

Data Privacy and Cybersecurity

European Commission Publishes Draft UK Adequacy Decisions

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Overview

Following the UK's exit from the EU, for data protection purposes, the UK is now a "third country". Pursuant to the trade deal between the UK and EU, agreed to at the end of 2020, data transfers between the EU and UK were allowed to flow freely for up to a further six months to 30 June 2021. However, after that date, any personal data sent from the EU to the UK would need to be adequately protected in compliance with the EU General Data Protection Regulation (EU GDPR) and the EU Law Enforcement Directive (EU LED).

Broadly speaking, this protection could either be achieved through (i) the European Commission (Commission) declaring that the UK is an adequate jurisdiction, or failing such a decision (ii) the use of measures prescribed by the EU GDPR to protect personal data.

On 19 February 2021, the Commission published two draft adequacy decisions in respect to the UK. At a high level, the Commission concluded that the UK ensures a similar level of protection to the EU for personal data as set out in:

1. an adequacy decision under the EU GDPR, for personal data processed other than by the law enforcement sector; and
2. an adequacy decision under the EU LED, for personal data processed by the law enforcement sector.

What do these draft adequacy decisions mean?

If these draft adequacy decisions are confirmed, then personal data can continue to be freely transferred from the EU to the UK without the need for any additional mechanisms to facilitate the transfer. This would allow data to flow between the EU and UK in the same unfettered way as occurred when the UK was a member of the EU.

This would be a significant relief for UK businesses. The exercise of mapping transfers of personal data, and then implementing mechanisms such as standard contractual clauses to facilitate those transfers, would have reportedly cost businesses up to £1.6 billion.^[1]

The draft adequacy decision in respect to the EU LED is the first adequacy decision to have been granted pursuant to that piece of legislation. However, it is as yet unclear:

- what its practical impact will be on the level of cooperation between EU and UK law enforcement organisations; and
- whether this will be able to effectively replace the security and law enforcement arrangements the UK enjoyed whilst a Member State of the EU.

Both draft adequacy decisions will lapse after four years, unless a subsequent review reaffirms that the UK continues to provide an adequate level of data protection.

Next steps

Before the draft adequacy decisions are finalised, there are two further steps the Commission has to take. First, the Commission will need to obtain an advisory opinion from the European Data Protection Board (EDPB). Second, approval is required from a qualified majority of representatives from EU Member States. Once these steps have been completed, the Commission will be free to adopt the draft adequacy decisions.

It is unclear how long this process may take. The last time the EDPB provided an opinion in respect to an adequacy decision (for Japan) the process took approximately four months. It is to be hoped, however, that the process in respect of the UK's adequacy decisions will be completed before 30 June 2021 (the date at which the free flow of personal data from the EU to the UK ceases under the UK/EU trade deal), to ensure that business is not disrupted.

On what basis were these decisions made?

The Commission stated that the basis for these adequacy decisions was a careful assessment of the UK's law and practice in respect to the protection of personal data. However, the Commission appears to be particularly concerned about the potential for the UK subsequently weakening its approach to data protection. In its statement accompanying the draft adequacy decisions, the Commission seemed to place significant additional weight on the fact that the UK "remains a member of the European 'privacy family'" by continuing to adhere to both:

- Convention 108 of the Council of Europe (a binding multilateral instrument on data protection); and
- The European Convention on Human Rights.

If the UK seeks to move away from alignment with the EU's data protection standards, the EU may well swiftly revisit its decisions that the UK adequately protects personal data.

Trouble ahead?

While we anticipate that the rest of the process to formalise these adequacy decisions will be relatively straightforward, potential concerns remain.

The European Parliament's Civil Liberties Committee (CLC) reportedly backed a motion stating that the UK needed to reform its privacy standards prior to an adequacy decision being finalised and issued. The CLC has no formal part to play within the approval process, however its members may seek to influence the EU representatives whose approval is required to finalise the draft adequacy decisions.

In addition, the draft adequacy decisions could be the subject of litigation, which might result in the decisions being rendered invalid. Max Schrems, the Austrian privacy activist responsible for the litigation that invalidated the EU-US Privacy Shield, commented on 19 February 2021 that "there are obviously issues on UK government surveillance on EU data". The Court of Justice of the European Union may once again be asked to determine the validity of the Commission's decisions concerning data privacy rights, if Mr Schrems, or any other privacy activist, decides to litigate the issue.

For now, however, the publishing of the draft adequacy decisions is good and welcome news for businesses in the UK. We will continue to monitor these draft decisions and will provide updates as they happen.

[1] https://neweconomics.org/uploads/files/NEF_DATA-INADEQUACY.pdf

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