



## Formal comments of the EDPS on the Recommendation for a Council Decision authorising the opening of negotiations on an agreement between the European Union and United Kingdom of Great Britain and Northern Ireland on cooperation and exchange of information in competition matters

### 1. Introduction and background

- The Recommendation for a Council Decision authorising the opening of negotiations on an agreement between the European Union and United Kingdom of Great Britain and Northern Ireland on cooperation and exchange of information in competition matters ('the Recommendation')<sup>1</sup> aims to enable the cooperation between the European Commission, the national competition authorities of the Member States (NCAs), on the one hand, and the UK competition authorities, on the other hand.
- As specified in the Explanatory Memorandum<sup>2</sup>, “[i]n order to allow for a safe and smooth cooperation between all competition authorities involved, the proposed agreement should also contain provisions on data protection, rights of defence and the protection of business secrets and other confidential data.”
- The Annex to the Recommendation contains the negotiating directives, which include a reference to the protection of personal data that would be exchanged pursuant to the cooperation in competition matters.
- These formal comments are provided in reply to the request by the Commission of 11 May 2021 pursuant to Article 42(1) of Regulation (EU) 2018/1725 ('the EUDPR')<sup>3</sup>. The EDPS was informally consulted prior to the adoption of the Recommendation on 17 March 2021. The comments below are limited to the provisions of the Recommendation that are relevant from a data protection perspective.
- These formal comments do not preclude any future additional comments by the EDPS, in particular if further issues are identified or new information becomes available. Furthermore, these formal comments are without prejudice to the formal consultation which has to take place on the proposals for a Council Decision for the

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<sup>1</sup> Recommendation for a Council Decision authorising the opening of negotiations on an agreement between the European Union and United Kingdom of Great Britain and Northern Ireland on cooperation and exchange of information in competition matters, COM(2021) 228 final, 11.5.2021.

<sup>2</sup> Explanatory Memorandum of the draft Recommendation for a Council Decision authorising the opening of negotiations on an agreement between the European Union and United Kingdom of Great Britain and Northern Ireland on cooperation and exchange of information in competition matters, p. 1.

<sup>3</sup> Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 295, 21.11.2018, p. 39–98.

signature and conclusion of the agreement pursuant to Article 218 TFEU, as per Article 42(1) of the EUDPR and to any future action that may be taken by the EDPS in the exercise of his powers pursuant to Article 58 of the EUDPR.

## 2. Comments

- The EDPS notes that the possibility for an agreement on administrative cooperation in competition matters is laid down in the Competition Chapter of the EU-UK Trade and Cooperation Agreement (TCA)<sup>4</sup>.
- Moreover, the EDPS notes that the European Union has concluded several international cooperation agreements on competition matters<sup>5</sup>. The EDPS also notes that, as referred to in the Explanatory Memorandum<sup>6</sup> “[a] binding mutual understanding on cooperation allowing the transfer of legally protected information between the Union and the UK can only be achieved through a formal international agreement.”
- On 28 June 2021, the Commission adopted a decision recognizing that the United Kingdom ensures an adequate level of protection for personal data transferred within the scope of the GDPR from the European Union to the United Kingdom (hence, the ‘adequacy decision’)<sup>7</sup>.

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<sup>4</sup> Article 2.4 (4) states that “[t]o implement the objectives of this Article [on Cooperation], the Parties may enter into a separate agreement on cooperation and coordination between the European Commission, the competition authorities of the Member States and the United Kingdom’s competition authority or authorities, which may include conditions for the exchange and use of confidential information.” Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (OJ L 444, 31.12.2020, pp. 14–1462, Title XI, Chapter two.

<sup>5</sup> Agreement between the European Community and the Government of the United States of America regarding the application of their competition laws (OJ L 95, 27.4.95, pp. 47-52 as corrected by OJ L 131, 15.6.95, pp. 38-39); Agreement between the European Communities and the Government of Canada regarding the application of their competition laws (OJ L 175, 10.07.1999); Agreement between the European Community and the Government of Japan concerning cooperation on anticompetitive activities (OJ L 183, 22/07/2003, pp. 12-17); Agreement between the European Community and the Government of the Republic of Korea concerning cooperation on anticompetitive activities (OJ L 202, 04.08.2009, pp. 36-41); Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws (OJ L 347, 3.12.2014, pp. 3-9).

<sup>6</sup> Explanatory Memorandum of the draft Recommendation for a Council Decision authorising the opening of negotiations on an agreement between the European Union and United Kingdom of Great Britain and Northern Ireland on cooperation and exchange of information in competition matters, page 3.

<sup>7</sup> C(2021) 4800 final, Commission Implementing Decision of 28.6.2021 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by the United Kingdom, available at:

[https://ec.europa.eu/info/sites/default/files/decision\\_on\\_the\\_adequate\\_protection\\_of\\_personal\\_data\\_by\\_the\\_united\\_kingdom\\_-\\_general\\_data\\_protection\\_regulation\\_en.pdf](https://ec.europa.eu/info/sites/default/files/decision_on_the_adequate_protection_of_personal_data_by_the_united_kingdom_-_general_data_protection_regulation_en.pdf)

- It is our understanding that the envisaged agreement on administrative cooperation in competition matters would not as such provide for a legal basis for the transfers of personal data within the meaning of the GDPR for the purpose of administrative cooperation in competition matters. Instead, such a legal basis would be provided by the adequacy decision mentioned above. Moreover, as specified at paragraph 279 of the adequacy decision, in particular: “[...] *during the period of application of this Decision, transfers from a controller or processor in the European Union to controllers or processors in the United Kingdom may take place without the need to obtain any further authorisation.*”<sup>8</sup>
- The EDPS also recommends adding a reference to the consultation of the EDPS in the preamble of the Decision.
- The EDPS notes the inclusion of the reference to the protection of personal data (under point 8)<sup>9</sup> and to purpose limitation (definition of the purpose of the information exchanged provided under point 9)<sup>10</sup> in the Annex to the Recommendation.
- At the same time, the EDPS highlights that the reference in point 8 to “*specific provisions on the protection of personal data [...] in case an exchange involves a transfer of personal data*” is no longer required to ensure the lawfulness of the transfers that will take place pursuant to the agreement, in the light of the recently issued adequacy decision.
- The EDPS recommends revising point 8 to clarify that the agreement should contain a specific reference to the Commission Implementing Decision of 28.6.2021 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by the United Kingdom.

Brussels, 5 July 2021

Wojciech Rafał WIEWIÓROWSKI  
(e-signed)

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<sup>8</sup> See at page 88 of the adequacy decision. See also paragraph 289, at page 90: “[...] *this Decision will apply for a period of four years as of its entry into force.*”

<sup>9</sup> “*The agreement should contain specific provisions on the protection of personal data ensuring appropriate safeguards, including data protection obligations and principles, individual rights, independent oversight and effective redress, in case that an exchange of information entails the transfer of personal data.*” (emphasis added)

<sup>10</sup> “*The agreement should provide that information exchanged shall be used only for competition law enforcement and policy.*”