EUROPEAN COMMISSION
Internal Market DG

SERVICES, INTELLECTUAL AND INDUSTRIAL PROPERTY, MEDIA AND DATA PROTECTION
Data protection

Summary of the contributions received to the Article 29 Working Party consultation on Binding Corporate Rules

Overview

Most contributors regard this initiative in positive terms but encourage the Article 29 Working Party to complete the work. Commentators broadly commend this working document as it provides for an alternative to standard contractual clauses and facilitates compliance by multinational companies. They are nevertheless of the view that it would be necessary to clarify and complete some issues (you can read the most important ones briefly summarised in this note) before binding corporate rules can be effectively used by operators.

The number of issues raised by the contributions is very limited for such a long working document and most contributors effectively comment on the same issues. This reflects a considerable level of acceptance of the working document although those issues almost unanimously commented should receive particular attention by the Group. The Secretariat recommends that those issues reflected in this note are considered as possible issues for discussions at the hearing to take place in January 2004.

List of contributors

- Confederation of British Industry
- American Chamber of Commerce to the European Union
- Accenture
- Bundesverband der Deutschen Industrie
- DaimlerChrysler
- European Privacy Officers Forum
- International Chamber of Commerce
- Japan Business Council in Europe
- KPMG International
- United States Council for International Business
- Sidley Austin Brown & Wood LLP

- Morrison and Foerster LLP
- International Communications Round Table
- Citygroup
- ABN-AMRO
- Philips
- European Banking Federation

The need for a clear and realistic co-operation procedure

This seems to be the condition-sine-qua-non for most commentators. There is a general fear that if there were no clear rules in this regard which effectively bind all DPAs, multinational companies might end up negotiating BCR with several data protection authorities which might read this working document in slightly different ways. There is a general request that the co-ordinated procedure is as streamlined as possible and it contains maximum response times. As the working document is not very clear in this regard, some commentators seem to have misunderstood this issue and some for example believe that the issuing of "permits" by all data protection authorities means in fact separate negotiations (when in reality these permits would be granted "automatically" as the final step of the co-operation procedure).

The Confederation of Business Industry and the European Banking Federation disagree that companies need binding corporate rules to transfer the data to third countries or that BCR have to be approved by the supervisory authorities. They are of the view that the Working Party has overlooked the extent to which the Member State's legislation implementing the Directive provides sufficient safeguards for data subjects. As a result, and disregarding reputational risk, they are of the view that a data controller within the EEA will only export personal data to companies within his group where he is confident that the procedures in place will ensure that adequate protection is provided.

For some commentators the co-operation procedure should rely on a "mutual recognition" approach by which the agreement of a data protection authority to a set of binding corporate rules would be accepted as sufficient safeguards by all Member States. Some also call for a Commission decision which would provide full legal certainty.

Codes of conduct should be able to stand alone (no need for contractual support). Emphasis on effective compliance.

Most commentators agree that it does not make any sense to develop a code of conduct's approach if companies have to rely on contractual arrangements after all. Some commentators think that unilateral undertakings or contracts are not the only valid ways to bind companies effectively and invite the Article 29 Working Party and the Commission to consider other alternatives.

Some examples mentioned: unfair trade practices laws, general rules on misrepresentation and misleading advertisement. Labour and consumer protection laws would also be likely to provide redress should a company make erroneous statements

about the processing of personal information. Some say that a Commission decision would eliminate any uncertainties about the legal effects of BCRs.

Commentators also say that as data subjects are in principle not very likely to go to court for violations of the binding corporate rules but on the contrary they may easily lodge complaints before the national data protection authorities, the role of the national supervisory authorities as dispute resolution bodies should be stressed. Some commentators think that as DPAs may withdraw or suspend the authorisation, or order the corporate group to cease particular processing, or publicly shame the corporate group or even impose fines, all these possibilities would anyway guarantee that corporations effectively abide by the rules if necessary.

Easier arrangements for onward transfers

Most commentators would like to benefit from more flexible rules as regards onward transfers. The working document says that onward transfers could only be made on the basis of the standard contractual clauses adopted by the Commission but multinational companies would like to be able to rely on more flexible arrangements such as those contained in the Safe Harbor Principles; for example, the undertaking by the recipient that he would apply the same data protection rules as those contained in the BCR. It is argued that at least this should be possible for onward transfers to data processors.

The difficult issue of the level of detail

Some commentators see enormous difficulties for multinationals to use binding corporate rules should the level of detail about data flows within the corporation be too high. While some seem to be happy with the idea of using the level of detail of notification set by the national authorities (Articles 18-20 of the Directive) as an example, others find this way of proceeding too burdensome.

The duty of co-operation with DPAs and audit requirements

As it was the case with the standard contractual clauses, some commentators find it difficult to interpret the expression "abide by the advice of the DPA" and would like to be clarified in practice. Some commentators feel uneasy about the fact that data protection authorities can request a copy of the internal audits at any moment or by the fact that these audits should be provided to the authority every time that there is an update to the BCR.

Transparency in practical terms

Finally, some commentators would like to know how to deal in practice with the duty of informing individuals that transfers are based on BCR as well as other transparency requirements. Some corporations feel uneasy about having to publicise that

compensations for damages are readily available or that an EU based entity is deemed liable for any violations by other members of the corporation.

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