Data adequacy post-Brexit: Avoiding disruptions in cross-border data flows

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The UK must engage in Brexit negotiations with an aim to preserve cross-border data flows and foster long-term cooperation with the EU in the digital and tech sectors. This is especially important for an effective COVID-19 recovery, as well as addressing the longer-term strategic interests of both parties.

This chapter offers an overview of the EU Digital Single Market (DSM) strategy, illustrating its high stakes for the stability of EU and UK economies, changes in the UK's political narrative post-2016, and the current state of play. Secondly, this chapter outlines three possible scenarios leading toward a decision on data adequacy, including the main issues, state of play and obstacles. Thirdly, it argues that adopting a stable negotiating position, preserving maximum data-regulatory convergence between the two parties, and extending the transitional period beyond 31 December 2020 are crucial preconditions for avoiding disruption on cross-border data flows and boosting development and responsible tech during the post-COVID-19 economic recovery.

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The Digital Single Market and Brexit

Published in May 2015, the European Commission's DSM strategy proposed a mix of initiatives to be tabled by

the end of 2016, set across three main pillars: (i) improving access to digital goods and services across the EU; (ii) creating conditions and a level playing field for digital networks and services; and (iii) maximising the growth potential of the EU digital economy.[1] The strategy suggested a €250 billion of additional growth over the course of the mandate of the Juncker Commission.[2] Overall, resolving barriers and fragmentation in a fully-functional DSM could contribute an additional €415 billion per year to European GDP.[3]

Ahead of the Brexit referendum, the UK government was fervently committed to the DSM strategy and made bold recommendations about its implementation and improvement.[4] In October 2015, it responded to a written question in Parliament: "The Digital Single Market is a key priority for the UK Government and we welcome its ambition."[5] At a policy level, the DSM addressed the "burdensome regulations" and "differing national regimes" in the EU that the UK had traditionally opposed.[6] At a political level, the DSM offered strategic benefits and a leading role to the UK, which already had a strong presence in the digital and technology sectors vis-à-vis its other EU partners.

The UK's tech sector exported £28 billion worth of digital services to the EU in 2018. This accounted for over half of the UK's digital exports in total. In the same year, the UK's digital sector contributed £149 billion to the national economy, which incidentally is ten times as much as what farming and fisheries provide.

A member of the DSM, the UK's tech sector exported £28 billion worth of digital services to the EU in 2018. This accounted for over half of the UK's digital exports in total, according to the Department for Digital, Culture, Media & Sport (DCMS). In the same year, the UK's digital sector contributed £149 billion to the national economy (i.e. 7.7% of UK gross value added), which incidentally is ten times as much as what farming and fisheries provide. It is also important to note that businesses in DCMS sectors imported £15.8 billion worth of services from other EU member states, accounting for 46.4% of all services (by value) they imported in that year.[7]

Despite the DSM's strategic importance, the then Prime Minister Theresa May announced the UK's exit from the DSM in March 2018.[8] A report by the House of Commons' Business, Energy and Industrial Strategy Committee had previously expressed concern that "the decision to leave the European Union risks undermining the United Kingdom's dominance in this policy area." It continues, "We could have led on the Digital Single Market, but instead we will be having to follow."[9] Despite leaving the DSM, May assured EU partners in the revised Political Declaration that the UK intends to preserve "a high level of personal data protection to facilitate [data] flows and exchanges across the future relationship."[10] This was a key concern on both sides of the Channel, as high UK data protection standards would help avoid disruptions in EU-UK data flows.

These commitments were also adopted later in the legally binding Withdrawal Agreement: "Union law on the protection of personal data shall apply in the United Kingdom in respect of the processing of personal data of data subjects outside the United Kingdom." However, the same article also specifies that to the extent that EU law no longer applies, "the United Kingdom shall ensure a level of protection of personal data essentially equivalent to that under Union law".[11] Thus, the UK could make its own arrangements and preserve cross-border data flows, as long as it offers an equivalent level of data protection to that offered under EU law (i.e. the General Data Protection Regulation; GDPR).

More recently, in February 2020, Prime Minister Boris Johnson wrote in a statement to the House of Commons that "the UK will in future develop separate and independent policies in areas such as [...] data protection".[12] This caused uneasiness in EU circles, prompting the EU's Chief Brexit Negotiator Michel Barnier to claim that Johnson was backtracking on earlier commitments. Furthermore, European Data Protection Supervisor Wojciech Wiewiórowski argued that deviations from the EU data protection *acquis* "would constitute an important obstacle to the adequacy findings," and that the EU should "take steps to prepare for all eventualities."[13]

Towards an EU-UK data adequacy agreement

During the transition period, the UK remains compliant with the EU's GDPR, and its courts continue to apply decisions of the European Court of Justice (ECJ) and other changes in EU law. Moreover, according to the Withdrawal Agreement's Article 71, GDPR will continue to apply in the UK as EU law even after the transition. This concerns personal data originating from the EU that continues to be processed within the UK post-transition, where the relevant data commenced before the end of the transition. This protective provision in the Withdrawal Agreement secures continuity in cross-border data flows at the end of the transition period. It also suggests that the UK could preserve cross-border data flows for business and citizens post-transition if these data flows are bound by joint data governance mechanisms. However, if the UK decides to deviate from present data governance arrangements, this provision will fall away, too.

In that case, an adequacy agreement would be necessary to preserve cross-border data flows, and ensure that UK data protection rules in handling data originating from the EU are robust enough to safeguard the fundamental rights of EU citizens post-Brexit. A decision on data adequacy – or lack thereof – would influence the future of cross-border data flows significantly. If data protection requirements are deemed inadequate by the European Commission, cross-border data flows for citizens, businesses and other services could be limited or even suspended.

Thus, there are essentially three scenarios for continuing cross-border data flows, one regarding the short-term, and two regarding the long-term EU-UK relations.

In the short term, cross-border data flows will continue unimpeded during the transition period.

In the long term, the UK can choose to continue to be bound by GDPR and joint EU-UK governance mechanisms. This would preserve cross-border data flows for business and citizens post-transition, even in the absence of an adequacy agreement. However, this would require significant regulatory convergence in other areas – the UK would have to remain in the European Economic Area and subject to the same data relationship rules as Norway, Iceland and Liechtenstein.

Otherwise, if the UK decides to deviate from joint governance mechanisms and EU law post-transition, an adequacy agreement would have to be concluded by 31 December 2020. In this case, adequacy could be full or partial.

If the European Commission grants the UK full data adequacy, cross-border data flows would be completely unrestricted, and the UK would enjoy the same data access relationship rules as Switzerland, Japan or New Zealand. However, if data adequacy is partial, data flows would be unrestricted only for certified organisations/sectors, and contingent on the adoption of Privacy Shield standards – as is the EU's present data access relationships with the US and Canada.[14]

Nevertheless, if the UK decides to deviate from joint governance and EU law post-transition, and an adequacy agreement is not concluded by 31 December 2020, this would have a significant impact on cross-border data flows, as these could be limited or even suspended.

It is difficult to predict the economic impact of such a disruption. It would place immense compliance burdens on individual organisations, which would have to pay legal and administrative fees to ensure that cross-border flows remain lawful. Increasing the cost of business could slow growth for many organisations and undermine innovation.[15] So far, reports have estimated the bureaucratic cost to be significant, too, especially for small businesses that would have to adopt Standard Contractual Clauses or Binding Corporate Rules.[16]

Judging from a first level of analysis, the economic impact would be significant, considering that 75% of UK data flows are with EU countries. Moreover, much of the UK's economic activity is dependent on these flows – it exported £28 billion worth of digital services to the EU in 2018.[17]

For an adequacy decision to be reached, a significant evaluation process must be completed. Steps involve a period of assessment by the Commission, followed by a draft decision, an opinion by the European Data Protection Board, and final approval by member states and the College of Commissioners. However, even when this evaluation takes place, there could still be other obstacles in reaching an agreement, as the ECJ would have the final word. In the *Schrems* case of 2015, the ECJ concluded that the transfer of EU citizens' personal data could be suspended when a third country does not afford an adequate level of protection to that under EU law. Thus, the ECJ can decide on adequacy relating to data protection, "even where the Commission has adopted a decision finding that a third country affords an adequate level of protection of personal data."[18]

So far, the UK has made some arrangements that could facilitate negotiations for an adequacy agreement. However, at this point, these are insufficient. The UK transposed the GDPR into national legislation by adopting the Data Protection Act in 2018. But in February 2020, the European Parliament adopted a resolution that highlights concerns about that act of UK legislation. Specifically, the Parliament expressed concern that the UK's current data regime provides a "broad exemption from the data protection principles and data subjects' rights for the processing of personal data".[19]

Indeed, the UK Data Protection Act currently allows the forwarding of personal data to third countries, the processing of personal data for immigration purposes, and the retention of electronic communications data. Therefore, the resolution concludes that the UK "does not fulfil the conditions of the relevant EU acquis as interpreted by the CJEU, and hence does not currently meet the conditions for adequacy".[20]

Additionally, a Commission 'decision on adequacy' cannot be conditional on other EU-UK agreements ahead of Brexit, such as in the area of trade. Adequacy decisions do not result from conventional negotiations. That is because the EU considers data adequacy (and the protection of personal data) to be a matter of fundamental rights, as enshrined in the EU's Charter of Fundamental Rights (which the UK controversially rescinded). In this regard, the Charter has the status of an EU treaty and is non-negotiable – hence the term 'decision'.

A decision on data adequacy would influence the future of cross-border data flows significantly. If data protection requirements are deemed inadequate by the Commission, cross-border data flows for citizens, businesses and other services could be limited or even suspended.

What does the future hold?

Currently, access to markets for digital services seems to be the most prominent issue for the UK digital economy as a whole. Nonetheless, the EU will also suffer substantial losses due to the UK's exit from the DSM in December 2020. Contrary to the EU's underinvestment in tech, venture capital in the UK tech sector has seen record-breaking investments in 2018 (£10 billion) and 2019 (a £3.1 billion increase from 2018) – the highest levels in UK history. These numbers should alarm EU officials, considering that UK-based tech firms in 2019 secured more venture capital investment than Germany (£5.4 billion) and France (£3.4 billion) combined.[21]

Other future Brexit scenarios suggest that the post-Brexit UK could remain well-positioned to attract venture capital in the tech industry, as its likely relaxed data protection regime could incline other EU-based companies to relocate. However, EU conditionality in this area could remain strong. Until now, the GDPR has provided a homogeneous regulatory environment in the EU that has inclined other global actors to adopt similar regulations, including big tech companies. The GDPR set a global gold standard in data protection that, among other things, decreases complexity for tech companies that are active across different global markets. Under this light, one could question whether it really is in the UK's interest to deviate

from data protection standards and the GDPR in the long term. One should also consider the political influence that big tech companies could exert over UK foreign policy post-Brexit. The EU has provided its member states with strong collective leverage against the influence of tech giants in China and the US.

Being part of the DSM, the UK has been well-positioned to attract venture capital in the tech industry. Additionally, the DSM has provided the UK with unprecedented market access for its tech sector within the EU, which will be lost post-Brexit. Thus, it remains uncertain whether the UK will be able to maintain the same levels of investment in tech upon leaving the DSM.

The economic damage incurred by the UK's exit from the DSM could be cushioned by adopting a close data governance relationship with the EU, as the UK and EU27 tech sectors could still benefit from each other, although to a lesser degree. Nevertheless, it seems that even the prospect of containing mutual damage is improbable, as the EU would not compromise its data protection standards to grant the UK data adequacy.

The UK's present approach to data-flows negotiations brings to mind zero-sum models and game theory outcomes. However, this approach is irreconcilable with the COVID-19 crisis, which emphasises the shared nature of risks and vulnerabilities, and illustrates the need for meaningful compromise and sustained cooperation between the two partners.

Preserving cross-border data flows is a contentious political issue for the UK government because it is closely tied to the role of the ECJ. A positive ECJ ruling on UK data adequacy currently seems unlikely, especially considering the UK's ambiguous track record in mass surveillance programmes. For example, think of the UK's violation of Article 8 of the European Convention on Human Rights, as per the European Court of Human Rights' ruling in September 2018.[22]

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Adopting a stable negotiating position, preserving maximum data-regulatory convergence between the two parties, and extending the transitional period beyond December 2020 are crucial preconditions for avoiding the 'digital' cliff edge of a no-deal. These steps should enable the UK to attain a full adequacy decision on data flows. Only this outcome would offer maximum damage limitation for both parties in the short and long terms.

Aside from Brexit, the EU must also find ways to increase its clout in big tech and digital sectors. It should encourage innovation by enabling EU tech champions in a fully-fledged DSM.

1. In addition to these pillars, the European Commission identified three additional areas of EU action in its 2017 mid-term review of the Digital Single Market strategy: (i) the European data economy; (ii) cybersecurity; and (iii) the promotion and regulation of online platforms. European Commission (2017), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Mid-Term Review on the implementation of the Digital Single Market Strategy: A Connected Digital Single Market for All, COM(2017) 228 final, Brussels. See also Bjerkem, Johan and Malcolm Harbour (2019), "Making the Single Market work: Launching a 2022 masterplan for Europe", Brussels: European Policy Centre.

2. European Commission (2015a), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe, COM(2015) 192 final, Brussels.

3. European Commission (2015b), Commission Staff Working Document: A Digital Single Market Strategy for Europe – Analysis and Evidence, SWD(2015) 100 final, Brussels.

4. UK Government (2015), "UK vision for the EU's digital economy", London.

5. *UK Parliament*, "Digital Technology: EU Internal Trade: Written question – 901740" (accessed 29 May 2020).

6. *After Brexit*, "The Digital Single Market and Brexit" (accessed 29 May 2020). See also *UK Government*, "The UK vision for the EU's digital economy" (accessed 29 May 2020).

7. UK Department for Digital, Culture, Media & Sport (2020), "DCMS Sectors Economic Estimates 2018: Trade in Services", London.

8. *BBC News*, "In full: Theresa May's speech on future UK-EU relations," 02 March 2018.

9. Business, Innovation and Skills Committee (2016), "The Digital Economy: Second Report of Session 2016-17", House of Commons, para.68.

10. Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU (2019), Revised text of the Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom as agreed at negotiators' level on 17 October 2019, to replace the one published in OJ C 66I of 19.2.2019, TF50 (2019) 65, para.8.

11. Council Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019), 2019/C 384 I/01, Art.71(1, 3).

12. *UK Parliament*, "UK / EU relations: Written statement – HCWS86" (accessed 29 May 2020).

13. Stolton, Samuel, "'Prepare for all eventualities' on UK-EU transfers, EDPS says", *EURACTIV*, 26 February 2020.

14. *European Commission*, "EU-US data transfers > Commercial sector: EU-US Privacy Shield" (accessed 29 May 2020).

15. Patel, Oliver and Nathan Lea (2019), "EU-UK Data Flows, Brexit and No-Deal: Adequacy or Disarray?", London: UCL European Institute.

16. *Ibid.*; Lloyd, Lewis (2020), "UK-EU future relationship: data adequacy", London: Institute for Government; *TechUK*, "The UK Digital Sectors After Brexit", 24 January 2017.

17. Patel and Lea (2019), *op.cit.*

18. Court of Justice of the European Union, Judgment in Case C-362/14, *Maximillian Schrems v Data Protection Commissioner*, The Court of Justice declares that the Commission's US Safe Harbour Decision is invalid, No117/15, 06 October 2015, Luxembourg, p.1.

19. European Parliament (2020), Motion for a resolution to wind up the debate on the statements by the Council and the Commission pursuant to Rule 132(2) of the Rules of Procedure on the proposed mandate for negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland (2020/2557(RSP)), B90098/2020, para.32.

20. *Ibid.*, para.32.

21. Tech Nation, "UK tech sector beats both US and China to lead global growth in 2019", 15 January 2020.

22. European Court of Human Rights, Some aspects of UK surveillance regimes violate Convention, ECHR 299 (2018), 13 September 2018, Strasbourg.