

EXPLANATORY MEMORANDUM TO

THE DATA PROTECTION, PRIVACY AND ELECTRONIC COMMUNICATIONS (AMENDMENTS ETC) (EU EXIT) (NO. 2) REGULATIONS 2019

2019 No. 485

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Digital, Culture, Media and Sport (DCMS) and is laid before Parliament by Act.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument uses powers under the EU (Withdrawal) Act 2018 (EUWA) to amend the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 (S.I. 2019/419) (“the Main Regulations”) in order to correct deficiencies in EU-derived data protection legislation as a result of the withdrawal of the UK from the EU. This will ensure that the legal framework for data protection within the UK continues to function correctly after exit day.

Explanations

What did any relevant EU law do before exit day?

- 2.2 The General Data Protection Regulation (GDPR) applies directly across all EU Member States, including the UK, until Exit Day. It regulates the processing of personal data by data controllers and processors with an establishment in the EU; and by those outside the EU which are processing data about individuals who are in the EU for the purposes of providing them with goods and services or monitoring their behaviour.
- 2.3 The Data Protection Act (DPA) 2018 supplements the GDPR within the UK by exercising areas for derogation within the GDPR. The GDPR is direct EU legislation that will form part of UK domestic law under the EUWA from Exit Day. Under the GDPR, the European Commission has the power to make adequacy decisions in relation to third countries and there are several such adequacy decisions currently in force.
- 2.4 One of the adequacy decisions the Commission has made is a partial adequacy decision in relation to transfers to the USA under the Privacy Shield Framework (“Privacy Shield”). The decision allows personal data to be transferred from the EU to a company in the United States which is on the Privacy Shield list maintained by the U.S. Department of Commerce. In order to be added to the Privacy Shield list, a US company must commit to comply with Privacy Shield and must have a privacy policy which complies with a set of principles (“the Privacy Shield Principles”) on the protection of personal data and safeguards. The U.S. Department of Commerce is responsible for managing and administering the Privacy Shield.

Why is it being changed?

- 2.5 The Main Regulations transfer the European Commission's powers in respect of making adequacy decisions to the Secretary of State, by enabling the Secretary of State to make "adequacy regulations", and revoke the current European Commission adequacy decisions which would otherwise form part of retained EU law. However, the Main Regulations make transitional provisions with the intention of enabling personal data to continue to flow from the UK to jurisdictions subject to an EU adequacy decision immediately before Exit Day, including the European Commission's adequacy decision in relation to the Privacy Shield.
- 2.6 In order to reflect the arrangements made for personal data transferred from the UK to Privacy Shield companies in the US to continue to be protected under Privacy Shield, an amendment is needed to the Main Regulations to correct a deficiency in the retained EU law and ensure it operates effectively after EU exit.
- 2.7 Following the UK's withdrawal from the EU, Privacy Shield companies will be required to update their privacy policies in order to continue receiving personal data from the UK in reliance on the Privacy Shield.
- 2.8 The instrument amends the Main Regulations to provide that personal data from the UK can only be transferred to Privacy Shield companies in reliance on Privacy Shield if the US Privacy Shield company has fulfilled this requirement.

What will it now do?

- 2.9 The instrument amends the transitional provisions of the Main Regulations to provide that transfers of personal data from the UK in reliance on Privacy Shield can only take place after 29 March 2019 in a no deal scenario, if the certified Privacy Shield company has a privacy policy which includes a commitment to comply with the Privacy Shield Principles in relation to personal data transferred from the UK. This maintains consistency with arrangements prior to the UK's withdrawal from the EU.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument was presented to the Sifting Committees for consideration on 18 February 2019. On 5 March 2019, the Sifting Committees agreed that the negative procedure was appropriate for the instrument. The Main Regulations, which this instrument amends, were made on the 28 February 2019.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is all of the United Kingdom.
- 4.2 The territorial application of this instrument is all of the United Kingdom.

5. European Convention on Human Rights

5.1 The Minister of State for the Department for Digital, Culture, Media and Sport, Margot James MP, has made the following statement regarding Human Rights:

“In my view the provisions of the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) (No. 2) Regulations 2019 are compatible with the Convention rights.”

6. Legislative Context

6.1 This instrument amends the transitional provisions under the Main Regulations which relate to the Privacy Shield. This is required to provide that transfers of personal data from the UK in reliance on the Privacy Shield can only take place after 29 March 2019 in a no deal scenario, if the certified Privacy Shield company has a privacy policy which includes a commitment to comply with the Privacy Shield Principles in relation to personal data transferred from the UK.

7. Policy background

What is being done and why?

- 7.1 The Government is seeking to use powers under section 8 of the European Union (Withdrawal) Act 2018 in order to address deficiencies arising from the withdrawal of the UK from the EU.
- 7.2 The Main Regulations permit data transfers to the US companies under the Privacy Shield by generally preserving the effect of the EU’s adequacy decision in respect of Privacy Shield. To ensure the continuation of Privacy Shield in respect of UK data transfers the U.S. Department of Commerce has put arrangements in place that continue the current protections for UK data subjects under the Privacy Shield framework in a no deal scenario. Under the arrangements, in order for the Privacy Shield protections to apply, there is a requirement that participant Privacy Shield companies have updated their public commitments to comply with Privacy Shield to include the UK.
- 7.3 This instrument is intended to reflect those arrangements by providing that UK personal data transfers can only take place to Privacy Shield companies whose privacy policies include a commitment to comply with the Privacy Shield Principles where the personal data is transferred from the UK
- 7.4 The amendments will allow UK companies to continue to transfer personal data to the US under the Privacy Shield scheme, provided that the Privacy Shield company to which they transfer the data has taken action by updating its privacy policy to refer to the UK.
- 7.5 This will ensure the continued application of Privacy Shield to UK personal data flows to the US in a no deal scenario and provide the necessary commercial and legal certainty for UK businesses. It will maintain the high standards of data protection for UK personal data transfers to the US and ensure UK data subjects continue to have access to the relevant redress mechanisms and oversight provided for under the Privacy Shield Framework.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument is being made using the power in section 8 of the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum

9. Consolidation

9.1 There is no current plan to consolidate the legislation amended by these Regulations.

10. Consultation outcome

10.1 HMG has not conducted consultations as this instrument makes no significant policy changes.

11. Guidance

11.1 The Information Commissioner's Office (ICO) has published [guidance](#) to support organisations and data subjects in understanding the implications of the exiting the EU on the UK's domestic data protection framework.

11.2 The U.S. Department of Commerce has published [guidance](#) to US Privacy Shield organisations on how personal data can continue to flow from the UK to the US under the Privacy Shield in a no deal scenario.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies arising from this instrument. This instrument will ensure that, post-EU exit, personal data can continue to be transferred from the UK to the US in reliance on the Privacy Shield with the current high standards of protection, including continued access to redress mechanisms and oversight for UK data subjects.

12.2 There is no, or no significant, impact on the public sector.

12.3 An impact assessment has not been prepared for this instrument because there is no, or no significant, impact on business, charities or voluntary bodies.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses. The instrument aims to ensure personal data that flows from the UK to Privacy Shield companies in the US continues to have the same protections and access to redress mechanisms currently existing under the Privacy Shield.

13.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), and to support business readiness, the US government and the ICO published guidance to US and UK businesses on Thursday 20 December concerning continued flows of personal data from the UK to the US under the Privacy Shield in a no deal scenario.

13.3 The only cost that UK business will incur is a small amount of additional procedure to check that their US counterpart has updated their privacy policy to include the UK

under their Privacy Shield commitments. This only requires the UK business to look at their US counterparts' privacy policy online.

- 13.4 This instrument means that the Privacy Shield framework will continue to be available to the numerous UK small businesses who use it to facilitate their continued business relationships with US firms, where there are protections in place for the personal data which is transferred. Moreover, both the UK and US share an interest in Privacy Shield's ongoing availability to facilitate the cross-border data transfers that underpin our [\\$231.9 billion](#) annual bilateral trade and investment relationship.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is the government will include this in future reviews of the UK's data protection framework. Noting that the changes made by this instrument are limited to ensuring the UK's data protection legislation will be operable on Exit Day. The government will review the need for further changes to the UK data protection framework and bring further legislative proposals forward as necessary to ensure it remains effective, protects data subjects' rights, ensures that data processing can be processed where it is in the public interest and that data can be shared appropriately with the UK's international partners.
- 14.2 As this instrument is made under the EU Withdrawal Act 2018, no review clause is required.

15. Contact

- 15.1 Jason Cotton at the Department for Digital, Culture, Media and Sport. Telephone: 020 7211 6430 or email: jason.cotton@culture.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 James Snook (Acting) Director at the Department for Digital, Culture, Media and Sport can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Margot James MP, Minister of State for the Department for Digital, Culture, Media and Sport, can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Sifting statement

- 1.1 The Minister of State for the Department for Digital, Culture, Media and Sport, Margot James MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) (No.2) Regulations 2019 should be subject to annulment in pursuance of a resolution of either House of Parliament (i.e. the negative procedure)”.

- 1.2 This is the case because: it does not meet the criteria for an affirmative procedure in the EUWA and this instrument does not alter the underlying UK policy on allowing personal data flows to US companies under Privacy Shield where the Privacy Shield protections are in place.

2. Appropriateness statement

- 2.1 The Minister of State for the Department for Digital, Culture, Media and Sport, Margot James MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) (No.2) Regulations 2019 does no more than is appropriate”.

- 2.2 This is the case because: this instrument simply ensures that UK personal data flows to the US in reliance on Privacy Shield can only continue post EU exit where the Privacy Shield protections are in place.

3. Good reasons

- 3.1 The Minister of State for the Department for Digital, Culture, Media and Sport, Margot James MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action”.

- 3.2 These are: because of the necessity of correcting deficiencies arising from the UK’s withdrawal from the European Union. These are explained in section 7 under Policy background of this Explanatory Memorandum. It will ensure the continued application of Privacy Shield to UK personal data flows to the US only where the Privacy Shield protections are in place in a no deal scenario, and provide the necessary commercial and legal certainty for UK businesses.

4. Equalities

- 4.1 The Minister of State for the Department for Digital, Culture, Media and Sport, Margot James MP, has made the following statement:

“The instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts”.

- 4.2 The Minister of State for the Department for Digital, Culture, Media and Sport, Margot James MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to the instrument, I, Margot James, have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.”

5. Explanations

- 5.1 The explanations statement has been made in section 2 of the main body of this Explanatory Memorandum.