EU Regulation Binding Corporate Rules Under the GDPR—What Will Change?

By Anna Pateraki

Binding Corporate Rules (BCRs) are a compliance mechanism with growing importance for global data transfers. They are internal corporate rules, such as codes of conduct, that govern intragroup data practices in a binding and consistent manner worldwide. BCRs demonstrate accountability and build data protection into a company’s DNA. Within the constantly changing landscape of international data transfers, BCRs offer a solid and comprehensive solution for global data transfers. With currently 80 companies having BCRs in place, the number of BCRs is expected to continue to increase.

The adoption of the EU General Data Protection Regulation (GDPR) will change the approval process of BCRs, which will involve the “consistency mechanism” and Commission implementing acts. However, the new process will have a number of benefits for organizations.

2. At the time this article was being finalized, 80 companies had BCRs in place, 15 of which were approved within the last 12 months. See European Commission, List of companies for which the EU BCR cooperation procedure is closed.

Anna Pateraki is senior associate for Hunton & Williams LLP in Brussels.
II. Explicit Recognition of BCRs Under the GDPR

1. BCRs as Appropriate Safeguards

Generally, BCRs are not enshrined in law but are established through a mutual recognition procedure. BCRs should be publicly available and allow BCRs to be used by both controllers and processors in their dealings with other controllers and processors within the same economic group. BCRs must also include a mechanism to make the BCRs legally enforceable on a company's employees and contractors. In particular, the minimum content of Binding Corporate Rules (BCRs) under the GDPR should be the same as the contents of BCRs under the current version of the GDPR (Article 71 (2)).

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III. Conclusion

In conclusion, the minimum content of Binding Corporate Rules (BCRs) under the General Data Protection Regulation (GDPR) should be the same as the contents of BCRs under the current version of the GDPR (Article 71 (2)). This ensures that companies can continue to use BCRs as appropriate safeguards for the transfer of personal data outside the EU. However, the minimum content of BCRs under the GDPR should be subject to future changes as the GDPR provides for a two-year transition period until it will apply directly in all EU Member States, thus reducing the risk appetite. The transition period will also be useful for data protection authorities (DPAs) who will need to adopt the GDPR separately. The GDPR will be adopted during the next ordinary session of the EU.
Principles

Profiling

Audit

Choice of court

Working Party on BCRs for processors (WP204 rev.1),
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The minimum content of BCRs enshrined in the GDPR is financial cost to the company, with more exhaustive requirements. For example, the adequateness under the BCRs is verified by mutual consent, a processor, and the controller can co-operate with the controller upon request, and the controller can co-operate with the controller upon request. The principle of data minimization, privacy by design and by default, and an obligation for companies to describe how they comply with some additional data protection principles.

Under the GDPR, BCRs should give individuals the right not to be subject to processing (Article 43 (4)). However, the BCRs for processors include reporting requirements such as the principle of data minimization, privacy by design and by default, and an obligation for companies to describe how they comply with some additional data protection principles. The principle of data minimization, privacy by design and by default, and an obligation for companies to describe how they comply with some additional data protection principles.

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Local DPA. Similar to the current regime under the GDPR, companies will have to identify the competent DPA to initiate the process (Article 58 (1)). Where the applicant company has more than one establishment in the EU, the competent DPA will be the lead DPA, meaning the DPA of the ‘main establishment’, i.e., the GDPR, contains detailed provisions about the identification of the main establishment (Article 6 (1)) and the cooperation with other “competent” DPA (Article 58(6), which companies would need to consult. For example, if there is disagreement between a DPA about which DPA should act as the lead DPA, this may be resolved at the EDPB on a voting basis (Article 66 (1)(aa)) following specific procedures and timelines, thus allowing for a quick resolution.

Draft decision of lead DPA. The lead DPA will have to review a company’s BCRs and communicate a draft decision to the EDPB before approving the BCRs.

Opinion of the EDPB. The EDPB will be comprised of representatives of the 28 EU DPAs and of the European Data Protection Supervisor. The opinion of the EDPB on BCRs shall be adopted by simple majority of its members. The lead DPA has two weeks in which to inform the EDPB whether it intends to follow the opinion of the EDPB, although the opinion is not legally binding. The lead DPA can adopt a decision to approve the BCRs within eight weeks, which can be extended by another six weeks (Article 58 (3)).

Decision of the lead DPA. Upon the EDPB adopting an opinion, the lead DPA can adopt a decision to approve the BCRs. The lead DPA shall approve the BCRs, as the EDPB opinion serves as a basis for the decision (Article 58 (1)(d)). The GDPR gives to the EDPB legal personality and makes it a body of the EU especially so it can adopt legally binding acts. However, under the GDPR, the European Commission can adopt legislative acts by itself.

Commission implementing acts. Before adopting implementing acts on BCRs, the commission will consult the EDPB (Article 66 (1)(aa)). Currently, the EDPB can only apply a non-binding opinion setting out uniform conditions for the implementation of the BCRs. Under the GDPR, the European Commission can adopt binding legislation regarding the BCRs, although it participates in the work of the Article 29 Working Party as an observer. However, under the GDPR for European Communities could play an important role in determining the legal and procedural aspects of BCRs.

The main element of adopting Commission implementing acts under Regulation 182/2011 is to provide for a legal base for binding agreements. The process involves the Council and the Parliament, which can exercise scrutiny, however without a veto. The process resembles the Council and the Parliament participating in the examination procedure (Article 43 (4)). Before adopting such implementing acts to specify the format and the procedures for the exchange of information between controllers and processors, the European Commission can adopt legislative acts on BCRs.

Dispute resolution. If the lead DPA adopts a decision to approve the BCRs, the applicant company may object to BCRs, instead of making a general reference to the whole consistency section, which seems to unnecessarily add on complexity.
Dealing with one DPA

Procedural flexibility

Harmonization

Abolition of national DPA authorization for data transfers under BCRs

The GDPR does not exclusively regulate data transfers, but one can expect that implementing powers of the Commission will be used to create procedural rules in the future as needed to better facilitate the approval process, therefore providing a more flexible mechanism in which companies having their BCRs approved in all relevant countries, companies having their BCRs approved in all relevant countries, will need to coordinate with one DPA for its BCRs, compared to the currently applicable system of one DPA. This is especially true for companies, which can build relationships and trust with their DPA before starting its own BCRs project.

The benefits of national DPA authorization under BCRs under the GDPR

Although the consistency mechanism might sound complex, it can become complex for the Commission is itself an implementing act. It is expected to be seen what BCRs mean will be explained to the companies, in the case of the Commission, will have to be coordinated with the EU countries (via mutual recognition or cooperation procedures) still need to obtain national DPA authorization. Therefore, existing national authorizations for data transfers under BCRs will continue to be valid until they are replaced by an EU situation. The GDPR does not contain a sunset clause for BCRs approved under the current regime. Therefore, new national authorizations for data transfers under BCRs will continue to be valid until they are replaced by an EU situation.

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