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Contributing editor
Alan Charles Raul
Sidley Austin LLP

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*William R M Long, Francesca Blythe, Denise Kara, Eleanor Dodding,
Matthias Bruynseraede and Subhalakshmi Kumar¹*

I OVERVIEW

Like other countries in Europe, the United Kingdom passed legislation designed to supplement the data protection requirements of the European Union General Data Protection Regulation (GDPR),² which came into force on 25 May 2018, repealing the EU Data Protection Directive 95/46/EC (the Data Protection Directive).³ The GDPR regulates the collection and processing of personal data across all sectors of the economy. The UK Data Protection Act 2018 (the DPA 2018), which came into force on 23 May 2018, repealed the UK Data Protection Act 1998 (the DPA 1998) and introduced certain derogations that further specify the application of the GDPR into English law. In addition to transposing the data protection and national security provisions of the EU Law Enforcement Directive 2016/680 (Law Enforcement Directive),⁴ the DPA 2018 grants powers and imposes duties on the national data supervisory authority, the UK's Information Commissioner's Office (ICO). Importantly, following the UK's withdrawal from the EU (more commonly known as Brexit) and the expiry of the Brexit transition period, which ended on 31 December 2020, the GDPR has been implemented into English law as the 'UK GDPR'. The GDPR is therefore retained in domestic law, but the UK has the independence to keep the framework under review and introduce additional provisions and derogations. Further details on the UK government's proposed data protection reforms, including under the Data Protection and Digital Information (No. 2) Bill (the UK DP 2 Bill), Digital Markets, Competition and Consumer Bill (DMCCB) and white paper on a 'pro-innovation' approach to AI (the AI White Paper) are provided in Section III and Section V.

1 William R M Long and Francesca Blythe are partners, Denise Kara and Eleanor Dodding are senior managing associates, Matthias Bruynseraede is a managing associate and Subhalakshmi Kumar is an associate at Sidley Austin LLP.

2 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

3 European Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

4 Directive (EU) 2016.680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

II THE YEAR IN REVIEW

The ICO has published a variety of guidance as well as decisions addressing compliance with the GDPR and the DPA 2018, including in relation to international transfers and novel technologies such as privacy enhancing technologies⁵ and artificial intelligence (see further Section III.v). It has also published its response to the UK government's proposed data protection reform following Brexit, further details of which are provided in Section III.

The ICO continues to report having received large volumes of personal data breach notifications and complaints from individuals – although these figures do appear to be reducing year on year. In particular, during the 2022/2023 period (1 April 2022 to 31 March 2023), the ICO has received 9,146 personal data breach notifications, down from 9,571 in the previous year⁶ and handled almost 33,753 data protection complaints during the same period (slightly lower than the previous year's 36,343 – which the ICO put down to improvements made to its guidance, as it now makes clear what data subjects should do before making a complaint). In this regard, the ICO also reported success with meeting one of its key aims in its strategic plan (ICO25) (the ICO25 sets out the ICO's key goals by 2025), to reduce its case backlog. Over the past year, the ICO reported a reduction in the backlog of over 1,000 freedom of information-related requests, 488 personal data breach cases and 36,000 data protection fee-related cases. The ICO has also now created a data security incidents trends dashboard where further analysis of incidents reported to the ICO can be viewed.⁷

In 2022/2023, the ICO issued a total of 29 fines and penalties for breaches of the DPA 2018 and the Privacy and Electronic Communications (EC Directive) Regulations 2003 (as amended by the Privacy and Electronic Communications (EC Directive) (Amendments) Regulations 2011) (PECR). The fines issued for breaches of the DPA 2018 and PECR totalled £15.27 million, a steep rise on the £3.55 million imposed the previous year. In addition to monetary penalties, the ICO issued 44 reprimand outcomes requiring organisations to improve their data protection practices. The top five sectors that generated the most complaints during the year remained the same as the past year: land or property services, financial services, general business, health and local government. Complaints mainly related to the right to provide a copy of personal data (Article 15(3)(1) GDPR) making up 20.29 per cent of all complaints, and to the right of access (Article 15 GDPR), which made up 18.92 per cent of all completed complaints.

On 17 November 2022, the ICO announced⁸ it had updated its guidance on international transfers, with a new section on transfer risk assessments (TRA) and the publication of a new TRA tool,⁹ which incorporates six questions to help identify and

5 ICO, Privacy-enhancing technologies (PETs) accessible at <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/data-sharing/privacy-enhancing-technologies/>.

6 ICO, Information Commissioner's Annual Report and Financial Statements 2022–2022 accessible at <https://ico.org.uk/media/about-the-ico/documents/4025864/annual-report-2022-23.pdf>.

7 ICO, Data security incidents trends dashboard accessible at <https://ico.org.uk/action-weve-taken/data-security-incident-trends/>.

8 ICO, blog post entitled 'International transfers: empowering innovation and growth whilst protecting people's personal information' accessible at <https://ico.org.uk/about-the-ico/media-centre/news-and-blogs/2022/11/blog-international-transfers-empowering-innovation-and-growth-whilst-protecting-people-s-personal-information/>.

9 ICO, Transfer risk assessments accessible at <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/international-transfers/international-data-transfer-agreement-and-guidance/international-data-transfer-agreement-and-guidance/transfer-risk-assessments/>.

assess the risks to the privacy and human rights of data subjects where an international transfer of data is being contemplated. Importantly, the ICO clarified that the TRA can be completed as an alternative to the European Data Protection Board's (EDPB) transfer impact assessment, which became mandatory following the *Schrems II* decision. Similarly, the ICO also confirmed that the UK's International data transfer agreement (IDTA), which was released on 21 March 2022, can also be used as an alternative to the UK's international data transfer addendum (Addendum) to the European Commission's standard contractual clauses for international data transfers. The ICO also set out its plans to provide further guidance on use of the IDTA and the Addendum, including with clause-by-clause guidance – though a publication date was not indicated. For further details, see Section VII.

On 10 September 2021, the UK government published its consultation entitled 'Data: a new direction', which forms part of the UK's National Data Strategy. The response to the consultation was subsequently published on 17 June 2022, and the UK DP Bill was introduced into the House of Commons on 18 July 2022 but was subsequently withdrawn from Parliament on 8 March 2023. Following this, a new bill, the UK DP 2 Bill¹⁰ was introduced to the House of Common on 8 March 2023 and is currently at Report Stage, where amendments can be made to the Bill. The ICO published its written response to the UK DP 2 Bill on 31 May 2023.¹¹ The UK DP 2 Bill is intended to reflect the UK government's new approach to data protection post-Brexit. For further details, see Section III.

The ICO has also placed a focus on content moderation, especially in relation to children's data. On 28 April 2023, the ICO invited stakeholders to provide feedback on the challenges organisations face concerning how data protection laws apply to online to content moderation processes.¹² In addition, on 30 April 2023, the ICO announced that it is currently consulting on its draft guidance in relation to the ICO's Children's Code.¹³

The ICO has also maintained a focus on direct marketing in the past year, publishing several new pieces of guidance concerning direct marketing and PECR. For example, on 28 March 2023, the ICO issued new guidance¹⁴ on direct marketing and regulatory communications. Further, on 4 October 2022, the ICO updated its guidance on direct

10 UK Parliament, Data Protection and Digital Information (No. 2) Bill accessible at <https://bills.parliament.uk/bills/3430>.

11 ICO, Information Commissioner's response to the Data Protection and Digital Information (No. 2) Bill accessible at <https://ico.org.uk/about-the-ico/consultations/information-commissioner-s-response-to-the-data-protection-and-digital-information-no-2-bill/>.

12 ICO, Press release accessible at https://www.linkedin.com/posts/information-commissioner-s-office_new-we-want-to-hear-from-organisations-and-activity-7057287120117190657-px6Q/.

13 ICO, Children's Code guidance and resources, 'Likely to be accessed' by children – FAQs, list of factors and case studies accessible at <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/childrens-information/childrens-code-guidance-and-resources/likely-to-be-accessed-by-children/#case-studies>.

14 ICO, Direct marketing and regulatory communications accessible at <https://ico.org.uk/for-organisations/direct-marketing-and-privacy-and-electronic-communications/direct-marketing-and-regulatory-communications/#who>.

marketing via calls¹⁵ and emails,¹⁶ and on 5 December 2022, the ICO launched a new direct marketing hub¹⁷ aimed at organisations looking to plan and deliver effective marketing campaigns in line with their privacy obligations.

III REGULATORY FRAMEWORK

i Privacy and data protection legislation and standards

Following the Brexit transition period, which ended on 31 December 2020, the GDPR ceased to have direct effect in the UK. Given the UK's commitment to maintaining an equivalent data protection regime, the provisions of the GDPR have been incorporated directly into the laws of the UK as the UK GDPR by virtue of the European Union (Withdrawal) Act 2018. In practice, there is currently little change to the core data protection principles, rights and obligations between the GDPR and the UK GDPR. Importantly, the GDPR may still apply to an organisation in the UK where that organisation operates in the European Economic Area (EEA), offers goods or services to individuals in the EEA, or monitors the behaviour of individuals in the EEA.¹⁸ References throughout this Chapter to GDPR should be read as UK GDPR, and references to EEA should be read to include the UK, where applicable.

Data protection in the UK is governed by the DPA 2018, which replaced the DPA 1998 on 23 May 2018, and acts to amend and supplement the UK GDPR. The DPA 2018 is split into six main parts: general processing, law enforcement processing, intelligence services processing, the UK data supervisory authority, the ICO, enforcement and supplementary and final provisions. This chapter will focus on the general processing sections of the DPA 2018. In addition, PECR regulates direct marketing, but also the processing of location and traffic data and the use of cookies and similar technologies in the UK. The PECR implements the EU Directive 2002/58/EC¹⁹ (as amended by Directive 2009/136/EC) (the ePrivacy Directive) into national law. The ICO has updated its guide to the PECR to take into account the GDPR. For more information on the ePrivacy Directive, see the EU chapter. While data protection in the UK remains governed by the DPA 2018, the GDPR and PECR, following the withdrawal of the original Data Protection and Digital Information Bill (the UK DP Bill), the UK DP 2 Bill was introduced on 8 March 2023. The UK DP 2 Bill is largely a reintroduction to Parliament of the original UK DP Bill and is intended to

15 ICO, Guidance on direct marketing using live calls accessible at <https://ico.org.uk/media/for-organisations/guide-to-pecr/guidance-on-direct-marketing-using-live-calls-1-0.pdf>.

16 ICO, Direct marketing guidance via email accessible at <https://ico.org.uk/for-organisations/direct-marketing-and-privacy-and-electronic-communications/guide-to-pecr/guidance-on-direct-marketing-using-electronic-mail/>.

17 ICO, Direct marketing guidance hub accessible at <https://ico.org.uk/for-organisations/direct-marketing-and-privacy-and-electronic-communications/>.

18 Article 3(2) of the GDPR.

19 Directive 2002/58/EC of the European Parliament and Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

‘update and simplify’ the UK’s data protection framework ‘with a view to reducing burdens on organisations while maintaining high data protection standards’. The UK DP 2 Bill²⁰ proposes a number of changes to the current UK data protection regime, including:

- a* clarifying the definition of ‘personal data’, which would limit the scope of personal data to: (1) information that is identifiable by the controller or processor by reasonable means at the time of processing; or (2) where the controller or processor ought to know that another person will likely obtain the information as a result of the processing and the individual will likely be identifiable by that person by reasonable means at the time of the processing;
- b* removing the legitimate interest balancing exercise for certain activities;
- c* amending the current ‘manifestly unfounded or excessive’ standard in the context of exceptions to complying with data subject rights requests to a standard of ‘vexatious’ or ‘excessive’;
- d* removing the requirement to appoint a UK representative for controllers located outside the UK but that are subject to the GDPR;
- e* removing the obligation for certain controllers and processors to appoint a data protection officer (DPO). Although, public bodies and those who carry out processing likely to result in a ‘high risk’ to individuals, must designate a senior manager as a ‘senior responsible individual’;
- f* certain changes to key obligations, including the requirement to have in place a Record of Processing of Personal Data (instead of Records of Processing Activities) and Assessments of High Risk Processing (instead of Data Protection Impact Assessments). In the context of Assessments of High Risk Processing, controllers will no longer be required to consult the ICO on certain high risk activities; and
- g* while the GDPR allows data subjects to lodge complaints with the relevant supervisory authority (and requires this is highlighted in privacy notices), the UK DP Bill proposes a new additional obligation to facilitate the making of complaints and requiring controllers to acknowledge receipt of complaints within 30 days and respond substantively ‘without undue delay’. If a data subject does not avail itself of the right to raise a complaint directly with the ICO, the ICO is entitled not to accept the complaint.

ii Key terms under the DPA 2018

The terms used in the DPA 2018 have the same meaning as they have in the GDPR.²¹ The key terms are:

- a* controller: a natural or legal person who (either alone, or jointly with others) determines the purposes and means of the processing of personal data;
- b* processor: a natural or legal person who processes personal data on behalf of the controller;
- c* data subject: an identified or identifiable individual who is the subject of personal data;
- d* personal data: any information relating to an identified or identifiable individual who can be identified, directly or indirectly, in particular by reference to an identifier such

20 The Data Protection and Digital Information (No. 2) Bill, 2022 accessible at <https://bills.parliament.uk/bills/3430>.

21 Section 5 of the DPA 2018.

as a name, an identification number, location data, an online identifier or one or more factors specific to the physical, psychological, genetic, mental, economic, cultural or social identity of that individual;

- e* processing: any operation or set of operations that are performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction; and
- f* special categories of data: personal data revealing the racial or ethnic origin of the data subject, his or her political opinions, his or her religious or philosophical beliefs, whether the data subject is a member of a trade union, genetic data, biometric data for the purpose of uniquely identifying the data subject, data concerning the data subject's health or data concerning the data subject's sexual life or sexual orientation.

iii Data protection authority

The DPA 2018 and the PECR are enforced by the ICO, and the ICO has powers of enforcement in relation to organisations complying with the data protection requirements in the GDPR and PECR. The ICO also enforces and oversees the Freedom of Information Act 2000, which provides public access to information held by public authorities. The ICO has independent status and is responsible for:

- a* maintaining the public register of controllers;
- b* promoting good practice by giving advice and guidance on data protection and working with organisations to improve the way they process data through audits, arranging advisory visits and data protection workshops;
- c* ruling on complaints; and
- d* taking regulatory actions.

iv Specific regulatory areas

Minors

The ICO's Age-Appropriate Design Code (Children's Code) for online services sets out 15 standards that information society services (ISS) (being, services normally provided for remuneration, at a distance, via electronic means and at the individual request of the recipient of services) should meet to protect children's privacy including high-privacy settings by default, data minimisation and the switching off of geolocation settings by default. The Code also provides that nudge techniques should not be used to encourage children to provide unnecessary personal data, weaken or turn off their privacy settings. It also addresses issues of parental control and profiling.²² On 27 April 2022, the ICO also published a self-assessment including tools, templates and guidance to help online service providers comply, using four

22 ICO, Guide to Data Protection, Key DP Themes, Age-Appropriate Design: a code of practice for online services, <https://ico.org.uk/media/for-organisations/uk-gdpr-guidance-and-resources/childrens-information/childrens-code-guidance-and-resources/age-appropriate-design-a-code-of-practice-for-online-services-2-1.pdf>.

steps, with Standard 1 of the Children's Code, which requires ISS to treat the best interests of the child as a primary consideration when designing and developing online services likely to be accessed by a child.²³

To aid ISS in determining whether they are subject to the Children's Code, the ICO issued draft guidance on 24 March 2023 on assessing the applicability of the Children's Code, namely clarification on the meaning of 'likely to be accessed' in the context of the Children's Code.²⁴ In a separate announcement, the ICO confirmed that, although schools are not ISS and within the scope of the Children's Code, providers of education technologies are 'likely to be accessed by children on a direct-to-consumer basis' and may, therefore, fall within the scope of the Children's Code.²⁵

Employee data

There is no specific law regulating the processing of employee data. However, the ICO has published an employment practices code and supplementary guidance to help organisations comply with UK data protection laws and to adopt good practices.²⁶

The code contains four parts covering:

- a* recruitment and selection, providing recommendations with regard to the recruitment process and pre-employment vetting;
- b* employment records, which is about collecting, storing, disclosing and deleting employees' records;
- c* monitoring at work, which covers employers' monitoring of employees' use of telephones, internet, email systems and vehicles; and
- d* workers' health, covering occupational health, medical testing and drug screening.

The code and supplementary guidance have not yet been updated to reflect the entry into force of the GDPR and DPA 2018, although on 12 August 2021 the ICO launched a call for views to update its Employment Practices guidance to make it more user friendly and ensure it reflects current data protection law and is currently reviewing those responses to develop the new guidance.

23 ICO, Best Interests of the Child Self-assessment, <https://ico.org.uk/for-organisations/childrens-code-hub/best-interests-of-the-child-self-assessment/>.

24 ICO, 'Likely to be accessed' by children – FAQs, list of factors and case studies, <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/childrens-information/childrens-code-guidance-and-resources/likely-to-be-accessed-by-children/#FAQs>.

25 ICO, The Children's code and education technologies (edtech) (draft), <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/childrens-information/childrens-code-guidance-and-resources/the-childrens-code-and-education-technologies-edtech/>.

26 ICO, The Employment Practices Code: Supplementary Guidance, November 2011, https://ico.org.uk/media/for-organisations/documents/1066/employment_practice_code_supplementary_guidance.pdf.

Employee monitoring

The DPA 2018 does not prevent employers from monitoring their employees.²⁷ However, monitoring employees will usually be intrusive, and workers have legitimate expectations that they can keep their personal lives private. Workers are also entitled to a degree of privacy in their work environment.

DPIAs must be carried out when the processing of personal data is likely to result in a high risk to the rights and freedoms of individuals. The EDPB's Guidance on Data Protection Impact Assessments²⁸ provides examples of when a DPIA should be carried out and an employee monitoring programme is identified as an example of when a DPIA should be carried out. Likewise, the ICO in its Guidance on DPIAs states that a controller should think carefully about doing a DPIA for any processing that, inter alia, involves monitoring, sensitive data or vulnerable individuals (e.g., employees).

Organisations should carry out a DPIA before starting to monitor their employees to clearly identify the purposes of monitoring, the benefits it is likely to deliver and the potential adverse impact of the monitoring arrangement, and to judge if monitoring is justified, as well as take into account the obligation that arises from the monitoring. Organisations should also inform workers who are subject to the monitoring of the nature, extent and reasons for monitoring unless covert monitoring is justified.

Employers should also establish a policy on use by employees of electronic communications, explaining acceptable use of the internet, phones and mobile devices, and the purpose and extent of electronic monitoring. It should also be outlined how the policy is enforced and the penalties for a breach of the policy.

Opening personal emails should be avoided where possible and should only occur where the reason is sufficient to justify the degree of intrusion involved.

On 8 June 2017, the former Article 29 Working Party adopted an opinion on data processing at work that also addressed employee monitoring.²⁹ This opinion is unlikely to fundamentally change the ICO's approach to employee monitoring in the UK. However, it does include a number of new recommendations, including for employers to block websites rather than continually monitor internet usage, where possible, in order to adopt a prevention over detection position to employee monitoring.

On 12 October 2022, the ICO published its draft guidance about monitoring employees in accordance with UK GDPR and the DPA 2018, which closed on 20 January 2023 but has yet to be finalised. The draft guidance summarises the position under English law on monitoring at work, as follows: (1) employers are permitted to monitor their employees but must balance the level of intrusion against their needs and those of employees and the public; (2) employees must be notified of the monitoring, including its nature, extent and rationale, unless exceptional circumstances require covert monitoring; (3) employers must have a clear

27 *ibid.* and see also ICO, *The Employment Practices Code: Supplementary Guidance*, November 2011, https://ico.org.uk/media/for-organisations/documents/1066/employment_practice_code_supplementary_guidance.pdf.

28 Article 29 Data Protection Working Party Guidelines on Data Protection Impact Assessment (DPIA) and determining whether processing is 'likely to result in a high risk' for the purposes of Regulation 2016/679 – Adopted on 4 April 2017 – as last Revised and Adopted on 4 October 2017.

29 WP 249: Opinion 2/2017 on data processing at work, adopted 8 June 2017.

purpose for monitoring and must not use the data collected under an existing purpose for a new purpose; and (4) employees must carry out a DPIA for any monitoring that is likely to result in a high risk to the rights of employees and other data subjects.³⁰

Whistle-blowing hotlines

The use of whistle-blowing hotlines (where employees and other individuals can report misconduct or wrongdoing) is not prohibited by the DPA 2018 and their use is not restricted by the ICO. The ICO published guidance on the use of whistle-blowing hotlines in June 2017,³¹ where it noted that employees can notify the ICO where they believe the employer has not processed their personal data in accordance with data protection legislation. The ICO has not published updated guidance on the use of whistle-blowing hotlines after the entry into force of the GDPR and DPA 2018. However, organisations using whistle-blowing hotlines in the UK will have to comply with the data-protection principles under the DPA 2018 and the GDPR.³²

In recent years, there have been a number of bills put before the UK Parliament that have sought to strengthen the UK whistle-blowing framework. Most recently, the House of Lords Bill 27 on Protection for Whistleblowing 2022–23 (Bill) was introduced in the House of Lords on 13 June 2022 and aims to establish an independent Office of the Whistleblower and create offences relating to the treatment of whistle-blowers and handling of such cases. The Bill was scheduled to have its second reading on 2 December 2022.³³

Electronic marketing

Under the PECR, unsolicited electronic communications³⁴ to individuals should only be sent with the recipient's consent.³⁵ The only exemption to this rule is known as 'soft opt-in', which will apply if the sender has obtained the individual's details in the course of a sale or negotiations for a sale of a product or service; and the messages are only marketing for similar products; and the person is given a simple opportunity to refuse marketing when his or her details are collected, and if he or she does not opt out, he or she is given a simple way to do so in future messages. These UK rules on consent do not apply to marketing emails sent to companies and other corporate bodies, such as a limited liability partnership, Scottish partnership or UK government body.³⁶ Senders of electronic marketing messages must provide the recipients with the sender's name and a valid contact address.³⁷ The ICO has

30 ICO, Employment practices: monitoring at work draft guidance, <https://ico.org.uk/media/about-the-ico/consultations/4021868/draft-monitoring-at-work-20221011.pdf>.

31 ICO, 'Disclosures from whistleblowers', 2 June 2017.

32 For guidance on how to comply with data protection principles under the DPA see WP 117: Opinion 1/2006 on the application of EU data protection rules to internal whistle-blowing schemes in the fields of accounting, internal accounting controls, auditing matters, and the fight against bribery, banking and financial crime adopted on 1 February 2006.

33 See Protection for Whistleblowing Bill accessible at <https://bills.parliament.uk/bills/3184>.

34 ICO, Guide to the Privacy and Electronic Communications Regulations, 2013, and Direct Marketing Guidance, v.2.2., <https://ico.org.uk/media/1555/direct-marketing-guidance.pdf>.

35 PECR Regulation 22(2).

36 Guide to PECR/Electronic and Telephone Marketing/Electronic Mail Marketing, <https://ico.org.uk/for-organisations/guide-to-pecr/electronic-and-telephone-marketing/electronic-mail-marketing/>.

37 PECR Regulation 23.

created a direct marketing checklist, which enables organisations to check if their marketing messages complies with applicable law and outlines the different rules on marketing calls, texts, emails, faxes and mail.

In addition, the ICO has published on its website a guide on rules for businesses when marketing to other businesses under the GDPR and PECR.³⁸ It advises that the GDPR applies to individuals who can be identified either directly or indirectly, even when they are acting in a professional capacity. It also notes the GDPR only applies to loose business cards where controllers intend to file them or input the details of the card into a computer system.

The proposed ePrivacy Regulation, which is still under review and will not come into force before the end of 2023 will not have direct effect in the UK. It remains to be seen whether similar rules and obligations will be introduced in the UK under domestic law and any updates to the PECR.

In January 2020, the ICO published a draft Direct Marketing Code of Practice (Draft Code) for public consultation.³⁹ The Draft Code is intended to update existing guidance published pre-GDPR and provide clarity on certain important issues. The key takeaways from the Draft Code are as follows: consent is not required under the PECR where an organisation sends service or operational messages to individuals (e.g., a message informing users they are approaching their monthly data limit); where an organisation partners with a third party to deliver electronic communications, both parties will need to comply with the PECR irrespective of who has access to the data used; and the two lawful bases for direct marketing under the GDPR are consent and legitimate interests. However, the Draft Code confirms that if consent is required under the PECR, it will also be the relevant legal basis under the GDPR. The Draft Code also provides that ‘tell a friend schemes’ are in breach of the PECR because it is impossible for the organisation to obtain valid consent from the ‘friend’; as the organisation does not have a direct relationship with the friend. The public consultation for the Draft Code ended on 4 March 2020 but the final version of the Draft Code has not yet been published. Further, on 4 August 2021, the ICO issued guidance on direct marketing for public sector organisations, although the guidance highlights that the majority of messages that public authorities send to individuals are unlikely to constitute direct marketing.⁴⁰

Financial services

Financial services organisations, in addition to data protection requirements under the DPA 2018, also have legal and regulatory responsibilities to safeguard consumer data under rules of the UK Financial Conduct Authority (FCA), which includes having adequate systems and controls in place to discharge their responsibilities. This includes financial services firms taking reasonable care to establish and maintain effective systems and controls for countering

38 ICO, For Organisations/Marketing/The Rules around Business-to-business Marketing, the GDPR and PECR, <https://ico.org.uk/for-organisations/marketing/the-rules-around-business-to-business-marketing-the-gdpr-and-pecr/>.

39 Direct Marketing Code of Practice Draft Code for Consultation 2020, <https://ico.org.uk/media/about-the-ico/consultations/2616882/direct-marketing-code-draft-guidance.pdf>.

40 ICO, Direct Marketing and the Public Sector Guidance, <https://ico.org.uk/for-organisations/direct-marketing/direct-marketing-and-the-public-sector/>.

the risk that the firm might be used to further financial crime, such as by misuse of customer data.⁶⁶ Failure to comply with these security requirements may lead to the imposition of significant financial penalties by the FCA.

v Technological innovation

Anonymisation and pseudonymisation techniques

Although neither the DPA 2018 nor the GDPR apply to anonymous data, there has been a lot of discussion over when data is truly anonymous and the methods that could be applied to anonymise data. In response to such discussion, on 28 May 2021, the ICO published the first chapter of its draft anonymisation, pseudonymisation guidance, which provides information on how to successfully anonymise and pseudonymise personal data while mitigating the risks involved in using such techniques to individuals.⁴¹

Anonymisation is the process of converting personal data into information that no longer identifies an individual. Where there are reasonable available means that could be used to identify individuals, then the data has not been effectively anonymised. The draft guidance states that even where an organisation uses anonymisation techniques there remains a level of inherent identification risk. Although this risk exists, it does not mean that a particular technique is ineffective or that the data has not been effectively anonymised for the purposes of data protection law.

The ICO outlines a number of benefits to using anonymisation techniques including:

- a being able to use anonymous information in innovative ways, as the data protection rules on purpose limitation do not apply;
- b protecting individuals' identities; and
- c helping organisations navigate potentially challenging issues such as when handling freedom of information requests or data subject requests.

The ICO notes that employing pseudonymisation techniques may, for example, reduce the amount of data an organisation will have to consider when responding to data subject rights requests and the risk of harm to individuals that may arise from the occurrence of a personal data breach.

The ICO has since launched consultations on the second, third and fourth chapter of its updated guidance on anonymisation and pseudonymisation. The second draft chapter, published on 8 October 2021, focuses on identifiability, including singling out, linkability and inferences. The draft chapter also highlights that identifiability can be context specific. The draft guidance also discusses what organisations should consider when assessing identifiability risk, including: (1) whether there is any additional information to enable identification; (2) whether there are techniques to enable identification; and (3) the extent to which additional information or techniques are reasonably likely to be accessible and used by a particular person to identify an individual.

The third draft chapter, published on 7 February 2022, focuses on pseudonymisation and highlights the ability of organisations to further utilise pseudonymised data. While pseudonymised data remains subject to the GDPR, the guidance is clear it remains a helpful

41 ICO Introduction to Anonymisation: draft anonymisation, pseudonymisation and privacy enhancing technologies guidance, <https://ico.org.uk/media/about-the-ico/consultations/2619862/anonymisation-intro-and-first-chapter.pdf>.

security and privacy risk management measure that should be referenced in DPIAs and LIAs as a method to reduce risk and a measure that can also help achieve data protection by design. The fourth draft chapter, published on 7 March 2022, addresses accountability and governance in the context of anonymisation. The guidance explains in what situations DPIAs should be conducted, who should take responsibility in an organisation (i.e., senior members, and in some cases a senior information risk owner) and how risk of re-identification can be mitigated in a security incident. For example, the draft guidance notes that if a security incident leads to re-identification of an individual from data you treated as anonymous information prior to the incident, this would not be considered a personal data breach at the time, provided an organisation has in place records of its decision-making that justify the original treatment of the data as anonymous.

Most recently, the ICO confirmed in response to the public consultation of the draft guidance that the anonymisation and pseudonymisation guidance has been paused for review from 2023 to 2024 to allow the UK DP Bill to progress through UK Parliament and so the UK ICO can reflect any changes to the law in the final guidance. The updated guidance will also include a new chapter on anonymisation and research, and the ICO has confirmed that it plans to publish several case studies to demonstrate how various technologies can be used to facilitate compliant data sharing.

On 16 June 2023, the ICO also separately published the final version of its Privacy-enhancing technologies (PETs) guidance.⁴² The guidance is divided into two sections: (1) how PETs can help with data protection compliance; and (2) what PETs are. The guidance explains that PETs are technologies that embody fundamental data protection principles by: (1) minimising personal information use; (2) maximising information security; or (3) empowering people. The guidance notes that while there are certain risks associated with their use, PETs can help demonstrate a ‘data protection by design and by default’ approach by: (1) complying with the data minimisation principle; (2) providing an appropriate level of security; (3) implementing robust anonymisation or pseudonymisation solutions; and (4) minimising risk from personal data breaches by making personal data unintelligible to anyone not authorised to access it. Various examples of PETs are provided, including homomorphic encryption, secure multiparty computation and zero-knowledge proofs, among others.

Artificial intelligence

On 30 July 2020, the ICO published guidance on best practices for data protection-compliant artificial intelligence (AI), including how the ICO interprets data protection law as it applies to AI systems that process personal data and best practice technical and organisational measures to mitigate the risks to individuals by the deployment of AI systems. The ICO suggests that organisations should adopt a risk-based approach when evaluating AI systems and to identify and mitigate data protection risks at an early stage (i.e., the design stage) to yield the best compliance results. In addition, the ICO recommends:

- a* carrying out a DPIA on the AI system to demonstrate compliance with the GDPR requirements, particularly requirements relating to accountability and ‘data protection by design’;

42 ICO, Privacy Enhancing Technologies, <https://ico.org.uk/media/for-organisations/uk-gdpr-guidance-and-resources/data-sharing/privacy-enhancing-technologies-1-0.pdf>.

- b* using techniques to aid in data minimisation and effective AI development, which includes implementing risk management practices and starting with mapping out machine learning processes in which personal data may be used;
- c* selecting separate legal bases for processing personal data at each stage of the AI development and deployment process;
- d* ensuring systems are in place to effectively respond to and comply with data subject rights requests; and
- e* designing AI systems to facilitate effective human review and provide sufficient training to staff to ensure they can critically assess the outputs and understand the limitations of the AI system.

On 16 March 2023, the ICO published the latest version of its toolkit to provide practical support to organisations auditing the compliance of their own AI systems. It is designed to provide further practical support to organisations to reduce the risks associated with their use of AI.⁴³ The UK government has also launched a pilot AI Standards Hub, a new online platform that will provide practical tools and educational materials concerning AI.⁴⁴

On 22 September 2021, the UK government published its AI Strategy, which outlines the UK government's plan to make Britain a 'global superpower' in the AI arena, and sets an agenda to build the most 'pro-innovation regulatory environment in the world'. The strategy recognises the profound impact that AI will have on businesses worldwide and aims to create a progressive and pro-innovation regulatory environment that will enable UK businesses in all sectors and regions to benefit from AI adoption and allow them to compete internationally. The government's AI strategy will be centred around three key principles:

- a* investing in the AI ecosystem to promote the type, frequency and scale of AI discoveries and investments;
- b* ensuring that AI benefits all sectors and regions; and
- c* updating the current legislative framework to ensure AI is governed effectively.

On 18 July 2022, the UK government also published its AI Action Plan, which sets out what has happened since the AI Strategy was published, focusing on three pillars: (1) investing in the long term needs of the AI ecosystem; (2) ensuring AI benefits all sectors and regions; and (3) governing AI effectively, as well as priorities for the year ahead. On the same date, the UK government also published a policy paper on establishing a pro-innovation approach to regulating AI,⁴⁵ which sets out the UK's emerging approach to regulating AI. Published alongside the UK DP Bill, the paper sets out a 'pro-innovation' framework, underpinned by cross-sectoral principles, that are:

- a* context-specific;
- b* pro-innovation and risk-based (with a focus on real-life application and real, identifiable unacceptable levels of risk);
- c* coherent (i.e., simple, clear, predictable and stable); and

43 ICO, AI and data protection risk toolkit 2.0, <https://ico.org.uk/media/for-organisations/uk-gdpr-guidance-and-resources/artificial-intelligence/guidance-on-ai-and-data-protection-2-0.pdf>.

44 AI Standards Hub, <https://aistandardshub.org/>.

45 UK Government, AI White Paper, <https://www.gov.uk/government/publications/ai-regulation-a-pro-innovation-approach>.

- d* proportionate and adaptable (i.e., asking regulators to consider lighter touch options such as guidance or voluntary measures).

The paper suggests that responsibility for AI governance will be given to different sectoral regulators (in comparison to the EU approach which proposes a central national regulatory body).

On 29 March 2023, the UK government launched its public consultation on the AI white paper, which set out the UK's 'pro-innovation approach to AI regulation' alongside a corresponding impact assessment. The white paper highlights the distinction in approach to AI between the EU and the UK, with the UK opting to take a decentralized sector-specific approach, with no new legislation expected at this time. Instead, the UK will regulate AI primarily through sector-specific principles based guidance and existing laws. The five principles are:

- a* safety, security and robustness;
- b* appropriate transparency and explainability;
- c* fairness;
- d* accountability and governance; and
- e* contestability and redress.

On 12 April 2023, the ICO published its response to the government's AI white paper in which the ICO broadly welcomed the approach but also made certain recommendations and requests for clarification.

On 3 April 2023, the ICO also published guidance for developers and users of generative AI,⁴⁶ which sets out eight questions that developers and users need to ask. This includes considering the lawful basis for processing, the role of the parties (e.g., controller, joint controller or processor), whether there is a requirement to complete a DPIA, how transparency will be ensured, mitigating security risk, how to ensure transparency, limit unnecessary processing and comply with individual rights requests.

Bring your own device

The ICO has published guidance for companies on implementing bring your own device (BYOD) programmes allowing employees to connect their own devices to company IT systems and its guidance on security also includes a short section on BYOD which provides guidance on security considerations with respect to: (1) company issued devices; (2) own device but accessing company software; and (3) using own device.⁴⁷ Organisations using BYOD should have a clear BYOD policy so that employees connecting their devices to the company IT systems clearly understand their responsibilities.

To address the data protection and security breach risks linked to BYOD, the ICO recommends that organisations take various measures, including:

- a* considering which type of corporate data can be processed on personal devices;
- b* how to encrypt and secure access to the corporate data;
- c* how the corporate data should be stored on the personal devices;

⁴⁶ ICO, Generative AI : eight questions that developers and users need to ask, <https://ico.org.uk/about-the-ico/media-centre/blog-generative-ai-eight-questions-that-developers-and-users-need-to-ask/>.

⁴⁷ <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/security/working-from-home/bring-your-own-device-what-should-we-consider/>.

- d* how and when the corporate data should be deleted from the personal devices; and
- e* how the data should be transferred from the personal device to the company servers.

Organisations should also install antivirus software on personal devices, provide technical support to the employees on their personal devices when they are used for business purposes and have in place a ‘BYOD acceptable-use policy’ providing guidance to users on how they can use their own devices to process corporate data and personal data.

The guidance has not yet been updated to take into account the entry into force of the GDPR and DPA 2018.

Cloud computing

The ICO, like many other data protection authorities in the EU, published guidance on cloud computing, in 2012.⁴⁸

The ICO proposes a checklist that organisations can follow prior to entering into an agreement with a cloud provider, with questions on confidentiality, integrity, availability, and other legal and data protection issues.⁴⁹

According to the guidance, cloud customers should choose their cloud provider based on economic, legal and technical considerations. The ICO considers it is important that, at the very least, such contracts should allow cloud customers to retain sufficient control over the data to fulfil their data protection obligations.

The ICO is currently updating the cloud computing guidance to reflect the entry into force of the GDPR and DPA 2018.

Cookies and similar technologies

Article 5(3) of the ePrivacy Directive 2002/58/EC – implemented in the UK through the PECR – requires consent for the use of non-essential cookies (e.g., audience measurement cookies) and similar technologies. As a result, organisations have an obligation to obtain the consent of website users to place non-essential cookies or similar technologies on their computers and mobile devices.⁵⁰ The consent obligation does not apply where the cookie is used ‘for the sole purpose of carrying out the transmission of a communication over an electronic communication network’ or is ‘strictly necessary’ to provide the service explicitly requested by the user. This exemption is applied restrictively and so cannot be used when using analytical cookies. Organisations must also provide users with clear and comprehensive information about the purposes for which the information, such as that collected through cookies, is used.

In July 2019, the ICO published new guidance on the use of cookies and similar technologies. In the new guidance the ICO formally recognises the stricter standards of consent and transparency now in force under the GDPR. In particular, the new guidance states that:

- a* consent for non-essential cookies must comply with GDPR standards, which means it must involve a clear positive action (continuing to browse the website is not sufficient)

48 ICO, Guidance on the Use of Cloud Computing, 2012, https://ico.org.uk/media/for-organisations/documents/1540/cloud_computing_guidance_for_organisations.pdf.

49 See the EU Overview chapter for more details on cloud computing.

50 PECR Regulation 6.

- and not implied consent; granularity (the ability to consent to cookies used for some purposes, but not others); and no pre-ticked boxes or sliders set to 'on' (i.e., the default option for non-essential cookies must be off);
- b* the legitimate interest legal ground cannot be used as an alternative for consent to place non-essential cookies on a website;
 - c* blanket cookie walls to restrict access to websites until a user consents to the use of cookies are unlikely to represent valid consent. The guidance confirms that statements such as 'by continuing to use this website you are agreeing to cookies' is not considered valid consent under the higher GDPR standard;
 - d* information provided on cookies must align with the GDPR standards for transparency; and
 - e* if an organisation's use of cookies changes significantly, users will need to be made aware of these changes to allow them to make an informed choice about the new activity.

To help address the above, the ICO recommends that organisations conduct a 'cookie audit' that will confirm the purpose (or purposes) of each cookie; confirm the type of cookie (session or persistent); distinguish between those that are strictly necessary and non-essential; document the findings; and consider follow-up actions while building in an appropriate review period. The ICO views this as an opportunity for organisations to 'clean up' existing web pages and stop using unnecessary cookies, particularly if the website has evolved since an initial assessment was undertaken. The numbers published by the ICO on its website show that while there was an increase in complaints relating to cookies, rising from 1,837 in 2020–2021 to 1,986 in 2021–2022, this has since decreased to 1,753 for 2022–2023.⁵¹

The guidance confirms that enforcement action will vary, as expected, depending on the level of privacy intrusion and risk of harm posed by cookies and related technologies. The current enforcement regime for the PECR remains as was in effect under the DPA 1998 (except where personal data is processed, in which case the GDPR enforcement penalties will apply). However, it is expected that this will be brought into line with the GDPR with the introduction of the ePrivacy Regulation, which will replace the ePrivacy Directive when finalised.

On 14 May 2022, and based on developments in guidance from EU data protection authorities, the ICO issued a statement confirming it welcomed plans by Google LLC to introduce a 'reject all', saying it will give 'consumers greater control and balance of choice over the tracking of their online activity'.⁵² This follows the ICO's statement on 3 February 2022 on online advertising and its plan to review, alongside the Competition and Markets Authority, Google's plans to replace third-party cookies with alternative technologies. This statement sits alongside the ICO's publication on 25 November 2021 of its opinion on data protection expectations and standards for adtech proposals which make various recommendations for adtech developers, including being able to demonstrate and explain design choices, and giving users meaningful control, among others.⁵³

On 9 August 2023, the ICO alongside the Competition and Markets Authority (CMA) announced the release of a joint ICO CMA position paper on harmful design in

51 ICO, Action we've taken, Cookies <https://ico.org.uk/action-weve-taken/cookies/>.

52 ICO and CMA, Harmful design in digital markets, https://www.drcf.org.uk/__data/assets/pdf_file/0024/266226/Harmful-Design-in-Digital-Markets-ICO-CMA-joint-position-paper.pdf.

53 ICO, Press Release, <https://ico.org.uk/about-the-ico/media-centre/ico-in-the-media/#media140422>.

digital markets. One topic highlighted in the position paper, is cookie consent banners as an example of harmful design, in particular a website's cookie banner should ensure it is as easy to reject non-essential cookies as it is to accept them and users should have a choice on whether consent is given for profiling or targeted advertising.⁵⁴

The UK DP Bill proposes extending the circumstances under which cookies (or similar technologies) can be used without express user consent, for example, in 'for risk activities, such as audience measurement'.

Facial recognition

On 18 June 2021, the ICO published guidance on the data protection and privacy implications for the use of live facial recognition technology in public places. In particular, the guidance outlines that as live facial recognition technology often involves the automatic collection of biometric data, it has greater potential to be used in a privacy intrusive way. The guidance sets out various key requirements for controllers when considering the use of live facial recognition, which include:

- a* identifying a specified, explicit and legitimate purpose for using live facial recognition in a public space;
- b* identifying and meeting the requirements of a valid lawful basis;
- c* identifying and meeting the requirements of the conditions for processing special category data and criminal offence data;
- d* considering alternative measures and demonstrating that the purpose cannot reasonably be achieved by using a less intrusive measure;
- e* ensuring that the use of live facial recognition is proportionate and the purpose is of sufficient importance to justify any privacy intrusion or other impact on individuals; and
- f* being transparent about data processing and conducting a DPIA.⁵⁵

On 23 May 2022, the ICO announced that it had fined a facial recognition database company £7,552,800 for using images of people in the UK, and elsewhere, that were collected from the web and social media to create a global online database that could be used for facial recognition. The ICO highlighted that the company had collected over 20 billion images of individual's faces and data from publicly available information on the internet and social media platforms to create an online database and that those individuals were not informed of such data collection. In addition, the ICO held that the company did not have a lawful basis to process the personal data, did not implement an adequate data retention policy, failed to meet the standards required for the protection of biometric data, and requested unnecessary information from data subjects in response to their requests to access their personal data. Despite the company not offering its services in the UK anymore, it had continued to use the personal data of persons in the UK.

In addition, on 31 March 2023, the ICO announced it had completed its investigation of a security company providing live facial recognition technology (FRT) systems to the retail sector which scanned faces as people entered a store and flagged if they were a 'subject

54 ICO Opinion, Data protection and privacy expectations for online advertising proposals, <https://ico.org.uk/media/about-the-ico/documents/4019050/opinion-on-data-protection-and-privacy-expectations-for-online-advertising-proposals.pdf>.

55 ICO, Guidelines on The Use of Live Facial Recognition Technology in Public Places, <https://ico.org.uk/media/2619985/ico-opinion-the-use-of-lfr-in-public-places-20210618.pdf>.

of interest'. While the ICO considered that the product complied with data protection legislation, it flagged a number of areas for improvement including: (1) reducing the personal data collected by focusing on repeat offenders or individuals committing significant offences; (2) appointing a DPO; and (3) protecting vulnerable data subjects to ensure they do not become a 'subject of interest'. The ICO was keen to stress, however, that this does give organisations a green light to the blanket use of FRT and that each new application must be considered on its own merits, balancing individuals' privacy rights with the benefits of preventing crime.

On 26 October 2022, the ICO also issued two reports to support businesses navigating the use of emerging biometrics technologies⁵⁶ and a blog post⁵⁷ warning organisations about the risks of discrimination in using emotion analysis technologies. Examples of such technologies include gaze tracking, sentient analysis, facial movements, gait analysis, heartbeats, facial expressions and skin moisture and use cases including monitoring the physical health of workers or registering students for exams by measuring body position and head movement. The first report (Insight) analyses current developments and trends in the area. The second report (Foresight) considers the privacy implications of the technologies in the near future. The ICO also notes that forthcoming biometric guidance will be published in Spring 2023, although as at the time of writing, this has not yet been published.

IV GENERAL OBLIGATIONS FOR DATA HANDLERS

The DPA 2018 does not create additional principles and obligations in relation to general processing of personal data under the GDPR. Therefore, controllers must comply with the GDPR's data protection principles and ensuing obligations when established in the UK or processing personal data of UK data subjects.

i First data protection principle: fair, lawful and transparent processing

Personal data must be processed fairly, lawfully and in a transparent manner in relation to the data subject. This essentially means that the controller must:

- a* have a legitimate ground for processing the personal data;
- b* not use personal data in ways that have an unjustified adverse effect on the data subject concerned;
- c* be transparent about how the controller intends to use the personal data, and give the data subject appropriate privacy notices when collecting his or her personal data;
- d* handle a data subject's personal data only in ways he or she would reasonably expect and consistent with the purposes identified to the data subject; and
- e* make sure that nothing unlawful is done with the personal data.

The UK DPA 2018 does not introduce any further requirements in relation to the first data protection principle.

56 ICO, Biometrics technologies, <https://ico.org.uk/about-the-ico/research-and-reports/biometrics-technologies>.

57 ICO, Blog post, 'Immature biometric technologies could be discriminating against people' says ICO in warning to organisations, <https://ico.org.uk/about-the-ico/media-centre/news-and-blogs/2022/10/immature-biometric-technologies-could-be-discriminating-against-people-says-ico-in-warning-to-organisations/>.

ii Legal basis to process personal data

As part of fair and lawful processing, processing of personal data must be justified by at least one of six specified grounds in Article 6 of the GDPR:

- a* the data subject has given consent to the processing of his or her personal data for one or more specific purposes;
- b* processing is necessary for the performance of a contract to which the data subject is party or to take steps at the request of the data subject prior to entering into a contract;
- c* processing is necessary for compliance with a legal obligation to which the controller is subject;
- d* processing is necessary to protect the vital interests of the data subject or of another individual;
- e* processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; and
- f* processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject that require protection of personal data, in particular where the data subject is a child.

The ICO guide on the GDPR contains guidance on the reliance of each Article 6 legal basis.⁵⁸ In particular, the ICO has also published detailed guidance on legitimate interests as a legal basis together with a legitimate interest assessment (LIA) template⁵⁹ that covers three tests controllers should conduct as part of any LIA:

- a* the purpose test: to assess whether there is a legitimate interest behind the processing;
- b* the necessity test: to assess whether the processing is necessary for the purpose it has identified; and
- c* the balancing test: to consider the impact on data subjects' interests and rights and freedoms and to assess whether they override the controller's own legitimate interests.

The ICO's guidance on the GDPR also contains a section on consent, which makes reference to the GDPR's high standard for valid consent, i.e., that consent be unambiguous, involve a clear affirmative action and provide distinct or granular options to give consent for distinct processing operations. As consent must be freely given, certain organisations in a position of power over their data subjects may find it difficult to demonstrate valid freely given consent, for example, consent obtained from employees by their employers is unlikely to be freely given as such consent is not considered to be a genuine choice, with employees possibly facing employment consequences as a result of failing to provide consent.

The GDPR and DPA 2018 apply a stricter regime for special categories of personal data and criminal convictions data, where such data may only be processed on the basis of additional conditions being fulfilled.⁶⁰

58 ICO, UK GDPR guidance and resources., <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources>.

59 ICO, sample legitimate interests assessment template. <https://ico.org.uk/media/for-organisations/forms/2258435/gdpr-guidance-legitimate-interests-sample-lia-template.docx>.

60 Articles 9 and 10 of the GDPR, Sections 10 and 11 and Schedule 1 of the DPA 2018.

iii Special categories of personal data

The GDPR distinguishes between personal data and special categories of personal data (or sensitive data). To lawfully process special categories of personal data, controllers must identify a legal basis 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 to the DPA 2018 includes the following conditions in relation to employment, health and research:

- a* employment, social security and social protection;
- b* health or social care purposes;
- c* public health; and
- d* research.

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

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

Where processing special categories of personal data in reliance on a condition under the DPA 2018, the controller will need to have in place an ‘appropriate policy document’ 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 special categories of personal data processed in reliance on certain DPA 2018 conditions.

iv Criminal records personal data

Criminal records and offences data is not included within the scope of special categories of personal data. Section 11 of 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.

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 official authority or when the processing is authorised by EU or Member State law. Where the processing of criminal records and offences data is not carried out under the control of official authority, such processing is authorised by English law for purposes of Article 10 only if the processing meets a condition in Parts 1, 2 or 3 of Schedule 1 to the DPA 2018.

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

- a* consent;
- b* protecting data subjects’ vital interests;
- c* processing by not-for-profit bodies;
- d* personal data in the public domain;
- e* legal claims;
- f* judicial acts;

- g* administration of accounts used in commission of indecency offences involving children; and
- h* 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 in place an appropriate policy document, as explained in Section IV.iii.

v Health data

Data concerning health falls within 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 healthcare services, which reveal information about his or her health status’.

One of the lawful processing grounds for health data is Article 9(2)(j) of the GDPR where 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 that the processing be subject to appropriate safeguards that ensure technical and organisational measures are in place in particular, to comply with the principle of data minimisation.

Article 19 of the DPA 2018 states that the processing will not meet these requirements where: (1) it is likely to cause substantial damage or distress to an individual; or (2) 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: (1) it is processed by a court, supplied in a report or other evidence given to a court, and under specified rules (i.e., those relating to family and children’s hearings in the courts) may be withheld from an individual;⁶¹ or (2) 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 should not be disclosed.⁶²

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.⁶³

On 19 May 2023, the ICO published its guidance for the research provisions within the GDPR and DPA 2018 (the Research Guidance) The Research Guidance seeks to help organisations understand where they can rely on the research provisions, including highlighting where the various research-related provisions can be found and their practical effect.⁶⁴

61 Article 37(5) of the GDPR.

62 Data Protection (Charges and Information) Regulations 2018/480.

63 Section 3, Part 2 of Schedule 3 to the DPA.

64 Section 4, Part 2 of Schedule 3 to the DPA.

vi Registration with the ICO

Under the UK Data Protection (Charges and Information) Regulations 2018⁶⁵ (Charges and Information Regulations), controllers are required to register with the ICO and pay a charge fee to the ICO (subject to limited exceptions such as where processing personal data is for core business purposes). The cost of the fee depends on the number of employees and the turnover of the organisation. The Charges and Information Regulations have established three tiers of fees ranging from £40 to £2,900. Registering with the ICO consists of filling in an online form on the ICO website and making the payment of a fee online, which must be paid when the controller registers for the first time and then every year when the registration is renewed.

vii Data protection officer

The appointment of a data protection officer (DPO) in the private sector is required where an organisation's core activities (i.e., the primary business activities of an organisation), involve: (1) 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, it offers recommendations to them; or (2) the large-scale processing of special categories of personal data (e.g., health data) or personal data relating to criminal convictions and offences – for example, a health insurance company processing a wide range of personal data about a large number of individuals, including medical conditions and other health information.⁶⁶

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 to 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 to help demonstrate compliance with the accountability principle.

The DPO must be designated on the basis of professional qualities and, in particular, expert knowledge of data protection law and practices.⁶⁷ The controllers and processors who do not meet the criteria for a required appointment of a DPO may voluntarily appoint one and are required to notify the ICO of any voluntary appointment.

Required and voluntary appointments of DPOs must be notified to the ICO in the form of webform, or an email, which includes:

- a* the contact details of the DPO;
- b* the registration number of the controller or processor;
- c* whether the appointment of the DPO was required or voluntary;
- d* the name, address, phone number and/or email address of the DPO (if they are an individual); and
- e* the name, address, phone number and/or email address of the external organisation carrying out the DPO duties on behalf of the organisation.

65 Section 2(2), Part 2 of Schedule 3 to the DPA.

66 ICO, guidance on research provisions within the UK GDPR and the DPA 2018, <https://ico.org.uk/media/for-organisations/uk-gdpr-guidance-and-resources/the-research-provisions-0-0.pdf>.

67 Section 37(1)(b) and (c) of the GDPR.

The ICO will publish the name of the DPO on the Data Protection Public Register, where the controller or processor has consented to publication.

Section 71 of the DPA 2018 requires controllers to entrust their DPO with the following non-exhaustive tasks:

- a* informing and advising the controller, any processor engaged by the controller and any employee of the controller who carries out the processing of personal data, of that person's obligations under the DPA 2018;
- b* providing advice on the carrying out of a data protection impact assessment (see below) and monitoring compliance;
- c* cooperating with the ICO;
- d* acting as the contact point for the ICO on issues relating to processing of personal data;
- e* monitoring compliance with the policies of the controller in relation to the protection of personal data; and
- f* monitoring compliance by the controller of Section 71 of the DPA 2018.

viii Record of processing activities

Article 30 of the GDPR requires controllers to also keep a record of their processing activities. Processors are also under an obligation to keep a record of processing activities carried out on behalf of controllers. The ICO has published template controller and processor records of processing activities. Such records will have to be provided to the ICO upon request.⁶⁸

ix Information notices

Controllers must provide data subjects with information on how their personal data is being processed pursuant to Articles 13 and 14 of the GDPR. The list of information to be provided varies if the personal data has been obtained directly from the data subject or from a third party (see below). The DPA 2018 introduces no further requirements in relation to the notices given to data subjects. The ICO, in its guidance on the GDPR,⁶⁹ in particular on the data subject's right to be informed, suggests the information notice can take many forms, including:

- a* a layered approach: this will usually be a short notice containing key privacy information, with additional layers of more detailed information;
- b* dashboards: preference management tools that inform people how the controller will use their personal data and provide the option for data subjects to manage what happens with the processing of their personal data;
- c* just-in-time notices: relevant and focused privacy notices delivered at the time the personal data is collected;
- d* icons: small, meaningful symbols that highlight the existence of data processing; and
- e* mobile and smart device functionalities: these include pop-ups, voice alerts and mobile device gestures.

⁶⁸ Article 30 of the GDPR.

⁶⁹ ICO, Guide to the General Data Protection Regulation (GDPR)/Individual Rights/Right to be Informed, <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/>.

On 20 February 2023, the UK's First-Tier Tribunal (Tribunal) ruled on an ICO decision regarding a company's direct marketing activities. Among other findings, the Tribunal confirmed that indirect notification of a controller's processing and the provision of privacy notices via third parties can be sufficient to meet the UK GDPR's transparency requirements.

x Data protection impact assessments

Controllers are under an obligation to carry out a data protection impact assessment (DPIA) where the processing is likely to result in a high risk to individuals. While 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 that sets out: (1) instances where a DPIA should always be carried out (e.g., 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 (2) situations where a DPIA should be considered (e.g., where processing on a large scale, or where using innovative technological or organisational solutions).

Section 64 of the DPA 2018 requires controllers to include in their DPIA:

- a* a general description of the envisaged processing operations;
- b* an assessment of the risks to the rights and freedoms of data subjects;
- c* the measures envisaged to address those risks; and
- d* safeguards, security measures and mechanisms to ensure the protection of personal data and to demonstrate compliance with Section 64 of the DPA 2018, taking into account the rights and legitimate interests of the data subjects and other persons concerned.

The ICO guidance also recommends that where a controller decides not to carry out a DPIA, the reasons for this decision are documented.⁷⁰

xi Second data protection principle: processing for specified, explicit and lawful purposes (purpose limitation)

Personal data can only be obtained for specified, explicit and lawful purposes, and must not be further processed in a manner that is incompatible with those purposes.

The UK DPA 2018 does not introduce any further requirements in relation to the second data protection principle.

The ICO's published guidance on the GDPR includes a section on purpose limitation,⁷¹ where it requires controllers to specify the purposes of the processing to data subjects at the outset of the processing, in the form of records of the processing activities that controllers are required to maintain and information notices that are required to be given to data subjects prior to the processing.

70 ICO, UK GDPR guidance and resources / Accountability and governance / Data Protection Impact Assessments (DPIAs) <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/accountability-and-governance/data-protection-impact-assessments-dpias/>.

71 ICO, UK GDPR guidance and resources / Data protection principles / Purpose limitation, <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/data-protection-principles/a-guide-to-the-data-protection-principles/purpose-limitation>.

xii Third data protection principle: personal data must be adequate, relevant and limited to what is strictly necessary (data minimisation)

A controller must ensure that the personal data it holds is adequate, relevant and limited to what is necessary in relation to the purposes for which it is processed.

The UK DPA 2018 does not introduce any further requirements in relation to the third data protection principle.

The ICO's published guidance on the GDPR contains guidance on data minimisation,⁷² requiring controllers to identify the minimum amount of personal data needed to fulfil its processing purposes, noting that if the processing carried out does not help the controller to achieve its purposes the personal data held is most likely inadequate.

The ICO recommends controllers should carry out periodic reviews of their processing to check that the personal data held is still relevant and adequate for its purposes, deleting any personal data that is no longer needed.⁷³

xiii Fourth data protection principle: personal data must be accurate and where necessary kept up to date (accuracy)

Controllers must ensure that personal data is accurate and, where necessary, kept up to date. The ICO recommends⁷⁴ controllers take reasonable steps to ensure the accuracy of any personal data obtained, ensure that the source and status of any personal data is clear, and carefully consider any challenges to the accuracy of information and whether it is necessary to periodically update the information.

xiv Fifth data protection principle: personal data must be kept in a form that permits the identification of data subjects for no longer than is necessary (storage limitation)

Personal data must be kept in a form that permits the identification of data subjects for no longer than is necessary for the purposes for which the personal data is processed. In practice, this means that the controller must review the length of time it keeps personal data and consider the purpose or purposes it holds the information for in deciding whether (and for how long) to retain this information. Controllers must also securely delete personal data that is no longer needed for this purpose or these purposes, and update, archive or securely delete information if it goes out of date.

It is good practice to establish standard retention periods for different categories of information (e.g., employee data and customer data). To determine the retention period for each category of information, controllers should take into account and consider any legal or regulatory requirements or professional rules that would apply.⁷⁵ The ICO, in its published

72 ICO, UK GDPR guidance and resources / Data protection principles / Data minimisation, <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/data-protection-principles/a-guide-to-the-data-protection-principles/the-principles/data-minimisation/>.

73 *ibid.*

74 ICO, UK GDPR guidance and resources / Data protection principles / Accuracy, <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/data-protection-principles/a-guide-to-the-data-protection-principles/the-principles/accuracy>.

75 ICO, UK GDPR guidance and resources / Data protection principles / Storage limitation, <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/data-protection-principles/a-guide-to-the-data-protection-principles/the-principles/storage-limitation>.

guidance on the GDPR, contains guidance on storage limitation, recommending that controllers erase or anonymise personal data where they no longer need it, to reduce the risk of the personal data becoming excessive, irrelevant, inaccurate or out of date. This will also help controllers comply with the data minimisation and accuracy principles, while ensuring the risk that the controller uses the personal data in error is reduced.

The ICO also recommends in its GDPR storage limitation guidance⁷⁶ that it is good practice for controllers to adopt clear policies on retention periods and erasure, which can help reduce the burden of dealing with questions from data subjects about retention and access requests for the erasure of personal data.

In its GDPR guidance on individuals' rights the ICO states that if a valid erasure request is received and no exemption applies then a controller will have to take steps to ensure erasure from backup systems as well as live systems. However, the ICO acknowledges that the data will remain within the backup environment for a certain period of time until it is overwritten. According to the ICO, the key issue is to 'put the backup data "beyond use", even if it cannot be immediately overwritten'. Provided that the controller does not use the data within the backup for any other purpose, 'it may be unlikely that the retention of personal data within the backup would pose a significant risk, although this will be context specific'.

xv Sixth data protection principle: personal data must be processed in a manner that ensures appropriate security of personal data

Personal data must be processed in a manner that ensures appropriate security of personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures. Where a controller uses a processor to process personal data on its behalf, the controller must ensure that it has entered into a written contract that obliges the processor to implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk of processing personal data.

The ICO recommends, in its published guidance on security under the GDPR,⁷⁷ that before deciding what measures are appropriate, controllers should assess the personal data risk by carrying out an information risk assessment. A controller should review the personal data it holds, and the way it is used to assess how valuable, sensitive or confidential the personal data is, including assessing any potential damage or distress that may be caused if the data is compromised.

When carrying out the assessment, the ICO recommends taking into account:

- a* the nature and extent of the controller's premises and computer systems;
- b* the number of staff the controller has;
- c* the extent of the staff's access to the personal data; and
- d* any personal data held or used by the processor acting on the controller's behalf.⁷⁸

76 *ibid.*

77 ICO, UK GDPR guidance and resources, Security <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/security/a-guide-to-data-security/>.

78 *ibid.*

In addition, the ICO recommends that controllers should aim to build a culture of security awareness within the organisation, identifying a person with day-to-day responsibility for information security within the organisation and ensuring the person has the appropriate resources and authority to do his or her job effectively.⁷⁹

The ICO considers encryption to be an appropriate technical measure owing to its widespread availability and relatively low cost of implementation.⁸⁰ However, there are other measures, such as pseudonymisation of data and anonymisation, that can also be used to ensure the security of personal data.

The technical and organisational measures controllers have in place are also considered by the ICO when deciding whether to impose an administrative fine on the controller for an infringement of the GDPR and DPA 2018.

xvi Seventh data protection principle: accountability

The data protection principle of accountability under Article 5.2 of the GDPR is prevalent throughout the GDPR and requires controllers to not only comply with the GDPR but to demonstrate their compliance with the data protection principles under the GDPR.

In addition to putting in place appropriate technical and organisational measures, the ICO suggest in its GDPR accountability guidance⁸¹ a number of measures controllers can adopt to comply with the accountability principle, including:

- a* adapting and implementing data protection policies;
- b* taking a ‘data protection by design and default’ approach;
- c* having written contracts in place with vendors processing personal data that comply with Article 28 of the GDPR;
- d* maintaining records of processing activities;
- e* recording and, where necessary, reporting personal data breaches;
- f* carrying out DPIAs for uses of personal data likely to result in a high risk to the data subject’s interests; and
- g* adhering to relevant codes of conduct and signing up to certification schemes.

The ICO notes that if controllers adopt a privacy management framework this can help embed accountability measures and create a culture of privacy across the controller’s organisation.⁸²

The framework could include:

- a* robust program controls informed by the GDPR requirements;
- b* appropriate reporting structures; and
- c* assessment and evaluation procedures.

On 5 October 2021, the ICO’s data sharing code of practice between controllers came into force. The data sharing code outlines how organisations should engage in data-sharing activities (including the requirement to have in place a data sharing agreement to help demonstrate accountability under the GDPR) and covers four main principles: accountability,

79 *ibid.*

80 *ibid.*

81 ICO, UK GDPR guidance and resources/ Accountability and governance, <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/accountability-and-governance/guide-to-accountability-and-governance/>.

82 *ibid.*

lawfulness, fairness and security in the context of data sharing. The data sharing code also provides guidance on risk management processes, best practices and misconceptions about data sharing.

The ICO has currently approved criteria for the following schemes: (1) ADISA ICT Asset Recovery Certification 8.0 (ICO-CSC/003, ICO-CSC/004); (2) Age Check Certification Scheme (ASSC) (ISO-CSC/001); (3) Age Appropriate Design Certification Scheme (AADCS) (ICO-CSC/002); and (4) UK GDPR Compliance Certification Scheme for the Provision of Training and Qualification Services.⁸³

The ICO has also published a guide to certification schemes,⁸⁴ which sets out the purpose of certification, how an organisation can apply for certification and the practical implication of the certification.

V INTERNATIONAL DATA TRANSFER AND DATA LOCALISATION

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

- a* the recipient third country is considered to offer an adequate level of data protection;
- b* a data protection safeguard (also known as a data transfer mechanism) has been applied (such as an IDTA or the EU's standard contractual clauses (SCCs) with an Addendum, or the organisation has implemented Binding Corporate Rules); or
- c* a derogation from the prohibition applies (such as the data subject has explicitly consented to the transfer).⁸⁵

This chapter does not consider the data protection safeguards and derogations as regards international data transfers in detail, which are set out in the EU Overview chapter. However, it is important to note that under the DPA 1998, controllers were allowed to determine for themselves that their transfers of personal data outside of the EEA were adequately protected. The DPA 2018 does not contain such a self-adequacy assessment. To this point, according to the recent *Schrems II* ruling by the CJEU, which invalidated the EU–US Privacy Shield as a mechanism to legitimise the transfer of personal data from the EEA or UK to the United States, the CJEU held that it is the responsibility of the data exporter and data importer to assess whether the level of protection required by EU law can be upheld by the data importer in the recipient third country concerned to determine if the guarantees provided by SCCs (and Binding Corporate Rules) can be complied with by the data importer in recipient third country in practice. If this is not the case, a Transfer Impact Assessment (TIA) (which in the UK is known as a Transfer Risk Assessment or TRA) should be carried out on whether supplementary measures should be implemented by the data importer to ensure an essentially equivalent level of data protection to that afforded to individual in the EU. Following the decision, the ICO has confirmed that, although the UK no longer forms part of the EU and,

83 ICO, Certification schemes register (A-Z), <https://ico.org.uk/for-organisations/advice-and-services/certification-schemes/certification-schemes-register/>.

84 ICO, Advice and Services / Certification schemes <https://ico.org.uk/for-organisations/advice-and-services/certification-schemes/certification-schemes-detailed-guidance/>.

85 SYSC 3.

in turn, is not bound by the decisions of the CJEU, the TIA as required by the *Schrems II* decision should still be carried out for organisations engaging in cross-border data transfers from the UK to third countries.⁸⁶

In addition, the GDPR contains a more limited version of the DPA 1998 self-adequacy assessment, and allows transfers:

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

Moreover, 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. In this regard, the UK government, on 7 July 2023, finalised the first law enforcement adequacy decision since Brexit for the Bailiwick of Guernsey, to enable UK law enforcement authorities to freely transfer personal data to authorities in Guernsey for law enforcement purposes.⁸⁷ The UK government is also processing law enforcement data adequacy assessments for the Bailiwick of Jersey and the Isle of Man, with the aim of concluding these assessments in the near future.⁸⁸

If a transfer is not based on an adequacy decision, transfers must be based on appropriate safeguards where a legal instrument containing appropriate data protection safeguards for the protection of personal data binds the intended recipient of the personal data, or the 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 in a form capable of being provided to the ICO upon request.

If a transfer is not based on an adequacy decision or on the implementation of appropriate safeguards, transfers must be 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 the protection of an immediate and serious threat to the public security of a Member State or a third country;

86 Updated ICO statement on recommendations published by the European Data Protection Board following the Schrems II case, <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2020/11/updated-ico-statement-on-recommendations-published-by-the-european-data-protection-board-following-the-schrems-ii-case/>.

87 UK Government, The Data Protection (Law Enforcement) (Adequacy) (Bailiwick of Guernsey) Regulations 2023, <https://www.legislation.gov.uk/uksi/2023/744/made>.

88 ICO, International data transfer agreement and guidance, <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/international-transfers/international-data-transfer-agreement-and-guidance/>.

- d* in individual cases for any law enforcement purposes (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); 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 in a form capable of being provided to the ICO upon request.

In terms of data protection safeguards for the transfer of personal data from the UK, the most commonly applied safeguard is the implementation of SCCs between the data exporter and the data importer. On 4 June 2021, the European Commission adopted new SCCs for international data transfers of personal data from the EU to third countries (new EU SCCs) To address transfers from UK following Brexit. the ICO published its IDTA and the Addendum on 21 March 2022.⁸⁹ The Addendum must be used with the new EU SCCs while the IDTA can be used as a standalone data transfer mechanism to address international transfers from the UK. Any agreements concluded after 21 September 2022 will have to use the IDTA or Addendum to the new EU SCCs, while all agreements will be required to use either the IDTA or Addendum to the new EU SCCs for transfers of personal data from the UK to third countries by 21 March 2024. This means all agreements using the existing SCCs for UK data transfers must be updated by this deadline.

On 17 November 2022, the ICO published updated guidance on international data transfers, including additional guidance on completing TRAs (TRA Guidance) as well as publishing a new TRA tool which offers a template to use when carrying out a TRA. The TRA Guidance states that if an organisation is relying on an Article 46 data transfer mechanism (e.g., the IDTA), it must carry out a TRA prior to conducting any such transfers.⁹⁰ The ICO considers there to be two approaches to conducting a TRA: organisations may use the ICO's approach in the TRA tool or the EDPB's approach in the TIA. The ICO has confirmed that it is currently working on guidance showing organisations how to use the IDTA and the Addendum, which will include clause-by-clause guidance.⁹¹

The UK has adopted the European Commission's adequacy decisions as at 31 December 2020 (Andorra, Argentina, Canada (commercial organisations only), Faroe Islands, Guernsey, Isle of Man, Israel, Japan (private-sector organisations only), Jersey, New Zealand, Switzerland and Uruguay) and has its own adequacy regulations in relation to EEA countries, the Republic of Korea and Gibraltar.

In terms of personal data transfers from the EU to the UK, on 28 June 2021, the European Commission announced that it had adopted adequacy decisions for the UK as

89 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 in a form capable of being provided to the ICO upon request.

90 ICO, Transfer risk assessments, <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/international-transfers/international-data-transfer-agreement-and-guidance/international-data-transfer-agreement-and-guidance/transfer-risk-assessments/>.

91 ICO, International data transfer agreement and guidance, <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/international-transfers/international-data-transfer-agreement-and-guidance/>.

it had deemed the UK's data protection laws to be essentially equivalent to data protection laws within the EU.⁹² As a result, personal data is able to continue to freely flow between the EU to the UK without the need for a data transfer mechanism (e.g., SCCs) being in place post-Brexit. The European Commission found that the UK's data protection system continued to be based on the same rules that were applicable when the UK was a Member State, and the UK had fully incorporated the principles, rights and obligations of the GDPR and the Law Enforcement Directive into its post-Brexit legal system.

The European Commission noted that the UK's adequacy has a sunset clause limiting the duration of adequacy to four years after entering into force, which is until June 2025. After the expiration of the sunset clause the UK's adequacy may be renewed on the condition that the UK continues to provide an adequate level of data protection. During this period, the European Commission has stated that it will continue to monitor the legal situation in the UK and could intervene at any point should the UK deviate from the level of protection currently in place.

Finally, transfers for the purposes of UK immigration control are excluded from the scope of the UK's adequacy decision to reflect a recent judgment of the England and Wales Court of Appeal, which deemed that the UK government's immigration exemption in the DPA 2018 is unlawful. The European Commission will reassess the need for this exclusion once the situation has been remedied under English law.

On 26 August 2021, the UK government published a mission statement setting out the UK approach to adequacy assessments and international transfers, including templates for how such adequacy decisions would be assessed. The UK plans to take a 'flexible approach' to adequacy and the decision on whether to commence such assessment will be made by reference to policy factors.. On August 2021, the UK government announced that it will be prioritising partnerships with Australia, Brazil, Colombia, The Dubai DIFC, India, Indonesia, Kenya, Singapore and the United States.⁹³

In relation to data transfers to the United States, on 10 July 2023, the European Commission issued its Final Implementing Decision granting the US adequacy (the Adequacy Decision) with respect to companies that subscribe to the EU-US Data Privacy Framework (DPF). With immediate effect, the Adequacy Decision provides a new lawful basis for transatlantic data transfers from data exporters in the EU to data importers in the United States who self-certify compliance with the DPF principles. Importantly, entities relying on SCCs or BCRs will now be able to rely on the analysis in the Adequacy Decision in their US TIA.

For the UK, the US Department of Commerce announced that companies will also immediately be able to self-certify to the UK extensions of the DPF, but that the UK component will not be live until the finalisation of the separate and ongoing UK-US adequacy process.

The UK DP Bill 2 retains the concept introduced by the Former UK DP Bill of a 'data protection test' for international transfers that would involve determining whether the standard of the protection provided for data subjects in the data receiver's country was 'not

92 European Commission, Data protection: Commission adopts adequacy decisions for the UK, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3183.

93 UK Government, International data transfers: building trust, delivering growth and firing up innovation, <https://www.gov.uk/government/publications/uk-approach-to-international-data-transfers/international-data-transfers-building-trust-delivering-growth-and-firing-up-innovation>.

materially lower' than the standard of the protection provided for data subjects in the UK. This marks a change from the test of 'essential equivalence' currently in place following the *Schrems II* decision. The test would not require a 'point-by-point comparison' between the other country's regime, and the UK, instead an assessment will be 'based on outcomes i.e. the overall standard of protection for a data subject'.⁹⁴

On 25 July 2022, the ICO published guidance on UK Binding Corporate Rules (BCRs) which it confirmed now supersedes all prior guidance. The ICO has updated its requirement tables for controllers and processors, application forms and issued new guidance (split into controller guidance and processor guidance) to provide certainty when organisations have used UK BCRs to transfer data. The ICO's guidance confirms that BCRs remain an adequate safeguard for making restricted transfers and has sought to simplify the process where organisations wish to rely on both EU and UK BCRs, by confirming that it will only request supporting documents and commitments once during the UK approval process.

VI DISCOVERY AND DISCLOSURE

The ICO has not published any specific guidance on this topic. E-discovery procedures and the disclosure of information to foreign enforcement agencies will, most of the time, involve the processing of personal data. As a result, organisations will have to comply with the data protection principles under the DPA 2018 in relation to e-discovery and must comply with the requirements of the GDPR.

In practice, this will mean informing data subjects about the processing of their personal data for this purpose. Organisations will also have to have a legal basis for processing the data. A data transfer solution will also have to be implemented if the data is sent to a country outside the EEA that is not deemed to provide an adequate level of protection pursuant to Article 45 of the GDPR.

VII PUBLIC AND PRIVATE ENFORCEMENT

i Enforcement agencies

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

- a* information notices: requiring controllers and processors to provide the ICO with information that the Commissioner reasonably requires to assess compliance with the GDPR or DPA 2018;
- b* 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 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 or material, and observe the processing of personal data on the premises);

⁹⁴ See Explanatory Notes to the Data Protection and Digital Information Bill, <https://publications.parliament.uk/pa/bills/cbill/58-03/0143/en/220143en.pdf>.

- c* notice of intent: where, after conducting its investigation, the ICO issues a notice of intent to fine the controller or processor in relation to a breach of the GDPR or the DPA 2018. Such a notice sets out the ICO's areas of concern with respect to potential non-compliance with the GDPR 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;
- d* enforcement notices: such notices are issued where the ICO has concluded the controller or processor has failed to comply with the GDPR or the UK DPA 2018, setting out the consequences of non-compliance, which could include a potential ban on processing all or certain categories of personal data; and
- e* penalty notices: if the ICO is satisfied that the controller or processor has failed to comply with the GDPR 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 monetary penalty to be paid for failing to comply with the GDPR or the DPA 2018. Under the GDPR, such monetary penalties can amount to €20 million or 4 per cent of annual worldwide turnover.

However, it is worth noting that the UK DP Bill 2 proposes changes to the ICO's governance and accountability structures,⁹⁵ such as by introducing statutory objectives, a statement of strategic priorities and a shift to a statutory board model with a chair and chief executive.

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 DPA 1998, continue to have effect under the DPA 2018.

In a speech at the National Association of Data Protection Officers annual conference delivered on 22 November 2022, the Information Commissioner, John Edwards, stated that 'monetary penalties remain an important regulatory tool, and we will use them in instances where they are truly needed – for the breaches which cause or have the potential to cause the most harm to people, or where a business has profited from its non-compliance' and that 'fines are only one of a number of enforcement tools available' to the ICO. The Information Commissioner also stated that 'there is very little evidence that fines on their own produce better outcomes for the people we are protecting' and emphasised the need for organisations to treat people's information with 'care and respect, and to not use it in ways that people wouldn't expect'.

In addition, the ICO is responsible for promoting public awareness, and in particular raising awareness among controllers and processors of their obligations under the GDPR and DPA 2018. In November 2022, the Information Commissioner announced that he would publish all reprimands issued since January 2022 on the ICO website as part of a drive to

⁹⁵ However, it is worth noting that the UK DP Bill 2 proposes changes to the ICO's governance and accountability structures, such as by introducing statutory objectives, a statement of strategic priorities, and a shift to a statutory board model with a chair and chief executive.

offer transparency and clarify about its regulatory activity. By publishing these reprimands and providing details about breaches, the ICO intends to educate organisations on how to avoid similar issues, allowing people to understand how it holds organisations accountable.⁹⁶

The FCA also has enforcement powers and can impose financial penalties on financial services organisations for failure to comply with their obligations to protect customer data.

It has also been acknowledged by the UK government's consultation on data protection reform that PECR's enforcement regime should be aligned with the GDPR and DPA 2018, given the current enforcement fines under PECR are currently a maximum of £500,000. In the Consultation Outcome, the UK government noted that the vast majority of respondents supported this proposal and that it therefore plans to proceed with these proposals, particularly given much of the ICO's enforcement activity to date has focused on unlawful marketing in breach of PECR.⁹⁷

The UK DP Bill 2 does propose to increase maximum enforcement fines under PECR to GDPR levels, which means that serious breaches could be liable to fines of up to 4 per cent of annual global turn over or £17.5 million (whichever is greater).

In 2022, the ICO consulted on its draft Regulatory Action Policy; Statutory Guidance on Regulatory Action and Statutory Guidance on PECR Powers. The consultation closed in March 2022, although final versions have not yet been published. The ICO emphasises in these draft documents the importance of flexibility, responsiveness, as well as transparency. In November 2022, the ICO published its ICO25 strategic plan and its regulatory approach, setting out priorities and policy for the next three years, including a particular focus on safeguarding the vulnerable. According to the strategic plan, the ICO will focus its investigation and project work on: (1) children's privacy including through enforcement of the Children's Code; (2) the impact of technology on vulnerable groups, specifically AI-driven discrimination, the use of biometric technologies, online tracking and the use of CCTV; and (3) issues that may aggravate, or be aggravated by, the cost of living crisis, including the use of intelligence databases by the financial industry, algorithms used within the benefits system, the use of adtech for gambling on social media and predatory marketing calls and data-enabled scams and frauds targeting vulnerable people online and on social media.⁹⁸

96 ICO, Information Commissioner's Annual Report and Financial Statements 2022–2023 accessible at <https://ico.org.uk/media/about-the-ico/documents/4025864/annual-report-2022-23.pdf>.

97 UK government, Consultation Outcome, Data: a new direction – government response to consultation, <https://www.gov.uk/government/consultations/data-a-new-direction/outcome/data-a-new-direction-government-response-to-consultation>.

98 Although final versions have not yet been published. The ICO emphasises in these draft documents the importance of flexibility, responsiveness, as well as transparency. In November 2022, the ICO published its ICO25 strategic plan and its regulatory approach, setting out priorities and policy for the next three (3) years, including a particular focus on safeguarding the vulnerable. According to the strategic plan, the ICO will focus its investigation and project work on: (1) children's privacy including through enforcement of the Children's Code; (2) the impact of technology on vulnerable groups, specifically AI-driven discrimination, the use of biometric technologies, online tracking, and the use of CCTV; and (3) issues that may aggravate, or be aggravated by, the cost of living crisis, including the use of intelligence databases by the financial industry, algorithms used within the benefits system, the use of adtech of gambling on social media, and predatory marketing calls and data-enabled scams and frauds targeting vulnerable people online and on social media.

ii Recent enforcement cases

Following the entry into force of the GDPR, the ICO took a number of high-profile enforcement actions, including fines of: (1) £20 million in relation to a cyber incident at a transport company; (2) £18.4 million in relation to a security incident affecting a hospitality company; (3) £40 million in relation to direct marketing by a financial services company (which was subsequently appealed successfully). These remain the largest fines imposed to date under the GDPR by the ICO, and in (1) and (2), in particular, the ICO was critical of significant failings to implement appropriate security measures to protect the data. Interestingly, in these cases, the eventual fines were significantly smaller than those initially proposed by the ICO (£183 million for (1) and £99.2 million for (2) above). Continuing the theme of issuing fines for security failings, the ICO in late 2020 also fined an events company £1.25 million for failing to put appropriate security measures in place to protect the personal data of its customers to prevent a security incident on a chat box installed on its online payment page, all in 2020. However, in one of the notable cases of 2023, the First Tribunal reviewed the ICO's decision regarding a financial services company, and departed from the ICO's enforcement notice in some respects, mainly due to the lack of evidence provided by the ICO with respect to key issues such as the finding that the company's use of credit reference data for direct marketing purposes was unfair, and that it did not properly assess its lawful basis, as well as in relation to the ICO's finding that the company's privacy notice was not transparent. Notwithstanding this, the First Tribunal also found, in support of the ICO, that the company had not processed the personal data of over 5 million individuals transparently, fairly or lawfully because it failed to notify them that it was processing their data for direct marketing purposes.

In the 2022/2023 period there were fewer high profile, large individual value fines. However, those of particular note are included below.

On 6 October 2022, the ICO fined a catalogue retailer £1.48 million for using personal data of 145,400 customers to predict their medical condition and target them with health-related products without their consent. The ICO investigation found that when a customer purchased a product from the retailer's catalogue, the retailer would profile the customer and make assumptions about their medical condition and then market health-related products to them without their consent.

On 24 October 2022, the ICO fined an outsourcing and construction company, £4.4 million after it suffered a cyberattack in 2020, resulting in the personal data of 113,000 of its current and former employees being compromised.

On 23 May 2022, the ICO fined a facial recognition company £7.5 million for its use of images of people in the UK (and elsewhere) used for facial recognition purposes in an online global database, which included over 20 billion images of data subjects. In combination with the fine, the ICO also issued an enforcement notice, ordering the company to stop obtaining and using the publicly available personal data of UK residents, and to delete the data of UK residents from its systems. This enforcement action was the result of a joint investigation by the ICO with the Office of the Australian Information Commissioner.

The ICO has also issued multiple fines to companies ranging up to £250,000 in the context of nuisance calls and nuisance text messages in breach of PECR.

iii Private litigation

Under the GDPR, data subjects are able to claim for ‘material or non-material damage’ as a result of a breach of the GDPR. In addition, not-for-profit organisations have the right to lodge a complaint on behalf of the data subject. For example, BA was involved in group litigation before the UK High Court against over 50,000 BA customers who were seeking damages as a result of the personal data breach. The case was settled in July 2021.⁹⁹

In addition, a recent case in the UK relating to a former employee who copied payroll data of 100,000 employees onto an external drive and subsequently posted the data on a file sharing website. The individual was jailed for eight years under the UK’s Computer Misuse Act. The employer was found by the court of first instance and the Court of Appeal to be vicariously liable to approximately 5,000 employees who joined the group litigation for breach of confidence and UK data protection laws because it was held that there was a sufficient connection between the employer having authorised the tasks of the former employee (i.e., he was entrusted with the payroll data) and the wrongful acts committed by him. On 1 April 2020, the UK Supreme Court reversed the ruling, holding that the employer was not vicariously liable for a data breach committed maliciously by a former employee who, acting to satisfy a personal vendetta against the employer, had disclosed employee payroll data online, as the wrongful conduct was not so closely connected with acts that he was authorised to do by his employer that it could be fairly regarded as carried out by him during his ordinary course of employment.¹⁰⁰

Moreover, on 28 and 29 April 2021, the UK Supreme Court heard the appeal by Google LLC (Google) against the Court of Appeal’s landmark judgment of 2 October 2019 in the *Lloyd v. Google LLC* case. In this matter, Richard Lloyd, a consumer rights activist, alleged Google breached core data protection principles under the DPA 1998 relating to more than 4 million Apple iPhone users between 2011 and 2012. On 10 November 2021, the Supreme Court dismissed Mr Lloyd’s representative action on the basis that: (1) it was not possible to interpret ‘damage’ under the DPA 1998 to include a pure ‘loss of control’ claim; and (2) while the Supreme Court did not discourage the use of representative action in certain types of claims where uniform per claimant damages are sought, in this case it was considered that a representative action is not a suitable vehicle for the individualised assessment of damages, given not all individual class members were participating in the action.

VIII CONSIDERATIONS FOR FOREIGN ORGANISATIONS

The DPA 2018 applies to a controller established in the UK and processing personal data in the context of that establishment, regardless of whether the processing takes place in the UK. It also applies to foreign organisations not established in the UK, or in any other EEA state, that process personal data in relation to the offering of goods or services to data subjects in the UK or to the monitoring of data subjects in the UK, as far as their behaviour takes place in the UK. Controllers not established in the UK or any other EEA country and processing personal data of data subjects in the UK must nominate a representative established in the UK and comply with the data principles and requirements under the GDPR and DPA 2018.

99 *WM Morrison Supermarkets PLC v. Various Claimants* [2020] UKSC 12.

100 *Lloyd v. Google LLC* [2019] EWCA Civ 1599.

IX CYBERSECURITY AND DATA BREACHES

i Cybersecurity

Investigatory Powers Act 2016 (the Investigatory Powers Act)

The Investigatory Powers Act (IPA) received Royal Assent on 29 November 2016. The Act prohibits the interception of communications without lawful authority and sets out the situations in which there is lawful authority. Various law enforcement and intelligence authorities can, under the IPA, make targeted demands on telecommunications operators.

Under the IPA, the Secretary of State may by giving notice require a public telecommunications operator to retain communications data for a period that must not exceed 12 months if he or she considers that this is necessary and proportionate for one or more of the purposes for which communications may be obtained under the IPA. The IPA also expands the data retention requirements in the DRIP Act that it replaces (see below) to a broader range of communications data, such as site browsing histories.

The IPA is controversial and like its predecessor, the DRIP Act, which was an emergency piece of legislation and automatically expired on 31 December 2016, it has been criticised for lacking basic safeguards and for granting overly expansive powers for the bulk collection of data. The legality of the IPA has already been called into question following a ruling of the CJEU on the data retention provisions in the DRIP Act. One year after receiving Royal Assent, the English High Court issued a landmark judgment declaring the DRIP Act unlawful. The High Court ruled that a number of the provisions in the DRIP Act were incompatible with EU human rights law. However, the ruling was suspended until 31 March 2016 to give UK legislators time to implement appropriate safeguards. Preliminary questions were referred to the CJEU by the English Court of Appeal. On 21 December 2016, the CJEU issued a landmark ruling that effectively upheld an original decision of the High Court in relation to the validity of the provisions of the DRIP Act.⁷³ Although the ruling concerned the DRIP Act, the IPA does little to address the criticisms of the DRIP Act in the CJEU's judgment and in some cases provides for even more extensive powers than under the DRIP Act. The case was returned to the Court of Appeal, who in January 2018, issued its judgment, ruling the DRIP Act was incompatible with EU law as the DRIP Act did not restrict the accessing of communications data to 'investigations of serious crime' nor did requests by police or other public bodies to access communications data meet independent oversight by way of a 'prior review by a court or independent administrative authority'. The UK government responded that it was making amendments to the IPA to take into account judicial criticisms of the DRIP Act. The UK High Court ruled in April 2018 that the UK government had six months to introduce changes to the IPA to make it compatible with English law. On 31 October 2018, the Data Retention and Acquisition Regulations 2018 came into force to address the UK High Court's ruling.

The Regulation of Investigatory Powers Act 2000 (RIPA)

The interception powers in Part 1, Chapter 1 of RIPA have been repealed and replaced by a new targeted interception power under the IPA. In February 2023, the Home Secretary appointed Lord (David) Anderson KBE KC to carry out an independent review of the IPA and a report was produced in June 2023.¹⁰¹ The Home Office is currently considering Lord Anderson's recommendations ahead of any potential reform to the IPA.

Separately, it is important to note that in October 2022, the Agreement on Access to Electronic Data for the Purpose of Countering Serious Crime between the US and the UK (the Data Access Agreement) entered into force. The Data Access Agreement is authorised by the 2018 US Clarifying Lawful Overseas Use of Data (CLOUD) Act, allowing both country's official investigators to obtain access to vital data to combat serious crime consistent with privacy and civil liberties standards.

UK cybersecurity strategy

In March 2013, the government launched the Cyber-security Information Sharing Partnership to facilitate the sharing of intelligence and information on cybersecurity threats between the government and industry.

The government has also developed the Cyber Essentials scheme, which aims to provide clarity on good cybersecurity practice.

Along with the Cyber Essentials scheme, the government has published the Assurance Framework, which enables organisations to obtain certifications to reassure customers, investors, insurers and others that they have taken the appropriate cybersecurity precautions. The voluntary scheme is currently open and available to all types of organisation.

In June 2015, the government launched a new online cybersecurity training course to help the procurement profession stay safe online.

In July 2015, the government announced the launch of a new voucher scheme to protect small businesses from cyberattacks, which will offer micro, small and medium-sized businesses up to £5,000 for specialist advice to boost their cybersecurity and protect new business ideas and intellectual property.

In January 2016, the government announced plans to assist start-ups offering cybersecurity solutions. Such start-ups will be given help, advice and support through the Early State Accelerator Programme, a £250,000 programme designed to assist start-ups in developing their products and bringing them to market. The programme is run by Cyber London and the Centre for Secure Information Technologies, and is funded by the government's National Cyber Security Strategy programme.

In March 2016, the government announced that the UK's national cyber centre (announced in November 2015) would be called the National Cyber Security Centre (NCSC). The NCSC, which is based in London, opened in October 2016 and intends to help tackle cybercrime.

101 Lord Anderson, Independent Review of the Investigatory Powers Act 2016, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1166726/Independent_Review_of_the_Investigatory_Powers_Act_2016-FINAL.pdf.

In response to the European Parliament's proposal for an NIS Directive in March 2014, which was part of the European Union's Cybersecurity Strategy, and proposed certain measures including new requirements for 'operators of essential services' and 'digital service providers', the UK government has implemented the NIS Directive into national law in the form of the UK Network and Information Systems Regulations 2018 (the NIS Regulations), which came into force on 10 May 2018.

The NIS Regulations have established a legal framework that imposes security and notification of security incident obligations on: (1) operators of essential services (OESs), being energy, transport, digital infrastructure, the health sector and drinking water supply and distribution services; and (2) on relevant digital service providers (RDSPs), being online marketplace providers, online search engines and cloud computing service providers.

The UK government has indicated that it plans to amend the NIS Regulations to widen its scope to include Managed Service Providers (MSPs) which provide specialised online and digital services. MSPs include security services, workplace services and IT outsourcing.

The NIS Regulations also require the government to outline and publish a strategy to provide strategic objectives and priorities on the security of the network and information systems in the UK.

The NIS Regulations also impose a tiered system of fines in proportion to the impact of the security incident, with a maximum fine of £17 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.

Controllers in the UK may in the event of a data security breach have to notify the relevant authorities both under the GDPR and the NIS Regulations.

New legislation is also being proposed, especially in those sectors where the UK government perceives there to be the greatest potential impact of cyberattacks such as within public authorities and to critical service providers. The UK government also hopes to empower intelligence agencies to tackle cybersecurity threats from malicious state actors including through the Counter State Threats Bill and the plans to amend the Proceeds of Crime Act 2002 (POCA). The aim of the amended POCA is to identify, seize and recover the proceeds of cybercrime. The UK government has also indicated it wants to do more to protect consumers from cyberattacks, including through regulating the internet of things (IoT) with a new bill entitled the Product Security and Telecommunications Infrastructure Bill (PST). Such legislative updates are planned to compliment other policy efforts, including the Plan for Digital Regulation and the National Strategies on AI and data, respectively.

On 15 December 2021, the UK government published its 2022 National Cyber Strategy and its first Cyber Security Strategy for 2022–2030. The reports recognise that there is currently a 'significant gap' in the UK's cyber resilience and proposes a range of recommendations and measures. These include to adopt the NCSC's Cyber Assessment Framework (CAF) to ensure that there is an industry standard of cybersecurity. Further, the UK government will establish a cyber coordination centre (GCCC), which will liaise between government organisations in an effort to share cybersecurity data and intelligence rapidly. In addition, the UK government wants to hone its ability to tackle cyberbreaches. For example, by working in partnership with the Alan Turing Institute to learn how to use artificial intelligence to detect cyberattacks more efficiently. The National Cyber Strategy outlines five priority actions that will form the pillars of the UK strategy:

- a* strengthening the UK cyber ecosystem by investing in people and skills, and deepening the partnership between government, academia and industry;

- b* building a resilient and prosperous digital UK by reducing cyber risks and ensuring citizens are more secure online;
- c* taking the lead of the technologies vital to cyber power;
- d* advancing UK global leadership and influence for a more secure, prosperous and open international order; and
- e* detecting, disrupting and deterring adversaries to enhance UK security.

On 19 April 2023, the UK government released a report on cybersecurity breaches following a survey of UK businesses about their approach to cybersecurity and any breaches or attacks that had been suffered over the prior 12 months. The report notes that 32 per cent of all UK businesses surveyed identified at least one cybersecurity breach or attack in the prior 12 months, a decrease from 39 per cent in 2022. Of that 32 per cent, around a third ended up being victims of cybercrime (e.g., a hacking, denial of service, or malicious software attack). Further, the report also notes that 57 per cent of the surveyed businesses had a policy not to pay ransoms. The report also notes that 79 per cent of data breaches were caused by fraudulent emails, with viruses, spyware and malware making up 11 per cent, impersonating an organisation in emails or online 31 per cent and finally, ransomware making up 4 per cent of incidents.

ii Data breaches

Under the GDPR, controllers are required to report personal data breaches to the ICO without undue delay, unless the breach is unlikely to result in a risk to the rights and freedoms of the data subject and, where feasible, no later than 72 hours after the controller becomes aware of the breach.¹⁰² If a controller does not report the data breach within 72 hours, it must provide a reasoned justification for the delay in notifying the ICO. The controller is also subject to a concurrent obligation to notify affected data subjects without undue delay when the notification is likely to result in a high risk to the rights and freedoms of natural persons.¹⁰³ Under the GDPR, processors also have an obligation to notify the controller of personal data breaches without undue delay after becoming aware of a personal data breach.¹⁰⁴

According to the ICO, there should be a presumption to report a breach to the ICO if a significant volume of personal data is concerned and also where smaller amounts of personal data are involved but there is still a significant risk of individuals suffering substantial harm.¹⁰⁵

The ICO has stated that the 72-hour deadline to report a personal data breach includes evenings, weekends and bank holidays,¹⁰⁶ and where a controller is not able to report a breach within the 72-hour deadline, it must give reasons to the ICO for its delay.

As part of the notification, the ICO requires controllers to inform the ICO of:

- a* the number of data subjects affected by the personal data breach;
- b* the type of personal data that has been affected;
- c* the likely impact on the data subjects as a result of the personal data breach;

102 Article 33(1) of the GDPR.

103 Article 34 of the Regulation.

104 Article 33(2) of the Regulation.

105 ICO, Personal Data Breach Reporting Webinar, 19 July 2018.

106 *ibid.*

- d* steps the controller has taken to rectify the personal data breach and to ensure it does not happen again; and
- e* the name of the DPO or another point of contact for the ICO to request further information.

The GDPR also imposes a requirement on controllers to inform the data subject where the personal data breach represents a high risk to their rights and freedoms. The ICO, in a webinar in July 2018,¹⁰⁷ stated it was of the view that the threshold is higher for informing data subjects of the personal data breach than it is for informing the ICO of the personal data breach. According to the ICO, this is because the aim of informing data subjects is so that they can take action to protect themselves in the event of a personal data breach. Therefore, informing them of every personal data breach, regardless of whether it has an effect on the data subject, can lead to notification fatigue, where the consequences of the breach are relatively minor.

In addition, when notification is given to the ICO of the personal data breach, the ICO can also require the controller to inform the data subjects of the personal data breach.

In addition, under the PECR82 and the Notification Regulation,¹⁰⁸ internet and telecommunication service providers must report breaches to the ICO no later than 24 hours after the detection of a personal data breach where feasible.¹⁰⁹ The ICO has published guidance on this specific obligation to report breaches.¹¹⁰

X SOFTWARE DEVELOPMENT AND VULNERABILITIES

There are no specific UK laws to address software developments or reporting requirements aside from NIS D1. In addition, the OSB and the DMCCB have already been addressed in Section III.i.

XI DIGITAL GOVERNANCE AND CONVERGENCE WITH COMPETITION POLICY

Following Brexit, the newly introduced EU laws on digital governance and competition law, including the Digital Services Act and the Digital Markets Act, no longer apply in the UK. However, the UK regime is currently in the process of developing its own similar legislation, namely the UK Online Safety Bill (OSB)¹¹¹ and the UK Digital Markets, Competition, and Consumer Bill (the DMCCB).¹¹² Both proposed Bills are still under review and, therefore, may be subject to change.

107 PECR Regulation 5A(2).

108 Commission Regulation No. 611/2013 of 24 June 2013 on the measures applicable to the notification of personal data breaches under Directive 2002/58/EC of the European Parliament and of the Council on privacy and electronic communications (the Notification Regulation), which entered into force on 25 August 2013.

109 Article 2 of the Notification Regulation. The content of the notification is detailed in Annex 1 to the Notification Regulation.

110 ICO, Guidance on Notification of PECR Security Breaches, 26 September 2013.

111 See Online Safety Bill accessible at <https://bills.parliament.uk/bills/3137>.

112 See Digital Markets, Competition and Consumer Bill accessible at <https://bills.parliament.uk/bills/3453>.

The OSB was introduced into UK parliament on 17 March 2022 and is about to commence its consideration of amendments as of 11 September 2023. The OSB is a proposed UK law to establish a new regulatory regime to address illegal and harmful content online. Among other requirements, the OSB will impose a duty of care in relation to illegal content as well as content that is harmful to both adults and children on providers of internet services that allow users to upload and share user-generated content. The OSB forms part of the UK's wider mission to develop rules and norms for the internet. The OSB will apply to providers of 'user-to-user' services (i.e., providers of internet services that allow users to encounter content generated, uploaded or shared by others) and 'search services' (i.e., providers of search engines which enable users to search multiple websites and databases). Expressly excluded from scope are SMS and MMS, one-to-one live aural communication, internal business services, limited functionality services that only allow comments and reviews, paid-for advertisements and news publisher content.

The DMCCB was introduced into UK parliament on 25 April 2023 and is now due to have its Report Stage and a Third Reading in the House of Commons, where further amendments can be made. The DMCCB aims to regulate competition in digital markets and to amend the Competition Act 1998 and Enterprise Act 2002 to promote fair competition in the digital and technology market. The most onerous requirements will fall on very large tech businesses with a global turnover exceed £25 billion or a UK turnover exceeding £1 billion. Of the businesses that meet the aforementioned thresholds, a new Digital Markets Unit (DMU) is to identify individual companies as having 'strategic market status' (SMS), with such companies being subject to a bespoke Code of Conduct, and regulatory measures to include those in relation to access and use of data. Further, the DMCCB is set to bolster the Competition Markets Authority's (CMA) powers to investigate and sanction digital businesses including through new maximum fines of up to 10 per cent of global annual turnover for certain violations of consumer law. The DMCCB therefore overlaps in its regulation of competition and data laws. Reflecting this, the CMA is required to consult the ICO to the extent that a proposal to exercise a regulatory digital markets function is likely to have a 'material adverse effect' on the ICO's ability to enforce data protection legislation and PECR.

XII OUTLOOK

It is likely that a continued focus will remain on international transfers following the publication of the UK IDTA and updated guidance from the ICO on international transfers and TRAs. In relation to the EU-US DPF, which was recently announced, while it has been confirmed that a proposed UK Extension to the DPF facilitating transfers between the US and UK will be established, no set timeline has been announced regarding this, though it is understood that this is a priority for both countries, after an agreement in principle was reached in June 2023. There is also no doubt that a crucial topic that we expect to see further developments on in the coming year will be the UK government's data protection reform, as the UK DP Bill 2 moves through the parliamentary process. Another area of interest will be the UK's regulation of the digital space more broadly, including its AI strategy, which was set out in its White Paper published in March, and the OSB, which will impose content moderation requirements on social media platforms – particularly concerning scanning for inappropriate content for children. In relation to AI, the UK's AI strategy does not envision new legislation and will instead adopt a decentralised, sector-specific and guidance-based

approach, with cross-sectoral principles underpinning all guidance, in the hopes that this will promote innovation and flexibility. Sector-specific guidance from various regulators is anticipated in the following year, and it remains to be seen how the AI White Paper's cross-sectoral principles will be interpreted and applied in practice. With respect to the OSB, the Bill is expected to receive royal assent this year, notwithstanding continuing debate over key issues around whether platforms will be required to decrypt encrypted messages involving suspected child sexual abuse content, and around age gating of certain online content.

