



## **Commercially Connected: December 2019**



Welcome to the Eversheds Sutherland monthly commercial law update, covering both case law and regulatory development as well as progress on Brexit. *This report is intended to give you a general overview of legal developments in certain areas. It is provided for information purposes only and is not intended to be comprehensive or to constitute advice on which you may rely.*

# Topics covered

Click on your topic of interest below:

Brexit

Commercial –  
general

Consumer law

Cyber security

Data protection  
and privacy law

IP

IT

Public sector

Focus on  
disruptive tech



Development	Summary	Links
Next steps for Brexit	<p>Given the general election result, we expect the following to happen:</p> <ul style="list-style-type: none"> <li>• reintroduction of the <b>Withdrawal Agreement Bill</b> into Parliament (expected on Friday 19 December), with the aim of being passed by the new Conservative majority to enable the UK's withdrawal from the EU by 31 January 2020</li> <li>• this Withdrawal Agreement Bill is likely to contain different provisions to that introduced in October (for example, we could see the removal of certain provisions that were included in order to obtain the support of particular MPs and in relation to the process of requesting an extension to the transitional period - see below)</li> <li>• negotiations with the EU on the future trading relationship. The European Council will expect the parameters for discussion to be based using the text of the Political Declaration agreed in October</li> <li>• within the withdrawal agreement agreed with the EU in October there is a deadline of 1 July 2020 for the UK to request an extension to the transition period but as at 18 December it has been reported that the UK Government is intending to write into the proposed Withdrawal Agreement Bill that this extension cannot be requested. This would mean that the transition period will expire on 31 December 2020. If there is no finalised free trade agreement with the EU at this point or in respect of any elements of trade not agreed within a limited trading agreement (such as a zero tariffs zero quotas deal on goods only), the relationship between the UK and the EU will default to WTO terms</li> <li>• reintroduced Brexit legislation such as the stalled Trade Bill and new immigration legislation to introduce the Conservative promised points-based system</li> </ul>	
The view from the EU	The <b>European Council</b> issued a paper on 13 December reiterating the basis for the UK exit as the agreed withdrawal agreement and the parameters of the Political Declaration and reiterating their previously stated position: "the future relationship will have to be based on a balance of rights and obligations and ensure a level playing field". Michel Barnier has been reappointed to lead these negotiations.	<a href="#">European Council conclusions of 13 December 2020</a>
What happens during the transition period?	<p>During the transition period, if ratified by both the UK and EU Parliaments, the provisions of the <b>withdrawal agreement</b> issued in October 2019 will apply. The key points are:</p> <ul style="list-style-type: none"> <li>• EU law and the international agreements to which the EU is a party will continue to apply in full the UK until the end of this period under <b>Article 127</b>: "Union</li> </ul>	<a href="#">Withdrawal agreement of October 2019</a>



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	<p>law shall be applicable to and in the United Kingdom during the transition period". This includes for the most part changes to EU law adopted during the transition period, with interpretation subject to case law of the CJEU during this period</p> <ul style="list-style-type: none"> <li>the arrangements for Northern Ireland come into force automatically at the end of this period</li> <li>there are no commitments within the withdrawal agreement committing the UK to level playing field commitments. If these are agreed and in whatever form they are agreed, they will be part of a future trading agreement between the UK and the EU</li> </ul> <p>In order for the withdrawal agreement to have the force of law in the UK, as an international treaty, it needs to be given force by the passing of the proposed Withdrawal Agreement Bill. The Bill will provide for the direct application of the withdrawal agreement provisions in the UK domestic law mainly by amending the existing European Union (Withdrawal) Act 2018.</p>	
Conservative manifesto	<p>Although not all Brexit related, the <b>Conservative manifesto</b> contains the following very general statements of interest to businesses across the spectrum:</p> <ul style="list-style-type: none"> <li>an Australian style points-based system to control immigration</li> <li>climate change "reaching net zero by 2050"</li> <li>"We will not raise the rate of income tax, VAT or National Insurance" during the next Parliament</li> <li>"We will not extend the [transition] period beyond December 2020"</li> <li>replacing EU structural funds with a UK Shared Prosperity Fund, for investment across the whole of the UK</li> <li>an aim to have 80% of UK trade covered by free trade agreement within the next three years, starting with the USA, Australia, New Zealand and Japan</li> <li>building Northern Powerhouse rail between Leeds and Manchester before focussing on other places in the North, investing in the Midlands Rail Hub and in improving train lines in other places and restoring some closed lines</li> <li>ending the existing rail franchising model</li> <li>more rapid electric vehicle charging stations and consulting on phasing on conventional petrol and diesel cars</li> </ul>	<a href="#">Manifesto</a>



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	<ul style="list-style-type: none"><li>• on HS2 only a promise to consider the findings of the latest review</li><li>• a commitment to devolve power “to people and places across the UK. Our ambition is for full devolution across England”, with a white paper promised next year</li><li>• reducing business rates via a review of the system</li><li>• strengthening the powers of the Small Business Commissioner including on late payment</li><li>• increasing the tax credit rate on R&amp;D tax credits to 13% and reform Entrepreneur’s Relief</li><li>• exploring how the Government can better support the self-employed</li><li>• implementing the Digital Services Tax</li><li>• consolidating and expanding anti-evasion and avoidance of tax measures</li><li>• giving workers a right to request “a more predictable contract and other reasonable protections”</li><li>• introducing a new Environment Bill with a new independent Office for Environmental Protection and introduce legal targets for air quality</li><li>• introducing a new levy to increase the proportion of recyclable plastics in packaging and introduce extended producer responsibility so that producers pay the full costs of dealing with the waste they produce and ban the export of plastic waste to non-OECD countries</li><li>• establishing up to 10 new freeports</li></ul>	



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<p>Financial series outsourcing and third party risk management</p>	<p>The <b>Prudential Regulation Authority</b> has issued a consultation paper setting out its proposals for modernising the regulatory framework on outsourcing and third party risk management. These proposals:</p> <ul style="list-style-type: none"> <li>• complement the policy proposals on operational resilience reported in the <b>Cybersecurity</b> section below</li> <li>• aim to facilitate greater adoption of the cloud and other new technologies;</li> <li>• implement the European Banking Authority’s Outsourcing Guidelines and clarify how the PRA expects banks to approach these outsourcing guidelines as well as elaborating on particular elements (such as data security and business continuity and exit plans)</li> <li>• take account of draft European Insurance and Occupational Pensions Authority Guidelines on Outsourcing to Cloud Service Providers.</li> </ul> <p>This paper is relevant to all UK banks, building societies and PRA designated investment firms, insurance and reinsurance firms and groups in scope of Solvency II.</p> <p>Consultation closes on 3 April 2020, with the PRA proposing to publish its final policy in the second half of 2020, with implementation shortly afterwards, although certain proposals which derive from the EBA Outsourcing Guidelines or, the draft EIOPA Cloud Guidelines would be subject to longer implementation periods.</p>	<p><a href="#">Consultation paper</a></p>
<p>Update on good faith</p>	<p>You may remember from last year the case of <b>Bates v Post Office</b> which arose out of a long running dispute between the Post Office and certain sub postmasters relating to the workings of an IT system that the sub-postmasters were required to use. The judge in that case implied various terms into this contract on the basis that it was a relational contract, including one relating to good faith. It has been reported that the Post Office has settled the case in mediation, so it does not look like we will get a Court of Appeal decision on whether the implication of these terms on good faith was correct. A separate decision on this dispute is commented on in the <b>IT</b> section below.</p>	<p><a href="#">Judgment</a></p>
<p>Unilateral exclusive jurisdiction clauses</p>	<p>The Court in <b>Etihad Airways v Flother</b> looked at the status of a unilateral or asymmetric jurisdiction clause under the <b>Brussels Recast Regulation</b> and held that under English law these types of jurisdiction clauses fall within the reference to “exclusive jurisdiction” agreements in Article 31(2) of the Brussels Recast Regulation, the implication being that where a party has already commenced proceedings in breach of such an exclusive agreement in another EU member state court, the second seised court is not required to grant a stay in favour of the first seised court.</p>	<p><a href="#">Judgment</a></p>



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	<p>As a reminder, a unilateral exclusive jurisdiction clause is a type of hybrid jurisdiction clause which is unilaterally exclusive by binding one party to a selected jurisdiction but gives the other party the additional option to sue in other courts.</p> <p>As the UK will lose access to the Brussels Recast regime at the end of the Brexit transition period, the issue will then become whether a unilateral exclusive jurisdiction clause is treated as an exclusive jurisdiction clause under the <b>2005 Hague Convention on Choice of Courts Agreements</b> if the UK accedes to this at the end of this transition period. Interestingly, the judge in this case said “There are good arguments that the rules in the Hague Convention are engaged by an asymmetric clause” and “there is a powerful case for saying that the conclusions reached in relation to Brussels Recast should assist in dictating the answer under the Hague Convention”, although this is only an opinion under English law and not of a court of another signatory to the Hague Convention.</p>	
When is a promise to pay a guarantee?	A Court of Appeal decision in <b>Abbhi v Slade</b> has held that an agreement by one individual to give another money to pay legal fees if that second individual could not afford to pay those fees was not a guarantee of those fees but a primary obligation. Part of the reasoning was based on the fact that all the parties knew from the outset that the second individual could not afford to pay the fees and therefore their payment was not reliant on any default occurring. As the obligation was a primary obligation not a guarantee, it did not have to be in writing to be effective (whereas if it had been a guarantee it would have needed to be in writing and signed by the guarantor).	<a href="#">Judgment</a>
Product liability claims for discontinued items	The High Court in <b>Wilson v Beko</b> has held that a consumer could not circumvent the ten-year limitation period for the strict liability regime contained in Part I of the Consumer Protection Act 1987 by claiming that there was a breach of safety regulations made pursuant to Part II of that Act. The decision appears to shut down the ability to make “backdoor” claims for defective products once the limitation period in Part I of the Consumer Protection Act has expired, with the result that manufacturers may be at less risk of being subject to strict liability claims in relation to products that may have already been discontinued.	<a href="#">Judgment</a>
EU product regulation	The <b>European Commission</b> has started preparations to update the <b>Blue Guide</b> on EU product rules and has invited comments by 15 January 2020. The Blue Guide was first published in 2000 and has since become one of the main reference documents explaining how to implement EU product legislation.	<a href="#">Consultation</a>



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Meaning of “consumer” in EU jurisdiction regime

In **Petruchova v Fibo Group Holdings** (Case C-208/18), the ECJ has clarified the meaning of “consumer” in **Articles 17 to 19** of the **Brussels Recast Regulation**, which allow a consumer to bring proceedings in the member state where the consumer is domiciled, despite a jurisdiction agreement. The court held that an individual who carried out foreign exchange transactions under a contract must be classified as a consumer if the conclusion of that contract did not fall within the scope of that individual’s professional activity. In a situation such as this, the question was whether a person might be refused the status of consumer on the grounds of the value of the transactions, I can the risk of financial loss and any knowledge or expertise of the person but the ECJ held that these were, in principle, irrelevant. It therefore remains a difficult question as to how to classify a wealthy private investor for these purposes.

[Judgment](#)



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<p>Operational resilience in the financial services sector</p>	<p>The <b>Prudential Regulation Authority, Financial Conduct Authority</b> and <b>the Bank of England</b> have published consultation papers on how financial services firms can try to avoid operational disruption.</p> <p>The key points are:</p> <ul style="list-style-type: none"> <li>• definitions of the key terms “operational resilience”, “impact tolerance” and “important business service”;</li> <li>• firms to:                             <ul style="list-style-type: none"> <li>○ identify their important business services that if disrupted could cause harm to consumers or market integrity, threaten the viability of firms, or cause instability in the financial system;</li> <li>○ set impact tolerances for each important business service;</li> <li>○ identify and document the people, processes, technology, facilities and information that support their important business services; and</li> <li>○ take actions to be able to remain within their impact tolerances through a range of severe but plausible disruption scenarios.</li> </ul> </li> </ul> <p>Firms have until 3 April 2020 to submit responses to these proposals.</p>	<p><a href="#">Consultation papers</a>  <a href="#">Joint Paper</a></p>
<p>Investment Association report on operational resilience</p>	<p>The <b>Investment Association</b> has published a report on operational resilience, identifying ways in which firms can improve their systems and controls, and identifying key areas where they should ensure they understand the workings of their business services.</p>	<p><a href="#">Report</a></p>
<p>EBA publishes final guidelines on ICT and security risk management</p>	<p>The <b>European Banking Authority</b> has published its final <b>Guidelines on ICT and security risk management</b> for credit institutions, investment firms and payment service providers. The Guidelines enter into force on 30 June 2020.</p>	<p><a href="#">Guidelines</a></p>
<p>Security by design for Internet of Things</p>	<p>The <b>European Union Agency for Cybersecurity</b> has published a Good Practices for Security of IoT report. It focuses particularly on software development guidelines, giving advice on how to securely collect requirements, design, develop, maintain, and dispose of IoT systems and services.</p>	<p><a href="#">Report</a></p>
<p>ISO releases new international standards for Internet of Media Things</p>	<p>The International Organisation for Standardisation has released a new set of international standards for the Internet of Media Things. The new standards have been developed to provide the requirements and common language to enable media devices,</p>	<p><a href="#">Press release</a></p>



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	applications and services to work together. They aim to facilitate the deployment of large-scale interoperable IoMT applications.	
ENISA releases report on port cybersecurity	The <b>European Union Agency for Cybersecurity</b> has released a report "Good practices for Cybersecurity in the Maritime Sector – Port Security" highlighting good practices in addressing port cybersecurity. The report is aimed at shipping and railway operators and port service companies.	<a href="#">Press release</a> <a href="#">Report</a>
ENISA launches security mapping tool	The <b>European Union Agency for Cybersecurity</b> has launched a security mapping tool to help operators of essential services in the energy, transport, banking, financial market infrastructures, health, drinking water supply and distribution and digital infrastructures sectors. The tool stems from the requirements of the NIS Directive and enables operators of essential services to search for security measures and their respective security controls in international standards research on the different international security standards.	<a href="#">Press release</a> <a href="#">Tool</a>
ENISA releases 'Cyber Security and Resilience of smart cars' report	The <b>European Union Agency for Cybersecurity</b> has released a report called "Cyber Security and Resilience of smart cars" aimed at smart car manufacturers, tiers and aftermarket vendors, insurance companies, industry groups and associations, and security companies.	<a href="#">Press release</a> <a href="#">Report</a>
ENISA prepares a cybersecurity certification candidate scheme for cloud services	The <b>European Union Agency for Cybersecurity</b> has announced its intention to launch a cybersecurity certification candidate scheme, following a request from the European Commission.	<a href="#">Press release</a>
ENISA publishes a report on pseudonymisation techniques and best practices	The <b>European Union Agency for Cybersecurity</b> has published a report "Pseudonymisation techniques and best practices" which explains key technical recommendations to implement pseudonymisation in business practice.	<a href="#">Report</a> <a href="#">Press release</a>
EU Commission publishes EU Cybersecurity Taxonomy	The <b>European Commission</b> has published an updated version of its European Cybersecurity Taxonomy which provides guidance on the classification of cybersecurity terminologies, definitions and domains across the EU.	<a href="#">Press release</a> <a href="#">Taxonomy</a>



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Schrems II – AG Opinion expected on 19 December	The AG’s opinion in Case C-311/18 Data Protection Commissioner v Facebook Ireland Limited, Maximillian Schrems (widely referred to as <b>Schrems II</b> ) is expected to be published on 19 December. In Schrems II, Mr Schrems has challenged the legitimacy of certain transfers of personal data from the EEA to the US which are subject to “mass surveillance” and safeguarded on the basis of the European Commission approved standard contract clauses. The complaint was referred to the CJEU for a preliminary ruling, and heard on 9 July 2019.	<a href="#">Case details</a>
ePrivacy Regulation progress stalls	In summary, despite continued efforts made by the Finnish Presidency of the Council of the EU to progress the proposal, EU member states have not been able to agree a common position on the proposed legislation. The Internal Market Commissioner announced on 3 December that the European Commission will table a new proposal for the Croatian Presidency to progress from January 2020. It remains to be seen whether this materialises.	<a href="#">Progress report</a>
ICO AI auditing framework	See our summary in the section <b>Focus on Disruptive Tech</b> below.	
ICO launches consultation on guidance on how explaining AI decision making	See our summary in the section <b>Focus on Disruptive Tech</b> below.	
ICO discusses data protection fee	<p>In a blog post, the <b>ICO</b> discuss their recent campaign to remind registered companies of their obligation to pay the data protection fee as required under the Data Protection Act 2018, unless the organisation is exempt.</p> <p>The ICO has provided a self-assessment checker to enable companies to check whether they need to pay the fee. However, if an organisation holds personal information for business purposes on any electronic device, it is likely that they will be required to pay the annual fee. The amount of the fee will depend on the size and turnover of a company, and it will range from £40 to £2,900.</p>	<a href="#">Blog post</a>
EDPB launches a consultation on the right to be forgotten on search engines guidelines	The <b>European Data Protection Board</b> has launched a consultation on the Guidelines on the Criteria of the Right to be Forgotten in Search Engines. These interpret the right to be forgotten on search engine results under the GDPR. They set out a data subject’s grounds for a de-listing request and the circumstances in which a search engine provider can refuse such a request. The consultation closes on 5 February 2020.	<a href="#">Press release</a> <a href="#">Guidelines</a>



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EDPB publish first set of approved standard Article 28 contractual clauses	<p>The <b>European Data Protection Board</b> has published the final text of the first standard contractual clauses for contracts between controllers and processors (Article 28).</p> <p>According to the EDPB: "The standard processor agreement ... aims at helping organisations to meet the requirements of art. 28 (3) and (4), given the fact that the contract between controller and processor cannot just restate the provisions of the GDPR but should further specify them, e.g. with regard to the assistance provided by the processor to the controller.</p>	<a href="#">Press release</a>
EDPS reflects on privacy issues involved with data sharing and competition	The <b>European Data Protection Supervisor</b> has published a blog post which focusses on data sharing and competition	<a href="#">Blog post</a>



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EU accedes to appellation of origin and geographical indication agreement	<p>The World Intellectual Property Organisation has announced that the EU has deposited the instrument of accession to the <b>Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications</b>, joining as the key fifth member of this international registration system that provides protection for names identifying the geographic origin of products such as coffee, tea, fruits, wine, pottery, glass and cloth. The agreement will enter into force for contracting parties on 26 February 2020.</p> <p>As a reminder, appellations of origin and geographical indications are distinctive product designations which require a qualitative link between the product to which they refer and its place of origin. The basic difference between the two terms is that the link with the place of origin is stronger in the case of an appellation of origin. The Lisbon System is an international registration system for appellations of origin and geographical indications through a single procedure with WIPO, allowing the holder of a national or regional appellation of origin or geographical indication to obtain protection of the distinctive sign in the states of the other contracting parties of the Lisbon System.</p>	<a href="#">Announcement</a>



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Disputing the robustness and accuracy of an IT system	<p>There has been another judgment in the long running dispute between the Post Office and 550 former sub postmasters (as reported in the <b>Commercial</b> section above). This sixth judgment concerns the operation and functionality of the computer system Horizon installed in all branches of the Post Office and which sub postmasters were required to use. Amongst other issues, it looked at:</p> <ul style="list-style-type: none"><li>• whether bugs and errors in the system caused discrepancies in accounts, thereby undermining the reliability of the system accurately to process and record transactions and held that this had been the case</li><li>• whether the system could alert its users of such bugs etc, the answer being no</li><li>• how likely was it that the system could cause shortfalls in the recording of transactions, the answer being that it was likely</li></ul> <p>The judge was critical of the fact that the system did not allow a sub postmaster to record a dispute (something that apparently was deliberately done by design), so that the sub postmasters effectively had no choice but to “accept” an entry in their accounts even if they thought it was incorrect. The practical result of this was that the sub postmasters had to accept “liability” for figures derived from the IT system they were required to use, without being given access to it to check the data they had entered.</p>	<a href="#">Judgment</a>



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New Procurement Policy Note on financial thresholds	The <b>UK Government</b> has issued a new Procurement Policy Note (PPN 06/19) giving advance notice of the revised financial threshold levels to apply for the purposes of the public procurement rules with effect from 1 January 2020. In-scope organisations must apply the provisions of PPN 06/19 from 1 January 2020.	<a href="#">PPN 06/19</a>



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ICO AI auditing framework	<p>The <b>ICO</b> expects to publish its final artificial intelligence auditing framework by 31 January 2020, with guidance for organisations scheduled for publication during Spring 2020. The ICO’s view is that AI raises significant data protection risks for data subjects and compliance challenges for organisations and is of the view that these are issues that cannot be delegated to data scientists or engineering teams but need accountability from senior leaders, including data protection officers. For example, using AI to process personal data is likely to result in a high risk to individuals’ rights and freedom from a GDPR perspective and trigger the requirement to undertake a data protection impact assessment.</p>	<p><a href="#">AI Auditing Framework</a></p>
European Commission report on AI	<p>The <b>European Commission</b> has published a report on liability for AI and other legal technologies, assessing existing liability regimes and concluding that there are at least some basic protections for those suffering from damage is caused by new technologies. However, the specific characteristics of these technologies and their applications (including complexity, modification through updates or self-learning during operation, limited predictability, and vulnerability to cybersecurity threats) may make it more difficult for claims for compensation to be successful and the allocation of liability may be unfair or inefficient. The key findings of the report are:</p> <ul style="list-style-type: none"> <li>• a person operating a permissible technology that nevertheless carries an increased risk of harm to others, for example AI-driven robots in public spaces, should be subject to strict liability for damage resulting from its operation. If a service provider ensuring the necessary technical framework has a higher degree of control than the owner or user of an actual product or service equipped with AI, this should be considered in determining who primarily operates the technology</li> <li>• a person using a technology that does not pose an increased risk of harm to others should still be required to abide by duties to properly select, operate, monitor and maintain the technology in use and – failing that – should be liable for breach of such duties if at fault</li> <li>• a person using a technology which has a certain degree of autonomy should not be less accountable for ensuing harm than if said harm had been caused by a human auxiliary</li> <li>• manufacturers of products or digital content incorporating emerging digital technology should be liable for damage caused by defects in their products, even if the defect was caused by changes made to the product under the producer’s control after it had been placed on the market</li> </ul>	<p><a href="#">Report</a></p>



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	<ul style="list-style-type: none"> <li>• for situations exposing third parties to an increased risk of harm, compulsory liability insurance could give victims better access to compensation and protect potential tortfeasors against the risk of liability</li> <li>• where a particular technology increases the difficulties of proving the existence of an element of liability beyond what can be reasonably expected, victims should be entitled to facilitation of proof</li> <li>• emerging digital technologies should come with logging features, where appropriate in the circumstances, and failure to log, or to provide reasonable access to logged data, should result in a reversal of the burden of proof in order not be to the detriment of the victim</li> <li>• the destruction of the victim’s data should be regarded as damage, compensable under specific conditions</li> <li>• it is not necessary to give devices or autonomous systems a legal personality, as the harm these may cause can and should be attributable to existing persons or bodies.</li> </ul>	
Explaining AI decision making	<p>The <b>ICO</b> and <b>the Alan Turing Institute</b> have launched a consultation on their joint guidance on how to explain decisions made with AI, aiming to give businesses practical advice to help explain the processes, service and decisions delivered by AI and how individuals may be affected by them. The final version of the guidance will be published later in 2020, taking feedback into account. Consultation closes on 24 January 2020.</p>	<a href="#">Consultation</a>
Intellectual property and AI	<p>The <b>World Intellectual Property Organisation</b> has published a consultation on AI and intellectual property policy, including the use of AI applications in IP administration (such as AI based applications for automated translation and image recognition and where inventions are autonomously generated by AI). Deadline for comments is 14 February 2020.</p>	<a href="#">Consultation</a>

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