EXPLANATORY MEMORANDUM TO

THE DATA PROTECTION (LAW ENFORCEMENT) (ADEQUACY) (BAILIWICK OF JERSEY) REGULATIONS 2023

2023 No. 1221

1. Introduction

1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

2.1 These Regulations specify that the Bailiwick of Jersey ensures an adequate level of protection for transfers of personal data from UK competent authorities[1] to any relevant authority[2] in the Bailiwick of Jersey who is subject to the Data Protection (Jersey) Law 2018[3]. The effect of these Regulations is to enable the cross-border flow of data for law enforcement purposes without a controller[4] being required to use appropriate safeguards or special circumstances under Chapter 5 of Part 3 of the Data Protection Act 2018.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument (that is, the jurisdictions which the instrument forms part of the law of) is England and Wales, Scotland and Northern Ireland.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales, Scotland and Northern Ireland.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

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[1] Competent authority means (a) a person specified or described in Schedule 7 of the Data Protection Act 2018, and (b) any other person if and to the extent that the person has statutory functions for any of the law enforcement purposes.

[2] Relevant authority means any person based in a third country that has (in that country) functions comparable to those of a competent authority.

[3] An electronic copy of this legislation can be obtained from: https://www.jerseylaw.je/laws/current/Pages/15.240.aspx#_Toc83281153

[4] Controller means the competent authority which, alone or jointly with others determines the purposes and means of the processing of personal data or is the controller by virtue of section 32(2) of the Data Protection Act 2018.

6. Legislative Context

6.1 Part 3 of the Data Protection Act 2018 ("the 2018 Act") relates to law enforcement processing of personal data. Chapter 5 of that Part restricts transfers of personal data to a third country[5] or international organisation by UK competent authorities (i.e. law enforcement authorities) unless the three conditions in subsections 73(2), 73(3) and 73(4) are met *and,* if the personal data was originally obtained from an EU member state, then that member state has authorised the transfer. The conditions include (section 73(3)) that the transfer is based on adequacy regulations, there being appropriate safeguards, or special circumstances. The purpose of Chapter 5 is to ensure that the level of protection for data subjects provided by Part 3 of the 2018 Act is not undermined when their personal data is transferred overseas.

6.2 Section 73(3)(a) and 74A of the 2018 Act establish that personal data may be transferred by UK law enforcement authorities overseas without the need for further safeguards or specific authorisation if the transfer is based on adequacy regulations. The Secretary of State has the power to make adequacy regulations in respect of a third country, territory, or sector within a third country or international organisation under Part 3 of the 2018 Act (specifically section 74A) where the Secretary of State considers that it ensures an adequate level of protection of personal data. Section 74A (4) of the 2018 Act describes the elements that the Secretary of State must consider when making an assessment under Part 3 of the 2018 Act.

6.3 The Secretary of State also has the power to make adequacy regulations under section 17A of the 2018 Act (in relation to transfers made under the United Kingdom General Data Protection Regulation) but that power is not being exercised in these Regulations.

7. Policy background

What is being done and why?

7.1 These Regulations specify that the Bailiwick of Jersey ensures an adequate level of protection of personal data for transfers by UK competent authorities to relevant authorities in the Bailiwick of Jersey who are subject to the Data Protection (Jersey) Law 2018. These Regulations have been made because the Secretary of State, following an assessment by Home Office officials, considers that the Bailiwick of Jersey ensures an adequate level of protection of personal data, taking into account the elements set out in section 74A (4) of the 2018 Act. Competent authorities in the UK can rely on these Regulations to transfer personal data freely, without further safeguards such as those set out in sections 75 or 76 of the 2018 Act, to relevant authorities in the Bailiwick of Jersey that are subject to the Data Protection (Jersey) Law 2018. The conditions in section 73 of the 2018 Act would still apply, as will the general data protection principles set out in Chapter 1 of the 2018 Act.

7.2 Home Office officials engaged with counterparts in the Bailiwick of Jersey to assess the Bailiwick of Jersey's data protection laws and practices that apply to law enforcement authorities in the Bailiwick of Jersey, who are processing personal data for law enforcement purposes. As part of this assessment, Home Office officials also assessed the rule of law, respect for human rights, the practical implementation of relevant laws governing the protection of personal data in the law enforcement

[5] A third country is a country or territory outside the United Kingdom as defined by section 33 of the Data Protection Act 2018.

context, the existence and functioning of an independent regulator, the rules for onward transfer of personal data to another third jurisdiction and relevant international commitments.

7.3 Home Office officials assessed the Data Protection (Jersey) Law 2018 as the Bailiwick of Jersey's comprehensive data protection framework that covers the processing of personal data by law enforcement authorities for law enforcement purposes. The Data Protection (Jersey) Law 2018 is the primary data protection legislation governing privacy and data security in the Bailiwick of Jersey and applies broadly to the general processing of personal data. The Data Protection (Jersey) Law 2018 as modified by Schedule 1 of the Data Protection (Jersey) Law 2018, applies to a competent authority processing personal data for a law enforcement purpose. If there is no modification contained in Schedule 1 then the articles of the Data Protection (Jersey) Law 2018 apply as written. The Data Protection (Jersey) Law 2018 applies equally to any data subject (including a foreign national) whose personal data is processed by a controller established in the Bailiwick of Jersey or any Bailiwick of Jersey resident whose personal data is processed outside of the Bailiwick. The Data Protection (Jersey) Law 2018 establishes core data protection principles of lawful and fairness, purpose limitation, data minimisation, accuracy, storage limitation and integrity and confidentiality.

7.4 The supervisory authority for data protection in the Bailiwick of Jersey is the Authority acting through the Jersey Office of the Information Commissioner ("JOIC"). The Authority is established by parts 1 and 2 of the Data Protection Authority (Jersey) Law 2018. The Data Protection Authority (Jersey) Law 2018 gives the JOIC responsibility for the oversight and regulation of processing activities carried out by all organisations within the material and territorial scope of the Data Protection (Jersey) Law 2018. This includes law enforcement processing falling within the Data Protection (Jersey) Law 2018, including both access to and use of personal data by law enforcement competent authorities. The independence of the JOIC is explicitly mandated under article 12 of the Data Protection Authority (Jersey) Law 2018, requiring the JOIC to act independently and free from external influence. The JOIC have demonstrated their political independence from the Bailiwick of Jersey's government called the States of Jersey. There is a public record of the actions taken by the JOIC to enforce the data protection provisions provided by the Data Protection Authority (Jersey) Law 2018.

7.5 In addition to the clear evidence of effective independent supervision and oversight mechanisms in place, there are redress options available to UK data subjects, that enable infringements to be reported, investigated, and sanctioned. There are administrative and judicial remedies available to the UK data subject to access their personal data and ensure that personal data is accurate and kept only for as long as necessary, resulting in enforceable data subject rights. The Data Protection (Jersey) Law 2018 restricts onward transfers of personal data from the Bailiwick of Jersey through imposing conditions which must be satisfied when transferring personal data outside of the Bailiwick of Jersey.

7.6 There is a clear need established within the Bailiwick of Jersey's data protection framework, for relevant authorities to apply the principles of necessity and proportionality when interfering with the right to privacy and protection of personal data of individuals whose personal data are transferred from the UK to the Bailiwick of Jersey.

Explanations

What did any law do before the changes to be made by this instrument?

7.7 In the absence of adequacy regulations, UK competent authorities are currently required to use appropriate safeguards or special circumstances under section 75 or section 76 of the 2018 Act to transfer personal data to the Bailiwick of Jersey for law enforcement purposes.

Why is it being changed?

7.8 These Regulations provide UK competent authorities a simple mechanism for transferring personal data to law enforcement authorities in the Bailiwick of Jersey for law enforcement purposes and remove the need for UK competent authorities to put in place further safeguards to transfer such data. These Regulations ensure the transfer of data from the UK to the Bailiwick of Jersey for law enforcement purposes is on firm legal footing and ensures this vital cross-border transfer continues with greater confidence in the protection of personal data by relevant authorities in the Bailiwick Jersey.

What will it now do?

7.9 These Regulations specify that the Bailiwick of Jersey ensures an adequate level of protection for transfers of personal data from UK competent authorities to any relevant authority (i.e. law enforcement authority) in Jersey who is subject to the Data Protection (Jersey) Law 2018. The effect of these Regulations is to allow such transfers of personal data, without a controller or processor being required to identify further safeguards.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 These Regulations are not consolidation regulations.

10. Consultation outcome

10.1 In accordance with section 182(2) of the 2018 Act, the Secretary of State is required to consult with the Information Commissioner and such other persons as the Secretary of State considers appropriate before making regulations. The Information Commissioner has been formally consulted by the Home Office for their opinion on these Regulations. The Information Commissioner will publish their opinion once these Regulations have been laid in Parliament.

11. Guidance

11.1 Relevant information that supports UK competent authorities undertaking personal data transfers to the Bailiwick of Jersey in reliance of these Regulations will be made available on the Information Commissioner's Office website.

12. Impact

12.1 There is no impact on business, charities, or voluntary bodies.

12.2 There is no impact on the public sector. There are no familiarisation costs for UK competent authorities and no action is required to benefit from these Regulations.

12.3 A full Impact Assessment has not been prepared for this instrument because no additional costs or benefits are imposed on businesses or the public sector. An Economic Note has been prepared outlining this in greater detail and is annexed to this explanatory memorandum.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is that these Regulations must be monitored and kept under periodic review, at intervals of not more than four years[6]. During this time, the Secretary of State may also amend or revoke these Regulations and must do so if the Secretary of State becomes aware that the third country or sector therein no longer ensures an adequate level of protection.

15. Contact

15.1 Melvin Babu at the Data and Identity Directorate of the Home Office, Melvin.Babu@homeoffice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Krisztina Katona, Deputy Director for Data Policy, at the Home Office can confirm that this explanatory memorandum meets the required standard.

15.3 Chris Philp, Minister of State at the Home Office can confirm that this explanatory memorandum meets the required standard.

[6] Section 74B of the Data Protection Act 2018.