

## **BINDING CORPORATE RULES**

As per the announcement of the Personal Data Protection Authority (“**Authority**”) dated 10 April 2020<sup>1</sup>, Binding Corporate Rules (“**BCR**”) has been introduced as a method regarding the personal data transfers to be performed between multinational group corporations operating in countries where adequate protection has not been provided. Our evaluations regarding the announcement of the Authority on the BCR has been presented to your attention below.

### **I. Scope of Article 9 of the Law on the Protection of Personal Data Regarding the Transfer of Personal Data Abroad**

In accordance with Article 9/1 of the Law on the Protection of Personal Data (“**Law**”) numbered 6698; the explicit consent of the data subject shall be sought for transferring personal data abroad. Whereas Paragraph 2 of the same Article regulates that personal data may be transferred abroad without obtaining the explicit consent of the data subject in case one of the conditions listed in sub-articles 9/2 (a) or 9/2 (b) are met. Article 9/2 (a) exhibits the condition that the country to which personal data will be transferred shall have an adequate level of protection. Whereas Article 9/2 (b) exhibits the condition regarding the written commitment guaranteeing an adequate level of protection of data controllers in Turkey and abroad to be signed and the permission of the Personal Data Protection Board (“**Board**”) to be obtained, in case there is not an adequate level of protection in the country to which personal data will be transferred.

Although it is stipulated that the countries with adequate level of protection shall be announced by the Board according to the Paragraph 3 of the same article, the countries providing adequate level of protection have not been announced yet. Therefore, Article 9/1 or Article 9/2 (b) are currently the options available for transferring data abroad.

### **II. Purpose and Scope of the Authority’s Announcement Regarding the BCR**

In its announcement dated 10 April 10 2020, the Authority referred to the aforementioned principles of transferring data abroad regulated in Article 9 of the Law, and thereafter referred to the “**Commitments**” method set forth in Article 9/2 (b), which allows for the transfer of personal data by data controllers residing in Turkey to countries where adequate protection has not been provided.

Hence the Authority declared the BCR as an additional method for cross-border data transfer following its evaluation that “*the Commitments generally facilitate the bilateral transfers to be made between the companies, but they may fall behind providing a practical implementation in respect to the data transfers to be made between the multinational corporation systems.*”

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<sup>1</sup> You may visit the following link to access Authority’s announcement: <https://www.kvkk.gov.tr/Icerik/6730/PUBLIC-ANNOUNCEMENT-ON-BINDING-CORPORATE-RULES>

*BCR are data protection policies used by multinational group companies for enabling them to commit adequate protection in writing for the transfer of personal data to countries they operate where adequate level of protection has not been provided. Accordingly, they are personal data protection policies to be adhered by the data controller, which is established in Turkey as an affiliate of the group of companies, regarding transfers of personal data to companies and enterprises operating abroad in one or more countries within the same group of companies and to data controllers that engage in a joint activity or have a joint decision mechanism regarding data processing activities.*

Before applying the BCR, the permission of the Board shall be obtained. Therefore, the Authority has attached the sample application form together with the auxiliary document regarding the main points to be included in the BCR to its announcement. These documents contain substantial and guiding information, some of which has been listed in titles below.

## **2.1 Rules and Procedures Regarding the Application of the BCR**

### **2.1.1 Who Shall Make the Application?**

In case the Group<sup>2</sup> has a headquarters established in Turkey, it is authorized to make the application. However, in case the Group does not have a headquarters in Turkey, then a Group member established in Turkey shall be authorized in terms of the protection of personal data. In this case, the authorized Group member shall be entitled to make the application on behalf of the Group.

### **2.1.2 Information and Documents to be Submitted during the Application**

The Following information and documents shall be submitted:

- Application Form,
- Full content of the BCR,
- All other information and documents relating to the application.

### **2.1.3 Application Method**

It is possible to make the applications to the Authority manually or by sending mail.

### **2.1.4 Result of an Application**

It is stated that applications shall be finalized approximately in one year as from the date of the application and may be extended for six-month periods, if deemed as necessary. Applications which are approved by the Board shall be notified to the applicant and may also be announced by the Board, if necessary.

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<sup>2</sup> The definition of “Group” has been made in the Application Form of Binding Corporate Rules for Data Controllers as follows: The companies and enterprises that operate within a group of companies and all data controllers engaged in a joint economic activity or have a joint decision-making mechanism regarding data processing activities.

## **2.2 What should be Included in the BCR?**

### **2.2.1. Binding Nature**

BCR must have a binding effect on the parties in line with the national legislation. In this context, *group companies* and *their employees* have an obligation to comply with the BCR. Therefore, it must be clearly stated how and by which method such binding effect shall be established (for example through agreements, undertakings, privacy agreements, company policies). The measures taken and sanctions to be applied in cases where the group companies do not comply with the determined policies or where the BCR are infringed by employees shall also be mentioned.

The commitments to be made by *data processors* regarding data security and the consequences and sanctions of the violation of the BCR by data processors shall also be explained in the application.

Rights and authorities of *the data subject* due to the Law shall be assured in the BCR.

In addition, in terms of *data subjects*, the followings must be explained in the application:

- Any and all the legal obligations that any of the Group members is/shall subject to in a foreign country which may have adverse material effects on the assurances that are ensured to the data subject through the BCR.
- *Data subjects* can apply to the Turkish courts regarding the lawsuits to be filed for the compensation of all kinds of damages they may suffer within the scope of the BCR.
- Any and all relevant supports such as translation, legal aid etc. shall be provided to the *data subject* in cases where legal actions regarding the rights of the *data subject* shall be filed in other countries.
- By virtue of the fact that the damage from the violation of provisions of the BCR in the Group shall be compensated by the headquarters of the Group established in Turkey or the Group member established in Turkey that has been authorized regarding the protection of personal data, the authorized Group member and the financial safeguards taken shall be indicated.

Furthermore, in case of a claim regarding the violation of the BCR, the process of fulfillment of the burden of proof on the headquarters of the Group established in Turkey or the Group member established in Turkey that has been authorized regarding the protection of personal data shall be explained.

### **2.2.2. Effective Implementation**

The mechanisms implemented for the execution of the BCR, whether or not the measures have been taken to ensure adequate protection of data transfers abroad are all important points to be considered in the BCR. Accordingly, information about trainings and

compliance supervisions are requested to be explained carefully in the application form. It is also anticipated that a complaint mechanism shall be envisaged within the Group in case of non-compliance with the BCR. The application form additionally contains the term “responsible personnel”, and asks whether or not there exists a “responsible personnel” or a “responsible unit” in order to ensure the compliance with the implementation of the BCR.

#### **2.2.3. Coordination with the Authority**

Information on cooperation with the Authority regarding the implementation of the BCR must be provided.

#### **2.2.4. Processing and Transferring Personal Data**

Data processing activities within the Group shall be defined simply and clearly in to order for allowing the Board to evaluate the existence of adequate protection in the transfer of personal data as per the BCR.

#### **2.2.5. Mechanisms on Reporting and Amendment of the Records**

All Group members and the Authority shall be notified about the amendments to be made in the BCR without any delay. The Authority also requires to be notified about any amendments on the BCR beforehand which may cause damages on the rights of *data subject* or affect the data security dramatically.

#### **2.2.6. Data Security**

All the details regarding how the necessary technical and administrative measures taken for providing an appropriate level of security considering the nature of personal data must be explained by submitting the supporting documents thereon. Technical and administrative measures undertaken by the data controller in the country to where personal data shall be transferred must also be provided.

#### **2.2.7. Accountability**

How the Group members shall comply with Binding Corporate Rules and how they shall be held responsible should also be explained in the application form. Information regarding the records of personal data processing to be kept by Group members on behalf of each data controller in scope of the BCR shall also be explained.

### **2.3 General Provisions Regarding the BCR**

Some of the general provisions which are listed in the application form attached to the announcement of the Authority are as follows:

- The Group and each of the Group members severally agree to comply with the instructions of the Authority relating to the interpretation and implementation of the BCR.

- The Group shall process personal data transferred within the scope of the BCR in compliance with the Law and the BCR, otherwise the Group shall inform the Authority immediately. In such a case, the Authority shall have the right to suspend the transfer of data and cancel the BCR.
- In case the data processed within the scope of the BCR is obtained by others unlawfully, it should be liaised without any delay with the headquarters of the Group established in Turkey or the Group member established in Turkey that has been authorized regarding protection of personal data. Such breach shall also be notified to the Board and relevant person immediately. The Board has the authority to announce such breach at its official web-site or through in any other way it deems appropriate, where necessary.
- BCR shall only relate to the transfer of data in the Group and between the Group members. Personal data that has been permitted to be transferred within the scope of the BCR shall not be transferred to persons other than Group members. *In the event that it is necessary to transfer personal data from a Group member not established in Turkey to any corporation that is not a member of the Group (subsequent transfer), the "Commitments" attached to the Board Decision No. 2018/33 of 02.04.2018 shall be taken into account.*
- In case of the disengagement of any member of the Group or the termination of the BCR for any reason, personal data subject to transfer and their backups shall be sent to the headquarters of the Group established in Turkey or to the Group member established in Turkey that is authorized regarding the protection of personal data.
- The Group and all the Group members shall neither disclose personal data to anyone contrary to the provisions of the Law, nor shall use such data for purposes other than that for which the personal data has been processed. This obligation is not limited to any period of time.
- The execution of the BCR approved by the Board is not subject to a time limit. However, it may be suspended or cancelled by the Board, when deemed as necessary.

*Kind Regards,*

***Koyuncuoğlu & Köksal Law Firm***

*\*As the explanations given in our newsletter are prepared pursuant to the legislation in effect in the Republic of Turkey and the disclosures made to the public by the relevant official authorities, in case of uncertainty, we advise you to seek advice and support from us before the final transactions are carried out. Otherwise, our Law Firm cannot be held responsible for the actions to be taken on the basis of the explanations contained herein and the consequences of such actions.*