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ARTICLE 29 Data Protection Working Party

Brussels, 12 June 2014

The President of the
European Parliament
Martin Schulz
Rue Wiertz
B - 1047 BRUSSELS Belgium

Dear President Schulz,

In the context of the ongoing legislative debate on the draft EU General Data Protection Regulation, and in particular the adoption by the European Parliament, on 12 March 2014, of the LIBE Committee's report which dropped in Article 43.1.a the reference to BCR for processors ("BCR-P") that had been introduced by the European Commission in its draft proposal published on 25 January 2012, the Article 29 Working Party ("WP29") would like to share its views on BCR-P with you.

In June 2012, the WP29 established a framework to authorize BCR for processors ("BCR-P"), in addition to BCR for controllers, and WP29 officially allows companies to apply for BCR-P since January 2013.

This tool intends to be implemented by group of companies acting as processors on behalf and under the instructions of third parties outside of the group acting as controllers, to ensure that transfers of personal data outside the European Union made between the entities of the processor's group of companies will take place in accordance with the EU rules on data protection. For your complete information on BCR-P, please find attached a description of the main guarantees offered by BCR-P towards controllers, data subjects and data protection authorities ("DPAs").

The WP29 does believe that the sub-processing activities do exist, have been explicitly authorized since the adoption by the EC of the model clauses 2010/87/EU, with the approval of Article Committee 31 representing Member States and cannot be legally prohibited. It should not be the intention of a legislator to prevent those technology developments, but at the contrary to frame them correctly. In this respect, BCR-P are an alternative to the use of such model contract or to Safe Harbor.

Currently, BCR-P offer a high level of protection for the international transfers of personal data to processors that qualify to apply for BCR and an optimal solution to promote the European principles of personal data abroad. Hence, denying the possibility for BCR-P will limit the choice of organisations to use model clauses or to apply the Safe Harbor if possible,

which do not contain such accountability mechanisms to ensure compliance as it is provided for in BCR-P.

One of the critics apparently justifying the dropping of BCR-P from the EP position is the lack of guarantees to frame the sub-processing activities. Strict conditions[1] are provided to ensure transparency towards the controller while also keeping a sufficient level of control for the data controller[2] and a sufficient level of data protection for data subjects. These conditions are even stricter that the current conditions provided by the EP to frame the sub-processing activities[3].

As regards disclosures to third country authorities, current conditions imposed under WP29 BCR-P framework impose transparency towards EU controllers but also towards DPAs which need to intervene[4]. Such conditions are going in the same direction as the article 43a proposed by EP and are certainly above the existing ones provided in the EC model clauses 2010/87/EU and in the Safe Harbor.

Besides, three multi-national organisations had, to date, their BCR-P approved by national DPAs who coordinate decisions at European level through the mutual recognition and co-operation procedures, and there are about ten applications currently under review by DPAs. Therefore, if BCR-P were not provided for in the future regulation, it would also create legal uncertainty for those organisations that have already implemented such transfer tool, and would create an important loss for them, as the adoption of BCR require important human and financial investments, in particular due to the implementation of accountability measures.

In light of those, the WP29 would like to call the EU institutions to consider these elements in their discussions on BCR-P when the trialogue between the EU Council, the European Commission and the European Parliament will take place. Naturally, I am most willing to meet with you or representatives of the European Parliament to clarify the Working Party's position in more detail, should you would so wish.

On behalf of the Article 29 Data Protection Working Party,

Isabelle Falque-Pierrotin
Chair

A letter in identical terms is being forwarded to Vice President Reding, European Commission and Ms Mitrou, Council of the European Union.

[1]See point 6.1 of WP195.
[2]Sub-processing can only take place with the prior specific or general consent of the controller (if general, combined with a right to object to any new sub-processor), with written engagements between processor and sub-processor and with full liability of the main processor for any breaches caused by the sub-processors.
[3]See proposed article 26.2.D.
[4]See point 6.3 of WP195

WP29 EXPLANATIONS ON THE GUARANTEES ADDUCED BY BCR FOR PROCESSORS TO INTERNATIONAL TRANSFERS OF PERSONAL DATA

*All the elements and principles required in BCR-P were set up by the WP29 in its Working document 02/2012 (*WP195*), and further explained in an explanatory document (*WP204*).*

1. **Use of external sub-processors**

- Processors can call upon a sub-processor (either internal to the processor's group or external) only in full transparency towards controllers and with their prior authorisation, which can be general or specific. When prior consent for sub-processing has been given in a general way, controllers retain a right to object to any new sub-processor;
- Contracts between processors and sub-processors shall impose on the latter the same obligations as those resting on the main processor, pursuant to the Service agreement and the BCR-P. Moreover the main processor remains fully liable towards controllers for any breaches caused by any sub-processor.

2. **Conflict between an applicable legislation and BCR-P and/or Service agreements / Access by law enforcement authorities**

- In case of third country legislation which may prevent processors from complying with their obligations under BCR-P and/or Service agreements, or with controllers' instructions, processors shall notify this to controllers, which are entitled to suspend the transfer and/or terminate the Service agreement. Processors shall also notify such situation of conflict to the DPAs competent for controllers;
- In case of access requests by third country law enforcement authorities, controllers shall be informed about it (unless it is explicitly prohibited by the legislation of that third country), and, in any case, the request should be put on hold and the DPAs competent for controllers and the lead DPA for the BCR-P should be informed of such request by the processor. This requirement goes in same direction as Article 43a introduced in the draft regulation by the European Parliament.

3. **Controllers' rights**

- Service agreements signed between processors and controllers shall contain a clear reference to BCR-P;
- Controllers can enforce BCR-P against processors in case of a breach by the latter;
- Processors shall cooperate with controllers and assist them to comply with data protection law;
- Controllers shall be informed by processors of any change affecting the processing conditions (e.g., addition of a new sub-processor), and be given the possibility to object to such change and/or terminate the Service agreement;

- The updated list of entities bound by the BCR-P shall be made accessible by the processor to controllers upon request;
- Controllers shall have access to the results of the internal audits carried out by the processor; and can conduct their own audit of the processor's data protection facilities relating to a specific controller (such audit shall be carried out by the controller itself or by an independent body chosen by the controller);
- Controllers shall immediately be informed by processors of any security breach;
- On the termination of the provision of data processing services, controllers are entitled to choose whether processors and sub-processors will return all the personal data transferred and the copies thereof to controllers, or destroy all those data and certify it has been done so.

4. Data subjects' rights

- BCR-P, or at least a document including all the information relating to third party beneficiary rights shall be easily accessible by data subjects (i.e., published on the processor's website);
- The updated list of entities bound by the BCR-P shall be made accessible by the processor to data subjects upon request;
- Like in EC Standard Contractual Clauses 2010/87, there is a direct liability of the processor in case the controller disappears, and, in case the processor also disappears, a direct liability of the sub-processor;
- In addition to their rights of access, objection, rectification and deletion, data subjects shall be provided with third party beneficiary rights (including redress), which entitle them to lodge a claim before a competent EU court and/or DPA in case of a breach of the BCR-P.

5. Processors' obligations towards data protection authorities

- Processors shall cooperate with the DPAs competent for the controllers and comply with the advice of DPAs on any issue related to BCR-P;
- Processors accept to be audited by the DPAs competent for the controllers, and the latter can have access, upon request, to the results of the internal audits carried out by processors;
- Processors shall report substantial changes to the BCR-P and/or to the list of entities bound by the BCR-P at least once a year; and the updated list of entities bound by the BCR-P shall be made accessible by the processor to DPAs upon request.

6. Implementation of accountability measures

- All processors' obligations under BCR-P have to be framed with effectiveness measures to ensure that they are effectively put into practice by the entities bound by the BCR-P: creation of a network of data protection officers, carry out of regular data protection audits, implementation of an internal complaint handling system and provision of appropriate training on BCR-p to staff members.