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Working Document Setting Forth a Co-Operation Procedure for the approval of “Binding Corporate Rules” for controllers and processors under the GDPR

Adopted on 11 April 2018

ARTICLE 29 DATA PROTECTION WORKING PARTY



Introduction

The procedure for approving binding corporate rules (BCRs) for controllers and processors is laid out by provisions contained in Articles 47.1, 63, 64 and (only if necessary) 65 of the Regulation (EU) 2016/679 (GDPR).

As a result, binding corporate rules are to be approved by the competent supervisory authority¹ in the relevant jurisdiction in accordance with the consistency mechanism set out in Article 63, under which the European Data Protection Board (EDPB) will issue a non-binding opinion on the draft decision submitted by the competent Supervisory Authority (Article 64 GDPR).

As the group applying for approval of its BCRs may have entities in more than one Member State, this procedure may involve a number of concerned Supervisory Authorities (SAs)², e.g. in those countries from where the transfers are to take place. However, the GDPR does not lay down specific rules for the cooperation phase which should take place among the concerned SAs in advance of referral to the EDPB. It also does not set out specific rules for identifying the competent SA – which will act as Lead Authority for the BCRs ('BCR Lead')³. The role of such BCR Lead includes acting as a single point of contact with the applicant organization or group during the approval process and managing the application procedure in its cooperation phase.

The aim of this document is to update the WP 107 and identify smooth and effective cooperation procedures in line with the GDPR whilst taking full advantage of the previous fruitful experience of the Data Protection Authorities in dealing with the approval of BCRs.

This document will be reviewed and if necessary updated, based on the practical experience gained through the application of the GDPR.

¹ Article 57.1.s GDPR states that “without prejudice to other tasks set out under this Regulation, each supervisory authority shall on its territory [...] approve binding corporate rules pursuant to Article 47” and Article 58.3.j GDPR according to which each supervisory authority shall have the “authorisation and advisory powers [...] to approve binding corporate rules pursuant to Article 47”.

² Pursuant to Article 4(22) (a) and (b), a ‘supervisory authority concerned’ means a supervisory authority which is concerned by the processing of personal data because the controller or processor is established on the territory of the Member State of that supervisory authority or because “data subjects residing in the Member State of that supervisory authority are substantially affected or likely to be substantially affected by the processing”. As for the BCRs approval procedure, the concerned SAs are the SAs in the countries from where the transfers are to take place as specified by the applicants or, in case of BCR-P, all SAs (since a processor established in a Member State may provide services to controllers in several – potentially all – Member States).

³ The “BCR Lead” is generally distinct from the “OSS Lead” considering that BCR transfers will not as a rule meet the definition/criteria of a cross-border processing operation. However, there could be cases in which the same SA could be the BCR Lead and the OSS Lead. This might e.g. be the case if a transfer performed by one establishment substantially affects data subjects in more than one MS (i.e. if personal data are first sent from member states A, B and C to the controller’s establishment in member state A, and subsequently transferred by this establishment in A to a third country or, in case of BCR-P, where the processor carries out the same transfers for all their clients in the different member states). In any case, the BCR approval procedure would be the specific one settled by Article 64 GDPR.

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1. Identification of the BCR Lead Supervisory Authority

1.1 A group of undertakings, or group of enterprises engaged in a joint economic activity ('Group'), interested in submitting draft binding corporate rules (BCRs) for the approval of the competent Authority according to Articles 47, 63 and 64 GDPR should propose a SA as the BCR Lead. The decision as to which SA should act as BCR Lead is based upon the criteria contained in this document (see next paragraph). It is for the organisation to justify the reasons why a given SA should be considered as the BCR Lead.

1.2 An applicant Group should justify the proposal of the BCR Lead on the basis of relevant criteria such as:

- a. the location(s) of the Group's European headquarters;
- b. the location of the company within the Group with delegated data protection responsibilities⁴;
- c. the location of the company which is best placed (in terms of management function, administrative burden, etc.) to deal with the application and to enforce the binding corporate rules in the Group;
- d. the place where most decisions in terms of the purposes and the means of the processing (i.e. transfer) are taken; and
- e. the member state within the EU from which most or all transfers outside the EEA will take place.

1.3 Particular attention will be given to factor described under 1.2 (a) above.

1.4 These are not formal criteria. The SA to which the application is sent (as prospective BCR Lead SA) will exercise its discretion in deciding whether it is in fact the most appropriate lead SA and, in any event, the SAs among themselves may decide to allocate the application to a SA other than the one to which the Group applied (see next paragraph), in particular if it would be possible and worth for speeding up the procedure (e.g. taking into account the workload of the originally requested SA).

⁴ According to Article 47.2.f GDPR, there should always be an EU based member of the group established on the territory of a Member State accepting liability for any breaches of the binding corporate rules by any member concerned not established in the Union. If the headquarters of the group were somewhere else, the headquarters should delegate these responsibilities to a member based in the EU.

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1.5 The applicant should also provide the proposed BCR Lead (the entry point) with all appropriate information (both on paper and electronically to facilitate further distribution) which justifies its proposal, *inter alia*, the nature and general structure of the processing activities in the EU with particular attention to the place/s where decisions are made, the location and nature of affiliates in the EU, the number of employees or persons concerned, the means and purposes of the processing, the places from where the transfers to third countries do take place and the third countries to which those data are transferred.

2. Cooperation procedure for the approval of BCRs

- 2.1 The proposed BCR Lead will forward the information received as to why that SA has been selected by the company to be the lead authority for the BCRs to all SAs concerned⁵ with an indication of whether or not it agrees to be the BCR Lead. If the entry point agrees to be the lead authority, the other concerned SAs will be asked, under Article 57.1.g GDPR, to raise any objections within two weeks (period extendable to two additional weeks if requested by any SA concerned). Silence is deemed as consent. In the event that the entry point is of the view that it should not act as the BCR Lead, it should explain the reasons for its decision as well as its recommendations (if any) as to which other SA would be the appropriate lead authority. The SAs concerned will endeavor to reach a decision within one month from the date that the papers were first circulated.
- 2.2 Once a decision on the BCR Lead has been made, the latter will start the discussions with the applicant and review the draft BCR documents. In order to foster a more consistent approach, it will send, under Article 57.1.g GDPR, a first revised draft of the BCRs and the related documents to one or two SAs (depending on the number of Member States from whose territories the transfers will take place)⁶ which will act as co-reviewers and will help the BCR Lead in the assessment. In case there is no response from a SA acting as co-reviewer within one month from the date the draft and the related documents were sent to it (deadline extendable under justified circumstances), that SA will be deemed to have agreed with them. There may need to be several different drafts or exchanges between the applicant and the relevant SAs before a satisfactory draft is produced.
- 2.3 The result of these discussions should be a “consolidated draft” sent by the applicant to the BCR Lead which will circulate it among all concerned SAs⁷ under Article 57.1.g GDPR for comments. According to this procedure, the period for comments on the consolidated draft will not exceed one month. A concerned SA which has not presented a

⁵ See above footnote n. 2.

⁶ As a rule, the BCR Lead will consult 2 co-reviewers whenever 14 Member States or more are concerned by transfers. Under this threshold it is possible to have one or two co-reviewers depending on the specific case and the availability of SAs.

⁷ See above footnote n. 2.

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reasoned objection within this period shall be deemed to be in agreement with the consolidated draft.

- 2.4 The BCR Lead will send any further comments on the “consolidated draft” to the applicant and may resume discussions, if necessary. If the lead authority is of the view that the applicant is in a position to address satisfactorily all comments received, it will invite the applicant to send a “final draft” to it.
- 2.5 Pursuant to Article 64.1 and 64.4 GDPR, the BCR Lead will submit the draft decision to the EDPB on the ‘final draft’ of the BCRs along with all relevant information, documentation and the views of the concerned SAs. The EDPB will adopt an opinion on the matter in accordance with Article 64.3 GDPR and its Rules of Procedure.
- 2.6 Where the opinion handed down by the EDPB under Article 64.3 endorses the draft decision on the draft BCRs in the form submitted, the BCR Lead will adopt its decision approving the draft BCRs.
- 2.7 Where the opinion handed down by the EDPB according to Article 64.3 requires any amendment to the draft BCRs, the BCR Lead will communicate to the Chair of the Board within the two-week period set out in Article 64.7 whether it intends to maintain its draft decision (i.e. not to follow the opinion of the EDPB) or whether it intends to amend it in accordance with the EDPB opinion⁸. In the first case, pursuant to Article 64.8 GDPR, Article 65.1 GDPR shall apply⁹. If the BCR Lead communicates to the Chair of the Board that it intends to amend its draft decision in accordance with the EDPB opinion, the BCR Lead will contact the applicant immediately in order to request the amendments to the draft BCRs to be made in accordance with the EDPB opinion so that the draft BCRs can be finalized. When the draft BCRs have been finalized in accordance with the EDPB opinion, the BCR Lead will amend its initial draft decision accordingly, notify the EDPB pursuant Article 64.7 of its amended decision and approve the BCR.
- 2.8 Once the BCR Lead approves the BCRs, it will inform and send a copy of them to all the concerned SAs. In accordance with Article 46.2.b GDPR, the approved ‘binding corporate rules’ will provide for the appropriate safeguards referred to in paragraph 46.1 without requiring any specific authorisation from the other concerned supervisory authorities.
- 2.9 Translations: as a general rule and without prejudice to other translations where necessary or

⁸ According to Article 64.5, the Chair of the Board will, without undue delay, inform by electronic means the members of the Board and the Commission of this information.

⁹ In particular, in accordance with Article 65.1.c., “in order to ensure the correct and consistent application of this Regulation in individual cases, the Board shall adopt a binding decision in the following cases: [...] (c) where a competent supervisory authority [...] does not follow the opinion of the Board issued under Article 64. In that case, any supervisory authority concerned or the Commission may communicate the matter to the Board”.

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required by law, all documents including the consolidated draft of the BCRs should be provided by the applicant in the language of the BCR Lead and also in English when possible in accordance with national law. The final draft and the approved BCRs must be translated by the applicant into the languages of those SAs concerned¹⁰.

2.10 Once the BCRs have been approved, the BCR Lead, according to WP 256 and 257, points 5.1, will inform the concerned SAs of any updates to the BCRs or to the list of BCR members as provided by the applicant. In case the group extended the scope of the BCRs to an additional EU member state (because of the establishment of a new BCR member in this EU member state), the SA of this member state will then be deemed to be a new concerned SA as for point 2.8.

¹⁰ See also on this WP 256 and 257, Sections 1.7 according to which “The BCRs must contain the right for every data subject to have an easy access to them”.