

## UK makes adequacy sales pitch

**Sam Clark**

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The UK government has begun its attempts to persuade the European Commission to grant the country adequacy post-Brexit – a decision worth billions, but which is dogged by doubts over the use of data by UK spying agencies.

In a series of documents published late last week, UK officials touted the country's "world-class" data protection regime and argued it should be considered as strong as the EU's. The European Commission must deem an outside country's data protection laws as "essentially equivalent" to the GDPR to open up free data flows between that jurisdiction and the European bloc.

The UK's sales pitch – labelled a “framework” for adequacy discussions – leaned heavily on its existing position as a world leader in privacy and data protection, citing its involvement in the earliest European data laws and the well-respected Information Commissioner's Office.

It noted that most parts of its national law – formed by local GDPR-implementing legislation the Data Protection Act 2018, which remains in force – are identical to the law on the continent.

But observers have raised questions about the effect of the UK's law enforcement and intelligence regime, which is the subject of criticism and legal action. European regulators and governments were blocked from taking issue with the UK's law enforcement data regime before Brexit, as the EU has no involvement in national security matters – but now the UK has exited the EU, the country's intelligence data-gathering practices may hinder its adequacy hopes.

Multiple civil liberties groups have approached the English courts to allege that the UK's mass surveillance framework fails to comply with EU privacy laws. Civil liberties group Liberty has brought one such lawsuit, **accusing** the UK's domestic counterintelligence and security agency of obtaining multiple bulk data interception warrants based on false information and failing to comply with safeguarding legislation.

Concerns among civil liberties groups about law enforcement use of data have challenges to international data transfers; the original *Schrems* case led to the abandonment of the Safe Harbor scheme between the EU and the US, while the follow-up *Schrems II litigation* threatens the replacement Privacy Shield mechanism.

The UK attempted to play down those concerns in the recently published documents, arguing the “world-leading” Investigatory Powers Act provides for “unprecedented transparency and oversight” over the use of such powers in the UK – overseen by the Investigatory Powers Commissioner.

The papers also pushed for other factors to be considered alongside data protection issues, saying that government initiatives such as the Centre for Data

Ethics, the National Cyber Security Centre and the online harms proposals all mean that data is properly safeguarded in the UK.

Rohan Massey, a partner at Ropes & Gray in London, noted that the documents “really try to highlight the similarities over the differences”, and that it “stresses good oversight and enforcement by the ICO as well as the UK being a leader in drafting and commenting on the GDPR”.

On the law enforcement issues, Massey said, the framework “presents [the UK’s surveillance powers] as a strength when set in the scope of a balanced democracy. It will be interesting to see how the EU responds to this position,” he said.

Massey noted that a possible sticking point is diverging enforcement once the UK and EU are no longer aligned. “Adequacy is dynamic and so this position may be good for now but could change in future,” he said.

Annabel Gillham, a partner at Morrison Foerster in London, told GDR that given the UK’s commitment to maintaining a “GDPR-equivalent” regime after the transition period, obtaining an adequacy decision appears “straightforward” at first glance.

But law enforcement issues could be a “key stumbling block”, Gillham said – “in particular its powers to carry out bulk interception and monitoring of individuals.”

Gillham also noted that the UK government is seeking continued cooperation between the ICO and other European data protection authorities, but said that the “EU’s negotiating directives are silent on the role of the ICO”.

Analysis of recently released figures from the European Data Protection Board also shows that there is little support for adequacy among other European data protection authorities – with only four EDPB members **suggesting** the UK should be considered for an adequacy decision.

UK Prime Minister Boris Johnson has said that the UK intends to seek an adequacy decision, although has also recently indicated that one area in which the UK may diverge from the EU is on data protection regulation.