

Can the EU's data protection rules survive data transfers to third states?

Judicial and law enforcement authorities of the EU member states exchange personal data in the context of investigating, detecting and prosecuting of criminal offences – especially terrorist acts – with each other and with authorities of third states. The number of agreements between the EU, Europol and Eurojust on the one hand and a third state on the other hand (f.e. the 2003 EU-US Agreement on Mutual Legal Assistance) has increased significantly since 2001. The EU's data protection principles are based on the 1981 Council of Europe Convention (ETS 108), which is ratified by all member states. For transfers to states who do not support these principles, the Council of Europe laid down a requirement to first assess the level of data protection in this third state as 'adequate'. This adequacy requirement was laid down in the 2001 Additional Protocol – which has only been ratified by 16 member states – and in a number of specific legal instruments such as the 2008 Framework Decision. Even though the importance of this requirement is high it is applied inconsistently in the EU's relations with third states.

The European Commission has included the goal to clarify and simplify this 'adequacy procedure' in its communication on EU data protection but new agreements (f.e. with the US) are being negotiated in the meantime. How should we assess the level of data protection of a third state? Do the latest agreements with third states include the necessary safeguards to protect data in accordance with the EU's data protection framework?

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