



HOUSE OF LORDS

EUROPEAN UNION COMMITTEE SERVICES

Note by the Clerk and Policy Analyst

BRIEFING ON THE FUTURE UK-EU RELATIONSHIP ON DATA ADEQUACY

Briefing with Oliver Patel, Head of Public Policy and Partnerships, UCL European Institute, 17 December 2020

Attendance

Lord Bruce of Bennachie
Lord Cavendish of Furness
Baroness Donaghy (*Chair*)
Lord McNally
Baroness Neville-Rolfe
Baroness Prashar
Lord Sharkey
Lord Thomas of Cwmgiedd
Viscount Trenchard
Lord Vaux of Harrowden

1. Asked about the importance of the free flow of data between the UK and EU for businesses and the UK economy more broadly, Oliver Patel set out how data flows underpin digital trade and trade in services. He highlighted that there is plenty of qualitative evidence about the importance of data flows, and stressed that just because it's difficult to put a precise number on the economic value of these data flows their importance should not be underestimated. Furthermore, this is not just a technology sector issue; it affects the whole economy.
2. Oliver Patel emphasised that this session is just about flows of personal data from the EU to the UK. His headline message was that the absence of a positive EU adequacy decision for the UK would not make it impossible for businesses to transfer personal data, but it would be disruptive and present compliance challenges for many companies. He said that "the disruption in terms of compliance costs and bureaucracy will be a problem but not Armageddon for the economy."
3. The absence of a positive EU adequacy decision would require businesses to set up alternative legal mechanisms, which render existing and future EU-UK data transfers compliant with EU law. This would lead to increased costs for both UK and EU business, just to keep the data flows status quo. Oliver Patel set out that there would be an increased risk of GDPR fines for companies due to these compliance requirements, and that these extra costs and risks would lead to knock-on effects on levels of investment, EU-UK trade, and potentially the relocation of jobs and business functions. However, these wider affects are hard to quantify and disentangle from other economic factors.

4. When asked about the extent to which a data adequacy decision from the European Commission is linked to the broader future relationship negotiations, Oliver Patel said that in theory data adequacy is a separate matter and a unilateral EU decision, distinct from any trade agreement. He said, however, that in reality the process of a data adequacy decision can be accompanied and closely linked with Free Trade Agreement (FTA) negotiations, as was the case with the EU-Japan FTA. His view was that adequacy decisions can be politicised. He expressed his surprise that this issue has not been given more attention in coverage of the negotiations.
5. Oliver Patel said that it was hard to imagine the EU granting an adequacy decision in a wider 'no agreement' scenario, as it would be forfeiting leverage over this unilateral decision. This is despite the Commission considering barriers to cross-border data flows as bad for the EU economy. He said that the Commission is in a difficult position because for over two decades it has prioritised the flow of data without regulatory barriers, but the European Court of Justice (ECJ) has a different view and has consistently ruled to restrict EU-third country data flows to uphold the fundamental rights to privacy and data protection.
6. Oliver Patel outlined that in the Schrems II case the ECJ invalidated the EU-US Privacy Shield framework. While the system of Standard Contractual Clauses (SCCs) was upheld, the judgement makes it much more burdensome for companies to use SCCs for EU-third country data flows. Companies now need to meet a rigorous threshold to lawfully transfer data outside the EU using an SCC. Oliver Patel said that the threshold is so high that it may be difficult for some businesses to assess the usage of an SCC (i.e. the legal system in the third country and the practices of the data importer) in the way that the ECJ outlined. Furthermore, some data transfers based on SCCs may have to stop. SCCs are the main legal mechanism which companies use to transfer data from the EU to a third country with no adequacy decision.
7. Oliver Patel also claimed that SCCs can be expensive to set up. This could damage UK businesses in the event of no EU adequacy decision. He gave the example of a UK-based cloud service provider, which would have to set up an SCC with each of its EU-based customers. This could entail setting up thousands of new contracts, just to keep the status quo in place. He described the setting up of SCCs as a "nuisance", but that the business would have to take action as it could be liable for large fines if it does not comply with GDPR. In his recent report, Oliver Patel and co-authors estimated the average compliance costs for a business as £3,000 for a micro business, £10,000 for a small business, £19,555 for a medium business, and £162,790 for a large business.¹ This only covers the cost of compliance work in the event of no EU adequacy decision, not any potential knock-on effects to trade, and it is most likely an underestimation due to limited available data. He said that he is particularly concerned about micro/small businesses.
8. When asked about business preparedness for continued data transfers after the end of the transition period, Oliver Patel said that a lot of big companies in heavily regulated sectors have been working on this for a long time. He said, however, that a lot of companies will wait and see what the outcome of negotiations are before investing significant sums in legal and compliance work.

¹ https://www.ucl.ac.uk/european-institute/sites/european-institute/files/ucl_nef_data-inadequacy.pdf

9. Oliver Patel described the guidance provided by the Government and the Information Commissioner's Office on data as "very robust, detailed, clear and practical". He noted, however, that communicating this guidance to all those affected is crucial, given the lack of awareness among many companies. Many smaller businesses in particular are not even aware of what data transfers are, let alone the potential risks stemming from Brexit.
10. However, European data protection regulators – who would be enforcing these new requirements – are pragmatic and tend to target big players, as shown by the relatively few major fines issued for GDPR noncompliance. As such, if the EU does not grant data adequacy, many UK SMEs are unlikely ever to be proactively targeted—but this will not prevent opportunist consultancies warning of the risks of noncompliance and potentially overcharging SMEs for setting up SCCs. Many SMEs may take the view that the costs involved mean it is worth risking noncompliance. Furthermore, compliance is not binary. First and foremost, regulators like to see that companies have made some effort to comply and document their steps.
11. Portraying the European Commission as having its hands tied by EU case law such as the Schrems II ruling, Oliver Patel said the UK will be free to take a more "creative, flexible and pragmatic approach" to international data flows. He said the "Holy Grail" for the UK would be to receive a positive EU data adequacy decision, while simultaneously being able to pursue the "substantial opportunities" for liberalised data transfers with the many countries which are not deemed 'adequate' by the EU (at present only 12 countries). This scenario is "plausible" and would represent an improvement on the situation the UK was in as an EU member, as there are many major and emerging economies which do not have liberalised data flows with the EU.
12. Furthermore, under the GDPR, individual economic sectors in a country can be recognised as adequate even if that country is not granted full data adequacy. The UK may wish to make more use of this legal possibility than the EU currently does.
13. While stressing that failing to receive a positive data adequacy decision from the EU carries risks such as potentially decreasing inward investment in the UK, Oliver Patel observed that the UK is also regaining sovereignty over its international data transfers regime. If the EU grants adequacy to the UK, it may insist that any EU personal data transferred to the UK is not subsequently transferred on to third countries. By contrast, the absence of a positive adequacy decision from the EU would mean the UK is completely unrestricted by the EU model.
14. Asked about the likelihood of further legal challenges contesting any positive data adequacy decision for the UK or the legality of SCCs, Oliver Patel noted that Max Schrems himself has repeatedly vowed not to challenge any decisions relating to Brexit, but that other activists and groups are likely to do so. He described a growing disconnect between restrictive EU legal rulings and the practical realities of modern business, where data flows are so integral to economic activities and the functioning of the internet. Companies will continue transferring data and activists will continue challenging its legality.
15. While acknowledging that the ECJ, through the consistency of its rulings, has dug a hole for the Commission in introducing onerous EU rules for data transfers, Oliver

Patel said it is difficult to imagine the EU stopping transatlantic data flows altogether, given their importance. If restrictive EU data transfer laws are ignored by companies en masse – which is possible in the context of EU-US data flows – it becomes a rule-of-law problem for the bloc.

16. Asked about potential forums in which the UK could act as a bridge between the US and EU approaches, Oliver Patel noted the UK's G7 Presidency in 2021. He also remarked that bespoke forums do not yet exist but will surely be created, as "data diplomacy" moves up the agenda. He said the US sees EU moves as a form of data localisation inconsistent with the actions of an open and allied liberal democracy. The dominant view in the US is that the EU's approach is hypocritical, not least because the EU benefits from US surveillance practices in the form of intelligence sharing.
17. Oliver Patel said the act of granting an EU data adequacy decision for the UK is unlikely to take much time but that, if there is a gap between the end of the transition period and the granting of a decision, regulators will be guided by the Commission. They are unlikely to target noncompliant companies if they know a data adequacy decision is forthcoming.

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