

# marinerg-i

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## Specific Legal Requirements – MARINERG-i Activities at Node Level

Author(s): Bird & Bird  
Confidential



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Authors (alphabetical)	
Name	Organisation
Roger Bickerstaff	Bird & Bird
Treena Dunlea-Peatross	Bird & Bird
Astrid de Longvilliers	Bird & Bird

Acknowledgements/contributions (alphabetical)	
Name	Organisation

## Abbreviations

HR	Human Resources
IP	Intellectual Property
ORE	Offshore Renewable Energy
Node	A local operating entity, separate from the core elements of the MARINERG-i ERIC entity

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## **MARINERG-I**

### **EXECUTIVE SUMMARY**

This report (Deliverable 5.4) explores a number of the more important legal issues relating to the projected activities of the MARINERG-i ERIC at Node level.

The issues identified in this report are based on the findings of Deliverable 5.3 (Specific Legal Requirements – Core MARINERG-i Activities). Deliverable 5.3 identified the legal issues relating to the MARINERG-i ERIC core activities which should be considered and discussed by Consortium members prior to setting up the MARINERG-i ERIC.

In this report, we look at whether these key legal issues are different in relation to the MARINERG-i ERIC's future Nodes and, where there are differences, we expand on how these are different at the Node level.

The legal issues that are covered in this report relate to: (1) the management of human resources; (2) dealing with intellectual property (such as patents, copyright, trademarks, etc.); (3) the legal framework relating to the procurement of goods, services and works by the MARINERG-i ERIC; and (4) guidance on the likely general liabilities of the MARINERG-i ERIC.

As the geographical locations of the various MARINERG-i ERIC entities have not been established, the issues have been dealt with in this Deliverable in general terms. The ERIC will need to obtain country-specific guidance on these issues as and when the geographic location of the MARINERG-i ERIC entities has been decided.

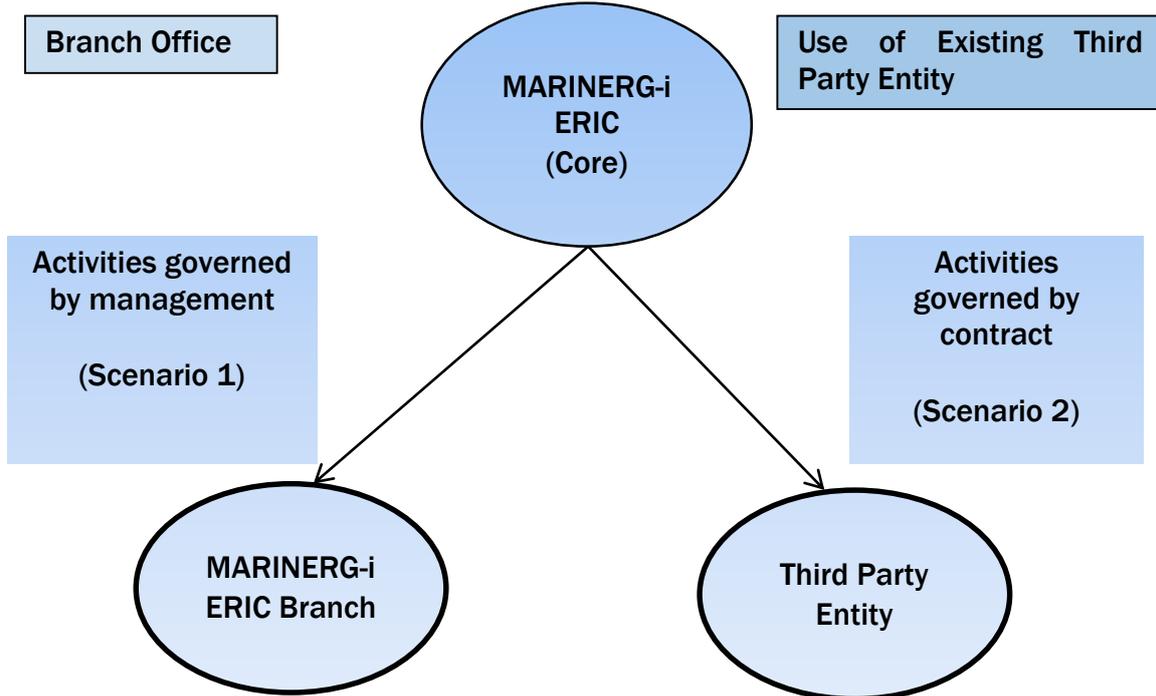
Future deliverables in this Work Stream relate to the preparation of draft legal statutes for the MARINERG-i ERIC.

**1. INTRODUCTION**

**Alternative Scenarios**

There are two main alternative legal structures that need to be considered for the operations of the MARINERG-i ERIC entity on a distributed level (i.e. as an organised network of resources) spanning across a number of different countries. These are the establishment of branch offices and the use of existing third party entities that already exist at the Node localities (such as an ORE Institute or other Research Facility).

These approaches are illustrated schematically in the diagram below.



**Diagram 1: Node Alternative Approaches**

By way of further explanation, the two most likely options for the MARINERG-i ERIC's activities at its Nodes will be:

**1. MARINERG-i Branch offices (Scenario 1)**

In this scenario, the MARINERG-i ERIC will operate in a locality where a Node is located through a branch office. Generally, these localities will be in different countries to the Member State where the core MARINERG-i ERIC has its statutory seat but on occasion there could be branch offices in the same country.

In legal terms a local branch office is the same legal entity as the MARINERG-i ERIC "parent". Under this scenario, there would be no need to set up a new legal entity for the branch. It would simply be a branch of the MARINERG-i ERIC which is located at the Node location. The MARINERG-i ERIC could carry out activities itself at the Node locality or it could contract via its local branch offices with established third party entities (e.g. an ORE Institute or other Research Facility) to provide services to third parties on behalf of the MARINERG-i ERIC.

Under Scenario 1 the relationship between the core MARINERG-i ERIC and its branch offices will be governed through its own management and internal decision making. This will allow the core MARINERG-i ERIC to retain maximum control over the activities that are carried out by the branch offices (as compared to a situation where a third party entity carries out the activities at the Node locality (see Scenario 2 below)).

In addition, this model also benefits from a greater level of flexibility as it would be easier for the MARINERG-i ERIC to vary the services by implementing management decisions. There would be no need to re-negotiate any contracts with branch offices in order to make changes. The MARINERG-i ERIC can make decisions at the core and require that these decisions are carried out by the branch entity.

(This model will be referred to in this report as "Scenario 1").

## **2. Node Activities through Third Party Entity (Scenario 2)**

Under this scenario the MARINERG-i ERIC would obtain services and carry out activities at the Node location through an already established third party entity (e.g. an ORE Institute or other Research Facility) to provide specific services, either: (i) to the MARINERG-i ERIC itself; or (ii) to third parties on behalf of the MARINERG-i ERIC.

The relationship between the core MARINERG-i ERIC and each third party entity will be governed by a contract or contracts to be entered into by the parties, setting out the terms and conditions of their relationship. These contracts would include: (i) a description of the services being procured by the core MARINERG-i ERIC; (ii) the responsibilities of each party in relation to their relationship; (iii) the price to be paid for the services; and (iv) the liability of each party towards the other in relation to potential losses suffered by the other party under the contract.

A third party entity could be a MARINERG-i ERIC Consortium member, acting independently from the MARINERG-i ERIC itself or they could be independent third parties.

(This model will be referred to in this report as "Scenario 2").

### ***Comparison of Alternative Scenarios***

MARINERG-i ERIC could decide on a country-by-country basis whether to use a branch office (Scenario 1) or a third party entity (Scenario 2) depending on the circumstances of a particular situation.

For example, if the MARINERG-i ERIC wants to conduct operations in a country where there is an ORE Institute or a Research Facility which has the capability and facilities to carry out the local activities on behalf of the MARINERG-i ERIC, then Scenario 2 may well be the preferred approach. The MARINERG-i ERIC would then enter into a contract with the ORE Institute or a Research Facility in order for the Node activities to be carried out by the local ORE Institute or a Research Facility.

(It may well be that the ORE Institute or a Research Facility would need to enter into further contracts in order to deliver the services required by the contract with the MARINERG-i ERIC. The procurement law implications of these further contracts are considered in Section 3 below).

If the MARINERG-i ERIC wants to carry out activities in a location where there is no local ORE Institute or other suitable Research Facility or if the local ORE Institute or other Research Facility is not willing to become involved in the MARINERG-i ERIC's project, then Scenario 1 (the local branch) approach will probably be more applicable. In these circumstances, MARINERG-i ERIC

would establish its own activities on a local basis, developing the resources, personnel and capabilities to carry out the desired activities locally.

It would also be possible for a combination of each Scenario to be used in a particular situation. Even where a MARINERG-i ERIC branch has been established in a particular location, it would be possible for the MARINERG-i ERIC branch to contract with an ORE Institute or another Research Facility for the provision of specific services.

It is also foreseeable that the funding mechanism agreed upon for the MARINERG-i ERIC may influence whether the MARINERG-i ERIC decides to use a branch office (Scenario 1) or a third party entity (Scenario 2). For example, if funding remains at node level and is predominantly in kind, then Scenario 2 may be considered as being the more appropriate structure to adopt. Therefore, whilst the legal model that is chosen is unlikely to dictate the funding that is sought, the funding obtained by the MARINERG-i ERIC may however influence the legal model.

### ***Possibility of MARINERG-i ERIC Subsidiary Entities***

We have also considered a third scenario for the conduct of activities at the Node level, which would be for the MARINERG-i ERIC to have subsidiaries in these localities and run Node operations through these subsidiaries.

In practice, we consider that this is unlikely. This is because further subsidiary ERIC entities are inconsistent with the requirements of the ERIC Regulation. The establishment of additional ERICs on a local basis would be very cumbersome, expensive and time-consuming. Furthermore, the concept of a local ERIC is inconsistent with the general nature of an ERIC that it is at least an EU-wide entity.

It may be possible for ERICs to set up and own subsidiary entities that have a non-ERIC form, such as a traditional corporate body (a limited company). To be consistent with the nature of an ERIC, such subsidiary entities would need to be non-commercial and not for profit companies<sup>1</sup>. Deliverable 5.2 sets out high level information on various corporate forms that could be used to establish these subsidiaries.

However, setting up a branch office arrangement is likely to be less burdensome and to require fewer ongoing obligations than setting up independent subsidiary entities. As mentioned above, a branch is not distinct from its parent – legally, they are treated as the same entity. By contrast, a subsidiary entity would have a distinct legal personality and would operate more autonomously than a branch.

In terms of process, establishment of a branch entity usually requires local registration with information on the parent and a local representative, whereas establishing a subsidiary will require following the local procedural requirements for that particular corporate form (e.g. appointing directors, etc.). A branch will have ongoing obligations such as local filings of company accounts, although, in many countries, a copy of the ERIC's accounts will suffice. In contrast, each subsidiary entity will need to have its own set of accounts that conform to the relevant country's local requirements.

It is also possible to establish a subsidiary entity that has a limited economic purpose provided that this entity is closely related to the principal task of the ERIC and does not interfere with that

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<sup>1</sup> A subsidiary with limited economic purpose can be established, as explained elsewhere in this section of the report, however, this is not a solution for the day-to-day operation of the ERIC.

principal task.<sup>2</sup> An example of this may be establishing a corporate entity for the purpose of transferring marine energy technology to engage in research activities with commercial entities – this is possible provided that this remains as a secondary activity and does not impact the MARINERG-i ERIC's achievement of its principal aims. We are not aware of any ERICs that have taken this approach. It is possibly too early in the development of the MARINERG-i ERIC to determine whether or not this structure is suitable.

Considering the requirements for establishing and administering branches versus subsidiary entities (in ERIC or non-ERIC form), we are of the opinion that the branch model is more practical for the MARINERG-i ERIC. As such, we have focused in this Report on the two scenarios outlined above.

### **General Approach**

This report touches on the same key legal issues which were set out in Deliverable 5.3 in relation to the core MARINERG-i ERIC. The analysis set out below focuses on the differences (if any) in how these legal issues will affect the Nodes (in each of the two scenarios set out above). This document should therefore be read in conjunction with Deliverable 5.3 which discusses these issues in relation to the core MARINERG-i ERIC.

The relevant key legal issues to be considered in relation to the two different types of Nodes are: (i) Human Resources issues; (ii) Procurement issues; (iii) Intellectual Property; and (iv) General Liability.

## **2. LEGAL CONSIDERATIONS FOR HUMAN RESOURCES**

### **2.1 Scenario 1**

**2.1.1 General HR Considerations:** The employment related topics highlighted in Paragraph 2 of Deliverable 5.3 are likely to apply in any jurisdiction where the MARINERG-i ERIC wishes to set up a branch office, as the MARINERG-i ERIC will need personnel in its branch offices in order to operate.

As explained in Deliverable 5.3, these personnel may be categorised as employees of the MARINERG-i ERIC or self-employed contractors or consultants providing services to the MARINERG-i ERIC. Whilst there is considerable harmonisation across the EU on these issues, each country takes a somewhat different approach and so the local HR legal implications should be determined in detail prior to any local branch activities being established in relation to each of the employment law issues highlighted in Deliverable 5.3.

**2.1.2 Need for a Local Entity:** Paragraph 2.6 of Deliverable 5.3 discusses the circumstances where a local employing entity may be appropriate (for example, where a local employee will require a visa to work in that country) as well as other considerations (such as tax laws) that may influence the decision to establish a local entity.

**2.1.3 Immigration Requirements:** It is also worth reiterating Paragraph 2.10 (Immigration requirements) of Deliverable 5.3 which will be applicable where the MARINERG-i ERIC carries out Node activities in localities outside the EEA free movement zone and employs non-EU personnel in its activities within the

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<sup>2</sup> Article 3, Council Regulation (EC) No 723/2009 on the Community legal framework for a European Research Infrastructure Consortium.

EU.

To the extent that the MARINERG-i ERIC may wish to: (i) use EEA workers in a non-EEA branch office of the MARINERG-i ERIC; and/or (ii) have non-EEA nationals working for the MARINERG-i ERIC within other EU countries. Once the UK leaves the EU, these considerations could apply to the UK. The MARINERG-i ERIC should stay abreast of the developments of Brexit negotiations over the next 12 months. Any Brexit agreement between the UK and the EU will be relevant in this context.

As between Ireland and the UK, it should be noted that it was confirmed in December 2017 that the Common Travel Area between the UK and Ireland will not be impacted by Brexit. The Common Travel Area facilitates the free movement of people between the UK and Ireland and is not dependent on membership of the EU. If the core MARINERG-i ERIC is established in Ireland, Brexit will not impact the ability for UK nationals to work for it.<sup>3</sup>

## 2.2 Scenario 2

**2.2.1 General HR Considerations:** By contrast, the employment issues highlighted in Paragraph 2 of Deliverable 5.3 would, for the most part, not be relevant to the MARINERG-i ERIC in the context of Scenario 2. This is because the persons carrying out the relevant services in relation to a particular project would be employees/contractors not of the MARINERG-i ERIC but of the relevant third party entity (ORE Institute or another Research Facility) with which the MARINERG-i ERIC enters into a contract in order to obtain the services.

**2.2.2 Confidentiality and Intellectual Property:** The MARINERG-i ERIC will need to ensure that its contracts with third party service providers contain adequate provisions relating to confidentiality and intellectual property to ensure that the treatment of these issues is consistent with the MARINERG-i ERIC's policies and approach to these issues. In particular, the third party service provider should be responsible for ensuring that its employees are bound by confidentiality obligations in relation to information of a confidential nature to the same extent as the third party service provider, and to ensure that, to the extent required by the MARINERG-i ERIC, any intellectual property that may be developed by a third party service provider's employees is transferred to the MARINERG-i ERIC (please see Paragraph 4.2 below for more detail on the intellectual property considerations of Scenario 2).

## 3. LEGAL CONSIDERATIONS FOR PROCUREMENT

### 3.1 Scenario 1

**3.1.1** The procurement considerations of Paragraph 3 of Deliverable 5.3 will also apply to any MARINERG-i ERIC branch office. In essence, this Paragraph concludes that the MARINERG-i ERIC will be outside the scope of the EU procurement law framework. This is because the Regulation establishing the legal status of European Research Infrastructure Consortia (ERIC)<sup>4</sup>

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<sup>3</sup> Citizens' Rights – UK and Irish Nationals in the Common Travel Area, Guidance published on 22 December 2017. <https://www.gov.uk/government/publications/citizens-rights-uk-and-irish-nationals-in-the-common-travel-area/citizens-rights-uk-and-irish-nationals-in-the-common-travel-area>.

<sup>4</sup> Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European

specifically provides that each ERIC will be regarded as being an international organisation within the meaning of the Procurement Directive<sup>5</sup>. Article 9(1)(b) of the Procurement Directive<sup>6</sup> excludes from the application of the Procurement Directive all contracts awarded pursuant to the particular procurement procedures of an international organisation. The MARINERG-i ERIC will establish its own procurement procedure and these procurement procedures will be applicable to the procurement activities of the MARINERG-i ERIC and not those of the Procurement Directive.

- 3.1.2 Accordingly, if the MARINERG-i ERIC establishes branches in order to carry out its activities on a local basis in its Node operations, any procurements that may be required by the branch in order to carry out these local activities will – in legal terms – be procurement activities of the MARINERG-i ERIC. As a result, the exclusion from the Procurement Directive will also apply to the activities of the Nodes where these are branches of the MARINERG-i ERIC.

### 3.2 Scenario 2

- 3.2.1 In the context of Scenario 2, it is important to note that the privileges relating to Procurement (together with other privileges of the ERIC) only apply to the activities of the ERIC and do not extend to associated entities.

- 3.2.2 This point is highlighted in the Commission's Guidance on ERIC structures which states;

*"It should also be noted that the privileges regarding VAT, excise duty and procurement only apply to the ERIC and cannot be extended to any connected other legal entities for other operations than those of the ERIC. Consequently, the agreements between the ERIC and these other legal entities should clearly allow the identification of the activities and resources which are put under the responsibility of the ERIC."*<sup>7</sup>

Accordingly, under Scenario 2, if a third party entity (such as an ORE Institute or other Research Facility) needs to carry out procurement activities in order to fulfil the obligations under any contract with the MARINERG-i ERIC in connection with the provision of Node activities for the MARINERG-i ERIC, the fact that these activities would be carried out for an entity that is excluded from the scope of the EU Procurement rules would not mean that any procurements by the Node entity in connection with these activities would also be excluded under the scope of the EU Procurement rules.

In other words, any EU-based Node entity that carries out activities for the MARINERG-i ERIC on a local basis pursuant to Scenario 2 would – in the absence of any other applicable exclusion - be required to comply with the EU Procurement rules<sup>8</sup> in respect of any purchasing that may be required by the Node entity in order to fulfil these MARINERG-i ERIC activities. Nodes which are based outside the EU will need to comply with the procurement laws which are

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Research Infrastructure Consortium (ERIC), OJ L 206, 8.8.2009.

<sup>5</sup> Article 7(3), Regulation 723/2009.

<sup>6</sup> Public Sector Procurement Directive EU/24/2014.

<sup>7</sup> Legal framework for a European Research Infrastructure Consortium – ERIC: Practical Guidelines P.12

<sup>8</sup> NB. The EU Procurement rules apply also to EEA countries, such as Norway. The EU Procurement rules will apply in the UK following Brexit but may be subject to subsequent modification.

applicable in their country. (For completeness, it should be noted that EEA countries (including Norway) follow the EU-procurement rules).

## 4. LEGAL CONSIDERATIONS FOR INTELLECTUAL PROPERTY

### 4.1 Scenario 1

**4.1.1 General IP Considerations:** The general Intellectual Property (IP) considerations of Paragraph 4 of Deliverable 5.3 should also be considered by the MARINERG-i ERIC in relation to its branch offices. In essence, any IP produced by or used by a branch office under Scenario 1 will be produced or used by the MARINERG-i ERIC itself.

**4.1.2 Local IP Considerations:** Whilst the issues discussed in Paragraphs 4.2 (Background IP) and 4.3 (Foreground IP) of Deliverable 5.3 are likely to be very similar in most countries where the MARINERG-i ERIC sets up a branch office, there are some local variations on a country-by-country basis and the MARINERG-i ERIC should check the local legal situation in each instance before it sets up activities in a new Node.

**4.1.3 IP Enforcement:** The issues highlighted in Paragraph 4.3 of Deliverable 5.3 in relation to IP enforcement are more variable from country to country. Each country applies its own rules of legal procedure to the enforcement of IP. These rules of legal procedure are not harmonised on an international basis.

### 4.2 Scenario 2

**4.2.1 General IP Considerations:** The IP considerations set out in Paragraph 4 of Deliverable 5.3 will be relevant in the context of Scenario 2. These considerations should be considered and should be dealt with clearly and extensively in the contract between the MARINERG-i ERIC and the relevant third party entity (ORE Institute or another Research Facility) that provides the local services in connection with any Node activities. The parties' expectations in relation to the development and ownership of IP should be established at the very beginning of the parties' relationship. This will hopefully help to avoid any subsequent disagreement and conflict on this subject later.

**4.2.2 Specific IP Considerations:** In particular, a contract between the MARINERG-i ERIC and a third party entity that provides the local services in connection with any Node activities should deal with the following issues:

**4.2.2.1** If IP is developed by the third party service provider under the contract (the "**Developed IP**"), should this ultimately be owned by the MARINERG-i ERIC or the third party service provider?

**4.2.2.2** If the Developed IP is to be owned by the MARINERG-i ERIC, the third party service entity that provides the local services in connection with any Node activities will most likely – subject to public policy and research considerations - wish to retain ownership of any of its foreground IP that forms part of the Developed IP, in which case an adequate licence (e.g. perpetual, worldwide, sub-licensable and irrevocable) should be granted to the MARINERG-i ERIC to use this foreground IP and to enable the MARINERG-i ERIC to use the Developed IP going forward.

4.2.2.3 If the Developed IP is to be owned by the MARINERG-i ERIC, does the third party entity that provides the local services in connection with any Node activities wish to be granted a licence from the MARINERG-i ERIC, allowing it to use the Developed IP (and if so, under what terms), and is this acceptable to the MARINERG-i ERIC?

4.2.2.4 If the Developed IP is to be owned by the third party entity that provides the local services in connection with any Node activities, the MARINERG-i ERIC will need to consider the licence terms under which it wishes to have the Developed IP granted to it.

## 5. LEGAL CONSIDERATIONS ON GENERAL LIABILITIES

### 5.1 Scenario 1

5.1.1 **General Liability Issues:** The general liability issues highlighted in Paragraph 5 of Deliverable 5.3 are likely to apply in some form or another in any jurisdiction where the MARINERG-i ERIC wishes to set up a branch office. However, there may be some local variations in relation to the following issues:

5.1.1.1 operations liability;

5.1.1.2 premises liability; and

5.1.1.3 environmental risks.

### 5.2 Scenario 2

5.2.1 **General Liability Issues:** It is worth noting that the MARINERG-i ERIC's exposure to the potential risks highlighted in relation to the issues listed at Paragraph 5 of Deliverable 5.3 is likely to be reduced quite considerably in a service provider to customer relationship (i.e. Scenario 2).

5.2.2 This is because the entity that provides the local services in connection with any Node activities (ORE Institute or another Research Facility) would be responsible for ensuring, for example, that adequate health and safety measures are in place in the relevant premises where the work is being carried out. The MARINERG-i ERIC will need to ensure that its contracts with service providers contain clear liability provisions so as to limit the MARINERG-i ERIC's liability as much as possible.

### 5.3 Management liability

It is worth noting that Paragraph 5.5 (Management liability) of Deliverable 5.3 is not relevant to the Nodes to the extent that it relates to the liability of Consortium Members to each other, and, once decided at Core level, would be unlikely to need to be reconsidered at Node level.

### 5.4 Customer Data

In relation to Paragraph 5.4 (Liability around customer data) of Deliverable 5.3, it is worth noting that the new European GDPR regime (effective from 25 May 2018) further harmonises how personal data should be treated across the EU, which is clearly an advantage for the MARINERG-i ERIC to the extent that, for the most part, it should be able to have a data protection and data security policy which it can apply across all of its

branch offices in the EU. The MARINERG-i ERIC should establish, as part of its data protection and data security policy, which European data protection agency would be its lead supervisory authority in relation to the processing of personal data. The MARINERG-i ERIC should be aware that, although there will be a lead authority for the MARINERG-i ERIC under either scenario (which will likely be the supervisory authority for the member state in which the core MARINERG-i ERIC is established), if the MARINERG-i ERIC is, for example, the subject of a data breach affecting individuals in other EU countries, other supervisory authorities will be involved in those cases (and the lead authority will need to cooperate with them).

Further, under either Scenario 1 or Scenario 2, the MARINERG-i ERIC will need to consider data processing terms between it and any third party entities with whom it enters into contracts for services. This is a requirement under the GDPR where any processing of personal data may occur and fines could arise for a failure to meet these requirements. Where any of the third party entities are not situated in EU member states (or where it is possible that any third party entities may store data outside of the EU), additional measures including contractual terms will need to be put in place.

In the event that MARINERG-i ERIC wishes to open a branch office outside of the EU, MARINERG-i ERIC would need to consider the local data privacy issues.

*Bird & Bird*

*17 April 2018*