

Guide

Is the government's legislative agenda creating risks for the UK economy?

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Is the government's legislative agenda creating risks for the UK economy?

In this guide, Eleonor Duhs, head of data privacy, considers the impact of upcoming legislative changes on the economy.

The free flow of personal data across borders is essential to the modern economy. The services sector - finance, banking, retail and hospitality - is the engine of the UK's prosperity and all depend on the free flow of personal data. The free flow of data between the UK and its biggest trading partner, the EU, is of crucial importance. But reforms to our data protection and human rights frameworks, as well as sweeping changes to laws we retained from when we were members of the EU, could put EU-UK data flows at risk at a time when

the UK economy is struggling.

The economic benefits of the free flow of personal data

When the UK government announced its data protection reforms it stated that as much as £11bn of trade around the world goes unrealised because of barriers associated with data transfers. Without the free flow of data, organisations have to conduct expensive and time-consuming risk assessments and enter into contracts with parties to whom they wish to export personal data. Analysts estimated that a lack of free flow of personal data from the EU to the UK could cost UK business up to £1.6bn.

The current arrangement for EU-UK data flows

The EU conferred data adequacy on the UK following its departure from the EU. Two adequacy decisions were made: the first under the GDPR, the second under the Law Enforcement Directive. The latter enabled the free flow of personal data from the EU to the UK in a law enforcement context.

The rationale for conferring adequacy on the UK as set out in the adequacy decisions themselves, are the very close alignment between UK and EU data protection law (for example, the UK's "UK GDPR" is almost identical to the EU's GDPR – the differences reflect the fact that the UK is no longer subject to the EU's institutions or decision-making structures). The UK's status as a signatory to the European Convention on Human Rights (which guarantees the right to a private and family life in Article

8) is also a central component of the UK's data adequacy.

However, the EU also sounded a note of caution in its communications relating to the UK's data adequacy. Věra Jourová, the European Commission's Vice-President for Values and Transparency reflected the concerns of the EU institutions that the UK might diverge from its current data protection standards. She underscored that the protection of personal data is a fundamental right in the EU's legal order and stated 'if anything changes on the UK side, we will intervene.' There is therefore a risk that the EU will see changes to the UK's data protection and human rights framework as being incompatible with a continued free flow of data from the EU to the UK.

What's changing in terms of the UK's data protection and human rights standards?

Three Bills were announced in the recent Queen's Speech, which could have implications for the free flow of data from the EU to the UK: the Data Reform Bill, the Bill of Rights and the Brexit Freedoms Bill.

The Data Reform Bill

Less than two months after UK adequacy was confirmed, the government announced its plan to reform the UK's data protection law. Ministers stated that the government would build on the foundation of the UK GDPR but reform it to ensure that the law was '[based on common sense, not box ticking](#)'. The UK would be the "global champion of safe and secure data flows' and encourage the cross-border data

transfers.

The consultation, '[Data: a new direction](#)', gave further details about the planned changes. The reforms included the removal of the right to the human review of automated decision making. The consultation referred to conferring powers on the Secretary of State to approve the guidance published by the UK's data protection regulator, the Information Commissioner's Office ("ICO").

The reforms also explored the possibility of giving powers to the Secretary of State to appoint a CEO to sit on the ICO's Board. The ICO responded on these proposals, underscoring that 'innovation is enabled, not threatened by high data protection standards'.

The ICO cautioned against removing the right to human review of automated decision making from UK law stating that automated decisions ‘can fundamentally affect our lives’ and that the [protections the government was seeking to remove had been part of data protection law for many years](#), including before the GDPR came into force. In the ICO’s view the proposals for the Secretary of State to approve ICO guidance and to appoint the CEO did not sufficiently safeguard the regulator’s independence.

Brexit Freedoms Bill - changes to retained EU law

[Recent press reports](#) suggest that the

government intends to remove all retained EU law from the statute book by a particular date, through the Brexit Freedoms Bill. This could mean that even after the Data Reform Bill becomes law, Ministers would have to legislate again to stop the UK GDPR from lapsing. Further, Ministers have announced that the intention of the Brexit Freedoms Bill is [to ‘normalise’ retained EU law](#). This could include removing general principles such as fundamental rights and the protection of personal data as aids to the interpretation of retained EU law. This could create uncertainty in terms of how to interpret key concepts and create further divergence between the UK GDPR and its EU counterpart.

Changes to the UK's human rights framework

The Queen's speech contained plans to replace the Human Rights Act 1998 ('HRA') with a domestic Bill of Rights. The HRA implements the ECHR in domestic law. Parliament's Joint Committee on Human Rights reported that the proposals ran counter to central concepts in human rights law, for example the principle that human rights are universal (See JCHR, Human Rights Act Reform (HC 1033 HL Paper 191)).

The Committee commented on the government's support for Ukraine's struggle for democracy, human rights and the rule of law and observed that it would be a 'terrible irony' for the UK government to be supporting Ukraine's efforts whilst simultaneously 'weakening our own protections for human rights'.

“The EU has emphasised that continued adherence to the ECHR is an underpinning principle of UK adequacy.”

Eleonor Duhs, head of Data Privacy at Bates Wells

What will the EU's response be?

The UK's changes to its data protection and human rights landscape causes headaches for the EU.

Removing the UK's adequacy and stopping the free flow of data from the EU to the UK would create barriers to EU-UK trade at a time of profound economic strain: this would be unwelcome. It also sets the bar for adequacy very high: if the UK is not adequate then this causes a significant problem in relation to the EU's adequacy frameworks more generally.

Many of the jurisdictions which currently enjoy EU adequacy have data protection laws which are not as closely aligned to the EU's as the UK's framework is and will continue to be, even after the Data

Reform Bill has become law.

UK data adequacy is important for the functioning of the Trade and Cooperation Agreement ('TCA') between the UK and the EU. For example, the loss of data adequacy under the Law Enforcement Directive could lead to a suspension of the law enforcement provisions in the TCA. This could leave European Citizens more vulnerable to criminal activity: something both the UK and the EU will be keen to avoid.

A dual regime in the UK

A loss of EU data adequacy would cause operational difficulties to UK organisations (beyond the problems arising in the context of EU to UK data flows). This is because of Article 71(3) of the EU-UK Withdrawal Agreement. Article 71(3) states that where adequacy is lost, personal data of EU data subjects which came from the EU to the UK before the end of the transition period or which is processed under the Withdrawal Agreement has to be protected in accordance with the GDPR standard (taking into account the case law of the CJEU from both before and after the end of the transition period). This would create a two tier data protection framework in the UK.

Conclusion

The end of the free flow of data between the EU and the UK is in the interests of neither side. The free flow of personal data is an engine of economic growth. It also helps to ensure that law enforcement activity can be carried out efficiently. On balance, therefore, it appears unlikely that the UK will lose its adequacy decisions. But in these uncertain times nothing can be taken for granted. The further the UK diverges from the frameworks on which its adequacy decisions rest, the more unpredictable the outcome becomes.



Get in touch

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to help.



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