# Chapter Three : Boosting trade and reducing barriers to data flows

17.12.21

## 3.1 Introduction

No questions

## 3.2 Adequacy

### Q3.2.1. To what extent do you agree that the UK's future approach to adequacy decisions should be risk-based and focused on outcomes?

Somewhat Agree

#### Q3.2.1a. Please explain your answer and provide supporting evidence if possible.

A risk-based approach focused on outcomes needs to fully consider data ethics, rights, freedoms and privacy risks. It is important that the rights of data subjects are at the heart of adequacy.

Clarity is required on what is considered immaterial with a focus on ensuring that any risks that impact the individual are still taken seriously. There are also some key considerations in terms of what redress the data subject and UK based controllers would have if things went wrong which are not yet clear within this section.

### Q3.2.2. To what extent do you agree that the government should consider making adequacy regulations for groups of countries, regions and multilateral frameworks?

Neither Agree nor Disagree

#### Q3.2.2a. Please explain your answer and provide supporting evidence where possible.

This needs to be independently regulated and any group assessment will need to be adequately reviewed. Grouping of countries or regions may not provide a detailed enough view of each country’s approach to data protection, leading to oversight or sharing data unlawfully.

Those making adequacy agreements need to ensure that all parties of the group have appropriate legislation. They should also be able to reflect changes to a single country within a group. Collective assessment and ranking would be a concern unless the group has the same legislation in place (such as with the EU).

### Q3.2.3. To what extent do you agree with the proposal to strengthen ongoing monitoring of adequacy regulations and relax the requirement to review adequacy regulations every four years?

Somewhat Disagree

#### Q3.2.3a. Please explain your answer and provide supporting evidence where possible.

Improved monitoring is supported, but continual activity can lead to complacency and an influenced view on the regulations. We would like to see both in ideal circumstances. A set review date provides focus and consistency in reviewing regulations as a whole, whereas monitoring has better reactivity to individual events which may affect only parts of regulations, which can cause the regulation as a whole to become disparate or contradictory without regular full review.

This combined with a risk based, outcome focused and grouping of countries in adequacy review appears to be a weaker approach to data protection as a whole.

We support the intention to operate a more pragmatic system but don’t consider four years too onerous when technology can move at such speed and regulations may need to move to match that or take into account emerging issues or new risks.

### Q3.2.4. To what extent do you agree that redress requirements for international data transfers may be satisfied by either administrative or judicial redress mechanisms, provided such mechanisms are effective?

Somewhat Disagree

#### Q3.2.4a. Please explain your choice and provide supporting evidence where possible.

We believe that administrative and judicial mechanisms are likely to be an inadequate form of redress where harm has resulted, and behaviour has been reckless as these mechanisms tend to only allow for reconsideration/review of a decision or prohibition of an activity.

## 3.3 Alternative Transfer Mechanisms

### Q3.3.1. To what extent do you agree with the proposal to reinforce the importance of proportionality when assessing risks for alternative transfer mechanisms?

Somewhat Agree

#### Q3.3.1a. Please explain your answer and provide supporting evidence where possible.

It would be a sensible rationale and approach to ensuring benefits/outcomes are proportionate given any risks attached to alternative transfer mechanisms, but it is important not to lose sight of also ensuring that considerations of necessity are also brought into this assessment.

Key is that considerations are in line with existing information governance assurances e.g. necessity test; risk assessment of the transfer methods (technical and non-technical). It is also important to maintain the checks and balances which might (lawfully and rightly) prevent transfer.

### Q3.3.2. What support or guidance would help organisations assess and mitigate the risks in relation to international transfers of personal data under alternative transfer mechanisms, and how might that support be most appropriately provided?

* ICO and Government guidance documents, publishing of decisions made for case application.
* Direct steer from government i.e. a ‘rules of engagement’ situation with materials and guidance readily available
* Examples of common risks and how they might be mitigated.
* Practical examples which cover the risk and issue methodology and mitigations.

### Q3.3.3. To what extent do you agree that the proposal to exempt ‘reverse transfers’ from the scope of the UK international transfer regime would reduce unnecessary burdens on organisations, without undermining data protection standards?

Neither Agree nor Disagree

#### Q3.3.3a. Please explain your answer and provide supporting evidence where possible.

Provided sufficient safeguards are in place to ensure data protection is not undermined, if a transfer from overseas is sent and the protection standards from the sender are comparable with UK GDPR then the sender’s standards should apply. However, it would be dependent on the nature of the data being exchanged, the volume and the purpose and again also the standards imposed. Perhaps this needs to be qualified i.e. that the reverse transfer meets certain criteria.

### Q3.3.4. To what extent do you agree that empowering organisations to create or identify their own alternative transfer mechanisms that provide appropriate safeguards will address unnecessary limitations of the current set of alternative transfer mechanisms?

Somewhat Agree

#### Q3.3.4a. Please explain your answer and provide supporting evidence where possible.

There is significant experience and knowledge of data protection law and contract law outside the regulator. In this instance, organisations should be mindful of using pre-existing legislation as a supportive benchmark but also given the flexibility of designing bespoke protection standards that are more in line with the purpose of the data sharing. Consequently, the parties involved should also be under no illusion that shortfalls leading to errors and mistakes will be wholly their responsibility to address and maybe if there is a frequency of this occurring the ‘freedom’ is withdrawn until sufficient remedies are in place and adherence can be clearly shown. However, it would be important to make sure this monitored correctly to prevent exploitation. Potentially this should be subject to some sort of accreditation which would provide assurances around the mechanism put in place.

### Q3.3.5. What guidance or other support should be made available in order to secure sufficient confidence in organisations' decisions about whether an alternative transfer mechanism or other legal protections not explicitly provided for in UK legislation provide appropriate safeguards?

* ICO guidance documents, frameworks or templates – many businesses might not have a DPO.
* Direct steer from government i.e. a ‘rules of engagement’ situation with materials and guidance readily available
* Examples of mechanisms and contract clauses etc.
* Aligning ICO guidance with e.g. NCSC and NHS Digital.

### Q3.3.6. Should organisations be permitted to make international transfers that rely on protections provided for in another country’s legislation, subject to an assessment that such protections offer appropriate safeguards?

Yes

#### Q3.3.6a. Please explain your answer and provide supporting evidence where possible.

Each and every data transfer activity is unique. So to give organisations the flexibility of tailoring transfers that meet the expectations and appropriate safeguards of another country that are also permissible domestically, would give rise to a more streamlined method of conducting day to day business. This would be without the burden of complying with requirements which may not be 100% necessary if it is clear that the protections are adequate and there is alignment with the Human Rights 1998.

###  Q3.3.7. To what extent do you agree that the proposal to create a new power for the Secretary of State to formally recognise new alternative transfer mechanisms would increase the flexibility of the UK’s regime?

Neither Agree nor Disagree

#### Q3.3.7a. Please explain your answer and provide supporting evidence where possible.

It would increase the flexibility of the regime. However, we would question whether this should this be in the power of the Secretary of State and not an independent body like the ICO.

We support the idea of flexibility to react to varied models and mechanisms put forward by other countries/groups of countries, however we are conscious that there may be a risk of too many separate, bespoke, mechanisms that then begin to cloud the data protection landscape. This may lead to an unintended erosion of individual rights and security assurances.

### Q3.3.8. Are there any mechanisms that could be supported that would benefit UK organisations if they were recognised by the Secretary of State?

Yes

#### Q3.3.8a. Please explain your answer and provide supporting evidence where possible.

It would be important for the ICO to be involved in the approval of transfer mechanisms to continue to ensure independence of decision-making.

## 3.4 Certification Schemes

### Q3.4.1. To what extent do you agree with the approach the Government is considering to allow certifications to be provided by different approaches to accountability, including privacy management programmes?

Somewhat Agree

#### Q3.4.1a. Please explain your answer and provide supporting evidence where possible.

Certifications could be effective, and assuming they have monitored external assessment and consistent renewal, we consider that this is a strong way to assess an organisation’s data protection compliance.

The idea of having a global set of recognisable standards is appealing to increase a smoother flow of data. However, a small selection of agreed certifications should be considered as opposed to potentially hundreds and potentially a tiered system of certificates dependent on the nature of the data transfers i.e. large volume/frequency, category of datasets, etc.

### Q3.4.2. To what extent do you agree that allowing accreditation for non-UK bodies will provide advantages to UK-based organisations?

Somewhat Agree

#### Q3.4.2a. Please explain your answer and provide supporting evidence where possible.

We support this. It would make alternative modes of transfer between organisations safer, if it acknowledges they adhere to a UK accreditation for data protection.

The acceptance of accreditation from non-UK bodies is permissible providing like-for-like standards are met i.e. a New Zealand version of ISO27001 could be accepted. It will provide a higher attraction to non-UK bodies to deal with UK based organisations if there are reduced barriers to fulfilling the activities, however this must not be to the detriment of an individual’s rights.

### Q3.4.3. Do you see allowing accreditation for non-UK bodies as being potentially beneficial for you or your organisation?

Neither Agree nor Disagree

#### Q3.4.3a. Please explain the advantages and risks that you foresee for allowing accreditation of non-UK bodies.

We have few dealings with international transfers. However, advantages would be the ease of dealing with non-UK organisations in a more streamlined fashion and the confidence of knowing that standards are met despite having a different title. Disadvantages would be the necessity to have a broader understanding of what ingredients comprise of each singular accreditation per country/group of countries which could be overwhelming and confusing. There could be arguments too regarding the standards required per country/group of countries for comparison.

### Q3.4.4. Are there any other changes to certifications that would improve them as an international transfer tool?

An assessment needs to be made around standards in this area, by the Cabinet office/GDS.

## 3.5 Derogations

### Q3.5.1. To what extent do you agree that the proposal described in paragraph 270 represents a proportionate increase in flexibility that will benefit UK organisations without unduly undermining data protection standards?

Neither Agree nor Disagree

#### Q3.5.1a. Please explain your answer and provide supporting evidence where possible.

Derogations can be a necessary tool when a situation cannot be resolved by other available means and providing there is no systemic abuse of the repeated use of derogations and that their use is 100% for the benefit of the data subject/s then a more flexible approach to their use appears common sense. However, we would question its desirability if organisations were found to be using derogations on a frequent basis.

These would probably still be necessary especially in urgent situations, such as vital interests, but should be limited and not encouraged. Thresholds need to be better understood as this may / may not undermine data protection standards.

## 3.6 Further Questions

### Q3.6.1. The proposals in this chapter build on the responses to the National Data Strategy consultation. The Government is considering all reform options in the round and will carefully evaluate responses to this consultation. The Government would welcome any additional general comments from respondents about changes the UK could make to improve its international data transfer regime for data subjects and organisations.

There needs to be a recognition that to do this adequately will need sufficient regulation. The regulator needs to be responsible and ethical and responsive. Failure to do this could result in significant harm to individuals.

### Q3.6.2. In your view, which, if any, of the proposals in ‘Boosting Trade and Reducing Barriers to Data Flows’ would impact on people who identify with the protected characteristics under the Equality Act 2010 (i.e. age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation)?

A lot of sensitive data is sensitive outside of reasons in data protection. This section focuses on making flexible legislation to allow transfer to adequate and non-adequate countries, dependent on legislation, accreditation etc. This translates to an increase amount of extra-UK transfer. Protected characteristics may be violated or not on individual transfer, not as a whole, as this section (without reading the rest of the document) makes no reference to them. What does need to be considered, especially in bespoke alternative transfers are the cultural views of the country or organisation this information is being sent to, something which hasn’t been outlined.

Where this type of sensitive data is being exchanged, data protection as a whole would protect these more as they are recognised as special category and requiring additional protection already, so these characteristics are implicitly taken into account and there is no greater or lesser impact. Perhaps emphasis needs to be placed on the need to consider extra safeguards and that the risks would be greater, because the harm would be greater, when engaging in transfers involving data of this nature.
This will vary depending upon human rights of that recipient country. This will vary and, in some instances, require greater safeguards especially if that individual was born in that recipient country and then for whatever reason travels back.

### Q3.6.3. In addition to any of the reforms already proposed in ‘Boosting Trade and Reducing Barriers to Data Flows’ (or elsewhere in the consultation), what reforms do you think would be helpful to make the UK’s international transfer regime more user-friendly, effective or safer?

Consider “non personal data”, the value of open data (public data) is still not where it could be in the sense of being able to assist transfers which don’t include personal data.

### End of chapter Q. Do you have any general comments about this chapter not yet captured by your responses to the questions above?

Key is the balance between privacy law, common law, human rights and ethics. A risk-based approach might make it easier to work with some other countries and international organisations, but a concern is risking the UK’s adequacy status with others.