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C 2015-1052 and 2017-1072
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Subject: Prior-checking Opinion regarding the updated notification for recruitment processing operations at the European Investment Bank (EDPS cases 2015-1052 and 2017-1072)

Dear Mr [...],

On 24 November 2015 and 30 November 2017, the European Data Protection Supervisor (EDPS) received updated notifications for prior checking under Article 27(2)(a) and (b) of Regulation (EC) No 45/2001¹ ('the Regulation') on recruitment processing operations from the Data Protection Officer (DPO) of the European Investment Bank (EIB).²

This processing operation concerns the revision of the procedures for recruitment of staff members. The recruitment processing operations at the EIB have already been prior-checked by the EDPS (Opinion of 11 November 2010 in case 2009-0254³) and the updated notifications merges and replaces this procedure.

The EDPS has issued Guidelines concerning the processing operations in the field of staff recruitment⁴ ('the Guidelines'). Therefore, and due to the fact that these notifications replace the one already analysed by the EDPS, 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 staff recruitment at EIB.

¹ OJ L 8, 12.1.2001, p. 1.

² 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.

³ Available on the EDPS website:

https://edps.europa.eu/sites/edp/files/publication/10-11-11_pc_eib_fr.pdf

⁴ Available on the EDPS website: https://edps.europa.eu/sites/edp/files/publication/08-10-10_guidelines_staff_recruitment_en.pdf.

The main differences with the previous notification are the following:

- EDPS case 2015-1052

This notification introduced external providers for selecting and verifying new agents.

- EDPS case 2017-1072

This notification refers to the introduction of Background checks on candidates, the use of consultants 'Recruitment Process Outsourcing (RPO)' and of 'HireVue digital interviewing', as well as the use of psychometric tests on candidates. The digital interviewing includes **pre-taped and life digital interviews and** will take place during the recruitment procedure through the services provided by HireVue Limited (processor). The digital tool for these interviews also enables the collection of analytics on the clicks candidates and EIB Frequent Users do on the EIB branding videos and materials.

1.1. Special categories of data / Data quality

The notifications and respective documentation mentions the processing of data regarding the candidates' **criminal record**, criminal pending cases and debt enforcement proceedings.

As stated in the Guidelines, the processing of data regarding criminal records should be seen as an exception. The questions 'Have you ever been convicted for infringing any law (excluding minor traffic violations) in any country?', 'Do you have any pending criminal cases and/or are you presently subject to an investigation for a criminal offence in any country?' and 'Are you, or have you ever been the subject of any debt enforcement proceedings in any country within the last 10 years?' are excessive and go beyond what is necessary to support that the applicant 'enjoys his full rights as a citizen' and 'has the appropriate character references as to his suitability for the performance of his duties'.

Therefore, those questions should be replaced by a request for a criminal record or a similar official document issued in accordance with the respective national law and only requested for the candidate selected for recruitment.

The EDPS **recommends** that the EIB replace the questions related to criminal convictions, criminal pending cases and debt enforcement proceedings by a request for a criminal record or similar and only for the candidate selected for recruitment.

The use of recorded video interviews is another novelty of the notification. When video footage is used to derive special categories of data (such as health data or origin), then it should be considered as a special category of personal data.⁵ In the case at hand, such use would be clearly unlawful. In light of this, as well as to avoid any possible discrimination, the EIB should be very clear in its instructions to staff for grading candidates. Additionally, the notification did not exhaustively list the kinds of reports/analytics that the contractor will generate from the videos recorded. Not all reports that the contractor *can* generate may be necessary or even relevant for the EIB's selection needs. The EIB should only use those reports that are necessary for its purposes.

The EDPS **recommends** that the EIB clearly define which kinds of report the contractors will provide and how they can be used.

⁵ See Article 29 Working Party Opinion 02/2012 on facial recognition in online and mobile services, page 4, available at: http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2012/wp192_en.pdf

1.2. Processors, sub-processors and data transfer

For the data processing regarding recruitment (including the digital interviews), the EIB will sub-contract several companies, namely Alexander Mann Solutions (Germany), HireRight Ltd (UK), and Sterling Talent Solutions (UK), HireVue Inc. (USA), and *Le consortium* ‘Deloitte Tax & Consulting sàrl et SHL Belgium sa’ (Belgium).

Some data processors will transfer data ‘... to other countries outside of the EEA [European Economic Area] to their international operations centres’, namely in the USA and in India. In those situations the EIB uses the European Commission Standard Contractual Clauses for transferring data outside EEA to the processors.

The EDPS highlights the fact that several legal contracts have been entered by the EIB with the service providers (processors) to try to ensure that personal information receives at least the same level of protection as within the EEA. However, in one of the agreements (between the EIB and Hirevue, Inc.), it is stated that sub-processors like Amazon AWS do not permit onsite audits or visits⁶.

In this regard, the EDPS reminds that, as data controller, the EIB is responsible for the data processing being performed by the processors and sub-processors. The data processing needs to comply with the Regulation, as well as with the forthcoming legal framework⁷.

Since sensitive information may be processed, the EIB should therefore remind its processors and sub-processors of their responsibilities and confidentiality for this processing activity, including to act only upon instructions from EIB.

The EDPS **recommends** that the EIB:

- explicitly request the processors and sub-processors to only act upon instructions from EIB (as mentioned respectively in Article 23(2)(a) of the Regulation);
- amend the contract with HireVue so that sub-processors do not exclude the possibility of being audited, in line with the new Regulation;

1.3. Right of information, access and rectification

According to the Article 11 of the Regulation, the controller shall provide to the data subject not only the purpose of this processing operation, but also information regarding (i) the identity of the controller, (ii) the categories of recipients of the data, (iii) which questions are mandatory or voluntary (and the possible consequences of failure to reply), (iv) the existence of the right of access and to rectify their data, (v) the legal basis of the data processing, (vi) the time-limits for storing the data, (vii) the right to have recourse at any time to the European Data Protection Supervisor and (viii) further information if necessary.

According to the information sent, the processor – on behalf of the controller – is providing a notice to candidates. However, that notice to candidates does not comply with the requirements listed under (i) to (viii) above.

As regards the point ‘(viii) further information if necessary’, the EDPS considers relevant that further information on the digital interviews and analytics on the clicks candidates do on the

⁶ See page 21 of the document ‘Appendix C: Offer’ of the Contract for the provision of services for digital interviewing software between EIB and HireVue, Inc. sent by the EIB.

⁷ According to the Article 29(3)(h) of the proposed Regulation which will supersede Regulation 45/2001 – and which already has a political agreement –, the processors need to make available to the controller all information necessary to demonstrate compliance with the obligations laid down in this Article and allow for and contribute to audits, including inspections, conducted by the controller or another auditor mandated by the controller. The rules in the new Regulation are equivalent to those in GDPR, so processors should be used to these requirements.

EIB branding videos and materials, as well as the reports generated by the processor, are given to the candidates

Additionally, the EDPS would like to highlight that the data subjects have the right to obtain information about the data processing and logic involved in any automatic decisions (see Article 13(d) of the Regulation).

The EIB must adopt a data protection notice with all the relevant information, including information about the digital interviews' processing, covering also the assessment process and metadata analytics, and provide it to the candidates.

Despite the fact that EIB refers in the notice to candidates that the information contained in their application will be verified either by the EIB or a third party provider and that their personal data may be sent, processed and stored outside the EEA, it does not mention the name of the external contractors.

The EDPS **recommends** that the EIB:

- adopt a data protection notice including all the required information under Articles 11 and 12;
- inform the data subjects about the data processing through the analytics on the clicks candidates and EIB Frequent Users do on the employer/potential employer branding videos and materials;
- detail the information to the data subjects about pre-taped digital interviews' data processing, including the assessment of physical features and metadata analytics.
- include the names of the external contractors in the notice to candidates.

1.4. Data Protection Impact Assessment

The text of the new Regulation states that '[w]here a type of processing in particular using new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall, prior to the processing, carry out an assessment of the impact of the envisaged processing operations on the protection of personal data'⁸.

This data processing seems to be within that framework, since the digital interviews involve new technologies and the use of analytics was not clearly described. Therefore, the EDPS draws the EIB's attention to the rules on data protection impact assessments (DPIA), as explained in the *Accountability on the ground*⁹ toolkit.

The EDPS recommends that the EIB perform a DPIA regarding this processing when necessary.

1.5. Automated individual decision-making

Under Article 19 of the Regulation (to be reinforced under Article 24 of the new Regulation), data subjects have the right not to be subject to a decision based solely on automated processing (under the new Regulation including profiling), which produces legal effects concerning him or her or similarly significantly affects him or her.

⁸ See Article 39 of the proposal for a new Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC

⁹ Available here: https://edps.europa.eu/data-protection/our-work/publications/guidelines/accountability-ground-provisional-guidance_en

Based on public information about the processor's products it appears that they may possess the technical capability for such decisions. It is not perfectly clear whether the EIB intends to use them in a way that would amount to such automated individual decision-making.

In any case, since the exceptions in Article 19 of the Regulation (in the future: Article 24 of the new Regulation) do not seem applicable to this data processing, the EIB and its processors should not perform automated individual decision-making on the candidates' personal data.

The EDPS **highly recommends** that the EIB and its processors do not use automated individual decision-making in the recruitment process.

2. Conclusion

In this Opinion, the EDPS has made some recommendations to ensure compliance with the Regulation, as well as several suggestions for improvement. Provided that those 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 cases 2015-1052 and 2017-1072**.

Yours sincerely,

(signed)

Wojciech Rafał WIEWIÓROWSKI

[signed]

Cc.: [...], DPO, EIB