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A Diversity of Adequacy: The European Commission's 11-Country Adequacy Review

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TECH, LAW & SECURITY
PROGRAM



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Tech, Law & Security Program (TLS)

The Tech, Law & Security Program (TLS) at American University Washington College of Law tackles pressing issues at the intersection of technology, law, and security, bridging government, civil society, and industry perspectives to develop consensus-driven, actionable solutions and train the leaders of tomorrow.

Privacy Across Borders (PAB)

Privacy Across Borders is a TLS project that brings together global experts and practitioners from the government, private sector, and civil society to develop practical, actionable recommendations for challenges to cross-border data flows.

Under [Article 45 of Regulation \(EU\) 2016/679 \(GDPR\)](#), the European Commission has the power to determine whether a country outside the European Union (EU) offers an adequate level of data protection. The effect of such a decision is that personal data can flow from the EU to that third country without additional authorization. Once an adequacy decision is adopted, the Commission must, on an ongoing basis, monitor developments in third countries.¹ On January 15, 2024, the European Commission released a batch of reviews of previous adequacy decisions adopted between 2000 and 2012 under the Data Protection Directive.² The reviews encompassed a diverse group of countries and territories: Andorra, Republic of Argentina, Canada, Faroe Islands, Bailiwick of Guernsey, Isle of Man, State of Israel, Jersey, New Zealand, Switzerland, and Eastern Republic of Uruguay.

A comparative analysis of these reviews reveals that, despite arriving at the same conclusion, the Commission's assessments of these countries and territories vary. This contrast underscores the flexibility and discretion exercised in determining adequacy. The eleven reviews adhere to a consistent format³ and length,⁴ with some paragraphs even directly replicated across reviews,⁵ and all conclude that the country or territory remains compliant and meets the standard of "essential equivalence" set by the General Data Protection Regulation (GDPR).

Yet, these countries and territories exhibit a diverse array of characteristics. Per capita gross domestic product (GDP) varies significantly from 2.1 trillion dollars in Canada to 7.3

¹European Commission, *Report from the Commission to the European Parliament and the Council*, at 2 (Jan. 15, 2024) https://commission.europa.eu/document/download/f62d70a4-39e3-4372-9d49-e59dc0fda3df_en?filename=JUST_template_comingsoon_Report%20on%20the%20first%20review%20of%20the%20functioning.pdf.

² Andorra (October 19, 2010); Republic of Argentina (June 30 2003); Canada (December 20, 2001); Faroe Islands (March 5, 2010); Bailiwick of Guernsey (November 21, 2003); Isle of Man (April 28, 2004); State of Israel (January 31, 2011); Jersey (May 8, 2008); New Zealand (December 19, 2012); Switzerland (July 26, 2000); Eastern Republic of Uruguay (August 21, 2012).

³The first section of the decision is entitled "Rules Applying to the Processing of Personal Data." This section starts by going through the relevant developments in the data protection framework since the Commission adopted the adequacy decision. The section ends by discussing oversight, enforcement, and redress under the data protection regime. The second section of the decision is entitled "Access To and Use of Personal Data Transferred From the European Union by Public Authorities in [Insert Third Country]." This section starts by explaining the general legal framework, then focusing on access and use by public authorities for criminal law enforcement purposes, and ending with a focus on access and use by public authorities for national security purposes. The part that focuses on national security starts by describing the intelligence agencies in the country or territory and then moves on to discuss the legal basis and application limitations and safeguards for processing. Next, the review discusses the specific limitations and safeguards on further use of the information collected. The national security sections end with a discussion on oversight and redress.

⁴ The average page count is 31 pages and the median page count is 32 pages. Andorra page count (20); Republic of Argentina (34); Canada (40); Faroe Island (27); Bailiwick of Guernsey (32); Isle of Man (27); State of Israel (33); Jersey (32); New Zealand (33); Switzerland (35); Uruguay (23 pages). The Andorra page count is less than the other decisions because there is no specific authority in Andorra engaged in the collection of personal data for national security purposes.

⁵The paragraphs that describe the international obligations are copied and pasted. For example, in the Andorra review, the paragraph on page 10 about the ECHR is the same as the paragraphs in the Faroe Islands review on pages 103 to 104 (besides a substitution of the countries name).

million dollars in Jersey.⁶ Population sizes range from around 45.8 million people in Argentina to just 53,270 people in the Faroe Islands.⁷ Moreover, the supervisory authorities differ in key metrics such as staff numbers and budget allocation; the supervisory authority of the Faroe Islands has a total staff of six and a 2020 budget of 435,000 Euros⁸ while the supervisory authority of Israel added thirty three staff members from 2016 to 2023 and had a 2022 budget of around 4.2 million Euros.⁹

The reviews' references to the GDPR fall into three groups that reflect differing degrees of similarities between the GDPR and the data protection frameworks under review. Some reviews, like Israel and Canada, rarely mention the GDPR. In the reviews that mention the GDPR, the Commission distinguishes between legal frameworks that have "further increased convergence" with the GDPR and legal frameworks that "closely align" with the GDPR. Specifically, developments in the legal frameworks of Switzerland and New Zealand have "further increased the convergence with the EU's data protection framework."¹⁰ Conversely, the legal frameworks of the Faroe Islands, Andorra, and Guernsey "closely align" with the GDPR.¹¹ These categorizations indicate that while a similar data protection framework is not necessary for an adequacy finding, the Commission does consider similarities in its assessment.

⁶ World Bank, *GDP - Canada*, <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=CA> (Canada GDP in 2022); States of Jersey, *Measuring Jersey's economy: GDP and GVA 2022*, (October 4, 2023), <https://www.gov.je/News/2023/pages/measuringjerseyseconomy2022.aspx>.

⁷ Andorra (80,088); Isle of Man (84,710); Argentina (45,773,884); Faroe Islands (53,270); Switzerland (8,796,669); Israel (9,174,520); Canada (38,781,291); New Zealand (5,228,100); Uruguay (3,423,108). These population sizes were found here: <https://www.worldometers.info/world-population/population-by-country/>. Guernsey (63,400). Population found here: <https://www.gov.gg/population>.

⁸ European Commission, *Commission Staff Working Document*, at 10 (Jan. 15, 2024), https://commission.europa.eu/system/files/2024-01/JUST_template_comingsoon_Commission%20Staff%20Working%20Document%20-%20Report%20on%20the%20first%20review%20of%20the%20functioning.pdf.

⁹*Id.* at 193.

¹⁰ The main findings and conclusions for Switzerland can be found on page 13. It states: "In particular, the modernised Federal Act on Data Protection that has *further increased the convergence* with the EU's data protection framework, notably with respect to the protections for sensitive data and the rules on international data transfers." New Zealand's can be found on page 12. It states: "In particular, the data protection regime underwent a comprehensive reform with the adoption of the Privacy Act 2020 that *further increased the convergence* with the EU's data protection framework, notably as regards the rules for international transfers of personal data and the powers of the data protection authority (the Office of the Privacy Commissioner)." European Commission, *supra* note 1.

¹¹ The main findings and conclusions for the **Faroe Islands** can be found on page 9. It states: "In particular, the Faroe Islands have significantly modernised their data protection framework by adopting the Data Protection Act, which entered into force in 2021 and *closely aligned* the Faroese regime with the GDPR." **Andorra's** can be found on page 7. It states: "In particular, the adoption of Qualified Law 29/2021 on the protection of personal data that entered into force in May 2022 has contributed to an increased level of data protection, as the Law is closely aligned with the GDPR in its structure and main components." **Guernsey's** can be found on page 10. It states: In particular, Guernsey has significantly modernised its data protection framework by adopting the Data Protection (Bailiwick of Guernsey) Law 2017 which applies since 2019 and *aligns the Guernsey regime closely* with the GDPR. European Commission, *supra* note 1.

The reviews also vary in their references to international obligations. The Israel, New Zealand, and Canada reviews do not mention international obligations.¹² On the other hand, the remaining eight reviews refer to at least one of the following international obligations: the European Convention on Human Rights (ECHR),¹³ the American Convention on Human Rights (ACHR),¹⁴ Convention 108,¹⁵ Convention 108+.¹⁶

Another difference is how certain reviews appear to assert pressure by explicitly mentioning the Commission's intention to monitor future developments. With Andorra, the Commission will monitor whether the legislature replaces the rules that apply to data processing by law enforcement authorities "with a more comprehensive regime that will be even further aligned with the rules that apply in the EU."¹⁷ For New Zealand, the Commission will closely monitor the recent introduction of a bill before Parliament that would "further strengthen the existing transparency requirements."¹⁸ Finally, for Argentina, Canada, and Israel, the Commission will monitor whether they "enshrine the protections that have been developed at sub-legislative level in legislation."¹⁹

There are various ways to reach the same conclusions across the reviews. In terms of oversight, all of the reviews conclude that the supervisory authority is independent²⁰ and active.²¹ Comparing the reviews side by side highlights the Commission's discretion in reaching

¹² The other reviews consider at least one of following international obligations: the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR), Convention 108, Convention 108+.

¹³ The European Convention on Human Rights (ECHR) is mentioned in the Andorra, Faroe Island, Guernsey, Isle of Man, Jersey, and Switzerland reviews.

¹⁴ The American Convention on Human Rights (ACHR) is mentioned in Argentina and Uruguay.

¹⁵ Convention 108 is mentioned in the Andorra, Argentina, Guernsey, Isle of Man, Jersey and Uruguay decisions.

¹⁶ Convention 108 + is mentioned in Andorra, Argentina, Switzerland, and Uruguay.

¹⁷ European Commission, *supra* note 1, at 9.

¹⁸ *Id.* at 13.

¹⁹ *Id.* at 8-11.

²⁰ **Andorra** ("The Data Protection Act integrates in its Chapter VII the provisions of the DPD concerning the APDA without significantly changing the composition, tasks and powers of the agency and the statutory safeguards for its independence."); **Isle of Man** ("Since the adoption of the adequacy decision, oversight and enforcement of compliance with the Isle of Man data protection law have been strengthened, notably by reinforcing the supervisory authority's independence and by extending its powers"); **Republic of Argentina** ("First, in a reform that has significantly strengthened the independence of the supervisory authority, the AAIP has been charged with monitoring and enforcing the LPDP."); **Faroe Island** ("To further strengthen the independence of the Council, the special commentary to the DPA provides that the members must remain free from external influence, whether direct or indirect, and may neither seek nor take instructions from anybody"); **Bailiwick of Guernsey** ("Compared to the previous Commissioner, the independence of the Authority has been significantly strengthened in several ways."); **Canada** (The OPC is the independent authority charged with oversight and enforcement of PIPEDA); **State of Israel** (While being part of the administrative structure of the Israeli Ministry of Justice, the PPA carries out its functions independently. Since the adoption of the adequacy decision, this independence has been strengthened); **Jersey** (Jersey has also reformed its system of oversight and enforcement of the Data Protection Law, strengthening both the independence and the powers of the oversight body). **New Zealand** (The OPC is the independent authority in charge of the oversight and enforcement of the New Zealand data protection rules.); **Switzerland** (The independent body in charge of overseeing compliance with the data protection rules by private operators and federal public authorities is the FDPIC); **Eastern Republic of Uruguay** ("The independent entity in charge of overseeing compliance with the data protection rules in Uruguay is the URCDP").

²¹ **Andorra** ("The APDA plays an active role, both when it comes to its engagement with stakeholders and exercising its oversight role) (8); **Republic of Argentina** (The AAIP plays an active role, both when it comes to its

these conclusions, as there is no one-size-fits-all approach. For instance, independence can be demonstrated through various means, including for-cause removals, term limits, prohibitions against Directors holding elected or advocate positions, separate budgets, laws that expressly stipulate the supervisory authority is an independent entity, or the legal personhood of the supervisory authority. Similarly, the active role of the supervisory authority can be supported by a diverse array of activities. Some of the activities mentioned include launching a website in the Faroe Islands, a “Data Protection Week” in Jersey, creating a podcast in New Zealand, periodic newsletters in Israel, or running a phone helpline in Switzerland. Other activities are more substantial such as, carrying out investigations, audits, and criminal investigations, issuing guidelines, position papers, and legal opinions, or advising Parliament and the government. The breadth of evidence indicates that the Commission has flexibility in deciding whether or not a certain element for adequacy is met.

When addressing the access and use of personal data by public authorities for national security purposes all of the reviews identify four essential elements: (1) a legal basis for processing; (2) processing is subject to limitations and safeguards; (3) processing is subject to independent oversight; (4) effective remedies are available to individuals.²² However, the specific details and interpretations of these elements vary across the different national security frameworks assessed.

For instance, limitations and safeguards stem from different sources. Andorra, Argentina, Faroe Island, Guernsey, Isle of Man, Jersey, Switzerland, and Uruguay derive limitations and

engagement with stakeholders and exercising its oversight role) (31). **Canada** (“Since the adoption of the adequacy decision, the OPC has carried out a number of important investigations under PIPEDA.”) (65) (“Its annual reports to the Parliament also show that the OPC deals with a number of complaints under PIPEDA on an annual basis”) (“[T]he OPC regularly engages with stakeholders”) (66). , **Faroe Islands** (“Despite its relatively small office, the Data Protection Agency plays an active role, both when it comes to its engagement with stakeholders and exercising its oversight role.”) (102); **Bailiwick of Guernsey** (“Despite its relatively small size, the Authority plays an active role, both when it comes to its engagement with stakeholders and exercising its oversight role.”) (131) ; **Isle of Man** (“Taking into account of the size of the territory for which it has jurisdiction, the office of the Information Commissioner has been active in exercising its different functions.”) (161); **State of Israel** (“The PPA plays a very active role in the interpretation and enforcement of data protection law, both when it comes to its engagement with stakeholders and when exercising its oversight role.”) (194) ; Jersey (“Despite its relatively small size, the Authority plays an active role.”) (223) ; **New Zealand** (“Its annual reports show that the OPC deals with a number of investigations and complaints on an annual basis.”) (“[T]he OPC regularly engages with stakeholders”) (255). **Switzerland; Eastern Republic of Uruguay** (“The URCDP plays an active role in Uruguay and Latin America when it comes to exercising its oversight role, engaging with stakeholders and cooperating with other authorities at regional and international level.”) (321).

²² “The ‘essential equivalence’ standard requires that relevant legal frameworks binding public authorities in the third countries and territories concerned include minimum safeguards ensuring that such authorities cannot access data beyond what is necessary and proportionate to pursue legitimate objectives, and data subjects enjoy effective and enforceable rights against such authorities.” European Commission, *supra* note 1, at 4. The elements relevant for assessing whether a foreign system ensures an adequate level of protection have been further clarified in guidance adopted by the Article 29 Working Party and its successor, the European Data Protection Board. European Commission, *Working document on Adequacy Referential*, (2018), <https://ec.europa.eu/newsroom/article29/items/614108>. The format of the reviews align with four elements. For each review, section 2.3 is entitled “Access and use by [country or territory] public authorities for national security purposes. Section 2.3.1 is entitled “legal bases and applicable limitations/safeguards.” Section 2.3.3 is entitled “Further use of the information collected.” Section 2.3.3 is entitled “oversight.” Section 2.3.4 is entitled “Redress.”

safeguards from international commitments.²³ Conversely, Canada, Israel, and New Zealand, do not. Additionally, different specialized terms are used in the discussions of limitations and safeguards. For instance, the Faroe Islands use the criterion “likely to be relevant,”²⁴ Canada employs the term “reasonableness,”²⁵ while Guernsey, Jersey, and New Zealand introduce the notion of “economic well-being.”²⁶ Furthermore, the terms “necessity” and “proportionality” are used in New Zealand, Israel, and other reviews, but with various definitions.²⁷ In New Zealand, “necessity” implies being “more than useful, reasonable or desirable, although not necessarily indispensable”²⁸ while in Israel “necessity” requires evaluating “whether there are less intrusive means to achieve the same purpose and ensure that only the minimum data required for the legitimate purpose is processed.”²⁹

At times, the reviews also vary in strength as they provide different levels of specificity and depth in explanation. For instance, in the Canada and Switzerland reviews, the Commission relies on information of different specificity in its discussion of investigations. The Canada review is specific, mentioning that the supervisory authority resolved 287 complaints through standard investigations between 2018 and 2021, while the Switzerland review is not, mentioning only that “a number of investigations” were conducted and then citing four specific examples.³⁰ Additionally, while all the reviews mention that the supervisory authority is independent, the depth of explanation differs. The Uruguay review simply characterizes the supervisory authority as “independent” without further explanation.³¹ In contrast, reviews like those for Switzerland,³²

²³ For Argentina, the international commitments are ACHR, Convention 108, Convention 108+; For Andorra, the international commitments are ECHR, Convention 108 and the amending Protocol. For Faroe Islands, the international commitment is ECHR. For Guernsey, the international commitments are ECHR and Convention 108. For the Isle of Man, the international commitments are ECHR and Convention 108. For Jersey, the international commitments are ECHR and Convention 108. For Switzerland, the international commitments are ECHR and Convention 108+. For Uruguay, the international commitments are ACHR, Convention 108 and Convention 108+.

²⁴ European Commission, *supra* note 8, at 117.

²⁵ *Id.* at 82-94.

²⁶ *Id.* at 150 for Guernsey, at 242 for Jersey; at 275 for New Zealand.

²⁷ *Id.* at 82-94.

²⁸ *Id.* at 272.

²⁹ *Id.* at 210.

³⁰ For the Canada review, the reference to the number of investigations carried out can be found on page 65-66. The review first mentions a number of prominent investigations carried out such as the use of facial recognition tools by Clearview and the Facebook/Cambridge Analytica scandal and then goes on to mention the specific number of investigations carried out each year from annual reporting. For the Switzerland review, the reference to the number of investigations carried out can be found on page 288. It states that: “Since the adoption of the adequacy decision, the FDPIC has also carried out a number of investigations (e.g., into a data breach at a telecommunications provider, the use of GPS data by a music streaming service, the processing of data by a dating application 2214, data practices of insurance companies and financial institutions 2215, etc.)” European Commission, *supra* note 8.

³¹ The only mention of independence in the Uruguay decision is on page 320. (“The independent entity in charge of overseeing compliance with the data protection rules in Uruguay is the URCDP.”) *Id.*

³² “The FDPIC is appointed for a term of four years, which may be renewed twice (Article 44(1) FADP 2020). The FADP 2020 provides that the FDPIC exercises its duties independently, does not receive instructions from any authority or third party, has its own budget and appoints its own staff (Article 43(4)-(5) FADP 2020). The FDPIC may not have any other occupation, unless specifically authorised by the Federal Assembly, provided such other occupation does not compromise his/her independence and standing (Articles 46-47 FADP 2020.” *Id.* at 287.

Canada,³³ Argentina,³⁴ and Andorra³⁵ provide multiple reasons to support the independence of the supervisory authority. These differences highlight the Commission’s discretion in emphasizing certain topics while downplaying others.

Overall, the reviews maintain consistency at a high level: they adhere to a similar structure, discuss common characteristics and elements, and uniformly conclude that the country or territory remains compliant, meeting the standard of “essential equivalence” set by the GDPR. Nevertheless, variations emerge in the details. These include the frequency of references to the GDPR and international obligations, the level of pressure the Commission seemingly exerts, and the nature of the evidence supporting the conclusions. While variation is expected given the range of countries and territories reviewed, it nevertheless highlights that there is room for the Commission to exercise flexibility and discretion in an adequacy finding.

³³ “The Office consists of a Privacy Commissioner, assisted by three Deputy Commissioners. The Commissioner is appointed by the Governor in Council after approval by the Senate and House of Commons for a renewable term of seven years and may only be removed by the Governor in Council for cause on address of the Senate and House of Commons (Section 53(1)-(2) Privacy Act). This would require that the House of Commons adopts a motion for an Address requesting the removal of the Commissioner and that the Senate unites with the House in that Address. The Commissioner must engage exclusively in the duties of his/her office and may not hold any other public office for reward or engage in any other employment for reward (Section 54(1) Privacy Act.” *Id.* at 64.

³⁴ “Other than the former DNPDP, the AAIP benefits from a number of institutional and procedural safeguards for its independence. First, Law No. 27.275 on Access to Public information expressly stipulates that the AAIP is set up as an independent entity with functional autonomy within the President’s Chief of Staff Office. Second, as a result of the reform, the system for the designation of the head of the supervisory authority has been reinforced. While the Director of the AAIP is appointed by the Executive (the President of Argentina) for a five-year term that is renewable once, (s)he must be selected through an open and transparent public selection process with a public hearing. This new process has led to increased scrutiny of candidates for the function of Director of the AAIP, as illustrated by the procedure that has recently been followed for the selection of a new Director. The law furthermore requires that the Director may not have any interest in, or links to, matters under his or her own right under the conditions laid down in Law No. 25.188 on Ethics in the Exercise of the Civil Service, and (s)he may not have held an elected or advocate position in the last five years prior to the appointment. In addition, the position of Director is deemed incompatible with any other public or private activity other than part-time teaching. Third, the Director may only be removed by the Executive in agreement with Congress, and only for specific reasons that are listed exhaustively in the law, notably misconduct, criminal offences in the performance of their duties or for common crimes. Finally, the AAIP has its own budget granted under the National Budget Law.” *Id.* at 30-31.

³⁵ “The APDA is formed as a public authority with its own legal personality, independent of other public authorities, and with full capacity to operate (Article 46 Data Protection Act). It is composed of the Head of the APDA and two inspectors. Both the Head and the inspectors are appointed by the Parliament by a qualified (2/3) majority for a term of four years. The appointment may be renewed at the end of each period. The APDA is financed exclusively from the budget appropriations established each year for its functioning in the general budget of the Parliament (Article 47 Data Protection Act.” *Id.* at 7.