

CIPL Submission to the Information Commissioner’s Office Consultation on its ICO25 Strategic Plan

1. INTRODUCTION

The Centre for Information Policy Leadership (CIPL¹) welcomes the opportunity to provide feedback and comment on the Information Commissioner’s Office (ICO) ICO25 Strategic Plan² launched on 14 July 2022, and the process which the Commissioner has put into progress.

We have a number of comments that cannot adequately be conveyed using only the survey³ that the ICO has created for this consultation. Accordingly, we have produced this short paper to supplement and explain our survey response.

2. SUMMARY

In summary, our feedback, applicable across ICO25 and the Plan, is as follows:

1. As an overall plan, it is clear that the ICO has considered the feedback from across a broad range of sectors, groups and individuals, and the overall direction is to be welcomed. However, the general and high level at which the objectives are articulated, and the select and limited examples given, mean that it is difficult to predict what the outcomes will look like, as more detail and clarity as to the “how” these objectives will be achieved is needed in order to add substance to what is otherwise a very broad outline of the proposed approach of the ICO.
2. As to the “how”, CIPL would encourage the ICO to actively include and incorporate sandboxes, pilots and prototypes as ways of developing outcome focussed approaches to regulation and to learn from existing practices and approaches of other regulators. In addition, showcasing how issues have been successfully remedied as an alternative to direct enforcement can help share best practice and develop better practice for privacy compliance, particularly in areas of emerging technology and innovative data uses.
3. We note that the ICO25 Plan will likely impact the current Regulatory Action Plan and Statutory Guidance, which consultation response is still outstanding. The ICO25 Plan may also be impacted by the UK Data Protection and Digital Information Bill. As such, there is considerable uncertainty as to which elements of ICO25 will actually be actioned.

¹ CIPL is a global privacy and data policy think tank in the law firm of Hunton Andrews Kurth LLP and is financially supported by the law firm and 89 member companies that are leaders in key sectors of the global economy. CIPL’s mission is to engage in thought leadership and develop best practices that ensure both effective privacy protections and the responsible use of personal information in the modern information age. CIPL’s work facilitates constructive engagement between business leaders, privacy and security professionals, regulators and policymakers around the world. For more information, please see CIPL’s website at <http://www.informationpolicycentre.com/>. Nothing in this submission should be construed as representing the views of any individual CIPL member company or of the law firm of Hunton Andrews Kurth.

² ICO25 Plan available at <https://ico.org.uk/about-the-ico/our-information/our-strategies-and-plans/ico25-plan/>

³ Call for views: ICO25 plan at <https://ico.welcomesyourfeedback.net/s/xox7y>

4. We would encourage the ICO as a whole economy regulator to continue to work with other regulators to ensure coherent and cohesive policy and practice approaches, and to leverage best in class learnings and approaches to support effective outcome based regulation.
5. The transparency and service levels proposed by ICO25 are most welcome, and we assume that the re-organisation of the ICO itself will enable the ICO to meet these targets.

3. GENERAL COMMENTS

a. Relation with Statutory Guidance and Regulatory Strategy

CIPL supports the ICO objectives of clarity and transparency of regulatory approach, specifically, prior consultation with relevant stakeholders. In particular, we note that ICO25 supports the DCMS Data Reform Consultation feedback. It is indeed important to all sectors of society and business that the Plan operates in concert with the new UK Data Protection and Digital Information Bill⁴ (“DPDI Bill”). However, we also note that the consultation on ICO25 ends before the DPDI Bill will be finalized, so ICO25 and the Plan will need to be adjusted to accommodate the final DPDI Bill. This means a longer period of time within which businesses and individuals lack clarity and certainty of the ICO approach, which is not helpful and at odds with government goals to ensure regulation enables investment, competition and innovation.

In addition, CIPL also notes that the Plan has to intersect with other strategic developments in data protection and the ICO role, both in relation to the changes proposed in the DPDI Bill and in relation to the current draft Regulatory Action Policy⁵, Statutory Guidance on Regulatory Action⁶ and Statutory Guidance on PECR⁷ (“draft Regulatory Action Policy and Statutory Guidance”). While understanding the pressures this puts on the ICO, it is nevertheless disappointing that the new Plan does not clearly set out the relationship between this developing strategy and the draft Regulatory Action Policy and Statutory Guidance. This lacunae, as well as the rather general terms of the Plan, make a detailed response challenging.

CIPL notes the Plan’s approach to its three core constituencies: those regulated, data subjects and its own team. It reiterates that clarity about the underlying regulatory approach to enforcement and the formal statutory guidance are essential for all three constituencies. It recalls that the draft Regulatory Action Policy and Statutory Guidance was issued in 2021 for consultation. That consultation period ended in March 2022⁸. CIPL reviewed that draft in detail, consulted widely with its members, and responded in a

⁴ Bill 143 2022-23 available at <https://bills.parliament.uk/bills/3322>

⁵ ICO Regulatory Action Policy available at <https://ico.org.uk/media/about-the-ico/consultations/4019400/regulatory-action-policy-2021-for-consultation.pdf>

⁶ ICO Statutory Guidance on our Regulatory Action available at <https://ico.org.uk/media/about-the-ico/consultations/4019213/statutory-guidance-on-our-regulatory-action-2021-for-consultation.pdf>

⁷ ICO Statutory Guidance on our PECR Powers available at <https://ico.org.uk/media/about-the-ico/consultations/4019214/statutory-guidance-on-our-pecr-powers-2021-for-consultation.pdf>

⁸ICO consultation on the *draft Regulatory Action Policy; statutory guidance on our regulatory action; and statutory guidance on our PECR powers* <https://ico.org.uk/about-the-ico/ico-and-stakeholder-consultations/ico-consultation-on-the-draft-rap-statutory-guidance-on-our-regulatory-action-and-statutory-guidance-on-our-pecr-powers/>

detailed paper to that consultation.⁹ The consultation closed in March this year but we have no indication of whether the statutory guidance, which is still mandated, is to be separated from the regulatory policy and the regulatory policy replaced by the approach set out in the Plan, or whether the draft is still under consideration and may be issued in due course. CIPL wishes to emphasise that the statutory guidance on PECR and the DPA 2018 remains legally mandated. As far as we can ascertain, the only regulatory action policy statement and statutory guidance in force currently are the 2018 documents. However, the plan clearly signals elements which appear to take a different direction.

This is not a formal, technical issue. The Commissioner's statutory guidance under the DPA 2018 will be a touchstone for data controllers in making difficult decisions on compliance and, inevitably, in any subsequent enforcement action litigation. As such, clarity about which guidance is applicable and how it sits with the Plan, is critical and now urgent.

b. Regulatory tools

The ICO outlines the wide range of regulatory options at its fingertips:

"These legislative frameworks are set by Parliament and, while we are independent in how we deliver our objectives, we are accountable to Parliament and the public for the outcomes we achieve through a variety of regulatory interventions. For example, the provision of advice, guidance and tools, formal opinions, audits and inspections, recommendations from complaints and breach reports, or mandating changes to practice or processes, and, where necessary, by issuing monetary penalties. Our aim is to provide certainty. We deliver a range of services to help organisations understand and comply with their obligations, always aware of the difference between minimum legal requirements and good practice advice".¹⁰

The wide range of regulatory options enable the ICO to tailor enforcement to the facts and circumstances of specific cases. We note that one of the commitments of the Plan is to set out a timetable for an investigation – we would also propose that some indication of the tools to be used would make the process more transparent.

We unreservedly welcome the statement that good practice recommendations be distinguished from legal obligations. This helps organisations to demonstrate and articulate best practice in processing personal data to those whose data they are processing.

As the pace of technological innovation continues to increase, we would reiterate the importance that ICO25 is sufficiently flexible to keep up with such developments. Focussing on an outcome based approach will help the ICO to maintain a consistent but flexible approach, recognising that many innovations need time and space to evolve, and that rushing to guidance may be counter-productive to developing compliance solutions and may stifle innovation. There should, therefore, be notice of guidance under consideration with a meaningful period for stakeholder engagement.

⁹ CIPL Response to UK ICO's Consultation on its Draft Regulatory Action Policy, Statutory Guidance on Regulatory Action and Statutory Guidance on PECR Powers available at https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_submission_ico_consultation_on_draft_regulatory_policy_and_statutory_guidance_on_regulatory_action.pdf

¹⁰ ICO25 – Empowering you through information - v1.0 14 July 2022 page 13

4. SPECIFIC COMMENTS

a. Purpose

We support the recognition of the ICO as a whole economy regulator, and the commitment that the ICO will work with other regulators to ensure a consistent and coherent approach to data regulation and guidance. Reference is made to the approach and objectives of the DRCF¹¹, but these will need to be further fleshed out in the strategy.

We welcome the ICO outcome based approach which proposes to identify trends around personal data use, so that the ICO can operate effectively as an informed regulator, working with business to develop compliant approaches, rather than reacting and responding after the fact. We look forward to hearing further details as to how this will be achieved in practice, and the timescales.

We would also welcome further details as to how the ICO proposes to simplify and lower the cost of compliance via the “how to” vs the “don’t do” model. Will current published guidance change, and if so, how and when and will this include a consultation? Is the ICO referring to the issuing of binding decisions to new firms or initiatives like the tax example, so that firms can rely on an ICO approach to develop a new area of enterprise or innovation? The objective is attractive, but it is unclear how this will be achieved and prioritised amongst the other objectives in the strategy.

b. Objectives – Safeguard and Empower People

CIPL supports the focus on interventions in areas of greatest harm and risk first, but the ICO must guard against a potentially discriminatory approach and continue to respect the accountability principle by allowing companies to resolve consumer complaints before the matter can be referred to the ICO.

To ensure that the prioritisation does not become selective or targeted enforcement against specific entities or sectors, further guidance as to the specific criteria for prioritisation will be necessary .

There have been various initiatives to help people to better understand their information rights, and this is an important objective. Misunderstandings or lack of awareness of information rights can create incorrect expectations on the part of individuals, and deprive them of the rights and redress to which they are entitled. CIPL looks forward to hearing more about how this objective will be achieved, particularly to a similar level of consistency, across the breadth of the society, and especially for vulnerable individuals.

CIPL welcomes the stated objective to increase transparency in the decisions taken when using ICO discretion, as this transparency is an essential pillar of building trust and enabling organisations to operate with greater certainty.

We welcome the commitment to address the issues of predatory marketing. In CIPL’s view, marketers which use the personal data of vulnerable individuals, regarded as such because of age or other marks in the data, is unfairly processing personal data under the DPA 2018, as well as committing breaches of PECR, and can, and should, be dealt with under both legislative regimes. We have made further comments below and referenced the work that CIPL has produced in relation to children’s data.

¹¹ ICO25 – Empowering you through information - v1.0 14 July 2022 page 13

CIPL strongly supports the development of techniques which may assist in dealing with this problem. It notes however that the “push” of financial service providers to move customers to online banking may have contributed to the vulnerability of some, particularly elderly customers. As a broad issue, CIPL recognises some of the unintended consequences and ongoing challenges of the move to the digital environment for many parts of society, and would encourage the ICO to ensure an approach which is cognoscente of similar unintended consequences.

c. Objectives – Empower responsible innovation and sustainable economic growth

CIPL welcomes the focus on supporting cutting edge innovation and SME’s (who make up circa 99% of UK businesses). Clear, timely and implementable guidance is essential to ensuring that SMEs can practically comply with their data protection obligations, and realise the benefits in their customer engagements.

CIPL agrees that it is important to support those who demonstrate good practice (such as through the Accountability approach), by focussing action against those who try to gain unfair advantage through unlawful or irresponsible actions.

For example, the Metaverse comes with many currently unanswerable questions and challenges, so it can be difficult to anticipate how fundamentally new areas such as biometrics and human characteristics fit into existing structures/compliance approaches. The ICO approach should focus on allowing new innovations to grow and test how they can innovate for compliance, and recognise that in such a fundamentally new environment it may not be possible to apply existing rules from the start. For example, eye tracking for headsets is intended to enable movement of the camera rather than biometric surveillance of what the individual is looking at. It is important to be open to reconsidering whether and how the existing rules can or should apply to evolving innovations.

CIPL concurs with ICO’s commitment to prioritise enforcement on actual harm caused and an evidence led and predictable approach to enforcement action based on actual harm caused. This will help the ICO prioritise its resources and effort on the most egregious conduct. CIPL does however have concerns regarding actions based on mere potential risk posed, rather than actual risk. To empower responsible innovation and sustainable economic growth, so that organizations are able to invest and innovate with confidence, the Plan must ensure that the ICO’s risk-based approach to supervision and enforcement is both evidence-based and objective avoiding supposition and focus on the rarest ‘edge’ cases (the ICO has championed its risk-based approach to regulatory oversight and enforcement in numerous public statements, parliamentary hearings and other regulatory guidance). Adopting a risk-based approach is beneficial to all parties¹². In this framework, accountability should be an explicit and strong mitigating factor of a predictable approach to enforcement action. The ICO should emphasize the role of accountability and organisational commitment to compliance, as well as behaviours that go beyond just legal compliance, as mitigating factors that will be considered following infringement. An assessment of accountability (from data protection management programs to formal certifications and adherence to codes of conduct) and best efforts to comply should be considered as part of the ICO’s risk-based

¹² See *CIPL Paper on Regulating for Results - Strategies and Priorities for Leadership and Engagement* (October 2017) https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_final_draft_-_regulating_for_results_-_strategies_and_priorities_for_leadership_and_engagement_2_.pdf

approach. The ICO should actively encourage accountable behaviour from organisations by explaining how it will factor accountability into any assessment of infringement, and in determining an appropriate regulatory response, including the quantum of sanctions. There should be specific consideration of whether an organisation takes into account the ICO Accountability Toolkit in building and implementing its data protection management program. The adoption of the Toolkit should be explicitly mentioned as one of the factors that may be taken into account in any enforcement action. Acts of non-compliance do not take place in a vacuum, and should be considered within the context of an organisation's wider data protection management program and any external certifications or adherence to a code of conduct. The same act of non-compliance should be evaluated differently by the ICO where an organisation has made best efforts to implement and maintain an extensive data protection management program, compared with an organisation that has committed wilful acts of non-compliance. Further, the intent or good faith effort of an organisation should be a consideration when establishing the action that will be taken against it.

The ICO is encouraged to continue its cooperation and collaboration with regulatory counterparts domestically and internationally. Data is predominantly digital, and is shared globally, so the ICO needs to ensure that the UK is engaged internationally and contributes to a global system of proportionate and workable regulation that supports investment and innovation.

CIPL supports the objective of amplifying advice and guidance through sectoral regulators and representative associations where regulatory responsibilities align to ensure consistency.

d. Objectives – Develop the ICO's culture, capability, and capacity

CIPL supports the objective to continuously develop the ICO's culture, capability and capacity to deliver impactful regulatory outcomes.

Ensuring that the ICO is a desirable place to work will help address staffing challenges, particularly high staff turnover and the resulting loss of experience. This can lead to inconsistency in approach and file handling, leading to delays and variable advice and feedback to the public as well as regulated entities.

Finally the approach laid down in strategy and policy papers such as the plan must permeate the work of all parts of the ICO. There can be a disconnect between the external ICO statements about policy approaches and levels of proactive outreach and the frequency and quality of external engagement by ICO teams. For example, the focus is often on technical compliance, with less of a consideration of the overall outcomes and measures taken to manage risks.

e. Values and Behaviours

CIPL is generally supportive of this approach, and would note that it would be useful if the ICO also looked at innovations in the global context when regulating in order to understand trends and also to better identify potential missed opportunities. Specifically, there may be a need to find a way to be proactive to address an innovative or challenging issue, or we risk seeing it being addressed in other jurisdictions which may be unhelpful or inconsistent with good data practice and responsible business objectives. Examples of these types of innovating and challenging issues would include the recent experience of sharing data

during the pandemic to develop vaccines. This was both an opportunity to deliver a faster and desired outcome, but there were many lost opportunities through lack of clarity on permitted data usage.

5. MEASURING OBJECTIVES THROUGH SENTIMENT, OUTCOMES AND PERFORMANCE

We welcome the performance service levels proposed by the ICO, particularly concluding formal investigations within 12 months of them starting. Investigations which drag on create uncertainty for those being investigated, their stakeholders and their broader organisational objectives.

a. Annex One – Annual Action Plan: October 2022 – October 2023

We would suggest to update the annual plan each year to accommodate and incorporate changing priorities and evolving challenges and opportunities. It is important that the ICO remains sufficiently flexible to be able to pivot its attention and resources if a significant issue or market need arises.

We welcome the development of the ICO transformation programme and are hopeful that this better enables the ICO to meet the objectives it has set.

Organisations have felt the burden in the last few years of a deluge of ICO and other regulatory consultations, which have stretched the ability of organisations to respond comprehensively and thoughtfully. There have been so many consultations, that many organisations have had to be selective and their finite resources have meant that they have not been able to contribute to many of them, even when they were pertinent to their operation. We would encourage the ICO to develop a clear and structured pipeline of consultations so that organisations are able to allocate appropriate time and resources to respond, which will improve the quality of the feedback provided. Piecemeal consultations, too many at once, or seeking further views when previous consultations responses have still not been published make it difficult for organisations to provide the most helpful and insightful feedback. Organisations need time to consider the consultation, where it sits in the context of the broader environment, and then to respond.

The proposal for the ICO to provide bespoke regulatory advice akin to tax authorities before processing takes place is welcome. However, this risks being untransparent to the wider market and may also result in this becoming a very significant undertaking given the UK focus on encouraging innovation, inward investment and a move to a digital economy. Has the ICO considered how this approach can be scaled to accommodate a significant number of requests across multiple sectors? How will this apply to SMEs? Has the ICO considered how bespoke regulatory advice will ensure a consistent approach with its broader and published policy objectives? How does a clearance not become an “endorsement” by the ICO? Which department within the ICO will have responsibility for the bespoke regulatory advice i.e. policy vs enforcement? Will information submitted be treated with commercial confidentiality and not used against a company? These questions and many more will need to be addressed if the proposal is to be successful. Given the experience of BCRs, it is clear that these are genuine rather than theoretical challenges, as many firms have been put off pursuing BCRs due to the challenges of accessing ICO resources to consider their applications.

b. Subject Access Request Tool

It is not clear how the Subject Access Request Tool will work in practice, but a consistent form of request would be helpful for businesses, and also helpful for individuals to identify and provide the information needed to help organisations to meet their obligations in relation to SARs.

c. Children's Data

The focus on aligning the Online Safety Bill with existing guidance on the processing of children's data is most welcomed. CIPL is currently carrying out an extensive project on Children's Data Privacy exploring ways to meet the data protection and compliance challenges that organizations face when addressing children's privacy. Our research shows¹³ that protecting children's privacy in the digital world, particularly as technologies emerge and develop, rapidly raises complex issues, and requires reconciling competing concerns especially in the framework of the implementation of a comprehensive Regulatory Code such as the ICO's Children's Code. The Code's enforcement needs to rationally balance the best interest of the child; the global nature of the online experiences, global networks and participation; the ability of children to understand the risks and consequences of their experiences coupled with the ability of organizations to facilitate the understanding of their information notices and practices. Striking delicate balances is required in both organizational implementation and regulatory enforcement especially in the context of use of data for safety – e.g. age assurance, content moderation, appropriate content.¹⁴ These complexities must be at the forefront of the ICO's enforcement efforts, developing effective and workable measures at the place where privacy, safety and wellbeing intersect.

However, we would note statements that organisations won't be prosecuted for taking actions to safeguard children is not consistent with the current law, and we would encourage the ICO to consider how this policy approach can be reconciled with the law in the form of new guidance or other measures.

This, and other areas, continue to be fertile ground for continued co-operation with the DRCF in order to produce a coherent policy approach across multiple sectors and industries.

d. AI

We note that the ICO aims to refresh the guidance for AI developers on ensuring that algorithms treat people and their information fairly. Will there be a new consultation on this new piece of guidance? A key issue to be addressed is what is meant by the term "fairly", which is important in the AI context.

The focus on AI discrimination makes sense as a priority for the ICO.

e. Biometric Technology focus

We would suggest that this focus needs to be long term, fluid, and to take into account emerging technologies, particularly in the context of the reforming of the data protection landscape. Will the ICO be consulting on any guidance issued around how biometric technologies are used? We would note our comments above about the volume and timing of consultations.

¹³ *Protecting Children's Data Privacy Policy Paper 1 International Issues and Compliance Challenges* – forthcoming October 2022

¹⁴ idem

f. Online tracking

We welcome the ICO's consideration – together with government, industry and other regulators on targeting and online identifiers including cookies. There are 2 key areas of work – selective investigation of certain types of targeting for their consistency with GDPR and the deprecation of third parties cookies and the role of identity in the provision of online services.

Regarding the first area, it is unclear from the specific examples given at page 41, such as gambling companies, if this and edge cases is the model of targeted advertising under review, or more generally.

Regarding the second area, the ultimate goal of the ICO's proposed approach needs more clarity and transparency. It is vitally important that the ICO's programme of work appropriately balances allowing the market to continue to function freely and providing legal guidance as to interpretation of GDPR. CIPL would recommend a period of reflection to re-engage with a wider group of impacted stakeholders, meet expectations of transparency and provide clarity as to the pipeline of future work in this area. Any regulatory action or guidance must support commerce and aid transition without foreclosing innovation or favouring a particular technology over others. This approach will build confidence in the sector and support the many commercial decisions market participants need to make. Further details on how this approach will be resourced by the ICO and other regulators would be welcome, specifically on how to encourage the alternative technological solutions which are needed to respond to the changes proposed, via sandbox initiatives or otherwise.

g. Age related vulnerability

The focus on the protection of vulnerable groups in the Plan, which not only covers predatory marketing, but also the use of AI in the benefits system and the protection of children's privacy is welcomed by CIPL. We would draw attention to the importance of ensuring that digital services are available to all, and that vulnerable individuals are not socially excluded by systems which they cannot properly or adequately access or use.

h. Enable sector-based resolution of data protection complaints:

We are supportive of exploring co-ordinating with sector-specific ombudsmen or representative groups to reduce the number of organisations that individuals need to deal with. For example in relation to cyber issues, not only are there multiple organisations but also different time limits, information to be provided, and processes to follow for the same issue. This just adds time, complexity and cost to an issue, diverting resources from effective resolution.

i. Empower responsible innovation and sustainable economic growth

We are supportive of the proposal to invest in services, tools and initiatives to help SME's and others ensure appropriate information rights practices. Understanding regulatory expectations and having examples of what "good" looks like is a practical way of ensuring wider adoption of privacy supporting practices across the breadth of business models and types of data usage.

The DSAR Tool proposal appears to be a practical and helpful approach. We would suggest that standardisation of the DSAR request would be more helpful given the wide variety of the current forms

of requests (e.g. Does a Tweet count as a DSAR?), and standardisation of the DSAR request would also make it simpler to identify and respond to requests.

j. Bring down the burden or cost of compliance

Publishing internal training, advice and recommendations together with off the shelf products or templates will be helpful to organisations, particularly SME's, to achieve consistency of approach.

Creating and hosting a forum for organisations to discuss and debate compliance questions will help both, to educate the ICO on challenging areas of compliance and practice, and also enable solutions to be robustly challenged and tested. This necessitates a trusted environment however, and one where firms feel confident enough to speak out about real compliance challenges with a regulator in the room. Details of how this trust can be fostered would be welcome.

We are supportive of increasing stakeholder engagement events for building lines of communication and engagement with organisations. Whether this engagement takes place through established industry bodies or specifically curated events, it is important to ensure that all voices are heard.

k. Provide assured regulatory advice

iAdvice is a useful initiative, it would however be helpful to understand the efficiencies compared to the current telephone service, and how iAdvice will address variable quality issues in relation to the advice given.

l. Development of "10 data essentials" for SME's to self-assess is an helpful approach

We look forward to the ICO resourcing up to support the development and delivery of codes and certifications, particularly given the challenges around the BCR experience to date.

m. Produce proportionate and transparent guidance to provide regulatory certainty

A "guidance pipeline" will help organisations plan their resources and engagement. The high volume of policy and other consultations over the last few years have been hugely burdensome for business and many have found it difficult to plan ahead and dedicate appropriate resource to meaningfully respond. This situation has been compounded by some consultations coming with little or no notice, or regulator guidance or action coming with no consultation at all.

It is therefore important that the ICO not only publicly discloses the pipeline of guidance it is working on but that it also consults with stakeholders as to what items should be added to the pipeline and when the market needs them. As a matter of course, the ICO should pro-actively engage with relevant stakeholders when it begins work on a new piece of guidance so that it receives a balanced and representative view from the widest possible number of market participants and other stakeholders.

CIPL is interested to see what the "Impact assessments" on the UK ICO work will look like.

n. Encourage public sector standards and efficiency

CIPL has noted with interest the revised approach to public sector enforcement by the ICO. CIPL concurs with the ICO that there is little or no public interest in seeing public funds which could otherwise be used for the provision of public services being circulated as fines back through the ICO to central government recipients in the Consolidated Fund. We note that there is a 2 year trial period in which the ICO will look to use other powers such as orders and reprimands.

CIPL would propose that the useful and creative thinking in this area should both go further and be considered in relation to all fines. CIPL would propose for the ICO to adopt a formal process to establish the equivalent appropriate fine to a private sector one (the nominal fine level). Clearly under the new policy this will not be the fine administered. However, the public body which needs to change its practices should be required to allocate an appropriate proportion of the nominal fine level to the necessary remedial work, whether that be a system update, re-training, further data developments/improvements etc. If it fails to do so, the nominal fine should become a real fine. That would ensure that an appropriate level of the nominal fines saved by the public bodies went to remedy the issue.

CIPL would also wish to see such an approach as a pathway or precursor to considering similar approaches in the private sector – for example to see some of the income from fines to be specifically devoted to encouraging improved compliance or education, for example being used to fund materials for use in schools.

o. Deliver timely regulatory interventions

We welcome the statement that existing operational backlogs will be cleared by 31 March 2023 and that there will be a focussed and proportionate approach to investigations going forward. We assume that meeting these targets is dependent on the re-organisation at the ICO and additional recruitment.

p. Enable international data flows through regulatory certainty

We welcome the ICO support for assessing UK government adequacy proposals. The process for obtaining BCRs has too often failed to meet expectations, and the proposed changes are most welcome.

q. Involvement in legislative reform

The ICO should not only be actively engaged in UK government legislative reform as a whole economy regulator, but should also be active in international forums to share the ICO experience and expertise to help better achieve a consistent approach to legislative developments.

r. Enable efficiency, productivity and collaboration

We are interested to better understand the ICO's own data strategy to ensure the best data practice and to evolve how the ICO captures, analyses, shares and uses data both internally and externally.

The upcoming governance structure changes will be an important development in how the ICO is managed, governed and operates.

s. Provide value for money for DP fee payers

We welcome the transparency that the annual publication of the “Value for money summary” of how DP fees contribute to the effective operation of the ICO.

If you would like to discuss any of these comments or require additional information, please contact Bojana Bellamy, bbellamy@HuntonAK.com, Natascha Gerlach, ngerlach@HuntonAK.com, or Camilla Ravazzolo cravazzolo@huntonak.com