

## New Data Protection (Adequacy) Regulations - UK Extension to the EU-US Data Privacy Framework

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|----------------------------|--|
| <b>Lead department</b>     | Department for Science, Innovation and Technology  |
| <b>Summary of proposal</b> | The Government proposes to grant data adequacy status to the Data Protection Framework (DPF) so that UK-based organisations can transfer personal data to US companies that have signed up to the DPF and opt-in to a UK extension of the EU-US DPF. |
| <b>Submission type</b>     | Impact assessment (IA) – 4 <sup>th</sup> August 2023   |
| <b>Legislation type</b>    | Secondary legislation  |
| <b>Implementation date</b> | 2023   |
| <b>Policy stage</b>        | Final  |
| <b>RPC reference</b>       | RPC-DSIT-5287(1)   |
| <b>Opinion type</b>        | Formal   |
| <b>Date of issue</b>       | 16 <sup>th</sup> October 2023  |

### RPC opinion

| <b>Rating<sup>1</sup></b> | <b>RPC opinion</b>   |
|---------------------------|--|
| <b>Fit for purpose</b>    | As originally submitted, the IA was not fit for purpose, due to the RPC assessing the IA as having missed impacts and unsupportive assumptions relating to the calculation of the EANDCB. The IA now contains a proportionate assessment of the direct and indirect impacts on business, and the Department has provided suitable evidence to support the estimation of the EANDCB and the indicative analysis and its assumptions. The IA has set out the different types of familiarisation costs faced by businesses and has justified the key assumptions using best available evidence. The SaMBA is proportionate and fit for purpose, although the IA would benefit from further assessment in respect of medium-sized businesses. Overall, the IA should further discuss the impact of legal challenge (including <i>Schrems III</i> and future UK challenge) on the take-up of the DPF and the risks that it poses. |

<sup>1</sup> The RPC opinion rating is based only on the robustness of the EANDCB and quality of the SaMBA, as set out in the [Better Regulation Framework](#). RPC ratings are fit for purpose or not fit for purpose.

## Business impact target assessment

|   | Department assessment   | RPC validated                            |
|---|---|--|
| <b>Classification</b>   | Qualifying regulatory provision (OUT)                                       | Qualifying regulatory provision (OUT)    |
| <b>Equivalent annual net direct cost to business (EANDCB)</b> | -£102.7 million (initial IA estimate)<br>-£78.4 million (final IA estimate) | -£78.4 million<br>(2019 prices, 2020 pv) |
| <b>Business impact target (BIT) score</b>                     | -£391.9 million   | -£391.9 million                          |
| <b>Business net present value</b>                             | £884.9 million  |  |
| <b>Overall net present value</b>                              | £893.1 million  |  |

## RPC summary

| Category                                    | Quality <sup>2</sup> | RPC comments   |
|---|----------------------|--|
| EANDCB                                      | <b>Green</b>         | The EANDCB is now fit for purpose and identifies some direct and indirect impacts, including monetised familiarisation costs. The Department has used both qualitative and quantitative evidence to justify the assumptions underpinning the EANDCB. Although it is implied that this familiarisation cost includes the cost of businesses reviewing their data transfer policies, the Department could make this more explicit in its description of these costs.   |
| Small and micro business assessment (SaMBA) | <b>Green</b>         | The SaMBA is proportionate and fit for purpose. It shows the distribution of the policy benefits across different sizes of business, with the vast majority falling on small and micro businesses. The IA would benefit from further assessment in respect of medium-sized businesses.   |
| Rationale and options                       | <b>Satisfactory</b>  | The IA establishes a rationale for intervention, detailing the strong trade and diplomatic considerations in favour of adequacy regulations. The Department also outlines the background to the proposal, including reference to the previous IA opined upon by the RPC, on the US Privacy Shield Framework that this proposal replaces. The IA could benefit from further discussion of the competition impact as part of the rationale for intervention, considering the consumer market and different types of stakeholders more clearly. |

<sup>2</sup> The RPC quality ratings are used to indicate the quality and robustness of the evidence used to support different analytical areas. The definitions of the RPC quality ratings can be accessed [here](#).

|                                |                     |   |
|--------------------------------|---------------------|---|
| Cost-benefit analysis          | <b>Satisfactory</b> | The monetised benefits are comprised of two elements: (a) removing the cost of International Data Transfer Agreements (IDTAs); and (b) realising additional profits that are currently suppressed, due to this cost acting as a non-tariff barrier. As with the EANDCB, the IA justifies the key assumptions, including conducting switching analysis. The IA discusses the possible impacts from <i>Schrems III</i> but should expand more on the implications this may have for US companies deciding to sign up to the DPF, for UK opt-in and company use of the DPF in place of IDTAs. There is still legal uncertainty around the EU-US DPF and the impact that this may have on the UK extension should be expanded upon in the IA. |
| Wider impacts                  | <b>Weak</b>         | The IA references productivity benefits to other businesses (particularly smaller firms) who rely on cross-border data transfers but should provide more evidence on what this means in practice, as well as deepening its discussion on how reducing the burdens for smaller businesses will affect competition. Furthermore, the reference to reducing the imperfect information problem faced by smaller businesses requires some clarity and the IA should clarify whether these wider may be affected by the future legal risk of <i>Schrems III</i> .   |
| Monitoring and evaluation plan | <b>Satisfactory</b> | The IA states that monitoring and evaluation activities are planned within 3 to 5 years of implementation, with the adoption of the framework used as the metric to determine the success of the policy. The Department could benefit from further explaining how this key success metric will be accurately captured, and how the research questions, data and metrics will align. The IA notes the difficulty in establishing causal effects for the success of the policy. The IA could benefit from considering the impact that external factors have on the policy, and whether any external factors pose a risk to its success.   |

## Response to initial review

As originally submitted, the IA was not fit for purpose as the EANDCB was underpinned by the uncertain assumption that 48 per cent of US companies will sign up to the EU-US DPF (and the UK extension). The IA should have tested this assumption, considering the fact that some companies undertaking the data transfers might not stop using IDTAs due to increased compliance required by the DPF and the legal uncertainty from potential future legal challenge. Additionally, the

IA had not considered the full range of familiarisation costs faced by businesses, such as the cost of reviewing their data transfer policies, deciding whether the new DPF or existing IDTAs will be the most appropriate and updating their data exporter's privacy notice. The IA also lacked discussion on the future legal risks associated with the DPF, including the impacts from *Schrems III* and potential future challenge in UK courts.

The Department has now provided further qualitative and quantitative justification for the US take-up assumption, including a risk-aversion parameter to account for the uncertainty (23%) and switching analysis to indicate the robustness of a net-positive impact in relation to this assumption. The Department has also expanded the range of familiarisation costs considered. In addition, the IA now includes further discussion on the future EU-US legal challenge. However, the full impact of a future legal challenge, and the risk it poses to the framework could be further developed in the IA. There is still legal uncertainty around the EU-US DPF and the impact that this may have on the UK extension should be expanded upon in the IA.

## Summary of proposal

The UK can grant data adequacy status to countries or jurisdictions that provide high standards of protection for personal data. UK-based organisations may then transfer personal data to a country assessed as having 'adequate' data protection without additional restrictions or safeguards.

The proposal aims to reduce barriers and burdens to organisations transferring personal data internationally, while providing trust and confidence that all citizens' data rights are upheld when personal data is transferred to other countries.

The Government has prioritised a number of countries for initial adequacy assessments and a new EU-US Data Privacy Framework has now been established as a new self-certification mechanism to permit the transfer of personal data to the US. UK organisations will be able to rely on the Data Privacy Framework as a means of transferring personal data to US organisations who have signed up to the Data Privacy Framework through a "UK Extension", agreed between the UK and the US.

This IA estimates the benefits for UK organisations following adequacy regulations being made in respect of the Data Privacy Framework. In this IA, two options are considered:

**Option 0 - Do nothing:** data transfers between the UK and third countries require alternative transfer mechanisms, primarily standard data protection clauses such as IDTAs before restricted data transfers are permitted.

**Option 1 - Grant adequacy status to the Data Protection Framework:** adequacy regulations remove the requirement for alternative transfer mechanisms such as IDTAs, where companies have self-certified under the DPF and opted-in to the UK extension, thereby removing barriers to transfer personal data under the Data Privacy Framework to the United States.

The monetised benefits are comprised of two elements: (a) removing the cost of IDTAs in the above circumstances; and (b) realising additional profits that are currently suppressed, due to this cost acting as a non-tariff barrier.

The cost-benefit analysis gives an expected net present value (NPV) of £1,181.7 million, with a sensitivity range of £633.8 million and £1798.2 billion. The net direct cost to business per year has been estimated at -£102.7m.

## EANDCB

### Impacts

The EANDCB calculation makes a reasonable distinction between direct and indirect impacts of the policy, consistent with RPC guidance. The policy is expected to be net-beneficial to businesses that would no longer be required to purchase International Data Transfer Agreements (IDTAs) for the specific purpose of sending data to the US, where the US importer of the data has self-certified under the DPF and opted-in to the UK extension. This is estimated to save business £78.4 million per year. This estimate has reduced from the EANDCB estimate in the original submission, which was -£102.7m. The main reason for this reduction is the application of a risk aversion parameter in the analysis to account for uncertainty.

The direct benefits within the EANDCB rely on the assumption of a 48% of US up-take, which can be considered uncertain. However, the Department has used both qualitative and quantitative evidence to justify this assumption in the analysis, including referencing the current take-up of the EU-US DPF and in light of some 2500 businesses that remained participants to the EU-US Privacy Shield (approximately half of those previously signed up to the Privacy Shield at the time it was invalidated) in anticipation of a new framework being agreed. The Department has also reduced its reliance on the 48% up-take assumption by applying the risk-aversion parameter (23%). Furthermore, the Department has undertaken switching analysis on the three adjustments to indicate the robustness of a net-positive impact in relation to this assumption.

### Costs to business

The main direct cost to businesses identified in the IA is the time they will spend familiarising themselves with the new rules, understanding how the DPF functions, and what they need to do. This calculation is measured in time cost to read guidance and is based on the median hourly earnings for different sizes of business and includes an uplift for non-wage labour costs. Although it is implied that this familiarisation cost includes the cost of businesses reviewing their data transfer policies and deciding whether the DPF or existing IDTAs is the best route, the Department should make this explicit in its description of familiarisation costs.

It is assumed that organisations will not remove existing standard data protection clauses, and the estimated impacts are for new clauses going forward. Therefore, it is reasonable that the costs of taking the original IDTAs into account are not included.

The Department has done well to also include the ongoing annual cost to businesses of checking whether current recipients have recertified or are signed up to the DPF and the annual cost to businesses of updating their data exporter's privacy notice.

## Counterfactual

The IA states that currently, in the absence of adequacy, UK businesses use standard data protection clauses, in the main, and would not have been able to rely on any other mechanism, notably the previous EU-US Data Privacy Shield, which was invalidated by the Court of Justice of the EU in 2020. Therefore, it is correct to measure the benefit from removing the standard data protection clauses against this baseline, and the counterfactual is applied appropriately. The RPC notes that the proposal effectively seeks to re-establish as far as possible the position at the start of the current parliament, when the (previous) Privacy Shield was in operation. There is, therefore, no reduction in burden on business since that point. The EANDCB figure represents a real saving in relation to UK against what businesses would have to continue to do since 2020 in the absence of this proposal.

## SaMBA

The SaMBA is proportionate and fit for purpose. It shows the distribution of the policy impacts across different sizes of business, with the vast majority falling on small and micro businesses. An exemption for small and micro businesses is not required as the legislation is significantly beneficial.

As mentioned in the EANDCB section above, the familiarisation costs faced by businesses are complex, and businesses may have to review their policies and update their privacy notices. The Department is providing online guidance in collaboration with the Information Commissioner's Office (ICO) and the US Department of Commerce, which should help to mitigate some familiarisation costs.

### *Medium-sized business considerations*

The Department details the distribution of the policy impacts on medium sized businesses, showing that they receive a small proportion of the costs and benefits from the proposal. In addition to the existing SaMBA, the IA should include further assessment for medium sized businesses, providing details of any disproportionate impacts, or mitigations.

## Rationale and options

### Rationale

The IA establishes a rationale for intervention, detailing the strong trade and diplomatic considerations in favour of adequacy regulations. The Department outlines the problem under consideration, referencing the costly alternative transfer mechanisms that occur when businesses transfer data to countries without adequacy regulations.

The IA also states that the granting of adequacy regulations will result in increased trust and confidence that all UK citizens' data rights will be protected. The IA would benefit from further discussion of this impact as part of the rationale for intervention, considering consumer perceptions and their actions in relation to data privacy, as well as different types of stakeholders.

## Options

The IA considers only a single regulatory option; to grant adequacy status to the US, thereby reducing the requirement for alternative transfer mechanisms such as IDTAs and removing barriers to the transfer of personal data. This seems appropriate in this case, considering that the decision over whether to lay adequacy regulations for the Data Privacy Framework would appear to be a binary choice.

The IA does not consider a non-regulatory option, as the nature of this proposal means only the Secretary of State can grant adequacy.

## Cost-benefit analysis

### Monetised costs and benefits

The cost-benefit analysis gives an expected net present value (NPV) of total net present social value of £893.0m with a sensitivity range of between £313.4m and £1,933.8m.

The NPV is slightly higher than the Business NPV, compared to the previous Privacy Shield IA. This is because public sector impacts have now been included and monetised appropriately.

The monetised benefits are comprised of two elements: (a) removing the cost of IDTAs; and (b) realising additional profits that are currently suppressed, due to this cost acting as a non-tariff barrier. The latter is appropriately treated as an indirect benefit to business.

### Non-monetised costs and benefits

The IA also contains a good summary of the qualitative impacts of the policy. This includes political and other relationships between the UK and US, but also potential privacy and security risks to British nationals' personal data due to increased data-sharing. The IA states that safeguards and routes for redress for UK subjects (paragraph 29 of the IA) are set out in a new US Executive Order and it considers these meet the legal tests set out in *Schrems II*. Other non-monetised impacts include trade openness and security.

### Assumptions

The IA also presents the results with a range of uncertainty, adjusting the impacts to account for the proportion of sectors in scope (20%), the scale of US take-up to the DPF (48%), and the risk aversion of business (23%). The assumption on the 48% US company sign-up to the DPF is uncertain and underpins the main direct benefit in the IA. However, the Department has justified this assumption by including a risk aversion parameter, using a 95% confidence interval and evidencing the EU-US

DPF take-up. Furthermore, the Department has undertaken switching analysis on the three adjustments to indicate the robustness of a net-positive impact. This shows that the take-up by US businesses would have to be 1% not 47.6% for the benefits to not break even.

## Risks

The IA notes that US-UK adequacy will be implemented through this proposal as an extension to the recent EU-US Data Protection Framework, which makes it more unlikely these proposed regulations will pose a risk to the UK's EU adequacy decisions.

However, there is still a significant legal risk associated with the DPF. The IA discusses the possibility of future judgements by the CJEU on the EU-US DPF, stating that it does not believe this will affect the UK's adequacy regulations. However, the IA should have provided further discussion on the possible impacts from *Schrems III* (and a potential UK legal challenge) as it is still a risk that may have implications for US companies deciding to sign up to the DPF and the UK opt-in, as well as decisions by UK companies on whether to switch to the DPF or continue with IDTAs or to use both, and should be considered as such in the cost-benefit analysis. It is not clear if enough consideration has been given to this risk in the IA, so the Department would benefit from considering this in more detail, alongside any associated time horizons and uncertainties, as this risk could affect the overarching functionality of the DPF. The IA should also consider the risks associated with the EU monitoring the DPF agreement, which starts next year. This monitoring could result in suspension, and the implications for the UK extension are not clear.

The IA states that, as a result of an Executive Order, the DPF benefits from new additional safeguards and new redress mechanisms in the US to strengthen the protections available to UK data subjects. However, there is still a risk to UK data subjects if the safeguards are not properly applied and the IA would benefit from discussing this risk further.

## Wider impacts

The IA contains a discussion of wider impacts of the policy, including an increase in both imports and exports and states that the gravity modelling indicates resulting imports will overtake exports in the medium-term.

The Department has conducted PSED analysis. Based on the Department's analysis, it is not expected that the policy will have disproportionate impacts on UK data subjects' equality. The IA would benefit from explicitly stating whether the policy will negatively impact any of the protected characteristics that were scrutinised.

The IA also makes reference to productivity benefits to other businesses (particularly smaller firms) who rely on cross-border data transfers but needs to explain this point further and what this benefit means in practice, as well as deepening its discussion on how reducing the burdens for smaller businesses will affect competition. For example, the IA states that consumers will likely benefit from potentially lower prices



but should provide further evidence on how the new level of supply will interact in a competitive market equilibrium, and how this will affect all economic agents involved (for example through reduced prices, passed on to consumers). This could include providing clarity on whether the cost increase since the end of the Privacy Shield in 2020 (passed onto consumers) has now been reversed.

Furthermore, the reference to reducing the imperfect information problem faced by smaller businesses requires some clarity, as this should not be counted as a competition impact. The lack of information is a problem faced by all business in this context. Therefore, the reference to imperfect information is misplaced.

The IA also states that a further wider impact of this policy could be in international diplomacy, and it could possibly help resume free trade agreement negotiations between the UK and US, while also encouraging reciprocation on data adequacy agreements from other countries by making the UK a more attractive partner. The IA should clarify whether this impact could be affected by the future legal risk of *Schrems III*, and further discussing the impacts of the EU-US DPF being declared invalid by the CJEU in the wider impacts section.

## Monitoring and evaluation plan

The IA states that monitoring and evaluation activities are planned within three to five years of implementation, including quantitative and qualitative surveys and interviews. An evaluation report will be produced with the findings of this analysis. The Department states that it is unlikely that causal impacts of the policy change will be directly estimated, due to other existing factors also influencing trade.

The Department states the adoption of the framework will be the metric that will be used to determine the success of the policy. However, the list of planned questions in the DSIT survey does not address this key metric, instead focusing on the implementation costs and benefits seen by businesses, and their awareness. The Department could benefit from further explaining how this key success metric will be accurately captured, and how the research questions, data and metrics will align. The monitoring and evaluation plan should also state whether or not the planned review is a statutory obligation.

The IA could also benefit from considering the impact that external factors have on the policy, and whether they pose a risk to its success, such as the US business take-up of the scheme, the possibility of *Schrems III* and associated legal uncertainties, and the implications of any CJEU invalidation of the DPF for UK extension.

### Regulatory Policy Committee

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