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UK: National Data Strategy and its effect on EU adequacy for the UK

In September 2020, the Guardian quoted EU sources who were worried that the UK's National Data Strategy ('NDS') signalled that the UK was intending to rewrite its data protection law at the end of the Brexit transition period. Eleanor Duhs, Director at Fieldfisher LLP, examines the extent to which this is a realistic prospect and the potential impact on EU adequacy for the UK.

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Government strategy on personal data and UK standards

Early in Theresa May's Government the plan was formulated whereby the UK would adopt EU law as national law at the point at which the EU Treaties ceased to apply to the UK. This would mean that the UK economy would continue to be regulated in the same way. Continuity would be guaranteed for businesses and individ-

uals alike because the standards, the legislation, and the familiar case law of the Court of Justice of the European Union[1] ('CJEU') would still be binding in the UK after the EU Treaties ceased to apply. That plan is now legislated for in the European Union (Withdrawal) Act 2018 ('the Act').

In terms of data protection law, the Act will save the GDPR and turn it into domestic law – the 'UK GDPR.' The Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 and the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) (No. 2) Regulations amend the UK GDPR so that it can work properly as domestic law, and in a context where the reciprocal rights and obligations which applied to the UK as an EU Member State no longer persist.

The plan to create the UK GDPR is the basis on which the UK has negotiated EU adequacy. The explanatory framework for adequacy discussions published by the UK Government in March 2020 stated that 'continued free flow of personal data is vital for the future relationship between the UK and the EU.' The framework cited the fact that 'EU personal data-enabled services exports to the UK were worth approximately £42bn (€47bn) in 2018, and exports from the UK to the EU were worth £85bn (€96bn).' It also confirmed that the key legislative elements at the end of the transition period would be the Data Protection Act 2018 and the UK GDPR. Together these instruments would provide 'comprehensive protections for data subject equivalent to those in EU law' which would mean that the UK would meet the test for EU adequacy – the standard of 'essential equivalence.'

The UK GDPR will also contain new, UK international transfer mechanisms including:

- UK 'adequacy regulations,' based on the same list of factors as in the GDPR such as the rule of law, the data protection regime, and the international commitments of the third country[2]; and
- standard data protection clauses issued by the UK Secretary of State or the Information Commissioner[3].

What's changed?

In short, the UK's plans have not changed. In the NDS the Government sets out that it wants to 'unlock the power of data' and that this entails 'maintaining a data regime in the UK that is not too burdensome for the average company.' The Government also aims to '[maintain] high data protection standards without creating unnecessary barriers to data use.' None of this signals a clear intention to change tack and scrap the idea of the UK GDPR. The consultation document asks for views about whether the UK can improve on current international transfer mechanisms but also states clearly that the UK will seek EU adequacy in order to maintain the free flow of personal data with the EEA and will confer UK adequacy on global partners in order to promote the free flow of data.

It is also worth pointing out that the UK has been somewhat inconsistent in its messaging. In February 2020, shortly before the publication of the explanatory framework for adequacy discussions was published, the Prime Minister stated that the UK would 'develop separate and independent policies in areas such as data protection[4].' However, the framework for adequacy discussions did not suggest that this would be the case, instead confirming that the UK would be adopting the GDPR as national law. In October 2020, the Government published guidance on the end of the transition period which reiterated the UK's ambitions to gain an EU adequacy decision[5].

Why does the UK want an EU adequacy decision?

There are three main advantages to an EU adequacy decision for the UK. First, a free flow of data from the EU to the UK will safeguard valuable trade. Second, the EU's position is that adequacy under the data protection law enforcement directive[6] is a prerequisite for a deal with the EU on sharing data for law enforcement purposes[7]. Losing access to law enforcement data sharing would be hugely damaging for cooperation in this context and make UK and EU citizens less safe. Given that the test for adequacy under the Law Enforcement Directive (Directive (EU) 2016/680) ('LED') is the same as under the GDPR, it would be difficult to take a different approach to adequacy under the GDPR as compared with adequacy under the LED. Third, the EU-UK Withdrawal Agreement sets out that UK has to provide protections for legacy data which came from the EU before the end of 2020. In the event that the UK does not receive EU adequacy, this category of data has to be processed in accordance with the GDPR as it stands at the end of the transition period. Both the past and future case law of the CJEU will bind UK courts when they are interpreting the GDPR as it applies to this category of data[8]. If the UK adopts different standards of data protection for UK data, this disparity in applicable regimes could be a logistical nightmare for companies.

State of play in the negotiations

It is difficult to read exactly what is going on in the negotiations between the UK and the EU at the moment. Michel Barnier released a statement last week stating that the negotiations on data adequacy were not progressing well[9]. This may be down to the NDS. Others say that the CJEU's judgment in the case of Privacy International[10] means that the UK will not now receive an adequacy decision from the EU. On top of that, the EU has begun the process for taking infringement proceedings against the UK over the Internal Market Bill.

On the other hand, a matter of days after launching the infringement proceedings, the European Commission, together with the UK, pledged to continue working intensively to bridge the gaps between them[11].

Perhaps the most insightful recent commentary came from the evidence given to the Parliamentary Committee on the Future Relationship with the European Union. Catherine Barnard, Professor of European Union and Labour Law at the University of Cambridge and Shanker Singham, Chief Executive Officer at Competere, pointed to the fact that the Government's current tactic may be to create some 'sound and fury' which would

allow both sides to reach a compromise[12]. Failure to broker a deal will have a damaging impact, including in the area of data protection. The NDS and the EU's interpretation of it may simply be part of a negotiating strategy which enables agreement to be obtained while allowing both sides to claim victory. This is supported by recent reports that the UK is about to make a concession to the EU by agreeing that the Human Rights Act 1998, which implements the European Convention on Human Rights in domestic law, will remain on the statute book after the transition period ends. A compromise on this issue would be helpful to the UK in terms of gaining EU adequacy.

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1. Judgments handed down after this point would generally not be binding on UK courts. See section 6(1) of the European Union (Withdrawal) Act 2018.
2. See Article 45(2) of the GDPR and the same Article of the UK GDPR as well as section 17A of the Data Protection Act 2018.
3. See section 17C and section 119A of the Data Protection Act 2018.
4. See the Written Ministerial Statement of 3rd February 2020, at: https://questions-statements.parliament.uk/written-statements/detail/2020-02-03/HCWS86
5. See: https://www.gov.uk/guidance/using-personal-data-after-brexit
6. See Directive (EU) 2016/680 of the European Parliament and of the Council of 27th April 2016.
7. See the evidence given by David Frost, the Prime Minister's Europe Adviser and Chief Negotiator of Task Force Europe on 27th May 2020 at Q240, available at: https://committees.parliament.uk/oralevidence/431/html/
8. See Article 71 of the EU-UK Withdrawal Agreement.
9. See: https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_1817
10. Case: C-623/17, ECLI:EU:C:2020:790.
11. See: https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_1821
12. See for example evidence given to the Committee on the Future relationship with the European Union in particular Q792-3, available at: https://committees.parliament.uk/oralevidence/916/html/