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Subject: Opinion on the notification for prior checking from the Data Protection Officer of the European Central Bank on leave management

Dear [...],

On 15 April 2013, the European Data Protection Supervisor ("EDPS") received from the Data Protection Officer ("DPO") of the **European Central Bank ("ECB")** a notification for prior checking covering leave management.

The cover letter and notification were accompanied by two annexes (ECB Conditions of employment 2013 and ECB Staff Rules 2013).

The notification was sent to the EDPS following the adoption on 20 December 2012 of the Guidelines on Leave and Flexitime (the "Guidelines"). The analysis does not cover flexitime because, as stated in the cover letter, the ECB does not process personal data for flexitime purposes nor does it operate any flexitime system. As the processing operations are already in place, the deadline of two months for the EDPS to issue his Opinion does not apply. This case has been dealt with on a best-effort basis.

Legal aspects

This Opinion deals with the already existing leave procedures at the ECB. It is based on the Guidelines, which allows the EDPS to focus on the ECB practices that do not seem to be compliant with the Guidelines and the principles of Regulation EC No 45/2001 ("the Regulation").

The notification covers data processing operations related to handling of data on all forms¹ of differentiated working patterns and of absences² of staff members with permanent or fixed term contracts, staff members with a short-term contract and participants in the Graduate Programme.

As already underlined in the Guidelines (in its footnote 4) some EU institutions and bodies, like the ECB, are not subject to the EU Staff Regulations and the conditions of Employment of Other Servants, as they have their own statutory labour and social security law framework. However, they remain subject to the Regulation for what concerns the protection of personal data in the various processing operations.

The cover letter provided by the DPO details the divergent views on particular data protection issues outlined in the Guidelines. These diverging views relate to the **retention periods**.

The notification specifies that **to date, all information** is kept for 10 years after the ceasing of the staff member's employment with the ECB or after the last ECB pension payment by the ECB (Article 1.1.5 of the Staff Rules—'general retention rule for the personal file'). The exception to this are the medical certificates and relating documents required for the application of the Conditions of Employment which are currently retained for a maximum period of five years commencing on the date of their submission (also Article 1.1.5 of the Staff Rules).

For the future, the ECB considers that the following retention periods could be applied depending on the type of leave and the purposes for which the data are collected and processed:

- Firstly, as regards the retention period of **sick leave records**, the ECB considers that a retention period of five years applicable to the sick leave records held by the Health and Safety function within the Directorate General Human Resources is needed as currently foreseen in the ECB's Staff Rules. Article 1.1.5 states, among others, that medical certificates and relating documents required for the application of the Conditions of Employment shall be retained for a maximum of five years commencing on the date of their submission.

In his Guidelines, the EDPS considered that a three years retention period should normally be sufficient in the case of sick leave records, covering the administrative data. As the ECB's Staff Rules foresee a maximum of 5 years, a retention period of 3 years, as suggested by the EDPS, would also respect the ECB's Staff Rules.

At this stage, the EDPS finds it useful to remind the ECB what he understands by health related data. This was already explained in the EDPS Guidelines concerning the processing of health data in the workplace by (EU) institutions and bodies adopted on 28 September 2009: "*The notion of health data in the context of the guidelines mainly refers to two different forms of data. First, it refers to **medical files** that are kept at a doctor's practice or at the medical service of an EU institution. Medical files include medical reports, laboratory tests, medical questionnaires (e.g. at the pre-recruitment medical examination phase). Second, it refers to*

¹ Except absence for illness or accident of staff members, which are dealt with in separate prior checking notifications filed with the EDPS, see Case 2012-0792 on the accident and occupational disease procedure, Case 2004-277 on the recording of absences and Case 2006-240/241 on the ECB medical files.

² This covers: Part-time, overtime and on-call duties, shift work duties, teleworking, annual leave, maternity and adoptive leave, parental leave, special leave for marriage (staff member, family member of relative), special leave due to death (family member of relative), special leave due to birth or adoption of a child, special leave for change of residence of the member of staff, leave for sickness of dependent child and sickness of family/relative, special leave for hospitalisation of dependent child, special leave for travelling and unpaid leave.

administrative documents that include personal data relating to the health status of a person. Amongst those documents are medical certificates (e.g. documents certifying medical aptitude for work), forms concerning sick leave or the reimbursement of medical expenses". Therefore, it is normally important to distinguish these two as the retention periods of the medical data on one side and of the administrative documents that include personal data relating to health on the other side may vary.

- Secondly, for the exercise and defence of legal claims in regard to medical cases where the medical consequences of prolonged exposure to certain substances (like asbestos) occur after a long period, the ECB would like to transfer all sick leave to the ECB Medical Centre (not part of the Directorate General Human Resources). Such transfer would imply that the ECB would not have recourse to such medical data but only the Medical Adviser would be able to access the data for the above purpose and where need be to issue a medical opinion in this respect. The sick leave data and sick leave certificates held by the Health and Safety function in the Directorate General Human Resources would be destroyed following the transfer of the sick leave data to the Medical Centre after the expiry of the above-referred retention period of five years.

As stated in the Guidelines, the conservation of medical data by medical services is covered by the Guidelines on health at work. Moreover, the Guidelines also foresee the case where an institution or body intends to keep for a longer period sick leave records that could relate to medical cases where the medical consequences of prolonged exposure to certain substances occurs after a rather long period (as can be the case for asbestos or radiation exposure). In this case, the Guidelines state that this should be specifically foreseen in the health data procedure submitted.

- Thirdly, as regards the retention period of **annual leave** (for which a period of maximum 3 years is foreseen in the Guidelines), the ECB explains in its cover letter that it was made aware of technical reasons in the ECB's IT system dealing with the HR Administration (SAP) preventing the ECB to implement the recommended retention schedule.

The ECB states that the deletion of the individual data necessitates that the carry-over totals are locked which implies in turn that staff members would not be able anymore to claim the carried-over leave days of the past. As a consequence, the ECB states that the general retention rule applicable to the personal file (Article 1.1.5 Staff Rules-10 years after the ceasing of the staff member's employment with the ECB or following the last pension payment by the ECB) has to remain applicable.

Besides, the ECB states that it remains committed to implement for the future a limited retention period for the annual leave "*to the extent an effective and economically acceptable technical solution can be found. Such solution would imply that (a) the data in relation to the carry-over totals in the SAP system would be retained until leaving the service; and (b) the detailed info on the leave would only be retained up to two years (amongst others to guarantee local management to apply a fair and coordinated holiday policy and to have the required data for the preparation of the next annual HR Report for statistical purposes)*".

The EDPS welcomes that the ECB wants to implement a shorter retention period than the current one which is linked to the retention period of the personal file.

The EDPS invites the ECB to pursue its tasks in view of reducing the retention period of annual leave to two years by studying further the modification of its retention periods regarding annual leave data.

As regards the **information**, besides informing the data subjects about the most important provisions laid down in the ECB Rules and Orientations during induction seminars and publication on the intranet, the notification states that the ECB is in the process of elaborating and fine-tuning a comprehensive data privacy statement, to be incorporated in the various forms and, in case the input is inserted directly by the staff members, also in ISIS³.

The EDPS could not analyse the data protection statement and invites the ECB to send it for analysis as soon as it is made available.

In this regard, the EDPS would like to draw the attention of the ECB to the case where a leave request is linked to the health situation of a family member. In such case, the EDPS considers that the privacy statement should foresee the communication of information to this family member whose personal data are processed by the ECB. If the EDPS admits that direct provision of such information would involve disproportionate efforts by the ECB, he considers that the institution, amongst other appropriate steps, could at least ask staff members submitting such data to inform the family members concerned about the processing of their personal data and their rights in that respect. This could be done by adding a specific sentence in privacy statement being elaborated.

Furthermore, the declaration of confidentiality to be signed by staff members dealing with health related data, as underlined under point 10 of the Guidelines, is missing. This should be provided in the follow-up phase for analysis.

Conclusion

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

- 1- re-assess its retention periods in line with the comments above and inform the EDPS about it;
- 2- provides the EDPS with a copy of the declaration of confidentiality to be signed by ECB staff dealing with health related data;
- 3- provides the privacy statement as explained above, including the information to the family members of staff.

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

[signed]
Giovanni BUTTARELLI

Cc: [...], Data Protection Officer, European Central Bank

³ ISIS is a SAP-based software system, which was introduced at the ECB in January 2008, relating to human resources management. This portal is available to all ECB staff through the intranet.