

Opinion on the notification for prior checking from the European Commission's Data Protection Officer regarding the "Checks on absences due to illness - Brussels, Luxembourg" case.

Brussels, 11 October 2007 (Case 2004-226)

1. Procedure

By electronic mail received on 21 February 2007, notification within the meaning of Article 27 of Regulation (EC) No 45/2001 was carried out by the Commission's Data Protection Officer (DPO) concerning the "Checks on absences due to illness" (case 2004-226). This processing operation features on the list of operations subject to prior checking submitted by the DPO to the European Data Protection Supervisor (EDPS) in September 2004.

The notification was sent together with a number of documents, including:

- the Decision by the Board of Heads of Administration concerning access of officials and other servants to their medical files (Conclusion 221/04);
- the confidentiality statement concerning the procedure for checks on absences due to illness;
- a description of the procedure for checks on absences due to illness;
- Commission Decision C(2004) 1597 introducing implementing provisions on absences as a result of sickness or accident;
- screen printouts from the SERMED support tool;
- copies of documents produced by the examining doctor;
- a note drawn up to establish a common approach within DG ADMIN to the rules on sick leave;
- extracts from the Staff Regulations concerning checks on absences due to illness;

In connection with this case, questions were put to the controller via the DPO on 13 March 2007. The controller replied on 26 June 2007.

In order to enable the DPO to provide the additional information and relevant comments, the deadline was suspended for 105 days plus 68 days for comments.

2. Facts

Checks on absences due to illness by the Brussels and Luxembourg Medical Services concern officials, temporary staff, contractual staff and seconded national experts working at the Commission in Brussels or Luxembourg or at one of the agencies with which an agreement to that effect has been signed or is being negotiated with the Medical Service.

Purposes

Under Article 59 of the Staff Regulations¹, "an official who provides evidence of being unable to carry out his duties by reason of illness or accident shall be entitled to sick leave". Furthermore, "the official may at any time be required to undergo a medical examination arranged by the institution. If the examination cannot take place for reasons attributable to the official, his absence shall be considered as unauthorised as from the date that the examination is due to take place. If the finding made in the examination is that the official is able to carry out his duties, his absence shall, subject to the following sub-paragraph, be regarded as unjustified from the date of the examination".

Commission Decision No 92-2004 of 6 July 2004 introducing implementing provisions on absences as a result of sickness or accident lays down the relevant implementing rules (see in particular section II.e Medical Examination).

The purpose of checks on absences due to illness is to ensure that the absence is justified and that the duration of the absence is in proportion to the nature of the illness.

Procedure for the decision to arrange a medical examination for the purposes of a check

A medical examination for the purposes of a check may be requested:

- by the data subject himself;
- by the Head of Human Resources (HRD) of the DG to which the data subject is assigned;
- by the competent examining doctor.

The criteria for checks defined within the framework of the medical examination provisions of the Staff Regulations and which can result in a request for a medical examination are: absences totalling 20 days or more over a two-month period, in the light of the diagnosis (if recorded on the medical certificate); the proportionality of the absence to the nature of the illness.

- ❖ First criterion for checks: absences totalling 20 days or more over a two-month period. Using SERMED (see below), the examining doctor extracts on a regular basis, by defining a specific observation period, a list of persons based on the following criteria:
 - "C": SERMED special calculation case (total absences in excess of 20 days over the last two months);
 - "F": potential future case (absence over the two last months + new illness reported and ongoing at the end of the observation period. The sum of the days of absence for the new illness and the days of absence over the observation period will result during the following month in more than 19 days of absence over a two-month period);
 - "M": manually triggered special case. By changing the end of a period of temporary incapacity manually, a special "C" or "F" case can be triggered in SERMED².

The report produced by SERMED displays in the case of a

1. "special case = C" extract

- the date on which the duration of an absence due to illness reaches 20 days;
- the total number of days of absence due to illness over the last three years (with a view to initiating an invalidity procedure);

¹ See Articles 16, 59, 60 and 91 of the Conditions of employment of other servants (CEOS) for other staff members.

² There are no known cases where this function has been used. According to the notification received by the EDPS, the function is to be eliminated.

- the total number of days of absence due to illness over the last two months (by definition 20 days or more);
- the type of medical certificate (half-time sick leave, etc).

2. "special case = F" extract

- the date of the latest current medical certificate and the beginning and end of the period of temporary incapacity (with the end of the period postdating the end of the observation period defined as a selection criterion);
- the total number of days of absence for illness over the last three years (with a view to initiating an invalidity procedure);
- the total number of days of absence due to illness over the two month period ending on the date of the end of the observation period;

SERMED extracts based on this criterion for checks are produced on a weekly basis in Luxembourg and on a daily basis in Brussels.

- ❖ Second criterion for checks: the proportionality of the duration of the absence (full or partial incapacity) to the nature of the illness is examined as follows:
After being recorded in SERMED, medical certificates are filed chronologically in files kept by the examining doctor in secure archives. In Luxembourg, where the examining doctor does not have an office of his own, the files are kept in the secure archives of the Medical Service. Given the distinction between preventive medicine and medicine for the purposes of checks, the examining doctor has access to medical certificates only, not to the data subject's medical file. On the basis of the medical certificates submitted, the examining doctor determines whether the duration of the absence is consistent with the nature of the illness.

Procedure for arranging a medical examination for the purposes of a check

The examining doctor examines situations on a case-by-case basis to decide whether a medical examination is warranted.

The official/other servant/SNE who is required to undergo a medical examination is notified by post (letter or e-mail) or (very exceptionally) by telephone. Since 1 December 2006, a confidentiality statement has been sent systematically together with the notification.

If the official/servant/SNE is unable to travel, he must inform the examining doctor accordingly and send him a medical certificate attesting to the fact that he is unable to travel. If he fails to attend the medical examination for no valid reason, his absence will be regarded as unauthorised from the date on which the examination was due to take place.

Examination by the examining doctor and outcome of the examination

During the medical examination, the examining doctor examines the data subject (where an examination is warranted by the medical condition alleged) and asks him questions. At the end of the examination, a document is signed by the examining doctor and the data subject and sent by secure means (in an envelope marked "Medical Secret") to the HRD. A copy of the document is given to the data subject. The original is kept in the examining doctor's files. Another copy is sent by secure means to the Medical Service for filing in the data subject's medical file *per se*.

The document specifies the data subject's name, personnel number and post, the date of the examination and the examining doctor's decision ("fit" or "unfit" to return to work). In the "comments" box, the doctor may suggest, for example, a meeting with the hierarchy to discuss working conditions if problems are mentioned by the person examined. The examining doctor

may also contact the HRD concerned or recommend that the person consult an occupational health expert if environmental problems are an issue.

The outcome of the medical examination (fit/unfit and date of return to work) is also entered into SERMED.

If the data subject considers the examining doctor's conclusions to be unjustified, he or a doctor acting on his behalf may within two days submit to the institution a request that the matter be referred for arbitration to an independent doctor chosen by common consent of the examining doctor and the data subject's doctor. In the absence of such agreement within five days of the request, the institution selects a person from a list of independent doctors established and reviewed as and when required by common consent of the Appointing Authority and the Staff Committee. The official may, within two working days, object to the institution's choice, whereupon the institution chooses another person from the list, which choice is final.

The independent doctor's opinion given after consultation of the official's doctor and the institution's medical officer is binding. Where the independent doctor's opinion confirms the conclusion of the examination arranged by the institution, the absence is treated as unjustified from the date of the examination. Where the independent doctor's opinion does not confirm the conclusion of the examination, the absence is treated for all purposes as justified.

The outcome of the arbitration procedure is entered into SERMED ("confirmation of the examining doctor's opinion" or "annulment of the examining doctor's opinion").

SERMED – Medical Examination Management Module for the purposes of Checks

Examinations using the aforementioned criteria are performed with the help of SERMED, the computer application which manages the activities of the European Commission's medical services. SERMED is also used to manage factual information on the various stages of medical examinations for the purposes of a check ("examinations management" module). Only the examining doctor responsible for monitoring absences due to illness, the medical officers of the Medical Service and their secretariat have access to SERMED.

The letter notifying the data subject of a medical examination is generated by the application (see above).

In addition to the administrative data (staff number, name, date of birth and post) which are downloaded automatically from SYSPER to SERMED, the examining doctor or his or her secretariat enters the following factual data when recording a medical examination for the purposes of a check:

- the date of the medical examination;
- information as to whether or not the person attended the medical examination and, if not, whether he or she cancelled the appointment,
- the name of the examining doctor;
- the person who arranged for the medical examination;
- the decision of the examining doctor: fit/unfit, absence justified/unjustified, date on which work is to be resumed (where absence is unjustified); unfit to work before ... (where absence is justified),
- two "comments" boxes to be ticked by the examining doctor as appropriate, namely "problem at workplace" or "invalidity procedure" (where that procedure needs to be launched), and
- one "comments" box in which the examining doctor enters information enabling him to monitor the absence (i.e. his or her own notes, plus references "certificate

approved", "decision of examining doctor confirmed by arbitration" or "medical certificate validated by arbitration").

Once the result of the examination has been entered, SERMED can be used to generate automatically and print the note setting out the examining doctor's decision for the HRD. Any arbitration request by the data subject is recorded in SERMED. Likewise, SERMED is updated so as to show the outcome of arbitration.

Excel Table

An Excel table is created and managed by the examining doctor. Its purpose is the medical monitoring on an individual and global basis of the population concerned with a view to identifying trends or recurring and persistent problems and proposing preventive measures. The table can be accessed by the examining doctor and his secretariat only. [...]

In addition to the administrative data and the data entered in SERMED, the table contains information which the examining doctor requires to monitor the population concerned. Such information includes, for example, contacts with managers in the human resources department in connection with, for example, a reassignment in the case of problems to do with the work environment, and their outcome; information on the state of health of individuals (type of medical condition, illness, injury, etc); information on changes in the state of health of data subjects.

An anonymous version of the table, i.e. the table without the SYSPER administrative data on the population concerned, is sent by the examining doctor to the medical service for the production of anonymous statistics to, for example, identify trends within the context of absenteeism or recurring and persistent problems to do with the work environment.

Information to be given to the data subject

A confidentiality statement is sent to the data subject when he is asked to attend a medical examination for the purposes of a check. The statement gives information on the examination procedure and its purpose, the identity of the controller, the type of data collected, the authorities or persons to whom the data are communicated, the right of access to the data, the right to rectify the data, the data retention period and the right of recourse to the EDPS.

Rights of data subjects

After each examination by the examining doctor, the data subject is asked to sign the decision taken by the examining doctor. Under the Decision of the Board of Heads of Administration of 19 February 2004 (Conclusion 221/04), by making a request in writing to the examining doctor, all data subjects have access to their file of medical examinations for the purposes of checks and to a copy of the information recorded in SERMED concerning those examinations. The official or other servant does not have access to the personal notes of doctors where, under Article 20(1)(c) of Regulation No 45/2001 and on the basis of a case-by-case examination, such restriction is necessary to safeguard the protection of the data subject or of the rights and freedoms of others.

Where justified and legitimate, data subjects are entitled to have the factual content of the medical examination files updated by making a request to the head of unit of the Medical Service.

Data retention

The files of the medical officer responsible for monitoring absences due to illness are kept in the Medical Service for as long as the data subject remains in active service and are then transferred to the archives for storage together with the medical file for a period of 30 years (in accordance with the rules set out in SEC 2005 1419).

The data contained in the examining doctor's Excel table are kept for five years.

Recipients

As mentioned above, the written conclusions of the medical examination are sent to the Human Resources unit of the DG for which the data subject works. A copy is sent to the Medical Service for filing in the data subject's medical file.

In exceptional cases, administrative data may be made available to the Legal Service in the event of an appeal before the Civil Service Tribunal, to judges of the Civil Service Tribunal or to the Ombudsman, at his request.

In the event of arbitration, the data are transmitted to an independent external doctor chosen by common consent between the official's doctor and the medical officer.

Security measures

[...]

3. Legal aspects

3.1 Prior checking

The procedure for checks on absences due to illness as described in the notification made by the Data Protection Officer on 21 February 2007 relates to processing of personal data ("any information relating to an identified or identifiable natural person" – Article 2(a)). The data processing in question is carried out by an institution in the exercise of activities which fall within the scope of Community law (Article 3(1)).

The processing of the files examined is partially automated insofar as a specific module within SERMED has been programmed to support the work of the examining doctor. Furthermore, the examining doctor has created an Excel file for the individual and global monitoring of the population concerned.

Article 3(2) is thus applicable in this case.

The processing therefore falls within the scope of Regulation (EC) No 45/2001.

Article 27(1) of Regulation (EC) No 45/2001 makes "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" subject to prior checking by the European Data Protection Supervisor.

In accordance with Article 27(2)(a) of the Regulation, processing operations likely to present such risks include the "processing of data relating to health (...)". The data processed in the case at hand undoubtedly fall within the scope of "data relating to health".

In principle, checks by the European Data Protection Supervisor should be performed before the processing operation is implemented. In this case, as the European Data Protection

Supervisor was appointed after the system was set up, the check necessarily has to be performed ex-post. This does not alter the fact that it would be desirable for the recommendations issued by the European Data Protection Supervisor to be implemented.

The procedure for checking on absences is linked to the keeping of medical files by the Commission and SERMED. These procedures were the subject of separate prior checking by the EDPS³.

The Commission Data Protection Officer's notification was received on 21 February 2007. Pursuant to Article 27(4) of the Regulation, the European Data Protection Supervisor had two months within which to deliver his opinion. However, in view of the suspension of the 105 days and the 68 days for comments, the European Data Protection Supervisor ultimately had until 11 October 2007 to deliver his opinion, in accordance with Article 27(4) of the Regulation.

3.2. Lawfulness of the processing operation and legal basis

The lawfulness of the processing operation should be scrutinised in the light of Article 5(a) of Regulation (EC) No 45/2001. Article 5(a) provides that the processing operation may not be carried out unless *"necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities ... or in the legitimate exercise of official authority vested in the Community institution ..."*. In this regard, Recital 27 of the Regulation also states that *"Processing of personal data for the performance of tasks carried out in the public interest by the Community institutions and bodies includes the processing of personal data necessary for the management and functioning of those institutions and bodies"*.

Checks on absences due to illness are carried out not only in the context of the management and functioning of the institution but also on the basis of the Staff Regulations, which were adopted under the Treaties.

As stated in the Facts section, under Article 59 of the Staff Regulations⁴, *"an official who provides evidence of being unable to carry out his duties by reason of illness or accident shall be entitled to sick leave"*. Furthermore, *"the official [on sick leave] may at any time be required to undergo a medical examination arranged by the institution"*. Commission Decision No 92-2004 of 6 July 2004 introducing implementing provisions on absences as a result of sickness or accident lays down the procedure for conducting such medical examinations.

The legal basis thus supports the lawfulness of the processing.

3.3. Processing of special categories of data

Under Article 10 of the Regulation, the processing of personal data concerning health is prohibited unless it is justified on the grounds provided for in Article 10(2) and (3) of Regulation (EC) No 45/2001. The present case very clearly relates to the processing of personal data on health.

Article 10(2)(b) (*"Paragraph 1 [prohibition of the processing of data concerning health] shall not apply where (...) 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*

³ See EDPS opinions 2004/225 and 2004/232.

⁴ Articles 16, 59, 60 and 91 of the Conditions of employment of other servants (CEOS) provide that the same arrangement applies to temporary agents, contractual agents and SNEs.

authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof (...)") applies in the case in point. The processing operation has been put in place by the controller in compliance with the provisions of the Staff Regulations concerning medical examinations in the context of absences due to illness.

3.4 Data quality

Data must be "*adequate, relevant and not excessive*" (Article 4(1)(c) of Regulation (EC) No 45/2001).

The prior checking in the case in point does not concern data collected and processed by a doctor during a medical examination but rather data collected and processed in the context of the management of absences due to illness. In the light of the facts described above, the EDPS considers that the data are adequate, relevant and not excessive for the purpose of monitoring and managing absences. He is fully satisfied that in the document sent to the HRD no medical information as such is communicated. However, the examining doctor should be reminded to take care not to enter medical information in the "comments" section of the document sent following the examination.

As regards the data entered into SERMED and in particular the "comments" section, the EDPS is concerned that in addition to the references "certificate approved", "arbitration confirms examining doctor's decision" or "arbitration validates the medical certificate", personal notes made by the examining doctor himself could appear in the "comments" box . If such notes are essential for the purposes of monitoring by the examining doctor, steps should be taken to ensure that only the examining doctor can have access to the "comments" box.

The EDPS is satisfied that only adequate and relevant data are entered in the examining doctor's Excel table.

Under Article 4(1)(d) of the Regulation, personal data must be "accurate and, where necessary, kept up to date", and "every reasonable step must be taken to ensure that 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 procedure in place gives sufficient cause to believe that the data are accurate and kept up to date on the basis of the data subject's state of health. By signing the document at the end of the examination, the data subject is able to verify the accuracy of the administrative data. The arbitration procedure also provides a certain degree of assurance that the data concerning the data subject's state of health are accurate. The EDPS is also satisfied that any arbitration request by the data subject is recorded in SERMED. SERMED is updated so as to show the outcome of arbitration.

Additionally, the data subject has the right to access and the right to rectify data so as to render them as accurate as possible. We will return to this matter later on (see section 3.9 below on the right of access and rectification).

Lastly, the data must be *processed fairly and lawfully* (Article 4(1)(a) of Regulation (EC) No 45/2001). The matter of lawfulness has been reviewed above. Given the sensitivity of the subject, fairness is an issue which warrants considerable attention. It is linked to the information to be given to the data subject (see section 3.8 below).

3.5 Data retention

Article 4(1)(e) of Regulation (EC) No 45/2001 lays down the principle that data must be "*kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed*".

A copy of the document resulting from the medical examination is sent to the HRD and to the data subject. The original is kept in the examining doctor's file. Another copy is sent to the Medical Service for filing in the data subject's medical file *per se*.

The data in the examining doctor's files are kept in the Medical Service for as long as the data subject remains in active service, and are then transferred to the archives for storage together with the medical file for a period of 30 years.

The retention of data in a data subject's medical file was the subject of a separate prior-checking analysis (see EDPS opinion 2004-225). The retention of data in the examining doctor's file for as long as the data subject remains in active service is justified by the examining doctor in the interests of the patient and by the fact that the examining doctor does not have access to the data subject's medical file in order to decide on the appropriateness of a medical examination in full knowledge of the facts. The EDPS considers that while the retention period in question may be necessary, it cannot be applied systematically to all files and suggests that consideration be given to how long the examining doctor's files need to be kept.

The data in the Excel table are kept for a maximum period of five years. The EDPS is satisfied that this retention period is consistent with the purposes of the table.

The period of retention in SERMED was the subject of a separate prior-checking analysis (see EDPS opinion 2004-232).

Under Article 4(1)(e) of the Regulation, data may be stored for a longer period than is required for the purpose for which they have been collected, and especially for statistical use, provided that they are kept either in anonymous form or, if that is not possible, with the identity of the data subject encrypted. In any event, the data may not be used for any purpose other than for historical, statistical or scientific purposes. The Excel table created by the examining doctor is used in particular to generate an anonymous table, i.e. a table without the administrative data of the data subjects, for the production of anonymous statistics to, for example, identify trends within the context of absenteeism or recurring and persistent problems to do with the work environment. In view of the number of officials and servants employed by the Commission, the EDPS is satisfied that the data are indeed anonymous and that the table does not reveal information concerning any individual in particular. He therefore considers that the retention of data for statistical purposes is in keeping with the Regulation.

3.6 Transfer of data

The medical examination conclusions are sent to the Human Resources unit of the DG for which the data subject works and to the Commission's Medical Service for filing in the data subject's medical file. In exceptional cases, administrative data may be made available to the Legal Service in the event of an appeal before the Civil Service Tribunal, to judges of the Civil Service Tribunal or to the Ombudsman, at his request.

The processing should therefore be examined in the light of Article 7(1) of Regulation (EC) 45/2001 which concerns the transfer of personal data within or between Community institutions or bodies "*if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient*".

There must consequently be assurance that the conditions of Article 7(1) are fulfilled, which there is in this case since the data collected are "*necessary for the legitimate performance of tasks covered by the competence of the recipient*". The HRD needs to be informed of the outcome of the medical examination to be able to decide whether the absence is justified or not. The Medical Service also needs to be able to update the data subject's medical file as regards absences due to illness. Furthermore, the task is the responsibility of various Commission departments. As regards the transfers, only relevant data must be transferred. The transfer in this case is therefore indeed lawful insofar as the purpose is covered by the competences of the recipients. Article 7(1) is therefore duly complied with.

Article 7(3) of Regulation (EC) No 45/2001 provides that "*the recipient shall process the personal data only for the purposes for which they were transmitted*". There should be explicit assurance that no member of the Commission's Medical Service receiving and processing data may use them for other purposes.

As regards transfers in exceptional cases to other parties such as the Legal Service in the event of an appeal before the Civil Service Tribunal, to judges of the Civil Service Tribunal or to the Ombudsman, at his request, the EDPS is of the opinion that Article 7 has been fully complied with.

In the event of arbitration, the data may be communicated to an independent external doctor chosen by common consent between the examining doctor and the official's doctor.

If the arbitrating doctor is in a country which has adopted legislation transposing Directive (EC) 95/46, Article 8 of the Regulation applies. Under Article 8(b), it is for the recipient to establish the necessity of having the data transferred and there must be no reason to assume that the data subject's legitimate interests might be prejudiced. In this case, the recipient has no difficulty in establishing the necessity of the transfer since he needs the data in order to reach a decision on the contested case. Furthermore, the transfer does not in any way prejudice the legitimate interests of the data subject because it assists an arbitration procedure initiated by the data subject himself.

If the arbitrating doctor is in a country which has not adopted legislation transposing Directive (EC) 45/96, Article 9 of the Regulation applies. Under Article 9, the transfer may only take place to a country offering an adequate level of protection. If the level of protection is not adequate, the data subject must give his consent to the transfer in accordance with Article 9(6)(a).

The EDPS would point out that he himself may be considered a data recipient under Regulation (EC) No 45/2001. For instance, pursuant to Article 33 (*Complaints by Community staff*) or Article 47(2)(a), he is entitled to obtain access, from the controller or Community institution or body, to any personal data and any information he needs for his enquiries. This should be reflected in the information given to data subjects (see below - 3.8 Information to be given to the data subject).

3.7. Processing including the staff or identifying number

The staff number of the person undergoing an examination is mentioned in the document containing the outcome of the medical examination. In this case the use of an identifier is, in itself, no more than a legitimate means of facilitating the task of the personal data controller. That said, such use may have significant repercussions, which is why the European legislator decided to regulate the use of such identifiers or personal numbers under Article 10(6) of the Regulation. Here, it is not a case of establishing the conditions under which the Commission may process the staff number but rather of drawing attention to this point in the Regulation. In this instance, the Commission's use of the staff number is reasonable because it provides a better means of monitoring the management of absences.

3.8 Information to be given to the data subject

Articles 11 and 12 of Regulation (EC) No 45/2001 provide that the data subject must be informed whenever his or her personal data are processed and lists a series of specific items of information that must be provided.

Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) applies in this case, since the information is collected from the different participants in the process (SYSPER, the examining doctor, the independent doctor in the event of arbitration, etc).

The EDPS is satisfied that since 1 December 2006 a confidentiality statement has systematically been sent together with the request for a medical examination. This statement covers the following: the identity of the controller; the purpose and stages of the procedure; the SERMED report and the existence of an Excel table created and managed by the examining doctor; the categories of data concerned; the recipients of the data; the existence of a right of access and the arrangements for exercising it; the legal basis of the processing operation; the data retention period and the possibility of recourse to the EDPS.

The EDPS considers that the statement complies satisfactorily with the requirements of Regulation (EC) No 45/2001 as regards information to be given to the data subject. The statement is also posted on the Commission's Intranet site with a view to ensuring maximum transparency vis-à-vis data subjects.

3.9 Right of access and rectification

Article 13 of Regulation (EC) No 45/2001 establishes a right of access – and the arrangements for exercising it – upon request by the data subject. Under Article 13 of the Regulation, the data subject has the right to obtain from the controller, without constraint, communication in an intelligible form of the data undergoing processing and any available information as to its source.

Article 20 of the Regulation provides for certain restrictions on this right, notably where such a restriction constitutes a necessary measure to safeguard the protection of the data subject or of the rights and freedoms of others.

The right of access in relation to the management of sick leave examinations is governed by the Decision of the Board of Heads of Administration of 19 February 2004 (Conclusion 221/04). By making a request in writing to the examining doctor, all data subjects can have

access to their file of medical examinations for the purposes of checks and to a copy of the information recorded in SERMED concerning those examinations.

The official or other servant does not have access to the personal notes of doctors where, under Article 20(1)(c) of Regulation No 45/2001 and on the basis of a case-by-case examination, such restriction is necessary to safeguard the protection of the data subject or of the rights and freedoms of others. The EDPS considers that this rule complies with Regulation (EC) 45/2001.

The data subjects do not have access to the examining doctor's Excel file. This restriction is also consistent with Article 20 and the requirement to protect the rights of others. The EDPS invites the Commission to look into the possibility of giving the data subject access to the Excel file without this entailing access to data relating to other persons or to the doctor's personal notes.

Article 14 of Regulation (EC) No 45/2001 allows the data subject the right of rectification. In addition to being given access to their personal data, data subjects may also have the data amended if necessary.

In relation to data processed under the procedure for the management of absences due to illness, and where justified and legitimate, data subjects are entitled to have the factual content of their medical examination files updated by making a request to the head of unit of the Medical Service. Bearing in mind the specific nature of medical data, and to the extent that the accuracy or completeness of such data is difficult to guarantee, the EDPS is of the view that the Regulation has been complied with.

3.11 Security measures

In accordance with Article 22 of Regulation (EC) No 45/2001 on the security of processing, the controller implements *"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"*.

The EDPS considers that Article 22 has been complied with as regards the medical examination files.

The security measures in relation to the SERMED application were the subject of a separate examination⁵.

Conclusion

The proposed processing operations do not appear to involve any infringement of the provisions of Regulation (EC) No 45/2001 provided that the comments made above are taken into account. This means, in particular, that:

- as regards data entered in SERMED and, specifically, the "comments" box, steps should be taken to ensure that no personal notes by the doctor appear in the "comments" box unless such notes are necessary to enable the examining doctor to monitor absences, in which case only the examining doctor should have access to the box in question.

⁵ See EDPS opinion 2004-0232.

- the Commission should give consideration to how long medical examination files for the purposes of checks should be kept in the light of the purposes of the processing.
- the Commission look into the possibility of giving the data subject access to the Excel file without this entailing access to data relating to other persons or the doctor's personal notes.

Done at Brussels, 11 October 2007

(Signed)

Joaquín BAYO DELGADO
Assistant European Data Protection Supervisor