

Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA

CHAPTER V

Transfers of personal data to third countries or international organisations

Article 35

General principles for transfers of personal data

1 Member States shall provide for any transfer by competent authorities of personal data which are undergoing processing or are intended for processing after transfer to a third country or to an international organisation including for onward transfers to another third country or international organisation to take place, subject to compliance with the national provisions adopted pursuant to other provisions of this Directive, only where the conditions laid down in this Chapter are met, namely:

- a the transfer is necessary for the purposes set out in Article 1(1);
- b the personal data are transferred to a controller in a third country or international organisation that is an authority competent for the purposes referred to in Article 1(1);
- c where personal data are transmitted or made available from another Member State, that Member State has given its prior authorisation to the transfer in accordance with its national law;
- d the Commission has adopted an adequacy decision pursuant to Article 36, or, in the absence of such a decision, appropriate safeguards have been provided or exist pursuant to Article 37, or, in the absence of an adequacy decision pursuant to Article 36 and of appropriate safeguards in accordance with Article 37, derogations for specific situations apply pursuant to Article 38; and
- e in the case of an onward transfer to another third country or international organisation, the competent authority that carried out the original transfer or another competent authority of the same Member State authorises the onward transfer, after taking into due account all relevant factors, including the seriousness of the criminal offence, the purpose for which the personal data was originally transferred and the level of personal data protection in the third country or an international organisation to which personal data are onward transferred.

2 Member States shall provide for transfers without the prior authorisation by another Member State in accordance with point (c) of paragraph 1 to be permitted only if the transfer of the personal data is necessary for the prevention of an immediate and serious threat to public security of a Member State or a third country or to essential interests of a Member State and the prior authorisation cannot be obtained in good time. The authority responsible for giving prior authorisation shall be informed without delay.

3 All provisions in this Chapter shall be applied in order to ensure that the level of protection of natural persons ensured by this Directive is not undermined.

Article 36

Transfers on the basis of an adequacy decision

1 Member States shall provide that a transfer of personal data to a third country or an international organisation may take place where the Commission has decided that the third country, a territory or one or more specified sectors within that third country, or the international organisation in question ensures an adequate level of protection. Such a transfer shall not require any specific authorisation.

2 When assessing the adequacy of the level of protection, the Commission shall, in particular, take account of the following elements:

- a the rule of law, respect for human rights and fundamental freedoms, relevant legislation, both general and sectoral, including concerning public security, defence, national security and criminal law and the access of public authorities to personal data, as well as the implementation of such legislation, data protection rules, professional rules and security measures, including rules for the onward transfer of personal data to another third country or international organisation, which are complied with in that country or international organisation, case-law, as well as effective and enforceable data subject rights and effective administrative and judicial redress for the data subjects whose personal data are transferred;
- b the existence and effective functioning of one or more independent supervisory authorities in the third country or to which an international organisation is subject, with responsibility for ensuring and enforcing compliance with data protection rules, including adequate enforcement powers, for assisting and advising data subjects in exercising their rights and for cooperation with the supervisory authorities of the Member States; and
- c the international commitments the third country or international organisation concerned has entered into, or other obligations arising from legally binding conventions or instruments as well as from its participation in multilateral or regional systems, in particular in relation to the protection of personal data.

3 The Commission, after assessing the adequacy of the level of protection, may decide, by means of implementing act, that a third country, a territory or one or more specified sectors within a third country, or an international organisation ensures an adequate level of protection within the meaning of paragraph 2 of this Article. The implementing act shall provide a mechanism for periodic review, at least every four years, which shall take into account all relevant developments in the third country or international organisation. The implementing act shall specify its territorial and sectoral application and, where applicable, identify the supervisory authority or authorities referred to in point (b) of paragraph 2 of this Article. The implementing act shall be adopted in accordance with the examination procedure referred to in Article 58(2).

4 The Commission shall, on an ongoing basis, monitor developments in third countries and international organisations that could affect the functioning of decisions adopted pursuant to paragraph 3.

5 The Commission shall, where available information reveals, in particular following the review referred to in paragraph 3 of this Article, that a third country, a territory or one or more specified sectors within a third country, or an international organisation no longer ensures an adequate level of protection within the meaning of paragraph 2 of this Article, to the extent necessary, repeal, amend or suspend the decision referred to in paragraph 3 of this Article

by means of implementing acts without retro-active effect. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 58(2).

On duly justified imperative grounds of urgency, the Commission shall adopt immediately applicable implementing acts in accordance with the procedure referred to in Article 58(3).

6 The Commission shall enter into consultations with the third country or international organisation with a view to remedying the situation giving rise to the decision made pursuant to paragraph 5.

7 Member States shall provide for a decision pursuant to paragraph 5 to be without prejudice to transfers of personal data to the third country, the territory or one or more specified sectors within that third country, or the international organisation in question pursuant to Articles 37 and 38.

8 The Commission shall publish in the *Official Journal of the European Union* and on its website a list of the third countries, territories and specified sectors within a third country and international organisations for which it has decided that an adequate level of protection is or is no longer ensured.

Article 37

Transfers subject to appropriate safeguards

1 In the absence of a decision pursuant to Article 36(3), Member States shall provide that a transfer of personal data to a third country or an international organisation may take place where:

- a appropriate safeguards with regard to the protection of personal data are provided for in a legally binding instrument; or
- b the controller has assessed all the circumstances surrounding the transfer of personal data and concludes that appropriate safeguards exist with regard to the protection of personal data.

2 The controller shall inform the supervisory authority about categories of transfers under point (b) of paragraph 1.

3 When a transfer is based on point (b) of paragraph 1, such a transfer shall be documented and the documentation shall be made available to the supervisory authority on request, including the date and time of the transfer, information about the receiving competent authority, the justification for the transfer and the personal data transferred.

Article 38

Derogations for specific situations

1 In the absence of an adequacy decision pursuant to Article 36, or of appropriate safeguards pursuant to Article 37, Member States shall provide that a transfer or a category of transfers of personal data to a third country or an international organisation may take place only on the condition that the transfer is necessary:

- a in order to protect the vital interests of the data subject or another person;
- b to safeguard legitimate interests of the data subject, where the law of the Member State transferring the personal data so provides;

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- c for the prevention of an immediate and serious threat to public security of a Member State or a third country;
- d in individual cases for the purposes set out in Article 1(1); or
- e in an individual case for the establishment, exercise or defence of legal claims relating to the purposes set out in Article 1(1).

2 Personal data shall not be transferred if the transferring competent authority determines that fundamental rights and freedoms of the data subject concerned override the public interest in the transfer set out in points (d) and (e) of paragraph 1.

3 Where a transfer is based on paragraph 1, such a transfer shall be documented and the documentation shall be made available to the supervisory authority on request, including the date and time of the transfer, information about the receiving competent authority, the justification for the transfer and the personal data transferred.

Article 39

Transfers of personal data to recipients established in third countries

1 By way of derogation from point (b) of Article 35(1) and without prejudice to any international agreement referred to in paragraph 2 of this Article, Union or Member State law may provide for the competent authorities referred to in point (7)(a) of Article 3, in individual and specific cases, to transfer personal data directly to recipients established in third countries only if the other provisions of this Directive are complied with and all of the following conditions are fulfilled:

- a the transfer is strictly necessary for the performance of a task of the transferring competent authority as provided for by Union or Member State law for the purposes set out in Article 1(1);
- b the transferring competent authority determines that no fundamental rights and freedoms of the data subject concerned override the public interest necessitating the transfer in the case at hand;
- c the transferring competent authority considers that the transfer to an authority that is competent for the purposes referred to in Article 1(1) in the third country is ineffective or inappropriate, in particular because the transfer cannot be achieved in good time;
- d the authority that is competent for the purposes referred to in Article 1(1) in the third country is informed without undue delay, unless this is ineffective or inappropriate;
- e the transferring competent authority informs the recipient of the specified purpose or purposes for which the personal data are only to be processed by the latter provided that such processing is necessary.

2 An international agreement referred to in paragraph 1 shall be any bilateral or multilateral international agreement in force between Member States and third countries in the field of judicial cooperation in criminal matters and police cooperation.

3 The transferring competent authority shall inform the supervisory authority about transfers under this Article.

4 Where a transfer is based on paragraph 1, such a transfer shall be documented.

Article 40

International cooperation for the protection of personal data

In relation to third countries and international organisations, the Commission and Member States shall take appropriate steps to:

- (a) develop international cooperation mechanisms to facilitate the effective enforcement of legislation for the protection of personal data;
- (b) provide international mutual assistance in the enforcement of legislation for the protection of personal data, including through notification, complaint referral, investigative assistance and information exchange, subject to appropriate safeguards for the protection of personal data and other fundamental rights and freedoms;
- (c) engage relevant stakeholders in discussion and activities aimed at furthering international cooperation in the enforcement of legislation for the protection of personal data;
- (d) promote the exchange and documentation of personal data protection legislation and practice, including on jurisdictional conflicts with third countries.