

Safe Harbour Conference – 21 October 2008

Speech Jacob Kohnstamm on BCRs

On 1 October 2002, at a conference on the review of the European Data Protection Directive, commissioner Bolkestein, at the time responsible for data protection, identified three priorities for the future of data protection: Quote:

“1. Reduction of divergencies in member state practices helped by the Data Protection Working Party.
2. more flexible arrangements for the transfer of personal data to third countries, together with a clearer and more uniform interpretation of the rules; and
3. promotion of self-regulatory approaches and in particular codes of conduct that can contribute to the free movement of personal data; the idea that approval of one data protection authority should in principle work in all member states needs to be pursued.” Unquote.

That was exactly six years ago, at a time when the first steps were taken by DPAs to see if corporate policies could be a basis for the transfer of personal data within a multinational. Those initial steps, set by Austria, Germany and the Netherlands in particular, in the summer of 2002, were first initiatives already putting into practice Bolkestein’s scenario for the future. This resulted in a European approach to Binding Corporate Rules, adopted in 2003 by all Data Protection Authorities , united in the EU’s Article 29 Working Party.

Since then, both DPAs and business have worked hard to make BCRs a success story. Recently, during the latest Article 29 Working Party, on 1 October of this year, all DPAs reaffirmed their strong commitment to support the development of BCRs.

However, we all know that practice has been more stubborn than our aspirations. It has proven difficult to speed up the process for approval. Today, despite our aspirations and everybody's willingness to make BCRs a success, in practice, there are only few BCRs that have been approved by several European countries. The Article 29 Working Party has been taking a critical look at itself over the last couple of months. For this self-reflection, we have gladly made use of our intensive contacts with the business community. After all, outsiders are usually better at holding a mirror up to someone's face! As DPAs, we understand the impatience of companies that have been waiting for several years to launch a BCR project, but that are now about to say farewell to their plans to set up a BCR. As developing, implementing and maintaining BCRs is a time-consuming and complex exercise, demanding a lot of investment from companies, they are only willing to invest in BCRs if they are sure of its success. We also understand that multinationals from across the Atlantic criticize Europe's difficulty in getting itself organized on this subject. We realise that the credibility of DPAs is at stake. We risk being seen as indecisive, and weak, "all talk, no action".

So, it is high time to deliver results. What does it take to make BCRs a success story? What does it take from us, DPAs? We concluded, first and foremost, that the so-called "coordination procedure", to ensure approval of a BCR by several European countries, does not work effectively in practice. It simply takes too much time. This is for a large part related to a second problem, namely that DPAs tend to review the adequacy of the BCR for third country transfers against their own national law, rather than against the Directive. Obviously, at national level in Europe, national provisions always prevail. But the litmus test for approving a BCR should be whether it ensures adequacy for the processing of personal data in third countries, in terms of the Directive. Over the last couple of months, and in the months to come, the Article 29 Working Party has worked hard to further clarify certain essential elements of BCRs, that together ensure adequacy, laid down in new Working Party documents. This should now enable

a uniform and European interpretation of BCRs, independent of the “lead authority” in charge of the particular BCR file. For business, this will facilitate the work of drafting BCRs and putting them into practice.

In addition to a uniform, European approach with regard to the content, a faster and more efficient cooperation procedure should be provided for. Business has emphasized strongly the urgency of this issue. Nowadays, in the coordination procedure, a total of possibly 26 DPAs redo the work of reviewing and analyzing a BCR by one authority, acting as lead DPA for that BCR, before giving their national approval. One could argue that that is an immense waste of scarce resources. It will be much faster and more efficient if the other DPAs accept the positive advice of the lead authority as a sufficient basis for providing their own national approval. It is however also understandable that DPAs hesitate to, so to speak, give away their national approval powers. This implies that one should trust the other authority’s evaluation.

That is not an easy assignment for DPAs. First, from a general perspective: Many EU Member States have only recently developed data protection laws. In addition to that, differences in national implementation of data protection still exist – lawful differences, in most cases. And, in a time where all DPAs are under immense pressure to defend privacy and data protection at national and international level, both in the realm of the private sector, and within the area of police, justice, and the fight against terrorism, it is understandable that we try to maintain what we have, and that we tend to develop a conservative reflex. Secondly, with regard to BCRs, when a DPA decides to accept and trust another DPA’s approval, this implies that the first DPA should also supervise data transfers from its territory on the basis of that other authority’s approval. Towards its national public, be it businesses, citizens, courts, or the media, the DPA will have to justify its supervisory activities, based on a document that it

has not approved or evaluated itself. It is therefore very understandable that DPAs hesitate to take this step.

Personally, however, although I fully understand such hesitations, I am of the view that it is exactly this reserved, somewhat conservative reflex that could contribute to the loss of strength and credibility of privacy, data protection, and Data Protection Authorities, in the period ahead of us.

If the DPAs do not organize themselves to ensure fast, smooth, and efficient approval procedures for BCRs, I am afraid two possible scenarios can be foreseen:

1. Business could decide to call an end to the development of BCRs, and find other ways to transfer personal data. This will be a negative outcome for all stakeholders, apart from, perhaps, data protection lawyers. If businesses no longer develop BCRs, they might decide to use contractual clauses, but it is also very likely that they will transfer personal data to third countries without adequate safeguards being provided. This puts the onus on DPAs, of which at least several will then shift their efforts to enforcement. This development will turn DPAs and business into opponents, rather than into allies that, each from their own perspective, have a joint interest in making data protection a success in global companies. And, most importantly, this will be a negative outcome for privacy and data protection across the globe.

2. A second scenario is that the European Commission might decide to take a firmer European stance, and propose changes to the current procedural rules with regard to data transfers. The Commission could develop a system of "home country control", or "recognition of approval", whereby all Member States have to accept the decision of another Member State to approve a company's transfers of personal data from Europe to third countries. If such a rule were to be

developed “top down”, I would take that as a sign of failure from the side of the Article 29 Working Party, to put its task of European harmonization into practice. I would also take it as a sign of failure to, ultimately, let the general interest prevail over conservative reflexes and the national interest.

I think that I can speak for all DPAs when I say that we wish to avoid the above scenarios to become reality. Therefore, as said, all DPAs are strongly committed to making BCRs a success. In addition, the chance of the above scenarios becoming reality, have made several DPAs decide to set aside their – justified – hesitations about new forms of cooperation based on trust. These DPAs have decided that we do trust our sister organisations to deliver good work. That we trust the EU legal framework. That we have faith in “Europe”, and that we are willing to sacrifice some of our own national powers, in order to guarantee for the future a substantial European influence in global data protection.

In this context, a new form of cooperation has been developed, whereby DPAs commit themselves to mutually recognize BCRs sent to them through the European coordination procedure. So far, 9 countries, have decided to apply this “mutual recognition”. These countries are: France, Germany, Ireland, Italy, Latvia, Luxembourg, the Netherlands, Spain, and the United Kingdom. With mutual recognition, the DPAs have also decided to go a long way to meet the requests and concerns expressed by business. Mutual recognition is a policy commitment rather than a legal change. It means that, when the lead DPA circulates a consolidated draft of a BCR with a positive opinion that it meets the required standard, other DPAs accept this opinion as sufficient basis for providing their own national authorization for the BCR. We are confident that this will provide a great impetus to the approval procedure and that this is the essential element for making BCRs a success story.

We trust that the ongoing work of the Working Party will also provide the basis for other DPAs to join the procedure of mutual recognition. Only this alliance of business and DPAs, each willing to take up their part of the responsibilities in a constructive manner, will make a true success story of BCRs.

We hope that the first mutual recognition success story is here today. Perhaps Sanofi-Aventis, that is currently working with the French DPA on Binding Corporate Rules, could be the first multinational to make advantage of the new procedural agreements. Let's hear what they have to say.

Thank you for your attention.