

EXPLANATORY MEMORANDUM TO
THE OVERSEAS PRODUCTION ORDERS AND REQUESTS FOR INTERCEPTION
(DESIGNATION OF AGREEMENT) REGULATIONS 2020

2020 No. 38

1. Introduction

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

2. Purpose of the instrument

- 2.1 These regulations are intended to ensure that the Agreement between Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America on Access to Electronic Data for the Purpose of Countering Serious Crime (“the Agreement”) is designated under both the Crime (Overseas Production Orders) Act 2019 (“the 2019 Act”) to enable UK overseas production orders; and the Investigatory Powers Act 2016 (“the 2016 Act”) to allow a UK telecommunications operator to lawfully intercept the communications of an individual at the request of the United States of America when such a request is made in compliance with the requirements of the Agreement.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None

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 the whole of the United Kingdom of Great Britain 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.

6. Legislative Context

- 6.1 The 2019 Act grants UK law enforcement agencies and prosecuting authorities the power to apply for and obtain electronic communications content data directly from service providers (those who create, process, communicate or store electronic communications data) in an evidential format for the purposes of criminal investigations and prosecutions. Such orders may only be used when permitted under

a designated international co-operation arrangement (a “relevant treaty”) between the UK and the country whose jurisdiction applies to the data sought.

- 6.2 The 2019 Act created a new overseas production order to obtain this type of electronic communications data which has extra-territorial effect, meaning that these orders are granted by UK courts exerting jurisdiction over evidence outside the UK. This jurisdiction may only be asserted where a relevant international co-operation arrangement, to which the UK is a party, permits this to happen and which has been designated for the purposes of the 2019 Act.
- 6.3 Article 2(a) of these Regulations designates the Agreement as a relevant treaty under the 2019 Act. This will enable overseas production orders to be made in respect of data governed by the laws of the United States of America.
- 6.4 The 2016 Act provides a legal framework for the use (by the security and intelligence agencies, law enforcement and other public authorities) of investigatory powers to obtain different types of data, including communications data, content, and secondary data for investigative purposes. These powers cover the interception of communications, the retention and acquisition of communications data, and equipment interference for obtaining communications and other data.
- 6.5 Section 52 of the 2016 Act deals with the issue of interception when a request is made from overseas and sets out the conditions which need to be met in order that a telecommunications operator in the UK may intercept the communications of an individual, at the request of another country. One such condition is that the interception is carried out in response to a request made in accordance with a relevant international agreement by the competent authorities of a country or territory outside the United Kingdom. Another condition is that the individual must be, or believed to be, outside the UK.
- 6.6 Article 2(b) of these Regulations designates the Agreement as a relevant international agreement so allowing a telecommunications operator to intercept the communications of an individual outside of the territorial UK, at the request of the United States of America when the request is made in compliance with the provisions of the Agreement.

7. Policy background

What is being done and why?

- 7.1 Enabling cross-border access to this information has been a high priority for the UK Government and UK law enforcement and national security agencies for a number of years. In recognition of this challenge, the UK prime minister in 2014 appointed Sir Nigel Sheinwald as a special envoy tasked with working with the US government to establish data access arrangements. The need for improved access to data also formed one of the recommendations made by Lord Anderson QC in 2016 in his report entitled “A Question of Trust” where he advised the government to:

“take a lead in developing and negotiating a new international framework for data-sharing among like-minded democratic nations.”

- 7.2 The Agreement is the first of these cross-border data access agreements. When brought into force, it will enable UK national security, law enforcement and prosecution agencies to make requests, using an appropriate authorised UK order,

directly to the US CSP who holds the data, providing the requirements in the Agreement are met. This will remove the barriers in US law to US CSPs acting upon UK orders.

- 7.3 The Agreement will facilitate the reduction in the possibility of investigations or prosecutions being delayed or abandoned due to an inability to access to data. It will speed up and make more effective the prevention, detection, investigation and prosecution of serious crime including child sexual exploitation and abuse (CSEA) and terrorism. It will also improve the speed in eliminating people from an investigation. A benefit for the US is a reduction in the burden placed on US authorities by the cumbersome mutual legal assistance (MLA) process.
- 7.4 The Agreement will also enable US law enforcement agencies to make requests directly to UK CSPs for data. However, it is anticipated that the US will make considerably less use of the Agreement as fewer UK CSPs offer their consumer services on a global basis.
- 7.5 The Agreement has taken over 4 years to negotiate with commitment from UK Prime Ministers and US Presidents to enter into an Agreement. It has required both the US and the UK to introduce changes to legislation to remove legislative barriers as well as agree the terms of the Agreement itself. Hence significant effort has been expended by both sides to conclude this Agreement which is a testament to the value the UK and US attach to this Agreement in obtaining access to data which may not otherwise be available.
- 7.6 The US enabling legislation, the Clarifying Lawful Overseas Use of Data (CLOUD) Act, allows US CSPs to comply with requests by another country for content data, provided an Agreement is in place. It was approved by the US President on 23 March 2018. The UK also passed legislation to address barriers in UK law:
- 7.7 The Investigatory Powers Act 2016 included a power in section 42 for a warrant to be served on a person outside the United Kingdom. Section 85 of that Act provided that an authorisation made under Part 3 of the Act may relate to conduct outside of the UK and a notice may be given under the Act to a person outside the UK. The 2016 Act also removes the barrier to UK CSPs responding to requests from another country for data, providing an international agreement is in place between the UK and the other country.
- 7.8 The Crime (Overseas Production Orders) Act 2019 provides UK law enforcement and prosecution agencies with the power to apply to UK courts for overseas production orders with extra-territorial effect providing there is an international agreement in place between the UK and the other country,

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

- 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 Not applicable.

10. Consultation outcome

- 10.1 This Agreement covers international relations between the UK and US which is not a devolved power. However, the Agreement does affect powers which are devolved in that it provides law enforcement and prosecution authorities in all parts of the UK with the right to make requests under the Agreement, providing they have met the requirements under the Agreement. The scope of the Agreement does not cover any British Overseas Territories or Crown Dependencies.
- 10.2 HMG have worked closely with the telecommunications industry in both the UK and US on the desirability and practicality of implementing the Agreement, and they have been supportive. HMG officials will continue to engage with them throughout the implementation period.

11. Guidance

- 11.1 Guidance is not required. However, Court rules have been drafted.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no significant impact on the public sector.
- 12.3 An impact assessment has not been prepared for this instrument because the volume of incoming requests from the US is very low, and the instrument does not make any change to the function of the primary legislation. The Crime (Overseas Production Orders) Act does not impact UK businesses.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 No specific action is proposed to minimise regulatory burdens on small businesses.
- 13.3 The basis for the final decision on what action to take to assist small businesses was predicated on the overall low-level impact on business as set out in 12.1

14. Monitoring & review

- 14.1 The Agreement is intended to improve law enforcement and the security agencies' access to data in the US jurisdiction for the prevention, detection, investigation and prosecution of serious crime. Article 12 of the Agreement requires that within one year of the Agreement's entry into force by exchange of diplomatic letters, and periodically thereafter, both Parties will review the performance and compliance of each other to the terms of the Agreement. Article 17 of the Agreement limits the Agreement's period in force to a five-year period, at which point it will require renewal by both Parties. The Investigatory Powers Commissioner will provide oversight of the operation of the Agreement as part of his/her duties under part 8 of the Investigatory Powers Act 2016.

15. Contact

- 15.1 Aled Lloyd Owen at the Home Office Telephone: 020 7035 6189 or email: aled.owen3@homeoffice.gov.uk can be contacted with any queries regarding the instrument.

- 15.2 Jonathan Emmett, Deputy Director for Investigatory Powers, at the Home Office can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Minister of State for Security and Economic Crime, Rt. Hon. Brandon Lewis CBE MP at the Home Office can confirm that this Explanatory Memorandum meets the required standard.