



**Delivery Hero**

# Delivery Hero Position Paper

On the EDPB Recommendations 1/2022 on the “Application for Approval and on the elements and principles to be found in Controller Binding Corporate Rules (Art. 47 GDPR)”, adopted on 14 November 2022

## 1. Overview

### 1.1 About Delivery Hero Group

Delivery Hero Group (Delivery Hero SE and its controlled companies) is the world's leading local delivery platform, operating its services in over 70 countries across Asia, Europe, Latin America, the Middle East and Africa. We started as a food delivery service in 2011 and is now also pioneering quick commerce, the next generation of e-commerce, aiming to bring groceries and household goods to customers in under one hour and often in 20 to 30 minutes. Headquartered in Berlin, Germany, Delivery Hero Group has been listed on the Frankfurt Stock Exchange since 2017 and is now part of the MDAX stock market index.

Delivery Hero Group has previously submitted an application for approval of BCR to its lead supervisory authority which at the date of writing is pending approval.

### 1.2 Context

Under its Art. 47, the GDPR provides for the use of binding corporate rules ("BCR") by a group of undertakings for its international transfers from the European Union to third countries (within the same group of undertakings), provided that such BCR include all essential principles and enforceable rights to ensure appropriate safeguards for transfers or categories of transfers of personal data.

Before this background, the European Data Protection Board (EDPB) published a set of recommendations (the "**Recommendations**") which serve to provide a standard form for the application for approval of BCR for controllers; clarify the necessary content of BCR as stated in Art. 47 GDPR; make a distinction between what must be included in BCR and what must be presented to the BCR lead supervisory authority in the BCR application; and provide explanations and comments on the requirements.

### 1.3 General Position

While Delivery Hero Group welcomes the Recommendations, we believe that a more comprehensive framework is still needed. Therefore, the EDPB is urged to provide more certainty in its Recommendations.

Delivery Hero Group's specific comments on the proposal for the Recommendations of the EDPB are as follows:

## 2. Key Aspects

### 2.1 On the Legal Effect of an Approval of BCR by the Lead Supervisory Authority

Recently, several decisions by data protection authorities approving BCR used the following wording to set certain limits on the validating effect of their approval decisions: "*The authority recalls that the approval of BCR does not entail the approval of specific transfers of personal data to be carried out on the basis of the BCR.*" **A clarification on the scope of such phrasing, in particular regarding the definition of "specific transfers" would have been helpful and should be added to the final version of the Recommendations.**

In light of Art. 46 GDPR stating that a controller "*may transfer personal data to a third country [...] only if the controller [...] has provided appropriate safeguards*" (including BCR), the intended effect of the language used by the data protection authorities is not clear to us. The sentence seems to suggest that BCR do in fact not have a legalizing effect while the wording of the GDPR does state the polar opposite by clarifying that such data transfers do in fact have a valid legal basis (if *Schrems II* requirements per the CJEU case law are met). While we are aware that a Chapter 5 GDPR legal basis does not entail the legality of the transfers with a view to other aspects (Art. 6 and Art. 9 GDPR legal basis etc.), a clarification would have been helpful that the EDPB in fact considers those transfers subject to the approval proceedings and covered by the BCR to meet the Chapter 5 GDPR requirements. In that sense, the respective transfers are approved for the purposes of Chapter 5 GDPR only which should be clarified unequivocally.

### 2.2 On the Timeframe for the Approval of BCR

While we are aware that the duration of administrative proceedings will be addressed exclusively by Member State law and will be subject to various factors, in our view **the Recommendations would also have presented an opportunity to at least provide general guidelines and clarify the regular timeframe for the approval of BCR.**

### 2.3 On Adding New BCR Members

Delivery Hero Group regrets that the Recommendations do not mention the applicable regime for adding new undertakings or enterprises to the list of BCR members that is part of the BCR which is of high practical relevance for BCR approval holders. **The EDPB is urged to provide additional information in Section 2.2 of Annex 2 to the Recommendations, in particular regarding the notification to the BCR Lead supervisory authority.**

### 2.4 On Termination

Section 6 of the elements and principles to be found in BCR (Annex 2 to the Recommendations) only provides that the BCR should specify if the BCR member acting as data importer can keep the personal data or must return or delete them.

Delivery Hero Group would have welcomed if a further clarification on the termination regime had been provided by the EDPB, in particular regarding the notification to the BCR lead supervisory authority. This point is of a particular relevance for fast-growing companies which engage in a high number of mergers, acquisitions and divestments in a dynamic market environment.

### 2.5 On Government Access Requests

Delivery Hero Group welcomes the inclusion of the obligations of the data importer in case of government access requests under the scope of the elements and principles to be found in BCR (Section 5.4.2). Access to personal data by public authorities is becoming a pressing topic for private undertakings in appropriately responding to the latest CJEU jurisprudence.

## Conclusion

In conclusion, Delivery Hero Group recommends the EDPB to further clarify the relationship between BCR members and the BCR lead supervisory authority, in particular when an undertaking joins or leaves the list of BCR members. Delivery Hero Group also proposes the EDPB provide further information on the timeframe for the approval of BCR and, potentially, even the impact of the Recommendations on ongoing applications.

Finally, Delivery Hero Group continues to see a certain degree of legal uncertainty for companies and calls upon the EDPB to adopt recommendations that not only repeal and replace Art. 29 WP Working Papers, but to really build on them in substance by clarifying the approval requirements even further.

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