

Jeremy Miles AC/AM
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Counsel General and Brexit Minister



Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref MA - L/CG/0250/19

Mick Antoniw AM
Chair
Constitutional and Legislative Affairs Committee
National Assembly for Wales
SeneddCLA@assembly.wales

27 June 2019

Dear Mick,

I am writing to you regarding the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019, which were laid in the UK Parliament on 18 February and made on the 28th of that month. I am writing to you in the spirit of keeping the Committee informed of issues and developments in relation to legislation being made as a result of Brexit.

This SI corrects deficiencies in EU-derived data protection legislation to ensure that the legal framework for data protection in the UK continues to function correctly after exit day. There dispute surrounding this SI which gave rise to an exchange of letters I had with Margot James MP, Minister for Digital and the Creative Industries.

As you know, we have made a commitment that, in the context of the use of correcting powers under the EU (Withdrawal) Act 2018, all legislation made in Wales would be amended in Wales, thereby enabling direct scrutiny by the National Assembly. The provisions of the EU (Withdrawal) Act which concern the correcting powers of the Devolved Administrations (Schedule 2) specifically allow for such an approach.

The UK Government's Department for Culture, Media and Sport asserts that the SI is reserved in its entirety and has stated that the amendments being made to the GDPR (or the "UK GDPR" as the EU's General Data Protection Regulation is to be renamed and modified post-exit) and the Data Protection Act 2018 relate to the reserved matter of "protection of personal data", as set out in Section L6 in Part 2 of Schedule 7A to the Government of Wales Act 2006 (reserved matters).

The UK Government is of the view that the amendments being made to other statutory provisions by the Regulations (including, for example, to the Pupil Information (Wales) Regulations 2011 (S.I. 2011/1942 (W. 209)) are wholly consequential on these changes being made to the UK GDPR and the Data Protection Act 2018. As such it considers that these amendments also relate to the reserved matter of protection of personal data and that therefore the Intergovernmental Agreement does not apply to the making of these consequential amendments to Welsh made legislation and the Welsh Ministers consent is not required.

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

This rationale does not acknowledge the powers of the Welsh Ministers to make corrections to Welsh SIs under their powers in Part 1 of Schedule 2 to the EU (Withdrawal) Act. This power to deal with deficiencies in retained EU law is a broad power and includes the power to make corrections of this kind. This power is available, irrespective of any question as to whether or not the corrections to the Welsh SIs would be within the legislative competence of the National Assembly for Wales under the Government of Wales Act 2006.

Although there are restrictions on the Welsh Ministers' powers to make provision outside devolved competence (in paragraph 2 of Schedule 2), "devolved competence" has a particular meaning within the context of Schedule 2 (see paragraph 9 of Schedule 2). Insofar as the provisions concerned are amendments to Welsh SIs that have been made by the Welsh Ministers, the provisions meet the conditions in sub paragraph (2) of paragraph 9 and are therefore within the devolved competence of the Welsh Ministers for the purposes of Part 1 of Schedule 2.

It appears that the UK Government's rationale addresses the question of whether the matter is reserved or devolved as if applying the test of devolved competence in paragraph 9(1)(a) of Schedule 2, without considering paragraph 9(1)(b) and the conditions set out in paragraph 9(2).

We do not have concerns about the policy approach proposed in this SI, and nor did we have an interest in frustrating its making. However, we do want to maintain the commitments made by both Governments in the Intergovernmental Agreement. What we have repeatedly requested is that the SI be withdrawn in order to remove the amendments to Welsh made legislation.

The response from the Minister was disappointing, even though it acknowledged the effect of the SI making corrections to Welsh made legislation. We are particularly dissatisfied as we had asked that commitments made to the National Assembly and in the Intergovernmental Agreement are respected. As a result, we intend bring forward legislation in the National Assembly to make the same corrections to the Welsh made legislation and also to make further amendments to the Welsh language text to ensure that it is accurate.

These amendments will come into force on exit day. This legislation will also make consequential amendments to the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 which will revoke the relevant provisions (namely paragraphs 71 to 75 and paragraphs 90 and 91 of Schedule 3). As the revocation of these provisions will need to come into force before exit day, we are consulting the UK Government in accordance with the requirement in paragraph 4(a) of Schedule 2 to the EU (Withdrawal) Act 2018.

I attach copies of our correspondence with the UK Government to this letter for your information.

Yours sincerely,



Jeremy Miles AM

Y Cwnsler Cyffredinol a Gweinidog Brexit
Counsel General and Brexit Minister



Department for
Digital, Culture,
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Margot James MP
Minister for Digital and the
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28 February 2019

Your Ref: MA/L/CG/0188/19
Our Ref: MC2019/01596

Jeremy Miles AM
Counsel General and Brexit Minister
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Dear Jeremy,

**THE DATA PROTECTION, PRIVACY AND ELECTRONIC COMMUNICATIONS (AMENDMENTS
ETC) (EU EXIT) REGULATIONS 2019**

Thank you for your letter of 15 February regarding the draft Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 ("the Regulations"), in which you raised concerns about the consequential amendments to a specific piece of devolved legislation.

I note that you have made a commitment to the National Assembly for Wales (NAW) about the mechanism for amending NAW legislation. I appreciate that your preference would have been for the Regulations to have been withdrawn so that the amendment in question could have been delivered through Welsh-made legislation.

Our primary objective must be to ensure that the law works appropriately by exit day. The Regulations provide the critical certainty that is needed by businesses and the public throughout the UK. The Regulations have now been approved by both Houses of Parliament, not making them at this stage would create enormous uncertainty for organisations in the UK.

We are grateful for your confirmation that you do not have concerns about the policy approach proposed in these Regulations. In light of this, we consider that we should proceed with our shared objective of ensuring a functioning statute book in time for EU Exit.

I have copied this letter to the Secretary of State for DCMS, the Chancellor of the Duchy of Lancaster, the Secretary of State for Wales, and the Minister for Education and the Minister for Health and Social Services in the Welsh Government.

Best wishes

Margot

Margot James MP

Minister for Digital and the Creative Industries

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Ein cyf/Our ref: MA/L/CG/0188/19

Margot James MP
Minister for Digital and the Creative Industries
Department for Digital, Culture, Media and Sport
100 Parliament Street
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15 February 2019

Dear Margot,

I am writing regarding the draft Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019, which are subject to a dispute over competence. Officials in our Governments have discussed this SI at length without being able to secure a resolution, so I am writing with the intention that we are able to resolve this matter and reach an approach that reflects the Intergovernmental Agreement between the UK Government and the Welsh Government, in respecting devolution, and the exercise of powers under the EU (Withdrawal) Act.

Officials at DCMS assert that the SI is reserved in its entirety. They have shared their view that the amendments being made to the “UK GDPR” and the Data Protection Act 2018 relate to the reserved matter of “protection of personal data”, as set out in Section L6 in Part 2 of Schedule 7A to the Government of Wales Act 2006 (reserved matters). We are happy to concur on this point.

However, we disagree with the other aspect of officials’ reasoning on the consequential amendments, and it is this part which we dispute. The consequential amendments will amend legislation which was made in Wales. We have publicly and repeatedly committed to the National Assembly that, in the context of the use of correcting powers under the EU (Withdrawal) Act, all legislation made in Wales will be amended in Wales, thereby enabling the direct scrutiny of the National Assembly. The provisions of the EU (Withdrawal) Act which concern the correcting powers of the Devolved Administrations (Schedule 2) specifically allow for such an approach.

DCMS officials are of the view that the amendments being made to other statutory provisions by the Regulations (including, for example, to the Pupil Information (Wales) Regulations 2011 (S.I. 2011/1942 (W. 209)) are wholly consequential on these changes

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being made to the UK GDPR and the Data Protection Act 2018. As such they consider that these amendments also relate to the reserved matter of protection of personal data.

This rationale does not acknowledge the powers of the Welsh Ministers to make corrections to Welsh SIs under their powers in Part 1 of Schedule 2 to the EU (Withdrawal) Act. This power to deal with deficiencies in retained EU law is a broad power and includes the power to make corrections of this kind.

Although there are restrictions on the Welsh Ministers' powers to make provision outside devolved competence (in paragraph 2 of Schedule 2), "devolved competence" has a particular meaning within the context of Schedule 2 (see paragraph 9 of Schedule 2). Our view is that insofar as the provisions concerned are amendments to Welsh SIs that have been made by the Welsh Ministers, the provisions meet the conditions in sub paragraph (2) of paragraph 9 and are therefore within the devolved competence of the Welsh Ministers for the purposes of Part 1 of Schedule 2.

It appears that the rationale of DCMS officials addresses the question of whether the matter is reserved or devolved as if applying the test of devolved competence in paragraph 9(1)(a) of Schedule 2, without considering paragraph 9(1)(b) and the conditions set out in paragraph 9(2).

We do not have concerns about the policy approach proposed in this SI, and nor do we have an interest in frustrating its making. However, we do want to preserve the commitments made by both Governments in the Intergovernmental Agreement.

What we have repeatedly requested is that the SI be withdrawn in order to remove the amendments to Welsh made legislation. We will then make those corrections in an SI laid in the National Assembly for Wales. We have incorporated this SI in our legislative programme to ensure that the resources (including translation) are in place for these corrections to be made in time for exit day. Doing so will mean that the data protection provisions will be in place by exit day, in a way that respects the devolution position set out in the EU (Withdrawal) Act and the Intergovernmental Agreement.

I look forward to your support in this matter.

I have copied this letter to the Secretary of State for DCMS, the Chancellor of the Duchy of Lancaster, the Secretary of State for Wales, and the Minister for Education and the Minister for Health and Social Services in the Welsh Government

Yours sincerely,



Jeremy Miles AM

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