



JBCE Response to Working Party 29 Consultation on Binding Corporate Rules

September, 2003

The Japan Business Council in Europe (JBCE) was founded in 1998 as one of the representative organizations for Japanese companies operating in the European Union. JBCE member companies market a wide range of products and services, and have made significant investments in the EU; currently, the JBCE includes 49 member companies (further information about the JBCE, including a list of members, is available at www.jbce.org). JBCE strongly supports data protection as a crucial right for individuals and an important mechanism for businesses to maintain consumer confidence.

I. Introduction

As a preliminary comment, JBCE commends the Working Party 29 (WP 29) for conducting this consultation on its document WP 74 of June 3, 2003¹ on the use of binding corporate rules (BCRs) as a legal basis for the transfer of personal data outside the EU. It is essential for both business and data protection regulators to work together to protect the rights of data subjects and ensure a workable framework for data protection, and such consultations are an excellent way to further this goal. JBCE is very interested in a continuing dialogue with the WP 29 on this and other important data protection subjects.

II. General Comments

As set forth in the paper JBCE submitted to the Commission on its review of implementation of Data Protection Directive 95/46/EC,² JBCE members definitely favor the development of BCRs as adequate safeguards adduced by the data controller within the meaning of Article 26(2) of the Data Protection Directive 95/46/EC. The transfer of personal data from the EU to third countries (such as Japan) under existing legal bases is currently is fraught with a number of difficulties, in particular the following:

¹ All references and page citations to WP 74 are to the English version.

² See http://www.jbce.org/files/data_protection_directive_FINAL.pdf.

- there is as yet no adequacy decision covering most countries (including Japan) (Article 25);
- the use of consent (Article 26(1)(a)) has been severely restricted by the Working Party 29 (see Working Document WP 12 of July 24, 1998 “Transfer of personal data to third countries: applying articles 25 and 26 of the EU Data Protection Directive”), and national law (see, e.g., Resolution of the German Data Protection Authorities of March 7-8, 2002), and it may be practically impossible to obtain the consent of all data subjects whose data is to be transferred;
- in many cases it is unclear under national law if the exceptions provided for under Article 26.1 (such as that the transfer is necessary for performance of a contract with the data subject) will apply;
- separate authorization of transfers by each Member State may take too long (Article 25); and
- the use of the Commission’s model contracts can require the conclusion of hundreds or even thousands of contracts between individual corporate entities (Article 26(4)).

Thus, JBCE believes that, in many cases, BCRs can be an important solution for transfers of personal data across a worldwide group of companies. However, a legal framework for binding corporate rules will only be useful if it takes the following points into account:

- it should be possible to use a variety of substantive data processing rules as the basis for the BCRs, depending on factors such as the country of import, the sensitivity of the data, and other relevant factors;
- interaction between the standard contractual clauses and BCRs should be clarified;
- there should be non-discrimination in the legal framework between companies with their headquarters in the EU and those with headquarters outside it;
- enforcement mechanisms should be flexible, and should respect the legal traditions and systems in the country of import;
- BCRs should be able to be approved at the Community level, or there should be at least a coordinated, transparent procedure for approval among the Member State DPAs, so that a company would only have to obtain a single approval by a Member State or DPA before transfers could begin.

III. Specific Comments

These comments on WP 74 have been purposely kept concise and pragmatic, and are given in the form of hypothetical situations which a Japanese company may find itself in with regard to the application of BCRs:

Issue 1: Definition of “corporate group”

Facts: A Japanese company wishing to implement BCRs has participations in various corporate entities around the world, some of which are 100% shareholdings, others 50% holdings, and still others 49% shareholdings or less.

The Issue: WP 74 recognizes that “the notion of ‘corporate group’ may vary from one country to another” (p. 9), but does not say further what types of corporate groups may use BCRs and which may not, beyond stating that “for loose conglomerates, binding corporate rules are very unlikely to be a suitable tool” (p. 9).

JBCE member companies hold a variety of participations in companies around the world, and may want to use BCRs throughout their corporate entities. Moreover, in the world of global business companies typically use a variety of legal mechanisms to structure their corporate participations, so that JBCE believes it would be both difficult and premature to take an overly-strict definition of the types of “corporate group” that should be allowed to use BCRs. JBCE also requests clarification as to what the WP 29 considers to be a “loose conglomerate”.

Issue 2: Interaction of Standard Contractual Clause and BCRs

Facts: A Japanese company has implemented BCRs throughout its corporate entities, and would also like to extend their use to other companies with which it has close business relations but which are not part of its corporate group (for instance, with regard to a company to which it has outsourced certain data processing functions).

The Issue: WP 74 states that “transfers of personal data to companies outside the corporate group would remain possible but not on the basis of the arrangements put in place by legally enforceable corporate rules”, and states further that such transfers may only be made if the transferor and transferee enter into the Commission’s standard contractual clauses (p. 9). However, JBCE believes that such transfers should be possible as long as legal mechanisms are used to extend the application of BCRs outside the corporate group which ensure an adequate degree of data protection and bind all the parties to abide by their protections, even if such mechanisms do not fulfill all the requirements of the standard contractual clauses adopted by the Commission in its decisions 2001/497/EC (transfers to data controllers) and 2002/16/EC (transfers to data processors). Mandating use of the standard contractual clauses in all cases could also give rise to legal uncertainty regarding how the obligations of these two systems would interact. The Commission’s standard contractual clauses are to be used in situations where an adequate degree of data protection does not already exist, whereas in this situation an adequate degree of protection has already been found to exist based on BCRs. Thus, there seems to be no reason why the transfer should not be allowed based on a contractual agreement that need not meet all the requirements of the standard contractual clauses but does bind the transferee to the obligations of the BCRs.

Issue 3: Lack of harmonization

Facts: A Japanese company has subsidiaries in a variety of Member States, and wishes to implement BCRs in order to provide a legal basis for the transfer of personal data from its various European entities to Japan.

The Issue: One of the main purposes of BCRs should be to allow a company to transfer personal data under a single set of rules, and to otherwise rationalize and facilitate the procedures for data transfer. However, WP 74 contains several provisions which seem to contemplate that BCRs would have to comply with the law of each individual Member State, rather than a single harmonized legal framework. For instance, with regard to the level of detail concerning data transfers that would need to be provided in BCRs, WP 74 states that “a practical suggestion could be that in those countries where the notification system contains a high level of detail, this section of the binding corporate rules should mirror the rules on the way that data controllers must notify to data protection authorities...” (p. 15). Under this suggestion, a company using

BCRs would in theory have to describe each transfer from a Member State under a different standard, depending on the level of detail required in that Member State's system for notification of data processing. Requiring a company to tailor elements of BCRs to the legal requirements of 15 (soon to be 25) individual legal systems defeats the purpose of using BCRs.

In addition, JBCE strongly urges WP 29 to develop a procedure for cooperation between national DPAs when dealing with national requirements under Article 26(2) of the Directive, as discussed on p. 20 of WP 74. In order for BCRs to be widely used in practice, it is imperative that an authorization made in one Member State be recognized in another Member State, or that a pan-European authorization system for BCRs be developed. Such a coordinated procedure would also help DPAs conserve resources, which the WP has recognized as a concern with regard to approval of BCRs (WP 74, p. 6).

Issue 4: Cooperation with DPAs and audits

Facts: A Japanese company uses BCRs to transfer personal data from EU Member States to Japan. One day the company is told by a European DPA that it wishes to conduct a data protection audit of the company in Japan to ensure that it is complying with the BCRs, and the company is also told by the DPA to change its data processing practices at the headquarters in Japan.

The Issue: WP 74 states that BCRs must oblige the company using them “to require the acceptance of audits by inspectors of the supervisory authority themselves or independent auditors on behalf of the supervisory authority” (p. 16), and that “there must be an unambiguous undertaking that the corporate group as a whole and any of its members separately will accept the audit requirements” (p. 17). JBCE members strongly believe that any interventions by a foreign regulatory authority outside the territory of its jurisdiction must respect the sovereignty of the country where such interventions are to take place, and may only be carried out in full compliance with the rules of public international law. Furthermore, WP 74 does not mention that there may be other legal requirements in the importer's country which restrict or limit its ability to allow regulatory authorities from another country to gain access to its confidential files; thus, allowing such audits may put the data importer in violation of the law in its home country. In this sense, JBCE believes that agreement to audits by European DPAs outside of their home countries should not be a precondition to approval of BCRs. JBCE believes that Clause II.g of the Alternative Standard Contractual Clauses developed by seven leading international business organizations (including JBCE) provides a workable solution to the question of audits while still protecting the interests of data subjects.³

³ The clause reads: “Upon reasonable request of the Data Exporter, it [the Data Importer] will submit its data processing facilities, data files and documentation needed for processing to reviewing, auditing and/or certifying by the Data Exporter (or any independent or impartial inspection agents or auditors, selected by the Data Exporter and not reasonably objected to by the Data Importer) to ascertain compliance with the warranties and undertakings in these Clauses, with reasonable notice and during regular business hours. The request will be subject to any necessary consent or approval from a regulatory or supervisory authority within the country of the Data Importer, which consent or approval the Data Importer will attempt to obtain in a timely fashion.”

The same comments apply to the requirements stated in WP 74 that all members of the corporate group must always abide by the “advice of the competent data protection authority on any issues related to the interpretation and application of these binding corporate rules” (p. 17). These statements fail to recognize that a company may not be able to implement advice of a DPA because doing so may put it in violation of the law of its home country; moreover, it is not clear exactly what constitutes an “advice” (is it only a formal determination of the DPA? Or do informal statements, some of which may be made orally, count as well?). JBCE believes that it is unrealistic to expect a company with operations in many different countries to subject its entities all around the world to the jurisdiction of European DPAs, and that it should be sufficient if the data exporter in the EU and/or the ultimate corporate parent (including the Data Importer) make binding and enforceable commitments that they will ensure compliance with the BCRs throughout the corporate group.

For further information, please contact:

Kazuyoshi Maekawa
Chairman, Information Society Committee
Japan Business Council in Europe (JBCE)
Rue d'Arlon 69-71
B-1040 Brussels, Belgium
Telephone: +32-2-286 5330
Fax: +32-2-712 7851
E-mail: NAF02632@nifty.com