

European Scrutiny Committee

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From: Sir William Cash MP

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Data adequacy and the Data Protection and Digital Information Bill

Your predecessor wrote to the Committee on 18 July. This concerned the introduction of the Data Protection and Digital Information Bill and its relevance to the two EU/UK data adequacy decisions. The letter responded to our request in our Report of 7 July 2021 to update us on any legislative developments in the data protection field relevant to those decisions.

We appreciate that the continued flow of personal data from the EU to the UK is vitally important for the conduct of both trade and law enforcement cooperation. The data adequacy decisions adopted by the European Commission in June 2021 are essential to maintaining seamless, uninterrupted flows of data for those purposes.

Discussions between the UK and the European Commission on the Bill

As you know, the General Data Protection Regulation (GDPR) and Law Enforcement Data Directive (LED) require the Commission to keep the decisions under review and act if adequate protection for personal data is no longer provided by a third country.¹

Given that the Bill would change aspects of the UK's data protection legislative framework, it would fall within the Commission's duty to keep UK adequacy under review.² We therefore welcome your news that discussions between the Government and the European Commission concerning the proposed reforms took place prior to the introduction of the Bill. We assume that discussions will carry on during its passage through Parliament. We would therefore be grateful if you could write to us again when there is anything material to report from those discussions concerning UK adequacy.

¹ By amending, suspending or possibly revoking the decisions.

² Article 45 GDPR and Article 36 LED.

Progress of the Bill in four areas of potential relevance to adequacy review

While we appreciate that the content of the Bill will not be finally settled until it has been enacted, we would welcome hearing from you again in any event once the Bill has cleared Third Reading in the Commons. As the Bill is extensive and has only just been introduced, we are focussing on four areas in the Bill of initial interest to us. As the Bill progresses, we may widen that field of interest.

The four areas in question seem to us to be of potential relevance to factors that the European Commission must consider when reviewing adequacy decisions adopted for a third country. Those factors include, but are not limited to:

- the relevant legislative framework;
- the rule of law, respect for human rights and fundamental freedoms;
- effective functioning of an independent data supervisory authority; and
- rules concerning rules for the onward transfer of personal data to another third country.

When updating us on the progress of the Bill, it would be helpful if you could focus on how the four areas of change might impact on the Commission's review of the two UK adequacy decisions. With that in mind, the four areas we have identified are:

- the change to the UK GDPR definition of "personal data" (Clause 1 "Information relating to an identifiable living individual");
- the abolition of the Office of the Information Commissioner and the creation of the Information Commission (specifically Clauses 27, 28, 31, 100, 101 and 102);
- removing the obligation to log justification for certain law enforcement processing (Clause 16); and
- a new "data protection test" for international data transfers (Clause 21 and Schedule 5).

Change to the UK GDPR definition of "personal data"

Clause 1 of the Bill seeks to change the UK GDPR definition of "personal data", specifically those parts of the existing definition which refer to an "identifiable living individual". Currently, Article 4 UK GDPR defines "personal data" as:

any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a

name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

Clause 1 instead proposes that information being processed will be information relating to an identifiable living individual *only* where they are "identifiable by the controller or processor by 'reasonable means' at the time of the processing" or "where the controller or processor knows, or ought reasonably to know, that another person will, or is likely to, obtain the information as a result of the processing, and the living individual will be, or is likely to be, identifiable by that person by reasonable means at the time of the processing."

As the definition of "personal data" is fundamental to the scope of the application of EU data protection law and the issue of "identifiability" has been the subject of judicial consideration in both EU and UK courts, this change may be relevant to an adequacy review.

Abolition of the Office of the Information Commissioner and the creation of the Information Commission

We understand that the Government proposes:

...to reform the regulator, the Information Commissioner, including its governance structure, duties, enforcement powers, reporting requirements, data protection complaints processes and its development of statutory codes of practice"³.

The Bill creates a new corporate body to replace the current Information Commissioner's Office (ICO), called the Information Commission (IC).⁴ It would transfer functions from the ICO to the new body. Although the Bill seeks to preserve the independence of the IC by providing, for example, that the IC is not to be regarded as a servant or agent of the Crown,⁵ questions may be asked about how the main role of the IC as an independent regulator would sit with:

- the new duty for the IC to consider "the desirability of promoting innovation and [...] competition"⁶; and
- proposed Ministerial powers to issue a statement of strategic priorities to the IC and block the adoption of statutory codes and guidance⁷.

³ Page 1 of Explanatory Notes to the Bill.

⁴ Clause 100 of the Bill.

⁵ Schedule 13 of the Bill.

⁶ Clause 27 of the Bill.

The independence of data protection authorities within the EU has been the subject of infringement proceedings against various Member States both before and after the GDPR's introduction. Most recently in the case of Belgium.⁸ The GDPR requires “complete independence” of data protection authorities.

Consequently institutional changes made to the UK data protection regulator are likely to be considered in any adequacy review. Although the current Information Commissioner (John Edwards) has been supportive of the Government's efforts to take his concerns about independence into account prior to the Bill's publication,⁹ the impact assessment to the Bill notes that the ICO “will likely publicly oppose any measures they believe infringe on their independence”.¹⁰

Removing the duty to log justification for certain law enforcement processing

Clause 16 of the Bill would remove the obligation on law enforcement authorities to log justifications for consulting or disclosing personal data in automated processing systems, currently required in [Section 62](#) of the Data Protection Act 2018. As this divergence from Article 25 of the LED has already caught the eye of one [MEP](#),¹¹ it is likely to attract further interest, regardless of the Government's explanations for this change.¹²

A new “data protection test” for international data transfers

The way in which the UK allows personal data transfers to other third countries would be a matter of interest, given the inclusion of international data transfers as a factor in adequacy review. Currently, the UK can issue “adequacy regulations” for third countries ensuring equivalent data protection to the UK,¹³ using a process and considerations which mirror the way the EU itself adopts adequacy decisions.

A particular focus may be the Bill's removal of Article 44 of UK GDPR which requires that “All provisions in this Chapter [dealing with international data transfers] shall be applied in order to ensure that the level of protection of natural persons guaranteed by this Regulation is not undermined”. Instead, a “data protection test” would apply for third countries. This divergence from the GDPR would involve determining if the standard of the protection provided in

⁷ Clauses 28 and 30 of the Bill.

⁸ See EU Commission Press Release, June 2021, Infringements Package: Data Protection

⁹ See the Government's [press release](#) of 17 June 2022.

¹⁰ Impact Assessment to the Bill.

¹¹ See Parliamentary question for the Commission - E-002789/2022, 8 August 2022, Sophie in t' Veld

¹² See Explanatory Notes to the Bill, paragraph 221 concerning technical challenges of manual input in automated systems and unreliability of justifications in cases of inappropriate data use.

¹³ See 17A (and 74A) and 17B(12) (and 74B) of the [Data Protection Act 2018](#)

the data importer's country is "not materially lower" than the standard of the protection provided for data subjects in the UK¹⁴. The "data protection test" would apply both to the Secretary of State (when making "adequacy" determinations) and controllers (when deciding whether it is safe to use other transfer mechanisms).

Relevance of the Retained EU Law (Revocation and Reform) Bill

Since the introduction of the Data Bill, the Government has also introduced the [Retained EU Law \(Revocation and Reform\) Bill](#). Clearly the Government's approach to data protection retained EU law under an ensuing Act will be relevant to the question of data adequacy. This is particularly true of the UK GDPR. We would therefore be grateful if you could keep us informed of Government's intentions.

Cross-parliamentary relevance of the Bill and the adequacy decisions

The Bill and how it relates to adequacy is of potential interest to many Select Committees. First of all, I draw this letter to the attention to the Chair (Rt. Hon Dame Diana Johnson MP) and Clerk of the Home Affairs Committee (HAC). HAC may wish to note the implications for law enforcement cooperation under the TCA if an adequacy decision ceased to apply.¹⁵ They may also be interested in the proposed removal of the requirement to log justifications by law enforcement authorities in relation to certain data processing. Finally, I refer them to what my Committee said in its first Report of [17 March](#) 2021 on the adequacy decisions:

...effective Parliamentary oversight of data protection issues by the Home Affairs Committee is referred to in the draft GDPR data adequacy decision as a contributing factor to the Commission's overall adequacy assessment. The Government itself relies on this oversight in its submission documents to the EU.

Additionally, I am copying this letter to the Chair (Julian Knight MP) and Clerk (Dr Stephen McGinness) of the Digital, Culture, Media and Sport Committee; the Chair and Clerk (Danielle Nash) of the Science and Technology Committee; the Chair (Angus Brendan MacNeil MP) and Clerk (Eligio Cerval-Pena) of the International Trade Committee; the Chair (Simon Hoare MP) and Clerk (Stephen Habberley) of the Northern Ireland Affairs Committee; the Chair (Darren Jones MP) and Clerk (Kenneth Fox) of the Business and Industrial Strategy Committee; the Chair (Rt. Hon Jeremy Hunt MP) and the Clerk (Joanna Dodd) of the Health

¹⁴ See Schedule 5 of the Bill.

¹⁵ Article 693(2) TCA states that "in the event of serious and systemic deficiencies within one Party as regards the protection of personal data", including "where those deficiencies have led to a relevant adequacy decision ceasing to apply" it is possible for some or all of the law enforcement part of the TCA to be suspended.

and Social Care Committee; the Chair (Rt Hon Joanna Cherry QC MP) and the Clerk (Lucinda Maer) of the Joint Committee on Human Rights; the Chair (the Earl of Kinnoull) and Clerk (Nick Boorer) of the Lords European Affairs Committee; Maxine Vining in the Department for Digital, Culture, Media and Sport; Alex Bernal in the Home Office; and Donald Harris in the Cabinet Office

CHAIR