

PC.21 Free Movement of Data

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The idea of a "data traffic regulation" emerged as early as the end of the 20th century. It was supposed to lead to a careful balance between data protection on the one hand and freedom of information and communication on the other. Now, the free movement of data is an EU competence, a *Schutzgut* of the GDPR and a political goal of the EU.

The EU's legislative competence for the free movement of data is an outgrowth of the EU's internal market competence, whereby the EU competence from Article 16 II TFEU is based solely on the free movement of personal data, while a legislative competence with respect to non-personal data can only be based on Article 114 TFEU. The free movement of personal data is a *Schutzgut* of the GDPR (cf. Art. 1 I and III GDPR). A framework for the free flow of non-personal data has been established by the "Free Flow of Data" Regulation 2018/1807, which primarily prohibits data localization rules of EU Member States.

The realization of the common internal market is a central goal of the EU (Art. 3 (3) TEU). In order to be able to create the digital single market, not only the "classic" fundamental freedoms (free movement of goods, persons, services and capital) are required, but also the free of movement of data. In policy papers, therefore, the free flow of data is often referred to as the "fifth" freedom on the internal market.

Arguably, the free movement of data guaranteed by the GDPR does not establish any precedence of the free movement of data over data protection. Rather, it only clarifies that national standards of data protection law do not fall below or exceed the level of data protection of the GDPR (albeit subject to the numerous opening clauses of the GDPR), as this may otherwise cause a barrier to trade.

Regardless of this, freedom of data movement has been one of the EU's political goals for years.

The free movement of data is also an important consideration in trade policy and law, as data regulations (e.g. data localisation requirements) are seen as a barrier to trade or even protectionist.