

Itera Compliance with the GDPR and rules for international data transfers

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Itera BCR-P as a robust legal basis for secure data transfers

The landmark Schrems II ruling on 16 July 2020 by the European Court of Justice (CJEU)¹ has emphasized the importance of compliance with the General Data Protection Regulation's (GDPR) rules on data transfers². The Schrems II ruling invalidated the use of Privacy Shield due to lack of protection against US surveillance³ and set out strict requirements for use of EU Standard Contractual Clauses (SCC) related to data transfers outside the EEA⁴.

Itera continuously monitors the requirements and developments with regard to international data transfers, including guidance from the European Data Protection Board (EDPB) and the relevant national data protection authorities.

Itera's assessment is that our nearshoring activities are not directly affected by the Schrems II decision and that our customers can continue to receive services from Ukraine as specified and agreed in the contractual terms, including data processing agreement, with the individual customer⁵.

Itera does not rely on EU Standard Contractual Clauses, which was under scrutiny by the CJEU, for transfers of customer data to Ukraine. Instead, Itera has since 2017 relied on Binding Corporate Rules for Processor (BCR-P) as the legal basis for transfers to Ukraine. BCR-P is considered the gold standard for data protection and is still considered a valid transfer mechanism by the EDPB⁶. BCR-P are a global, company-wide privacy framework that allows the transfer of customer personal data outside of the EEA by processors, once approved by European DPAs.

European Data Protection Authority (DPA) BCR approval, which includes a lead DPA and two consulting DPAs, typically takes over two years and requires significant resources to draft,

¹ The CJEU judgment in the Schrems II case. European Union, 2020. Available at: [https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/652073/EPRS_ATAG\(2020\)652073_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/652073/EPRS_ATAG(2020)652073_EN.pdf) (Accessed: 2021-02-04).

² What rules apply if my organisation transfers data outside the EU?. European Commission. Available at: https://ec.europa.eu/info/law/law-topic/data-protection/reform/rules-business-and-organisations/obligations/what-rules-apply-if-my-organisation-transfers-data-outside-eu_en (Accessed: 2021-02-04)

³ Case C-311/18. InfoCuria Case-law. Available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=228677&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=9791227> (Accessed: 2021-02-04)

⁴ Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data Adopted on 10 November 2020. Available at: https://edpb.europa.eu/sites/edpb/files/consultation/edpb_recommendations_202001_supplementarymeasurestransferstools_en.pdf (Accessed: 2021-02-04)

⁵ Assessment by The law firm Simonsen Vogt Wiig. Oslo 2021-02-03. SVW-MATTERS. [REDACTED]

⁶ Binding Corporate Rules (BCR) Corporate rules for data transfers within multinational companies. European Commission. Available at: https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/binding-corporate-rules-bcr_en (Accessed: 2021-02-04).

implement, and maintain. To date, a very limited number of companies worldwide have obtained BCR approval, and only a portion of these are approved as BCR for Processors (BCR-P). Itera's BCR-P was given through The Norwegian Data Protection Authority (DPA) at 2017-04-20, and is listed in the European Commission BCR registry⁷.

All Itera Group Companies and associated staff are obliged to adhere to the strict BCR-P requirements. Adherence to the BCR-P is backed by audits and staff training programs overseen by Itera's Group Data Protection Officer (DPO) and the DPO organization with local DPO's for each Business Units.

The Schrems II decision has confirmed the value of Itera's long-term commitments with regard to establishing a strong privacy framework based on the DPA approved BCR-P, Itera have also made assessments of the legal framework in Ukraine. As elaborated below, **in our own opinion the Itera BCR-P and the regulatory framework in Ukraine provides an effective level of data protection as required under the GDPR and the guidance from the EDPB.**

Assessment of the legal framework for protection of personal data in Ukraine

The Constitutional Court of Ukraine has in a case 2012-01-20 confirmed that the Ukrainian Constitution safeguards information regarding the personal and family life of individuals⁸. The case also confirmed the strict rules for the collection, storage, use and dissemination of such information by any person, including state and local bodies. The Decision has the status of law and compliance with it is mandatory.

Ukraine has recognised human rights and rule of law by accession to the numerous international treaties such as:

- the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms;
- the International Covenant on Economic, Social and Cultural Rights;
- the International Covenant on Civil and Political Rights; and
- the United Nations Convention on the Rights of the Child.

More specifically, **Ukraine has also entered into international commitments** related to data protection, such as the Council of Europe Convention 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data⁹. The Convention 108 includes many of the same rights and as GDPR, such as the principles of proportionality, lawfulness and transparency. Restriction on the rights laid down in the Convention are only possible when

⁷ List of companies for which the EU BCR cooperation procedure is closed. European Commission. Available at: https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=613841 (Accessed: 2021-02-04).

⁸ «One more important document announced in January 2012 and related to data protection matters was the Decision of the Constitutional Court of Ukraine dated 20 January 2012 (the "Decision") which provided the official interpretation of the information about personal and family life of an individual and confirmed the rule requiring the data subject's consent for collection, storing, use and dissemination of such information to be obtained by any person, including state and local bodies. The Decision has a status of the law and is mandatory.». Ukraine: Recent Developments In Data Protection Legislation. 22 February 2012. Available at: <https://www.mondaq.com/data-protection/165144/recent-developments-in-data-protection-legislation> (Accessed: 2021-02-04).

⁹ Details of Treaty No.108 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. Council of Europe. Available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108> (Accessed: 2021-02-04).

overriding interests (e.g. state security, defense, etc.) are at stake. The Convention also imposes some restrictions on transborder flows of personal data to states where legal regulation does not provide equivalent protection.

Ukraine have also adopted several laws and regulations that regulate data protection in Ukraine which also applies to foreign data subjects:

- Law of 1 June 2010 No. 2997-VI on Personal Data Protection;
- Law of 23 February 2012 No. 4452-VI and the Law of 20 November 2012 No. 5491-VI (collectively 'the Amendments').

Moreover, Ukraine is a party to the EU-Ukraine Association Agreement between the European Union and its Member States¹⁰, of the one part, and Ukraine, of the other part. Title III of the EU-Ukraine Association Agreement provides for the development of national laws to bring them in line with the standards set forth by the GDPR.

The main regulator for data protection in Ukraine is the Ombudsman. The Ombudsman maintains an independent role from government bodies and other state bodies. The Ombudsman has adopted several legislative acts relating to data protection, which together with the Law and amendments provides provisions on the rights and responsibilities of data controllers and data processors, as well as the rights of data subjects.

Itera is not aware of any disproportionate surveillance acts or surveillance practice in Ukraine. Neither has Itera experienced any government access request for disclosure of data since Itera initiated activities in Ukraine in 2008.

Concluding remarks

Itera's DPA approved BCR-P provides a robust framework for processing and transfer of personal data to Ukraine. Itera will actively monitor regulatory developments in Ukraine to ensure that the BCR-P and our compliance framework provides an adequate level protection of personal data in the light of the GDPR and the EDPB guidelines.

Disclaimer

This assessment is a product by and for Itera Group. Itera does not provide legal advisory and this information can therefore not be perceived as such. Any reference to or any use of this information outside Itera Group is at the third party's own risk.

¹⁰ Official Journal of the European Union - ASSOCIATION AGREEMENT between the European Union and its Member States, of the one part, and Ukraine, of the other part. The European Union. 29.5.2014. Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22014A0529%2801%29> (Accessed: 2021-02-04).