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correspondence

Subject: Consultation on the need for prior checking of BEREC Office's public register of documents (Case 2014-0338)

Dear Mr Chiodi,

We thank you for your message of 18 March 2014, in which you consulted us under Article 27(3) of Regulation (EC) 45/2001 (the Regulation) on the need for prior checking of BEREC Office's public register of documents. Another question raised in your message related to the appropriate instrument to establish the policy regarding the register, specifically whether a decision of the Management Committee was needed or whether an Internal Administrative Instruction of the Administrative Manager would be enough. On 26 March, we asked several questions for clarification, which you answered on 2 April 2014.

In the view of the EDPS, this set of processing operations is **not subject to prior checking**. Nonetheless, we would like to make some remarks on the register.

The Facts

BEREC Office maintains a public register¹ of certain documents held by BEREC and BEREC Office, for transparency purposes.² A list of the types of documents included in the register was provided to the EDPS. It includes for example meeting agendas and conclusions for the Board of Regulators (BoR) and the Management Committee (MC), as well as their preparatory bodies. Other documents include declarations of interests of BoR and MC

¹ http://www.berec.europa.eu/eng/document_register/welcome/ .

² Articles 18 and 22 of Regulation (EC) No. 1211/2009 establish that BEREC and BEREC Office shall work with a high level of transparency and that Regulation (EC) 1049/2001 applies to them; Articles 11 and 12 of Regulation (EC) No. 1049/2001 oblige the institutions, bodies and agencies to keep public registers of documents and to provide direct access as far as possible; Article 15 TFEU contains the general principles of transparency and public access.

members, contributions to BEREC's public consultations, and other messages received by BEREC and BEREC Office from outside parties.³ Some documents are available in full text, while for others only summary information on originator/recipient and content is given. In replying to public access requests to documents for which only summary information is available, BEREC Office may anonymise certain documents if feasible.

BEREC Office supplied a privacy statement to be published on the welcome page of the Register. It is not published there yet.

Legal Analysis

Article 27 of the Regulation lists the kinds of processing operations considered as likely to be risky and thus subject to prior checking:

- Point (a) of paragraph 2 of this Article refers to processing of certain special categories of data, e.g. health and (suspected) offences. It seems clear that BEREC Office's primary *aim* is not to process these data categories via the register, which is simply intended to be a repository of documents.⁴
- Point (b) refers to processing operations intended to evaluate personal aspects of the data subject. This is not the case here either.⁵
- Point (c) refers to processing creating linkages not provided for pursuant to national or community law between data processed for different purposes. This does not apply here.
- Point (d) refers to processing operations intended to exclude the data subject from a right, benefit or contract. This would, for example, be the case for asset freezes and blacklists⁶, so does not apply here either.

The processing operations notified are thus not subject to prior checking. That said, the other provisions of the Regulation still need to be complied with. If you believe that there are other factors that justify prior checking, we are of course prepared to review our position. Similarly, in the event of any modifications to this data processing, we would kindly ask you to reassess the need for submitting this processing to the EDPS for prior checking.

However, we have identified certain issues that may require attention.

The overview of the different kinds of documents to be included in the register gives the impression that the term "personal data" is not applied widely enough by BEREC Office. The EDPS interprets the concept of "personal data" in the same way as the Article 29 Working Party interprets the same term in the context of Directive 95/46/EC.⁷ For example, the content of statements, and the positions taken by a natural person should also be qualified as personal data relating to that person. In some cases, it seems as if BEREC Office only considers

³ It is specifically mentioned that unsolicited job applications are not included in the public register.

⁴ Examples of processing operations falling under point (a) would be the collection of criminal records upon recruitment or disciplinary proceedings (the EDPS has interpreted "offences" to also include disciplinary/administrative investigations and breaches of ethics of regulated professions). However, simple repositories of documents are not considered to fall under this provision, even if some documents in these registers could possibly contain such data (see e.g. EDPS case 2013-0793 on personal files). In such cases, only the procedure creating these documents (e.g. disciplinary proceedings) should be notified under Article 27. Independently of this, please see below on reconciling data protection and public access for cases in which these documents might incidentally contain such special categories of data.

⁵ Examples of such processing would e.g. include staff appraisal and probationary reports.

⁶ See e.g. EDPS cases 2010-0426 and 2012-0823.

⁷ See the Working Party's opinion interpreting this term: Article 29 Working Party Opinion 04/2007, WP136: http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2007/wp136_en.pdf.

directly identifying data such as names to be personal data. It should therefore reconsider its position on the matter in light of the interpretations outlined above.

Since the register is meant to facilitate the right of public access to documents held by BEREC and BEREC Office, the principles of transparency and public access on the one hand, and privacy and data protection on the other, will need to be balanced here. In this respect, the judgement in the Bavarian Lager case is relevant.⁸ The EDPS has also issued a background paper⁹ providing guidance on how to reconcile these two principles, stressing the need for a proactive approach. This includes informing data subjects about the (possible) publication of documents in advance and ensuring that they have the right to object to the publication on compelling grounds, where applicable (Article 18 of the Regulation).

For public consultations, BEREC Office does inform data subjects that submissions will be summarised in a published report and that (unless specifically asked not to) the full replies to the consultation will be published as well. In some BEREC cases, publication is specifically mandated, e.g. for the declarations of interest of members of the Board of Regulators and the Management Committee¹⁰ or decided by policy, such as for contributions to BEREC's public consultations.¹¹ This should also be made clear to the data subjects concerned, where relevant. In deciding whether or not to grant public access to a document, the fact that a document contains personal (in some cases sensitive) data is relevant for the assessment of whether access should be given. It will also be important to consider who the personal data relate to, in terms of any expectation the data subject may already have of disclosure (such as the names, positions and views of senior members of staff acting in a professional capacity).¹²

You also supplied a privacy statement to be published on the welcome page of the register. Concerning this privacy statement, we would like to remark that the reference to "consent" in relation to the publication of the declarations of interest of members and alternates of Board of Regulators and the Management Committee is not accurate, as Article 21 of Regulation (EC) No. 1211/2009 specifically provides for the publication of these declarations. Their publication is a legal obligation and not based on the consent of the data subjects. Consent can therefore not be regarded as the legal basis here.

Finally, in response to your question on whether a decision of the Management Committee is needed or whether an Internal Administrative Instruction of the Administrative Manager would be a sufficient basis for operation of the public register, the EDPS does not have any definitive position on this issue. What matters most from a data protection perspective is that the policy is transparent to data subjects and that they are informed about the processing and able to exercise their rights. How BEREC and BEREC Office ensure this is in the first place a question for them, taking into account the distribution of their tasks established under Regulation (EC) 1211/2009.

We hope that this information was helpful for you. Should you need further advice, please do not hesitate to contact our staff.

Yours sincerely,

(Signed)

Giovanni BUTTARELLI

⁸ C-28/08 *Commission v. Bavarian Lager*.

⁹ Background paper: Public access to documents containing personal data after the *Bavarian Lager* ruling, available at: https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Papers/BackgroundP/11-03-24_Bavarian_Lager_EN.pdf.

¹⁰ Article 21 of Regulation (EC) 1211/2009.

¹¹ EDPS case 2014-0141.

¹² See also the EDPS background paper referred to above in footnote 9.