



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

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Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol
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27 Mehefin 2019

Annwyl Mick,

Ysgrifennaf atoch ynglŷn â Rheoliadau Diogelu Data, Preifatrwydd a Chyfathrebu Electronig (Diwygio etc) (Ymadael â'r UE) 2019 a osodwyd yn Senedd y Deyrnas Unedig ar 18 Chwefror ac a wnaed ar 28 Chwefror. Rwy'n ysgrifennu atoch yn yr ysbryd o sicrhau bod y Pwyllgor yn cael gwybod am y materion a'r wybodaeth ddiweddaraf mewn perthynas â deddfwriaeth a wneir o ganlyniad i Brexit.

Mae'r OS hwn yn cywiro diffygion mewn deddfwriaeth diogelu data sy'n deillio o'r UE er mwyn sicrhau bod y fframwaith cyfreithiol ar gyfer diogelu data yn y DU yn parhau i weithredu'n effeithiol ar ôl y diwrnod ymadael. Fe arweiniodd yr anghydfod ynglŷn â'r OS hwn at gyfnewid llythyrau rhyngof i a Margot James AS, y Gweinidog dros Faterion Digidol a'r Diwydiannau Creadigol.

Fel yr ydych yn gwybod, gwnaethom ymrwymiad, yng nghyd-destun Deddf yr Undeb Ewropeaidd (Ymadael) 2018, y byddai pob darn o ddeddfwriaeth a wnaed yng Nghymru yn cael ei ddiwygio yng Nghymru, gan alluogi'r Cynulliad Cenedlaethol i graffu arno'n uniongyrchol. Mae darpariaethau Deddf yr Undeb Ewropeaidd (Ymadael) sy'n ymwneud â phwerau cywiro'r Gweinyddiaethau Datganoledig (Atodlen 2) yn caniatáu'n benodol ar gyfer dull o'r fath.

Mae Adran Diwylliant, y Cyfryngau a Chwaraeon Llywodraeth y DU yn cadarnhau bod yr OS wedi'i gadw yn ôl yn ei gyfanrwydd ac mae wedi datgan bod y diwygiadau sy'n cael eu gwneud i'r GDPR (neu "GDPR y DU" gan fod Rheoliad Diogelu Data Cyffredinol yr UE i gael ei ailenwi a'i addasu ar ôl ymadael) a Deddf Diogelu Data 2018 yn ymwneud â'r mater a gedwir yn ôl o "ddiogelu data personol", fel y nodwyd yn Adran L6 yn Rhan 2 o Atodlen 7A i Ddeddf Llywodraeth Cymru 2006 (materion a gedwir yn ôl).

Mae Llywodraeth y DU o'r farn bod y diwygiadau sy'n cael eu gwneud i ddarpariaethau statudol eraill gan y Rheoliadau (gan gynnwys, er enghraifft, i Reoliadau Gwybodaeth am Ddisgyblion (Cymru) 2011 (O.S. 2011/1942 (Cy. 209)) yn llwyr ganlyniadol i'r newidiadau a wnaed i GDPR y DU a Deddf Diogelu Data 2018. I'r perwyl hwn, mae'n ystyried bod y diwygiadau hyn hefyd yn berthnasol i'r mater a gedwir yn ôl, sef diogelu data personol, ac felly nad yw'r Cytundeb Rhynglywodraethol yn berthnasol i'r broses o wneud y diwygiadau

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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.

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canlyniadol hyn i ddeddfwriaeth a wneir yng Nghymru ac nad oes angen cydsyniad Gweinidogion Cymru.

Nid yw'r rhesymeg hon yn cydnabod pwerau Gweinidogion Cymru i wneud cywiriadau i OSau Cymreig o dan eu pwerau yn Rhan 1 o Atodlen 2 i Ddeddf yr Undeb Ewropeaidd (Ymadael). Mae'r pŵer hwn i fynd i'r afael â diffygion yng nghyfraith yr UE a ddargedwir yn bŵer eang ac yn cynnwys y pŵer i wneud cywiriadau o'r math hwn. Mae'r pŵer hwn ar gael, waeth bynnag am unrhyw gwestiwn ynghylch a fyddai'r cywiriadau i'r OSau Cymreig o fewn cymhwysedd deddfwriaethol Cynulliad Cenedlaethol Cymru o dan Ddeddf Llywodraeth Cymru 2006 ai peidio.

Er bod cyfyngiadau ar bwerau Gweinidogion Cymru i wneud darpariaeth mewn meysydd lle nad yw cymhwysedd wedi ei ddatganoli (ym mharagraff 2 o Atodlen 2), mae gan "cymhwysedd wedi ei ddatganoli" ystyr benodol yng nghyd-destun Atodlen 2 (gweler paragraff 9 o Atodlen 2). I'r graddau bod y darpariaethau dan sylw yn ddiwygiadau i OSau Cymreig a wnaed gan Weinidogion Cymru, mae'r darpariaethau yn bodloni'r amodau yn is-baragraff (2) o baragraff 9 ac felly o fewn cymhwysedd datganoledig Gweinidogion Cymru at ddibenion Rhan 1 o Atodlen 2.

Ymddengys fod rhesymeg Llywodraeth y DU yn mynd i'r afael â'r cwestiwn a yw'r mater yn un sydd wedi ei gadw yn ôl neu wedi ei ddatganoli fel petai'n cymhwyso'r prawf cymhwysedd datganoledig ym mharagraff 9(1)(a) o Atodlen 2, heb ystyried paragraff 9(1)(b) a'r amodau a amlinellir ym mharagraff 9(2).

Nid oes gennym bryderon am y dull polisi a gynigir yn yr OS hwn, ac nid oedd gennym ddiddordeb ychwaith mewn llesteirio'r gwaith o'i wneud. Fodd bynnag, rydym yn awyddus i gynnal yr ymrwymadau a wnaed gan y ddwy Lywodraeth yn y Cytundeb Rhynglywodraethol. Rydym wedi gofyn fwy nag unwaith am i'r OS gael ei dynnu'n ôl er mwyn dileu'r diwygiadau i ddeddfwriaeth a wnaed yng Nghymru.

Roedd ymateb y Gweinidog yn siomedig, er ei fod yn cydnabod effaith yr OS o ran gwneud cywiriadau i ddeddfwriaeth a wnaed yng Nghymru. Rydym yn arbennig o anfodlon gan ein bod wedi gofyn am i'r ymrwymadau a gafodd eu gwneud i'r Cynulliad Cenedlaethol ac yn y Cytundeb Rhynglywodraethol gael eu parchu. O ganlyniad, rydym yn bwriadu cyflwyno deddfwriaeth yn y Cynulliad i wneud yr un cywiriadau i'r ddeddfwriaeth a wnaed yng Nghymru, ac i wneud diwygiadau pellach i'r testun Cymraeg i sicrhau ei fod yn gywir.

Daw'r diwygiadau hyn i rym ar y diwrnod ymadael. Bydd y ddeddfwriaeth hon hefyd yn gwneud diwygiadau canlyniadol i Reoliadau Diogelu Data, Preifatrwydd a Chyfathrebu Electronig (Diwygio etc) (Ymadael â'r UE) 2019 a fydd yn dirymu'r darpariaethau perthnasol (sef paragraffau 71 i 75 a pharagraffau 90 a 91 o Atodlen 3). Gan y bydd angen i'r dirymiad hwn ddod i rym cyn y diwrnod ymadael, rydym yn ymgynghori â Llywodraeth y DU yn unol â'r gofyniad ym mharagraff 4(a) o Atodlen 2 i Ddeddf yr UE (Ymadael) 2018.

Amgaeaf gopïau o'n gohebiaeth â Llywodraeth y DU gyda'r llythyr hwn er gwybodaeth ichi.

Yn gywir,



Jeremy Miles AC

Y Cwnsler Cyffredinol a Gweinidog Brexit
Counsel General and Brexit Minister



Department for
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Margot James MP
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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
Welsh Government
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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

Jeremy Miles AC/AM
Y Cwnsler Cyffredinol a Gweinidog Brexit
Counsel General and Brexit Minister



Llywodraeth Cymru
Welsh Government

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
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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

Y Cwnsler Cyffredinol a Gweinidog Brexit
Counsel General and Brexit Minister