

# ADGM to Adopt New GDPR-like Data Protection Regime

21 December 2020

On 9 November 2020, the Abu Dhabi Global Market (“ADGM”), [introduced](#) its new draft [Data Protection Regulations 2020](#) (the “Draft Regulations”) which are intended to entirely replace the [Data Protection Regulations 2015](#),<sup>1</sup> as amended (the “Existing Regulations”).<sup>2</sup>

The Draft Regulations, which are annexed to the ADGM’s [Consultation Paper \(No. 6 of 2020\)](#) on the New Data Protection Regulatory Framework (the “Consultation Paper”), are largely modelled on the European Union’s General Data Protection Regulation (the “GDPR”), with the ADGM acknowledging that “GDPR is the appropriate internationally accepted best practice benchmark.”<sup>3</sup> However, some ADGM-specific differences are proposed, so companies already complying with the GDPR should not assume that nothing additional needs to be done to comply with the ADGM rules too. The Draft Regulations are a new chapter in the ADGM’s long-standing commitment to globally-recognised standards of data protection.

The Consultation Paper invited public feedback on the Draft Regulations until 19 December 2020. Following the review of public comments, and any consequential amendments that may be required, the Draft Regulations will need to be approved by the ADGM’s Board of Directors as the final step required to enact new legislation.

The Draft Regulations will result in significant changes and additional responsibilities for personal data controllers and processors. It will be important for these parties to be alert to the commencement date of the final version of the Draft Regulations, as well as any interim period that may be provided to allow for compliance with the new regulations.

Below, we discuss the key features of the Draft Regulations, areas of overlap with the GDPR, as well as certain proposed departures from the GDPR that will need to be monitored by organisations doing business in both the ADGM and the European Union.

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<sup>1</sup> Draft Regulations, section 62.

<sup>2</sup> The Existing Regulations were amended in [2018](#) and in [2020](#).

<sup>3</sup> Consultation Paper, paragraph 4.



## Background

**Current regime.** The Existing Regulations are largely based on the OECD Privacy Guidelines, the European Data Protection Directive (Directive 95/46/EC on the protection of individuals with regards to the processing of personal data) (the “**Data Protection Directive**”) and the UK Data Protection Act 1998.<sup>4</sup>

**New Regime.** The legal regimes upon which the Existing Regulations are based have largely been superseded by the GDPR.<sup>5</sup> Accordingly, the move to replace the Existing Regulations with the Draft Regulations, based on the GDPR and updated international guidelines and legislation is a logical and necessary step to ensure that the ADGM’s data protection regime continues to maintain globally-recognised high standards.

The ADGM’s decision to update the Existing Regulations comes shortly after the Dubai International Financial Centre (“**DIFC**”) new Data Protection Law ([DIFC Law No. 5 of 2020](#)) came into effect on 1 July 2020. The DIFC’s new Data Protection Law also repealed its predecessor legislation, and was enacted to align the DIFC’s data protection regime with international best practice, including the GDPR regime among others.<sup>6</sup>

## Rationale for GDPR alignment

The Consultation Paper recognises that the GDPR is “*generally considered to have set a high-water mark for data protection regulation globally*”, and accordingly “*any regime based on the GDPR is more likely to be compliant with the core principles of other, less demanding regimes.*”<sup>7</sup> Basing its future data protection law on the GDPR is therefore a pragmatic solution by the ADGM at a time where critical international data flows have been disrupted by a judgment of the Court of Justice of the European Union (the “**CJEU**”), in part as a result of the lower standards for data protection identified in certain non-

EU jurisdictions (information on the “*Schrems II*” judgement of the CJEU and its impact on international data flows can be found [here](#)).<sup>8</sup>

The ADGM recognises the importance of a robust domestic data protection regime as part of ensuring its continuing international appeal. In particular, the Consultation Paper notes that “*consistency with other international data protection regimes is likely to be attractive to multinational companies operating within ADGM and ADGM companies seeking international expansion*”.<sup>9</sup> The Consultation Paper highlights Brazil, Malaysia and California as examples of jurisdictions in which new data protection laws have recently been enacted which are based on, or inspired by, the GDPR.<sup>10</sup>

Other perceived advantages of basing the Draft Regulations on the GDPR are listed in the Consultation Paper,<sup>11</sup> including the following:

- global businesses can capitalise on their familiarity with the GDPR, making it easier for businesses to adopt a consistent, global approach to data privacy (including group-wide data protection policies and procedures);
- guidance adopted by EU supervisory authorities and the European Data Protection Board can be referred to by the ADGM’s supervisory authority in order to establish best practices; and
- the GDPR provides a potentially useful precedent for disputes before the ADGM Courts when considering such cases in ADGM.

**Areas of overlap with the GDPR.** Language that is similar to – or often copied verbatim from – the GDPR’s text can be found in the Draft Regulations. For example:

<sup>4</sup> Consultation Paper, paragraph 2.

<sup>5</sup> The Data Protection Directive and the UK DPA 1998 have now been superseded by the GDPR and the UK DPA 2018; see Consultation Paper, paragraph 2.

<sup>6</sup> See the DIFC’s [press release](#), dated 1 June 2020.

<sup>7</sup> Consultation Paper, paragraph 4(a).

<sup>8</sup> *Data Protection Commissioner v Facebook Ireland Ltd, Maximilian Schrems* (Case C-311/18). In addition to the Draft Regulations being aligned with the GDPR, the Consultation Paper

notes that the ADGM’s new legislative regime will also be aligned with the Consultative Committee of the Convention for the protection of individuals with regard to the processing of personal data, as well as the UK Data Protection Act 2018; see Consultation Paper, paragraph 5.

<sup>9</sup> Consultation Paper, paragraph 4(b).

<sup>10</sup> Consultation Paper, paragraph 4(b).

<sup>11</sup> Consultation Paper, paragraph 10.

- **Key definitions** (e.g., personal data, data subject, processing, consent, personal data breach, controller and processor);
- **Key principles** relating to processing of personal data,<sup>12</sup> *i.e.*, lawfulness, fairness and transparency, purpose limitation, data minimisation, accuracy, storage limitation and integrity and confidentiality;
- **Lawful bases of processing**,<sup>13</sup> including consent, necessity for contractual performance, compliance with a legal obligation or for the purposes of legitimate interests;
- **Data subject rights**,<sup>14</sup> which includes information provision obligations placed on controllers as well as an individual’s right to access, rectification, and erasure of their personal data, as well as the right to restriction of processing, data portability, objection to processing and to be informed of automated decision-making;
- **Compensation for material or non-material damage suffered** by a data subject as a result of a controller or processor’s non-compliance;<sup>15</sup>
- **Security obligations**, *i.e.*, the requirement for appropriate technical and organisational measures to be implemented;<sup>16</sup>
- **Requirements in connection with joint control and controller to processor relationships**,<sup>17</sup> including mandatory contractual provisions in connection with the appointment of a processor and the new requirement for an “arrangement” between joint controllers setting out their responsibilities for compliance;
- **Personal data breach notification requirements and thresholds** including notification requirements vis-à-vis the Commissioner of Data Protection (the “**Commissioner**”) (*i.e.*, within 72

hours, unless the breach is unlikely to result in a risk to the rights of natural persons) and data subjects (without undue delay, where the breach is likely to result in a high risk to the rights of natural persons);<sup>18</sup> and

- **Designation of a “data protection officer”** in certain circumstances.<sup>19</sup>

**International transfers.** The framework for the transfer of personal data out of the ADGM is detailed in Part V of the Draft Regulations and features similar mechanisms for international transfers as those found in Chapter V of the GDPR. For example, transfers can be made lawfully to a jurisdiction outside of the ADGM pursuant to an adequacy decision of the Commissioner and intragroup data transfers out of the ADGM are also permitted subject to compliance with Binding Corporate Rules approved by the Commissioner.<sup>20</sup>

Additionally, the Commissioner may from time to time adopt the then current standard contractual clauses issued by the European Commission which would be automatically incorporated by reference into the new ADGM data protection law.<sup>21</sup> The Consultation Paper highlights that “*this would allow multinational businesses to adopt a single form of data transfer agreement for use across multiple jurisdictions, including ADGM.*”<sup>22</sup>

**Specific departures from the GDPR.** Despite the general areas of alignment, the Draft Regulations also feature a number of departures from the GDPR as highlighted in the Consultation Paper, which explains that such departures are provided either (i) where required in order for the new law to be adapted to the needs of the ADGM, or (ii) where the ADGM identified an opportunity to be more “*proportionate and commercially friendly*” without undermining the key ambition of achieving a high standard of protection for personal data.<sup>23</sup>

<sup>12</sup> Draft Regulations, section 4.

<sup>13</sup> Draft Regulations, section 5.

<sup>14</sup> Draft Regulations, Part III.

<sup>15</sup> Draft Regulations, section 58(1)

<sup>16</sup> Draft Regulations, sections 22(1) and 30.

<sup>17</sup> Draft Regulations, sections 25 and 26.

<sup>18</sup> Draft Regulations, sections 31 and 32.

<sup>19</sup> Draft Regulations, section 34.

<sup>20</sup> Draft Regulations, section 42.

<sup>21</sup> Draft Regulations, section 41.

<sup>22</sup> Consultation Paper, paragraph 26.

<sup>23</sup> Consultation Paper, paragraph 6.

**Certain key differences between the Draft Regulations and the GDPR are summarised in the table below:**

<i>Item</i>	<i>The GDPR</i>	<i>ADGM Draft Regulations</i>
<b>Territorial scope</b>	<p><b>Article 3:</b> Applicability is based on the processing of personal data:</p> <ul style="list-style-type: none"> <li>— in the context of a controller or processor in the EU (regardless of whether the processing takes place in the EU or not); and</li> <li>— of data subjects who are in the EU by a controller or processor not established in the EU where the processing activities are related to (a) the offering of goods or services to data subjects in the EU, or (b) the monitoring of their behaviour that takes place in the EU.</li> </ul>	<p><b>Section 3:</b> Applicability is based only on the processing of personal data in the context of the activities of an establishment of a controller or processor in the ADGM, regardless of whether the processing takes place in the ADGM or not.</p>
<b>Administrative fines</b>	<p><b>Article 83:</b> Maximum fines for serious infringements can be imposed up to the higher of €20 million or 4% of an undertaking's total worldwide annual turnover for the preceding financial year.</p>	<p><b>Section 54(1):</b> An administrative fine may not exceed USD 28 million.</p> <p>According to the Consultation Paper, “<i>this is commensurate with the maximum numerical cap under the GDPR.</i>”</p> <p>(Note that if a company simultaneously breaches the ADGM rules and the GDPR it could be subject to fines totaling double this amount, or more.)</p>
<b>Deadlines for responding to data subjects' requests</b>	<p><b>Article 12(3):</b> Responses to data subjects must be made without undue delay and within an initial time limit of <i>one month</i>, which can be extended by two further months where necessary, “<i>taking into account the complexity and number of the requests.</i>”</p>	<p><b>Section 10(3) and (4):</b> Responses to data subjects must be made without undue delay and within the initial <i>two-month</i> time limit, which can be extended by two further months where necessary, “<i>taking into account the complexity and number of the requests.</i>”</p> <p>The Consultation Paper explains that this longer period for response is intended to “<i>[reduce] the burden on businesses.</i>”</p>
<b>Data Protection Fees</b>	<p>The GDPR does not prescribe that fees must be paid by data controllers to their local supervisory authority. However, UK law does provide that such a fee be paid to the UK Information Commissioner's Office (pursuant to the Data Protection (Charges and Information) Regulations 2018). The costs of the fee depends on an organisation's size and turnover and there are three tiers of fees ranging from £40 to £2,900.</p>	<p><b>Section 24:</b> Controllers must pay an annual data protection fee to the Commissioner.</p> <p>The Consultation Paper explains that the ADGM proposes to maintain the flat fee structure of the existing Regulations – currently USD 300 for registration and USD 100 for annual renewal – but applying it only to those controllers that are required to engage a data protection officer (<i>i.e.</i>, excluding small businesses).</p>
<b>Exemptions for small businesses</b>	<p><b>Article 30:</b> Exemption from the requirement to maintain records of processing activities for organisations “<i>employing fewer than 250 persons unless the processing it carries out is likely to result in a risk to the rights and freedoms of data subjects, the processing is not occasional, or the processing includes special categories of data [...] or personal data relating to criminal convictions and offences [...].</i>”</p>	<p><b>Section 28:</b> Exemptions from the requirements to maintain records of processing activities and to designate a data protection officer for an “<i>Establishment employing fewer than five employees unless it carries out High Risk Processing Activities.</i>”</p>

## Other noteworthy provisions of the Draft Regulations

***Fine and remedies.*** The Commissioner will have the power to issue corrective “directions” to processors or controllers in the event of a violation of the Draft Regulations.<sup>24</sup>

As noted above, the Commissioner may also impose administrative fines, not exceeding USD 28 million, in the event of a violation of the Draft Regulations by a controller or processor (an increase from USD 25,000 under the current regime).<sup>25</sup> A range of eleven factors will be considered by the Commissioner when determining the appropriateness and amount of a fine payable.<sup>26</sup>

A fixed penalty of 150% of the Data Protection Fee or Renewal Fee, will be payable in the event of non-payment of the Data Protection Fee or Renewal Fee. This penalty amount will be in addition to the actual Data Protection Fee or Renewal Fee.<sup>27</sup>

***Commencement and transition period.*** Following the recent closing of the public consultation period on 19 December 2020, the ADGM will now consider whether modifications should be made to the Draft Regulations. The Board of Directors of the ADGM will then proceed to enact the Draft Regulations,<sup>28</sup> potentially as early as the beginning of 2021. A notice will be published on the ADGM’s website informing the public that the Draft Regulations have been enacted.

The Draft Regulations propose:

- a 12-month transition period for existing establishments in the ADGM, and
- a 6-month transition period for new establishments that are registered after the new law is enacted.<sup>29</sup>

While the 6-month transition period for new establishments is welcomed, it is not clear why a longer two-year transition period for existing ADGM

establishments is not provided, in line with the transitional period provided under with the GDPR, given that the obligations are similarly onerous. This shorter transitional period could be based on an assumption that many existing establishments are likely to already be compliant with the GDPR regime or simply that the ADGM wants to ensure that it catches up to international standards as soon as possible.

***Independent data protection regulator.*** The ADGM proposes to maintain its current Office of Data Protection within the ADGM Registration Authority but with “*clear operational independence*” from the Registrar’s other regulatory functions.<sup>30</sup> In addition to the enforcement powers mentioned above) the proposal in the Draft Regulations is for the Office of Data Protection to be given new powers and responsibilities including: compliance monitoring responsibilities, data subject complaint handling duties, the ability to conduct investigations, and the power to impose limitations or bans on data processing.<sup>31</sup>

## Conclusion

The Draft Regulations will impose new obligations on personal data controllers and processors and introduce new enforcement powers in connection with non-compliance. For certain controllers and processors located in the ADGM but active internationally, for whom compliance with the GDPR is already essential, the Draft Regulations may not be perceived as introducing a significant new compliance burden. Although compliance with the GDPR will go a long way to ensuring compliance with the Draft Regulations, organisations will need to ensure that they understand the few notable differences between the two regimes to ensure compliance with each.

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<sup>24</sup> Draft Regulations, section 53.

<sup>25</sup> Draft Regulations, section 54.

<sup>26</sup> Draft Regulations, section 54(3).

<sup>27</sup> Draft Regulations, section 55.

<sup>28</sup> The ADGM Board of Directors is authorised to enact legislation pursuant to Article 6 of [Abu Dhabi Law No. 4/2013](#) (the Founding Law).

<sup>29</sup> Draft Regulations, section 62(1).

<sup>30</sup> Consultation Paper, paragraph 31.

<sup>31</sup> Draft Regulations, Part VI.