

ARTICLE 29 Data Protection Working Party



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FedEE
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Subject: Binding Corporate Rules

Dear Mr Chater,

I am writing to you on my capacity as Chairman of the Article 29 Working Party (which is the umbrella organisation of all data protection authorities in the EU) to update you and your members on the progress and development of Binding Corporate Rules (“BCR”) as a basis for transferring personal data outside the EU.

As you know, transfers of personal data to countries outside the EU are prohibited unless the country in question offers an adequate level of protection. This level of protection is generally assessed in practice by the European Commission. For countries which have not been recognised as providing an adequate level of protection, various solutions have been provided at EU level and I would like to draw your attention to one of these solutions, i.e. Binding Corporate Rules (or “BCR”). These are internal rules (such as a code of conduct) adopted by a multinational organisation and define the policy for the transfers of personal data within the organisation from the EU entities to entities located outside the EU.

BCR can be used by multinational companies in order to adduce adequate safeguards for the protection of privacy and fundamental rights and freedoms of individuals within the meaning of Article 26(2) of Directive 95/46/EC as the BCR ensure that all personal data transferred within a group benefit from an adequate level of protection. It is, therefore, an alternative to the Safe Harbor Principles (for transfers to the United States) or to the Standard Contractual Clauses adopted by the European Commission.

This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

The secretariat is provided by Directorate C (Fundamental Rights and Union Citizenship) of the European Commission, Directorate General Justice, B-1049 Brussels, Belgium, Office No LX-46 01/190.

Website: http://ec.europa.eu/justice/policies/privacy/index_en.htm

One recent development is the introduction of BCR for processors (“BCR-P”) which are designed to adduce sufficient safeguards to personal data transferred within a group acting as a processor on behalf and under the instructions of a client (controller), i.e. where an organisation is carrying out outsourcing or processing activities on behalf of an external client. The Working Party published documents setting out the criteria for approval of BCR-P in 2012 and the data protection authorities (“DPAs”) have been accepting applications since January 2013. BCR-P complements the BCR for Controllers (“BCR-C”) which is designed to adduce sufficient safeguards to personal data transferred within a group acting as a controller (i.e. for the data relating to its employees or customers).

Both BCR-C/BCR-P are reviewed under the same procedure, based on a close and efficient cooperation between DPAs. Each application for approval is managed by a lead DPA which co-operates closely with its European counterparts to complete the process and grant the approval. The speed of the process has increased greatly since BCR were initially introduced. These improvements are, in part, due to the creation of the mutual recognition procedure, to which 21 countries including 3 in the EEA have joined. In addition the Working Party has produced a toolkit of documents to assist in the preparation of applications for approval of BCR-C and BCR-P. The Working Party continues to provide assistance and guidance to organisations considering applying for approval of BCR-C/BCR-P and offers them practical tools to understand and implement the BCR principles. In addition, DPAs regularly discuss on BCR-C/BCR-P to share their experiences and provide applicants with harmonized views.

Should you need further information on the BCR procedure and documentation, please consult the WP29 website¹ or those of the national DPAs.

To date, it is more than 45 BCR-C² that were reviewed by DPAs and considered as adducing adequate safeguards in the meaning of Article 26(2) of Directive 95/46/EC, against 14 approved in late 2010, which represents a raise of more than 220% in about 2 years. These figures show that not only more multinational decided to implement BCR but also that DPAs remarkably worked on reducing the average length of cooperation procedures between DPAs. Indeed, a recent audit conducted within the WP29 members showed that:

- In average, it takes 5 months to the lead DPA to handle a BCR application: review of the several drafts (reviews 3 drafts in average) and coordination of the cooperation with the other DPAs;
- In average, it takes 3 to 3.5 months for the mutual recognition and cooperation procedures with the other DPAs concerned by the transfers;
- In average, it takes 7.5 months to an applicant to take into account the comments received by the lead DPA and the co-reviewers (and potentially the DPAs not part of the mutual recognition procedure) and to submit an amended draft.

¹ http://ec.europa.eu/justice/data-protection/document/international-transfers/binding-corporate-rules/procedure/index_en.htm

² The list of companies for which the BCR procedure is closed is available on the WP29 website, http://ec.europa.eu/justice/data-protection/document/international-transfers/binding-corporate-rules/bcr_cooperation/index_en.htm

Whilst there are a number of different ways of ensuring adequate safeguards for the protection of privacy and fundamental rights and freedoms of individuals when transferring personal data from the EU, there are particular strengths provided by BCR-C and BCR-P. These include:

- Standardization of the data protection processes within a group;
- Communication on the privacy policy of a group;
- Evidence of accountability which is a key element of the draft EC regulation.

For these reasons, the WP29 encourages you to circulate this information on BCR-C and BCR-P to your members.

Please feel free to share with us any ideas to help speeding up the process. We would be happy to build a dialogue with you on BCR, which we consider as an effective tool to protect personal data transferred outside the EU. In this regard, we would like to suggest organizing a workshop with you on BCR, as this tool may suit some of your members.

Yours sincerely,

On behalf of the Article 29 Working Party,

Jacob Kohnstamm
Chairman of the Article 29 Working
Party