

THE STATES OF DELIBERATION
of the
ISLAND OF GUERNSEY

COMMITTEE FOR HOME AFFAIRS

DATA PROTECTION: DATA SHARING WITH THE UNITED KINGDOM

The States are asked to decide:-

Whether, after consideration of the policy letter entitled 'Data Protection: Data Sharing with the United Kingdom' dated 21st December 2018, they are of the opinion:-

1. To approve the UK as an authorised jurisdiction for the purposes of the Data Protection (Bailiwick of Guernsey) Law, 2017; and
2. To approve the Ordinance entitled "The Data Protection (Authorised Jurisdiction) (Bailiwick of Guernsey) Ordinance, 2019".

The above Propositions have been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications in accordance with Rule 4(1) of the Rules of Procedure of the States of Deliberation and their Committees.

THE STATES OF DELIBERATION
of the
ISLAND OF GUERNSEY

COMMITTEE FOR HOME AFFAIRS

DATA PROTECTION: DATA SHARING WITH THE UNITED KINGDOM

The Presiding Officer
States of Guernsey
Royal Court House
St Peter Port
Guernsey

21st December, 2018

Dear Sir

1. Executive Summary

1.1. The purpose of this Policy Letter is to request the approval of the States of Deliberation in respect of matters in the attached draft Ordinance, namely “The Data Protection (Authorised Jurisdiction) (Bailiwick of Guernsey) Ordinance, 2019”. Approval of the draft Ordinance will ensure that the status quo regarding the continued free-flow of data between the Bailiwick of Guernsey and the United Kingdom (“UK”) is maintained in the event of a no-deal Brexit from the European Union (“EU”).

2. Background

2.1. The General Data Protection Regulation (“GDPR”) is an EU regulation which governs the processing and free movement of personal data within the EU and approved third countries. The Bailiwick of Guernsey is not an EU Member State, but is deemed to operate with data protection ‘adequacy’, and therefore it is acknowledged as an “authorised jurisdiction”. Where personal data is intended to be transferred to an “unauthorised jurisdiction”, the GDPR imposes the need for appropriate safeguards to be put in place before any transfer of personal data takes place.

2.2. The GDPR includes a principle of “extraterritoriality”; this means that the GDPR extends to the processing of personal data of any EU citizen regardless of where the processing activity takes place. The Islands’ global and local businesses routinely process the data of EU citizens and therefore the need to ensure that the Bailiwick of Guernsey operates with an equivalent level of data protection provision to that of the EU is of a paramount importance.

- 2.3. As such, in response to the GDPR, the States of Guernsey drafted and enacted the Data Protection (Bailiwick of Guernsey) Law, 2017 (“DPL”). The DPL provides the same standards of protection of personal data as the GDPR and ensures that Bailiwick residents are afforded the same level of privacy rights as EU citizens. In addition, the DPL supports the local economy by enabling the free movement of personal data with EU Member States.

3. Adequacy

- 3.1. ‘Adequacy’ enables third countries to apply to the European Commission (“the Commission”) for recognition that their own data protection regime provides protection of personal data that is ‘essentially equivalent’ to that found within the EU. Where a third country achieves ‘adequacy’ status from the Commission, personal data can be transferred to that third country without the requirement for any additional safeguards as specified within the GDPR.
- 3.2. The Bailiwick of Guernsey currently has ‘adequacy’ status under the previous EU Data Protection Directive (“the Directive”), but legislative and regulatory changes were required locally to maintain this status under the GDPR. Existing adequacy decisions made under the Directive will remain in force until they are amended, replaced or repealed. It is expected that a review of the Bailiwick of Guernsey’s adequacy decision will be undertaken by the Commission by 2020.

4. Data Sharing

- 4.1. The Bailiwick of Guernsey is home to a number of global businesses which rely heavily on the unrestricted flow of personal data to and from EU Member States; this is particularly crucial for the financial services sector. It is also important to highlight that the UK is currently the Islands’ biggest data sharing partner and therefore it is imperative that an unrestricted data flow between the Bailiwick of Guernsey and the UK is maintained.
- 4.2. In addition to private sector requirements, the Bailiwick of Guernsey’s public authorities also routinely share data with UK Government Agencies in crucial areas such as Policing, Security, Health Care and Education. It is of the utmost importance that public authorities can continue to share data with the UK for intelligence and security purposes.
- 4.3. The need to safeguard the Islands’ current data sharing practices is a clear objective and this is reflected in the ‘Future Guernsey – Policy & Resource Plan Phase One’ (approved by the States of Deliberation on 16th November 2016) and ties in to two of the four themes; ‘Our Quality of Life – safe and secure place to live’ and ‘Our Economy – strong, sustainable and growing’.

5. UK Withdrawal Agreement

- 5.1. The draft agreement on the withdrawal of the United Kingdom and Northern Island from the European Union (published on 14th November 2018) states that:

“Union law on the protection of personal data shall apply in the United Kingdom in respect of the processing of personal data of data subjects outside the United Kingdom, provided that the personal data:

(a) Were processed under Union law in the United Kingdom before the end of the transition period; or

(b) Are processed in the United Kingdom after the end of the transition period on the basis of this Agreement.”

- 5.2. The UK Department for Culture, Media & Sport (“UK DCMS”) has confirmed that the UK remains committed to a high level of data protection standard and regulation, and that European Union law (including GDPR) will remain in force in the UK until the end of the transition period (December 2020).
- 5.3. As such, in the event that the withdrawal treaty is agreed by the House of Commons, the Bailiwick of Guernsey will be in a position to continue to share data with the UK, until the end of the transition period, without the need for additional legislative provision or other remedial action.

6. Implications of a no-deal Brexit

- 6.1. In the event of a no-deal Brexit, the UK would become a third country and EU rules governing the transfer of personal data to third countries would apply. The potential ramifications of a ‘no deal’ could include the prevention of the free flow of personal data to and from the UK by those jurisdictions operating under the umbrella of the GDPR.
- 6.2. The UK DCMS has advised that, in the event of a ‘no-deal’, the UK is ready to begin discussions with the aim of obtaining an adequacy decision from the European Commission. However, in order to ensure the continual free flow of personal data to and from the UK, the Bailiwick of Guernsey must be prepared with alternate provisions should the UK fail to immediately obtain an adequacy decision from the European Commission and also fail to agree a suitable transition period in the interim of continued adequacy negotiations.
- 6.3. In order to prepare appropriately for the potential implications of a ‘no-deal’, there are two plausible solutions for the Bailiwick of Guernsey:

- i. Utilise existing provisions located within the DPL and GDPR for the transfer of data to third countries; or
 - ii. Nominate the UK as an “authorised jurisdiction” by Ordinance for a designated period.
- 6.4. In relation to option one (above), the DPL and GDPR includes a number of provisions which allow for the transfer of personal data to “unauthorised jurisdictions”. These provisions include: transfers on the basis of available safeguards that are in place, the approval of binding corporate rules, the use of standard data protection clauses and the use of approved data protection codes/mechanisms.
- 6.5. However, the provisions located within the DPL and GDPR are most appropriately utilised for specific processing activities or for processing within businesses that are located across multiple jurisdictions. Arguably, the provisions are not intended to facilitate general data sharing to and from a jurisdiction in its entirety.
- 6.6. In addition, the practical implications of putting in place any of the above provisions are significant and would represent a considerable change from the status quo. The provisions would not only place an administrative burden on the public sector, but also the private sector, which could be prohibitive for some of the Islands’ businesses. These provisions are not often utilised across the Bailiwick, and therefore a transition period would be required in order to ensure that the Islands’ private sector and public authorities are able to put the provisions in place.
- 6.7. In relation to option two (above), the DPL contains provisions that allow the States of Deliberation to make various arrangements by Ordinance. As such, and in the event of a ‘no-deal’, the States would by Ordinance designate the UK as an “authorised jurisdiction” for a period of time whilst the UK continued to address the implications of a no-deal Brexit from a data protection perspective.
- 6.8. This provides a simple alternative which would allow the Bailiwick of Guernsey to continue to share personal data with the UK and maintain the status quo until the Ordinance is no longer in place (see paragraph below). As a designated jurisdiction under an Ordinance the UK would be an "authorised jurisdiction" for the purposes of section 111(1) of the Data Protection (Bailiwick of Guernsey) Law, 2017. Accordingly, this definition would also extend to the Data Protection (Law Enforcement and Related Matters) (Bailiwick of Guernsey) Law, 2018.

- 6.9. The decision to nominate the UK as an “authorised jurisdiction” in the event of a ‘no-deal’ could affect the current adequacy status that the Bailiwick has in relation to data protection provision. The Bailiwick’s adequacy decision is due to be reviewed by the European Commission by 2020. Therefore, in order to reduce any potential risk to the Bailiwick of Guernsey’s adequacy, the draft Ordinance contains a “sunset clause” meaning that it would cease to have effect on a designated date.

7. Consultation

- 7.1. As a result of the tight timeline associated with Brexit work-streams, and the need to ensure that data sharing provisions remain in place, there has been and continues to be consultation with the following:
- a) the Data Protection Authority;
 - b) the Policy & Finance Committee of the States of Alderney; and
 - c) the Policy & Performance Committee of the Chief Pleas of Sark.

8. Conclusions

- 8.1. It is proposed that the Assembly approve the UK as an authorised jurisdiction for the purposes of the Data Protection (Bailiwick of Guernsey) Law, 2017 and consequently approve the draft Ordinance entitled “The Data Protection (Authorised Jurisdiction) (Bailiwick of Guernsey) Ordinance, 2019”. This will maintain the status quo regarding the continued free-flow of data between the Bailiwick of Guernsey and the UK in the event of a no-deal Brexit from the EU.
- 8.2. In the event that the UK achieves adequacy before the end of the “sunset clause”, the draft Ordinance would be repealed. Additionally, in the event that the UK does not achieve adequacy following assessment from the Commission, the draft Ordinance would also be repealed. Therefore, should the UK be assessed in terms of its data protection adequacy prior to the lapse of the sunset clause, the draft Ordinance would be repealed despite the outcome.
- 8.3. In the event that the withdrawal treaty is agreed by the House of Commons, the draft Ordinance would not be required.

9. Compliance with Rule 4

- 9.1. Rule 4 of the Rules of Procedure of the States of Deliberation and their Committees sets out the information which must be included in, or appended to, motions laid before the States.

- 9.2. In accordance with Rule 4(1), the Propositions have been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications.
- 9.3. In accordance with Rule 4(4) of the Rules of Procedure of the States of Deliberation and their Committees, it is confirmed that the propositions above have the unanimous support of the Committee.
- 9.4. In accordance with Rule 4(5), the Propositions relate to the duties of the Committee to advise the States and to develop and implement policies on matters relating to its purpose, including data protection.
- 9.5. Also in accordance with Rule 4(5), the Committee has consulted as detailed in paragraph 7 of this Policy Letter.

Yours faithfully

M M Lowe
President

R G Prow
Vice-President

R H Graham
M P Leadbeater
V S Oliver

The Data Protection (Authorised Jurisdiction) (Bailiwick of Guernsey) Ordinance, 2019

THE STATES, in exercise of the powers conferred on them by sections 108 and 111(1) of the Data Protection (Bailiwick of Guernsey) Law, 2017¹ and following consultation with the Policy and Finance Committee of the States of Alderney, the Policy and Performance Committee of the Chief Pleas of Sark and the Data Protection Authority, hereby order:-

The United Kingdom to be a designated and authorised jurisdiction.

1. (1) The United Kingdom is designated for the purposes of the definition of "**designated jurisdiction**" in section 111(1) of the Data Protection (Bailiwick of Guernsey) Law, 2017.

(2) Accordingly, the United Kingdom is an authorised jurisdiction under both the Data Protection (Bailiwick of Guernsey) Law, 2017 and the Data Protection (Law Enforcement and Related Matters) (Bailiwick of Guernsey) Law, 2018².

Citation.

2. This Ordinance may be cited as the Data Protection (Authorised Jurisdiction) (Bailiwick of Guernsey) Ordinance, 2019.

¹ Order in Council No. VI of 2018; as amended by Order in Council No. IV of 2018; Ordinance No. X of 2018 and G.S.I. No. 21 of 2018.

² Ordinance No. XI of 2018; as amended by Order in Council No. IV of 2018.

Commencement.

3. Subject to section 4, this Ordinance shall come into force on exit day, and for this purpose "**exit day**" has the meaning given by section 12(1) of the European Union (Brexit) (Bailiwick of Guernsey) Law, 2018³.

Expiry.

4. This Ordinance expires at the close of the 31st December, 2020.

³ Order in Council No. * of 2019.