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WW/TS/sn/D(2017)0305 C 2015-1088
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correspondence

Subject: Prior checking notification concerning the selection of interim workers

Dear (...),

I refer to the notification for prior checking concerning the selection of interim workers at the Office of the Body of European Regulators for Electronic Communications (BEREC) submitted to the European Data Protection Supervisor (EDPS) by the BEREC Office Data Protection Officer (DPO) on 11 December 2015.

I also take into account the additional information provided on 15 January 2016 together with the 'Internal Administrative Instruction No IA/2015/8 of the Administrative Manager of the BEREC Office on establishing the principles on how personal data shall be processed at BEREC Office in the context of the use of the interim workers', as well as the related privacy statement included in the annex.

We note that the selection procedure in question is in most aspects in compliance with Regulation (EC) 45/2001¹ (the Regulation) as outlined in the Staff Recruitment Guidelines² and will therefore only address the existing practices which do not seem to be fully compliant in this respect.

¹ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data

² EDPS Guidelines on the processing of personal data in the field of staff recruitment of 10 October 2008

Firstly, the roles and responsibilities of the BEREC Office as well as the employment agency in the selection procedure have to be clarified in terms of **controller and processor**.

Pursuant to Articles 2(d) and (e) as well as Article 23 of the Regulation, the controller determines the purposes and means of the processing operation, whereas the processor may only process personal data on behalf and upon instructions of the controller. The carrying out of the processing should be governed by a contract outlining, in particular, confidentiality and security obligations of the processor as set out in Articles 21 and 22 of the Regulation or in the respective national law transposing Articles 16 and 17(3) of the Directive 95/46/EC³.

The notification only mentions that two framework contracts in cascade were signed at the end of 2014 with subject of the provision of interim workers for the BEREC Office and that they are supposed to be in place until the end of 2018. As it seems that the framework contracts do not provide for any of these obligations, we recommend that an additional provision is added stating that the employment agency may only act on instructions from the BEREC Office, as well as specify the actual measures adopted to ensure the confidentiality and security of the processing.

Secondly, **the information to data subjects' policy** has to be addressed. The information is provided in the form of a privacy statement, which is posted permanently on the website of the BEREC Office as well as included in all declarations to be signed on the day of their take up of duties. This privacy statement contains some potentially misleading information about the rights of data subjects as well as the legal basis of the processing. In fact, it states that the exercise of the right to access, update or correct personal data and to have them rectified is guaranteed through the possibility to reach either the data controller *or the DPO*. In addition, it mentions that the processing is lawful under Article 5(a) of the Regulation: the data subject has unambiguously given his/her consent. The consent (referred to in Article 5(d) of the Regulation) is not an appropriate legal basis for selection procedures in the employment context. The Administrative Instruction No IAI/2015/8 of the Administrative Manager of the BEREC Office is the actual basis that makes the processing lawful under Article 5(a) of the Regulation.

We recommend that the existing privacy statement is revised in the following manner: the information about how to make a use of the rights of access and rectification should only refer to the controller and the Internal Administrative Instruction No IAI/2015/8 of the Administrative Manager of the BEREC Office should be referred to as the actual legal basis of the processing.

In conclusion, the EDPS considers that there is no reason to believe that there is a breach of the Regulation on condition that the considerations contained in this opinion are fully taken into account. In particular, the BEREC Office should revise the existing framework contracts as well as privacy statement in a way outlined above.

³ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

The EDPS expects that the BEREC Office implements the recommendations accordingly and will therefore close the case.

Wojciech Rafał WIEWIÓROWSKI
(signed)

Cc: (...), Data Protection Officer