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WW/XK/sn/D(2016)0513 C 2013-0956
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correspondence

Subject: Prior-check Opinion on the processing of health data at the Electronic Components and Systems for European Leadership (ECSEL Joint Undertaking), case 2013-0956.

Dear Mr. De Colvenaer,

We have analysed the updated notification and revised documents you have provided to the EDPS for prior-checking under Article 27(2)(a) of the Regulation (EC) n° 45/2001 (the Regulation) on the processing of health data at the ECSEL Joint Undertaking (**ECSEL JU**). The purpose of this processing is to assess the aptness of staff members in the context of pre-recruitment and annual medical check-ups and to manage their absences in case of sick leave and special 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 are 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.

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.

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

1) Legal basis

The legal basis is one of the conditions for a processing operation to be lawful under Article 5(a) of the Regulation.

ECSEL JU has not stated the relevant legal basis of the processing related to annual check-up and to special leave.

The notification should therefore be updated accordingly.

2) Services of a private practitioner

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

The EDPS reminds ECSEL 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 mention any special accommodations or working conditions the staff members might need.

ECSEL 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

The notification lists the Commission's medical service as recipient. ECSEL JU has concluded a SLA with the Commission's medical service for carrying out the medical visits. In light of Article 23 of the Regulation, this party is acting on behalf of the ECSEL JU and is therefore classed as a data processor. This is because it is obliged to carry out the processing only on instructions from the controller - ECSEL JU (Article 23(2)(a)). Its obligations regarding confidentiality and security measures are also laid down in the SLA (Article 23(2)(b)).

ECSEL JU should therefore clarify in both the notification and the privacy statement that the Commission's medical service acts as a data processor on behalf of ECSEL JU in light of the requirements of Article 23 of the Regulation.

4) Quality of data

ECSEL JU pointed out that the agency has no access to medical information from its staff members.

However, both the notification and the privacy statement mention that the HR Department of ECSEL JU collects sick leave certificates from the staff members and keeps them in their personal files.

Sick leave and some special leave certificates are considered as 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 ECSEL JU should, under Article 4(1)(c) of the Regulation, only keep information which is adequate, relevant and necessary for the purpose for which it needs to collect them, 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.

ECSEL JU should modify its policy and should ensure that its staff members send their sick leave certificates directly to the Commission's medical service. The Commission will then inform the HR about the administrative related data, such as the name, surname and duration of absence of the staff member.

5) Retention periods and storage

The notification and the privacy statement state "*ten years after the end of the period during which a staff member is in active employment or the last pension payment*", but they do not specify for which data this retention period applies.

Medical data concerning the pre-recruitment and the 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 ten years after the end of the period during which a staff member is in active employment or the last pension payment.

ECSEL JU should update the notification accordingly.

6) Information to be given to the data subject

Identity of the controller

The privacy statement mentions the Head of Administration as controller. The EDPS reminds ECSEL JU that from a legal perspective, ECSEL JU is the responsible controller of these processing operations. In practice, the HR Department of ECSEL JU is responsible for internally managing the processing operations under analysis, as it is correctly indicated in point 2 of the notification. A contact person from the HR should also be indicated in the privacy statement, so that data subjects may contact him directly, allowing written requests and confidentiality.

The recipients of the data

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

Right of access

On the basis of Articles 11(1)(e) and 12(1)(e) of the Regulation, ECSEL JU should add to the privacy statement that data subjects can have indirect access - instead of direct access- to their

psychiatric and psychological reports via a doctor appointed by them³.

Legal basis

Under Articles 11(1)(f)(i) and 12(1)(f)(i) of the Regulation, ECSEL JU should indicate the legal basis for annual check-ups and special leave (see point 1 above).

The time-limits for storing the data

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

The right to recourse to the EDPS

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

ECSEL JU should revise accordingly the privacy statement.

In light of the accountability principle, the EDPS trusts that the ECSEL JU will duly implement the above recommendations so that the processing under analysis is 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 Rafał WIEWIÓROWSKI

Cc: Mr Marc JEUNIAUX, Head of Administration.
Ms Anne SALAUN, Data Protection Officer.

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