

Dominika Kuźnicka-Błaszowska¹

Public consultation on “Recommendations 1/2022 on the Application for Approval and on the elements and principles to be found in Controller Binding Corporate Rules (Art. 47 GDPR)”

General comments

The author was happy to receive information about the preparation of the first draft of the Recommendations by the EDPB and hopes that they will contribute to a wider application of the BCR in the international transfer of data. However, to ensure that this transfer mechanisms is widely used, it is worth to consider, what are the reasons for controllers and processor not being vividly interested in adopting this mechanism so far. Although BCR can help to organize the processing of personal data and constitute a transfer mechanism considered relatively secure, the procedural aspects mean that few controllers use this measure. Binding corporate rules can be extremely costly to develop and there is no guarantee that they will be approved by the supervisory authority. However, it seems that for many entities potentially interested in BCRs, the biggest obstacle is the potential to attract the attention of the supervisory authority, which has a chilling effect. In their current shape, the recommendations do not solve these problems, moreover, it seems that some of the guidelines contained therein impose additional obligations on controllers and processors applying for the adoption of the BCR, not required by the GDPR.

Detailed comments on specific sections

I “Introduction” Section

This is not clear whether, Controller and Processors need to sign the contract or other legal act (as required in art 28 (3) GDPR) in addition to BCR. In the view of the author, BCR may serve as “other legal act” as long as they are lawfully binding for all members of the Group adopting BCR. EDPB may wish to clarify this point and consider whether BCR may in fact serve as “other legal act” as required in art. 28 (3) and as such, adopting BCRs may be sufficient to comply with art 28 in this regard.

It may be further clarified whether controllers adopting binding corporate rules can decide whether BCR are applicable to all data processing in the Group or only data processing which is covered by material and territorial scope of GDPR. Such clarification has been included in

¹ This paper exclusively reflects the view of its author and does not, in any way, represents views of any institution the author is associated with.

WP264 and similar wording may be introduced in the new Recommendations. At this moment this is not clear whether the approach has changed and BCR shall be applicable to all data processing in the Group or not. In the view of the author, this is up to controller to decide whether BCR are applicable to all data processing taking place in the Group or not (especially considering different data protection model in various jurisdictions the Group may operate).

The obligation for controllers whose BCR have been already approved and implemented to “bring their BCR-C in line with the requirements set out below” shall not be required. This creates additional costs for controllers whose BCR have been already approved and brings uncertainty of the consequences of non-compliance with this part of Recommendations. EDPB may consider further clarification on this point.

II “Elements and principles to be found in BCR-C” Section

3.1. Suitable training programme- in author’s view, the requirement to provide training to personnel “who are involved (...) in the development of tools used to process personal data” goes beyond obligation stated in art 47 (2)(n) GDPR and as such shall not be imposed in the form of Recommendations. EDPB may want to reconsider the scope of obligation to implement suitable training programme in its recommendations. Also, considering the efficiency and economic aspects of preparing training materials, the obligation to develop training material before approving BCR shall not be imposed. There may be situations, when the controller fails to have BCR approved or provides significant changes to BCR during the procedure. In such scenario, to ensure that training materials are fully up-to-date and in line with BCR, controller will need to update training materials. In author’s view, it shall be sufficient for controllers to have the materials developed before BCR comes into force.

5.1.2. Lawfulness of processing – this is not clear whether changes in the lawful basis for processing listed in BCR (e.g. by starting new data processing based on lawful basis not listed in BCR) constitutes material change to BCR and requires communication in advance to supervisory authority. This may be further clarified by EDPB.

5.3. Accountability and other tools – imposing on controllers obligation to maintain a record of all categories of processing activities carried out on personal data transferred under BCR goes beyond obligations stated in GDPR and as such shall not be implemented in Recommendations. This shall be sufficient to have the fact of using BCR for particular processing reflected in Data Processing Inventory.

8.1. Process for updating the BCR-C – this section includes a lot of specific obligations on updating BCRs and keeping records of provided changes, whereas art 47 (2) (k) suggests that this is controller who may decide on how changes are recorded and tracked. As such, it seems that EDPB shall not impose additional obligations in this regards in form of Recommendations (e.g. identifying a person or team/department that keeps record of any updates to the BCR-C, obligation to notify changes to BCR members once a year). On the other hand, this part is missing further explanation and more examples on changes which may be detrimental to the level of the protection offered by the BCR-C or significantly affect them. It is not clear what changes may require new approval and whether such changes shall be approved in any form of simplified procedure.

Dominika Kuźnicka-Błaszowska