

The Information Commissioner's response to public consultation entitled Reforming the framework for better regulation from the Department of Business Energy and Industrial Strategy (BEIS)

Introduction

- 1) The Information Commissioner's Office (ICO) is responsible for regulating both data protection and freedom of information, and is empowered to take regulatory action under legislation that includes the UK General Data Protection Regulation (UKGDPR), the Data Protection Act 2018 (DPA), the Freedom of Information Act 2000 (FOIA), the Environmental Information Regulations 2004 (EIR), the Privacy and Electronic Communications Regulations 2003 (PECR) and the Networks and Information Systems Regulations 2018 (NIS).
- 2) The ICO welcomes the opportunity to respond to the consultation on reforming the framework for better regulation. The ICO recognises that the UK's exit from the European Union affords us an opportunity to look afresh at the domestic regulatory framework to ensure that it can realise the opportunities of the global digital economy, whilst continuing to effectively serve regulated communities and the citizens it seeks to protect.
- 3) The ICO has been engaging positively with the Government on its proposals to reform the UK's data protection regime set out in its consultation *Data: a new direction*¹ and have recently published a detailed response to it². The proposals include a package of reform to ICO's governance model and powers, including a number around accountability that overlap with those being consulted on in this consultation.
- 4) This response therefore does not seek to replicate our response to the data protection reform proposals, but instead takes a broader look at the regulatory landscape in which the ICO currently operates, sets out the ICO's view on what good regulation looks like in the 21st century with reference

¹ *Data: A new direction* consultation DCMS

² ICO Response to *Data: A new direction* consultation

to the concepts and principles described in the government's consultation, and uses data protection regulation for illustration where applicable.

- 5) It should also be noted that the ICO has been actively engaging with other consultations that touch on regulatory reform and may be relevant to this response, including the Online Safety Bill³, the Digital identity and attributes consultation⁴ and A new pro-competition regime for digital markets⁵.

The key principles of good regulation

- 6) It is the responsibility of Government and Parliament to determine the shape of the legislative and regulatory framework. The ICO's role is to provide independent expert advice to government based on our experience of the regulatory landscape. As a whole-economy regulator that regulates across international borders, the ICO has considerable experience of operating within complex regulatory markets and the growing dependencies between the work of individual regulators. Based on this experience, we have set out our thoughts on the key principles of good regulation that we would recommend are borne in mind when making changes to the regulatory framework.
- 7) The regulatory framework needs to provide net benefits to UK society as a whole: Any regulatory framework needs to protect and benefit people, businesses and the regulated communities, and to promote innovation, economic growth and fair competition. There are no inherent tensions in these different aims – in fact they are complementary of each other - providing that they are all sufficiently balanced within the framework. It is essential though that the individual is at the heart of any reforms if the goals of innovation, fair competition and economic growth is going to be achieved.

³ ICO Response to draft Online Safety Bill

⁴ ICO Response to Digital identity and attributes consultation

⁵ ICO Response to A new pro-competition regime for digital markets

- 8) With respect to data protection, there has been rapid change in the use of personal data over the last decade. Innovative technology, particularly in the fields of AI and machine learning, allow us to process huge volumes of information, much of this personal data, with a speed and efficiency unknown in our history. New uses have emerged that show the power of these techniques to deliver transformative social and economic benefits. However, for society to fully realise the benefits of these innovations, individuals must be able to have trust in how organisations are handling their information; by those organisations being accountable for how they collect, store, use and share it and to ensure that individuals can exercise their rights over that data. Without trust, individuals are less likely to share their information and innovation may be hampered.
- 9) *Agile and Proportionate Regulation*: The consultation refers to the importance of agile and proportionate regulation and suggests the introduction of an explicit 'Proportionality Principle'. Proportionality is at the heart of any good regulatory system - where interventions made are proportionate to the benefits gained, are evidenced based and where regulators have regard to the principles of competition and innovation.
- 10) Proportionality is already embedded in regulatory frameworks and through statutory objectives provided to regulators – for example through the Regulators' code. The ICO has a strong track record of proportionate risk-based regulation. For example, our Regulatory Action Policy⁶ sets out a risk-based approach to acting against organisations and individuals who have breached the legislation we regulate. It focuses on areas of highest risk and most harm and that any action is fair, proportionate and timely. This is supported by an ICO framework for assessing the likelihood and severity of data protection harms, as set out in the Regulatory Policy Methodology⁷.
- 11) There may be merit in an explicit 'Proportionality Principle' to provide consistency and embed it further across the UK regulatory landscape. However, it is important that a generic proportionality requirement reflects

⁶ ICO Regulatory Action Policy

⁷ ICO Regulatory Policy Methodology Framework

the tailored approaches to regulatory proportionality already taken by individual regulators and does not cut across or undermine it.

- 12) Outcomes based regulation avoids a one size fits all approach and encourages innovation, but it does present challenges and risks: The consultation proposes adopting a more 'common law' approach to regulation, replacing prescriptive statutory frameworks with a more outcomes-based approach.
- 13) The ICO has always taken an outcomes-based approach to regulation. The data protection framework is principles based, which allows for flexibility of regulation – essential as a whole economy regulator, where the level or risk varies across sectors, businesses, and organisations. The risk-based approach described above is underpinned by tailored guidance developed in consultation with sectors. In addition, the ICO's accountability framework is an example of how we adopt an agile approach to meeting the needs of organisations. The framework supports organisations to put in place appropriate and effective policies, procedures and measures proportionate to the risks of the data they are processing. The agile approach also seeks to adapt ICO codes of practice and guidance to the needs of modern technology. The support UKGDPR also provides for industry-driven codes of conduct is also a good example of how the core legislation can enable and support agile regulation focused on outcomes rather than inputs.
- 14) However, it is important to understand the context in which a common law approach to regulation could apply. As the consultation acknowledges, the extent to which this can be adopted will depend on the legal basis for and the maturity of the area of regulation. Data protection law (the UKGDPR) is based on internationally recognised human right standards and principles, that must be balanced with a common law approach. The public recognise and value key rights, alongside sensible and practical approach of common law. The UK's challenge is to successfully recognise that the UKGDPR is too prescriptive in places and that is why we are open and committed to working with government to review the existing law in this area.
- 15) We also know that certainty is important for engendering trust between businesses and the public in data protection regulation and that principles-

based legislation can be challenging for some organisations, particularly those that are less mature at thinking about their approach to processing and protecting data. These organisations look to the ICO for greater clarity and guidance and we have sought to mitigate this through our bespoke SME hub and other guidance.

- 16) As the consultation acknowledges this is a complex area and, the pros and cons of this approach are likely to vary depending on the area of regulation and that there is unlikely to be a one size fits all solution.
- 17) Regulatory coherence and collaboration between regulators are essential: Collaboration and coherence between regulators is essential for delivering for businesses and citizens, especially around digital services, where it is necessary for regulation to be able to respond to the scale and global nature of the large digital platforms.
- 18) The ICO participates in several cross regulatory fora and initiatives, including the UK Regulatory Network (UKRN) and the Digital Regulatory Cooperation Forum (DCRF).
- 19) It is essential that regulators consider the wider regulatory ecosystem in which they operate and not just their own regulatory duties. In the area of digital regulation, for example, there are a range of varying duties held by the different regulators, including competition, the interests of citizens, consumers, and privacy – some or all of which might be issues in a digital services-based investigation being taken forward by an individual regulator⁸. To ensure they are given equal weight, one option would be a general duty to cooperate between regulators or a duty to consult other regulators on cross cutting regulatory outcomes.

Further ideas to address barriers and strengthen regulatory cooperation can be found in the DRCF's response to DCMS's review in this area.

⁸Digital Regulatory Cooperation Forum's response to DCMS on the future of the digital regulatory landscape

- 20) *International Standards and cooperation:* The UK's regulatory framework needs to support businesses to compete internationally on a level playing field, promoting high standards and protection to citizens and consumers. A domestic regulatory framework that promotes high standards, innovation and competition is especially important, but globalisation presents challenges to regulation that cannot be dealt with in isolation.
- 21) From a data protection perspective, the responsible use of personal data and the ability to access official information are rights enjoyed in over 100 countries around the world. Data protection is an example of a regulatory sphere that displays characteristics of international convergence, with many countries such as Brazil and India introducing new laws based on international standards - such as the OECD privacy guidelines, Council of Europe Convention 108 and GDPR. Convergence and interoperability with these global principles are important for frictionless flows of data and digital innovation across border in fields such as AI.
- 22) In an increasingly digital world, these are issues that transcend national borders and therefore benefit from global cooperation by regulators. The data protection framework in the UK provides the ICO with extraterritorial reach, which is essential when regulating major online platforms, many of which are not domiciled in the UK. This helps ensure a level playing field for UK businesses as well as equivalent protections for UK citizens. Extraterritorial powers of this kind are now essential for all regulatory regimes operating in the international context and need to be considered as part of any review of the regulatory framework.
- 23) Through our work in organisations such as the OECD, the Council of Europe and the Global Privacy Assembly, the UK leads and influences work on the interoperability of global data protection regimes and high standards.

Accountability of Regulators

- 24) The consultation rightly draws out the importance of the accountability of regulators. Many of the proposals made overlap with those set out in the Government's consultation *Data: A New Direction* in relation to reform of the

ICO's Governance model which we have covered in detail in our published response and will therefore not replicate here.

- 25) One area particularly pertinent to this consultation is the issue of Parliamentary accountability. As the consultation acknowledges, one of the consequences of a more common law approach to regulation is that it can result in less transparency of decision making and it therefore suggests that there might be increased accountability to Parliament. One solution to this might be the setting up of a Parliamentary Committee for Regulatory accountability and oversight that would be separate but complementary to the current Departmental Select Committees to which individual regulators currently account.
- 26) This new committee would be expert in regulation and could conduct deep dives into cross cutting issues for example, the use of fines, market interventions, joint regulatory cases such as that involving ICO and the CMA examining Google privacy arrangements, and the fitness for purpose of powers or overall risk management arrangements at national level. Regulators would continue to be accountable to their relevant departmental committees for spending, policies, individual sanctions and administration.

Sandboxes

- 27) The ICO welcomes the Government's recognition of the role of regulatory sandboxes and the importance they have in creating safe operation environments that citizens can trust.
- 28) The ICO's sandbox provides a significant opportunity to support organisations to develop truly innovative projects, with considerable public benefits, that are compliant with privacy rights. By applying the legislation to new and emerging data protection issues, we have been able to use it to inform wider guidance and regulatory approaches.
- 29) As we continue to grow our own sandbox, we would support the potential for legislation to give regulators powers that would increase the number and impact of regulatory sandboxes. We would also welcome the opportunity to

share our learning with other regulators. We have already learnt from the FCA's original approach. It would be helpful too, in the context of the governments stated aims for a more global Britain, to be able to explore internationally-based sandbox with comparable regulators overseas and with appropriate safeguards.

- 30) Government might also consider how it can enable regulators to work more closely with innovators to test and trial ideas where legislation does not currently enable this. For example, the World Economic Forum has highlighted the use of experimentation clauses in other jurisdictions⁹. Pilots of this nature might usefully inform future regulatory or legislative reform – subject to appropriate safeguards to ensure that businesses are regulated fairly, regulatory standards upheld, and any potential adverse impact on individuals mitigated.

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⁹ Agile Regulation for the Fourth Industrial Revolution: A Toolkit for Regulators