EVERSHEDS SUTHERLAND

Commercially connected

November 2020

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Introduction

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

Click on the topic on the right to take you to the relevant section of our report.

Key developments this month			
	Development	**Topic**	**Impact rating**
	Environment Bill: laws to tackle illegal deforestation	Changes to the Environment Bill have been proposed by DEFRA that will see businesses over a certain turnover threshold required to carry out due diligence to ensure that there is no illegal deforestation taking place in their supply chains, together with mandatory reporting requirements.	
	EDPB adopts recommendations following *Schrems II*	In the wake of the Schrems II decision the European Data Protection Board has adopted measures to ensure compliance with EU data protection requirements when transferring personal data outside the EEA.	
	European Commission publishes draft standard contractual clauses	The European Commission has published for consultation two sets of standard contractual clauses, one to replace the existing forms of SCCs used for controller-controller and controller-processor exports and the other comprising a set of standard terms to be entered into by a controller and processor to comply with Article 28 GDPR requirements.	

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	For COVID-19 legal advice and updates, visit out coronavirus hub.	Coronavirus legal hub	
Coronavirus legislation and government guidance	Legislation and Government guidance on coronavirus is constantly being updated. Click on the links to access the latest information. On 23 November the Government published its COVID-19 Winter Plan, setting out its programme for "suppressing the virus, protecting the NHS and the vulnerable, keeping education and the economy going and providing a route back to normality".	Legislation.gov.uk landing page Gov.uk COVID-19 business support landing page COVID-19 Winter Plan	
FCA test case on business interruption insurance	The Supreme Court hearing of the appeal in the FCA test case on business interruption insurance and COVID-19 was held last week (the week commencing 16 November). Watch out for commentary from our insurance team when the judgment is handed down.	FCA landing page	

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	For Brexit business and legal advice, visit our Brexit hub.	Brexit hub	
BEIS Committee call for evidence on Brexit preparedness	The UK Business, Energy and Industrial Strategy Committee has issued a call for evidence on business preparedness for Brexit. The closing date for submissions is 30 November and there will be an evidence session on 8 December. It is likely that witnesses from the food and drink, financial and related professional services, automotive, chemical and pharmaceutical sectors will be called.	Call for evidence	
Institute for Government report on Brexit readiness	The Institute for Government has issued a report on how ready the UK is for Brexit. Conclusions include the following: • the Northern Ireland Protocol won't be ready to implement on 1 January 2021; • border disruption is inevitable due to poor trader readiness and EU checks; and • the COVID-19 pandemic means that many UK businesses are less prepared than they were last year. The report recommends that: • the EU should be ready to show flexibility with regard to implementation of the Northern Ireland Protocol in acknowledgement that it will be almost impossible to implement on time; • the UK Government must prove that it won't renege on its international obligations; • in order to minimise border disruption the Government should consider light-touch enforcement or further delays to new import controls;	Report	

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	• the Government should clearly communicate the practical impact of leaving the single market and customs union, in particular increased trade bureaucracy; and • the Government should work closely with business groups to identify where targeted economic support for businesses affected by Brexit may complement its COVID-19 economic response.		
Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020	The Immigration and Social Security Co-ordination (EU Withdrawal) Bill received Royal Assent on 11 November 2020. This ends free movement of people under EU retained law at 11pm on 31 December 2020 and introduces the new points-based immigration system.	The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020	
UK Government policy papers on the United Kingdom Internal Market Bill 2020	Although the UK Internal Market Bill (the "Bill") is still being debated, the Government has launched a suite of policy statements explaining how it will work and what its impact will be, including the following: • **Mutual recognition of goods: general principles and relevant requirements** - this explains the principle of mutual recognition, ie that if a good meets the relevant regulatory requirements of the part of the UK in which it is produced or imported, it can be sold in any other part of the UK without having to meet regulatory requirements there. Relevant regulatory requirements for this purpose are those that relate to the good itself, eg its characteristics, presentation and accompanying documentation. • **Mutual recognition of goods: location of production** – this explains how to assess where the good is produced for the purpose of the principle of mutual recognition. This will be the place where the most significant production step which is a regulated step has occurred. • **Non-discrimination of goods: general principles** – this explains that the Bill will prevent	UK Internal Market Bill 2020: policy statements	

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	discriminatory regulation of the manner of sale of goods, eg regulation on the terms of sale or how products are transported or stored. • **Goods market access: approach to restrictions and bans** – this makes it clear that, despite the principles of mutual recognition and non-discrimination, all parts of the UK will be able to regulate for pricing and manner of sale policies provided the regulations are non-discriminatory and apply equally to all goods from all parts of the UK, eg minimum alcohol unit pricing and plastic bag charges. • **Goods market access: enforcement** – this explains that the UK will use existing regulators such as local authority trading standards to give effect to the principle of mutual recognition in the UK. • **Goods market access: exclusions** – this explains where exceptions to the principles of mutual recognition or non-discrimination will apply. • **Services market access** – this explains the key principles of mutual recognition and non-discrimination in relation to trade in services. Subject to exclusions, a service provider authorised in one part of the UK to provide a certain service can rely on that authorisation to provide that service in every part of the UK, and requirements that discriminate against an incoming service provider from another part of the UK will be disapplied.		
Office for the Internal Market	The UK Government has published policy papers setting out details of the purpose, role and governance of the new Office for the Internal Market, which is being created under the Internal Market Bill. The Office for the Internal Market will sit within the Competition and Markets Authority. It is being created as an independent body to	Purpose and role of the Office for the Internal Market Governance of the Office for the Internal Market	

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	monitor and support the effective operation of the UK's internal market and will report on the same to the UK Parliament and to each of the devolved legislatures.		
Inquiry into common frameworks after Brexit	The House of Lords Common Frameworks Scrutiny Committee is carrying out an inquiry into the UK common frameworks programme after Brexit. Common frameworks are the mechanisms by which the UK and devolved governments can agree regulatory consistency in policy areas where returning EU powers are within devolved competence. The deadline for submissions is 30 November 2020.	Inquiry	
Trading in goods between Great Britain and Northern Ireland from 1 January 2021	The UK Government is encouraging businesses to sign up to the Trader Support Service which will support them with adapting to the changes to Northern Ireland trade that will take effect on 1 January 2021. The Government has also issued a new policy paper on moving goods under the Northern Ireland Protocol which sets out the customs processes that will apply to goods moving to and from Northern Ireland. HMRC has published a policy paper on accounting for VAT on goods moving between Great Britain and Northern Ireland from 1 January 2021. This explains that following the end of the Brexit transition period Northern Ireland will remain part of the UK's VAT system, but due to the Northern Ireland Protocol Northern Ireland will remain aligned with the EU VAT rules for goods. The paper explains at a practical level how HMRC will deal with import VAT due on goods entering Northern Ireland from Great Britain and vice versa. The European Parliament has approved the text of the European Commission proposal for a Directive to amend the VAT Directive 2006/112/EC as regards the identification of taxable persons in Northern Ireland. This will introduce special identification numbers for businesses in Northern Ireland to reflect the fact that Northern Ireland	Trader Support Service Moving goods under the Northern Ireland Protocol HMRC policy paper European Parliament legislative resolution	

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	will be subject to EU VAT legislation for goods and UK VAT legislation for services. It is expected that this Directive will be adopted and implemented as soon as possible and in any event before the end of the transition period.		
Freeport bidding process open for applications	The UK Government has opened the bidding process for applications to establish freeports. It is intended that there will be at least 10 UK freeports which will benefit from tax reliefs, simplified customs procedures and wider government support. A business will be able to import goods into a freeport without paying tariffs, process them into a final good, then either pay a tariff on goods sold into the domestic market or export the final goods without paying UK tariffs.	News story	
UK Government guidance	The UK Government has published a series of webpages pulling guidance for preparing for Brexit into one place on a sector basis. Pages likely to be of interest to commercial practitioners include: • The digital, technology and computer services sectors • The telecoms and information services sector • The media and broadcasting sectors • Public sector procurement from 1 January 2021 • Placing manufactured goods on the market in Great Britain from 1 January 2021 • Placing manufactured goods on the market in Northern Ireland from 1 January 2021 • Exporting and importing businesses: prepare for 1 January 2021 • Consumer goods sector: end of transition period guidance • Product safety and metrology from 1 January 2021: Great Britain	UK Government Brexit transition landing page	
IPO guidance on the IP system post Brexit	The UK Intellectual Property Office ("**IPO**") has published guidance on how the IP system and the IPO will operate	IPO guidance	

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	from 1 January 2021. The guidance includes information on the following: • use of representatives and requirements to represent clients on new IP applications and proceedings; • UK address for service; • on 1 January 2021 the IPO will create a comparable UK trade mark for every registered EU trade mark; applicants for EU trade marks that have not yet been registered at the end of the transition period will have 9 months in which to apply for the same protection in the UK; • on 1 January 2021 the IPO will create a re-registered design for every Registered Community Design; applicants for Registered Community Designs that are not registered or have deferred publication at the end of the transition period will have a period of 9 months in which to apply for the same protection in the UK; • on 1 January 2020 the IPO will create a comparable UK trade mark/re-registered UK design for every international trade mark (EU)/international design (EU) that is protected at the end of the transition period; applicants for an international trade mark or design designating the EU that is not yet protected will have 9 months in which to apply for the same right as a UK trade mark or design; • unregistered community designs that arise before the end of the transition period will continue to be protected in the UK for the remainder of their three year term. From 1 January 2021 a supplementary unregistered design, which provides similar protection to that conferred by the unregistered Community design but only in respect of the UK, will become available in UK law;		

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	• as the European Patent Office is not an EU agency, Brexit does not affect the current European patent system; • there will be some changes to the Supplementary Protection Certificate application process due to the Northern Ireland Protocol, depending on whether marketing authorisation is valid for the UK, Great Britain or Northern Ireland; • the IP rights in goods placed on the UK market by or with the consent of the right holder may no longer be considered exhausted in the EEA, meaning that businesses parallel exporting such goods from the UK to the EEA may need the right holder's consent. IP rights in goods placed on the EEA market by or with the consent of the right holder will continue to be considered exhausted in the UK. The IPO intends to publish a formal consultation on exhaustion of IP rights in early 2021; • current cross-border copyright arrangements unique to EU member states will stop at the end of the transition period, including cross-border portability of online content services and reciprocal protection for database rights; and • DEFRA led guidance on geographical indications (IP rights used on products that have a specific geographical origin and possess qualities or reputation due to that origin, eg Scotch whisky).		
UK geographical indications post Brexit	From 1 January 2021 the UK will have its own schemes for protecting geographical names of food, drink and agricultural products, managed by the Department for Environment, Food and Rural Affairs ("**DEFRA**"). The schemes will be open to producers from the UK and other countries. All existing UK products registered under the EU schemes at the end of the Brexit transition period will be automatically protected under the new UK schemes. From 1 January 2021 producers will need to apply to the	The Agricultural Products, Food and Drink (Amendment etc.) (EU Exit) Regulations 2020 UK Government guidance	

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	relevant UK scheme to protect a new product name in Great Britain and to the relevant EU scheme to protect a new product name in Northern Ireland and the EU. Northern Ireland will remain under the EU rules due to the Northern Ireland Protocol. Producers and retailers with pre-1 January 2021 registrations will have three years in which to change their packaging and marketing materials to display the new UK logos. For products registered from 1 January 2021 the new logos must be used immediately. Click on the link for more detailed information on how the schemes will operate. DEFRA intends to publish further guidance in due course.		
Authorisation for export of dual use goods from EU to UK	The European Commission has adopted a proposal for a Regulation to amend Regulation 428/2009 by granting a General Export Authorisation which will allow the export of certain dual-use items (ie goods, software and technology that can be used for both civilian and military applications) from the EU to the UK.	Proposal	

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Supreme Court cases applying the defence of illegality	This month there have been two Supreme Court cases on the defence of illegality, a rule of law which prevents a claimant from using the Courts to obtain compensation for loss suffered as the result of the claimant's own illegal or immoral act (and sometimes referred to as the *ex turpi causa* principle). These cases applied and refined the three-part test set out in the 2016 Supreme Court case of *Patel v Mirza*. They also made it clear that the test applies to all types of civil claim, not just to claims in restitution (which was the claim in question in *Patel v Mirza*). In *Patel v Mirza* it was held that in deciding whether the defence of illegality applies to bar a civil claim, the correct approach is not that relief is automatically refused to a party who has to rely on their own illegality to establish their case, but rather the Court must balance the public policy considerations that are in play. This month's judgments help to clarify both the rationale behind this approach and how to apply the approach in practice. The rationale behind the defence of illegality is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system. In applying the three-part test set out in *Patel v Mirza* the Court is seeking to identify the policies engaged (ie the policy behind the law that has been broken and, conversely, any policies that might be undermined if the claimant is not allowed to bring its claim) and to ascertain whether to allow the claim would be inconsistent with those policies or, where the policies compete, where the overall balance lies. As such the decision will be reached as a matter of judgement rather than by a mechanical application of the three part test. In the context of commercial contracts the typical situation in which the defence of illegality may be relevant is where a party is seeking to enforce an indemnity in respect of its own illegal or unlawful act, eg to cover fines and other losses flowing from breach of Section 7 of	Stoffel & Co v Grondona Henderson v Dorset Healthcare University NHS Foundation Trust	

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	the Bribery Act 2010 or the obligations imposed by data protection legislation.		
High Court upholds oral collateral contract	In **Coleman v Mundell** the High Court found that a deed of transfer of shares from Coleman to Mundell did not reflect the entire agreement between the parties. There was also an oral collateral contract to the effect that the share transfer was provided as security for a loan and so the shares had to be transferred back to Coleman once the loan was repaid. Although this case turned on its facts, it is a useful reminder of two points: • in deciding whether discussions between individuals reach the threshold of creating a legally enforceable contract, a Court will consider whether, objectively assessed, what was communicated between them by words and conduct leads to the conclusion that they intended to create a legally binding relationship and that they had agreed all the terms that the law requires as essential for that purpose (*Wells v Devani* [2019] UKSC 4); and • one of the purposes of an entire agreement clause is to exclude the possibility that a collateral contract exists. If the deed in question had included an entire agreement clause this may have been sufficient to deny the existence of the oral collateral contract.	Judgment	
Commercial Court considers construction of force majeure clause	In the High Court case of **TOTSA Total Oil Trading SA v New Stream Trading AG** the Court found that the occurrence of a force majeure event did not relieve the supplier of its obligation to return an advance payment made by the customer: it was clear from the drafting of the contract that the advance payment had to be repaid if delivery of the contract goods did not occur "for any reason whatsoever". Although decided on the construction of the terms of the particular contract, this case is a reminder of the importance of thinking through all the potential ramifications of the occurrence of a force majeure event and making it absolutely clear in the contract what the impact of a force majeure event will be, ie which obligations		

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	still have to be performed notwithstanding the force majeure event and in respect of which obligations is relief given.		
CJEU decision preventing a distributor from registering a principal's trade mark	The CJEU has held that a distributor of goods bearing an unregistered trade mark fell within the concept of "agent or representative" under Article 8(3) of the Trade Mark Regulation which provides for an absolute grounds for refusal of a trade mark application where the application is made by the proprietor's agent or representative without their consent. The purpose of this provision is to prevent the misuse of a mark by the agent or representative of the proprietor so that they do not improperly benefit from the proprietor's effort and investment. The practical impact of this case is that the owner of an unregistered trade mark may well be able to prevent its agent or distributor from registering that trade mark without its consent, even where the contract between the parties does not contain such a prohibition.	Judgment	
The National Security and Investment Bill 2020	The National Security and Investment Bill has had its first reading in the House of Commons. The purpose of the Bill is to strengthen the Government's ability to investigate and intervene in mergers, acquisitions and other types of deal that could threaten the UK's national security. When in force it will replace the current ability for the Secretary of State to scrutinise mergers that give rise to national security considerations under the Enterprise Act 2002. The Bill will give the Secretary of State power to "call in" certain defined acquisitions of control over qualifying entities and assets in order to undertake a national security assessment of that acquisition. In addition, there will be a requirement for businesses and investors to notify the Government about and obtain approval for certain types of transactions in designated sensitive sectors where security risks are most likely to arise, including defence, energy, transport, communications, data infrastructure, AI, autonomous robotics and computing hardware. The Government is currently consulting on defining those sectors and the consultation will close on 6 January 2021. As well as the mandatory part of the regime, the Bill also envisages a voluntary notification system to encourage notification from parties who consider that their transaction or other acquisition may raise national security concerns.	National Security and Investment Bill Consultation on secondary legislation to define the sectors subject to mandatory notification Eversheds Sutherland briefing Eversheds Sutherland podcast	

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	It is proposed that transactions that take place without a mandatory notification will be void, that sanctions for non-compliance will include fines of up to the higher of 5% of worldwide turnover or £10 million and that there will be a 5 year retrospective power to call in transactions that were not notified but which may raise national security concerns. Click on the links to read a briefing and to listen to a podcast on the Bill.		
Environment Bill: laws to tackle illegal deforestation	In August 2020 the Department for Environment, Food & Rural Affairs ("**DEFRA**") consulted on proposed new laws to clamp down on illegal deforestation and protect rainforests. DEFRA has now published its response to the consultation, together with provisions to be included in the Environment Bill 2019-21. The proposed legislation applies to regulated persons (which term will be defined in regulations by reference to turnover) and provides that: • a regulated person can only use a "forest risk commodity" (with a list of such commodities to be specified in secondary legislation) or a product derived from that commodity in its UK commercial activities if relevant local laws relating to deforestation have been complied with in relation to that commodity; • a regulated person who uses such a commodity or a product derived from such a commodity in their UK commercial activities must establish and implement a due diligence system to assess and mitigate the risk that local laws were not complied with in relation to that commodity; • a regulated person is required to report to the Secretary of State annually on its due diligence activities and reports will be made public; • there will be a de minimis exemption from these requirements where the amount of commodity used is below a prescribed threshold; and • detailed enforcement provisions will be made by secondary legislation and will include civil sanctions, with criminal offences for failure to comply with civil sanctions or failure to assist an enforcement authority.	Consultation outcome Environment Bill 2019-21 Government response to GRI taskforce	

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	DEFRA has also published the government's response to the Global Resource Initiative taskforce March 2020 report and recommendations on the environmental sustainability of the UK's international supply chains.		
PPN 07/20 published	The Cabinet Office has published Procurement Policy Note 07/20 on taking account of a bidder's approach to payment in the procurement of major contracts. This PPN updates and replaces PPN 04/19 with effect from 1 April 2021. Subject to exceptions, it applies when in-scope organisations procure goods, services and/or works with an anticipated contract value of over £5 million per annum (excluding VAT) or, in the case of framework agreements and dynamic purchasing systems, where the value of an individual contract is over this threshold. PPN 07/20 is intended to reflect the Government's commitment to ensuring that big contractors comply with the Prompt Payment Code. It gives guidance on how to assess a bidder's payment systems to demonstrate that the bidder has a reliable supply chain in place. The two key issues to focus on are whether the bidder has paid its suppliers in accordance with relevant contractual terms and whether, overall, the bidder has paid its suppliers promptly, with payment of 95% of invoices within 60 days considered an appropriate measure of overall payment promptness.	PPN 07/20	

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CMA investigation into green claims	The Competition and Markets Authority ("**CMA**") has launched an investigation into claims that products and services are eco-friendly and whether such claims could mislead consumers. It is calling on the public to say what they expect from eco-friendly products, how often they come across green claims and how those claims affect their purchasing decisions. Whist this project is UK focused, the CMA is also working on a project with the International Consumer Protection and Enforcement Network looking at green claims in a global context. The closing date for comments is 14 December 2020. The CMA intends to publish guidance for businesses in summer 2021 to help support the transition to a low carbon economy without misleading consumers.	CMA press release	
New Consumer Agenda for 2020 - 2025	The European Commission has launched its New Consumer Agenda for 2020 – 2025. This aims to respond to consumers' needs during and after the COVID-19 pandemic and sets out its proposed action plan for the next five years split into five key areas: • **Green transition**: in 2021 the Commission will present a legislative proposal to empower consumers for the green transition with better information on the environmental sustainability characteristics of products and better protection against practices such as greenwashing and early obsolescence, as well as a legislative proposal on the substantiation of green claims; it will work with economic operators to encourage voluntary pledges to actions in support of sustainable consumption; from 2022 it will assess in the context of its review of the Sale of Goods Directive how to encourage purchase of more sustainable and circular products. • **Digital transformation**: by 2022 it will update guidance on the Unfair Commercial Practices Directive and the Consumer Rights Directive and analyse whether additional legislation is	New Consumer Agenda	

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	needed to ensure equal fairness online and offline; it will legislate for requirements for AI in 2021; in 2021 it will prepare a proposal for the revision of the General Product Safety Directive for the digital age; also in 2021 it will make proposals for the revision of the Consumer Credit Directive and the Distance Marketing of Financial Services Directive. • **Effective enforcement and redress of consumer rights**: this will include coordinating and supporting the enforcement work of the Consumer Protection Cooperation network and, by 2023, evaluating the CPC Regulation in particular to assess the effectiveness of enforcement in addressing EU-wide practices that contravene consumer law. • **Addressing the specific needs of certain vulnerable consumer groups**: this will include raising awareness and advice and in 2021 preparing a Commission Decision on safety requirements to be met by standards on childcare products. • **International cooperation**: this will include setting up an action plan with China to enhance cooperation on product safety for products sold online. It remains to be seen to what extent the UK will seek to align its consumer laws with EU laws going forward, but UK businesses selling to consumers in the EU will need to be aware of and comply with relevant EU laws even if they diverge from the UK law in this sector.		
Proposed new Directive on representative consumer actions	The Council of the EU has adopted a draft Directive that will require member states to establish a system for qualified entities to take representative actions to protect groups of consumers that have been harmed by traders infringing EU consumer protection law. Its full title is a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC. The Directive is part of the New Deal for Consumers package. It is anticipated that the Directive will be approved by the European Parliament by the end of 2020. It will then be published in the OJEU and will enter into force 20 days after the date of publication. Member states will then have two years in which to transpose the Directive	Press release	

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	into national law and a further six months before they have to apply its provisions.		
CAP guidance on use of qualifications	The ASA has published new CAP guidance on use of qualifications in non-broadcast advertising. These are additional pieces of information that ensure consumers properly understand the primary claims being made. The guidance focuses on the clarity and prominence of qualifications and considers the differences between ads on different media.	ASA news story	
The Energy Information (Amendment) Regulations 2020	The Energy Information (Amendment) Regulations 2020 came into force on 23 November 2020. These Regulations provide UK market surveillance authorities with the legal basis to enforce new energy labelling requirements for household washer-dryers, washing machines, dishwashers, refrigerating appliances and electronic displays.	The Energy Information (Amendment) Regulations 2020	

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Amendments to the NIS Regulations	The purpose of the Network and Information Systems Regulations ("**NIS Regulations**") is to improve the security of network and information systems which are critical to the provision of essential services and certain digital services, the disruption of which could cause significant harm. They apply to operators of essential services in the transport, energy, water, health and digital infrastructure sectors and to relevant digital service providers (including online marketplaces, online search engines and cloud computing services). In May 2020 the UK Government carried out a post-implementation review of the NIS Regulations, concluding that some reform is required to improve their efficiency and implementation. In August to September 2020 the Government undertook a call for views on its proposed amendments to the NIS Regulations. The Government has now issued its response to the call for views and as a result of views received has made some changes to its amending statutory instrument, The Network and Information Systems (Amendment and Transitional Provision etc) Regulations 2020. These Regulations come into force on 31 December 2020. Broadly speaking, the areas upon which the amendments focus include (amongst others): information sharing powers; information notices (clarifications of such notices); inspections; the enforcement and penalty regimes; introduction of an independent appeals mechanism; timelines for further post-implementation reviews and clarifications to/addition of definitions (including to clarify which organisations fall within the scope of the NIS Regulations).	Government response The Network and Information Systems (Amendment and Transitional Provisions etc) Regulations 2020	
NCSC publishes annual review (including its work against cyber-attacks)	The **National Cyber Security Centre** ("NCSC", part of GCHQ) has published its annual review covering key developments from its work against cyber attacks over the past year. The review reveals that the NCSC defended the UK against 723 cyber incidents (300 of these being related to COVID-19) in the last year alone, a significant increase upon preceding years, and details the extent of the support	Press release Annual review (pdf)	

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	it has provided in response to the COVID-19 pandemic (eg launching a 'suspicious email reporting service' with police authorities, due to a rise in phishing emails and online scams which has followed an increase in remote working).		
White paper on the security benefits of good cloud services published by the NCSC	The **NCSC** has published a (17 page) white paper covering various security-enhancement benefits to businesses which can be achieved by using '*good*' cloud services – and in doing so seeks to challenge a perception that businesses may have that the use of the cloud inherently increases risk in comparison with use of traditional IT services. The white paper challenges such perceptions by exploring thirteen outcomes (such as pervasive and consistent access control, consistent test environments and encouraging good security), explaining how use of a good cloud service can achieve each of those outcomes and how a business can maximise the security benefits.	White paper (pdf)	
Online toolkit for National Information Sharing and Analysis Centres ("ISACs") published by ENISA	The **European Union Agency for Cybersecurity** ("ENISA") has published a toolkit to support the establishment and development of ISACs, which aims to provide '*practical guidance and the means to empower industry to create new ISACs and to further develop already existing ones*', and consists of 4 developmental phases: build; run; evaluation and develop.	Press release Toolkit	
ENISA guidelines for securing the Internet of Things	ENISA has published guidelines for securing the entire supply chain for Internet of Things devices. ENISA says this has been developed to help IoT manufacturers, developers, integrators and stakeholders make better security decisions when building, deploying or assessing IoT technologies.	Guidelines	

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	Click the link to read quarterly Privacy and Cybersecurity updates.	Updata	
EDPB adopts recommendations following *Schrems II*	Following the *Schrems II* court decision this summer, which invalidated the Privacy Shield framework for transfers of personal data from the EU to the US and simultaneously cast doubt on whether standard contractual clauses ("**SCCs**") provide adequate protection for data transfers (for more details on this court decision, please read our quarterly publication 'Updata' which is referenced above), the **European Data Protection Board** ("EDPB") has adopted recommendations on measures to ensure compliance with EU data protection requirements when transferring personal data outside of the European Economic Area ("EEA") (open for consultation until 21 December 2020, recently extended from 30 November 2020). These recommendations have been eagerly anticipated by privacy professionals. By way of background, GDPR requires that personal data can only be transferred outside of the EEA if it is adequately protected. Unless a derogation under GDPR applies, in practice this means that either: (i) the territory to which the personal data is transferred has received an 'adequacy decision' from the EU (rare); (ii) the appropriate version of SCCs is put in place between the data exporter and importer; or (iii) the transfer is pursuant to binding corporate rules (this option (iii) is only available for companies within the same corporate group, and is rarely relied upon in practice). SCCs are by far the most commonly relied upon mechanism for exporting personal data to outside the EEA. Following the *Schrems II* court decision, a controller using SCCs to export personal data must take steps to ensure that the data importer entering into the SCCs can actually comply with the terms of the SCCs – ie it must take steps to verify if the legal regime of the third country (to which the data importer is subject) does not prevent the SCCs from being complied with, which would prevent the personal data being protected by 'essential equivalence'. Data exporters may use	Press release Recommendations – measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data Recommendations – European Essential Guarantees for surveillance measures ICO statement	

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	measures in addition to SCCs to comply with their duty to ensure equivalence with European data protection standards, where SCCs are not sufficient. The EDPB's recommendations aim to assist data exporters in identifying and using appropriate supplementary measures where necessary. A roadmap is included to help data exporters assess whether data transfers are in accordance with EU law, and which measures may be appropriate to ensure this. However, the EDPB has highlighted that responsibility lies with data exporters in making the crucial assessment of equivalence (and necessary supplementary measures); due diligence must be thorough and must be properly recorded in line with accountability under the GDPR. The EDPB has also stressed that supplementary measures may not be sufficient in all cases. The key recommendations are as follows: • data exporters must know their transfers, ie be aware of where personal data is being transferred to; and ensure that transferred data is 'adequate, relevant and limited' to what is necessary for the purpose and processing; • verification of transfer mechanisms used to export the personal data (ie an adequacy decision, SCCs, binding corporate rules or a derogation); • assess if the third country's laws or practices may limit the effectiveness of the safeguards of the transfer tools used. Importantly, this is significantly broader than simply assessing whether the surveillance laws in the third country may compel the data importer to process personal data outside of what is permitted under SCCs, binding corporate rules etc (although see further detail below about surveillance assessment); • identify and adopt necessary supplementary measures to ensure essentially equivalent data protection (eg technical measures, additional contractual measures, organisational measures); • take formal procedural steps if required (as summarised in the recommendations); and • re-evaluate throughout the protection given to transferred data and monitor if any developments affect the protection of transferred personal data.		

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	In relation to assessing equivalence for surveillance laws, EDPB has published separate recommendations which contain useful detail as to how data exporters can assess whether the third country's laws/regime provides for the same level of 'essential guarantees', which means (according to the recommendations): • processing should be based on clear, precise and accessible rules; • necessity and proportionality with regard to the legitimate objectives pursued need to be demonstrated; • an independent oversight mechanism should exist; and • effective remedies need to be available to the individual. In the UK, the Information Commissioner's Office ("**ICO**") has published a statement that it is reviewing the recommendations.		
European Commission publishes draft (updated) SCCs (and launches public consultation)	The **European Commission** has published a draft of an updated set of SCCs (see update above) ("**New SCCs**"), which are open for consultation until 10 December 2020. This update has been eagerly anticipated by privacy professionals, and is intended to replace the existing forms of SCCs in due course (which have not been updated following GDPR and hence an update has been expected). Notably, the New SCCs are a single document which covers obligations relating to controller-controller transfers, controller-processor transfers, processor-processor transfers and processor-controller transfers. Currently, the former 2 categories are dealt with in different versions of current SCCs (and, indeed, controller-controller transfers have a choice of 2 forms of SCCs), whilst the latter 2 categories do not currently have specified SCCs and therefore the New SCCs plug an existing gap in this respect (in particular the introduction of obligations in relation to processor-controller transfers). Amongst other obligations in the SCCs are obligations of the data importer in relation to government authorities' access requests to personal data transferred pursuant to the New SCCs – a hot topic following the *Schrems II* decision (see update above).	Draft implementing decision and annex	

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European Commission publishes draft controller-processor terms	In addition to published draft New SCCs (see update above), the **EU Commission** has published draft standard terms to be entered into between controller and processor as set out in Article 28 GDPR. By way of background, when a controller engages a processor, Article 28 GDPR sets out some (minimum) obligations which must be contained in a written agreement between the controller and processor. GDPR empowered the EU Commission to lay down standard contractual terms to cover the Art 28 GDPR requirements, and now the EU Commission has published a draft of such terms for public consultation (open until 10 December 2020) ("**Draft Processor Clauses**"). Interestingly, the Draft Processor Clauses go beyond the (minimum) requirements of Article 28 GDPR – for example, providing that not only must a processor notify the controller of personal data breaches '*without undue delay*' (which is what GDPR requires), but that in addition it will do so in any event within 48 hours (this timescale is not set out in Article 28 GDPR itself). Furthermore, in relation to audit rights, it makes clear that should a processor mandate an independent auditor (eg for the purposes of sharing an audit report with the controller), the processor must bear all of the costs of the audit – costs of audits are an area which is not addressed in the GDPR. However, the Draft Processor Clauses do not go further than Article 28 GDPR requirements in many respects (eg where the parties agree that the processor is authorised to engage sub-processors without prior consent, but subject to a requirement to notify the controller in advance of changes to sub-processors thereby giving the controller the chance to object, which is the minimum GDPR requirement, the Draft Processor Clauses are silent (like the GDPR) on what happens if the controller does object). Usefully, the Draft Processor Clauses contain (in square brackets) some information security areas which could be covered in the Annex III, which is intended to work as a description of the technical and organisational security measures which the processor must implement to protect personal data (the same concept is addressed in the New SCCs mentioned in the update above).	Draft implementing decision and annex	

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Revised draft of the ePrivacy Regulation published	The **Presidency of the Council of the European Union** has published a revised text for the proposed ePrivacy Regulation (Regulation concerning the respect for private life and protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications)). The latest draft has followed much debate and that will not necessarily cease following the publication of the latest revisions, which include (amongst others) removal of some provisions around retention of information and increased clarity around necessity in the context of use of terminal equipment to provide services to users.	Draft Regulation	
EDPB publishes updated guidelines on data protection by design and default	The **EDPB** has updated its guidelines on data protection by design and default, following public consultation. Broadly speaking, GDPR Article 25 requires controllers to (where relevant) put in place technical measures designed to ensure that the data protection principles set out in the GDPR are achieved (eg only minimal data is processed, including use of pseudonymisation where possible, retention for no longer than necessary, accessible only to those who need to access etc.). In short, privacy concerns and GDPR compliance should be at the forefront of a company's concerns before embarking on new projects/service development, rather than something to be addressed as an afterthought. The EDPB's (31 page) updated guidance provides information to controllers on how to achieve compliance with these requirements.	Guidelines (pdf)	
£18.4m fine for Marriott, following a cyber attack which commenced in 2014	The **ICO** has announced another significant fine for a personal data breach. Marriott International Inc. has been fined £18.4m for a cyber attack at one of Marriott's subsidiaries which commenced in 2014 (indeed, before Marriott acquired the subsidiary). Marriot acquired the subsidiary in 2016 (at which point the cyber attack was still ongoing) but it was not until September 2018 (after GDPR was in force) that Marriot finally identified that the subsidiary's IT systems were currently compromised, at which stage the ICO was notified. It was estimated that 339 million guest records were affected by the cyber attack, albeit that a portion of the information affected was encrypted. The fine of £18.4m was notwithstanding that the ICO had not seen any evidence of financial harm to individuals. This case demonstrates the importance of due diligence in acquisitions (and indeed post-	Press release Penalty notice (pdf)	

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	acquisition audits, and regular audits generally). Had the cyber attack been identified and resolved prior to 25 May 2018 (when GDPR came into force), the ICO would only have been able to impose a fine of up to £500,000 (which was the cap for fines under the Data Protection Act 1998 which preceded GDPR), significantly less than the £18.4m fine imposed here.		
DCMS updated guidance on data protection and data flows post-Brexit transition	The **Departments for Digital, Culture, Media & Sport, Business, Energy & Industrial Strategy** ("DCMS"), **Office for Civil Society** and the **ICO** have published updated (high-level) guidance on data protection at the end of the post-Brexit transition period (and beyond). Notably, the guidance states that the Government is '*confident*' that an EU adequacy decision in respect of the UK can be concluded by the end of the transition period (however, it points out that if an adequacy decision is not concluded, UK entities will need to act to ensure they can continue to lawfully receive personal data from EU entities). For background, after the end of the transition period, transfers from EU entities to UK entities will constitute a transfer by the EU entity to a third party outside of the EEA, triggering a requirement that the transfer is made pursuant to one of the approved transfer mechanisms set out in the GDPR (one of which would be an adequacy decision, if one is concluded, which would negate the need to enter into eg SCCs (see updates above for more details about SCCs and alternative transfer mechanisms for exporting personal data outside of the EEA)). The guidance also reaffirms the UK's previously stated position that no such transfer mechanism will be required for transfers from the UK to the EEA (or countries who currently have an adequacy decision from the EU), but states that if this changes the guidance will be updated.	Guidance	
Detailed guidance on processing criminal offence data issued by ICO	The **ICO** has issued updated its guidance on the processing of criminal offence data, including issuing some new detailed guidance. The new detailed guidance is an important resource for UK entities who process criminal offence data. Amongst others, it clarifies that the concept of criminal convictions covers information relating to the *absence* of such convictions (ie a 'clear' criminal record check still constitutes processing of criminal offence data), and furthermore that details about victims will also be caught within this concept. Additionally,	General guidance (updated) Detailed guidance (new)	

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	notwithstanding that civil proceedings/orders will not generally be caught, they will be caught if the penalty for non-compliance with the order comes with a criminal sanction (eg restraining orders).		
WHO and UN (and others) joint statement on data protection and privacy (in relation to COVID-19)	The **United Nations**, **World Health Organisation** and a number of other internal bodies have issued a joint statement in relation to respecting privacy rights in relation to the COVID-19 response. The high-level statement recognises the important role that collection and use of data can play in responding to the pandemic, including via digital contract tracing, analysis of mobility data etc. However, it is acknowledged that this could have a significant impact if used for purposes not specifically related to the COVID-19 response, and on that basis the statement contains a summary of the principles which UN system organisations must comply with in this context (including security, retention and transparency amongst other principles).	Joint statement	
Privacy campaigners bring case against the ICO for alleged failure to take action against AdTech industry	Privacy campaigners at the **Open Rights Group** ("ORG") have announced that they are taking legal action against the ICO in respect of the ICO's alleged failure to take action against unlawful practices by the AdTech industry. For background, the ICO concluded a review into the AdTech industry in June 2019, which found that in some cases industry practices were at odds with GDPR requirements. However, the ICO '*paused*' its subsequent investigation into real-time bidding and the AdTech industry in May 2020 (following a reassessment of priorities and approach during the COVID-19 pandemic) and most recently the ORG alleges that the ICO '*ended*' its investigation in September 2020 without taking substantive action, and hence is seeking to challenge this in the courts.	Press release	

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Progress towards EU Digital Services Act: European Parliament approves reports	The European Parliament has approved two legislative initiative reports calling on the European Commission to address shortcomings in the online environment in its Digital Services Act package. The Parliament sets out recommendations for the Commission to take into account when developing stronger rules to tackle illegal online content, with harmful content that is not illegal to be dealt with via transparency obligations; enhanced requirements for online platforms and intermediation services to detect and take down false claims and rogue traders; and more control for users going hand in hand with less dependence on algorithms. The Commission is due to present its Digital Services Act package in December 2020.	European Parliament press release	
Reports on disinformation on COVID-19	The European Commission has published the third set of reports provided by the signatories to the Code of Practice on Disinformation, Facebook, Google, Microsoft, Twitter and TikTok, highlighting the actions taken in September 2020 to limit disinformation on COVID-19.	Press release and reports	
Connected and autonomous vehicles	The Centre for Connected and Autonomous Vehicles has published a booklet containing information on the 2020 status and progress of connected and autonomous vehicles within the UK.	Booklet	

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