EXPLANATORY MEMORANDUM TO

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

2019 No. 419

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Digital, Culture, Media and Sport (DCMS) and is laid before Parliament by Act.

2. Purpose of the instrument

2.1 This instrument uses powers under the EU (Withdrawal) Act 2018 (EUWA) to correct deficiencies in EU-derived data protection legislation as a result of the withdrawal of the United Kingdom (UK) from the EU, including consequential amendments to other legislation. This will ensure that the legal framework for data protection within the UK continues to function correctly after exit day.

2.2 This instrument also uses a power under the European Communities Act 1972 (ECA 1972) to amend the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR) to more clearly align data protection standards with the General Data Protection Regulation (Regulation (EU) 2016/679) (GDPR).

2.3 This instrument also uses a power under the Data Protection Act 2018 (DPA 2018) to make amendments to other legislation consequential to that Act.

Explanations

What did any relevant EU law do before Exit Day?

2.4 The GDPR applies directly across all EU Member States, including the UK, until Exit Day. It regulates the processing of personal data by data controllers and processors with an establishment in the EU; and by those outside the EU which are processing data about individuals who are in the EU for the purposes of providing them with goods and services or monitoring their behaviour.

2.5 The DPA 2018 supplements the GDPR within the UK by exercising areas for derogation within the GDPR. For example, it provides for additional processing conditions of special categories of personal data where permitted by Article 9 of the GDPR, and restrictions to data subject rights under Article 23. Chapter 3 of Part 2 of the DPA 2018 also extends GDPR standards to certain processing activities that are outside the scope of EU law – this is known as the "applied GDPR".

2.6 The Law Enforcement Directive (Directive (EU) 2016/680) concerns the processing of personal data by bodies with law enforcement functions for law enforcement purposes. The UK implemented this Directive through Part 3 of the DPA 2018.

2.7 The GDPR is direct EU legislation that will form part of UK domestic law under the EUWA from Exit Day. Chapters 2 and 3 of Part 2, Part 3, and Parts 5 to 7 of the DPA 2018 so far as they relate to Parts 2 and 3, are EU-derived law for the purposes of the EUWA.

2.8 Other direct legislation that will be incorporated into UK domestic law under the EUWA in the field of data protection includes EU decisions on the adequacy of third countries and on standard contractual clauses, both of which are relevant for the international transfers provisions in Chapter V of the GDPR. These decisions and the GDPR have been adopted by the EEA. The paragraphs of Annex XI to the EEA Agreement setting out that adoption will also be incorporated into UK domestic law, as will a Regulation on processing by EU institutions.

Why is it being changed?

2.9 The GDPR applies to the UK as an EU member state, and confers certain tasks and powers on the European Commission and European Data Protection Board (EDPB), which would no longer have competence in relation to the regulation of personal data in the UK post-exit. This instrument makes necessary and appropriate changes to the GDPR and to the DPA 2018 so that the law continues to function effectively after the UK has left the EU – for example, by replacing references to EU Member States, institutions, procedures and decisions that will no longer be directly relevant after Exit Day with references to UK equivalents.

2.10 The DPA 2018 extended GDPR standards to general processing activities that were outside the scope of EU law via the 'applied GDPR'. As the GDPR will no longer apply directly in the UK, this instrument introduces a single regime for general processing activities known as the UK GDPR. It is necessary to make changes throughout the DPA 2018, and to other legislation, as a result of this.

2.11 Part 3 of the DPA 2018, which transposed the Law Enforcement Directive into UK law, will be preserved. However, there are deficiencies that arise in Part 3 as a result of the UK's Exit from the EU. Appropriate amendments have been made to correct these.

2.12 Parts 5 to 7 of the DPA 2018 make general provisions relevant for the UK data protection framework on matters such as the constitution and functions of the Information Commissioner, enforcement and territorial application of the Act. This instrument corrects deficiencies arising from the UK's exit from the EU – for example, by removing obligations for the Information Commissioner to cooperate with other member state's supervisory authorities for the Law Enforcement Directive.

2.13 It will not be necessary to retain the EU decisions on adequacy and standard contractual clauses, or the EEA adoption of those decisions or the GDPR, or the Regulation on processing by EU institutions, so these are revoked by this instrument.

What will it now do?

2.14 This instrument maintains the data protection standards that currently exist under the GDPR and the DPA 2018 and introduces a newly merged regime for general processing activities (covering matters that were in and out of scope of the GDPR prior to Exit Day). It also maintains the extra-territorial scope of the GDPR, so that controllers or processors based outside the EEA which are processing UK residents' data for the purposes of providing goods and services or monitoring behaviour will continue to be covered by the UK GDPR, and extends this to cover such processing by controllers and processors in the EEA. A number of functions conferred on the European Commission by the GDPR will be transferred to the Secretary of State and/or the Information Commissioner.

2.15 This instrument makes further transitional, transitory and saving provision made in connection with the amendment of the DPA 2018 and the UK GDPR by regulations under section 8 of the EUWA.

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 The territorial application of this instrument includes Scotland and Northern Ireland.

3.3 The powers under which this instrument is made cover the entire United Kingdom and the territorial application of this instrument is not limited either by the EUWA, ECA 1972 or the DPA 2018 or by the instrument.

4. Extent and Territorial Application

4.1 Apart from consequential amendments to other legislation, the territorial extent of this instrument is England and Wales, Scotland and Northern Ireland, except for paragraphs 82, 83 and 84 of Schedule 2 which extend to England and Wales and Northern Ireland only. These paragraphs amend provisions in the DPA 2018 that do not extend to Scotland. In relation to consequential amendments to other legislation (as set out in Schedule 4 to the instrument), those amendments have the same territorial extent as the legislative provision they are amending, including provisions that specifically extend to England and Wales, Scotland or Northern Ireland.

4.2 The territorial application of this instrument is set out in Section 3 under "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)", and it also has extra-territorial effect in certain circumstances (as explained in paragraph 4.3).

4.3 The GDPR as it applies to the UK, and the DPA 2018 insofar as it supplements the GDPR for the UK, apply to processing by controllers and processors who are established outside of the EEA in certain circumstances where they are processing data about individuals who are in the UK. After Exit Day, the UK GDPR and the DPA 2018 (as both amended by this instrument) will apply in the same way to processing by controllers and processors who are established outside of the UK. This will extend the extraterritorial application of the domestic framework to the remaining EEA Member States.

5. European Convention on Human Rights

5.1 The Minister of State for the Department for Digital, Culture, Media and Sport, Margot James MP, has made the following statement regarding Human Rights:

"In my view the provisions of the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 are compatible with the Convention rights."

6. Legislative Context

6.1 The EUWA makes provision for repealing the European Communities Act 1972 and will incorporate direct EU legislation, as it stands immediately before Exit Day, into UK law, as well as saving EU-derived domestic legislation relating to the EU – collectively referred to as "retained EU law". The Act also provides a temporary power for ministers to make regulations to prevent, remedy or mitigate any failure of retained EU law to operate effectively, or any other deficiency in retained EU law, arising from the withdrawal of the United Kingdom from the EU. This instrument exercises that power to amend the GDPR and the DPA 2018 and to make consequential amendments to other legislation.

6.2 The DPA 2018 received Royal Assent on 23 May 2018. Schedule 19 to the DPA 2018, as introduced by section 211, makes minor and consequential amendments to other legislation. Section 211 also enables the Secretary of State to make regulations that make amendments to other legislation consequential to the DPA 2018. This power enables enactments passed or made before the end of the same parliamentary session in which the DPA 2018 was made to be amended, repealed or revoked. Most of schedule 19 was brought into force on 25 May 2018 by the Data Protection Act 2018 (Commencement No. 1 and Transitional and Saving Provisions) Regulations 2018 (S.I. 2018/625). Paragraphs 76 and 201 of Schedule 19 have not been brought into force. They provided for amendments to the Anti-Terrorism, Crime and Security Act 2001 and the Investigatory Powers Act 2016. This instrument exercises the section 211 power to amend the same provisions of those Acts, and repeals Paragraphs 76 and 201 of Schedule 19 to the DPA 2018.

6.3 Section 137 of the DPA 2018 enables the Secretary of State to make regulations requiring controllers to pay charges to the Information Commissioner. By extending the extra-territorial application of the data protection framework to processing by certain controllers in the EEA this instrument exposes additional controllers to the possibility of charges being required of them through Regulations made under the section 137 power. This instrument uses the power provided in Paragraph 1(1) of Schedule 4 to the EUWA in relation to that.

6.4 The PECR were made to implement the provisions of Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector ("the Directive") in the UK. They were made using the power in section 2(2) of the ECA 1972. The Directive is one of a family of five directives which formed the original European Electronic Communications Framework and were implemented within the UK by the Communications Act 2003, the Wireless Telegraphy Act 2006, and PECR. This instrument uses the power provided in section 2(2) of the ECA 1972 to amend the PECR to make clear that the GDPR definition of consent applies for the purposes of PECR.

7. Policy background

What is being done and why?

Correcting deficiencies arising from the UK's departure from the EU

7.1 The EUWA retains the GDPR in UK law at the point of Exit. When the UK is no longer a member of the EU, a number of deficiencies will arise in the UK's data protection framework. The GDPR, in particular, will contain a number of references that will no longer make sense in a purely domestic context. This instrument will

remove references to, for example, Member States, Union law and the European Commission; replacing them, where appropriate, with references that will operate correctly in domestic law. Some of the articles in the GDPR issue, in effect, directions to Member States, for example, to make certain provision in domestic law. It would not be appropriate to retain such provision in domestic law after Exit Day so these have been omitted. The GDPR also confers a number of legislative, or quasi-legislative, functions on the European Commission. Post-exit, it will not be appropriate for the European Commission to continue to exercise such functions in respect of the GDPR as it forms part of domestic law. A number of these functions are therefore being transferred, through these Regulations, to the Secretary of State or the Information Commissioner.

Other changes reliant on powers under section 211 of the DPA 2018 and section 2(2) ECA 1972

7.2 This instrument will also address two minor issues identified in schedule 19 to the DPA 2018 (minor and consequential amendments) shortly before it received Royal Assent. It was noticed that the drafting in paragraphs 76 and 201 of schedule 19 did not have the effect of maintaining the status quo, as had been intended. The government was unable to propose amendments to these provisions at such a late stage in the Bill's passage through Parliament. Instead, the Secretary of State has not commenced these provisions and this instrument uses the Act's power to make further consequential amendments to address these issues and to repeal paragraphs 76 and 201 of schedule 19.

7.3 Under the GDPR, one of the key changes was a change to the way consent can be obtained from an individual and then used as a lawful basis for processing their personal data. The amendments made by this instrument make clear that, for the purposes of the PECR, the GDPR definition of consent applies.

7.4 Unless otherwise stated the paragraph references below are to the Regulations supported by this EM.

Changes to the GDPR and the DPA 2018

Renaming the GDPR

7.5 For clarity, the retained version of the GDPR will be renamed the "UK GDPR".

A single general processing regime

7.6 The 'applied GDPR' is a separate regime created by in Chapter 3 of Part 2 of the DPA 2018. It extends GDPR-equivalent standards to personal data processing which is not covered by other parts of the DPA 2018 and is outside the scope of EU competence, and it includes appropriate exemptions for national security and defence purposes. When the UK leaves the EU, all data processing, such as this, will be outside the scope of EU law (though EU jurisprudence will continue to have effect in the circumstances set out in section 6 of the EUWA).

7.7 To simplify matters at the point of exit, this instrument creates a single regime for data processing currently regulated by the GDPR and the 'applied GDPR'. Regulation 5 of the instrument makes clear that merging the 'applied GDPR' regime with the GDPR regime does not itself affect interpretation of processing for purposes that were outside the scope of EU competence prior to Exit Day and excludes the application of EU jurisprudence to such processing post-Exit where it did not apply to it pre-Exit (consistent with section 6(3)(b) of the EUWA). The amendments to Article 2

(Material scope) of the GDPR made by paragraph 4(2) of Schedule 1 to this instrument make clear that the newly merged regime covers matters that were outside the scope of EU competence prior to the UK's departure from the EU.

7.8 Existing exemptions in the 'applied GDPR', which are applicable where exemption from specified provisions is required for the purposes of safeguarding national security or for defence purposes, will be retained for the merged regime. These exemptions reflect the fact that whilst it is important to ensure that, personal data is protected, the UK's security and intelligence community can carry out their vital work to safeguard national security.

Territorial scope

7.9 Article 3 of the GDPR extends the regulation to data controllers and processors who are based outside of the EEA, but are processing personal data of people within the EEA in connection with the offering of goods and services to them or for monitoring purposes. Paragraph 5 of Schedule 1 of the instrument retains this principle in the context of the UK. In practice this means that the UK GDPR will apply to a controller or processor who is based outside of the UK, but is processing personal data of people within the UK in connection with the offering of goods and services to them or for monitoring purposes. This entails extending the scope of the current regime (which currently apply extraterritorially to controllers and processors outside of the EEA) to certain processing by controllers and processors established *within* the EEA after the UK's Exit.

Controller/Processor representative

7.10 Article 27 of the GDPR requires a controller or processor not established in the EEA to designate a representative within the EEA in certain circumstances where they are processing the personal data of data subjects who are in the EEA. The requirement does not apply to public authorities or to controllers/processors whose processing is only occasional, low risk, and does not involve special category or criminal offence data on a large scale. This provision has been retained in the UK GDPR but changed, by the amendment in paragraph 21 of Schedule 1, so that it applies to a controller or processor outside of the UK, who will be required in certain circumstances to designate a representative in the UK. The representative can be contacted by supervisory authorities and/or data subjects, instead of or in addition to the data controller/processor, on all issues related to data processing, for the purposes of ensuring compliance with the UK GDPR.

Prior consultation

7.11 Article 36 of the GDPR requires Member States to consult the supervisory authority when they are preparing new legislation involving the processing of personal data, or preparing a regulatory measure based on such legislation. The UK Government or the devolved administrations might be responsible for preparing legislation or regulatory measures of this nature (though in the case of the devolved administrations, this would be limited to matters within devolved competence). The instrument therefore makes clear that, post-Exit, it is the Secretary of State, Scottish or Welsh Ministers or the relevant Northern Ireland Department (as the case may be) that must consult the Information Commissioner on the development of new proposals (see paragraph 30 of Schedule 1).

International Transfer of personal data

7.12 Under Chapter V of the GDPR, data controllers and processors may not transfer personal data to countries outside the EEA unless certain safeguards are in place.

7.13 One established process for allowing free flow of personal data outside of the EEA is where the European Commission has considered the legal framework of the country in question and decided that it provides an 'adequate' level of protection for personal data. The adequacy assessment process is set out in Article 45 of the GDPR. The European Commission must take into account certain factors and consult the EDPB (made up of representatives of the regulators in the various Member States) before making an adequacy decision.

7.14 When the UK leaves the EU, it will not be appropriate for the European Commission to make adequacy decisions upon which UK controllers and processors can rely for transferring personal data to third countries or international organisations. This instrument therefore transfers the European Commission's powers in respect of making adequacy decisions to the Secretary of State by enabling the Secretary of State through "adequacy regulations" to specify that a third country, territory, sector or international organisation ensures an adequate level of protection of personal data (see new section 17A of the DPA 2018 as inserted by paragraph 23 of Schedule 2). The Secretary of State will be required to consult the Information Commissioner (in accordance with section 182(2) of the DPA 2018) rather than receive an opinion from the EDPB.

7.15 Article 45 of the GDPR sets out the adequacy assessment process, including requirements for ongoing monitoring of adequate countries and that decisions are reviewed at least every four years. These standards are maintained by this instrument in relation to "adequacy regulations" (see new section 17B of the DPA 2018 as inserted by paragraph 23 of Schedule 2).

7.16 In the absence of an adequacy decision, transfers of personal data to countries outside the EEA can still occur under Article 46 of the GDPR, but alternative safeguards may need to be put in place. For example, EEA organisations may need to put contractual clauses in place with recipient organisations to ensure the data is treated safely and securely. The European Commission has approved **Standard Contractual Clauses** (SCCs) for use in certain circumstances.

7.17 When the UK leaves the EU, it will not be appropriate for the European Commission to issue SCCs for use by UK businesses. Paragraph 23 of Schedule 2 of this instrument confers this power on the Secretary of State. This instrument also removes the obligation on the Information Commissioner to seek European Commission approval for SCCs she has adopted although Parliament will have the opportunity to scrutinise SCCs adopted by the Commissioner, including the opportunity to halt such clauses from continuing to have effect (see new section 119A of the DPA 2018 as inserted by paragraph 51 of Schedule 2)

7.18 **Binding Corporate Rules** (BCRs) allow multinational organisations to transfer personal data internationally within the same corporate group to countries outside the EEA. BCRs currently have to be authorised by relevant supervisory authorities. The Information Commissioner will continue to be able to authorise new BCRs under the UK GDPR.

7.19 Article 36 of the Law Enforcement Directive (LED) contains a similar provision to Article 45 of the GDPR, enabling the free flow of personal data by competent

authorities to authorities in third countries for law enforcement purposes, where the European Commission has considered that a third country provides an adequate level of protection for EU data subjects (though other mechanisms are also provided). As with general processing, when the UK leaves the EU, the European Commission will no longer be able to make adequacy decisions relating to law enforcement data processing on our behalf. Paragraph 42 of Schedule 2 of this instrument provides the Secretary of State with equivalent powers to make adequacy decisions concerning international transfer of personal data processed by competent authorities for law enforcement purposes.

Transitional provision for EU Adequacy Decisions and SCCs and BCRs

7.20 To ensure that established data flows from UK controllers to organisations outside of the UK can continue after the UK leaves the EU, the instrument inserts transitional provisions in the DPA 2018 in relation to adequacy decisions, standard contractual clauses and binding corporate rules (see Part 3 of the new Schedule 21 to the DPA 2018 as inserted by paragraph 102 of Schedule 2).

7.21 The EUWA provides that existing adequacy decisions by the European Commission form part of retained EU Law. This instrument will revoke these decisions but will make transitional provision to enable personal data to continue to flow from the UK to jurisdictions subject to an EU adequacy decision immediately before Exit Day.

7.22 Provision is also made so that the use of SCCs that have previously been issued by the European Commission will continue to be an effective basis for international data transfers from the UK to third countries after exit day.

7.23 Existing authorisations of BCRs made by the Information Commissioner will also continue to be recognised for the purposes of the UK GDPR.

Transitional provision for free flow of personal data from UK to EEA countries, EU/EEA Institutions and Gibraltar

7.24 Upon leaving the EU, controllers in the UK will need a legal basis to continue the free flow of personal data from the UK to EU Member States, other EEA countries, EU/EEA Institutions and Gibraltar. The instrument provides that legal basis by transitionally deeming these territories and international organisations as having been specified in adequacy regulations as ensuring an adequate level of protection of personal data (see Part 3 of the new Schedule 21 to the DPA 2018 as inserted by paragraph 102 of Schedule 2). This reflects the unprecedented degree of alignment between the UK and the data protection regimes of these countries/institutions. Note that for law enforcement processing transitional provisions are made for the EU and Gibralta only, the remaining EEA countries are not subject to LED or an adequacy decision.

7.25 This transitional provision can only be relied on in respect of transfers of personal data from the UK. The UK cannot legislate to permit the flow of data from, for example, the EU to the UK as this will be subject to EU GDPR controls.

The Information Commissioner

7.26 Article 52 of the GDPR provides that supervisory authorities should act with complete independence when performing their tasks. This instrument replaces references to 'supervisory authorities' (or words to that effect) with references to the '[Information] Commissioner'. Article 52(4) instructs Member States to ensure that supervisory authorities are provided with the human, technical, and financial resources, premises

and infrastructure necessary for the effective performance of its tasks and exercise of their powers. The government is committed to ensuring the Information Commissioner's Office (ICO) is appropriately resourced. Section 137 of the DPA 2018 allows the Secretary of State to make regulations requiring controllers to pay charges to the Commissioner so that expenses incurred when discharging her functions under the data protection legislation are covered. For these purposes, on 25 May 2018, the Data Protection (Charges and Information) Regulations 2018 (the 2018 Regulations) came into force. Section 138 of the DPA 2018 requires the Secretary of State to keep the working of the regulations under review. There is also the power for the Secretary of State to make payments to the Commissioner out of money provided by Parliament (see paragraph 9 of Schedule 12 of DPA 2018). This instrument therefore omits Article 52(4) from the UK GDPR, as this has been already been implemented through domestic legislation.

7.27 Articles 53 – 55 of the GDPR are also omitted by this instrument because they relate to the process for appointing the supervisory authority, qualifications and eligibility criteria of office-holders and duration of appointment. There is no need for these provisions to be retained in the UK GDPR because they have already been implemented through Part 5 and Schedule 12 of the DPA 2018. Nor is there a need for Article 56 which deals with matters of competence when there is more than one supervisory authority.

Co-operation between supervisory authorities

7.28 Articles 60 – 75 of the GDPR makes provision for supervisory authorities of EU Member States to work together to investigate cross-border data breaches, agree on which authority should take the lead where personal data from more than one EU Member State is being processed and ensure that the GDPR is enforced consistently across Member States. It also creates the EDPB, which is attended by representatives of each supervisory authority, to agree common approaches to enforcement and to advise the European Commission of amendments that might be needed to the legislation.

7.29 When the UK is outside the EU, and in the absence of any subsequent agreement, the Information Commissioner will no longer be party to these consistency mechanisms and will not have a seat on the EDPB. This instrument therefore removes Articles 60 – 75 from the UK GDPR. Article 50 (international cooperation for the protection of personal data) is retained.

Other redundant provision

7.30 A number of the articles in the GDPR make provision which is akin to that in a directive, permitting Member States to make certain data protection provision in domestic law. For example, articles 87, 88 and 90. Such articles will be wholly redundant after Exit Day and have therefore been omitted.

7.31 As a result of the terms of the UK's membership of the EU, some provisions referred to in schedule 1 are not applicable to the UK. The instrument is therefore clear that it is not to be presumed, by virtue of the omission of a provision by schedule 1 of this instrument, that the provision was applicable to the UK immediately before exit day (and so would, but for this instrument, be part of the UK GDPR).

The Privacy and Electronic Communications (EC Directive) Regulations 2003

7.32 Regulation 8 of this instrument, in reliance on the powers conferred by s.2(2) of the European Communities Act 1972, inserts a definition of "consent" into Regulation 2(2) of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR"). This amendment makes clear that, for the purposes of PECR, the definition of consent corresponds to that in the GDPR instead of that in the 1995 Data Protection Directive (Directive 95/46/EC).

7.33 At EU level, the GDPR provides a general gloss so that references to the 1995 Directive are instead to be read as references to the GDPR (see art. 94(2)). The amendment made by regulation 8 will make clear that the definition of consent in PECR is updated so as to mirror this approach.

7.34 This amendment is made under s.2(2) ECA 1972 powers since this is not a deficiency arising from the UK's departure from the EU, although the amendment itself requires further amendment, to change "GDPR" to "UK GDPR", as a result of Exit (see paragraph 44 of Sch. 3 to the instrument). Further, this instrument provides for this amendment to come into force on 29 March 2019; that is to allow the maximum amount of time for these regulations to be considered by Parliament and then come into force. If the definition of Exit Day is modified, the coming into force of this amendment will be unaffected.

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

8.1 This instrument is being made using the power in section 8 of the EUWA in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the UK from the EU. The instrument is also made under the powers in section 23 and in Paragraph 1 of Schedule 4 to the EUWA. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum]/[Annex [A].

8.2 Alongside the EUWA powers the instrument is also being made under section 2(2) of the ECA 1972 to more clearly align the data protection standards with the GDPR and under section 211 of the DPA to make amendments to other legislation consequential to that Act.

9. Consolidation

There is no current plan to consolidate the legislation amended by these Regulations.

10. Consultation outcome

10.1 The government has not consulted publicly on this instrument. As outlined above, its purpose is to ensure continuity in current data protection laws and procedures. This instrument has been developed in consultation with the Information Commissioner's Office, in accordance with Article 36(4) of the GDPR

11. Guidance

11.1 Keeling schedules showing the amendments this instruments makes to the retained GDPR and DPA 2018 will be available in January 2019

11.2 The ICO has published regulatory guidance to help organisations understand and comply with the "EU" GDPR and DPA 2018.

11.3 The ICO has published additional guidance to support organisations and data subjects understand the implications of the exiting the EU on the UK's domestic data protection framework.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies arising from this instrument. This instrument will maintain the current standards for data processing within the UK and will ensure that, post-exit, personal data can continue to be transferred from the UK to other countries and international organisations as before exit. Data flows from the EEA to the UK may be restricted post-exit, but that is as a consequence of the UK leaving the EU, not as a result of this instrument.

12.2 There is no significant impact on the public sector.

12.3 An impact assessment has not been prepared for this instrument because there is no, or no significant, impact on business, charities or voluntary bodies.

13. Regulating small business

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

13.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the ICO have published some "6-steps guidance" to help them prepare for a No Deal Brexit. The Information Commissioner published a blog on 13 December 2019 signposting businesses, particularly SMEs, to guidance which will support them prepare for a possible no-deal Brexit. The ICO have produced a straightforward, interactive guide, particularly aimed at small and medium sized organisations, to help them decide if Standard Contractual Clauses are relevant. It includes help with completing the clauses, but further developments are planned in the next few weeks to incorporate an online tool to help organisations generate them automatically.

13.3 The basis for the final decision on what action to take to assist small businesses was based on the fact that the main purpose of the instrument is to correct deficiencies in retained EU law, rather than make policy changes with an impact on small businesses. The nature of the amendments are limited by the EUWA and given the recent implementation of the GDPR and DPA any administrative and familiarisation costs are expected to be negligible, and lower than they would have been without this SI – which ensures a smooth transition after exit day and avoids increased legal uncertainty.

14. Monitoring & review

14.1 The changes made by this instrument are limited to ensuring the UK's data protection legislation will be operable on Exit Day. The government will review the need for further changes to the UK data protection framework and bring further legislative proposals forward as necessary to ensure it remains effective, protects data subjects' rights, ensures that data processing can processed where it is in the public interest and that data can be shared appropriately with the UK's international partners.

14.2 As this instrument is made under the EUWA, no review clause is required.

15. Contact

15.1 Donald MacKinnon or Sarah Goulsbra at DCMS can be contacted with any queries regarding the instrument. Please email data.protection-leg@culture.gov.uk or call 020 7211 6880

15.2 Kevin Adams (Deputy Director) at DCMS can confirm that this Explanatory Memorandum meets the required standard.

15.3 Margot James MP, Minister of State for the Department for Digital, Culture, Media and Sport, can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising clauses 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising clauses 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising clauses 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising clauses 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising clauses 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before Exit Day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising clauses 8(1), 9, and	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising clauses 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after Exit Day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s.2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s.2(2) ECA, identifying the relevant law before Exit Day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after Exit Day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s.2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Appropriateness statement

1.1 The Minister of State for the Department for Digital, Culture, Media and Sport, Margot James MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 does no more than is appropriate".

1.2 This is the case because this instrument only does what is appropriate to ensure the UK retains an operative Data Protection framework post exit. As set out in Section 2, these amendments include: making appropriate changes to the General Data Protection Regulation ("the GDPR"), and to the Data Protection Act 2018 ("the 2018 Act") so that the law continues to function effectively after the UK has left the EU; replacing references to EU Member States, institutions, procedures and decisions that will no longer be directly relevant after Exit Day with references to UK equivalents. And, the repatriation of powers from European Commission to Secretary of State to approve safeguards allowing the free flow of personal data from the UK and providing a transitional regime so UK controllers and processors can continue to rely on safeguards adopted by the European Commission after exit day.

2. Good reasons

2.1 The Minister of State for the Department for Digital, Culture, Media and Sport, Margot James MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action".

2.2 These are explained in sub-sections 7.1 – 7.4 under Policy background of this EM.

3. Equalities

3.1 The Minister of State for the Department for Digital, Culture, Media and Sport, Margot James MP, has made the following statement:

"The draft instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts."

3.2 The Minister of State for the Department for Digital, Culture, Media and Sport, Margot James MP, has made the following statements regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In relation to the draft instrument, I, Margot James MP, have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010."

4. Explanations

4.1 The explanations statement has been made in paragraph 2 of the main body of this explanatory memorandum.

5. Legislative sub-delegation

5.1 The Minister of State for the Department for Digital, Culture, Media and Sport Margot James MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view it is appropriate to create a relevant sub-delegated power in The European Union (Withdrawal) Act 2018."

5.2 This instrument inserts section 119A into the Data Protection Act 2018 ("the 2018 Act") which confers a power on the Information Commissioner to issue a document specifying standard data protection clauses which the Commissioner considers provide appropriate safeguards for the purposes of transfers of personal data to a third country or an international organisation in reliance on Article 46 of the UK GDPR. A similar power, exercisable through the making of regulations, is also conferred on the Secretary of State by the new section 17C which this instrument also inserts into the 2018 Act.

5.3 This is appropriate in light of the Information Commissioner's existing ability, under article 46(2)(d) of the General Data Protection Regulation ("the GDPR"), to adopt standard data protection clauses. Currently, any such adoption of clauses is also subject to approval by the European Commission. After the UK's exit from the European Union it will not be appropriate for the European Commission to continue to have this role and so this is being removed.

5.4 The Information Commissioner is the independent data protection regulator for the UK with technical expertise in this area and will be well placed to prepare standard data protection clauses for the purposes of the domestic regime.

5.5 Section 119A includes consultation requirements with which the Commissioner must comply before issuing a document. Further, after issuing a document, the Information Commissioner must send a copy to the Secretary of State, who must then lay it before Parliament. If, within a (defined) 40-day period, either House of Parliament resolves not to approve the document then, with effect from the end of the day on which the resolution is passed, the document is to be treated as not having been issued under section 119A. This process will afford Parliament an opportunity to consider any document issued by the Information Commissioner and to intervene if considered appropriate.

5.6 This instrument also confers a power on the Information Commissioner, through amendments to article 12 of the GDPR, to publish standardised icons for use in combination with information provided to data subjects under Articles 13 and 14 of the GDPR, or to issue a notice setting out requirements in respect of such icons to be issued by other persons. This replaces a similar power conferred on the European Commission by art. 12(8) of the GDPR. The Information Commissioner, as the regulator in this area, will have the necessary knowledge and experience to ensure that such icons are fit for purpose, including that they are easily visible, intelligible and clearly legible. The use of such icons by controllers will, as is currently the case under the GDPR, be optional.