



Commercial Bulletin

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Welcome to the Eversheds Sutherland monthly commercial bulletin covering both case law and regulatory developments as well as progress on Brexit

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Commercial bulletin

Development	Summary	Links
Brexit		
UK political developments	<p>As at the date of publication of this bulletin:</p> <ul style="list-style-type: none">• the Prime Minister has delayed the meaningful vote of the House of Commons on the withdrawal deal negotiated in November 2018 to 12 March "at the latest";• if the Government does not win a meaningful vote by that date then it will table an amendable motion to be voted on by 13 March at the latest asking the House of Commons if it supports leaving the EU without a withdrawal agreement and a framework for a future relationship on 29 March (so the UK will only leave without a deal on 29 March if there is explicit consent in the House of Commons for that outcome);• if the House of Commons, having rejected leaving with the deal negotiated with the EU, then rejects leaving on 29 March without a withdrawal agreement etc, the Government will on 14 March bring forward a motion on whether Parliament wants to seek what the PM has described as "a short limited extension to Article 50" and if the House votes for an extension, seek to agree that extension with the EU;• this would then involve bringing forward the necessary legislation to change the exit day set out in existing Brexit legislation to match that extension;• a caveat is that the PM has promised an amendable motion which means that the vote might not occur on the precise lines described above;• even if a withdrawal agreement is approved by 12 March, there is a question mark over whether that leaves sufficient time to secure the passage of the necessary Act of Parliament and any associated statutory instruments made under it before 29 March; and• even a UK vote to extend Article 50 is not the end of the story as the EU would need to unanimously agree to this or may have its own views on the length of any extension. The PM's view was a short extension and not beyond the end of June 2019. <p>On 26 February the Government published a no deal impact assessment detailing the implications for business and trade. This includes:</p>	<p>Prime Minister's statement to the House of Commons of 26 February</p> <p>UK Government no deal impact assessment of 26 February</p>

Commercial bulletin

Development	Summary	Links
	<ul style="list-style-type: none"> the statement that the Government will apply a “short term “continuity approach” to no deal plans, meaning it would take unilateral action to maintain as much continuity as possible in the short terms, irrespective of whether the EU reciprocated”; Government departments are not in track to deliver 100% of no deal projects (and on track for just over 2/3rds of the most critical projects); readiness of SMEs for a no deal scenario is low, focussing on the low numbers of businesses who have applied for an EORI number to ensure customs clearance (for more on this process see below); a promise to set out the UK import tariff that would apply “soon”; an analysis of the impact on service sectors, currently supported by free movement of people and cross-cutting regulation such as mutual recognition of qualifications but in no deal subject to barriers to establishment and service provision in the EU, such as nationality requirements, mobility, recognition of qualifications and regulatory barriers when setting up subsidiaries in EU member states; and further analyses of the impact on goods businesses, particularly those operating in harmonised sectors (eg chemicals, aerospace, medicines and automotive) and those with integrated just in time supply models. 	
Free trade agreements with other countries	<ul style="list-style-type: none"> The UK Government has confirmed that there is no prospect of rolling over trade deals with Japan or Turkey by 29 March. Other notable omissions are Canada, Singapore or indeed any of the major UK trade partners (rolling over being the process of agreeing with the counterparty that trade will continue on the same terms between the 2 countries on the same terms as was agreed in the trading agreement with the EU). So far, seven have been rolled over: Switzerland, Zimbabwe, Chile, Madagascar, Seychelles, Mauritius and the Faroe Islands. The UK Government has said that an agreement with Israel will soon be signed. The UK has also signed Mutual Recognition Agreements on Conformity Assessment with Australia and New Zealand. 	House of Commons Library briefing paper

Commercial bulletin

Development	Summary	Links
	<p>Click on the link to read a House of Commons Library briefing paper on EU trade agreements which also reports on the progress in rolling over these. The no deal impact assessment linked above also contains detail on the progress made in respect of trade agreements.</p>	
<p>No deal guidance: UK</p>	<p>The UK Government has published further no deal guidance pages for UK businesses, collating existing guidance and focussing on particular sectors including professional and business services, electronics, machinery and parts, consumer, space and chemicals. The majority of these materials are not new but are now collated by sector for easier reference.</p>	<p>List of UK Government EU Exit guidance for businesses</p>
<p>Brexit and regulations and standards</p>	<p>BEIS has published no deal guidance for manufacturers intending to place products on either the UK or the EU market.</p> <p>Pre Brexit and whilst the UK is a member of the EU, manufactured goods are subject to a variety of regimes:</p> <ul style="list-style-type: none"> • some have stand-alone regulatory regimes (such as for chemicals, cars, aerospace and medicines); • others are regulated under what is known as the “new approach” which provides a common set of regulatory measures that includes conformity markings (such as the CE marking) and the use of third party bodies to assess compliance.; • other goods, categorised as “non harmonised goods” are subject to national rather than EU wide regulation (other than non-product specific rules relating to product safety). <p>In a no deal scenario, this EU wide approach will fall away for the UK, although EU regulation will be transposed into UK domestic law so that in most cases the regulatory requirement for placing a manufactured good on the UK market will not significantly change from the pre-Brexit position. However, this transposition cannot answer all questions and legal issues, for example, the role of bodies in the compliance process and the validity of existing accreditations and markings. This guidance is issued partly to address these “gaps”. It states that:</p> <ul style="list-style-type: none"> • goods that already meet EU regulatory requirements will continue to be recognised as valid for sale on the UK market after exit day, but this will be for a time limited period only (not specified in the guidance); 	<p>Guidance</p>

Commercial bulletin

Development	Summary	Links
	<ul style="list-style-type: none"> the UK Government will adopt this approach irrespective of the approach that the EU takes in respect of UK goods being placed on the EU market; products for the UK market that have a third party assessment of conformity carried out by a UK conformity assessment body will need a new UKCA marking (the UK's replacement for the CE marking, the initials standing for UK Conformity Assessed), but this will not be the case if the certificate of conformity has been transferred to an EU recognised body (in which case the CE marking would apply); after the time limited period is over, all products that need third party conformity assessment and currently carry the CE marking that are being sold on the UK market will need the UKCA marking; and in some areas there will be new requirements and new processes to follow, with the guidance referring to chemicals, automotive and medicines in this context. <p>For goods placed on the EU market:</p> <ul style="list-style-type: none"> the EU will no longer recognise regulatory compliance activity carried out in the UK as valid; the UKCA marking will not be recognised on the EU market; and manufacturers placing their goods into the EU will need to continue to meet EU regulatory requirements: for example products currently requiring a CE marking will continue to require a CE marking for sale in the EU. <p>For goods where it is intended that they be placed on both the UK and EU markets, there will be 2 sets of regulatory requirements to follow.</p>	

Brexit: customs procedures and new procedures for VAT

HMRC has published another version of its guidance on customs processes likely to apply if the UK exits the EU without a deal. This covers:

- a **transitional simplified procedure** for importing goods from roll-on/roll-off locations (with businesses able to sign up for this from 7 February 2019);
- taxpayers who want to use the **EU VAT refund scheme** to claim refunds for 2018 must do so by 29 March 2019 (the normal deadline being 30 September 2019);

[Guidance](#)

[HMRC announcement](#)

[HMRC letters to traders](#)

[Registering for an EORI number](#)

[National Export System](#)

Commercial bulletin

Development	Summary	Links
	<ul style="list-style-type: none">taxpayers currently using the mini one-stop shop (MOSS) should submit returns for sales of digital services to EU consumers between 1 January 2019 and 11.00 pm on 29 March 2019 using the UK MOSS by 20 April 2019 (normal deadline). To continue using the MOSS to report subsequent sales, taxpayers must register for the non-union MOSS scheme in an EU country after Brexit. The non-union MOSS scheme requires registration by the 10th day of the month following a sale, so the registration deadline is 10 April 2019 for first sales of digital services to EU consumers after Brexit but before 31 March 2019, and 10 May 2019 for first sales in April 2019. Alternatively, taxpayers can register in each EU country in which they make sales;a UK-only online VAT number checker will be available from 29 March 2019. <p>Separate guidance is anticipated for importing or exporting goods across the Irish border.</p> <p>HMRC has also announced that forms used by the haulage industry for imports of goods called "Entry Summary Declarations" (pre-arrival forms) are being phased in for EU imports but not until 6 months after a no deal exit. Importers are still required to submit import declarations for customs purposes (these are different to Entry Summary Declarations).</p> <p>HMRC has now issued three letters to businesses trading with the EU telling them the steps they need to take to be ready for a no deal scenario, so that these now cover:</p> <ul style="list-style-type: none">advice on registering for an Economic Operator Registration and Identification (EORI) Number now;registering for HMRC's new transitional simplified procedures for customs (this registration means being able to transport goods into the UK without having to make a full customs declaration at the border and being able to postpone paying import duties. Registration needs an EORI number)if exporting, registering for the National Export System (this allows export declarations to be made electronically and is mandatory for exporters)a summary of changes to VAT, with a promise that more information will be available soon on how to pay import VAT in a VAT return rather than when goods arrive at the UK border).	<p>Moving goods to and from the EU through roll on roll off ports or the Channel Tunnel</p> <p>Register for simplified import procedures if the UK leaves the EU without a deal</p> <p>Guidance: Transitional import procedures—no deal Brexit guidance</p>

Commercial bulletin

Development	Summary	Links
EU guidance on customs in a no deal scenario	<p>The European Commission has also published documents to help EU companies to continue trading with the UK after Brexit. Amongst other things, the Commission recommends that affected businesses:</p> <ul style="list-style-type: none"> • register with their national customs authority to trade with non-EU countries; • consider applying for Authorised Economic Operator status; and • register for the VAT Mini One Stop Shop (MOSS) in an EU 27 member state, if currently registered in the UK. 	<p>Press release</p>
Brexit and the consumer sector	<p>Follow the link to reach the Government's landing page for guidance for the consumer goods sector. The advice includes import-export advice as covered by the HMRC guidance listed above and also:</p> <ul style="list-style-type: none"> • advice on EU citizens applying to the EU Settlement Scheme (the scheme will open from 30 March 2019 but EU workers must apply by 31 December 2020); • advice on applying for skilled-work or unskilled-work visas for employees; • advice on validity of UK passports; and • getting products assessed and marked by an EU recognised conformity assessment body if the products are to be sold in the EU or arranging for assessments to be transferred to an EU recognised body. 	<p>Government guidance landing page</p>
Brexit and personal data	<p>DCMS guidance</p> <p>The Department for Digital, Culture, Media & Sport (DCMS) has published a statement including revised guidance to help stakeholders prepare for a no deal Brexit. The proposals aim to:</p> <ul style="list-style-type: none"> • preserve EU GDPR standards in domestic law; • maintain the extraterritorial scope of the UK data protection framework; • recognise all EEA countries (including EU Member States) and Gibraltar as 'adequate' to allow data flows from the UK to Europe to continue on a transitional basis; • preserve the effect of existing EU adequacy decisions on a transitional basis; 	<p>Statement relating to UK data protection law</p> <p>Keeling schedules</p> <p>DPPECRs amendments and Explanatory memorandum</p> <p>Privacy Shield Brexit FAQs</p> <p>EDPB guidance on BCRs</p> <p>EDPB guidance on data transfers</p>

Commercial bulletin

Development	Summary	Links
	<ul style="list-style-type: none">• recognise EU Standard Contractual Clauses in UK law and give the ICO the power to issue new clauses;• recognise Binding Corporate Rules authorised before Brexit; and• require non-UK controllers who are subject to the UK data protection framework to appoint representatives in the UK if they are processing UK data on a large scale. <p>The guidance includes amendment to UK data protection law on a no deal, with schedules illustrating proposed changes to UK data protection law under the draft Data Protection, Privacy and Electronic Communications (Amendment etc.) (EU Exit) Regulations 2019 (DPPECRs) as well as proposed changes to the GDPR as retained in UK law.</p> <p>Further guidance is promised from DCMS in the coming weeks.</p> <p>Keeling schedules</p> <p>DCMS has helpfully published two “<i>keeling schedules</i>” which show how the DPPECRs will amend the GDPR and the Data Protection Act 2018 (DPA 2018) post-Brexit.</p> <p>DPPECRs amendments</p> <p>By way of reminder, the DPPECRs were originally laid before Parliament in December 2018, were subsequently changed and laid again on 14 January 2019 to correct minor typos. They amend UK data protection legislation with the aim of ensuring that the UK legal framework for data protection continues to function correctly after exit day.</p> <p>The draft Data Protection, Privacy and Electronic Communications (Amendments etc.) (EU Exit) (No 2) Regulations 2019 have also been laid for sifting. They amend the draft DPPECRs to ensure that UK to US data transfers reliant on the Privacy Shield framework are not impinged should the UK leave the EU without a Withdrawal Agreement (no deal scenario). They provide that such data transfers may only take place if the certified Privacy Shield organisation has updated its privacy policy to refer to personal data transfers from the UK, as already confirmed by the US Department of Commerce in their Privacy Shield and Brexit FAQs (as previously reported in January’s bulletin).</p> <p>European Data Protection Board (EDPB)</p> <p>The EDPB has published new guidance on: (1) Binding Corporate Rules (BCRs) if the UK leaves the EU without a deal in place and the Information</p>	

Commercial bulletin

Development	Summary	Links
	Commissioner's Office (ICO) no longer has a role in the BCR community; and (2) data transfers under the GDPR.	
EU contingency planning for no deal	<p>The EU continues to announce temporary measures for a no deal scenario. These include measures:</p> <ul style="list-style-type: none"> • to ensure basis road freight and road passenger connectivity; • to ensure air connectivity (thereby enabling UK licenced carriers to provide basic air transport services between the UK and the EU, but conditional on equivalent rights being granted by the UK); and • an outreach campaign to help EU businesses wishing to trade in the UK. 	<p>EU Press release</p> <p>EU press release</p>
Brexit and aviation safety: EU measures	The Council of the European Union has issued a proposal for a regulation on aviation safety. Although aerospace businesses can transfer to a civil aviation authority of an EU member state certificate and approvals issued by the UK Civil Aviation Authority, there are some instances where it is not possible to obtain a certificate from another member state or its agency. For this reason, this proposal is for a temporary mechanism to extend the validity of certain aviation safety certificates for a period of 9 months, including certificates issued by the European Union Aviation Safety Agency to UK businesses.	Proposed regulation
Brexit and eu domain names	<p>The registry for .eu domains (EURid) has published a notice setting out what will happen after Brexit to eu. domain names registered with the GB (Great Britain) or GI (Gibraltar) country code. (.eu domains can only be held by registrants within the EEA.) If the UK leaves without a deal, for a two-month period after exit day registrants that have a GB or GI country code will be allowed to:</p> <ul style="list-style-type: none"> • update their contact data to demonstrate that they have an establishment in the EU. • transfer their domain names to registrants that do not have a GB or GI country code. <p>Any domains owned by such registrants will not be automatically renewed during this period.</p> <p>As of 30 May 2019, the domain names of any registrants who have not demonstrated eligibility will be withdrawn. As of 30 March 2020, all such domain names will be revoked and made available, in batches, for registration by others.</p>	EURid notice

Commercial bulletin

Development	Summary	Links
	<p>If a domain name owned by a registrant from the UK or Gibraltar is the subject of legal proceedings on exit day, it will be put on hold (but remain on the register) until 30 May 2019, when it will be suspended and, if the legal decision is that the domain should stay with the UK or Gibraltar registrant, it will be withdrawn.</p> <p>If the UK leaves following a transition period the provisions are very similar, but eligible domains will be withdrawn on 2 March 2021. The domains will be revoked and made available, in batches, for registration by others from 1 January 2021. The date for suspension of domains that are the subject of litigation is 2 March 2021.</p>	
Brexit and corporate entities	<p>Companies House has announce that certain company registrations will need to be changed if the UK leaves the EU without a deal. The impacted entities are Societas Europaea (SEs) and European Economic Interesting Groups (EEIGS), UK companies and LLPs with EEA registered corporate officers, EEA companies with UK establishments and UK companies involved in cross border mergers. The key changes are:</p> <ul style="list-style-type: none">• SEs and EEIGs will no longer be able to be registered in the UK and existing entities face automatic conversion into new UK corporate structures (UK Societas or UK EIG) unless they put alternative arrangements in place prior to 29 March 2019;• EEA registered corporate officers will no longer benefit from slightly reduced information filing requirements as compared with non-EEA corporate officers. The additional information to be filed is minimal covering the legal form of the EEA company and the law by which it is governed. The changes do not impact UK registered corporate officers;• EEA companies with UK establishments will be subject to the same requirements as non-EEA companies. This means that:<ul style="list-style-type: none">○ additional information will need to be filed including the law under which the company is incorporated, accounting periods and periods for preparing/filing accounts, registered office/principal place of business, objects, issued share capital amount (if applicable) and the additional details highlighted above for any EEA registered corporate officers; and○ there will be additional requirements to display the same information on business letters, order forms and websites such	<p>Changing your company registration if the UK leaves the EU without a deal (Companies House guidance)</p> <p>Changes to Companies House forms in the event of a no deal Brexit (Companies House guidance)</p>

Commercial bulletin

Development	Summary	Links
	<p>as head office location, if it is a limited company and share capital amount (if applicable);</p> <ul style="list-style-type: none"> • Cross-border mergers involving UK companies will no longer be permitted. 	
<p>Brexit statutory instruments: issued drafts and enacted regulations</p>	<p>The content and substantive impact of these is increasing.</p> <p>As at 21 February, the Government had laid 451 Brexit statutory instruments before Parliament, with the Hansard Society estimating that they are two-thirds of the way towards its estimate of approximately 600 Brexit statutory instruments needed to prepare the statute book for exit day on 29 March. Ultimately, if the Government is running out of time, it can initiate an “urgent case procedure” as set out in the European Union (Withdrawal) Act 2018. This would ensure that all statutory instruments that are required can come into effect on exit day.</p>	 <p>Summary of Brexit statutory instrument</p>
<p>WTO tariffs</p>	<p>The European Commission has published a regulation relating to the apportionment of WTO tariff rate quotas between the UK and the EU. The regulation sets out the methodology to be used for this apportionment</p>	<p>Regulation 2019/216</p>
<p>Other Brexit papers issued by the House of Commons Library</p>	<p>Click on the link to read a House of Commons Library paper on VAT and the implications of EU law for how the UK will be able to set its own rates. To date the UK Government has not published any specific details as to its post Brexit relationship with the EU on VAT beyond stating its ambition for an agreement on common processes and procedures to avoid the need for any new VAT-related border controls on goods. Future VAT rules will depend on the outcome of negotiations with the EU in terms of the future trading relationship and what is agreed on alignment and border controls.</p>	<p>House of Commons briefing paper</p>
	<p>Click on the link to read a House of Commons Library paper on EU citizens in the UK and a no deal Brexit. This cover the proposed “European Temporary Leave to Remain in the UK” system that will be implemented (if approved by Parliament) in the period between Brexit and the implementation of the Immigration and Social Security Co-ordination (EU Withdrawal) Bill. The paper explains the main features of this temporary regime and who is able to benefit from it.</p>	<p>House of Commons briefing paper</p>
	<p>Click on the link to read a House of Commons Library paper on the Financial Services (Implementation of Legislation) Bill.</p>	<p>House of Commons briefing paper</p>

Commercial bulletin

Development	Summary	Links
	<p>Click on the link to read a House of Commons Library paper on extending the Article 50 period, including an assessment of whether further UK legislation would be required to request an extension and the complications arising from the European Parliament elections 23-26 May 2019.</p>	<p>House of Commons library briefing paper</p>
	<p>Click on the link to read a House of Commons Library paper on what legislation is required for a no deal Brexit (if the proposed withdrawal agreement was approved by the UK Parliament, this would be implemented via the European Union (Withdrawal Agreement) Bill). There are 13 Bills and draft Bills associated with the process of existing the EU, five of which are already enacted (the European Union (Withdrawal) Act 2018, the Sanctions and Anti-Money Laundering Act 2018, the Haulage Permits and Trailer Registration Act 2018, the Nuclear Safeguards Act 2018 and the Taxation (Cross-border Trade) Act 2018). Of the remaining proposed Bills, the most significant ones in a commercial context are:</p> <ul style="list-style-type: none"> • the Trade Bill. This sets up the Trade Remedies Authority to protect UK business against unfair trade by other countries. If this is not passed in time, the SS for international Trade has said that the Government has a range of contingency measures to put in place on a temporary basis; and • the Immigration and Social Security Co-ordination (EU Withdrawal) Bill: this repeals retained EU law relating to free movement and brings EEA nationals under UK immigration control, it protects the status of Irish citizens and covers social security co-ordination. 	<p>House of Commons library briefing paper</p>
Brexit and sanctions	<p>The UK Treasury has published guidance on financial sanctions post Brexit including under the new UK only regime of the Sanctions and Anti-Money Laundering Act 2018.</p>	<p>Treasury guidance</p>
Commercial - general		
Brexit and frustration	<p>Judgment was handed down by the English High Court on 20 February in the case of Canary Wharf v European Medicines Agency where the European Medicines Agency (the EMA) had argued its 25 year lease in Canary Wharf was frustrated as a result of Brexit. The judgment ruled against the EMA and concluded that “the Lease will not be discharged by frustration on the United Kingdom’s transition from Member State of the European Union to third country nor does the EMA’s shift of headquarters from London to Amsterdam constitute</p>	<p>Judgment Client briefing</p>

Commercial bulletin

Development	Summary	Links
	a frustrating event". Click on the link to read an Eversheds Sutherland client briefing on this important case.	
Binding contract despite lack of key term	<p>In Wells v Devani, the Supreme Court held that a binding oral contract had been reached despite there being no express identification of the event which would trigger the payment obligation. This conclusion was:</p> <ul style="list-style-type: none"> reached without the need to imply terms into the contract; on the basis that if there is evidence that the parties had the intention of being contractually bound and had acted on their agreement, then the terms will not be held as to be so vague or uncertain as to be unenforceable; and suggests that where an arrangement has not been spelt out in detail, this will not necessarily prevent a legally binding contract from arising. 	Judgment
When are terms incorporated into a contract?	<p>In Rabilizirov v A2 Dominion London Ltd, a dispute arose as to whether a sub-contractor was liable to indemnify the main contractor when the subcontract work order simply stated that works had to be carried out in accordance with particular JCT terms and conditions, rather than specifically incorporating those terms into the order. In other words, was it possible to distinguish between terms relating to how the works were to be carried out (which applied) from terms relating to the consequences of works being carried out? On the basis that there was no clear words excluding any particular terms and that it was standard for an indemnity clause to be present in a subcontract in a high value contract, the indemnity applied, notwithstanding that there was no express incorporation of it by specific reference. However, this is an approach that should not be adopted as it would be dangerous to rely on the wording used by the parties and instead there should be express incorporation of all terms the parties want to apply.</p>	Judgment
Product marking after a no deal Brexit	<p>Instead of the EU CE mark, post Brexit the new UK product marking will be the "UK Conformity Assessed" or UKCA marking and which, subject to parliamentary approval, will be able to be used for certain goods placed on the UK market. This new marking is concerned with the UK market only and will not be recognised on the EU market and products for sale in the EU that currently need a CE marking will continue to need a CE marking. BEIS has published guidance clarifying how the UKCA marking regime will work.</p>	Guidance
New EU proposals on product safety	<p>The EU is introducing new rules which will ensure that products placed on the single market are safe and compliant with EU legislation protecting public</p>	EU agreed text

Commercial bulletin

Development	Summary	Links
	<p>interests, such as health and safety in general, health and safety at the workplace, consumers, the environment and public security. The proposal is for a regulation which:</p> <ul style="list-style-type: none"> enhances the enforcement of EU rules for non-compliant products by consolidating the existing framework for market surveillance activities; creating a strengthened framework for controls on products entering the single market; and for improved cooperation between market surveillance authorities and customs authorities. 	
Sanctions	<p>The first sanctions regulations have been made under the UK's new sanctions regime (under the Sanctions and Anti-Money Laundering Act 2018). These regulation cover Iran, Venezuela and Burma. The Office of Financial Sanctions Implementation has also updated its guidance on UK financial sanctions that will apply post Brexit.</p>	<p>OFSI guidance</p>
When does software constitute goods?	<p>No new judgment here but the Supreme Court will hear on appeal (commencing 28 March) the case of Computer Associates UK Ltd v Software Incubator Ltd as to whether software supplied to customers electronically constituted goods within the meaning of the Commercial Agents (Council Directive) Regulations 1993.</p>	
Competition law		
Commission Roadmap on review of Motor Vehicles Block Exemption	<p>On 19 February 2019, the Commission published a roadmap on its planned evaluation of the Motor Vehicle Block Exemption Regulation ("MVBBER") and accompanying Guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles. The MVBBER expires on 31 May 2023 and requires the Commission to draw up an evaluation report on its operation by 31 May 2021.</p> <p>The purpose of the evaluation is to gather facts and evidence on the functioning of the MVBBER notably by verifying the extent to which its objectives are fulfilled.</p> <p>The Commission will launch a consultation in the second quarter of 2020 to assist it in collecting in-depth and high-quality evidence on the key competition issues arising in vertical relationships on the motor vehicle distribution and after-sales markets. In the meantime, the Commission invites comments on the roadmap by 19 March 2019.</p>	<p>Roadmap</p>

Commercial bulletin

Development	Summary	Links
Commission issues consultation to inform evaluation of Vertical Agreements Block Exemption Regulation	<p>On 4 February 2019, the Commission launched a public consultation to inform its ongoing evaluation of the Vertical Agreements Block Exemption Regulation ("VBER") and its accompanying Guidelines on Vertical Restraints.</p> <p>The Commission is evaluating the effectiveness, efficiency, relevance, coherence and EU added value of the VBER, which will expire on 31 May 2022, to determine whether to allow it to lapse, prolong its duration, or revise it to take proper account of new market developments since 2010. It plans to publish a staff working document setting out the results of this evaluation in the second quarter of 2020.</p> <p>The Commission invites responses by 27 May 2019.</p>	Consultation
AG opinion on joint and several liability of undertakings for antitrust damages	<p>On 6 February 2019, Advocate General Wahl handed down his opinion on a request for a preliminary ruling from a Finnish court regarding the issue of joint and several liability of undertakings for antitrust damages.</p> <p>Between 1994 and 2002, a cartel operated in Finland in the asphalt market. In 2009, the Supreme Administrative Court of Finland imposed penalty payments on seven companies for anti-competitive conduct. One of the companies ordered to make a penalty payment was Lemminkäinen Oyj. Unlike Lemminkäinen Oyj, some other companies involved in the cartel were later dissolved in voluntary liquidation procedures and their respective sole shareholders continued their economic activity. On the basis of the principle of economic continuity, a penalty payment was imposed on these undertakings. The Finnish municipality of Vantaa (which had entered into contracts for asphalt works when the cartel was in place) then brought a private action for damages against the companies that had been ordered to pay penalty payments.</p> <p>The question was whether the companies that continued the economic activity of the cartel participants were liable to pay compensation for harm caused by the anti-competitive conduct of their predecessors.</p> <p>The Advocate General considered that the European Court of Justice should answer the questions referred by finding that Article 101 TFEU must be interpreted as meaning that in determining the person liable to pay compensation for harm caused by a breach of that provision, the principle of economic continuity is to be applied so that, in a private law action for damages before a national court, an individual may seek compensation from a company that has continued the economic activity of a cartel participant.</p>	AG Opinion

Commercial bulletin

Development	Summary	Links
Commission sends Statement of Objections in European Government Bonds cartel	<p>On 31 January 2019, the Commission announced that it sent a Statement of Objections to eight banks setting out its preliminary view that they have breached Article 101 TFEU.</p> <p>The Commission is concerned that, at different periods between 2007 and 2012, the eight banks participated in a collusive scheme to distort competition when acquiring and trading European Government Bonds. It alleges that traders employed by the banks exchanged commercially sensitive information and coordinated on trading strategies. These contacts would have taken place mainly, but not exclusively, through online chatrooms.</p>	Press Release
Commission publishes report on competition enforcement in the pharmaceutical sector post-2009	<p>On 28 January 2019, the Commission published a report on competition enforcement in the pharmaceutical sector in the period 2009-2017. The report gives an overview of competition law enforcement by the Commission and the national competition authorities in the pharmaceutical sector; sets out key characteristics of the sector that shape the competition assessment; and illustrates, including through practical examples, how competition law enforcement contributes to more competitive prices of medicines and to innovation and choice in medicines and treatments.</p>	Report
UK Competition Law Updates		
FCA issues first fines to three asset management firms for breach of competition law	<p>On 21 February 2019, the Financial Conduct Authority ("FCA") announced that it issued a decision and fined three asset management firms for breach of the Chapter I prohibition of the Competition Act 1998 and/or Article 101 TFEU.</p> <p>The FCA decision found that three firms shared information by disclosing the price they intended to pay or volume of shares they intended to bid for, in relation Initial Public Offerings and share placings. This information was exchanged shortly before the share prices were set.</p> <p>The FCA found that the sharing of this information undermines the price setting process, which in turn could reduce the share price achieved, impacting available funding for investment.</p> <p>This is the first time that the FCA has issued a decision and fine since it obtained concurrent competition enforcement powers in April 2015.</p>	Client Briefing FCA Press Release
CMA announces adverse provisional findings in Sainsbury's/ Asda merger	<p>On 20 February 2019, the Competition and Markets Authority ("CMA") announced the provisional findings of its Phase 2 investigation into the anticipated merger between J Sainsbury Plc and Asda Group Ltd. The merger combines the second and third largest grocery retailers in the UK, each of which</p>	Press Release

Commercial bulletin

Development	Summary	Links
	<p>operates supermarkets, convenience stores and petrol filling stations, provides online deliveries, and sells a range of general merchandise.</p> <p>The CMA has provisionally found that the merger may, on the balance of probabilities, be expected to give rise to a substantial lessening of competition ("SLCs") in a number of markets. The CMA is, therefore, concerned that the proposed merger could lead to a worse experience for in-store and online shoppers across the UK through higher prices, a poorer shopping experience, and reductions in the range and quality of products offered, and also that prices could rise at a large number of Sainsbury's and Asda petrol stations.</p> <p>The CMA is seeking views on possible remedies, either prohibition or divestiture. However, given the number of SLCs provisionally found, their interrelated nature, and the need for the divested business to be a multi-channel national retailer able to provide an effective competitive constraint, the CMA expressed doubts whether a suitable package of assets could be found to provide an effective and comprehensive divestiture remedy.</p>	
<p>FCA final report on market study on competition in the wholesale insurance broker sector</p>	<p>On 20 February 2019, the FCA published its final report of its wholesale insurance brokers market study. The market study was launched in November 2017 to assess how competition was working in the sector. It has published its final report, without first consulting on an interim report, as, overall, it has not found evidence of significant levels of harm that merit the introduction of any intrusive remedies.</p> <p>The FCA has, however, identified some areas of concern which have scope for improvement including in relation to conflicts of interest, the information that firms disclose to clients and certain specific contractual agreements between brokers and insurers. The FCA considers that these issues can be addressed within its usual supervisory processes. It will now work with firms to address the concerns found in these areas. It intends to continue to monitor the market as part of its normal supervision function to assess developments arising from the impact of EU withdrawal, possible further consolidation in the industry and as a consequence of any changes in business models.</p>	<p>Press Release</p> <p>Report</p>
<p>Appeal against CAT judgment upholding CMA decision finding information exchange between galvanised steel tanks suppliers dismissed (Court of Appeal)</p>	<p>On 15 February 2019, the Court of Appeal dismissed the appeal by Balmoral Tanks Limited and its parent company Balmoral Group Holdings Limited against the October 2017 Competition Appeal Tribunal judgment upholding the CMA's decision that fined Balmoral £130,000 for engaging in an illegal exchange of pricing information with three suppliers of galvanised steel tanks, in breach of Article 101 TFEU and the Chapter I prohibition.</p>	<p>Press Release</p>

Commercial bulletin

Development	Summary	Links
	<p>The CMA found that Balmoral exchanged information about current and future pricing intentions at a single meeting in July 2012 with three suppliers that participated in in a cartel in the galvanised steel tank market. (Balmoral was not part of that cartel.)</p>	
<p>CMA publishes revised guidance for competition director disqualification orders</p>	<p>On 6 February 2019, the CMA published its revised guidance on seeking director disqualification orders in competition law cases. The new guidance replaces the current version (OFT510), which dates from 2010.</p>	<p>Guidance</p>
<p>Consumer law</p>		
<p>What constitutes an aggressive trading practice and undue influence</p>	<p>The Advocate General has issued an opinion, in Orange Polska, Case C-628/17, which, if followed by the Court of Justice, will provide clarity to the interpretation of the concepts of aggressive practices and undue influence under the Unfair Commercial Practices Directive and the implementing UK Consumer Protection from Unfair Trading Regulations 2008. These laws prohibit unfair commercial practices that cause consumers to make transactional decisions they would not otherwise have made. Aggressive practices are a criminal offence and may involve undue influence (including the exploitation of a relatively strong bargaining position) The opinion:</p> <ul style="list-style-type: none"> • makes clear that usually a consumer who deals online is likely to be more knowledgeable and less vulnerable than one who deals by telephone (with a distention where the consumer voluntarily decides to visit a website as opposed to an unsolicited telephone call and because the quality of information provided to the consumer is likely to be less when given over a telephone than when available online); • it is an aggressive commercial practice if getting a consumer to conclude a contract is done in a way that significantly undermines the freedom of choice of the consumer through undue influence. 	<p>Opinion</p>
<p>Draft EU wide rules for remedies for faulty goods</p>	<p>A proposed new sales of goods directive will, if it becomes law, give EU customers equal remedies throughout the EU if they purchase faulty products. The rules provisionally agreed will apply to goods sold online and offline as well as goods with digital elements. The proposals cover:</p> <ul style="list-style-type: none"> • when a product is defective, consumers can either have it repaired or replaced, free of charge; • consumers will be entitled to an immediate price reduction or contract termination and to get their money back in certain cases; 	<p>Press release: Consumer protection—Deal on EU-wide rules for those sold faulty product</p>

Commercial bulletin

Development	Summary	Links
	<ul style="list-style-type: none"> the trader will be liable if the defect appears within two years from the consumer receiving the product; and for up to one or two years after delivery, the buyer will not need to prove the good was faulty. 	
EU proposals for new European rules to improve fairness of online platforms' trading practices	<p>As part of the EU Digital Single Market Strategy, the EU has reached a political agreement on new rules for traders selling online via marketplaces or booking platforms. The rules will include:</p> <ul style="list-style-type: none"> a ban on certain unfair practices (such as unexplained account suspensions and a requirement for plain terms and advance notice of changes); provisions on disclosure of main parameters used by platforms to rank goods and services on their sites; mandatory disclosure any advantage platforms give to their own products over others and what data they collect and how it is used (outside a personal data environment); new avenues for dispute resolution for business users. 	<p>Press release</p> <p>European Commission FAQs</p>
Data protection, privacy and cyber-security		
ePrivacy Regulation	The Romanian Presidency of the Council of the European Union published further revisions to the proposed ePrivacy Regulation, ahead of discussion in the WP TELE meetings on 19 and 20 February.	Draft ePrivacy Regulation
Code of conduct for data-driven health and care technology	The Government and NHS England have developed a Code of Conduct for data-driven health and care technology which sets out the behaviours expected from those developing, deploying and using data-driven technologies, to ensure they abide by the ethical principles for data initiatives developed by the Nuffield Council on Bioethics. One of the code's principles requires organisations to "explain algorithms to those taking actions based on their outputs" and "undertake ethical examination of data use specific to this use-case".	Code of conduct
Uploading video content online with identifiable people in the background	In the case of Sergejs Buivids v. Datu valsts inspekcija (C-345/17), the CJEU ruled that someone who records video footage with identifiable people in the background and uploads that footage to an online platform allowing unrestricted access by third parties falls within the scope of the data protection framework, and outside the domestic purposes exemption. The impact of being	CJEU ruling

Commercial bulletin

Development	Summary	Links
	<p>within the data protection framework means that the person uploading the video needs to, among other things, register with or notify their national supervisory authority and provide appropriate privacy information to the data subjects in the footage, respond to access requests etc. and fulfil other responsibilities of a controller. The court referred the question of whether the GDPR derogation for journalistic purposes could be applied to "citizen journalists" back to the referring court.</p>	

European Data Protection Board (EDPB) news

The EDPB has been involved with a number of projects this month, including:

- hosting its **seventh plenary** on 12 February 2019. The plenary included discussions on Brexit, the 2019-2020 EDPB Work Program, the consultation on guidelines on codes of conduct, the Article 64 GDPR Opinion on the draft AA by the European Securities and Markets Authority (ESMA) and the International Organisation of Securities Commissions (IOSCO).
- publishing its **2019-2020 Work Program** – Among other things, the program includes issuing guidance on targeting social media users, reliance on Article 6(1)(b) in the context of online services, the concepts of controller and processor and the notion of legitimate interest of the data controller, video surveillance, data protection by design and default and connected vehicles.
- launching a **consultation on guidelines on codes of conduct and monitoring bodies** under GDPR. The consultation ends on 2 April 2019.
- publishing an opinion endorsing the draft arrangement by ESMA and IOSCO for the **transfer of personal data between EEA financial supervisory authorities and non-EEA financial supervisory authorities**.
- publishing an **overview report** – The report contains some interesting statistics on the implementation of the GDPR and the roles and means of the national supervisory authorities.
- launching a **consultation on Annex 2 to Guidelines 1/2018 on Certification** and Identifying Certification Criteria in Accordance with Articles 42 and 43 of the GDPR, adopted on 23 January 2019. The consultation ends on 29 March 2019.
- making the **Norway and Leichtenstein DPIA lists** available online.

[Seventh plenary agenda](#)

[2019-2020 Work Program](#)

[Consultation on guidelines on codes of conduct and monitoring bodies](#)

[Opinion on transfers between EEA and non-EEA financial supervisory authorities](#)

[GDPR implementation overview report](#)

[Consultation on Annex 2 to certification guidelines](#)

[Norway and Leichtenstein DPIA lists](#)

[Opinion on clinical trials Q&A](#)

Commercial bulletin

Development	Summary	Links
<p>Information Commissioner's Office (ICO) news</p>	<p>The ICO has been working on a number of initiatives, including:</p> <ul style="list-style-type: none"> • publishing an opinion on clinical trials Q&A – The opinion addresses, among other things, aspects related to the adequate legal bases in the context of clinical trials, and the secondary uses of clinical trial data for scientific purposes. • The ICO and FCA have signed a memorandum of understanding establishing a framework for cooperation, coordination and information sharing. • The ICO is focussing on the world of ad-tech, programmatic advertising and real-time bidding (in line with their Tech Strategy), and both online tracking and artificial intelligence are priority areas. They have identified three main areas of interest: transparency, lawful basis for processing and security. The ICO is hosting a fact-finding forum in London on 6 March, which aims to bring together representatives from the adtech industry to explore certain key themes. • Criminal prosecution/fine for ignoring a DSAR – The ICO has reminded organisations that they could face criminal prosecution if they fail to respect people's right to access their personal information, by reporting that a housing developer was fined £300 by Westminster Magistrates for ignoring a DSAR (under the DPA 1998 regime). • ICO blogs on non-payment of data protection fees – The blog post explains why small businesses need to pay the data protection fee. • Regulatory sandbox – The ICO has published a discussion paper on their sandbox initiative. The purposes of the sandbox are: (1) to support the use of personal data in innovative products and services that can be shown to be in the public interest; (2) to help develop a shared understanding of what compliance in particular innovative areas looks like; and (3) to support the UK in its ambition to be an innovative economy. 	<p>ICO and FCA memorandum of understanding</p> <p>Ad-tech commentary</p> <p>DSAR prosecution news</p> <p>Data protection fee blog post</p> <p>Regulatory sandbox discussion paper</p>
<p>European Union Agency for Network and Information Security (ENISA) news</p>	<p>ENISA has publicised the following key updates this month:</p> <ul style="list-style-type: none"> • Guidelines written by German IT security association, TeleTrusT in cooperation with ENISA on What is "state of the art" in IT security? The phrase "state of the art" is used in the GDPR Articles 25 and, crucially, Article 32 in relation to the security measures controllers and processors are required to implement. 	<p>What is "state of the art" in IT security? guidelines</p> <p>European Cyber Security Month 2019 press release</p> <p>SMAShiNG press release</p>

Commercial bulletin

Development	Summary	Links
	<ul style="list-style-type: none"> ENISA is encouraging organisations to get involved in European Cyber Security Month 2019. Smartphone Secure Development Guidelines – ENISA has released SMAShING, an online tool that maps security measures for smartphone guidelines. The tool supports developers to build secure mobile applications. SMAShING touches upon crucial security measures such as: User authentication; Sensitive data protection; Secure software distribution; Device and application integrity; Protection from client side injections; and Correct usage of biometric sensors. Internet of Things security checklist – This new ENISA tool will help users save time when identifying threats and prioritising security areas of importance. 	Internet of Things security checklist press release
Phone-paid Services Authority consultation on retention of data	The Phone-paid Services Authority (PSA) has launched a consultation on draft guidance aimed to clarify the PSA's expectations for the retention period of certain types of relevant data. The proposals for the guidance are aimed to support the PSA's access to such data in the event of an investigation into a service provider. The closing date for responses is 3 April 2019.	Consultation
Investigatory powers updates	<p>New regulations</p> <p>On 4 February 2019, the Investigatory Powers Act 2016 (Commencement No. 11) Regulations 2019 (SI 2019/174) were made. These Regulations brought into force certain sections of the Investigatory Powers Act 2016 (IPA 2016) which remain outstanding, including: Section 11 (offence of unlawfully obtaining communications data) and Part 3 (sections 61-86) (authorisations for obtaining communications data).</p> <p>IPCO 2017 Annual report</p> <p>The Investigatory Powers Commissioner's Office (IPCO) published their first annual report on the use of investigatory powers during 2017. The report is a comprehensive account of the oversight work carried out by IPCO and their predecessor organisations (the Office of the Surveillance Commissioners, the Interception of Communications Commissioner's Office and the Intelligence Service Commissioner).</p>	Investigatory Powers Act 2016 (Commencement No. 11) Regulations 2019 (SI 2019/174) Explanatory note IPCO annual report Press release
Supreme Court finds government system for disclosing criminal	Unlock (a charity for people with convictions) brought a claim against the Government concerning the way they implement the filtering system for	Judgment

Commercial bulletin

Development	Summary	Links
convictions is “disproportionate” and breaches Article 8 ECHR	<p>criminal records disclosure, and the fact that it does not comply with Article 8 ECHR (right to respect for private and family life).</p> <p>By way of background, there are three types of criminal record check available in the UK via the Disclosure and Barring Service. The searches are tightly regulated to ensure that they are only made where permitted by law and justified. The type of check which can be conducted and the information that the results of the check will contain, will depend on the relevant role.</p> <p>The Government is now compelled to look at making changes to the rules and processes governing criminal records disclosure.</p>	
IP		
Law Society guidance on intellectual property and a no deal Brexit	<p>Guidance for solicitors on changes in intellectual property law if the that UK leaves the EU without a deal on 29 March 2019 has been published by the Law Society. Key changes include:</p> <ul style="list-style-type: none"> • UK lawyers will lose their rights of representation before EU courts and bodies; • EU rules concerning the recognition and enforcement of judgments cross-border will cease to apply in the UK. The rules governing the enforceability of a judgment that has not been enforced by 29 March 2019 will cease to have effect; • UK owners of UK database rights may find that their rights are not enforceable in EU/EEA states; • solicitors advising UK-based broadcasters should be aware that their clients may need to have broadcasting rights approved in all Member States where the signal reaches; • it will no longer be possible to submit an application to the UK customs authorities to request that EU Member States take action with respect to goods suspected of infringing an IP right; • parallel imports from the UK to the EU/EEA could be blocked by holders of national IP rights or EU trade marks; • EU trademarks and Community design rights will no longer have effect in the UK. The government has stated it will provide registered EU trademark and design rights holders with an equivalent UK right upon exit so that there is continued protection in the UK. However, the 	<p>Law Society guidance</p>

Commercial bulletin

Development	Summary	Links
	<p>situation is less clear with regard to unregistered Community design rights; and</p> <ul style="list-style-type: none"> EU registrars will have the right to revoke .eu domain names owned by UK companies or individuals on their own initiative and it will not be possible to renew those domain names. 	
<p>UK Government guidance on intellectual property after Brexit</p>	<p>BEIS has published guidance on intellectual property after Brexit as a supplement to their previously published note on intellectual property rights. In both a deal and a no deal scenario, the UK will protect existing registered European Union trademarks, registered Community designs and unregistered Community designs. It will carry on recognizing database rights held by EEA nationals and business, supplementary protection certificate applications that are pending on exit will be resolved in line with current EU regulation. ON a no deal, the UK will protect existing EU and EEA EFTA database rights, will preserve EU law on patents, copyright and exhaustion of IP rights on the UK statute book and there will be no change for the importation of goods into the UK (although there may be restrictions on the parallel importation of goods from the UK into the EEA).</p>	<p>Guidance</p>
<p>European Copyright Directive: responsibility for copyright infringement on platforms</p>	<p>The text for Article 13 of the European Copyright Directive has been agreed. Article 13 aims to make user-upload services legally responsible for copyright infringement on their platforms. If Article 13 comes into force with this text, certain online platforms would have to actively police their sites, rather than relying on rights holders noticing infringements and using the notice and take-down systems that are currently in place.</p> <p>The agreed text must now be formally confirmed by the European Parliament and the Council and published in the Official Journal. Member states then have 24 months to transpose the new rules into their national legislation.</p>	<p>European Commission press release</p>
<p>IPO call for evidence on copyright changes</p>	<p>The Intellectual Property Office has launched a call for evidence regarding its review of copyright changes made in 2014. Respondents are invited to submit evidence of the impact the changes have had on them or their organizations. The evidence submission deadline is 10 April 2019.</p>	<p>Consultation</p>
<p>Public sector</p>		
<p>New funding framework for construction firms</p>	<p>A new seven-year funding framework, developed by the Crown Commercial Service, has been introduced to enable construction firms to bid for work on central government and public sector projects that involves the construction, refurbishment, repair, demolition or decommission of public buildings</p>	<p>Press release</p>

Commercial bulletin

Development	Summary	Links
	<p>throughout the UK. Prompt payment initiatives and project bank accounts have been included in the framework to support supply chains. Suppliers have to register on the Crown Commercial Service eSourcing system in order to bid.</p>	
Updated Model Services Contract	<p>The Cabinet Office has published updates to the Government Model Services Contract. It includes amendments to the definition and interpretation provisions in preparation for Brexit, updates to the data protection provisions in accordance with amended procurement policy guidance, additional provisions on independent control and joint control of personal data and new provisions regarding compliance with the Criminal Finances Act 2017.</p>	<p>Guidance: Model services contract</p>
Client training and briefings		
Eversheds Sutherland Brexit webinar	<p>Following the success of our first webinar, we are holding a second Brexit webinar on 18 March when Ros Kellaway will discuss what the House of Commons' votes on 12-14 March mean. Please contact us if you would like to attend.</p>	
Other Eversheds Sutherland client briefings	<p>Product safety and IoT: European Commission orders recall over data security failings</p> <p>GDPR and privacy issues in retail finance</p> <p>FCA final guidance issued: assessing fairness of variation terms in financial services consumer contracts</p> <p>FCA imposes fines in first competition enforcement case</p> <p>A tale of three regulator: the EBA, ESMA and FCA guidance on cryptoassets</p>	

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