

Editorial

*Bridget Treacy
considers
Binding
Corporate
Rules and the
ICO's recently
released
RAND study for
Volume 9, Issue
6, of Privacy
& Data
Protection*

There is tangible excitement amongst privacy professionals following the news that *Accenture* has received preliminary approval for its Binding Corporate Rules ('BCRs') from 20 European Data Protection Authorities. As readers will be aware, in 2005 the Article 29 Working Party issued a revised process for obtaining BCR approval, termed the "co-operation" procedure. Under this process, all participating Data Protection Authorities ('DPAs') examine in detail and agree upon the content of BCR documentation submitted for approval. The process is managed by a Lead Authority (in *Accenture's* case, the UK Information Commissioner). Once the co-operation procedure is complete, each DPA issues an authorisation for the BCRs in accordance with their national law.

The intention of the co-operation procedure was to improve (and shorten) the BCR approval process, so that BCRs would become the preferred option for international data transfers within corporate groups. The reality of the process is somewhat different, and many had begun to despair that BCRs were becoming discredited. *Accenture's* leadership in securing approval from such a significant number of DPAs brings much needed credibility to the process, and will encourage other companies that are presently weighing up the merits of embarking on a BCR journey.

Behind the euphoria of *Accenture's* success is a story of detailed preparation, hard work, and determination. Bojana Bellamy, *Accenture's* Director of Data Privacy, notes that part of the reason for her team's success lies in the fact that they built their BCRs from the ground up, over several years. It reflects the commitment to privacy made by every *Accenture* employee. This approach stood them in good stead as the DPAs closely scrutinised *Accenture's* policies, procedures, training and awareness programme, privacy oversight function, and documentation. On-site visits were conducted. This high level of scrutiny may mean that obtaining BCR approval becomes a highly sought after mark, perhaps akin to a trust mark or seal, in addition to the very practical result of easing international data flows. BCRs may give companies a competitive advantage as data privacy issues move higher up the corporate risk agenda.

Accenture's success with its BCRs perhaps reflects a greater commitment on the part of the DPAs to work towards more practical implementation of the existing data protection framework. This is one of the themes which emerges from the long awaited RAND report, commissioned by the UK Information Commissioner to assess the strengths and weaknesses of the European Data Protection Directive 95/46/EC (the 'Directive').

The concept of such a review was highly radical when first proposed, and it stimulated considerable debate as to whether, and if so when, the Directive itself might be re-opened. The conclusions of the RAND study are much less radical than anticipated, but as a consequence more likely to stimulate constructive debate within Europe as to the future shape of data protection law.

One of the key frustrations of our existing data protection framework is the mechanism for accommodating international data transfers. The adequacy test currently applied by the European Commission to assess data protection standards in other jurisdictions is regarded as artificial, and operates in practice as requiring 'equivalent' data protection, rather than 'adequate' data protection. Alternative approaches to adequacy, such as the Spanish DPA's promulgation of a set of internationally recognised data protection standards, will take time to gain support. Other methods for establishing adequacy, such as EU Model Clauses, can be cumbersome and inflexible. *Accenture's* success with its BCRs raises the possibility of the BCRs approach being promoted not merely as a mechanism for facilitating international transfers, but as a means of embedding good data protection practices within the core of an organisation's culture.

During the last year a number of companies have adopted a data protection compliance strategy of becoming "BCR ready." Following in *Accenture's* footsteps, those companies will now seek to formalise their BCRs, and many others will begin to prepare theirs. DPAs are anticipating an increase in applications for BCR approval. Many DPAs have signalled a greater commitment to the BCR concept by joining the mutual recognition process, intended to shorten the BCR approval process. Attention will now focus on whether BCRs can be made to work for the majority, and not just the few.

Bridget Treacy
Editor and Partner at Hunton & Williams
btreacy@hunton.com
