

ICO consultation on the draft Impact Assessment Framework

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Consultation response – April 2023

A. About Reset.

1. Reset (www.reset.tech) seeks to improve the way in which digital information markets are governed, regulated and ultimately how they serve the public. We do this through supporting new public policies across a variety of areas – including data privacy, competition, elections, content moderation, security, taxation and education.

B. Introduction

2. Impact Assessments (“IAs”) are important because *“IAs provide decision-makers with crucial information on whether and how to regulate to achieve public policy goals. They also help policy-makers defend decisions not to intervene in markets where the costs of doing so outweigh the benefits”*.¹
3. The draft Impact Assessment Framework reflects **the worrying trend in UK digital policy to shift power away from individuals towards business, and away from the ICO as independent regulator towards government.**

¹ Draft Impact Assessment Framework Framework, page 5.

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4. While Reset is not opposed, *in principle*, to the ICO formalizing its approach to impact assessments (and recognises how, done properly, this could have benefits for public trust and accountability), Reset has significant concerns that **the ethos underpinning the Framework risks further lowering the standard of protection for citizens' data protection rights.**
5. The Framework, as currently drafted, **does not strike the right balance between business interests and society's interests.** It places undue emphasis on the cost of regulatory interventions to business and not enough focus on the risks to society of allowing data protection harms to continue.
6. The **voice of business is amplified** and given a greater platform to input and consult on the ICO's regulatory interventions than the voice of citizens, even though business may have vested interests in avoiding regulation and are unlikely to be the intended beneficiaries of ICO interventions, unlike data subjects who require a regulator to take steps to ensure the protection of their fundamental rights.
7. The Framework also frustrates the ability of the ICO to act independently by **ensuring that the ICO will adopt an identical approach to that of government when deciding on regulatory interventions** – this is an approach which is overly business and costs-focused and which undermines the ICO's ability to apply a risk-based regulatory approach to interventions.
8. The consultation asks for a response on four questions:
 - 8.1. Do you agree with the overall approach of this draft Impact Assessment Framework?

8.2. Are you satisfied with the criteria and circumstances when we will and won't produce impact assessments?

8.3. Do you have any views on the policy-making, consultation, and publication aspects of the Framework?

8.4. Do you have any other comments on the Framework?

9. Reset has addressed each of these questions in these submissions, providing detailed insight wherever possible. Reset's concerns are interlinked and its submissions should be read as a whole. However, if an aspect of the Framework has not been explored in detail, Reset should not be taken to have endorsed or refuted a particular position.

10. Finally, some aspects of the Framework do not provide sufficient information or detail to properly respond to the consultation. Thus, Reset expects the ICO to invite further submissions from stakeholders as it moves towards finalisation of the Framework to ensure the consultation is effective.

C. Consultation questions

a. Do you agree with the overall approach of this draft Impact Assessment Framework?

11. Reset is not opposed, *in principle*, to the ICO formalizing its approach to impact assessments. Reset recognizes how consistency of approach in regulatory interventions could help to ensure accountability and foster greater public trust in the ICO as an institution. Nonetheless, Reset has significant concerns that the ethos

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underpinning the Framework (as it is currently drafted) risks further lowering the standard of protection for citizens' data protection rights in this jurisdiction.

12. The Introduction² sets the tone clearly for the rest of the Framework. It says, “Recital 4 of the General Data Protection Regulation (GDPR) makes clear that the right to the protection of personal data is not absolute, and must be balanced against other rights and freedoms in a proportionate manner.” As a result, the ICO says, it “must take into account the **freedom to conduct a business** when carrying out its work”.

13. This is a selective and unbalanced reading of what Recital 4 requires. Recital 4 of the GDPR says:

The processing of personal data should be designed to serve mankind.

The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality.

This Regulation respects all fundamental rights and observes the freedoms and principles recognised in the Charter as enshrined in the Treaties, in particular the respect for private and family life, home and communications, the protection of personal data, freedom of thought, conscience and religion, freedom of expression and information, freedom to conduct a business, the right to an effective remedy and to a fair trial, and cultural, religious and linguistic diversity.

² Draft Impact Assessment Framework Framework, page 3.

14. Thus, Article 4 both explicitly recognises data protection as arising from the fundamental right to respect for private life, and recognizes the plethora of important rights which individuals have that must be considered - including the right to privacy, to freedom of expression, to the protection of personal data - and not just the freedom to conduct a business.

15. In this intentional choice of language, the Introduction downgrades the protection of individual rights whilst elevating the impact on businesses. This appears to reflect the new duty of the ICO to have “regard to the desirability of promoting innovation and competition”.³ However, economic considerations should not be the main consideration or priority for the ICO. Instead, its focus should be on making risk-based interventions to address data protection harms in society. As Reset set out in its submissions on Data A new direction, *“requiring the ICO to “have regard” to growth and innovation may result in inconsistent and weaker protections for individuals, in cases where individual rights should prevent innovation”*.

16. Reset is concerned about how this guiding ethos permeates the ICO’s overall approach to impact assessments, in particular how it plans to conduct “cost-benefit analysis”:

16.1. *Cost benefit analysis* - The prioritization of business interests is readily apparent in the stated approach to the “cost-benefit analysis” which places economic metrics like *“Equivalent Annual Net Direct Cost to Businesses (EANDCB), Net*

³ This duty is also reflected in the circumstances where the ICO will do an impact assessment where it considers this is best practice, as opposed to where it has a statutory obligation to do so. Those circumstances include where the policy decision was likely to have a significant impact on (any or all): economic growth, innovation, competition.

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*Present Social Value (NPSV) and Net Present Business Value (NPBV) ... Business Impact Target (BIT) reporting*⁴ front and center.

While impacts on “*impacts on relevant groups and individuals within society*” are mentioned as factors in the analysis, the significant focus on economic costs is concerning especially as it is not clear precisely how these costs to business estimates are to be factored in to the ICO’s overall assessment. The Framework does not explain what the main determining factors in the cost-benefit analysis are, what weight will be attached to the different factors, and how the ICO will arrive at a conclusion. This will be extremely important for the ICO to clarify to stakeholders. For instance, how does the ICO intend to balance the impact to business against the benefits for society, or the costs to data subjects of failing to intervene? What will happen in situations where business interests and societal interests collide? How will the ICO place on qualitative harms – such as those to human dignity – that arise from breaches of citizens’ data rights a monetary value which can weigh against ‘EANDCB’? The Framework should much more explicitly recognise that it is often necessary and important that business experience a detriment for the sake of the common good, e.g., codes of practice or regulatory interventions which are focused on curbing lucrative *AdTech* practices that would hurt that bottom line of many businesses but would ultimately benefit society overall.

Even though they may be less quantifiable than economic metrics, the benefits to society of an intervention, the harms to society posed by a particular data protection practice, and **the true cost to society of allowing a data protection**

⁴ Draft Impact Assessment Framework Framework, page 11.

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harm to continue unaddressed, must be analysed in depth as part of the ICO's cost-benefit analysis, and given the weight they deserve in that analysis. Currently, these factors seem to be given relatively short shrift by comparison with the attention that is placed on economic considerations in the Framework. This is essential to ensure the Framework works for the overall betterment of society, not just for the benefit of business.

16.2. Relatedly, the importance of evidence and of evidence-based interventions is mentioned several times in the Framework. However, it is not clear from the Framework *what* evidence will be relied upon and *whom* that evidence is to be sourced from. If evidence is to be sourced from business, how will the ICO ensure that costs and economic impact for business is not being over-stated by those with a vested interest in avoiding regulatory intervention, as this seems to be an obvious potential issue?⁵

17. Reset also has concerns that the Framework hinders the ability of the ICO to operate independently of government. The Framework, as currently drafted, **aligns the ICO's priorities towards those of government**⁶, making the focus of the ICO's analysis the impact on business and the economic costs of regulatory interventions, rather than its usual risk-based regulatory approach. While the ICO can "depart" from the Framework where it considers it appropriate to do so, the Framework ensures that the ICO will typically adopt an identical approach to that of government when deciding on which regulatory interventions to pursue. It is also concerning that

⁵ This is also a concern when it comes to the issue of **consultation** and whose voices are being listened to.

⁶ The Framework "*draws closely from the guidance set out by HM Treasury in the Green Book*" and "*reflects the Better Regulation Framework*". Draft Impact Assessment Framework Framework, page 4.

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IAs will not be conducted where “*government has already undertaken an IA for a programme [the ICO has] been asked to deliver*”.

b. Are you satisfied with the criteria and circumstances when we will and won't produce impact assessments?

18. Reset considers that the Framework would benefit from some illustrative examples regarding of when the ICO will conduct “*best practice*” impact assessments. The Framework would also benefit from some illustrative examples of what the ICO would consider to be a “*low-risk, well-evidenced and low-impact intervention*”⁷ requiring only a light-touch IA.

⁷ Draft Impact Assessment Framework Framework, page 7. As stated throughout these submissions, Reset has concerns about *whose* voice, evidence, and assessment of impact will be factored in here, and whose will be left out.

c. Do you have any views on the policy-making, consultation, and publication aspects of the Framework?

19. *Policy-making* – Reset’s concerns regarding the overall ethos of the Framework and approach to the cost-benefit analysis are outlined throughout these submissions.

20. *Consultation* – The ICO says that it will “*adopt a proportionate approach to consulting on our IAs, depending on the nature of the intervention under consideration. For example, consultation about a low-status, low-risk project could include targeted engagement with relevant affected industry groups, whereas consultation for a higher-status, higher-risk project is likely to be broader.*”⁸ Again, the Framework could benefit from some illustrative examples, for instance of what the ICO would consider a low-status, low-risk project or a higher-status, higher-risk project.

It is not clear what is meant by industry groups and the ICO is invited to clarify this. However, given the apparent weighting in favor of business interests in the Framework, Reset is concerned that the voices of business are to be foregrounded to the exclusion of other groups including academia, the public sector, the community & voluntary sector and, most importantly, data subjects themselves and those representing their interests. Without these varied perspectives a full sense of the true societal cost of interventions (or the failure to intervene) may be lost. The voice of business must not be given a greater platform to input on the ICO’s regulatory interventions than the voice of society more broadly, particularly as

⁸ Draft Impact Assessment Framework Framework, page 14.

business may have vested interests in avoiding regulation and may not be the intended beneficiaries of regulation.

21. *Publication* – It is imperative that there is full transparency. Reset agrees that IAs should be published.

d. Do you have any other comments on the Framework?

22. As set out throughout this submission, the ethos of the draft Impact Assessment Framework is heavily weighted towards viewing interventions through an economic lens to the detriment of what should be the ICO's top priority: applying a risk-based approach to its interventions so that they benefit society overall. The Framework is not acceptable in its current format as it is unbalanced in favour of business and undermines the independence of the ICO as regulator.

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