

The 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) include a reference to the Processor Binding Corporate Rules that may be confusing.

Paragraph 5 of the Introduction states that *‘BCR for processors (hereinafter “BCR-P”) apply to data received from a controller that is not a member of the Group, and which are then processed by the concerned Group members as processors and/or sub-processors. ‘*

The word ‘receives’ implies the data is actually obtained or at least available/accessible by the processor. According to this sentence, the processor needs to ‘receive’ the data first and (only) if after that data is transferred within the Group to a sub-processor located in a third country, the processor can rely on its BCR for processor. Does the EDPB mean to state that BCR for processor do not apply if the processor itself does not ‘receive’ the data from the controller, but a sub-processor in the same Group located in a third country, processes the data by means of accessing the data stored on the controller’s infrastructure in the EEA? In other words, if the controller keeps the data stored on its infrastructure (as a basic security measure) and provides the processor and its sub-processors in the same Group access to the data to perform the processing activities, the processor can not rely on its BCR for processors? In other words, does the data transfer mechanism that can be applied depend on the storage location of the data?

If this is not the intention of the EDPB, it would be better to avoid confusion and change the sentence into: *BCR for processors (hereinafter “BCR-P”) apply to data that will be processed by the processor on behalf of a controller that is not a member of the Group, and which are then processed by the concerned Group members as processors and/or sub-processors.*

On the other hand, if it is the intention of the EDPB, the EDPB introduces a new condition to be met by BCR for processors that is not listed in art 47 GDPR or perhaps even introduces a new definition of processor. The goal of EDPB Recommendations is to provide guidance on the interpretation of core concepts of the GDPR. Including a new condition is beyond the scope of authority of the EDPB.

Adding the element of data storage location to the discussion of applicable data transfer mechanism will be confusing and not adding to the protection of data subjects, their rights and their legal remedies. If in the described case that data will remain stored by the controller in the EEA, the BCR for processors would not be an appropriate safeguard, another mechanism in accordance to art 46 GDPR will need to be relied upon. In reality and in practice it is likely that the processing activities of the processor are much broader and involve processing of data that is stored on the infrastructure of the controller in the EEA and data that is actually obtained and processed by the processor and sub-processors in the same Group. In the latter the BCR for processor can be used as the data transfer mechanism, in the first another transfer mechanism needs to be used, whilst the same processor and sub-processors perform the processing activities.

The contractual relationships between controller, processor and sub-processor might become very complex. It will be more difficult to be transparent and understandable in the information to be provided to data subjects regarding data transfer in line with Section 2 GDPR. This could have a negative impact on the the data subject rights and legal remedies for the data subjects and therefore not fulfill the main condition for all transfer mechanisms in accordance to art 46 GDPR; to provide for enforceable data subject rights and effective legal remedies for data subjects.

Therefore it should not be the intention of the EDPB to introduce a new condition when the BCR for processor is applicable and it is better to change the sentence in paragraph 5 of the Introduction as mentioned above.