

EXPLANATORY MEMORANDUM TO
THE DATA PROTECTION (ADEQUACY) (UNITED STATES OF AMERICA)
REGULATIONS 2023

2023 No. 1028

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Science, Innovation and Technology (“DSIT”) and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

- 2.1 These Regulations specify the United States of America as a country which provides an adequate level of protection of personal data for certain transfers for the purposes of Part 2 of the Data Protection Act 2018 (“the 2018 Act”) and the UK GDPR (defined in section 3 of the 2018 Act). This means that personal data which will be in the scope of the EU-US Data Privacy Framework Principles can be transferred to persons in the United States of America who participate in the UK Extension to the EU-US Data Privacy Framework without the need for any specific authorisation. The effect of these Regulations is to allow such transfers of personal data, without a controller or processor being required to use appropriate safeguards or a derogation under Article 46 or 49 of the United Kingdom General Data Protection Regulation (“the UK GDPR”).

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 These Regulations extend and apply to 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.

6. Legislative Context

- 6.1 Chapter V of the UK GDPR restricts transfers of personal data to a third country¹ or international organisation unless done in accordance with Articles 45, 46 or 49 of the UK GDPR. The purpose of Chapter V is to ensure that the level of protection for data subjects provided by the UK GDPR is not undermined when their personal data is transferred overseas.

¹ A ‘third country’ is a country or territory outside the United Kingdom as defined in Article 4(27) of the UK GDPR.

6.2 Article 45(1) of the UK GDPR establishes that personal data may be transferred overseas without the need for further safeguards or authorisation (for example, International Data Transfer Agreements) 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, a territory or sector within a third country, or an international organisation, under Part 2 of the Data Protection Act 2018 (“the 2018 Act”) (specifically section 17A) where the Secretary of State considers that it ensures an adequate level of protection of personal data. The Secretary of State also has the power to make adequacy regulations under section 74A of the 2018 Act (in relation to transfers made under Part 3 of that Act) but that power is not being exercised in these Regulations. Article 45(2) of the UK GDPR describes the elements that the Secretary of State must consider when making an assessment under section 17A of the 2018 Act.

7. Policy background

What is being done and why?

- 7.1 These Regulations specify that the Secretary of State considers that the US ensures an adequate level of protection of personal data for certain transfers of personal data. This means that personal data which will be in the scope of the EU-US Data Privacy Framework Principles can be transferred to organisations in the United States of America that participate in the UK Extension to the EU-US Data Privacy Framework. These Regulations have been made because the Secretary of State, following an assessment by DSIT officials, considers that the US ensures an adequate level of protection of personal data for certain transfers, taking into account the elements set out in Article 45(2) of the UK GDPR. Controllers and processors can rely on these Regulations to transfer personal data freely, without further safeguards such as those set out in Articles 46 and 49 of the UK GDPR, to certified US organisations.
- 7.2 DSIT officials have been working closely with counterparts in the US and relevant stakeholders such as the Information Commissioner's Office to build a detailed, evidence based technical assessment of the US’ data protection laws and practices, including international and domestic commitments to the protection of personal data, the rule of law and respect for human rights; practical implementation and oversight of specific relevant legislation and frameworks governing the protection of personal data, onward transfers and public authority access to personal data, including law enforcement and national security laws and practices.
- 7.3 The UK assessment has focused on the UK Extension to the EU-US Data Privacy Framework, a self-certification scheme for US organisations administered by the US Department of Commerce. US organisations who wish to certify to the UK Extension to the EU-US Data Privacy Framework must self-certify annually to the US Department of Commerce confirming that they agree to adhere to EU-US Data Privacy Framework Principles. These constitute a detailed set of requirements on how to protect and process data, based on privacy principles such as notice, choice, access, and accountability for onward transfers (both domestically and internationally). Only US organisations subject to the jurisdiction of the US Federal Trade Commission or the US Department of Transportation are eligible to participate in the UK Extension to the EU-US Data Privacy Framework. Both provide effective enforcement and are empowered to address infringements and violations of the UK Extension to the EU-US Data Privacy Framework.

- 7.4 The US has a robust and pragmatic framework of laws and practices in place to manage interferences with individuals' privacy rights for the purposes of law enforcement and national security. This includes the recently adopted Executive Order 14086 'Enhancing Safeguards for US Signals Intelligence Activities' (EO 14086), and the Regulation on the Data Protection Review Court issued by the US Attorney General at the same time.
- 7.5 DSIT's full analysis of the US framework of laws and practices and its assessment of the UK Extension to the EU-US Data Privacy Framework will be made publicly available on GOV.UK. This sets out the reasoning as to why the Secretary of State considers the US to provide an adequate level of protection for personal data for certain transfers of personal data.

Explanations

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

- 7.6 In the absence of adequacy regulations, UK controllers and processors are currently required to use appropriate safeguards or derogations under Articles 46 and 49 of the UK GDPR to transfer personal data to the US.

Why is it being changed?

- 7.7 These Regulations will provide UK controllers and processors with the most straightforward mechanism for transferring personal data to certified US organisations, by removing the requirement for them to put in place further safeguards such as contractual agreements to transfer such data. These Regulations will provide UK consumers with greater confidence in the protections their personal data will have when transferred to certified US organisations. These Regulations will make it easier for UK controllers and processors, and therefore British businesses, to connect with US markets and provide opportunities to attract greater investment as a result of the Regulations and reduce the current levels of resources required to transfer personal data to the US.

What will it now do?

- 7.8 These Regulations will allow UK controllers and processors to transfer personal data to a person in the United States of America who is indicated on the Data Privacy Framework List as participating in the UK Extension to the EU-US Data Privacy Framework and which will be subject to the EU-US Data Privacy Framework Principles on receipt by that person without the need for further safeguards set out in Articles 46 and 49 of the UK GDPR.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not 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 Secretary of State for their views on these Regulations.

11. Guidance

11.1 Relevant information that supports UK controllers and processors undertaking personal data transfers to the US in reliance on these Regulations will be made available on the Information Commissioner's Office website and on GOV.UK. The US has also published guidance on the dedicated Data Privacy Framework website. To note, small familiarisation costs are estimated which represent the wage costs of reading any new guidance to understand what businesses are no longer required to do, as well as verifying if US organisations are on the Data Privacy Framework List.

12. Impact

12.1 A full Impact Assessment has been submitted to the Regulatory Policy Committee (RPC) for their review. The full Impact Assessment will be published in due course on the legislation.gov.uk website once their response has been received.

12.2 The United States is a vital trading partner for the UK when it comes to data-enabled exports.² In 2022, 89% of the UK's service exports to the US were data-enabled, amounting to £99bn and representing about 32% of the UK's total global data-enabled services exports. This figure is expected to grow with a data bridge, by removing the need for alternative transfer mechanisms for transfers to certified organisations in the US.

12.3 In addition to trade, the data bridge for the UK Extension to the EU - US Data Privacy Framework will be beneficial to political, scientific and research relationships between the UK and the US, potentially leading to onward innovation benefits.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 The effect of these Regulations is to remove barriers to certain transfers of personal data to the US. Hence, SMEs will not be required to spend resources on appropriate safeguards to permit personal data flows to certified US organisations. UK SMEs will be one of the most significant beneficiaries of these Regulations.

14. Monitoring & review

14.1 Under the 2018 Act these Regulations must be monitored and kept under periodic review, at intervals of not more than four years.³ 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.

² Data-enabled services trade is estimated by applying the *United Nations Conference on Trade and Development* (UNCTAD) definition of a digitally-deliverable services sector to ONS statistics on UK trade in services by sector and country, [UK trade in services: service type by partner country, non-seasonally adjusted](#).

³ Section 17B(1) of the 2018 Act.

15. Contact

- 15.1 Sam Roberts, International Data Flows Unit, at the Department for Science, Innovation and Technology Telephone: 07794 294 018 or email: sam.roberts@dsit.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 James Snook, Director, Data Policy, at the Department for Science, Innovation and Technology can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Michelle Donelan, Secretary of State at the Department for Science, Innovation and Technology can confirm that this Explanatory Memorandum meets the required standard.