

Editorial

Bridget Treacy considers the progress of Binding Corporate Rules and Mutual Recognition, for Volume 9, Issue 2 of Privacy & Data Protection

It has been a whirlwind few weeks for data protection professionals in Europe.

The 30th International Conference of Data Protection and Privacy Commissioners was held in Strasbourg in October, exploring the theme of 'Protecting Data in a Borderless World'.

The discussion included diverse topics including whether privacy is an obstacle or an asset for economic growth, the need to balance the privacy rights of individuals with counter-terrorism surveillance, and the impact of social networking on privacy rights. However, as with many such conferences, it is the discussion outside the conference room which is often the most illuminating.

One of the issues delegates in Strasbourg seemed keen to speculate about is the future of Binding Corporate Rules ('BCRs'). The Article 29 Working Party issued a press release on 2nd October announcing that nine Data Protection Authorities ('DPAs') (France, Germany, Ireland, Italy, Latvia, Luxembourg, the Netherlands, Spain and the UK) have agreed that once a lead DPA from within the group circulates a consolidated BCR and opinion, the other DPAs in the group will adopt the opinion and issue their own approval. This will eliminate further review and assessment of the BCR by individual DPAs within the group, which has been the practice until now. The expectation is that this process of mutual recognition will reduce the lengthy timeframes currently experienced by organisations seeking BCR approval.

The speculation amongst delegates in Strasbourg centred on what mutual recognition will mean in practice. There were some who applauded the concept, believing that the initiative heralds a new era in which BCRs will, finally, become a reality for many more organisations. However, others are far more sceptical, fearing that the burden of making a decision upon which their fellow DPAs will rely is likely to result in greater conservatism by lead DPAs in their review and assessment of applications.

There is already anecdotal evidence from organisations in the queue for BCR approval that lead DPAs are now raising further questions, taking longer to reach decisions, and even signalling the possible withdrawal of approvals already granted.

Whether this is merely a temporary regression, or a worrying longer term trend remains to be seen.

The concept of BCRs is probably the most workable solution for ensuring that an international transfer of personal data is adequately protected, while retaining flexibility for the organisations involved. Indeed, the concept of BCRs is not limited to the EU. A similar solution appears in the Asia-Pacific Economic Cooperation Privacy Framework, which promulgates 'Cross Border Privacy Rules' to safeguard data which is transferred internationally.

The additional guidance recently published by the Article 29 Working Party suggests the EU DPAs are all too aware of the need to ensure that BCRs achieve wider success. They need to become the compliance strategy of the majority, rather than the domain of a handful of companies. However, for BCRs to gain widespread acceptance (and approval), regulators require more than the simple assurance that they provide adequate protection for data. Organisations need to prove that they remain accountable for the personal data they collect and process, irrespective of the jurisdiction in which the processing takes place. Creating and demonstrating accountability is a key prerequisite to BCR approval, and is the hurdle at which a number of organisations fail.

'Accountability' is a concept which is often discussed in abstract terms, and ignored in practice. Yet it lies at the heart of much of our data protection regulatory framework. Organisations which seek BCR approval will have an easier path to approval if accountability can be demonstrated in a real and tangible way. Demonstrable accountability may also reassure lead DPAs participating in the mutual recognition scheme.

It is too early to judge whether mutual recognition will speed the process of BCR approval, but many organisations are watching with great interest. For an increasing number, BCRs are the only sensible solution to cross border data transfer issues. There are many companies ready to join the queue for BCR approval — once they can see that the queue is moving forward.

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