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## **EUROPEAN BANKING FEDERATION'S COMMENTS ON THE ARTICLE 29 WORKING PARTY UPDATED ADEQUACY REFERENTIAL AND WORKING DOCUMENT ON BCRs (WP254 & WP256)**

### **EBF key points:**

- ◆ The European Banking Federation (EBF) welcomes the Article 29 Data Protection Authority (hereafter 'WP29') paper on Binding Corporate Rules (BCRs) and the updated adequacy referential which provide further clarity on how international data transfers will be managed under the General Data Protection Regulation (GDPR).
- ◆ The GDPR is a key element of the European Union's Digital Single Market Strategy and is designed to align data protection requirements across the EU and provide high standard safeguards for consumers and their data. The banking sector supports the objectives of the GDPR to increase transparency around personal data processing and to empower citizens and data subjects.
- ◆ Cross-border data transfers are today an important part of the modern global economy as data has become its lifeblood. Digital trade and cross-border data flows are expected to continue to grow faster than the overall rate of global trade. Which is why it is necessary to provide a high level of data protection to European citizens while enabling the companies to exchange data and contribute to economic growth.
- ◆ Financial institutions often need to process personal data within the group of which they are members in order to achieve objectives, such as offering a broader variety of products to the clients, or, efficiently tackling fraud. In that respect, clarity and legal certainty are necessary.
- ◆ Under the Data Protection Directive 95/46/EC, third country transfers between firms are broadly manageable, though not without complications owing to the requirement for appropriate safeguards.

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The GDPR recognises in recital 48 that "*controllers that are part of a group of undertakings or institutions affiliated to a central body may have a legitimate interest in transmitting personal data within the group of undertakings for internal administrative purposes, including the processing of clients' or employees' personal data. The general principles for the transfer of personal data, within a group of undertakings, to an undertaking located in a third country remain unaffected.*"

- ◆ Nevertheless, there will be greater difficulties going forward for three reasons:
  1. The new provisions in the GDPR will make third country transfers more difficult. Under the GDPR, the possibility to make an internal adequacy decision within the firm is no longer possible.  
In the absence of an alternative adequacy decision by the European Commission, data controllers will instead have to rely primarily on Standard Contractual Clauses (SCCs) for transfers outside their group. For intra-group transfers, firms will need to rely on either SCCs or on Binding Corporate Rules (BCRs).
  2. However, the **slowness of the BCRs adoption process is today an important obstacle**. We note that **BCRs currently require 18 months or more to be approved and demand will likely increase under the GDPR**.
  3. There is **uncertainty over firms' ability to rely even on the safeguards provided for under the GDPR**. The EU-U.S. Privacy Shield and SCCs, for example, have an uncertain future, given the striking down of the Safe Harbour adequacy decision in 2015 and a more recent court challenge against SCCs and referral to the Court of Justice of the European Union ("Schrems II").
- ◆ We believe further assessment should be conducted on the barriers that prevent banks from processing or storing data inside and outside the EU (linked to data protection, confidentiality, bank secrecy requirements, etc.). Ultimately, there should also be a clear legal basis to share information among jurisdictions at group company level.

We hope – and expect – that the national competent authorities responsible for GDPR supervision will strike the right balance in this matter.

## Specific comments on the Working document setting up a table with the elements and principles to be found in Binding Corporate Rules (BCRs):

Please find below some comments on the WP29 document on BCRs (wp256).

◆ **Page 3, paragraph 1.1, “right to lodge a complaint”.**

The WP29 states in this paragraph that “[d]ata subjects should be given the choice to bring their claim either before the Supervisory Authority (‘SA’) in the Member State of his habitual residence, place of work or place of the alleged infringement (pursuant to Art. 77 GDPR) or before the competent court of the EU Member States (choice for the data subject to act before the courts where the data exporter has an establishment or where the data subject has his or her habitual residence (Article 79 GDPR)”.

We disagree with the use of the word “choice”. Article 77 and 79 of the GDPR provide data subject a right, not a choice.

◆ **Page 4, Paragraph 1.2 “Amendments of already adopted BCRS”.**

We would welcome assurances from the WP29 that organisations that already have BCRs in place should only notify their lead DPA on the changes in their BCRs in order to bring them in line with the principles of the GDPR as of 25 May 2018 and onwards (thus not prior to 25 May 2018) without having to apply for a new authorisation.

◆ **Page 5, Paragraph 1.2 “An explanation of how the rules are made binding on the BCR members of the group and also the employees”, “ii) on employees by one or more of:”.**

We believe that there should be other ways allowed to show that BCRs are binding upon employees. The possibility exists that some of these options are not allowed under applicable law.

◆ **Page 8, Paragraph 1.4 “The EU headquarters, EU member with delegated data protection responsibilities or the data exporter accepts liability for paying compensation and to remedy breaches of the BCRs”.**

We believe this paragraph could be better aligned with Article 47.2.f of the GDPR. In addition, the following exemption present in this article should be indicated in the WP29 document: “the controller or the processor shall be exempt from that liability, in whole or in part, only if it proves that that member is not responsible for the event giving rise to the damage” (second part of Article 47.2.f of the GDPR).

◆ **Page 10, Paragraph 2.1 “The existence of a suitable training programme”.**

We believe that the WP29 goes beyond what Article 47.2.n states when it writes that “[t]he Supervisory Authorities evaluating the BCRs may ask for examples and explanations of the training programme during the application procedure. The training programme should be specified in the application”.

There is indeed no such obligation in Article 47.2.n which states that “*the appropriate data protection training to personnel having permanent or regular access to personal data*”.

◆ **Page 12, Paragraph 2.4 “The existence of an audit programme covering the BCRs”.**

The third paragraph should be amended to add “only if legally possible” in order to better ensure clarity and certainty.

*EBF suggestion for amendment:*

“The BCRs must state that Supervisory Authorities can have access to the results of the audit upon request and give the SAs the authority/power to carry out a data protection audit of any BCR member if required, **only if legally possible**”.

◆ **Page 14, Paragraph 3.1 “A duty to cooperate with SAs”.**

The paragraph should be amended to add “only if legally possible” in order to better ensure clarity and certainty.

*EBF suggestion for amendment:*

“The BCRs should contain a clear duty for all BCR members to co-operate with, to accept to be audited by the Supervisory Authorities and to comply with the advice of these Supervisory Authorities on any issue related to those rules, **only if legally possible**”.

## About EBF

The European Banking Federation is the voice of the European banking sector, uniting 32 national banking associations in Europe that together represent some 4,500 banks - large and small, wholesale and retail, local and international - employing about 2.1 million people. EBF members represent banks that make available loans to the European economy in excess of €20 trillion and that securely handle more than 300 million payment transactions per day. Launched in 1960, the EBF is committed to creating a single market for financial services in the European Union and to supporting policies that foster economic growth.

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