Editorial

Bridget Treacy considers the question of whether Binding Corporate Rules are coming of age, for Volume 10, Issue 6, of Privacy & Data Protection

The recent approval of the Binding Corporate Rules ('BCRs') of JPMorgan Chase and BP in the UK brings much needed credibility to the BCR process and is creating renewed speculation that BCRs will become the mainstream mechanism for facilitating international data transfers. In anticipation of a wave of BCR approvals, some organisations have explicitly fine-tuned their data protection compliance strategies to accommodate a BCR, or they have set out to become 'BCR ready'. Whether now is the right time to pursue a BCR application will depend, to some extent, on whether organisations can overcome two key obstacles to BCRs: cost and delay.

International data transfers are ubiquitous. It is now a challenge to identify organisations that do not transfer personal data internationally. Even if an organisation does not have an international presence itself, there is a high probability that it will rely on a service provider that uses data processing facilities in far flung destinations, perhaps accessing those services via the cloud. In a world in which international data transfers have become the norm, rather than the exception, organisations are seeking pragmatic, flexible solutions to facilitate transfers. Once approved by regulators, the BCR offers the greatest flexibility for data transfer within a corporate group.

However, on closer examination, one of the real advantages of a BCR is that it offers more than merely a compliant mechanism for data transfers. A BCR reflects an integrated approach to data protection compliance. It requires a comprehensive privacy programme, and evidence of how the programme is implemented and enforced. Thus, more than any other data transfer mechanism, the process of creating and implementing a BCR offers a structured means of embedding good data protection practices within the core of an organisation's culture. There are indications that a BCR may become a highly sought after mark, organisations a competitive advantage as data privacy issues move higher up the corporate risk agenda. A BCR is thus a logical component of a comprehensive data governance strategy.

Despite these advantages, the cost and the length of time required to obtain regulator approval are cited as the principle reasons for not pursuing BCRs.

In relation to the issue of cost, organisations frequently include within the cost of a BCR the cost of devising and implementing a data protection compliance strategy. Strictly speaking, such a strategy is required in any event, irrespective of whether a BCR is adopted. The preparation of the BCR itself is a relatively contained task and, if it is separated from the cost of the compliance programme, not overly expensive.

Regulators have sought to address the issue of delay by introducing the "mutual recognition" procedure in which DPAs endorse the decision of the lead data protection authority to approve a BCR. Current variations to this process, involving further vetting by additional DPAs, risk the approval process becoming bogged down once again. Further, there is a risk that a flood of new applications might quickly overwhelm DPAs, again risking the credibility of the BCR process.

There are many hundreds of companies in the UK, yet only 7 BCRs have been approved over a 5 year period. The scale of the potential problem is quickly apparent. If BCRs are to become the mechanism of choice for businesses and regulators alike, regulators will need to convince businesses that they can process BCR applications in a timely manner, perhaps outsourcing some of the analysis to third parties.

Further, if BCRs are truly to come of age, they need to be accessible to all, not just to the privileged few. If the BCR application process can be further streamlined and well resourced, organisations might dust off their draft BCRs and think again about applying for approval.

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