

Your Data Processing Activities and Transfer to Third Countries

This fact sheet is intended for the *data controller*, i.e. the party that uses other individual's personal data for his own purposes.

THIS FACT SHEET WILL ANSWER THE FOLLOWING QUESTIONS:

In which situations can data be transferred to countries outside the European Union?

How can you find out whether or not an adequate level of protection exists in a particular country?

Which possibilities exist for data transfer where a so-called third country lacks an adequate level of protection?

Which procedure applies for permit applications?

Which role does the Dutch DPA play?

More information?

The Wet bescherming persoonsgegevens (WBP) [Dutch Data Protection Act] does not contain any separate provisions for data traffic within the European Union (EU) since the Act was created in implementation of the European Privacy Directive. This Directive has two objects, i.e. to achieve the harmonised protection of personal data and to facilitate the free traffic of personal data within the EU.

Once all member states have modified their legislation in line with the Directive, the EU will be a single jurisdiction in the context of data protection. Hence, data traffic between the Netherlands and another EU country will only have to meet the general requirements of the WBP.

Data traffic to countries outside the EU

The WBP (Dutch Data Protection Act) contains specific provisions applicable to data traffic to third countries. Third countries are all countries outside the EU, with the exception of Norway, Liechtenstein and Iceland. The main rule is that personal data may only be transferred to third countries with an adequate level of protection. Where this is not the case, transfer will only be permitted on the basis of a statutory exception or with a permit from the Ministry of Justice. In all cases, parties will be expected to comply with the general requirements of the WBP. One of these general requirements is the obligation to notify the Dutch Data Protection Authority (Dutch DPA) [College bescherming persoonsgegevens (CBP)].

Adequate level of protection

To determine whether a country provides an adequate level of protection, the controller should first establish whether either the Minister of Justice or the European Commission (EC) has passed a ruling concerning the level of protection in the country concerned. You are the controller if you are the party who determines the object and means of processing and if the personal data is used in your interest. In this context, data processing means any procedure involving data, from the collection of data to the destruction of data. Transfer is therefore a form of data processing.

On the Dutch DPA Internet site (www.cbpweb.nl), you will find a *list* of the countries on which the EC has adopted a decision as indicated above. This list contains all countries considered to have an adequate level of protection. Where no decision has been adopted, you must analyse the situation yourself, on the basis of a number of criteria.

The United States

The United States does not have any general legislation providing for the protection of personal data. For this reason, the EC has adopted a special decision in respect of the United States: an adequate level of protection shall only be deemed to apply for those organisations that have undertaken to comply with the so-called Safe Harbor Principles. These organisations are indicated in a public list, setting out which specific organisations comply with the above Principles. To view the list, please see the website for the U.S. Department of Commerce (www.export.gov/safeharbor).

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This information is also available on www.cbpweb.nl.

Exceptions and permit from the Minister of Justice

If a third country does not provide an adequate protection, it may nevertheless be possible to transfer personal data to that country; there are two possibilities. The first possibility is a transfer covered by one of the exceptions defined in the WBP. This would apply, for example, where data subjects have given their unambiguous consent for the transfer of their data to a third country, or where data transfer is necessary for the fulfilment of a contract. These exceptions must be interpreted in a restrictive manner.

The second possibility is transfer on the basis of a permit granted by the Minister of Justice. These permits are subject to further conditions, which serve as a guarantee for the protection of personal data. One way of ensuring that adequate safeguards are provided is to use one of the model contracts approved by the EC. To date, the EC has approved two model contracts: 1) for transfer between two controllers, one of which is established in a EU country and the other outside the EU, and 2) for transfer to a processor in a third country. The use of a model contract expedites the permit procedure. For information on the EC's model contracts and the adequacy of personal data protection in third countries, please see www.europa.eu.int/comm/privacy.

Permit applications via the Dutch DPA

Applications for permits granted by the Minister of Justice must be submitted to the Dutch DPA, using the application form at the back of the brochure entitled *Third countries. Transfer of Personal Data to Countries outside the European Union* [Derde Landen. Doorgifte van persoonsgegevens naar landen buiten de Europese Unie], or via the Dutch DPA website. All applications must be accompanied by documents evidencing sufficient guarantees with regard to the data transfer in question. A permit will only be issued once the Dutch DPA has advised the Minister of Justice on the application. If you are using the model contracts approved by the EC without any additions or changes, the Dutch DPA will normally have processed your application within 2 to 4 weeks. If you are using the model contracts with additions, your application will normally have been processed within 6 weeks. Finally, the processing period will be 13 weeks where you are using the model contracts with changes, or where you have prepared an instrument yourself. The period applicable will also depend on the time that the controller needs to implement any modifications required during the advice period.

Supervision by the Dutch DPA

If a country does not provide an adequate level of protection, any transfer to that country is unlawful unless covered by a statutory exception or a ministerial permit. The Dutch DPA monitors compliance with the WBP by controllers based in the Netherlands who transfer data to third countries. The Dutch DPA will initiate its supervisory activities itself or in response to complaints received from citizens. In its primarily activities the Dutch DPA focuses on categories of transfer that entail special risks. For example:

- transfers involving a (financial) risk, such as credit card transactions via the Internet;
- repetitive transfers of bulk data.

The WBP [Dutch Data Protection Act] allows the Dutch DPA to apply administrative force or impose an order for periodic penalty payments.

More information

For a more detailed discussion of this subject, please see the policy document on third countries *Nota derde landen*.