



Commercially connected

March 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
<p>Negotiations on future UK-EU relationship</p>	<p>On 27 February the UK government published a paper setting out its approach to negotiations on the future relationship between the UK and the EU. This categorically states that the UK will not agree to any obligation for UK law to be aligned with EU law or for EU institutions, including the CJEU, to have jurisdiction in the UK and that the government will not extend the post Brexit transition period.</p> <p>The UK government approach is to seek a comprehensive free trade agreement covering substantially all trade, based on the agreement that the EU has with Canada and other friendly countries and “friendly cooperation between sovereign equals, with both parties respecting one another’s legal autonomy and right to manage their own resources as they see fit”. It envisages that there will be no tariffs, fees, charges or quantitative restrictions on trade in manufactured and agricultural goods between the UK and the EU; that the agreement will also address non-tariff barriers to trade such as import/export licensing restrictions and will provide for streamlined customs arrangements covering trade in goods; and that the agreement should also promote trade in services and investment by including provisions on market access, non-discriminatory treatment and most favoured nation treatment. The UK government also intends that there will be separate agreements on fisheries (to take back control of UK waters), law enforcement and judicial cooperation in criminal matters and agreements in technical areas covering aviation, energy and civil nuclear cooperation. The UK government states that if it is not possible to negotiate a satisfactory outcome then the trading relationship with the EU will rest on the 2019 Withdrawal Agreement and will look similar to Australia’s.</p> <p>On 28 February the agreed terms of reference for the negotiations on the future UK-EU relationship were published. It was intended that face to face negotiations would take place in five rounds between 2 March and 16 May, but talks have been interrupted by the impact of the Covid-19 outbreak and both sides are currently looking at alternative ways to continue discussions. Despite this, the UK government remains adamant that the transition period will not be extended.</p> <p>On 5 March the House of Lords European Union Committee issued a report made under Section 29 of the European Union (Withdrawal Agreement) Act 2020 which empowers scrutiny committees of either House to report on EU legislation that they consider raises matters of vital national interest to the UK. The report focuses on the extent to which the UK and EU positions have diverged since the October 2019 political declaration on the framework for the future UK-EU relationship, with the EU position on creating a level playing field hardening and the two side’s positions on state aid being incompatible.</p>	<p>UK government approach to negotiations</p> <p>Agreed terms of reference for negotiations</p> <p>House of Lords European Union Committee report</p> <p>Committee on the Future Relationship with the European Union inquiry</p> <p>European Commission draft text on UK-EU future agreement</p>

Development	Summary	Links
	<p>On 9 March the Committee on the Future Relationship with the European Union launched an overarching inquiry into all aspects of the negotiations between the UK and the EU.</p> <p>On 18 March the European Commission published a 440 page draft legal text of the UK-EU future relationship agreement, with the contents of that draft reflecting the negotiating directives approved by EU member states and therefore the EU's negotiating position.</p>	
Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2019-21	The Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2019-21 has been reintroduced to Parliament. Once enacted, this legislation will repeal the right of free movement of people under retained EU law. EEA nationals and their family members will require permission to enter and remain in the UK (under the Immigration Act 1971) following expiry of the post-Brexit transition period. It will also provide the legal framework for the UK's new points-based immigration system and will preserve the special status of Irish citizens.	Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2019-21

Commercial – general

Development	Summary	Links
Coronavirus 1: Eversheds Sutherland hub	Click on the link to access our coronavirus hub. This brings together in one place all our briefings and updates on coronavirus across all jurisdictions and all topic areas. You can also sign up to receive coronavirus email updates via the hub.	Eversheds Sutherland coronavirus hub
Coronavirus 2: Coronavirus Act 2020	<p>The Coronavirus Act 2020 came into force on 25 March. The UK already has legislation to deal with public health emergencies, the Public Health (Control of Disease) Act 1984 which was updated in 2006. The Coronavirus Act 2020 provides additional powers to the 1984 Act, possibly to supplement them where there are perceived gaps. Although much of the Act is taken up with health and social care measures (such as those relating to emergency registrations of health workers and relaxing certain rules to allow for continued operation of health and social care operations), the following provisions are of particular interest in a business context:</p> <ul style="list-style-type: none">• Sections 25 - 29: Power to require information relating to food supply chains. An appropriate authority (the Secretary of State, the Scottish Ministers, the Welsh Ministers or the Department of Agriculture, Environment and Rural Affairs in Northern Ireland) is entitled to require a person (but not an individual) who is in or closely connected with a food supply chain to provide it with information about that person's activities connected with that food supply chain, provided that the appropriate authority considers that the provision of information is necessary for the purpose of establishing whether all or part of a food supply chain is being disrupted or is at risk of disruption or the nature of that disruption. This power can only be exercised where the appropriate authority has already requested the information from that person and they have either not provided the information at all or have provided information that is materially false or misleading. Information provided following such a request can only be used for the purposes of establishing, mitigating, eliminating, preventing or reducing disruption to a food supply chain. It is made clear that disclosures made in accordance with the Act do not breach any confidentiality obligation or other restriction on disclosure to which the person making the disclosure would otherwise be subject. However, in making disclosures data protection legislation must not be breached. Breach of the obligation to provide information is punishable by a fine equal to 1% of the qualifying turnover of the person and this is increased by 50% for late payment. The terms "food supply chain" and persons "in" or "closely connected with" a food supply chain are defined broadly so as to cover most persons involved at any level and in any capacity in providing individuals with items of food or drink for personal consumption.	Coronavirus Act 2020 House of Commons Library briefing

Commercial – general

Development	Summary	Links
	<ul style="list-style-type: none"> Sections 37 - 38 and Schedules 16 and 17: temporary closure of education institutions and childcare premises: these provisions confer powers to restrict access to or close educational and childcare establishments and to give directions requiring continuing provision by such establishments. Section 50 and Schedule 20: power to suspend port operations: the Secretary of State is given power to require a port (which includes airports as well as sea ports) to temporarily suspend operations if, due to coronavirus, there are insufficient border force officers to maintain adequate border security. Section 51 and Schedule 21: powers relating to potentially infectious persons: in summary, the Act gives public health officers the power to quarantine those who have tested positive or inconclusive for coronavirus or those they reasonably suspect have the disease. Police officers will be given powers to take people they suspect of having coronavirus to be tested by public health officers. Section 52 and Schedule 22: power to issue directions relating to events, gatherings and premises: this confers power to prohibit and restrict events and gatherings and to close or restrict access to premises. <p>The Act also gives the necessary statutory permissions in relation to postponement of elections and new rules for use of video and audio links in courts and tribunals. It contains relaxation of statutory sick pay rules to help employers recover SSP, new emergency volunteer leave provisions and gives business time limited protection from forfeiture of commercial leases.</p> <p>It contains a sunset clause so that it mainly expires after two years.</p>	

Coronavirus 3: The Health Protection (Coronavirus, Business Closure) (England) Regulations 2020

The Health Protection (Coronavirus, Business Closure) (England) Regulations 2020 came into force on 21 March. They apply in England only and enable the enforcement of closures of certain businesses. Equivalent regulations with effect in Wales have also been brought in. The Regulations provide that:

- businesses within scope include all food and drink venues for consumption on site (excluding hospitals, schools, care homes, homeless services and military canteens), drinking establishments such as bars and clubs, entertainment venues, museums and galleries, spas, casinos and betting shops and all indoor leisure and sports facilities such as gyms. The person responsible for running these businesses (defined as owner, proprietor and manager) is required by law to close them;
- any person who contravenes the regulations commits a criminal offence;

[The Health Protection \(Coronavirus, Business Closure\) \(England\) Regulations 2020](#)

Commercial – general

Development	Summary	Links
	<ul style="list-style-type: none"> • there is provision for the Secretary of State to designate a person to take action to enforce a closure or restriction and designations have been made for local authorities and the police; and • the regulations are made under emergency powers under existing UK legislation (the Public Health (Control of Disease) Act 1984) and so have not been subject to Parliamentary debate. However, there is a sunset clause in effect after 6 months. In addition the Secretary of State must review the need for them every 28 days. 	
Coronavirus 4: financial measures to support business	Click on the link to read an Eversheds Sutherland briefing giving an overview of governmental economic support for businesses affected by the coronavirus outbreak.	Briefing
Coronavirus 5: establishment of new implementation committees	The government has set up four implementation committees to coordinate, prioritise and respond to the coronavirus pandemic: a healthcare committee chaired by the Health Secretary to focus on the preparedness of the NHS, a General Public Sector committee chaired by the Chancellor of the Duchy of Lancaster to look at preparedness across the public and critical national infrastructure excluding the NHS, an economic and business committee chaired by the Chancellor to consider economic and business impact and response including supply chain resilience and an international committee chaired by the Foreign Secretary to consider our international response to the crisis.	Government news story
Coronavirus 6: ICC materials	The ICC in partnership with the New England Complex Systems Institute has created a summary of actions that businesses can take to reduce risk associated with coronavirus.	ICC guidance
Coronavirus 7: guidance for UK businesses trading internationally	The Department for International Trade and UK Export Finance have published guidance for UK businesses trading internationally, highlighting the support available. The DIT states that it can help impacted businesses to find alternative suppliers as well as providing general advice and support, whilst UK Export Finance works with banks and insurance brokers to help businesses to fulfil and get paid for export contracts and can assist with providing guarantees, loans and insurance on behalf of the government to protect UK exporters facing delayed payments or transit restrictions.	DIT guidance
Coronavirus 8: EU talks on draft laws suspended	Talks on all draft EU laws and regulations between the bloc's executive, governments and lawmakers have been frozen indefinitely at both political and expert level due to the Covid-19 outbreak.	

Commercial – general

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IR35: changes postponed for one year	<p>The government has announced that, as part of its COVID-19 response, the changes to IR35 (the off-payroll working rules) will be delayed for a year and will be implemented on 6 April 2021.</p> <p>Previously, when the reforms were still intended to go ahead on 6 April 2020, the government had issued its response to the review of the reforms, the key points of which were that:</p> <ul style="list-style-type: none"> the rules would only apply to services performed on or after the implementation date; a legal obligation would be placed on clients to respond to a request for information about their size from their contractual counterparty or an individual worker (because small private businesses are to be exempt from the new regime, this information will enable the worker and the supply chain to know whether or not the new rules will apply); and clients who are wholly overseas organisations with no UK presence will be excluded from the new regime. 	Government response to the review of the changes to the off-payroll working rules
Consultation on RPI reform	<p>The government and the UK Statistics Authority have launched a consultation on a proposal to address the shortcomings in the RPI measure of inflation. Although RPI is no longer a National Statistic it is still widely used as a measure of inflation. The UK Statistics Authority has proposed that RPI should be reformed to align with CPIH (the Consumer Prices Index including owner occupiers' housing costs). The consultation closes on 22 April 2020.</p>	Consultation
Climate change: The Chancery Lane Project	<p>Eversheds Sutherland was delighted to be involved in a project to develop proforma clauses and model laws looking to tackle climate change, The Chancery Lane Project. For more information click on the link to read our briefing.</p>	Eversheds Sutherland briefing
Loan agreement not a relational contract	<p>In Morley t/a Morley Estates v The Royal Bank of England plc the High Court found that a loan agreement was not a relational contract and there was no general duty of good faith implied into the agreement; rather, the contractual discretions conferred on the bank in the agreement had to be exercised so as not to vex the claimant maliciously or for purposes unconnected to the bank's commercial interests. This case reflects an unwillingness by the courts to find that broad categories of commercial agreements are so-called relational contracts.</p>	Judgment

Commercial – general

Development	Summary	Links
Incorrectly executed deed takes effect as a simple contract	<p>In Signature Living Hotel Limited v Andrei Sulyok Roxana Monica Cocarla the High Court found that a deed of guarantee which had not been properly executed as a deed took effect as a simple contract. The Court was satisfied that the applicable law is that if an otherwise complete contract of guarantee is intended to be embodied in a deed but the formalities have not been complied with the creditor can still enforce the agreement.</p> <p>By analogy this means that a commercial contract that is intended to be executed as a deed but is incorrectly executed should be enforceable as a simple agreement provided that all the necessary elements for contract formation are present, that the contract has been validly executed as a simple agreement and that the transaction is not one for which a deed is required. However, this may be open to dispute in a situation where there is evidence that it was the intention of the parties that the contract would only be binding when executed as a deed.</p>	<p>Judgment</p>
Liability for inducing a breach of contract	<p>In Allen v Dodd the Court of Appeal had to consider what amounts to a sufficient state of mind to make a person liable in tort for inducing a breach of contract. The Court concluded that in order to be so liable a person must know that they are inducing a breach of contract; if the defendant honestly believes that the act they procure will not amount to a breach of contract they will not be liable in tort even if the belief is mistaken in law. The judgment also makes it clear that it is for the claimant to prove that the defendant had actual knowledge of the breach, not for the defendant to prove an absolute belief that there would be no breach.</p>	<p>Judgment</p>
The difference between performance bonds and on-demand bonds	<p>Yuanda v Multiplex, a recent High Court decision, provides a helpful reminder of the distinction between a performance bond and an on-demand bond, both of which can be used to provide security in respect of the performance of a contract.</p> <p>A performance bond or guarantee confers a secondary liability on the party providing the bond; liability under the performance bond is conditional on liability having arisen under the contract in respect of which this security is being provided.</p> <p>An on-demand bond confers a primary liability on the party providing the bond to pay out on demand when specified documentation is provided; it is an unconditional liability that is autonomous to liability or performance under the separate contract.</p>	<p>Judgment</p>
Government response to Law Commission report on electronic execution of documents	<p>The government has issued its response to the recent Law Commission report on electronic execution of documents (issued in September 2019). The government agrees with the report's conclusion that electronic signatures are legally valid and that legislation is not required to reinforce this. The government also accepts the Law</p>	<p>Law Commission report Government response</p>

Commercial – general

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	<p>Commission recommendation that an Industry Working Group should be established to consider issues pertaining to the security and technology of electronic signatures, including the issue of whether video witnessing of electronic signatures should be permissible (the Law Commission report concluded that the requirement under the current law for a deed to be signed “in the presence of a witness” requires the physical presence of that witness, even where both the person executing the deed and the witness are executing/attesting using e-signatures). Finally, the government has also agreed that there should be a wider review of the law on deeds and that the Law Commission will be asked to undertake this review when time allows.</p>	
<p>Consultation on the end of the sale of new petrol, diesel and hybrid cars and vans</p>	<p>The government has launched a consultation on bringing forward the date of the end of the sale of new petrol, diesel and hybrid cars and vans from 2040 to 2035, or earlier if a faster transition appears feasible. This reflects the Independent Committee on Climate Change’s advice on what is needed in order for the UK to end its contribution to climate change by 2050. Views are sought on the phase out date, the definition of what should be phased out, barriers to phase out, the impact of phase out and the measures required to achieve an earlier phase out date. The consultation closes on 29 May 2020.</p>	<p>Consultation</p>
<p>European Commission study on due diligence in the supply chain</p>	<p>The European Commission has published a study on due diligence requirements through the supply chain, focusing on identification, prevention, mitigation and accountability for abuse of human rights, health risks and environmental damage.</p>	<p>Study</p>
<p>New European Industrial Strategy Package</p>	<p>The European Commission has adopted a new European Industrial Strategy package, which it describes as “a new Strategy to help Europe’s industry lead the twin transitions towards climate neutrality and digital leadership”. The package comprises a new Industrial Strategy, an SME strategy and an action plan for better implementation and enforcement of single market rules</p> <p>The new Industrial Strategy is intended to help deliver on the three priorities of maintaining European industry’s global competitiveness, making Europe climate neutral by 2050 and shaping Europe’s digital future. The strategy includes developing an intellectual property action plan, a review of competition law, a White Paper to be produced mid-2020 to address distortive effects in the single market caused by foreign subsidies and to tackle foreign access to EU public procurement and EU funding and measures to modernise and decarbonise industries and to support sustainable industries.</p>	<p>European Industrial Strategy landing page</p>

Commercial – general

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	<p>The SME strategy is intended to help EU SMEs to adapt to climate neutrality challenges, reap the benefits of digitalization, reduce their regulatory burden and improve their opportunities to access finance.</p>	
<p>European Commission circular economy action plan</p>	<p>In tandem with the new Industrial Strategy referred to above, the European Commission has launched a circular economy action plan as part of the European Green Deal, the EU’s agenda for sustainable growth. This includes specific proposals in respect of particular sectors, including:</p> <ul style="list-style-type: none"> • electronics and ICT: regulatory measures under the Eco-design Directive to ensure that devices are designed for energy efficiency, durability, repairability, upgradability, maintenance, reuse and recycling; a priority sector for implementing the right to repair, including to update obsolete software; introduction of a common charger and incentives to decouple charger purchase from new device purchase; improving the collection and treatment of waste electrical and electronic equipment and a review of rules on restrictions of hazardous substances in electrical and electronic equipment; • batteries and vehicles: improve recycling rates, address non-rechargeable batteries, sustainability and transparency requirements for batteries; revise the rules on end-of-life vehicles; • packaging: ensure that all packaging on the EU market is reusable or recyclable in an economically viable way by 2030, including by reducing packaging and packaging waste, driving design for re-use and recyclability and reducing the complexity of packaging materials; • plastics: tackling the presence of microplastics in the environment, use of bio-based plastics and biodegradable or compostable plastics; ensuring timely implementation of the Single Use Plastics Products Directive; • textiles: applying a sustainable product framework; improving the business and regulatory environment for sustainable and circular textiles; providing guidance to achieve high levels of separate collection of textile waste; boosting sorting, re-use and recycling of textiles; and • food, water and nutrients: propose a target on food waste reduction; determine the scope of a legislative initiative on reuse to substitute single-use packaging, tableware and cutlery. 	<p>Circular economy action plan</p>

Development	Summary	Links
CMA warning against exploitation of COVID-19 outbreak	On 5 March the Competition and Market Authority (“CMA”) issued a statement warning traders not to exploit the coronavirus outbreak to take advantage of consumers, for example by charging excessive prices or making misleading claims about the efficacy of protective equipment.	Statement
CMA taskforce set up to tackle negative impacts of COVID-19 pandemic	The CMA has launched a taskforce to tackle negative impacts of the COVID-19 pandemic. This will scrutinise market developments to identify harmful sales and pricing practices as they emerge, warn firms suspected of exploiting the situation through unjustifiable prices or misleading claims, take enforcement action where appropriate and equip the CMA to advise the government on emergency legislation and how to ensure that competition law does not stand in the way of legitimate measures to protect public health and support the supply of essential goods and services.	Press release
Relaxation of competition law for food sector	Elements of competition law are being temporarily relaxed for the food sector to allow supermarkets to work together during the coronavirus outbreak. This will allow retailers to share data and resources and to cooperate in order to keep shops open.	Press release
Scope of court’s duty to assess fairness of consumer contract terms of its own motion	<p>In Györgyné Lintner v UniCredit Bank Hungary Zrt the CJEU held that a court is only obliged to examine the fairness of a term in a consumer contract of its own motion where that term is either challenged by the consumer or connected to a disputed term. However, it is open to member states to impose a wider-ranging duty on their courts.</p> <p>In the UK Section 71 of the Consumer Rights Act 2015 provides that where there are proceedings before a court which relate to a term of a consumer contract the UK courts must consider whether the term is fair even if none of the parties has raised the issue or indicated that they intend to raise. It is unclear whether this wording requires the UK courts to consider the fairness of undisputed terms.</p>	Judgment

Development	Summary	Links
ENISA, European Commission and CERT-EU issue statement on COVID-19	<p>The European Commission, the European Union Agency for Cybersecurity (“ENISA”), the European Union Agency for Law Enforcement Cooperation (“Europol”), and the Computer Emergency Response Team for the EU Institutions (“CERT-EU”) published a short joint statement on the COVID-19 outbreak. The statement explains that, as a result of the spread of Coronavirus, many people are working from home, and that “malign actors are actively exploiting these new challenging circumstances” to target those working remotely, individuals and businesses. The EU entities are working together to track malicious activities, raise awareness in their respective communities and help protect confined citizens.</p>	<p>Commission press release ENISA press release Europol press release</p>
NCSC guidance for people working from home due to COVID-19	<p>The NCSC has published guidance for employers on how to prepare for their employees to be working from home following the COVID-19 outbreak.</p> <p>The guidance includes general recommendations for employers including ensuring that employees have devices encrypting data, that staff are aware of how to report problems and reducing the risk of removable media (such as USB) by using antivirus tools. The guidance also warns of increased email scams relating to the coronavirus and provides practical tips on how to identify phishing emails.</p>	<p>Guidance</p>
ENISA recommendations in relation to COVID-19	<p>The ENISA has produced tips for people who are working remotely as a result of the spread of coronavirus. The recommendations include ensuring a secure wi-fi connection, updating anti-virus systems, updating security software, remembering to back up files, locking your screen if using a shared space, establishing a secure connection and ensuring encryption tools are installed.</p> <p>ENISA also makes various recommendations to employers, including providing feedback to staff on how to deal with issues, to prioritise the support of remote access solutions, providing virtual solutions and establishing a clear procedure that should be followed in case of a security breach.</p> <p>ENISA also warns of the risks of phishing emails, in particular those referencing the coronavirus.</p>	<p>Guidance</p>
ENISA publishes cybersecurity procurement guidelines for hospitals	<p>The European Union Agency for Cybersecurity (“ENISA”) has published its guidelines on cybersecurity in the context of procurement of services, products and infrastructure by hospitals.</p> <p>The guidelines:</p>	<p>Press release Guidelines</p>

Development	Summary	Links
	<ul style="list-style-type: none"> • identify types of procurement and the corresponding assets relevant to hospitals' cybersecurity infrastructure, and outline the potential threats, risks and challenges related to procurement in hospital organisations; • emphasise that given the high sensitivity of medical data and the potential vulnerability of the healthcare sector, cybersecurity mechanisms should be implemented in every step to safeguard patient data privacy and the resilience of healthcare services; and • propose a set of good practices to meet the relevant cybersecurity objectives. 	
<p>NCSC guidance on protecting smart security cameras and baby monitors from cyber attack</p>	<p>The National Cyber Security Centre ("NCSC") has published guidance explaining how smart security cameras and baby monitors can be protected from cyber attacks.</p> <p>The guidance explains how smart cameras connect to the internet using home Wi-Fi enabling a live camera feed, and that it is possible for them to be accessed by unauthorised users. The NCSC recommends four steps to ensure that the device is safe, including changing the default password to a secure one, regularly updating the camera's software/firmware, checking router settings and disabling the feature(s) that enable remote viewing camera footage via the internet UPnP and port forwarding, and disabling the feature that lets you remotely view camera footage via the internet if this is a feature that is not used.</p>	<p>Guidance</p>
<p>FCA publishes industry insights into cyber resilience</p>	<p>In 2017, the FCA brought together the Cyber Coordination Groups ("CCG"), comprising over 175 firms across different financial sectors to share information and ideas from their cyber experiences. The CCG have shared their knowledge of their common experiences in their latest insights paper, which covers: cyber risk; identity and access management; third parties and supply chain; and malicious emails.</p> <p>The paper identifies the following as emerging risks and future trends: Development and Security in Operations (DevSecOps) which integrates security by design into the development operations processes by ensuring security is an integrated consideration at each stage of the development process; Cloud security risk including reduced visibility and control of risks, insecure or misconfigured cloud instances/interfaces, concentration risk, insider risk (eg abuse of trust or of privileged access) to manipulate and or gain access to sensitive data and services; and payment systems security (including vulnerabilities in core systems such as payment messaging and transaction authorisation).</p>	<p>CCG insights</p>

Data protection and privacy law

Development	Summary	Links
<p>COVID-19 and data protection</p>	<p>A number of countries have issued regulatory and/or governmental guidance and statements on compliance with applicable privacy and data protection legislation in responding to the COVID-19 outbreak, including the ICO and European Data Protection Board (“EDPB”).</p> <p>The Executive Committee of the Global Privacy Assembly (“GPA”) issued a statement on coronavirus. Importantly, the GPA emphasises that health information is considered sensitive among many jurisdictions but that sharing personal information across borders and between organisations and governments is necessary, and that this can assist with tracking the spread of the virus. The GPA has also introduced a resources page for data protection and COVID-19.</p> <p>The European Digital Rights (“EDRI”) association called on the Member States and EU institutions to ensure that, while taking public health actions to tackle Coronavirus, they ensure that – among other things – any measures involving personal health data, geolocation data, or other metadata are necessary, proportionate, and legitimate.</p> <p>See below for our briefings on this topic:</p> <ul style="list-style-type: none"> • UK – Coronavirus and Data Protection (9 March 2020) • France – New guidelines on handling of health data from French regulator (10 March 2020) • UK/US – Cybersecurity and coronavirus—Guarding against hackers in this heightened risk environment (10 March 2020) • Ireland – Coronavirus – Data Protection Implications for Organisations (12 March 2020) • Hong Kong – The use of Personal Data in connection with Covid-19 (18 March 2020) • International – Coronavirus – Data Protection considerations for alternative communication platforms (25 March 2020) 	<p>ICO statement</p> <p>EDPB statement</p> <p>GPA statement and resources page</p> <p>EDRI press release</p>
<p>DCMS publishes UK data protection explanatory framework to assist European Commission adequacy assessment</p>	<p>The Department for Digital, Culture, Media & Sport (“DCMS”) has published a pack of explanatory material, which provides an overview of the UK’s legal framework underpinning data protection standards in order to assist the European Commission in conducting its assessment of the UK for adequacy under Article 45 GDPR and Article 36 of the Law Enforcement Directive, to ensure the continued free flow of personal data between the EU, the UK and Gibraltar.</p>	<p>Framework and press release</p>

Data protection and privacy law

Development	Summary	Links
	<p>The documents aim to illustrate the UK's "long and proud tradition of defending privacy rights" by emphasising a number of features of its data protection legal landscape, including: the ICO's role as a reliable, experienced and capable independent regulator; robust principles; clear grounds limiting when processing of personal data is lawful; and effective and enforceable rights of individuals.</p> <p>The covering note ends by confirming that the "UK stands ready to offer further clarifications throughout the assessment process and looks forward to an open dialogue with the Commission".</p>	
<p>Croatian Presidency releases revised draft ePrivacy Regulation proposals</p>	<p>The Croatian Presidency of the Council of the European Union has released revised drafts of the Regulation concerning the Request for Private Life and the Protection of Personal Data in Electronic Communications and Repealing Directive 2002/58/EC (the "Draft Regulation") introducing changes to Articles 6 (Permitted processing of electronic communications data), 7 (Storage and erasure of electronic communications data) and 8 (Protection of end-users' terminal equipment information).</p> <p>Among the proposed changes are the possibility to process metadata for legitimate interests pursued by the electronic service or network provider except when such interest is overridden by the interests or fundamental rights and freedoms of the end-user. In addition, a new ground for the use of processing and storage capabilities of terminal equipment and the collection of information from end-users' terminal equipment where necessary for the purpose of the legitimate interests pursued by a service provider to use processing and storage capabilities of terminal equipment or to collect information from an end-user's terminal equipment, except when such interest is overridden by the interests or fundamental rights and freedoms of the end-user.</p> <p>The Draft Regulation provides that the end-user's interests shall be deemed to override the interests of the service provider where: the end-user is a child; the service provider processes, stores or collects the information in order to determine the nature and characteristics of the end-user or to build an individual profile of the end-user or the processing; or the storage or collection of the information by the service provider contains special categories of personal data.</p> <p>The Working Party on Telecommunications and Information Society (WP TELE) were due to discuss the proposals in March but meetings have been postponed due to the COVID-19 outbreak.</p> <p>By way of background, despite continued efforts made by the Finnish Presidency of the Council of the EU to progress the proposal last year, EU member states were unable to agree a common position on the proposed legislation. The Croatian Presidency is now looking to progress the proposal during its presidency rotation.</p>	<p>ePrivacy Regulation tracker</p> <p>Draft Regulation (21 February 2020)</p> <p>Draft regulation text (6 March 2020)</p>

Data protection and privacy law

Development	Summary	Links
<p>EDPS publishes blog post on facial recognition and AI</p>	<p>The European Data Protection Supervisor (“EDPS”) published a blog post setting out the EU’s approach to facial recognition and artificial intelligence (“AI”). Among other things, the blog post highlights the importance of agreeing how to apply key GDPR principles such as data minimisation, accountability and transparency to AI technology as well as understanding the contrast between the principle of data minimisation and the concept of <i>Big Data</i>, and the criteria that research activities must meet to fall under the scientific research derogations provided by the GDPR.</p> <p>Additionally, the blog post discusses the use of facial recognition software to identify an individual in a public place and classes it as significantly more intrusive than face authentication to unlock one’s smartphone.</p>	<p>Blog post</p>
<p>ICO opens consultation on support for online service providers</p>	<p>The ICO has opened a consultation for online service providers to indicate what type of support the ICO should provide them with. The consultation follows the ICO’s recent publication of the final version of its Age Appropriate Code of Practice, aimed at safeguarding children’s personal data. There is a 12 month transition period for service providers to comply.</p> <p>The consultation closes on 27 March 2020.</p>	<p>Consultation</p>
<p>ICO publishes guidance on developing Codes of Conduct and Certification schemes</p>	<p>The ICO has published guidance for organisations who are developing Codes of Conduct or Certification schemes under the GDPR.</p> <p>Trade associations and other representative bodies are able to develop codes of conduct, identifying and addressing data protection issues that are important to their members. The ICO are encouraging this as a method of establishing sector-specific guidelines to aid compliance with the GDPR. Organisations can submit their proposals for these schemes to the ICO for approval. Once approved, other organisations can sign-up to a code of conduct, allowing them to ensure they are following the rules that developed for their sector.</p> <p>Certification enables organisations to demonstrate compliance with the GDPR and by allowing them to show they have appropriate technical and organisational measures to ensure data security. Certification can apply either generally to a variety of matters or to one specific issue. An organisation will be assessed by the accredited certification body for a scheme and, if successful, will be issued with a data protection certificate, seal or mark which is relevant to that scheme.</p>	<p>Codes of Conduct guidance</p> <p>Certification guidance</p>

Data protection and privacy law

Development	Summary	Links
<p>WEF publishes white paper on facial recognition</p>	<p>The World Economic Forum (“WEF”) published its <i>Framework for Responsible Limits on Facial Recognition</i> white paper which provides a policy basis for the safe and ethical use of facial recognition technology.</p> <p>The white paper encourages organisations who are trialling facial recognition to carry out a number of precautionary steps including conducting impact assessments, designing systems to support privacy and establishing a process for informing end users on the use of facial recognition technology. Organisations are also recommended to obtain consent from individuals in respect of the use of facial recognition technology and retention of data derived from it.</p> <p>The white paper includes four main steps to ensure the responsible design and use of facial recognition technology for flow management use cases: <i>Define</i> what constitutes the responsible use of facial recognition through the drafting of a set of principles for action; <i>Design</i> a set of methodologies, tailored by use cases, to support product teams in the development of systems “responsible by design”; <i>Assess</i> to what extent the system designed is responsible through an assessment questionnaire that describes for each use case what rules should be respected to comply with the principles for action; and <i>Validate</i> compliance with the principle for action through the design of an audit framework by a trusted third party.</p> <p>The WEF concludes that the next steps of the project are to test the framework, assess its relevance and review this based on the results.</p>	<p>WEF white paper</p>
<p>Verbal disclosure does not constitute ‘processing’ of personal data under DPA 1998</p>	<p>In Scott v LGBT Foundation Ltd [2020] EWHC 483 (QB), the court considered whether a charity had breached the Data Protection Act 1998 (“DPA 1998”) in disclosing personal data about the claimant in a telephone conversation with his GP.</p> <p>The court held that there had been no breach because the disclosure had been made verbally – it did not amount to “processing” for the purposes of the DPA 1998 as it had not been recorded in either electronic or manual form. Further, the court found that if the disclosure had amounted to processing, then it would have been lawful on the grounds of it being necessary to protect the data subject’s vital interests.</p>	<p>Judgment</p>
<p>UK and Australia data protection authorities sign a memorandum of understanding</p>	<p>The Office of the Australian Information Commissioner and the ICO have signed a memorandum of understanding for cooperation in the regulation of laws protecting personal data and upholding information rights. The MoU captures the intention of both authorities to better protect personal data through: (i) sharing experience, expertise and ways or working; (ii) cooperating on specific projects and investigations; and (iii) sharing intelligence and information to support their work.</p>	<p>ICO blog post</p>

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Court of Appeal sheds light on application of legal privilege exemption and relevant filing system under DPA 1998	<p>In Dawson-Damer v Taylor Wessing [2020] EWCA Civ 352, the Court of Appeal allowed appeals from both sides against a High Court judgment that a law firm's paper files constituted a "relevant filing system" under the DPA 1998 and that the legal professional privilege exemption could apply to documents in scope of a subject access request.</p> <p>The case involved subject access requests which were made to the solicitors of the trustees of a foreign trust. The High Court had found that "joint privilege" applied but the Court of Appeal disagreed and held that this was a matter of domestic procedure and evidence rather than one of local trust law. The Court of Appeal also considered whether the paper files held by the law firm constituted a relevant filing system under the DPA 1998. It held that the documents were not readily retrievable according to a specific criteria – the Court cited the ICO's "temp test" in reaching its conclusion</p>	Judgment
SCC and the ICO publish a new template DPIA and updated guidance on DPIAs for surveillance cameras	<p>The Surveillance Camera Commissioner ("SCC") and the ICO have released updated guidance specifically for the use of surveillance cameras. The update includes a new template DPIA with associated guidance notes, and aims to provide an approach in line with the updated data protection requirements contained in the Data Protection Act 2018, the GDPR and the Protection of Freedoms Act 2012.</p> <p>It is hoped this joint effort between the SCC and the ICO will ensure surveillance camera systems are implemented for the protection of citizens rather than spying, and that public trust in the use of such systems will be strengthened.</p>	Press release Template DPIA and guidance

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COVID-19: impact on work of IP registries and courts	<p>Click on the links for updates on the impact that COVID-19 is having on the work of the IPO, EUIPO, WIPO and the European Patent Office.</p> <p>The IPO has cancelled physical hearings until 1 June 2020</p> <p>The EUIPO has extended to 1 May 2020 all time limits relating to trade mark and design proceedings currently before the EUIPO that were due to expire between 9 March and 30 April 2020.</p> <p>As at 17 March WIPO remains operational with its personnel working remotely.</p> <p>The European Patent Office has a dedicated webpage via which it provides updates on the impact of COVID-19 on its services.</p>	<p>IPO page</p> <p>EUIPO COVID 19 update</p> <p>WIPO update on COVID-19</p> <p>EPO COVID-19 - continually updated information</p>
EPO consultation on patent guidelines	<p>The EPO has launched a public consultation on its guidelines on the examination of European and international applications and patents in accordance with the European Patent Convention and the Patent Cooperation Treaty and their implementing regulations. The consultation closes on 15 April 2020.</p>	<p>Consultation</p>
UK to withdraw participation in Unified Patent Court system	<p>It has been reported in the media that the UK will not be seeking involvement in the Unitary Patent or the Unified Patent Court system. This is on the basis that the government has stated in its document "The Future Relationship with the EU: the UK's approach to negotiations" that the UK will not agree to any obligation for its laws to be aligned with EU laws or for EU institutions including the CJEU to have jurisdiction in the UK.</p> <p>The EU Justice Sub-Committee has written to the responsible minister asking her to formally confirm the position.</p>	<p>EU Justice Sub-Committee statement</p>

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Coronavirus and the role of tech companies	Major tech companies including Amazon, Google, Microsoft, Apple and Facebook met with the government on 11 March for a roundtable to discuss how they can help ensure the public gets the most accurate and up to date information on coronavirus, including by modelling and tracking data relating to coronavirus and the impact of any government interventions and tackling disinformation.	Government press release
New digital services tax	The Chancellor confirmed in the March 2020 budget that the new digital services tax will apply from 1 April 2020. This will be a 2% tax chargeable on the revenues of search engines, social media services and online marketplaces which derive value from UK users. There is a de minimis level of revenue that is required before the new tax will bite. There are other proposals at international level for similar taxes from the OECD and the UK tax has been seen as an interim measure pending global reform of international tax rules.	Digital services tax policy paper
New digital markets taskforce	<p>As part of the measures introduced in the March 2020 budget, the government has established a digital markets taskforce to advise it on the potential design and implementation of pro-competitive measures for unlocking competition in digital platform markets. The taskforce will sit within the CMA, and comprise officials from the CMA, Ofcom and the ICO. It will build upon work already carried out by and proposals set out in the report of the Digital Competition Expert Panel and will consider in particular how to promote competition in digital platform markets (including e-commerce platforms, peer to peer platforms, social media networks and search engines).</p> <p>The taskforce will operate for a six month period and will publish a final report in September 2020 that will cover, amongst other things:</p> <ul style="list-style-type: none"> • advice on a potential methodology to designate digital platforms as having strategic market status; • consideration of whether intervention to promote competition is justified in relation to platforms that don't fall within this scope but nonetheless exhibit characteristics that may have adverse effects on competition; • advice on the form, content, operation and enforcement of a potential code of conduct to promote competition, as well as its interaction with other regulatory regimes; and • advice on potential international co-operation in this field. <p>The government intends to draw upon the taskforce's advice, alongside consideration of broader policy objectives including those covered by the Cairncross Review and the</p>	Digital markets taskforce: terms of reference

Development

Summary

Links

Online Harms White Paper, in making final decisions on the design of a pro-competitive regime.

Development	Summary	Links
<p>Procurement policy note on responding to COVID-19</p>	<p>The government has issued Procurement Policy Note 01/20 on the public procurement regulations in the context of responding to COVID-19. This highlights the application of Regulation 32(2)(c) of the Public Contract Regulations which permits contracting authorities to enter into contracts without competing or advertising the requirement for reasons of extreme urgency brought about by unforeseeable events. The note stresses the need to keep a written record of the justifications for any such procurements, as well as the need to carry out a separate assessment for each procurement. It states, in particular, that what might be categorised as unforeseeable now may not be as time moves on.</p> <p>The note also runs through other possible rules that may be relevant, eg the circumstances in which a direct award can be made due to absence of competition or protection of exclusive rights (eg where there is only one supplier with the relevant expertise or capacity); call off from an existing framework agreement or dynamic purchasing system; using a standard procedure with accelerated timescales due to urgency; and extending or modifying an existing contract where the need to do so is brought about by unforeseen circumstances.</p>	<p>Procurement Policy Note 01/20</p>
<p>Procurement policy note on supplier relief due to COVID-19</p>	<p>The government has issued Procurement Policy Note 02/20 on supplier relief due to COVID-19. This provides guidance for public bodies on dealing with suppliers in order to ensure service continuity during and after the coronavirus outbreak. This guidance applies until the end of June 2020 and it covers two key principles:</p> <ul style="list-style-type: none"> • rather than accept claims for contractual relief that would allow performance to be suspended, such as force majeure, in order to maintain service continuity contracting authorities should, where possible, work with their suppliers to vary contracts and provide relief in other ways, such as extending performance dates, softening or waiving service credit regimes etc; and • suppliers should be paid as quickly as possible and potentially in advance, even if supply is interrupted by the impact of the coronavirus outbreak, in order to keep supplier businesses solvent and ensure that they are in a position to resume normal contract performance once the coronavirus outbreak is over. The guidance requires suppliers in receipt of public funds to operate on an open book basis so that authorities can check that payments made to the supplier have been used in the manner intended (eg to pay staff and sub-contractors). <p>To support this policy the government has also issued Model Interim Payment Terms which are to be used to vary an existing contract in line with the principles set out in PPN 02/20.</p>	<p>Procurement Policy Note 02/20</p>

Focus on disruptive tech

Development	Summary	Links
OECD AI policy observatory and collaboration between OECD and European Commission	<p>The OECD has launched OECD.AI, which it describes as “a platform to share and shape public policies for responsible, trustworthy and beneficial AI”.</p> <p>Separately, the European Commission has announced that it is collaborating with the OECD on global monitoring and analysis of AI developments. As part of this collaboration reports from AI Watch (the European Commission’s database) will be made available on the OECD AI policy observatory, data will be shared and there will be collaboration on the design of improved methodologies for data collection.</p>	<p>OECD AI observatory</p> <p>European Commission news article</p>

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