Memorandum on building a common EU and UK Binding Corporate Rules (BCR) framework

TO: Data Protection Unit of the European Commission
European Data Protection Board (EDPB)
Information Commissioner's Office (ICO)
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Introduction

This memorandum reflects the collective views of the attendees to a workshop session organised jointly by Hogan Lovells and Privacy Laws & Business that took place in London on 12 December 2022. The aim of the workshop session was to identify differences between the current EU BCR approach and the ICO's new UK version, and to take the initiative to encourage the EDPB and the ICO to have harmonised BCR schemes with mutual recognition in a way that enhances the role of BCR as a model for global data protection.

On 25 July 2022, the ICO published its new approach[1] to the assessment and authorisation of BCR, which is closely modelled on the text of Article 47 of the UK GDPR. The ICO regards BCR as "the gold standard" and declares that "using them demonstrates […] commitment to implementing appropriate safeguards."

In parallel, the EDPB is seeking to refresh its own approach to BCR authorisations, and on 15 November 2022, it adopted draft Recommendations on the application for approval and on the elements and principles to be found in Controller Binding Corporate Rules (BCR-C)[2]. The EDPB is requesting views on its Recommendations until 10 January 2023.

In order to inform the discussions that took place during the workshop, representatives from DCMS, the Irish Data Protection Commission, and the ICO provided helpful views on the current situation and approval practices.

The aim of this memorandum is to contribute to this important debate by providing constructive comments based on experience and ultimately, to strengthen the role of BCR.

Harmonisation and mutual recognition

At the core of this memorandum there is a strong call for greater harmonisation between the EU and UK approaches to BCR. The origins of BCR as a mechanism to legitimise international data transfers lie in the collective efforts of the European data protection authorities and the ICO played a decisive and active role in the development of BCR alongside other authorities from the outset. At present, the legal basis for BCR is identical under Article 47 of the EU and UK GDPR. Crucially, multinationals seeking to rely on BCR for transfers of personal from the EU and the UK apply identical mechanisms and compliance practices in order to meet such BCR standards. It is therefore obvious that the practical adoption of BCR to cover such transfers should be matched by a similar level of harmonisation at a regulatory approval level.

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1 Guide to Binding Corporate Rules. https://ico.org.uk/for-organisations/guide-to-binding-corporate-rules/

2 Recommendations 1/2022 on the application for approval and on the elements and principles to be found in Controller Binding Corporate Rules (BCR-C). https://edpb.europa.eu/our-work-tools/documents/public-consultations/2022/recommendations-12022-application-approval-and_en

An ideal way forward that is still consistent with the political reality of the EU and the UK would be to implement a system of mutual recognition of authorisations with minimal or reduced scrutiny, which would be complemented by a regulatory cooperation procedure between the EU and the UK. That way, a multinational group that has already gone through the approval process in the EU or the UK and obtained the relevant authorisation in one jurisdiction, would not need to repeat an identical or very similar process in another.

One practical way that could be deployed to facilitate this type of arrangement in practice would be to create EU and UK Addendums to existing BCR, aimed at tailoring the existing provisions to the requirements that are truly specific for each jurisdiction (e.g. the liability or regulatory supervision provisions). The existing UK Addendum to the EU Standard Contractual Clauses (SCC)[3] is a precedent for this idea that is proving very successful when using this specific contractual mechanism for transfers taking place from both the EU and the UK.

Role of BCR in relation to government access to data

BCR is a particularly suitable mechanism to assist with the potential conflict between data privacy and government access to data. The flexibility and adaptability of BCR makes it ideal to incorporate a risk-based approach to the protection of personal data in this context, which is entirely in line with the approach of the Court of Justice of the EU (CJEU) in its *Schrems II* decision[4], where the CJEU emphasised the need take measures to compensate for the lack of data protection in a third country by way of appropriate safeguards for the data subject.

Accordingly, BCR should provide for principles and practices to be deployed in order to ensure that such appropriate safeguards will be in place, while maintaining the flexibility that is at the essence of this mechanism. In other words, BCR can have a key role in relation to government access to data by setting out a general approach to ensure compliance with European standards of protection in this regard, rather than by creating a rigid and constraining regime.

This is something of particular relevance in the context of the EDPB Recommendations 1/2022, which introduce strict requirements for local law assessments and the handling of government access requests which go beyond the requirements on the same issue under the SCC. The risk of adopting an excessively constraining approach to this issue as part of the BCR requirements is that this mechanism might lose its ability to adapt the practices of organisations to the actual prospects of being subject to unjustified government access requests.

Process to streamline approvals

A universal criticism of BCR, that has adversely affected the ability to realise its full potential as a tool for applying European privacy standards at a global scale, is the cumbersome nature of the approval process. While it is true that over time, European data protection authorities have become more experienced in this area and their efforts to collaborate and consolidate their BCR approval practices should be recognised and welcomed, both in the EU and the UK, the level of scrutiny and administration involved is daunting. This can be contrasted with the practice of relying on SCC, which has rightly become much more scrutiny-free. So while it is right for BCR approval process to be rigorous, efforts should be made to make it more streamlined for the benefit of all parties involved.

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[3] International Data Transfer Addendum to the EU Commission Standard Contractual Clauses. Version B1.0, in force 21 March 2022. https://ico.org.uk/media/for-organisations/documents/4019539/international-data-transfer-addendum.pdf

[4] Judgment of the Court (Grand Chamber) of 16 July 2020 in Case C-311/18 *Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems*.

Professionalism and rigour are not in conflict with helpfulness and trust, and in this particular area, where organisations devote substantial efforts, time and skills to create a global framework that not only applies the highest standards of data protection across the board, but does so in an eminently practical and viable way, it is essential to facilitate the administrative aspects of the process. With that in mind, there is considerable room for streamlining the BCR approval process whilst still retaining the necessary rigour that assessing the effectiveness of this mechanism requires.

In other words, in the same way that the regulators' creativity and enthusiasm for a workable way of deploying high standards of data protection across jurisdictions led to the creation of this tool in the first place, it is necessary to continue to apply the same creativity and enthusiasm going forward. In practical terms, this means being able to design and implement an approval process that relies on a streamlined assessment focused on what truly matters in light of the requirements set out in Article 47 of the EU and UK GDPR.

In any event, there should be a firm commitment among the data protection authorities to observe the timeframes envisaged by the law and to keep applicants informed of their progress. Within the EU, the lead supervisory authority should be encouraged to work as closely as possible with the relevant co-reviewers and possibly delegate some of its functions where a shared approach to the review may accelerate the approval. This may be even more appropriate where one or both of the supporting authorities have particular expertise, experience and/or capacity to take on more work to lessen the load on the lead authority and speed up the approval process. Conversely, a lead supervisory authority should be prepared to intervene on behalf of an applicant if a reviewer is unclear about, or misunderstands, any elements of the applicant's documentation. Above all, the EU data protection authorities and the ICO should apply a pragmatic approach led by the objective of increasing the number of BCR adopted.

Transparency of BCR documentation

An area that would benefit from guidance and a sensible approach is the requirement for transparency regarding the documentation that comprises the BCR of a corporate group. At present, there appear to be inconsistent expectations as to what elements of the BCR should be made available, by what means, and to whom. In reality, different audiences are likely to benefit from different levels of availability, so while it is right for the internal audience of a set of BCR to be provided with the full set of documents that comprise the BCR, data subjects may primarily benefit from a summary document that focuses on their rights rather than the provision of detailed and complex legal information. This is an area where greater consistency among the EU and UK data protection authorities will be much welcome.

Approach to the annual update

A key aspect of the long term success of any given BCR is the way in which an existing set of BCR, and the way in which it is applied, evolves over time. Organisations with approved BCR are normally expected to provide an annual update to the relevant authority. While this may in principle be a sensible way for organisations to remain accountable, a strict and inflexible approach to the annual update risks adding an unnecessary focus to the administrative aspects of the BCR and, more worryingly, turning the update process into a never-ending authorisation exercise.

Accordingly, greater flexibility should be afforded to this aspect of the BCR. A suitably flexible approach to this exercise may involve an agreement between the organisation and the relevant lead authority to provide an update only if and when a significant development has taken place, without specifying the precise timeframe for regular updates. Similarly, the parties may be able to agree a flexible way of reporting updates by relying on the most appropriate means of communication which may be oral or in writing, or a combination of both.

Approach to BCR audits

Another largely administrative aspect of a BCR system is the ongoing assessment of compliance with its rules and practices. As with other elements of this mechanism, it is important not to be too constraining or prescriptive about the way in which BCR audits should be conducted. For example, the EDPB Recommendations 1/2022 refer to using "accredited auditors" when in reality, such a concept may not be relevant or even exist in some jurisdictions. Similarly, rather than specifying that the results of the BCR audit should be communicated to an organisation's "board", it would be advisable to make this type of requirement more generic by referring instead to the organisation's senior management or leadership. With regard to the entitlement of data protection authorities to have access to the results of the audit upon request, it would be sensible to clarify that in practice, this would only be triggered in the event of a complaint.

Processor BCR

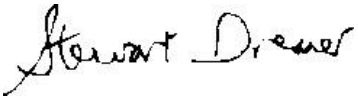
The concept of Processor BCR was developed several years after the Controller BCR was devised, but it has become a driving force for BCR. The prospect of global providers of data processing services applying European data protection standards universally is one of greatest successes of the GDPR framework. Therefore, similar efforts and attention should be devoted to ensure that this prospect is fulfilled and the benefits it brings are fully realised, and we encourage the EDPB to issue an equivalent revised set of recommendations for Processor BCR as a matter of priority.

A key aspect of the ability of Processor BCR to succeed is to be able to address a common practical situation where EU and UK-based controllers engage a processor in a different jurisdiction and transfer personal data directly to that processor. From a data protection perspective, to the extent that the importer of the data is subject to the Processor BCR, there is no reason to treat that situation differently from one where a controller engages a processor in the EU or the UK, and then that processor transfers the data to an overseas entity within the group covered by the same Processor BCR. Accordingly, both the EU data protection authorities and the ICO should align their positions to allow transfers from an EU or UK controller to any entity subject to a Processor BCR to fall within the scope of application of that BCR.

Conclusion

By working together and aligning their positions on BCR, all European data protection authorities can make a very significant and tangible contribution to the protection of personal data. The European Commission and the UK Government should facilitate this alignment by empowering those authorities to work as constructively as possible. Any efforts made by both the EDPB and the ICO to simplify their guidance, for example by ensuring that the final version of the EDPB Recommendations 1/2022 replaces long and complex sentences with simple statements, are likely to yield significant benefits in terms of encouraging more global organisations to adopt this model and facilitating approvals. BCR represent a valuable practical mechanism that benefits organisations and individuals, so we encourage all stakeholders to continue to actively support the development and growth of BCR.

We hope that the constructive views expressed in this memorandum are helpful in contributing to the success of BCR in the EU, the UK and ultimately, the world.



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