

Privacy Next's Response to the European Commission Call for Evidence on the Second Evaluation of the Law Enforcement Directive (EU) 2016/680

Key Points

- The EU's current LED adequacy framework is underused despite a growing need and demand for increased international law enforcement cooperation.
- The existing "all-or-nothing" approach to adequacy is too restrictive, effectively requiring near-complete legal equivalence and limiting cooperation with trusted international partners that nevertheless maintain strong rule-of-law and human rights safeguards.
- A more flexible and nuanced adequacy model is required, assessing third countries against global human rights standards and constitutional safeguards rather than expecting a complete replication of the EU's legal framework.
- The LED should make greater use of sector-specific, limited-scope, conditional, and phased adequacy decisions, supported by a formal adequacy roadmap, to facilitate trusted cross-border law enforcement cooperation while maintaining strong data protection safeguards.

The Need for a More Strategic and Operationally Effective Approach to LED Adequacy Decisions

Introduction

Privacy Next welcomes the opportunity to contribute to the Commission's second evaluation of the Law Enforcement Directive (LED). Nearly a decade after the Directive entered into force, the review offers a timely opportunity to assess whether the legal framework remains fit for purpose amid rapidly evolving transnational criminal activity. Criminal organisations exploit cross-border infrastructures with a speed and sophistication that governments struggle to match. They are largely unconcerned with jurisdictional boundaries. Their operations are increasingly digital, decentralised and global.

Given the context of increasing transnational crime and the increasingly sophisticated use of technology, this submission focuses on one specific aspect of the Directive: the

use of the adequacy mechanism under Article 36 LED. The Commission's first evaluation recognised that adequacy decisions effectively facilitate international transfers of law enforcement data with trusted partners. Yet, despite this recognition, the practical use of adequacy decisions remains extremely limited, with only the UK benefiting from a comprehensive adequacy decision under the LED.

The European Union requires a more ambitious and operationally focused adequacy strategy under the LED. Data protection remains essential, but the current approach risks creating a situation in which the pursuit of perfect legal alignment between the EU and target Third Countries undermines law enforcement authorities' ability to adequately protect European citizens. There is also a degree of urgency involved. Modern criminal threats increasingly transcend territorial boundaries. Cybercrime, ransomware, online fraud, human trafficking, terrorist financing, organised crime, and child sexual exploitation are all increasingly facilitated through digital technologies and global communications infrastructure. Evidence relevant to investigations is frequently held outside the jurisdiction where the offence occurred.

Adequacy Decisions Remain Significantly Underused

The Commission's first review of the LED acknowledged the importance of adequacy decisions in facilitating international transfers while ensuring appropriate safeguards. The Council similarly observed that Article 36 adequacy decisions are "an essential tool to facilitate safe international data transfers" and called on the Commission to take further meaningful and proactive steps toward adopting **additional adequacy decisions**.

The Council's position deserves significant attention. Law enforcement remains fundamentally a Member State competence. The operational realities faced by police authorities, prosecutors and criminal justice agencies should therefore carry considerable weight in any assessment of whether the LED is functioning effectively.

The evidence suggests that adequacy decisions are not being adopted at a pace commensurate with operational need. Instead, authorities continue to rely heavily on

alternative mechanisms, including appropriate safeguards under Article 37 and derogations under Article 38. While these mechanisms remain important, they are inherently more burdensome, less predictable and often less suitable for the rapid exchange of information required in modern investigations. As a result, the most efficient means of facilitating international cooperation remains largely dormant.

The Current Approach is Too Restrictive

One of the principal obstacles appears to be how adequacy is currently conceptualised. Adequacy decisions under the LED are treated as an "all-or-nothing" determination across criminal justice and national security. Either a third country is considered capable of providing protection that is essentially equivalent to that guaranteed within the European Union, or it is not. The UK adequacy decision was an obvious measure given the circumstances of EU withdrawal, where the UK system had in place EU guarantees on data transfers.

A strict binary approach is increasingly disconnected from the realities of transnational international law enforcement cooperation and hinders the ability of governments to deliver security to their societies. Non-EU jurisdictions do not replicate the EU model in every respect. Differences exist regarding policing powers, surveillance oversight, criminal procedure or institutional arrangements. At the same time, many of the EU strategic partners possess robust rule-of-law systems, functioning courts, independent oversight institutions, and well-developed human rights protection in criminal justice.

The practical consequence is that the EU places partners in an undesirable intermediate position. EU authorities trust them to cooperate in different ways. They may already exchange information through Europol, Eurojust, or bilateral arrangements. They may benefit from GDPR adequacy decisions for commercial transfers. Yet they still cannot secure LED adequacy because they fall short of a standard interpreted as requiring near-complete equivalence across an entire law enforcement and national security ecosystem, in the Commission's view.

This creates a paradox for a Commission that is committed to transnational cooperation in the pursuit of security. The ProtectEU Strategy calls for increased global cooperation to counter transnational crime. Adequacy decisions will directly support the objectives of this strategy.

A More Nuanced Adequacy Model is Needed

The Law Enforcement Directive (LED) was adopted in recognition that effective law enforcement depends on cooperation across jurisdictions. Preventing, investigating, detecting, and prosecuting criminal offences increasingly requires the exchange of personal data between countries. The Directive's objective is therefore not to impede international cooperation by requiring third countries to replicate the EU data protection framework in every respect. Rather, it seeks to ensure that such cooperation occurs within criminal justice systems that respect human rights and provide appropriate safeguards for processing personal data.

In the context of international law enforcement cooperation, the relevant point of reference should be human rights rather than the EU-specific concept of fundamental rights. The latter is rooted in the EU constitutional order and embodied in the Charter of Fundamental Rights of the European Union. By contrast, the LED itself recognises, including in its recitals, the importance of assessing human rights protections in third countries. Many jurisdictions around the world have well-developed constitutional and legal frameworks governing law enforcement activities, derived from domestic constitutional traditions and international human rights obligations.

The EU cannot afford a framework for law enforcement cooperation that is hindered by perceived procedural obstacles or substantive over-expectations. The EU has a number of strategic partners where agreements on data protection are in place. These, combined with respect for the partner's constitutional standards, provide a basis for further LED adequacy decisions.

The Commission should therefore move beyond a one-size-fits-all approach to LED adequacy decisions. This does not require lowering standards; rather, it requires greater flexibility in how adequacy is assessed and implemented. The Commission should make fuller use of the flexibility already contained within Article 36 LED. The Directive expressly allows adequacy decisions for a "territory or one or more specified sectors" within a third country. This possibility has received remarkably little practical attention despite its potential to facilitate trusted law-enforcement cooperation while maintaining a high level of protection.

Current adequacy assessments effectively require examination of an entire national legal order, including policing powers, criminal procedure, surveillance frameworks, judicial remedies, oversight mechanisms and onward transfer arrangements. Such a comprehensive assessment creates a high threshold for positive findings and significantly limits the number of countries that can achieve adequacy. This approach may no longer be appropriate in an environment where law enforcement cooperation increasingly occurs through specialised agencies and specific operational channels rather than through entire criminal justice systems.

The Commission should consider, amongst other potential adequacy initiatives:

- Sector-specific adequacy decisions focused on law enforcement authorities or criminal justice bodies rather than entire national legal systems.
- Limited-scope adequacy arrangements covering specific categories of data transfers.
- Conditional adequacy decisions subject to enhanced monitoring and review.
- Phased pathways allowing countries to progressively demonstrate compliance over time.

Such approaches would recognise operational reality while maintaining safeguards. It would be more effective to use these safeguards dynamically rather than making adequacy so difficult to obtain that few countries ever qualify and put European law

enforcement at an asymmetrical disadvantage and operational paralysis in addressing transnational crime.

The Commission should consider establishing a formal LED Adequacy Roadmap process. Such a roadmap would provide objective benchmarks, increase transparency on adequacy requirements, and demonstrate a willingness to further enhance cooperation. These roadmaps would identify specific benchmarks, such as effective judicial remedies, demonstrable respect for rule-of-law practices, safeguards on the use of data in law enforcement, and oversight and accountability mechanisms suitable for criminal justice systems. The objective would be a realistic and transparent pathway toward adequacy so a mutual understanding of what is necessary can be realised. Countries would understand what is expected of them and how progress will be assessed. This would represent a significant improvement over the current situation, where the path toward adequacy appears uncertain and unpredictable.

LED adequacy assessments are undoubtedly complex and specialised evaluations of foreign legal systems. Questions concerning surveillance oversight, policing practices, criminal justice safeguards, national security processes, judicial effectiveness and operational realities cannot always be adequately assessed and require substantial resources. While adequacy decisions are exclusive to the Commission, greater engagement with third countries in this area and the use of external independent expertise can help overcome these challenges.

Conclusion

The second review of the Law Enforcement Directive must recognise that the global environment of criminal behaviour is increasingly cross-border, digital, and technology-enabled. Law enforcement cooperation has become increasingly dependent on rapid, lawful exchanges of information across borders.

Privacy Next believes the Commission should maintain its commitment to strong data protection safeguards while adopting a more strategic, pragmatic, and nuanced approach

to adequacy decisions to support law enforcement without complicating international cooperation efforts.

The future adequacy regime should:

- Support rather than inhibit trusted international cooperation.
- Make fuller use of sectoral and limited-scope adequacy determinations.
- Incorporate phased and conditional pathways where appropriate.
- Apply enhanced continuous monitoring and review mechanisms.

A more flexible approach to adequacy decisions in the LED will maintain the EU's global leadership in data protection. However, leadership also requires an ability to adapt legal frameworks to contemporary realities. A sectoral approach would not lower the standard of protection required by Article 36, as the requirement for "essentially equivalent" protection would continue to apply. However, the assessment would become more targeted and evidence-based.

An adequacy regime that produces only one significant outcome in almost a decade clearly fails to fulfil its intended purpose. The second LED review provides an opportunity to build a more effective, credible and operationally relevant framework that strengthens both security and fundamental rights in an increasingly interconnected world.