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**Subject: Prior-checking Opinion regarding ‘The processing of personal data in management of all leave entitlements, processing of received requests for reimbursement of annual medical check-ups, received pre-employment medical exams/clearances’ at the Single Resolution Board (SRB) (EDPS case 2017-0853)**

Dear [...],

On 4 October 2017, the European Data Protection Supervisor (EDPS) received a notification for prior checking under Article 27 of Regulation (EC) No 45/2001<sup>1</sup> (the Regulation) on the ‘processing of personal data in management of all leave entitlements, processing of received requests for reimbursement of annual medical check-ups, received pre-employment medical exams/clearances’ from the Data Protection Officer (DPO) of the Single Resolution Board (SRB).<sup>2</sup>

The EDPS has issued Guidelines concerning the processing of personal data in the area of leave and flexitime<sup>3</sup> and health<sup>4</sup> (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 this processing of personal data at SRB.

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<sup>1</sup> OJ L 8, 12.1.2001, p. 1.

<sup>2</sup> As this is an ex-post case, the deadline of two months does not apply. This case has been dealt with on a best-effort basis.

<sup>3</sup> Available on the EDPS website: [https://edps.europa.eu/sites/edp/files/publication/12-12-20\\_guidelines\\_leave\\_flexitime\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/12-12-20_guidelines_leave_flexitime_en.pdf)

<sup>4</sup> Available on the EDPS website: [https://edps.europa.eu/sites/edp/files/publication/09-09-28\\_guidelines\\_healthdata\\_atwork\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/09-09-28_guidelines_healthdata_atwork_en.pdf)

### Legal basis and lawfulness of the processing

The legal basis for SRB to carry out pre-employment and annual medical visit and, to process sick leave certificates is found in Articles 28(e) and 59 of the EU Staff Regulations. These processing operations are necessary to assess the data subjects' ability in effectively carrying out their role in light of any medical issue and with the specific purpose of managing the sick leave at SRB. The processing operations are therefore necessary for the performance of SRB's mission carried out in the public interest on the basis of Article 5(a) of the Regulation.

However, the notification mentions together with Article 5(a) that 'as in line with the Regulation (EC) 45/2001, the data subjects by providing freely their personal data, are giving their consent for data processing'. 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. Regarding the processing activity at hand, employees are obliged to give this data to SRB for the management of the leave entitlements and for the reimbursement of annual medical check-ups, and consent is therefore not the appropriate ground for lawfulness.

Consent under Article 5(d) of the Regulation may however be considered as an additional ground for the legitimisation of any further processing of medical data, which is collected based on the Staff Regulations' provisions and on the Treaties, in order to ensure medical follow up. Thus, the SRB should adequately inform the data subjects before the processing of their medical data through a privacy statement containing all the requirements provided by Articles 11 and 12 of the Regulation. Data subjects should also have the possibility to withdraw their consent at any time without prejudice to their rights.

In light of the above, the EDPS **recommends** only relying on consent as a ground for lawfulness when the individual has a genuine free choice and can withdraw the consent at any time without negative consequences. Furthermore, the SRB should specify which processes that are voluntary for the SRB staff and inform them accordingly (see information to data subjects below).

### Information to data subjects

In the notification, SRB states that in case of pre-employment medical check-up, the data subjects are informed well in advance (in the vacancy notice and invitation for medical tests) about the purpose and the legal basis of the processing of the health data. The SRB does however not mention how information is given to the data subjects in relation to the other purposes of the notified processing activity. Upon request, SRB has explained that all statutory staff newcomers receive the SRB Data Protection Policy. However, this policy covers how SRB processes personal data on a general basis. In light of the information requirements of the Regulation and with reference to the abovementioned lawfulness of the processing, SRB should provide all the required information items under Article 11 regarding the notified activity to all data subjects before the launching of a processing operation. For example, information about

how health data is processed could be provided as a data protection statement attached to invitations to medical check-ups.

The EDPS thus **recommends** drafting a data protection statement on how SRB process personal data related to health and provide it to all individuals before their data is collected.

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 SRB to implement the above recommendations accordingly and has therefore decided to **close the case**.

Yours sincerely,

**(signed)**

Wojciech Rafał WIEWIÓROWSKI

Cc.: [...], DPO, SRB