

Opinion of the Board (Art. 64)



Opinion 32/2020 on the draft decision of the Dutch Supervisory Authority regarding the Controller Binding Corporate Rules of Equinix

Adopted on 15 December 2020

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The European Data Protection Board

Having regard to Article 63, Article 64(1)(f) and Article 47 of the Regulation 2016/679/EU of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (hereinafter “GDPR”),

Having regard to the European Economic Area (hereinafter “EEA”) Agreement and in particular to Annex XI and Protocol 37 thereof, as amended by the Decision of the EEA joint Committee No 154/2018 of 6 July 2018¹,

Having regard to Articles 10 and 22 of its Rules of Procedure.

Having regard to EDPB [Opinion 15/2019 on the draft decision of the competent supervisory authority of the United Kingdom regarding the Binding Corporate Rules of Equinix Inc.](#), adopted on 8 October 2019.

Whereas:

(1) The main role of the European Data Protection Board (hereinafter the “EDPB”) is to ensure the consistent application of the GDPR throughout the EEA. To this effect, it follows from Article 64(1)(f) GDPR that the EDPB shall issue an opinion where a supervisory authority (hereinafter “SA”) aims to approve binding corporate rules (hereinafter “BCRs”) within the meaning of Article 47 GDPR.

(2) The EDPB welcomes and acknowledges the efforts the companies make to uphold the GDPR standards in a global environment. Building on the experience under Directive 95/46/EC, the EDPB affirms the important role of BCRs to frame international transfers and its commitment to support the companies in setting-up their BCRs. This opinion aims towards this objective and takes into account that the GDPR strengthened the level of protection, as reflected in the requirements of Article 47 GDPR, and conferred to the EDPB the task to issue an opinion on the competent SA’s (BCRs Lead) draft decision aiming to approve BCRs. This task of the EDPB aims to ensure the consistent application of the GDPR, including by the SAs, controllers, and processors.

(3) Pursuant to Article 46(1) GDPR, in the absence of a decision pursuant to Article 45(3) GDPR, a controller or processor may transfer personal data to a third country or international organisation only if the controller or processor has provided appropriate safeguards, and on condition that enforceable data subject rights and effective legal remedies for data subjects are available. A group of undertakings or group of enterprises engaged in a joint economic activity may provide such safeguards by the use of legally binding BCRs, which expressly confer enforceable rights on data subjects and fulfil a series of requirements (Article 46 GDPR). The specific requirements listed in the GDPR are the minimum items BCRs shall specify (Article 47(2) GDPR). The BCRs are subject to approval from the competent SA, in

¹ References to “Member States” made throughout this opinion should be understood as references to “EEA Member States”.

accordance with the consistency mechanism set out in Article 63 and Article 64(1)(f) GDPR, provided that the BCRs meet the conditions set out in Article 47 GDPR, together with the requirements set out in the relevant working documents of the Article 29 Working Party², endorsed by the EDPB.

(4) This opinion only covers EDPB's consideration that the BCRs submitted for the required opinion afford appropriate safeguards in that they meet all requirements of Article 47 GDPR and WP256 rev01 of the Article 29 Working Party, as endorsed by the EDPB³. Accordingly, this opinion and the SAs' review do not address elements and obligations of the GDPR mentioned in the BCRs at issue other than those related to Article 47 GDPR.

(5) WP256 rev.01 of the Article 29 Working Party, as endorsed by the EDPB, provides for the required elements for BCRs for controllers (hereinafter "BCR-C"), including the Intra-Company Agreement where applicable, and the application form. WP264 of the Article 29 Working Party, as endorsed by the EDPB, provides for recommendations to the applicants to help them demonstrate how to meet the requirements of Article 47 GDPR and WP256 rev01. Additionally, WP264 informs the applicants that any documentation submitted is subject to access to documents requests in accordance with the SAs' national laws. The EDPB is subject to Regulation 1049/2001⁴ pursuant to Article 76(2) GDPR.

(6) Taking into account the specific characteristics of BCRs provided for by Article 47(1) and (2) GDPR, each application should be addressed individually and is without prejudice to the assessment of any other BCRs. The EDPB recalls that BCRs should be customised to take account of the structure of the group of companies that they apply to, the processing they undertake, and the policies and procedures that they have in place to protect personal data⁵.

(7) The opinion of the EDPB shall be adopted, pursuant to Article 64(3) GDPR in conjunction with Article 10(2) of the EDPB Rules of Procedure, within eight weeks after the Chair has decided that the file is complete. Upon decision of the EDPB Chair, this period may be extended by a further six weeks, taking into account the complexity of the subject matter.

HAS ADOPTED THE FOLLOWING OPINION:

1 SUMMARY OF THE FACTS

1. On 8 October 2019 the EDPB adopted its [opinion 15/2019 on the draft decision of the competent supervisory authority of the United Kingdom regarding the Binding Corporate Rules of Equinix Inc.](#) On 22 July 2020, the EDPB adopted an information note on BCRs for Groups of undertakings / enterprises

² The Working Party on the Protection of Individuals with regard to the Processing of Personal Data instituted by Article 29 of Directive 95/46/EC.

³ Article 29 Working Party, Working Document setting up a table with the elements and principles to be found in Binding Corporate Rules, as last revised and adopted on 6 February 2018, WP 256 rev.01.

⁴ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

⁵ This view was expressed by the Article 29 Working party in Working Document Setting up a framework for the structure of Binding Corporate Rules, adopted on 24 June 2008, WP154.

which have ICO as BCR Lead SA, which explained that for BCRs already approved under the GDPR, the new BCR Lead SA in the EEA, as the new competent Supervisory Authority (“SA”) in accordance with Article 47.1 GDPR, will have to issue a new approval decision following an opinion from the EDPB before the end of the transition period. The Dutch Supervisory Authority has taken over the role as Lead SA.

2. In accordance with the cooperation procedure as set out in WP263 rev.01, the proposed revisions to the BCR-C of Equinix were reviewed by the Dutch Supervisory Authority as the Lead SA (hereinafter the “BCR Lead SA”).
3. The BCR Lead SA has submitted its draft decision regarding the draft BCR-C of Equinix, requesting an opinion of the EDPB pursuant to Article 64(1)(f) GDPR on 3 December 2020. The decision on the completeness of the file was taken on 3 December 2020.

2 ASSESSMENT

4. The BCRs of Equinix, contained in the Global Privacy Policy and its Appendices, cover personal data transferred from entities of Equinix Inc. in the EEA to entities of the group outside the EEA and processed by those entities outside the EEA.
5. Concerned data subjects include employees and business contacts, i.e. suppliers and vendors.
6. The revisions proposed to the BCR-C of Equinix have been scrutinised according to the procedures set up by the EDPB in light of the *‘Checklist of elements for Controller and Processor BCRs which need to be amended for a BCR Lead SA change in the context of Brexit’*⁶.
7. Beyond those provisions in need of revision according to the checklist, the EDPB recalls its Opinion 15/2019 on the draft decision of the competent supervisory authority of the United Kingdom regarding the Binding Corporate Rules of Equinix Inc., adopted on 8 October 2019.
8. In light of the above, the EDPB does not have any concerns that need to be addressed with respect to the draft decision of the Dutch SA.

3 CONCLUSIONS / RECOMMENDATIONS

9. Taking into account the above and the commitments that the group members undertake by signing the Equinix Intra-Company Agreement on Binding Corporate Rules, the EDPB considers that the draft decision of the BCR Lead SA may be adopted as it is, since the draft BCR-C of Equinix contain appropriate safeguards to ensure that the level of protection of natural persons guaranteed by the GDPR is not undermined when personal data will be transferred to and processed by the group members based in third countries. Finally, the EDPB also recalls the provisions contained within Article 47(2)(k) GDPR and WP256 rev.01 providing the conditions under which the applicant may modify or update the BCRs, including updates to the list of BCRs group members.

⁶ Annex to the EDPB information note on BCRs for Groups of undertakings / enterprises which have ICO as BCR Lead SA, adopted on 22 July 2020. https://edpb.europa.eu/our-work-tools/our-documents/other/information-note-bcrs-groups-undertakings-enterprises-which-have_en

4 FINAL REMARKS

10. This opinion is addressed to the BCR Lead SA and will be made public pursuant to Article 64(5)(b) GDPR.
11. According to Article 64(7) and (8) GDPR, the BCR Lead SA shall communicate its response to this opinion to the Chair within two weeks after receiving the opinion.
12. Pursuant to Article 70(1)(y) GDPR, the BCR Lead SA shall communicate the final decision to the EDPB for inclusion in the register of decisions which have been subject to the consistency mechanism.
13. In accordance with the judgment of the Court of Justice of the European Union C-311/18⁷, it is the responsibility of the data exporter in a Member State, if needed with the help of the data importer, to assess whether the level of protection required by EU law is respected in the third country concerned, in order to determine if the guarantees provided by BCRs can be complied with in practice, taking into consideration the possible interference created by the third country legislation with the fundamental rights. If this is not the case, the data exporter in a Member State, if needed with the help of the data importer, should assess whether they can provide supplementary measures to ensure an essentially equivalent level of protection as provided in the EU.

For the European Data Protection Board

The Chair

(Andrea Jelinek)

⁷ CJEU, *Data Protection Commissioner v .Facebook Ireland Ltd and Maximilian Schrems*, 16 July 2020, C-311/18.