Rt Hon John Whittingdale OBE MP
Minister of State for Media and Data
4th Floor
100 Parliament Street
London SW1A 2BQ

E: ps.whittingdale@dcms.gov.uk

www.gov.uk/dcms

Department for Digital, Culture, Media & Sport

19 April 2021

Sir William Cash MP
European Scrutiny Committee
House of Commons
London
SW1A 0AA

Dear Bill,

Draft data adequacy decisions for trade and law enforcement purposes (ESC numbers 41796-7)

Thank you for your letter dated 17 March 2021 relating to the draft data adequacy decisions that the European Commission published on 19 February 2021.

We welcome these decisions, which rightly recognise the UK's high data protection standards and would allow for the continued free flow of personal data from the EU to the UK.

We agree that the decisions are of significant legal and political importance. The Government is therefore urging the EU to complete its technical approval process promptly. This will provide certainty for businesses, enable continued cooperation between the UK and the EU, and will help law enforcement authorities to keep our citizens safe.

The process for adopting the draft adequacy decisions is controlled by the EU. The European Data Protection Board's (EDPB) role in the approval process is to review the decisions and publish non-binding opinions, which they did on 16 April 2021. The EDPB noted the "strong alignment" between the UK and EU data protection systems, but also emphasised that the Commission should monitor future "relevant developments" in the UK. The UK Government is reviewing the EDPB opinions and the European Commission is also considering them. We now expect the Commission to move on to the next stage of the process and we see no reason why the decisions should not be swiftly approved. The Council's Article 93 Committee of EU Member State representatives has already met to discuss the draft decisions and they will formally vote on them shortly. The Commission expects this process to be concluded by late May or early June 2021. In the meantime, due to the time limited 'bridging mechanism' we agreed as part of the EU-UK Trade and Cooperation Agreement, personal data can continue to flow freely as it did previously, until the adequacy decisions are adopted (or 6 months from 1 January 2021, whichever is earlier).

The Government will endeavour to keep the Committee informed about the progress of the process for adopting the draft decisions.

We have responded to your individual questions on the issues below.

a) How will the Government assess and manage the risk to the maintenance of the adequacy decisions should it wish to diverge from EU data protection law in future? Divergence seems likely to us, in the light of the article in the Financial Times (FT) written by the Secretary of State

for Digital, Culture, Media and Sport (The Rt Hon. Oliver Dowden CBE MP) on 27 February, though the timing and extent is less clear.

Now that we have left the EU, we control our own data protection laws. We will continue to operate a high-quality regime that promotes growth and innovation, and underpins the trustworthy use of data. The UK has a unique opportunity to be at the forefront of global, data-driven growth.

It is inevitable that the UK and EU's independent data protection regimes will evolve independently over time. The UK is firmly committed to maintaining high data protection standards - now and in the future. Protecting the privacy of individuals will continue to be a priority.

As the European Commission itself has made clear, a third country is not required to have exactly the same rules as the EU in order to be considered adequate - "essentially equivalent" does not mean identical. The twelve EU 'adequate' countries, from Israel to New Zealand, each have data protection laws that are different to the EU's.

b) Linked to this, how does the Government propose to approach the "invitation" in Recitals 275 of the GDPR decision and 165 of the LED decision which note the ongoing monitoring obligations of the Commission of UK adequacy and state: "To this end, the UK authorities are invited to inform the Commission of any material change to the UK legal order that has an impact on the legal framework that is the object of this Decision...". What would it consider to be a "material change" and how wide does it consider the relevant "legal framework" to be? Would that encompass any material future changes the Government may wish to make in due course to judicial review or the Human Rights Act? How will Parliamentary scrutiny be included in that process? Will Parliament be informed at the same time as the EU Commission?

UK officials provided a significant amount of information on the UK's legal framework to the Commission as part of the adequacy assessment, and we also published detailed information on how the UK's framework meets the EU's adequacy test. The Government will keep Parliament informed regarding any major developments or milestones relating to EU adequacy or the UK's future data protection framework.

It is for the EU to decide what constitutes a "material change" or the relevant "legal framework" with respect to its adequacy decisions, as this is a unilateral EU process. The European Commission monitors decisions on an ongoing basis, and it is for them to decide how they do so. The UK is firmly committed to maintaining high standards of data protection and we will continue to engage with the EU on these matters.

c) What arrangements will there be in Government for monitoring EU developments that could cause divergence between the EU and UK legal frameworks in this area, both in terms of new data protection legislation and CJEU case law? How will dialogue take place between the EU and the UK about managing such divergence? How will Parliamentary scrutiny be included in that dialogue?

Now that we have left the EU and have a sovereign data protection policy we will monitor data protection developments across the world, including in the EU, and assess whether and how those developments can inform our own laws and practices.

The UK has legislated to treat all EU and EEA states as 'adequate' under UK law. This means that personal data can continue to flow freely from the UK to the EU and EEA, without additional safeguards needing to be in place. We will continue to monitor data protection standards in the EU and EEA states to ensure they provide an adequate level of protection for UK personal data, and our own legislation requires us to undertake a review of the relevant legislative provisions within four years of the end of the Transition Period in any event.

To give legal effect to a decision to specify a country as 'adequate', including the EU and EEA states, the Secretary of State must make regulations and lay these in Parliament, thereby providing an opportunity for Parliamentary scrutiny.

d) How will the Government ensure that its own new adequacy assessments for non-EU countries do not cause "equivalence" difficulties in terms of onwards transfer from the UK to those countries of personal data originating from the EU? We note in this respect from the Secretary of State's FT article that the Government is keen to adopt significantly more adequacy assessments for non-EU countries than the EU currently has.

The UK Government intends to expand the list of adequate destinations in line with UK national interests including a commitment to high standards of data protection. Doing so will provide UK organisations and international partners with more straightforward and cost-effective mechanisms for international data transfers. The EU is also working to expand its adequacy list, as shown by its recent announcement of a draft adequacy decision for the Republic of Korea. We will be publishing our priority countries for UK adequacy in due course and we will continue to champion the free flow of data and the opportunities this brings.

The European Commission reviewed the UK's laws and independent approach to international data transfers as part of its comprehensive assessment of the UK. They found it to be 'adequate' for the purposes of EU law and outlined why in the draft adequacy decisions. They did not recommend in those decisions any restriction on the transfer of EU data from the UK to jurisdictions that the UK may in future find adequate.

The UK will continue to ensure that individuals' data protection rights are protected and upheld when their personal data is transferred overseas from the UK. Any future UK adequacy decisions will only be granted to countries which are found to have high data protection standards. The test for adequacy provided for in the UK GDPR is that, when personal data is transferred to the third country, the level of protection under the UK GDPR is not undermined. To determine this, we will consider the overall effect of a country's data protection laws, implementation, enforcement, and supervision.

For the Secretary of State's adequacy decisions to have legal effect, the Government will lay relevant regulations in Parliament, thereby providing an opportunity for Parliamentary scrutiny. The Secretary of State will also consult the Information Commissioner's Office (ICO) on future adequacy assessments. More information on the roles and responsibilities between the ICO and DCMS on UK data adequacy assessments is set out in a Memorandum of Understanding (available on gov.uk). Once UK adequacy decisions are granted, we will review them on a periodic basis and in intervals of not longer than every four years.

e) How will the Government ensure that "equivalence difficulties" are not caused by data protection, data exchange and digital trade provisions in any international agreements between the UK and non-EU countries?

Data flows drive international commerce, trade and development. They underpin modern day business transactions and allow businesses to scale and trade globally. Removing unjustified barriers to data transfers can unlock the value of potential trading relationships with strategic partners worldwide.

The UK does not intend for free trade agreements (FTAs) to provide a legal basis for the cross border transfer of personal data. Data adequacy is legally separate from provisions in FTAs. Nonetheless, adequacy decisions can help unlock the benefits of market liberalising provisions in FTAs, especially for services that depend on flows of personal data.

The UK will not enter into international agreements that are incompatible with our high data protection standards. The Government will continue to consider the implications - including for cross-border data transfers - of all international agreements and commitments we enter into.

f) What arrangements, if any, will there be for communication between the EU, UK Government and the Information Commissioner on matters potentially affecting the maintenance of the adequacy decisions?

We are in regular contact with EU officials and representatives. We will continue to communicate and cooperate on a wide range of issues, including but not limited to data protection and adequacy.

The UK stands ready to engage in any future review processes, although these will be controlled by the European Commission. The UK is firmly committed to maintaining high standards of data protection and remaining a global leader in privacy and the trustworthy use of data.

We are also in regular contact with the independent ICO on a wide range of data protection matters. For example, the DCMS-ICO Memorandum of Understanding, referenced above, provides significant detail on how the Government will work with the ICO and seek their expertise in the process of making UK adequacy decisions.

g) To what extent, if any, will the Government need to take a different or enhanced approach to maintaining the Law Enforcement data adequacy Decision?

International data sharing is important for law enforcement cooperation and helps tackle crime and bring perpetrators to justice. When adopted, the UK's law enforcement adequacy decision will be the first of its kind and will help give confidence to law enforcement authorities based in the EU that when they share data with their UK counterparts that data will be protected to equivalent high standards. However, adequacy is just one way for which data can be shared internationally; both EU and UK data protection legislation provide alternative transfer mechanisms in the absence of adequacy.

Domestically and internationally a strong data protection framework underpins law enforcement data processing and enhances public confidence in the important work of our law enforcement authorities. As we have already discussed, the UK remains committed to high data protection standards, which we have made clear throughout this process. In the event that UK and EU legislation diverges in the future, the UK is committed to ensuring high data protection standards, as rightfully recognised by the Commission in their decision, and as such we would expect to retain our adequacy decision.

h) How does the Government interpret the ART.LAW.OTHER 137 in terms of possible suspension of parts or the whole of Part 3 Law Enforcement Cooperation of the TCA? If one or either of the two adequacy decisions ceased to apply, would that be sufficient for one party to suspend obligations or it is beyond doubt that the "serious and systemic deficiencies" as regards the relevant party's data protection would also need to be established?

Art.Law.Other.137 sets out the circumstances under which either party may suspend the law enforcement and criminal justice (LECJ) part of the TCA in part or in whole. Article 137 (2) is clear that the legal test for suspension is "serious and systemic deficiencies" in data protection – there is no direct link between cooperation under the LECJ part of the TCA and adequacy although it is a factor either party could take into consideration. Furthermore, data protection concerns would not automatically lead to suspension – this would be a decision for the party in question.

i) How does the Government propose to keep Parliament and this Committee informed on these matters on a regular, timely, responsive and transparent basis, particularly in the lead-up to the four-year expiry/extension deadline?

The Government endeavours to keep the Committee and Parliament informed and updated on important milestones in the EU adequacy process. When the EU formally adopts the UK's adequacy

decisions, the Secretary of State will make a statement to the House of Commons. Furthermore, when the Secretary of State makes UK adequacy decisions in respect of new countries, for these decisions to have legal effect, the Government will lay relevant regulations in Parliament, thereby providing an opportunity for Parliamentary scrutiny.

The handling of the review and renewal of the UK's adequacy decisions is a unilateral EU matter. It is not for the UK to comment on which arrangements the EU should make in order to facilitate this. The UK stands ready to engage in any future review processes and the Government will provide information and updates to Parliament at the appropriate time.

* * *

We trust this will assist your scrutiny of these issues. We are also copying this letter to the Chair (Julian Knight MP) and Clerk (Stephen McGinness) of the Digital, Culture, Media and Sport Committee; the Chair (Rt Hon Yvette Cooper MP) and Clerk (Elizabeth Hunt) of the Home Affairs Committee; the Chair (Rt. Hon Greg Clark MP) and Clerk (Danielle Nash) of the Science and Technology Committee; the Chair (Angus Brendan MacNeil MP) and Clerk (Jo Welham) of the International Trade Committee; the Chair (Simon Hoare MP) and Clerk (Stephen Habberley) of the Northern Ireland Affairs Committee; the Chair (Darren Jones MP) and Clerk (Dr Rebecca Davies) of the Business and Industrial Strategy Committee; the Chair (Rt. Hon Jeremy Hunt MP) and the Clerk (James Davies) of the Health and Social Care Committee; the Chair (Rt Hon Harriet Harman QC MP) and the Clerk (Lucinda Maer) of the Joint Committee on Human Rights; the Chair (the Earl of Kinnoull) and Clerk (Stuart Stoner) of the Lords European Union Committee; Rob Isherwood, Laurie Scott and Megan Wilson in the Department for Digital, Culture, Media and Sport; Alex Bernal in the Home Office; and Les Saunders and Donald Harris in the Cabinet Office.

John Whittingdale OBE MP
Minister of State for Media and Data

Kevin Foster MP
Minister for Future Borders and Immigration