

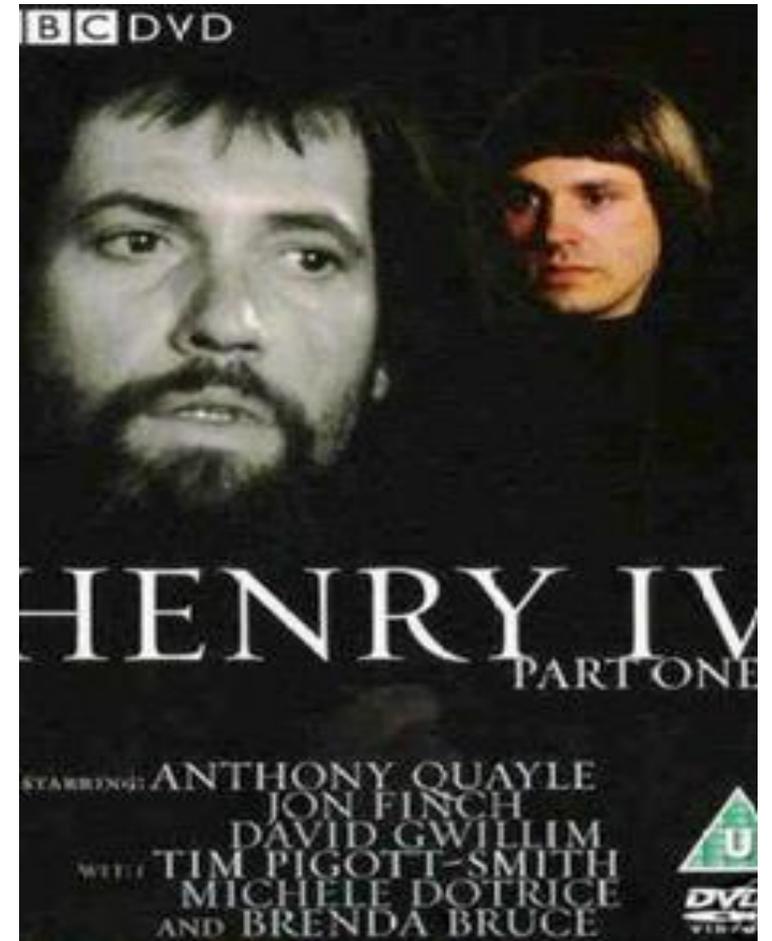
Henry the IV Part 1, Act 3 Scene 1

GLENDOWER

I can call spirits from the vasty deep.

HOTSPUR

Why, so can I, or so can any man;
But will they come when you do call for
them?



Jersey's new data laws

New legislation received Royal Assent in February 2018 and will come into force on 25 May 2018

1. Data Protection (Jersey) Law 2018

Drafted to ensure continued “adequacy”. implements, in full, both the GDPR and the associated Law Enforcement Directive (“LED”) by providing for the obligations of data controllers, processors and the rights of data subjects.

2. Data Protection Authority (Jersey) Law 2018

Establishes and sets out the powers and functions of the new Data Protection Authority.

Jersey's status

Jersey is a “third country” for the purpose of the EU’s DP legislation.

Jersey has an ‘adequacy’ decision from the EU Commission, (2008/393/EC) and this rolls over for GDPR.

New legislation provides ‘essentially equivalent’ protection to EU law – decision will therefore remain in force, until amended, replaced or revoked.

The Data Protection (Jersey) Law and representatives

Definition of representative in Article 1 - *“means a representative nominated by the controller under Article 4(3)”*.

Article 4(3) – A controller referred to in Article 2(b) must nominate, in writing, a representative established in Jersey.

Article 2(b) - *“This Law applies to the processing of personal data....by a controller or processor not established in Jersey, but who uses equipment in Jersey for processing....otherwise than for the purpose of transit”*.

Article 27 of the GDPR: Representatives of controllers or processors not established in the Union

“ 1. Where Article 3(2) applies, the controller or the processor shall designate in writing a representative in the Union.”

Article 3(2) is one of the provisions setting out the territorial scope of the GDPR.

As a matter of EU law, the GDPR applies to any processor or controller outside the EU if they are processing personal data relating to either offering goods or services to data subjects in the EU, or monitoring the behaviour in the EU of such data subjects.

Article 27 of the GDPR: limitations

“ 2. The obligation laid down in paragraph 1 of this Article shall not apply to:

*(a) processing which is occasional, does not include, on a large scale, processing of special categories of data as referred to in Article 9(1) or processing of personal data relating to criminal convictions and offences referred to in Article 10, and is unlikely to result in a risk to the rights and freedoms of natural persons, taking into account the nature, context, scope and purposes of the processing; or **[underlined parts are cumulative]***

(b) a public authority or body. “

The elements of 27.2(a) are cumulative - so it is of limited use.

Article 27 of the GDPR: where established

“ 3. The representative shall be established in one of the Member States where the data subjects, whose personal data are processed in relation to the offering of goods or services to them, or whose behaviour is monitored, are.”

No requirement for the representative to be located where a majority of the data subjects are.

Article 27 of the GDPR: what is the role of the rep?

The nature and scope of the role of the representative is set out at article 27(4) and (5).

(4) Provides that the representative is to be *“mandated”* to be *“addressed”* by supervisory authorities and data subjects *“... on all issues related to processing, for the purposes of ensuring compliance with this Regulation”*.

(5) Provides that the representative’s *“designation ... shall be without prejudice to legal actions which could be initiated ...”* against the relevant controller or processor.

Guidance in Recital 80?

“The representative should act on behalf of the controller or the processor and may be addressed by any supervisory authority.....the designation of such a representative does not affect the responsibility or liability of the controller or of the processor under this Regulation. Such a representative should perform its tasks according to the mandate received from the controller or processor, including cooperating with the competent supervisory authorities with regard to any action taken to ensure compliance with this Regulation. The designated representative should be subject to enforcement proceedings in the event of non-compliance by the controller or processor.”

But other GDPR provisions tell a different story

Article 4 - “representative” is defined as “ ... a ...person, established in the Union who, designated by the controller or processor in writing..., represents the controller or processor with regard to their respective obligations....”

Articles 13 and 14 – name of rep to be provided to data subject

Article 30 and 31 - obligations to maintain records, make them available on request and to co-operate with a supervisory authority apply to the rep

Article 58 – powers of supervisory authority to require the provision of information apply to the rep.

How is this being implemented in the EU?

UK - see Part 6 of the Data Protection Bill - only provides for the Information Commissioner to have coercive powers against a rep to the extent of issuing and enforcing compliance with information notices.

Germany – the representative is an address for service for a non-EU based data controller or processor, but is not personally substantively liable. See sections 16(1) and 44 of the Federal Data Protection Act, read together with section 184 of the German Civil Code.

Other jurisdictions? Potential for jurisdiction shopping?

Additional burden and potential for exponential growth?

Even if a limited role it may amount to a significant burden on businesses in Jersey and in other third countries to appoint reps.

Not aware of other adequate third countries' Governments (Canada, New Zealand) taking action in respect of Article 27. Potential for absurdity!



Article 27 of the GDPR: Enforcement

In theory enforcement action might be taken in the EU in respect of a failure to appoint a representative.

In practice, enforcement will be very difficult if the controller or processor has no assets in the EU to enforce against.

Jersey's rules on the enforcement of foreign judgments are based on English common law and orders of foreign courts imposing regulatory penalties will rarely be enforceable.

Some scope for the appointment of a representative to distort the position on enforcement if it is taken as submission to the jurisdiction of the foreign court.

Conclusions and next steps

Purpose of Article 3 of the GDPR and the provisions on international transfers is to ensure that protection ‘travels with the data’.

In Jersey this protection is afforded by our new Data Laws recognised by our adequacy decision.

Jersey based controllers and processors are required to fulfil their transparency obligations to data subjects, who are in turn, wherever they are resident, afforded the ability to enforce those rights through our Data Protection Authority.

Article 50 GDPR - international co-operation mechanisms - Article 16 co-operation mechanisms.

In this context there may be little or no point in seeking to enforce Article 27.

Conclusions and next steps

Proposed European Data Protection Board consultation (probably in June 2018)

Likely to cover Article 3(2) and Article 27

Government likely to respond, but will look to work together with industry and the Authority on the response.

