Huw Thomas Counsel
huw.thomas@careyolsen.com

Alexandra Gill Associate
alexandra.gill@careyolsen.com

Carey Olsen, Jersey and Guernsey

The GDPR and the Channel Islands

Guernsey and Jersey have recently reformed their respective national data protection laws in view of the entry into effect of the General Data Protection Regulation (Regulation (EU) 2016/679) ('GDPR'). Huw Thomas and Alexandra Gill, Counsel and Associate at Carey Olsen in the Channel Islands respectively, highlight the key areas of the reform.

Personal data is critical to the economy of the Channel Islands. Both Guernsey and Jersey have strong finance and tourism sectors that hold and process large amounts of personal data in the pursuit of their businesses. Neither Guernsey nor Jersey are members of the EU, although at present they have a limited relationship with the EU (along with the Isle of Man) which is governed by Protocol 3 to the Treaty of Accession to the European Community of 1973.

A large proportion of the personal data that Guernsey and Jersey process relates to EU citizens. Historically both Guernsey and Jersey have taken great care to ensure that their data protection regimes provide standards of protection for personal data which are equivalent to those in force within the EU. With the advent of the GDPR, those standards are changing significantly.

Guernsey

Guernsey has had data protection legislation since 1986. The Data Protection (Bailiwick of Guernsey) Law, 1986 was based on the UK Data Protection Act 1984 ('the 1984 UK Act'), which itself was enacted in response to the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

With the advent of the Data Protection Directive (Directive 95/46/EC), this regime became outdated and Guernsey once again updated its data protection legislation to conform to European standards, leading to the Data Protection (Bailiwick of Guernsey) Law, 2001. Once again, that legislation was modelled closely on a UK antecedent - the Data Protection Act 1998 ('the 1998 UK Act').

Jersey

Jersey has followed a very similar path to Guernsey. The Data Protection (Jersey) Law 1987 was also modelled closely on the 1984 UK Act and the Data Protection (Jersey) Law 2005 was (like the 2001 Guernsey Law) modelled on the 1998 UK Act.

Channel Islands' response to the GDPR

Both Guernsey and Jersey have now enacted legislation to mirror the enhanced requirements of the GDPR. Guernsey has enacted the Data Protection (Bailiwick of Guernsey) Law 2017 ('the DPGL') and Jersey has enacted the Data Protection Authority (Jersey) Law 2018 and the Data Protection (Jersey) Law 2018 ('the DPJL'). The new law in both jurisdictions comes into force on 25 May 2018.

Adequacy: raising the bar

Both Guernsey and Jersey have been assessed by the European Commission ('the Commission') as providing adequate protection for personal data (Opinion 02072/07/EN WP 141 and Opinion 10595/03/EN WP 79). Both islands have indicated that continuing to be judged to be adequate is a strategic priority.

These adequacy findings are 'grandfathered' into the new regime under the GDPR (Article 45(9) of GDPR), subject to a reassessment which is expected to take place in or around 2020. Under Article 45 of the GDPR, the adequacy bar has been significantly raised following the decision of the European Court of Justice ('CJEU') in *Maximillian Schrems v. Data Protection Commissioner* (C-362/14). The CJEU in Schrems held that adequacy requires an 'essentially equivalent' regime to that guaranteed within the EU.

Recital 104 of the GDPR tracks this language and requires that a Commission adequacy decision means that a third country must ensure 'an adequate level of protection essentially equivalent to that ensured within the EU.'

Under Article 45 of the GDPR, the Commission must consider an array of factors in assessing adequacy, including 'the rule of law, respect for human rights and fundamental freedoms, legislation relating to public security, defence, national security and criminal law and the access of public authorities to personal data, rules for the onward transfer of personal data to other third countries or international organisations, case law and the enforcement of data subject rights.' The existence and functioning of an independent regulator must also be considered (including their enforcement powers).

Article 45 also provides for the ongoing monitoring and (if necessary) suspension and/or revocation of adequacy decisions.

Being a third country is not easy

Both Guernsey and Jersey have undertaken extensive projects to assess the requirements of the GDPR and how they should respond. This has not been a straightforward process. The text of the GDPR is by no means easy to work with and is particularly problematic when read

Image: Alberto Casanillas / EyeEm / Getty Images

Will we see EU supervisory authorities seeking to engage with controllers (and processors) in Guernsey and Jersey directly or will they seek to work through the local regulators?

from the viewpoint of a third country. One of the biggest challenges in designing and implementing legislative schemes which would stand up to the challenge of an adequacy assessment is the fact that Guernsey and Jersey are among the first jurisdictions to try and produce such schemes. Unlike the previous iterations of their laws under which they could largely follow the UK, they were essentially starting from scratch in terms of producing their laws.

The DPGL and DPJL are different in form but both have achieved a broadly similar outcome - legislation that in broad terms reproduces the primary features of the GDPR. The differences between the two Channel Islands laws are not vast, but they are sufficient to have given rise to some unanticipated outcomes. In particular, under their current laws, the data protection regime in Guernsey and Jersey was sufficiently closely aligned that they were able to share a regulator. With the advent of the GDPR this is no longer considered practicable and going forward each jurisdiction will have its own regulator.

Outstanding questions

Just how the GDPR will apply even within the EU is still not entirely clear - a great deal of guidance and national legislation remains to be put in place and there is accordingly a degree of uncertainty as to just how the new regime will be interpreted and enforced.

In addition to the issues above, there are a number of open questions to which the answers are not as clear as one might hope. Some of those questions are as follows:

- How will enforcement of the GDPR work? Will we see EU supervisory authorities seeking to engage with controllers (and processors) in Guernsey and Jersey directly or will they seek to work through the local regulators? Article 50 of the GDPR states that the Commission and supervisory authorities should take appropriate steps to develop international cooperation mechanisms to facilitate the effective enforcement of legislation for the protection of personal data - how these mechanisms will operate in practice remains to be seen.
- The role of EU representatives for controllers and processors in 'adequate' jurisdictions. Article 27 of the GDPR requires controllers and processors that are not established in the EU, but offer goods or services to data subjects in the EU or which (monitor their behaviour) to appoint an EU-based representative to provide a point of contact for individuals and local data protection authorities. How will adequacy (and Article 50 international co-operation) interact with this obligation (if at all)?
- What is the status of Channel Islands legal and regulatory obligations? A number of provisions in the GDPR require that certain types of processing - including processing of personal data based on a legal obligation to which the controller is subject in Article 6(1)(c) of the GDPR - must have a basis in EU or Member State law. What is not clear is the extent to which the law of an adequate jurisdiction will come within this requirement. This issue - how controllers in an adequate third country can reconcile the requirements of local law and regulation with the provisions of the GDPR - is a critical one that is yet to be resolved.
- What does 'large scale' mean in a Channel Islands context? Both the DPGL (at Section 47) and the DPJL (at Article 24) replicate the obligations of Article 37 of the GDPR in requiring the appointment of a data protection officer for all public authorities and where the core activities of the controller or the processor involve 'regular and systematic monitoring of data subjects on a large scale' or where the entity conducts large scale processing of special categories of personal data. Does 'large scale' mean something different in small jurisdictions such as Guernsey and Jersey? Or should controllers and processors in a Channel Islands context take as their benchmark their peers in larger jurisdictions within the EU?
- Will the UK be considered a third country following Brexit? If so, will it have an adequacy finding? Nothing is at all clear. Given the proximity of the Channel Islands to the UK and the overlap between businesses operating in both locations, or referring business between locations, this is another critical question.

These are just some of the questions with which controllers, processors and the authorities in the Channel Islands are confronted with in getting to grips with the GDPR and its local equivalents. It is becoming ever more evident that the real work may just be beginning on 25 May 2018.