

Dutch business pushes towards 'workable' corporate rules

Binding corporate rules aim to offer multinationals a less burdensome alternative to standard contractual clauses or Safe Harbor arrangements. **Laura Linkomies** finds out how the Netherlands is looking to make the rules work in practice.

Lokke Moerel, attorney at the Dutch law firm De Brauw Blackstone Westbroek, explained at Privacy Laws & Business's Annual Conference in July how five Dutch multinationals have drafted Binding Corporate Rules (BCRs) schemes for exporting data overseas.

Moerel said that BCRs have become an attractive option for multinationals, as it is becoming increasingly common to establish central HR databases where personal data is transferred across borders on a daily basis. Many companies have also moved towards shared service centres with central call centres and web hosting. Outsourcing, centralised marketing and purchasing from suppliers worldwide are additional factors that have increased the flow of personal data across borders.

Because of the complexities that data protection legislation adds to these processes, said Moerel, businesses are seeking an easy solution - one which can be provided by BCRs for intra-company data transfers.

Worldwide applicability

Although the Article 29 Data Protection Working Party has not yet finalised its report on the approval criteria for BCR schemes, Moerel explained that the Dutch Data Protection Authority wanted to be one step ahead, and invited five Dutch-based multinationals to draft a jointly developed BCR model. The companies, including Shell, Heineken and Philips Electronics, wanted worldwide applicability for their data transfers. This was acceptable to the Dutch regulator, as the rules only apply to intra-group transfers.

The rules have now been finalised, and the Dutch authority is seeking approval from other EU Data Protection Commissioners. According to Lokke Moerel, who advised the compa-

nies during the lengthy drafting process, the rules aim to provide a minimum level of protection. If there are stricter local rules, then they will still override the more general BCR provisions. This is the case, for example, in direct marketing regulations in certain countries. "We had to investigate how direct marketing rules differ internationally," said Moerel. "Regarding the processing of sensitive data, we decided to base our approach on the Dutch law."

How to make rules binding

According to the EU Working Party, BCRs should be based on compliance with the EU Data Protection Directive and be binding - both externally and internally. "The Article 29 Group has been concerned about whether BCRs in general can be binding," Moerel said. "In the Dutch model, the parent company adopts the rules on behalf of the group of companies, which are externally bound. Data subjects, on the other hand, are third party beneficiaries, and their rights are governed by the Dutch DPA and the Dutch courts."

To make rules binding internally, Moerel explained that they should be included in the Company Business Principles, and adopted by the Board of Directors. There should be audits and yearly statements made by central and local privacy officers.

Will other authorities approve?

The real problem with BCRs, however, lies with the fact that the other EU Data Protection Authorities will also have to approve the rules. Both Moerel and Peter Schaar, the German Data Protection Commissioner and the Chairman of the Article 29 Working Party, shared the view that one country will have to take the lead in negotiating overall approval. Schaar said that the German

view was to simplify the process. He suggested that the country in which the company's headquarters are based should first study the proposed rules, and then present its decision to other data protection regulators.

Data protection regulators in the EU tend to have different views about BCR schemes. The group published its initial thoughts in June 2003. And in early June this year, a meeting between some Data Protection Authorities (Netherlands, UK, Germany, France, Austria, Hungary and Poland), discussed further the possibility of using BCRs. The Article 29 Group is now in the process of discussing ways to simplify its decision-making process, and will soon publish its final report on BCRs.

Only an alternative

It has to be remembered that BCRs provide an alternative when other solutions are not practical. Companies can still rely on seeking individuals' consent, or use model contracts.

"BCRs are very difficult to draft, and sometimes I felt that it might just be easier to use model contracts," Moerel admitted. On the other hand, she recognised the benefits to companies in terms of less paperwork and ability to more easily implement new data handling systems.

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Article 29 Working Party document on Binding Corporate Rules:
http://europa.eu.int/comm/internal_market/privacy/workinggroup/wp2003/wpdocs/03_en.htm.