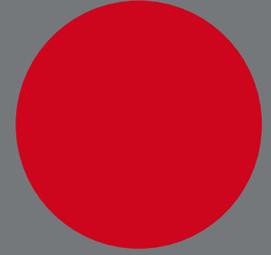


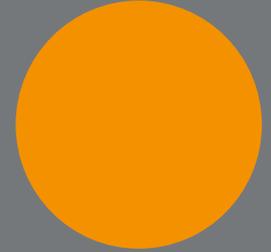
**Commercially connected**  
May 2020



**Impact**



**Immediate**



**Impact in the near future**



**On the horizon**

## Introduction

Welcome to the Eversheds Sutherland monthly commercial law update, covering both case law and regulatory development. *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.*

**Click on your topic of interest below**

Focus on  
Coronavirus

Brexit

Commercial -  
general

Consumer

Cyber security

Data protection  
and privacy

IP

Public sector

Technology

Development	Summary	Supporting information	Impact
UK legislation	<p>In England The Health Protection (Coronavirus Restrictions) (England) (Amendment) (No 2) Regulations 2020 came into force on 13 May. These reflect the relaxation of lockdown rules in England announced by the Prime Minister on 10 May.</p> <p>In Wales there are the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020, together with three sets of amending regulations which reflect changes in lockdown policy.</p> <p>The Government has created a handy web page dedicated to coronavirus legislation. Click on the link to access this.</p>	<p><a href="#">The Health Protection (Coronavirus Restrictions) (England) (Amendment) (No 2) Regulations 2020</a></p> <p><a href="#">Legislation.gov coronavirus page</a></p>	
Corporate Insolvency and Governance Bill	<p>The Corporate Insolvency and Governance Bill was published on 20 May. This Bill contains measures relating to company law (AGMs and filings) and insolvency procedures and protections. Some of these are COVID-19 related and some have been subject to earlier consultation.</p> <p>The Government is intending to ask Parliament to fast track this Bill, with all three House of Commons stages intended to take place on 3 June, even although not all the measures are COVID-19 related.</p> <p>Some but not all of the measures in the Bill are time limited. Some will be extendable by regulations made under the Bill.</p> <p>The insolvency measures include a new free standing statutory moratorium and a new restructuring plan procedure. Significantly for commercial contracts, the Bill seeks to extend existing statutory restrictions on exercising termination and payment acceleration rights to include most supplies of goods and services when a corporate customer goes into a wider range of insolvency procedures than is currently the case. These are intended to be permanent measures, although there is some time limited protection for smaller suppliers.</p> <p>The upshot of these changes, if they go ahead in the form as published in the Bill, will be to require a review of existing insolvency triggers in all supply contracts and a renewed focus on credit control and other</p>	<p><a href="#">Corporate Insolvency and Governance Bill</a></p>	



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Development	Summary	Supporting information	Impact
	payment protection mechanisms that are not subject to restriction under this Bill.		
Financial support for business	Click on the link to access the latest information on the financial support available for businesses dealing with the impact of the COVID-19 pandemic.	<a href="#">Government landing page</a>	
Government trade credit insurance guarantee	The Government has announced that it will temporarily guarantee business to business transactions currently supported by Trade Credit Insurance in order to support supply chains and help businesses to trade with confidence. Trade credit insurance provides cover in respect of the risk of customers to whom suppliers supply goods on credit defaulting on payment.	<a href="#">Announcement of Government Trade Credit Insurance guarantee</a>	
Cabinet Office guidance on responsible contractual behaviour	The Cabinet Office and Infrastructure and Projects Authority have published non-statutory guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the COVID-19 emergency. The guidance is aimed at both the private and public sectors and it emphasises the importance of contracting parties working together to deal with the impact of COVID-19 on contract performance in order to protect jobs and the economy. The guidance applies with immediate effect and will be reviewed on or before 30 June 2020. It does not apply in the devolved administrations and does not override specific policy notes issued by the Government or other specific support that is available.	<a href="#">Guidance</a>	
UK Government COVID-19 recovery strategy	The UK Government has published its COVID-19 recovery strategy, setting out its "roadmap" to the lifting of lockdown restrictions.  It has also launched five new ministerial-led taskforces to plan how and when closed sectors can reopen safely. These sectors are pubs and restaurants, non-essential retail, recreation and leisure, places of worship and international aviation.	<a href="#">UK Government COVID-19 recovery strategy</a>  <a href="#">Government announcement of roadmap taskforces</a>	
UK Government guidance on getting businesses back up and running safely	The UK Government has published guidance for employers on getting businesses back up and running safely. The most significant points from this guidance are that:	<a href="#">UK Government guidance</a>	



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	<ul style="list-style-type: none"> <li>• “all reasonable steps” should be taken by employers to help people work from home;</li> <li>• for those businesses whose employees cannot work from home (and whose workplace is not required to close under UK lockdown regulations): businesses should carry out a risk assessment in consultation with workers or trade unions with the UK Government “expecting” that all businesses with over 50 employees will publish their risk assessments on their website; businesses should redesign workspaces to maintain 2 metre distances and where staff cannot be 2 metres apart “manage transmission risk”, which could be by using barriers, creating different shift patterns or ensuring staff face away from each other; and clean workplaces more frequently and provide handwashing/sanitising facilities at entry and exit points.</li> </ul> <p>How this guidance fits in with current legal obligations of businesses is not fully spelt out, with only a statement that it “operates within current health and safety employment and equalities legislation”.</p>		
FCA test cases on business interruption insurance	The FCA is bringing test cases in the High Court to try to resolve contractual uncertainty on how some key terms of business interruption insurance policies apply in the context of the COVID-19 outbreak. The FCA aims to resolve issues on the meaning and effect of some of the most frequently used policy wordings that are giving rise to uncertainty in order to assist insurers and insureds in determining how much may be payable under individual policies.	<a href="#">FCA statement</a>	
IMF and WTO joint statement	The IMF and the WTO have issued a joint statement calling on governments to refrain from imposing export and other trade restrictions on key medical supplies and food in response to the COVID-19 pandemic and to quickly lift those put in place since the start of the year.	<a href="#">Joint statement</a>	
ICC and WCO joint statement	The ICC and the World Customs Organization have issued a joint statement calling for increased action on customs and trade facilitation to ensure an effective response to the COVID-19 pandemic, with the	<a href="#">Joint statement</a>	



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Development	Summary	Supporting information	Impact
	aim of keeping trade flowing by maintaining international supply chains.		

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UK-EU negotiations	<p>The third round of negotiations on the future relationship between the UK and the EU took place from 11 to 15 May.</p> <p>Following negotiations David Frost, UK chief negotiator, stated that very little progress had been made on the most significant outstanding issues, blaming the EU insistence on tying the UK to the "level playing field" which, he said, "would bind this country to EU law or standards, or determine our domestic legal regimes, in a way that is unprecedented in Free Trade Agreements and not envisaged in the Political Declaration".</p> <p>In a statement from the EU side, Michel Barnier's key point was also that the parties had failed to make progress on the difficult issues, from the EU perspective blaming the UK for failing to engage in a real discussion on the question of the level playing field.</p> <p>On 19 May the UK Government published a suite of legal texts to accompany its February 2020 policy paper on the UK's future relationship with the EU, including a free trade agreement which provide for zero tariffs and zero quotas on goods and separate agreements on specific areas including fisheries and law enforcement and judicial cooperation in criminal matters.</p> <p>The House of Commons Library has also published a report based on publicly available documents which summarises the position of each side in negotiations. This was written before publication of the UK texts on 19 May so does not take account of their contents.</p> <p>The fourth round of negotiations will begin on 1 June.</p>	<p><a href="#">UK Government statement</a></p> <p><a href="#">EU statement</a></p> <p><a href="#">UK Government policy paper and draft legal texts</a></p> <p><a href="#">House of Commons Library report</a></p>	
Implementation of the Ireland/Northern Ireland Protocol	<p>On 30 April the UK-EU Ireland/Northern Ireland Specialised Committee met for the first time. The Committee is tasked to work on implementing the Ireland/Northern Ireland Protocol which will apply from the end of the transition period and which is intended to avoid a hard border between Ireland and Northern Ireland. Following that</p>	<p><a href="#">UK Government statement</a></p> <p><a href="#">European Commission statement</a></p>	



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	<p>meeting the UK Government reiterated that its approach will be focused on protecting the Good Friday Agreement and preserving Northern Ireland's place in the UK. The EU Commission statement stressed the need for the UK to set out its plans on the implementation measures given the short timescale. It also published a technical note on implementation of the Protocol asking the UK to provide details of how the UK intends to, amongst other things, apply the EU Customs Code formalities and EU customs tariff in respect of goods entering Northern Ireland from Great Britain or a third country and vice versa and ensure that goods placed on the market in Northern Ireland or entering into Northern Ireland from Great Britain or a third country will comply with EU product legislation.</p> <p>Subsequently on 20 May the UK Government published the UK approach to implementing the Northern Ireland Protocol. This paper states that there should be no additional administration in respect of trade from Northern Ireland to Great Britain. For Great Britain to Northern Ireland trade the paper states that tariffs will only be levied on goods ultimately entering Ireland or the rest of the EU. It recognises that "some limited additional process on goods arriving in Northern Ireland" will have to be carried out. This is intended to be carried out online and "there will be no new physical customs infrastructure".</p>	<p><a href="#">European Commission technical note</a></p> <p><a href="#">UK approach to the Northern Ireland Protocol</a></p>	
Withdrawal Agreement	<p>Under the UK-EU Withdrawal Agreement a Joint Committee (comprising representatives of both the UK and the EU) was established. This has the power to make minor amendments to the Withdrawal Agreement. The European Commission has adopted a proposal for a Council Decision which sets out the EU's position on proposed amendments to be put to the Joint Committee. Most of these are amendments to reflect the extension that was made to the Article 50 period and to amend the Ireland/Northern Ireland Protocol to add certain acts to the list of rules related to the Single Market that are to apply in Northern Ireland but which were omitted from the original text of the Protocol</p>	<p><a href="#">Proposal for Council Decision</a></p>	
UK global tariff	<p>The UK Government has published the UK trade tariffs that will apply from 1 January 2021, as well as guidance on how to use the tariff checking tool.</p>	<p><a href="#">UK trade tariffs from 1 January 2021</a></p> <p><a href="#">Government guidance</a></p>	



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Development	Summary	Supporting information	Impact
The European Union (Withdrawal Agreement) Act 2020 (Commencement No. 3) Regulations 2000	These Regulations bring certain provisions of the European Union (Withdrawal Agreement) Act 2020 into force from 19 May, including powers to make regulations on the implementation of provisions relating to citizens' rights, the implementation of separation provisions and implementation of the Ireland/Northern Ireland Protocol. The Regulations also bring into force the power to set out in further regulations the circumstances in which certain UK courts will not be bound by retained EU case law.	<a href="#">The European Union (Withdrawal Agreement) Act 2020 (Commencement No. 3) Regulations 2000</a>	
Trade Bill 2019-21	The Trade Bill had its second reading in the House of Commons on 20 May and was committed to a Public Bill Committee which is expected to report to the House by 25 June 2020. The Trade Bill will, amongst other things, establish the UK Trade Remedies Authority and make provision for transitioning of the EU's international trade agreements to UK agreements.	<a href="#">Trade Bill 2019 - 21</a>	
The Private International Law (Implementation of Agreements) Bill 2019-21	The Private International Law (Implementation of Agreements) Bill 2019-21 is intended to provide a mechanism for implementing into UK domestic law international agreements on private international law (such as jurisdiction, applicable law, recognition and enforcement of judgements and cooperation on procedural matters). The House of Lords Consultation Committee has published a report on this Bill, concluding that the power contained within it to allow the Government to implement such agreements via statutory instrument is an inappropriate delegation of power and should be removed.	<a href="#">Report</a>	

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IR35	<p>The House of Lords Economic Affairs Finance Bill Sub Committee has published a report on the IR35 rules, "Off payroll working: treating people fairly". The Committee recommends that as the plans to extend the IR35 regime to the private sector have been delayed for a year due to the COVID-19 pandemic, the Government should use this time to completely rethink the legislation. The Committee calls the framework flawed, with its concerns centring on ensuring that there is a fair balance between tax, rights and risk. It notes that many witnesses have told it that the rules give them none of the rights of an employee but none of the tax advantages of being self-employed. It also notes that the Government has severely underestimated the costs to business of implementing the changes. The Committee has called on the Government to announce by October 2020 whether or not it will implement the IR35 reforms in April 2021.</p>	<p><a href="#">Report</a></p>	
<p>High Court interpretation of a force majeure clause</p>	<p><b>2 Entertain Video Limited and others v Sony DADC Europe Limited</b> the parties entered into a logistics services agreement under which Sony agreed to provide storage and distribution facilities and logistics services to the claimants ("2E"). During the 2011 riots a warehouse owned by Sony was burned down completely destroying the building and all of 2E's stock.</p> <p>Sony tried to rely on the force majeure clause in the agreement to protect it from liability to 2E. The clause described force majeure events as "circumstances beyond the reasonable control of the party affected including....fire...". This argument failed. The judge found that although the riots were unforeseen and unprecedented, the risks of unauthorised entry, arson and destruction of the warehouse and its stock by fire should all have been foreseen. Sony could have taken appropriate security measures and fire precautions which would have prevented the incident or suppressed the fire and reduced the damage, but it didn't. Therefore the fire and resulting loss did not</p>	<p><a href="#">Judgment</a></p>	



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	amount to circumstances beyond Sony's reasonable control and it could not rely on the force majeure clause.		
Remedies for misuse of confidential information	In <b>Media Entertainment NV v Sapor Karyagdyev Alfonso Gonzalez Garcia</b> the High Court reviewed the authorities on misuse of confidential information and concluded that for there to be a damages remedy the defendant must have sufficient knowledge that they lacked authorisation from the claimant to act in the way that they did (ie to use the confidential information in the way that they did). There is no such knowledge requirement in order for the claimant to be granted an injunction.	<a href="#">Judgment</a>	

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<p>COVID-19 and consumer protection</p>	<p>The CMA has launched an investigation into reports of businesses failing to respect cancellation rights during the COVID-19 outbreak, initially focusing on weddings and private events, holiday accommodation and nurseries and childcare provision.</p> <p>The CMA has also issued a statement on consumer protection law in relation to cancellations and refunds complaints. This states that the CMA would usually expect a consumer to be offered a full refund where a business cancels a contract without providing the contract goods or services, where no service is provided or where the consumer cancels or is prevented from receiving the services due to Government public health measures. Consumers should also not be misled or pressured into accepting credits, vouchers, rebooking or rescheduling as an alternative to a refund.</p> <p>The CMA has also issued its May update on the work of its COVID-19 taskforce. This notes that the large majority of complaints that the CMA has received since mid-April relate to unfair practices on cancellations and refunds, with three quarters of these relating to holidays and air travel. It is also investigating a number of complaints of unjustifiable price rises, particularly for essential goods.</p> <p>Which? has launched an online tool which enables consumers to report price gouging practices in respect of essential items that are prompted by the COVID-19 outbreak. Which? may share anonymised data gathered via this tool with the CMA to assist monitoring of unfair trading practices prompted by the COVID-19 outbreak.</p>	<p><a href="#">CMA press release</a></p> <p><a href="#">CMA statement</a></p> <p><a href="#">CMA update on its COVID-19 taskforce</a></p> <p><a href="#">Which? press release</a></p>	
<p>WTO report on impact of COVID-19 on e-commerce and cross-border trade</p>	<p>The WTO Secretariat has published an information note on how the COVID-19 pandemic has affected e-commerce and the implications for cross-border trade. This states that the pandemic has highlighted the importance of digital technologies and has also exposed vulnerabilities, highlighting the need to bridge what it call the "digital divide" which hampers the ability of small producers, sellers and</p>	<p><a href="#">WTO report</a></p>	



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	consumers to participate in e-commerce activities particularly in least-developed countries.		
The Consumer Protection (Enforcement) (Amendment etc) Regulations 2020	The Consumer Protection (Enforcement) (Amendment etc) Regulations 2020 come into force on 2 June 2020. The Regulations are intended to ensure that EU Regulation 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws (which came into force on 17 January 2020) operates correctly in the UK. The EU Regulation reformed the cooperation framework within the EU to ensure it is fit for purpose in the digital age. The UK regulations ensure that competent authorities have the necessary investigation and enforcement powers to perform the functions required by the new EU Regulation.	<a href="#">The Consumer Protection (Enforcement) (Amendment etc) Regulations 2020</a>	

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ENISA issues advice on cybersecurity amidst COVID-19	The coronavirus pandemic has increased the threat of cybercrime, particularly in the healthcare sector which has become more vulnerable to attack. Recognising this, the European Union Agency for Cybersecurity (" <b>ENISA</b> ") has issued advice to help the health sector and medical facilities guard against the risk of increased phishing and ransomware attacks.	<a href="#">Advice</a> <a href="#">Press release</a>	
ENISA issues guidance to SMEs on usage of online communication tools	<p>ENISA has issued guidance to SMEs on the selection and usage of online communication tools such as video and audio conferencing, instant messaging and remote document sharing. ENISA highlights that security and privacy settings of such tools are critical to ensure that SMEs continue to operate in a productive, efficient, but secure manner, particularly given the new challenges in increased working from home. In particular, ENISA shared the following recommendations:</p> <ul style="list-style-type: none"> <li>• ensure any tools support encrypted communication and strong authentication;</li> <li>• favour those with central management systems;</li> <li>• consider configuration and integration with existing in-house systems including single sign on;</li> <li>• read the privacy policy of the tool and understand the types of data stored by the tool, location of the data, transfers to third countries and retention periods of data;</li> <li>• make sure up to date software versions are used and security patches are applied promptly;</li> <li>• access the service through work devices and limit if possible use from personal devices;</li> <li>• ensure all meetings are password protected and avoid sharing conference links/passwords outside the intended participants;</li> </ul>	<a href="#">Guidance</a>	



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	<ul style="list-style-type: none"> <li>• verify default settings of the tool and where possible, apply settings that protect users' privacy (eg video deactivated by default); and</li> <li>• educate users on minimising the use of such tools to only where necessary ie ensuring video is used cautiously to avoid revealing confidential information or personal data in the background.</li> </ul>		
ENISA issues guidance on Computer Incident Response Teams	ENISA has issued guidance to highlight the Computer Incident Response Teams (" <b>CSIRT</b> ") that operate across Europe to assist with cyber security incidents and attacks. The guidance aims to assist SMEs, businesses and private citizens during the COVID-19 outbreak by raising awareness of what CSIRTs do and how they can assist in the event of a cyber security incident. ENISA has also published a CSIRT map that can be used to identify the best team to contact if organisations are facing a cyber threat or to assist with the transition to home working. In summary, the CSIRTs network is made up of incident response teams appointed by member states and EU institutions to help in responding to cyber threats and to share related information with businesses who may be affected.	<a href="#">Guidance CSIRT Map</a>	
UK and US security departments publish joint alert on cyber threats to healthcare organisations	<p>The United States Department of Homeland Security ("<b>DHS</b>"), along with the Cybersecurity and Infrastructure Security Agency ("<b>CISA</b>") and the UK's National Cyber Security Centre ("<b>NCSC</b>") have published a statement to alert healthcare and other essential service organisations of the ongoing risks coming from advanced persistent threat ("<b>APT</b>") groups during the COVID-19 outbreak.</p> <p>The alert states that the APT groups aim to collect masses of personal information, intellectual property and other sensitive data by using password spraying campaigns. The alert recommends making use of the CISA and NCSC's previous advice on how to improve password policies and how to protect against password spraying, along with other defences such as updating VPNs, using multi-factor authentication, using modern systems and software and setting up a security monitoring capability.</p>	<a href="#">Press Release Alert</a>	



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Extension of EU framework against cyber-attacks	The EU Council has adopted a decision extending until 18 May 2021 the cyber sanctions regime which sets out a framework for the EU to impose targeted restrictive measures in response to cyber-attacks which have a significant impact and which threaten the EU or its member states.	<a href="#">Press release</a> <a href="#">Council Decision</a>	
ISO standards for cybersecurity updated	The International Organisation for Standardisation (“ <b>ISO</b> ”) has updated its standard ISO/IEC 27009 which aims to address information security, cybersecurity and privacy protection. By revising the standard, the ISO hopes to allow for more sector-specific provisions in the standards, to help improve the standard’s application.	<a href="#">Press release</a>	
European Commission founds sub-group on Cooperative Intelligent Transport systems	The European Commission has established a sub-group on Cooperative Intelligent Transport systems to support the Commission with implementing its EU-wide cybersecurity infrastructures and processes which aims to establish secure and trustworthy communication between vehicles, infrastructure for road safety and traffic management related messages. The sub-group will work under the Commission Expert Group on Intelligent Transport Systems, and the Commission is calling for interested organisations to submit their applications should they wish to be considered. Applicants can be received at any time during the existence of the group but initial applicants for the first meeting of the group will be considered until 30 May 2020.	<a href="#">European Commission statement</a>	

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<p>EU institutions update guidance around COVID-19 tracking apps</p>	<p>This month saw an increase in guidance from EU institutions around the use of contact tracing apps and what organisations and governments need to consider before any nation-wide implementations of such schemes, particularly around protections of personal data and privacy concerns not only within each member state but also cross-border.</p> <p>Whilst the European Commission has urged governments to encourage citizens to voluntarily download contact tracing apps, it reiterates that such apps must respect people’s privacy, explaining that the apps should be a temporary measure, using only arbitrary identifiers and no geolocation or movement data.</p> <p>The European Data Protection Supervisor (“<b>EDPS</b>”) has also sought to explain the different types of contact tracing apps being used during the coronavirus crisis, and what technologies are being used in order for these apps to work. The EDPS also considered the serious data protection implications such apps have, particularly as they require the processing of health data which needs special protections. The main concerns which the EDPS raised related to:</p> <ul style="list-style-type: none"> <li>• the large scale of such surveillance, which can have high risks to individuals’ rights and freedoms, hence the need for data protection impact assessments to be conducted prior to their use;</li> <li>• broad ranging number of contacts and frequency of data collected could reveal more information not only about the individual’s social habits but also those of its family members, neighbours or colleagues, meaning data minimisation and privacy-enhancing technologies ought to be considered;</li> <li>• large scale behavioural monitoring which requires data protection by design to be implemented to help reduce this;</li> </ul>	<p><a href="#">Interoperability guidelines</a></p> <p><a href="#">European Commission statement</a></p> <p><a href="#">Blog Post</a></p>	



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	<ul style="list-style-type: none"> <li>the need for purpose limitation so that these apps are only used until the epidemic has stopped;</li> <li>lack of transparency in the use of such apps which should be addressed by the apps being voluntary and transparent as to the use of information;</li> <li>insufficient data accuracy caused by errors in the apps being able to trace all types of contact; and</li> <li>security of personal data against cyber security attacks.</li> </ul> <p>Use of contact tracing apps across Europe also raises a question of how governments can monitor cross-border chains of infection. The EU has therefore produced interoperability guidelines for approved contact tracing mobile applications, which have been adopted by EU Member States. The guidelines are intended to act as a follow-up of the EU Toolbox for contact tracing applications (mentioned in our previous update), and emphasise the need for EU Member States to utilise the technology to trace cross-border chains of infection. The guidelines also aim to be used as a guide for developers who are designing and implementing the apps.</p>		
<p>COVID-19 Contact tracing app launched on the Isle of Wight</p>	<p>The UK Government announced the launch of the contact tracing app on the Isle of Wight from 5 May. The app has been developed by NHSX, with assistance from the National Cyber Security Centre, and aims to help contain the spread of COVID-19 and to enable the identification of high risk individuals so that they can take action to prevent themselves and others from contracting the virus.</p> <p>Once someone reports symptoms on the app, the app will detect which other users that individual has had significant contact with over the previous few days. The app will then anonymously alert these contacts and provide advice, for example how to get a test to confirm whether they have contracted the virus. There will also be an option to report symptoms in other ways for those who do not have access to a smartphone.</p> <p>The app developers have confirmed that the data collected will only be used for NHS care, management, evaluation and research and the</p>	<p><a href="#">Government Announcement</a>  <a href="#">NCSC-Press Release</a>  <a href="#">NCSC- Technical Paper</a>  <a href="#">NCSC- Blogpost</a>  <a href="#">NCSC-Explainer</a>  <a href="#">ICO Statement</a>  <a href="#">DPIA</a>  <a href="#">Paper</a></p>	



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	<p>NHS has confirmed that it will at all times act in accordance with data protection laws.</p> <p>In support of this The National Cyber Security Centre ("<b>NCSC</b>") have released a Technical Paper, along with a supporting blogpost and explainer document, demonstrating the work that the NCSC have been doing on the app. The documents also explain the privacy and security design of the app, how the app will work to help stop the spread of COVID-19 and an explanation of the security measures that underpin the technology.</p> <p>Following the app's launch, there have been some initial concerns raised, the ICO confirming that the Data Protection Impact Assessment ("<b>DPIA</b>") for the NHSX pilot is currently under review. To assist with this, the NHS has since released an unredacted version of its DPIA, which outlines how the App handles personal data and how data is anonymised. The ICO is expected to provide its comments sooner rather than later to ensure they are captured in the trial period before a full roll out of the app.</p> <p>In addition, the Chartered Trading Standards Institute ("<b>CTSI</b>") announced that it received evidence of phishing scams themed around the app, whereby members of the public received texts informing them they had come into contact with someone who tested positive for COVID-19. The message included a link to a website which requests the individual's personal data, which could be used to commit identity fraud. You may recall that in our last update we reported on the ICO's intention to investigate coronavirus scams of this nature.</p> <p>To assist in the development of contact tracing apps, the ICO has published a paper containing a number of recommendations and principles for developers to consider, which includes emphasising the need for transparency as to the purpose of the app and that a minimum amount of data be collected.</p>		
<p>Health Secretary rejects Joint Committee on Human Rights' suggestion that primary legislation is necessary for NHSX's contact tracing App</p>	<p>The JCHR's report titled 'Human Rights and the Government's Response to Covid-19: Digital Contact Tracing' concluded that the current legislative regime was unsatisfactory to protect against the misuse of individual's data. In order to address this deficiency, the JCHR has provided a draft bill, to provide specific primary legislation</p>	<p><a href="#">Report</a> <a href="#">Letter</a></p>	



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	<p>on contact tracing apps, which it deems is necessary because such apps are more significant data collection mechanisms than has been envisaged by legislation to date.</p> <p>Whilst the report did state that the app could be effective in helping to reduce the spread of COVID-19, it stressed the importance of adequate safeguards. Within its recommendations it also suggested there needed to be a specific Digital Contact Tracing Human Rights Commissioner to oversee the app, and to deal specifically with complaints from the public.</p> <p>In response, Matt Hancock, the current Secretary of State for Health and Social Care has responded to the JCHR stating that its suggestion that primary legislation be required for contact tracing apps is unnecessary. In his written response Mr Hancock emphasised his confidence that the NHSX App complies with current data protection laws and the information governance standards expected of public services. As such, he does not believe that any new legislation is required as the existing legislation provides all necessary protections, powers and responsibilities.</p>		
<p>EDPS publishes blogpost on the application of data protection laws during COVID-19</p>	<p>The EDPS has outlined how personal data may be used throughout the COVID-19 outbreak and its importance in responding to the pandemic. The post emphasises that data protections laws such as the GDPR and e-Privacy rules will not act as an obstacle to using personal data to help with attempts to control the spread of the virus, rather the legislation is flexible enough to both support the public good in the use of data whilst maintaining privacy standards.</p> <p>The EDPS explains that it will continue to analyse issues within the digital ecosystem and assist with building technological solutions which are effective, whilst knowing where to draw the line in order that the ethical needs for privacy and data protection are preserved.</p>	<p><a href="#">Blogpost</a></p>	
<p>ICO updates its key priorities during the COVID-19 pandemic</p>	<p>The ICO has published a blogpost explaining that it has reassessed its data protection priorities in light of the COVID-19 outbreak in order to protect public interest and help to facilitate economic growth.</p> <p>The ICO states that, going forward, it intends to focus on the following:</p>	<p><a href="#">Blogpost</a> <a href="#">Statement</a></p>	



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	<ul style="list-style-type: none"> <li>protecting vulnerable citizens;</li> <li>supporting economic growth and digitalisation for all businesses;</li> <li>shaping proportionate surveillance;</li> <li>enabling good practice in AI;</li> <li>enabling transparency; and</li> <li>maintaining business continuity.</li> </ul> <p>The Commissioner also highlighted that whilst some ICO projects may be paused, the main focus is in maintaining the ICO's statutory function as regulator. One example of a project which has been put on pause during the pandemic is the ICO's investigation into real time bidding and the Adtech industry.</p>		
<p>ICIC publishes joint statement highlighting the duty to document particularly during the Coronavirus pandemic</p>	<p>The International Conference of Information Commissioners ("<b>ICIC</b>") published a joint statement calling for both public and private sector organisations to document decisions, keep records secure and preserve access to data during the COVID-19 pandemic, this being essential for business continuity. Whilst the duty to document already existed, the ICIC sought to emphasise that this "<i>does not cease in a crisis, it becomes more essential than ever</i>" particularly in trying to prevent other events, and to learn from the pandemic in the future.</p>	<p><a href="#">Press release</a> <a href="#">Statement</a></p>	
<p>EU Commission publishes statement following second round of Brexit negotiations</p>	<p>The head of the Task Force for relations with the UK, Michel Barnier has released a statement outlining the current status of Brexit negotiations. In particular regarding data protection, Barnier highlighted one area of importance around police and judicial cooperation which is facing difficulties because of the UK's insistence in lowering current standards and deviating from current mechanisms of data protection. The concern is that failure to maintain such standards could limit any future security partnership with the EU.</p> <p>An example of the impact this has was evidenced in the vote taken on 13 May 2020 by the European Parliament who voted against a draft implementing decision which would have permitted the data exchange of fingerprints to the UK from the EU. MEPs have recommended a</p>	<p><a href="#">Statement</a> <a href="#">Press statement</a> <a href="#">Statement</a></p>	



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	<p>decision not be made until the UK can ensure “full reciprocity and data protection” as it is not currently clear whether the UK will meet EU data protection standards post-transition. Barnier has emphasised the need for reciprocity of data exchanges and that any lowering of the current standards or changes to the agreed structure for data protection will be impossible for the EU to agree to.</p>		
<p>CJEU to issue its judgment on 16 July 2020 in the latest Schrems case against Facebook challenging the validity of model clauses</p>	<p>The CJEU has confirmed on twitter that it will deliver its judgment on the Schrems II case on 16 July 2020. In its judgment, the CJEU is expected to decide whether the standard contractual clauses are sufficient for the legal transfer of personal data to the USA under the GDPR.</p> <p>The CJEU’s Advocate General released its non-binding opinion on the case back in December 2019, stating that the standard contractual clauses did provide adequate protection for personal data, but this does not mean the CJEU’s judgement will necessarily follow this opinion.</p>	<p><a href="#">CJEU announcement</a></p>	
<p>Cabinet Office publishes 2019 Freedom of Information Statistics</p>	<p>The Cabinet Office has published its 2019 Freedom of Information (“FOI”) statistics for 40 central government bodies. The statistics show that in 2019 there were 49,439 FOI requests received, which is a 1% decrease from the number of requests received in 2018. The statistics also show that 93% of requests were responded to on time (up by 2% when compared with the previous year).</p> <p>The report also cites the exemptions used and shows that personal information was by far the most cited exemption (49.7%). Of those FOI requests, there were 479 known complaints to the ICO for 2019 which represents just under 1% of total requests having been complained about.</p>	<p><a href="#">Cabinet Office Bulletin</a></p>	
<p>National surveillance camera strategy for England and Wales published</p>	<p>The Surveillance Camera Commissioner has released its 2020-2023 national surveillance camera strategy for England and Wales. The strategy outlines the commissioner’s overall objectives, including establishing a recognisable standard for delivering surveillance camera solutions, early warning systems for technological developments, making information about the operation of cameras</p>	<p><a href="#">Strategy</a> <a href="#">Objectives</a></p>	



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	freely available to the public, and the sharing of information by the police and local authorities.		
ICO issues guidance to employers on workplace testing	<p>In the UK the ICO has issued guidance to employers wishing to undertake workplace testing (the "<b>Guidance</b>"). The Guidance states that employers are required to comply with GDPR when processing employee health data (which is special category data) and handle such data in a lawful, fair and transparent manner. The Guidance also includes the following best practices:</p> <ul style="list-style-type: none"> <li>• employers should undertake a data protection impact assessment to demonstrate accountability in their data processing;</li> <li>• employers should consider data minimisation and only collect and retain the minimum amount of data needed to fulfil their purpose; and</li> <li>• employers should exercise transparency in all contexts, including when informing staff about the purposes of using their data, and when using temperature checks or thermal cameras.</li> </ul> <p>Other data protection supervisory authorities, including in the Netherlands and Spain have also issued guidance with varying (and indeed stricter) approaches as to whether such testing can be in accordance with the GDPR. Organisations seeking to use temperature tracing should be cautious to ensure that they are able to comply with the GDPR before proceeding.</p>	<p><a href="#">ICO guidance</a></p> <p><a href="#">AP Press release (only available in Dutch)</a></p> <p><a href="#">AEPD Statement (In Spanish)</a></p>	
UK Government orders audit of ICO's operations following claims the regulator lacks the might to take on Big Tech	<p>The UK Government has commissioned Oliver Wyman, a global management consultancy, to undertake a major audit of the ICO's functions following claims that the ICO may not be able to take on major tech companies and therefore may be unfit for purpose. This appointment followed recommendations in the 2019 report from the Parliamentary Joint Committee on Human Rights (the "Report"). The Report found that the ICO did not actively police Big Tech, instead operating a reactive approach to investigation. As such it was recommended that the Government review whether there were adequate measures to enforce the GDPR and Data Protection Act in</p>	<p><a href="#">Parliamentary joint committee third report of session 2019</a></p>	



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	relation to how internet companies were processing personal data, including consideration of whether the ICO has sufficient resources to act effectively as a regulator.		
UK High Court finds a school letter in breach of the Data Protection Act 1998	In <b>ST (a minor) and another v L Primary School [2020] EWHC 1046 (QB)</b> , the High Court ruled that circulation of a school letter to parents containing sensitive private information relating to a disabled pupil constituted a breach of the Data Protection Act 1998 (the "DPA"). The Court found that the pupil's disability constituted sensitive personal data for the purposes of the DPA and that clear and express consent would be required from the pupil's parents before any disclosure of that data was made. The Court highlighted that the school failed to produce compelling evidence which explicitly documented the consent. In doing so, it rejected the school's arguments that consent had been given on the basis that the pupil's parents did not object to or raise concerns at the time the letter was circulated.	<a href="#">Judgement</a>	
Tusla subject to the first fine from Irish Data Protection Commissioner	The Irish data protection commissioner has issued its first fine for a breach of the GDPR. Tusla, a child and family agency, was fined €75,000 following investigations into three unauthorised disclosures of children's personal data, including one scenario where the contact and location of a mother and child victim were disclosed to an alleged abuser. The fine was reported in papers filed to the Circuit Court. This is the first economic penalty issued by the regulator since the implementation of the GDPR.	<a href="#">Press article</a>	
Family of 10 lose harassment and privacy claims against newspaper publishers	In <b>Sube v News Group Newspapers &amp; Express Newspapers (No 3) [2020] EWHC 1125 (QB)</b> , the High Court rejected a claim under Section 10 of the Data Protection Act 1998 (the "DPA") made by the claimants against two leading newspaper publishers – News Group Newspapers and Express Newspapers – in respect of various newspaper articles and online posts circulating information about the claimants' rejection of a council house in Luton. By way of background, Section 10 sets out a data subject's right to prevent a data controller from processing personal data where such processing is likely to cause damage or distress to the data subject or another.	<a href="#">Judgement</a>	



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	<p>The Court ruled that both News Group Newspapers and Express Group had stopped any processing activity by deleting the relevant posts before the statutory deadline set out in Section 10(3) of the DPA (this being 21 days of receiving notice), and that retaining hard copies of the posts after their deletion did not constitute processing in breach of Section 10.</p> <p>As a result, the judge considered it unnecessary to consider whether the data contained in the online posts constituted sensitive personal data for the purposes of Section 2 of the DPA. However, for sake of completeness, the judge ruled that it did not due to the claimants' failure to identify and explain which of the posts infringed Section 2.</p>		
No automatic expectation of privacy for party in tribunal hearings	In <b>Moss v Information Commissioner [2020] EWCA Civ 580</b> , the Court of Appeal (Civil Division) has released its judgment relating to anonymity of parties in information rights cases. The appellant argued that the refusal to grant him anonymity unlawfully interfered with his Article 6(1) (right to a fair trial) and Article 8 (right to respect of private life) ECHR rights. However, the Court of Appeal disagreed, agreeing with the earlier decision that the established rules on anonymising parties apply to information rights tribunals in the same way as everywhere else.	<a href="#">EWCA Judgment</a>	
EasyJet announces large scale cybersecurity breach involving	EasyJet has announced that it has suffered a major cybersecurity incident suspected to involve the email addresses and travel details of around 9 million of its customers, along with the credit card details of 2,208 customers. EasyJet have announced that all customers affected will be contacted, and that they have informed the ICO and the National Cyber Security Centre ("NCSC").	<a href="#">Notice</a>	
ICO publishes guidance to assist organisations in explaining AI	The ICO has published its joint guidance with the Alan Turing Institute on how to explain to individuals how their personal data is processed using AI. The guidance aims to help organisations to comply with the GDPR requirement that where an individual is subject to decisions	<a href="#">Guidance</a>	



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	<p>made wholly by electronic means, those individuals should be given information on how those wholly electronic decisions are made.</p> <p>The guidance is split into three parts. Part 1 deals with the key concepts of AI, Part 2 seeks to explain the practicalities of AI and how these are implemented by technical teams in organisations, and the third part looks at the roles, procedures and documentation which organisations should consider to ensure that it is explaining to affected individuals exactly how AI is being used.</p>		
Insurance Europe calls for the European Commission not to review the GDPR	Insurance Europe (“ <b>IE</b> ”) published its response to a consultation by the European Commission on its upcoming report on the review of the GDPR. IE cautioned that it would be premature for the Commission to undertake this review since it has only been two years since the GDPR came into force. Instead, IE states that the Commission’s report should focus on the experiences gained since the effective date. In particular, IE highlighted that the report should consider the impact of the GDPR on innovation in the insurance industry, particularly any unintended obstacles to the implementation of technologies such as AI, big data and the internet of things.	<a href="#">Press release</a> <a href="#">Report</a>	
EDPB adopts updated consent guidelines	<p>The European Data Protection Board (“<b>EDPB</b>”) has adopted new consent guidelines that provide clarification on both the validity of consent provided by the data subject when interacting with cookie walls, and the example on scrolling and consent.</p> <p>In terms of the update on cookie walls, the revised guidance state that access to services must not be conditional on the consent of a user to the storing of information (or gaining access to information already stored), otherwise consent will not be considered freely given.</p> <p>Furthermore, the updated example used on scrolling and consent now explains that scrolling or swiping through a webpage will not satisfy the requirement of a clear and affirmative action.</p>	<a href="#">Revised guidelines</a>	
IAB Europe releases its guide titled “Guide to the Post Third-Party Cookie Era”	IAB Europe is a European industry association focused on advertising and marketing. It has released its guide aimed at reviewing the current use of digital advertising cookies and providing alternative options which may be utilised in the future. This is in anticipation of	<a href="#">Guide</a>	



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	<p>the blocking of third party cookies in Chrome, which means the use of third party cookies (which are used for cross-site tracking, retargeting and ad-serving) will inevitably change.</p> <p>The guide identifies the following key changes from the blocking of third party cookies:</p> <ul style="list-style-type: none"> <li>• data management platforms won't be able to create identity linkages in the same way;</li> <li>• last or multi-touch attribution will not be possible;</li> <li>• audience targeting information from third party data will be unusable;</li> <li>• dynamic targeting will be unworkable; and</li> <li>• frequency capping will no longer be available in its current form.</li> </ul> <p>The reason for such changes is seen as being a mixture of the legal environment regarding privacy and consent to tracking changing, and the practical changes of increased use of Ad blocking and browser gatekeeping.</p> <p>The three main solutions which the guide highlights for these changes are to:</p> <ul style="list-style-type: none"> <li>• improving identity on the web, and having more reliable user data;</li> <li>• using other advertising data to make targeting decisions such as CRM data or email; and</li> <li>• contextual intelligence to target advertising</li> </ul>		
<p>EDPB publishes 2019 annual report</p>	<p>The European Data Protection Board ("<b>EDPB</b>") has published its 2019 annual report which summarises its adoption of five new guidelines which aimed to clarify EU data protection legislation, its recommendations and binding decisions, and its review of the levels of data protection across the EU.</p> <p>The report also outlines the EDPB's 2020 objectives, including producing guidance on the legitimate interest legal basis for</p>	<p><a href="#">Annual Report</a></p>	



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	processing, data controllers and processors and data subject rights, as well as further guidance on the impact of COVID-19 and the data protection implications. The EDPB also states that it will be focussing on reviewing new technologies, for example artificial intelligence and connected vehicles.		
ECHR issues judgment on the balance between privacy and freedom of expression	In <b>Rodina v Latvia [2020] ECHR 326</b> , the court considered whether the applicant's Article 8 right to respect for private life was breached by the media's publication of her family's story, and the subsequent handling of this by the Latvian Courts. The ECHR ruled that the Latvian courts had not found a fair balance between the applicant's right to a private life and her relatives' rights to freedom of expression. The ECHR held that the information published in the media was a significant intrusion into the applicant's private life, and did not consider that the information was of importance to the general public, particularly given that the journalists did not mention any broader social issues in its report, meaning there was no contributing to a debate of public interest. In addition, the media had not made any attempts to protect the individual's privacy, for example by blurring her face. This emphasises the need to consider precautions to protect privacy in order to strike a fair balance between the rights' of individuals.	<a href="#">Judgment</a>	

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COVID-19 – impact on UK IPO	The UK IPO has updated its website to provide information on the alterations it has made to its services as a result of the COVID-19 pandemic. This includes current information on the extension of deadlines relating to patents, supplementary protection certificates, trade marks and designs and a warning to rights holders to proactively manage renewals rather than relying on reminder letters (which it cannot issue while its offices are closed).	<a href="#">IPO website - coronavirus important update on IPO services</a> <a href="#">IPO website: alterations to services - patents</a> <a href="#">IPO website: alterations to services - trade marks and designs</a> <a href="#">IPO website: alterations to our services - tribunals and hearings</a>	
COVID-19 – impact on EUIPO	The EUIPO has published a guidance note on time limits after the end of the extension period (to 18 May 2020) for proceedings before the EUIPO that was allowed in the context of the COVID-19 pandemic.	<a href="#">Guidance note</a>	
COVID-19 – European Patent Office extension of time	The EU Patent Office has issued a notice regarding extension of time limits in light of the COVID-19 pandemic.	<a href="#">European Patent Office notice</a>	
WIPO COVID-19 tracker	WIPO has launched a tool that tracks IP measures being implemented by WIPO member states in response to the COVID-19 pandemic.	<a href="#">WIPO press release</a>	

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Cabinet Office guidance on responsible contractual behaviour	See the "Focus on Coronavirus" section above for an item on non-statutory guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the COVID-19 emergency which is aimed at both the public and the private sectors.		
PPN 02/20 updated	Procurement Policy Note 02/20 on supplier relief due to COVID-19, which we reported on in the March edition of Commercially Connected, has been updated with additional guidance for state-funded schools. The Note provides guidance for public bodies on dealing with suppliers in order to ensure service continuity during and after the coronavirus outbreak.	<a href="#">PPN 02/20</a>	
National Assembly for Wales becomes Senedd Cymru	On 6 May the National Assembly for Wales changed its name to the Senedd Cymru or Welsh Parliament to reflect its constitutional status as a national parliament. Assembly members are now known as Members of the Senedd or Aelodau o'r Senedd.  This change was made under the Senedd and Elections (Wales) Act 2020 which amends section 1(1) of the Government of Wales Act 2006 to substitute "Senedd Cymru or the Welsh Parliament" for "the National Assembly for Wales".		



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RUSI paper on use of AI for national security purposes	RUSI, the Royal United Services Institute for Defence and Security Studies, has published a paper setting out the conclusions of its GCHQ commissioned independent research study into the use of AI for national security purposes. RUSI is the UK’s leading defence and security think tank and is politically independent. The stated aim of the project is to establish an independent evidence base to inform future policy development regarding national security uses of AI. The study concludes that AI has the potential to enhance many aspects of intelligence work, but that whilst many uses are benign others raise potential privacy and human rights issues. Where they arise, these issues would need to be assessed within the existing regulatory framework. Enhanced policy and guidance in this area is also needed.	<a href="#">RUSI paper</a>	
Ofcom update on implementation of the European Electronic Communications Code	Ofcom has published an update on the transposition of the European Electronic Communications Code in relation to consumer rights. It intends to publish a statement on implementation of the end-user rights aspects of the Code in September 2020, subject to the Government confirming its approach to transposition before then. In the context of the impact of the COVID-19 crisis Ofcom intends to give providers at least 12 months from the date of publication of its statement to implement the new rules	<a href="#">Ofcom update</a>	
Study on implementation of the Code of Practice on Disinformation	The European Commission has published an independent study assessing the implementation of the Code of Practice on Disinformation in its first year (October 2018 – October 2019). It concludes that the Code established a common framework to fight disinformation, produced positive results and should not be abandoned. Its main criticism of the Code are its self-regulatory nature, lack of uniformity of implementation and monitoring and lack of clarity around its scope and some of the key concepts.	<a href="#">Study</a>	



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Progress on EU Digital Services Act	MEPs have set out their priorities for the future EU Digital Services Act in the first draft recommendations to the EU Commission on how digital services, including online platforms, should be regulated. In the press release it is stressed that the Digital Services Act needs to prioritise enhanced consumer protection and transparency requirements on digital platforms and that the principle of “what is illegal offline is also illegal online” should be enshrined in the Act.	<a href="#">European Parliament press release</a>	
MEPs’ recommendations on the regulation of AI	MEPs sitting on the Legal Affairs (JURI) Committee of the European Parliament have presented recommendations to the European Commission on how AI should be regulated in the area of civil liability, ethical aspects and intellectual property rights. These comprise legislative reports on a framework of ethical aspects of AI, robotics and related technologies, a civil liability regime for AI and IPR for the development of AI technologies. Amendments to the reports will be debated in the summer, with a vote on the reports scheduled for 28 September and a plenary vote in October.	<a href="#">European Parliament press release</a>	
Law Commissions’ report on automated vehicles	The Law Commission of England and Wales and the Scottish Law Commission have published their analysis of responses to their second consultation paper on the legal framework for automated vehicles. They intend to publish a third consultation paper later this year, with a final report and recommendations for legislation to be published in 2021.	<a href="#">Law Commissions’ response</a>	

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