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# Data Protection Update

Joanna de Fonseka & Ben Slinn | Tuesday 9 November 2021



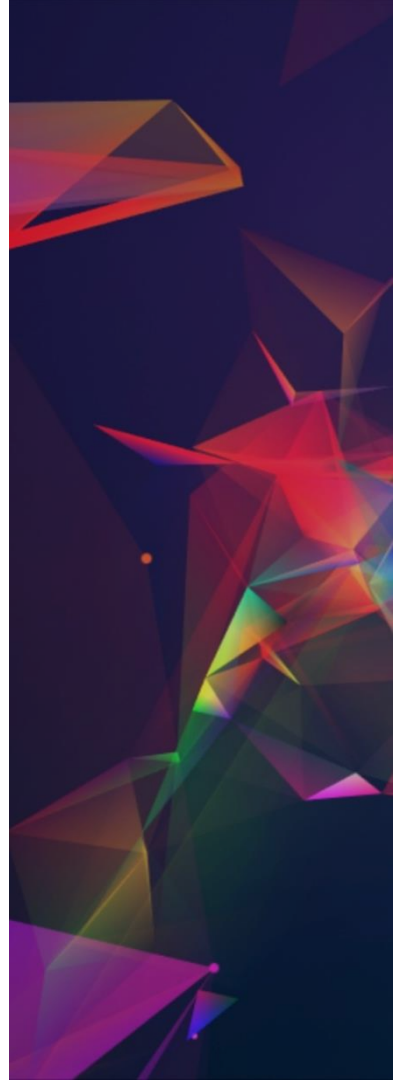
# Speakers



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# Agenda

- 1 International data transfers: EU position
- 2 International data transfers: UK position
- 3 UK proposals for data protection reform
- 4 Other key UK developments:  
What else has happened?



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# International data transfers: EU position

# New EU standard contractual clauses

## Current position

- New EU SCCs under EU GDPR to take account of the GDPR and Schrems II
- Phased approach for using new EU SCCs:
  - New contracts/processing: must use new EU SCCs from **27 September 2021**
  - Existing contracts/processing: must update to include new EU SCCs by **27 December 2022**
- Bifurcated approach to international data transfers for organisations processing EU and UK personal data for now (but note ICO consultation on data transfers under UK GDPR)
- Additional new EU SCCs for transfers to importers subject to Art 3(2) GDPR?



# New EU standard contractual clauses

## Practical issues



Modular approach (C2C, C2P, P2P, P2C)



Use by non-EU data exporters



Annexes – must clearly distinguish information applicable to each transfer/category of transfers



Optional clauses / elections (but otherwise must not be modified)

- Clause 7 – docking clause
- Clause 9 – sub-processors (C2P and P2P only)
- Clause 11 – redress
- Clause 13 – supervision
- Clauses 14 and 15 – local laws and obligations in case of access by public authorities (in practice, means a TIA is required)
- Clauses 17 and 18 – governing law and jurisdiction



# Transfer impact assessments – EU position



## What is a TIA?

- Assessment of the **protections** contained in the **appropriate safeguard** (generally SCCs), taking into account the **legal framework** of the destination country.
- Required under new EU SCCs.



## How should we conduct a TIA?

- Must take account of EDPB recommendation on supplementary measures
- Document assessment – and keep under regular review
- Range of approaches in practice



## When to complete a TIA?

- Preferably **before** you rely on an appropriate safeguard to make a restricted transfer.



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# International data transfers: UK position



# International Data Transfers

## Current UK Position

- UK GDPR applies as of 1 January 2021
- Schedule 21 of UK DPA 2018: transitional provisions which allow for:
  - Continued transfers to EEA and jurisdictions with adequacy decision from European Commission; and
  - Use of standard contractual clauses
- However, only if approved before the end of the Brexit Transition Period
- Therefore, new EU SCCs not currently recognised under the UK DPA 2018 or UK GDPR



# International Data Transfers

## ICO Consultation

- ICO consultation on data transfers under the UK GDPR
- Proposal for new International Data Transfer Agreement:
  - Would replace use of the standard contractual clauses
  - Structure: (a) tables; (b) extra protection clauses; (c) option for commercial clauses; and (d) mandatory clauses.
- UK Addendum to EU SCCs
- International Transfer Risk Assessment guidance and Transfer Risk Tool
  - Step 1 – assessing the transfer
  - Step 2 – enforceability in the destination country
  - Step 3 – appropriate protection for personal data from third party access / surveillance in the destination country



The background features a complex, abstract geometric pattern of overlapping, semi-transparent polygons in shades of purple, blue, and red. In the upper right corner, there is a network of small, colorful dots connected by thin lines, resembling a data visualization or a molecular structure. The overall aesthetic is modern and digital.

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# UK proposals for data protection reform

# "Data: A new direction"

- Department for Digital, Culture, Media & Sport – consultation closes 19 November 2021
- Legitimate interests – limited, exhaustive list – no need for balancing test
- Proposals aimed at reducing burdens on businesses / better outcomes for people:
  - Flexible risk based accountability framework – privacy management programmes
  - Removal of requirements to designate a DPO
  - Removal of requirement to conduct a DPIA
  - Removal of requirement for prior consultation with ICO
  - Removal of art 30 record keeping requirement
  - Change the breach reporting threshold
  - Voluntary undertaking process



# "Data: A new direction"



- Subject Access Requests – proposals for a fee regime, and change the threshold for response
- Cookies:
  - Analytics cookies without consent
  - Use of cookies without consent for limited purposes – legitimate interests where impact on the privacy of the individual is likely to be minimal (e.g., technical faults or enabling use of video or other enhanced functionality on websites)
  - Removal of consent for all types of cookies?
- Direct marketing: soft opt-in extension to non-commercial organisations (charities, political parties)
- Increased level fines for breaches of PECR, in line with UK GDPR (£17.5m or 4% global turnover)
- Adequacy – intention to add more countries – "ambitious programme of adequacy assessments"

The background features a complex, abstract geometric pattern. It consists of numerous overlapping, semi-transparent triangles in various colors, including shades of red, orange, purple, and blue. The triangles are arranged in a way that creates a sense of depth and movement. In the upper right corner, there is a network of small, colorful dots (red, green, blue, yellow) connected by thin lines, resembling a molecular structure or a data network. The overall color palette is dark, with the vibrant colors of the shapes standing out against a deep blue and black background.

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# Key UK developments and recent enforcement trends





## Data Sharing Code of Practice

- Now in force as of 5 October 2021
- Statutory code of practice prepared under s121 DPA 2018
- ICO will take the code into account when considering whether organisations have complied with DP obligations



## Direct marketing

- Remains an enforcement priority for ICO
- May 2021: £90,000 fine for sending over four million emails classed as service emails to customers; ICO concluded these were in fact marketing emails
- September 2021: three fines totalling £495,000 for sending millions of nuisance emails and texts without valid consent



## Age Appropriate Design Code

- Statutory code of practice prepared by ICO
- Effective from 2 September 2021
- Sets out 15 standards of age appropriate design
- Applies to online services “likely to be accessed by children”
- Children = anyone under the age of 18

# Questions

The background features a large white circle on the left side, set against a dark blue gradient. On the right side, there are colorful, low-poly geometric shapes in shades of purple, red, and blue, resembling a network or data visualization. The overall aesthetic is modern and tech-oriented.

The image features the Baker McKenzie logo in the top left corner, set against a dark background with a complex, abstract geometric pattern of overlapping triangles in shades of purple, blue, and red. The logo consists of the words "Baker" and "McKenzie." stacked vertically in a white, sans-serif font. The background pattern is dense and multi-colored, with some areas appearing more vibrant than others, creating a sense of depth and movement.

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