



Commercial Bulletin

January 2019

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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Topics covered:

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Development	Summary	Links
Brexit		
Brexit: where are we now?	<p>Parliament's rejection of the Withdrawal Agreement on 15 January triggered certain requirements under the European Union (Withdrawal) Act 2018, including obligations for a Minister to give a written statement setting out how the government proposes to proceed in relation to the withdrawal negotiations and for arrangements to be made for motions relating to that statement to be moved in both Houses.</p> <p>On 21 January the Prime Minister gave a statement to the House of Commons. She stressed that the only ways in which the possibility of a no deal Brexit can be ruled out are for Parliament to approve a deal or for the Article 50 notice to be revoked so that the UK remains in the EU. She was clear that she does not support revocation of the Article 50 notice which she believes would go against the referendum result. She also expressed concerns about a second referendum, making it clear that this is not an option she favours. With regard to the Northern Ireland backstop she stressed that the creation of a hard border between Northern Ireland and Ireland is not an option. Going forward the government intends to develop proposals to ensure that Brexit will not lead to a reduction in workers' rights and environmental standards and to ensure that Parliament has a proper say and fuller involvement in the forthcoming negotiations on the future UK-EU relationship.</p> <p>On 24 January the European Parliament Brexit Steering Group called on the UK to clarify its position in the coming days, stating that it expects the UK to come back as quickly as possible with a positive and viable proposal on the way forward. The Group reiterated that the Withdrawal Agreement, including the backstop, cannot be re-negotiated and that whilst a no deal Brexit is in nobody's interests work on no deal planning would need to be intensified in light of Parliament's rejection of the Withdrawal Agreement.</p> <p>Also on 24 January the Prime Minister gave a written statement to the House of Commons stating that the government proposed to proceed with the steps outlined in her statement of 21 January. The required motions were subsequently tabled and various amendments to them were proposed by MPs. On 29 January, following debate on these amendments, the House of Commons voted in favour of rejecting a no deal Brexit and seeking to renegotiate the backstop provisions in the Withdrawal Agreement with a view to accepting the Withdrawal Agreement in revised form at a further "meaningful vote". Although the results of these votes do not have legal effect, they have political effect in</p>	<p>PM statement 21 January</p> <p>Written statement 24 January</p> <p>PM statement 29 January</p> <p>European Parliament press release 24 January</p> <p>Exiting the EU Committee response to rejection of Withdrawal Agreement</p> <p>Webinar</p> <p>Slides</p>

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	<p>that they enable the Prime Minister to return to negotiations with the EU with clarity on the way forward that should be acceptable to the House of Commons.</p> <p>The Exiting the EU Committee has published a full response to Parliament's rejection of the Withdrawal Agreement. Click on the link to read this.</p> <p>Click on the links to access the recording and slides from the Eversheds Sutherland webinar "This deal, no deal, no Brexit" which was delivered by partner Ros Kellaway following the "meaningful vote" on 15 January.</p>	
Finance Bill 2019	The Finance Bill 2019 has been amended so that the government will only have the power to make Brexit related tax changes if either the House of Commons approves a Brexit withdrawal agreement and a framework for future relationship with the EU, the Prime Minister has formally requested an extension of the Article 50 notice or the House of Commons has approved a no-deal Brexit.	Finance (No. 3) Bill
Supreme Court decision on the Scottish Continuity Bill	Following a reference by the Attorney General and the Advocate General for Scotland, the Supreme Court has held that significant aspects of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill are outside the legislative competence of the Scottish Parliament because they would modify provisions of the Scotland Act 1998 or the European Union (Withdrawal) Act 2018. The Bill was introduced by the Scottish government as a way of giving the Scottish Parliament legislative control over the continuity of laws relating to devolved matters in Scotland that are currently the subject of EU law pre Brexit.	Supreme Court landing page
EEA EFTA separation agreement	<p>The government has reached a separation agreement with the EEA EFTA states of Iceland, Liechtenstein and Norway. This will require domestic legislation in order to implement it in the UK and the intention is that this will be done via the EU (Withdrawal Agreement) Bill. On a no deal Brexit the UK has said that it will still pursue a citizens' rights agreement with the EEA EFTA states.</p> <p>The separation agreement includes the following provisions:</p> <ul style="list-style-type: none">• UK nationals lawfully residing in an EEA EFTA state at the end of the implementation period, and vice versa, will be able to stay• mutual recognition of professional qualifications• goods placed on the UK or EEA EFTA market before the end of the implementation period can continue to circulate freely between the UK and EEA EFTA states	EEA EFTA Separation Agreement and explainer

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	<ul style="list-style-type: none"> • goods that are in transit or temporary storage at the end of the implementation period may continue to be treated under the customs procedures that applied at the end of the implementation period for up to 12 months • existing EEA EFTA geographical indications will remain protected in the UK until a future agreement comes into effect • as regards transfers of personal data, the UK is seeking an adequacy decision from the EU by the end of the implementation period and if it obtains this it will automatically apply to the EEA EFTA states • public procurement rules under the EEA agreement will continue to apply to procurements ongoing at the end of the implementation period 	
<p>UK accession to the Hague Convention on Choice of Court Agreements 2005</p>	<p>The UK has now deposited its instrument of accession to the Hague Convention on Choice of Court Agreements 2005. The Convention will enter into force for the UK on 1 April 2019 on a no deal Brexit. The effect of the Convention is that EU member state courts will be required to recognise exclusive jurisdiction clauses which designate the courts of a part of the UK and which are entered into on or after 1 April 2019.</p>	<p>Notification of accession</p>
<p>European Commission notice to stakeholders on Brexit and civil justice</p>	<p>On 18 January the European Commission published a revised notice to stakeholders on the effect of Brexit on civil justice and private international law. This updates their previous notice of 21 November 2017. The notice states that, subject to the implementation period provided for in the Withdrawal Agreement, the UK will become a third country on exit day with the effect that:</p> <ul style="list-style-type: none"> • EU rules for international jurisdiction will continue to apply to proceedings involving a defendant domiciled in the UK that have already started, but new proceedings will be governed by the national rules of the member state of the court seized • UK court judgments exequatored (officially recognised) but not enforced before exit day can still be enforced in the EU, but the recognition and enforcement of any other UK court judgments will be governed by the national rules of the member state in which recognition or enforcement is sought <p>in each case, unless an international convention to which both the EU and the UK are party applies.</p>	<p>Notice</p>

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Brexit and the World Trade Organisation	<p>The European Parliament and European Commission have each adopted a proposed Regulation on the apportionment of tariff rate quotas included in the EU's WTO schedule following Brexit. The Regulation sets out how the EU's tariff rate quotas will be apportioned between the EU and the UK on Brexit, until such time as formal agreement on apportionment is reached with WTO members. It is now expected that this Regulation will be formally adopted under the ordinary legislative procedure without further amendment.</p> <p>Separately, the UK government has announced its intention to lodge an instrument of continued acceptance of the WTO's Agreement on Trade Facilitation. This Agreement is intended to improve cross-border movement of goods by improving transparency, streamlining customs procedures and removing red tape. The UK is currently a member of this Agreement by virtue of its membership of the EU and so the instrument of continued acceptance would confirm its independent membership of the Agreement following Brexit.</p>	<p>Resolution on proposed Regulation on apportionment of tariff rate quotas included in the WTO schedule of the EU</p> <p>UK government position on WTO's Agreement on Trade Facilitation</p>
No deal Brexit: updated government guidance	<p>The government has stated that preparing for no deal is now an operational priority. In response to the European Commission's communication of 19 December on implementation of its no deal Contingency Action Plan, the government has updated its no deal landing page to state that it is pleased to see that the EU is committing to step up preparations for all scenarios and that the UK is ready to intensify its engagement and cooperation with the Commission's Brexit Preparedness Group and other institutions and member states in order to minimise disruption to both the UK and the EU.</p> <p>The government is continually updating its no deal advice: click on the link to view the landing page. We also comment below on various no deal technical notes that are of particular interest to commercial practitioners.</p> <p>The House of Commons Library has also published a briefing on the implications of a no deal Brexit on the economy, trade and customs and various sectors. Click on the link to read this.</p>	<p>No deal guidance</p> <p>House of Commons Library briefing</p>
Online tool to help prepare for Brexit	<p>The government has created an online tool to help businesses prepare for Brexit. The business answers a series of simple questions and the tool will direct them to all relevant publications.</p>	<p>Online tool</p>
Motor vehicle type-approvals and Brexit	<p>EU Regulation 2019/26 on type approval legislation and Brexit has been published in the OJEU and came into force on 13 January. Existing legislation allows manufacturers to choose the type-approval authority from which to obtain a type-approval that allows them to place motor vehicles and</p>	<p>Regulation 2019/26</p>

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	components on the EU market. In the absence of specific provisions in this area Brexit would mean that type-approvals granted by the UK type-approval authority would no longer ensure access to the EU market. To deal with this situation the Regulation provides that manufacturers holding a valid UK type-approval can apply for a replacement EU27 type-approval.	

Brexit draft statutory instruments

The following draft statutory instruments, amongst others, have been published this month:

[Provision of Services \(Amendment etc\) \(EU Exit\) Regulations 2018](#): these Regulations amend the Provision of Services Regulations 2009 (which implement the EU Services Directive, the aim of which was to break down barriers to cross-border trade within the EU). They correct deficiencies resulting from the UK being outside the EU's regulatory framework for services, including by removing obligations on UK competent authorities regarding the way in which they regulate EEA service providers (so that they will be regulated in the same way as third country service providers) and removing reciprocal arrangements such as those relating to administrative cooperation. Therefore the principles of the Regulations will apply for the benefit of UK businesses only. Correcting those deficiencies also ensures that the UK meets its commitments under WTO rules, in particular the WTO most favoured nation principle which prevents countries from discriminating between their trading partners outside of negotiated deals.

[The Data Protection, Privacy and Electronic Communications \(Amendments etc\) \(EU Exit\) Regulations 2019](#): these create a UK GDPR regime which will be a single data protection regime that applies after exit day, merging the GDPR and the applied GDPR regimes currently set out in the Data Protection Act 2018. The Regulations preserve the extra-territorial scope of the EU GDPR so that non-UK controllers or processors who process personal data of UK residents in certain circumstances will be covered by UK GDPR. The Regulations confer power on the Secretary of State to make adequacy regulations, to issue Standard Contractual clauses and to authorise Binding Corporate Rules. EU adequacy decisions and Standard Contractual Clauses are revoked but can continue to be used on a transitional basis after exit day. Adequacy is deemed for EEA states. The Regulations also make it clear that the GDPR definition of consent applies for the purpose of the Privacy and Electronic Communications (EC Directive) Regulations 2003 and this amendment will come into force on 29 March 2019 regardless of when exit day actually occurs.

[The Electronic Commerce \(Amendment etc\) \(EU Exit\) Regulations 2019](#): these amend provisions in the E-commerce Regulations 2002 and the E-Commerce

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	<p>Regulations 2018 to address references that will be inappropriate post Brexit. The Regulations also amend the implementation of the country of origin principle, by removing provisions that require UK providers of information society services to comply with UK laws in the coordinated field where they provide those services in EEA states rather than the UK. It is not, however, possible to use these Regulations to remove the restriction on applying UK laws in the coordinated field to EEA information society service providers when they are providing services in the UK.</p> <p>The Sanctions (Amendment) (EU Exit) Regulations 2019: these Regulations amend EU Council regulations on sanctions regimes and arms embargoes to substitute references to the UK for references to the EU or member states.</p> <p>Excise Goods (Holding, Movement and Duty Point) (Amendment etc) (EU Exit) Regulations 2019: in the event of a no deal Brexit goods imported from the EU will be treated in the same way as those coming from the rest of the world. Therefore these Regulations amend the current excise legislation to ensure that the UK maintains suitable controls for the holding and movement of excise goods in order to protect revenue, in particular to reflect the fact that free movement of excise goods under duty suspension between the UK and EU will no longer be practicable.</p> <p>The Value Added Tax (Miscellaneous Amendments and Revocations) (EU Exit) Regulations 2019: these Regulations are made under the Taxation (Cross-border Trade) Act 2018 to ensure that for VAT purposes transactions between the UK and EU countries are treated in the same way as transactions with the rest of the world.</p> <p>The Value Added Tax (Accounting Procedures for Import VAT for VAT Registered Persons and Amendment) (EU Exit) Regulations 2019: these Regulations allow UK VAT registered businesses to change the way they account for VAT due on imported goods, so that they can declare and recover import VAT on periodic VAT returns. The current system requires the payment of import VAT on or soon after the goods arrive at the UK border and the recovery of VAT on a subsequent return.</p> <p>The Value Added Tax (Postal Packets and Amendment) (EU Exit) Regulations 2019: these Regulations introduce a registration regime for collecting import VAT from non-UK businesses that supply goods in postal packets, the contents of which are valued at £135 or less. Suppliers will need to register and account</p>	

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	<p>for the import VAT unless arrangements are made which ensure that a payment is to be made by a postal operator on their behalf.</p> <p>Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2018: these amend the Copyright, Designs and Patents Act 1988, subordinate legislation and retained direct EU legislation in order to correct deficiencies arising from Brexit and to ensure that cross-border mechanisms and arrangements which break down on Brexit are resolved on a rational basis, retaining these where possible and removing them where they would result in an obligation on the UK which would not be reciprocated. They also revoke the Portability of Online Content Services Regulations 2018 and EU Regulation 2017/1128 on cross-border portability of online content services in the internal market, which allow consumers to access their online content services while temporarily present in another member state.</p> <p>The State Aid (EU Exit) Regulations 2019: these transpose the EU state aid regime into domestic law and give the CMA the function of regulating the regime in place of the European Commission. They also make changes to retained EU law to ensure that it operates effectively and to remedy deficiencies arising from Brexit.</p> <p>The Competition (Amendment etc) (EU Exit) Regulation 2019: these Regulations separate the EU and UK competition and merger control systems, whilst preserving the effect of the existing systems so far as possible. They provide that the CMA and sector regulators will investigate anti-competitive conduct in the UK solely under UK law and remove their powers to investigate and enforce EU competition law, as well as reciprocal investigation cooperation requirements. EU Block Exemptions will be retained under UK law but will be amended to correct deficiencies arising from Brexit. The Regulations also separate the UK merger control regime from the EU regime and give the CMA power to review all mergers that affect the UK market even if they are also being reviewed by the EU Commission.</p> <p>The REACH etc (Amendment etc) (EU Exit) Regulations 2019: these Regulations will create a regulatory system for the manufacture and import of chemicals into the UK which is similar to the current EU system, transfer functions currently exercised by EU agencies or institutions to UK equivalents and provide for a transitional system under which UK companies can carry on with the same activities in relation to chemicals that they currently carry out under the EU REACH Regulation.</p>	

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<p>Supreme Court case on service of notice</p>	<p>In UKI (Kingsway) Limited v Westminster City Council the Supreme Court held that a statutory notice from a council to a building owner was validly served when it was left with the receptionist of the company that managed the building who then scanned and emailed a copy of the notice to the building owner. In reaching its conclusion the Court found that:</p> <ul style="list-style-type: none"> • The notice was delivered indirectly, rather than directly, as it passed through the hands of the third party receptionist. However the key issue was whether the council caused the notice to be received by the building owner; ie was there a sufficient causal connection between the council's actions and the actual receipt of the notice. It found that there was such a causal connection. • The fact that the notice was sent by email rather than in hard copy was valid service. Before the enactment of the Electronic Communications Act 2000 case law had established that service of notice by fax was valid and when that Act made provision to facilitate the use of electronic communications this was not intended to cut down the existing law (with the effect that only service by fax expressly permitted by regulations made under that Act rather than under general principles of law would be valid service). There was no good reason for distinguishing transmission by fax from transmission by email. <p>Whilst this case is specific to its facts it is helpful in setting out some broad, pragmatic principles that the courts may apply to disputes about service of notice. That said, it is important to note that this case concerned a notice to be given under a statute where the methods of service set out in the applicable notice provisions were non-exhaustive and so other methods were permissible. When giving contractual notices it is essential to comply with any applicable notice provisions contained in the relevant contract as these will be interpreted strictly by the courts.</p>	<p>Judgment</p>
<p>Remedies available for agent's breach of fiduciary duty</p>	<p>In HPOR Services de Consultoria Ltda v Dryships Inc., Ocean Rig Udw Inc. the High Court found that a principal was entitled to the remedy of forfeiture and not the remedy of an account of profits where its agent was in breach of fiduciary duty. In this case the agent did not receive any unauthorised benefits or payments from a third party as a result of its breach of fiduciary duty; the only payments that it received were its contractual remuneration from the principal. The remedy of an account of profits is directed to sums which are diverted from the principal or which result from misuse of the principal's</p>	<p>Judgment</p>

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	<p>property (such as secret commissions) and there were no such sums at issue here. However, the principal was entitled to forfeit the agent's contractual remuneration because the remedy of forfeiture is available to all classes of breach, provided that the breach in question is sufficiently serious.</p> <p>This case is a helpful illustration of the circumstances in which the remedies of an account of profits and forfeiture are available to a principal for breach of fiduciary duty on the part of its agent.</p>	
<p>European Parliament Resolution on the Late Payment Directive</p>	<p>The European Parliament has passed a resolution on the implementation of the Late Payments Directive 2011/7/EU1. The resolution states that both the Late Payments Directive and national legislation on late payment should be better enforced and that, whilst there is no one-size-fits-all approach to tackling the issue of late payments, generally efforts should be made to move towards 30-day payment deadlines. It urges member states to take full responsibility for public sector prompt payment and to foster 'a decisive shift towards a culture of prompt payment' by taking the most suitable measures, including issuing guidelines on best practice and, where necessary and appropriate, legislative initiatives.</p>	<p>European Parliament Resolution</p>
<p>Second interim report from the review of the Modern Slavery Act 2015</p>	<p>The second interim report of the independent committee review of the Modern Slavery Act 2015 has been published. The recommendations set out in the report include the following:</p> <ul style="list-style-type: none"> • the government should keep an internal list of those businesses that are subject to the Section 54 reporting requirements • the quality of Section 54 statements should be improved, including by removing the right for businesses to state that they have taken no steps to address modern slavery in their supply chains and by making the six areas that organisations currently "may" cover in their statement mandatory • legislation should be amended to require organisations to consider the entirety of their supply chains • the Companies Act 2006 should be amended to include a requirement for companies to refer to their modern slavery statement in their annual reports and Section 54 should also be amended to impose a similar duty on non-listed companies that meet the £36 million threshold but are not captured by the Companies Act 2006 reporting requirements • organisations should be required to have a named, designated board member who is personally accountable for the production of the section 54 statement 	<p>Report</p>

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	<ul style="list-style-type: none"> • failure to fulfil modern slavery statement reporting requirements or to act when instances of slavery are found should be an offence under the Company Directors Disqualification Act 1986 • there should be a central government-run repository to which companies are required to upload their statements and which should be easily accessible to the public, free of charge • the Independent Anti-Slavery Commissioner should monitor compliance • government should legislate to strengthen its approach to tackling non-compliance, by adopting a system of initial warnings, fines (as a percentage of turnover), court summons and directors' disqualification. These sanctions should be introduced gradually over the next few years • Section 54 should be extended to the public sector and government should strengthen its public procurement processes to make sure that non-compliant businesses in scope of Section 54 are not eligible for public contracts • the Crown Commercial Service should keep a database of compliance checks and due diligence carried out by public authorities for use during the procurement process 	
Consumer law		
Brexit and consumer rights	The government has published a series of guides on the protection of consumer rights after Brexit, in both a deal and no deal scenario.	Guidance

CMA response to super-complaint on loyalty penalties

The Competition and Markets Authority ("CMA") has published its response to a super-complaint from Citizens Advice that companies penalise existing customers by charging them higher prices than new customers (also known as the "loyalty penalty"). The CMA looked at the markets of cash savings, mortgages, household insurance, mobile phone contracts and broadband and found that there is a total loyalty penalty of about £4 billion per year in these markets, with firms undertaking damaging practices including year on year "stealth" price rises, costly exit fees, difficult cancellation and switching processes and auto-renewals. The CMA has made recommendations to regulators and government as a result of these findings. General recommendations include the following and there are also market-specific recommendations:

- Bolder use of existing enforcement and regulatory powers to tackle harmful business practice. As part of this recommendation the CMA has announced an investigation into the anti-virus software market.

[CMA press release](#)

[CMA landing page](#)

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	<ul style="list-style-type: none"> • Potential for legislative and/or regulatory change as well as new powers for the CMA to seek substantial fines where law is breached. As part of this recommendation the CMA has established a set of core principles for businesses to follow, including the ability for consumers to exit a contract as easily as they can enter it; auto-renewal on an opt-in basis only and not at all for a fresh fixed term; no exit fees after any minimum/fixed term; giving sufficient information about renewals and price changes and switching being managed by the gaining supplier. • Publish the size of the loyal penalty in key markets and on a per supplier basis. • Empower intermediaries, such as Citizens Advice, to support switching between suppliers. • Press ahead with the roll out of the smart data review (a review on how to use data portability to improve the consumer experience). • Capture and share best practice on “nudge” remedies, such as requiring suppliers to give last year’s price on renewal. • Consider targeted pricing regulations such as caps, particularly to protect vulnerable consumers. • Assess the feasibility of matching price data to a recurring, large scale UK survey to improve understanding of who pays the loyalty penalty across markets. 	
<p>Government response to Law Commission report on consumer prepayments on retailer insolvency</p>	<p>In 2016 the Law Commission issued a report on the protections given to consumer prepayments in the event of retailer insolvency and whether those protections should be strengthened. The government, through the Department for Business, Energy and Industrial Strategy, has now responded to that report. The report states that next steps will include looking at options to enact primary legislation to grant the Secretary of State a power to require protection of consumer prepayments in sectors which pose a significant risk to consumers and to mandate such protection in certain schemes such as Christmas savings clubs. The government will also be exploring the possibility of changing the law on transfer of ownership of goods (as set out in the Sale of Goods Act 1979) to make it clearer, although it has not committed to a timescale for doing this. The government is not, however, intending to make any changes to the creditor hierarchy in insolvency in order to better protect consumers as this could have unintended consequences.</p>	<p>Government response</p>

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<p>Attorney General opinion on return of goods for repair or replacement</p>	<p>Attorney General Wahl has given an opinion on issues concerning the return of defective goods for repair or replacement under the Sales and Guarantees Directive. In the UK this Directive is implemented by the Consumer Rights Act 2015. The opinion concludes that:</p> <ul style="list-style-type: none"> • The place where a consumer has to return goods acquired under a distance contract to a seller in order to enable repair or replacement is a matter for the national court to decide and will be determined by reference to all the relevant circumstances. The relevant place must be such as to ensure repair or replacement free of charge, within a reasonable time and without any significant inconvenience to the consumer, taking account of the nature of the goods and the purpose for which the consumer required them. • A consumer may have to advance the costs of outward and/or return shipping, as long as this does not amount to a financial burden which dissuades the consumer from asserting his rights • A consumer who has notified a defect to the seller is entitled to have the contract rescinded where the seller has not taken any steps (including providing information on where the goods must be made available in order for them to be brought into conformity) by means of one of the remedies under the Directive, unless the lack of conformity is only minor or has not been demonstrated. 	<p>Opinion</p>
<p>CMA open letters on secondary ticketing</p>	<p>The CMA has issued two open letters, one to event organisers and one to secondary ticketing website operators, regarding the outcomes of the CMA's investigation into the secondary ticket sector and reminding them of their obligations under consumer protection law.</p>	<p>Letter to event organisers</p> <p>Letter to secondary ticketing website operators</p>
<p>Proposed Digital Content Directive</p>	<p>The European Parliament and Council have provisionally agreed the text of a Digital Content Directive. This will apply to digital content such as music, movies, apps, games and computer programmes and digital services including cloud computing services and social media platforms. This draft Directive provides that:</p> <ul style="list-style-type: none"> • if it is not possible to fix defective digital content or digital services in a reasonable time, the consumer is entitled to a price reduction or a full reimbursement within 14 days; • if a defect becomes apparent within one year of the date of supply it is presumed that it existed at the point of supply without the need for the 	<p>Press release</p>

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	<p>consumer to prove this. For continuous supplies the burden of proof remains with the trader throughout the term of the contract;</p> <ul style="list-style-type: none"> the guarantee period for one-off supplies cannot be shorter than two years and for continuous supplies it should apply throughout the duration of the contract; and for subscriptions to digital content for a period of time, the trader can only modify the content if this is permitted by the contract, the consumer is notified reasonably in advance and is given the opportunity to terminate the contract within at least 30 days of notice. <p>The Directive is part of a package together with the proposed sales of goods directive and both are part of the Digital Single Market Strategy.</p>	
<p>Proposals to amend EU consumer protection laws</p>	<p>The European Parliament has announced proposals to amend four consumer rights' directives (on Unfair Commercial Practices, Consumer Rights, Unfair Contract Terms and Price Indication) as part of the "New Deal for Consumers" package.</p> <p>If they become law, the proposals will require online marketplaces and comparison services (such as Amazon and eBay) to disclose the main parameters determining how offers resulting from a search query are ranked and whether the authenticity of product reviews are checked. They will also give consumers the right to know who the actual seller of a product or service is and to be provided with clear information prior to a purchase.</p>	<p>Press release</p>
<p>Data protection, privacy and cyber-security</p>		
<p>Brexit and data protection</p>	<p>As mentioned above, the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 create a UK GDPR regime to apply after the UK leaves the EU.</p> <p>You can find out more about the impact of Brexit on data protection issues in our briefing.</p>	<p>Eversheds Sutherland briefing The Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019</p>
<p>EDPB report on second annual joint Privacy Shield review</p>	<p>The EDPB have adopted a report on the Second Annual Review of the EU-US Privacy Shield. The report contains commentary on concerns already expressed by the EDPB's predecessor, the Article 29 Working Party, on the lack of concrete assurances that indiscriminate collection and access of personal data for national security purposes are excluded. In addition, the EDPB notes that the Ombudsperson is not vested with sufficient powers to remedy non-compliance,</p>	<p>Press release Report</p>

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	<p>and that checks regarding compliance with the substance of the Privacy Shield's principles are not sufficiently strong.</p> <p>The EDPB also highlights additional concerns in relation to checks to comply with the onward transfer requirements, the scope of meaning of HR Data and the recertification process, and a list of remaining issues raised after the first joint review which are still pending.</p>	
<p>Privacy Shield and Brexit FAQs</p>	<p>The US Department of Commerce has published FAQs on Privacy Shield and Brexit explaining steps certification participants must take to receive personal data from the UK post-Brexit. In order to receive personal data from the UK in reliance on the Privacy Shield, participants must complete certain steps <i>before</i>: (i) in the event the Withdrawal Agreement is agreed – the end of the transition period (31 December 2020); or (ii) in the event of no-deal, 29 March 2019. The steps to be completed are:</p> <ol style="list-style-type: none"> i. Update your public commitment to comply with the Privacy Shield to include the UK. (Note: If you plan to receive Human Resources (HR) data from the UK in reliance on Privacy Shield, you must also update your HR privacy policy) ii. Maintain your Privacy Shield certification by recertifying annually. 	<p>FAQs statement</p>
<p>AG Opinion on scope of search engine de-listing</p>	<p>Following a previous Court of Justice of the European Union (CJEU) ruling that, subject to exceptions, search engines are required to "de-reference" a webpage, or URL, from their search results when requested to do so by an individual if the webpage in question contains personal data which is inaccurate, inadequate, irrelevant or excessive, Advocate General Szpunar has issued an Opinion in respect of Case C-507/17 Google v CNIL that the CJEU should limit the scope of the de-referencing that search engine operators are required to carry out, <u>to the EU only</u>.</p>	<p>Opinion</p>
<p>European Data Protection Board (EDPB) sixth plenary</p>	<p>The EDPB met on 22 and 23 January for their sixth plenary session. Topics discussed included:</p> <ul style="list-style-type: none"> • Privacy Shield – the EDPB's report on the Second Annual Review of the EU-US Privacy Shield was adopted (see update above). • Brexit – EDPB members agreed to cooperate and exchange information regarding their preparations and the tools available to transfer data to the UK post-Brexit. 	<p>News update</p>

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	<ul style="list-style-type: none"> • Clinical trials – the EDPB have adopted an opinion on the clinical trials Q&A, which addresses the adequate legal bases in the context of clinical trials and the secondary uses of clinical trial data for scientific purposes. • DPIA lists – the EDPB adopted opinions on the DPIA lists submitted by Liechtenstein and Norway. • Guidelines on certification – the EDPB adopted the final version of the guidelines on certification. The guidelines explore the rationale for certification as an accountability tool, provide explanations for the key concepts of the certification provisions in Articles 42 and 43 GDPR, explain the scope of what can be certified and outline the purpose of certification. • Australian supervisory authority request – the EDPB discussed a written request received from the Office of the Australian Information Commissioner regarding the publication of data breach notifications by supervisory authorities. 	
<p>EU-Japan adequacy agreement</p>	<p>The European Commission and Japan have formally adopted a mutual adequacy arrangement enabling personal data to flow freely between the European Union and Japan.</p> <p>The European Commission is also in the process of negotiating an adequacy decision with South Korea.</p>	<p>Press release</p> <p>Factsheet</p>
<p>New Open Data and Public Sector Information Directive</p>	<p>The European Parliament, Council and Commission have reached agreement on the text of the new Directive on Open Data and Public Sector Information, which sets out the conditions under which public sector non-personal data should be made available for re-use with the aim of making it more easily accessible.</p>	<p>Press release</p>
<p>New PCI Security Standards</p>	<p>The PCI Security Standards Counsel has now published two new standards, the <i>PCI Secure Software Standard</i> and the <i>PCI Secure Lifecycle Standard</i> (Secure SLC Standard), as part of a new PCI Software Security Framework. The framework is a collection of software security standards and associated programs for the secure design, development and maintenance of modern payment software. The Standards will replace the current PCI Payment Application Data Security Standard (PA-DSS) which will be retired in 2022.</p>	<p>PCI Security Standards blog post</p> <p>PCI Security Standards library</p>
<p>European Union Agency for Network and Information Security (ENISA)</p>	<p>ENISA has published analysis mapping existing security standards against requirements on security and privacy in the area of the Internet of Things.</p>	<p>Report</p>

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Development	Summary	Links
report on security and privacy and the Internet of Things		
ENISA report on eIDAS auditing framework for trust providers issuing qualified website authentication certificates	ENISA has published a report assessing the routes to global acceptance of the eIDAS auditing framework for trust providers issuing qualified website authentication certificates.	Report
European Data Protection Supervisor (EDPS) report on smart glasses and data protection	<p>The EDPS has issued a report which aims to clarify the state of play of smart glasses (wearable computer devices with mobile internet connection, to be worn as or mounted on eye-glasses), official positions on related data privacy issues and future developments. The report examines the data privacy issues associated with smart glasses, such as facial and voice recognition and the collection of "invisible" personal data like device identifiers in the form of Wi-Fi or Bluetooth radio signals.</p> <p>The EDPS summarises that given the GDPR provides stakeholders with a harmonised set of principles and a system of tools to assess and control the impact of smart glasses on data privacy, <i>"...an urgent need for technology specific legislative initiatives does not appear to be justified. However, the development of smart glasses and similar connected recording devices underlines the need to establish a robust framework for privacy and electronic communications, as proposed with the ePrivacy Regulation"</i>.</p>	Report
IP		
Brexit and IP	Both the Intellectual Property Office and the government have published guidance on IP and Brexit. This consolidates previously published materials in one place.	IPO guidance Government guidance
European Commission consultation on design protection	The European Commission has launched a public consultation on the evaluation of EU legislation on design protection with a view to establishing the degree to which that legislation works as intended and can still be considered fit for purpose. The consultation closes on 31 March 2019.	Consultation
New Trade Marks Directive in force	On 15 January the new Trade Marks Directive 2015/2436/EU came into force. In the UK this is implemented by the Trade Marks Regulations 2018 which came into force on 14 January. The Directive is intended to harmonise national and	Eversheds Sutherland briefing The Trade Mark Regulations 2018

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Development	Summary	Links
	<p>EU trade mark law. Click on the link to read Eversheds Sutherland briefing on the changes.</p> <p>The new Regulations contain the following amendment to the Trade Marks Act 1994: "A contractual obligation to transfer a business is to be taken to include an obligation to transfer any registered trade mark, except where there is agreement to the contrary or it is clear in all the circumstances that this presumption should not apply." This means that, on a business or asset sale, you should always ensure that it is clear exactly which registered trade marks are being assigned to the buyer. If not all registered trade marks owned by the transferring business are to be assigned to the buyer (for example because some marks are to be retained within the selling group) then it is good practice to contract out of this provision.</p>	
Technology		
<p>No deal Brexit: guidance on the e-commerce directive</p>	<p>The government has published guidance on the e-commerce Directive in the event of a no deal Brexit. The Directive applies to information society services, which include internet service providers, social media platforms and online retailers, and its purpose is to facilitate e-commerce across the EEA and remove barriers to trade. It establishes a "country of origin principle", a reciprocal arrangement whereby any EEA based information society service is only subject to the laws of the EEA state in which it is established, and not the laws of all the states in which it provides services, where those laws relate to the "coordinated fields" (ie laws relating to online activities such as information, advertising and contracting. The coordinated field does not extend to legal requirements relating to goods).</p> <p>On a no deal Brexit the government states that its policy approach will continue to align with the Directive. However, information society services established in the UK will no longer benefit from the country of origin principle when operating in EEA states. In other words they will have to comply with the laws of the coordinated fields in each EEA state in which they operate. UK based information society services will only have to comply with UK laws in the coordinated fields when operating in the UK and not just by virtue of being established in the UK. Conversely, over time the government will remove the country of origin principle from UK legislation so that EEA based information society services will have to comply with UK laws in the coordinated fields when operating in the UK.</p> <p>The government strongly urges both UK and EEA information society services to consider compliance issues resulting from the loss of the country of origin principle.</p>	<p>Government guidance</p>

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Development	Summary	Links
	See also the commentary on The Electronic Commerce (Amendment etc) (EU Exit) Regulations 2019 in the Brexit SIs section above.	
No deal Brexit: guidance for digital service providers on the NIS Directive	The government has issued guidance on the Network and Information Systems Directive for digital service providers in the event of a no deal Brexit. The guidance states that digital service providers (over the relevant threshold) established in the UK that offer services in EU member states may be required to designate a representative in one of the EU member states where they offer services. Whether this will definitely be required is presently unknown and may depend on future agreements with each member state.	Guidance
No deal Brexit: guidance on .eu domain name registrations	The government has issued guidance on .eu domain name registrations in the event of a no deal Brexit. The guidance notes that in a notice to stakeholders the European Commission confirmed that if there is a no deal Brexit UK persons will no longer be eligible to register or renew .eu domain names and that where the holder of an existing registration no longer fulfils the eligibility criteria the relevant Registry will be entitled to revoke the relevant domain name on its own initiative. The guidance therefore tells stakeholders to check the eligibility requirements for a .eu domain name and to consider transferring the registration to another top level domain name if those requirements are not met.	Guidance
AI 1: new European High Level Expert Group	The European Commission has appointed 52 experts, from academia, civil society and industry, to a new High Level Expert Group on Artificial Intelligence. The objective of the group is to support the implementation of the European AI strategy.	Announcement
AI 2: Draft EU guidelines on ethics for the development and use of AI	<p>The High-Level Expert Group on Artificial Intelligence has released the first draft of its ethics guidelines for the development and use of AI. These guidelines set out how developers and users can make sure that AI respects fundamental rights, applicable regulation and core principles in order to ensure it has an "ethical purpose" and that it is technically robust and reliable. The draft guidelines are open for comment until 1 February 2019. Final guidelines will be presented to the Commission in March 2019.</p> <p>Click on the link to read an Eversheds Sutherland briefing on the guidelines by Charlotte Walker-Osborn.</p>	European Commission landing page Eversheds Sutherland briefing

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Development	Summary	Links
AI 3: European Parliament opinion on a comprehensive European industrial policy on AI and robotics	<p>The Committee on Legal Affairs for the European Parliament has written to the Committee on Industry, Research and Energy expressing its opinion on a comprehensive European industrial policy on AI and robotics. The suggestions and comments set out in that opinion include, amongst other things:</p> <ul style="list-style-type: none">• great attention must be paid to product safety to ensure protection and trust of consumers in AI and robotics• human-centric design is crucial to ensure responsibility and accountability of decision-making processes by machines• policy framework must be designed to encourage the development of all kinds of AI, not only deep learning systems• public authorities should ensure ways of producing, sharing and governing open data• the Committee regrets that no legislative proposal on liability rules for new technologies was put forward during the current legislature• the Committee notes the ongoing work of the ISO on AI and urges member states to coordinate their ISO members to defend European values and interests in the development of standards• the Committee underlines the need to monitor the relevance and efficiency of IPR rules to govern the development of AI	Opinion
AI 4: AI4EU project	<p>AI4EU, a new project aiming to develop a focal point for AI resources, has been set up as part of the European Commission's strategy to increase investment in AI research and innovation under the Horizon 2020 programme. The project brings together 79 top research institutes, SMEs and large enterprises from 21 EU countries and aims to bring AI to small businesses, non-tech companies and public administrations across Europe. It will create a collaborative and open platform to provide support to users of AI technology, helping them to test and integrate AI solutions in processes, products and services and offering skills based courses.</p>	Press release
BSI cyber-security standard for self-driving vehicles	<p>The British Standards Institute has published a new cyber security standard for self-driving vehicles, PAS 1885:2018. Manufacturers will be able to use this standard to demonstrate that they are following the cyber-security for automated vehicles principles that were published by the government in 2017.</p>	Press release on new standard Government's cyber-security principles for connected and automated vehicles

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Development	Summary	Links
European Parliament resolution on autonomous driving	The European Parliament has adopted a non-binding resolution on autonomous driving in European transport, stressing that the EU needs to move faster in this area and that further efforts are needed to ensure sufficient funding to support the sector and to establish appropriate safety and liability rules. The resolution urges the Commission and member states to work to take and maintain a leading role in the international technical harmonisation of automated vehicles within the framework of the United Nations Economic Commission for Europe and the Vienna Convention.	Press release
Proposed UK legislation to tackle drone misuse	<p>The government has issued its response to the consultation on the future of drones which took place last year. The government has stated its intention to:</p> <ul style="list-style-type: none"> • legislate to give the police greater powers to tackle drone misuse, with a draft Drones Bill currently being finalised; and • better protect airports by extending the area in which drones cannot be flown. 	Response
Public sector		
No deal Brexit: public procurement	<p>The government has published guidance on public sector procurement on a no deal Brexit. This guidance states that:</p> <ul style="list-style-type: none"> • the current procurement regulations will be amended to ensure they remain operable and functional on Brexit, but the majority of the regulations will remain the same • the key difference for contracting authorities would be the need to send notices to a new UK e-notification service instead of the EU Publications Office, as on a no deal Brexit contracting authorities may no longer have access to the EU Publications Office or Tenders Electronic Daily. Contracting authorities who currently use a third party e-sender to submit notices will be able to continue to use them provided that the e-sender integrates its systems with the new UK e-notification service. Contracting authorities who submit notices directly will need to register with the new UK e-notification service • for procurements that have commenced before exit day (11pm on 29 March 2019), contracting authorities will need to comply with the amended regulations from that point. However, the effect of the former rules will be preserved in some circumstances to maintain fairness throughout the procurement 	Public sector procurement on a no deal Brexit

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Development	Summary	Links
	<ul style="list-style-type: none"> for procurements commencing after exit day, contracting authorities will need to follow the amended regulations 	
CJEU decision on contracting parties using framework agreements to which they are not party	The CJEU has ruled that a contracting authority may act on its own behalf and on behalf of other contracting authorities that are specifically indicated but are not direct parties to a framework agreement, provided that the requirements for advertising, legal certainty and transparency are complied with. The contracting authority must, however, still indicate the total quantity of supplies/services that may be procured under the framework including those to be procured by contracting authorities that are not direct parties.	Judgment
Eversheds Sutherland briefings		
	<ul style="list-style-type: none"> Update: your quarterly privacy and cyber-security update Leaving the past behind - "right to be left alone" in privacy The "transfers from EU back into the UK conundrum" Electronic signatures TMT outlook 2019 Data protection and Brexit: what you can do to prepare 	

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