical assessments and their Policy. On the basis of these

³ Available on the EIB website: http://www.eib.org/attachments/general/eib_staff_regulations_2018_en.pdf

⁴ Regarding working hours

⁵ Regarding absence of duty

⁶ Regarding preventive medicine

⁷ Provisions governing part time work

⁸ Regarding medical administrative procedures

articles, the EIB has decided to offer this voluntary risk assessment of the individual's work place and tasks to ensure that, where possible, any risks should be removed or working conditions should be adapted to protect the pregnant staff member and her unborn child.

The EIB has stated that this risk assessment is voluntary for the staff member. If the employees wish to undertake the pregnancy self-assessment, they would have to sign the pregnancy self-assessment form (which is considered as consent) and return it to the OHC. The Policy does however mention that, on notification of pregnancy, the OHC is required to carry out a risk assessment of the individual's work place and tasks and make recommendations to ensure that, where possible, any risks should be removed or working conditions should be adapted to protect the pregnant staff member and the unborn child. In our understanding, this is not in line with what EIB has stated about the processing activity being 'voluntary'. If it is 'voluntary', the OHC may only carry out a risk assessment and make recommendations after the person signs and agrees to the pregnancy self-assessment.

In this regard, the EDPS would like to point out that the data subject's consent is defined in Article 2(h) of the Regulation as '*any freely given specific and informed indication of his or her wishes by which the data subject signifies his or her agreement to personal data relating to him or her being processed*'. The EDPS stresses that consent should be used with caution in the employment context. Such consent is valid only in exceptional circumstances where the employee has a genuine free choice and is subsequently able to withdraw the consent without negative consequences. To be valid, consent has to be 'informed' (see below).⁹

The EDPS recommends amending the Policy so it is clear that the procedure is voluntary for the pregnant staff without negative consequences for an employee who does not participate in the OHC pregnancy self-assessment.

2.2. Information to data subjects

The EIB has described that there is no privacy notice for this specific procedure but that the Policy will be published on the intranet and that the notification covering all services handled by the medical service will be displayed in the OHS reception.

However, neither the Policy nor the notification include all of the elements listed in Article 11 of the Regulation, such as the identity of the controller, the purposes of the processing, and further information such as the legal basis and the fact that the procedure is voluntary (see the recommendation above). Therefore, the EIB should draft a data protection statement including all the requirements under Article 11 of the Regulation and ensure that employees are provided with this information before deciding whether to participate or not.

⁹ Article 29 Data Protection Working Party Opinions 8/2001 of 13 September 2001 on processing of personal data in the employment context and 2/2017 of 8 June 2017 on data processing at work.

The EDPS recommends drafting a data protection statement including all the required information items under Article 11 of the Regulation and provide it to the individuals before they decide to participate in the risk assessment.

3. Conclusion

In this Opinion, the EDPS has made some recommendations to ensure compliance with the Regulation. Provided that the recommendations are implemented, the EDPS sees no reason to believe that there is a breach of the Regulation.

In light of the accountability principle, the EDPS expects the EIB to implement the above recommendations accordingly and has therefore decided to **close the case**.

Yours sincerely,

(signed)

Wojciech Rafał WIEWIÓROWSKI

Cc.: [...], Data Protection Officer, EIB