

## Written evidence submitted by the Information Commissioner (ICO) (FRE0079)

As you will appreciate, I am limited in what I can say on a process which is ongoing and on which my office is advising. However, I thought it would be helpful if I set out below the ICO's role in the adequacy process; our experience of how the process works, and the issues that are likely to arise during the negotiation.

Getting the data policy right on the commercial and law enforcement and security side is critically important to the UK and the EU. As you know, the UK Government has made it clear from the outset that it remains committed to maintaining high data protection standards and the continued free flow of data.

As set out in the Political Declaration<sup>1</sup> and confirmed by David Frost, the UK's Chief Negotiator for Taskforce Europe, the Government is seeking "adequacy decisions" from the EU under both the General Data Protection Regulation (GDPR) and the Law Enforcement Directive (LED)<sup>2</sup> to allow personal data to continue to flow freely.

Whilst I explore some of the scenarios below from a data protection perspective as requested by your letter, I would like to state at the outset that the ICO has been active in ensuring that businesses and organisations are supported and prepared for various scenarios. This includes a suite of guidance and self-assessment tools so that businesses of different scales facing the issue to a greater or lesser degree can build the understanding required for their processing context. We are constantly assessing the situation in terms of impact on organisational compliance and updating our advice as required. We will continue to react swiftly to any changes in direction on UK-EU data flows.

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<sup>1</sup> <https://www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration>  
<sup>2</sup> Directive (EU) 2016/680

### **The Adequacy Process and the role of the Data Supervisory Authority**

As the Committee will be aware, an EU adequacy assessment involves a dialogue between the European Commission and the government of the third country or territory being assessed. The Data Supervisory Authority for the country or territory being assessed has no formal role in the process, but the ICO has and will continue to provide regulatory expertise into the process where relevant. As an example, we have provided information to the Government about our office and activities to assist it in making the UK's case for adequacy to the Commission. The Government's *Explanatory Framework for Adequacy Discussions* was published by the Department for Digital, Culture, Media and Sport in March 2020.<sup>3</sup>

In terms of adequacy decisions, the UK is in a unique position in comparison to other third countries having implemented and experienced the GDPR and LED since 2018. The UK was a party to the negotiation and passage of these legal instruments; and the UK's history of data protection law goes back to 1984, thus predating the EU's own legislation. This contrasts with other countries seeking adequacy decisions from the European Commission.

Article 45.2 of the GDPR sets out the factors that the Commission will consider in particular when making an adequacy assessment, including:

- the rule of law, respect for human rights and freedoms, including rules relating to the

- onward transfer of personal data to other third countries or international organisations;
- enforceable rights for individuals along with effective avenues for administrative and judicial redress;
- the existence of an effective, independent supervisory authority for data protection with responsibility for ensuring and enforcing compliance with the rules, including adequate enforcement powers, the ability to advise and assist individuals and an ability to cooperate with EU counterparts; and
- the international commitments the country has entered into, or other obligations arising from legally binding conventions.

The Commission must seek an opinion on an adequacy decision from the European Data Protection Board (EDPB). The EDPB will formulate their opinion based on their *adequacy referential*<sup>4</sup> and *European Essential Guarantees*<sup>5</sup>

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<sup>3</sup> <https://www.gov.uk/government/publications/explanatory-framework-for-adequacy-discussions>

<sup>4</sup> Article 29 Working Party, 2018, [WP 254 rev.01, Adequacy referential](#)

<sup>5</sup> Article 29 Working Party, 2016, [Working Document 01/2016 on the justification of interferences with the fundamental rights to privacy and data protection through surveillance measures when transferring personal data \(European Essential Guarantees\)](#)

documents published by its predecessor, the Article 29 Data Protection Working Party.

In my opinion, the UK is in a strong position due to its current data protection regime including a strong and independent regulator who has two years of experience of regulating the GDPR. Also, some of the robust investigatory powers bestowed on my office such as the ability to carry out no notice inspections and to compel data from individuals come from the UK's domestic legislation, not the GDPR.

The Government will be aware of the Commission's scrutiny of our intelligence services and their collection, use and retention of data. This particular scrutiny did not occur when the UK was a member of the EU because we were within the European structure, rather than seeking to engage with it. The UK benefits from its experience in seeing these discussions play out in 2016 when the Commission assessed the United States' regime for the EU-US Privacy Shield framework, and more recently in 2019 when the Commission made a partial finding of adequacy for Japan.

On the issue of law enforcement and security cooperation, Parliament has dedicated time to reviewing the legal framework around our security and intelligence gathering. Government committed to making improvements to the transparency and accountability of our regime following a legal challenge by the campaign group Liberty which saw the High Court hand down a judgement in 2018<sup>6</sup> calling for the Investigatory Powers Act 2016 to be redrafted within six months. In October 2019, the UK appointed a new independent Investigatory Powers Commissioner, Sir Brian Leveson QC, who also will be providing independent oversight of the UK's use of the new UK-US Data Access Agreement when it comes into use later this year. Overall, the UK has enhanced its oversight of intelligence services in the last two years, including an enhanced role for the ICO under the Data Protection Act 2018 when it comes to personal data processing.

### **Alternatives to Adequacy**

As you would expect there are measures which can be taken in the event of no adequacy decisions

being granted by the Commission.

In the first instance, the Government unilaterally decided in 2019 to ensure transfers of data from the UK to the European Economic Area (EEA) will not be restricted. However, from the end of the transition period, GDPR transfer rules will apply to any data coming from the EEA into the UK. We have advised organisations to consider what alternative GDPR safeguards they can put in place

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<sup>6</sup> <https://www.judiciary.uk/wp-content/uploads/2018/04/liberty-v-home-office-judgment.pdf>

to ensure that data can continue to flow freely into the UK such as standards contractual clauses, binding corporate rules, codes of conduct and certification and consent.

### *Binding Corporate Rules*

We are providing detailed guidance to a small number of multinational groups with existing EEA-approved binding corporate rules (BCRs) to explain how restricted data transfers between their EEA entities and non-EEA entities may be affected. They may have to review and update their processes and documentation to continue making transfers into and out of the UK after the transition period.

### *Standard Contractual Clauses*

The most appropriate safeguard for a restricted transfer from the EEA to the UK is to enter into standard contractual clauses (SCCs) with the sender of the personal data. Small and medium enterprises (SMEs), including microbusinesses make up the lion's share of UK economic activity. We recognise that many will not have significant legal resources to fall back on. It was imperative that we produced comprehensive guidance<sup>7</sup> quickly to help organisations on the commercial and law enforcement side irrespective of a deal or no deal scenario at the end of the transition period, including an interactive tool on using SCCs for transfers into the UK. As I noted earlier, we keep our guidance under review.

The Committee will be aware of the Schrems II judgment (case C-311/18 — Facebook Ireland and Schrems)<sup>8</sup> the Court of Justice of the European Union. Like other data protection authorities and governments, we are now considering the implications of the judgment from a legal perspective. We will be providing initial reassurance to businesses and other affected UK parties in the immediate term.

### **International cooperation**

My office has seen in our international work that other jurisdictions are increasingly moving towards high data protection standards. In 2018, the UK Government ratified the Council of Europe's modernised Convention 108 which safeguards personal data at an international level. As countries outside the Council of Europe's membership continue to voluntarily join the Convention as a party, we are optimistic that it could provide a strong bridge between many data protection systems around the world.

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<sup>7</sup> <https://ico.org.uk/for-organisations/data-protection-at-the-end-of-the-transition-period/data-protection-at-the-end-of-the-transition-period-for-small-businesses/>

<sup>8</sup> <https://panopticonblog.com/wp-content/uploads/sites/2/2020/07/Schrems-II-Judgment.pdf>

Europe remains very important to the UK when it comes to trade and co-operative policing and security. The ICO has always maintained excellent bilateral relations with our closest European regulators, within and beyond formal EU structures. We will continue to nurture these strong working relationships, working together to maintain citizen protections and clarity for businesses.

Investing in roles and relationships beyond Europe is equally important. With its home advantage of a strong UK legal regime and a strong sense of both business and citizen needs in the UK, the ICO is well positioned to promote consistency of approaches and effective regulatory cooperation globally.

I chair the Global Privacy Assembly (GPA) – a forum of 130 data protection authorities. The GPA acts as a convening forum to discuss issues of wide concern to the community of my data protection regulator peers. We have unsurprisingly been very actively engaged with each other during the COVID-19 crisis. In chairing the GPA through this period, I have brought businesses and governments and health officials into the data protection tent, listening to them, sharing my concerns as chair of my community, and producing practically focused guidelines of global applicability on matters like the safe, privacy friendly design on contact tracing systems.

Our international influence extends beyond the GPA alone; an ICO Deputy Commissioner chairs the OECD's Working Party on Data Governance and Privacy, which represents an opportunity for the ICO and the UK to show its credentials as being aware of business impact and citizen expectations in discussions on data protection and the economy. On a bilateral level, we are actively building relationships through fora such as the G20 and Asia Pacific Economic Cooperation. Data is cross cutting international issue and the ICO is helping to impress upon these international fora the growing importance of data protection as an essential aspect of any modern economy seeking to engage in the globalised economy.

I hope this information is useful for the Committee, please do not hesitate to get in touch if you have further questions.

***July 2020***



# Committee on the Future Relationship with the European Union

House of Commons, London, SW1A 0AA

Email: [freucom@parliament.uk](mailto:freucom@parliament.uk) Website: [www.parliament.uk/freucom](http://www.parliament.uk/freucom)

12 June 2020

Elizabeth Denham  
Information Commissioner  
ICO

Dear Ms Denham,

The House of Commons Committee on the Future Relationship with the European Union is inquiring into the progress of the negotiations between the UK and the EU. Under normal circumstances, the Committee would hold regular oral evidence sessions in Westminster. However, measures to prevent the spread of the coronavirus make this difficult.

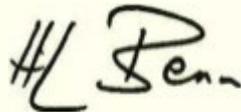
The Committee wishes to gather as much evidence as possible to inform its deliberations and I am writing to you to ask whether you would be willing to help us with our work by making a written submission. We welcome general responses to our [call for evidence](#), which was published on 4 March. We also hope that you would be willing to answer the more specific questions set out below on issues that fall within your area of expertise. Such submissions need not address every bullet point and can include other matters that you think are relevant to the negotiations and should be drawn to the attention of the Committee.

- To what extent do the Government's negotiating aims meet the needs of the digital sector? What would you have preferred to be different? In which areas do you believe it should prioritise reaching an agreement?
- Given the UK and the EU's starting positions, are there any areas of reported disagreement that are of concern? If so, what are they and why?
- How confident are you that the UK will receive a data adequacy decision from the EU by the end of the transition period? Do you see any obstacles to gaining one? To what extent is this unilateral EU process and the future relationship negotiations interdependent, if at all? What would be the utility of an adequacy decision in the absence of an overall trade agreement?
- The Data Protection section of the Political Declaration refers to "arrangements for appropriate cooperation between regulators". What would be your preferred arrangements for appropriate cooperation between regulators, and what factors might influence the nature of these arrangements?
- If an adequacy decision is not reached, what alternative arrangements could be put in place for enabling data flows between the UK and the EU for different sectors of the economy? What would be the benefits or drawbacks of such arrangements?
- At the end of the transition period how confident are you that the UK and the EU will reach an agreement on sharing EU policing and security databases (e.g. Schengen Information System)? What do you see as the obstacles to reaching such an agreement? What might alternative arrangements to sharing data for law enforcement look like?
- How confident are you that the UK will receive a separate data adequacy decision for law enforcement purposes by the end of transition period? Do you see any obstacles to gaining one? To what extent is this unilateral EU process and negotiations on internal security interdependent? What would be the utility of an adequacy decision in the absence of an agreement on internal security?
- What lessons should the UK take from the experience of the Schrems I case and the role of the CJEU in protecting EU citizens' data beyond the geographical boundaries of the Member States?
- The Government said it would "invite contributions about the economic implications of the future relationship from a wide range of stakeholders via a public consultation", and that this process would "begin later this spring". What are your views on this consultation? What was positive and negative about the Government's overall strategy to engage with business in advance of publishing its approach to the negotiations?

- Since the negotiations began, to what extent have you been kept abreast of developments? Have you found the updates from negotiation rounds helpful in assisting your sector to plan for the remainder of the Transition Period? If so, how?
- What steps are you taking to prepare for the end of the Transition Period? Do you have the necessary information and resources to prepare effectively? How long do you need once the final nature of any deal affecting your sector is known to prepare for new arrangements?
- Regarding research, why is an agreement enabling data sharing between the UK and the EU important for current levels of scientific and research collaboration?
- How confident are you that the UK and the EU will reach an agreement on sharing EU research and scientific databases by the end of the transition period? What do you see as the obstacles to reaching such an agreement? What might alternative arrangements to sharing information look like?
- How prepared is the digital sector for the possibility of leaving the Transition Period without a trade deal in place on 1 January 2021? What discussions are you having with EU business partners in order to make contingency plans?
- How much progress would you need to see at the high-level summit in June to give confidence that a deal will be done? If it appears in June that a trade deal looks unlikely, how do you expect this to affect business behaviour? How important is an FTA to your sector versus trading on WTO terms?
- How, if at all, are you seeking to influence the EU in these negotiations? What engagement have you had with the Commission, European Parliament or any other EU organisation?
- How has the COVID-19 crisis affected your ability to prepare for the end of the Transition Period? Have you learned any lessons for contingency planning and supply-chain preparedness from your experiences with COVID-19 that could be applied to preparations for the end of the Transition Period?
- Considering the Coronavirus pandemic, is your sector calling for an extension to the duration of the Transition Period? If so, why? If not, why not?

The Committee staff will be happy to discuss the inquiry, any issues raised, or the process for submitting written evidence. You can contact them at [freucom@parliament.uk](mailto:freucom@parliament.uk).

Yours sincerely,



**Hilary Benn**  
**Chair of the Committee**