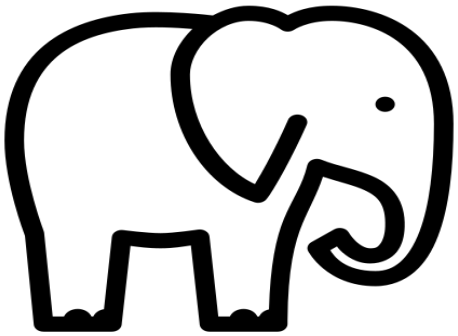
The inadequacy of the
EU Commission Draft GDPR Adequacy Decision on the UK

=== EXECUTIVE SUMMARY ===

by

Douwe Korff
Emeritus Professor of International Law, London Metropolitan University
Visiting Fellow, Yale University (Information Society Project)
Associate, Oxford Martin School, University of Oxford

A tale involving an elephant and three monkeys



3 March 2021

Douwe Korff
Emeritus Professor of International Law, London Metropolitan University
Visiting Fellow, Yale University (Information Society Project)
Associate, Oxford Martin School, University of Oxford

About the full paper and this Executive Summary:

The full paper provides critical comments on the European Commission's Draft Implementing Decision pursuant Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by the United Kingdom, released on 19 February 2021, available at: https://service.betterregulation.com/document/488712

It follows on from a series of submissions on the issue by the author and Prof. Ian Brown to EU bodies and officials involved in the taking of this decision and some further comments issued since, that can be found here:

Korff-Brown Submission to EU re UK adequacy, Part One *re* general inadequacy, 9 October 2020, available at:
https://www.ianbrown.tech/2020/10/09/the-uks-inadequate-data-protection-framework/

Korff-Brown Submission to EU re UK adequacy, Part Two *re* UK surveillance, 30 November 2020, available at:
https://www.ianbrown.tech/wp-content/uploads/2020/11/Korff-Brown-Submission-to-EU-re-UK-adequacy-Part-Two-DK-IB201130.pdf

Korff-Brown Submission to EU *re* UK adequacy, Executive Summary (with a discussion of the implications for the UK, other third countries and the EU, 30 November 2020, available at:
https://www.ianbrown.tech/wp-content/uploads/2020/11/Korff-Brown-Submission-to-EU-re-UK-adequacy-ExecSumm-DK-IB201130.pdf

Douwe Korff, *"The United Kingdom is not a third country under EU law"*, 2 January 2021, available at:
https://www.ianbrown.tech/2021/01/02/the-united-kingdom-is-not-a-third-country-under-eu-law/

Douwe Korff, *UK adequacy, international transfers, and human rights compliance*, 2 February 2021, available at:
https://www.ianbrown.tech/2021/02/02/uk-adequacy-international-transfers-and-human-rights-compliance/

This Executive Summary is for convenience only: for details of the analyses and arguments underpinning the conclusions reached, please consult the full paper.

About the author:

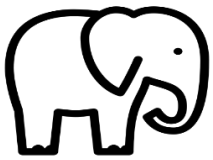
Douwe Korff is a Dutch comparative and international lawyer specialising in human rights and data protection. He is emeritus professor of international law at London Metropolitan University and visiting professor at the universities of Zagreb and Rijeka in Croatia; an Associate of the Oxford Martin School of the University of Oxford, a Visiting Fellow at Yale University (Information Society Project), and a Fellow at the Centre for Internet and Human Rights of the European University of Viadrina, Berlin.

Acknowledgment: I am grateful to Prof. Ian Brown for his helpful comments on an earlier draft of this paper. All errors of course remain entirely mine.

Douwe Korff
Emeritus Professor of International Law, London Metropolitan University
Visiting Fellow, Yale University (Information Society Project)
Associate, Oxford Martin School, University of Oxford

AT A GLANCE:

- The Draft Decision generally looks at the law on paper (as described, at times misleadingly, by the UK itself) without paying any real attention to the application of the law in practice and without assessing law or practice against the EU legal standards.
- The UK rules on data sharing, the immigration exemption and the research exemption are clearly not in accordance with the EU standards.
- Adoption of the decision would lead to **serious risks** that the UK will become a data protection-evasion haven for personal data from the EU/EEA to countries that are not held to provide adequate protection by the EU; that the UK will allow for undue direct access to data (including data on EU persons) by US authorities under the UK-US Agreement; and that it will allow UK companies to meekly comply with judgments and orders from non-EU Member States, also in respect of EU data, contrary to Article 48 GDPR.
- The UK ICO continues to fail to properly enforce the law in the vast majority of cases – even when it itself concludes that the law has been broken.
- **The elephant in the room: The Draft Decision completely fails to assess (or even note) the UK's intelligence agencies' actual surveillance practices.**



The Commission simply does not want to see or hear about or talk about these practices. It ignores that:

- ✓ there is no effective substantive oversight by the ICO or the courts over the use of the national security exemption in UK data protection law;
- ✓ the limitations on the use of UK "bulk powers" are not set out in the law itself, as required by the CJEU (but rather, are left to executive discretion subject to very marginal, "respectful" judicial review);
- ✓ the description of "secondary data" (metadata) in the Draft Decision is **seriously misleading** and fails to note that such data can be highly revealing and intrusive and are subject to sophisticated automated analyses. Yet under UK data protection law metadata are not meaningfully protected against undue access, bulk collection and AI-based analysis by the UK intelligence agencies.
- ✓ the "5EYES" agencies, and more in particular GCHQ and the NSA, in practice share effectively all intelligence data.

- Given the lack of action by the Commission in relation to other adequacy decisions, not too much should be expected of the "ongoing monitoring" by the Commission of the situation in the UK after the UK decision comes into force (if it ever does).

Douwe Korff
Emeritus Professor of International Law, London Metropolitan University
Visiting Fellow, Yale University (Information Society Project)
Associate, Oxford Martin School, University of Oxford

The inadequacy of the EU Commission Draft GDPR Adequacy Decision on the UK

=== EXECUTIVE SUMMARY ===

General comments:

The Draft UK Adequacy Decision:

- relies on uncritically copied-and-pasted descriptions of UK law and practice by the UK Government;
- briefly – much too briefly – mentions the standards set by the CJEU and the EDPB that should be applied to UK law and practice – but then does not actually apply those standards;

and fails to note that:

- even EU law, case-law and general principles that are supposed to be "retained" in UK law can already be discarded by ministerial order or judicial re-interpretation (by the highest UK courts);
- in any case the UK is no longer bound by post-1 January 2021 CJEU judgments in relation to data protection (while several important cases are pending), i.e., that alignment with EU law in this regard is not "dynamic";
- the UK Government has made very clear that it wants to diverge from EU data protection law and also include flows of (personal) data in trade agreements including the much hoped-for FTA with the USA (contrary to the EU horizontal policy that personal data should not be included in such agreements); and
- in some contexts, such as immigration and national security, lip service is paid in the text of the law to necessity and proportionality but with limited effect in practice.

The Draft Decision generally looks at the law on paper (as described, at times misleadingly, by the UK itself) without paying real attention to the application of the law in practice and without assessing law or practice against the EU legal standards.

Specific issues:

I. General adequacy issues:

1. **Data sharing:** The UK rules on the sharing of personal data (and in particular lightly pseudonymised data) are clearly not "essentially equivalent" to the EU rules (even if one has to look beyond the simple text of the UK GDPR to note this).

2. <u>Exemptions</u>:

2.1 **Immigration exemption:** In the – for EU citizens and other non-UK nationals in the UK, crucial – immigration context, the UK data protection rules are both on paper and in practice clearly not "essentially equivalent" to the EU ones (as set out in the GDPR).

2.2 **Research exemption:** Contrary to what is allowed under the EU GDPR, the exemption in the UK GDPR relating to processing for research purposes also allows departure from the rules on international data transfers.

3. Data transfer issues:

3.1 **Semantics:** The UK and the Commission make an indefensible distinction between "transfers" and "transits" and "merely routing" of data. This playing with words is an attempt to exclude "simple routing of data" through third countries and "direct collecting of personal data" by third country entities (private and public) directly from data subjects in the EU/EEA from the rules in the GDPR on international transfers – and onward transfers. If the UK and EU Commission views were to be allowed to pass, that would drive a coach and horses through *Schrems II*, *PI*, *LQDN* and other judgments, and through the EDPB's European Essential Guarantees for surveillance.

3.2 **Onward transfers on the basis of UK-issued adequacy decisions:** The UK has given its own authorities the power to declare that other third countries provide "adequate" protection in terms of the UK GDPR – and the UK has already shown it is willing to declare territories as providing such adequacy even when the EU has not done so.

> Unless there are watertight assurances from the UK Government that it will not declare any non-EU/EEA country to provide adequate protection under the UK GDPR unless that country is also held by the EU to provide adequate protection under the EU GDPR, and that it will suspend or withdraw any UK-issued adequacy decision on any country in respect of which the EU invalidates, suspends or withdraws its adequacy decision, the UK will become a data protection-evasion haven for personal data from the EU/EEA to countries that are not held to provide adequate protection by the EU (or in respect of which a previous decision was invalidated, suspended or revoked), including the other "5EYES" countries (USA, Canada, New Zealand and Australia).
> **The Draft Decision provides no assurances to that effect.**

3.3 **Onward transfers on the basis of the UK-USA Agreement:** In the Draft Decision the Commission accepts transfers (including onward transfers) from the UK to the USA under the recently signed UK-USA Agreement because (in the Commission's view) it provides for "equivalent protections to the specific safeguards provided by the so-called 'EU-US Umbrella Agreement'" – but not only are there still serious doubts about the Umbrella Agreement, the UK also only promises that it will apply the Umbrella Agreement safeguards "*mutatis mutandis*" with "*adaptations to reflect the nature of the transfers at issue*". The Commission says it will monitor how this will work out – but that is not a sufficient safeguard: see below, at III.

3.4 **Compliance with foreign judgments and orders:** The relationship between Article 48 GDPR and the remainder of Chapter V, in particular Articles 46 and 49, is unclear. But it was clearly the intention of the EU legislator (in particular the EP) that Member States should bar companies under their jurisdiction from meekly complying with judgments and orders from non-EU Member States; that the same should apply in relation to onward transfers from third countries; and that that should be reflected in all adequacy decisions. But the information provided by the UK makes clear that the UK effectively wants to ignore and bypass that constraint – and the Commission is willing to collude in that.

3.5 **Oversight and enforcement:** It is difficult to see how the Commission – had it looked seriously at the statistics – can have concluded that the ICO "identifies and punishes"

transgressors "in practice" and "imposes [appropriate] sanctions" on controllers and processors who break the law. In fact, on the contrary, the ICO continues to fail to properly enforce the law in the vast majority of cases – even when it itself concludes that the law has been broken.

II. Issues relating to UK national security and bulk surveillance powers:

1. **The elephant in the room:** The Draft Decision completely fails to assess (or even note) the UK's intelligence agencies' actual surveillance practices. It does not mention the Snowden revelations, or the US-UK "TEMPORA" programme, or the joint UK-US bulk interception station in Bude, Cornwall, or what it is used for, or the European Parliament's report on US surveillance (which is also extremely relevant to the UK), or Caspar Bowden's report to the EP, or the UK NGO Open Rights Group's excellent and detailed reports into the UK surveillance practices and laws, or Eric King's witness statement on behalf of Privacy International in the case before the UK Investigatory Powers Tribunal (or our own summaries of these matters). The Commission appears to believe that all this need not be looked at because, while the Draft Decision actually confirms that the bulk data collected by the UK intelligence agencies also includes data on EU persons, it only forms a small part of the massive global UK-USA (and other "5EYES") surveillance programmes.

   Hopefully, the EDPB and the EP will seek further details on this issue – and will not accept that UK surveillance of and bulk data collection on EU persons can be ignored because it "does not happen normally" or all that often (comparably speaking).

2. **The national security exemption:** Neither the relevant legal provisions nor the ICO-UK Intelligence Community MoU "ensure" that the exemption from data protection rights in the UK GDPR is only used when objectively necessary and proportionate to protect national security. They place an obligation on the part of the authorities issuing a "conclusive" certificate to consider the necessity and proportionality of the certificate – but do not involve effective substantive oversight by the ICO or the courts to ensure this is properly done. This raises doubts about the compatibility of the law with fundamental (EU CFR) requirements.

3. **Limitations on the use of the UK "bulk powers":** The UK law allowing for the use of bulk powers (the IPA) does not in itself, on its face, specify the nature of offences which may give rise to the issuing of a bulk powers warrant (rather, they can be used in relation to any "interests of national security", including the "economic wellbeing of the UK" and "preventing and combating serious crime" when related to national security), and that law also does not, in itself, on its face, define the categories of people on whom data can be collected under the bulk power warrants. Those matters may well, to some extent, be addressed in the processes concerned – but that is not the same as specifying them in the law itself. That is clearly not in accordance with the case-law of the CJEU and the ECtHR, or with the EDPB's European Essential Guarantees.

4. **The nature and use of the data obtained in bulk:** The description of "secondary data" (metadata) in the Draft Decision is seriously misleading. It fails to note that such data can be highly revealing and intrusive and are subject to sophisticated automated analyses. Yet under UK data protection law:

- metadata are not meaningfully protected against undue access and bulk collection by the UK intelligence agencies;
- the situation in relation to oversight over complex selectors and search criteria is still unclear; while
- oversight over the much more sophisticated data mining analyses appears to not have been addressed at all.

The situation relating to the processing of metadata ("secondary data") by the UK intelligence agencies therefore clearly does not meet the EU standards as set out, in particular, in the CJEU LQDN judgment, referenced in this regard in the EEGs.

5. **Transfer of data obtained in bulk to other third countries:** The extensive – indeed, it would appear, comprehensive – data sharing arrangement between the "5EYES" agencies, and more in particular between GCHQ and the NSA, means that data on individuals in the EU, and in particular their communications data, collected in bulk by GCHQ, will (continue to) be made available also to the NSA – and indeed analysed in the manner described earlier jointly by GCHQ and NSA staff. In terms of the GDPR, this sharing will, at least from 1 January 2021, involve the "onward transfer" of the data on individuals in the EU from the UK to the USA.

   While the UK was an EU Member State, perhaps not much could be done about this under EU law. However, now that the UK is no longer an EU Member State this can, and we submit must, be addressed urgently, in general and in the context of the matter of a UK adequacy decision.

   But once again, the Draft Decision effectively ignores this crucial issue.

III. Monitoring of the adequacy decision:

In line with all other adequacy decisions, the Draft Decision says that the Commission will "monitor the developments" in relation to data protection in the UK after the coming into force of the decision, "on an ongoing basis"

However, in practice, the Commission has **never** repealed, suspended or amended any adequacy decision even when it would be clear from even a cursory examination of a country's law and practices that (whatever the original situation when assessed under the 1995 Directive) the country does not provide for adequate protection in terms of the GDPR, as clarified by the CJEU in *Schrems I* ("essentially equivalent").

In the circumstances, not too much should be expected of the "ongoing monitoring" by the Commission of the situation in the UK after the UK decision comes into force (if it ever does).

- o – O – o -

Douwe Korff (Prof.
Cambridge, UK, 3 March 2021