

Comments on EDPB Recommendations on the application for approval and on the elements and principles to be found in Controller Binding Corporate Rules

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General comments

Insurance Europe welcomes the possibility to comment on the European Data Protection Board's (EDPB) [recommendations](#) on the application for approval and on the elements to be found in the Controller Binding Corporate Rules (BCR-Cs). These are an essential transfer tool that can be used by a group of undertakings or enterprises, engaged in a joint economic activity, to transfer personal data outside of the European Economic Area to controllers or processors within the same group. BCRs create enforceable rights and set out commitments to establish a level of data protection essentially equivalent to the one provided by the General Data Protection Regulation (GDPR).

The aim of these recommendations is to provide an updated standard application form for the approval of BCR-Cs, and to clarify the necessary content of BCR-Cs and what must be presented to the BCR lead data protection authority in the BCR application. The recommendations also replace the existing guidelines for BCR-Cs, namely (a) [Working Paper 264](#) with recommendations on the standard application for approval of C-BCR and (b) [Working Paper 256 rev01](#) specifying the elements and principles to be found in C-BCR.

However, while the changes to bring existing guidance **in line with the requirements in the CJEU's Schrems II ruling** are justifiable, in many instances the recommendations establish **new requirements that cannot be directly derived from Article 47 of the GDPR**. This was not previously foreseen and means an enormous additional effort for the companies concerned.

Additionally, the recommendations do not lay out a **proper transitional arrangement** to allow companies to update their BCRs. The EDPB expects all BCR holders to bring their BCR-C in line with the requirements of the new recommendations even if they have been approved before its publication. In Section 8.1. paragraph 5, the EDPB briefly mentions a **one-year** time frame for companies to update their BCR and notify their supervisory authority. Such a timeframe does not take into account all of the associated implementation work that will be needed, such as the update to training programs for employees and the preparation of new FAQs.

Recommendation: The EDPB should lay out a proper transitional arrangement to allow enough time for companies to update their existing BCRs. The proposed one-year timeframe is not enough given the complex and extensive update requested by the EDPB. In the absence of such a transitional period, the

recommendations should apply only to new BCRs that have not yet been approved by the competent supervisory authority, while existing BCR-holders should be able to align their BCRs at the time of their next planned update (for instance to take into account modifications of the regulatory environment or changes to the scope of the BCR-C).

Given the above considerations, Insurance Europe invites the EDPB to provide the necessary clarifications on the issues described below.

Application Form

The new table on page 17 ff. (especially column 5) de facto requires that **information that previously needed to be provided in the application form must now be included directly in the BCRs**. It is not clear why information that previously needed to be provided in the application form must now be included in the BCRs if the legal situation remains unchanged.

The application form establishes **new requirements** that cannot be directly derived from Article 47 of the GDPR. For example:

- Sanctions will now need to be described directly in every means which was chosen to bind the employees (**Part 2, 5, page 12**).
- The Intra Group Agreement will now need to be signed at board level (**Part 2, 6, page 15**).

The content of the "acknowledgement" in **Part 2, 4., page 10** shows that the EDPB expects that each member of the group of undertakings must assess whether the legislation of the third country of destination prevents the recipient from complying with the BCR themselves. Therefore, the practical advantage of BCRs (ie the fact that it is no longer required to assess each transfer individually) appears to be undermined due to the inclusion of this requirement. This acknowledgement appears superfluous and an unnecessary burden, particularly as a declaration "on behalf of each member of the group" would require a corresponding authorisation by each individual group company. The acknowledgement is also partly redundant given Annex 2, 5.4.1.

Elements to be found in BCR-C

Apparently, in this section the EDPB does not only expect appropriate safeguards as mentioned in Article 46 of the GDPR, but rather a **1:1 copy of the GDPR** in the BCRs. For example:

- **Annex 2, 5.2.** stipulates that the BCR should provide the rights of the data subjects "in the same way as these rights are provided for by Articles 12 to 19, and Articles 21 and 22 GDPR."
- According to **Annex, 5.3. paragraph 2** the BCR-C must specify the content of contracts with all internal and external contractors/processors "as set out in Article 28(3) of the GDPR".

These obligations exceed the demands of Chapter 5 of the GDPR, which establishes that personal data leaving the EU must receive an "equivalent level of protection" in the country of the data importer, but it does not mandate the establishment of identical requirements in the third country or in the relevant transfer tool.

Furthermore, Annex 2 of Recommendation 1/2022 establishes **requirements that cannot be directly derived from Article 47 of the GDPR**. This was not previously foreseen and means an enormous additional effort for the companies concerned. In particular, the following requirements are affected:

- According to **Annex 2, 1.3.2.** the **right of representation by non-profit organisations** (Article 80 of the GDPR) is to be implemented in the BCRs.
- A confirmation of sufficient assets must be renewed in every annual update pursuant to Annex 2, 8.1 to the BRC Lead (**Annex 2, 1.5**).
- Regarding the **specification of the material scope** of application of the BCRs, the previous guidance required a "general description of the transfers". The fact that it is not necessary to describe each transfer individually has so far been a **decisive practical advantage of BCRs over SCCs** for

the exchange of data within a group. Conversely Recommendation 1/2022 requires in Annex 2, 2.1 a detailed description of each single transfer or each set of transfers on the basis of the characteristics referred to in Article 47(2) (b) of the GDPR (categories of personal data, type of processing and its purposes, type of data subjects affected and identification of the third country or countries in question). According to footnote 18, this description must be “exhaustive”. Every transfer or set of transfer must be described and where the description provided by the applicant is too broad, general or vague, the applicant must explain why it is not in a position to provide more detailed information. If there is any change in detail, the process for updating the BCRs (Annex 2, 8.1) will need to follow.

- In **Annex 2, 4.1**, additional requirements for the cooperation with supervisory authorities (Article 47(2) (l) of the GDPR) are set out, which must be included in the BCR. This requires, in particular, an agreement on the place of the jurisdiction and procedural law of the authority. The BCR members agree to submit themselves to the jurisdiction of these courts (page 33, last paragraph).
- According to **Annex 2, 5.1.2**, the BCR-C should contain an **exhaustive list of all legal basis** for processing on which the BCR members intend to rely. Although “other legal basis” is mentioned, it is not clear why only Article 6 (1) and (3) are referred to, but not Article 6 (4).
- **Annex 2, 5.4.1 and 5.4.2**. align with the Schrems II jurisprudence. For companies included in the BCRs, groups carry out a central risk assessment to ensure that there are no regulations in the third country that conflict with the BCRs or that a comparable level of data protection exists. However, an additional in-depth security audit or an audit of every transfer is not possible in practice due to the large number of data transfers. The agreement of the BCRs, which guarantee an adequate level of protection, should be sufficient for this.

Finally, in many passages, a **level of detail** is required in the BCRs that goes far beyond the requirements of the GDPR. For example, it is required that the following information is provided directly in the wording of the BCR:

- A description of the elements of the short BCR to be published in the BCRs in detail (Annex 2, 1.7).
- The frequency and content of staff training (Annex 2, 3.1).
- The frequency of audits and the department responsible for audits (Annex 2, 3.3).

Article 47 of the GDPR does not require such a level of detail. The provision of such details is not advisable, as it will mean that insignificant changes must be brought to the attention of the BCR lead in the procedure according to Annex 2, 8.1.

Conclusions

If not carefully considered, these changes are likely to devalue the BCR instrument. Due to the increased effort required, companies may no longer see any advantage to use BCRs over the new European Commission’s Standard Contractual Clauses (SCCs). Groups that have considered BCRs are now likely to prefer an intra-group agreement with underlying SCCs.

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