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LAW AND PRACTICE:

p.3

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Law and Practice

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UK LAW AND PRACTICE

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Sidley Austin LLP is a premier law firm with a practice attuned to the ever-changing international landscape. The firm advises clients around the globe, with more than 2,000 lawyers worldwide. Sidley maintains a commitment to providing quality legal services and to offering advice in litigation, transactional and regulatory matters spanning virtually every area of law. The firm's lawyers have wide-reaching legal backgrounds and are dedicated to teamwork, collaboration and superior client service. Sidley's lawyers help a range of businesses address some of the most challenging

matters concerning data protection, privacy, information security and incident response, data commercialisation, internet and computer law, intellectual property, information management and records retention, e-commerce, consumer protection and cybercrimes. Lawyers advise clients with extensive operations in Europe, as well as in the US, Asia and elsewhere, on developing and implementing global data-protection programs.

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1. Basic National Legal Regime

1.1 Laws

The General Data Protection Regulation (GDPR) came into force on 25 May 2018 and regulates the processing of personal data of individuals by imposing obligations on data controllers and data processors. Data controllers are organisations that determine the means and purposes of the processing of personal data, while data processors are organisations that process personal data on behalf of a data controller. As a directly applicable regulation, the legal obligations contained in the GDPR have direct effect in the UK without any national implementing measures. However, the GDPR contains a number of derogations that provide EU Member States with discretion to introduce specific derogations on how certain provisions of the GDPR will apply in Member State law.

The UK has introduced such specific derogations in UK law through the UK Data Protection Act 2018 (DPA 2018). The DPA 2018 repealed the UK Data Protection Act 1998, which had implemented the EU Data Protection Directive 95/46/EC. The DPA 2018 supplements the adoption of the GDPR into UK law by dealing with UK derogations and the transposition into UK law of the Law Enforcement Directive 2016/680, as well as implementing national security provisions and the powers and duties of the national data supervisory authority, the UK's Information Commissioner's Office (ICO).

The Privacy and Electronic Communications (EC Directive) Regulations 2003 (as amended by the Privacy and Electronic Communications (EC Directive) (Amendments) Regulations 2011) (PECR) regulate direct marketing in the UK, but also the processing of location and traffic data and the use of cookies and similar technologies. PECR implemented Directive 2002/58/EC (as amended by Directive 2009/136/EC) (the ePrivacy Directive). The European Commission, European Council and European Parliament are currently in trilogue negotiations on its replacement, the ePrivacy Regulation, which is not expected to come into force until 2019 at the earliest.

The Freedom of Information Act 2000 (FOIA) is a UK Act that creates a public "right of access" to information held by public authorities. The full provisions of the act came into force on 1 January 2005 alongside the Environmental Information Regulations 2004, which is a UK Statutory Instrument (SI 2004 No 3391) that provides a statutory right of access to environmental information held by UK public authorities.

1.2 Regulators

The UK's national data supervisory authority is the ICO, headed by the Information Commissioner. The ICO is a

non-departmental public body that reports directly to the UK Parliament and is sponsored by the Department for Digital, Culture, Media and Sport (DCMS). It is the independent regulatory office dealing with the DPA 2018, PECR, the FOIA and the Environmental Information Regulations 2004 in England, Wales and Northern Ireland and, to a limited extent, in Scotland.

The ICO has several enforcement powers under the DPA 2018 in the UK, including the monitoring and enforcement of the GDPR and the DPA 2018 in the UK. Such powers include the power to issue the following:

- **information notices** – requiring controllers and processors to provide the ICO with information that the Commissioner reasonably requires in order to assess compliance with the GDPR and/or DPA 2018;
- **assessment notices** – requiring the controller or processor to permit the ICO to carry out an assessment of whether the controller or processor is in compliance with the GDPR and/or DPA 2018 (this may include the power of the ICO to conduct an audit, where the assessment notice permits the ICO to enter specified premises, inspect or examine documents, information and material, and observe the processing of personal data on the premises);
- **notice of intent** – where the ICO issues a notice of intent to fine the controller or processor in relation to a breach of the GDPR and/or the DPA 2018 after conducting its investigation. Such a notice sets out the ICO's areas of concern with respect to potential non-compliance with the GDPR and/or the DPA 2018, and grants the controller or processor the right to make representations. After such representations have been carefully considered, the ICO reaches its final decision on any enforcement action in the form of an enforcement notice;
- **enforcement notices** – such notices are issued where the ICO has concluded that the controller or processor has failed to comply with the GDPR and/or the UK DPA 2018, and set out the consequences of non-compliance, which could include a potential ban on processing all or certain categories of personal data; and
- **penalty notices** – if the ICO is satisfied that the controller or processor has failed to comply with the GDPR and/or the DPA 2018, or has failed to comply with an information notice, an assessment notice or an enforcement notice, the ICO may, by written notice, require a penalty to be paid for such failure. Under the GDPR, such monetary penalties can amount to EUR20 million (GBP17 million) or 4% of annual worldwide turnover.

As the DPA 2018 came into effect on 23 May 2018, any information notices issued by the ICO to commence possible investigations, assessment notices or enforcement notices served pre-23 May 2018 and thus served under the Data

Protection Act 1998 continue to have effect under the DPA 2018.

In a speech at the Data Protection Practitioners' Conference on 9 April 2018, the ICO Information Commissioner, Elizabeth Dunham, stated that "enforcement is a last resort" and that she has "no intention of changing the ICO's proportionate and pragmatic approach after the 25th of May". She added: "Hefty fines will be reserved for those organisations that persistently, deliberately or negligently flout the law," and that "those organisations that self-report, engage with us to resolve issues and can demonstrate effective accountability arrangements can expect this to be a factor when we consider any regulatory action."

In addition, the ICO is responsible for promoting public awareness and, in particular, raising awareness amongst controllers and processors of their obligations under the GDPR and DPA 2018. The ICO has published extensive guidance on complying with the GDPR, and is currently working on guidance on the DPA 2018, which was last updated when the Act was a Bill going through the UK Parliament.

1.3 Multilateral and Subnational Issues

Brexit

As the GDPR is a directly applicable EU law and entered into force prior to the date of Britain's departure from the EU on 29 March 2019, it has direct legal effect in English law. The UK government is currently determining what the UK's data protection laws will be post-Brexit. As the UK government wants to ensure that personal data can continue to be transferred from the EU to the UK post-Brexit, any attempt to repeal the central data protection legislation of the EU would weaken the prospects of the UK achieving its aim of being granted an 'adequacy' decision as a third country by the European Commission and therefore allowing organisations to be able to transfer personal data lawfully from the EU to the UK without having to put in place other data transfer solutions, such as the EU's standard contractual clauses or Binding Corporate Rules.

The UK government published a white paper on Brexit in July 2018, setting out its intentions for the UK's future relationship with the EU, where any future UK-EU agreement should, in the view of the UK government, provide for the continued exchange of personal data between the UK and the EU, with strong privacy protections for individuals in the EU, and continue to allow for the ongoing co-operation between the ICO and other EU Member State data supervisory authorities in relation to the cross-border processing of personal data.

1.4 Key Developments

The ICO has taken a series of enforcement actions over the previous 12 months under the Data Protection Act 1998 (now replaced by the DPA 2018), including the following:

- in May 2018, the Crown Prosecution Service was fined GBP350,000 after losing historical child sex abuse victims' interview videos, containing the most intimate sensitive details of the victims and perpetrator as well as identifying information pertaining to other parties;
- in May 2018, a university was fined GBP120,000 for inadequate security measures following a cyber attack on a microsite that contained contact details and sensitive data of university employees and students. It was the first university to be fined under the DPA 1998;
- in June 2018, the ICO fined a bible society GBP100,000 for inadequate technical and organisational measures that allowed their computer network to become compromised as a result of a cyber attack, with the cyber attacker being able to access the personal data of 417,000 of the society's supporters. A small subset of the supporters also had some payment card and bank account details placed at risk; and
- in June 2018, a global web-service provider was fined GBP250,000 by the ICO for inadequate technical and organisational measures that allowed a cyberattacker to access the personal data of approximately 500 million users, with 515,121 UK accounts placed at risk.

1.5 Significant Pending Changes, Hot Topics and Issues

As referred to above, the European authorities are currently negotiating the ePrivacy Regulation, which will complement the data protection provisions of the GDPR and have direct effect in Member States, including the United Kingdom (if it enters into force before Brexit on 29 March 2019). The ePrivacy Directive aims to reinforce trust and security in the Digital Single Market by updating the legal framework on ePrivacy, and provides additional sector-specific rules including in relation to online marketing and the use of website cookies. It is intended to bring so-called 'Over the Top' services (OTTS) into its scope, including instant and social media messaging services and 'voice over internet protocol' providers (VoIPs).

The ICO's regulatory action policy will be re-launched in the next few months, setting out the practical and policy approach the ICO is going to take towards discharging its ability as the UK's data supervisory authority.

The Information Commissioner, Elizabeth Denham, has stated that the ICO intends to focus on cybersecurity, artificial intelligence (AI) and device tracking over the next 12 months. The ICO recognises the importance of innovation and, as a result, is working to establish a 'regulatory sandbox' that will enable organisations to beta-test new initiatives,

support innovative digital products and services, whilst ensuring the appropriate safeguards remain in place. The ICO intends to focus on AI applications and in 2019 will launch its AI application programme, which will establish partnerships with stakeholders and other regulators on technology and innovation issues.

In relation to children's privacy, the ICO is currently producing an Age Appropriate Design Code (Code), which will enable those who design online services for children to adopt a series of privacy standards appropriate for children. The ICO has launched a Call for Evidence in relation to its Code, asking for views from online service providers, child development experts, children's advocacy services and academics on what the Code should say.

2. Fundamental Laws

2.1 Omnibus Laws and General Requirements

Data Protection Officers

The appointment of a data protection officer (DPO) in the private sector is required where an organisation's core activities (ie, the primary business activities of an organisation) involve the following:

- the regular and systematic monitoring of individuals on a large scale – for example, where a large retail website uses algorithms to monitor the searches and purchases of its users and, based on this information, offers recommendations to them; or
- the large-scale processing of special categories of personal data (eg, health data) or personal data relating to criminal convictions and offences – for example, a health insurance company processes a wide range of personal data about a large number of individuals, including medical conditions and other health information.

The ICO states in its guidance on the appointment of DPOs that, regardless of whether the GDPR requires an organisation to appoint a DPO, the organisation must ensure that it has sufficient staff and resources to discharge its obligations under the GDPR, and that a DPO can be seen to play a key role in an organisation's data protection governance structure and help improve accountability. The guidance further advises that, should an organisation decide that it does not need to appoint a DPO, it is recommended that this decision be recorded in order to help demonstrate compliance with the accountability principle.

The GDPR requires an organisation to publish the contact details of the DPO and to communicate these to the ICO. To notify the ICO, organisations should send an email to dataprotectionfee@ico.org.uk, with the subject line 'Add a DPO'. The email should include the following information:

- the organisation's ICO registration number;
- whether the organisation is required to appoint a DPO or whether the organisation has appointed a DPO voluntarily; and
- the name, address, phone number and/or email address of the DPO (if they are an individual – ie, a member of staff), or the external organisation that will be carrying out the DPO duties on the organisation's behalf. Organisations must clearly state within the email whether they wish to publish the name of their DPO if it is an individual.

Application of "Privacy by Design" or "by Default"

Data protection by design and by default is the requirement for controllers to put appropriate technical and organisational measures in place to implement the data protection principles and safeguard individual rights. Although this is not a new concept and was historically viewed as 'good practice' under the previous UK Data Protection Act 1998, the GDPR has now made this a legal requirement, essentially requiring controllers to consider data protection and privacy issues at the outset, and by default process the minimum amount of personal data necessary to achieve the specific purpose (ie, data minimisation).

Data Protection by Design

In its guidance on data protection by design and by default, the ICO states that data protection by design is about adopting an organisation-wide approach to data protection, and 'baking in' privacy considerations into any processing activity undertaken. Indeed, in considering whether or not to impose a penalty, the ICO has advised that it will take into account the technical and organisational measures a controller has put in place in respect of data protection by design.

Data Protection by Default

Practically, the ICO recognises in its guidance that controllers will need to process personal data in order to achieve their purposes. However, 'privacy by default' requires the controller to specify this data before the processing starts, appropriately inform individuals prior to processing, and only process the personal data needed for the specified purposes. The ICO acknowledges that what actions are required to be taken will depend on the circumstances of the processing and the risks posed to individuals.

In its guidance, the ICO encourages controllers to develop a set of practical, actionable guidelines that can be used in its organisation, framed by the controller's assessment of the risks posed and the measures available to it. The ICO suggests that these guidelines could be based on the seven foundation principles of privacy by design, as developed by the Information Commissioner of Ontario.

Data Protection Impact Assessments (DPIAs)

Controllers are under an obligation to carry out a DPIA where the processing is likely to result in a high risk to individuals. Whilst the GDPR provides three specific examples of where a DPIA should be carried out, the ICO in its guidance on DPIAs states that it is also good practice to do a DPIA for any other major project that requires the processing of personal data. The ICO has also published a DPIA Screening Checklist, which sets out instances where a DPIA should always be carried out (eg, where processing special categories of personal data or criminal offence data on a large scale, or where processing personal data without providing a privacy notice directly to the individual) and instances where a DPIA should be considered (eg, where processing on a large scale, or where using innovative technological or organisational solutions). The ICO guidance also recommends that, where a controller decides not to carry out a DPIA, the reasons for this decision are documented.

Privacy Policies and Notices

The implementation of internal privacy policies may assist organisations to meet the principle of accountability as required under Article 5(2) of the GDPR, as well as the requirement under Article 24(2) of the GDPR to implement appropriate data protection policies where this is proportionate in relation to the processing activities.

Individuals have a right to be informed about the collection and use of their personal data. The information to be provided is set out in Articles 13 and 14 of the GDPR. Where personal data is collected directly from the individual, this transparency information must be provided at the time the personal data is collected. Where personal data is collected from another source, the transparency information must be provided within a reasonable period of time, no longer than one month. The ICO has published detailed guidance on the right to be informed, which requires the transparency information to be reviewed regularly and, where necessary, updated.

The DPA 2018 includes a number of exemptions from the requirement to provide information as required under Articles 13 and 14 of the GDPR, in addition to those provided for in the GDPR. These exemptions are set out in Schedule 2 of the DPA 2018 and include the following:

- **Crime and Taxation** – where the personal data is processed for the prevention or detection of crime, the apprehension or prosecution of offenders, or the assessment or collection of any tax or duty or any imposition of a similar nature, to the extent the provision of the transparency information would be likely to prejudice any such purposes.
- **Disclosures Required by Law** – where the disclosure is required by law or is necessary for the purpose of or in connection with legal proceedings (including prospective legal proceedings), obtaining legal advice, and establishing, exercising or defending legal rights.
- **Legal Professional Privilege** – where the personal data processed consists of information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.
- **Management Forecasting and Planning** – where the personal data is processed for the purposes of management forecasting or management planning in relation to a business or other activity.
- **Negotiations** – where the personal data consists of records of the intentions of the controller in relation to any negotiations with the individual.
- **Confidential References** – where the personal data consists of a reference given or to be given in confidence for the purposes of, for example, employment (or prospective employment) of the individual.

Data Subject Rights

The GDPR affords individuals the following rights under the GDPR:

- (a) the right to be informed (see above);
- (b) the right of access;
- (c) the right to rectification;
- (d) the right to erasure;
- (e) the right to restrict processing;
- (f) the right to data portability;
- (g) the right to object; and
- (h) rights in relation to automated decision making and profiling.

Right of Access

Individuals have a right to receive confirmation of whether the business is processing personal data concerning them, receive a copy of the personal data, and receive certain supplemental information.

Right to Rectification

Individuals have a right to obtain rectification of inaccurate personal data concerning themselves. An individual also has the right to have incomplete personal data completed, including by means of providing a supplementary statement. The DPA 2018 defines ‘inaccurate’ as ‘incorrect or misleading as to any manner of fact’.

Right of Erasure

Individuals have a right to have their personal data erased without undue delay in certain circumstances (eg, where the personal data is no longer needed for the purpose for which it was collected or processed).

Right of Restriction

Individuals have a right to restrict the processing of their personal data in certain circumstances (eg, where the business no longer needs the personal data for the purposes of

the processing but the individual requires it for the establishment, exercise or defence of legal claims).

Right to Data Portability

Where an individual has provided their personal data to the controller, the right to data portability allows an individual to receive that personal data in a structured, commonly used and machine-readable format, and to cause the controller to transmit that data to another controller, when the controller is processing the personal data based on either consent or the legal ground of where the processing is necessary for the performance of a contract with the individual, and the processing is carried out by automated means (ie, performed by a computer).

Right to Object

Individuals have a right to object to: (a) processing where the controller's legal basis for the processing of the personal data is either not in the public interest, or not in the legitimate interest of the controller; (b) processing for direct marketing purposes; and (c) processing for scientific or historical research purposes or statistical purposes.

Exemptions

Although the DPA 2018 does not afford individuals additional rights over and above those in the GDPR, it does include a number of exemptions that disapply the data subject rights identified in a) through g) above, in certain circumstances. These include, for example:

- **Crime and Taxation** – where the personal data is processed for the prevention or detection of crime, the apprehension or prosecution of offenders, or the assessment or collection of any tax or duty or any imposition of a similar nature, to the extent the provision of the transparency information would be likely to prejudice any such purposes.
- **Disclosures Required by Law** – where the disclosure is required by law or is necessary for the purpose of or in connection with legal proceedings (including prospective legal proceedings), obtaining legal advice, and establishing, exercising or defending legal rights.

The GDPR requires a controller to respond to a request without undue delay, and within one month. This time period can be extended by a further two months if the request is complex or if the controller has received a number of requests from the individual. However, guidance published by the ICO states that, in its view, it is unlikely to be reasonable to extend the time limit if the request is manifestly unfounded or excessive, if an exemption applies, or if the controller is requesting proof of ID.

In addition to the DPA 2018 exemptions detailed above, the DPA 2018 includes a further exemption from the requirement to comply with a subject access request where doing

so would involve disclosing information relating to another individual who can be identified from that information. However, this exemption does not apply where the other party has consented to the disclosure, or if it is reasonable to disclose the personal data without the consent, having regard to all the relevant circumstances.

A controller is also exempt from the requirements to comply with a subject access request in the following examples:

- **Legal Professional Privilege** – where the personal data processed consists of information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.
- **Management Forecasting and Planning** – where the personal data is processed for the purposes of management forecasting or management planning in relation to a business or other activity.
- **Negotiations** – where the personal data consists of records of the intentions of the controller in relation to any negotiations with the individual.
- **Confidential References** – where the personal data consists of a reference given or to be given in confidence for the purposes of, for example, employment (or prospective employment) of the individual.

The DPA 2018 makes it a criminal offence – in certain circumstances and in relation to certain information – to require an individual to make a subject access request.

Anonymisation, De-Identification and Pseudonymisation

The DPA 2018 does not apply to anonymous data (ie, information that does not relate to an identified or identifiable individual). When assessing whether an individual is identifiable, guidance published by the ICO states that the information processed together with all the means reasonably likely to be used by either the controller or any other person to identify that individual should be considered. The ICO also acknowledges that it is possible that the same information is personal data for one controller's purposes but is not personal data for the purposes of another controller.

The DPA 2018 does apply to pseudonymised data (ie, where the separation of personal data from direct identifiers has occurred so that linkage of the identity is not possible without the use of additional information). The ICO acknowledges that pseudonymised data can help reduce privacy risks by making it more difficult to identify individuals.

2.2 Sectoral Issues

The GDPR distinguishes between personal data and a narrower special category of personal data (or sensitive data). Special categories of personal data include personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, genetic

data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning an individual's sex life or sexual orientation.

In order to process lawfully special categories of personal data, controllers must identify a legal ground under Article 6 of the GDPR and a condition under Article 9 of the GDPR. The DPA 2018 introduces additional conditions for processing special categories of personal data. Part 1 of Schedule 1 of the DPA 2018 includes the following conditions in relation to employment, health and research:

- employment, social security and social protection;
- health or social care purposes;
- public health; and
- research, etc.

Part 2 of Schedule 1 of the DPA 2018 includes 23 conditions in relation to processing that are necessary for reasons of substantial public interest, including:

- equality of opportunity or treatment;
- racial and ethnic diversity at senior levels of organisation;
- regulatory requirements relating to unlawful acts and dishonesty, etc;
- preventing fraud;
- insurance; and
- occupational pensions.

Where processing personal data in reliance on a condition under the DPA 2018, the controller will need to have an 'appropriate policy document' in place that explains the controller's procedures for securing compliance with the principles in Article 5 of the GDPR, and explains the controller's policies as regards the retention and erasure of personal data processed in reliance on the DPA 2018 condition.

Criminal records and offences data is not included within the scope of special categories of personal data. The DPA 2018 states that references in the GDPR to criminal records and offences data include personal data relating to the alleged commission of offences by the individual, or proceedings for an offence committed or alleged to have been committed by the individual.

In order to lawfully process criminal records and offences data, controllers must identify a legal ground under Article 6 of the GDPR, and carry out the processing under the control of the official authority or have legal authority for the processing under Article 10 of the GDPR. Where the processing of criminal records and offences data is not carried out under the control of the official authority, such processing is authorised by UK law for purposes of Article 10 only if the processing meets a condition in Part 1, 2 or 3 of Schedule 1 of the DPA 2018.

Part 3 of Schedule 1 of the DPA 2018 sets out a number of conditions for the processing of criminal records and offences data, including those which relate to:

- consent;
- protecting an individual's vital interests;
- processing by not-for-profit bodies;
- personal data in the public domain;
- legal claims;
- judicial acts;
- administration of accounts used in the commission of indecency offences involving children; and
- extension of the insurance conditions in Part 2 of Schedule 1.

Part 3 also permits a controller to rely on a Part 2 condition, and the requirement that the processing be in the substantial public interest can be disapplied. Where processing criminal records and offences data in reliance on a condition under the DPA 2018, the controller will need to have an 'appropriate policy document' in place.

Health Data

Data concerning health falls within the scope of the special categories of personal data under Article 9 of the GDPR. The GDPR defines "data concerning health" as "personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about his or her health status."

Article 9(2)(j) of the GDPR is relevant in the context of health data as it includes the legal ground regarding where the processing is necessary for scientific research purposes. To rely on this legal ground, the processing must comply with Article 89(1) of the GDPR, which requires the processing to be subject to appropriate safeguards that ensure technical and organisational measures are in place, in particular to comply with the principle of data minimisation. The DPA 2018 states that the processing will not meet these requirements where it is likely to cause substantial damage or distress to an individual, or where the processing is carried out to support measures or decisions relating to a particular individual, unless this includes purposes of approved medical research.

The DPA 2018 includes exemptions from the data subject rights for data concerning health where:

- it is processed by a court, supplied in a report or other evidence given to a court, and under specified rules (ie, those relating to family and children's hearings in the courts) may be withheld from an individual; or
- the request is made by someone with parental responsibility for a person under the age of 18 (or 16 in Scotland) and the data subject has an expectation that the information

would not be disclosed to the requestor or has expressly indicated that it should not be disclosed.

The DPA 2018 also includes an exemption from the subject access right to health data where disclosure would likely cause serious harm to the physical or mental health of the individual or another person.

Children's Privacy

The DPA 2018 states that where a controller is relying on consent as the legal ground for processing personal data when offering an information society service directly to a child, only children aged 13 years or over are able to provide their own consent. Where a child is under 13 years, the processing will only be lawful where consent is given or authorised by a parent or guardian, unless the information society service is an online preventive or counselling service.

The DPA 2018 requires the ICO to prepare an age-appropriate design code for information society services that are likely to be accessed by children. The ICO has also published detailed guidance on children and the GDPR, which includes guidance on direct marketing to children, the profiling of children and the sharing of children's data.

2.3 Online Marketing

Direct marketing is not defined by the GDPR. The DPA 2018 defines direct marketing as the communication (by whatever means) of advertising or marketing material directed to particular individuals. Where direct marketing involves the processing of personal data – for example, where the organisation knows the name of the individual it is contacting – it must comply with the GDPR and the DPA 2018 in its treatment of that personal data.

Individuals are given a right to prevent their personal data being processed for direct marketing. This is an absolute right and an individual can request an organisation to stop processing their personal data at any time. In its guidance on Direct Marketing, which was updated in March 2018 in the context of the GDPR, the ICO recommends that it is good practice to acknowledge the request and confirm that the marketing will stop. The ICO guidance expects that any communications should stop within 28 days of receiving the objection (and providing two months for postal communications). However, if an organisation can reasonably stop direct marketing communications sooner, then it should do so.

The ICO has not yet updated its Direct Marketing guidance to take account of the DPA 2018. The ICO has also created a direct-marketing checklist that enables organisations to check if their marketing messages comply with the law, and is currently consulting on a Direct Marketing Code of Practice as mandated by the DPA 2018, which will replace and update the current guidance.

In addition to compliance with the GDPR and DPA 2018, organisations that conduct electronic direct marketing will also need to comply with PECR. Although PECR has not yet been updated following the coming into force of the GDPR, organisations will still be required, for example, to use the new standard of GDPR consent when complying with the PECR rules. Under the GDPR, consent must be given knowingly and freely, clear and specific, in order to be valid.

2.4 Workplace Privacy

Special Categories of Personal Data

The processing of special categories of personal data for employment purposes is permitted under the DPA 2018 where the controller meets the condition as set out in Part 1 of Schedule 1 of the DPA 2018, which requires that:

- the processing is necessary for the purposes of performing or exercising obligations or rights that are imposed or conferred by law on the employer or employee in connection with employment, social security or social protection;
- the employer has an 'appropriate policy document' in place when the processing is carried out; and
- the additional safeguards as set out in Part 4 of Schedule 1 of the DPA 2018 are complied with – ie, the data processing record (as required under Article 30 of the GDPR) includes reference to the DPA 2018 condition relied upon, the Article 6 legal ground relied upon, and whether the personal data is retained and erased in accordance with the employer's policies and, if not, the reason for not following the policies.

Employee Monitoring

The DPA 2018 does not specifically address employee monitoring. However, the ICO's guidance on DPIAs states that a controller should carefully consider carrying out a DPIA for processing that involves monitoring or vulnerable individuals (ie, employee monitoring).

The ICO has also published its Employment Practices Code and Supplementary Guidance (the "**Code**"), which addresses monitoring at work and covers employers' monitoring of employees' use of telephones, internet, email systems and vehicles. However, the Code was prepared under the previous UK Data Protection Act 1998 and has not yet been updated to reflect the position under the GDPR and DPA 2018.

Whistleblower Hotlines and Anonymous Reporting

The DPA 2018 does not specifically address the use of whistleblowing hotlines (ie, where employees and other individuals can report misconduct or wrongdoing), nor does it offer specific legislative protection for whistleblowing. However, controllers using whistleblower hotlines in the UK will need to comply with the data protection principles under the GDPR and the DPA 2018.

The ICO has not published any general guidance on the use of whistleblowing hotlines but has published guidance on protection for whistleblowers who disclose information to the ICO about concerns that their employer may be contravening requirements of legislation relating to data protection and freedom of information.

Anonymous reporting is not strictly prohibited in the UK and there is no specific obligation under the DPA 2018 to keep the identity of the accused confidential.

Enforcement and Litigation

As referred to above, the DPA 2018 provides the ICO with various enforcement powers, including the ability to issue, in sequence, information notices, assessment notices, a notice of intent, enforcement notices and, lastly, penalty notices to controllers or processors that it considers may have breached the data protection legislation.

As under the GDPR, the DPA 2018 provides two levels of penalties. The higher maximum amount is EUR20 million or 4% of the undertaking's total annual worldwide turnover in the preceding financial year, whichever is higher, and the standard maximum amount is EUR10 million or 2% of the undertaking's total annual worldwide turnover in the preceding financial year, whichever is higher. The level of penalty imposed will depend on the context of the breach, and the DPA 2018 provides a number of factors that must be taken into account when determining the penalty level within the two bands.

The ICO is required to produce guidance on its enforcement powers under the DPA 2018 in due course.

The GDPR and the DPA 2018 also provide individuals with the right to lodge a complaint with the ICO if they consider that there has been an infringement of the GDPR, in connection with personal data relating to them.

Where the ICO receives a complaint, the DPA 2018 requires that the ICO:

- takes appropriate steps to respond to the complaint;
- informs the complainant of the outcome of the complaint;
- informs the complainant of the rights under section 166 of the DPA 2018; and
- provides the complainant with further information about how to pursue the complaint, if asked to do so by the complainant.

3. Law Enforcement and National Security Access and Surveillance

3.1 Laws and Standards for Access to Data for Serious Crimes

A number of laws relating to law enforcement access to data are applicable in the UK, but the following focuses on the application of the Law Enforcement Directive 2016/680.

Law Enforcement Directive and DPA 2018: Key Principles

The transposition of the Law Enforcement Directive into UK law, via the DPA 2018, introduced further requirements to comply with the data protection principles when processing personal data for law enforcement purposes.

Under the DPA 2018, processing for law enforcement purposes in the UK is only lawful if it is based on law and if either the data subject has given consent to the processing of his or her personal data for that purpose or if the processing of the personal data is necessary for the performance of a task carried out for law enforcement purposes by a competent authority, which includes the UK Government, a UK police authority, the UK's Revenue and Customs, the Director General of the National Crime Agency, the Director of the Serious Fraud Office, the Financial Conduct Authority, a court or tribunal, or the ICO.

Additionally, the DPA 2018 requires controllers to comply with the principle of collecting personal data for specified, explicit and legitimate purposes when processing personal data for law enforcement purposes.

In accordance with the accuracy data protection principle, where personal data is being processed for law enforcement purposes in the UK, the controller must take every reasonable step to ensure that inaccurate personal data is erased or rectified without delay, having regard to the law enforcement purposes for which it is processed. When processing personal data for UK law enforcement purposes, controllers must also ensure the following:

- that personal data based on facts must, so far as possible, be distinguished from personal data based on personal assessments;
- that there is a clear distinction, where relevant and as far as possible, between personal data relating to different categories of data subject, such as:
 - (a) persons suspected of having committed or being about to commit a criminal offence;
 - (b) persons convicted of a criminal offence;
 - (c) persons who are or may be victims of a criminal offence; and
 - (d) witnesses or other persons with information about offences.

Moreover, data controllers must ensure that all reasonable steps are taken to ensure that data which is inaccurate, incomplete or no longer kept up to date is not transmitted or made available for any law enforcement purposes.

The DPA 2018 also imposes a requirement for appropriate time limits to be established for the periodic review of the need for the continued storage of personal data for law enforcement purposes.

Law Enforcement Directive and DPA 2018: Transfers of Data Outside the EEA

The DPA 2018 also introduces further derogations for the transfer of personal data from the UK to a country outside of the EEA, where the transfer:

- is necessary for law enforcement purposes; and
- is based on an adequacy decision; or
- if not based on an adequacy decision, is based on appropriate safeguards where a legal instrument containing appropriate safeguards for the protection of personal data binds the intended recipient of the personal data, or the data controller – having assessed all the circumstances surrounding the transfers of that type of personal data to that specific country or territory outside of the EEA – concludes that appropriate safeguards exist to protect the personal data. (When relying on this particular derogation, the transfer must also be documented, and such documents must be provided to the ICO upon request, including the date and time of the transfer, the name or any other pertinent information about the recipient, the justification for the transfer of the personal data, and a description of the personal data transferred); or
- if not based on an adequacy decision or on there being appropriate safeguards, is based on special circumstances that allow for the transfer of personal data from the UK to a country or territory outside of the EEA, where the transfer is necessary:
 - (a) to protect the vital interests of the data subject or another person;
 - (b) to safeguard the legitimate interests of the data subject;
 - (c) for protection against an immediate and serious threat to the public security of a Member State or a third country (non-EEA Member State);
 - (d) in individual cases for any law enforcement purposes (provided that the controller has not determined that fundamental rights and freedoms of the data subject override the public interest in the transfer of personal data from the UK to a third country); or
 - (e) in individual cases for a legal purpose (provided the controller has not determined that fundamental rights and freedoms of the data subject override the public interest in the transfer of personal data from the UK to a third country). When relying on

this particular derogation, the transfer must also be documented, and such documents must be provided to the ICO upon request, including the date and time of the transfer, the name or any other pertinent information about the recipient, the justification for the transfer of the personal data, and a description of the personal data transferred.

4. International Considerations

4.1 Restrictions on International Data Issues

The GDPR prohibits the transfer of personal data outside of the EEA to third countries, unless:

- the recipient country is considered to offer an adequate level of data protection (such as Israel and New Zealand);
- a data protection safeguard has been applied (such as the EU's Standard Contractual Clauses for transfers of personal data from the EU – also known as “Model Contracts” – or the organisation has implemented Binding Corporate Rules); or
- a derogation from the prohibition applies (such as the data subject having explicitly consented to the transfer).

Such safeguards and derogations are not considered in detail here, but a salient point from a UK perspective is that, under the DPA 1998, controllers were allowed to determine themselves that their transfers of personal data outside of the EEA were adequately protected. The DPA 2018 does not contain such a provision. However, the GDPR contains a more limited version of the DPA 1998 self-determination provision, and allows transfers:

- that are not repetitive, concern only a limited number of data subjects and are necessary for the purposes of compelling legitimate interests which are not overridden by the interests or rights and freedoms of the data subject; and
- where the controller has assessed all the circumstances surrounding the data transfer and has, as a result, implemented suitable data protection safeguards; and
- where the controller has notified the relevant data protection authority of the transfer.

The DPA 2018 also introduces a derogation where the transfer is a necessary and proportionate measure for the purposes of the controller's statutory function.

See earlier sections regarding the UK's proposals in relation to data transfers following Brexit.

4.2 Limitations and Considerations

In general, controllers may provide personal data in relation to non-EEA civil discovery requests, if:

- it is permitted under Article 48 of the GDPR;

- a data protection safeguard set out in Article 46 has been applied (such as Model Contracts for international data transfers or if the organisation has implemented Binding Corporate Rules); or
- a derogation from the prohibition set out in Article 49 applies.

Article 48 of the GDPR

Article 48 allows the transfer of personal data from the EU to a third country on the basis of a judgment of a court or tribunal or any decision of an administrative authority of the third country, where the transfer is based on (for example) a mutual legal assistance treaty (MLAT) between the requesting third country and the EU Member State concerned. Importantly, Article 48 acknowledges that a transfer is also permissible if a safeguard or a derogation applies. As MLATs between EU Member States and third countries are not widespread, controllers can rely on the exemptions referred to above or the specific derogations below, as Article 48's applicability is without prejudice to other grounds of transfer.

Interestingly, the UK has sought an opt-out of the restrictions contained in Article 48 – that is, the UK does not want to be restricted in terms of foreign law data access rights by the restrictions contained in Article 48. In particular, the UK has sought to rely on Article 3 of Protocol 21 to the Treaty on the Functioning of the European Union to attempt to secure this opt-out. However, it is not clear whether the UK has successfully opted out of this Protocol. In addition, it is not clear how this opt-out would work in practice: for example, could an organisation in Germany circumvent the requirements in Article 48 by first transferring the data to the UK before transferring it outside the EEA? In any event, as noted above, Article 48 itself acknowledges that transfers (that do not satisfy the requirements of Article 48) may nonetheless occur if another legal safeguard or derogation set out in the GDPR applies.

Data Protection Safeguards

The most relevant safeguard is European Commission-approved Model Contracts for data transfers, as these may be entered into with (for example) e-discovery vendors and document review providers.

The most relevant derogations are that the transfer is:

- necessary for important reasons of public interest – for example, the transfer is needed to prevent money laundering or for purposes of public health;
- necessary for the establishment, exercise or defence of legal claims – this may be useful in civil proceedings (and even potentially in pre-trial discovery, though this is not clearly available if the discovery has not been ordered by a court);

- non-repetitive and relates only to a limited number of data subjects (see **4.1 Restrictions on International Data Issues** above); and
- explicitly consented to by the relevant data subject; however, in practice, it may be challenging to obtain such consent in relation to foreign data access requests.

5. Emerging Digital and Technology Issues

5.1 Addressing Current Issues in Law

Big Data Analytics

The ICO issued guidance regarding Big Data in July 2014, and revised it in 2017. This guidance covers a broad range of topics, including anonymisation, privacy impact assessments, repurposing data, data minimisation, transparency and subject access.

Some of the key points raised in the ICO's guidance are as follows:

- The ICO recommends performing data protection impact assessments. If particular issues are identified through such an assessment, the controller would then be able to identify and implement measures to address such issues and protect individuals' privacy.
- The ICO identified quality and reliability of data as a potential issue for Big Data analytics. These issues arise in particular because the frequency of data processing increases the risk of inaccuracies where the data has been partially de-identified or anonymised and cannot be easily reconnected with the original data subject. As a result of such inaccuracies, data subjects may be subjected to inaccurate profiling, discrimination, or other forms of prejudice.
- The ICO recommends conducting a compatibility analysis in order to determine whether the purpose limitation principle has been satisfied. In particular, the purpose limitation principle may be a barrier to the development of Big Data analytics, as many secondary uses may not have been considered when the data was first collected. Controllers may also wish to consider whether the "research" exemption is also available.
- The ICO has identified the data minimisation principle as another key concern for Big Data analytics. It recommends that organisations identify at the outset why they need the particular data and what they expect to learn from its analysis, which, in turn, will limit the volume of personal data that is collected and processed. Similarly, with respect to data retention, controllers should justify why particular data should be retained or alternatively seek to anonymise data that they retain.
- The ICO acknowledged the potentially higher data security risks arising from Big Data, and suggested that appropriate data security measures be implemented.

6. Cybersecurity and Data Breaches

6.1 Key Laws and Regulators

The key data security obligations under UK law are contained in the following:

- the Communications Act 2003;
- the Computer Misuse Act 1990;
- the GDPR and DPA 2018;
- the Network and Information Systems Regulations 2018 (NIS Regulations);
- the Official Secrets Act 1980; and
- the Privacy and Electronic Communications (EC Directive) Regulations 2013.

Only the NIS Regulations are considered here, as they represent the most significant recent change in UK data security laws (outside of the GDPR and the DPA 2018).

NIS Regulations

Organisations Subject to the NIS Regulations

The UK Government implemented the Network and Information Systems Directive (NIS Directive) into national law in the form of the NIS Regulations, which came into force on 10 May 2018. The NIS Regulations (like the NIS Directive) impose security incident obligations on operators of essential services (OESs) – ie, energy, transport, digital infrastructure, the health sector and drinking water supply and distribution services. While the UK was permitted (under the NIS Directive) to designate organisations as OESs within the banking and financial markets infrastructure sectors, the UK elected (in the NIS Regulations) not to do so. In order to be considered an OES, the organisation must provide an essential service of the kind identified in Schedule 2 of the NIS Regulation, and that service must rely on network and information systems, and meet specific threshold requirements.

The NIS Regulations also impose security obligations on relevant digital service providers (DSPs) – ie, online marketplace providers, online search engines and cloud computing service providers. An organisation may be a DSP if:

- (a) it provides a digital service in the UK;
- (b) it is not a small or micro business; and
- (c) its head office is in the UK or the organisation has nominated a representative who is established in the UK.

Key Features of the NIS Regulations

The NIS Regulations:

- require the UK Government to publish strategic objectives and priorities on the security of the network and information systems in the UK;
- designate the UK's Government Communications Headquarters (GCHQ) as the Computer Security Incident

Response Team (CSIRT) for certain relevant sectors and digital sectors. The CSIRT is required to provide incident support and assistance to OESs and DSPs;

- designate the GCHQ as a Single Point of Contact (SPOC) intended to act as a liaison and to facilitate cross-border co-operation, including with the European Network and Information Systems Agency (ENISA); and
- designate one or more national competent authorities (Competent Authorities). The UK has determined that it wishes to designate Competent Authorities for particular sectors (rather than one single Competent Authority across sectors). Competent Authorities have a key role under the NIS Regulations, including:

- (a) preparing and publishing guidance for OESs and DSPs;
- (b) receiving incident reports;
- (c) conducting incident investigations; and
- (d) enforcing the NIS Regulations.

The NIS Regulations also impose a tiered system of fines in proportion to the impact of the security incident, with a maximum fine of GBP17 million imposed where a competent authority decides the incident has caused or could cause an immediate threat to life or a significantly adverse impact on the UK economy. Competent Authorities are also vested with a number of enforcement-related powers under the NIS Regulation.

Security Obligations

In general, OESs and DSPs must take appropriate and proportionate technical and organisational measures to:

- manage the risks posed to the security of relevant network and information systems; and
- prevent and minimise the impact of incidents affecting the security of relevant network and information systems.

6.2 Data Breach Reporting and Notification

Data breach notification obligations under the GDPR, the Data Protection Act 2018 and the NIS Regulations are considered below; there may be additional sector-specific data breach notification obligations (such as with respect to organisations that are regulated by the FCA).

GDPR and Data Protection Act 2018

Controllers have an obligation to report personal data breaches to the ICO within 72 hours of the breach, unless the breach is unlikely to result in a risk to the rights and freedoms of the data subject. Controllers are also required to inform the data subject where such breach is likely to result in a high risk to their rights and freedoms.

When a personal data breach is reported to the ICO, the GDPR requires the following to be provided:

- a description of the nature of the personal data breach, including where possible:
 - (a) the categories and approximate number of data subjects concerned; and
 - (b) the categories and approximate number of personal data records concerned;
- the name and contact details of the data protection officer;
- a description of the likely consequences of the personal data breach; and
- a description of the measures taken, or proposed to be taken, to deal with the personal data breach, including, where appropriate, the measures taken to mitigate any possible adverse effects.

Where controllers do not have all of the required information, the ICO requires them to notify the breach as soon as they become aware of it, and to note that submission of further information will follow as soon as possible. If full details cannot be provided within 72 hours, any such delay should be communicated to the ICO, including when such further information will be expected.

The ICO provides an online personal data breach reporting form for any personal data breach to be notified to the ICO online.

NIS Regulation

An OES must notify its designated Competent Authority about any incident that has a significant impact on the continuity of the essential service provided by the OES. The NIS Regulations set thresholds in relation to determining whether notice must be provided by OESs. If such a notice must be given, it should be given “without undue delay” and in any event within 72 hours.

A DSP must notify the ICO (its Competent Authority) about any security incident that has a substantial impact on the provision of specified digital services. The NIS Regulations set out thresholds in relation to determining whether notice must be provided by DSPs. If such a notice must be given, it should be given “without undue delay” and in any event within 72 hours.

In certain circumstances, the relevant Competent Authority is required to share information regarding the incident with the CSIRT. The Competent Authority may also notify the public itself, or direct the relevant OES or DSP to do so.

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