

TRANSLATION OF THE OFFICIAL PUBLICATION OF SINT MAARTEN (AB 2010, GT no. 2)

EXPLANATORY MEMORANDUM

General

Introduction

In a modern society, increasing use is made of data files in which data that can be traced to individual natural persons are recorded. Such files play a useful and often essential role with regard to proper provision of information, in the execution of numerous government tasks, in the internal management and service provision of companies and institutions, in scientific research, etc. However, risks for the privacy of registered persons can be associated with unrestricted use of such files, or their use without due care. This proposal outlines the frameworks within which personal data can be used and how the privacy of registered persons should be protected.

Constitution

Articles 5(2) and 5(3) of the draft Constitution for Sint Maarten provides that rules to protect privacy in connection with the recording and provision of personal data must be laid down by national ordinance. That Article also prescribes the criteria that the recording and provision must meet. These standards have been taken over from Article 8(2) of the draft Charter of Fundamental Rights of the European Union. Furthermore, the principle is recorded that the party concerned must have given explicit consent for the recording and processing, unless a warranted ground established by national ordinance makes a departure from this possible.

Article 5(3) of the draft Constitution also prescribes that the national ordinance should also provide for the possibility for persons regarding whom personal data are processed to access these data and request improvements to these.

In the first instance, it was assumed that by using an additional Article, the date on which these provisions would take effect would be postponed for a maximum of five years following the date on which the Constitution came into force. However, in view of the importance of protection of personal data in society, a decision was made to draw up a regulation in the preparatory stage for the Country of Sint Maarten.

International context

The protection of privacy is laid down in various human rights treaties. Specific treaties have also been established with regard to the protection of personal data. In particular, the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data established in Strasbourg on 28 January 1981 (Bulletin of Treaties, 1988, 7). The Convention was ratified for the Kingdom by law of 20 June 1990 (Bulletin of Acts, Orders and Decrees 1990, 351). However, this Convention does not apply for the Netherlands Antilles. By agreement with Section H of the Final Declaration of 2 November 2006, this Convention will still not apply for Sint Maarten after the creation of the country. Following the change of status, the desirability of co-ratification of the Convention will be considered.

The object described in Article 1 of the Convention, namely 'to secure respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him' is largely consistent with the object and purport of this draft.

Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (EHRC) (Bulletin of Treaties 1951, 154) and Article 17 of the International Covenant on Civil and Political Rights (ICCPR) (Bulletin of Treaties 1969, 99; Dutch text of the Bulletin of Treaties 1978, 177) provides, among other things, that everyone has a right to respect for his private life. This right includes the right to protection of personal data.

Apart from the international legal framework, the protection of personal data also plays a special role in the economic development of the island. There are different angles here. The citizens and companies of Sint

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Maarten have contacts with foreign companies, international companies establish branches on Sint Maarten where, for example, the policy is that staff and client files are administered at the head office, or companies establish themselves in Sint Maarten for the provision of telecommunication services in other countries. The economic possibilities cannot be foreseen by the legislator. The national ordinance therefore follows an internationally accepted standard of protection of personal data, so that the citizens can make use of the economic possibilities associated with data exchange without harming the privacy of others as a result.

Within the Kingdom

At the time of writing of this Memorandum, only the Netherlands had a general regulation for the protection of personal data within the Kingdom. In the Netherlands Antilles the protection of personal data was generally regulated in the various national ordinances through a confidentiality requirement. This provision is firstly directed at the government bodies that possess personal data on citizens for the performance of their duties. The provisions do not provide for keeping of personal data by private persons, with the exception of the protected professions. A regulation for the protection of personal data is also included in the Kingdom Act on administrative customs support (P.B. 1999, No. 192). This Kingdom Act imposes rules concerning the administrative support between the countries of the Kingdom in the field of customs and concerning the levy and collection of customs duties, VAT, general expenditure tax and corporation tax. It also serves partly for the implementation of the Administrative Customs Support Treaty contracted between the Kingdom and the Republic of France.

In the absence of regulation in the Netherlands Antilles concerning the protection of personal data, the Kingdom Act contains regulations for that purpose.

As part of the constitutional reforms of the Netherlands Antilles, Bonaire, Sint Eustatius and Saba will become part of the Dutch state system. In the closing declaration of the conference of 10 and 11 October 2006 on the future constitutional position of Bonaire, Sint Eustatius and Saba, it was agreed, among other things, that in principle, Netherlands Antillean law will remain in effect and that Dutch legislation will be introduced gradually. This draft is based on the draft Personal Data Protection Act, BES.

The draft

From a practical point of view, a decision was made to adopt as much of the Dutch Personal Data Protection Act) as possible. A large number of provisions are therefore identical. This draft differs from the Dutch Personal Data Protection Act on a number of points, in connection with the differences between Sint Maarten and the BES on the one hand and the European territory of the Netherlands on the other. Furthermore, for the first time, a general statutory regulation on the protection of personal data will apply in Sint Maarten.

In order to avoid disproportionately burdening the administrative bodies and the private sector of Sint Maarten, particularly during the transitional period, a number of matters are regulated differently than in the Dutch Personal Data Protection Act .

Thus supervision is designed somewhat differently than in the Dutch Personal Data Protection Act . Furthermore, the obligation to report processing of personal data to the supervisory authority (the reporting obligation) and the accompanying sanction have not been adopted.

The administrative costs and the financial consequences

The following can be noted with regard to the costs for citizens and the private sector in order to comply with the information requirements imposed by the government, the administrative costs associated with this draft.

Various studies have been conducted into the administrative costs and the compliance costs arising from the Dutch Personal Data Protection Act . On the basis of these, an estimate has been made of the costs that could arise from this draft. As already mentioned, not all elements of the Dutch Personal Data Protection Act have been included in this draft. For the draft, only the costs for keeping data, including the security costs, and the costs for the request for dispensation for the processing of special personal data are relevant. The corporate administrative costs benchmark for 2007 showed that in the European part of the Netherlands, the actions for storing personal data, including the security costs, and the prevention of unlawful processing of

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data (Article 14(5) of the draft legislation) constitute an average administrative cost item of about €80 per company. Measured over the 31,400 Dutch companies that process personal data, this amounts to a total of about €2.5 million in the benchmark year of 2007. At present, no estimate can be produced of the number of companies that will process personal data in Sint Maarten. Although the above amounts are only indicative for Sint Maarten because they relate to the European part of the Netherlands, it can be concluded on that basis that in any event, the administrative costs will be limited.

With regard to the requests for dispensation for the processing of special personal data (Article 23(1e) of the draft legislation), only one request was measured in the benchmark year of 2007, and the costs of this amounted to €87. With regard to the effect of this Article for companies in Sint Maarten, it is not possible to assess how often such requests will be submitted, but in view of the 2007 benchmark, this is expected to take place sporadically. In cases arising, the administrative costs are very low.

The three members of the Personal Data Protection Supervisory Committee, referred to in Article 42 will receive remuneration laid down by national decree containing general measures (Article 45). The costs for regular and incidental payments are estimated at some ANG 40,000 per year. The national decree will take account of the increase in the price index figure. In the first year, the costs will be funded from the partnership resources and thereafter, from the regular budget.

The introduction

As mentioned earlier, a statutory system for protection of personal data will exist on Sint Maarten for the first time. The introduction should therefore be supervised as closely as possible, primarily bearing the provision of information in mind. In addition, the role that the supervisory body can play in the introduction will be considered together with that body, as was the case with the Registration Board in the introduction of the Personal Records Act and the Personal Data Protection Act in the European part of the Netherlands.

The draft also provides for a gradual transition to the new system for existing processing of personal data. The terms are based on Article 79 of the Dutch Personal Data Protection Act . A year's time has been granted to harmonise existing processing with the statutory requirements. For the processing of special data, a period of three years has been granted. We assume that these transitional periods will be adequate.

Article by Article Section

The following explanation does not aim to be a summary of the parliamentary history of the Dutch Personal Data Protection Act. After all, such a summary contains the risk that certain nuances from the parliamentary debates will not be presented accurately or in full.

Articles 1 up to and including 5: General definitions of terms

This draft presents rules for the processing of personal data, by both the public and the private sector.

Key terms are personal data, the responsible party and processing. The draft provides rules for the processing of personal data and these are in the first instance directed at the responsible.

Article 2(c) provides that the national ordinance does not apply to the processing of police data; this subject is regulated in a separate national ordinance based of the Police Kingdom Act.

Personal data

According to Article 1, *personal data* refers, in short, to information on identified or identifiable natural persons. In the first instance, this concerns data such as names, dates of birth and gender. If data co-determine the way in which people are regarded or treated in society, the relevant data must be regarded as personal data.

The personal data must relate to natural persons. However, under certain circumstances, data on legal entities, such as companies or organisations, may also qualify as personal data. This could include profit details on a sole trader. These data say something about the income of the owner of the one-man business. Data on equipment or objects could also qualify as personal data under certain circumstances. The value of a

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car, for example, could be treated as personal data if it were processed in the accounts of an insurance company. In principle, that value says something in society about the income or assets of the owner of the car. By contrast, the value is not regarded as personal data in the price list of a car dealer.

As already mentioned, this concerns identified or identifiable persons. It must be reasonably possible to verify or determine the identity of the person concerned, without disproportionate effort.

Processing of personal data and the scope of the draft

With regard to the processing of personal data as such, Article 1 records which actions are referred to by the term *processing*. This not only concerns the gathering, recording, ordering, saving, updating and changing of personal data but also the retrieval, viewing and provision via through transfer of personal data obtained, its circulation or other means of provision, and the combination, association, shielding, exchanging, deleting or destruction of the personal data.

However, not every data processing method is covered by the regime of the Dutch Personal Data Protection Act. In connection with this, Article 2 of the Dutch Personal Data Protection Act has also been taken over. The rules apply to:

- a. full or partial automated processing of personal data; and
- b. non-automated, i.e. manual processing of personal data recorded in a file or intended for that purpose.

The term *file* refers to a structured set of data relating to different persons. This set of data must be inter-related and the system must be accessible. The latter could include the storage method. If the data are saved in such a way that they are easy to view, there is systematic accessibility.

Article 2(2) includes processing with certain purposes that are not covered by the regime of the national ordinance. This concerns the processing of data such as data processing for purely personal or domestic purposes (e.g. a personal address book or a birthday calendar). This also concerns processing by or for investigation and security services, for police tasks, the population administration, the execution of legal documents and the certificates of no objection and the execution of the national ordinance on elections. The draft therefore does not apply to these forms of processing.

Article 3 concerns processing for particular purposes, which is partially covered by the statutory regime. This concerns the processing of personal data solely for journalistic, artistic or literary purposes. Only part of the statutory regime applies for these forms of processing. In any event, the general rule is that the data must be processed properly and with due care for an explicitly described and justified purpose and must comply with a number of conditions laid down in the national ordinance.

Another determining factor for the processing is where the activity takes place. This national ordinance applies only to the processing of personal data as part of the activities of a responsible party on the island of Sint Maarten.

The responsible

Once it has been determined that a form of processing falls under the statutory regime, partially or otherwise, it is important to know who the responsible party is. After all, the statutory obligations are borne by the party *responsible*. Pursuant to Article 1, the responsible party is the party that determines the objective of, and the resources for the processing. This is the one that, in formal legal terms, has control over the processing. This need not necessarily be a natural person. Administrative authorities or companies can also qualify as responsible parties.

The processor

The Dutch Personal Data Protection Act also identifies the person of the processor: a person who is not in a direct relationship of authority with the responsible, and therefore not a subordinate of the responsible, but who processes data for the responsible. However, the processor must act in accordance with the instructions of the responsible. A processor could, for example, include a specialised agency deployed for certain actions, such as a payroll administration agency.

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Certain regulations apply for the processor. For example, the processor may only process personal data on the instructions of the responsible party. In addition to the responsible party, the processor is also liable for damages or losses that someone suffers as a result of processing actions. Furthermore, the processor is subject to the same confidentiality obligations as the responsible party.

Articles 6 up to and including 15: The processing of personal data in general

It has already been noted that processing must comply with certain requirements and conditions, regardless of whether the regime applies partially or in full.

An initial requirement is that the data must be processed in compliance with the law (Article 6). This not only concerns this national ordinance, but also other regulations that may contain special rules regarding the processing of the data.

The second requirement is that data processing must be performed properly and with due care (Article 6). If the data are not processed properly and with due care, there could be a conflict with the general principles of good administration (in the case of administrative bodies) or an unlawful action (private persons, companies or other organisations).

Furthermore, personal data may only be processed under certain conditions.

A crucial condition in relation to the protection of personal data is the objective requirement. This means that personal data must be gathered for a carefully considered, explicitly described and justified objective (Article 7). The objective must be clearly determined or recorded before data-gathering begins. During processing, the objective may not be changed without further ado. In designing the data processing, the question of whether processing of the data is necessary for the objective must be determined. The question must continually be asked of whether the same goal could be achieved with fewer data (proportionality requirement). For example, for a dispatch list, name and address details will in principle be sufficient. It is also necessary to consider whether the same result could be achieved by other means (subsidiarity requirement).

Data must not be processed further in a manner that is inconsistent with the purposes for which they were obtained. Article 9 provides a number of leads for the assessment of whether inconsistency exists. For example, the nature of the data may be a determining factor. With special data, such as medical or criminal personal data, it must be assumed faster that these may not be used for purposes other than the ones for which they were gathered.

Article 8 provides a comprehensive enumeration of the grounds that can justify data processing. It must always be possible to base the data processing on one or more of the grounds listed in Article 8. If this is not the case, the data may not be processed.

For example, data may be processed because the processing is necessary for the execution of an agreement to which the person concerned is or will become a party, or to comply with a statutory obligation borne by the person concerned or (this applies for the public sector) because it is necessary for the proper performance of a public law duty. Data may also be processed if the person concerned has granted unambiguous consent for the processing.

Personal data may not be kept for longer than is strictly necessary for the purpose of the processing, at least not in a form in which they can be traced to persons (Article 10(1)). A special regulation applies for processing for historical, statistical or scientific purposes (Article 10(2)).

Processing for a particular purpose also means that no superfluous data must be processed. This is developed in more detail in Article 11. The data that are processed must be adequate and relevant. There must be no excessive processing. The term *adequate* means that all relevant data must be processed. Consequently, too few data must not be processed either, as this could improperly give rise to an incorrect picture of the person concerned.

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The responsible party has an obligation here to ensure that the data are processed correctly and accurately. The person acting under the authority of the responsible party or the processor itself bears a confidentiality obligation if it does not already have such an obligation on the grounds of other statutory provisions (Article 12).

The responsible party also has an obligation to ensure that appropriate technical and organisational measures are taken to secure the data against loss or any form of unlawful processing (Articles 13 and 14).

Articles 16 up to and including 24: The processing of special personal data

The processing of personal data on a person's religion or faith, race, political views, health, sexual life and personal data on the membership of a trade union is in principle prohibited. This also applies with regard to a person's criminal personal data and personal data concerning unlawful or obstructive conduct in relation to a prohibition imposed in response to that conduct (Article 16).

However, a number of exceptions apply (Article 17 et seq.).

For example, data on a person's religion or faith may be processed by church associations or associations with a spiritual basis or by other institutions on religious or ideological grounds (Article 17).

Personal data on a person's race may be processed for identification purposes only or, subject to conditions, in relation to a preferential treatment policy (Article 18).

With regard to personal data on a person's health, it should be noted that this refers to data on both physical and mental health. Article 21 provides that the relevant personal data may only be processed by certain groups of responsible parties, such as:

- hospitals;
- social service institutions;
- insurers;
- special schools;
- probation services;
- the Guardianship Council;
- administrative authorities and implementing institutions that implement certain social security laws.

Criminal personal data may only be recorded by a limited circle of responsible parties, under certain conditions (Article 22).

The foregoing does not mean that the special personal data can never be processed other than in the cases mentioned (Article 23).

The data may be processed if the person concerned has granted explicit consent for this, or if that person disclosed the data himself, or if this is necessary for the establishment, exercise or the defence of a right in court proceedings, in order to comply with an obligation under international law or if this is necessary with a view to a serious interest, where appropriate assurances are provided, or if dispensation is granted.

With dispensations, a similar policy line as that regarding the Dutch Personal Data Protection Act in the BES will also apply for this draft. This means that in the event of a dispensation for processing with a more structural character, as a rule preference will be given to a legal regulation. The Minister of Justice will then aim for a legal regulation. If a legal regulation has already been initiated in the area concerned, or will take effect in the foreseeable future, dispensation can be granted for the period until the legal regulation takes effect. In other respects, dispensation can be granted for incidental processing, following a positive substantive assessment of the application to that effect.

The personal data may also be processed if it is for the purpose of scientific research or statistics, if the research serves a general interest, the processing is necessary for the research or the statistics and it is not possible to ask the person concerned for consent, or this costs a disproportionate effort.

Articles 25 and 26: The provision of information to the person concerned

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As noted in the general section of this Explanatory Memorandum, the person concerned has a right of notification. A person regarding whom personal data are gathered must be able to determine what happens with those data. For that reason, rules are laid down in Articles 25 and 26 regarding the provision of information to the person concerned. These Articles provide that the responsible party is required to identify himself to the person concerned and to inform that person of the objectives of the processing, unless the person concerned 'is already aware of this'. This information obligation is one of the most important instruments in this Act, particularly since in this case the reporting obligation to the supervisory body will not yet be effected, as a result of which no prior research, within the meaning of Articles 31 and 32 of the Dutch Personal Data Protection Act, will take place either. For the time being, the supervisory authority will primarily act repressively in relation to this draft national ordinance.

The information provided to the person concerned must in any event state who the responsible party is and the purpose for which the data are gathered and processed. In cases arising, further information must be provided to the person concerned if this is necessary in order to assure proper processing with due care. Consequently, it is always necessary to consider whether more detailed information on the processing of the data must be provided to the person concerned from the point of view of due care. The nature of the data, the way in which they are obtained and the use made of them play an important role in this. The more sensitive the data for the person concerned, the more obvious it will be that the person concerned should be informed more extensively on the processing of the data.

The provision of information must take place before the data are obtained, or if the personal data have been obtained from persons other than the person concerned, before these are recorded by the person responsible.

Obtaining the data from the person concerned himself occurs if that person enters personal data in a form and sends this to the person responsible. In that case, the form or an enclosed leaflet could state who the responsible party is and what the purposes of the processing are.

Provision of information must also take place in cases in which the personal data are obtained without the involvement of the person concerned. This is possible by informing the person concerned in person, for example, but also, if a larger group of persons concerned is involved, through more general forms of information, with certainty that these will reach the persons concerned. In principle, a single advertisement in a free newspaper is not deemed to be adequate.

If it is not possible to provide information, or if this requires a disproportionate effort, the information need not be provided. A disproportionate effort may include cases in which it is exceptionally time-consuming to trace the address of the person concerned. In such cases, the origins of the data must be recorded, so that a person concerned can, if required, check what was done with his data after the event.

Articles 27 up to and including 34: The rights of the person concerned

In addition to the information obligation of the responsible party, the person concerned has a right to be informed. The latter may inquire, at reasonable intervals, whether and if so, which of his personal data have been processed. A written answer must be provided to such an inquiry within four weeks. The requirement that a reply is provided in writing does not rule out electronic messaging.

The reply must contain:

- a full list of the data processed;
- a description of the purpose of the data processing, the categories of data to which the processing relates and the recipients or categories of recipients;
- all available information on the origin of the data.

If the person concerned requests this, information must also be provided on the system of the automated data processing, unless this would involve disclosing business secrets.

The person concerned has the right to improvement, supplementation, deletion or shielding of those data if these prove to be factually incorrect. Once again a reply must be sent to such a request within four weeks, stating the extent to which the request will be met. The reasons for any rejection must be stated.

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The improvement, supplementation, deletion or shielding requested and granted must be executed at the earliest opportunity. The responsible party is also required to notify third parties to whom the data were sent prior to the request of the corrections. If the person concerned so requested, the third parties to whom that notice was sent shall also be reported.

In a number of cases, the person concerned can appeal against the processing of his personal data. This concerns cases in which his personal data are processed because the processing is necessary for proper execution of the public-law duties of an administrative body, or for a justified interest of the responsible party or of a third party (Article 32).

In cases of direct marketing, too, a person concerned may appeal against the processing (Article 33). In those cases, he must be referred to the possibility of appeal (Article 33(3)).

Articles 35 and 36: Exemptions and restrictions

Under certain circumstances, the regulations on inconsistent further processing of personal details (Article 9(1)) and the provision of information, both active and passive (Articles 25 up to and including 27) need not be applied. Those circumstances include when processing is in the interests of the security of the country or the state, if criminal offences must be prevented, investigated or prosecuted, or if serious economic and financial interests of the country or the state, or the protection of the person concerned or the rights and freedoms of other parties are at stake.

Notification of the person concerned need also not take place if processing takes place by institutions or services for scientific research or statistics, where the necessary provisions have been made to ensure that the data are also used solely for that purpose. Furthermore, no notification is required for the processing of personal data that form part of archive documents that have been transferred to an archive storage location.

Articles 37 up to and including 41: Legal protection

Articles 37 to 41 contain provisions concerning the legal processes that a person concerned may follow. There is a differentiated system for judicial supervision.

For decisions by administrative bodies regarding the right of access and the right to improvement, supplementation etc., the person concerned can institute proceedings before the Common Court of Justice of Aruba, Curaçao and Sint Maarten and of Bonaire, Sint Eustatius and Saba on the basis of the national ordinance on administrative justice.

If the decision was taken by a party other than an administrative body, such as a company, the person concerned can submit a petition to the Court of first instance, pursuant to Article 38. This involves civil-law proceeding.

A responsible party who acts in contravention of the prohibition on processing of personal data referred to in Article 4(3) commits a penal offence.

Articles 42 up to and including 62: Supervision

Initially, the idea was to place supervision of the processing of personal data in the hands of the Judicial Enforcement Council currently in formation. Pursuant to Article 3 of the Kingdom Act on the Judicial Enforcement Council, the Council may be charged with supervision of the processing of police data. As already seen, this draft does not relate to police data. On further consideration, a Personal Data Protection Supervisory Committee will thus be instituted for supervision of compliance. This committee is independent.

The three committee members will be appointed by the Minister of Justice.

The duties and powers of the committee are largely consistent with those of the Data Protection Authority . The main task of the committee is to ensure compliance with this national ordinance. To that end, the committee is authorised to conduct investigations, officially or at the request of an interested party, into the application of this draft. If the findings relate to the execution of the national ordinance, this will be notified to the Minister of Justice. The committee will also issue a publicly available annual report.

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In order to be able to realise the supervision of compliance, the committee will be equipped with the power to enter locations, to require information and access and to enforce cooperation, with or without the imposition of an administrative enforcement order or a penalty. Article 51 of the Personal Data Protection Bill of the BES declares the supervisory provisions of Title 5.2 of the Dutch General Administrative Law Act are likewise applicable. The power to impose an administrative enforcement order or an order subject to a penalty is also awarded to the Data Protection Authority. These powers are effective tools for promoting compliance. In connection with the administrative enforcement order and order subject to a penalty, the provisions of sections 5.3.1 and 5.3.2 of the Dutch General Administrative Law Act are declared to be likewise applicable in the BES Bill. Because Sint Maarten does not have such an Administrative Law Act, an abridged separate regulation is included in this draft in relation to administrative enforcement and an order subject to penalty. The fact that the committee holds the above powers means that the national ordinance administrative justice applies to orders of the committee, to the extent that these can be qualified as administrative decisions within the meaning of the National ordinance administrative justice. The term 'administrative decision' is defined in the National ordinance concerning administrative justice as a written order by an administrative body containing a public law action that does not have general effect. A refusal to issue an administrative decision is equated with an administrative decision (Article 3(2) of the National ordinance concerning administrative justice. The regular courts are competent to hear the appeals against an order subject to penalty regulated in Article 62 (Article 62(3)).

In view of the powers to handle complaints, we are of the opinion that in any event, the chairman must comply with the requirements for appointment as a judge of the Common Court of Justice of Aruba, Curaçao and Sint Maarten and of Bonaire, Sint Eustatius and Saba. With regard to the membership of the committee, we take the view that the committee members must have knowledge of both the public and the private sector as well as of the protection of personal data. The possession of that knowledge will therefore be an important criterion in the recruitment of the committee members.

The committee is supported by a secretariat appointed by the Minister of Justice, following consultation of the chairman of the committee.

Articles 63 and 64: Data exchange with other countries

Within the European Union, a sound and high standard of protection of personal data must be realised in all member states, so that the European Union forms a legal area in relation to the protection of personal data. However, different rules apply with regard to countries outside the European Union. The Dutch Personal Data Protection Act and the Personal Data Protection Act of the BES provide that data exchanges with such other countries are possible only if 'an appropriate level of protection is provided'. On the basis of that regulation, Articles 76 and 77 propose a regulation that serves to ensure that an appropriate level of protection is always assured in the event of data exchanges with other countries.

Whether this exists must be assessed on the basis of the circumstances. In the first instance, this must be performed by the person responsible, although the Minister of Justice can also make assessments in this respect.

The assessment can take place on the basis of the following:

- the nature of the data;
- the purpose or purposes of the proposed processing;
- the duration of the proposed processing;
- the general and sectoral rules applying in the country concerned;
- compliance with security measures observed in the country concerned.

Article 65

Within one year of this Bill taking effect, existing data processing must be harmonised with the Act. The Act will apply with immediate effect for new processing. A longer term applies for special data. This provision is identical to Article 79 of the Dutch Personal Data Protection Act .

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