EVERSHEDS SUTHERLAND

Commercially connected

FEBRUARY 2020

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
- Focus on disruptive tech
- IP
- IT
- Public sector

Brexit

Development	Summary	Links
Key dates	The key dates during the Brexit transition period are as at the date of this bulletin: • 25 February: European Council adopted a decision authorising the opening of negotiations and adopting negotiating directives • 27 February: UK Government to present its own negotiating mandate to Parliament • 2 March: negotiations due to commence • June 2020: high level UK/EU summit to take stock of progress • End of June: financial services to conclude assessments of "equivalence" and UK/EFTA states to discuss arrangements for civil judicial co-operation • 1 July: deadline for requesting extension to transition period • end September: deadline for UK to give notice to accede to 2005 Hague Convention on Choice of Courts Agreements • 31 December: end of transition period.	EU negotiating mandate as adopted by the European Council 25 February 2020
Exit documents	As a reminder, it is not just the EU from whom the UK is withdrawing but also EEA and EFTA. There are therefore 2 withdrawal or separation agreements: • the withdrawal agreement between the UK and the EU; and • the separation agreement between the UK and EEA EFTA states (Norway, Iceland and Liechtenstein). This largely mirrors the withdrawal agreement and includes a deal on citizens' rights that protects the rights of EEA EFTA nationals in the UK and UK nationals in the EU as well as including separation provisions.	Withdrawal Agreement EEA EFTA Separation Agreement
Impact on particular sectors	Click on the link to hear some of our top lawyers discuss how things will change after the UK leaves the EU for their sector.	Client podcast
Tariffs on goods	The **UK Government** is preparing to reverse previous plans to cut import tariffs on most goods after 31 December 2020. Previously Theresa May's Government planned a temporary zero tariff regime for most goods to follow a no deal Brexit but this has been permanently shelved, with the Department for International Trade now saying that they will consult business groups about simplifying the current regime rather than abolishing tariffs. One proposal is to remove tariffs of less than 2.5% and rounding down tariffs to the nearest 2.5%, 5% or 10% band. Another is to remove tariffs on components used in factory production. Consultation closes on 5 March 2020.	Consultation

Development	Summary	Links
Checks on goods	At a **Cabinet Office event** called "Preparing our border for the future relationship", businesses who trade with Europe were told that they need to prepare for "significant change" with "inevitable" border checks for most who import from the EU from 2021. Delegates were warned that it could take 5 years to get a smart border involving online processes ready and so businesses should be ready for change by January 2021, whatever the outcome of the negotiations on the future trading relationship. The deadline for businesses to apply for customs support funding has been extended to 31 January 2021.	Government press release
Freeports	The **UK Government** has issued a consultation on its proposed freeports policy. These are designated zones within which favourable customs and tax rules may apply, so that typically goods brought into a freeport do not attract tariffs until they enter the domestic market. with obvious advantages for importing components where the finished product is exported. The proposal is for up to 10 freeports to include zones away from a port, as well as specific economic zones offering tax and other incentives to encourage businesses to invest in freeports. Locations to be announced by the end of 2020. The Government's proposals include: • no tariffs, import VAT or excise to be paid on goods brought into a freeport until they leave the freeport and enter the UK's domestic market • if the duty on a finished product is lower than that on component parts, a company could benefit by importing components duty free, manufacturing the final product in the freeport zone and then pay the duty at the rate of the finished product when it enters the UK domestic market • a company could import components duty free, manufacture the final product in the freeport zone and then pay no tariffs on the components when the final product is re-exported • simplified customs procedures • customs sites to be run by a freeport operator responsible for security and keeping records of goods in the zone: both physically secure and secure via digital tracking which can be viewed remotely by government agencies • businesses operating within freeports to be authorised by the Government in a "light touch process" • certain categories of goods such as licensed products to be excluded from freeports whilst excise goods would be permitted to enter with duties suspended	Consultation

Development	Summary	Links
	• tax advantages with the possibility of tax incentives such as SDLT, R&D tax credits and NI contributions • proposals for amending/streamlining planning legislation including use of local development orders • seeking views on the necessary infrastructure required for freeports to be a success • allowing 2 or more ports to collaborate (eg an inland rail port with a sea port or airport) to become 1 freeport • these applying for freeport status to be invited through a competitive bidding process, with the consultation paper setting out initial criteria Consultation closes on 20 April 2020.	
Which free trade agreements is the UK going to prioritise?	The **DIT** has outlined the UK Government's proposed approach to the negotiation of FTAs with countries it has identified as priority partners including the USA, Japan, Australia and New Zealand.	Announcement
Intellectual property	The **Intellectual Property Office** (**IPO**) has released information on how IP rights are affected during the transition period. The IPO has stated that the IP system will continue as is until 31 December 2020, after which nearly all 1.4 million EU trade marks (EUTMs) and 700,000 EU designs will be converted to comparable UK rights. A different form of protection or process for application of protection is given to various IP rights, as set out by the IPO: • EU Trade Marks and Registered Community Designs: rights will continue to extend until the end of transition, then comparable rights will be created at that point in time under the terms of the Withdrawal Agreement. Those having applications at the end of transition have nine months to apply in the UK for the same protection • unregistered designs: post–transition, they are covered for the rest of their three-year term • international registrations designating the European Union: protection will be extended during transition. After transition they will continue to be protected. The UK is working with the World Intellectual Property Organisation to ensure they are adequately protected	IPO update

Development	Summary	Links
	• rights of representation: UK lawyers will have continued rights under the Withdrawal Agreement to present ongoing cases in EUIPO when the transition period ends • patents: the European Patent Office is not an EU body, therefore patent rights are unaffected • supplementary protection certificates: these are provided as national rights. The Withdrawal Agreement provides that the UK will apply the same framework for those applications pending at the end of the transition period • copyright: protection is mainly assured through international treaties. Any cross–border arrangements will depend on the UK-EU future relationship, and the Withdrawal Agreement ensures that any database rights existing in the EU and the UK at the end of the transition period will be recognised in both territories for the remainder of their term • exhaustion of rights: IP rights exhausted in EU and UK before end of transition period will remain exhausted in both territories.	
The future for non UK workers and freelancers	The **UK Government** has issued a policy statement on its new points-based immigration system. Click on the link to read this and an Eversheds Sutherland client briefing on this topic. Key points are: • from 1 January 2021 EU and non-EU citizens will be treated the same • free movement will be replaced with a points based system for skilled workers • there will be no general low skilled or temporary work route • there will be no cap on the number of people who can come on the skilled worker route • there will be no dedicated route for self-employed people • all applicants under the points based system will need to demonstrate a job offer from an "approved sponsor", that the job offer is at the required skill level and that they speak English. Other characteristics will be tradeable within the points based system. For the most highly skilled, they can enter the UK without a job offer if they are endorsed by a relevant body as well as a broader unsponsored route within the points based system to allow a smaller number of the most highly skilled works to come to the UK without a job offer (but possibly to be introduced at a later stage) • skilled workers will be able to be accompanied by their dependants	UK Government Policy Statement Client briefing

Development	Summary	Links
	• the pilot scheme for seasonal workers in agriculture will be expanded and there will be a procedure for allocating extra points for occupations deemed to be in shortage but only in respect of temporary relief • students will be covered by the points based system. Specialist occupations including "innovators" and those involved in sport and the arts can use other immigration routes • for visitors, EU citizens can come to the UK as visitors for six months without the need to obtain a visa and there will be no change for the Common Travel Area. The future system will also deliver on "Mode 4" commitments for temporary service suppliers	
UK trade remedies	Click on the link to read **UK Government guidance** on how the **Trade Remedies Investigations Directorate** will carry out transition reviews into existing EU measures and investigate if new measures are needed.	Government guidance
ICO Brexit update	In a statement on the implications of Brexit on the UK data protection regime, the **Information Commissioner's Office** (**ICO**) confirmed that EU data protection laws (including the GDPR) will continue to apply in the UK during the transition period. The ICO highlighted that it will remain the lead data protection supervisory authority for businesses and organisations operating in the UK. You can read more about the data protection implications of Brexit in our client briefing, here.	Statement Guidance
US Department of Commerce updated FAQs regarding Privacy Shield post-Brexit	The **International Trade Administration of the US Department of Commerce** has issued an updated version of the FAQs relating to the EU-US Privacy Shield in the wake of Brexit. The FAQs particularly focus on the obligation on Privacy Shield organisations to update their public commitment of compliance with the Privacy Shield to specifically include the UK. The updated FAQs also outline that it is imperative for organisations to maintain a Privacy Shield certification and re-certify themselves each year.	FAQs
Council of the EU negotiations mandate emphasises importance of commitment to data protection rules, following European Parliament warning to Commission of deficiencies in UK privacy laws in respect of adequacy assessment	In the addendum to its decision authorising the opening of negotiations with the UK for a new partnership agreement, the Council of the European Union expressed the following: "*In view of the importance of data flows, the envisaged partnership should affirm the Parties' commitment to ensuring a high level of personal data protection, and fully respect the Union's personal data protection rules, including the Union's decision-making process as regards adequacy decisions. The adoption by the Union of adequacy decisions, if the applicable conditions are met, should be a factor for fostering cooperation and exchange of information. It is also a condition, where necessary, to*	European Council addendum to decision authorising the opening of negotiations with the United Kingdom European Parliament adopted text

Development	Summary	Links
	achieve the high level of ambition on law enforcement and judicial cooperation in criminal matters as envisaged in section 2 of Part III". The addendum also contained commentary on the important of addressing data protection rules in the contexts of digital trade and law enforcement and judicial cooperation in criminal matters. Interestingly, only a couple of weeks prior, the European Parliament highlighted a number of specific areas for the European Commission to consider in relation to any UK adequacy assessment, in its then proposed UK/EU negotiation mandate. The Parliament instructed the European Commission to "*carefully assess*" the UK's data protection legal framework and ensure the UK has resolved the following prior to considering UK data protection law adequate in line with EU law: • immigration exemption in DPA 2018 • UK's legal framework on the retention of electronic telecommunications data • the UK's legal framework on national security and processing by law enforcement authorities, particularly mass surveillance programmes which may not be adequate when considering *Schrems* case and ECHR case law.	

Commercial – general

Development	Summary	Links
Impact on supply chains of Coronavirus	Click on the link to read an Eversheds Sutherland client briefing on this topic, with a particular focus on force majeure.	Client briefing
Jurisdiction from 1 January 2021	The future of civil judicial co-operation between the EU and the UK after the Brexit transition period remains unclear. Currently we will lose access to the **Brussels Recast Regulation** and the **2007 Lugano Convention** on 31 December 2020 (the Lugano Convention being the rules governing jurisdiction between EU member states and Norway, Iceland and Switzerland) and the original proposal from the UK Government was to accede to the 2005 Hague Convention which only protects exclusive jurisdiction agreements in a limited number of contracts. However, now the UK Government has indicated an intention to accede to the Lugano Convention, having received statements of support from certain EFTA states. Lugano is a regime that is largely equivalent to the EU rules that applied when the predecessor to the Brussels Recast regime was in force but which (unlike the Hague Convention) requires the consent of the EU in order for the UK to accede in its own right. The statement of support that the UK has received from Norway and Iceland also confirms that if the UK has not acceded to the Lugano Convention by the end of the transition period, the UK, Iceland and Norway will seek to agree alternative options, with the parties agreeing to meet no later than six months before the end of the transition period to assess the situation and seek to agree any necessary arrangements. Although acceding to the Lugano Convention allows continuation with most of the current rules of the EU on civil judicial co-operation, there may still need to be resolved the role of the CJEU in interpreting this Convention and whether any such "oversight" is acceptable to the UK Government.	UK Government announcement on Lugano Convention
Jurisdiction based on directing activities to a particular member state	The High Court in **Hutchinson v Mapfre** has held that it has jurisdiction over claims by a British victim of an accident in Spain against a Spanish operator under the consumer jurisdiction provisions of the Brussels Recast Regulation on the basis that the Spanish operator had directed its activities to the UK. The English court also had jurisdiction over the British individual's claims against the operator's insurers, despite a policy term limiting cover to claims submitted in Spain, on the basis that the court held the insurer could not rely on this provision because it derogated from the special jurisdiction in insurance matters conferred on the court by the Recast Brussels Regulation.	Judgment

Commercial – general

Development	Summary	Links
Effect of sanctions on enforcing contract awards	In **Ministry of Defence & Support for Armed Force of the Islamic Republic of Iran v International Military Services Ltd**, the Court of Appeal held that EU sanctions precluded the Iranian Ministry of Defence from enforcing an interest component of an arbitration award in respect of a period when it was subject to international sanctions. The case is a reminder of the effect of international sanctions as, in this case, the particular sanction prevented the satisfaction of claims in connection with any contract or transaction the performance of which was affected by the sanctions. As the Iranian ministry in question was designated as an entity to which the sanctions applied, the contractor was prevented from making any payment to it and that included any payment resulting from the Iranian Ministry enforcing interest on overdue payments, even where it had an arbitral judgment in its favour.	Judgment
New UK Environment Bill	Click on the link to read about the **new Environment Bill** introduced back into Parliament on 30 January. The Bill includes: • five overarching environmental principles to be at the heart of policy making • the Secretary of State to be able to set legally binding environmental targets in air quality, water, biodiversity, resource efficiency and waste reduction • not so much a non-regression clause but a new obligation on ministers when introducing new environmental laws to state that the new laws will not reduce the current level of environmental protection or, if that statement cannot be made, whether the minister still wants to proceed with the legislation • the Secretary of State to be obliged to report every 2 years on significant developments in international environmental protection legislation • a new environmental watchdog, the Office for Environmental Protection • moves towards a "circular economy" model, with powers to create new extended producer responsibility schemes, to make producers provide information to consumers about resource efficiency of their products, power to establish a deposit return scheme, power to impose charges on single use plastic items and various other powers.	Client briefing
Payment Matters	Click on the link to read our latest edition of **Payment Matters**. This includes articles on the development of Open Finance to enable third party providers to access customers' data across a broader range of financial sectors and products, an extension from existing principles to payment accounts to other financial products, competition issues arising in the New Payments Architecture, new proposals for a revised Open	Payment Matters

Development	Summary	Links
	Banking Roadmap, updated EBA fraud reporting guidelines, ban on using credit cards for gambling payments,	
IR35: draft PAYE debt transfer provisions	**HMRC** consulted until 19 February on two sets of draft regulations providing for recovery of unpaid PAYE and NICs debts from other parties in labour supply chains to which the off payroll working rules (**IR35**) apply from April 2020. Under the draft secondary legislation, HMRC will be able to recover income tax and NICs from the end client when the UK based agency (as the deemed employer) has failed to make PAYE deductions from payments made in relation to an off-payroll worker and there is, according to HMRC, 'no realistic prospect' of recovering the outstanding income tax from the deemed employer 'within a reasonable period'. HMRC must issue a recovery notice to transfer the debt within two years. The recipient of the recovery notice has the right to appeal. The technical note that accompanies the draft regulations states that HMRC will not exercise this transfer of debt power in the case of 'genuine business failure' of the party ordinarily liable to account for tax and NICs. There is no explanation of what constitutes a 'genuine business failure'. As HMRC hinted last year, end users will need to take care about who they engage contractors through. If, through no fault on the part of the end user, the fee payer fails to pay the tax (perhaps due to insolvency), then HMRC can collect it from the end user. As a consequence, suppliers with less strong balance sheets and compliance systems may be less attractive to some end users. HMRC has also updated its Employment Status Manual with new guidance for the IR35 regime.	HMRC Employment Status Manual
Good faith in joint ventures	In the case of **Russell v Cartwright**, the High Court heard arguments about whether a joint venture established by 4 individuals was subject to duties of good faith. The judge held that: • there was no implied duty to act in good faith simply because the agreement could be categorised as relational: the test of implying a term must still be satisfied • as the agreement contained references to act in good faith in specific circumstances, this suggested that the individuals had considered this duty and decided to impose it only in limited circumstances; hence implying a general duty to act in good faith would be inconsistent with the express terms of the agreement	Judgment

Development	Summary	Links
	• in any event, even if there was an implied duty to act in good faith, there was no breach of it and it would not have prevented the individuals from pursuing their own interests.	
Extent of indemnity over tax liabilities	In the case of **First National Trustco (UK) Ltd v McQuitty**, an indemnity in a deed of trust that indemnified the trustee against liabilities incurred in connection with trust property or otherwise incurred as trustee was held not to cover a tax liability incurred by the owner of that property.	Judgment
Online advertising	The **UK Government** has launched a call for evidence to regulate online advertising, supplementing various ongoing reviews of the sector by the **Competition & Markets Authority** and the **Centre for Data Ethics and Innovation**. The questions are mainly centred around the effectiveness of the current regulatory regime for online advertising: the self-regulatory codes of the ASA, industry led initiatives such as the Internet Advertising Bureau's Gold Standard and platforms terms of service and advertising policies. The review excludes advertising relating to politics, alcohol and gambling, with a closing date of 23 March 2020.	Call for evidence
Modern slavery in public contracts	The **Public Contracts (Modern Slavery) Bill** had its first reading in the House of Lords on 3 February. This is a formality and no date has been scheduled for its second reading. If passed in its current form, this bill will provide for a duty to avoid slavery in public procurement, with delegated power for regulations to make provisions for the due diligence that must be undertaken to establish whether a business is engaged in modern slavery (meaning exploitation within its supply chain or failing to take reasonable steps to eliminate exploitation within its supply chain).	Bill
European Commission 2020 Work Programme	The **European Commission** has published its **2020 Work Programme**, setting out the actions that it intends to take for this year. New initiatives include: • a Digital Services Act, aimed at reinforcing the single market for digital services • a Consumer Agenda, to align consumer protection around cross-border and online transactions • an Industrial Strategy for Europe, including a focus on helping SMEs • a new legislative Proposal on Crypto Assets, aimed at protecting digital finance from cyberattacks. For initiatives on AI and data strategy see our section on **Disruptive Tech**. Other proposals are steps to further strengthen overall cybersecurity in the EU, including	Work Programme

Development	Summary	Links
	a review of the NIS Directive and a new industrial strategy with specific attention will be paid to the media and audio-visual sectors. The programme also identifies: • existing legislation that will be subject to simplification including the Electronic Identification Regulation, the General Product Safety Directive and the Vertical Block Exemption Regulation • existing legislative proposals that are priorities including the new E-Privacy Regulation • existing legislative proposals that are being formally abandoned including the proposed Regulation on a Common European Sales Law.	
DAC 6	As a reminder, in January, the **International Tax Enforcement (Disclosable Arrangements) Regulations 2020** were laid before Parliament. These regulations, which come into force on 1 July 2020, implement **Council Directive (EU) 2018/822** of 25 May 2018 known as **DAC 6** which require mandatory information about certain cross border transactions to be filed with relevant tax authorities.	

Consumer law

Development	Summary	Links
Proposals for future UK consumer law	The **BEIS** Parliamentary Under-Secretary of State has provided an update on the UK Government's plans to revise consumer law during a Parliamentary debate, with a "**consumer and competition Command Paper**" to be published in Spring 2020 (this command paper could either be a green paper/consultation or a white paper/policy initiative and proposal for legislation). A review of the **Consumer Rights Act 2015** will be carried out later this year to consider whether this legislation has met its objectives	
Consumer internet of things security	The **UK Government** has announced **new legislation** to improve security standards of internet-connected household devices. Although no draft legislation has yet been published or proposed, the Government's announcement states that all consumer smart devices sold in the UK will have to adhere to 3 security requirements: • all consumer internet-connected device passwords must be unique and not resettable to any universal factory setting • manufacturers of consumer IoT devices must provide a public point of contact so anyone can report a vulnerability and it will be acted on in a timely manner • the same manufacturers must explicitly state the minimum length of time for which the device will receive security updates at the point of sale.	Announcement
Online harms	See the **IT** section below for **DCMS's** initial response to the public consultation on the Online Harms White Paper published in April 2019.	Government response
Jurisdiction based on directing activities to a particular member state	The High Court in **Hutchinson v Mapfre** has held that it has jurisdiction over claims by a British victim of an accident in Spain against a Spanish operator under the consumer jurisdiction provisions of the Brussels Recast Regulation on the basis that the Spanish operator had directed its activities to the UK. The English court also had jurisdiction over the British individual's claims against the operator's insurers, despite a policy term limiting cover to claims submitted in Spain on the basis that the insurer could not rely on this policy term because it derogated from the special jurisdiction in insurance matters conferred on the court by the Recast Brussels Regulation.	Judgment
Calls for legally binding AI rules to benefit consumers in the EU	The European Consumer Organisation is calling for the EU to implement legally binding rules to provide AI rights for consumers, as well as safeguards to impose obligations on organisations to be clear, transparent, and fully accountable about their activities involving AI systems and applications.	Press release

Cyber security

Development	Summary	Links
ENISA report on cybersecurity standards	The **EU Agency for Cybersecurity** (**ENISA**) has published: • a report on standardisation in support of cybersecurity certification including a set of recommendations for Standards Developing Organisations and prospective authors of certification schemes • a report on standards supporting certification covering 5 areas (internet of things, cloud, threat intelligence in the financial sector, electronic health records and qualified trust services) in which frameworks, schemes or standards currently exist that could potentially be evolved to EU candidate cybersecurity certification schemes. As a reminder, the **Cybersecurity Act** entered into force in the EU on 27 June 2019 and, among other things, establishes a cyber security certification framework which creates a mechanism and consistent set of rules for establishing various EU-wide cyber security certification schemes. While the UK Government plans to repeal the Cybersecurity Act post Brexit transition, it is expected to enter into negotiations with the EU, as part of its future relationship, to ensure that UK-issued cybersecurity certificates serve the same purpose in EU markets as EU-issued certificates and vice versa. For this reason, these reports may influence the UK's approach to cybersecurity certification.	Report: Standardisation in support of the Cybersecurity Certification Report: Standards Supporting Certification
NCSC design guidelines	The **National Cyber Security Centre** (**NCSC**) has published design guidelines for high assurance products for users and developers about products and systems whose purpose is to protect against elevated cyber threats (that is, threats that aim to circumvent mass-produced cyber security tools). The principles are designed for use where NCSC "certified assisted products" evaluation is not appropriate (CAPS high grade assessment being an independent assessment by the NCSC of primarily cryptographic products).	Guidelines
Consumer internet of things security	See the **Consumer** section above for a **UK Government** announcement on new legislation to improve security standards of internet-connected household devices.	Announcement
Access to 5G networks	The **Department for Digital, Culture, Media & Sport** (**DCMS**) has announced the following restrictions to be placed on the use of high-risk vendors in the UK's 5G and gigabit-capable networks: • high-risk vendors will be excluded from sensitive core parts of 5G and gigabit-capable networks, including safety-related and safety-critical networks, and sensitive geographic locations, such as nuclear sites and military bases	Government statement Press release NCSC guidance

Development	Summary	Links
	• a 35% cap will be imposed on high-risk vendor access to non-sensitive parts of the network, that is, the access network, which connects devices and equipment to mobile phone masts • legislation will be introduced at the earliest opportunity. The **NCSC** has published guidance to UK telecoms on the use of equipment from high risk vendors, setting out the practical steps operators should take to mitigate the risks posed.	
European Commission NIS Cooperation Group provides toolkit on measures to mitigate security risks of 5G rollout	The **European Commission** has endorsed a toolbox of measures agreed by member states to mitigate security risks relating to the rollout of 5G. The toolbox recommends that member states should implement measures to respond appropriately and proportionately to present and future risks, and restrict, prohibit and/or impose specific requirements for the supply, deployment and operation of 5G networks. In particular, they should: • strengthen security requirements for mobile network operators (e.g. strict access controls, rules on secure operation and monitoring, limitations on outsourcing of specific functions, etc.) • assess the risk profile of suppliers; as a consequence, apply relevant restrictions for suppliers considered to be high risk for key assets defined as critical and sensitive in the EU coordinated risk assessment (e.g. core network functions, network management and orchestration functions, and access network functions) • ensure each operator has an appropriate multi-vendor strategy to avoid or limit any major dependency on a single supplier (or suppliers with a similar risk profile), ensure an adequate balance of suppliers at national level and avoid dependency on suppliers considered to be high risk. The Commission has called for Member States to implement the measures by 30 April 2020 and to prepare a joint report on their implementation by 30 June 2020.	Press release
Government launches consultation into changes to Cyber Security Breaches Survey	**DCMS** launched a consultation on its proposed changes to the Cyber Security Breaches Survey statistical series, seeking feedback on what information is used and how frequently, as well as how any potential changes would impact on this usage. The consultation closes on 23 March 2020.	Consultation

Cyber security

Development	Summary	Links
UK Finance supports collaborative approach to cybersecurity threats	In a recent blog post, **UK Finance** discussed the call by the International Monetary Fund (**IMF**) for a more collaborative approach to managing and dealing with cybersecurity threats. The IMF outlined four principal areas of concern for financial institutions to improve on: • better understanding of cybersecurity risks and their potential impacts on financial stability; • greater collaboration on threat intelligence and incident reporting; • more consistency across regulatory regimes; and • increased understanding by countries and organisations of attacks and how to respond to them. The suggestions by the IMF mirror UK Finance's Financial Sector Cyber Collaboration Centre initiative which is working to enhance cybersecurity robustness across the financial sector.	Blog post
Malware guidance warns cloud syncing devices will not provide enough backup	The **NCSC** has released guidance on how to deal with malware and ransomware attacks. The guidance provides suggestions on how organisations in both public and private sectors can identify and defend against a malware threat with recommendations including: • regularly backing up important data • ensuring back-ups are stored offline away from the relevant network • taking steps to prevent malware from being delivered to devices (e.g. through use of effective filtering and blocking malicious websites) • preventing malware from running on devices and limiting the impact of infection and enabling rapid response. The guidance also warns organisations that cloud syncing services should not be considered sufficient as a standalone method for backing up important information because they may automatically synchronise immediately after files have been 'ransomwared'.	NCSC guidance

Development	Summary	Links
ENISA launches online platform to help security of personal data processing	**ENISA** has launched an online platform to assist with the security of personal data processing. The platform focusses on analysing technical solutions for the implementation of the GDPR including the principle of data protection by design and default, and security of processing. ENISA hopes that the platform might assist data controllers and data processors to establish their approach in developing policies to protect personal data. In addition, the platform can used by auditors and data protection supervisory authorities to assess the level of preparation and analysis taken in the selection and implementation of security measures adopted by a data controller.	Press release Report Platform
EDPB publishes documents adopted at 17th plenary	The EDPB announced the outcomes of its 17th plenary meeting which took place on 28–29 January 2020. Among the documents adopted during the session were: • draft Guidelines 1/2020 on the processing of personal data in the context of connected vehicles and mobility related applications for consultation, ending 20 March 2020; • final version of the Guidelines 3/2019 on processing of personal data through video devices following public consultation; and • Opinion 4/2020 on the draft decision of the competent supervisory authority of the United Kingdom regarding the approval of the requirements for accreditation of a certification body pursuant to Article 43.3 GDPR.	Press release Agenda List of adopted documents
ICO issues Brexit update: GDPR will continue to apply in the UK until December 2020	In a statement on the implications of Brexit on the UK data protection regime, the Information Commissioner's Office (**ICO**) confirmed that EU data protection laws (including the GDPR) will continue to apply in the UK during the transition period, set to end in December 2020. The ICO highlighted that it will remain the lead data protection supervisory authority for businesses and organisations operating in the UK. You can read more about the data protection implications of Brexit in our client briefing, here.	Statement Guidance
US Department of Commerce issue updated FAQs regarding Privacy Shield post-Brexit	The International Trade Administration of the US Department of Commerce has issued an updated version of the FAQs relating to the EU-US Privacy Shield in the wake of Brexit. The FAQs particularly focus on the obligation on Privacy Shield organisations to update their public commitment of compliance with the Privacy Shield to specifically include the UK. The updated FAQs also outline that it is imperative for organisations to maintain a Privacy Shield certification and re-certify themselves each year.	FAQs

Development	Summary	Links
CDEI publishes final report on online targeting	The Centre for Data Ethics and Innovation (**CDEI**) published a final report following its review of online targeting. Online targeting systems are those which promote content on social media platforms, recommend videos, and customise search engine results. CDEI revealed that internet users understand the advantages of online targeting – namely, it personalises online experiences, and enables convenience. However, users also expressed concern with the lack of accountability by organisations for the damage that targeting systems can cause to vulnerable individuals. The report specifies three sets of recommendations including: 1) Accountability – the government is currently developing a regulatory regime which is intended to manage the threat of online harms by holding organisations accountable for their use of targeting systems; 2) Transparency – CDEI encourages online targeting systems to be more transparent so that internet users can appreciate the effects of such systems. This requires system operators to make data processed for sensitive areas publicly accessible; and 3) User empowerment – the new regime should provide users with more information and greater control including the incorporation of a 'fairness by design' duty for online platforms.	Final report
Private Member's Bill for moratorium on and review of the use of AFR technology in public spaces	A new **Private Member's Bill** has been introduced in the House of Lords to prohibit the use of automated facial recognition technology in public places, and to make such surveillance a criminal offence. The Bill also requires the government to conduct an annual review such use of technology, including an examination of equality and human rights implications, data protection implications, quality and accuracy of technology, and adequacy of the regulatory regime governing data sharing and processing.	Private Member's Bill
FCA, ICO and FSCS warning to insolvency practitioners and FCA-authorised firms to be	The Financial Conduct Authority (**FCA**), the ICO and the Financial Services Compensation Scheme issued a joint warning to insolvency practitioners and FCA-authorised firms dealing with personal data, reminding them of their obligations under the Data Protection Act 2018 and the GDPR.	FCA statement ICO statement
Council of the EU negotiations mandate emphasises importance of commitment to data protection rules, following European Parliament warning to Commission	In the addendum to its decision authorising the opening of negotiations with the UK for a new partnership agreement, the Council of the European Union expressed the following: "*In view of the importance of data flows, the envisaged partnership should affirm the Parties' commitment to ensuring a high level of personal data protection, and fully respect the Union's personal data protection rules, including the Union's decision-making process as regards adequacy decisions. The adoption by the Union of adequacy*	European Council addendum to decision authorising the opening of negotiations with the United Kingdom European Parliament adopted text

Development	Summary	Links
of deficiencies in UK privacy laws in respect of adequacy assessment	*decisions, if the applicable conditions are met, should be a factor for fostering cooperation and exchange of information. It is also a condition, where necessary, to achieve the high level of ambition on law enforcement and judicial cooperation in criminal matters as envisaged in section 2 of Part III*". The addendum also contained commentary on the important of addressing data protection rules in the contexts of digital trade and law enforcement and judicial cooperation in criminal matters. Interestingly, only a couple of weeks prior, the European Parliament highlighted a number of specific areas for the European Commission to consider in relation to any UK adequacy assessment, in its then proposed UK/EU negotiation mandate. The Parliament instructed the European Commission to "*carefully assess*" the UK's data protection legal framework and ensure the UK has resolved the following prior to considering UK data protection law adequate in line with EU law: • immigration exemption in DPA 2018 • UK's legal framework on the retention of electronic telecommunications data • the UK's legal framework on national security and processing by law enforcement authorities, particularly mass surveillance programmes which may not be adequate when considering *Schrems* case and ECHR case law.	
Documents adopted at EDPB's 18th plenary	The European Data Protection Board (**EDPB**) published details of the documents and subject matter covered at its 18th plenary which was held on 18 and 19 February 2020. The key document adopted in the session was the draft guidelines to provide clarification regarding the application of Articles 46(2)(a) and 46(3)(b) GDPR regarding transfers of personal data from EEA public authorities to public bodies in third countries or to international organisations, where not covered by an adequacy decision. The consultation on the draft guidelines ends on 6 April 2020. In addition, the EDPB adopted a statement on the privacy consequences of mergers in the wake of the planned acquisition of Fitbit by Google. The session also focused on whether and when the EDPB and individual data protection supervisory authorities should conduct a review of the GDPR as required by Article 97 GDPR. The EDPB acknowledged that despite the general success of the implementation of the GDPR over the past 20 months, there are still several concerns, for example the harmonisation of national GDPR procedures. However, the EDPB concluded that it would be premature to carry out an evaluation at this time.	Press release
Policy of indefinite retention of convicts' biometric data found to be unlawful	The European Court of Human Rights recently ruled in **Gaughran v United Kingdom** that a Northern Irish police service's policy of maintaining a record of photographs, fingerprints and DNA samples was unlawful. The indiscriminate nature of the policy	Judgment

Development	Summary	Links
	amounted to a disproportionate interference of a convicted person's fundamental right to respect his private and family life. The court held that "the applicant's biometric data and photographs were retained without reference to the seriousness of his offence and without regard to any continuing need to retain that data indefinitely" and the unlikelihood of any potential evaluation of the policy "failed to strike a fair balance" between competing private and public interests.	
ICO consults on the draft AI auditing framework guidance for organisations	The **ICO** has launched a consultation on its draft AI auditing framework. The framework aims to provide guidance on how the data protection legislation impacts AI. The ICO intends to produce comprehensive guidance on how organisations can introduce operational and technical measures to mitigate the risks that AI poses. The closing date for submitting responses is 1 April 2020.	ICO announcement

Development	Summary	Links
Unrestricted access to website: no copyright infringement	In **Christopher Wheat v Google LLC**, the High Court held that where a website owner provided free and unrestricted access to their website and had consented to Google indexing and caching the site's content to display in search results when the public submitted queries to Google's search engine, Google's communication of the website owner's images to the public via hotlinking websites in the search result did not give rise to a good arguable case of copyright infringement. The appellant had argued that Google's methods meant that the copyright in his images was being attributed to the hotlinking websites, which were being prioritised over his own in Google's ordering of search results and he had not consented to his images being used in hotlinking practices.	Judgment
Beijing Treaty on Audio-visual Performances in force	The **World Intellectual Property Organisation** has confirmed that the **Beijing Treaty on Audio-visual Performances** will come into force on 28 April 2020. This will give performers 4 kinds of economic rights for performances fixed in audio-visual formats: reproduction rights, distribution right, rental right and the right to make available to the public. For unfixed (that is, live) performances, the right to broadcast for the first time, communicate to the public and a right of fixation will be available.	Press release Summary of the Beijing Treaty
AI inventor patents	The **European Patent Office's** examining division has looked at a case relating to an invention that was said to be derived from AI. This application was refused because the alleged inventor was a computer and not a natural person, with the EPO issuing a press release stating that "an inventor designated in the application has to be a human being, not a machine". The UKIPO has also announced that listing an AI inventor is not permitted in the UK.	Announcement
Broad trade mark specifications not grounds for invalidity	In the case of **Sky plc v SkyKick UK Ltd**, the ECJ held that marks cannot be invalidated just because the specification is imprecise or covers goods which were registered without an intention to use the trade marks in relation to all the goods and service specified, although that does not mean to say that registries will allow broad terms to not be challenged. Separately, EUIPO has issued a press release as a response to this decision: • the ECJ's decision in so far as it reassures EU trade mark owners that they will not face invalidity actions for registrations which include broad terms solely on the basis of the fact that those broad terms may lack clarity and precision confirms what is current EUIPO practice	Judgment Press release

Development	Summary	Links
	• as the ECJ did not question the clarity and precision of the term "computer software", EUIPO says that this decision also does not call into question EUIPO practice on terms lacking clarity and precision • as the ECJ decision has clarified the circumstances in which the ground of bad faith can be invoked against registrations for goods and services which the applicant has no intention to use, EUIPO invites applicants to carefully consider their business needs before applying for overly long lists of goods and services. In particular, EUIPO advises applicants against including in the application goods and services solely with the intention of extending the scope of their exclusive right or for purposes other than those falling within the functions of a trade mark.	

Development	Summary	Links
EBA Fintech report	The **European Banking Authority** has published a report on big data and advanced analytics in the financial services sector. The report sets out 4 key pillars and what it designates as "trust elements" which it says should be addressed when applying AI and machine learning technologies. There are no policy recommendations or set supervisory expectations in this report but it does give an indication of what the EBA considers to be the key risks. The "trust elements" that the EBA says should be dealt with are: • ethics: having an ethical policy in place to enforce ethical principles from the start of an AI project with an ethics committee to oversee this • explainability and interpretability: the need to explain is higher when decisions have a direct impact on customers and also when a human is required to make the final decision based on (say) AI generated results. The report also refers to the rights of data subjects under the GDPR to receive meaningful information about the logic involved in reaching automated decisions, with the lack of explainability being a prominent risk: financial instructions should be able to validate results without too strongly relying on the provider who sold them the AI/automated solution • fairness and avoidance of bias: the report identifies how bias can be introduced by the input data, training of the model and coding of the rules and discusses techniques that can be used to prevent or detect bias • traceability and auditability: all the steps and choices throughout the entire process should be clear, transparent and traceable. The report suggests keeping a register of the evolution of the models • data protection: this includes ensuring that the use of personal data in advanced analytics is compatible with the original purpose for which personal data was collected and includes explaining to data subjects where decisions are automated • consumer protection: this involves assessing when certain customers are excluded and other customers treated more favourably if they learn how to behave so that the analytics model produces a particular outcome.	EBA report
Contract expiry warning for telecoms	**Ofcom** has announced that from 15 February 2020 phone, broadband and pay-tv customers must be warned when their current contract is ending and what they could save by signing up to a new deal.	Ofcom announcement

Development	Summary	Links
Online harms	**DCMS** has published its initial response to the public consultation on the **Online Harms White Paper** published in April 2019. This White Paper suggested a new statutory duty of care on companies whose services allow users to share user generated content or interact and a new regulator to enforce the new framework, with the power to impose fines. The Government response suggests using Ofcom as the new regulator, rather than create a new body. Other aspects of its response are: • rather than forcing companies to remove specific items of content, companies will need to state what content and behaviour is acceptable on their sites in their terms and conditions and enforce these terms. Companies will need to have effective user redress mechanisms to allow users to report harmful content and challenge content takedown. • only companies that provide services or use functionality on their websites which facilitate the sharing of user-generated content or user interactions will be in scope, with guidance to be provided to help businesses understand if they are in scope. So, if a site allows comments, forum or video sharing, the company operating that site will be in scope. • the proposal for annual transparency reporting on content removal appears to remain but the response states that reporting requirements for companies as to how they remove content will vary in proportion with the type of service. The regulator will apply minimum thresholds for the level of detail a company needs to include in a transparency report. • The response states that the new regime will be proportionate in its application but does this mean proportionality will be introduced through the regulator's approach to enforcement? The response states that the Government will minimize the regulatory burden on small businesses and where there is a lower risk of harm occurring. The Government has said it will publish a full response to the consultation in Spring 2020. The response also states that "We do not expect there to be a code of practice for each category of harmful content. We recognize that this would pose an unreasonable regulatory burden on in-scope services. However, we will publish interim codes of practice in the coming months to provide guidance for companies on how to tackle online terrorist and CSEA content and activity. The codes will be voluntary but are intended to bridge the gap and incentivise companies to take early action prior to the regulator becoming operational, thus continuing to promote behaviour change from industry on the most serious online harms. We are continuing to engage with key stakeholders in the development of the codes to ensure that they are effective."	Government response

Development	Summary	Links
EIOPA publishes guidelines on outsourcing to cloud service providers	Following a public consultation, the **European Insurance and Occupational Pensions Authority** (**EIOPA**) has published the final version of its Guidelines on outsourcing to cloud service providers. The guidelines are addressed to national supervisory authorities and focus on (among other things): • the criteria for distinguishing whether cloud services should be considered within the scope of outsourcing; • principles and elements of governance of cloud outsourcing; • instructions for the risk assessment of cloud sourcing and the due diligence which should be undertaken on cloud service providers; • contractual requirements; • management of access and audit rights; security of data and systems; sub-outsourcing of critical or important operational functions or activities, monitoring and oversight of cloud outsourcing and exit strategies; and • instructions for national supervisory authorities on the supervision of cloud outsourcing arrangements.	Press release Guidelines
TMT thought leadership	Click on the link to download our TMT Thought leadership edition of Telescope.	Eversheds Sutherland client briefing: Telescope

Public sector

Development	Summary	Links
When are automatic exclusions for subcontractor violations unlawful under EU procurement law	The **CJEU** has found that Italian domestic public procurement legislation requiring the automatic exclusion of a tenderer, when a contracting authority discovers during the tender that that the tenderer's nominated subcontractor has violated social and labour laws, infringes the principle of proportionality. This may result in a review of domestic procurement legislation in EU member states which mandate exclusions operating automatically rather than by discretion. Within the UK, as the Public Contracts Regulations 2015 effectively copied out the underlying EU directive, they maintain the maximum flexibility for contracting authorities to make their own decisions on exclusion matters and so do not automatically mandate removal.	Case C-395/18
Impact of AI on public standards	The **Committee on Standards in Public Life** has published a report on artificial intelligence and its impact on public standards. Key points include: • there is not one accepted definition of what counts as AI. The term can be used to describe a broad range of processes, from simple automated data analysis to complex deep neural networks, with machine learning being an important subset of AI • certain key principles of public life such as openness, accountability and objectivity could be threatened by the use of AI, with issues particularly surrounding transparency and data bias • if AI is going to be successfully integrated into public sector life, the regulatory framework should inspire public confidence in new technologies and that implementing clear standards around AI may increase the rate of adoption by public bodies. Although a guide to using AI in the public sector was published by the Government Digital Service and Office for Artificial Intelligence in January, this report thinks that guidance alone is insufficient and that regulation is needed. • although the report identifies the need for a regulatory body, instead of a new, separate AI regulator, it suggests that the Centre for Data Ethics and Innovation be given an independent statutory footing to act as a central regulatory assurance body • in order to avoid the embedding of discrimination in public sector practice, the application of anti-discrimination law to AI should be clarified • public procurement requirements should ensure that private companies providing AI appropriately address public standards when developing AI solutions for the public sector and that tenders and contractual arrangements should explicitly deal with these issues.	Government Digital Service and Office for AI guide Government report

Development	Summary	Links
European Commission White Paper on strategies for data and AI	The **European Commission** has published its ideas and proposed actions for a framework for what it calls trustworthy artificial intelligence systems. Its Paper: • recommends that current EU rules on unfair commercial practices and personal data protection and privacy should to continue to apply • describes as high risk areas health, policing and transport where AI systems should be transparent, traceable and guarantee human oversight • suggests authorities should be able to test and certify the data used by algorithms, with unbiased data needed to training high risk systems to perform properly and to ensure non-discrimination. • for lower risk AI applications, it envisages a voluntary labelling scheme if they apply higher standards. • as regards damage caused by AI, the Commission's view is that "There is no need to complete re-write liability rules at EU or national level" but they are inviting views on how best to ensure that safety remains at a high standard and that potential victims do not face more difficulties to get compensation compared to victims of traditional products and services. At the same time the European Commission has published its European data strategy whose aim includes allowing people to have a stronger say on who can access the data they generate. The White Paper is open for consultation until 19 May 2020. The European Consumer Organisation has also called for the EU to provide legally binding safeguards to establish AI rights for consumers as well as rules to enforce obligations on companies to be transparent and accountable about their use of AI and to provide powers for public authorities to ensure AI applications do not expose consumers to harm.	White Paper European Data Strategy Announcement
ICO consults on their AI auditing framework draft guidance	The **ICO** has issued a consultation on its draft guidance on the **AI Auditing Framework**. The guidance sets out advice on how to understand data protection law in relation to AI and recommendations for measures to mitigate the risks AI poses to individuals. It also aims to provide a solid methodology to audit AI applications and ensure they process personal data fairly. Closing date for responses is 1 April 2020.	Consultation Draft guidance

Focus on disruptive tech

Development	Summary	Links
EBA Fintech report	See our **IT** section for a summary of the **European Banking Authority's** report on big data and advanced analytics in the financial services sector.	EBA report
Impact of AI on public standards	See the Public Sector section above for a report issued by the UK Government's Committee **on Standards in Public Life** on artificial intelligence and its impact on public standards.	Government Digital Service and Office for AI guide Government report

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