Dear clients and business friends,

For Swiss domiciled multinationals, it is recommendable starting becoming acquainted with the EU data protection reform. It is certain that the new rules will have an impact beyond the EU's borders including Switzerland. The recent announcement of some postponement of the reform does not change this fact. Under certain circumstances, Swiss domiciled multinationals need to be prepared becoming directly subject to the EU Data Protection Ordinance. They will have to align their processes accordingly. In this context, the international transfers of data within the group is of particular interest. By means of Binding Corporate Rules “BCR”, personal data can be transferred across the same group from Switzerland to EU counties and even to third countries that do not have level of data protection equivalent to the Swiss one. In the present issue of Legal News, we explain the principle of BCR and which advantages they entail.

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1. Definition

BCR are binding internal rules, that ensure compliance with EU data protection levels for the transfer and processing of personal data (of natural persons) in countries with inadequate level of data protection. The purpose of BCR is to allow multinationals - in particular with subsidiaries or branches in countries having a level of data protection not equivalent to the Swiss or EU level - to transfer data within the group in compliance with the EU data protection principles subject to Article 25 and Directive 95/46/EC.

2. Content of BCR

2.1 Principles

The contents of BCR depends on the activity of a specific company. However, BCR must contain elements and principles published by the Article 29 Data Protection Working Party. Accordingly, the scope of application and validity, the type of data, and the data subjects have to be defined as well as the data protection principles, the modalities of data transfer and processing. This includes provisions governing the transfer of data from the EU to countries without adequate level of data protection. Thereby the data protection authorities shall have the possibility to examine the appropriateness of the level of data protection when data is transferred and processed in countries without adequate level of data protection.

2.2 Enforcement Rights

The BCR shall grant the Data subjects specific enforcement rights. These include judicial remedies in the case of a breach of granted rights either at the place of jurisdiction of the data exporting company, the company’s EU headquarters, or at the domicile of the entity in the EU, which is responsible for data protection. The company’s EU headquarters or the entity responsible in the EU has to commit towards the data subject - regardless which group company caused the breach - to compensate damages and to take remedial actions where violations of BCR occur. These obligations include treating such breach as if the breach occurred by the responsible company itself (EU headquarters or responsible entity in the EU). The burden of proof lies with the responsible company and not with the data subject. Thus, the EU headquarters or the responsible EU entity, as the case might be, is obligated to evidence that the no group company has committed a breach of privacy. The BCR must be easily accessible for data subjects (e.g., by publishing them on the internet).

2.3 Complaint Procedure and Data-Protection Supervisors

In addition to the external judicial remedies, BCR must also provide for an internal complaint procedure that enables data subjects to file a complaint. The department or person responsible for complaints must be
clearly identified and have an appropriate level of independence in the execution of such function. A group-wide network of data privacy officers has to be implemented, with clearly defined tasks and responsibilities.

2.4 Data Protection Audits
In addition to this, the BCR must impose an obligation for the group to conduct regularly data protection audits or on specific request from the data privacy officer. These audits should be performed by internal or external auditors. Furthermore, all group companies have to cooperate with the data-protection authorities in all matters relating to the BCR.

2.5 Transparency
The principle of transparency plays an important role in connection with the BCR. For example, the EU headquarters or the responsible EU entity must be informed if local law prevents a group company from complying with its obligations under the BCR.

2.6 Training Programs
In order that BCR are effective, employees must pass suitable training programs and have to acknowledge the contents as well as the scope of application of the BCR.

2.7 Subsequent Amendments or Updates to BCRs
BCR can be amended or updated at any time. The relevant procedure has to be outlined in the BCR itself. In addition, any amendment has to be communicated towards the entire group as well as the data protection authorities.

3. The Road to BCR
The road to BCR has been standardized across Europe. As a prerequisite, the company has to designate a lead data-protection authority within the EU. The choice of authority depends on the company’s needs, but will primarily be dictated by its place of the domicile of the EU headquarters. Provided the lead authority approves the BCR, they will be transmitted to other data-protection authorities within the EU for their approval. In this context, all communications are channeled through the lead authority in order to simplify the process. Furthermore, the process will be accelerated due to the mutual-recognition agreement to which currently 21 EU countries are signatories. In the event that the lead authority recognizes the BCR, the remaining members of the mutual-recognition agreement will refrain from conducting their own examination. Following conclusion of the recognition procedure, the company needs to seek authorization for transfers from the national authorities within the EU.

4. Advantages of BCR
Compared to the widely used EU standard contract clauses, BCR are a more efficient solution. BCR cover the entire structure of a group and not just individual data transfers. In this context, corporate acquisitions or divestments generally have no influence, so that there is no need for special contracts per data transfer between the individual group companies. In addition to this, training of personnel and the active monitoring of data protection ensures a uniformly high level of data protection. Novartis was the first Swiss headquartered multinational to introduce BCR. Also EY has introduced BCR globally in its organization (additional information can be found at: http://www.ey.com/GL/en/Home/EY-Data-Protection-Binding-Corporate-Rules-Program).

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