

The Centre for Cross Border Studies – Written Evidence (DAT0003)

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Submission to the House of Lords European Affairs Committee inquiry into data adequacy and its implications for the UK-EU relationship

1 May 2024

This document has been prepared by the Centre for Cross Border Studies in response to the call for evidence issued by the House of Lords European Affairs Committee on data adequacy and its implications for the UK-EU relationship.¹

About The Centre for Cross Border Studies

The Centre for Cross Border Studies (CCBS), based in Armagh, Northern Ireland, has a strong reputation as an authoritative advocate for cross-border cooperation and as a valued source of research, information and support for collaboration across borders on the island of Ireland, between the island of Ireland and Great Britain, elsewhere in Europe and beyond.

The short submission that follows, therefore, is closely informed by the Centre's particular knowledge of and experience in cross-border socio-economic development involving a range of sectors from both Northern Ireland and Ireland, including public bodies, business and civil society. **It is focused on the Centre's ongoing efforts in monitoring the extent to which the necessary conditions for North-South cooperation are being maintained following the UK's withdrawal from the EU in accordance with Article 11 of the Protocol on Ireland/Northern Ireland and the Windsor Framework,² and is informed by the results of its quarterly surveys on the conditions for North-South and East-West cooperation,** ongoing since the first quarter of 2021,³ as well as the Centre's role in convening the Ad-Hoc Group for North-South and East-West Cooperation.⁴

¹ This response was authored by Dr Anthony Soares, Director of the Centre for Cross Border Studies (a.soares@qub.ac.uk).

² The Centre has responded to a range of relevant parliamentary inquiries and produced a number of Briefing Papers, which can be consulted at <http://crossborder.ie/category/research-and-policy/policy/consultation-responses/> and <http://crossborder.ie/category/research-and-policy/policy/briefings/>.

³ The results of the Centre's quarterly surveys, published in Research Briefings, can be accessed at: <https://crossborder.ie/what-we-do/projects/maintaining-the-necessary-conditions-for-cooperation-and-cross-border-lives/>.

⁴ The views expressed in this submission are entirely those of the Centre for Cross Border Studies and should

The current situation regarding data adequacy and cross-border cooperation

1. The smooth flows of cross-border data exchanges between the Republic of Ireland, as an EU Member State, and the United Kingdom are enablers of both North-South (between the two jurisdictions on the island of Ireland) and East-West (between the Republic of Ireland and Great Britain) cross-border cooperation. In terms of North-South cooperation, it takes place in many forms and across a range of sectors, including cross-border research initiatives, health and social care, collaboration between the emergency services, education, policing, justice, tourism and cross-border environmental protection.

2. It is normally the case that Letters of Offer issued to organisations by funders of cross-border cooperation projects set out an obligation on the recipients related to data protection and compliance with GDPR regulations. Currently, organisations are familiar with these requirements, and confident that they are compatible across the jurisdictions on these islands.

3. As noted by a Centre for Cross Border Studies' Border People Briefing in May 2016 in relation to the Common Travel Area, in 2011 the UK and Irish governments had 'agreed to seek ways to improve cooperation in the field of visas, **data sharing** and the development of an electronic border management system' (emphasis added, p.3).⁵

4. However, the current context reveals uncertainty regarding the future of the underlying context enabling the cross-border exchange of data. Concerns relating to this issue began to be expressed in the Centre for Cross Border Studies' 4th Quarterly Survey on the conditions for North-South and East-West cooperation (corresponding to the period October to December 2021),⁶ and have been raised repeatedly in subsequent editions of the surveys, including the most recent relating to the period January to March 2024.⁷

5. As a result of the concerns being raised, on 2 March 2023 the Centre organised a workshop on cross-border data involving officials from Northern Ireland's Department for the Economy and a number of key stakeholders.⁸ The

not be seen as representing the opinions of the organisations supporting the Ad-Hoc Group for North-South and East-West Cooperation. For further information on the Ad-Hoc Group, see <https://crossborder.ie/ad-hoc-group-for-north-south-and-east-west-cooperation/>.

⁵ "The Referendum on UK Membership of the EU: Freedom of Movement of People" (May 2016), <https://crossborder.ie/newsite/wp-content/uploads/2021/09/Border-People-Briefing-Brexit-Referendum.pdf>.

⁶ "Quarterly Survey on the conditions for North-South and East-West cooperation: Briefing on the findings from the 4th Quarterly Survey (October to December 2021)", <https://crossborder.ie/newsite/wp-content/uploads/2022/01/Research-Briefing-4th-Quarterly-Survey-of-North-South-and-East-West-Cooperation.pdf>.

⁷ The surveys began in the first quarter of 2021.

⁸ "CCBS hosts Cross-Border Data Workshop", <https://crossborder.ie/news/ccbs-host-cross-border-data-workshop/>. The Department for the Economy commissioned a report published in September 2023, on "Understanding the risks to cross border transfer of personal data: EU-UK Data Adequacy", <https://www.economy-ni.gov.uk/publications/understanding-risks-cross-border-transfer-personal-data-eu-uk-data-adequacy>.

source of much of the uncertainty regarding the future of cross-border data exchanges in support of North-South and East-West cooperation was the Data Protection Digital Information Bill, and its potential to end the EU's granting to the UK (and therefore Northern Ireland) of data adequacy status.⁹

6. The UK's ability to diverge in this area, and therefore to potentially risk its data adequacy status with the EU, was stressed by the Government in its January 2024 Command Paper, "Safeguarding the Union".¹⁰ Having referred in paragraph 54 to what will be 'now considerable underlying regulatory divergence North and South' on the island of Ireland, the subsequent paragraph states:

The Government recognises that these changes do create a different legal and practical context on the island of Ireland, with substantial and likely increasing divergence between Northern Ireland and Ireland over time – building, of course on the in-built capacity for divergence in the vast majority of areas outside the Protocol including environmental law, professional qualifications, employment law, procurement, immigration, banking, data and a wide range of services and other rules.

The capacity for divergence on data is one of the areas specifically highlighted by the Government, which exacerbates concerns on what the implications will be for the transfer of data that supports North-South and East-West cooperation.¹¹

7. However, it is important to note that while concerns are being raised by some actors of cross-border cooperation, they are generally expressed in ways that denote uncertainty given the lack of knowledge of *how and to what extent* the UK may diverge in the area of data, and what that would mean in terms of EU data adequacy recognition. Moreover, although concerns may be being raised by some, it is highly likely that many involved in the cross-border transfer of data are not even aware of the issue.

The future maintenance of UK-EU data adequacy, cross-border cooperation and the Protocol/Windsor Framework

8. It is imperative that the UK Government's potential ability to diverge in the area of data is exercised in a way that is conscious of and does not contradict its obligations under Articles 1 and 11 of the Protocol on Ireland/Northern

⁹ On the Data Protection and Digital Information Bill, see also the Equality Commission for Northern Ireland's written submission of March 2024

(<https://www.equalityni.org/ECNI/media/ECNI/Consultation%20Responses/2024/HoL-DataDigitalinfoBill-ECNIsubmission.pdf>), and the Northern Ireland Human Rights Commission's Briefing of January 2024 (Publication - NIHRC Briefing on the Data Protection and Digital Information Bill | Northern Ireland Human Rights Commission).

¹⁰ HM Government, "Safeguarding the Union" (January 2024), <https://www.gov.uk/government/publications/safeguarding-the-union>.

¹¹ For the Centre's response to the Command Paper, see "Briefing Note on UK Command Paper: 'Safeguarding the Union'" (February 2024), <https://crossborder.ie/briefing-note-on-uk-command-paper-safeguarding-the-union-2/>.

Ireland/Windsor Framework, as well as its status as a co-guarantor of the 1998 Good Friday/Belfast Agreement.

9. While Article 11 states that the 'Protocol shall be implemented and applied so as to maintain the necessary conditions for continued North-South cooperation', Article 1 sets out how the Protocol provides the 'arrangements necessary to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North-South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions'.

10. Although it could be argued that the issue of UK-EU data adequacy falls outside the scope of the Protocol/Windsor Framework, the question arises as to how the emergence of obstacles to the transfer of data between Northern Ireland and the Republic of Ireland necessary for North-South cooperation would not be seen to conflict with the commitments made under Articles 1 and 11, even if such obstacles were to come as a result of the UK exercising an ability to diverge in an area not covered by the Protocol.

11. It could also be argued that, in the event that UK divergence results in the loss of EU recognition of UK data adequacy, it would not prevent those wishing to continue their North-South (and East-West) cooperation from transferring cross-border data where necessary, as long as they implemented the appropriate safeguards in the absence of an adequacy decision. Crucially, however, while it may be feasible for larger institutions and organisations to put in place safeguards such as Standard Data Protection Clauses, Binding Corporate Rules or some other legally binding and enforceable instrument, this will not be the case for the majority of smaller organisations involved in cross-border cooperation – where most cross-border cooperation takes place. Without dedicated and continuous UK Government support,¹² there will be insufficient capacity in terms of financial and human resources within such organisations to put in place the measures necessary to ensure any cross-border transfers of data are compliant in both jurisdictions.

12. Without an overarching approach to considering how proposed policies or legislation may impact on it, there is a serious risk that the conditions for continued North-South cooperation will be undermined, and that Articles 1 and 11 of the Protocol/Windsor Framework will not be complied with. Each individual policy decision – such as UK divergence resulting in the loss of EU data adequacy – may be considered of itself not to impose excessively onerous administrative and financial burdens on those wishing to continue their cross-border cooperation activities (especially if that assessment is made based on the capacity of larger institutions and businesses). However, the accumulation of

¹² Crucially, such support would have to come from the London Government. Given that divergence resulting in the loss of data adequacy recognition by the EU would be the product of policy choices by the UK Government, it would not be justifiable to expect the Northern Ireland devolved administration to provide the necessary support. In this situation the UK Government must not refuse to provide the necessary support on the grounds that North-South cooperation is a devolved matter.

administrative and financial burdens that may result from a range of policy decisions, whether by the UK or EU, could prevent many organisations from engaging in cross-border cooperation. If this were to be the case, then it could no longer be said that the necessary conditions for continued North-South cooperation existed.

Received 1 May 2024