



# The Civil Society Brexit Project

Expert information and advice on Brexit  
for organisations in Scotland.

## **BLOG: The UK is stuck in a tug of war between EU and US on digital rights**

**Digital rights, specifically your right to privacy online, is set to undergo a dramatic upheaval as the UK exits the European Union.** While a member of the EU, the UK was a part of a bloc that prioritised fundamental rights over the economic incentives that the digital economy provides.

**Now though, the UK is caught between two competing philosophies.** The EU's standard that fundamental rights must be respected and protected if you want to gain access to the European market; and the United States' prioritisation of economic interests and protecting companies over fundamental rights.

This tug of war for the United Kingdom will play out in two key processes: future trade negotiations with the United States; and what is known as an "adequacy assessment" for data protection standards – this is undertaken by the European Commission and is important for continued flow of personal data of EU citizens to the UK, but also important as a barometer for the UK's level of respect for privacy in the digital age.

While data is a reserved matter, and thus Scotland's flexibility in this area is limited, there will be an effect on the Scottish Government's strategic goals.

It may seem peculiar to introduce a discussion of trade and economics in a piece focused on human rights, but these go hand in hand for debates on digital technologies. The digital economy is a growing economic force powered by the personal data of individuals. **Further, technologies are beginning to play an important role in our rights, such as a growing role in welfare and criminal justice systems.**

In its trade negotiations, the United States prioritises the protection of companies interests, such as intellectual property about how their systems work. It is determined to resist any rules requiring the source code of algorithms to be disclosed. **If the UK were to accept this standard, it could be hugely significant for transparency and accountability in public systems.**

For example, in the criminal justice sector, decision-making by computer algorithms are being used by Durham Constabulary to "assist decision making relating to whether a suspect could be eligible for a deferred prosecution". This technology may produce decisions having a legal or potentially significant effect on someone's lives.

Under current rules from the EU's General Data Protection Regulation, such decisions cannot be made unless, among other things, it is authorised in law and has suitable measures to safeguard individual's rights and freedoms and legitimate interests.

One of those safeguards would normally involve explanation of how the decision was made, providing transparency to facilitate accountability in automated systems that, in the area of facial recognition, have been shown to contain racial and gender bias. However, if that were a US company underpinned by a US – UK trade deal that preserved trade secrets (which could include the rules that make up the algorithm that makes the decision) that key right allowing for accountability may not be available, or at least would be open to challenge.

**This matters to every individual who would have been subject to a decision by that system but it also matters at a systemic level.**

As a result of the UK's exit from the EU, to preserve data flows between the EU and UK, the European Commission must assess whether the UK guarantees "essentially equivalent" standards of data protection – known as an adequacy assessment. There are already factors in the UK's implementation of European data protection law that risk a positive adequacy decision, such as restricting access to personal data if it would prejudice effective immigration control, which Open Rights Group are challenging in the courts. The future trade relationship with the United States will play a huge role in determining the outcome of this assessment. The UK wants an adequacy decision from the European Commission, but Boris Johnson has also explicitly said that the UK will seek to take a new path. These two aims may work against each other.

**As Scotland embarks on creating its own strategy on Artificial Intelligence, changes in overarching standards may tie Scotland's hands in trying to ensure a strategy that ensures fairness and respect of fundamental rights.**

This is a deeply complicated and complex territory, with multiple interests, market forces, and fundamental ideologies involved, which is why Open Rights Group are calling for much greater transparency and Parliamentary oversight of trade negotiations.. The direction looks clear to be a reduction in fundamental rights towards a US-model. The question is how far the different EU institutions will allow that reduction before it decides that the UK is no longer adequate to receive European citizens' personal data.

If that were to occur, it would signal an end to the alignment on data protection rights that the UK and EU have had in place since 1995, carrying a huge moral and political statement and also a practical change in what rights we have in the digital age.

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