

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. The analysis underpinning this assessment and setting 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 to US has been published on GOV.UK.²
- 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. In other words, the UK Extension is a programme administered and operated by the US Department of Commerce, as an extension of the EU-US Data Privacy Framework.³

²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1185427/analysis_of_the_uk_extension_to_the_eu-us_data_privacy_framework.pdf

³ It is not an international agreement in legal terms.

- 7.4 The EU and US agreed to bring into force the EU-US Data Privacy Framework after engagement with the US over the course of several years, and it was brought into effect on 10 July 2023. The EU-US Data Privacy Framework replaced the previous EU-US Privacy Shield Framework, which the UK had previously participated in while we were an EU Member State. The UK Department for Science, Innovation and Technology (previously Department for Digital, Culture, Media and Sport) had been in parallel discussions with the US Department of Commerce for the past few years about ensuring protections for UK personal data transfers to the US. Discussions between the EU and US and between the UK and US took place in parallel but were independent of each other.
- 7.5 As a result of the UK-US discussions, the US agreed to extend the protections of the EU-US Data Privacy Framework to transfers of personal data from the UK - this represents the 'UK Extension to the EU-US Data Privacy Framework'. Relying on an extension to the EU-US Data Privacy Framework for transatlantic data transfers, rather than a separate framework approach, reduces the administrative and compliance burden for US organisations certifying to the framework. These Regulations for the UK Extension are distinct from the EU's own adequacy decision and do not directly rely on the EU to have an adequacy decision in place for the US in order to continue to function.
- 7.6 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
- 7.7 The EU-US Data Privacy Framework Principles (including the Supplemental Principles and Annex I of the Principles) are requirements in relation to data protection which organisations who certify to the EU-US Data Privacy Framework (and the UK Extension to it) commit to abide by. These principles are the 'Notice principle', 'Data integrity and purpose limitation principle', 'Choice principle', 'Security principle', 'Access principle', 'Recourse, enforcement and liability principle', and 'Accountability for onward transfer principle'. They cover how an organisation collects, processes, and discloses personal data, and include matters such as the information that must be given to data subjects and the taking of appropriate security measures to protect personal data. There are also Supplemental Principles which cover additional matters such as protections for journalists and the press, due diligence and audit activities, and secondary liability for companies acting on behalf of others (e.g. telecommunications companies). A link to a copy of the EU-US Data Privacy Framework Principles, and a further link to the list of certified US organisations, can be found footnoted within these Regulations.⁴ 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.
- 7.8 The details of the UK Extension and how it will be operated by the US Department of Commerce and other relevant US bodies are set out in the letters provided by the US Department of Commerce (Annexes B and C, to the analysis linked in paragraph 7.1),

⁴ <https://www.gov.uk/government/publications/uk-us-data-bridge-supporting-documents>

the US Federal Trade Commission (Annex D) and US Department of Transportation (Annex E).⁵ These letters contain commitments and explanations from the US government and Federal Trade Commission concerning the enforcement and extension of the protections of the EU-US Data Privacy Framework to personal data transfers from the UK under the UK Extension.⁶

- 7.9 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.

Explanations

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

- 7.10 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?

- 7.11 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?

- 7.12 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.

⁵ <https://www.gov.uk/government/publications/uk-us-data-bridge-supporting-documents>, see annexes B to E.

⁶ See footnotes 2 and 3 of Annex C, 'International Trade Administration (Department of Commerce) letter from Under-Secretary for International Trade Marisa Lago' (13 July 2023): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1185186/annex_c_ita_letter_uk_extension_to_the_eu-us_dpf.pdf

9. Consolidation

9.1 These Regulations are not consolidation regulations.

10. Consultation outcome

- 10.1 No formal public consultation process has taken place in relation to these changes. Given the technical nature of the assessment, consultation with the Information Commissioner Office was considered particularly important.
- 10.2 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 opinion on these Regulations, which has been published on the Information Commissioner's Office website.⁷
- 10.3 Additionally, engagements have taken place with the International Data Transfers Expert Council, consisting of experts in a range of fields relevant to international data transfers who provide expertise on the design and implementation of international data transfers policy.⁸
- 10.4 The Department has also issued several public statements in relation to the progress made in the development and implementation of these Regulations since 2021, in-line with the Department's stated approach to be transparent and make information publicly available in relation to our stated aims and objectives to facilitate the international flow of data, whilst maintaining high standards of protection for personal data⁹. The UK's overall approach to facilitating the international flow of data was also included under Mission 5 of the UK's National Data Strategy published in December 2020 which was subject to formal pre- and post-publication public consultation progress between 2019 and 2021.¹⁰ It is under the umbrella of this strategy that the UK's approach to international data flows has been developed.

11. Guidance

- 11.1 Relevant information that supports UK controllers and processors undertaking personal data transfers to the US in reliance on these Regulations has been made available on the Information Commissioner's Office website¹⁰ and on GOV.UK.¹¹ The

⁷ "Information Commissioner's opinion: UK government's assessment of the UK Extension to the EU-US Data Privacy Framework" at <https://www.gov.uk/government/publications/uk-us-data-bridge-supporting-documents>

⁸ <https://www.gov.uk/government/groups/international-data-transfers-expert-council>

⁹ International Data Transfers: <https://www.gov.uk/government/publications/uk-approach-to-international-data-transfers/international-data-transfers-building-trust-delivering-growth-and-firing-up-innovation>

UK – US joint statement on data partnership: <https://www.gov.uk/government/news/uk-us-joint-statement-on-deepening-the-data-partnership>

UK-US Comprehensive Dialogue on Technology and Data: <https://www.gov.uk/government/publications/uk-and-us-progress-tech-and-data-partnership/uk-us-joint-statement-new-comprehensive-dialogue-on-technology-and-data-and-progress-on-data-adequacy>

Inaugural meeting of US-UK Comprehensive Dialogue: <https://www.gov.uk/government/news/inaugural-meeting-of-us-uk-comprehensive-dialogue-on-technology-and-data>

Atlantic Declaration: <https://www.gov.uk/government/publications/the-atlantic-declaration/the-atlantic-declaration>

¹⁰ <https://ico.org.uk/make-a-complaint/uk-extension-to-the-eu-us-data-privacy-framework-complaints-tool/>

¹¹ <https://www.gov.uk/government/publications/uk-us-data-bridge-supporting-documents>

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 was not originally published but has subsequently been submitted with this memorandum and published alongside the Explanatory Memorandum on the [legislation.gov.uk](https://www.legislation.gov.uk) website¹².
- 12.2 The expected combined annual benefits of reduction in annual standard data protection clauses costs for the private sector (£84m), central and local government (£1m) and non-profit sector (£3m) and annual increase in exports (£27m) gives an estimated total annual benefit to UK businesses of about £115m.
- 12.3 A net present value for the case of the UK granting the US data adequacy has been calculated using 2022 prices and 2023 as its present value (when benefits/costs begin) with a 10-year appraisal period and 3.5% discount rate. As per standard RPC practice, the impact has been converted to 2019 prices and 2020 present value with a best estimate of having a total net present social value of about £893m with a sensitivity range of between £313m and £1,933bn. It is estimated that about 16,000 businesses are directly impacted by the change with 96% of the impacted businesses being small or micro. More businesses will also be impacted indirectly by the reduction of non-tariff trade barriers, disproportionately benefiting smaller businesses.
- 12.4 In addition to trade, these Regulations for the UK Extension to the EU - U.S. 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.¹³ 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 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.

¹² <https://www.legislation.gov.uk/ukxi/2023/1028/impacts>

¹³ Section 17B(1) of the 2018 Act

- 15.2 Morgane Donse, Deputy Director, International Data Flows Unit, Data Policy, at the Department for Science, Innovation and Technology can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 John Whittingdale, Minister for Data and Digital Infrastructure at the Department for Science, Innovation and Technology can confirm that this Explanatory Memorandum meets the required standard.