

EDPS joint comments on three draft Decisions of the BEREC Board of Regulators and the BEREC Office Management Board concerning implementing rules on data protection and internal rules on the provision of information to data subjects and the restriction of certain rights of data subjects

1 Introduction

- These comments refer to three separate draft Decisions of the BEREC Board of Regulators and the BEREC Office Management Board concerning implementing rules on data protection and internal rules on the restriction of certain rights of data subjects, which were jointly presented to the EDPS. Our comments refer to the documents submitted on 27 May 2019.
- The documents submitted by BEREC and the BEREC Office were the following:
 - BEREC CN (19) 58 draft Decision of the Board of Regulators adopting implementing rules on data protection;
 - BEREC CN (19) 59 draft Decision of the Management Board adopting implementing rules on data protection; and
 - BEREC CN (19) 60 draft Decision of the Management Board laying down internal rules concerning the provision of information to data subjects and the restriction of certain of their data protection rights by the BEREC Office in the context of administrative inquiries, pre-disciplinary, disciplinary and suspension proceedings.
- We give these comments in accordance with Article 41(1), Article 41(2) and Article 58(3)(c) of Regulation (EU) 2018/1725¹ and Article 36(4) of Regulation (EU) 2018/1971².

2 Comments on BEREC CN (19) 58

- We welcome that with this draft Decision, the BEREC Board of Regulators will adopt implementing rules that more clearly define the roles and responsibilities of BEREC and the BEREC Office (hereafter ‘the Office’).
- Both BEREC and the Office were recently (re-)established by Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018. To our understanding, this Regulation has not significantly affected the dual structure and division of tasks between BEREC and the Office from a data protection point of view. The BEREC Board of Regulators remains a forum for the Heads of the NRAs, performing various regulatory tasks such as assisting and advising on technical matters in electronic communications, issuing opinions and guidelines and participating on issues concerning its competence relating to market regulation. Meanwhile, administrative and support functions requiring the processing of personal data (e.g. travel reimbursements) are taken care of by the Office.

¹ OJ L 295, 21.11.2018, p. 39.

² OJ L 321, 17.12.2018, p. 1.

- As such, the EDPS agrees that the Office will in the vast majority of processing operations be the one determining the purposes and means of the processing of personal data, leading to its qualification as the controller in line with Article 3(8) of Regulation (EU) 2018/1725 (hereafter ‘the Regulation’).³ However, should the normal application of the Regulation instead point to BEREC as the controller, please note that BEREC would not be able to rely on implementing rules to contradict this finding. The fact that BEREC does not have legal personality also does not disqualify it from being a controller in this sense.
- At the same time, the EDPS recognises that the Office will usually be best placed to ensure and demonstrate compliance with the Regulation. Indeed, in nearly all situations it will be the Office, not BEREC, which organises the processing of personal data in practice. To reflect the factual relationship between both parties, **the EDPS recommends deleting Article 1(1) of the Decision, as well as the corresponding part of Recital 8. At the same time, the EDPS recommends to introduce a Recital 7(a) which clearly describes the role that the Office plays in the processing of personal data.**
- To improve clarity, we would also recommend to invert the wording of both Article 1(3) and part of Recital 8 so they read as “the DPO of the BEREC Office shall be the DPO of BEREC.”

3 Comments on BEREC CN (19) 59

- Regarding the Office’s implementing rules on data protection, we particularly welcome the Office’s decision to keep a central register of records and to involve the DPO in all issues which relate to data protection at the Office. While **we have no further comments on the text of the draft Decision**, the EDPS would like to highlight the revised position paper on the role of Data Protection Officers of the EU institutions and bodies, which we issued on 30 September 2018.⁴ It contains further guidance on aspects such as the practical relationship between the EDPS and the DPO.

4 Comments on BEREC CN (19) 60

4.1 General comments

- Concerning the **right to information**, we take note that the Office is going to publish data protection notices on its website informing all data subjects of the potential restrictions of their rights related to personal data processing.
- The EDPS welcomes the fact that the Office will perform **a necessity and proportionality test** on the need for the restriction of data subjects’ rights, according to several provisions of the internal rules.
- These draft internal rules will serve as the Office’s legal basis to impose restrictions under Article 25 of the Regulation, in the absence of a legal act adopted on the basis of

³ See also our response letter to BEREC’s consultation on this topic dating from 30 September 2013 (case 2013-0840).

⁴ Available on the EDPS website: https://edps.europa.eu/sites/edp/files/publication/18-09-30_dpo_position_paper_en.pdf

the Treaties. As these restrictions seek to temporarily render unavailable certain rights that lie at the heart of the right to data protection, such as the right to information and the right to erasure, their legal basis should be well defined. In this regard, it appears to the EDPS that the internal rules are duly limited to the types of processing operations the Office performs or expects to perform and that each type of processing operation is clearly linked with its specific ground(s) for restriction *ex* Article 25 (1) of the Regulation.

4.2 EDPS recommendations

- In relation to the necessity principle, the EDPS underlines that **restrictions should be temporary and be lifted when their causes no longer apply**. According to the current version of the internal rules, the Office will review restrictions every year, which appears to be too long. The EDPS recommends adjusting this review period to **every six months**, and reminds that in such cases a necessity/proportionality assessment should be conducted.
- **The assessment of the risks to the rights and freedoms** of data subjects is one of the central points in the (updated) Regulation. As such, the EDPS applauds the fact that it has been given its own Article 3 in the internal rules. We would underline, however, that this **assessment is part of the larger necessity and proportionality** test that should be conducted prior to imposing any restriction. Indeed, this test is broader than the assessment of the risks to the rights and freedoms of data subjects: it is about assessing whether the risks caused by the restriction are justified and proportionate in the light of the right or interest that the restriction is intended to protect. As such, the necessity and proportionality criterion aims at balancing the scope of the restriction of the fundamental right at stake. **The EDPS recommends adding a sentence, such as “Any restriction shall be necessary and proportionate taking into account the risks to the rights and freedoms of data subjects [...]”** to Article 3 to help clarify this.

Brussels,

22 JUL 2019

