

RECOMMENDATION 1/2022 ON THE APPLICATION FOR APPROVAL AND ON THE ELEMENTS AND PRINCIPLES TO BE FOUND IN CONTROLLER BINDING CORPORATE RULES (ART. 47 GDPR) EDPB CONSULTATION

On 14 November 2022, the European Data Protection Board (EDPB) adopted an updated version of its recommendations on "controller" binding corporate rules (C-BCR).

Preliminary remarks

Before commenting further on these draft recommendations, AFEP member companies would like to highlight the following points:

- a) BCRs are valued as a legal security element facilitating intra-group transfers of personal data. They are both part of the principle of accountability, a major provision of the GDPR, and of a global implementation of compliance policies within companies;
- b) The main purpose of the document submitted for consultation is to bring the conditions for the approval of BCRs into line with the conclusions of the Schrems II judgment;
- c) This tool:
 - was originally conceived as a co-construction between the company integrating the requirements related to personal data and supervisory authorities rightly encouraging the development of personal data culture within companies,
 - intended to create a global framework facilitating intra-group data transfers in order to cover all processing carried out by the company or more particularly data transferred outside the European Union.
- d) The analysis that would now be required will result in an additional administrative burden for European data-exporting companies while:
 - the risk analysis, which may be carried out by the company concerned, is recalled by the CJEU in the Schrems II judgment and by the European Commission in its Communication of June 2021; under certain conditions, this analysis allows the company to assess the reality of the context governing the transfers without overloading it with constraints,
 - the principle of accountability advocated by the GDPR should be part of a framework aiming to ease requirements required by supervisory authorities – contrary to what is envisaged here. It is on the basis of this principle that companies have already developed and applied their own processes, often based on the methodologies recommended by European authorities and that condition data processing. From this follows the implementation of structuring tools framed, controlled, and objectified within companies. These same tools are also based on international standards such as ISO standards. They help to allow the processing of data in a controlled manner and in accordance with the applicable rules.

- e) In view of the amount of precision, justification, and assurances to be provided, these new requirements put companies at risk in the face of potentially varying interpretations from different European supervisory authorities.

This project therefore unnecessarily complicates the usual mechanisms for transferring data outside the EU, which are essential for companies in the daily management of their activities (exchange of information within a group of companies, management of expatriate employees, outsourcing of customer services, etc.).

Comments on the notice

In general, companies deplore the fact that the draft, which is intended to specify the conditions for approval by a competent supervisory authority, continues to increase their legal responsibility without any real pragmatic support. This new EDPB publication reinforces the burden on European data exporters by requiring information that is often far removed from economic realities.

a) Relevance of the information requested

This draft Recommendation no longer envisages transfer processes in a general commitment framework **but in a data transfer process by data transfer**.

The compliance of some of these transfers would now have to be documented with regard to the destination or type of data, for example, which in total would mean thousands of lines of additional formal documentation. Such a volume of information would be incomprehensible and therefore useless for the vast majority of those concerned.

Companies recall that BCRs are intended to secure the processing of data within the same group in the event of transfers outside the EU within a global framework, in consultation with the competent authority. In this context, they question the relevance of this additional information.

They consider that they should be given a margin of appreciation to provide the most appropriate information according to all the circumstances that characterize the transfer (nature of the data, frequency of transfers, practical experience, type of business model, guarantees and safeguards put in place, etc.).

b) Interpretive risks

The requirements for analyzing and assessing the conditions of transfers required are potentially due to the varied approaches of the many European supervisory authorities, whose assessment of situations is more or less strict. These authorities are likely to require ever more precise justifications for the information provided.

In the light of this interpretative variety to which European undertakings are already subject, the risk for a data-exporting undertaking of being deemed to be in default is thus increased without necessarily being proportionate to the relevance of the mass of information requested.

c) Comments on specific points of the document

- The new, heavy constraints cannot **be applied retroactively** as advocated in §13 of the introduction. The mass of new information that may have to increment already approved BCRs (before the publication of the future Recommendation 1/2022) cannot be imposed

retroactively.

It would be appropriate to specify that these provisions will be applicable for any new BCRs or when existing ones are to be updated - requiring further approval by the EDPB.

- In Part 1 – 4 of the document (Acknowledgement), companies deplore the lack of pragmatism of the supervisory authorities who recommend in §3 the suspension or cessation of transfer if the legal conditions are not respected in the third countries receiving the personal data transferred.
- In point 3 (p.17 et seq.), the companies draw the EDPBs' attention to comments in §3.4 (p.32): they point out that if DPOs make DPIAs, this reference in the context of BCR audits is confusing. The parallel with DPIAs should be removed from this paragraph.
- Publication on companies' websites: faced with a mass of illegible information, the usefulness for the concerned persons appears relative. Conversely, this same overabundant publication can provide malicious actors with easy - and often formal - opportunities to initiate litigation or provide them with the opportunity to launch more easily a cyberattack on the data of the concerned persons.

That publication obligation therefore appears disproportionate in relation to the risks to which it exposes data-exporting undertakings.

d) Evolution of the general legal framework

European economic actors wish to highlight the ongoing developments in litigation concerning - in particular- personal data.

Directive 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers is being transposed in the Member States. It aims to facilitate class actions in Europe. Its very broad scope includes the protection of personal data.

Its ongoing transposition in France, which already has a law (2016) allowing this type of litigation concerning personal data, aims to simplify access to the class action procedure and ensure better compensation for victims.

Draft Recommendation 1/2022 multiplies the requirements and clarifications to be provided by European economic actors. As a result, this project is increasing the burden of declarative and formal responsibilities. The EDPB risks providing new reasons for attacking economic operators on grounds of formalism or procedure rather than substance.

It is not certain that this contributes to general economic support or better data protection.

Conclusion

Companies are now wondering about the interest they would still have in developing and/or using the BCR tool. Originally a facilitator of transfer, it is gradually becoming a tool for administrative supplementation. They do not understand the relevance while the risks continue to grow without improving data protection for the data subjects.

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About AFEP

Since 1982, AFEP brings together large companies operating in France. The Association, based in Paris and Brussels, aims to foster a business-friendly environment and to present the company members' vision to French public authorities, European institutions and international organisations. Restoring business competitiveness to achieve growth and sustainable employment in Europe and tackle the challenges of globalisation is AFEP's core priority.

AFEP has 114 members. More than 8 million people are employed by AFEP companies and their annual combined turnover amounts to €2,600 billion.

AFEP is involved in drafting cross-sectoral legislation, at French and European level, in the following areas: economy, taxation, company law and corporate governance, corporate finance and financial markets, competition, intellectual property, digital, data protection, labour law and social protection, environment and energy, corporate social responsibility and trade.

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