EVERSHEDS SUTHERLAND

Commercially Connected: October 2019

Welcome to the Eversheds Sutherland monthly commercial law update, covering both case law and regulatory development as well as progress on Brexit. *This report is intended to give you a general overview of legal developments in certain areas. It is provided for information purposes only and is not intended to be comprehensive or to constitute advice on which you may rely.*

Topics covered

Click on your topic of interest below:

- Brexit
- Commercial – general
- Consumer law
- Cyber security
- Data protection and privacy law
- IP
- IT
- Public sector

Development	Summary	Links
Update of events as at 30 October 2019	**14 October**: the Queen's Speech set out the UK Government's proposed legislation for what was meant to be the 2019-2020 Parliamentary session. If this programme returns if a Conservative government is re-elected, it includes various Brexit bills: • the European Union (Withdrawal Agreement) Bill (for more detail on this see our briefing linked below) • the Trade Bill (putting in place the UK's post Brexit independent trade regime) • the Immigration and Social Security Co-ordination (EU Withdrawal) Bill (this would end free movement in UK law and allow the Government to align the treatment of EU citizens arriving after January 2021 with non-EU citizens, and lay the foundations for a new points based immigration system from 2021) • a Financial Services Bill relating to regulatory standards after Brexit • an Environment Bill (this establishes the Office for Environmental Protection and enshrines certain environmental principles in law. It also introduces measures to extend producer responsibility and introduces a mandatory biodiversity requirement for developers) and • the Private International Law (Implementation of Agreements) Bill which includes powers for the UK Government to implement into UK law various international agreements on private international law such as the 2005 Hague Convention on Choice of Courts Agreements. **17 October**: the EU and the UK Government agreed a new version of the withdrawal agreement and political declaration **19 October**: Parliament refused to endorse these and the Prime Minister requested an extension to the Article 50 process as required by law **22 October**: Parliament approved first reading of the bill which brings into effect the agreed withdrawal agreement in UK law (the European Union (Withdrawal Agreement) Bill), but rejected the proposed three day timetable for its scrutiny and ratification **28 October**: EU agreed in principle to extend Brexit until 31 January 2020 but the UK may leave on the first day of November, December or January if the withdrawal agreement is ratified in both Westminster and the European Parliament in the meantime. The Prime Minister officially accepted the EU's offer of an extension. **29 October**: UK Parliament voted to hold a UK general election on 12 December via new bill, the Early Parliamentary General Election Bill. If this bill receives royal assent by 5 November, the election can be held on 12 December. If royal assent is later then	

Development	Summary	Links
	the election must also be held at a later date (since Parliament must be dissolved 25 working days before a general election) **5 November** last day before Parliament is dissolved for the general election. The Prime Minister has made a written statement to the House of Commons that the new set of MPs will have their first Parliamentary session before 23 December **12 December** proposed date of the general election From the EU's perspective, the European Council must authorise the signature of the withdrawal agreement before sending it to the European Parliament for its consent. The European Parliament will only vote on the withdrawal agreement after it has been approved by the UK Parliament.	
The latest Article 50 extension	The EU has agreed a further extension of the UK's membership of the EU until 31 January 2020 at the latest "with a view to allowing for finalisation of the ratification of the Withdrawal Agreement". Under the terms of this decision, should the UK and the EU complete their respective ratification procedures of the withdrawal agreement before 31 January 2020, the withdrawal of the UK will take place on the first day of the month following completion of the ratification procedures or on 31 January 2020, whichever is the earliest. So, if both the EU and the UK complete their respective ratification procedures by the end of December, the withdrawal agreement takes effect on 1 January 2020 and if they are completed in January 2019 then the withdrawal agreement takes effect on 1 February 2020. The EU has made it clear that the extension excludes any re-opening of the withdrawal arrangements as agreed in October and that the extension cannot be used to start negotiations on the future relationship between the UK and the EU. It is possible that the outcome of that general election: • may result in a new government revoking the UK's Article 50 notification (which it is able to do so at any time) • may result in a request for a further extension from the EU in order to hold a referendum on the proposed deal • may result in the return of a majority Conservative government where we would expect that the revised withdrawal arrangements agreed in October	European Council decision on extending the Article 50 period Press release

Development	Summary	Links
	would gain Parliamentary approval. If this occurred, the UK would be subject to a transitional period of approximately 11 months during which time EU law would continue to apply in the UK. At the end of that period, trade between the UK and the EU would revert to WTO terms (what could be called a hard Brexit) unless the UK and the EU have agreed a future free trade agreement by that point in time. Concluding a free trade agreement by 31 December 2020 is extremely ambitious, although the withdrawal agreement does allow for a one off extension to the transitional period of up to 2 years or • may result in a hung Parliament with some form of coalition government. What that government would then agree is highly speculative but its actions would be in the context of the 31 January 2020 extension coming shortly to an end.	
The latest withdrawal deal (1)	Click on the link to read an Eversheds Sutherland **briefing on the revised withdrawal arrangements negotiated by the current UK Government**, including a look at the structure and approach of the proposed withdrawal agreement bill which puts on a statutory footing the withdrawal agreement, including its transition period and arrangements with Northern Ireland. We need to await the outcome of the general election on 12 December to see if these arrangements will come back before Parliament. Initial key points from the renegotiated withdrawal deal for businesses are: • the changes on the Northern Ireland arrangements have significant implications for businesses supplying goods into Northern Ireland as there will be separate rules in the areas of customs, VAT and regulatory alignment for goods that will apply • don't assume that a trade agreement with the EU will be in place by the end of the transition period. Without one being in place, UK-EU trade (and trade with other countries where free trade agreements are not rolled over or agreed with the UK) will be governed by WTO terms • businesses should not assume equivalence between UK and EU law after the end of the transition period (although areas such as financial services and environment are subject to separate proposed legislation surrounding future policy in this area) • contingency planning (including contractual rights) based on an exit day (defined as the UK ceasing to be an EU member state) may not reflect the practical reality of the transition period if it comes into effect: the UK will have exited from the EU but will remain subject to EU law for the transition period.	Client briefing Withdrawal agreement of 19 October 2019 Political declaration of 19 October 2019 European Union (Withdrawal Agreement) Bill

Development	Summary	Links
	This includes new EU law introduced during this period, without the UK having the ability to repeal this law during transition	
Preparing for a no deal Brexit	We will continue to report on preparations for a no deal Brexit. No deal Brexit preparations come into play in various scenarios: • if the extension of the Article 50 period expires with a UK Government prepared to exit on a no deal basis and the UK Parliament not passing further legislation to prevent this scenario • if the extension of the Article 50 period expires and the EU is not prepared to grant a further extension or • at the end of any agreed transition period where there is no free trade agreement in place between the UK and the EU. Click on the link for an Eversheds Sutherland briefing on how to prepare for a no deal Brexit covering the legal position, trade, effect on contracts, immigration, intellectual property, civil legal proceedings, data flows and financial services.	Client briefing
No deal Brexit (1): UK Government no deal readiness report	This document outlines what the **UK Government** is doing to prepare for a no deal Brexit, covering data protection, energy and environment, services, changes at the border, changes to rights of EU citizens in the UK and UK nationals in the EU and changes to civil justice co-operation.	Report
No deal Brexit (2): UK Government Brexit readiness presentations	Click on the link to access all the presentations that the **UK Government** delivered at their recent Brexit Business Readiness events. These cover actions for readiness for employers of EU citizens, exporting services and investing in the EU, food and drink, getting customers and suppliers ready for Brexit, import, export and customs, intellectual property and trading with countries internationally after Brexit.	Presentations
No deal Brexit and goods (1): revised temporary import tariff rates and quotas	The **UK Government** has published **revised drafts of the tariffs that would apply on a no deal Brexit** and guidance detailing the goods that will be subject to import duty on importation into the UK (and the rate), together with details of any applicable tariff-rate quotas.	The Tariff of the United Kingdom
No deal Brexit and goods (2): updated guidance on importing EU goods	**HMRC** has updated its **guidance on importing EU goods into the UK**, focussing on how to use the transitional simplified procedures under the **Common Transit Convention** in a no deal scenario. This Convention and these procedures:	Guidance

Development	Summary	Links
	• cover movement of goods between EU member states, EFTA, Switzerland, Turkey, North Macedonia and Serbia, with the process varying depending on whether the imported goods are controlled or standard goods • will enable the transit procedure for goods to commence or finish at a trader's premises or an approved customs facility. For this, a trader will need authorised consignor and/or authorised consignee status. This status enables goods to be declared without needing to present them at the customs office and allow the trader to send arrival notifications electronically and receive unloading permission automatically HMRC has said it will keep these simplified procedures under review post a no deal Brexit and will give 12 months' notice before withdrawing them. On withdrawal importers will need to use a third party forwarder or customs agent, apply for authorisation to use customs freight simplified procedures and complete import declarations under the full import procedure.	
No deal Brexit and goods (3): impact of Brexit on Irish trades buying goods from the UK	Click on the link to read an Eversheds Sutherland briefing on the effect of Brexit on Irish traders buying goods from the UK.	Client briefing
No deal Brexit and goods (4): guidance on product safety	The **Office for Product Safety and Standards** has published new guidance for businesses on specific product safety regulations issued for Brexit. The guidance is made up of separate guides for separate sectors that set out how the UK Government intend product safety to apply in a no deal Brexit. Covered are general product safety law, electrical and electronic, gas, lifts, machinery, metrology (weights and measures), protective equipment, pressure equipment and recreational craft.	Guidance
No deal Brexit and goods (5): guidance on using transitional simplified procedures	**HMRC** has published guidance on its customs handling of import and export freight (CHIEF) system for those making declarations for goods imported using transitional simplified procedures. After Brexit, if you are making declarations yourself you will need to buy third party software that works with the CHIEF system.	Guidance
Brexit and IP	Please refer to our **IP** section for materials updating you on Brexit developments in the intellectual property field.	

Brexit

Development	Summary	Links
No deal Brexit and eu domain names	The **UK Government** has published updated guidance on .**eu domain names** for those businesses who hold an .eu domain name or who are thinking of getting one and therefore need to check if they will still be eligible post Brexit	Guidance
No deal Brexit and services (1): eCommerce Directive guidance	The **UK Government** has issued updated guidance on the **eCommerce Directive**. These rules relate to online activities in the EEA and allow EEA online service providers to operate in any EEA country, while only following relevant rules in the country in which they are established. On a no deal Brexit, this will no longer apply to the UK. The guidance helps online providers work out whether their services are in scope and how to ensure they are compliant with the relevant requirements in each EEA country they operate in. As a reminder, the eCommerce Directive applies to "information society services" which are any service normally provided for payment (including indirect payment such as advertising revenue), at a distance, by electronic means and at the individual request of a recipient of the service. This covers online retailers, video sharing sites, search tools, social media platforms and internet service providers.	Guidance
Brexit and services (2): UK Government Brexit checklist for telecoms providers	The **UK Government** has published a checklist for telecoms service providers setting out what actions they should take to prepare for Brexit, particularly in a no-deal scenario.	Checklist
No deal Brexit and services (3): no deal Brexit guidance notes for media, technology, cultural and creative sectors	The **Department for Digital, Culture, Media and Sport** has published four guidance notes on preparing for a no-deal Brexit, aimed at the media and broadcasters; providers of digital, technology and computer services; those in the arts, culture and heritage industries; and those working in the creative sector.	
Brexit and social security contributions	Click on the link to read an Eversheds Sutherland briefing setting out the Brexit implications for UK employers who have employees working the EU, EEA or Switzerland in the context of what social security contributions will need to be made.	Client briefing
Brexit and tax	Click on the link to read an Eversheds Sutherland briefing on some of the key tax implications for US companies selling into the UK.	Client briefing
Brexit statutory instruments issued in October of general commercial interest	• Network and Information Systems (Amendment etc.) (EU Exit) (No. 2) Regulations 2019 (currently draft): for further information on this statutory instrument see our **Cybersecurity section** below	

Development	Summary	Links
	• Taxation (Cross-border Trade) (Miscellaneous Provisions) (EU Exit) (No. 2) Regulations 2019 (2019 No. 1346): these amend subordinate legislation relating to various customs rules as well as including measures to ensure the UK has a customs regime in place for exit day • Agricultural Products, Food and Drink (Amendment) (EU Exit) Regulations 2019: these relate to geographical indication schemes and are designed to guarantee continuity of protection As a reminder, if a transitional period comes into force as part of a duly ratified withdrawal agreement, then the effect of these Brexit statutory instruments will be delayed until the end of that transitional period.	

Commercial - general

Development	Summary	Links
Reminder EBA outsourcing guidelines now in force	As a reminder for those involved in financial services outsourcings, the **European Banking Authority outsourcing guidelines** came into effect on 30 September for outsourcing arrangements entered into, reviewed or amended on or after that date.	EBA Guidelines
Automatic signatures and formality requirements	In the County Court case of **Stavros Neoclous v Christine Rees**, it was held that an automatically generated signature in an email footer could constitute a "signed" contract for the purposes of the **Law of Property (Miscellaneous) Provisions Act 1989**. This meant that an exchange of emails with automatically generated signatures satisfied the formality requirements of the 1989 Act which require a contract for the sale of an interest in land to be "signed by or on behalf of each party to the contract". The County Court judge held that the question was whether the electronic signature was applied "with authenticating intent": if it was, then a contract was formed, but he also queried how far an email signature could truly be said to be automatic and therefore not have the necessary "authenticating intent". His view was that although software generated the name by default, it only did so after someone took conscious action to create that setting in the software. The person writing the email knew this and by manually typing "many thanks" linked his automatically inserted name with the contents of the email.	Client briefing
Duties of good faith in commercial contracts (1)	In the case of **Emagine Films Ltd v Mister Smith Entertainment Ltd**, the court refused to imply a term into a commercial term sheet that negotiations had to be continued in good faith, partly because it was too ill defined a term since the position of parties in negotiations is inevitably adversarial (given that each party was entitled to pursue its own interest in the negotiations, how could you determine the point at which a party was entitled to terminate the negotiations as having failed?). The court's analysis of the difficulties in interpreting an obligation to negotiate in good faith could equally apply where a contract contains a similar express obligation.	Judgment
Duties of good faith in commercial contracts (2)	The case of **New Balance Athletics v Liverpool FC** is another example of a court assessing an obligation of good faith, in this case in a sponsorship agreement. However, in this case the parties had both accepted that a duty to act in good faith should be implied, and so the issue before the courts was not whether that duty existed but whether that standard of behaviour had been met. The judgment makes clear that a duty of good faith can be breached not only by dishonesty but also by conduct "which lacks fidelity to the parties' bargain", the issue being the uncertainty in trying to assess that in the particular context of the contract in question.	Judgment

Commercial - general

Development	Summary	Links
What is "mandatory law"?	The case of **Lamesa Investments Ltd v Cynergy Bank** looked at an obligation to comply with "mandatory" laws and whether foreign laws (in this case US sanctions) would fall within this definition. The clause in question provided that a party would not be in default if it did not pay in order to comply with "any mandatory provision of law, regulation or order of any court of competent jurisdiction". It was decided that a US law imposing sanctions on an extra territorial basis was "mandatory" in this particular English law contract, even although there was no US nexus as regards the parties or the contract Initially it appears that foreign provisions of law should not be regarded as binding or mandatory in English law contracts but this case demonstrates it is not as straightforward as that. One way of reducing this uncertainty would be to include an express sanctions clause or to call out particular foreign laws that could impact on performance (such as anti-corruption or anti-slavery).	Judgment
Incorporation of market practice into standard terms	A clause in terms and conditions that read "All transactions are subject to all applicable laws, rules…and, where relevant, the market practice of any exchange, market, trading venue and/or any clearing house" was held in **CFH Clearing Ltd v Merrill Lynch International** to not operate to incorporate "market practice" as an express term. This was partly on the basis that if all the matters listed in the clause were incorporated into the contract, the contract would be too uncertain to be workable (as well as being in direct conflict with other provisions of the contract).	Judgment

Consumer law

Development	Summary	Links
New right to repair regulations	The **European Commission** has announced that it will be implementing new measures as part of its "Energy efficiency first" principles that look to improve the general "eco-design" of a range of products, including refrigerators and washing machines. Amongst other things, these measures include improving product life-spans as well as removing barriers to maintaining and repairing such products, with specific requirements for manufacturers to make spare parts and repair information available for up to ten years after purchase. The regulations also provide for more stringent energy efficiency labelling. We will have to wait to see how the regulations are implemented in the UK in the wake of Brexit. However, UK firms will have to abide by the new regulations if they want to sell appliances in Europe after Brexit. Similar "right to repair" legislation is also being considered across the US, and so it may be safe to assume that, notwithstanding Brexit, a similar initiative would be welcomed in the UK. If implemented, these proposals will have a significant impact on the consumer law regime that applies both in the UK and beyond. For example, the requirement for spare parts to be available for up to ten years after sale of the original product will extend the current "repair and replace" obligations of the Consumer Rights Act 2015 and will mean that manufacturers will need to put new systems in place to ensure sufficient stocks can be produced and stored for this extended period.	Client briefing
Office for Product Safety and Standards report on consumer protection	The **Office for Product Safety and Standards** has published a report referring to improvements to its OPSS Product Recall Site and research into how consumers want to receive messages about safety and recalls. OPSS says this will help the development of a new product safety database and for it to develop new ways to improve product registration rates, with an experimental trial starting in autumn 2019 and reporting in summer 2020.	Report

Cyber security

Development	Summary	Links

Brexit changes to UK cybersecurity law	The **UK Government** has published the **draft Network and Information Systems (Amendment etc) (EU Exit) (No 2) Regulations** which:
	• amend the Network and Information Systems Regulations 2018 (for further detail see below)
	• repeal Regulation (EU) 526/2013 (this regulation previously set out the governance provisions in relation to ENISA) as redundant as a result of Brexit
	• revoke Regulation (EU) 2019/881 on the European Union Agency for Cybersecurity (ENISA) (also known as the Cybersecurity Act) which came into force on 27 June 2019 and which:
	  ○ sets out the governance and operations of ENISA
	  ○ introduces an EU wide cybersecurity certification framework
	As a reminder the Network and Information Systems Regulations 2018 implemented an EU directive introducing measures for a high common level of security across the EU for certain essential services and certain digital services (such as online market places, online search engines and cloud computing services). These 2018 Regulations are being retained post Brexit on a domestic basis. This statutory instrument only concerns digital service providers and is being introduced to ensure that there is no gap in the regulatory regime post Brexit by requiring digital service providers established outside of the UK but offering services within the UK to nominate a representative in the UK and comply with these Regulations in the UK.
		Network and Information Systems (Amendment etc.) (EU Exit) (No. 2) Regulations 2019

Revised NIS guidance	Whereas the statutory instrument referred to above covers the position of digital service providers established outside the UK, the **UK Government** has published guidance for digital service providers established in the UK but operating in the EU on what they should do to comply with the Network and Information Systems Regulations 2018, including when they are likely to be considered as offering services within the EU.	Guidance on complying with NIS Regulations
NCSC new Cyber Assessment Framework	The **National Cyber Security Centre** has issued a new version of its **Cyber Assessment Framework**. This framework was originally part of its support of the UK implementation of the EU NIS Directive via the Network and Information Systems Regulations 2018 referred to above. This is a framework for assessing compliance against certain top-level cybersecurity objectives formulated by the NCSC as part of its role as the UK's single point of contact and computer security incident response team under the Network and Information	Cyber Assessment Framework

Development	Summary	Links
	Systems Regulations 2018. It outlines acceptable levels of security for certain operators of essential services in the energy, transport, health, drinking water supply and distribution, and digital infrastructure sectors. However, the latest updates to the framework are intended to support its wider use beyond those sectors, by replacing some of the very specific NIS terminology with more general language, suitable for a wider range of potential users who are looking to improve their cyber security.	
EU member states report on cybersecurity risk of 5G networks	Click on the link to read a **risk assessment of the cybersecurity of 5G networks** based on results of assessments completed by all EU member states. The assessment provides a useful summary of the new features of 5G as well as the key risks, ranging from lack of specialised personnel, lack of adequate internal security controls, lack of maintenance procedures and incorrect implementation of standards as well as poor design and architecture. It also contains a section on vulnerabilities specific to suppliers. The document assesses as new vulnerabilities relevant to 5G as: • the technological changes introduced by 5G will increase the overall attack surface and the number of potential entry points for attackers • enhanced functionality at the edge of the network and a less centralised architecture than in previous generations of mobile networks means that some functions of the core networks may be integrated in other parts of the networks making the corresponding equipment more sensitive • the increased part of software in 5G equipment leads to increased risks linked to software development and update processes, creates new risks of configuration errors, and gives a more important role in the security analysis to the choices made by each mobile network operator in the deployment phase of the network • these new technological features will give greater significance to the reliance of mobile network operators on third-party suppliers and to their role in the 5G supply chain. This will, in turn, increase the number of attacks paths that could be exploited by threat actors • therefore the individual risk profile of suppliers will become particularly important, in particular where a supplier has a significant presence within networks or areas • a major dependency on a single supplier increases the exposure to and consequences of a potential failure of this supplier	EU coordinated risk assessment

Development	Summary	Links
	• 5G networks will end up being an important part of the supply chain of many critical IT applications, and as such not only confidentiality and privacy requirements will be impacted, but also the integrity and availability of those networks will become major national security concerns and a major security challenge from an EU perspective.	
NCSC annual review 2019	The NCSC has published its 2019 annual review. The review sets out key developments over the course of 1 September 2018 to 31 August 2019. The review comments on the following, among other things: • the rise in the sophistication of SMS-interception attacks, with multiple financial institutions and communications service providers being affected • the NCSC's work with businesses in the energy sector exploring how successful cyber-attack could disrupt fuel and power supplies and how to help prevent such disruption • increasing threats to the aviation sector due to the attractiveness of airline passenger data to cyber attackers and • security challenges in smart cities such as ensuring citizen privacy is maintained and understanding the interdependencies between a smart city's services and the impact of failure.	Press release Report

Data protection and privacy law

Development	Summary	Links
CJEU rules that storing cookies requires internet users' active consent	In **Case C-673/17 Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV v Planet49 GmbH**, the Court of Justice of the European Union ("**CJEU**") ruled that pre-ticked boxes are not "consent" for placing cookies. Please read our briefing for more information.	Press release Judgment
Google facing class action after Court of Appeal overturns High Court decision	Google is facing a substantial class action after the Court of Appeal's ("**CA**") judgment in **Lloyd v Google [2019] EWCA Civ 1599**, overturning the decision given previously by the High Court. The CA ruled that where a contravention causes an individual to lose control or autonomy over their personal data, they are entitled to be compensated, regardless of any pecuniary loss or distress. In addition, the CA held that the people making up the representative class had the same interest (a requisite under CPR 19.6(1)) as they had suffered the same loss as a result of the same wrong. Please read our briefing for more information.	Judgment
UK and US enter into CLOUD Act agreement – allowing access to electronic data for serious crime investigation	The United States Department of Justice ("**DOJ**") announced that the US and UK entered into the world's first CLOUD Act Agreement ("**Agreement**") that will "*allow American and British law enforcement agencies , with appropriate authorization, to demand electronic data regarding serious crime, including terrorism, child sexual abuse, and cybercrime, directly from technology companies based in the other country, without legal barriers*". The US CLOUD Act was passed in 2018 to enable federal law enforcement to compel US-based technology companies to provide data stored on servers based outside the US. CLOUD stands for Clarifying Lawful Overseas Use of Data. The Agreement was published on 8 October and will enter into force after a six month review period by the US Congress, and a corresponding review by the UK's Parliament. It will provide the basis for the implementation of the Crime (Overseas Production Orders) Act 2019 which was passed in February this year.	US DOJ press release Agreement Crime (Overseas Production Orders) Act 2019
EU law does not preclude websites from being ordered to remove illegal content or from injunctions producing such effects worldwide	In **Case C-18/18 Eva Glawischnig-Piesczek v Facebook Ireland Limited**, the Supreme Court in Austria asked the CJEU to interpret Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (the "**E-commerce Directive**") in relation to a request by an Austrian politician to compel Facebook to remove a comment published by a Facebook user which was harmful to her reputation, and allegations which were identical and/or of an equivalent content.	Judgment Press release

Development	Summary	Links
	The CJEU ruled that the E-commerce Directive does not preclude a court of a Member State from ordering a host provider such as Facebook to remove identical and, in certain circumstances, equivalent comments previously declared to be illegal. In addition, the E-Commerce Directive does not preclude a court of a Member State from ordering a host provider to remove information covered by the injunction or to block access to that information worldwide within the framework of the relevant international law, and it is up to Member States to take that into account. This development is viewed as a significant step in empowering the courts to compel social media platforms to take greater responsibility for the content published on their networks. The decision aligns with the incoming European Commission's proposed agenda which includes plans for a Digital Services Act that aims to clarify the obligations of social media companies in relation to illegal content posted by their users.	
High Court hold immigration exemption under DPA 2018 to be lawful	In **Open Rights Group & Anor, R (On the Application Of) v Secretary of State for the Home Department & Anor [2019] EWHC 2562 (Admin)**, the High Court ruled that the immigration exemption in paragraph 4 of Part 1 of Schedule 2 of the DPA 2018 is lawful and does not contravene Article 23 GDPR or Articles 7 or 8 of the Charter of Fundamental Rights of the EU. By way of reminder, paragraph 4 of Part 1 of Schedule 2 of the DPA 2018 removes certain rights of individuals in relation to their personal data to the extent that the application of those rights would prejudice the maintenance of effective immigration control, or the investigation or detection of activities that would undermine the maintenance of effective immigration control. The case was brought by the Open Rights Group, a digital rights campaigning organisation, and the3million, an organisation working on the rights of EU citizens living in the UK. The two groups intend to appeal against the decision to the Court of Appeal.	Judgment
European insurance and reinsurance federation calls for more time and flexibility in implementing EIOPA cloud out	Insurance Europe – the European insurance and reinsurance federation – has called for more time and greater flexibility for members to implement the EIOPA cloud outsourcing guidelines. Insurance Europe said the guidelines should be limited to instances of material outsourcing (i.e. outsourcing that encompasses critical and important operational functions or activities only to ensure legal certainty and consistency with Solvency II). In addition, Insurance Europe said that cloud services should only be regarded as outsourcing if there are certain risks associated with cloud services that may have a material impact on either the insurer's ability to comply with regulatory requirements or its customers. They added that clear definitions are required to ensure the scope of application is sufficiently precise, and they called on EIOPA to	Press release

Development	Summary	Links
	encourage and allow greater reliance on the use of third-party certification in the context of access and audit rights.	
European insurance and reinsurance federation urge European Council to ask European Commission to reassess ePrivacy Regulation proposal	Insurance Europe a group of industry associations (representing ICT, automotive, medical technology, construction equipment, consumer electronics, home appliances, retail, banking and insurance, publishers and communications agencies) have called on the Council of the European Union to ask the European Commission to fundamentally reconsider its proposed Regulation on Privacy and Electronic Communications (2002/58/EC) (the "**Proposed ePrivacy Regulation**"). The statement notes that "there remain unanswered questions about the essential aspects of the proposal – its scope of application, its definitions, its inflexible legal bases and its relationship with the GDPR". Further, without a major overhaul of the text, "Europe's digital transformation will be severely hampered as a result of the legal uncertainty and rigidity brought about" by the Proposed ePrivacy Regulation. The associations see the arrival of a new European Commission in November and European Parliament as representing an opportunity for a fresh start in the debate and view this as "an opportune time to reset the ePrivacy discussions and ensure certainty and consistency for both industry and consumers".	Press release Joint statement
European insurance and reinsurance federation outline role of insurance industry in	Insurance Europe issued a publication outlining the insurance industry's role in EU cyber resilience. The publication sets out the EU data protection and cybersecurity framework and puts forward a number of policy recommendations to be considered by EU policymakers, such as: • promote awareness-raising; • support public-private cooperation on catastrophic risks; • urge member states to increase cybersecurity; and • support efforts to make cyber-incident data available. The report also warns against: (a) introducing premature standardisation, which, according to the federation, could harm both customers and insurers; and (b) introducing mandatory insurance for cyber risks which would be counterproductive.	Press release Publication
Revised guidance issued after EDPB fourteenth plenary 8-9 October 2019	The European Data Protection Board ("**EDPB**") adopted the final versions of certain documents, further to its fourteenth plenary on 8-9 October 2019. The documents included the final Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects.	Agenda Summary Adopted documents

Development	Summary	Links
	The guidelines are relevant to providers of online services, such as social media, e-commerce, internet search engines, communication and travel services. They provide insight on how narrowly the application of the lawful basis is likely to be applied. The guidelines shed light on the interpretation of "contract" as a lawful basis for processing in other contexts, not just in the online environment (e.g. processing for employment contracts) and more widely about how narrowly "necessity" is construed. Our briefing on the guidelines (at draft stage) can be found here.	
High Court admits covert recording as evidence in personal injury case	In **Mustard v Flower and Ors [2019] EWHC 2623 (QB)** the issue of admissibility of covert recordings in civil proceedings was considered. The claimant had covertly recorded certain conversations with medical experts appointed by an insurer following a road traffic accident and wanted to use the recordings in support of her case. The insurer objected, citing breach of the GDPR and DPA 2018. The judge held that the recordings fell within the "personal purposes" exemption of the GDPR. The judge also provided that the legal proceedings exemption in paragraph 5 of Schedule 2 to the DPA 2018 would also apply if recourse to it was needed. The judge summarised that the admissibility of such evidence will be determined on a case by case basis, and not generally.	Judgment Panopticon briefing
California Attorney General issues draft Regulations to the California Consumer Privacy Act	On 11 October 2019, the California Attorney General issued long-awaited draft Regulations to the California Consumer Privacy Act, by way of a series of bills. The draft Regulations provide helpful clarity on some core aspects of California's sweeping new privacy law, while also adding significantly to the complexity of, as well as the list of, requirements on a business to protect consumer personal data. In some instances, these regulations go beyond the requirements of the GDPR, and in some cases, the likely contemplation of even the well prepared. Please read our briefing for more information.	California Governor's press release
ICO blog post on enabling access, erasure, and rectification rights in AI systems	As part of their ongoing call for input on developing a framework for auditing AI, the ICO has published a blog post on the challenges organisations may face in implementing mechanisms in AI systems that allow data subjects to exercise their rights of access, rectification and erasure.	Blog post
Latest drafts of proposed ePrivacy Regulation	The Finnish Presidency of the Council of the EU published updated drafts of the proposed ePrivacy Regulation ("**Regulation**") ahead of the Working Party on	Draft (4 October) Draft (17 October)

Development	Summary	Links
	Telecommunications and Information Society's meetings on 11 October and 22 October. By way of reminder, the Regulation will sit alongside the GDPR and is intended to repeal and replace the existing ePrivacy Directive 2002/58/EC (as amended) which governs – among other things – the confidentiality and security of communications services, the use of cookies and location data and the sending of direct marketing communications. It is broader in scope than the ePrivacy Directive and aims to cover communications provided by a wider range of providers, including over-the-top service providers (such as instant messaging apps), Voice over Internet Protocol platforms and machine-to-machine services (such as the Internet of Things). The latest draft text provides: • an extended scope to cover internet based electronic communication services (so-called "over the top" services) as well as traditional communications services; • a GDPR standard of consent applicable to activities covered; • new lawful grounds for processing communications data; • new rules on the uses of cookies, tracking technologies and the sending of unsolicited marketing communications; and • enhanced obligations around privacy by design and by default.	
ICO blog: AI and data protection impact assessments	The ICO has published a blog post about the key considerations for organisations undertaking data protection impact assessments ("DPIA") for AI systems. The blog states that the use of AI for processing personal data will usually meet the legal requirement for completing a DPIA. The blog recommends that a DPIA is most effective in the AI lifecycle if it is undertaken early in the project and it should feature the following components: • a systematic description of the processing • an assessment of necessity and proportionality • an identification of risks to rights and freedoms • measures to address the risks • serve as a living document to be reviewed regularly Detailed guidance on DPIA can be found here.	ICO blog

Development	Summary	Links
European Commission review on the functioning of the EU-US Privacy Shield	The European Commission published a report on the third annual review of the EU-US Privacy Shield. The report confirms that the US continues to ensure an adequate level of protection for personal data transferred under the Privacy Shield from the EU to participating companies in the US. The review focused on the lessons learnt from its practical implementation and day-to-day functionality. The Commission found that there have been a number of improvements in the functioning of the framework, as well as appointments to key oversight and redress bodies, such as the Privacy Shield Ombudsperson. Among the improvements noted by the Commission: • the US Department of Commerce is ensuring oversight in a more systematic manner by way of monthly checks of a sample of companies to verify compliance with the Privacy Shield; • enforcement action has increased – the Federal Trade Commission has taken action related to the Privacy Shield in seven cases; and • a permanent ombudsman has been appointed as well as a fully staffed Privacy and Civil Liberties Oversight Board. • The Commission recommends that further steps are taken to improve the functioning of the Privacy Shield, including: • strengthening the (re)certification process for companies wanting to participate by shortening the time of the (re)certification process; • expanding compliance checks, including concerning false claims of participation in the framework; and • developing additional guidance for companies related to human resources data; and • increasing the number of FTC investigations into compliance with substantive requirements of the Privacy Shield and providing the Commission and the EU data protection authorities with information on ongoing investigations.	Press release
Committee of Advertising Practice (CAP) calling for evidence on children's ability to recognise online marketing communications	The Committee of Advertising Practice ("CAP") is calling for evidence on the ability of children to recognise online marketing. The UK Code of non-Broadcast Advertising, Direct & Promotional Marketing (the CAP Code) requires marketing communications to be obviously identifiable as such. CAP published guidance in December 2017, identify situations in online media where particular care should be taken to ensure young audiences recognise marketing and	Call for evidence

Development	Summary	Links
	offer suggestions for how that might be achieved. After conducting a 12 month review of the guidance, CAP would now like to update its understanding of the evidence base and ensure that its policies on children's recognition are fit for purpose. The deadline for submissions is 5 December 2019.	
ICO blog post outlines overarching themes emerging from Call for Input into development of AI Auditing Framework	The ICO published a blog post to mark the close of its call for input on developing an Auditing Framework for AI. The post comments on some of the key governance and accountability themes that emerged from the eight month process and cut across AI risk areas. The themes are: • the need to build adequate AI governance and risk management capabilities; • understanding data protection risks and setting an appropriate risk appetite; and • leveraging data protection impact assessments as a roadmap to develop compliant and ethical approaches to AI. The ICO plans to publish the draft framework and guidance for consultation by early January 2020.	Blog post
ICO consulting on accountability toolkit	The ICO is consulting on the development of an accountability toolkit, to support organisations in demonstrating their compliance with the accountability principle to the ICO, the public or their business partners. The ICO hopes that the toolkit will enable organisations to understand the ICO's expectations and take responsibility for designing their own accountability programs. The deadline for submitting a response is 9 December 2019.	Statement Consultation

Development	Summary	Links
When is an inventor entitled to share of profits from employer?	The **Supreme Court** decision of **Shanks v Unilever** looks at when an inventor is entitled to a share of outstanding benefit that his employer had derived from an invention and various patents relating to it under section 40 of the Patents Act 1977.	Judgment
Joint ownership of IP	The **Court of Appeal** has given guidance in the case of **Kogan v Martin** on the law of joint authorship of copyright works. The case involved a dispute relating to authorship of a screenplay: for joint ownership to arise, the work must first be produced by collaboration of all the people who created it and such work must be created with a common design to its general outline as well as be a significant contribution by the author to the work in a way which is not distinct from the contribution of the other author	Judgment
IPO guidance on Brexit and IP law	The **Intellectual Property Office** has published the following: • revised guidance on changes to trade mark law after Brexit • new guidance on the exhaustion of intellectual property rights and parallel trade after Brexit • a collection of materials with guidance on copyright rules (covering cross-border portability of online content, use of satellite decoder cards, access to copyright works for visually impaired people, collective rights management, copyright clearance for satellite broadcasting and orphan works • guidance on sui generis database right • guidance on changes to unregistered designs • guidance on international EU protected designs • revised guidance on changes to supplementary protection certificates (SPCs) and patent law (here there will in general be few or very limited effects on patents as the European Patent Convention is not an EU agreement. As for SPCs, if there is a no-deal Brexit, in future there will be a separate UK SPC, the grant of which will depend on having a UK marketing authorisation as well as a UK patent).	Guidance note Guidance on exhaustion of IP rights and parallel trade after Brexit Copyright guidance Sui generis database guidance Unregistered designs guidance EU protected designs guidance Guidance on SPC and patent law
Protected international trade marks to be replaced by comparable UK trade mark	The **Intellectual Property Office** has announced that protected international trade mark registrations designated in the EU under the Madrid Protocol will no longer be valid. The rights will automatically be replaced by UK rights after Brexit. A comparable trade mark will be created on Brexit day and will be treated as if applied for and registered under UK law. For subsequent international designations in an international	IPO guidance

Development	Summary	Links
	registration, a comparable trade mark will be created for each designation. This means on exit day multiple comparable trade marks can correspond to a single international registration. There will be no cost for comparable trade marks and those with an existing right do not need to do anything yet.	
WIPO explains implications of a no deal Brexit on Madrid system	**WIPO** has published an explainer on the implications of a no-deal Brexit on the Madrid system of international applications and registrations for which the EUIPO is the office of origin, and which are filed or held by UK nationals or legal entities. WIPO explains that it has released the information to make Madrid system users aware of how their rights would be preserved and how to safeguard those rights in a no-deal scenario. WIPO states that the note also provides information on the implications of a no-deal Brexit on subsequent designations of the UK resulting from conversion filed with EUIPO.	Explainer
Updated guidelines on examination of patents	The **European Patent Office** has updated its guidelines for examination of patents coming into force on 1 November 2019.	Guidelines
Updated Manual of Patent Practice	The **Intellectual Property Office** has published the most recent update to its Manual of Patent Practice, effective from 1 October 2019.	Manual

Development	Summary	Links
New dispute resolution forum for tech disputes	The **Society for Computers and Law** is launching a new contractual adjudication process for the resolution of technology disputes. The process includes: • a three month procedure for resolving tech disputes with no restriction on the size or scope of the dispute that may be referred • choice of specialist adjudicators from a panel set up by the SCL • the adjudicator's decision to be provisionally binding unless the parties reopen the dispute in subsequent litigation or arbitration (within six months) and • express obligations on the parties to act in good faith and co-operate throughout the procedure If parties want to use this process, the SCL is proposing incorporating the SCL Adjudication Rules into contracts using one of three model set of clauses.	
Regulation of online services	**Ofcom** has published a paper providing a broad overview of online policy issues, looking out how market failures in online services can cause harms to individuals and society. This can be read in conjunction with the UK Government White Paper on regulating companies with a view to protecting people from harmful content and conduct online issued in April 2019.	Ofcom paper Online Harms White Paper April 2019
BEREC consultations on telecoms and internet	The **Body of European Regulations for Electronic Communications** has issued four new consultations: • on net neutrality guidelines (ending on 28 November 2019) • on identifying business requirements for the successful deployment of 5G in Europe (also ending on 28 November 2019) • on guidelines on quality of service parameters to be adopted by 21 June 2020 (ending on 5 December 2019) • on its draft guidelines on geographical surveys of network deployments (ending on 21 November 2019)	BEREC consultations

Public sector

Development	Summary	Links
Judicial review of smart meters roll out	In **R (on the application of Utilita Energy Ltd) v SS for BEIS,** the claimant electricity supplier applied for judicial review of two decisions relating to the roll out of smart electricity meters, based partly on arguments surrounding the adequacy of the consultation document and potential breaches of the Equality Act 2010/public sector equality duty. Click on the link to read the judgment	Judgment
Ofgem proposes reforms to reduce risk of supplier failure	**Ofgem** has launched a consultation into its proposed reforms for existing suppliers to improve customer service standards, reduce the risk of supplier failure and strengthen the safety net for suppliers that do fail. Under the proposed reforms, fast growing suppliers will have to demonstrate to Ofgem that they have capacity to serve additional customers effectively, as well as meeting industry obligations, while remaining financially viable. This will include maintaining "living wills" to be scrutinised by Ofgem, covering what would happen if they failed, including any barriers to an orderly exit such as likely costs faced by consumers and disruption to services. Closing date for responses is 3 December 2019.	Consultation
Subcontracting without authorisation can justify exclusion of tenderer under EU public procurement rules	The **ECJ** has given a **preliminary ruling** on the **interpretation of Article 57(4) of Directive 2014/24** (the Public Procurement Directive, implemented in the UK by the Public Contracts Regulations 2015 and the Utilities Contracts Regulations 2016) and the optional grounds for exclusion if an operator has shown "significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract". The ruling follows proceedings where a consortium was excluded from a procurement because one of its members was part of another consortium whose contract with another contracting authority had been terminated because it had subcontracted without authorisation. This had not been declared to the excluding contracting authority.	ECJ ruling

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