



Dubai International
Financial Centre

CONSULTATION PAPER NO. 2

February 2021

PROPOSED AMENDMENTS TO DIFC
LEGISLATION

CONSULTATION PAPER NO. [2]
PROPOSED AMENDMENTS THE DATA PROTECTION LAW AND THE
INSOLVENCY LAW & REGULATIONS

Why are we issuing this paper?

1. This Consultation Paper seeks public comment on the DIFC Authority's ("**DIFCA**") and the Commissioner of Data Protection's (the "**Commissioner**") proposal to amend the Data Protection Law, DIFC Law No. 5 of 2020 (the "**Data Protection Law**") and the Insolvency Law, DIFC Law No. 1 of 2019 (the "**Insolvency Law**") through the DIFC Laws Amendment Law, DIFC Law No. [X] of 2021 (the "**DIFC Laws Amendment Law**") and the issuance of new Insolvency Regulations ("**Insolvency Regulations**"). This Consultation Paper has two main parts:
 - (a) **Part A** deals with the proposed amendments to the Data Protection Law; and
 - (b) **Part B** deals with the proposed amendments to the Insolvency Law and Insolvency Regulations.

Who should read this paper?

2. This Consultation Paper would be of interest to:
 - (a) legal advisors advising on matters relating to the Insolvency Law and Data Protection Law;
 - (b) DIFC-licensed Controllers or Processors, or Third Parties subject to the Data Protection Law, as well as Data Subjects whose Personal Data is Processed by the above-referenced entities
 - (c) DIFC companies and partnerships; and
 - (d) liquidators registered in the DIFC and auditors undertaking company.

How to provide comments

3. DIFCA invites interested parties to provide their views and comments on the issues outlined in the Consultation Paper using the table of comments attached at Annex C.
4. All comments should be provided to the person specified below:

Jacques Visser
Chief Legal Officer
DIFC Authority
Level 14, The Gate, P. O. Box 74777
Dubai, United Arab Emirates
or e-mailed to: consultation@difc.ae

5. You may choose to identify the organisation you represent in your comments.
6. DIFCA reserves the right to publish, on its website or elsewhere, any comments you provide, unless you expressly request otherwise at the time the comments are made.

What happens next?

7. The deadline for providing comments on the proposals in this Consultation Paper **is 28 March 2021**.
8. Once we receive your comments, we will consider if any further refinements are required to this proposal. Given the nature of the amendment sought and its urgency, the deadline for providing comments on this proposal is 28 March 2021. Once DIFCA considers the changes to be in a suitable form, it will then proceed to enact the changes to the DIFC Laws Amendment Law and the Data Protection Regulations to come in to force on a date specified and published.
9. The DIFC Laws Amendment Law is in draft form only. You should not act on them until the DIFC Laws Amendment Law is formally enacted. We will issue a notice on our website when this happens.

Defined terms

10. Defined terms are identified throughout this paper by the capitalisation of the initial letter of a word or of each word in a phrase and are defined in the DIFC Laws Amendment. Unless the context otherwise requires, where capitalisation of the initial letter is not used, the expression has its natural meaning.

PART A – PROPOSED AMENDMENTS TO THE DATA PROTECTION LAW

Background

11. In Part A, the Commissioner is proposing to make amendments to the Data Protection Law to clarify redress mechanisms that support the exercise of Data Subjects' rights.

Complex, Numerous or Vexatious Data Subject Access Requests

12. In accordance with Articles 33(7) and 33(8) of the Data Protection Law, where a Data Subject makes complex or numerous requests to access his or her Personal Data, or where in the determination of the Controller, such requests are deemed manifestly unfounded or excessive, in particular because of their repetitive character, the Controller may:
- (a) extend the period for replying to the request by two months;
 - (b) charge a fee for the request; or
 - (c) refuse to act on the request.

Court costs for proceedings initiated by the Commissioner

13. Currently the Data Protection Law is silent on whether the Commissioner is to pay Court costs for proceedings that he initiates in relation to the Data Protection Law or incurs in the course of carrying out his regulatory functions.

Power of the Commissioner to Make Findings of Contravention of the Data Protection Law

14. Currently the Data Protection Law implies that the Commissioner may make a finding of a contravention of the Data Protection Law, only stating that he may make a finding of no contravention of the Data Protection Law in Article 60(4). Any action that he may take where a contravention finding is made is also not clearly stated.

Applications to the Court

15. In a recent judicial review and statutory appeal claim in which the Commissioner was involved as the respondent party, it became clear that Article 63(5) requires clarification to state that in any proceeding before the Court of First Instance in which the Commissioner is a party as a result of a claim for statutory appeal or judicial review, the Commissioner or any other party to the proceedings may appeal the decision of the Court of First Instance to the Court of Appeal.

Other Miscellaneous Drafting Corrections

16. Minor drafting corrections are proposed in various Articles of the Data Protection Law to clarify the wording in them.

Proposed Amendments**Complex, Numerous or Vexatious Data Subject Access Requests**

17. It is proposed that Article 33 is amended to require that a Controller maintains a register of instances where it relies on Article 33(7) to extend the period for compliance with the request, or on Article 33(8) to charge a fee or refuse to act on the request setting out the reasons why the request was particularly complex or is manifestly unfounded or excessive (as the case may be). Accordingly, the Commissioner may then inspect the proposed register and may at any time request additional information, raise a query or an objection to the extension of time, fee or refusal (as the case may be) or conduct an investigation to determine whether the exercise of the powers conferred by Articles 33(7) or 33(8) complies with the Data Protection Law. Under this proposed amendment, the Commissioner's determination whether the Controller was entitled to so act is final and conclusive, subject to any appeal under Article 63(1). Finally, where a Controller contravenes Article 33(1) by invalidly relying on either of Articles 33(7) or 33(8), it shall be subject to the remedies, liabilities and sanctions set out in Part 9. The impact of maintaining such a register will likely be negligible as it will only be on rare occasions or in extraordinary circumstances that such measures set out in Articles 33(7) and 33(8) will be necessary.

Court costs for proceedings initiated by the Commissioner

18. It is proposed that the Commissioner shall not be required to pay any court costs for proceedings initiated by the Commissioner in relation to the Data Protection Law or incurred in the course of carrying out his regulatory functions. The Court has the discretion to award costs against the Commissioner in proceedings in which the Commissioner is the unsuccessful party where the Court is satisfied that the Commissioner has acted in bad faith or in excess of his statutory functions.

Power of the Commissioner to Make Findings of Contravention of the Data Protection Law

19. It is proposed that the Data Protection Law Article 46(3) is amended to clarify that the Commissioner may make a finding of a contravention of the Data Protection Law and that any action he may take where a contravention finding is made is set out clearly in Article 60(4).

Applications to the Court

20. Article 63(3) is proposed to ensure that in any appeal to the Court, the appellant may rely only on the material before the Commissioner at the time he made the relevant finding.

21. Article 63(5) is amended to state that in any proceeding before the Court of First Instance in which the Commissioner is a party as a result of a claim for statutory appeal or judicial review, in accordance with the relevant Articles of the Data Protection Law, the Commissioner or any other party to the proceedings may appeal the decision of the Court of First Instance to the Court of Appeal.

- Q1. Do you have any issues or concerns about requiring Controllers to maintain an additional register of instances of reliance on the options to refuse to act, require a fee or extend the period for a reply to a data subject access request?**
- Q2. Do you find that it is appropriate for the Commissioner not to be liable for costs for proceedings initiated by the Commissioner in relation to the Data Protection Law or incurred in the course of carrying out his regulatory functions?**
- Q3. Are there concerns about the procedural clarification regarding consideration of materials presented to the Commissioner at the time a complaint is made and a resulting direction is issued, or regarding the right to appeal the decision of the Court of First Instance to the Court of Appeal where a statutory appeal or judicial review of a Registrar or Commissioner's direction is at issue?**
- Q4. Do you have any other issues or concerns relating to the amendments? If so, what are they, and how should they be addressed?**

PART B – PROPOSED AMENDMENTS TO THE INSOLVENCY LAW & REGULATIONS

Background

22. In Part B, DIFCA is proposing to amend the Insolvency Law and Insolvency Regulations 2019 to bring the bonding requirements in line with current practices in the UAE. The Liquidator's reporting requirements have been enhanced and clarified in the DIFC Laws Amendment Law and miscellaneous amendments and corrections have also been made.

Proposed Amendments

Bonding Arrangements

23. At the end of 2019, numerous comments were received from Law Firms and Accounting Firms in the DIFC regarding the lack of availability of a bond as required under the Insolvency Law and Insolvency Regulations 2019. After making various enquiries with insurance providers both in the DIFC and internationally, it became clear that whilst there was interest in making bonding arrangements available in the UAE, at present there are no insurers in the UAE offering any bonds for use by insolvency practitioners in the DIFC.
24. Given the lack of availability of the required bond, DIFCA proposes that the Insolvency Regulations 2019 should be amended to provide for greater flexibility relating to the requirement to obtain a bond. The proposed amendments to Regulation 7 of the Insolvency Regulations 2019 ensure that whilst the bond remains a feature of the legislation, it is not expressed as a requirement at present.
25. The proposed amendments allow for the bond market to develop and for the Registrar to introduce the requirement at a later date, once the bond products are introduced in the DIFC. Accordingly Regulation 7.4.2 waives the bonding requirements until such time as the Registrar directs. This waiver applies to all insolvency procedures including those that have already been commenced prior to the enactment of these amendments.

Liquidator's reporting obligations

26. The proposed amendments to the Insolvency Law and Regulations also include some minor changes to a liquidator's reporting obligations to ensure consistency in reporting for the different types of liquidation procedures available under the Insolvency Law in articles 62, 73, 95 and 101. It also includes a new Annex in the proposed Regulations which describes the content to be included in the reports.

Miscellaneous Amendments

- 27. Further amendments are made by grouping some of the existing common provisions together as they apply to both compulsory and voluntary liquidation in articles 104 to 106. Likewise in Regulation 6 of the Insolvency Regulations, chapter headings have been introduced to distinguish between the provisions applicable to the different types of liquidation procedures, for clarity and convenience.
- 28. The proposed amendments also delete article 120 of the Insolvency Law, which overlapped with provisions introduced by the Operating Law 2018 and remove some erroneous references to the DFSA in Regulation 7. An express reference to Article 60 of the Operating law regarding the power to make further regulations to waive and modify any requirements of the Law or Regulations has also been added.

- Q5. Are there any issues or concerns with the more flexible bonding requirements proposed in the new Insolvency Regulations?**
- Q6. Are there any concerns with enabling the Registrar to waive the bonding requirements in all legal proceedings, including those that have commenced prior to the enactment of these proposed amendments?**
- Q7. Are there any other aspects relating to Liquidator’s reports that should also be addressed? If so, what are they, and how should they be addressed?**
- Q8. Are there any other amendments to the Insolvency Law and Regulations that you wish to propose?**

Legislative Proposal

- 29. This legislative proposal contains the following:
 - a. The DIFC Laws Amendment Law (at Annex A)
 - b. Proposed Insolvency Regulations (at Annex B)
 - c. A table of comments to provide your views and comments on the Consultation Paper is attached at Annex C.