EVERSHEDS SUTHERLAND

Commercially connected: January 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
- IP
- IT
- Public sector
- Focus on disruptive tech

Development	Summary	Links

The current position	The current position on Brexit is as follows:
	• the UK will leave the EU at 11:00pm GMT on Friday 31 January 2020;
	• there will then be a transition/implementation period until 31 December 2020 (whilst the withdrawal agreement between the EU and the UK provides for the possibility of this period being extended by agreement, the European Union (Withdrawal Agreement) Act 2020 does not permit this under UK law);
	• during the transition/implementation period the UK will not be an EU member state but EU law (including new EU law adopted during this period) will continue to apply to the UK;
	• the (non-binding) political declaration which sets out the framework for the negotiations of the future trading relationship between the UK and the EU aims for a free trade agreement for goods but does not contain any commitment from the UK to align with EU regulation; and
	• agreeing the terms of the future trading relationship between the UK and the EU in 11 months is challenging and there remains a real risk of a "no deal" scenario at the end of the transition/implementation period. In this scenario:
	  ○ trade between the UK and the EU will revert to WTO terms; and
	  ○ in practical terms there will be a customs and regulatory border between Great Britain and Northern Ireland affecting goods intended for export to the EU.
	To read our latest Brexit briefing which goes into more detail on the timetable for the UK's exit from the EU, the legal position during the transition/implementation period, the scope of the political declaration and the potential outcomes of negotiations on the future trading relationship between the UK and the EU, click on the link to our Brexit hub.
		Eversheds Sutherland Brexit hub

House of Commons Library report on Brexit and the Northern Ireland border	The House of Commons Library has published a paper on Brexit and the Northern Ireland border, highlighting that questions remain about exactly how goods will move between Northern Ireland and Great Britain including whether paperwork such as customs declarations will be required, to what extent goods will have to be checked and how different the regime for goods going from Great Britain to Northern Ireland will be compared to that for goods going from Northern Ireland to Great Britain.	Report

Development	Summary	Links
EU Commission slides on proposed free trade agreement between the UK and the EU	The EU Commission has published slides on the EU27 preparations for discussions on the proposed future free trade agreement between the EU and the UK. The slides contain a useful comparison of the single market vs free trade agreements. They conclude that for both trade in goods and trade in services a free trade agreement will not mean frictionless trade and that whilst there may be voluntary co-operation in some areas there will be no common rulebook.	Free trade agreement slides
EU principles for transparency in negotiation of future EU-UK trading relationship	The EU Permanent Representatives Committee (COREPER) has endorsed guiding principles for transparency in negotiations on the future relationship with the UK in order to facilitate effective public scrutiny and provide a steady flow of public information throughout the negotiations whilst also preserving the space to form EU positions and to negotiate with the UK.	

Commercial – general

Development	Summary	Links
Contract formation: authority to bind	In **Athena Brands Ltd v Superdrug Stores Ltd** the High Court granted summary judgment in favour of the claimant Athena, finding that a contract for Superdrug to purchase a minimum quantity of products from Athena had been formed by exchange of emails. As well as reminding us that all pre-contract correspondence should be marked "subject to contract" in an attempt to reduce the chances of contracts being inadvertently formed, this case also raised the issue of authority to contract. Superdrug argued that the employee who entered into the contract, a buyer with the job title of "Buyer – Body, Skin, Suncare and Travel Accessories", did not have actual or ostensible authority to bind Superdrug. It argued that a buyer's role is to identify appropriate products for retail stores and to negotiate a price for those products with suppliers, but the role does not involve actually placing orders for products and this practice is well known within the retail industry. The Court did not accept Superdrug's arguments, finding that the buyer was held out by Superdrug as the person with whom trading terms were to be discussed and agreed and that there was nothing in the correspondence or in the "supplier pack" provided by Superdrug to Athena to suggest that what was agreed with the buyer was subject to ratification or confirmation by anyone else at Superdrug. Further the Court was unconvinced that there was a real prospect of Superdrug establishing the "well established industry practice" that it claimed exists. This case highlights how important it is for businesses to train their employees on the principles of contract formation and to ensure that clear rules regarding process and authority exist and are communicated both to employees and to potential customers/suppliers.	Judgment
High Court considers Braganza duty and implied duties of good faith	In **Taqa Bratani Limited and others v Rockrose UKCS8 LLC** the High Court had to consider whether notice of termination given to a party to a joint venture agreement was valid. In deciding that the notice was valid, the Court provided helpful analysis of the case law on two topics that are cropping up with increased frequency in commercial contract cases. The defendant argued that the express right to terminate was qualified by what is commonly referred to as a "Braganza duty" (after one of the leading cases on the topic): an obligation to exercise the right in good faith and not capriciously or arbitrarily. The Court found that, in the absence of words to the contrary, in an expertly drawn complex commercial agreement between sophisticated commercial parties an express right to terminate a contract is an unqualified right which does not attract a Braganza duty. The defendant also argued that the joint venture agreement was a relational contract and therefore that the termination right was subject to an implied duty of good faith.	Judgment

Development	Summary	Links
	Without finding it necessary to determine whether or not the agreement in question was a relational contract, the Court made it clear that a duty of good faith is not automatically implied into a relational contract. Rather, whether such a duty is to be implied has to be decided in accordance with the usual test for implying a term as set out in *Marks & Spencer v BNP Paribas*. Here, such an implied term would be inconsistent with the express term (the unqualified right to terminate) and therefore it would fall foul of the rule that an implied term cannot contradict an express term. Further, it was not necessary to imply it in order to give the contract business efficacy or because it was so obvious that it went without saying.	
IR35 reform	Click on the link to read a House of Commons Library report on personal service companies and IR35, the off-payroll working rules. This sets out useful background to the current legislative regime and the extension of the current rules to medium and large private sector organisations which is planned to take effect from 6 April 2020. This month HMRC issued draft secondary legislation for consultation. The draft legislation will apply where a "deemed employer" under the IR35 legislation fails to make PAYE deductions and employer NICs contributions in respect of an off-payroll worker and there is no realistic prospect of HMRC recovering these liabilities from the deemed employer within a reasonable period. In this situation HMRC will be able to recover these liabilities from another party within the labour supply chain, first attempting to recover from the agency that the client contracts with (if UK based), but ultimately having the right to recover from the client. The consultation closes on 19 February.	Report HMRC consultation on draft secondary legislation
Small Business Commissioner and Late Payments etc Bill	The Small Business Commissioner and Late Payments etc Bill 2019-20 has been introduced into the House of Lords. This is a private member's bill and, as such, is unlikely to become law, but that said this is an area in which reform is anticipated. The Bill provides, amongst other things, for the Late Payment of Commercial Debts (Interest) Act 1998 to be amended to reduce the period before statutory interest starts to run from 60 to 30 days; for the introduction of a statutory time limit of 21 days in which a purchaser must notify a supplier of an invoice dispute, followed by a time limited procedure for resolving that dispute with ultimate referral to the Small Business Commissioner; for large businesses and public authorities to automatically pay statutory interest to small businesses without a request being made; for the prohibition of certain payment practices including prompt payment discounts; and for an increase in the powers of the Small Business Commissioner.	Bill

Commercial – general

Development	Summary	Links
Consultation on RPI reform delayed	The Chancellor of the Exchequer has announced that the proposed consultation on reform of the RPI will be delayed until 11 March 2020 to coincide with the Budget.	Letter from the Chancellor of the Exchequer
Construction of a covenant to pay	In **Axa S.A. v Genworth Financial International Holdings Inc and others** the High Court had to construe the meaning of a clause contained in a business sale and purchase agreement which was intended to deal with liability for claims for historic mis-selling of PPI. The clause provided that: "The Sellers hereby covenant to the Purchaser and each Target Group Company that they will pay to the Purchaser or such Target Group Company on demand an amount equal to [90% of the relevant losses]". As a matter of contract construction the Court found that the clause was not an indemnity but was a covenant to pay. However, it also observed that it is not helpful to classify or pigeon-hole a provision as a particular type of contractual obligation giving rise to particular outcomes, particularly a bespoke provision in a contract between commercially sophisticated parties. Rather, a Court should interpret the meaning of the words used in accordance with the established principles of contract construction. Part of the defendant Seller's reason for arguing that the clause was an indemnity was to make it a pre-condition to payment of the relevant liabilities that the Purchaser and the Target Group Companies must have asserted all defences reasonably available to them in respect of the PPI mis-selling claims. This is effectively another way of expressing the principle that in order for an indemnifier to pay out to an indemnified in respect of third party claims, both the fact and the amount of the settlement with the third party must be reasonable. The argument failed, firstly because the clause was not construed as an indemnity and secondly because as a matter of construction there was no express or implied term to this effect. This case is a reminder of how important it is to fully think through the risk allocation provisions in a contract and to provide expressly for where risk should fall and for any pre-conditions that should apply to recovery of costs and losses. Particularly in a contract between sophisticated, legally represented commercial entities, the Court will be reluctant to intervene to fill in any gaps. In this case the provision in question was only intended to operate in the short-term because the parties were expecting another agreement to be entered into which would shift the risk onto a third party. However, this didn't happen and so the short-term arrangement became permanent. This also demonstrates the risk of assuming that a certain state of affairs over which the contracting parties do not have control will happen, rather than dealing expressly in the contract with the different possible scenarios.	Judgment

Commercial – general

Development	Summary	Links
Airbnb is an information society service	An information society service ("ISS") is defined in the E-commerce Directive 2000/31 as "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services". The purpose of the E-commerce Directive 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 ISS is only subject to the laws of the EEA state in which it is established where those laws relate to the "coordinated field" (ie laws relating to the activities of an ISS, such as qualifications or authorisations it needs to hold and its behaviour); and • the ISS benefits from the freedom to provide its services in all other EEA states without having to comply with each state's laws in the coordinated field (although there are some circumstances in which a state can derogate from this principle). In **Airbnb Ireland** the CJEU held that the services provided by Airbnb Ireland (consisting of connecting, via an online platform, potential guests with hosts offering accommodation to rent) fall within the definition of an ISS. The service is provided for remuneration, at a distance, by electronic means and upon individual request from the guest. An earlier case involving Uber has established that even if a service meets all the criteria for an ISS it will not be classified as an ISS if it forms an integral part of an overall service whose main component is a service coming under another legal classification. However, the CJEU found that this was not the case here: Airbnb's service cannot be separated from the property transaction that it facilitates and so it is not merely an ancillary to a wider accommodation service. Further, the service is not indispensable to the provision of accommodation services as both hosts and guests have other options and Airbnb does not set or cap the price charged for accommodation. Note that, in the absence of an agreement to the contrary between the UK and the EU, following expiry of the post-Brexit transition/implementation period UK based ISSs will no longer be able to benefit from the country of origin principle.	Judgment
Cryptoasset held to be property	In **AA v Persons Unknown**, the Court held that a cryptoasset such as bitcoin is a form of property. The Court accepted the analysis in the recent (non legally binding) UK Jurisdictional Taskforce legal statement on cryptoassets and smart contracts and also noted that cryptoassets fulfil the four criteria set out in the classic definition of property: they are definable, identifiable by third parties, capable in their nature of assumption by third parties and they have some degree of permanence.	Judgment (para 55 et seq)

Commercial – general

Development	Summary	Links
The importance of dealing expressly with what happens on termination of a contract	In **Demand Media Ltd v Koch Media Ltd** the High Court refused to imply into a distribution agreement terms providing for what happened to unsold stock on termination of the agreement. This case is a reminder that it is important to ensure that a contract deals expressly and comprehensively with rights and obligations arising on termination and that an argument that terms are to be implied is the "last refuge of the desperate" and rarely works.	Judgment

Development	Summary	Links
Enforcement and Modernisation Directive in force	The Enforcement and Modernisation Directive (the full title of which is "Directive (EU) 2019/2161 of the European Parliament and of the Council amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules") was published in the OJEU on 18 December. It amends the current Unfair Commercial Practices Directive, Consumer Rights Directive, Unfair Contract Terms Directive and Price Indications Directive and is intended to modernise consumer protection law and update it for the digital age as part of the EU's "New Deal for Consumers. The Directive came into force 20 days after its publication. Member states have to adopt and publish compliance measures by 28 November 2021 and those measures will come into effect from 28 May 2022. Assuming that the post-Brexit transition/implementation period will have ended by May 2022, UK traders selling to EU consumers will have to comply with the new rules but it remains to be seen whether or not the UK will pass measures aligning to the rules. The Directive includes provisions on the following: • member states are required to impose penalties for breach of national consumer protection law of up to 4% of the trader's annual turnover in the relevant member state; • a right for consumers to seek redress directly from traders; • new information obligations for online traders, in particular regarding the criteria used to rank search results, the verification of online reviews, the status of the seller and personalised pricing based on automated decision making; • the Consumer Rights Directive is amended to apply to both digital content and digital services provided in exchange for personal information; • an obligation on online marketplaces to inform consumers of whether the responsible trader in a transaction is the seller and/or the online marketplace itself; • clear information provision obligations in respect of price reductions; and • an obligation on the Commission to ensure that consumers can use the single digital gateway to access up to date information about EU consumer rights and to submit a complaint through the Commission's Online Dispute Resolution platform.	Directive

Consumer law

Development	Summary	Links
New Consumer Protection Cooperation Regulation in force	On 17 January Regulation EU 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation EC 2006/2004 (the Consumer Protection Cooperation Regulation) came into force. This improves the current EU-wide cooperation framework which enables national authorities to work together to address breaches of consumer protection law in cases where the trader and the consumer are in different EU countries.	Europa Consumer Protection Network page
Consultation on guidelines for the EU Regulation on market surveillance and compliance	The European Commission is seeking feedback on guidelines on the implementation of Article 4 of Regulation EU 2019/1020 on market surveillance and compliance of products. This Regulation will strengthen and modernise market surveillance of products to protect consumers from unsafe products and to provide a "level playing field" for economic operators. Article 4 provides that for certain categories of product there should be an economic operator in the EU that can provide information to and cooperate with market surveillance authorities. Feedback is required by 17 April 2020.	Consultation
Update on Citizens Advice super complaint against the loyalty penalty	In December 2019 the Competition and Markets Authority ("CMA") published its response to the Citizens Advice super complaint against the "loyalty penalty" (ie where long term customers pay more for goods and services) in the mobile, broadband, cash savings, home insurance and mortgage markets. It found that the loyalty penalty is significant, impacting many consumers and it set out a significant package of reforms to provide support to consumers and to tackle harmful and unacceptable practices by businesses. On 21 January the CMA published its six-monthly report on progress on addressing the loyalty penalty, focusing on work in this area by the CMA, Ofcom and the FCA.	CMA loyalty penalty landing page
Fake and misleading online reviews	In response to the CMA's programme of work aimed at tackling fake and misleading online reviews, the CMA has reported that both Facebook and eBay have taken action to remove content and have agreed to implement measures to help prevent such content from appearing on their websites in the future.	CMA update
CMA interim report on online platforms and digital advertising	In December 2019 the CMA published an interim report on its examination of online platforms and digital advertising, part of the CMA's strategy in tackling the challenges of the rapidly developing digital economy. Its findings include that a lack of real competition to Google and Facebook could have anti-competitive impact on consumers; collection of personal data plays a key role in driving market position through enabling the effective targeting of advertisements; and there is a lack of transparency in the way that business on these platforms works. The CMA also reiterates that there is a strong	CMA market study into online platforms and digital advertising

Development	Summary	Links
	argument for the development of a new regulatory regime and sets out suggested proposals to address the issues identified. The CMA is consulting on the interim report and responses are due by 12 February 2020.	

Cyber security

Development	Summary	Links
Cyber security certification post Brexit	The government has issued a response to its call for views on the proposed approach to cyber security certification following the UK's post Brexit departure from the EU-wide cyber security certification framework established by the EU Cybersecurity Act. The government has said that it is committed to maintaining a close relationship with the EU on cybersecurity and that it will seek to enter into negotiations on establishing mutual recognition arrangements "where it seems reasonable to do so".	Policy paper
Government response to consultation on IoT security	The government has published its response to its 2019 consultation on regulatory proposals regarding consumer Internet of Things ("IoT") security which seek to ensure that strong cyber security is built into IoT products by design. The government is advocating a staged approach to regulation in this area and intends to start by implementing legislation that aims to increase the basic level of security within IoT products by mandating the following: • IoT device passwords to be unique and not resettable to any universal factory setting; • IoT product manufacturers to provide a public point of contact as part of a vulnerability disclosure policy; and • IoT product manufacturers to explicitly state the minimum length of time for which the device will receive security updates. It does not, however, intend to proceed with the launch of a voluntary labelling scheme for IoT products at this time in the light of feedback from respondents to the consultation. The government will now carry out further policy development on the detail of this first phase stage of regulation and following implementation of this stage states that it will "look to increase the baseline and mandate further security requirements as and when appropriate".	Consultation landing page
NCSC guidance on security of communication services	The National Cyber Security Centre ("NCSC") has issued guidance on assessing the security of voice, video and messaging communication services in the workplace, with particular relevance for those working in government and the public sector. The NCSC requests and welcomes feedback.	Guidance
NCSC guidance on mobile devices	The NCSC has issued guidance to assist organisations in choosing, purchasing, configuring and securing mobile devices.	Guidance

Development	Summary	Links
Advocate General issues Opinion in Schrems II – Standard Contractual Clauses remain valid transfer mechanism	The Advocate General has issued his Opinion in the Schrems II case. In summary, the Advocate General ("AG") has advised that the validity of the EU Commission's Standard Contractual Clauses ("SCCs") is not affected by complaints made in Schrems II. The Opinion is not binding, however it provides us with a strong indication as to what the CJEU judgment will be. The key takeaways from the Opinion are that the AG advises that: • the validity of European Commission Decision 2010/87/EU regarding the SCCs should not be affected by the questions referred to the CJEU by the Irish High Court, and that the SCCs provide a valid mechanism to facilitate international transfers of personal data; • where SCCs are relied upon to legitimise transfers of personal data to a third country, the onus is on controllers and supervisory authorities to suspend or prohibit transfers when the SCCs cannot be complied with by the data importer in a third country due to obligations imposed by the law of that country; and • the CJEU should refrain from ruling on the impact of the Privacy Shield on the complaint raised by Schrems in this case and the validity of the Privacy Shield decision. However, the AG does set out a number of observations including reasons that lead him to question the validity of the Privacy Shield decision. Click on the link to read our briefing on the Opinion.	Eversheds Sutherland briefing Opinion European Commission Decision 2010/87/EU
CJEU publishes AG opinion on the applicability of the ePrivacy Directive to national security and counter-terrorism activities	The CJEU has published Advocate General ("AG") Manuel Campos Sánchez-Bordona's opinions on the **Privacy International case (C-623/17)**, the joined cases of **La Quadrature du Net and Others (C-511/18) and French Data Network and Others (C-512/18)** and the case of **Ordre des barreaux francophones et germanophone and Others (C-520/18)**. Collectively, the cases consider the application of the Directive on Privacy and Electronic Communications (the "ePrivacy Directive") to national security activities and activities aimed at combatting terrorism. The AG states that the ePrivacy Directive does not apply to activities carried out by public authorities on their own account which aim to safeguard national security. The AG noted that the ePrivacy Directive will, in principle, be applicable where providers of electronic services are required by law to retain data belonging to their subscribers and to allow public authorities to have access to that data, irrespective of whether those obligations are imposed on such providers for reasons of national security.	Press Release Opinion

Development	Summary	Links
	The AG also recommended that the joined cases of **Tele2 Sverige AB v. Post-och telestyrelsen (C-203/15)** and **Secretary of State for Home Department v Tom Watson and Others (C-698/15)** should be upheld, opining that a general and indiscriminate retention of all traffic and location data of all subscribers and registered users is disproportionate.	
ICO publishes direct marketing draft code of practice	The ICO has produced a new draft 'Direct marketing code of practice' for consultation. The code will offer practical guidance for direct marketing operators on how good practice can be achieved whilst remaining compliant with data protection legislation and e-privacy rules. The consultation closes on 4 March 2020.	Draft code
ICO publishes final Age Appropriate Design Code	The ICO has published its final Code of Practice to protect children's privacy – the Age Appropriate Design Code. The code contains 15 standards, rooted in the GDPR, which online service providers should meet to protect a child's right to privacy. The standards do not prohibit any actions or prescribe any obligations, however, if followed, the standards will enable online services to provide built-in protection to allow children to explore, play and learn online without putting them at risk of any online harm. The Secretary of State will now need to lay the Code before Parliament for its approval.	Press release Code
ICO consults on new DSAR guidance	The ICO is consulting on new guidance for organisations around how to handle data subject access requests ("DSARs"). The consultation closes on 12 February 2020.	Press release and draft guidance
ICO amends guidance on timescales for complying with DSARs when clarification is sought	The ICO has amended its GDPR guidance, changing the position on timescales when the controller requests clarification from the data subject. The time limit is not paused while the controller waits for a response to its request. This is a divergence from previous guidance issued by the ICO. This new position is also reflected in the draft DSAR guidance issued for consultation (see above).	Updated guidance
ICO to work with UK Accreditation Service to deliver certification schemes	The ICO has confirmed it will be working with the UK Accreditation Service ("AKAS") to deliver ICO approved data protection certification schemes. Articles 42 GDPR requires supervisory authorities to encourage the establishment of data protection certification schemes. The ICO will approve and publish the schemes and UKAS will accredit certification bodies to deliver them. More information on certification is available on the ICO's website and the EDPB's Guidelines 1/2018 on	ICO press release ICO page on certification Official statement EDPB website

Development	Summary	Links
	certification and identifying certification criteria in accordance with Articles 42 and 43 of the Regulation.	
Interactive Advertising Bureau publishes response to ICO report on adtech and real time bidding	The Interactive Advertising Bureau ("IAB") has published a response to the ICO's June 2019 report on adtech and real time bidding ("RTB"). In the response, the IAB comments on its discussions with the ICO which have been constructive and informative on both sides and have enabled the IAB to develop realistic and meaningful proposals for change. The IAB proposes action on the six key issues from the ICO's report, summarised as: • use of organisational/technical measures to secure data in transit and at rest, appropriate safeguards for international transfers and appropriate data minimisation and retention controls; • processing of special category data; • reliance on legitimate interests as a legal basis for storage / access (cookies and similar technologies); • legitimate interests legal basis; • data protection impact assessment requirements; and • transparency and fairness (information provided to consumers). The IAB notes that further information and discussion is required before clearer position can be reached on the following: use of legitimate interest as a legal basis for processing personal data under GDPR where consent has been gained for access and storage prior to such processing, and some aspects of the discussions around special category data, along with the question of conditionality of access to content.	ICO's report IAB response
Consumer groups demand that advertising tech companies comply with data protection rules	The European Consumer Organisation has said that EU consumer groups across its network, including *Which*?, are encouraging supervisory authorities to investigate the practices of online advertising technology companies in an effort to ensure that they comply with the GDPR. Norwegian consumer organisation, *Forbrukerrådet*, has also released a report on current practices which has led to it filing several complaints against five online advertising companies and the dating app Grindr. The report shows how some ad-tech companies collect vast amounts of personal data from mobile devices allowing them to target consumers with bespoke advertising, apparently all without the knowledge of consumers or a valid legal basis.	Press Release Report

Development	Summary	Links
ICO calls for views on the processing of personal data relating to criminal convictions	The ICO has published a survey to assess whether there are any deficits in data controllers' knowledge of the data protection requirements under Article 10 GDPR. Under Article 10, organisations can process personal data relating to criminal convictions and offences or related security measures for certain reasons, for example to safeguard vulnerable individuals. The ICO is calling for controllers and/or processors of Article 10 data to participate and complete the survey by Friday 28 February 2020.	Press release Survey
London pharmacy fined for "careless" storage of patient data	The ICO has fined a London pharmacy £275,000 for breaching the GDPR in failing to ensure special category data was adequately secured. The ICO also issued an enforcement notice requiring the organisation to improve its data protection practices within three months. Eversheds Sutherland's Global Co-Lead of Privacy and Cybersecurity, Paula Barrett, commented: "*There are likely many others for whom the disposal of personal data securely is an ongoing operational concern. Particularly for those businesses where they have a large number of smaller premises, where centralised controls are more difficult to implement. Here what was actually happening on the ground was contrary to their own policy and supposedly arrangements with a service provider.*" *"In addition to the storage breach itself, they were also sanctioned for non-compliance in other areas. Notably an inadequate privacy notice. One of the first cases in which we have seen the ICO comment."* *"It further demonstrates the co-operation between agencies, the investigation process, factors taken into consideration and that the final amount of the penalty notice was reduced following the initial notice from £400,000 down to £275,000, so it appears some consideration was given to representations made. As well as a fine, they also have further remediation work to undertake, so there is, in fact, a combination of tools in the ICO armoury being deployed here. Remediation effort costs could outweigh the fine itself."*	ICO press release
FCA publishes a Call for Input on Open Finance risks and opportunities	The Financial Conduct Authority ("FCA") has issued a call for input by 17 March 2020 in an attempt to collate information about the risk and opportunities which consumers and small businesses experience when sharing payment account data with third-party service providers. The FCA is asking for comments on whether the GDPR provides a robust framework for the progression of open finance. The FCA will also try to evaluate	Call for Input

Development	Summary	Links
	whether any other rights or protections are needed to govern the evolution of open finance.	
EU Council Presidency reports position on application of GDPR and highlights areas for attention	The Presidency of the Council of the European Union has released its *Position and Findings on the Application of the GDPR*. The position was produced after comments were provided by member states. In the position, the Presidency encourages the European Commission to consider in its upcoming report the application and functioning of the GDPR beyond what is specifically mentioned in Article 97(2) GDPR (ie Chapter V on transfers and Chapter VII on cooperation and consistency).	Position paper
EDPS releases its Preliminary Opinion on data protection and scientific research	The European Data Protection Supervisor ("EDPS") has published its initial opinion on data protection and scientific research (the "Preliminary Opinion"). The Preliminary Opinion explores the implications of GDPR in the sphere of scientific research which, by its nature, involves the exchange of information and the generation, evaluation and digitisation of personal data. Data resulting from scientific research is incredibly valuable to hold corporate giants to account, and data protection obligations should not act as an excuse for powerful market players to evade accountability and transparency. In the Preliminary Opinion the EDPS recommends escalating the communication between data protection authorities and ethical review boards in order for a common understanding to be reached as to what constitutes 'genuine' scientific research, and for EU research programme frameworks and data protection standards to become more closely aligned.	Preliminary Opinion

Development	Summary	Links
The Copyright Directive post Brexit	Chris Skidmore, Secretary of State for Business, Energy and Industrial Strategy has said that the government has no plans to implement the EU Copyright Directive into UK law. The deadline for implementation by EU member states is 7 June 2021 which, on the current anticipated timetable, will be after expiry of the post-Brexit transition/implementation period.	UK Parliament: answer to written question 4371
Supplying an e-book to the public for download is an act of communication to the public	The CJEU has ruled that suppling an e-book to the public to download for permanent use is covered by the concept of "communication to the public" within the meaning of Article 3(1) of the Copyright Directive 2001/29/EC and not by the concept of "distribution to the public" within the meaning of Article 4(1) of that Directive. This means that the supply falls outside the rule on exhaustion of distribution rights and so, in practical terms, the copyright holder has the right to control the online supply of "second-hand" copies of its e-book. Given that, as is expressly recognised in the judgment, there is no difference between a new and a used copy of an e-book, to rule otherwise would have been likely to adversely affect the ability of copyright holders to obtain appropriate reward for their works This is in contrast to the position on software, as the principle of exhaustion of rights applies to all copies of a software program, whether tangible or intangible (*Usedsoft C 2012:407*).	Judgment
Breach of software licence constitutes IP infringement	The CJEU has ruled that a breach of a software licence clause that relates to the IP rights of the copyright owner also falls within the concept of "infringement of IP rights" under the Enforcement Directive 2004/48. This means that the owner must be able to benefit from the guarantees provided by that Directive regardless of the liability regime under national law.	Judgment

Development	Summary	Links
Online Harms	A Private Member's Bill, the Online Harms Reduction Regulator (Report) Bill, has been introduced to the House of Lords. This Bill proposes amending the Communications Act 2003 to: • require Ofcom to produce a report making recommendations for a duty on UK online platform service operators to avoid online harms; and • require the Secretary of State to establish an Online Harms Reduction Regulator in accordance with the recommendations set out in that Ofcom report. This Bill follows on from the April 2019 Online Harms White Paper. As it is a private member's bill it is unlikely to become law, but it may serve to keep focus on the topic in the foreground.	Bill

Development	Summary	Links
Claim for damages for alleged unlawful public procurement is a breach of statutory duty claim	In **Secretary of State for Transport v Arriva Rail East Midlands Ltd and others** the Court of Appeal held that a claim for damages arising from an alleged unlawful public procurement exercise for rail franchises was a claim for breach of statutory duty to which a 6 year limitation period applies. This is in contrast to a challenge to the validity of a public procurement decision, in respect of which it might be an abuse of process if it was commenced outside the 3 month time limit for judicial review. This reflects the fact that a judicial review application seeks to undo the effects of a decision by a public body and so needs to be undertaken rapidly, whereas a damages claim accepts that decision but seeks compensation in respect of its effects. Further, a private law claim for damages arising out of the decision of a public body will not automatically be categorised as a purely public law act in order to activate the truncated limitation period applicable to judicial review.	Judgment
Automatic suspension on contract award lifted	In **Alstom Transport UK Ltd v Network Rail Infrastructure Ltd** the High Court held that an automatic suspension on award of a contract under the Utilities Contracts Regulations 2016 that arose on a procurement challenge being issued by the claimant should be lifted. Applying the tests set out in *American Cyanamid*, the Court found that damages would be an adequate remedy for the claimant if the suspension was lifted and the claimant succeeded in its claim at trial. Damages would not be an adequate remedy for Network Rail if the suspension remained in place and it succeeded at trial, as the continuation of the suspension would result in delayed improvements to safety and delays and disruption to relevant rail services. For completeness the Court also considered the balance of convenience test and concluded that the public interest issues were a strong factor in favour of lifting the suspension, as continuing with it would result in delay to the project and additional costs being incurred and could jeopardise the business case for the entire project.	Judgment

Development	Summary	Links

WIPO call for comments on AI and IP policy	One of the major challenges posed by the rapid growth in the use of AI is whether or not existing IP systems are adequate to deal with the ownership and exploitation of AI-assisted and AI-generated products, processes, works and designs.
	
	The World Intellectual Property Organization (WIPO) has launched a call for comments on its draft issues paper which sets out a list of the questions that it believes need to be considered in relation to the impact of AI on IP policy. Responses are due by 14 February 2020, following which the paper will be revised for discussion at the Second Session of the WIPO Conversation on IP and AI in May 2020. The current call relates only to identification of the issues and accordingly respondents are invited to comment on whether the questions have been correctly and comprehensively identified and not, at this stage, to suggest answers to those questions.
	
	Many of the questions stem from the core issue of whether an invention, design or literary or artistic work that is autonomously generated by AI should qualify for IP protection at all and, if it should, how this would work in practice. The issues covered therefore include the following:
	
	• Should there be a "sui generis" (bespoke) system of IP rights for inventions, designs and works generated by AI or should they be protected by existing IP rights (in particular patents, copyright and design rights)?
	• If existing IP protection is to be available:
	  ○ Should it be possible/necessary for the AI application to be the inventor/creator or must there be a human inventor/creator? And if there needs to be a human inventor/creator how should that individual be identified?
	  ○ Who should be recognised as the first owner of the IP right and should consideration be given to creating a legal personality for an AI application to enable it to own IP rights?
	  ○ For an invention to be patentable it must involve an inventive step or be non-obvious to a person skilled in the relevant art to which the invention belongs. For AI generated inventions consideration needs to be given to determining the correct parameters for making this assessment. Patent laws also require disclosure of an invention which is sufficient to enable a person skilled in the relevant art to reproduce that invention, but what exactly needs to be disclosed to fulfil this requirement where an invention has been generated by AI?
	• Data is, of course, a very important factor in the evolution of AI and poses particular issues. AI techniques such as machine learning require AI applications to use large quantities of data which could potentially be subject
		Consultation

Development	Summary	Links
	to copyright. Should such use without authorization constitute copyright infringement or should it be expressly permitted under copyright laws on either an absolute or a qualified basis? And is there a need to create completely new rights in data in response to its significance as a critical component of AI? These issues have been vexing commentators for some time, so it will be fascinating to see how this paper and the ensuing debates around how to answer the questions posed take shape. Throughout the paper there is an emphasis on IP protection as a system of valuing and incentivising human creativity and innovation with the underlying theme being how do we position machine creativity in relation to human creativity? This is all part of the larger debate around how we position AI in our society and economy; is it simply a tool for human use or is it something that should be allowed to evolve on its own terms and potentially develop an identity independent of the human race?	
European Parliament Resolution on automated decision making processes	The European Parliament's Internal Market and Consumer Protection Committee has approved a Resolution on automated decision making processes. Against the background of ensuring that consumers are closely protected when interacting with a system that automates decision making, the Resolution urges the European Commission to update EU product and services legislation to reflect the increasing prevalence of AI enabled products and to ensure that systems use only high quality and unbiased data sets and that humans remain ultimately in control of decision making processes.	Resolution

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