

LEGISLATIVE CONSENT MEMORANDUM

DATA PROTECTION AND DIGITAL INFORMATION (NO.2) BILL

1. This legislative consent memorandum is laid under Standing Order (“SO”) 29.2. SO29 prescribes that a legislative consent memorandum must be laid, and a legislative consent motion may be tabled, before Senedd Cymru if a UK Parliamentary Bill makes provision in relation to Wales for any purpose within, or which modifies the legislative competence of the Senedd.
2. The Data Protection and Digital Information No.2 Bill (“the Bill”) was introduced in the House of Commons on 8 March 2023. The Bill can be found at: [Data Protection and Digital Information No.2 Bill - Parliamentary Bills - UK Parliament](#).

Policy Objective(s)

3. The UK Government’s stated policy objectives are to update and simplify the UK’s data protection framework with a view to reducing burdens on organisations while maintaining high data protection standards.

Summary of the Bill

4. The Bill is sponsored by the Department for Science, Innovation and technology (DSIT).
5. The Bill makes provision for the regulation of the processing of information relating to identified or identifiable living individuals; about services consisting of the use of information to ascertain and verify facts about individuals; about access to customer data and business data; about privacy and electronic communications; about services for the provision of electronic signatures, electronic seals and other trust services; about the disclosure of information to improve public service delivery; for the implementation of agreements on sharing information for law enforcement purposes; about the keeping and maintenance of registers of births and deaths; about information standards for health and social care in England; to establish the Information Commission; about oversight of biometric data; and for connected purposes.
6. A Data Protection and Digital Information Bill was originally laid in the House of Commons on 18 July 2022, however this Bill was subsequently placed on pause prior to its 2nd reading. This new Bill replaces the original Data Protection and Digital Information Bill.
7. The Bill is 204 pages long and covers multiple policy areas and Ministerial responsibilities.

Engagement with the UK Government

8. The General Data Protection Regulation (GDPR) is a European Union (EU) regulation on data protection and privacy in the EU and the European Economic Area (EEA). It also addresses the transfer of personal data outside the EU and EEA areas.
9. The GDPR came into force on 25 May 2018 and was immediately binding on all EU member states. The UK's Data Protection Act (DPA) 2018 received Royal Assent around the same time, and both pieces of legislation work in tandem to govern the processing of personal data within the UK.
10. Following the UK's departure from the EU, the GDPR was retained in domestic law as 'UK GDPR' and sits alongside an amended DPA 2018.
11. In December 2020 the UK Government published its National Data Strategy in which they set out a framework to 'unlock' the power of data to 'strengthen the economy' and 'create opportunities' for the future. The strategy set out five priority areas of action for UK Government.
 - Unlocking the value of data across the economy
 - Securing a pro-growth and trusted data regime
 - Transforming government's use of data to drive efficiency and improve public services
 - Ensuring the security and resilience of the infrastructure on which data relies
 - Championing the international flow of data
12. In September 2021, UK Government published "Data: A new direction", a consultation document to seek views on a number of proposed reforms to the UK's current legal data protection regime, primarily to the UK GDPR. The consultation document set out 74 proposed reforms based around key elements of UK GDPR.
13. Across the range of proposals contained within the "Data: A new direction" consultation the overarching concerns from a Welsh Government perspective were:
 - Undermining individual rights (whether real or perceived as either could impact on behaviour or just general worry around privacy);
 - Potential loss of EU Adequacy and the impact on Wales; and
 - Dilution of the independence of the Information Commissioner's Office (ICO) as the regulator for data protection in the UK.
14. Welsh Government submitted a response to the Consultation in November 2021.

15. Prior to the introduction of the original Bill in July 2022, the UK Government engaged with Welsh Government at official level via cross-UK groups, engaging on aspects of the direction of travel for particular areas in the Bill.
16. UK Government officials have continued to be in regular contact with Welsh Government Officials. A draft version of the new Bill was shared with us on 7 March 2023, the day before introduction.

Provisions in the Bill for which consent is required

Clauses 54 & 56 - Part 2, Digital Verification Services, Information Gateway:

17. These clauses make provision about the sharing of information for the purpose of providing Digital Verification Services (DVS). These clauses confer a power on public authorities to provide personal information about individuals (subject to consent) to organisations providing DVS. The purpose is to facilitate the provision of DVS and improve the service offered to the user. These clauses relate to devolved matters of public services, economy and business.
18. As such, these are “relevant provisions” for the purposes of SO29.

Clauses 61 to 77 - Part 3, Customer Data and Business Data:

19. These clauses make provision about sharing customer and business information to improve data portability (Smart Data) in order to improve the quality of service provided to the customer and to businesses.
20. They impose a duty on data holders to share customer and business data and they remove limitations which impede customers’ access to certain services. The purpose relates to business and economy.
21. These provisions therefore are “relevant provisions” for the purposes of SO29.

Clause 92 - Part 4, Disclosure of information to improve public service delivery to undertakings:

22. This extends the data sharing power in section 35 of the Digital Economy Act (DEA) 2017, which permit specified public bodies (‘specified persons’ in the DEA) to share data in order to improve the delivery of public services to individuals and households. The proposed amendments would extend these powers to include improving the delivery of services to businesses. ‘Specified persons’ are listed in Schedule 4 to the DEA 2017 and include in Part 2 ‘Welsh Bodies’ (various devolved Welsh authorities).
23. Consent is required as this clause has the purpose of improving public service delivery by Welsh bodies, therefore it is devolved. To the extent that this clause has the purpose of improving public service delivery by

Welsh bodies, this provision is therefore “relevant provision’ for the purposes of SO29.

Clause 93 - Part 4, Implementation of law enforcement information-sharing agreements:

24. This clause confers powers on the Secretary of State to make regulations for the purpose of implementing an international agreement relating to sharing information for law enforcement purposes (I-LEAP).
25. Law enforcement includes the prosecution of criminal offences and execution of criminal penalties. The Senedd has legislative competence to make provision for the prosecution of criminal offences and execution of criminal penalties on a wide range of devolved matters, for example, environmental or wildlife crime.
26. Whilst the UK Government has stated the purpose of the regulation making power is for the prevention and detection of crime, the power has been widely drafted and could potentially be used to legislate on other matters that may impact on devolved areas. As such these provisions therefore are “relevant provisions” for the purposes of SO29.
27. Consent is required for this provision because it contains provision for a purpose within the legislative competence of the Senedd.

UK Government view on the need for consent

28. In correspondence sent to the First Minister by Julia Lopez MP, Minister of State in the Department of Science, Innovation and Technology on 7 March, the UK Government stated they would be seeking legislative consent from the Senedd in respect of three measures within the Bill:
 - Part 3, Customer Data and Business Data;
 - Part 4, Disclosure of information to improve public service delivery to undertakings; and,
 - Part 4, Implementation of law enforcement information-sharing agreements.
29. UK Government are not in agreement that clauses 54 & 56 - Part 2, Digital Verification Services, Information Gateway require the legislative consent of the Senedd. Rather UK Government are of the view that DVS will always involve use of the internet in some way, and therefore the internet services reservation is relevant.
30. The UK Government’s approach suggests that any service that is provided via the internet would be captured by the reserved matter of ‘internet services’. This is an extraordinarily wide interpretation of this reserved matter and, in my view, cannot be correct.

Welsh Government position on the Data Protection and Digital Information Bill

31. Through the Bill, the UK Government seeks to provide greater clarity on the UK data protection framework and reduce burdens on organisations. The Bill will also reform the governance structure and powers of the Information Commissioner's Office (ICO), as the regulator, and transfers them to a new body, the Information Commission. In addition, the Bill seeks to enable more effective use of personal data in delivery of public services through initiatives such as Digital Identity Verification and Smart Data schemes.
32. The Welsh Government is committed to the improvement of digital public services through better use of data, as set out in our Digital Strategy for Wales. Key to this is ensuring that people and organisations have full confidence that their data is being treated responsibly, handled securely and used ethically.
33. However, there are concerns that the Bill could lead to the undermining of individual rights, as well as diluting the independence of the ICO as the regulator.
34. In addition, there are also concerns that the introduction of the Bill creates a risk to the UK's current adequacy decision, which was granted in June 2021 by the EU for a period of 4 years initially. The potential loss of EU data adequacy is a key concern from a trade perspective as this would be a major threat for Welsh exporting businesses, whose main overseas market continues to be the EU.
35. Further discussions will be needed with UK Government officials to understand what legal and policy analysis has been undertaken on the likelihood of these and any mitigating actions.
36. The vast majority of the Bill concerns matters reserved as a result of the data protection reservation, the sale and supply of goods and services to consumers reservation, the telecommunications reservation and the reservation for the registrations of births, deaths and places of worship, as set out in Schedule 7A to the Government of Wales Act 2006. As such I believe it may be appropriate for these provisions to be made through a UK Bill.
37. However, there are matters of concern which will need to be resolved before I can recommend the Senedd gives consent to this Bill.

Key matters of concern to be resolved before consent can be recommended:

Clause 56 - Part 2, Digital Verification Services, Information Gateway:

38. This clause gives powers to the Secretary of State and Treasury to publish a Code of Practice in relation to clause 54, creating a permissive data sharing power enabling public authorities to share information

relating to an individual with an organisation registered on the DVS register, where the individual has requested that organisation provides DVS. The clause sets out that the Code must be consistent with, and issued under, section 125(4) of the DPA Act 2018 and that Public Authorities sharing data for DVS must have regard to the Code.

39. Further consideration needs to be given to the devolved implications of a UK wide Code of Practice. I will provide an update on the Welsh Government position in due course.

Clauses 61 to 77 - Part 3, Customer Data and Business Data:

40. Together these clauses give Secretary of State and Treasury regulation making powers:
- requiring a data holder to provide customer data to either the customer or to an authorised person; requiring a data holder to produce, collate or retain data and to amend the data; and for data receiver to exercise customer rights in relation to the data holder;
 - requiring a data holder to publish business data or to provide business data on request to a customer of the trader, or to a “third party recipient”;
 - for the enforcement of data regulations and for the enforcement of requirements, including enforcement by a specified public body;
 - enabling data holders, enforcers and decisions makers (and those acting on their behalf), to require other persons to pay fees; and,
 - for a levy to be paid by data holders to a specified public body, including how funds must or may be used.
41. In addition, under clause 72 the Secretary of State or Treasury may give financial assistance to enforcers and/or decision makers to cover expenses.
42. Further consideration needs to be given to the devolved implications of these regulation making powers being given to the Secretary of State and Treasury. I will provide an update on the Welsh Government position in due course.

Clause 93 - Part 4, Implementation of law enforcement information-sharing agreements:

43. This clause gives the Secretary of State powers to make regulations, as they deem appropriate, for international agreements for sharing information for law enforcement purposes.
44. It is my view that Welsh Ministers should be given appropriate powers to make regulations for the purpose of implementing an international agreement relating to sharing information for the aspects of law enforcement within the Senedd’s competency. This issue is subject to ongoing discussions with UK Government.

Financial implications

45. There may be financial implications for Wales with the UK Government's Data Protection and Digital Information (No.2) Bill in relation to clause 72 which gives powers to the Secretary of State or Treasury to give financial assistance to specified 'persons'. Work is underway to understand how this may impact Wales, and further information will be shared when possible.

Conclusion

46. In my view it may be appropriate to deal with these provisions in this UK Bill as the Bill represents the most effective way for these provisions to come into force.

47. It is my view that it is appropriate to recommend consent in respect of Clause 54, Part 2, Digital Verification Services and Clause 92, Part 4, Disclosure of information to improve public service delivery to undertakings.

48. However, it is my view that it is not appropriate to recommend consent for the following provisions until further discussions have been held with UK Government in relation to the matters outlined in paragraphs 39-44 above:

- Clause 56, Part 2, Digital Verification Services;
- Clauses 61 to 77, Part 3, Customer Data and Business Data; and,
- Clause 93, Part 4, Implementation of law enforcement information-sharing agreements.

Mark Drakeford MS
First Minister
29 March 2023