

TURKISH DATA PROTECTION AUTHORITY ANNOUNCES BINDING CORPORATE RULES

Despite enactment of the Data Protection Law of Turkey on 7 April 2016 (the "DPL") and secondary legislation, cross-border data transfer has been one of the major controversial data privacy issues in Turkey. Given the significance of cross-border data transfer for operations of multinational corporations, market players has long sought a streamlined mechanism to transfer personal data abroad. On 10 April 2020, the Data Protection Authority of Turkey (the "**Authority**") announced that data processors would be able to adopt binding corporate rules ("**BCRs**") for transferring personal data to their affiliates outside Turkey.

Introducing Binding Corporate Rules for Data Processors

BCRs seek to facilitate international transfer of personal data to jurisdictions that are not deemed to provide an adequate level of personal data protection by law. They are codes of conduct, approved by the Authority, which regulate processing and transfer of personal data for intra-group operations.

BCRs are designed to ensure that personal data transferred outside Turkey, but within a single corporate group, continue to be protected by a regime which reflects adequate rules and principles on data protection. To this end, BCRs must be supported by the group's overall compliance framework (e.g. by means of staff training and audit programs). BCRs enable members of a corporate group to transfer personal data outside Turkey, on an intra-group basis, without having to take cumbersome compliance steps on a transfer-by-transfer basis.

Companies willing to benefit from BCR process should file an application to the Authority by using the application form and considering the fundamental requirements announced by the Authority on its website. The Authority requires the BCR to be submitted for approval by the HQ of the group, if the HQ is located in Turkey. If the HQ is located outside of Turkey, the group shall appoint a Turkey resident group member for application and assumption of data protection responsibilities.

BCRs should be internally binding on all relevant group companies and the employees and externally binding for the benefit of third party individuals. BCRs should clearly describe, amongst others, compliance and audit mechanisms and rights of third party individuals.

The Value of BCRs for Data Processors

Although adopting BCRs is not mandatory, adoption of those may be of interest to data controllers and processors. Adopting BCRs will allow data processors to leverage their internal compliance frameworks for commercial purposes.

Recognition of a data processor group's BCRs by the Authority will send a clear message to the relevant group's customers as to its commitment to comply with applicable data privacy requirements.

Additionally, BCRs can be used to harmonize and strengthen compliance with applicable data protection laws and reduce administrative burdens (e.g. obtaining explicit consent or per transfer authorisations) for cross-border data transfer.

Legal Framework for Cross-Border Data Transfer under the DPL

Under the DPL, explicit consent of individuals should be obtained for cross-border data transfer. Whilst explicit consent is regulated as a rule under the DPL, it is inefficient for large corporations (e.g. organisations using cloud-based services, online IT services, global HR database) to adhering this rule for each transfer of data abroad.

Other alternatives to explicit consent under the DPL are:

- **Data Transfer to "safe-harbours"**: Data transfer to a recipient in a third country may take place (without seeking consent) if the Authority has decided that such third country ensures an adequate level of data protection ("**safe harbours**"). Having said that, the long-awaited list of "safe-harbours" has not yet been specified by the Authority. Consequently, each country is deemed as "no safe-harbour". However, once the list is announced, Turkish data controllers could take advantage of cross-border data transfer if any of the data processing grounds exists (i.e. performance of the contract) without adhering to other data transfer measures.
- **Per-Transfer Authorisations (e.g. data transfer undertakings)**: Until availability of the BCRs, the only method for cross-border data transfer to countries not designated as "safe-harbours" was the execution of data transfer undertakings (which provide safeguards for personal data) between the Turkish data controllers and off-shore recipients, and submission the same for the approval of the Authority. It is worth to note that execution of data transfer with each offshore recipient creates a huge workload and administrative burden for both data processors and the Authority. As such, BCRs would be more convenient and smooth for international intragroup data transfers for multinational corporations. BCRs can provide a framework for a variety of intra-group transfers to meet the organisation's requirements.

Commentary

Despite the foregoing advantages, in deciding whether or not to adopt BCRs, the adoption of BCRs, and the process of obtaining the required approval from the Authority, will require significant time and effort. According to the announcement of the Authority, a straightforward BCR application could take around 12 months to conclude and a six month delay extension is also possible. These should be evaluated carefully against the alternatives – for example, transfer to "safe harbours" (i.e. after the announcement of safe-harbours) or "per transfer" solutions such as using agreements (e.g. data transfer undertakings) based on the forms approved by the Authority. The availability of BCRs as a solution for data processors is likely to be attractive to large data processor groups.

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